

National Security for a Diverse Community Forum 2-3 August 2007

“Special authority – special accountability”

Speech by Mr Ian Carnell
Inspector-General of Intelligence and Security

Introduction

- I am genuinely pleased to see this Forum taking place and to be able to speak. I say this because I was a member of the independent Sheller Committee which in 2005/2006 reviewed some of the anti-terrorism legislation and as a committee we were concerned about not just the need to improve the legislation itself, but about the need for government and others to strongly address concerns about discrimination, alienation and divisiveness within the Australian community. I hope that an event like today is one of a number of processes whereby these concerns continue to be addressed.
- I also stand here strongly holding the belief that it is vital for democracies to set boundaries on intelligence and law enforcement agencies, to protect it as a democracy and so that individuals do have protections from the arbitrary exercise of power.
- In the last three decades at the Commonwealth government level a great deal of attention has been given to making government bodies accountable. A range of mechanisms such as the Commonwealth Ombudsman, the Administrative Appeals Tribunal and Freedom of Information have been introduced.
- Accountability for government bodies is necessary for several reasons – these include the point I have already mentioned about the proper exercise of government power, but other considerations are fairness, minimising corruption, ensuring efficiency and very importantly, engendering the trust and confidence of the community in government bodies.
- Given these compelling reasons, I think it is clear that where government bodies have special powers and capabilities, the accountability arrangements for them must be carefully structured and equally special.

Inspector-General of Intelligence and Security

- I should explain briefly my role at this point, although it is important to appreciate that my position is but one of several mechanisms which look to hold intelligence and law enforcement bodies accountable.
- My position is an independent statutory one. This means that I have strong security of tenure and that I am not subject to general direction by government ministers.
- My responsibilities are set out in a specific piece of legislation. This legislation gives me strong investigative powers when I need them, and they are similar to those of a Royal Commission.
- I can use those powers in respect of the six Commonwealth intelligence agencies. First is the domestic agency – the Australian Security Intelligence Organisation (ASIO) – then the three agencies that are collectors of foreign intelligence – the Australian Secret Intelligence Service (ASIS), the Defence Imagery and Geospatial Organisation (DIGO), and the Defence Signals Directorate (DSD) – and our two assessment agencies – the Office of National Assessments (ONA) and the Defence Intelligence Organisation (DIO).
- I can decide of my own motion what activities I will inspect or into which I will conduct a formal inquiry. This is in addition to responding complaints made to my office.

- My central concern is to ensure that the six agencies are acting strictly within Australian law and directions and guidelines given to them, that they conduct their activities with propriety (which covers things such as fairness, proportionality, and integrity) and that they respect human rights.

Intelligence agencies

- The last 35 years have seen three Royal Commissions into some or all of our intelligence agencies.
- One was conducted in the mid 1970s and a key result was the enactment of legislation about ASIO.
- The second Royal Commission was conducted in the mid 1980s and an important outcome from it was creation of the position I currently occupy.
- The third Royal Commission in the mid 1990s led to the enactment of the *Intelligence Services Act 2001*, which governs the three foreign intelligence collection agencies.
- I have specifically emphasised legislation because it is a foundation stone to ensuring that intelligence agencies play a proper role within, and on behalf of a democracy.
- To illustrate, the ASIO Act defines quite specifically what ASIO's role is and emphasises that it can only do things that are within its charter.
- The ASIO Act also makes clear the extent of its powers and that it is fully subject to Australian law. In our Australian system a distinction has been maintained between intelligence and law enforcement, with intelligence not having powers of arrest or a general capacity to stop, search and detain. Intelligence agencies collect, report, and in some instances assess material, but where evidence needs to be gathered with a view to prosecution the matter becomes one for law enforcement agencies.
- Importantly, the ASIO Act does not give ASIO any general exemption from Australian law. ASIO officers are not free to simply break the law if in their opinion it helps them to meet their responsibilities.
- Where ASIO does believe it necessary to conduct activities which would otherwise contravene the law such as entry and search or telephone interception, the legislation requires that they obtain a warrant from the Attorney-General. And the legislation sets out a number of tests that must be satisfied before a warrant can be issued.
- I and my staff visit ASIO regularly and scrutinise all warrant requests made by ASIO. We do this to satisfy ourselves that the legislative requirements have been fully met.
- Sometimes in relation to warrants my office has a further role in being a safeguard. For example, when an ASIO questioning warrant is issued I, or my most senior staff member, attend on at least the first day to satisfy ourselves that the questioning is being conducted legally. If I have a concern, the legislation allows me to immediately raise that concern and it must be considered by the prescribed authority (usually a retired judge – who also monitors the questioning) if necessary by the prescribed authority suspending the questioning.
- Another key principle in the ASIO Act is that ASIO must not stifle lawful advocacy, protest or dissent. It is when people would use violence or serious destruction to pursue political ends that they become of legitimate interest to ASIO. Otherwise, in a healthy democracy one expects to see plenty of lawful advocacy, protest and dissent – indeed it is an essential feature of a healthy democracy.
- I mentioned earlier the *Intelligence Services Act 2001* which defines the roles of the three foreign intelligence collecting agencies. And it too sets requirements on the agencies about how they do their business.

- One of these is that if they are to intentionally collect intelligence on an Australian person they must first have an authorisation from the relevant minister.
- In addition, any intelligence actually collected on an Australian person, before it is reported to anyone, must satisfy a set of privacy rules. In essence these rules require that there be sufficient and proper justification for reporting the information.
- As with ASIO warrants, I and my staff regularly visit the agencies and review all the requests for ministerial authorisations for the collection of intelligence.
- We also scrutinise the action of agencies in reporting collected intelligence to other Australian Government agencies to satisfy ourselves that the privacy rules have been applied and applied correctly.
- While my office's inspection program is very important, it would be remiss of me if I did not also touch on complaints. Complaints can be made – without any cost – to my office about the behaviour of the intelligence agencies and their staff.
- All complaints with some substance will be investigated. An example is the conduct of ASIO officers when there is an entry and search warrant. I like to think that as a result of earlier investigations into instances of this, ASIO is now more careful and culturally sensitive when it carries out such operations.

Other intelligence watchdogs

- In addition to my role, there is also a special committee of the Parliament – the Parliamentary Joint Committee on Intelligence and Security – which reviews the same six intelligence agencies that are within my jurisdiction.
- This committee conducts an annual review of the finances and administration of the agencies. It also conducts special inquiries such as one in 2003 into intelligence assessments about Iraq and weapons of mass destruction. In addition, it reviews decisions to proscribe organisations as terrorist organisations.
- I meet periodically with this Joint Committee to tell them in general terms about the work that I have been doing.
- At the start of my address I mentioned the Administrative Appeals Tribunal. The Tribunal, which is headed by a Federal Court judge, includes a special Security Appeals Division that can review the merits of decisions by intelligence agencies. Australian citizens and permanent residents can lodge appeals with the Tribunal about ASIO security assessments on which other decisions have been based, such as decisions to refuse or to cancel a passport.
- Then there is the Australian National Audit Office, which reviews the financial management of the intelligence agencies to make sure that the financial statements are true and accurate.
- And very significantly, the intelligence agencies are subject to our Courts, which can undertake judicial review of whether the agencies are acting in accordance with the legislation that governs their functions.
- Simply because a decision is made in the interests of national security does not mean a court will not review whether the decision was lawfully made. The decisions of intelligence agencies will frequently be based on classified and confidential information; this poses challenging issues for the courts but increasingly this is being managed.

Law enforcement

- The large majority of police in Australia are in State and Territory police services. This is shown by the relative numbers:

- There are around 59,000 people providing police services on behalf of the Australian States and Territories.
- There are roughly 4,000 in the Australian Federal Police (AFP) who are involved in national policing and protective services.
- Important accountability issues for police have long been corruption and abuse of power.
- For the AFP there are now two accountability mechanisms:
 - The Commonwealth Ombudsman, who also has a special title of Law Enforcement Ombudsman, has long had a role in investigating complaints about the conduct of AFP officers.
 - Recently an Integrity Commissioner and an office to support this Commissioner – the Australian Commission for Law Enforcement Integrity – were created.
- The Integrity Commissioner is to focus on serious corruption and systemic corruption. It matches similar bodies in the States like the Police Integrity Commission in New South Wales, the Crime and Misconduct Commission in Queensland, the Crime and Corruption Commission in Western Australia and the Office of Police Integrity in Victoria.
- The Commonwealth Ombudsman focuses on serious misconduct other than corruption, by AFP officers.
- He also conducts an annual review of how the AFP Professional Standards Unit and AFP managers have dealt with complaints and conduct issues on less serious matters (eg. rudeness, delay and minor traffic matters).
- As with my role, the Ombudsman is not limited to reviewing a matter only when a complaint is made. He too has an own motion capacity to initiate investigations.
- Similarly, the Ombudsman has an inspection program where his staff scrutinise AFP records on
 - telephone interception
 - what are called “controlled operations”, where police are given approval to be a part of a criminal activity so as to catch the other participants
 - use of surveillance and tracking devices
- For completeness I must mention that in each State and Territory there is also an Ombudsman or similar agency that has a role in considering complaints about State and Territory police.
- All the Ombudsmen meet regularly and cooperate when there is a need.
- And I can assure you that the Commonwealth Ombudsman and I have a cooperative relationship. Where our offices can help each other, we do so.

Conclusion

- So you can see that our accountability system has been designed so that there is special scrutiny where there is substantial intrusion into the private lives of citizens or other substantial power being exercised.
- Another significant feature is that we have a separation between intelligence and police. And of course judicial power is separate from the police and the prosecuting authorities.
- Of particular note is that our courts have proudly and strongly maintained their independence and are steeped in the notion of the rule of law and protecting individuals from the arbitrary exercise of

power.

- I am not saying that our arrangements for scrutiny of intelligence and law enforcement bodies are perfect, but I hope that I have at least given you a sense that this is not a blank canvass – there is a range of mechanisms already in place. We need to develop these, and their interactions, to make sure that there is the necessary special accountability in relation to special powers.
- There has been much intense debate within the Parliament and beyond in recent years about these matters. No doubt the future holds more such debates. The important thing is that these debates be constructive, well informed and seriously wrestle with the real challenges to our community while preserving it as a genuine democracy.