

INTERNATIONAL INTELLIGENCE REVIEW AGENCIES CONFERENCE
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Panel 2: Proactive rather than reactive oversight mechanisms?
Speaking notes – Mr Ian Carnell
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- 1. I am making my comments from a perspective shaped by my role, key features of which are:**
 - Review six agencies (domestic security agency, three which collect foreign intelligence, two assessment agencies).
 - My remit is the operational activities of these agencies (not finance or administration).
 - Focus is on legality, propriety and respect for human rights.
 - Conduct an inspection program and also undertake formal inquiries.

- 2. Proactive work is a strong theme in how the role of the Australian IGIS has developed**
 - In the early years the Inspector-General's office was swamped with grievances from existing staff of agencies about conditions of service or the treatment of them as an employee. This was criticized by a Royal Commission in 1995. Alternative mechanisms for handling such grievances have been developed or improved.
 - The emphasis for the Inspector-General and his office since then has been that the larger part of the office time must be spent on proactive examination of the operational activities of agencies.
 - Overall, putting aside time spent on necessary management and administrative functions, in 2005/06 around 60 percent of the office time was spent on inspections, 30 percent on inquiries and 10 percent on legislative review, policy and presentations.

- 3. Why having a proactive program is important**
 - Assists to prevent or forestall problems of illegality, impropriety or lack of respect for human rights.
 - Focuses on systematic matters in a sustained way, not just individual cases (even though individual cases can open up systemic issues).
 - Influences the culture of the agencies in a positive manner.

*“My own experience is that compliance auditing of this kind is a highly effective and low cost mechanism for ensuring strict compliance with statutory procedures that are grounded in the ideals of rule of law and rights protection. Importantly, too, I have seen how the systematic nature of this oversight has induced a culture of compliance within the law enforcement agencies; this is now anchored in the development of internal procedures for rigorous quality assurance and legal compliance, and in active support shown by senior law enforcement managers for the Ombudsman's oversight role” (Professor John McMillan, *The Ombudsman and the Rule of Law*, Australian Institute of Administrative Law, Forum 1 2005, Canberra, pp. 7-8)*

4. What this means in practice:

- reviewing every aspect for the use of special powers warrants (eg listening devices, entry and search etc.) made by ASIO under the *Australian Security Intelligence Organisation Act 1979* and the *Telecommunications (Interception and Access) Act 1979*, and all requests for ministerial authorisations (to permit the deliberate collection of intelligence about Australian persons) made under the *Intelligence Services Act 2001*.
- reviewing all authorities to investigate
- reviewing selected categories of operational files (selected by the IGIS)
- reviewing access by agency staff to data held by the Financial Intelligence Unit (AUSTRAC)
- reviewing application by agency staff of the privacy rules which apply to reporting on Australian persons.
- visiting all Australian-based offices and sites of the agencies on a regular basis (not simply the central offices)
- observing agency training courses
- seeking and being given briefings on agency developments/initiatives
- providing comment (in respect of legality, propriety and respect for human rights) on draft and existing agency policies and guidelines, and
- undertaking pilot projects to see if particular extensions to the inspection program would be useful.

5. Dimensions are widening

- ASIO questioning / questioning and detention warrants – the IGIS generally attends on at least the first day and can raise a concern with the prescribed authority (usually a retired judge) who supervises the questioning. The concern must be considered, if necessary by suspending the questioning.
- Many presentations at training courses and seminars – outlining the role of the office, the importance of the rule of law and accountability. Emphasise six overarching principles in the legislation for the agencies:
 - Stick within their legislative charter.
 - Don't inhibit lawful advocacy, protect and dissent.
 - Don't create even suspicion that they are meddling in domestic policies, avoid being a divisive influence in the community generally.
 - Sensitivity to privacy.
 - Proportionality (i.e. only intrude on individual rights to the extent necessary to deal with the particular risk and its urgency).
 - Objectivity and independence.

- Reviewing the independence and objectivity of intelligence assessments (the traditional focus has been on collection activities).

6. Also proactive in the sense that the IGIS can initiate formal inquiries of ‘own motion’

- On average there are two such inquiries initiated each year.
- These can be triggered by inspection activities or media stories.

7. Risks with a proactive approach

- Must not become part of decision making or jeopardize current operations, or confuse lines of responsibility and accountability for operations.
 - *“The creation of a new position with power to second guess or takeover managerial or administrative decisions would confuse the issue of responsibility and could lead to ‘buck passing’ among those concerned”* (Justice R M Hope, Royal Commission on Australia’s Security and Intelligence Organisations, 1984).
- Avoid by sharp awareness of these risks and strong maintenance of focus on legality, propriety and respect for human rights.
- Must not be seen as a player in domestic politics and undertaking particular inspections or inquiries to favour one side in the political debate. Need to be very careful in making public comments.

8. Conclusion

- Other accountability mechanisms have their own particular strengths:
 - Courts – eg rigour of testing evidence and procedural fairness.
 - Parliamentary committees – eg close connection to community values, range and depth of experience of members.
- Proactive approach is a particular strength of IG model in Australia.