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“Accountable Intelligence Agencies – Not an Oxymoron”

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*“It is much easier to be critical than to be correct”
Benjamin Disraeli (1804-1881)*

Introduction

Thank you, Chair, for the introduction and the opportunity to speak today.

The previous speakers have covered the nature of the terrorist threat and its evolution, as well the legislative response to the threat.

It's a logical step from there to consider what protections and safeguards are needed around the government response to the threat. While the response has many facets, in this address I will focus on the accountability of the six agencies which come within my legislative remit – the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Defence Signals Directorate (DSD), the Defence Imagery and Geospatial Organisation (DIGO), the Defence Intelligence Organisation (DIO), and the Office of National Assessments (ONA).

Intelligence agencies pose something of a dilemma for democracies. Such agencies are necessary for the protection of the democracy, but they undertake some activities which we would consider unacceptable for most other public sector agencies to engage in, and much of the detail of the work of intelligence agencies simply cannot be open to public scrutiny because their effectiveness would be lost. Yet it is openness to which we commonly look to ensure accountability.

This issue is perhaps sharper for the Australian community since 11 September 2001, as our intelligence agencies have been given both increased powers and capabilities.

A healthy democracy needs monitoring and review to ensure such powers are not being misused and abused. A continuing question must be whether the agencies are acting responsibly and can be entrusted with intrusive powers and capabilities.

General role of IGIS

The position I hold is integral to such monitoring and review in Australia.

The functions of the Inspector-General of Intelligence and Security are set out in a separate piece of Commonwealth legislation, the *Inspector-General of Intelligence and Security Act 1986*. The position is an independent statutory one, with strong formal inquiry powers. These inquiry powers are akin to those of a royal commission.

Independence is a product both of the tenure provided by the legislation – I can only be removed in limited circumstances – and absence of a general power of direction by the Prime Minister or any other minister in relation to inquiries or inspections.

I can conduct an inquiry into the legality, propriety and respect for human rights of the activities of the six agencies I have listed (ASIO, ASIS, DSD, DIGO, DIO or ONA). Inquiries can be generated by a complaint, a ministerial request or of my own motion.

A key part of my role and that of my dedicated staff, in addition to formal inquiries, is to conduct inspection activities in relation to the six agencies. This means that we regularly examine records such as all of ASIO's requests for special powers warrants. In this example the examination is directed at ensuring that the legislative tests and requirements have been fully satisfied. We do this to proactively identify and either prevent or forestall problems arising in the first place. It also has an influence on the culture of the agencies.

Quality of debate

There are some who have attempted to argue that we did not need any legislative changes and increases in agency powers. This has come from people and bodies who have, I believe, an obligation to make a better contribution to our public debates.

One can readily agree that times of crisis produce the greatest risks to a range of individual liberties. The need for government to be seen as responding and in charge can create, in the words of Stephen Flynn, who wrote an interesting book on America's counter-terrorism efforts, that the mantra becomes "act now" rather than necessarily "act effectively".¹

However, the response can't be simply conservative defence of existing arrangements. Some need to heed more broadly the advice given earlier in the year by Professor Conor Gearty, Professor of Human Rights Law and Rausing Director for the Study of Human Rights at the London School of Economics. He said:

*"Human rights people shouldn't be saying the way criminal law was in the 19th century is the way it will remain, that it is pure, don't touch it. We are our own worst enemies when we deny flexibility in the criminal process."*²

One particular disappointment I have with the quality of some of the counter-terrorism debate in Australia is the refusal by some to recognise what safeguards and protections are already in place for the intelligence agencies.

There are statements such as ASIO is subject to "little, if any, external scrutiny", or that there is "no effective mechanism for independent scrutiny" of ASIO. As Benjamin Disraeli said – "It is much easier to be critical than to be correct".

I was astonished to read recently of a call by a former judge for a "security ombudsman", which he described would be a statutory position to monitor the use of powers by security agencies, to receive complaints and to investigate matters with adequate powers to do so.³ There was no acknowledgment that such a role is already carried out by me in relation to the six core Australian intelligence and security agencies, and by the Commonwealth Ombudsman in respect of agencies such as the Australian Federal Police. The Ombudsman and I work closely together when necessary.

Post 11 September 2001

It might be useful if I illustrate some of the current protections and safeguards by reference to the capacity enacted in 2003 whereby ASIO can seek to have questioning or questioning and detention warrants issued. Some stories attacking this capacity start from the assumption that almost anyone can be whisked away on a minor pretext and automatically detained for seven days.

The legislative provisions setting out necessary tests, procedures and safeguards run to 51 pages (in comparison you might think about our 42 page Constitution). These warrant provisions were the

¹ Stephen Flynn, *America the Vulnerable*, New York: Harper Perennial, 2005, pp. 162-163.

² Professor C. Gearty, *Human Rights, Human Security: Protecting Rights in the National Interest*, Australian Human Rights Centre Annual Public Lecture, 16 May 2006.

³ *The Age*, 15 May 2006, p. 5.

subject of intensive parliamentary consideration in 2003 and a thorough review by the Parliamentary Joint Committee on Intelligence and Security in 2005.

One of the several requirements which must be satisfied before a warrant can be issued is that relying on other methods of collecting that intelligence would be ineffective – in other words, it is essentially a last resort. All requests by ASIO for special powers warrants are scrutinised by my staff and I to satisfy ourselves that tests such as this are met.

Detention can only occur where there are reasonable grounds that a person will either not appear for questioning; may destroy, damage or alter records; or may alert someone involved in a terrorism offence that the offence is being investigated.

The safeguards include the capacity for the Inspector-General or his staff to attend questioning sessions and raise concerns with the prescribed authority – usually a retired judge – who oversees the questioning. As a standard practice I attend at least the first day of questioning, and on a number of occasions I or my senior staff have attended on subsequent days. A concern raised by the Inspector-General or his representative must be addressed, if necessary by suspending the questioning.

There are a variety of other safeguards but time precludes the detailing of those.

What has been the practical experience to date with these warrants? To 30 June 2006 – a period of nearly three years of operation – there have been 15 warrants issued. Hardly an indication of excessive use. Importantly, none have involved detention.

Having attended questioning sessions on many occasions, I can confidently state that the questioning has been conducted in an appropriate manner and the subjects of the warrants have been treated humanly. ASIO has behaved professionally.⁴

The review by the Parliamentary Joint Committee on Intelligence and Security has confirmed this. It concluded that the provisions have “...been useful and administered in a professional way”.⁵ The committee’s view of the questioning was that “...it was very formal and certainly polite and dispassionate, if persistent”.⁶

This is not to say that we can relax about the availability of such powers. A power to detain without charge is something about which citizens in a democracy should be very wary. There is a sunset clause, but 2016 is a long way away. You can be assured that I will continue to monitor use of the provisions closely.

A broader view of the accountability framework

A key general proposition I wish to put to you is that in respect of the Australian intelligence agencies, Australia already has a significant accountability framework which should provide considerable reassurance to the community that the day-to-day activities of the agencies are subject to substantial scrutiny.

Some commentators seem unable to look beyond the possibilities of lawyers and the judiciary in considering how best to construct an accountability framework. One is reminded of the saying that when you have a hammer everything looks like a nail.

A good tool kit has several hammers, but completeness requires supplementary implements.

This has been put more elegantly by Professor John McMillan, an eminent lawyer in the field of administrative law and current Commonwealth Ombudsman, who has said that discussion about the

⁴ Inspector-General of Intelligence and Security *Annual Report 2004-05*, pp. 13-14 and Annex 2.

⁵ Parliamentary Joint Committee on Intelligence and Security, *Annual Report of Committee Activities 2005-2006*, September 2006, Canberra, p. 15.

⁶ *id.*, *ASIO’s Questioning and Detention Powers*, November 2005, Canberra, p. 14.

rule of law in Australian legal and academic circles often has more to say about the role of courts than about the true focus of the doctrine, which is limiting and controlling the behaviour of governments.⁷ He has also argued convincingly that the protection of human rights requires more than statements – important as these are – it also involves many practical elements.⁸

Chief Justice Spigelman, Chief Justice of the NSW Supreme Court since 1998 has made the challenging statement that integrity and accountability bodies such as the Commonwealth Ombudsman effectively constitute a fourth arm of government, equivalent to the legislative, executive and judicial branches.⁹ This jolts the traditional doctrine of three arms of government.

So what is this possible fourth branch? It arguably consists of a range of independent oversight agencies such as human rights and anti-discrimination commissions, privacy and information commissioners, inspectors-general of different kinds, administrative tribunals, and auditors-general.

These bodies play an important role in safeguarding the rule of law, in addition to the legislature and the judiciary.

I do not wish for one moment to suggest that the judiciary play other than an absolutely vital role in ensuring that executive government is subject to the law and not above it. Our courts have a very proud history in this regard and it would be alarming to try to contemplate our system having a less effective judicial arm.

But there are some limitations in what the judiciary can do in protecting rights. The range of issues which receive judicial scrutiny is in fact adventitious and episodic. Most areas of government decision making receive little or no judicial oversight. There are limitations to the set of remedies which courts can order and courts are not able to follow through, after giving judgement, to monitor what happens in the particular case and in other cases.¹⁰

I must also note the vital role of the legislature. It provides the legislative framework that is the fundamental starting point, and is crucial to debate about the formation of that framework and statements of how it is meant to operate. It can also perform periodic, effective reviews – for example, the review of questioning warrants I mentioned earlier.

When I consider the tremendous effort and commitment that various parliamentarians have shown in the consideration of security related legislation in recent years, I must say that they have my admiration. I know it is fashionable to disparage politicians, but having a laugh at easy caricatures should not blind us to some of the impressive efforts made.

Design of a system

If one had a green field in which to design the sort of safeguards and protections one would wish to have around intelligence and security agencies, international studies suggest that you must look at several areas.¹¹

The first would be legislation, where one should look to clearly specify the role of agencies in legislation and carefully define key topics such as “politically motivated violence”. In the legislation

⁷ Professor J McMillan, *The Ombudsman and the rule of law*, AIAL Forum 1, 2005, Australian Institute of Administrative Law Inc., Canberra, 2005, p. 3. Reference can also be made to the work of Transparency International and Griffith University, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity System*, December 2005.

⁸ *id.*, address to conference on “Legislatures and the Protection of Human Rights”, University of Melbourne, Faculty of Law, 21 July 2006.

⁹ The Hon J J Spigelman, *Jurisdiction and Integrity*, Second Lecture in the 2004 National Lecture Series of the Australian Institute of Administrative Law. See also the South African Constitution, specifically the Chapter 9 institutions.

¹⁰ Professor J. McMillan, Address 21 July 2006, *op. cit.*

¹¹ Eg. H. Born and I. Leigh, *Making Intelligence Accountable: Legal Standards and Best Practice for Oversight of Intelligence Agencies*, Parliament of Norway, Oslo, 2005.

you would want to emphasise that the agencies can only do things that are within their legislative charter and that they must be careful to not meddle or create suspicion that they might be meddling in domestic politics.

Australia has such legislation in place – I refer you to the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*.

The second thing one would look at is the manner of appointment of agency heads. You would generally look to have them as statutory positions with security of tenure and you might even look to have a requirement for consultation with the Leader of the Opposition before an appointment was made. Again, you will find these are features of the appointment of the heads of ASIO and ASIS. I might also add that they apply to the appointment of the Inspector-General of Intelligence and Security.

Third, you would look to carefully specify the relationship between the relevant minister and the head of the agency. You would look to ensure that the minister is responsible for policy, is advised about or approves sensitive matters, and is accountable to the Parliament. At the same time, you would place significant limitations on the minister's capacity to direct the agency operationally least he or she succumb to a temptation to try to use the agency for political ends. Yet again these features are present in our Australian arrangements.

Fourth, you would want the right culture and governance of the agencies. Compliance with rules is all well and good, but proper integrity and sound accountability come in fullest measure from the right culture and governance. You would look to see that there are formal internal policies and procedures that guide staff, as well as internal mechanisms to promote these. You would look to see comprehensive training programs with an emphasis on ethics and accountability. Importantly, you would want to see clear commitment by agency leadership to such principles. In some cases it might even be feasible to have the agency produce an unclassified annual report. I suspect that you will not be surprised when I say that these features are present in our Australian system.

Fifth, you would limit and construct the powers of the agencies most carefully. Here it might be a useful illustration if I talk specifically about ASIO. ASIO does not have police powers such as those of arrest. Access to special powers such as telephone interception or entry and search warrants requires a number of tests set out in the ASIO Act to be satisfied (and as I have mentioned my office reviews all warrants requests carefully).

Sixth is the need to have external monitoring and review. There is my position, an independent statutory position with full access to all information about the activities of the six intelligence and security agencies. I can call upon powers similar to those of a royal commission if I need to. Importantly, I produce an unclassified annual report which is tabled in the Parliament. In that report we endeavour to provide as much information as we can, within the restraints of security and privacy, about our scrutiny of the agencies. The report for 2005-06 was tabled in Parliament recently and is available on my office's website (www.igis.gov.au).

Other mechanisms

But I am not the only kid on the block. The Commonwealth Ombudsman is a watchdog over Commonwealth administration generally. Recently at a seminar I heard an interesting comment¹² by the Hon Sir Anthony Mason, a former Chief Justice of our High Court and a member of the Kerr Committee which was the catalyst in the 1970's to the establishment of the several elements of the Commonwealth system for administrative review. Sir Anthony said that the Ombudsman was the element in those arrangements which had exceeded expectations in protecting citizens. Experience of the Ombudsman role in Australia, he said, had demonstrated that you can have effective oversight by an external agency which draws attention to faults and works cooperatively with agencies, while maintaining independence.

¹² As yet unpublished address to Administrative Review Council seminar, 14 September 2006.

The financial management of the intelligence agencies is audited by the Australian National Audit Office.

There is also the Parliamentary Joint Committee on Intelligence and Security which I mentioned earlier. It has an ongoing role in scrutinising the administration and expenditure of the agencies. The committee can also review matters referred to it by the parliament or by the responsible minister. Earlier I referred to the committee's thorough review of ASIO's questioning warrants.

In some instances matters can be appealed to the Security Appeals Division of the Administrative Appeals Tribunal. There, Australian citizens and permanent residents can seek a merits review of security assessments such as those in relation to passports or employment, or of archives decisions.

Moreover, the judicial system is also available to people. This includes the Federal Court by virtue of the *Administrative Decisions (Judicial Review) Act 1976* and the *Judiciary Act 1903* and the High Court by virtue of section 75 of the Constitution. You only need to think of some of the reports in the media about court action being taken against agencies, to realise that these court avenues are also used.

Conclusion

I would not wish you to think that I am saying we have the perfect framework for accountability of our intelligence and security agencies, or of our counter-terrorism arrangements generally.

The situation will not be static and no doubt, as earlier speakers have alluded to, design and refinement of arrangements will be an important part of ongoing debate.

For example, there is an important need to further review our counter-terrorism offences in the light of further experience. This was highlighted in the recent Sheller report by an independent committee chaired by a retired NSW Supreme Court judge, the Hon Simon Sheller QC, AO.¹³ And it appears that procedures around the handling of security related material in the courts need monitoring and should be the subject of future review. Furthermore, control orders and preventative detention orders are to be the subject of a Council of Australian Governments commissioned review in 2010.

But I do hope that in my presentation this morning I have given you confidence that, contrary to what some commentators would have you believe in considering safeguards and protections in respect of the Australian intelligence agencies, we are not starting from zero or the backmarker – we actually have a probing, multi-faceted set of accountability arrangements already in place.

¹³ Security Legislation Review Committee 2006, *Report of the Security Legislation Review Committee*, SLRC, Attorney-General's Department, Canberra.