

Intelligence Oversight and the War on Terrorism

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Oversight of intelligence agencies is a statutory function of the Australian parliament in recognition of the gravity given to the subject by the Parliament. It is also a relatively recent and evolving process, made more prominent by the war on terrorism and the general increase of interest in and expenditure on security matters in the last four years. A large amount of legislation is being introduced into Parliament, extending the powers of the intelligence agencies and curbing civil liberties. Intelligence agencies do and must operate clandestinely. Scrutiny of their operations is limited, in the past non-existent. In Australia, accountability through a parliamentary committee began in the 1980's and applied to only one agency - ASIO. It was extended in 2001 to cover the three collection agencies - ASIO ASIS and DSD.

Oversight committees seek to counter and prevent abuses by intelligence personnel and to balance the needs for national security and democratic principles. It has been argued that oversight is as important to the prevention of terrorism as to the protection of civil liberties.

A Short History

From the formation of the intelligence services in Australia in the 1940s until the mid 1980s there was no parliamentary oversight of the services. In this period, the Australian Security Intelligence Organisation (ASIO) was publicly known, but the Australian Secret Intelligence Service (ASIS) was neither widely known nor acknowledged by the government.

As a result of public concern at perceived abuses by the agencies, between 1974 and the mid 1990s, a number of commissions of inquiry were held: 1974 - the Hope Royal Commission; 1983 - Second Hope Royal Commission; 1995 - Samuels and Codd inquiries. The outcome was an increasing level of legislative control and parliamentary and other oversight. ASIO was placed on a legislative footing in 1979 (the *ASIO Act, 1979*). The government acknowledged the existence of ASIS but declined, at that time, to place the organisation on a legislative basis.

After the 1983 Hope Royal Commission, the office of the Inspector General of Intelligence and Security was established (1986). This is an independent, statutory officer within the Department of Prime Minister and Cabinet. Its role is to supervise the operations of the services. In addition, in the mid 80s, under the ASIO Act, a parliamentary committee, the Parliamentary Joint

Committee on ASIO was established. It was first appointed in 1988. Its oversight was limited to one of the collection agencies only; its mandate excluded operationally sensitive matters; and its work was not known widely. In its 13 years of operation, it published 5 reports.

The Samuels and Codd inquiries in 1995 led to a new Act, the *Intelligence Services Act 2001*, and a further extension of the powers of the committee to include ASIS and the Defence Signals Directorate (DSD). The Parliamentary Joint Committee on ASIO ASIS and DSD first met in March 2002.

In the past three and a half years, the work of this new committee - the Parliamentary Joint Committee on ASIO, ASIS and DSD - reflects the expanded role and increased intensity of an oversight committee in an age of terrorism. Sixteen reports have been tabled in the three and a half years since 2002. Not only has the Committee increased powers and functions, but these are continuing to expand. There has been an exponential rise in public awareness of and interest in the work of the committee and, with that, an increase in the perennial tension between security and disclosure.

The Committee

The Committee consists of 7 members of Parliament, appointed by the Prime Minister (on the advice of the Leader of the Opposition in respect of opposition members). This is to be expanded to 9 in this session. They are from both houses. They are usually senior, experienced members: Membership so far has included two ex-defence ministers, an ex- minister for administrative services, an ex -minister for justice, two chief whips and an ex-Speaker.

What the Committee cannot do

Unlike most Parliamentary committees, this one takes much of its evidence in private. There are a number of additional restrictions on its operations. For example:

The intelligence agencies have a say over the suitability of meeting places (s17(3)) of Schedule 1

The Minister must approve the holding of any public hearings (s20 (2))

Ministers can prevent persons from giving evidence or documents being provided (on operationally sensitive matters) by giving a certificate to the Presiding Officers. (s4)

The staff of the committee must be cleared to the level of an ASIS officer – TSPV (21)

The intelligence agencies must approve the arrangements for the security of documents (s22(1))– safes, swipe pass entry to suites, protocols for handling, safe hand and registration of documents, Hansard recording and transcript production, isolated copiers, safe phones etc.

The secrecy provisions in the Intelligence Services Act (reinforced by the Crimes Act and the ASIO Act) are onerous and carry heavy penalties. See Schedule 1 Part 2, particularly (s12)

Committee reports cannot be made to the Parliament until they are expressly cleared by the responsible ministers. (s 7)

What the Committee can, and does, do:

Review the administration and expenditure of the agencies

Review legislation

Review regulations banning organisations as terrorist organisations

Other inquiries referred by the Minister or the Chambers

Three reports/reviews of the committee are illustrative of its changing and expanding role and the sensitivities and difficulties associated with oversight in these circumstances.

The ASIO Legislation Amendment (Terrorism) Bill 2002.

This bill was a counter-terrorism measure and a direct result of the terrorist attacks in 2001. It sought to strengthen ASIO's powers and was similar to legislation in other countries. However, the original bill introduced into the Australian Parliament in March 2002 was severe. Its provisions included:

open ended detention of terrorist suspects;

detainees could be held incommunicado;

no right to legal representation;

refusal of the right to silence;

no protection against self incrimination;

children as young as ten could be detained under these arrangements and could be strip searched; and

there were no protocols for detention practices.

The committee's inquiry attracted 150 submissions, all critical of the legislation.

The committee made 15 recommendations – including:

- giving a role in the detention process to the Inspector-General,
- raising the age of detention to 18,
- providing a panel of cleared lawyers for detainees,

- limiting the period of detention to 7 days;
- developing a Protocol for the guidance of the practice of ASIO officers; and
- inserting a sunset clause for review of the legislation after three years.

Of these recommendations, the government accepted 9, in part or in whole, although it left out some of the most serious matters in the reintroduced bill. For example, the sunset clause was initially rejected, children as young as 14 remained in the Bill. When the amended bill reached the Senate, it conducted a further inquiry (with over 400 submissions) and came to conclusions similar to the joint committee and made similar recommendations. The government in the lower House refused the Senate amendments and chose to set the Bill aside in December 2002. It was finally passed, much in the form recommended by the committee, in March 2003.

This outcome is a good illustration of the constructive work of the committee, the importance of bringing a community perspective into the consideration of anti-terrorist matters and an achievement in balance between security and civil liberties and human rights.

These provisions have now been in operation for three years. Also built into the legislation was a sunset clause ASIO Act (s34Y) and a review mechanism Intelligence Services Act (s 29(1)(bb)). That review is currently taking place and I am not at liberty to canvass the committee's views on the operations of the Act before the report is tabled next month.

However, the inquiry has thrown up another interesting issue related to the role of the committee. The requirement of the review was that the committee would consider the operations, effectiveness and implications of the questioning and detention powers of Division 3 Part III of the ASIO Act. However the ASIO Act (s34VAA) prevents anyone from discussing any aspect of the operations of the powers. The question was how could the committee properly fulfil its function if it could not speak to anyone affected by the powers – subjects of warrants, their lawyers or government officials?

The committee sought advice from the Clerks of the Houses, and finally sought a formal opinion from Mr Bret Walker SC. On the basis of this opinion, the following advice was prepared for potential witnesses.

Submissions made to or evidence given before the Joint Parliamentary Committee on ASIO, ASIS and DSD in respect of its statutory review of Division 3 Part III of the *ASIO Act 1979* are protected by the provisions of the *Parliamentary Privileges Act 1987* relating to the protection of witnesses, namely subsections 12(1) and (2) and 16 (3) and (4). Furthermore, anybody threatening such a prosecution may be committing an offence.

The committee advises persons who intend to give evidence or make submissions to the review of Division 3 Part III of the ASIO Act that it has received legal advice that the provisions of sec 34VAA of the ASIO Act do not apply, subject to restrictions placed on the committee by section 29(3) and Schedule 1 clauses 2, 3 and 4 of the *Intelligence Services Act 2001*. That is, within the bounds of those restrictions, it would not be an offence for persons to provide evidence or documents to the inquiry. Potential witnesses must note, however, that the committee is not entitled to examine and is not interested in examining the intelligence or the subject matter(s) discussed under a questioning warrant. It wishes to pursue only those procedures used in the operation of the questioning and detention powers under the ASIO Act.

The committee will take such evidence in-camera and witnesses are reminded that any unauthorised disclosure of evidence taken in-camera by a witness or other person could be proceeded against as a contempt of Parliament and prosecuted as an offence under section 13 of the *Parliamentary Privileges Act 1987*.

Intelligence on Iraq's Weapons of Mass Destruction

This was a reference to the committee from the Senate, received on 18 June 2003. The Senate asked the committee to examine the nature, accuracy and independence of the pre-war intelligence on Iraq's WMD and the accuracy and completeness of the presentation of the intelligence by the Australian Government. The inquiry occurred in a highly charged atmosphere of public opposition to the war and, therefore, there was intense public interest in the inquiry.

The inquiry raised issues of intelligence sharing arrangements and the capacity of the oversight committee to scrutinise intelligence, largely gained from overseas intelligence partners. How good was the intelligence and how timely was the provision of it to allies making decisions to go to war?

A further interesting factor in the committee's findings was that, despite 97% of the intelligence on Iraq coming from partner agencies, the assessments of the Australian agencies, particularly the Defence Intelligence Organisation

(DIO), were more accurate to the real conditions on the ground discovered after the invasion. For example, DIO argued:

‘We thought it likely that they [Iraq] still retained some of the weapons of mass destruction that had been produced prior to the Gulf War. But we did cast some doubts about the likely state, fragility and reliability of those weapons of mass destruction from that period. Iraq had the capability to produce chemical and biological weapons ... at relatively short notice, ... but we could not say that they had done so.’ In particular [both agencies argued the following]:

- The scale of threat from Iraq’s WMD is less than it was a decade ago (ONA 1 March 2001)
- Under current sanctions, Iraq’s military capability remains limited and the country’s infrastructure is still in decline. (ONA 8 February 2002)
- Suspected holdings – small stocks of chemical agents and precursors, some artillery shells and bombs filled with mustard, [Iraq] might have hidden a few SCUD warheads. (DIO/ONA 19 July 2002)
- Nuclear program unlikely to be far advanced. Iraq obtaining fissile material unlikely. (DIO/ONA 19 July 2002)
- No ballistic missiles that can reach the US. Most if not all of the few SCUDS that are hidden away are likely to be in a poor condition. (DIO/ONA 19 July 2002)
- Intelligence slight since the departure of the UN inspectors (ONA 6 September 2002)
- Limited stockpile of CW agents, possibly stored in dual-use or industrial facilities. Difficulties of storage and degradation of agent make the capacity to employ it uncertain. Although there is no evidence that it has done so, Iraq has the capacity to restart its CW program in weeks and manufacture in months. (DIO 10 October 2002)
- There is no known CW production (DIO 31 December 2002)
- No specific evidence of resumed BW production (10 October 2002)
- No known BW testing or evaluation since 1991. No known offensive Iraq research since 1991. (DIO 31 December 2002)
- Iraq does not have nuclear weapons (DIO 31 December 2002)
- No evidence that CW warheads for Al Samoud or other ballistic missiles have been developed. (DIO 31 December 2002);
- So far, no intelligence has accurately pointed to the location of WMD (ONA 31 January 2003).

Review of Terrorist Listings

In 2004, the government gave an additional function to the committee – to review the Attorney-General's decision to list organisations as terrorist organisations under the Criminal Code Amendment Act. The Act allows the Attorney-General to list an organisation as a terrorist organisation by regulation and the committee may then review the listing in the 15 sitting days following the making of the regulation. The consequences of a listing are serious, attracting a possible 25 years in gaol. The history of this process is in itself an interesting study in the concerns over anti-terrorist legislation. It is outlined in detail in the committee's first report, *Review of the Listing of the Palestinian Islamic Jihad* at www.aph.gov.au/house/committee/pjcaad/pij/report.htm.

The committee was confronted with a review process that was to be conducted in a very short time frame – 15 sitting days. The first listing was received on 3 May 2004. In its first review, the committee established principles for such reviews. They reflected normal parliamentary practices and included:

The Government should be required to present the regulation and the accompanying unclassified brief formally to the Committee immediately the regulation is made. In this brief, the Government should provide details of its consultation with the States and Territories and the Department of Foreign Affairs regarding the making of the regulation. There should also be details of the procedures followed in the making of the regulation.

ASIO should be called to provide a private briefing to the Committee. Any classified information that pertained to the listing and the reasoning behind the listing should be presented at this briefing. This briefing should occur whether or not the Committee chooses to hold a public review. It will be Hansard recorded by the cleared Hansard officers of the Parliament.

On receipt of the regulation and accompanying brief from the Attorney-General, the Committee will decide whether to advertise the review. The normal parliamentary process is to advertise any inquiry, even if the Committee then chooses to take evidence in private and make submissions confidential. This demonstrates to the public that the process of parliamentary scrutiny exists; it seeks to elicit from the public any information of which the Committee might be unaware; and it offers to members of listed entities an opportunity to contest adverse assessments made by ASIO.

After considering the nature of the listing, the submissions received from community organisations or others and whether the listed organisation has members in Australia who might seek to make representations, the Committee may decide to hold a hearing on a listing. In particular, if the Committee were

convinced that there appeared to be a *prima facie* case against a particular listing, a hearing would be held.

If a hearing is to be held, it could be in-whole or in-part in public or in-camera depending on the sensitivities of those giving evidence.

If the Committee decides not to hold a hearing, its report will be based wholly on the papers supplied to it and the ASIO briefing.

A report will then be drafted and tabled in Parliament within the time frame as dictated by the legislation. The legislation requires that the Committee report before the end of the disallowance period.

Further consideration was given to the criteria upon which terrorist listings might be decided. There are over 115 organisations listed by the UN as terrorist organisations. Australia has chosen to ban 19. In considering why, the committee asked ASIO for some stated rationale against which it could test the decision to ban a particular organisation. The Attorney-General himself had defined the need for this listing process as whether the organisation fitted the definition of a terrorist organisation and whether there were links to Australia. He believed that the protection of Australia's interests was a primary factor in his decision making. The committee accepted and agreed with this. However, this criterion is not embedded in the Act.

In its review of the first terrorist listing under the Act (the PIJ), the committee expressed concern at the reasons put forward. In response it suggested some matters that might be considered. This view sought to be consistent with the security needs of the fight against terrorism, but also recognised the importance of addressing the underlying causes of terrorism and the complex foreign policy issues that surround political violence. In its conclusions on the review of the PIJ, the committee argued:

It is clear from the supporting statement that the Palestinian Islamic Jihad has used deadly violence in pursuit of its objectives and it has targeted civilians. It fits within the definitions of a terrorist organisation under the Act. It is the Committee's firm view that political violence is not an acceptable means of achieving a political end in a democracy.

However, the Committee would also note there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances - within an armed conflict - the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and,

with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:

[When] there is a peace process, ...you can unintentionally make things worse if you do not think through the implications of the listing.

The Committee would therefore reiterate its view, expressed above, that the immediate and threatening aspects of a particular entity, its transnational nature and the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing. This does not appear to have occurred in this listing.

Nevertheless, the Committee does not object to this listing. However, it would like to see a more considered process in any future regulations. Given the serious consequences attached to listing, it should not be taken lightly.

ASIOs response to this first report was to bring forward six factors which the agency used in selecting an organisation for listing. They are: engagement in terrorism; ideology and links to other terrorist groups/networks; links to Australia; threats to Australian interests; proscription by the UN or like-minded countries; and engagement in peace /mediation processes.

The committee has now considered all 19 listings. They will be 'renewed' and re-considered every two years. The criteria have been a useful point of reference but also to some extent a point of contention.

Finally, in an age of terrorism, the oversight committee must achieve a delicate balance. It must create a feeling of trust between the agencies and the committee that substantial areas of national security will not be compromised. Its work must be sufficiently public to inspire public confidence in its oversight role. It can't afford to be too close to the agencies – to become part of an exclusive club. Inquiries should be thorough and probing; criticism should be fair, modulated and constructive. This is, of course, an ideal world and, in this, as in all things, practice is often much messier. "Between the idea and the reality, falls the shadow."