

THE ROLE OF THE INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY: A PRIMER

2024 Fiat Justitia Lecture
Monash University

The Hon C N Jessup KC
Inspector-General of Intelligence and Security

Introduction

In December 1984, five reports of the Royal Commission into Australia's security and intelligence agencies were presented to the Government. One related to the Australian Security Intelligence Organisation (ASIO).¹ In that report the Commissioner, Justice Robert Hope, said:

What is needed is an independent person with power to maintain a close scrutiny of ASIO's performance of its functions, and to look into complaints, in order to give greater assurance to the Attorney-General, and through him Parliament and the public, that ASIO is acting with propriety and within its charter.²

Justice Hope proposed that such a person be empowered to inquire into ASIO's compliance with the law, into the propriety of ASIO's actions and into the appropriateness and effectiveness of ASIO's internal procedures.³

Another of those reports, described as the "General Report",⁴ covered issues that related to all the intelligence agencies in the Commission's terms of reference. In that report Justice Hope recommended that the person with the inquiry function proposed in the ASIO report should have a like function in relation to the Australian Secret Intelligence Service (ASIS) and the forerunner of the Australian Signals Directorate (ASD),⁵ and should be known as the Inspector-General of Intelligence and Security.⁶

The recommendations of the Royal Commission led to the enactment of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). There could not be much doubt

¹ *Report on the Australian Security Intelligence Organisation*, December 1984, Parliamentary Paper No 232/1985.

² *Ibid* para 16.84.

³ *Ibid* para 16.91.

⁴ *General Report*, December 1984, Parliamentary Paper No 231/1985.

⁵ At the time, the Defence Signals Directorate within the Defence Department.

⁶ *General Report, op cit*, para 3.25. Justice Hope did not recommend that the proposed Inspector-General should have a broad, ongoing, inquiry function in relation to the other two agencies included in his terms of reference, the Joint Intelligence Organisation (now DIO) and the Office of National Assessments (now ONI).

but that, in the 37 years that have passed since the commencement of that Act,⁷ the security environment in which Australia finds itself, both internally and externally, has become more complex, and the need for quality intelligence more insistent. The importance of the work of the agencies which generate and understand this intelligence cannot be overstated. Neither can the significance of the fact that this work must, at least in very large part, be undertaken in secret.

At the same time, we must not lose sight of what it is that these agencies are protecting: a society which abhors tyranny, which values human dignity and the freedom of the individual, and which lives by the rule of law. Consistently, it is broadly accepted that the exercise of the authority of the state should be examinable, and where appropriate subject to challenge, by legal or administrative procedures which themselves are visible to the public generally. The tension between this principle and the importance of the work which the intelligence agencies perform in secret points to the need for an institution with powers, in effect, to audit the performance of the agencies for legality and propriety – powers which themselves must be exercised in secret.

The Intelligence Agencies

Of the ten Commonwealth government agencies that constitute the National Intelligence Community (NIC),⁸ six are comprehensively within the statutory oversight remit of the Inspector-General: ASIO,⁹ ASIS,¹⁰ ASD,¹¹ the Australian Geospatial-Intelligence

⁷ On 1 February 1987.

⁸ A statutory artefact under the *Office of National Intelligence Act 2018* (Cth) (ONI Act). Strictly, there are eleven agencies in the NIC, the eleventh being “the Defence Department (other than AGO or DIO)”, but that “agency” has no relevance to the role of the Inspector-General and is not further mentioned in this paper.

⁹ ASIO is constituted, and its functions are defined, by the *Australian Security Intelligence Act 1979* (Cth) (ASIO Act). Of those functions, the broadest, and the one which gives the best general idea of the scope of ASIO’s activities, is “to obtain, correlate and evaluate intelligence relevant to security”: ASIO Act, para 17(1)(a). The term “security” is defined as including the protection of, and of the people of, the Commonwealth, the States and Territories, from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system or acts of foreign interference, whether directed from, or committed within, Australia or not ASIO Act: ASIO Act, s 4, definition of “security”. The definition also extends to the protection of Australia’s territorial and border integrity from serious threats and the carrying out of Australia’s responsibilities to any foreign country in relation to the other matters referred to in the definition.

¹⁰ ASIS is constituted, and its functions are defined, by the *Intelligence Services Act 2001* (Cth) (IS Act). A high-level idea of the role of ASIS is conveyed by the function of obtaining intelligence about the capabilities, intentions or activities of people or organisations outside Australia: IS Act, para 6(1)(a). Broadly, ASIS may be understood as a foreign intelligence agency.

¹¹ ASD is also constituted, and its functions are defined, by the IS Act. A significant function of ASD aligns with the foreign intelligence function of ASIS, the difference being that the intelligence is here obtained in the

Organisation (AGO),¹² the Defence Intelligence Organisation (DIO)¹³ and the Office of National Intelligence (ONI).¹⁴ Of the remaining four NIC agencies, two – the Australian Criminal Intelligence Commission (ACIC)¹⁵ and the Australian Federal Police (AFP)¹⁶ – are partly within the statutory oversight remit of the Inspector-General.¹⁷

Those who work in the intelligence agencies are bound by broad statutory secrecy provisions, contravention of which attracts severe penalties.¹⁸ In certain cases, the identity of individual members of the staff of an agency must not be published¹⁹ or disclosed.²⁰ The agencies are subject to significant carve-outs from the operation of the *Freedom of Information Act 1982* (Cth) (FOI Act) and from the application of conventional administrative and judicial review procedures and remedies.²¹ Within this environment of secrecy, in important aspects of their

form of electromagnetic energy, or in the form of electrical, magnetic or acoustic energy: IS Act, para 7(1)(a). As Australia's signals intelligence agency, ASD also has a range of other functions which are not limited to the context of foreign intelligence, including the provision of advice and assistance to other Australian and foreign authorities and persons, an understanding of the detail of which is outside the scope of the present paper.

¹² Being part of the Defence Department, AGO is not constituted by the IS Act, but its functions are there defined. Broadly, AGO's role is to obtain geospatial, hydrographic, meteorological, oceanographic and imagery intelligence about the capabilities, intentions or activities of people or organisations outside Australia: IS Act, para 6B(1)(a).

¹³ Likewise, DIO is not constituted by the IS Act, but, differently from the case of AGO, the functions of DIO are not laid out in that Act, although some of the regulatory provisions of the IS Act apply to DIO in the same, or similar, terms as those applicable to the other intelligence agencies. Rather, DIO has developed its own mandate, under which it describes itself as "Defence's all-source intelligence assessment agency", and its role as the provision of "well-judged, clear and timely insights into defence and security-related matters that may affect Australia's national interests": <https://www.defence.gov.au/sites/default/files/2023-06/dio-mandate.pdf> viewed on 15 December 2023.

¹⁴ ONI is constituted, and its functions are defined, by the ONI Act. Broadly, its role involves leadership by guiding the direction of the NIC, evaluating the effectiveness of agencies in the NIC and providing high-level advice to the Prime Minister: ONI Act, ss 7, 8 & 9.

¹⁵ ACIC is constituted, and its functions are defined, by the *Australian Crime Commission Act 2002* (Cth) (ACC Act). Its functions cover many areas, but, for presently relevant purposes, it is sufficient to note that ACIC is charged with the collection, correlation, analysis and dissemination of criminal information and intelligence: ACC Act, para 7A(a).

¹⁶ AFP is constituted, and its functions are defined, by the *Australian Federal Police Act 1979* (Cth) (AFP Act). Its functions include the provision of police support services for the purpose of assisting or co-operating with an Australian or foreign intelligence or security agency: AFP Act, subpara 8(1)(bf)(ii).

¹⁷ The remit of the Inspector-General extends only to the "intelligence functions" of these two agencies, defined as limited to the activities of the agencies in relation to network activity warrants – as defined in the *Surveillance Devices Act 2004* (Cth) – obtained by them. Henceforth in this paper, a reference to an "intelligence agency" should be taken to include ACIC and AFP to the extent only that they undertake "intelligence functions".

¹⁸ ASIO Act, subs 18(2); IS Act, Pt 6, Div 1; ...

¹⁹ ASIO Act, s 92.

²⁰ IS Act, s 41 (ASIS).

²¹ ASIS, ASIO, ASD, ONI, AGO and DIO are exempt from the operation of the FOI Act: see subss 7(1) & (1A) and Pt I of Sched 2 of that Act. Decisions under the IS Act and the ASIO Act are not decisions to which the *Administrative Decisions (Judicial Review) Act 1977* (Cth) applies: see para (d) of the definition of "decision to which this Act applies" in s 3, and Sched 1, of that Act. Security assessments made by ASIO under Pt IV of the ASIO Act may be reviewed in the Security Division of the Administrative Appeals Tribunal, but otherwise decisions of the intelligence and security agencies are not reviewable in that tribunal.

work the intelligence agencies exercise powers, and enjoy immunities, that are unavailable to members of the community generally.²²

The office of the Inspector-General

The office of the Inspector-General of Intelligence and Security is established by s 6 of the IGIS Act. The Inspector-General holds office for such period, not exceeding 5 years, as is specified in the relevant instrument of appointment.²³ Organisationally, the Inspector-General sits within the ministerial portfolio of the Attorney-General, but, in relation to his or her oversight responsibilities, is not subject to direction or control by any person.

The staff engaged to assist the Inspector-General are members of the Australian Public Service.²⁴ At present, there are 58 Public Service positions in the Office of the Inspector-General.²⁵ The staff are based in a secure facility tenanted from the Attorney-General's Department in Canberra, but carry out much of their inspection work in the various premises of the intelligence agencies concerned. They are all required to have Top Secret, positively-vetted, security clearances. Save for positions which, of their nature, require particular qualifications, the Inspector-General's staff have a range of relevant qualifications and experience.

The inquiry function of the Inspector-General

The objects of the IGIS Act include the provision of assistance to Ministers in the "oversight and review" of the intelligence agencies' compliance with the law, of the propriety of the agencies' activities and of the effectiveness and appropriateness of the agencies' procedures relating to the legality and propriety of their activities. It is also an object to assist the Government in assuring the Parliament and the public that intelligence and security matters

²² Details.

²³ IGIS Act, subs 26(1). The Inspector-General may be re-appointed once: IGIS Act, subs 26(2).

²⁴ IGIS Act, para 32(1)(a). The Inspector-General also has the power to engage non-public service assistants, consultants and contractors in the performance of specific functions (IGIS Act, paras 32(1)(b), (c) and (d)), a power which is exercised occasionally.

²⁵ These are the full-time effective positions for which appropriations exist in 2023/24. The actual numbers are somewhat less than this.

relating to Commonwealth agencies, and in particular the activities and procedures of the intelligence agencies, are open to scrutiny.²⁶

In seeking to achieve those objects, the IGIS Act gives to the Inspector-General what is probably his or her most important, and potentially most impactful, function: “to inquire into any matter that relates to ...”²⁷ one or more of the activities of an intelligence agency as specified in the Act. The matters into which the Inspector-General may (and in some circumstances must) inquire vary, in point of detail, as between the agencies, but the following aspects are common to all:

- compliance by the agency with the laws of the Commonwealth, the States and the Territories;
- compliance by the agency with directions and guidelines given by the relevant responsible Minister; and
- “the propriety of particular activities” of the agency.²⁸

In each case, the inquiry function also extends²⁹ to an act or practice of the agency that is, or may be, inconsistent with or contrary to any human right, that constitutes, or may constitute, discrimination³⁰ or that is, or may be, unlawful under certain anti-discrimination legislation.³¹

Subject to various detailed provisions of the IGIS Act applicable in different situations, an inquiry may be commenced upon receipt of a request from the Attorney-General or the relevant responsible Minister, of the Inspector-General’s own motion or in response to a complaint.³² Whether an inquiry is in fact conducted in any particular case depends on the source of the initiating circumstance and is regulated by a number of quite specific provisions of the statute. Depending on the facts, the decision to commence an inquiry is not wholly discretionary.

²⁶ IGIS Act, s 4. Other objects of the IGIS Act include the provision of assistance to Ministers in ensuring that the activities of the intelligence agencies are “consistent with human rights” and in investigating “intelligence and security matters relating to Commonwealth agencies” (ie including those that are not intelligence agencies).

²⁷ This statutory formula is used in the following provisions of the IGIS Act: para 8(1)(a) in relation to ASIO, para 8(2)(a) in relation to ASIS, AGO and ASD and para 8(3)(a) in relation to DIO and ONI.

²⁸ *Ibid*, subparas (i), (ii) and (iii) respectively in relation to each named agency.

²⁹ Under the following provisions of the IGIS Act: subpara 8(1)(a)(v) in relation to ASIO, subpara 8(2)(a)(iv) in relation to ASIS, AGO and ASD and para 8(3)(b) in relation to DIO and ONI.

³⁰ In the IGIS Act, the term “human rights”, and the word “discrimination”, have the same meanings as in the *Australian Human Rights Commission Act 1986* (Cth).

³¹ The *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth) or the *Sex Discrimination Act 1984* (Cth).

³² Where the complaint relates to ASIS, AGO, ASD, DIO or ONI, the complainant must be an Australian citizen or permanent resident: IGIS Act, paras 8(2)(a) and 8(3)(a).

In every case, the Inspector-General must first determine whether the conduct of an inquiry is, in the circumstances, within his or her functions under the IGIS Act.³³ Even in cases in which the relevant subject matter falls within scope,³⁴ there are some situations in which conducting an inquiry is excluded from the statutory functions.³⁵ Assuming the matter is within functional jurisdiction, the Inspector-General must then decide whether to conduct an inquiry. To assist in the making of this decision, the Inspector-General is empowered to make “preliminary inquiries” of the head of the relevant agency.³⁶ This is a very useful facility, particularly in the handling of complaints. Commonly, a complaint, as and when first received, will raise issues of which the Inspector-General has no foreknowledge and no necessary familiarity. Someone may, for example, complain that he or she is being subjected to some kind of covert surveillance by an intelligence agency. As the first step in responding to such a complaint, the Inspector-General may – and usually will – consult with the staff of the agency concerned, and if necessary call for any records relating to the complainant,³⁷ in order to assist in the process of deciding whether the complaint should be the subject of an inquiry.

The ability to conduct a preliminary inquiry is also useful where the Inspector-General is considering whether to commence an inquiry of his or her own motion. There may be any number of circumstances arising in the daily work of the Inspector-General and his or her staff which have the potential to become the subject of formal inquiries. If – as is almost invariably the case – the Inspector-General has the benefit of open and transparent access to the records of the agency concerned, he or she will be better placed to make an informed decision whether to commence an inquiry. Of course, if the relevant agency head chooses not to assist in the way contemplated by the preliminary inquiry provisions of the IGIS Act, the Inspector-General may have no alternative but to proceed to the conduct of an inquiry.

While the decision whether to commence an inquiry of the Inspector-General’s own motion is entirely discretionary, the same cannot be said of the situation arising upon receipt of a complaint. If inquiring into the complaint is within the functions of the Inspector-General,

³³ In the case of a statutory office with defined powers, this step is, of course, implicit. Where a complaint has been received, however, it is expressly mandated: IGIS Act, para 11(1)(b).

³⁴ For example, there may be a doubt whether an intelligence agency had acted legally and with propriety.

³⁵ For example, see subs (3B) and (5) of s 8 of the IGIS Act.

³⁶ IGIS Act, s 14.

³⁷ At this stage, the Inspector-General has no power to compel the production of documents. The efficacy of the preliminary inquiry process depends largely upon the degree of co-operation offered by the relevant agency to the staff of the Inspector-General.

there must, subject only to the specific exceptions provided for in s 11 of the IGIS Act, be an inquiry.³⁸ Some of those exceptions are categorical,³⁹ while others leave the Inspector-General with a degree of judgement, evaluation or discretion.⁴⁰ In the case of the latter, the broadest form of the discretion not to inquire is to be found in subs 11(2) of the IGIS Act, which provides that an inquiry need not be conducted if the Inspector-General is satisfied that the complainant became aware of the matter more than 12 months before the complaint was made, that the complaint is frivolous, vexatious or not made in good faith, or that “having regard to all the circumstances of the case, an inquiry ... into the action is not warranted.”⁴¹ This lastmentioned ground for deciding not to conduct an inquiry provides a discretion which is both broad and flexible. In practice, the occasions for its exercise arise very frequently.

Sometimes, although the result of a preliminary inquiry might have been that a full inquiry cannot or need not be conducted, the Inspector-General might take the view that some matters which emerged in the course of the preliminary inquiry warrant the attention of the responsible Minister or the head of the relevant agency. In such a case, there is a discretionary power to provide a report about such matters, which may include the Inspector-General’s conclusions and recommendations.⁴²

If there is to be an inquiry as such, it must be conducted in private and, subject to the IGIS Act, in such manner as the Inspector-General thinks fit.⁴³ The Inspector-General has power to require any person to provide information, to produce documents, and to attend for the purpose of answering questions (on oath or affirmation), relevant to an inquiry.⁴⁴ On

³⁸ IGIS Act, subs 11(1).

³⁹ By way of example, see IGIS Act, subs 8(7) (for an employment complaint, the availability of internal review) and s 9AA (ministerial actions, certain actions by the Board of ACIC or the Inter-Governmental Committee, and the availability of review by the Security Division of the AAT).

⁴⁰ By way of example, in the absence of “special reasons”, the fact that the complainant has exercised, or exercises, a right to cause the action to which the complaint relates to be reviewed by a court or tribunal is a bar to the conduct of an inquiry: IGIS Act, subs 11(3). If there is or was such a right which has not been exercised, the Inspector-General has a discretion not to inquire into the matter if he or she forms the opinion that it would be, or would have been, reasonable for the complainant to exercise, or to have exercised, that right: IGIS Act, subs 11(4). Where the complaint concerns a matter relating to the employment of the non-public service staff of ASIO, ASIS, ONI or ASD (a category of complaint which falls within the functions of the Inspector-General under subs 8(6) of the IGIS Act), the Inspector-General must not inquire if he or she is satisfied that the procedures of the relevant agency relating to the redress of employee grievances are adequate and effective, if the complainant has not pursued those procedures as far as practicable or if the subject of the complaint is not of sufficient seriousness or sensitivity to justify an inquiry: IGIS Act, subs 11(5).

⁴¹ These discretions have been part of the IGIS Act from the outset, having been based on corresponding provisions introduced into the *Ombudsman Act 1976* (Cth) by the *Ombudsman Amendment Act 1983* (Cth): see the *Explanatory Memorandum* to the Inspector-General of Intelligence and Security Bill 1986, para 35.

⁴² IGIS Act, s 25B.

⁴³ IGIS Act, subs 17(1).

⁴⁴ IGIS Act, subss 18(1), (3) and (4).

completing an inquiry, the Inspector-General must first provide the head of the agency concerned with a draft of the proposed report and include in the final report any comments which the head of the agency made about the draft.⁴⁵ The final report must be given to the head of the agency, to the responsible Minister and, on request, to the Prime Minister and/or the Attorney-General.⁴⁶ Where the inquiry was initiated by complaint, the complainant must be provided with a written response.⁴⁷

It is important to note that the outcome of an inquiry by the Inspector-General is not a binding instrument, in the nature of a court order or declaration, for example. The Inspector-General is part of the executive arm of government, and his or her reports are addressed to others in that arm – agency heads and ministers. However strongly the conclusions and recommendations in a report may be expressed, whether effect should be given to them, when, and to what extent, are matters which fall within the responsibilities of those addressees. Likewise, any view on a question of law which underpins a report of the Inspector-General is not binding on the agency concerned.

The inspection function of the Inspector-General

Although I have described the conduct of inquiries as the Inspector-General's most important function, quantitatively it represents only a small fraction of the work in fact carried out under the IGIS Act.⁴⁸ The other main function committed to the Inspector-General is conducting inspections of the intelligence agencies "for the purpose of giving effect to the objects" of that Act.⁴⁹ An inspection is to be conducted at such times as the Inspector-General determines in consultation with the head of the relevant agency.⁵⁰ In the context of such an inspection, the Inspector-General may enter premises, is entitled to all reasonable facilities and assistance that the agency head is capable of providing and to full and free access to information, documents and other property of the agency. The Inspector-General

⁴⁵ IGIS Act, subss 21(1) and (2).

⁴⁶ IGIS Act, subss 22(1), (4) and (5). In any case, the report may, if the Inspector-General considers it appropriate, be given to the Prime Minister or the Attorney-General: IGIS Act, subs 22(6).

⁴⁷ IGIS Act, s 23. The response, which is not just a copy of the final report, must not be given until the relevant agency head and the Inspector-General have agreed that it will not prejudice security, the defence of Australia, Australia's relations with other countries, law enforcement operations, the privacy of individuals, confidential commercial information or the fair trial of a person or the impartial adjudication of a matter: IGIS Act, subs 23(2).

⁴⁸ The Inspector-General's annual reports show that the number of inquiries completed in the years ending on 30 June 2021, 2022 and 2023 were zero, one and one respectively.

⁴⁹ IGIS Act, subs 9A(1).

⁵⁰ *Ibid.*

may examine copies of, or take extracts from, any such information or documents.⁵¹ Having conducted an inspection, the Inspector-General may prepare a report for the attention of the responsible Minister or the head of the relevant agency.⁵²

In practice, it is the conduct of regular inspections which represents the bulk of the work of the Inspector-General's staff on a day-to-day basis.⁵³ This function is carried out by teams of inspectors, each with its own specialised understanding of the nature of the activities of the agency or agencies concerned. Each year the agencies are notified of the program of inspections which it is intended to conduct in the forthcoming period, the result being that the agencies are generally well-prepared to co-operate with the relevant teams' requirements. The general practice is that the reports generated from these inspections are prepared, and forwarded to the agency heads, as and when the relevant inspections are finalised, and summaries are forwarded to the responsible Ministers on a six-monthly basis.

On occasions, it will be considered necessary to conduct inspections, and to prepare and to forward the resulting reports, *ad hoc*, in response to the emergence of specific issues or questions which lie outside the pre-ordained program. The process followed in such instances may have much in common with the conduct of an inquiry – in essence an investigation followed by a report. Whether the issues or questions being investigated should become the subject of an own-motion inquiry or remain within the realm of inspections is a matter of procedure to be decided in the discretion of the Inspector-General.

Broadly, and with a particularity appropriate to an unclassified environment, the areas of agency activity inspected are set out in the Annual Report of the Inspector-General. To take ASIO, and the year 2022-23, as representative for a large and sophisticated collection agency, the areas fell under the following headings: non-warranted surveillance operations,⁵⁴ technical collection and retention, analytic integrity, human source management, special intelligence operations, interaction with minors, warrants, device access orders and industry assistance requests.⁵⁵

⁵¹ IGIS Act, subs 9A(2).

⁵² IGIS Act, s 25A.

⁵³ In 2022/23, the number of inspections completed, by agency, were: ONI, 6; ASIO, 28; ASIS, 18; ASD, 16; AGO, 17; DIO, 4. See Inspector-General of Intelligence and Security, *Annual Report 2022-23*, ISSN 1030-4657, pp 84-89.

⁵⁴ This refers to surveillance operations that may be carried out by ASIO without a warrant, but subject to conditions, under s 26D of the *Australian Security Intelligence Organisation Act 1979*, not to surveillance operations that should have been, but were not, authorised by warrant.

⁵⁵ IGIS, *Annual Report, op cit*, pp 96-98.

In addition to the inspection function as such, the inspection teams are also the point of contact for the agencies' self-reporting of compliance incidents of which they become aware. There is no legal obligation for the agencies to proceed in this way, but the practice demonstrates the elevated culture of compliance which generally pervades the intelligence community – a culture which, it can possibly be asserted without too much false modesty, has grown out of the assiduous attention to detail of the Inspector-General's inspection teams and of the high level of trust and confidence which exists between the various agencies and the members of those teams.

Legality and propriety

Turning to the substantive matters involved in the work of the Inspector-General, it is customary to classify the concerns which he or she may have with the activities of intelligence agencies as those relating to legality, propriety and consistency with human rights. Such a classification is not comprehensive, but it represents (probably) about 90% of the work involved.

As to "legality", as already mentioned the IGIS Act refers not to legality, or lawfulness, in the broad but to compliance with the laws of the Commonwealth, the States and the Territories. In practice, most often it is with agencies' compliance with the laws of the Commonwealth that the Inspector-General is concerned.⁵⁶ By reason of the nature of their work, it is the collection agencies which must attend most closely to the requirements of these laws. Of necessity, the collection of domestic intelligence in the interests of security will involve activities which would be unlawful if done by an ordinary citizen but which if done pursuant to specific statutory powers are not so. That is to say, compliance with the statute makes lawful what would otherwise be unlawful. For example, the Inspector-General's inspectors would be interested in such things as the existence and scope of an applicable warrant and the coverage by the warrant of the activities being undertaken.⁵⁷

The three agencies covered by the IS Act – ASIS, ASD and AGO – are subject to an important restriction for which that Act provides. Pursuant to directions made under subs 8(1) of that Act, these agencies must obtain a ministerial authorisation before engaging in

⁵⁶ Although what was probably the most egregious publicly-acknowledged transgression of the "legality" requirement (albeit occurring shortly before the IGIS Act was enacted) by an intelligence agency did not, at least apparently, concern the laws of the Commonwealth: see *A v Hayden* (1984) 156 CLR 532.

⁵⁷ The exercise of powers under a warrant is proffered here as an example only. Under relevant statutes, there are also powers which, for their lawful exercise, do not depend on the existence of a warrant.

specified activities, including an activity which has the specific purpose of producing intelligence on an Australian person.⁵⁸ This provision reflects the broad proposition that collecting domestic intelligence is not the normal work of these agencies. Accordingly, the coverage of, and the agencies' compliance with, ministerial authorisations of this nature is within the "legality" remit of the Inspector-General.

These instances are examples only of the many different contexts in which the legality of the activities of intelligence agencies may arise for consideration under the oversight functions of the Inspector-General. It will be seen at once that the court processes to which recourse is conventionally had for the enforcement of statutory norms of conduct are ill-suited to deal with issues of compliance in instances such as these. Members of the community who are affected by the activities of the intelligence agencies will generally be wholly unaware that the activities are taking place, much less have the wherewithal to assess the legality of them. And if, in a particular case, both of these bars were crossed, the conduct of litigation in the setting of openness conventionally associated with court processes could not seriously be contemplated where the very subject matter of the dispute involved the secret operations of an intelligence agency.

As already mentioned, examining the "propriety" of the activities of the agencies is also a regular aspect of the work of the inspection teams and, if necessary, an element in an inquiry under the IGIS Act. Exactly what "propriety" connotes in this context is a question regularly asked at meetings and forums. The word is not, and has never been, defined in the IGIS Act. Neither does the word seem to be used elsewhere in Commonwealth legislation in a context that is even remotely analogous to its use in that Act.⁵⁹

The concept of "propriety" has been in the IGIS Act from the outset. It represented much more than the mere grammatical preference of the draftsman. It was fundamental to the recommendations of Justice Hope and thus stands as one of the two main policy pillars that led to the establishment of the statutory office of Inspector-General. In his ASIO report, his

⁵⁸ An "Australian person" is an Australian citizen or a "permanent resident", the latter term being defined to include a body corporate incorporated under a law in force in a State or Territory, other than a body corporate controlled by a foreign power, by a natural person who is neither a citizen nor a permanent resident or by a group of natural persons none of whom is a citizen or a permanent resident.

⁵⁹ A brief, and quite probably inadequate, electronic survey discloses that the word is mainly used (1) in an alternative grammatical form of the time-honoured formula "fit and proper" in such contexts as superannuation, insurance and banking, and (2) as an element in a formula referring to reasonable adult expectations as to standards of decency, morality, etc in such contexts as the classification of publications, films and computer games and the regulation of the importation of related materials.

Honour used the word repeatedly and confidently. It may be that, nearly 40 years ago, conducting oneself, or one's businesslike or governmental activities, with propriety was a concept of such obvious content that nothing further needed to be said. On the other hand, to make this point by a contrasting example, the concept of diversity, so often invoked in organisational jargon in the current era, may have been bewildering to the policymakers of the 1980s.

This is not the occasion to assay a broad exposition of the concept of propriety, save to say that any conclusion as to the consistency of an activity of an intelligence agency with that concept will necessarily be context-dependent. To the clear-sighted and experienced inspectors who have to make judgements on such matters, a propriety deficit will generally be recognisable with little difficulty. That is to say, as in many areas of the law, the elephant test finds its way into relevant decision-making – it may not be possible to state exhaustively what “propriety” connotes, but its absence in a practical setting tends to be readily apparent.

Human rights

To date, the present discussion has centred upon so much of the Inspector-General's role as is concerned with the legality and propriety of the activities of the intelligence agencies. As mentioned earlier, the relevant oversight function is concerned also with the consistency of agency activities with human rights.⁶⁰ This remit of the Inspector-General would thus extend to activities of an agency which may not be non-compliant with Australian legislated law, but which might arguably be inconsistent with human rights.⁶¹ Procedurally, in addition to the normal avenues by which an inquiry or an inspection might be initiated, where an act or practice of an “intelligence agency”⁶² comes to the attention of the Australian Human Rights Commission, the matter must be referred to the Inspector-General.⁶³

⁶⁰ Defined in subs 3(1) of the IGIS Act as having the same meaning as in the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) which, by definitions in subs 3(1) thereof, invokes the meaning of the term in the International Covenant on Civil and Political Rights, the United Nations (UN) Declaration of the Rights of the Child, the UN Declaration on the Rights of Mentally Retarded Persons and the UN Declaration on the Rights of Disabled Persons.

⁶¹ Such as the receipt and utilisation of intelligence forwarded by a foreign agency, where the intelligence had originally been obtained by means which were inconsistent with human rights.

⁶² In this context ASIO, ASIS, ASD, AGO, DIO or ONI.

⁶³ AHRC Act, subs 11(3). Where the matter concerns ACIC or AFP, there are provisions in the AHRC Act for the transfer of a complaint to the Inspector-General where the President of the Human Rights Commission forms the opinion that the subject matter of the complaint could be more effectively or conveniently dealt with by the Inspector-General: AHRC Act, subs 20(4C).

Some other matters

In addition to the matters already discussed, there are several specific matters into which the Inspector-General has the function of inquiring, including –

- matters which relate to the “effectiveness and appropriateness of the procedures of [an agency] relating to the legality or propriety of the activities of that agency”;⁶⁴
- in some cases, the procedures of an agency relating to the redress of grievances of employees;⁶⁵ and
- in some cases and with some exceptions, a matter which relates to the promotion, termination of appointment, discipline or remuneration of an employee who has filed a complaint in that regard.⁶⁶

What the Inspector-General does not do

So much for the broad outlines of what the Inspector-General does. It may now be useful to note what he or she does not do. It is occasionally said that the intelligence agencies are “accountable” to the Inspector-General. So to assert is to misdescribe the role of the Inspector-General, and to conflate the distinction between oversight and accountability. As mentioned earlier, the role of Inspector-General involves assisting Ministers and the Government and, through them, providing assurance to the Parliament and the public of the agencies’ compliance with the law, and with the requirements of propriety, and human rights, in their activities.

Neither does the Inspector-General review the quality or appropriateness of the substantive operations of the intelligence agencies. The inspection teams do not claim to know the work of the intelligence agencies better than the agencies themselves. So, for example, if an agency decided that there was intelligence value in undertaking surveillance of the comings and goings of a particular individual, the Inspector-General would not second-guess that judgement. If it transpired that the warrant or authorisation required to carry out such an

⁶⁴ IGIS Act, subpara 8(1)(a)(iv) (ASIO); para 8(2)(c) (ASIS, AGO and ASD); para 8(3)(aa) (DIO and ONI); para 8(3A)(g) (ACIC and AFP). In the case of ASIS, AGO, ASD, DIO and ONI, this function may be exercised only on the request of the Attorney-General or of the responsible Minister, or of the Inspector-General’s own motion. In the case of ASIO, ACIC and AFP, the function may – and, subject to the carve-outs in s 11 of the IGIS Act referred to earlier, *prima facie* must – also be exercised in response to a complaint.

⁶⁵ IGIS Act, para 8(1)(b) (ASIO); para 8(2)(b) (ASIS, AGO and ASD); para 8(2)(ba) (DIO and ONI). In the case of ASIO, this function relates also to procedures for the redress of grievances of “affiliates”: see ASIO Act, s 4, “ASIO affiliate”.

⁶⁶ IGIS Act, subs 8(6) (ASIO, ASIS, ONI and ASD). In the case of ONI, this function relates only to employees who are engaged otherwise than under the *Public Service Act 1999* (Cth). In the case of ASIO, this function relates also to “affiliates”: see IGIS Act, subs 8(8).

activity had expired, or had never been obtained, the Inspector-General would then most certainly be interested, but on legality or propriety grounds only.

Likewise, the Inspector-General does not provide “before-the-event” advice – legal or otherwise – to the intelligence agencies. It is not the function of the Inspector-General to assure an agency that, if it proceeded to undertake a particular activity, no issues would arise along the legality or propriety axes. For the Inspector-General to get involved in approving or endorsing activities about to be undertaken by an agency would inevitably compromise the independence of his or her later judgement if the legality or propriety of the activities as carried out came into question.

That is not to exclude entirely the appropriateness of an intelligence agency, about to embark upon an activity, informing the Inspector-General of its intentions, nor of the Inspector-General drawing attention to any apparently applicable legal restrictions or requirements, for example. Whether, and to what extent, any such restrictions or requirements in fact stood in the way of the intended activity would be an operational decision to be made by the agency itself. Another instance of what might be called soft collaboration between an intelligence agency and the Inspector-General is where the agency acts to implement a recommendation made by the Inspector-General in one of his or her previous reports. The question might arise whether the particular change in practice proposed by the agency would be sufficient to satisfy the recommendation.⁶⁷

Public interest disclosures

In addition to the matters already discussed arising under the IGIS Act, the Inspector-General has important functions under other legislation, the most frequently-encountered of which being the *Public Interest Disclosure Act 2013* (Cth) (PID Act). Where an “internal disclosure”⁶⁸ of information is made in relation to an intelligence agency, a duly-appointed member of the Inspector-General’s staff is an “authorised internal recipient” of that information.⁶⁹ Once a disclosure is made in this way, it must, subject to limited exceptions, be “allocated”, either to the Inspector-General as such, to the agency in relation to which it

⁶⁷ The closeness of the ongoing relationship between the Inspector-General and the agencies whose activities he or she oversees is ultimately a matter of individual judgement and, in a sense, style. The case for a closer form of collaboration has been persuasively laid out by a former Inspector-General: see The Hon Margaret Stone AO, “Reflections on Oversight of Intelligence Agencies: Promoting Compliance, Trust and Accountability” (2021) 95 (10) *Australian Law Journal* 780.

⁶⁸ PID Act, subs 26(1), table item 1.

⁶⁹ PID Act, s 36 and s 34, table item 2; and, in relation to ACIC and AFP, table item 1(ca).

was made or to another appropriate agency.⁷⁰ The principal officer of the agency to which the disclosure was allocated must, again subject to limited exceptions, investigate the matter.⁷¹

When someone who is, or has been, a “public official”⁷² contacts the Inspector-General with an expression of dissatisfaction, disapproval, or the like, about an intelligence agency, it will be necessary to decide whether that contact is a complaint under the IGIS Act or a disclosure under the PID Act (or, occasionally, neither). That is often not a simple matter. A disclosure under the PID Act may be made anonymously and may also be made without the discloser asserting that it was made for the purposes of that Act.⁷³ But if, objectively, some kind of contact satisfies the description of a public interest disclosure, it must be dealt with consistently with the provisions of the PID Act.

One of those provisions which is germane to the present discussion arises where the recipient agency has a “separate investigative power”.⁷⁴ The disclosure may then be investigated under that power rather than under the PID Act. In the settings with which the Inspector-General is concerned, relevant to this choice of process is the circumstance that an investigator under the PID Act has no power of compulsion – in relation either to documents or to witnesses – whereas, when conducting an inquiry in response to a complaint under the IGIS Act, the Inspector-General does have powers of that nature, as previously mentioned.

Another instance of the interactive operation of the IGIS Act and the PID Act is to be seen in the recently-enacted s 7B of the latter.⁷⁵ Under that provision, a complaint may be made to the Inspector-General about the “handling” of a public interest disclosure by an intelligence agency.⁷⁶ This contemplates a situation in which a disclosure was first allocated to, and investigated within, the agency to which it related, but where the discloser was not satisfied with the way in which the matter had been handled within that agency. By this means, the Inspector-General becomes a second, more independent, layer of consideration of the disclosure, thereby, arguably, strengthening the integrity of the investigative process.

⁷⁰ PID Act, subs 43(3).

⁷¹ PID Act, s 47. The exceptions are listed in subs 48(1) of the PID Act.

⁷² A term defined in s 69 of the PID Act.

⁷³ PID Act, s 27.

⁷⁴ PID Act, s 49.

⁷⁵ Introduced by the *Public Interest Disclosure (Review) Act 2023* (Cth).

⁷⁶ Before the enactment of s 7B, any such complaint would have to be considered within the rubric of “propriety” under the IGIS Act.

Conclusion

For reasons explained earlier, save to refer to material in the Annual Report, it has not been permissible to include in this brief survey of the role of the Inspector-General any actual “information” about the matters which are subject to inquiry or inspection under the IGIS Act.⁷⁷ For those who anticipated an exposition of the lurid details of the undercover work of our intelligence agencies, an apology is extended. The restrictions under which the Inspector-General and his or her staff work are, of course, necessary in the interests of national security, but equally important is the confidence which they engender in the intelligence agencies themselves to engage with the Inspector-General with frankness and transparency in relation to every aspect of their activities. That is a feature of the work of the Inspector-General which should never be compromised – even on an occasion as significant as this.

CNJ
8 May 2024

⁷⁷ IGIS Act, s 34.