The Changing Legal Framework of the Australian Intelligence Community: From Hope to Richardson

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Intelligence and security agencies in Australia have been reviewed by judicial inquiries, including two Royal Commissions conducted by Justice RM Hope (1974–1976) and (1983–1985), and later investigations by officials, culminating in the Comprehensive Review (2018–2019) by Mr DJ Richardson. Seeking a balance between civil liberties and suggested security needs, the article traces the two inquiry models. It outlines the dangers presented by the past targeting of communists, homosexuals and political adversaries; the comparative weaknesses of Australia's individual constitutional protections; and the need for regular reviews of such agencies given radical changes in geopolitics, alliances and technology. Reconciling the demands of intelligence and security with democracy and basic rights is never easy and is now increasingly difficult.

Security and Intelligence: Humble Beginnings

In his mid-century book *Prosper the Commonwealth*,[1] Sir Robert Garran surveyed lawmaking in the first 57 years of federal government in Australia. He felt able to do so without any scrutiny of the issues of national intelligence and security. Two world wars came and went. The battles of Gallipoli, El Alamein and Korea were fought. The Fenians, anarchists, Nazis, fascists, communists and anti-imperialists all took their toll on the new nation. Although, Garran witnessed 22 parliaments and 32 federal Ministries, there was no mention in his book of spies or terrorism.

It was not until 9 March 1949, during the second Chifley government, that a Directive for the establishment of a national security service was issued. Yet even this move, did not rank a mention among the countless enterprises of nation building that Garran records. Insofar as there was any Australian arrangement concerning intelligence and security in its first 50 years, it was substantially found in executive government activities for Imperial co-operation with the United Kingdom and its officials. A loose and non-statutory initiative was ultimately established. As the Chifley Government was moving to its close, that initiative came to be known, in August 1949, as the Australian Security Intelligence Organisation (ASIO).[2]

Surprisingly, no reference was even made by Garran to the dramatic defection to Australia of the Soviet intelligence operatives, Vladimir Petrov and his wife Evdokia, in March 1954. Nor did he refer to the Royal Commission on Espionage, established as a consequence in April 1954 (Justices Owen, Philp and Ligertwood). This was so despite the fact that the impact on politics and law of those events was large and long lasting. Although the Royal Commission on Espionage found that the Soviet Embassy in Canberra had been used for the purposes of spying from 1943 to 1954, when its agents were expelled, it also found that the only locals who had collaborated were known communists or sympathisers. The Soviets made little or no headway in securing secret information, and still less in spreading disaffection among the general Australian population. The fear that they might occasion widespread disloyalty to the

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[1] RR Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958).

[2] David Horner, *The Spy Catchers: An Official History of ASIO 1949-1963* (QBD, 2015); John Blaxland and Rhys Crowley, *The Secret Cold War: An Official History of ASIO 1975-1989* (QBD, 2015).

Crown, the Commonwealth or the people of Australia was found to be unproved.[3] Nevertheless, that fear was skilfully played for a decisive political advantage by Prime Minister Robert Menzies.

The serious split in the Australian Labor Party (ALP) that followed the publication of the report of the Royal Commission on Espionage, and the way in which the ALP leader, Dr HV Evatt, responded to it, occasioned bitterness and suspicion among ALP politicians and supporters concerning allegations of spying and sedition. Although ASIO had been founded by Chifley, some ALP members were affronted by what they saw as the anti-ALP bias on security issues that ASIO had generally appeared to evidence.

In December 1972, the first ALP Government in 23 years was returned to office. Soon after, in March 1973, the Attorney-General of the Whitlam Government, Senator Lionel Murphy, led unheralded "raids" on ASIO offices in Melbourne and Canberra. The Attorney-General was accompanied on his visit by media and attracted much public attention. The raids were justified as an assertion of the Attorney-General's ministerial right to ensure effective accountability on the part of ASIO to the Federal Parliament and the elected Australian government. ASIO's response to the raid allegedly involved the "leakage" of documents by the organisation, designed to contradict the Prime Minister's account of what had happened. This, in turn, produced a determination on the part of Whitlam and Murphy that ASIO and the intelligence community should be rendered more accountable to democratic controls in Australia. They should be subjected to new legal requirements and removed from what had come to appear to them as effective political untouchability and unquestionability.[4] A proposal during the first term of the Whitlam Government to establish a judicial inquiry into ASIO matured into a promise to establish a Royal Commission if the ALP were returned to office in the June 1974 federal election. When this happened, Justice Robert Hope AC CMG, a senior Judge of the New South Wales Court of Appeal, was appointed to conduct an inquiry into national intelligence and security in Australia. This was the First Hope Royal Commission.

Justice Hope's specific task was to make recommendations on the intelligence and security services that the Australian nation "should have available to it and on the way in which the relevant organisations can most efficiently and effectively serve the interest of the Australian people and Government". He later declared that the files and records of ASIO, as he found them in his inquiry, were "in such disorder" that he considered it necessary to concentrate on issues concerning future reform rather than sorting out the many alleged wrongs of the past. Justice Hope concluded that Australia's intelligence agencies, as already part of the five nation (Five Eyes) arrangement with the United States, United Kingdom, Canada and New Zealand were "too close to those in the UK and US".[5] The longer Justice Hope was involved in the scrutiny of the intelligence community, the more doubtful he became about the extent of their co-operation with his inquiries. He also became more committed to recommending institutional means to ensure that an ongoing process of reform would be put in place that was compatible with the liberal democratic polity provided for in the *Australian Constitution*.

The Hope Approach and Principles

The First Hope Royal Commission resulted in eight separate reports, five of which were tabled in the Federal Parliament in 1977. These reports helped to outline the future structure of the Australian security and intelligence services; the ambit of intelligence gathering that should be legally permitted; and the machinery for ministerial control, direction and co-ordination of the agencies comprising the intelligence community. The Commission resulted in the enactment of the *Australian Security Intelligence Organisation Act 1979* (Cth); the enactment of the *Office of National Assessments Act 1977* (Cth); and the establishment of the Office of National Assessments (ONA). The ONA was a new intelligence agency, accountable to the Prime Minister, created to provide independent assessments and analysis on political, strategic and economic developments and to coordinate foreign intelligence derived

[3] National Archives of Australia, *The Royal Commission on Espionage, Report* (1955).

[4] CJ Coventry, *Origins of the Royal Commission* (MA Thesis, UNSW, 2018) 119.

[5] Coventry, n 4, 119. See generally Peter Edwards, *Law, Politics and Intelligence: A Life of R.M. Hope* (New South Publishing, 2020) 147–171.

from members of the Australian intelligence community. Such intelligence included that derived from relationships with foreign intelligence agencies. In time, the ONA achieved a leadership role in the Australian intelligence community, through its work of co-ordination and evaluation of multiple sources of intelligence information gathered by other agencies. Simply collecting more data, without analysis and assessment, was not the way to go.

In May 1983, a further Royal Commission on Intelligence and Security (the Second Hope Royal Commission) was established by the new ALP Government led by Prime Minister RJ Hawke. Once again Justice Hope was appointed to conduct it. Its task was to survey the progress made in implementing the earlier Commission's recommendations; to report on the development of additional policies, priorities and co-ordination; and to assess the success in achieving effective ministerial and other accountability, financial oversight and the proper handling of complaints where these were made. As with the First Hope Royal Commission, important parts of the second report were not made public when the Commission completed its work. Even when, later, additional material was published, much of it was unintelligible because of extensive redactions.

In 1995, a further judicial Commission of Inquiry was established by the Keating Government under Justice Hope's erstwhile judicial colleague, Justice Gordon Samuels AC CVO, former Judge of the New South Wales Court of Appeal. Justice Samuels was joined in his inquiry by the retired Secretary of the Prime Minister's Department, Mr Mike Codd AC. Reflecting the ongoing concern to secure effective accountability to civilian government, the Samuels and Codd Inquiry was charged with investigating intelligence held by the Australian Secret Intelligence Service (ASIS), allegedly on tens of thousands of Australian citizens. This Inquiry's findings concluded that, while files of that description existed, the suggested quantity did not. However, the Minister acknowledged that some files did exist on Australian citizens although the brief of ASIS had been limited to foreign targets outside, rather than inside, the Australian Commonwealth. The Commissioners affirmed the existence of legitimate concerns about the effectiveness of grievance procedures that had been put in place. They found that these tended to "elevate conformity to undue heights and to regard the exercise of authority rather than consultation as the managerial norm". They recommended the assessment of staff grievances by access to an independent tribunal and the provision of a statutory basis for ASIS. These reports were not made public.[6]

At this stage, in March 1996, the Howard Government assumed office replacing the ALP administration. The security and intelligence scenes were soon altered by the attacks of the Al Qaeda Islamic organisation on targets in the United States and other friendly states, on "nine eleven" 11 September 2001.

ASIS had originally been created by an Executive Order in 1952, within the Department of Foreign Affairs. However, responding to further inquiries, the *Intelligences Services Act 2001* (Cth) was enacted. It converted ASIS to a statutory body, headed by a further Director-General. The legislation enumerated the functions of ASIS and the constraints imposed on fulfilling those functions. In particular, the use of weapons, except in self-defence and the conduct of violent or paramilitary operations by ASIS officers were curtailed. In order to enhance accountability, provision was made for the establishment of a parliamentary committee to provide oversight of the burgeoning agencies within the "national intelligence community" (NIC).[7]

The conduct of inquiries, some of them mentioned above, into the evolving network of the NIC continued in conjunction with the passage of further federal legislation that substantially enhanced the responses of the Commonwealth to international terrorism, foreign espionage and the exercise of influence upon Australian citizens and institutions by foreign agents for purposes unconnected with, or hostile to, Australia's national interests.

[6] Coventry, n 4, 167, 168.

[7] Australia, *Office of National Assessments, R.M. Hope and Australian Public Policy*, Archived from original, National Archives of Australia, 26 January 2014.

In 2004, a new inquiry into the Australian intelligence agencies, was conducted by a senior Australian diplomat, Mr Philip Flood AO.[8] It focused on the co-ordination and evaluation of Australia's foreign intelligence activities and the assessment of international developments of "national importance" to Australia. it recommended a substantial increase to the ONA's budget, which was doubled as a consequence. However, this inquiry was essentially an internal one. Its chair was an insider so far as intelligence agencies were concerned. Between 1995 and 1996 Mr Flood had served as the Director-General of ONA.

In 2017, another inquiry, described as the Independent Intelligence Review (IIR), was established. Despite its description, it involved a further shift away from the earlier practice of appointing independently-minded judges to conduct such inquiries. Instead, senior bureaucrats were appointed, also with earlier close engagements with Australia's intelligence and security apparatus.

The 2017 investigation was undertaken by Mr Michael L'Estrange AO and Mr Stephen Merchant, PSM.[9] The former was a long-time senior officer in the Australian Department of Prime Minister and Cabinet and later Secretary of the Department of Foreign Affairs (2005–2009), the latter a Deputy Secretary in the Department of Defence. He had also served as head of the National Security College (2009–14). The IIR inquiry found that numerous amendments to the legislative framework over a number of years had resulted in imposing an "*ad hoc* character" upon the federal statutes. The result had been the grant of substantial new powers and the adoption of different thresholds for the issue of warrants under legislation permitting ever more intrusive functions. These and other features of the legislation resulted in the potential for the enactments to create uncertainty because of the very rapid expansion of institutions and the adoption of differing tests and criteria for intrusive action.

The L'Estrange and Merchant inquiry resulted in the enactment of the *Office of National Intelligence Act 2018* (Cth). This envisaged yet another agency within the NIC: the Office of National Intelligence (ONI). In keeping with the arrangements in force in each of the "Five Eyes" countries, ONI was to become the single national point of contact and co-ordination for Australia's national intelligence arrangements with friends abroad.[10]

In 2017 the Turnbull Government announced its intention to establish the ONI. Additionally, at first under administrative arrangements, the Government established a Ministry of Home Affairs portfolio to bring security, intelligence, law enforcement, counter-terrorism, counter foreign interference, border security, transport and critical infrastructure security and cybersecurity capabilities under a single federal Minister serving in Cabinet. In 2018 the *Home Affairs and Integrity Legislation Amendment Act 2018* (Cth) gave statutory effect to the departmental move, and it created the powerful new portfolio of Home Affairs. The broad sweep of its responsibilities was explained by the need to create a "comprehensive, integrated source of advice" to the government on all of the perceived main threats to Australia's security.[11] The IGIS and the INSLM, while retaining their independence, were moved from the Prime Minister's portfolio to that of the Attorney-General.

On 30 May 2018 the Federal Attorney-General announced the commissioning of yet another review on the "legal framework of the national intelligence community". This implemented another recommendation contained in the 2017 IIR report that a comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure that all agencies would operate under a legislative framework that was clear, coherent and contained protections for Australians. From the context it is clear that the "protection for Australians" referred to was protection from the alleged acts of intelligence, security terrorists and other wrongdoers not protection, as such, from excessive burdens on their liberties. To undertake this further "comprehensive review", Mr Dennis Richardson AC was appointed as Reviewer.

[8] PJ Flood, Inquiry into Australian Intelligence Agencies, *Report* described in Australia, *Report of the Comprehensive Review of the Legal Framework of the National Intelligence Community* (2020) Vol 1, 149 [6.194]–[6.195].

[9] Australia, Comprehensive Review of the Legal Framework of the National Intelligence Community (AGPS, 2019) Vol 1, 150 [6.197]–[6.198] (*Richardson Report*).

[10] *Richardson Report*, n 9, Vol 1, 150 [6.197]–[6.201].

[11] *Richardson Report*, n 9, Vol 1, 151 [6.206].

His appointment constituted the ultimate departure from the earlier model involving the enlargement of senior State judges (Owen, Philip, Ligertwood, Hope, Samuels and Sheller). That model had also been partly followed in the appointment of senior independent barristers (Bret Walker AO SC; Hon RV Gyles AO QC; and Dr James Renwick CSC SC) as Independent National Legislation Monitor and a former Federal Court Judge (Hon Margaret Stone AO) as Inspector-General of Intelligence and Security. Mr Richardson, on the other hand, was the quintessential "insider". He was selected to perform the comprehensive review. The word "independent" was missing from the title of his investigation.

Mr Richardson had held numerous high offices in federal administration. These included as Director-General of ASIO (1996–2005); Australian Ambassador to the United States (2005–2009); Secretary of the Department of Foreign Affairs (2010–2012); and Secretary of the Department of Defence (2012–2017). His experience and knowledge were beyond reproach. His integrity was unquestioned. However, he would have been the first to acknowledge that his appointment lacked the feature of manifest independence earlier thought vital to such appointees in this area of activity. A similar feature had been evident in the election of the previous chair of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (Hon Andrew Hastie MP). He was a former captain in the Australian Special Air Service Regiment. He was assigned to Afghanistan (2009–2010)); a participant in Australian Special Operations (2013); and engaged in the Middle East (2014–2015). By such appointments, emphasis was placed on the office-holder's prior knowledge and experience in a specialised field of activity. However, manifest neutrality of the subjects of investigation may be affected by the appearance (and possibly the reality) of special empathy with the Australian intelligence community, simply by virtue of earlier intense professional engagements. Yet, do such appearances matter in the selection of personnel to oversee the institutions, legislation and activities of reviews of Australia's laws and practices concerning intelligence and security?

It can be inferred that those who have lately selected close "insiders" were not concerned about the supposed advantages of investigations by "outsiders". If they considered such advantages at all, they may have considered it a mistake to try to import into the supervision of intelligence and security, whether in Parliament or in the executive government, the stricter standards that are expected in Australia where decision-making is performed in the judicial branch of government?[12] Where the conduct concerned is undertaken by elected legislators or submitted for ultimate decision by elected members of the executive government, is it sufficient to rely on the effectiveness of electoral sanctions? Electoral defeat can be invoked if the community is dissatisfied by either the methodology, the conclusions of elected officials, or the checks and balances put in place to ensure respect for basic human rights and fundamental freedoms.

HOPE AND THE VALUE OF OUTSIDERS

Justice Hope expressed his own views on this issue when he explained the approach that the Royal Commissions he chaired had adopted and the justifications he saw for his approach. The opening chapter of the fourth report of the Second Hope Royal Commission, *General Report*, described the way in which, before his inquiry in 1974, the NIC had operated. To a large extent, it had operated outside the law and outside much knowledge on the part of the democratic branches of government:[13]

> After World War II Australia's intelligence and security agencies carried on their activities for many years in considerable secrecy. They were accountable, directly or indirectly, to Ministers, who were, in turn, accountable to the Parliament, but any public knowledge of what they did and indeed, in some cases, of their existence, was very limited. Although at times incidents like the defection of the Petrovs and the subsequent Royal Commission lifted the curtain to some extent, for the most part they and their activities remained substantially hidden, with the Government relying on what it was told for most of its knowledge about them.

It was this state of affairs, largely beyond any real operation of the rule of law, that the Hope Royal Commissions were determined to correct. Moreover, in order to achieve such correction, the politicians who created the two Commissions obviously thought it would be beneficial (possibly essential) to appoint outsiders to conduct the investigations and to provide the recommendations.

[12] See, eg, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Johnson v Johnson* (2000) 201 CLR 488.

[13] Australia, Royal Commission on Australia's Security and Intelligence Agencies, *General Report* (December 1974) 2 [1.1].

In approaching his tasks, Justice Hope specifically referred to the particular features of his own appointment that he saw as involved in his selection to be the royal commissioner. These were considered especially useful to two special sub-inquiries that were involved in the fourth report of the Second Hope Royal Commission. One of these concerned the "Ivanov/Combe affair".[14] The other related to an incident at the Sheraton Hotel in Melbourne involving disproportionate activities by officers of the security agencies.[15] While these two matters involved specialised investigations, they had a consequential value that Justice Hope, as the royal commissioner, explained:[16]

> Those inquiries were valuable for the purposes of the wider inquiry [by] throwing light on aspects of the activities of ASIO and ASIS.

Like any experienced judge, Justice Hope was inclined to value an ounce of clear evidence over many pounds of opinion, assertion and generalities. He was also conscious of an advantage which many years in the performance of judicial duties had afforded to him, involving rigorous independence from other public actors; knowledge about the general operations of the law; awareness of the overall protections of individual freedoms; and familiarity with the rules obliging proportionality in the intrusions of public officials into the lives of citizens:[17]

> [A]n inquiry of this kind makes considerable demands on time and effort upon the agencies subject to it. … [A]n inquiry such as this can have an unsettling effect upon an agency. … At the same time, it has become apparent to me that, regardless of the outcome of my inquiry, the process of the inquiry itself has had positive effects. The very fact of questioning *by an outsider* can stimulate an organisation to think again about its functions and the way it is carrying them out. I have seen in each of the agencies internal reviews or changes initiated as a result, in part at least, of matters to which I have drawn attention.

This approbation of externality and bringing the light of outsiders to the scrutiny of the performance of intelligence and security operations, runs through the Hope reports. It is also reflected in his recommendations. For example, to an experienced judge like himself, the notion that an agency with large powers and responsibilities to the democratic government of the Commonwealth could operate almost entirely beyond the effective reach of the law and real accountability to elected ministers, was shocking. Thus, in describing the changes that he saw in ASIO when he returned to his functions of royal commissioner in 1984, Justice Hope wrote:[18]

> Perhaps the greatest changes that I have found in ASIO is the degree of concern for compliance with the requirements of the law and of propriety. It is not to be inferred from this statement that in 1974 ASIO disregarded law and propriety. The environment in which the Organisation operated was then significantly different from the environment today. In 1974 it had little legislation, governmental guidance or direction as to what it should or should not do. A lot of what it did was based on implied powers, or on the vague support of the prerogative. Ministers generally distanced themselves from its activities, although at times Ministers had misused it or expected too much from it.

This was the context in which, in the reports of the Second Royal Commission, Justice Hope emphasised the importance of externality and the advantage of bringing an *outsider's* perceptions to the task of scrutiny. Thus, in 1984, he recommended the establishment of the office of Inspector-General of Intelligence and Security.[19] He explained the importance of that office by reference to the same values of externality, independence and fresh insights:[20]

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[14] Concerning the activities of a Soviet intelligence operative Valery Ivanov and David Combe, a lobbyist, who was a past National Secretary of the ALP having previous close associations with the Government Party then in office. The Hope Inquiry found that Mr Combe had been targeted; but that there was no threat to national security. See Edwards, n 5, 264–277.

[15] Concerning an event at the Sheraton Hotel, Melbourne, in February 1984, after the establishment of the second Hope Royal Commission in May 1983 but referred to the Commission as permitted by the Prime Minister's authority. See Edwards, n 5, 278–281; *A v Hayden* (1984) 156 CLR 532.

[16] RCASIA, *General Report*, 2 [1.4].

[17] RCASIA, n 16, 3 [1.10] (emphasis added).

[18] RCASIA, n 16, 7 [7.3].

[19] RCASIA, n 16, 25 [3.26].

[20] RCASIA, n 16, 25 [3.19] (emphasis added).

> I recommend the establishment of the office of Inspector-General with power to enquire into and report upon ASIO's compliance with the law and with propriety, and the appropriateness and effectiveness of its internal procedures. This recommendation is not intended to divert or to intrude upon the responsibility of the Attorney-General or the Director-General of Security but to provide an *independent oversight* of ASIO's activities, to give the public a *greater assurance* that those activities are proper ones, and to clear ASIO, or to bring it to task, as the case may be, if allegations of improper conduct are made against it.

It was this faith in the value of effective external scrutiny of activities of the NIC that reinforced Justice Hope's conclusion not to recommend creation of a PJCIS. When the time came to implement the second Hope report, the Hawke ALP Government differed from Justice Hope's conclusion in this respect. It favoured the creation of a parliamentary joint committee. By inference, Justice Hope had concluded that such a parliamentary committee would be dazzled by the asserted dangers and too willing to surrender increasing powers to the security officials, occasionally sharing their redacted secrets with members of the Parliament. Alternatively, it might politicise issues of security; result in leakage of confidential material; or have a chilling effect on accountability. He concluded that, relevantly, a parliamentary committee would not be sufficiently an outsider for the purpose of monitoring the Australian intelligence community's powers and responsibilities.

The Hawke Government had a larger confidence in the capacity and willingness of elected Australian legislators and their scepticism and willingness to call the intelligence community to account. Hence, the Parliamentary Joint Committee on Security was established (under successive names), comprised of elected representatives of different political parties. Sometimes the Hawke Government's optimism in this committee has been vindicated. However, the capacity and willingness of the Parliamentary Joint Committee to question, and sometimes to reject, proposals for enlarged powers can be cited to support both opinions. The vast amount of security legislation, and the ever-expanding ambit of its subject matter and of administrative claims for more powers and resources have arguably revived concern that greater protection for basic civil rights may be afforded by independent-minded guardians who are outsiders than by politically accountable insiders. The latter may be prone to act cautiously in contesting, or doubting, "experts" warning of "dangers" whose appetite for ever larger powers, personnel and budgets appears unquenchable. Since the establishment of the Parliamentary Joint Committee, few proposals for enlarged legislation at the behest of the NIC have been modified. Still fewer, have been rejected.[21]

Of the major security reforms recommended by the Parliamentary Joint Committee in 2018, apart from listing the approval given for several enactments that had significantly increased the powers of intrusion by the NIC, the Committee acknowledged only one accepted recommendation for protecting competing values, namely journalists' confidentiality. Yet that was a topic strongly supported by the already vocal voice of media owners and journalists. Absent such support, the alternative voice of civil liberty, if it is heard at all, is seemingly less persuasive to the PJCIS than the voice of the NIC.[22]

Justice Hope's rejection of the proposal for a parliamentary committee was therefore based not so much on a hostility towards parliamentary scrutiny as on a scepticism. This was seemingly derived from Hope's judicial, and post judicial, acquaintance over many years, with the disappointing features in the lawmaking performance of parliamentary committees. In this respect, his belief seems to have been that a parliamentary committee would manifest relatively little scepticism and exercise scant real scrutiny so far as upholding proportionality in civic protections and the proper limits on enlarged powers for the NIC officials. The resulting danger would be the creation of a *semblance* of democratic supervision but a *reality* of political untouchability that had been Attorney-General Lionel Murphy's concern when carrying out his raids on ASIO in 1973. Justice Hope obviously considered it more likely that independent judges would be more effective in monitoring, questioning and holding the intelligence community to

[21] Edwards, n 5, 290–295; see Greg Carne, "Reviewing the Reviewer: The Role of the Parliamentary Joint Committee on Intelligence and Security – Constructing or Constricting Terrorism Law Review" (2019) 43 *Monash University Law Review* 470. Sarah Moulds, "Who's Watching the 'Eyes'? Parliamentary Scrutiny of National Identity Matching Laws" (2020) 45 *Alternative Law Journal* 266, 269.

[22] See Australia, Parliamentary Joint Committee on Intelligence and Security 2018, *Wikipedia* entry inferentially prepared with the participation of the Committee, <https://en.wikipedia.org/wiki/Parliamentary_Joint_Committee_on_Intelligence_and_Security>. Compare G Brown and O Caisley, "Labor to Oppose Terror Law Extension", *The Australian,* 30 July 2019, 6.

account. The tenure of the judges in office; their acquaintance with judicial review of ministers and other high officials; and their familiarity with, and sympathy for, traditional civil rights was much more likely to afford protections from the overreach of a secretive bureaucracy than the chimera of a parliamentary committee constituted by ambitious political officeholders.

JUSTIFIABILITY OF EFFECTIVE SCRUTINY

Although Justice Hope's views in this regard were overruled by the Hawke Government and the Parliamentary Joint Committee on ASIO was established in 1988 (later succeeded by the present parliamentary joint committee) a number of additional considerations arguably lend weight to superimposing more vigilant and effective scrutiny and control over the ever increasing enlargement of the Australian intelligence community; the enhancement of the powers of its agencies; and the pressure to reduce effective limitations on the deployment of such powers. Stated in summary form, the considerations suggesting the need for heightened vigilance and greater effective controls on the NIC include the following:

- *Constitutional context*: Although Australia has democratic political traditions, the protective presumptions of the common law that sometimes uphold basic civil and human rights and certain statutory protections, its constitutional arrangements, federal and State, are weaker in the provision of enforceable civil rights than those of other similar countries.[23] Thus, citizens in Australia have fewer and less effective constitutional protections than can be deployed against security and like agencies than any of the other "Five Eye" nations with which we often compare ourselves. By majority, the decision of the High Court of Australia in *Australian Communist Party v Commonwealth*,[24] invalidated the *Communist Party Dissolution Act 1950* (Cth). In doing so the Court deployed strong interpretive reasoning based in part on constitutional inferences rather than any express textual protections that could be called in aid. Recent decisions of the High Court of Australia have expanded the local applicability and deployment, in the civilian context, of the constitutional defence power.[25] They have displayed a far greater willingness to broaden the concepts of "constitutional facts" and of "judicial notice" than was tolerated by the High Court in the *Communist Party Case*. In 1950, the Menzies Government's assertion that the nation was on a "semi-war footing" in its struggle against communism cut no ice with the High Court specifically Dixon J. In *Thomas v Mowbray*,[26] by way of contrast, the ambit of federal power over persons declared "terrorists" was enlarged by a majority judicial decision. Additional evidence of a retreat from an approach of strictness to Executive Government claims for self-defined "emergency" powers became clear in the later decision of *Pape v Commissioner of Taxation*.[27] Hayne and Kiefel JJ, invoking language reminiscent of that of Dixon J in the *Communist Party Case*, cautioned against governmental action whose validity rested on "notions as protean and imprecise as 'crisis' and 'emergency' [which would render the] executive's powers in such matters… self-defining". Concerns of this kind become all the more troubling because, unlike the other "Five Eye" countries, Australia lacks a constitutional charter of rights or even a national statute of basic rights providing enforceable civil rights that can be invoked to counterbalance official powers in security or anti-terrorism legislation criticised as disproportionate or unjustifiable by reference to fundamental legal rights.

[23] *Fardon v A-G (Qld)* (2004) 223 CLR 575; *Al-Kateb v Godwin* (2004) 219 CLR 562 and see, eg, the recent decision of the High Court of Australia in *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166, 190 [74]–[75] (Gageler J (diss)), 195 [103] (Gordon J (diss)); S Zifcak, "Australia's Human Rights Failings Seriously Exposed", Pearls and Irritations, John Menadue (29 March 2021) <https://johnmenadue.com/australias-human-rights-failings-seriously-exposed/>.

[24] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). See Paul Latimer, "Unexplained Wealth Orders in Australia: Limits to Transparency and Responsibility for Other People's Wealth" (2021) 95 ALJ 31, 43.

[25] *Australian Constitution* s 51(vi).

[26] *Thomas v Mowbray* (2007) 233 CLR 307, 486–487 [530]–[533], 502–506, [582]–[589].

[27] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

- *Red and Lavender "scares":* A further consideration suggesting a particular need in Australia for more effective checks and balances against activities of the NIC may be found in the history of the targets selected by the NIC in the past for surveillance, data gathering and national intelligence strategies. At least four targets of ASIO in earlier generations would now probably be regarded as unjustified or even perhaps intolerable. I refer to the targeting of "reds" (communists international socialists and fellow travellers);[28] "lavender boys", being homosexuals and other suspect sexual minorities;[29] opponents of the wars in Vietnam, Afghan, Iraqi or Syria; and noisy student politicians and university "trouble-makers".[30] It was my misfortune when growing up in the 1950s–1970s to be associated with all of the foregoing categories.[31] The consequence is that (as I later discovered) I accumulated a small but intrusive ASIO file based on surveillance of my innocent and undeserving activities. The results of such surveillance are now available to Australians on application pursuant to legislation. The first entry in the present writer's ASIO file disclosed his presence, aged 12, at the Taronga Park Zoo in Sydney in company with his grandmother's second husband, Jack Simpson. He had been an original ANZAC but, at the time, he was the national treasurer of the Australian Communist Party. Other surveillance arose out of later activities in student politics which also involved many later national leaders. Citizen surveillance is only justified in very limited circumstances. The discovery of the breadth of earlier NIC surveillance and its unjustifiability demonstrates the need for effective controls lest the enthusiasm for collection outweighs the legitimacy of officials' monitoring citizens and the dangers that can arise in consequence.
- *Asking fundamental questions:* While the democratic features of the *Australian Constitution* suggest the need to constantly submit public policy (particularly matters of life and death) to democratic accountability, there are inherent difficulties in doing so when it comes to intelligence, security and terrorism. From the outset of colonial government it was assumed that Australia's security would ultimately be protected by its legal and political relationship with the United Kingdom. This assumption lasted, largely unquestioned, until the fall of Singapore in 1941. The existential crisis of the Pacific War led to the switch of many such engagements to the United States. The Korean War was fought under the flag of the United Nations; but in practical terms it was under the command of the United States. For decades, through the military operations in Vietnam, Afghanistan, Iraq and Syria, it has generally been assumed that Australia's security interests coincided with those of the United States. Yet this assumption has lately been questioned in fundamental ways. Prime Minister Julia Gillard commissioned a federal white paper from a committee chaired by Dr Ken Henry AC on *Australia in the Asian Century*.[32] This document suggests that Australia's national and security interests may become a much more open question than they had been in earlier decades. Essentially, the greater questioning of fundamentals derives from existential concerns about the expense and dangers of particular military weapons (especially nuclear); the questioning of military alliances; and the changing features of Australia's contemporary ethnic make-up. Although New Zealand is a member of the "Five Eyes" intelligence alliance and a party to its treaty for joint co-operation in signals intelligence, the revelation in recent times that "Five Eyes" personnel are conducting surveillance on one anothers' citizens and sharing the collected information with each other has led to fundamental questioning.[33] The difficulties of engaging with fundamental questions concerning a nation's long-term national interests, are obvious. Much relevant knowledge is in the possession of comparatively, indeed numerically, few people. Most such people are "insiders". By disposition,

[28] Stuart Macintyre, *Reds: The Communist Party of Australia from Origins to Illegality* (Allen & Unwin, 1998) xii + 482.

[29] Peter Shinkle, *Ike's Mystery Man: The Secret Lives of Robert Cutler* (Steerforth, 2018) as reviewed by James Kirchick, "How a Gay White House Adviser Helped Purge Homosexuals from Government", *The Washington Post*, 20 January 2019, B7; Douglas M Charles, *Hoover's War on Gays: Exposing the FBI's "Sex Deviates" Program* (Kansas University, 2015).

[30] Meredith Burgman, *Radicals: Remembering the Sixties* (NewSouth Publishing, 2021); Meredith Burgmann, *Dirty Secrets – Our ASIO Files* (NewSouth Publishing, 2014) 49.

[31] See, eg, actions of President Nixon described in Charles, n 29, 299–301.

[32] KR Henry (Chair), "Australia in the Asian Century" (White Paper, Australian Government, 2011, publicly released 2012).

[33] Peter Beaumont, "NSA Leaks. US and Britain Team up on Mass Surveillance", *The Guardian*, 31 December 2013.

> training and experience many of them are unlikely to ask, or persist with, fundamental questions. A huge bureaucracy has grown rapidly in recent years to sustain the fundamentals of the inherited status quo. Imposing, or facilitating, attitudes that question fundamentals may not be common, at least in the Australian political context. From colonial times, Australia has faced a paradox presented by its imperial history and racial past that sit uneasily with its Asia-Pacific geography. New Zealand appears more prone to address its similar paradox as seen by comparing its decision to sign and ratify the *Nuclear Weapons Ban Treaty*. Although that treaty originated in initiatives of civil society in Australia, acknowledged by the award of the 2017 Nobel Prize for Peace, Australia has neither signed nor ratified that treaty, although it has now come into force.[34] Any rational system of accountability for laws, policies and practices on intelligence and security would arguably publicly address potential dangers for human as well as national survival.
>
> It may be said that any such "fundamental questions" properly belong only to the elected government, not to unelected officials or judges. In theory this may be correct. However, in practice, such an assertion may be unrealistic. The security context is constantly changing. The relevant technology is highly complex. Much of the relevant data essential to informed decision-making is unavailable to citizens. The elected personnel are lay people, commonly prone to defer to professionals on "operational" matters. The stakes are potentially very large. The experts have huge resources to back them up. They normally have strong support from most outlets in the Australian media.[35] It took a change of government after 23 uninterrupted years to produce the first Hope Royal Commission in 1974. After the controversial dismissal of that government and its aftermath the second Hope Royal Commission emerged. It took these circumstances to produce the reports of a confessed "outsider" with a determination to assert civilian control over the national intelligence community. It took all these circumstances to result in the appointment of Robert Hope. He was not only a greatly talented lawyer and senior judge. Many did not know or care that he was also a past President of the Council for Civil Liberties, alert to the needs and opportunities for real legal and institutional change.

The Richardson Report

The terms of reference for the *Comprehensive Review of the Legal Framework of The National Intelligence Community* in Australia were released in June 2018. The secretariat for the review was provided by the Federal Attorney-General's Department. The review submitted a "classified" report on 19 December 2019. It provided a "declassified" version on 1 July 2020.

The declassified version was then released by the Attorney-General (Hon Christian Porter MP) on 4 December 2020. The declassified report comprised approximately 1,300 pages and four volumes. It contained 203 recommendations, of which 13 remain classified. As the review itself acknowledged the report was, a "long" one, seeking to answer detailed terms of reference. The government had allocated $18 million and a full-time secretariate of over 20 persons to work on the task for 18 months. Mr Richardson, was almost certainly not the person whom the L'Estrange and Merchant report envisaged to conduct the review when it recommended it. Their suggestion that a "suitably qualified person" be chosen they probably had in mind, as Professor Peter Edwards has remarked:[36]

> [S]omeone like Justice Robert Marsden Hope … whose two royal commissions … laid the foundation of legislation, structures, oversight arrangements and operational doctrines of the intelligence community for the next 40 years.

At the outset of his report, Mr Richardson acknowledges:[37]

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[34] *Treaty on the Prohibition of Nuclear Weapons*, UN Treaty Collection, effective 27 January 2021. See (2021) 95 ALJ 10–11. Compare JA Camilleri, M Hamel-Green and F Yoshida, *The 2017 Nuclear Ban Treaty: A New Path to Nuclear Disarmament* (Routledge, 2019) 254.

[35] When New Zealand declined to sign on to the "Five Eyes" criticisms of China in 2020–2021 it was criticised heavily in News Ltd publications: see editorial: "Crucial Five Eyes alliance must not become 4½ eyes", *The Australian*, 22 April 2021, 10.

[36] P Edwards, "Richardson Intelligence Review: Much More Than an 'Inside Job'", *The Strategist*, 2020, xi.

[37] *Richardson Report*, n 9, Vol 1, 2 [1.2].

> Very few readers of this report will have a need (or inclination!) to read the whole four volumes. But in addition to exploring and analysing the precise nature of proposed reforms in one of the most complex areas of legislation, the report provides a template for the reform process.
>
> The report acknowledges assistance from the National Intelligence Community (NIC) as well as local authorities and eminent persons and legislative frameworks in "comparable democracies" stated to be "each of the Five Eyes, as well as France and the Netherlands".[38]

The present author was one of the small number of persons invited by the Review to make submissions.[39] Properly, a number of concerning features of the laws adopted in recent times were identified by the Review:[40]

> The legislative framework within which agencies operate is complex. In a great many cases, the complexity is the result of the inherent tension in a liberal democracy between protecting and promoting the rights of the individual and broader, collective interests – in particular, national security and public safety.
>
> However, there are some areas in which the legislative framework is unnecessarily complex, leading to unclear and confusing laws for those NIC officers who must interpret and act in accordance with them. The sheer volume of the laws agencies must deal with on a daily basis can add to its complexity. The original number of pages in the Acts named in our terms of reference was 729; today it is 2,310. As a single example, the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act) comprised 19 pages when originally enacted; it now numbers 411.
>
> The majority of the growth in the legislative framework has taken place following the terrorist attacks of 11 September 2001. Between that date and 1 August 2019, the Parliament passed more than 124 Acts amending the legislative framework for the NIC, making more than 14,500 individual amendments, ie inclusive of the minor and technical … complex laws … undermine public trust and confidence. It should be clear to the Australian public what intrusive powers are available to NIC agencies, the circumstances in which they may be used and the limits, controls, safeguards and accountability mechanisms that arise.

The list of 203 recommendations made by the Review covers 24 pages. Of the 203, a comparatively small number, 13, are classified and not reproduced. It is beyond the purpose and scope of this article to identify and analyse the published recommendations.

An important recurring feature of the recommendations is the response to technological changes. These include changes in the technology of communications interception; in the internet; in cyber espionage; and in the potential for artificial intelligence and bulk data analytic techniques to be used in conducting intelligence activities.[41] The result of the technological changes and the need to harmonise and simplify present legislation is predicted to require 2–3 years.[42] Also time consuming will be the development of responses to "cyber-attacks launched for foreign state-sponsored actors" that constitute a new threat to Australia's national security.[43] Even passing familiarity with the impact and dangers of the alleged cyber-attacks on the 2016 and 2020 United States Presidential Elections will indicate the potential of this new technology to present serious challenges to the constitutional assumptions of the Australian nation.

While artificial intelligence for intelligence purposes may potentially require legislation in the future, no comparable western country has yet introduced statutory controls. The Review recommends, for the time being, that the requirement to "have human involvement in significant or adverse decisions made by automated capabilities for AI should be maintained".[44] These proposals are made with respect to the overall design of the Australian legislative framework; management and co-operation among the 10 NIC agencies; the provisions governing authorisations and immunities; the role of the Attorney-General as

[38] *Richardson Report*, n 9, Vol 1, 21 [1.6].

[39] *Richardson Report*, n 9, Vol 1, 163 [7.43].

[40] *Richardson Report*, n 9, Vol 1, 33 [3.7]–[3.8].

[41] *Richardson Report*, n 9, Vol 1, 43–44 [3.62]–[3.64]. (See also J Renwick SC, *Trust But Verify, a Report by the 3rd INSLM on the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and Related Matters* (2020); Anderson QC, Independent Reviewer of Terrorism Legislation, *A Question of Trust: Report of the Investigatory Powers Review 2015* (2015)).

[42] *Richardson Report*, n 9, Vol 1, 45 [3.67].

[43] *Richardson Report*, n 9, Vol 1, 46 [3.76].

[44] *Richardson Report*, n 9, Vol 1, 50–51 [3.96]–[3.98].

the First Law Officer; the facility of emergency warrants; the deposit of, and access to, archival material; and the protection of identities and other national security information.[45]

The completion of the Review in a tight timetable and the completion of the government's consideration of the recommendations is extraordinary. This is especially so if the funds devoted to the tasks, the official time and staff assigned to the project and the swift presentation of the documents are contrasted with normal standards of law reform projects in federal jurisdiction in recent years.[46] Issues of intelligence and security are important in a democratic society, sometimes extremely urgent and occasionally affecting the lives and wellbeing of many individuals. On the other hand, general law reform in Australia has fallen into serious neglect and under-investment in recent years. Retaining an audited and constantly updated procedure for systematic reform of the law is also vitally important to a rule of law society. Devoting huge funds and enormous financial resources to intelligence, security and anti-terrorism, while allowing general law reform to languish, is dangerous for the future of the rule of law in a democratic society. Some of the efficiency funding, personnel and priority evident in the conduct and follow-up to the *Richardson Report* need to be deployed on issues of general law reform, also vital to the achievement of the objectives of the *Australian Constitution*.

Conclusions on the Review

Mr Richardson went about his duty of review with the professionalism that such a senior "insider" could be expected to deploy. He reported with commendable speed. The orchestrated consultations included federal, State and Territory governments; all of the agencies in the NIC; and overseas interests, especially in the Five Eyes. Substantially, this was an inquiry in which the main actors had a shopping list they had been accumulating for years. In Dennis Richardson, they had secured what must have seemed a perfect *alumnus* to deliver a sympathetic report with as few obstacles as possible to impede the once-in-forty-year opportunity that the government had provided.

The present writer came to know Mr Richardson when he was serving as Ambassador to the United States and afterwards when conducting an inquiry for the United Nations Human Rights Council relating to human rights in North Korea.[47] The ensuing discussions were useful, emphasising the inescapable interaction of security and human rights; themes reflected in the *Richardson Report*, although described as involving the clash of efficiency and "values".[48]

As a consummate professional, Mr Richardson was careful to consult some members of relevant civil society organisations who might be expected to be sceptical both of him and of his review.[49] He held private consultations with Professor George Williams AO and Dr Kieran Hardy and with Honourable Margaret Stone AO (IGIS), Mr Bret Walker SC AO (former INSLM) and this writer. After these consultations, Walker SC and the writer supplemented earlier submissions with a suggested shopping list of our own, relevant to the proposed report. The disclosed consultations were relatively narrow and selective, although the review did publish advertisements calling for submissions from civil society organisations, academics, jurists, officials and the public. Workshops were held. However, a list of the attendees suggests that, other than the named consultants, the Law Council of Australia and the Human Rights Law Centre, virtually all of the bodies engaged with were official and governmental. The voice of civil liberties was muted.

Nevertheless, in a number of places it is clear that the Review was affected by the "non-official" consultants. Commentary on the declassified report, when released, has been very limited. Professor

[45] Attorney-General's Report, *Commonwealth Government Response to the Comprehensive Review of the Legal Framework of the National Intelligence Community* (December 2020) 52pp.

[46] See, eg, MD Kirby, "The Decline and Fall of Australia's Law Reform Institutions – And the Prospects of Revival" (2017) 91 ALJ 841.

[47] MD Kirby, "The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights" (2015) 89 ALJ 714.

[48] *Richardson Report*, n 9, Vol 1, 162 [7.37], "The Importance of Values, Principles and Propriety. See also Vol 1, 162 [7.42].

[49] In an Oversight and Transparency Workshop for the Richardson Review held on 1 April 2019.

Edwards describes this as remarkable, given the importance of the topics.[50] He ascribes that lack of submissions to, and comment upon the Review to the daunting "size, scope and technical complexity" of the subject matter. He points to the range of the Reviewer's experience beyond his service in ASIO and his specific attention, like Justice Hope, to the "culture" of the agencies. He refers to the acknowledged consultations with persons with reputations sympathetic to civil liberties.[51] However, it is asking a lot of that small group to counterbalance in their submissions the overwhelming and well-funded attention to the official voice.

Professor Edwards correctly draws attention to the tone of the *Richardson Report*. It frequently pays tribute to the "fundamental principles laid down by Hope" and finds them "still valid today". It is also "scathingly critical of attempts by the agencies to dismiss the legal constraints upon them as unnecessary, outdated or unreasonably burdensome". Edwards suggests that only a senior official who, with Sir Arthur Tange, held the top posts in the Departments of Foreign Affairs and Defence[52] would have felt able to reject so sharply the demands by agencies for relief from supervisory powers. One area in which this is evident relates to the distinction established by the Hope Royal Commission between surveillance of Australian citizens and of non-citizens. The suggestion that this had been a mistake by the Parliament or that it was an approach overtaken by modern technology gets short shrift from Dennis Richardson:[53]

In those instances where the Richardson review has not accepted recommendations of the intelligence community, Professor Edwards suggests that it is likely that the agencies will come back, at the time of the next review, for yet another attempt to remove obstacles, either in the review itself, or the decisions of a federal government even more biddable to change.

Taken as a whole, the security agencies enjoyed substantial success in the *Richardson Report* in the acceptance of their submissions. Occasional sharp language in rejecting a particular proposal;[54] and the extent that the *Richardson Report* has diminished the requirement of independent *judicial* warrants to permit surveillance (or has diminished such judicial control by permitting the substitution for judges of magistrates and administrative tribunal members)[55] these must be seen as retrograde steps. In the "Five Eye" countries it is not unusual, indeed it is common, to permit authorisation for exceptional surveillance and other action by security agencies to have the authority of judges or retired judges. This too was not something accidental in the recommendations of Justice Hope. It derived from his conviction that scrutiny of exceptional intervention by the State and its agents into the lives of individuals in a country like Australia should be submitted to the sharp scrutiny of those accustomed to such duties and not afraid to rebuff powerful and opinionated ministers and officials, namely: judicial officers and retired judicial officers.[56] Those who work in a bureaucratic hierarchy, unaccustomed to challenging powerful colleagues, may not always feel comfortable in discharging the authorisation power as a judge or former judge will do.

One point made by Professor Edwards should be endorsed. This is his proposal that the "next independent intelligence review be upgraded to a Royal Commission".[57] To this should be added, with no disrespect to

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[50] Edwards, n 36, 2.

[51] Such as B Walker, "The Information that Democracy Needs" (Whitlam Oration delivered at the Western Sydney University, 5 June 2018).

[52] Sir Arthur Tange was the only other person to have served as Secretary of both Departments.

[53] *Richardson Report*, n 9, Vol 1, 39 [3.35]–[3.36].

[54] See, eg, *Richardson Report*, n 9, Vol 1, 39 [3.34] and [3.35]–[3.38].

[55] Compare these contrary in Renwick, n 41, Chs 10 and 11.

[56] *Australian Security Intelligence Organisation Amendment Act* 2020 (Cth) noted (2021) 95 ALJ 87. See also ICJ Australia, *"Grave Concern" over Changes to Surveillance Act Denham Sadler Innovation Aus* <https://www.innovationaus.com/grave-condern-over-changes-to-surveillance-act/>. Compare John Menadue, "We Need a Standing Royal Commission to Supervise Our Intelligence Agencies", *Pearls and Irritations*, John Menadue (31 August 2020) <https://johnmenadue.com/we-need-a-standing-royal-commission-to-supervise-our-intelligence-agencies/?mc_cid=659b5c4c80&mc_eid=[f5b6278e6a]>. The author was Secretary of the Department of Prime Minister and Cabinet 1974–1976.

[57] Edwards, n 36, 2.

Dennis Richardson or the other high officials who have conducted security reviews in the past 25 years, that there is merit in appointing experienced, and independent-minded, judges and jurists to undertake such functions. Experience in this domain has demonstrated that judicial royal commissioners like Hope, Samuels and Sheller (and other senior lawyers and former judges conducting special security tasks) can be swift, efficient and practical in the delivery of their reports. Moreover, they can bring to bear in their recommendations a deep knowledge of the values, principles and propriety expected by the common law that afford the context, derived ultimately from the *Australian Constitution*, from which balance, proportionality and individual justice must be inferred for want of more express protections.

Justice Robert Hope was correct in believing that the fact that he was an "outsider" made him specially suitable to perform the definitive work of the two Royal Commissions on intelligence and security that he conducted. This consideration has become more, and not less, important given the huge expansion of official powers of the NIC; the complexity and potential of new technology; and the abiding failure of the Australian legal system to deliver an effective and enforceable charter of fundamental rights, to which citizens and others might appeal to safeguard their rights against official intrusion.

The Richardson Comprehensive Review of the Legal Framework of the National Intelligence Community was less damaging to fundamental rights than might have been feared. Yet basic issues still need to be addressed. They are likely to be larger and more pressing the next time around.