

**INTERNATIONAL INTELLIGENCE REVIEW AGENCIES CONFERENCE**  
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**“CRITERIA AGAINST WHICH OVERSEERS JUDGE AGENCIES’ PERFORMANCE,  
INCLUDING HOW THE PROPRIETY OF ANY AGENCY ACTIVITY IS JUDGED”**

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**Introduction**

- I volunteered for this session because the concept of ‘propriety’ can be conceptually difficult to pin down, and is something with which I have grappled in the last 41/2 years.
- Like the concept of “justice”, its absence may be easier to identify than establishing a definition of what it actually is. But saying it can only be case-by-case matter is trying to take the easy way out.
- Wrestling with the concept is not without some advantages. I discovered that in the Australian Capital Territory Regulations it is an offence for a taxi driver, hire car driver or bus driver not to behave in an orderly way/politely/with propriety.
- If sparking conversation at a dinner party is a problem, mentioning this requirement can generate a veritable storm of stories about taxi and bus rides and the drivers of these conveyances. Your duties as a host will be well on the way to being fully met.
- I haven’t yet been game enough to ask a taxi or bus driver if he or she is aware that they must act with propriety.
- On a more serious note, this illustrates that use of the term in legislation is varied and very context specific.

**General legal use**

- In my enabling legislation – the *Inspector-General of Intelligence and Security Act 1986* – I am required to review the operational activities of six intelligence and security agencies in respect of:
  - legality
  - compliance with Ministerial directions and guidelines
  - propriety, and
  - respect for human rights.
- This is not a mandate which includes, at least in a direct sense, efficiency, effectiveness or financial management. That reflects two things.
- First, one particular catalyst in 1986 for the creation of the position of Inspector-General was concern that agencies might not be sufficiently under ministerial control and that they were not sufficiently sensitive to individual freedoms including privacy.
- Second, it was seen as important that the position not blur the accountability of the agency head, and that if the Inspector-General became a part architect of agency operational arrangements through considering matters such as efficiency, his or her capacity to independently review results could be impaired.

- There is no definition of “propriety” in the IGIS Act. Clearly it is broader than “legality”, but still has some outer limits.
- The term is used in a relatively small number of other pieces of Australian legislation, apart from traffic regulations, ranging across:
  - being part of the definition of “act of indecency” in the *Crimes Act 1914* (Cth)
  - searches of prisoners in *South Australian Correctional Services Act 1982*
  - classification of books/films/videos/videogames in, for example, the *Commonwealth Classification (Publications, Films and Computer Games) Act 1995*
  - various Acts establishing committees, boards or statutory office positions, which require those entities to act with “propriety”
  - evidentiary requirements in criminal trials e.g. the *Evidence Act 1995* (Cth).
- As you can see, these are quite varied and context specific, although for a number there is arguably an underlying idea of “community standards”.
- But what are “community standards”? Is it a majority, or something on which there is virtual unanimity? What about points on which there are sharply divergent views in at least two different parts of the community? There is a risk that one might think one’s own views are always “community standards”.
- I have had cause to reflect also on whether there is alignment between “impropriety” in my context and “improper conduct” in evidence law. Our evidence law has the effect that a judge in considering the admissibility of material will have regard to, among other things:
  - lying or trickery
  - bribery or enticement with food, accommodation or financial reward
  - mental or psychological pressure placed on a person.
- Some intelligence collection may at times steer close to or even into these waters.
- I have taken the view that while there will be overlap between “impropriety” and “improper conduct”, that the two are not identical. The concern in our criminal law to ensure the voluntariness of any admissions made, means that what will be regarded as “improper conduct” in that area is – and appropriately so – drawn more broadly than “impropriety” in the intelligence collection context.

### **As a moral concept**

- In the absence of an obvious legal definition, I considered the question of “propriety” as a moral concept.
- Leaving to one side philosophical arguments, such as that made by Ronald Dworkin, that the law should be treated as a moral issue; it seemed to me that the concept of propriety may sit more comfortably as a moral, rather than a legal concept.
- However, considering it as a moral concept sheds only a certain amount of additional light on the matter.

- Groucho Marks once said: “Those are my principles. If you do not like these I have others.”
- This can read as more than cynicism, it makes a point about consistency and subjectivity.
- Unless I take the position that there are moral absolutes independent of humanity and discernable through reason, then my concept of ‘propriety’ is necessarily subjective.
- The American philosopher, John Rawls, provided what may be a useful way of way of considering these issues. Using what he termed ‘the veil of ignorance’ he argued that we could determine our principles of justice without fear of bias toward any particular element of society.
- The idea of the veil was to prevent us from knowing our position in the society – that is we would not know our sex, race, socio-economic status or any other classifying feature – as we set about constructing a system of justice. The end result of a process such as this should be a justice system without bias toward particular individuals or elements of society.
- An approach such as this can be used as part of defining the concept of propriety.
- When talking about morality, justice and ethics there are always several ways of skinning the cat.
- For instance, it has been suggested that by exposing decisions, actions or activities to a ‘full disclosure’ test – ie. if you would be comfortable explaining or defending a decision, action or activity in a public forum – then you will (presuming full rationality of the individual concerned) have met the requirements of propriety. This is a sometimes argued to be a significant part of the effect of some of our parliamentary hearings into the actions of agencies.
- In presentations to staff of the Australian intelligence and security agencies I sometimes suggest that there is utility in them asking the question: Would you be comfortable explaining your decision, action or activity to me? That said I do not believe it provides the full answer to the question of what constitutes propriety.
- The ‘full disclosure’ test is particularly useful in eliciting a particular person’s sense of what propriety is, yet it fails to articulate the specific requirements for a general threshold of propriety.

#### **How have I applied the concept to date?**

- In terms of considering what propriety means in relation to my responsibilities to review the activities of the Australian Intelligence Community, I have taken it to mean four things in particular:
- The first is the notion of “proportionality” in the collection of intelligence.
- By proportionality I mean that while collection must be lawful, timely and efficient, it must also:
  - be proportionate to the gravity of the threat posed and of the probability of its occurrence, and
  - involve as little intrusion into individual privacy as is possible, with less intrusive means preferably being employed before very intrusive means are considered.

- In part this is an echo of the concept of a “Just War” in moral philosophy. War involves doing things that would not ordinarily be considered moral actions. Just War theory says, however, that war can be morally justified if several conditions exist. Among the necessary conditions is a notion of Proportionate Means. This is along the lines that:
  - Nations should limit the weaponry and force used to what is absolutely necessary to stop aggression and secure a just peace.
- We allow our intelligence agencies, in certain circumstances and subject to conditions, to do things which we do not allow other parts of public administration to do. However, even when legal, I believe these special capabilities are always subject to a test of proportionality.

### **Internal policies, doctrine, procedures, guidelines**

- The second way in which I have found the concept of propriety useful is in looking at internal agency guidance to staff.
- Agencies have various internal guidance which articulates not just legal requirements and how the agency will conform with those, but also expectations of staff conduct, and lessons learnt the hard way in the past. Some policies and procedures set out in the internal guidance may not be required by the law, but were put in place to lessen risks of various kinds, many of which are pertinent to my remit.
- My office therefore looks to see that agency staff are following relevant internal policies, doctrine, procedures and guidelines. And obviously hold them to account if they are not doing so.

### **Procedural fairness, where applicable**

- The third way in which I have applied propriety is in relation to some staffing issues. Certain levels of procedural fairness can be legal requirements, but sometimes fairness requires more than the legal minimum.
- I should emphasise that my focus is primarily the operational activities of the intelligence agencies, but I do deal with some more administrative matters.
- Staff in intelligence agencies are in a relatively novel and closed form of employment, with strict secrecy obligations.
- To my mind this means that their treatment within an agency must be scrupulously fair.

### **Integrity of assessments**

- The fourth way in which I have also found the concept of propriety to be useful in my review of strategic assessment (as opposed to collection) activity.
- In 2005 my legislation was amended to extend my remit to include the capacity to initiate own-motion inquiries in relation to our Office of National Assessments and our Defence Intelligence Organisation.
- I was also specifically required by these legislative amendments to periodically review the “independence” of the Office of National Assessment’s assessments. This was to a significant degree prompted by the controversy over assessments about WMD and Iraq.
- In developing this new role I took the view that, consistent with my general jurisdiction, I was not engaged in review of:
  - the efficiency of ONA business processes, or

- the correctness as such of the judgements made in ONA's assessments.
- On the other hand, I did consider that my remit was not a narrow one of looking only to see if there had been improper outside direction to ONA on assessments.
- Instead I saw the combination of the requirements independence and propriety meaning that there must be analytic integrity.
- By analytic integrity I mean four things:
  - First, that assessments made are based on Australia's national interest, independent of the interests of other nations.
  - Second, that assessments are:
    - made objectively and dispassionately
    - factually correct
    - reflect careful and thorough consideration of intelligence and information, and
    - free from political pressure/direction.
  - Third, that the assessments are policy relevant but not policy driven: in other words those policy considerations are accounted for, but the assessment itself is not determined or guided by the policy.
  - Fourth, that there are proper and robust debates with policy departments on certain issues, but with ONA always having the final say on their judgements.

### **Concluding Remarks**

- Apart from having these specific uses I believe that including "propriety" in my enabling legislation sends a very important message about general expectations to the intelligence agencies.
- The message for the intelligence agencies is that convenient interpretations of the law and a focus on what they can get away with, within that framework, is unacceptable. For the community to entrust them with special powers and capabilities, their standard of conduct must be a high one.
- For the community there is an important reassurance. The AIC is not subject to the same levels of public scrutiny as other government agencies and departments.
  - It could not be effective if it were.
- Nonetheless, my enabling legislation says to the community that there are special mechanisms to review the agencies, as something of a substitute for the public scrutiny to which other agencies are subject, and that there are requirements about the standard of conduct of the agencies. Moreover, these standards are not narrow legal ones.