

## Oversight by the Inspector General of Intelligence and Security

For the effective protection of the rights of the government the Parliament and the people of Australia, we need an effective IGIS.<sup>1</sup>

- 3.1 As Mr David Irvine, the Director-General of ASIS observed in evidence to the Committee above, the Inspector-General of Intelligence and Security is a key accountability mechanism. The office of the IGIS is intended to provide independent assurance that Australia's intelligence agencies act legally, with propriety, under ministerial direction, and with regard to human rights.<sup>2</sup>
- 3.2 The Committee considers that its own work and that of the IGIS, while separate, are complementary and should be mutually reinforcing. The Committee is determined to build an effective and cooperative relationship with the IGIS. The Committee's own inquiries provide an independent check on the nature of the relationships between the IGIS and the Australian Intelligence Community.

### Background

- 3.3 The office of the IGIS was established by the *Inspector-General of Intelligence and Security Act 1986*. The IGIS oversees the entire Australian Intelligence Community (AIC) which comprises ASIO, ASIS, DSD, ONA, DIO and DIGO. The IGIS does not have formal responsibilities, however, in relation to other agencies which are involved in security and intelligence

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1 *Transcript*, p.7-8.

2 Inspector-General of Intelligence and Security, *Annual Report, 2000-2001*, p.1.

activities, for example the Australian Federal Police which is overseen by the Commonwealth Ombudsman.

- 3.4 The IGIS conducts inquiries in response to a complaint or a reference from a Minister. In addition, the IGIS can 'also act independently to initiate inquiries and conducts regular inspections and monitoring of agency activities.<sup>13</sup> The IGIS has significant inspection powers which include 'requiring the attendance of witnesses, taking sworn evidence, copying and retention of documents and entry into an agency's premises.<sup>14</sup> The IGIS produces an Annual Report that includes details of complaints and referrals received during the reporting year. In addition, the report dedicates a separate section to each of the agencies which examines their performance relating to their obligation to act legally and with propriety and to comply with guidelines and directives.
- 3.5 The Office of the IGIS is quite small. At present, in addition to the Inspector-General himself, it has only four staff, one of whom is part-time. The role of the IGIS does not include conducting efficiency audits of the agencies. For example, the IGIS does not conduct audits of the agencies focusing on whether the agencies are using their resources and delivering programs efficiently and effectively.
- 3.6 In March 2004, Mr Bill Blick retired as Inspector General and Mr Ian Carnell was appointed to the office by the Prime Minister on the 23 March 2004.<sup>5</sup> The Committee met informally with the Mr Carnell on 13 May 2004 to welcome him to the position and for preliminary discussions on the role of his office and the role and activities of the Committee. The Committee was pleased that Mr Carnell offered to meet on a quarterly basis throughout the year or additionally if required to update the Committee on matters arising within the Australian Intelligence Community.
- 3.7 It is anticipated that Mr Carnell will brief the Committee more fully for the next review of administration and expenditure. In view of his recent appointment as IGIS, the Committee did not feel it appropriate to request greater input from Mr Carnell at this stage for this review.

## Issues from the IGIS Annual Report

- 3.8 During the course of the Committee's review, a number of complaints examined and documented by the IGIS in his unclassified Annual Report
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3 Inspector-General of Intelligence and Security, *Annual Report, 2000-2001*, 2001, p. 1.

4 Inspector-General of Intelligence and Security, *Annual Report, 2000-2001*, 2001, p. 1.

5 *Press Release by the Prime Minister*, 23 March 2004.

for 2002-2003 were also examined by the Committee. The methods by which the IGIS oversees agency operations were also discussed.

## Complaints against ASIO

- 3.9 During 2002-2003 the IGIS dealt with 32 complaints about ASIO without proceeding to conduct a preliminary inquiry. Four outstanding matters were carried over from the previous reporting period. The IGIS conducted preliminary inquiries into 19 new complaints about ASIO, an inquiry into whether Australia's intelligence agencies (which included ASIO) had any warning of the Bali bombings and another preliminary inquiry which also involved approaching each agency.<sup>6</sup>
- 3.10 A preliminary inquiry allows the IGIS to conduct a quick review of a complaint, to determine whether the issues raised fall within the jurisdiction of the IGIS and to address complaints where the use of formal powers is considered unnecessary. A full inquiry allows the IGIS to use the complete range of statutory powers under the IGIS Act.
- 3.11 ASIO was asked about the nature of complaints made about ASIO which were examined by the IGIS in 2002-2003. Mr Richardson assured the Committee that these complaints were of a relatively minor nature. One of the more serious matters examined by the IGIS was a mistake made by officers concerning the entry of premises not specified on a search warrant.<sup>7</sup> In this case the IGIS concluded that, while the error was unintentional, the search was nevertheless unauthorised.
- 3.12 The IGIS also reported that a number of other people whose residences ASIO searched complained about various aspects of the searches. The IGIS noted that when conducting an overt search under warrant ASIO obtains assistance from the Australian Federal Police and State police, principally at the start of the search, to gain entry to the premises and ensure that risks to persons involved in the search are minimised. In doing this, although acting under the authority of a warrant issued to ASIO and with the benefit of ASIO intelligence about the risks, the police use their own judgement about the techniques to use.<sup>8</sup>
- 3.13 The IGIS noted that a good number of the complaints about conduct related to an incident alleged to have occurred at the initial stages of searches and appeared to be about police behaviour. The IGIS therefore encouraged complainants in such cases to exercise their rights to have police behaviour reviewed. The Commonwealth Ombudsman became

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6 IGIS *Annual Report 2002-2003*, p.18.

7 *Transcript*, p.57.

8 IGIS *Annual Report 2002-2003*, p.19.

involved in investigations under the *Complaints (Australian Federal Police) Act 1981*.

- 3.14 While agreeing that the approach adopted by the IGIS has been appropriate, the Committee is concerned that complainants raising concerns about combined ASIO/police operations may be left with the impression of buck-passing between jurisdictions and complaint authorities.
- 3.15 Given the potential for complaints about overt searches to generate adverse community reactions with negative implications for cooperation with ASIO and the police, it is important that ASIO and the police be seen to be fully accountable for the conduct of combined activities.

#### **Recommendation 4**

- 3.16 **The Committee recommends that consideration be given, as appropriate, to greater liaison between the IGIS and the Commonwealth Ombudsman (and State Ombudsman), including the development of a memorandum of understanding or protocol governing possible joint reviews of combined ASIO/police operations.**

#### **Alleged bugging of a federal politician**

- 3.17 The Committee asked about the alleged bugging of a federal politician, a matter that was investigated by the IGIS.
- 3.18 The IGIS conducted an inquiry into the alleged bugging of the Hon LJ Brereton MP's communications during the investigation into leaks of classified material relating to East Timor in 1999-2000. Allegations made in news outlets suggested that DSD may have cooperated with overseas agency to monitor the Member's communications.<sup>9</sup> The IGIS found that DSD had not engaged in interception activities directed against Mr Brereton or provided access to the capabilities of overseas organisations, but had provided accommodation and some analytical support for the AFP Defence Security Branch investigation (Operation Arbitre/Keeve).<sup>10</sup>
- 3.19 The Committee asked if DSD would like to make any comment on this. In response, Mr Merchant stated:

First of all, there was the inspector-general's inquiry into those allegations. He concluded that there was no substance to those

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<sup>9</sup> IGIS *Annual Report 2002-2003*, p.68.

<sup>10</sup> IGIS *Annual Report 2002-2003*, pp.76-77.

allegations. DSD certainly had not bugged or intercepted communications of Mr Brereton. Certainly, in regard to the related allegation, we had not asked any of our partners to intercept those communications. They were the core elements of the allegation that was made.<sup>11</sup>

- 3.20 In the course of his investigation, the IGIS did confirm media reports that at a meeting attended by ASIO in December 1999, a member of the Defence Security Branch/AFP investigation team asked whether ASIO was able to assist the leak investigation by obtaining a warrant to intercept certain telephone services at Parliament House.<sup>12</sup>
- 3.21 By implication the Defence Security/AFP team turned to ASIO because the AFP was not legally empowered to seek a telecommunications warrant in what was a domestic “leak” investigation (as distinct from a matter of alleged foreign espionage).
- 3.22 The IGIS has reported that the ASIO representatives replied in the negative to Defence Security and the AFP and subsequently provided a report to the Director-General of Security. Mr Richardson annotated the report saying, *inter alia*, “It is important that the AFP and Defence understand that, unless there is relevance to our functions under the Act, we cannot engage in such activity.”<sup>13</sup>
- 3.23 While noting ASIO’s appropriate response in relation to this particular matter, the Committee is mindful that this episode raises a more general issue of what is appropriate involvement for intelligence agencies in law enforcement investigations, including leak investigations.
- 3.24 In this regard the Committee also notes a discussion of these issues in the IGIS’s Annual Report for 2000-2001. In this, the IGIS noted that DSD may, in certain circumstances and subject to tight restrictions, target the foreign communications of Australians at the request of Commonwealth law enforcement agencies.<sup>14</sup> Such requests are relatively few in number and, if in any doubt about whether to accede to a request, DSD would normally consult with the IGIS.<sup>15</sup>
- 3.25 In his 2000-2001 Annual Report, the then IGIS commented that in a couple of such instances (in which the requests were ultimately declined) he was concerned that the agency in question may not, before making the request, have exhausted other legal possibilities open to it, requiring more detailed

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11 *Transcript*, p. 35.

12 *IGIS Annual Report 2002-2003*, p.71

13 *IGIS Annual Report 2002-2003*, p.71.

14 *IGIS Annual Report 2000-2001*, p.34.

15 *IGIS Annual Report 2000-2001*, p.34.

justification than provided by DSD, to obtain the necessary intelligence. In other words, the agencies might see use of DSD capabilities as a soft option.<sup>16</sup>

- 3.26 These cases prompted the IGIS to write to the Director DSD suggesting that, in principle, the test for triggering use of DSD capabilities in these circumstances should be no lower than that required to obtain a warrant to intercept domestic telecommunications under the applicable legislation.<sup>17</sup> The Director of DSD replied that he supported this view and he wrote to the heads of the relevant agencies requesting that they apply this principle when considering requests for DSD assistance.<sup>18</sup>
- 3.27 In the light of the request made by the Aribite/Keeve investigation team to ASIO for telecommunications interception of a Federal Member of Parliament, there would be merit in further communication between the IGIS, ASIO, ASIS, DSD, and DIGO, and law enforcement agencies concerning the circumstances in which intelligence agencies may provide assistance to law enforcement agencies.
- 3.28 This would ensure that law enforcement agencies have a clear understanding of what assistance can and cannot be obtained from the intelligence community and the circumstances in which assistance might be obtained. In this, consideration should be given not only to the use of intelligence gathering powers and capabilities, but also to other forms of assistance such as those provided by DSD to the Arbite/Keeve investigations: analytical, logistical, accommodation and personnel.

## **Practice of scrutiny by IGIS**

- 3.29 Although there was no specific matter raised with ASIS by the Committee, in relation to issues in the IGIS Annual Report, the Director-General of ASIS, Mr Irvine was asked about the methods the IGIS employ for inspecting the procedural correctness of operations within ASIS and the access that he gains to intelligence agency records. Mr Irvine stated:

[The IGIS] comes into ASIS and look at every piece of paper or, these days, every bit of data on a computer and he does it regularly. He comes in, will take an operation and will go through an entire operation. He will go through all of our privacy work to make sure that we are doing it properly. If we are not doing it

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<sup>16</sup> IGIS *Annual Report* 2000-2001, p.34.

<sup>17</sup> IGIS *Annual Report* 2000-2001, pp.34-35.

<sup>18</sup> IGIS *Annual Report* 2000-2001, p.35.

properly, he will tell us. If there are substantial issues that he feels should be reported to the government and the ministers, he will report to them.

3.30 Mr Irvine assured the Committee that:

We do not regard [scrutiny by the IGIS] as a brake on our activities; we regard it as a very legitimate organisation that performs a very legitimate function in keeping a watch on us and advising us in fulfilling our responsibilities.<sup>19</sup>

3.31 Mr Irvine was asked whether he ever points out to the IGIS something that he believes the IGIS should look at. Mr Irvine responded that he had done so and had done so quite recently.<sup>20</sup>

It might appear to the public that it is reactive when IGIS is asked to do something because something has cropped up and it is felt that you need an independent observer to look at it. But IGIS comes to us on a daily basis to look at this and that. We cannot dictate to them what they will look at and what they will not.

3.32 Mr Irvine stated:

... one of the things that really worries me about the current controversies that you are reading in the press, the newspapers and so on, is that IGIS has been set up to perform a function but we are getting into the sort of situation where if it produces a report that people do not agree with then it is biased or whatever.<sup>21</sup>

3.33 The Committee noted that the IGIS has been called upon to undertake a wide range of special investigations including an inquiry into security in government, an inquiry into the activities of Mr Jean-Philippe Wispelaere; an inquiry into allegations relating to the Tampa incident; an inquiry into allegations concerning the deaths of the five Australian newsmen at Balibo, East Timor, in 1975, an inquiry into the Bali terrorist attack, and the above mentioned inquiry into the alleged bugging of Mr Brereton.

3.34 At a time when the Australian intelligence community is subject to more media and public scrutiny than at any time in the past three decades, there may be a tendency for Government to regard the IGIS (and indeed also this Committee) as a convenient place to refer controversial matters for investigation and resolution.

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19 *Transcript*, p.8.

20 *Transcript*, p.8.

21 *Transcript*, p.7.

- 3.35 While accepting that the IGIS is and should be available to provide an independent review of matters referred to it by the Government, the Committee considers that care should be taken to ensure that this important Office is neither overburdened or diminished in relation to its primary statutory functions of exercising day-to-day oversight of the Australian intelligence community.
- 3.36 The Committee has some concern that the Office of the IGIS may be understaffed in view of its increasing workload due to the growth in intelligence agency activities, staffing levels and legislative powers. The Committee may wish to explore this further in the next review.

