

**SPEECH BY THE INSPECTOR-GENERAL OF
INTELLIGENCE AND SECURITY
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TRUST AND THE RULE OF LAW

Thank you for the opportunity to speak today.

I thought the theme for this conference of truth and accountability is a very good one.

Truth is indeed “great and mighty above all things” – and in the often difficult world of intelligence, the smoke and mirrors make it a difficult thing indeed to discern. Yet it is that very capacity to ascertain the real amid the smoke and mirrors that is one of the great skills.

Accountability is fundamental because only through proper accountability can agencies have the trust of the community.

In listing fundamentals we must include the need for community trust in agencies – and closely related to this is the importance of adherence to the rule of law.

For it is only by having the trust of the community, of having acceptance that intelligence agencies are indeed trustworthy guardians of community safety and the rule of law, that will mean in the agencies continue to be entrusted with significant powers and capabilities.

The rule of law is a term I use in the sense of a bulwark for individuals against the exercise of arbitrary power. It is a very precious thing from our common law heritage and one that our intelligence and security agencies protect.

But one must act in accordance with the dictates of the very thing that one is protecting. So it is of profound importance that agencies act in accordance with the law and not undermine it.

We are currently seeing some sharp debate about what additional powers some agencies ought have and how relevant laws should be shaped. This has regularly been the case since 11 September 2001.

The more measured of these debates have revolved around how to find an appropriate balance between the intrusiveness of the new powers afforded to agencies on the one hand, and the rights of the individual on the other.

The challenge for governments is to find paths which offers maximum protection to citizens (and permanent residents) but without giving succour to those who would undermine the foundations upon which our society is constructed.

I must confess to some occasional irritation when I see comments in newspaper columns to the effect that the agencies are subject to “little, if any, external scrutiny” or that there is “no mechanism for independent scrutiny”.

If we are to have debates about the checks and balances, then it should be done in an objective way, based on facts, if it is to have a productive outcome. Hyperbole is of little use. Nor is the narrow view of some in Australian legal and academic circles which sees the rule of law as protected only by the courts. The true focus of the doctrine is limiting and controlling the behaviour of governments, and there are a range of mechanisms which are important in safeguarding the rule of law. A more sophisticated view needs to be taken.

This is not to discount the vital role and proud history of the courts in this area. Nor am I being defensive – evaluation of whether we have the balance right and the effectiveness of each existing mechanism and their overall effect, is an ongoing requirement. And to be very clear – there is no implied criticism in what I have just said, of the increased judicial role apparently being included in the counter terrorism legislation which is controversial at the moment.

In relation to the intelligence and security agencies, I would argue that some special mechanism or mechanisms must supplement more traditional mechanisms. This is because of the invariably secret and secretive nature of much of what intelligence and security agencies do.

Generally, most Australians will not know if they have become of interest to such an agency. Nor what an agency might be doing with information which it has gathered on them.

Hence there is a need for arrangements which proactively examine agency activities and have access to even the most sensitive of material.

Creation of IGIS

Two motivations largely explain why the position I currently occupy was created by specific legislation in 1986.

The first was because of a sincere belief in some parts of the community at that time, that ASIO targeted socially progressive individuals and groups regardless of whether they posed a real threat to national security. This was, of course, all set in the context of the Cold War.

No doubt some of you will recall the incident in 1973 when the Attorney-General of the day, The Hon Lionel Murphy, conducted what was referred to as a “raid” on ASIO’s Melbourne headquarters. While one can query the judgement involved in taking such a step, one must also appreciate his concern that as Attorney-General he was not being provided all information of legitimate interest to him.

Yet another prominent incident was when a training exercise conducted by ASIS in the environs of the Sheraton Hotel in Melbourne went badly awry in 1983.

This training exercise, which involved the “rescue” of a “hostage” from a hotel room was intended to be conducted without publicity and without involving persons other than those directly taking part. However, members of the public did become involved and it was publicly revealed the next day that the trainees had been carrying weapons, had threatened members of the public and had forced entry into a room of the hotel causing damage.

The second motivation for the original creation of my position relates to the general reforms which were taking place in administrative law and hence the accountability of Australian government administration, in the 1970s and early 1980s.

This is not an administrative law history lesson so I will only skate across this and mention:

- the creation of the Administrative Appeals Tribunal, allowing people to appeal against government decisions on their merits
- the establishment of the Commonwealth Ombudsman, so that people can complain about the conduct of government agencies
- codification of judicial review of administrative decisions, and
- freedom of information legislation, so people could access the information on which decisions about them were based, and the conduct of government more generally.

In 1988 the Privacy Act introduced a regime regulating the collection, storage and use of personal information by Australian government agencies.

For the most part the six agencies which now comprise the Australian intelligence community were and are, partially or fully exempt from much of this administrative law regime.

There are good reasons why these agencies should have this exempt or partially exempt status. The most obvious reason is that it is necessary for the agencies to protect their sources, capabilities and methods if they are to function effectively, and this end is not served if such matters are aired publicly.

Nonetheless, there was a determination that these agencies should still be subject to at least the same degree of scrutiny as that to which other Australian government agencies are subject.

Hence legislation was enacted in 1986 and the office of the Inspector-General of Intelligence and Security commenced operating on 1 February 1987.

The second reading speech succinctly expressed the purpose of the office as:

“... provide an independent oversight of the agencies’ activities, give the public a greater assurance that those activities are proper ones, and clear the agencies, or bring them to task, as the case may be, if allegations of improper conduct are made against them.”

Role in brief

There are six agencies which are within my legislative jurisdiction, namely:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Defence Signals Directorate (DSD)
- Defence Imagery and Geospatial Organisation (DIGO)
- Defence Intelligence Organisation (DIO), and
- Office of National Assessments (ONA).

You will note that agencies such as the Australian Federal Police are not included – generally other agencies in the Commonwealth come within the jurisdiction of the Commonwealth Ombudsman.

The Ombudsman and I have a good working relationship and, for example, where both ASIO and the AFP are involved in a matter, we liaise so that all aspects can be properly reviewed by one or both of us.

The legislation prescribes the four matters on which I must focus. These tend to be shorthand as legality and propriety, but expressed in full there is also compliance with ministerial directions and guidelines, and respect for human rights.

The original conception of my office involved a clear understanding that it is not here to second-guess the general management of the agencies or to cut across the general executive responsibility of the agency heads. The focus is to be on legality and propriety.

How my office does this is through either inspection activity or inquiry activity. And again I think the original concept is proving to be prescient. The emphasis is a proactive inspection program, so that potential problem areas can be avoided or forestalled, rather than becoming major problems.

The Inspector-General is appointed by the Governor-General in Council, and I have the security of tenure that comes with statutory appointments.

It is worth noting that while it is the government of the day which makes a recommendation to the Governor-General, the legislation requires the government to consult with the Leader of the Opposition in the House of Representatives over any proposed appointment. This is a mechanism to ensure that no appointment will be seen as “political”.

If necessary, in conducting a formal inquiry, I can exercise the coercive powers that we generally associate with a Royal Commission. That is, I can compel people to attend before me to answer questions, they must attend and answer truthfully. Similarly, I can compel the production of

documents. It is an offence to not comply with these requirements, although there is “use immunity” for the person who provides information, produces a document or answers questions.

I also have the capacity to readily enter agency premises – the late Senator Murphy would probably be envious.

Some recent developments

At the start I talked about some of the debates in recent years about powers and capabilities of agencies. Some of the legislative changes have certainly added an extra dimension to the work of my office.

Two examples worth touching on are ASIO questioning and detention warrants, and then the capacity for ASIS officers to be able to carry weapons for self-defence.

Legislative provisions enacted in 2003 permit the Director-General of Security i.e. the head of ASIO, with the Attorney-General’s consent, to seek a warrant authorising the questioning or detention of a person where doing so would substantially assist the collection of intelligence in relation to a terrorism offence.

It is in the public domain that this power was used 14 times (in respect of 13 people) to the end of June 2005.

Some of the key safeguards in that legislation involve me attending at least the first day of the questioning, where I have the capacity to raise a concern with the retired judge, formally referred to as a “prescribed authority”, who will be overseeing the questioning. I also have access to the videos which must be made of these sessions, as well as transcripts.

The experience of my predecessor and I has been that to date ASIO has conducted the questioning in an appropriate and professional way.

In the car yesterday I heard a historian on the radio assert that ASIO has been turned into a secret police, that it now grabs people off the street, takes them to ASIO headquarters, and grills them in a dark room. Alas, the truth is more mundane. People are generally served with a questioning warrant a day or two before they must present themselves for questioning. It is not at ASIO headquarters. And having been in the hearing rooms I can tell you with complete confidence that the rooms are well lit. There is usually a legal representative for the subject of the warrant present, the questioning has been measured, and it is overseen by retired judges who are well used to controlling court rooms and don’t hesitate to pull people into line. I might add that that has usually related to the subject of the warrant or their legal representative, rather than an ASIO questioner.

The second example echoes back to the Sheraton Hotel incident mentioned earlier. Following that incident, ASIS staff were prohibited from carrying weapons or using other techniques for self-defence. In 2004 in an environment undergoing some distinct shifts, ASIS was given a limited capacity to undergo self-defence training and carry weapons.

The Minister for Foreign Affairs must approve all training or the carrying of weapons, and the legislation requires that I automatically receive a copy of all approvals. I also commented on the internal guidelines when they were being drafted and have viewed the training curriculum. This means that I can monitor closely the actual application of the new provisions and provide – in at least general terms – advice to the Parliament and others about ASIS’s use of this capability.

In my recent Annual Report, I noted that approvals for training had been quite small in number and the number of approvals for weapons to be carried was smaller again. Such a closely structured and monitored regime of approvals and training, and prudent usage, should provide some reassurance that a Sheraton Hotel type incident will not occur again.

Yet another dimension will shortly be added to my role as a result of the 2004 review of AIC agencies by Mr Philip Flood AO. Whereas the interest in the past has been in the collection of intelligence, now I will also inspect and inquire into the production of assessments by ONA and DIO, to try to provide

assurance that there is no improper policy or political influence on these assessments. As with my general role, I will not be second guessing the assessments, but rather focusing on the propriety of their preparation.

Inspections and inquiries

I should say a little more about inspection activities. These take around 70 percent of my office's time and are tailored to each agency's particular functions and activities.

To give an example, my office visits ASIO monthly and inspects the documentation for all warrants that ASIO had sought in the preceding month.

This means that when there is debate about whether certain warrants were soundly based – and this applies to some search warrants in Melbourne in June 2005 which received significant publicity – that I am able to confidently state that the warrant requests were detailed, soundly based and did fully satisfy the legislative requirements.

As to formal inquiries, as noted earlier, I can use Royal Commission powers if I feel I need to.

Given the sensitive material involved, it can hardly be a surprise that my inquiries must be conducted in private.

For those of you who are interested in looking at the abridged versions of inquiry reports which have been put into the public domain, or reading more about the range of my office's activities, the website is www.igis.gov.au.

To illustrate the inquiry work, I will quickly run through some examples.

First I should note that one inquiry which has been important for DSD concerned the Tampa incident in August and September 2001, but as Ron Bonington has already addressed that particular matter, I will touch on three others.

There was an inquiry by my predecessor into whether the agencies had any information which warned them of the bomb attack in Bali on 12 October 2002. Despite rigorous searching, the end conclusion was that there was nothing which could be construed as possibly providing warning of the attack.

ASIO search warrants can generate complaints to the office and the experience has been that most of the complaints are not upheld. However, there are some exceptions to this.

In one instance there was compensation paid because a computer was not returned in the same condition it was in when it was seized. In a second case, a search took place at premises other than those specified in the warrant.

Some of you may have seen in the media recently, stories about this second case, where the matter has now been settled with compensation being paid.

A third inquiry example was the tragic loss of life when the people smuggling boat referred to as "SIEV X" sank en route to Australia in October 2001.

My predecessor scrutinised all possibly relevant material held by DSD and ASIS, but the conclusion was that what was held by those agencies, couldn't have materially assisted in preventing the tragedy.

Some key principles

When one looks at the legislation which covers the Australian government intelligence and security agencies, there are some notable messages in some of the provisions.

One is that the agencies shouldn't interfere, or be seen to interfere, in domestic politics, or be a divisive influence within the Australian community. From the history I touched on at the start of this address, that message is hardly a surprise. And even in the current circumstances agencies must remember that they are here to protect the Australian community as a whole.

The legislation also strongly emphasises the need for the agencies to stick within their respective legislative charters. Only activities clearly within their legislative charters should be undertaken.

An important principle, particularly for ASIO, is that agency activities shouldn't limit lawful advocacy, protest or dissent.

We want our democracy to be a vibrant one and such things are exactly what one should see in a vibrant democracy. The line is crossed only when violence or threats of violence or destruction of property are the means by which individuals or groups wish to pursue their political ends.

There is recognition that intelligence and security activities will necessarily on occasions, need to be intrusive. Careful judgement is needed about only using the degree of intrusion which is appropriate to the particular risk, but also balancing the need for intelligence to be timely and effective.

Similarly there is recognition that while personal information about Australians can be important intelligence, deliberately collecting and/or reporting it, must be clearly justified.

And lastly, but by no means least, is the need for objectivity and independence.

Conclusion

Let me conclude by emphasising something I said earlier.

This is that intelligence and security agencies, and those who perform such functions within organisations, are there to protect the rule of law and must therefore be careful to act within the law.

Doing so, in conjunction with a commitment to accountability and to truth, is the only way in which:

- the community will have confidence in the activities of the agencies
- accept them as proper guardians of our society, and
- entrust these agencies with the powers and capabilities which are necessary as very real threats are posed to our society.

Thank you again for the opportunity to speak.