

Intelligence Services Act 2001

By James Renwick

James Renwick analyses recent legislative measures aimed at overseeing Australia's intelligence services.

The shocking events of 11 September 2001 in New York City and Washington DC have had many consequences, including for Australia. From an international law perspective, the events were treated by Australia and the United States of America as an 'armed attack' upon the latter within the meaning of the ANZUS Treaty.¹ Australia consequently acted on a request by the USA to meet 'the common danger'² by committing over 1500 members of our Navy, Army and Airforce to an unconventional and difficult military operation whose duration cannot be foreseen.

The effects on domestic law may also be serious. Certainly, the imperative to detect and prevent future terrorist acts has led to many countries, including Australia, suggesting law reform³. It seems likely that such law reform proposals will awaken interest in an almost forgotten area of domestic law, namely, the topic of national security law.

National security is located at a point where law, politics, international relations, defence and, on occasion, individual freedoms intersect and where, therefore, difficult

and sometimes controversial legal and policy choices must be made by parliaments, judges and policy-makers to protect the nation while preserving what is precious in its democratic life and that of its citizens.

While one can readily agree with Justice Kirby of the High Court of Australia when he recently wrote that: 'the countries that have done best against terrorism are those that have kept their cool, retained a sense of proportion, questioned and addressed the causes, and adhered

steadfastly to constitutionalism',⁴ the topic becomes harder when one turns to the detail.

Furthermore, as much of the practice in this area remains unknown, even to Parliament, national security requires a measure of trust in the executive government and its national security agencies. As trust is sparingly given and easily lost in this area, careful consideration needs to be given to what is known, for example, the legal basis, functions and powers, and accountability mechanisms for national security agencies.

This article first notes the significant proposal to give the Australian Security Intelligence Organisation (ASIO) new powers. The article also examines the terms of the *Intelligence Services Act 2001* (Cth) which came into force on 1 October 2001, and the components of the Australian intelligence community ('AIC').

Proposed new powers for ASIO

On 2 October 2001, the Commonwealth Attorney-General announced⁵ that the Federal Government would:

- supplement the existing warranting regime under which the Australian Security Intelligence Organisation exercises special powers;
- create a new general offence of terrorism and an offence related to preparing for, or planning, terrorist acts; and
- amend the *Proceeds of Crime Act 1987* to allow terrorist property to be frozen and seized.⁶

As to the first matter, is proposed that:

the Director-General of Security will be able to seek a warrant from a federal magistrate, or a legal member of the Administrative Appeals Tribunal, that would require a person to appear before a prescribed authority (such as a federal magistrate or a legal member of the Administrative Appeals Tribunal), to provide information or to produce documents or things. These reforms would allow ASIO, before a prescribed authority, to question people not themselves suspected of terrorist activity, but who may have information that may be relevant to

ASIO's investigations into politically motivated violence. The legislation would also authorise the State or federal police, acting in conjunction with ASIO, to arrest a person and bring that person before the prescribed authority. Such action would only be authorised where the magistrate or tribunal member was satisfied it was necessary in order to protect the public from politically motivated violence.⁷

The Attorney notes that 'these are significant new powers, to deal with significant new threats'. He also says that 'stringent safeguards will be introduced in relation to the exercise of these powers'.⁸ While it could be argued – and no doubt will be – that some of these proposed powers would be no greater than those conferred on the NSW Crime Commission⁹ or the National Crime Authority,¹⁰ the terms of any Bill will be awaited with interest. In particular, it will be important to discover whether any Bill proposes that the person questioned is to be held incommunicado, even from his or her lawyer.

The Intelligence Services Act

The *Intelligence Services Act 2001* (Cth) ('the IS Act') and the *Intelligence Services (Consequential Amendments) Act 2001* (Cth) came into force on 1 October 2001. In summary, the IS Act:

- puts the Australian Secret Intelligence Service (ASIS) on a statutory footing for the first time, and
- sets out the functions of ASIS and the Defence Signals Directorate (DSD);
- provides immunities for officers of both organisations in respect of the proper conduct of their functions,
- provides rules to protect the privacy of Australian citizens,
- creates a parliamentary joint committee for ASIS and ASIO which will examine expenditure and administration of each agency,
- protects the identity of ASIS staff in the same manner as ASIO officers, and
- extends the oversight of each agency by the Inspector-General of Intelligence and Security (IGIS).

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The Australian intelligence community

The AIC includes :

- ASIS
- ASIO
- the Office of National Assessments (ONA)
- DSD
- The Defence Intelligence Organisation (DIO)
- The Defence Imagery and Geospatial Organisation (DIGO)
- the Inspector-General of Intelligence and Security (IGIS)

ASIS

ASIS was established by, and was, until passage of the IS Act, maintained under the authority of, s61 of the Constitution. It was established in 1952. Its functions embrace 'The collection and distribution of secret foreign intelligence, associated counter-intelligence activities, and liaison with similar organisations'.¹¹

ASIS has no para-military functions and does not employ force or lethal means in carrying out its tasks. ASIS is responsible to the Parliament through the minister for foreign affairs and, under the directive issued by the minister to the director-general of ASIS, it accepts guidance on targets and priorities issued from time to time by the Security Committee of Cabinet.

ASIS' operations were examined in 1995 by the *Commission of Inquiry into the Australian Secret Intelligence Service* (The Samuels Report). The Samuels Report concluded that it was appropriate for ASIS to be put on a legislative footing. One of the purposes of the IS Act was to achieve that aim.

ASIO

ASIO is Australia's domestic security intelligence organisation with responsibility for protecting Australia and its inhabitants from espionage, sabotage, political motivated violence, the promotion of communal violence, attacks on the Australian defence system or attacks of foreign interference. It is expressly not concerned with lawful dissent.

While originally established by executive order in 1949, it was continued in existence by the Australian Security Intelligence Organisation Acts of 1956 and 1979: the latter Act is discussed for example by the High Court in *Church of Scientology Inc. v Woodward* (1981) 154 CLR 25.

ASIO officers and agents other than the director-general have the protection of a criminal sanction if their identities are revealed publicly. There is a parliamentary joint committee which examines its administrations or finances although, unlike its US counterparts, not its operations.

ONA

The Office of National Assessments is established by the Act of that name in 1977. It is an independent body within the prime minister's portfolio with a function of assembling, collating and reporting on information relating to international matters that are of political, strategic or economic significance to Australia. It has an important role of tasking intelligence activities and assessing what is produced by the ONA or by the committees and processes it chairs and directs.

DSD

The DSD, whose functions are also set out in the IS Act, exists to obtain intelligence about the capabilities, intentions or activities or people or organisations outside Australia from foreign signals intelligence. It also ensures sensitive Australian electronic information systems are not susceptible to unauthorised access, compromise or disruption.

DIO

The DIO provides intelligence to inform defence and government policy planning and to support the Australian Defence Force. It assesses rather than collects intelligence.

DIGO

The Defence Imagery and Geospatial Organisation collects and analyses images of foreign and domestic subjects for various Commonwealth agencies and for the Australian Defence Force.

IGIS

Overseeing all of these organisations, which are not subject to oversight for example by the Commonwealth ombudsman, is the inspector-general of intelligence and security, set up by the Act of that name in 1986. He oversees and reviews the activities of the six agencies just mentioned. He may undertake an inquiry as a result of a reference from a responsible minister or may independently initiate inquiries provided the complainant is an Australian citizen or resident, or the complaint or matter of concern involves a possible breach of Australian law.

The IS Act

Section 6 of the IS Act sets out the functions of ASIS as, relevantly

- 1) The functions of ASIS are:
 - a) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and
 - b) to communicate, in accordance with the Government's requirements, such intelligence; and
 - c) to conduct counter-intelligence activities; and
 - e) to liaise with intelligence or security services, or other authorities, of other countries; and
 - f) to undertake such other activities as the responsible minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

By s6(4) it is provided that in performing its functions 'ASIS must not plan for, or undertake, paramilitary activities or activities against the person or the use of weapons.'

Section 7 sets out the functions of DSD as follows:

- 7) The functions of DSD are:
 - a) to obtain intelligence about the capabilities, intentions or activities of people or organisations outside Australia in the form of electromagnetic energy, whether guided or unguided or both, or in the form of electrical, magnetic or acoustic energy, for the purposes of meeting the requirements of the Government, and in particular the requirements of the Defence Force, for such intelligence; and
 - b) to communicate, in accordance with the Government's requirements, such intelligence; and
 - c) to provide material, advice and other assistance to Commonwealth and State authorities on matters relating to the security and integrity of information that is processed, stored or communicated by electronic or similar means; and
 - d) to provide assistance to Commonwealth and State authorities in relation to cryptography and communications technologies.

Sections eight and nine of the Act set out important and desirable accountability mechanisms. First s8 requires the responsible

minister (the foreign affairs minister for ASIS, the defence minister for DSD) to issue a written direction specifying when prior authorisation under s9 must be obtained from the minister. When that authorisation is sought, in every case the minister is required to be satisfied that the activities would be necessary for the proper performance of a function of the agency concerned, that there are satisfactory arrangements in place to ensure that nothing will be done beyond what is necessary for that proper performance and that there are satisfactory arrangements to ensure the nature and consequences of the acts done in reliance on the authorisation will be reasonable.

Section 11 sets out limits on what the agencies can do. Section 11(1) provides 'the functions of the agencies are to be performed only in the interest of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.'

It is expressly provided that the functions do not include police functions or otherwise enforcing the law, although that does not prevent passing on intelligence otherwise properly obtained it is relevant to serious crime, to the appropriate law enforcement authority.

One of the most important provisions is s14. It states:

14 Liability for certain acts

- 1) A staff member or agent of an agency is not subject to any civil or criminal liability for any act done outside Australia if the act is done in the proper performance of a function of the agency.
- 2) A person is not subject to any civil or criminal liability for any act done inside Australia if:
 - a) the act is preparatory to, in support of, or otherwise directly connected with, overseas activities of the agency concerned; and
 - b) the act taken together with an act, event, circumstance or result that took place, or was intended to take place, outside Australia, could amount to an offence; but in the absence of that other act, event, circumstance or result, would not amount to an offence; and
 - c) the act is done in the proper performance of a function of the agency.

2A ...

2B The Inspector-General of Intelligence and Security may give a

certificate in writing certifying any fact relevant to the question of whether an act was done in the proper performance of a function of an agency.

2C In any proceedings, a certificate given under subsection (2B) is prima facie evidence of the facts certified...

The rationale for this provision was described in the explanatory memorandum of the Bill as:

The purpose of the clause is to provide immunity in a limited range of circumstances [principally conspiracy laws] directly related to the proper performance by the agencies of their function. It does not provide a blanket immunity from Australian laws for all acts of the agencies. This limited immunity is necessary as certain Australian law, including State and Territory law, could impose liability on the agencies.

There are some analogies with this provision. So, the *Crimes Act* (Cth) provides for 'controlled operations' giving federal law enforcement officers immunity from State drug possession offences, when certain pre-conditions are met.¹² Further, the provision finds its counterpart in relation to the *Cyber Crime Act 2001* (Cth) division 476.5 which deals with computer related acts for example covertly intercepting e-mails or reading the hard drive of a computer.¹³

The Joint Select Committee on the Intelligence Services, which was the parliamentary committee considering the IS Bill, regarded s14 as the most controversial provision in the Bill. They were obviously concerned about the potential abuse of s14 and they successfully recommended both amendments to clause 14 to ensure that immunity can only be granted where an act is done in the proper performance of a function of the agency; and that protocols for the operation of both clause 14 and its Cyber Crime Bill counterpart be written and approved by the relevant ministers, and the attorney-general and then given to IGIS.

Generally, the Joint Select Committee approved of the Bill for the IS Act, thus continuing the bi-partisan approach by the major political parties in the national security area.

The IS Act provides for the establishment and operation of a Parliamentary Joint Committee on ASIO and ASIS (PJCAA). The PJCAA's main function is to review the administration and expenditure of ASIO and ASIS.¹⁴ The

functions of the PJCAA do not include scrutiny of the agencies' activities or operations: that is a matter for IGIS. In this regard, the position differs from that pertaining in the United States.

It is perhaps significant that when the Bill for the IS Act was being debated, which was well before 11 September, its contents provoked little controversy. While this probably reflects the bi-partisan approach on this topic of the major political parties, it also suggests that the IS Act establishes an appropriate framework for ASIS and DSD.

In the opinion of the author, the IS Act properly implements key recommendations of the Samuels Inquiry. The legislative framework, particularly the IS Act and the IGIS Act contains appropriate safeguards to ensure that ASIS and DSD behave lawfully.

The AIC together with the Australian Defence Force and the Australian federal, State and Territory police, constitute Australia's defences against terrorism. The events of 11 September will continue to provoke debate as to how these institutions, and the laws they operate under or administer, might be changed to better protect the nation and its citizens.

- 1 Security Treaty between Australia, New Zealand and the United States of America [ANZUS], made at San Francisco, 1 September 1951, Australian Treaty Series 1952 No. 2.
- 2 *Ibid.*, Article IV.
- 3 The term 'terrorism' was apparently first used in relation to 'The reign terror' of the French revolutionaries of 1793-4. Mathew Parris of The London *Times* wrote on 22/10/01 'Terrorist' might be thought a recent expression but goes back at least as far as 1795 when it was used in

England to describe the Government of France unleashing 'the Terror' on its citizens.'

- 4 Law Council Of Australia; 32nd Australian Legal Convention Canberra, 11 October 2001; *Australian Law - After September 11, 2001*; http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_after11sep01.htm
- 5 Press release at see also <http://www.ag.gov.au/ministers/attorney-general/transcripts/asiopowers.html>
- 6 *Ibid.*
- 7 *Ibid.*
- 8 *Ibid.*
- 9 *NSW Crime Commission Act* (NSW) s16.
- 10 *NCA Act* s28.
- 11 Samuels Report pp. 1-2.
- 12 Part 1AB.
- 13 Senate Legal and Constitutional Legislation Committee, Consideration of legislation referred, to the Committee Inquiry into the Provisions of the Cybercrime Bill 2001, August 2001
- 14 s29 of the IS Act.

Enduring law

By N R Cowdery Q.C., Council Member, Human Rights Institute President, International Association of Prosecutors

Nicholas Cowdrey argues the case for the alleged terrorists to be prosecuted in an International Criminal Court.

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On 11 September 2001, attacks were made by individuals (some identified, some not) against property in the United States of America, against persons in the US and against aspects of the fabric of US society. Over 5,000 individuals from over 80 countries were killed.

This was criminal conduct on a large scale and with a significant international dimension.

These actions provoked understandable human responses including (as for many crimes) outrage and a desire for revenge. In response, the government of the US acted against its main suspect, his associates and the government of the country

believed to be sheltering him. A 'war against terrorism' was declared (to be known first as Infinite Justice, then as Enduring Freedom). The US purported to exercise its right to individual or collective self-defence under customary international law and Article 51 of the United Nations Charter and set about building a coalition of nations under various agreements and relationships.

It should be noted, however, that Article 51 allows such measures against armed attack 'until the Security Council has taken measures necessary to maintain international peace and security'.

A few weeks later the UN and its Secretary General were awarded the 2001 Nobel Peace Prize. Kofi Annan wishes the UN to be the centre of a 'global coalition against terrorism'. A useful first step would be for the Security Council to act under Chapter Seven of the UN Charter - by taking such action as may be necessary to restore international peace and security and by establishing an international tribunal to try those identified as the surviving perpetrators of these crimes.

Although the attacks on 11 September had warlike features and consequences, they were criminal actions. A criminal law response is the most appropriate one and the mechanism exists for it to be made. Such a response enables the guilty to be identified, targeted and dealt with under the rule of law. The highly successful Lockerbie trial is an example of what can

be achieved by such means. A warlike response is less discriminating and open to allegations of the pursuit of ulterior objectives, especially in the absence of UN Security Council direction. It allows those against whom the 'war' is waged to trade on the injustices that it will necessarily produce. It also introduces superfluous allegations against the principal wager of the war - in this case, the world's only superpower.

Domestically, members of the coalition that has been formed have introduced emergency measures to address the continuing threat of terrorism. Care must be taken to ensure that such measures are proportionate to the threat and that they do not extend beyond the term of any clear and present danger.

It is disturbing that the 'war' is being directed by a country that is so opposed to the establishment of the International Criminal Court. The ICC will be created and it will supersede the presently under-resourced tribunals at The Hague. It will have jurisdiction over crimes like these if countries otherwise having jurisdiction are unable or unwilling to try the offenders. It will assist in avoiding wars.