

# National Security and Public Accountability in Australia

Written by David Martin Jones

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<https://www.e-ir.info/2013/09/14/national-security-and-public-accountability-is-there-adequate-oversight-over-the-australian-intelligence-community/>

DAVID MARTIN JONES, SEP 14 2013

From the foundation of a modern security service in 1949 under the Cold War auspices of MI5, to the expansion of the concept of security after 2001 and the promulgation of over fifty new counter terror laws, the practice of national security has troubled the Australian political conscience. During this period, the maintenance of national security and the evolution and practice of an Australian Intelligence Community (AIC) has raised questions concerning both its necessity, as well as the most efficient and accountable ways of sustaining it. Indeed, the extent of 'terrorist organizations' willing to engage in 'an action ...with the intention of advancing a political, religious or ideological cause and with the intention of coercing...the government', as the *Security Legislation Amendment (Terrorism) Act*, puts it, together with the constitutional oversight of those agencies charged with detecting and deterring them, have occasioned an enduring political debate.

The pursuit of national security, especially since 2001, has exposed a paradox at the core of modern Australian democracy, namely, that the practice of political freedom might entail proscribing those dedicated to subverting it by violent means. Significantly, prior to the 'exceptional' first decade of the twenty first century, successive Australian governments had shown a lack of conviction about the 'need for security and intelligence organizations' combined with 'public apathy on the part of most Australians and hostility to them from a minority...resulted not in less spying but simply in less efficient spying' only exacerbated this paradox (Templeton 1976, p. 9). Indeed the development of a distinctive Australian perception of national security in the geo-political aftermath of the Cold War currently shapes the character of Australian intelligence and the conduct of the organizations that comprise the AIC. The fact that a recent report by the Independent National Security Legislation Monitor, an office charged specifically in 2010 with counter terror legislation, called for sweeping changes to the 'unnecessary, disproportionate and ineffective' Australian anti-terror laws introduced since 2001, served only to highlight the central constitutional paradox that has always confronted Australian intelligence gathering (see Blackbourn 2013).

To explore the problem of AIC accountability further, we first need to consider the contingent manner in which security organization developed in the Australian context after World War II. In 1949, under pressure from its allies the UK and the US, the Labor government of Ben Chifflery agreed to the creation of an Australian Secret Intelligence Organization (ASIO) to address the problem of Soviet espionage in Canberra. Subsequently, in 1952, the Liberal government of Robert Menzies secretly approved the formation of the Australian Secret Intelligence Service (ASIS) to gather information abroad about threats to Australian security.

An analogous secrecy pervaded the evolution of intelligence gathering services linked to the Australian armed forces and housed within the Ministry of Defence over the same period. The Defence Signals Bureau (1947, subsequently renamed the Defence Signals Directorate in 1978) operated clandestinely under the umbrella of the UK, US, Canada, New Zealand signals intelligence agreement. Analogously, the Defence Imagery and Geospatial Organization (DIGO) and the Defence Intelligence Organization (formerly the Joint Intelligence Organization) also date from the Cold War, or allied suspicion of Soviet war aims in the Asia Pacific theatre at the end of the Second World War. The DIO, in particular, after 1949, came to distance itself from the assessment and intelligence gathering activities of the civilian intelligence organizations.

Intra-mural tensions between the services led to Justice Robert Hope's *Royal Commission on the Intelligence*

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*Services* which reported in 1977 that the AIC was both 'fragmented and poorly coordinated' (Hope 1976, p. 34). To remedy this, the then Liberal government of Malcolm Fraser established an additional Office of National Assessments (ONA) in 1977. A distinctively Australian organization, in contrast with the allied influence involved in the creation of the other security agencies, ONA seeks to exercise an oversight role housing a small staff of analysts reporting directly to the Prime Minister.

Following the Royal Commission's findings the government also created the office of the Inspector General of Intelligence and Security (IGIS) and established the National Security Committee of the Cabinet (NSC), also in 1977, to exercise some form of accountability. According to Allan Gyngell and Michael Wesley, the Hope Royal Commission 'improved oversight, and lines of accountability through individual ministers and cabinet were made much clearer' (Gyngell and Wesley 2004, p. 145).

From this perspective, the story of Australian intelligence is one of evolving accountability as a security architecture created by administrative fiat, often in conditions of great secrecy, becomes subject to public scrutiny over time. As Gyngell and Wesley contend, 'the period from the first Hope Royal Commission Report in 1977 through his second report in 1984 to the Gordon Samuels and Michael Codd Commission of Inquiry into ASIS in 1995 and the Intelligence Services Act 2001 was a story of the gradual integration of the intelligence services into the Australian policy process, a growing movement to accountability and greater transparency' (p. 145).

Ironically, although the *Security Intelligence Act 2001* and its various amendments after 2001 enhanced ASIO's power to issue control orders, search orders and warrants for preventative detention, the legislation also established the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review the administration and expenditure of ASIO, ASIS, DIGO, DIG, DSD and ONA, and make recommendations to the relevant ministry. In other words, as the powers of the security agencies grew and their personnel, and expenditure grew dramatically after 2001, so too did parliamentary oversight over the AIC.

More precisely, the IGIS has the authority, under the *Inspector General of Intelligence and Security Act* (1986), to inquire formally into the activities of any Australian intelligence agency in response to a complaint or a reference from a minister. In this context, the independently appointed IGIS has the power to require attendance of witnesses, take sworn evidence, retain documents and enter Australian intelligence agencies' premises.

Since 2008 the IGIS has taken its constitutional responsibility seriously. Two cases in particular that raised public concern after 2001 demonstrate that the IGIS actively examined claims that ASIO and ASIS acted extra judicially in the wake of 9/11 and the new security powers vested in them. In 2011, the current Inspector General, Vivienne Thom, conducted a detailed investigation into the case of Australian/Egyptian citizen Mamdouh Habib. The US had detained Habib in Pakistan in October 2001 on the grounds that he had prior knowledge of the 9/11 attacks on New York and Washington. Habib subsequently experienced rendition to Cairo in November 2001 before being interned at Guantanamo Bay. After his release in 2005, Habib claimed that ASIO and Australian Federal Police (AFP) officers were present during his interrogation in Cairo and were complicit with a process that involved cruel and inhumane treatment. Thom found that neither ASIO or AFP officers were involved in Habib's transfer to Cairo or attended his interrogation. Thom's report did however find that both ASIO and AFP needed clearer guidelines about providing information to foreign governments about Australian citizens and should 'ascertain that the interviewee would not be subject to cruel, inhumane or degrading treatment' (Thom 2011, p. 12). The report also considered that the relevant agencies and the Department of Foreign Affairs and Trade owed Mrs. Mahda Habib an apology for failing to keep her informed about her husband's whereabouts and conditions of detention.

Analogously, the IGIS investigated the circumstances surrounding the interrogation and prosecution of Izhar Ul-Haque in 2007. ASIO and AFP officers suspected Ul-Haque of involvement in a plot organized by Faheem Khalid Lohdi to commit a terrorist act in Sydney in 2003. In 2006, Lohdi received a twenty year sentence for three terror related offences. However, the New South Wales Supreme Court dismissed charges against ul-Haque, a known associate of Lohdi, in 2007, and criticized two ASIO officers for their 'oppressive conduct'. The IGIS investigation found that there was no evidence to support the claim of 'false imprisonment' or 'unlawful detention' (Carnell 2008, p. 40). What the IGIS did consider problematic, however, was the lack of coordination between ASIO and the AFP in

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their conduct of the ul-Haque investigation. In particular the then IGIS, Ian Carnell, considered that ASIO displayed a 'lack of confidence' in sharing information with the police and failed to communicate its operational plan to the 'relevant police authority' (Carnell, p. 42).

A similar breakdown in communication between agencies also occurred in the case of Dr. Mohamed Haneef. Australian Federal Police (AFP) officers arrested Haneef at Brisbane airport in July 2007 in connection with a failed terrorist attack on Glasgow International Airport that involved his second cousins Kafeel and Sabeel Ahmed. Held in solitary confinement without charge for twelve days under the *Anti-Terrorism Act* (2005), Haneef was eventually released without charge. The subsequent inquiry into the Haneef case led by former New South Wales Justice John Clarke QC found that the evidence against Haneef was 'completely deficient' and that ASIO had informed the AFP that there was no evidence to suggest Haneef was 'guilty of anything'. Ultimately, Clarke concluded that AFP Commander, Ramzi Jabbar, manager of counter terrorism domestic had 'lost objectivity' and was unable to see that the evidence he regarded 'as highly incriminating amounted to very little' (Clarke 2008, p. 20). Similarly the Street review of the AFP counter terror practice identified a failure of 'interoperability between the AFP and its national security partners' (Street 2008). This deficiency stems from two sources: firstly, the conflict between the intelligence gathering function of the security agencies and the evidence gathering of the police force; and secondly the tendency of different security agencies to 'silo' information, that the Flood Report into the Australian Intelligence Agencies highlighted in 2004 (Flood, p. 174).

Moreover, despite the Rudd government's creation of a new office of National Security Adviser to provide strategic direction to the disparate agencies in the AIC in 2008, there remains a problem of coordination and information sharing between the various agencies, and in particular between ASIO and the AFP. It is this together with a tendency to proliferate both agencies anti-terror laws and special powers, rather than a problem of accountability that is an enduring problem for the AIC. As we have seen, parliament through the JCIS and IGIS exercise a reasonable degree of oversight over the core security agencies.

The organization that is least politically accountable, however, is the Australian Federal Police counter-terror force. Since 2001, the AFP assumed an enhanced domestic and international counter terror role. Significantly, in 2011, the *Parliamentary Joint Committee on Intelligence and Security Review of Administration and Expenditure* recommended that its power of oversight power be extended to include the AFP (JCIS 2011, p. 35). The government failed to support this recommendation on the grounds that the AFP was a law enforcement agency and not part of the AIC.

Herein lies the rub. As terrorism acquired a specific legal definition under the terms of *The Security Legislation Amendment (Terrorism) Act* (2002) its pre-emption assumed a political purpose. Yet, as Justice Sir Victor Windeyer observed in 1979, the best safeguard against new terrors lay in the rigorous enforcement of criminal law rather than making new laws about terrorism. Policing a political or ideological action necessarily politicises the police and engages the AFP in the world of security rather than law enforcement. To ensure greater accountability in an age of increased surveillance, the weakness in Australian oversight lies not in the realm of security agencies but in policing. It is further complicated by legislation that responds to events and handicapped by an unnecessary proliferation of agencies that are mutually suspicious, sclerotically bureaucratic and insulated by different cultural practices.

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