Law Council of Australia

Panel Discussion

18-19 June 2015

"Justice and freedom in times of terror"

"An enlightened discussion about the appropriate balance between freedom and security"

Notes for Presentation

David Irvine

Perspectives of a National Security Practitioner

I speak as one who has been entrusted with responsibilities for protecting national security and the lives of our citizens, as a practitioner of the security intelligence function rather than a theorist or lawyer.

In the assertion and counter-assertion of recent debate about laws governing the security intelligence and law enforcement agencies, too much commentary neglects to acknowledge that the security and safety of citizens living within our community is just as much a human right as the other civil liberties of individual citizens. Is there a point at which one set of rights should be sacrificed in favour of the other? Or are they both, as I believe they should be, complementary elements of an indivisible whole? Justice Robert Marsden Hope took the view that:

"*…in the final analysis, public safety and individual liberty sustain each other.*[1]

In agreeing with Hope, for me the question is not so much how we balance freedom and security, but how we integrate these two equally fundamental concepts into the way in which we govern and protect ourselves.

If democratic governments are to fulfil their obligations for the protection of the community, they need to have organisations and laws that assist them to anticipate and prevent threats. This predictive and preventative function of national security intelligence is fundamentally different in nature to the evidence-based prosecutorial function that operates after a contravention of the law has allegedly occurred.

The issue is further complicated by the need for a security intelligence agency to operate mostly in secret; to protect both the subject of its investigations and its sources and methods. Claims are often made to the effect that secret intelligence is of no value, and that secret agencies are a menace to our civil liberties. "That is quite wrong. We

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[1] (RCIS, Fourth Report, Volume 1 [ASIO]) *"I have had in mind through my inquiries that the balance between the rights of individual persons and the preservation of the security of Australia as a nation is no simple or easy thing to achieve. But in the final analysis, public safety and individual liberty sustain each other."*

cannot do without secret intelligence to defend ourselves against enemies who are themselves operating in secret."[2]

So are Australia's lawful security intelligence mechanisms a menace to our civil liberties?

Some aspects of intelligence legislation do indeed butt up against the purist view that civil liberties are untrammelled and cannot be derogated – and not even by the so-called "tyranny of the majority".

I am mindful of former South Australian Chief Justice Sir John Bray's acknowledgement that, while the liberty of the individual and the right to privacy were values to be protected and not to be interfered with except for good cause, society was nevertheless entitled to use its power over the individual to prevent that individual causing harm to others. Community life would otherwise be impossible.[3]

Here in Australia, we have addressed this issue of integrating national security, community protection and civil freedoms by developing a uniquely Australian system of laws and accountability mechanisms that provides a robust foundation to protect our citizens against unreasonable or disproportionate violation of civil liberties by agencies such as ASIO

The system involves very precise laws stipulating what the security intelligence agency can and cannot do. These laws have been translated into detailed operating guidelines set by the Attorney-General, and which are available publicly. The system provides for the concepts of necessity and proportionality in intrusive actions undertaken by the security agency. It provides for ASIO assessments that may be prejudicial to an Australian citizen – and executive actions informed by such assessments - to be contested or reviewed within the Australian judicial system, including the Administrative Appeals Tribunal.

Importantly, our system provides for a variety of oversight mechanisms, involving a bipartisan Joint Parliamentary on Intelligence and Security, Senate Estimates and the independent statutory Office of the Inspector-General of Security and Intelligence and Security, tantamount to a standing royal commission examining on a daily basis the legality, propriety and appropriateness of ASIO's actions.

As a practitioner, I am satisfied that our system is an effective mechanism for working through and resolving the perceived tensions between the basic human right of citizens to be protected, for example against terrorism, and their rights to established civil liberties, including privacy.

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[2] Braithwaite, Rodric, The Royal Institute of International Affairs, Chatham House, Friday 5 December 2003

[3] Andrew Ligertwood, 'Bray the Jurist' in A Portrait of John Bray: law, letters, life; Prest, Wilfred (ed), Adelaide 1997, pp is six 75-76.

Nevertheless, particularly because our national security legislation is so extremely detailed in what is or is not permitted, it has proved necessary from time to time to revise or modernise some laws or to introduce new elements of legislation to enable governments to deal with the changes in the national security and law enforcement operating environments.

These environmental drivers are essentially two-fold:

> The rapid development of technology frequently requires legislation to be updated or modernised to enable the security intelligence and law enforcement agencies to continue to be able to carry out their functions of protecting the nation, not just from terrorism but from serious crime, espionage, various other forms of politically motivated violence and cyber attack.
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> > For example, recent changes to ASIO's powers in relation to surveillance, the streamlining and modernising of warrants and the lawful interception of communications, including a better concept of metadata and rules for its preservation by telecommunications providers, were introduced to cope with changes to the technical operating environment. For the most part they do not confer significantly expanded powers upon the agencies.
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> > > Indeed the metadata legislation essentially seeks to preserve the *status quo* in a new technological operating environment, enabling the agencies to use telecommunications data in a highly targeted manner – largely as they have done for the past 35 years – without any significant or systematic abuse having been identified during that period.[4]
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> Second, the advent of terrorism and the way terrorist methodologies have evolved has forced Governments to consider new powers to deal with the rapidly evolving nature of the new terrorist threat.
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> > The powers given to ASIO since 9/11 for the compulsory questioning of persons, and even for a precisely defined period of detention (the questioning and detention warrants) for the purpose of obtaining intelligence about general or specific terrorist threats, were clearly new powers – devised for a particular set of circumstances to avoid the questioning process actually hastening a planned terrorist attack. Fortunately, ASIO has not so far had to approach an issuing authority to authorise the detention of a person. I hope it never will. ASIO has however used the questioning powers on a score of occasions – to good effect.

[4] The principle change was the obligation of telecommunications providers to retain call data for two years, whereas in the past retention was not obligatory but voluntary for the purposes of their business models.

> Similarly, recent legislation to apply the concept of legal immunity to ASIO officers or their agents in certain operational situations is directly related to the evolution of the terrorist threat. It is a new tool to facilitate the collection of intelligence from within terrorist groups at home or overseas. Of course it has been criticised as "another ASIO grab for power",[5] ignoring the fact that the concept of immunities in controlled operations is not a new concept in Australian law. The AFP has had similar powers at least since 2010.

The Government has also introduced other legislation over the past year to strengthen and improve Australia's legislative counter-terrorism framework – in response to the growing threat posed by extremist recruitment of young Australians to the terrorist cause, returning foreign fighters and individuals within Australia who support foreign conflicts. Other measures include, *inter alia*, the legislation of the new offence of entering a "declared" area overseas.[6] The Government has enhanced the ability of the AFP to seek control orders on returning foreign fighters and it has lowered the threshold for arrest without warrant for foreign incursion and terrorism offences to a basis of "reasonable suspicion".

Most recently the Government has given notice that it is considering the withdrawal of Australian citizenship from dual nationals who engage in terrorism at home or overseas. The polls suggest that public opinion is running strongly in favour of such a move; removal of citizenship could prevent persons overseas from returning to Australia to pose a direct terrorist threat on Australian soil or would enable the deportation of such persons from Australia. The process for determining such withdrawals of citizenship– on the decision of a Minister or Ministers (but with provision for judicial review)[7] or only as a result of a criminal court process - is currently the subject of debate.

As a former practitioner of the security intelligence function may I issue a plea for people to pay close attention to the practical implications of some of the things they are suggesting: it is too easy to seek to assuage people's concerns about the intrusive powers of ASIO by simply adding more oversight or approval mechanisms every time we adjust ASIO's operating legislation - as if additional bureaucracy and increased cost would provide a more effective and greater level of assurance to the public than those layers already in place and proven over decades.

For example, ASIO has been accessing metadata under some form of legislative authority for 35 years based on a carefully controlled internal authorisation process. It

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[5] . The ASIO "special operations" provisions were modelled closely on the legislation of immunities for "controlled operations" in Part 1AB of the Crimes Act introduced by a Labour Government in2010. It is interesting that the ASIO Act has attracted all sorts of criticism that did not attach to the same sorts of immunities being accorded the Federal Police five years earlier, which also contain penalties for the unauthorised disclosure of such operations.

[6] i.e. where terrorist organisations are engaging in hostile activity and of advocating terrorism

[7] i.e. in the AAT or the Federal Court systems.

is a crucial component, often one of the starting points, of almost all ASIO's security investigations. To argue now that metadata can only be accessed on the basis of an external warrant might mollify those people who have mistakenly labelled metadata access as "mass surveillance" but it would gum up both criminal and security investigation systems. We should not add unnecessary process at the expense of operational effectiveness. (We should nevertheless continue to apply the principle of proportionality and seek warrants for the far more intrusive acquisition of the actual content of communications.)

Far better for the operating efficiency of the agencies would be to increase the resources of the Office of the Inspector-General of Intelligence and Security, as the Government has done recently, to monitor even more comprehensively the adherence by the agencies to the law and their correct application of the principles of necessity and proportionality in intrusive investigative practices.

Summary Conclusion

Public polling consistently shows that Australians are genuinely (and rightfully) concerned about the threat of terrorism. Australians expect their Governments to protect their security and safety and have shown willingness to surrender elements of their civil liberties in order to obtain that protection – provided that they can be confident agencies will only do as much as is necessary for their protection and no more (the principles of necessity and proportionality) and that the agencies are accountable and properly oversighted.

Let us debate and justify every new piece of legislation, but let us not reinvent the wheel each time the laws governing ASIO need to be modified, modernised or refined. We should accept the fact that our unique Australian system is generally working well and that the control and oversight mechanisms are effective.

A security intelligence organisation like ASIO, operating in a liberal democracy under the Rule of Law can only be effective if it has the support of the Australian people. Governments and the agencies themselves will increasingly be required to assist their populations, their politicians, their press and the legal fraternity to understand the nature of modern intelligence work, its value-added contribution and the systems of checks and balances within which it operates.

Finally, spare a thought for the officers of ASIO. Unlike those who can snipe from one side or the other of the virtuous human rights-national security divide, every day they have conscientiously to make decisions that integrate respect for civil liberties and human rights with the imperative to collect and assess intelligence that enables Government to meet its first obligation: the protection of the community. Their successes are often unremarked; their few failures invariably a subject of public castigation. We should value their contribution to both our security and our freedoms.