

# Surveillance, Intelligence and Accountability: an Australian Story

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Of all the responsibilities of the Australian Parliament, none is more important than ensuring the security of our nation and its people.

Today we confront emerging and serious threats to our national security.

The Australian Parliament's responsibility is clear.

It must ensure our intelligence and security agencies have the necessary powers and resources to protect Australian citizens and Australian interests. However, these powers can impinge on the values and freedoms on which our democracy is founded – values and freedoms which Australian citizens rightly expect Parliament to protect.

So Parliament must strike a balance between our security imperatives and our liberties and freedoms.

Key to achieving this balance is strong and effective accountability. Enhanced powers demand enhanced safeguards. Public trust and confidence in our security and intelligence agencies can only be assured through strong and rigorous oversight and scrutiny.

Since 11 September 2001, new threats to Australia's national security have emerged with Australians targeted by terrorist organisations at home and abroad.

Close to home, the threat of terror became a shocking reality with the 2002 and 2005 Bali bombings, the 2004 bombing of the Australian Embassy in Jakarta, the 2009 Holsworthy Barracks terror plot, and other planned attacks on Australian soil, prevented by authorities.

On 12 September 2014, based on advice from agencies, the Government moved the Australian terror-alert level from *Medium* to *High* for the first time.

Over the thirteen years since the 11 September, 2001 attacks, the Australian Parliament has debated and enacted 62 pieces of anti-terror legislation.

With the exception of the first ASIO Bill, which was laid aside in December 2002, there has been a high level of cooperation in the Parliament to secure bipartisan agreement on national security legislation.

The ASIO Bill as presented in 2002 would have given ASIO extraordinary powers with inadequate safeguards.

The Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJC) considered the *ASIO Bill 2002* and provided a unanimous and scathing Advisory Report on 5 June 2002. In the report, the Chairman of the PJC (the Hon. David Jull) noted:

*The Bill is one of the most controversial pieces of legislation considered by the Parliament in recent times... The committee has been confronted with the challenging task of balancing the proposals in the Bill with the need to ensure that the civil liberties and rights under the law that Australia provides as a modern democracy are not compromised. The Bill, in its original form, would undermine key legal rights and erode the civil liberties that make Australia a leading democracy.<sup>1</sup>*

These differences, between not only the government and opposition but also the cabinet and the government's own backbenchers, were the exception to the rule, and indeed an amended Bill was passed in 2003, providing ASIO with substantial new powers but with enhanced safeguards.

Parliament determined an appropriate balance. Bipartisanship on national security matters resumed.

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<sup>1</sup> *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002*, Chairman's Foreword, 5 June 2002, p.vii.

Agencies are again seeking additional powers to meet the current enhanced threat of terrorism. If security powers are to be extended, scrutiny and oversight must again keep pace.

In recent years, Australia has benefited from professional and well run intelligence and security agencies; respecting the parliament, the government of the day and our laws. But effective safeguards against the abuse of security powers cannot depend on the personal integrity and quality of the leaders of our agencies. It is the responsibility of Parliament to prescribe safeguards that keep pace with the expansion of security powers.

This paper describes the history of intelligence and security agency oversight and scrutiny in Australia, explores relevant overseas arrangements, and sets out a series of recommendations to enhance the effectiveness of our current oversight arrangements.

## **The Past**

Throughout the 1950s and 60s, in the mood of the Cold War, unsupervised by either parliament or public, ASIO followed and spied on thousands of Australian citizens. At the behest of the Menzies Government it used its remit to protect the country against subversion in the broadest political way. Opposition to the policies of the government was often enough to draw ASIO's attention. Many who opposed the government's position on the banning of the Communist Party of Australia (CPA), or the sending of troops to Vietnam, or those perceived to be communist sympathisers or fellow travellers in trade unions or the Australian Labor Party (ALP) were the focus of ASIO surveillance. The reputations, careers and lives of many people were, as a result, blighted. The political system and ASIO's standing were damaged by the heightened suspicion and lack of trust this engendered, especially amongst those on the left of politics. It has been a difficult legacy to shake.

Experience has taught us that any organisation that is allowed to operate without scrutiny is likely to abuse its powers. The longer it is able to keep its operations beyond scrutiny, the greater the abuse is likely to be. Historically, this is the lesson of

government whether that government is of the left or right, totalitarian, authoritarian or just plain secretive. (Of course, the rule does not just apply to government, but to any organisation – businesses, non-government organisations, even charities and religious organisations). Intelligence organisations by their very nature are always at risk of succumbing to this tendency. As the Hope Royal Commission noted in 1977:

*It is nonetheless true that any secret service poses problems for democracy. If not properly controlled such organisations easily become a law unto themselves or political tools of the government. With this capacity for misuse they represent at least a potential menace to the values they are intended to protect.<sup>2</sup>*

There is a fascinating and telling history of Australian intelligence organisations within the reports of the Hope Royal Commission. The lessons of this history remain pertinent today.

Our first intelligence agency, the Australian Intelligence Corps, was established within the armed forces as early as 1907. It was part time. Other organisations later came to exist within Military Intelligence and Naval Intelligence and police forces. In 1916 the Commonwealth created the Counter Espionage Bureau, run by the Official Secretary to the Governor General, George Seward. It reported to and was strongly influenced by the British, Military Intelligence, Section 5 (MI5). State and Commonwealth Governments also employed private investigators as well as their police services to collect intelligence on citizens and ‘subversives’. Much energy was directed to ‘alien control and immigration and passport control’, particularly during wartime.<sup>3</sup>

The partisan nature of surveillance began early. Beyond enemy aliens, the concentration of intelligence agents during the First World War was on the anti-conscription campaigners, especially after the Prime Minister, WM Hughes, was pelted with eggs at a rally in Warwick, Queensland, in November 1917. The Prime

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<sup>2</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1, p.14.*

<sup>3</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1, p.2.* CEB became the Special Intelligence Bureau in 1917.

Minister believed that the Queensland police took too little action against the perpetrators. The incident and the response reflected the fact that these services ‘tended to reflect the politics and anxieties of their governments’.<sup>4</sup> It was after this incident that Hughes established the Commonwealth Investigation Branch (CIB), a small force of 46, later named the Commonwealth Police, to ‘overcome the unreliability of the State police forces’.<sup>5</sup> Surveillance focussed on peace movements, returned soldiers’ organisations that spoke against conscription, but also Bolsheviks, Irish nationalists, trade unionists and Labor Party members.

At that time anti-conscription views were not just considered a matter of policy difference or party political opposition, but were seen by many in the establishment as ‘evidence of treason, disloyalty and security risk’.<sup>6</sup>

*One of Military Intelligence’s larger dossiers was on the Labor Premier, T J Ryan. In that dossier was a report titled ‘Summary of Ryan’s disloyal associations 1915 – 1918’.*<sup>7</sup>

The whole ‘arrangement’ resulted in rivalries in the collection of intelligence, poaching of agents, surveillance of each other, non-cooperation and, in the conduct of inquiries, private motivations, be they political or personal revenge. Many staff were amateur, poorly trained and often chosen by patronage, resulting in mediocrity and a narrowness of outlook.

*Sections of Military Intelligence resorted to relying heavily on the willing services of the large private spy network of a very well-endowed and politically extreme employers’ organisation and a section of the Catholic Church.*<sup>8</sup>

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<sup>4</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1, p.11.*

<sup>5</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1, p.7.*

<sup>6</sup> Hocking, Jenny, *Beyond Terrorism: The Development of the Australian Security State*, Allen and Unwin, 1993, p. 44.

<sup>7</sup> Hocking, Jenny, *Beyond Terrorism: The Development of the Australian Security State*, Allen and Unwin, 1993, p. 44.

<sup>8</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1, RCIS, p. 7.*

In the interwar period instability was fomented by the fear of revolution and the great bitterness of returned soldiers left unemployed by economic depression. There were strikes, riots and pitched street battles between police and the unemployed.

Disillusioned by the economic circumstances at home, many returned soldiers split their allegiances between the extreme left and right of politics.

Surveillance, however, was targeted almost entirely on the left of politics - members of the International Workers of the World or communists - but not at militarily trained right wing groups: the Sane Democracy League, the Home Defence League, the Old Guard and its splinter group, the New Guard (both of which were closely aligned with business) and the Victorian League of National Safety (LNS).

This is a complex story with a multiplicity of groups, organised often on a state by state basis, many attracting army support. The Old Guard<sup>9</sup> was supported by such notables as Sir Philip Goldfinch, the General Manager of Colonial Sugar Refinery and Sir Robert Winton Gillespie, of Gillespie Flour Mills and the Chairman of the Bank of New South Wales, Sir Kelso King, Chairman of Mercantile Mutual, Colonel Somerville of the Royal Agricultural Society and Colonel Bertram, Secretary of the Royal Sydney Golf Club.<sup>10</sup> According to HE Jones, the Director of the CIB, Sir Thomas Blamey, then Commissioner of Police in Victoria, headed the LNS.<sup>11</sup> These groups had militias with thousands of members; the LNS in Victoria alone was thought to have 30,000 men.

Eris O'Brien and P J Ryan in NSW and BA Santamaria in Victoria developed a Catholic network, largely in the Trade Unions and the Labor Party that reported regularly to the security services and, after 1948, to ASIO.<sup>12</sup> The Royal Commission reported that the employment of the Catholic network by Military Intelligence, the CIB and ASIO lasted longer than any of the others. ASIO stated that Santamaria was an 'enormous help'.<sup>13</sup>

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<sup>9</sup> Various known as the Goldfinch/Gillespie Committee or the Movement. *Royal Commission into Intelligence Services, Seventh Report, Vol 1, RCIS*, p. 127-128.

<sup>10</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1*, p. 126.

<sup>11</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1*, p. 127.

<sup>12</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1*, p. 162.

<sup>13</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1*, p. 162.

Not only were these organisations, with the exception of the New Guard, not under surveillance, they were conduits of information to the security services about activities on the left of politics. Even the efforts of the Labor Prime Minister to separate these organisations from official arms of the state were unsuccessful. In March 1931 the Scullin Government through the Army Board issued a directive that the 'Army dissociate itself from the LNS' or from any organisation which claimed 'to assist the State Police in the maintenance of law and order in an emergency'. This directive was ignored by many army officers.<sup>14</sup>

## **The Establishment of ASIO**

The Chifley Government created ASIO during the early stages of the Cold War as wartime allegiances gave way to post war suspicion.

At the end of the Second World War and with a Labor government in charge, the United States withheld security information from Australia. At a meeting in the Pentagon of the State/Army/Navy/Air-force Coordinating Sub-Committee (SANACC) for Military Information Control it was argued:

*'[B]ecause of political immaturity, a leftish government influenced by Communist infiltrated labour organisations and the fact that Australian government activities have violated the basic security principle that classified information should not be divulged to unauthorised persons, Australia is a poor security risk.'*<sup>15</sup>

The recently published, *The Spy Catchers: The official history of ASIO 1949-1963* illustrates that US reticence was not without basis. Intelligence gathered under the Venona Project pointed out that some CPA members were engaged in espionage in Australia. However, it is also noted that:

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<sup>14</sup> *Royal Commission into Intelligence Services, Seventh Report, Vol 1*, p. 128. Also Cain, Frank, *Origins of Political Surveillance*, p. 220.

<sup>15</sup> Cain, Frank, *Origins of Political Surveillance*, p. 298. Information was sourced from the National Archives Washington.

*‘... it is difficult to discern to what degree SANACC was guided by concern linked to the Venona intercept or rather was fuelled by prejudices of the US Ambassador in Australia, Myron Cowen, and his Naval Attache, Commander Stephen Jurika.’<sup>16</sup>*

In 1949, in response to espionage activities in Australia and growing concerns about Australia’s security as well as pressure from the United States and particularly the United Kingdom, the Prime Minister, Mr Chifley, by administrative fiat, established ASIO, the Australian Security Intelligence Organisation. Neither the establishment of ASIO nor direct representation by the Chifley Government in Australia to the Administration in Washington brought any change to the embargo on Australian access. This was not lifted until after the election of the Menzies Government in December 1949.

The document governing the establishment of ASIO was a single page memorandum – startling in its simplicity and significance. It gave little guidance, but did seek to emphasize the defensive and non-executive nature of the organisation—that is, it was given no police-like powers to detain—confining it to counter-espionage rather than broad community surveillance. Chifley appointed a judge of the South Australian Supreme Court, Justice Geoffrey Reed, as head of the new organisation. Reed was a World War One veteran, previous head of the South Australian National Security Committee and, as his legal career had illustrated, a committed civil libertarian.<sup>17</sup> His tenure was marked by a bipartisan approach. The Australian Dictionary of Biography notes:

*Reed faced a difficult and politically delicate task. He set about his job in a dedicated and methodical manner, his integrity and bipartisan approach winning him the early confidence of his political masters.*

*The new organization made its presence felt within a few months. By June 1949 the prime minister had authorized the first telephone-interception*

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<sup>16</sup> Horner, D. *The Spy Catchers: The official history of ASIO 1949-1963*, 2014 p. 65.

<sup>17</sup> <http://adb.anu.edu.au/biography/reed-sir-geoffrey-sandford-11495>.

*operations and on 8 July C.P.A. headquarters in Sydney was raided at A.S.I.O.'s direction.*<sup>18</sup>

Twelve months later, with the Menzies Government in office, Colonel Spry, the Director of Military Intelligence, succeeded Reed as the head of ASIO. He would remain Director General of ASIO for almost twenty years – retiring only when ill health forced him to in 1970.

From the outset there was an argument about accountability. In 1956, the Prime Minister, Mr Menzies, when introducing the ASIO Bill, which was to put ASIO on a legislative footing for the first time, stressed that ASIO had an advisory function only, no police function, no executive function, no capacity to direct departments of state. However, the Bill did not establish clear lines of ministerial accountability. Menzies argued that too great a ministerial oversight would suggest political interference:

*The bill makes no attempt to specify the manner in which, or the degree to which, ministerial authority should be exercised in relation to the service. It is clearly impossible, and in any event undesirable, for a Minister to exercise in this field the same degree of supervision and authority that he exercises in his own department.*<sup>19</sup>

The Leader of the Opposition, Dr Evatt, disagreed. He argued that there must be ministerial responsibility for the organization. He believed that only Ministers were subject to election and therefore ultimately answerable to the public. This began a long argument between the left and right of politics about the nature and degree of supervision and scrutiny that should apply to intelligence agencies. Evatt said:

*We want ministerial responsibility in a general sense. I do not mean that we want detailed consideration of every particular activity of the organization, but there must be a supervisory Minister responsible to the Parliament and to the people.*<sup>20</sup>

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<sup>18</sup> <http://adb.anu.edu.au/biography/reed-sir-geoffrey-sandford-11495>.

<sup>19</sup> House of Representatives Debates, 24 October 1956, p.1747.

<sup>20</sup> House of Representatives Debates, 31 October 1956, p. 2010.

In practice, Colonel Spry reported to the Attorney General with authority to directly approach the Prime Minister on matters of national importance, while both the Attorney General and Prime Minister were routinely briefed by Spry and his successors.

However, Dr Evatt continued to argue for accountability similar to that given to the operation of security assessments during World War Two:

*One of the first things that the Labor Government had to do in 1942, after the war with Japan had commenced, was to pass special national security regulations commanding the [security review] tribunal to give the substance of what was alleged against a person to that person so that an answer could be given.*<sup>21</sup>

A committee appointed by Prime Minister Curtin reviewed decisions about internment of enemy aliens and subsequently reduced the numbers interned from 7,500 to 500. Evatt noted that none of the decisions were queried and none of those released offended against security.<sup>22</sup> He predicted that an intelligence organisation that was not subject to review could become a political police force in that it would come to ‘regard non-conformity and criticism of institutions as signs of disloyalty or subversion.’<sup>23</sup>

In the 1980’s, Dr John Burton spoke for the first time about an experience he had soon after he became Secretary of the Department of External Affairs. In 1947, before the establishment of ASIO, Burton said he was approached by Colonel Spry, who was then Director of Military Intelligence. Burton stated:

*I was asked by ... Spry to swear an oath additional to that which public servants swear, namely not to convey to anyone, even my minister, any information I might receive from intelligence services.*<sup>24</sup>

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<sup>21</sup> House of Representatives Debates, 31 October 1956, p. 2010.

<sup>22</sup> House of Representatives Debates, 31 October 1956, p. 2014.

<sup>23</sup> House of Representatives Debates, 31 October 1956, p. 2014.

<sup>24</sup> Dr John Burton, National Times, 28 Sept – 4 Oct 1984, p. 11.

While such authorisations may have been a requirement of the then Joint Intelligence Committee to access classified or secret documents, there is no doubt Dr Burton refused to sign.

According to Burton, Spry's suspicion of Labor Ministers extended beyond merely a reluctance to inform them of intelligence findings; it was, he believed, the role of intelligence agencies to supervise the electoral mandate. Dr Burton said that Col Spry told him:

*It was the role of security services to protect democracies against themselves. Parties could come into power on a program that promised better living standards, but once in office they might act outside this mandate. ... It was the duty of intelligence and security officials to ensure that this did not happen by keeping such parties out of office.*<sup>25</sup>

Of course many argue that Dr Burton was not a dispassionate observer. Coral Bell, former diplomat and academic, went as far as to say that Burton was the principal contact of Soviet Intelligence in Canberra<sup>26</sup>. However it is worth noting that in 1966 Spry himself said:

*There has never been any indication that Burton is a member of the Communist Party or a Communist. He has a number of associates who are Communist and pro-Communist and his radical views, such as his statement in a radio program in March 1959, when he implied that South Korea was the aggressor in the Korean War, have brought his impartiality into question. There are indications that the Communist Party, particularly in the mid 1950s, whilst unsure of Burton's political sympathies, cultivated him for their own particular purposes.*<sup>27</sup>

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<sup>25</sup> Dr John Burton, National Times, 28 Sept – 4 Oct 1984, p. 11.

<sup>26</sup> Ball, D. Soviet Spies had protection in very high places. *The Australian*. 14/1/2012.

<sup>27</sup> Horner, D, *The Spy Catchers: The official history of ASIO 1949-1963*. Allen & Unwin: Sydney. p. 304.

In the late 1940s some officers in the Department of External Affairs were considered with good reason to be security risks. ASIO focused in particular on two officers from the Department, Jim Hill and Ian Milner. These concerns were valid—their espionage had been revealed by the Venona Project.

Not only did justified concerns exist about post-war espionage and the involvement of individuals like Hill and Milner, there were also divergent views about how Australia's foreign policy and foreign relations should be conducted. An example of this was the obvious tension between Dr Burton, the Secretary of the Department of External Affairs, and Sir Frederick Shedden, Secretary of the Department of Defence.

Dr Burton told the Royal Commission on Espionage in 1954 that in 1949 Australia's foreign policy was one of 'open diplomacy'. Open diplomacy was an evolving theory of international relations inspired in part by US President Woodrow Wilson's approach to the Versailles Peace Conference and based on what were believed to be the flaws in diplomatic relations which led to World War 1. Openness, Wilson believed, was both democratic and liberal and would build confidence between states, avoiding the distrust that often precedes war. Article 1 of Wilson's 14 Points was: "Open covenants of peace, openly arrived at, after which there shall be no private understandings of any kind but diplomacy shall proceed always frankly and in the public view." For Wilson, transparency was key to stable international relations.

In line with this policy, Burton requested the Counsellor of the Soviet Embassy to meet with him once a week at the department, in an effort to persuade the Soviets not to veto Australia's resolutions in the United Nations Security Council. However, his experience was that it was difficult to 'get them to take an interest and even come to listen'.<sup>28</sup>

While Menzies' stated concerns about too close a ministerial supervision of ASIO might have had some validity in theory, in actuality the vagueness of its purpose and lines of accountability facilitated rather than prevented its political partisanship. Throughout the 1950s and 1960s, the nature and attitudes of the Director General and

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<sup>28</sup> Evidence given in-camera to the Royal Commission on Espionage, 2 Nov. 1954. p. 7.

his close personal relationship with the Prime Minister contributed to concerns about partisanship. Spry's and Menzies' successors did not share such close ties.

Enormous discretion was vested in the Director General of ASIO. He could advise Ministers where he was satisfied that it was necessary to do so. That choice, in part an outcome of the 'independence' of the agencies, could also be a means by which agencies could deceive a government. Equally, if there were a close, personal and sympathetic relationship between agency or agency head and ministers, such as between Spry and Menzies, the power to advise when necessary could be used to provide political support. Over the next 20 years, concerns about the partisan nature of intelligence gathering and intelligence matters became entrenched on the left of Australian politics.

Suspicion about this partisanship reached its zenith in the Australian Labor Party with the defection of Vladimir Petrov on 3 April 1954. Petrov was Third Secretary of the Soviet Embassy in Canberra and a Colonel in the KGB. Prime Minister Menzies informed the House of Representatives of the defection on 13 April 1954.

The timing of Menzies' announcement coincided with the Opposition Leader Dr Evatt being absent from the House. He was in Sydney. *The Spy Catchers* notes that Evatt:

*asked to see Spry about the Petrov defection, but Spry replied that Menzies had told him not to speak to him, but that he should direct any queries directly to the Prime Minister.*<sup>29</sup>

Menzies' failure to inform Evatt, after the defection and before his public announcement, and his instruction to Spry not to speak to Evatt, betrays Menzies' political motives. Petrov's defection and the early hearings of the Royal Commission on Espionage dominated the 1954 Federal Election held on the 29 May 1954 and contributed to a narrow Labor defeat.

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<sup>29</sup> Horner, D, *The Spy Catchers: The official history of ASIO 1949-1963*. Allen & Unwin: Sydney, 2014. p. 343.

ASIO inherited approximately 250,000 dossiers on Australian citizens<sup>30</sup> and over the years that followed that swelled to hundreds of thousands more. The scale and nature of the surveillance became a matter of great controversy, especially during the Vietnam War and a new conscription debate in the 1960s and 70s.

### *The First Hope Royal Commission*

In light of the close ties between the intelligence agencies and one side of politics and the perception of partisan motives that came with this familiarity, the Whitlam Government established the Hope Royal Commission in 1974. Justice Hope investigated the past practices of ASIO and the extent to which the agency was prepared to deal honestly with the Labor Government. The controversial ‘raid’ of ASIO by the Attorney-General, Lionel Murphy, who believed ASIO was not telling him the truth about the intelligence collected on the unrest in the Yugoslav community, illustrated the delicate line between political responsibility, accountability, transparency and independence. While it was seen as intemperate and improper at the time, Murphy’s raid also illustrated the extent to which the Labor Government had lost trust in the impartiality and objectivity of ASIO.

The Hope Royal Commission was the first real scrutiny of the organisation since its creation. The Commission was to last over three years and it was a thorough examination of all the then agencies – ASIO, ASIS (at that time undeclared) and the Joint Intelligence Organisation, since renamed the Defence Intelligence Organisation (DIO).

Hope’s criticisms were significant, at times scathing. His conclusions were often expressed as ways ASIO should not behave in future, rather than as statements about specific past wrongs. For example:

- *I have found evidence of cases where Members of Parliament have written to Attorneys-General seeking information from the Minister about a particular person. It is in my view improper for MPs to ask and for Ministers to transmit*

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<sup>30</sup> House of Representatives Debates, 31 October 1956, p.2014.

*and for the Director General to communicate information on persons by way of reply.*<sup>31</sup>

- *ASIO should communicate information on individuals to state authorities only where their employment affects national security, narrowly defined. That persons may hold radical views or may induce radical action disrupting an institution's affairs are not matters justifying communication by ASIO.*<sup>32</sup>
- *ASIO does not and should not conduct surveillance of employers' organisations or trade unions. However, surveillance of left wing radical organisations has led to ASIO obtaining information concerning the activities of trade unions. Activities do not affect security merely because they make for or do result in industrial disruption.*<sup>33</sup>
- *Evidence was made available that ASIO has in the past provided selected people with secret intelligence material for publication. It is no part of ASIO's intelligence dissemination to publicise threats to security. It has no authority to engage in propaganda. It is a misconceived enterprise resulting in discredit to ASIO.*<sup>34</sup>
- *The Special Projects Section had as its role covert spoiling activities, counter propaganda activities, and the production of overt papers and studies. Action was taken by this section to build and maintain liaison with selected contacts in a variety of fields, including the media. These activities were improper in the extreme, all the more so because ASIO officers have shown a tendency to think of anyone they chose to call left wing as subversive.*<sup>35</sup>

By way of example: Robert Mayne, a Sydney journalist, claimed in 1970 to have received from then NSW Liberal Party member and Editor of the Bulletin, Peter Coleman, ASIO files on five 'left wingers' to be used in articles in the magazine, *Analysis*, registered by Mr Coleman. The intention was to discredit radical individuals, members of the ALP and political organisations such as the Vietnam

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<sup>31</sup> Royal Commission into the Intelligence Services, Vol 4, p.116.

<sup>32</sup> Royal Commission into the Intelligence Services, Vol 4, p. 124.

<sup>33</sup> Royal Commission into the Intelligence Services, Vol 4, p. 125.

<sup>34</sup> Royal Commission into the Intelligence Services, Vol 4, p. 128.

<sup>35</sup> Royal Commission into the Intelligence Services, Vol 4, p. 130.

Moratorium.<sup>36</sup> Between 1962 and 1972, ASIO distributed 67 sets of briefing papers to the Australian press.<sup>37</sup>

The Hope Royal Commission recommendations, published in its first report in 1977, have influenced the structure and oversight of the intelligence agencies ever since. A new act to give much more specific legislative basis to ASIO was passed in 1979. The Hope Commission recommended the separation of intelligence collection from policy, and the separation of intelligence analysis from intelligence collection.

The Office of National Assessments (ONA) was to be established as statutorily independent from government and to be responsible for reviewing Australian foreign intelligence collection. Within ASIO, where both collection and assessment of intelligence occurs within the one agency, Hope recommended that, while Ministerial direction and control remain in the broad, the Director General would be statutorily independent on whether a matter was relevant to security and the detailed conduct of intelligence operations. He also believed that the Director General of ASIO was responsible for ensuring that his advice to Ministers was formulated objectively and on the basis of comprehensive information, independently verified.<sup>38</sup> Finally, Hope asserted that intelligence activities should be conducted in accordance with Australian law.<sup>39</sup>

### ***The Second Hope Royal Commission***

In 1983, Prime Minister Hawke established a second Royal Commission under Justice Hope. Its intention was to review the implementation of the recommendations made six years earlier. However, it was required to consider two other events that intervened and to some extent overwhelmed its core work. They were the government's handling of the Combe-Ivanov affair and a shambolic ASIS training exercise at the Sheraton Hotel in Melbourne, where the hotel and local police were

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<sup>36</sup> Hocking, Jenny, *Beyond Terrorism: The Development of the Australian Security State*, Allen and Unwin, 1993, Hocking, p. 85

<sup>37</sup> Cain, Frank, *ASIO: An Unofficial History*, p. 204.

<sup>38</sup> Royal Commission into the Intelligence Services, Vol 4, p. 175-176.

<sup>39</sup> Office of National Assessments, History – Australian Intelligence Community, [www.ona.gov.au/history/australian-intelligence-community.html](http://www.ona.gov.au/history/australian-intelligence-community.html)

unaware of what was going on, frightened civilians were menaced and some ASIS staff were arrested by police.

Justice Hope reported that much that he had previously recommended had been implemented. He noted that:

*the Office of National Assessments had been established by legislation in 1977; JIO had been substantially reorganised; ASIO operated under a new Act of Parliament, passed in 1979; ASIS and DSD were now publicly acknowledged, although not with statutory authority; and DSD had been raised in status from a Division to a Directorate.*<sup>40</sup>

In response to the Second Hope Commission, the Hawke Government also proposed a parliamentary committee be established to oversee ASIO, a move opposed by the Coalition parties. They claimed the committee would be a device for the ALP probing into ASIO's secrets.<sup>41</sup> According to Neil Brown, the Shadow Minister for Foreign Affairs, it would cause the demise of ASIO. He told the House of Representatives:

*We then get into the realms of the utterly ridiculous, the dreamland of the proposed Parliamentary Joint Committee on the Australian Security Intelligence Organisation. It is not enough for the Government to give the Security Appeals Tribunal more powers; it is not enough to neutralise ASIO by defining the matters it can investigate; it is not enough to set up the position of Inspector-General to watch over the shoulder of ASIO and the other intelligence organisations. In addition we will now have a parliamentary committee.*

*There are people whose conduct with respect to this debate on security services and whose behaviour in saying what they have give one very grave doubt about whether they are loyal to this country. That must certainly be true. So far as the proposed parliamentary committee is concerned, it will utterly,*

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<sup>40</sup> Dr Peter Edwards, *Robert Marsden Hope and Australian Public Policy*, Published by the Office of National Assessments, 2011, p. 37.

<sup>41</sup> Cain, Frank, *ASIO: An Unofficial History*, p. 276.

*excessively, unfairly and improperly restrict the activities of ASIO and has nothing to commend it.*<sup>42</sup>

For some in the Coalition, the very suggestion that there be parliamentary oversight and public scrutiny of ASIO questioned the patriotism of the Hawke Government. The Coalition refused to supply members to the committee until 1988, and promised to dissolve it if elected to office.<sup>43</sup>

Despite the intransigence of some conservatives, the second Hope Royal Commission, in 1983, and the Samuel and Codd inquiry of 1994 produced much greater oversight and accountability of the Australian intelligence agencies – an elaborate system of intelligence gathering, analysis and oversight.

## **The Intelligence System Today**

The main acts of Parliament governing these agencies are: the *ASIO Act 1979*, the *ONA Act 1978*, and the *Intelligence Services Act 2001*. They define the powers and the purpose of the agencies and seek to set out the limits on their activities.

Today there are six intelligence agencies in the Australian Intelligence Community (AIC):

Four of them undertake collection:–

- ASIO, the Australian Security Intelligence Organisation, established in 1949, collects intelligence domestically and also produces security assessments. Its activities are governed, both defined and curtailed, by an Act of Parliament, the *ASIO Act 1979*. ASIO is responsible to the Attorney General.
- ASIS, the Australian Secret Intelligence Service, was established in 1952, although not publicly declared until 1977, again after the Hope Royal Commission. It was not put onto a legislative footing until 2001 with the passing of the *Intelligence Services Act 2001*. ASIS collects foreign

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<sup>42</sup> N Brown, House of Representatives Debates, 2 June 1986, p. 4373

<sup>43</sup> Cain, Frank, *ASIO: An Unofficial History*, p. 276.

intelligence from human sources. It is responsible to the Minister for Foreign Affairs.

- ASD, the Australian Signals Directorate, (formerly DSD) was formed in 1947, based on the wartime signals intelligence organisation known euphemistically as Central Bureau. ASD collects foreign signals intelligence, largely outside Australia. ASD was given a legislative footing in 2001 and is responsible to the Minister for Defence.
- AGO, the Australian Geospatial Organisation (formally DIGO, the Defence Imagery and Geospatial Organisation), was formed within JIO and with RAAF photographic interpreters separated from DIO in 1998. The AGO collects geospatial intelligence from satellite imagery and other sources. AGO was given a legislative footing in 2004 and is responsible to the Minister for Defence.

The other two agencies are analytical agencies: –

- DIO, the Defence Intelligence Organisation, again part of Defence's traditional intelligence system, was formally created after World War II as the Joint Intelligence Bureau later to become the Joint Intelligence Organisation. It analyses the intelligence obtained by the Defence collection agencies and its overseas partners.
- ONA, the Office of National Assessments, formed in 1978 as recommended by the first Hope Royal Commission, assesses and analyses international political, strategic and economic developments for the Prime Minister and senior ministers in the National Security Committee of Cabinet.. It is established under its own Act of Parliament and is statutorily independent.

### ***Agency Resources***

In the period since 9/11, the size of Australia's intelligence organisations and their budgets have more than tripled. Publicly available information on ASIO's expansion provides valuable insight. As at 30 June 1999, ASIO had 565 staff<sup>44</sup> and on 30 June

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<sup>44</sup> Figures provided by the Parliamentary Library in September, 2014. These are full-time equivalent staff (FTE).

2013 this had grown to 1791.8 staff. ASIO's budget expanded commensurately from \$65.7 million in 1999-2000 to \$443.8 million (estimated actual) in 2013-14. ASIS staffing is not publicly available but their budget in the same period has risen from \$42.5 million to \$258 million. ONA's staffing has risen from 74 in 2004 (as result of the Flood Report) to 150 in 2009. Their budget has also risen from \$6.8 million in 1999-2000 to \$33.6 million in 2013-14.

Both the staffing and the funding of the Defence agencies are not readily disaggregated. However, the Flood report of 2004 provided some insights. The staffing of ASD rose about 60% from 2000 to 2004. The DIO increased approximately 12% in size in the same period with staff levels growing from about 300 to around 350 today. The AGO, had approximately 311 staff in 2004 and was seeking to recruit an additional 100 analysts. In 1999-2000, Defence reported their total staff for the Defence Intelligence Group (DIG) was 1,452 with a budget of \$161.7 million. In 2014, the budget for the same group is estimated to be \$518.6 million. The Defence Intelligence and Security Group now includes the DIO, ASD, AGO, and the Defence Security Authority (DSA).

In line with the growing size and funding of intelligence agencies, their powers have grown exponentially in the period immediately following September 11, 2001. A significant volume of legislation passed through the Parliament has given the intelligence agencies and other security agencies including the AFP unprecedented powers.

These new laws included: new terrorism offences with a broader definition of terrorism, terrorist acts and terrorist organisations; laws prohibiting the financing of terrorism or receiving funds from a terrorist organisation; laws against advocating or praising terrorism, associating with terrorist organisations or recruiting for terrorist organisations or giving support to a terrorist organisation.

New legal regimes have introduced control orders and questioning and preventative detention powers for the AFP and ASIO, increased powers for the AFP to obtain documents, increased surveillance powers for intelligence agencies and police, new

anti-money laundering rules, new stop and search powers, and new Criminal Code regulations which have listed proscribed and banned terrorist organisations.

### ***Review and Accountability of the AIC***

Currently a range of mechanisms is available to scrutinise the AIC. At the heart of these arrangements are the three pillars of oversight: Ministerial responsibility, the Parliamentary Committee on Intelligence and Security (PJCIS) and the Inspector General of Intelligence and Security (IGIS). Other arrangements include the Independent National Security Legislation Monitor (INSLM), internal review within the agencies themselves and by the ONA, internal compliance mechanisms specific to each agency, periodic commissions of inquiry, oversight of warrants by the judiciary or the IGIS and sunset clauses within contentious legislation. Finally, the Security Appeals Division of the Administrative Appeals Tribunal (AAT) reviews adverse and qualified ASIO security assessments.

There have been numerous formal reviews of or relating to the AIC over the years, notably:

- The Royal Commission on Espionage 1954 – 55. Following the Petrov defection, in April 1954. The Prime Minister, Robert Menzies, instituted this commission to inquire into and report on Soviet espionage in Australia.
- The Royal Commission on Intelligence and Security 1974-77. Appointed by Prime Minister Gough Whitlam in August 1974 to inquire into the structure of security and intelligence services, the nature and scope of the intelligence required and the machinery for ministerial control, direction and coordination of the security services.
- The Protective Security Review 1978-79 commissioned by the Fraser Government following the bombing of the Sydney Hilton Hotel in February 1978. The review examined the threat of terrorism, protective security arrangements for the Commonwealth and co-operation between national and state governments and agencies.
- The Royal Commission on Intelligence and Security 1983-84. Established in May 1983 by Prime Minister Bob Hawke to examine progress in implementing the previous recommendations; arrangements for developing

policies, assessing priorities and coordinating activities among the organisations; ministerial and parliamentary accountability; complaints procedures; financial oversight and the agencies' compliance with the law.

- The Samuel and Codd Royal Commission 1994 – 95. The Minister for Foreign Affairs, Gareth Evans, instituted a review of ASIS on 21 February 1994 to inquire into the effectiveness and suitability of existing arrangements for control and accountability, organisation and management, protection of sources and methods and resolution of complaints.
- The Flood Inquiry 2004. An internal inquiry conducted by Mr Flood on the recommendation of the Parliamentary Joint Committee on ASIO, ASIS and DSD following the findings of that committee on the intelligence provided to government on Iraq's weapons of mass destruction.
- The Taylor Review of ASIO staffing was commissioned by the Howard Government in 2005. Mr Alan Taylor, former Director General of ASIS, recommended a significant boost to ASIO resources and staffing in order to meet the growing threat of terrorism and international espionage in Australia.
- Independent Review of the Intelligence Community 2011. In 2011, Prime Minister Julia Gillard appointed Robert Cornall and Dr Rufus Black to conduct an internal review pursuant to the recommendation of the Flood Inquiry that a review of the AIC be conducted every 5 to 7 years.
- In addition, there have been inquiries into counter terrorism legislation, notably the Security Legislation Review Committee conducted by Simon Sheller in 2006, followed up by the Parliamentary Joint on Intelligence and Security. Both of these inquiries were mandated by the legislation as an automatic review mechanism. Ric Smith, former Secretary of the Department of Defence, looked into Homeland and Border Security in 2008.

Ministers, through the National Security Committee of Cabinet (NSC), set the priorities of the intelligence agencies, broadly once a year, although this might be changed by necessity at any time. What is agreed by relevant ministers on the NSC (Prime Minister, Deputy Prime Minister, Treasurer, Foreign Minister, Defence Minister, Attorney-General and Minister for Immigration) and the heads of agencies are very broad parameters in an order of priority. Agencies then collect and analyse

material as they see fit to meet these priorities, but within the terms of the Acts that have been established to govern their activities. Ministers receive daily written briefing papers from the two analytical agencies on the agreed priorities. Direct briefings from the collection agencies are less common.

Apart from the setting of general priorities, the first level of scrutiny of agency activities is through the warrant system. Ministers must sign warrants or authorisations for ASIO's surveillance of Australian citizens or non-citizens or for the questioning and detention of Australian citizens under the ASIO Act. Warrants under ASIO's questioning and detention powers must be approved by the Minister and issued by an appointed judge or magistrate. Warrants are not required for the listening to or capture of telecommunications by ASD, whose surveillance has predominantly operated outside Australia. However, where ASD does collect information that involves Australian citizens then they too require authorisation in writing from their Minister. ASIO questioning warrants must be reported to the IGIS so that the IGIS can decide whether to attend the questioning. Other warrants are covered in IGIS's inspection program.

The PJCIS, established by the *Intelligence Services Act 2001* (ISA), examines the administration and expenditure of all AIC agencies and reports annually to the Parliament. The committee is specifically prohibited from examining the operations of agencies. However, it has looked into intelligence on the Iraq War and does have a role in examining counter-terrorism legislation and the listing of terrorist organisations.

Portfolio Budget Statements are published annually and the administration of each AIC agency (with the exception of ASIS) may, in addition to the PJCIS, be subject to questioning by a Senate Standing Committee during Senate Estimates hearings.

The IGIS fulfils the role of detailed scrutiny of the legality and propriety of the agencies' operations – specifically agencies' compliance with ministerial guidelines and directives, and respect for human rights. The Inspector General has significant powers, under the IGIS Act, to investigate concerns raised by members of the public and public officials (past and present) about the activities of the AIC. The IGIS has

the power to decide on inquiries and to enter the agencies and seek and inspect papers. The IGIS reports annually to the Parliament.

The Independent National Security Legislation Monitor (INSLM) was established in 2011 to examine the operations, effectiveness and necessity of the extraordinary legislation passed in the last 14 years to counter terrorism. The Monitor also reports annually to Parliament. He has provided expert, independent legal advice and analysis not just to the government, but also to the Parliament and the parliamentary committee on legislation that is controversial and potentially damaging to the civil liberties of Australian citizens and to Australia's democracy. The value of this advice to the Parliament and therefore to the wider public cannot be overestimated. The Abbott Government announced the abolition of this important position in March 2014, but later reversed that decision.

Committees of heads of agencies supervise the implementation of priorities, coordinate their agencies' activities, negotiate with foreign partners and provide policy advice to government on priorities.

The agencies also have permanent arrangements to review themselves. The National Security Adviser (NSA), situated within the Department of Prime Minister and Cabinet, evaluates the performance of agencies annually and reports to the Prime Minister and Ministers. ONA has a legislated role to review Australia's foreign intelligence activities and reports to the Prime Minister and contributes to the NSA's broader review. These are internal mechanisms. None of these assessments are available to the public or to the PJICIS.

As with all agencies, the AIC have a range of internal mechanisms to manage financial compliance, fraud control requirements, and compliance with the protective security policy framework. Agencies' compliance mechanisms are supported by documents, databases and software application systems that enable tracking and monitoring of compliance.

Staff, including legal advisors, are required to ensure that intelligence is obtained, stored, and disseminated in compliance with relevant statutory requirements. These

internal compliance teams also ensure that agency staff adhere to internal agency policies and procedures. All staff are required to attend regular compliance and accountability training which is compulsory for all new staff. Compliance reporting is regularly provided to senior management.

Internal processes have been established to support the rigour and independence of assessments by encouraging internal review and debate. These processes allow analysts to test assessments and underlying assumptions, giving them the opportunity to raise concerns with an assessment and have those concerns heard, managed and recorded. This process improves analytical quality.

Despite all the mechanisms in place, the integrity of the actions of agencies remains dependent on the quality and integrity of their leaders, and on their willingness to adhere not only to the letter but also the spirit of the law.

## **Contemporary Issues**

Today's legal framework specifies that agencies must exclude from their functions:

*Undertaking any activity for the purpose of furthering the interests of an Australian political party or other Australian political organisation.*<sup>45</sup>

However, despite all the changes since the Hope Royal Commission, the agencies are still the subject of controversy and a degree of suspicion – especially in the press and the court of public opinion. Part of the problem today lies in the enormous changes made to the resources and powers of the intelligence agencies since the attack on the World Trade Center in 2001. There has also been a series of actions taken by democratic governments, which have been very controversial, not just in changes to the law, but in decisions to go to war, the treatment of people detained – either as a result of war or within states on terrorism charges - and the extension of state surveillance to unprecedented levels.

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<sup>45</sup> *Intelligence Services Act 2001*, s11

One principle continues to be vital and needs to be reiterated: the greater the power, the greater the need for scrutiny. This is critically important in areas that affect the liberties and freedoms of individuals or decisions relating to war.

### ***The use of intelligence in the Iraq War***

The decision to go to war in Iraq raised questions in Australia about the quality of intelligence assessments and the public use the government made of intelligence on Weapons of Mass Destruction (WMD). The parliamentary inquiry<sup>46</sup> did not receive all the pre-war assessments, but despite the limitations inherent in its powers under the ISA, it was assured by the Director of the Office of National Assessments that it was given a ‘reasonable reflection of what was said’.<sup>47</sup> The committee found that ‘the AIC assessments are more moderate and cautious [about the existence of Iraq’s WMD] than those of their partner agencies, particularly those of the United States. ... [That] the pre-war assessments that [were] most accurate were those that were most sceptical. These were the assessments ... provided by DIO.’<sup>48</sup> This view on the intelligence on Iraq was one largely endorsed by the Flood inquiry which followed.

The committee was most critical of the government’s use of the intelligence prior to the decision to go to war. The government claimed that intelligence proved that ‘Iraq possessed WMD in large quantities and posed a grave and unacceptable threat to the region and the world, particularly as there was a danger that Iraq’s WMD might be passed to terrorist organisations.’<sup>49</sup> As the committee found: ‘This is not the picture that emerges from an examination of the assessments provided to the committee by Australia’s two analytical agencies.’<sup>50</sup> There has been no further inquiry into this issue.

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<sup>46</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Intelligence on Iraq’s weapons of mass destruction*, December 2003. Tabled 1 March 2004.

<sup>47</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Intelligence on Iraq’s weapons of mass destruction*, December 2003, p. 27.

<sup>48</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Intelligence on Iraq’s weapons of mass destruction*, December 2003, p. 82.

<sup>49</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Intelligence on Iraq’s weapons of mass destruction*, December 2003, p. 93.

<sup>50</sup> Parliamentary Joint Committee on ASIO, ASIS and DSD, *Intelligence on Iraq’s weapons of mass destruction*, December 2003, p. 93.

The role of intelligence agencies in the rendition and torture of Australians during that war remains highly controversial. By contrast with Australia, the United Kingdom has conducted at least six major inquiries into these issues: two parliamentary committees – the Foreign Affairs committee and the Intelligence committee, the Hutton Inquiry into the death of David Kelly, the Butler Inquiry to review the intelligence on WMD, the Chilcot Inquiry, which had access to Cabinet papers and members, into the decision to go to war and the Gibson Inquiry into the role of the intelligence agencies in the process of rendition and torture.

### ***Terrorism laws and rights of individuals before the law***

In the heightened atmosphere of war and terrorism there is a danger that proper effect will not be given to important measures to safeguard the rights of Australian citizens. In November 2007, Justice Adams in the NSW Supreme Court made findings very critical of ASIO in its dealings with Mr Izhar Ul-Haque in November 2003. The judge ruled certain evidence inadmissible and accused ASIO officers of oppressive and improper conduct and possible offences of false imprisonment and kidnapping at common law and unlawful trespass. These serious accusations caused the prosecution to withdraw the charges. The IGIS decided to investigate the matter. He interviewed 14 ASIO officers in the course of his inquiry; however, Mr Ul-Haque did not respond to invitations to appear before him. On the basis of evidence before him, the IGIS did not recommend further action against the ASIO officers. However, he noted that ‘ASIO has no powers of arrest, or powers to stop and search’<sup>51</sup> and he did warn ASIO of the need to take care in the exercise of its powers, on the assumptions it made about the reactions of citizens when confronted by officers of security agencies and on the strict adherence to the terms of its warrants. He noted that it was open to Mr Ul-Haque to pursue remedies for false imprisonment.

Also, in the case involving Joseph ‘Jihad Jack’ Thomas, the Victorian Court of Appeal overturned his conviction because admissions he made whilst in custody in Pakistan had been obtained by ASIO and Australian Federal Police (AFP) agents contrary to Australian legal safeguards.

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<sup>51</sup> Inspector General of Intelligence and Security, *Report of inquiry into the actions taken by ASIO in 2003 in respect of Mr Izhar Ul-Haque and related matters, 2008, p.11. See also findings and recommendations.*

The case of Dr Muhamed Haneef revealed the capacity of counter-terrorism laws to infringe the rights of an individual and to deny just treatment. The Haneef case also highlights arguments, which have not been resolved, about the power to detain people. Dr Haneef was arrested on 2 July 2007, held for 12 days without charge, during which he was questioned for only 12 hours. He was charged with providing support to a terrorist organisation. On 27 July the Commonwealth Director of Public Prosecutions withdrew the charges due to insufficient evidence.

The Law Council of Australia has stated that the long detention was ‘in effect, primarily used to deny Dr Haneef a timely bail hearing and that the process was a misuse of the ‘dead time provisions of the Crimes Act under which he was charged.’<sup>52</sup> On his ‘release’ when the charges were dropped the Minister for Immigration cancelled his visa on character grounds. In 2010, Dr Haneef returned to Australia to seek damages and was awarded an undisclosed but reportedly substantial amount of compensation. The decision of the Minister for Immigration to cancel the visa was widely criticised, notably at the time by the Head of the Bar Council of Australia, Stephen Estcourt.

### ***Disclosure of reasons for adverse assessments***

There are also questions about whether ASIO should disclose its reasons for adverse assessments. These questions often arise in relation to immigration cases. Adverse findings by ASIO relating to Australian nationals can be appealed to the Security Appeals Division of the AAT; however neither the applicant nor his lawyer may be present for the closed part of the hearing when ASIO presents its case. The Tribunal has urged that applicants be allowed to brief a security-cleared lawyer to appear on their behalf<sup>53</sup>. This would be consistent with ASIO’s questioning and detention powers, where lawyers are permitted under ss34F(1)(d), 34TA and TB and 34U.

In May this year the Parliament reasserted the rights of ASIO to make assessments affecting refugees in secret and maintained the system that those assessments cannot

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<sup>52</sup> Law Council of Australia, *Submission to the Clarke Inquiry into the case of Dr Haneef*, 16 May 2008, p 15, 17.

<sup>53</sup> Reported in Saturday Paper, Debra Jopson, *Inside ASIO’s Files, March 22-28 2014*

be reviewed by an independent tribunal. In relation to adverse assessments by ASIO against Sri Lankan asylum seekers, Professor George Williams noted in the Sydney Morning Herald on 20 May 2014:

*It is dangerous for any government to have power to deny a person their liberty on the basis of unsubstantiated and untested information. The problem is magnified here because the detention can last the rest of a person's life.*

A High Court challenge to such indefinite detention failed in 2012. The response of the Gillard Government to the problem was to appoint a former Federal Court Judge to review ASIO's adverse assessments. Despite several assessments being changed as a result of closer scrutiny the current government will terminate this appointment as at December 2014.

This issue becomes even more pertinent with proposed new laws that would revoke Australian citizenship for dual nationals.

### ***Surveillance***

In May 2013 Edward Snowden flew to Hong Kong and subsequently to Moscow having offered large amounts of information (an estimated 1.7 million documents) collected by the National Security Agency of the United States to the Guardian newspaper and the Washington Post. In June last year the newspapers began publishing excerpts of the material provided to them by Mr Snowden. They revealed a massive program of collecting records of every phone call that every American makes as well as those of millions of people around the world. It included email address lists, mobile phone user locations and information gained from hacking into the data hubs of Google and Yahoo. This surveillance included the leaders of friendly nations.

The shock of these revelations is related to the scale of the operations and the indiscriminate nature of collection.

Snowden's revelations alleged similarly broad scooping up of information in Australia - possible surveillance of the phones of the President of Indonesia and his wife.

Coincidentally, just as Snowden was revealing the National Security Agency programs, Australia's Parliamentary Joint Committee on Intelligence and Security was considering further broad ranging changes to Australia's intelligence and surveillance laws, including, most controversially, metadata retention. Organisations as diverse as the Law Council of Australia, Liberty Victoria, the Human Rights Centre, the Pirate Party and the Institute of Public Affairs (IPA) objected. The IPA warned that:

*The imposition of such an extraordinary, systematic and universal program would render any presumed or existent Australian right to privacy empty.*<sup>54</sup>

The IGIS has supported reform of the Telecommunications Act to ensure that the privacy of citizens is properly considered. She notes that the Act starts with the broad recognition that interception is prohibited with certain exceptions, but also notes that the number of exceptions has grown and that therefore there is a need to reassert the importance of privacy. She has also argued that ASIO should report to Parliament annually on the use of its surveillance powers. This occurs in similar agencies overseas.

In a similar vein, the Australian Information Commissioner, Professor John McMillan AO, has argued that the intelligence agencies should be made subject to Freedom of Information (FOI) laws in the same way that the Central Intelligence Agency (CIA) and the National Security Agency in the United States are.

Terrorism has been an enabler of a new phase of intelligence activity with the added dimension of the new technological capacities of governments. It has brought with it all the old challenges: security and community safety versus privacy and personal

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<sup>54</sup> Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, May 2013, p. 186.

freedom, freedom of speech and freedom from government intrusion. Many of the curbs that were placed on intelligence agencies as a result of the excesses of the 50's, 60's and 70's have been reversed by the legislative response to the attacks of 9/11 and as a result there has been a return to problems not unlike those that led to the Hope Royal Commission here and the Church Committee inquiry in the US. Mark Danner in the New York Review of Books stated that 'September 11 had offered the opportunity for a counterrevolution'. In support, he quoted Barton Gellman of the Washington Post:

*With Bush's consent, Cheney unleashed foreign intelligence agencies to spy at home. He gave them legal cover to conduct what he called "robust interrogation" of captured enemies, using calculated cruelty to break their will. At Cheney's initiative, the United States stripped terror suspects of long-established rights under domestic and international law, building a new legal edifice under exclusive White House ownership. Everything from capture and confinement to questioning, trial, and punishment would proceed by rules invented on the fly.<sup>55</sup>*

In April 2014, the US Senate Intelligence Committee's findings on the activities of the CIA in the 'War on Terror' were leaked. They concurred with Gellman's assessment. The story they tell represents a failure of the agencies concerned and a failure of oversight. They detail an agency operating beyond legislative scrutiny and beyond the legal framework set up after the 2001 attacks, which itself had loosened the normal protections for suspects. Specifically, the Committee found that the CIA used brutal techniques and torture on large numbers of detainees and they then misled the oversight bodies and the Justice Department about the techniques, the numbers subjected to it and the value of information obtained. They leaked classified information to the media, which was factually inaccurate about the effectiveness of the program in order to publicly justify it.

While this describes the American experience and not the Australian one, we do cooperate closely with partner agencies in the US and the UK, Canada and New

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<sup>55</sup> Danner, Mark, *He Remade our World*, New York Review of Books, 3 April 2014.

Zealand and must therefore consider all aspects of our common approaches both positive and negative. Recent information coming from the material disclosed by Edward Snowden reveals something of the nature of that cooperation and raises questions about the extent to which the cooperation between allied agencies might circumvent national laws relating to the surveillance of citizens. It is interesting to note that Hope himself:

*repeatedly asserted that Australia should develop its own capacities and should constantly re-assess the costs as well as the benefits of its alliance arrangements.*<sup>56</sup>

In response to the Snowden leaks, President Obama has redefined the principles of intelligence collection and suggested certain reforms. On the general principle, he said that ‘The United States would no longer monitor the personal communications of friendly heads of state’ and ‘the United States does not collect intelligence to suppress criticism or dissent ... or to disadvantage people on the basis of their ethnicity, race, gender, sexual orientation or religious beliefs ... or to provide a competitive advantage to US companies ... but to meet specific security requirements: counter intelligence; counter terrorism; counter proliferation and cyber security; and force protection.’<sup>57</sup>

President Obama suggested reforms of procedure including the creation of a third party, separate from the US Government, to hold the raw data, to be accessed only with the authorisation of a judge. None of this is yet in place. However, given the way intelligence operates in our globalised world, this is an issue that will require a coordinated response from all America’s allies, including Australia.

## **Principles and Procedures for Oversight Today**

Many countries are grappling with the question of how to manage expansion of their intelligence capabilities and, in the process, balance personal freedom and national security. In 2010 the United Nations Human Rights Commission published a report

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<sup>56</sup> Dr Peter Edwards, *Robert Marsden Hope and Australian Public Policy*, Published by the Office of National Assessments, 2011, p. 44.

<sup>57</sup> Nick O’Malley, *The Canberra Times*, 22 January 2014.

on ‘the promotion and protection of human rights and fundamental freedoms while countering terrorism’. The report argues that intelligence oversight fosters ‘public trust and confidence in the work of intelligence services’<sup>58</sup> and that oversight ensures that intelligence services perform their functions ‘in accordance with respect for the rule of law and human rights’<sup>59</sup>. One of the key aims of increased oversight must be that intelligence services—in all but exceptional circumstances—continue to respect the rule of law.

The UN Report of the Special Rapporteur acknowledges that given the complex range of agencies, institutions and governments operating in individual nations no one single system of oversight will suit all nations, but the report provides a number of key recommendations to guide the creation of institutional frameworks for the oversight of intelligence agencies. Firstly, the report recommends that intelligence services themselves be given robust *internal* management and control mechanisms. Secondly, the report recommends that *external* processes of review be given to a government’s executive, parliament and the judiciary. Some of these recommendations are already part of the architecture of security oversight in Australia. However, the report suggests that external frameworks and mechanisms—again where practicable—should:

*‘...have the power, resources and expertise to initiate and conduct their own investigations, as well as full and unhindered access to information, officials and installations necessary to fulfil their mandates.’<sup>60</sup>*

Security agencies are essential to our national security. Much of the information they gather is sensitive, many of their practices are necessarily secretive, so naturally any external investigation of their activities needs to be carefully calibrated. In

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<sup>58</sup> Scheinin, M. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. United Nations: New York, 2010, p. 8-9.

<sup>59</sup> Scheinin, M. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. United Nations: New York, 2010, p. 8-9.

<sup>60</sup> Scheinin, M. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*. United Nations: New York, 2010, p.9.

considering how to best construct an oversight framework it is prudent to compare Australian accountability practice with our overseas partners with whom we share common values and close security relationships.

### ***Security Oversight Overseas – The "Five Eyes" Experience***

The United Kingdom, United States, Canada and New Zealand are nations with political systems and security risks comparable to our own. They are also our partners in the 'Five Eyes' security alliance—an intelligence sharing alliance originating in the Atlantic Charter of the 1940s. In each country oversight is managed by a combination of structures that draw on executive, parliamentary and judicial oversight. Given the commonalities of governance, security capacity and security risk analysing the oversight structures of these nations provides an opportunity to think through how Australia might reshape its own regime of accountability.

#### *The United Kingdom*

The United Kingdom has a comprehensive oversight system administered by four bodies: the Intelligence and Security Committee of Parliament, the Intelligence Services Commissioner, the Interception of Communications Commissioner and the Investigatory Powers Tribunal.

The Intelligence and Security Committee of Parliament is an independent parliamentary committee established under the *Intelligence Services Act 1994*. It is a nine-member committee appointed by the Prime Minister. The committee produces an annual report to the Prime Minister and Parliament that is not subject to alteration by the Prime Minister's office. Critically, security agencies under the Act are required to disclose requested information to the committee. There is a capacity to withhold sensitive information; however this provision has never been exercised.<sup>61</sup>

The Intelligence Services Commissioner's role is to review the exercise of intrusive powers operated by security agencies and the Ministry of Defence.<sup>62</sup> The Interception of Communications Commissioner role is to review the interception, acquisition and

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<sup>61</sup> <http://isc.independent.gov.uk/>

<sup>62</sup> [http://isc.intelligencecommissioners.com/docs/40707\\_HC304IntelligenceServicesCommissioner\\_Accessible.pdf](http://isc.intelligencecommissioners.com/docs/40707_HC304IntelligenceServicesCommissioner_Accessible.pdf)

disclosure of communications data by intelligence agencies, police and public authorities. There are clear parameters for the interception of information and clear guidelines for what is appropriate. In the United Kingdom interception of information is limited to activities that jeopardise the national interest and/or can be used to detect and prevent serious crime and/or activities that impact on the economic interests of the United Kingdom. Both the Intelligence Services and Interception of Communications Commissioners are former senior judges independent of government who report annually to Parliament.

The Investigatory Powers Tribunal investigates complaints and ensures legislative compliance with the European Convention on Human Rights.<sup>63</sup> Like our Inspector General of Intelligence and Security, these offices inspect the warrant issuing process and compliance of the agencies with their governing acts of Parliament.

The combination of commissioners, committees and tribunals attempts to ensure not only a rigorous system of oversight but to provide the public with an avenue for redress if unfairly impacted by the actions of security agencies.

In addition to these oversight bodies, the United Kingdom has an Independent Reviewer of Terrorism Legislation, with responsibility for overseeing the legislation that governs powers available to intelligence and law enforcement agencies and is obligated to report annually to relevant Ministers and Parliament. The recent proposal to replace the single Independent Reviewer with a four person Independent Privacy and Civil Liberties Board is controversial and has raised questions about the continued effectiveness of the independent review in the UK.

The most recent report of the UK Intelligence and Security Committee offers much food for thought. The legislation covering their parliamentary committee, the *Intelligence Services Act 1994*, was amended in 2013. The result has been greatly enhanced powers for the committee, firstly to oversee the operational activities of the agencies and secondly the power to require information rather than request it.<sup>64</sup> Most

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<sup>63</sup> <http://www.ipt-uk.com/section.aspx?pageid=1>

<sup>64</sup> Intelligence and Security Committee of Parliament, Annual Report 2012-2013, p. 42.

importantly, the committee will have ‘increased research and analysis resources – including staff working more closely with the Agencies and able to inspect primary material at the Agencies’ premises.’<sup>65</sup> Nine staff support the secretariat of the UK committee – a senior civil service appointee, one investigator and seven other staff. A memorandum of understanding has been developed between the Intelligence and Security Committee and the Prime Minister regarding the provision of information to the committee.

### *The United States*

Arrangements for scrutiny of the United States Intelligence Community combine executive, senate and congressional oversight. There are two congressional committees – one in the Senate and one in the House of Representatives. They look at both intelligence activities and programs, including legislative oversight. They have jurisdiction over all government agencies that deal with intelligence. The Senate Committee reports quarterly. All Senators in the US Congress have access to classified intelligence assessments; members of the Intelligence Committee have access to assessments, intelligence sources and methods, programs and budgets. The President is required to ensure that the Committee is kept fully and currently informed of intelligence activities. An exception is where the President may limit information of covert action to the Chairman and Vice Chairman of the Committee.

The US Committee meets fortnightly, often hearing from Intelligence Community officials. As with most US Congressional committees, the Intelligence Committee has authorisation power for the funding of the intelligence services. They look at treaties and legislation, and they conduct reviews of programs and events. They have the powers to subpoena witnesses and documents. The House Committee’s powers are similar to those of the Senate.<sup>66</sup>

In the United States there are also Inspectors General across Federal Departments and agencies. They conduct audits, investigations and inspections. They also have

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<sup>65</sup> Intelligence and Security Committee of Parliament, Annual Report 2012-2013, p. 42

<sup>66</sup> Information from the Australian Parliamentary Library and the Committees’ web sites.

responsibility for preventing waste and promoting efficiency. Their powers are considerable in being able to subpoena information or documents; however in intelligence areas they often come under the control of the heads of agencies, for example the Secretary of Defense for defence intelligence agencies.

In addition, the President appoints a board of 16 people selected from outside the agencies to conduct performance audits, overseeing quality, quantity and adequacy of the intelligence agencies' activities. In addition, the Privacy and Civil Liberties Board, which was established in 2009, has a specific mandate relating to anti-terrorism and reports to Congress and relevant committees. Appointments, staffing and tasking of the Board have not advanced sufficiently to make an assessment of the Board's effectiveness.

The oversight powers of the House and the Senate in the United States constitute an important accountability measure for both the US intelligence community and the Congress. As Robert Gates, previous director of the CIA pointed out, the prospect of debate and questioning from the Hill is often enough to dissuade the executive and intelligence services from adopting controversial measures.<sup>67</sup> Again this represents an important oversight mechanism as the congressmen and senators are accountable to US voters.

### *Canada*

Canada is of comparable size and security capacity to Australia with an oversight framework which combines parliamentary and statutory authority. Canada does not have a specialist committee of Parliament overseeing the intelligence agencies. Oversight is delegated to a number of committees, including – the Senate Committee on Legal and Constitutional Affairs, the Senate Committee on National Security and Defence, and the House Committee on Public Safety and National Security.

In addition, Canada has a Communications Security Establishment Commissioner, which is an independent statutory officer, established under the Defence Act. This appointment is made by the Governor in Council and is a supernumerary judge or a

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<sup>67</sup>Lundberg, D. In: Baldino, D. (Ed.) *Democratic oversight of intelligence services*. Federation Press (2010).

retired judge of the Superior Court. The position is funded separately by Parliament. This position reviews compliance with the law and receives complaints. The Commissioner reports annually to Ministers and the Parliament.

In Canada, there is a non-parliamentary, independent review body, the Security Intelligence Review Committee. It is appointed by the Governor in Council (after consultation between the Prime Minister and the Leader of the Opposition) from members of the Queen's Privy Council for Canada. It looks at the performance of, and cooperation between, agencies and other law enforcement bodies as well as foreign governments and institutions and international organisations. It conducts reviews to ensure the service's activities do not involve unreasonable or unnecessary exercise of its powers. It also receives complaints. It has absolute access to documents and provides annual reports to Parliament.

Canada did have an Inspector General of the Canadian Security Intelligence Service but that office was abolished in 2012.

The Canadian oversight framework entails compliance with the law and a complaints mechanism similar to the UK system. In Canada there is an expectation that the security services will adhere to law, and importantly there is a capacity for citizens to question the activities of its agencies. Furthermore, the Canadian system sets up a system of independent review set apart from the legislature and security service.

### *New Zealand*

In comparison to Australia and the three other 'five eyes nations' the New Zealand security intelligence apparatus is modest in size. The Intelligence Community in New Zealand is made up of the New Zealand Security Intelligence Service, the Government Communication Security Bureau and the External Assessments Bureau. However, intelligence accountability measures in New Zealand still combine parliamentary and statutory authorities.

The Intelligence and Security Committee of Parliament has a statutory footing and was created to oversee the New Zealand Security Intelligence Service and the Government Communication Security Bureau. The committee is made up of the

Prime Minister, the Leader of the Opposition and three additional members agreed to in consultation between the Prime Minister and Opposition.

New Zealand has an Inspector-General of Intelligence and Security, a former judge of the High Court. The Inspector-General has a responsibility to assist the Prime Minister on accountability matters relating to the intelligence and security agencies with a particular focus on ensuring that the NZ security agencies act in compliance with international and domestic law. The Inspector-General's focus is on issues where New Zealand citizens have been adversely affected by the activities of its security agencies.<sup>68</sup>

Finally, the Commissioner of Security Warrants is a former High Court judge appointed by the NZ Governor-General on the recommendation of the Prime Minister. The Commissioner's role is to advise the Prime Minister on the merits of applications for domestic interception warrants.

New Zealand's system is one where the executive rather than the legislature is dominant. However, the New Zealand system of oversight still combines parliamentary measures—albeit in a limited sense—with independent scrutiny by former high level judicial officers.

In sum, certain aspects of the oversight capacities of each of Australia's five-eye partner nations provide useful examples and suggest possible improvements to our own. The comparable security risks and political systems in these nations suggest that we could comfortably adopt the best of these measures and apply them to our own security agencies. In the following I outline a way forward, which draws on international best practice.

## **A way forward for Australia**

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<sup>68</sup> Littlewood, J. In: Baldino, D. (Ed.) *Democratic oversight of intelligence services*. Federation Press (2010).

Effective and best practice oversight and scrutiny arrangements for Australian intelligence and security agencies are essential to ensure they retain public confidence and respect our laws and values.

A serious examination of the effectiveness of the oversight of the Australian Intelligence Community is now long overdue, particularly as the agencies' powers, functions, and resources have changed and expanded dramatically over recent years.

Achieving best practice oversight requires new thinking, additional measures, improved mechanisms and better resourcing.

To address current shortcomings, this paper proposes a PJCIS with more flexible membership, greater powers and resources, the capacity to generate its own inquiries, better coordination with the IGIS, oversight responsibility for the counter-terrorism elements of the Australian Federal Police (AFP) and mandatory sunset clauses and review for controversial legislation.

The case is made for a comprehensive review of the oversight of Australian intelligence agencies. The timing for this review is right as further security measures are brought to the Parliament for consideration. There are a number of steps that are not only worthy of debate, but which could be readily adopted to enhance our current system.

### *1. A more flexible PJCIS membership*

The PJCIS is established under Part 4 of the Intelligence Services Act. Schedule 1 of the Act contains detailed provisions about the committee's operations and appointment processes.

The committee currently has 11 members, a government majority and government chair. This should not change – however, the provision of the ISA requiring a prescribed balance of committee members between the Houses has been an unnecessary impediment to ensuring the best qualified eligible parliamentarians serve on the committee.

This constraint has meant, for example, that the current Shadow Attorney General, the Hon Mark Dreyfus QC MP has been unable to serve on the committee because of the limited number of positions available to Opposition members of the House of Representatives. More flexible committee membership provisions, without affecting the political balance of the committee, would enable the committee to benefit from his experience and expertise.

In order to ensure the PJCIS has the benefit of the service of the best and most experienced parliamentarians (only excluding those currently unavailable because of the positions they hold), I would propose that Section 28 (2) of the ISA be amended to:

- ensure there is minimum representation of one Government member and one Opposition member from both the House of Representatives and the Senate; and,
- enable the remaining 7 members of the committee to be made up of best available members from either House.

These amendments will ensure the PJCIS has the capacity to draw on those parliamentarians with the greatest expertise and experience to fulfil its critical role.

## ***2. The PJCIS and oversight of the AFP***

The AFP has critically important and growing responsibilities for counter-terrorism and national security functions. It has developed strong linkages with the Australian Intelligence Community.

The AFP conducts counter-terrorism investigations in Australia and abroad, as well as countering terrorism activities through local community engagement and capacity building with our international partners, particularly in the Asia-Pacific region.

In its June 2010 report (Review of Administration and Expenditure: No 8 Australian Intelligence Agencies) the PJCIS mounted a strong case to extend its oversight role to AFP counter-terrorism functions.

The committee formally recommended "that the *Intelligence Services Act 2001* be amended to include AFP counter terrorism elements in the list of organisations the committee reviews", and its report included suggested amendments to section 29 of the ISA to drive that outcome. The then Rudd Government did not act on this recommendation.

The AFP now plays a central role in Australia's counter-terrorism framework and to ensure comprehensive and consistent oversight arrangements it is critical that the AFP's counter-terrorism elements be added to the list of existing organisations reviewable by the PJCIS.

The remit of the PJCIS should cover the full gamut of the now broadened and integrated intelligence activities of the Federal Government. To achieve this s29 (1) of the *Intelligence Services Act 2001* should be amended to include oversight of the counter-terrorism units of the Australian Federal Police in the committee's remit.

Indeed, one of the key lessons of the post September 11 environment has been that the range of agencies that will have some involvement in counter-terrorism is substantial. The remit of the IGIS can be expanded in suitable cases to include agencies beyond the AIC (for example the AFP and the DFAT) and the same sort of thinking must be applied to the remit of the PJCIS.

### ***3. Enhancing the powers and access of the PJCIS***

Currently the ISA stipulates the functions of the committee as review of the administration and expenditure of agencies including their annual financial statements, in addition to any other matter referred by a Minister or resolved by either House of the Parliament.

The provision to the PJCIS of 'specific material which does not affect current operational activity' was also recommended by the PJCIS in its *Review of Administration and Expenditure: No 8*.

This recommendation, which was not supported by the Rudd Government, does raise the question of what, in a practical sense, the PJCIS should have access to - assuming existing legislative obstacles were reduced.

I would argue the PJCIS should have access to classified reports such as the *2005 Review of ASIO Resourcing* (Taylor Report), the *2008 Homeland and Border Security Review* (Smith Report), and the *2011 Independent Review into the Intelligence Arrangements* (Cornall Black Report).

The annual reviews of the AIC by the ONA and by the NSA – should also be made available in some form to the committee, as well as key policy documents such as the Privacy Rules under the ISA and any other policies concerning the protection of human rights (including international co-operation, and the retention and destruction of data in appropriate circumstances).

Of course, in considering the provision of such material, the critical issue arises of where to draw the line. It is clear that some types of information are so sensitive that they should not be provided to the PJCIS, even if the committee were given a broader remit.

Such sensitive information would include:

- revealing the identity of a confidential human source, or a human intelligence source;
- current or planned operations, but not necessarily past operations;
- revealing the identities of agency staff, past and present (unless this requirement was waived by the agency head);
- technical details of nonhuman intelligence sources, including cryptology;
- data or information provided by another country (unless that country consents);
- current vulnerabilities of ICT systems, installations, or infrastructures relating to national security; and
- technical capabilities which are subject to protection beyond the Top Secret level.

The PJCIS has previously proposed that a “small working group drawn from relevant Departments, Agencies and the committee” be set up to recommend the types of material which the PJCIS could access, material which should remain off-limits, and amendments to the ISA enabling any proposed changes for consideration by government. This proposal has merit, and should be implemented.

Any proposal to enable PJCIS members to have access to additional sensitive material will inevitably raise the issue of the secrecy of committee processes and the need to ensure security. Currently, strict secrecy provisions (including offences relating to publishing or disclosing evidence or documents) apply to committee members. However, if PJCIS members have access to an increased amount of highly classified information, it would be reasonable for members to be required to sign a non-disclosure statement, with serious penalties if it were ever breached.

Regardless, the demand for integrity and professionalism of PJCIS members would remain paramount.

#### ***4. Committee to be afforded the power to generate its own inquiries***

Currently the PJCIS can only, by resolution, request a matter be referred to it by the responsible Minister.

In order to ensure the authority and independence of the work of the PJCIS, the committee should be able to generate its own inquiries and work program, in addition to its statutory functions. This is a significant extension, but is essential to enhance the oversight role of the Committee. Such a remit would bring the PJCIS into line with equivalent parliamentary committees in the US and the UK.

In 2013, the UK’s Intelligence and Security Committee of Parliament was reformed by passage of the *Justice and Security Act 2013*. According to the ISC’s 2012/13 Annual Report, the committee “sets its own agenda and work program”.

In the US, both the House and Senate Select Committees on Intelligence set their own work programs, conduct hearings, receive evidence on oath, and engage in a range of detailed committee work to assist the performance and accountability of the US intelligence community.

It is time for the Australian equivalent of these committees – the PJCIS – to be given the power to generate its own inquiries if it believes, following consultation with relevant agencies, that such action is necessary and appropriate.

#### ***5. Increased resourcing of the Inspector General of Intelligence and Security***

It is critically important the resources available to the IGIS keep pace with the increased size, resourcing and power of AIC agencies. Over recent years, the role of the Office of the IGIS (OIGIS) has expanded exponentially with significant additional responsibilities - including conducting inquiries in certain circumstances involving agencies outside the AIC, and assisting the AAT with FOI matters.

The IGIS Annual Report 2012-13 noted that by 30 June 2013, the office of the IGIS (not including the IGIS herself) comprised thirteen staff - 11 ongoing and 2 non-ongoing. The IGIS staffing level had remained unchanged since 30 June, 2012. At the same time, ASIO's unclassified submissions to the PJCIS for its Review of Administration & Expenditure Reports Nos. 11 (2012-2013) and 12 (2012-2013), stated that ASIO staff had increased from 1,812 at 30 June 2012 to 1,904 at 30 June 2013.

In her formal submission to the PJCIS on its Inquiry into the National Security Legislation Amendment Bill (No.1) 2014, the IGIS, Dr Vivienne Thom, made clear her view that the proposed amendments in the Bill "would increase the scope and complexity of oversight arrangements and the workload of the [Office of the] IGIS". Her submission detailed the new powers proposed in the Bill that would require additional oversight.

In evidence to the PJCIS the IGIS reinforced her concerns:

*I have set out in the submission where I think there would be requirements for additional oversight. For example, the program for the inspection of ASIO's authorised operations is a completely new program and would require oversight not just in Canberra but also at regional offices. There would also be an increase in the technical complexity of our work, particularly for the computer access warrants, and we would have to engage additional resources for that. But our requirement for an increase in resources has been recognised by the government; in the Prime Minister's statement about the new counter-terrorism measures, he announced that he will be increasing the resources for our office. I am not sure of the exact amount yet. Our office is currently resourced with, I think it is, \$2.2 million for the next year—we are talking about small amounts—and I would imagine that another three to five people could adequately oversight these new powers.*

The Abbott Government recently moved to boost the resources of the OIGIS, nevertheless the Government and the Parliament must ensure the resources and level of staffing provided to the OIGIS continue to meet the growing demands and responsibilities placed on them by the expansion of the AIC and its powers. It is critical that the Government and the PJCIS regularly review or audit the resources – including levels of staffing and their expertise – within the OIGIS.

The IGIS's Annual Report should be required to provide a detailed assessment of the adequacy of resources provided to their office and the consequences of any shortfalls, with the Government and the PJCIS to provide a response to this annual assessment.

#### ***6. A stronger relationship between the PJCIS, the IGIS, and the INSLM***

The PJCIS meets regularly with the heads of agencies, notably in their review of administration and expenditure and also when terrorist listings and legislation are reviewed. However, there could and should be greater liaison between the committee and other oversight bodies including the IGIS, the INSLM and on occasions, the Auditor General.

The relationship between the IGIS and the PJCIS should be formalised and broadened. The IGIS is clearly the most appropriate body to undertake inspections and audits of the operations and legal propriety of agencies' actions and to handle complaints. However, there is no question an understanding of issues of concern to the IGIS would be valuable to committee members. As part of this, a copy of each IGIS formal inquiry report should be provided to the PJCIS no more than three months after it is presented to the Prime Minister or relevant Ministers.

It would also be good practice for the committee to receive regular briefings from the IGIS and the INSLM, and where appropriate the NSA based in the Department of Prime Minister and Cabinet. In the case of the INSLM and the NSA, s30 of the ISA should be extended to empower the committee to request they brief the committee. While such briefings would generally be private, there may be scope to formalise at least part of them as public hearings, in line with the common practice in the US. Such an approach would have the effect of raising public awareness of the legislature's role and responsibility in its oversight of the intelligence agencies.

### ***7. Mandatory sunset clauses for controversial legislation***

In recent years, in some instances the Parliament has used sunset clauses when intelligence agencies have been granted unprecedented powers.

These unprecedented powers include AFP preventative detention orders, AFP control orders, and ASIO questioning and detention powers.

As a general principle sunset clauses should be applied to controversial legislative provisions that have been enacted in response to a heightened threat or alert level.

But sunset clauses can only be an effective scrutiny and accountability measure, if they are accompanied by a serious review, with adequate time and information made available. Controversial legislation containing a sunset clause is likely to be debated extensively inside and outside the Parliament when introduced, and a government should be required to account for, and defend, their renewal at expiration.

The Parliament then has the choice of passing new legislation, renewing or amending the provisions subject to the sunset clause or allowing them to terminate.

The lifespan of too many Australian sunset clauses has been too long. It is simply not possible to predict the nature and extent of terrorist threats over a 10 year period. Giving future sunset clauses a 3 year lifespan would be a more appropriate period to meet immediate threats to national security and give a new Parliament, with a fresh perspective, the opportunity to reconsider their necessity.

The PJCIS should have the capacity, focus and expertise required to provide meaningful and rigorous consideration of sunset clauses. A mandatory review by the PJCIS, assisted by an INSLM review, should be conducted before expiry of a sunset clause provision. The committee should undertake a comprehensive review of the terms and operations of the legislation, and gather information from stakeholder agencies, as well as take public submissions and make considered recommendations to the Parliament.

#### ***8. Comprehensive review of the oversight of Australian intelligence agencies***

The time has also come for a thorough review of the current arrangements for oversight of Australian intelligence agencies. Given the importance of agency oversight to Australia's national security framework, and our desire to ensure it is able to respond to contemporary challenges, it is crucial to begin the process of reform by conducting a thorough review of the oversight system. Any such review should canvas ideas for change and reform, including the suggestions made in this paper.

The PJCIS itself could also conduct an inquiry into the structure of the oversight of the agencies extending beyond the AIC, to include other agencies such as the AFP and the Australian Customs and Border Protection Service.

The inquiry should encompass the role, powers and scope of existing oversight mechanisms and consider the adequacy of the legislative framework which governs oversight; the degree to which it is coordinated and comprehensive; and whether the

resources allocated to such bodies are adequate.

The terms of reference for such a review should examine the roles and effectiveness of:

- internal mechanisms within agencies themselves;
- independent, external bodies such as the IGIS, the INSLM, the Australian National Audit Office (ANAO), the Ombudsman's Office and the courts; and,
- parliamentary oversight either through the specialist committee, the PJCIS, or through other committees of the Parliament.

Consideration might also be given to responsibility for oversight agencies resting with a single Minister who does not have direct responsibility for the agencies requiring scrutiny.

Not only has oversight of the intelligence agencies failed to keep pace with their burgeoning role and powers, it has been decades since the effectiveness and adequacy of their oversight framework have been critically examined. It is time to satisfy the Australian community, the Parliament, and the agencies themselves that we have got this right.

## **Conclusion**

In Australia, as in many other similar democracies, the powers of intelligence and security agencies have changed dramatically in recent years - the product of an increasingly complex and unpredictable security landscape. The maintenance of public security in the current security environment does require enhanced powers for the agencies charged with this responsibility. However, the protection of our hard-won democratic freedoms equally demands enhanced oversight of the exercise of these powers. With legislative change extending the powers of security agencies, the requirement for reliable, effective external oversight arguably becomes more critical to maintaining an essential level of trust in the community about agency operations.

This article works from the simple proposition that enhanced power requires enhanced accountability. The greater the potential for that power to infringe on

individual liberties, the greater the need for accountability in the exercise of that power. This is not to suggest that our security and intelligence agencies are acting perniciously or misusing their powers. I do not believe that to be the case. But in the relatively recent past those powers were used inappropriately, with a consequent erosion of public trust, and we must be conscious that enhancements we agree to now may lend themselves to future misuse in the absence of appropriate and effective accountability mechanisms.

Of course, ultimately the constitutional duty to control executive conduct as to its lawfulness lies with the High Court of Australia. This is a fundamental but only partial aspect of the oversight of intelligence agencies. Australians need continuing assurance of much more than simply the absence of illegality. They need to be assured the agencies are serving the purpose for which they were created and that they are doing so in a cost effective way. It is the parliament to which the agencies are accountable, not the judiciary, and it is the parliament's responsibility to oversight their priorities and effectiveness, and to ensure agencies meet the requirements and standards it sets. There is no greater or more important focus of political activity in this country than parliament itself, and the Australian Parliament has no better or more authoritative forum than the PJCIS to do this job.

It is the responsibility of Parliament, on behalf of the people, to balance individual liberty and national security. If the public are to have confidence that an appropriate balance has been struck and that the enhanced powers and capabilities of our intelligence and security agencies are being used only for the purposes for which they were granted, current accountability arrangements must be improved. The measures proposed in this paper will increase the accountability of our security and intelligence agencies and ensure ongoing public confidence in the integrity of these vital institutions.

## **List of Abbreviations**

AAT – Administrative Appeals Tribunal

AFP – Australian Federal Police

AGO – Australian Geospatial Organisation

AIC – Australian Intelligence Community

ALP – Australian Labor Party

ANAO – Australian National Audit Office

ASD – Australian Signals Directorate

ASIO – Australian Security Intelligence Organisation

ASIS – Australian Secret Intelligence Service

CIB – Commonwealth Investigation Branch

CPA – Communist Party of Australia

DIGO – Defence Imagery and Geospatial Organisation

DIO – Defence Intelligence Organisation

DSA – Defence Security Agency

DSD – Defence Signals Directorate

FOI – Freedom of Information

ICT – Information and Communications Technology

IGIS – Inspector General of Intelligence and Security

INSLM – Independent National Security Legislation Monitor

IPA – Institute of Public Affairs

ISA – Intelligence Services Act

LNS – League of National Security

NSA – National Security Advisor

NSC – National Security Committee of Cabinet

OIGIS – Office of the IGIS

ONA – Office of National Assessments

PJC – Parliamentary Joint Committee

PJCIS – Parliamentary Joint Standing Committee

UN – United Nations

WMD – Weapons of Mass Destruction