

Espionage against East Timor and the need for Parliamentary oversight

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Abstract

This article discusses allegations of espionage against the government of East Timor and analyses the weakness of legislative oversight of Australia's intelligence agencies. It suggests a means of rectifying this weakness.

Keywords

intelligence, oversight, East Timor, oil, espionage

On 9 September 2004, as staff at the Australian Embassy in Jakarta gathered for morning tea, a small Daihatsu delivery van exploded on the street outside. The Australian Embassy had been hardened as a result of previous terrorist attacks in Indonesia, but people outside the walls weren't protected; just under a dozen were killed, including an embassy security guard, four Indonesian policemen, the gardener, a visa applicant and some others. Jemaah Islamiyah claimed responsibility. A few months before, the Australian government had released its White Paper on Terrorism. 'Extremist-Muslim' terrorism was identified as a focus more than 50 times, and Indonesia was said to be central to Australia's counter-terror strategy, receiving a hundred mentions in the space of 110 pages.

The Australian Secret Intelligence Service (ASIS) was to be a vital pillar of the counter-terror strategy. ASIS is Australia's overseas spy agency. It collects intelligence about the capabilities, intentions or activities of people or organisations outside Australia. It would have an obvious role in gaining intelligence about Jemaah Islamiyah and other 'extremist-Muslim' terror groups. David Irvine, the Director-General of ASIS, travelled to Jakarta soon after the attack on the Australian Embassy. Irvine was a professional diplomat who had been chosen to lead ASIS after a successful performance as Australian ambassador to China. There, he had led the Howard



government's efforts to clinch a \$25 billion liquefied natural gas deal for a group of companies led by Woodside Petroleum. By the time Irvine was given command of ASIS, Woodside Petroleum was at the head of a consortium with valuable leases on oil and gas reserves in the Timor Sea.

According to information that became public some years later, the Australian government diverted ASIS's valuable resources from the campaign against 'extremist-Muslim' terror groups in Indonesia, and ordered it to undertake an espionage operation against the East Timorese leadership in Dili. Accordingly, ASIS used the cover of an aid project to install listening devices in East

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Timorese ministerial offices. It then turned these devices on (and off, to conserve battery life) with a microwave beam transmitted from a covert post in the Central Maritime Hotel, a 127-room floating hotel moored off the wharf with a direct line-of-sight to East Timor's ministerial offices about half a kilometre away. The digital recordings were then allegedly couriered across town to the Australian Embassy, and sent to Canberra for analysis. The espionage operation provided Australia with secret access to East Timor's internal deliberations and negotiating tactics.

Some months later, the Secretary of the Department of Foreign Affairs and Trade, Dr Ashton Calvert, retired and joined the board of directors of Woodside Petroleum. The responsible Minister, Alexander Downer, worked as a lobbyist for Woodside after leaving Parliament in 2008. Woodside Petroleum is a company of no small importance to Australia. In 2001, Treasurer Peter Costello blocked its takeover by Dutch oil giant Shell. Woodside's chairman, Charles Goode, became a Companion of the Order of Australia in June that year, and sat on the boards of Liberal Party fundraising vehicles.

Australians who welcome operations that protect national security and public safety may look askance at operations that appear to be conducted for economic reasons. This, at any rate, appears to have been a concern for the then-head of all technical operations for ASIS. A senior officer who cannot be identified publicly, he is a decorated veteran with many years of service. He is said to have expressed disquiet at the diversion of scarce assets from the counter-terror effort in Indonesia. ASIS subsequently terminated his employment. He filed a complaint with the Inspector-General of Intelligence and Security, saying that he had been constructively dismissed 'as a result of a new culture within ASIS'.



His case serves to draw attention to the fact that, as currently written, the *Intelligence Services Act 2001* clearly permits — or at least does not prohibit — an espionage operation such as the one undertaken against East Timor. Section 6 prevents ASIS from planning for or undertaking

'paramilitary activities, violence against the person or the use of weapons by staff members or agents of ASIS'. That restriction aside, Section 11 of the Act allows ASIS operations 'in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being'.

In Parliament, independent Senator Nick Xenophon put this matter to the Inspector-General of Intelligence and Security, Dr Vivienne Thom. '[H]ow do you distinguish between spying for the economic wellbeing of Australia versus the wellbeing of a particular company or companies?' he asked. Thom replied:

[T]he functions of all the foreign intelligence agencies are to obtain intelligence in accordance with government's requirements... The government's requirements for intelligence are set by the National Security Committee of cabinet. They set the priorities which guide collection by ASIS and other intelligence agencies.¹

But, Senator Xenophon wanted to know, if a spying target is 'considered to be to the economic wellbeing of an Australian owned or majority Australian owned firm', can that be 'a sufficient criterion to also deem it to be to the economic wellbeing of Australia in the context of section 11(1) of the *Intelligence Services Act*'?

Dr Thom's answer was instructive:

If I had questions about whether an activity of ASIS fitted within their mandate, I would firstly look to see whether it was collecting intelligence in accordance with government's priorities and then to see whether it was in accordance with the legislation and those three broad areas [national security, foreign relations, national economic well-being] given in the legislation... So national economic wellbeing is a broad umbrella, if you like, and there are many areas of intelligence collection that could fall under it. The prosecution of Australia's trade interests could also be a purpose related to national economic wellbeing.²

That is the reality of intelligence operations and intelligence oversight in Australia. The government apparently orders intelligence operations in accordance with its priorities, and the Inspector-General of Intelligence and Security checks that the agency carries out the mission 'in accordance with government's priorities'. Little wonder, then, that Senator Xenophon complained in frustration after a year of pursuing the matter:

So we have no idea whether this has been investigated, whether it was unlawful or not. We are none the wiser about whether the law was broken by one of our own intelligence agencies.³

¹Finance and Public Administration Legislation Committee: Estimates, Senate, Parliament of Australia, Canberra, 26 May 2014, 175–6 (Dr Vivienne Thom, Inspector-General of Intelligence and Security).

²Finance and Public Administration Legislation Committee: Estimates, above n 1, 176–7.

³Finance and Public Administration Legislation Committee: Estimates, Senate, Parliament of Australia, Canberra, 23 February 2015, 196 (Senator Xenophon).

Furthermore, under Australia's system of government and public service conventions, an incoming government is not told about intelligence operations authorised by its predecessors. Intelligence operations authorised by the National Security Committee of cabinet are confidential to the government that authorised them, and access to them by succeeding governments is not sought, and if sought is not given, except with the approval of the current leader of the relevant political party – the Prime Minister or Leader of the Opposition as the case may be. Accordingly, ASIS operations ordered by one government aren't made known to the next government. Thus, Stephen Smith, Kevin Rudd and Bob Carr weren't 'read in' to the ASIS files about the espionage operations against East Timor allegedly ordered by Alexander Downer. That's the way the conventions work.

What check then exists against executive malfeasance? Precious little. Oversight of the intelligence services is alarmingly poor. Australia lacks institutionalised review of surveillance programs from both the legislative and judicial branches of government. The Royal Commissions of the late 1970s and early 1980s were watershed moments in Australian intelligence history, but the modern environment is a very different one. Currently, the Inspector-General of Intelligence and Security (IGIS) has oversight of the intelligence agencies. Yet IGIS is located within the Executive arm of government – in the Department of Prime Minister and Cabinet. As Senator Xenophon's questions established, IGIS plays no meaningful oversight role apart from checking that operations are carried out 'in accordance with government's priorities'.

Parliamentary oversight is also feeble, with the Parliamentary Joint Committee on Intelligence and Security (PJCIS) ordinarily restricted to the administration and financing of the intelligence agencies. The PJCIS does not examine any past, present or proposed operations, or the sources and methods involved. This is a deficiency in comparison with the US, where the Intelligence Committees and Judiciary Committees in the Senate and House of Representatives are regularly briefed about all authorised intelligence collection programs, and relevant members of Congress receive detailed briefings prior to each reauthorisation.

In addition, the executive is required to brief select groups of congressmen on specific types of operation

before they take place. Members of the so-called Gang of Four, comprising the chairpersons and most senior opposition members of the House and Senate intelligence committees, receive briefings on 'sensitive non-covert action intelligence programs', such as highly sensitive intelligence collection programs. Members of the so-called Gang of Eight (comprising the Gang of Four and the speakers and opposition leaders of the House and Senate) receive briefings from the executive on forthcoming covert actions, without having the power to approve or veto executive plans. This preserves executive freedom while also ensuring a check on executive overreach. Furthermore, all members of the House and Senate intelligence committees and their key staffers are regularly provided with extended footage of completed operations involving, for example, drone strikes. No such provision exists in Australia.

There is nothing to stop further – or ongoing – espionage operations, ostensibly for 'economic wellbeing', in the face of terrorist threats posed by Islamic State or related groups, that use the Australian aid program as a cover, and thereby endanger the safety of thousands of legitimate aid workers by exploiting the trust that aid agencies must build with their host country. To remedy this state of affairs, a good first step would be for Parliament to insist on genuine oversight.

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