

## THE SECRET STATE, THE RULE OF LAW & WHISTLEBLOWERS

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1. I am speaking to you from my home library just a walk from Manning Clark House. I well remember the Professor button-holing me in meetings when self-government was being debated here in the late 80's. Always wearing his broad-rimmed Akubra. 'Don't let them create a cozy little Westminster system here-make it a consultative Assembly' he would say. He, Mark Oliphant, distinguished former Australian Ambassadors, Public Servants, even a retired dare I say, dismissed former head of the Australian Secret Intelligence Service, poets and writers including retired senior ASIO officer Michael Thwaites and John Rowland were just some of the citizen participants as the Capital Territory progressed to self-government.
2. On the eve of the self-government vote our near neighbour John Gorton went on TV and called for a new order. Our community party won as many seats as the Liberal party and one less than Labor. We became the first community based party to hold Ministerial seats since Federation. We campaigned on the enduring theme of protecting the bush capital and against corruption in planning and development.
3. I am speaking at a time when community awareness of the Rule of Law is probably the most enlivened in generations, perhaps in Australian history. It is also a time when citizen participation in events and confidence in leadership that may shape our nation is at a low ebb. We are, increasingly, told what is good for us. Some, who are preoccupied with the ordinary struggles of life might not be too concerned with this overlordship but when those who dictate to us cannot manage a timely ordering of vaccine supplies even the Mums who week in week out plan ahead the kids school lunchbox know something is wrong.

4. Several respected journals in Australia state that the current Australian Federal Government is the most corrupt in history. Some eminent onlookers are making similar claims and there are widespread calls for some form of a national integrity commission. In that regard Witness K and myself must declare a personal interest in making sure such a commission has retrospective jurisdiction. Will Labor commit to this? There is also the question whether the Morrison Government is the more incompetent in history. Certainly, after Robodebt cruelty by algorithm, Sports Rorts et al the wider Australian community that doesn't usually reflect on a need for Rule of Law is probably doing that now.
  
5. Today I'm addressing an informed audience. I won't go into the origins and development of the rule of law. We are more aware of the concept when we lack Rule of Law. I want to break down the absence of Rule of Law into areas of governance. Underpinning our form of democratic government based on the separation of power between the Judiciary, the Executive, and the Legislature is the rule of law. Each constituent element in the separated powers is bound by the rule of law. In balancing out the power of the Judiciary, the Executive and the legislature each must respect the overriding rule of law. No element may become master or mistress unto itself.
  
6. In modern history some newer democracies established with a constitutional separation powers have failed when the Executive seized power. Russia for example. In modern times it has not been the Judiciary that has seized power and nor since Robespierre lost his head in 1797 have Parliamentarians themselves seized power. Democracy's vulnerable point is the Executive. History shows that authoritarianism and popularism have gone hand in hand with the erosion of a balanced democracy. Failure in democratic governance around the world sees the Executive as the element likely first to fail followed by a Legislature unable or unwilling to check the Executive. The one infects the other.
  
7. On some significant issues the Australian Parliament has ceased to be a place of effective lawmaking by the people, for the people. It has become

commonplace for Parliamentarians to see a marathon superannuated career out with ideals sacrificed for ambition. The same old faces doing the baton changes. Caucus or group control irrespective of the needs of local electorates. In this environment and with the assistance, indeed encouragement of elements in the bureaucracy, a corrupt Secret State has started to thrive. Recognising a wide community call for reform should we require an enduring pre-Election commitment to change from the Opposition? At core the problem is a lack of citizen involved deliberation. The public is told what is good for them. Can we achieve a turn around at the next election or will it be more of the same from either of the major parties?

### **CITIZEN DELIBERATION**

8. Effective citizen participation in democratic decision making is vital. Let me give a current example of the absence of citizen deliberation- the cancellation of the submarine contract. Just from a civil law perspective it is a bad look. In business the sudden repudiation of contracts is not an issue that may attract shareholders. But how may ordinary citizens now saddled with the geo-strategic damage and the economic cost have contributed to such decision making? Further, and ironically, if we are so threatened in the Indo-Pacific why have we disarmed ourselves for such a further lengthy period? Refugee advocates are familiar with Australia's departure from international law and so too are the Timorese. Are we a recidivist nation?
  
9. Why did the Government not inform the people about certain implications of the decision to acquire US nuclear fuelled submarines? Australia is a party to the *Nuclear Non-Proliferation Treaty* (NPT). There is a loophole in the treaty that the international community including Australia, even China and Russia have from time to time sought to prevent countries, notably Iran from taking advantage of. Australia is now using a treaty loophole we have campaigned vigorously to prevent other countries using. Namely, nuclear reactors used in naval propulsion that are fuelled with weapons grade uranium (HEU). Unlike the French nuclear submarine fleet that is fuelled with low enriched uranium (LEU) the US fleet is fuelled with weapons grade enriched uranium. The fuel mass requires no further enrichment before it may be used for weapons. In other words, Australia proposes to become the first non-nuclear State to have

weapons grade uranium at hand or at least portside. This is what the International Atomic Energy Agency sent Hans Blik and his team into Iraq and Iran to look for.

10. Surely if Australia is to slyly avoid via a loophole the provisions of a treaty we have strongly supported such a decision should be worthy of public debate. Our adversaries may now assume that we may have the capacity to secretly build nuclear weapons. The very fact that our democracy is fragile and Australia is inching towards secret State status would put a potential adversary on guard. This, and our dishonesty may raise questions of trust with our neighbours anxious not to be drawn into a nuclear stand-off.
11. Both the Abbott and Gillard Governments opened debate before entering the *India-Australia Civil Nuclear Cooperation Agreement*. I recall Bob Carr addressing the issues openly. Why has the Morrison Government used an over-fuelled populist fear of China to conceal our move away from the *Nuclear Non-Proliferation Treaty*? Surely citizen deliberation of the pros and cons of using French LEU submarines or US HEU subs could have opened the way for informed debate.
12. The French surely know that Morrison and Dutton's claims that the US subs have the range endurance Australia needs is disingenuous. The French could have been asked to place on offer their Barracuda nuclear sub with its unique propulsion system with the same endurance range as the US Virginia Class and claimed better characteristics. The French sub avoids Australia from giving such an affront to our NPT obligations.
13. Moreover, do we seriously believe that US industry will allow Australia to build 60%? The US sub has an alleged life-time reactor whereas the French requires refuelling after 10 years. This gives time for the community to decide whether it may support an extension of our capacity to produce on-shore low grade nuclear fuel. Why no debate on these important issues? Just to launch debate with the public and with the French may have ameliorated the geo-strategic disaster of offending France, the EU and countries in our Region. I

recall that as INTERFET got underway in Timor, France responded immediately from New Caledonia to augment our landing craft needs. Australia has again behaved dishonourably in our name.

14. Right now in Australia, I think we agree that aspects of our democracy are fragile. A non-consultative, authoritarian Executive has infected the Parliament whereby the Legislature, the floor of Parliament, has ceased, on some key issues, to be a place of effective open debate and law-making by the people, for the people. Repressive laws have passed largely unchallenged.
15. Authoritarian national security powers beyond those in any other Western democracy now encroach on every citizen. A combination of media power able to wedge the Opposition has enhanced the power of an increasingly authoritarian Executive. Hurried legislation and autocratic decisions sometimes pass relatively unchallenged by an Opposition wedged docile or complicit.
16. Provisions never used on alleged terrorists have been used on Witness K and particularly on me to cover up Downer's dirty linen. I would never have survived this onslaught by a clique determined to cover up without the immense toil by the partners and staff of Sydney pro-bono law firm Gilbert & Tobin and the wonderful barristers who have also lent their time and energy. If the Government has spent millions you may imagine what sacrifices my loyal colleagues are making. More than ever before we need the protection of lawyers and the Judiciary.

#### **DEMOCRATIC OVERSIGHT OF ASIS**

17. Moving on from the emerging Australian Secret State I want to concentrate today on just one facet where the Rule of Law in Australia is not working. I want to focus on the question of proper democratic oversight over the Australian Secret Intelligence Service, ASIS. But first an historical allusion. It is a sobering to learn three quarters of a century after the Second World War, the truth regarding some activities of the protagonist's secret intelligence services.
18. As a young man posted to France, I had the privilege to listen to survivors on both sides of the English Channel of resistance activity during that war. These

were first-hand accounts. Our children attended the École Jean Moulin in the Vallée de Chevreuse, through which an element of De Gaulle's Liberation Army had fought its way into Paris. The great mystery that seized France post-war, and which continues to this day to excite commentary, is a question of who betrayed De Gaulle's second-in-command, Jean Moulin? I heard the story over and over from the informed to the less informed, on both sides of the Channel. Patrick Marnham's recent revelatory work<sup>1</sup> reminds us of the relationship between espionage and geostrategic design. Just add corporate involvement in geostrategic design and the lesson is modernised. Both Roosevelt and Churchill were apprehensive that de Gaulle might establish post-war a Franco style military dictatorship. Secret intelligence steps were taken to limit de Gaulle's popular base in France. I won't ruin the book for you.

19. Historian Hugh Trevor-Roper, himself a former member of Britain's wartime MI6, once wrote, "*It is absurd to subordinate a secret service to egalitarian morality...*".<sup>2</sup> Let's pause and think of that approach.

20. We all must accept that you cannot subject a secret intelligence service to ordinary administrative external review. The decisions made for, and within a secret intelligence service are in no way of the same character as local council planning decisions open to review. And nor are they activities that can be subjected to freedom of information research or, when one considers the separation of powers, to judicial scrutiny. The High Court of Australia has long maintained a sensible distance from any form of direct or indirect participation in national security decision-making that is by its nature political.

21. If as Hugh Trevor-Roper says, it is a fantasy to believe that there is any egalitarian morality to secret intelligence work is spying licensed lawlessness? We may understand the need for well-reasoned counter espionage at home practised by ASIO but how may we regulate Australia's own espionage

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<sup>1</sup> Patrick Marnham, *War in the Shadows*, (One World, London, 2020).

<sup>2</sup> Hugh Trevor-Roper, *The Secret World*, (Tauris, London, 2014), 166.

activities abroad by ASIS? How may we ensure a balanced and lawful approach to spying. The several inquiries and reviews over recent years all assume the proposition that there is a 'national interest' in spying. I stress 'national interest'. Matters of so-called national interest are by the nature of our Executive leadership ephemeral. What one political party or group of bureaucrats ascribe to national interest may not be that which another elected leadership adopt. At core it is the public interest that should guide our leaders and in a working democracy the public interest trumps national interest.

22. The public interest holds to an inherent continuum of decency, ethical standards and morality that should survive political vicissitudes. The national interest is part only of the public interest in the pursuit of democratic ideals. We don't have a complete democracy if, for example, we direct secret service agencies that contribute to extra-judicial executions like targeted killings. As both the United States found in the depths of the Vietnam War and Australia in Afghanistan the public will not accept an Executive that gives direct or tacit approval to such activity and labels it 'in the national interest'. It is my view that the Coalition Government is as keen to conceal from public witness the licence given in Afghanistan under the rubric 'national interest' as it is to hide events in Timor-Leste from public trial

23. How do we achieve a balance? How do we manage a secret service that is dedicated in the public interest to defending our country, protecting life and property, and furthering legitimate economic and security interests?

24. For example, it is fair to say there is community agreement that we should defend our country from theft of intellectual property. The bigger question is should we plant similar spies at their universities, in their research institutes, in their organs of State? The answer is probably yes, and the Legislature has provided limited scope for our secret service to breach Australian domestic and overseas laws. Where ethics are concerned, we need to trust those who decide the better good, the higher ethic.

25. How do you, the people, ensure that the secret service is used in the public interest in accordance with key democratic values that extoll fundamental precepts such as the protection of human life, the common good, and basic notions of fairness and equity? No greater posing of that question in contemporary Australian history are the events that surround the negotiation of treaties with our impoverished neighbour East Timor in 2004.
26. In his review precipitated by the Sheraton Hotel incident in Melbourne, Justice Robert Hope understood the value of secret intelligence and implored those who managed it to act as close to lawfully as they could. His Royal Commission reports were essentially an enjoinder for the service to be operated as close to democratic and lawful values as they could be. Implicit in the Hope Commission reviews, and subsequent reviews, is the *espoir* that the service be managed by those of integrity.
27. The subsequent *Intelligence Services Act 2001* introduced by Alexander Downer was part of that *hope*. While you might say Downer and his then-minions treated national interest cynically the greater worry is that Downer demonstrated that you can drive a truck through the *Intelligence Services Act 2001*. Parliamentarians have a vital responsibility to ensure that intelligence functions inherently unsuited to external judicial or administrative review are subjected to appropriate operational oversight.
28. In 2002, Australia declared that it would negotiate in good faith with East Timor for the mutual benefit of both countries. Australia, with a chequered past, reassured the UN and the world by signing a *Memorandum of Understanding* promising explicitly to negotiate in good faith, afterwards repeating this pledge in the 2002 Timor Sea Treaty that was domesticated into black letter Australian law. One might describe such conduct as pledging the honour of every Australian. As we know the Howard Government approached further treaty-making with the objective of joining corporate mates in outwitting the impoverished Timorese. In my book I deal with how the Howard Government



sought success over the Timorese at any moral cost. The rest of the story has been censored under the rubric of 'national security'.

### **Legal Controls on Spying Abroad**

29. At all relevant times the *Intelligence Services Act 2001*<sup>3</sup> permitted the Australian Secret Intelligence Service (ASIS) to conduct activities abroad subject to those activities being necessary and proper, and fitting within the rubrics of *foreign relations, national security, and Australia's economic wellbeing*. The gateway into such activity required either of two statutory pre-conditions to be met.
30. The first required the activity be 'a government requirement'.<sup>4</sup> In simple terms, an activity the Government required. In context and established legal principle, Parliament intended spying abroad by ASIS to conform to that resolved upon as necessary and proper in the national interest. Primarily, not what a single Minister or a bureaucrat recommended but a reasonable requirement lawfully resolved upon by members of the Executive Government usually the National Security Committee acting to secure that which would in terms of foreign relations, national security or Australia's economic wellbeing be necessary and proper.
31. Speaking of the law as it stood in 2004, the Parliament did allow, and still allows, a second gateway. The responsible Minister - as distinct from those members of the Executive who may have resolved upon a 'government requirement' - could approve an ASIS activity abroad, but only subject to strict conditions. The overriding obligation, of course, was that the activity accord with the three rubrics I have mentioned (foreign relations, national security, and economic wellbeing), that it be necessary and proper, and only after the Foreign Minister responsible for ASIS had consulted Ministers with related responsibilities, informed the Parliamentary Committee of the nature of the activities proposed, and provided the Inspector-General of Intelligence and Security with a copy of the direction given to ASIS for the activity. This means

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<sup>3</sup> *Intelligence Services Act 2001* (as amended up to Act No. 143 of 2003), s6(1)(a).

<sup>4</sup> *Ibid*, s6(1)(a).

explicit advice to those who might oversight the Minister's own proposed ASIS activity abroad.

32. The very fact that the Parliament set rigid controls to oversight directions given only by the responsible Minister makes clear that the term '*Government requirement*' in the primary gateway meant a requirement set by some plurality in Executive decision-making. The extent of that plurality may depend on factors such as risk. To take an extreme example whether compromise of the overseas operation might lead to hostilities even war. Were that the risk you might expect Cabinet decision-making with all relevant agency and Chiefs of Staff providing advice.
33. In 2001, when the *Intelligence Services Bill* was passing through the Parliament the Minister responsible for its passage Alexander Downer was left in no doubt by a bipartisan Committee recommendation that these recommended extra controls were to prevent unapproved maverick intelligence activities abroad, particularly, operations that may intrude on law-abiding Australians abroad. The Committee insisted that the responsible Minister must leave a clear record. Any direction had to be in writing and only after other Ministers with related responsibilities were consulted.<sup>5</sup>
34. The reason for the specific controls placed upon a minister approving an overseas spying mission stemmed from the Sheraton Hotel incident, when ASIS officers being trained in hostage rescue in Melbourne committed criminal acts when they detained hotel staff and caused property damage. A subsequent series of Royal Commissions ensured that ASIS activities abroad had to meet an Executive-approved 'government requirement' and/or be subject to specific approval processes if directed only by the responsible Minister.<sup>6</sup>
35. There is, I believe, an overriding jurisprudential issue. May, for example, an Executive Government in a democracy ruled by law ever make an activity that

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<sup>5</sup><https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2001-09-18%2F0120%22>.

<sup>6</sup> Justice Robert Hope, *Report on the Sheraton Hotel Incident, February 1984*, Royal Commission on Australia's Security and Intelligence Agencies, AGPS, Canberra 1984.  
Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organisation*, AGPS, Canberra, 1984.

would breach a solemn signed undertaking to act in good faith, breach *jus cogens* international law, defraud a fiduciary commercial partner and breach Australian criminal laws, ‘a **government requirement**’. If, perish the thought, there was ‘a *Government requirement*’ to carry out such conduct, who among the PM’s Executive would believe that such deplorable activity would be supported by public opinion? More to the point would a Parliamentary Committee entrusted with a degree of operational oversight approve of such activity. This would likely be a safeguard. It might be more of a safeguard if the Minister with control over ASIS had gone maverick and not consulted Ministers with related responsibilities.

36. A ‘*Government requirement*’ cannot rest on some standing enjoinder about having good intelligence on the other side’s negotiating position. Were that the case we might see ASIS teams flying off to every overseas trade negotiation. Spying activity abroad must be necessary and proper and as such it must meet a **specific** weighed contemporary requirement that, for example, other sources cannot meet.
37. Specificity and lawfulness must set the ‘*Government requirement*’ in place. The Attorney’s oversight is crucial. Consultation with all players in the intelligence community is axiomatic.<sup>7</sup> Parliament required the Attorney, responsible for ASIO, to be consulted in relation to ASIS activity affecting certain Australians abroad.<sup>8</sup>
38. The *Intelligence Services Act 2001* was strengthened at the instigation of Labor during its passage through Parliament. The then Intelligence Committee of Parliament suggest a series of bipartisan amendments to the Bill introduced by Foreign Minister Downer. Perhaps Hugh Trevor-Roper was correct. All that now holds ASIS on the straight and narrow is the integrity of its leadership. I await my opportunity to explain in open Court how neither the Act nor the safeguards moved by Labor have worked. The Act is ineffective at preventing maverick behaviour and dangerous with respect to the extent to which its purported controls provide a false sense of security to the Parliament and the community.

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<sup>7</sup> <https://www.aspistrategist.org.au/the-australian-secret-intelligence-service-007-blessing-and-curse/>.

<sup>8</sup> *ISA s9(1A)(b)*

39. In my view the remedy lies in combining effective Parliamentary operational oversight with Public Interest Disclosure laws unique to the intelligence community. Career members of the intelligence community invariably operate to high standards of personal integrity. I am afraid the same cannot be said about some career politicians. In saying this I recognise that ASIO is subject to far greater administrative and judicial scrutiny than ASIS. I venture to say that ASIO would not have engaged in conduct of which I am critical. I consider it highly significant that once the facts were disclosed ASIO Director-General Duncan Lewis twice declined to support the Foreign Minister's denial of a passport to Witness K on 'national security' grounds. It is important in this debate to differentiate between agencies.
40. I recommend that the Parliamentary Joint Committee on Intelligence and Security (PJIS) should be given greater operational oversight along the US model with Committee staff independently recruited and given statutory independence and protection. Intelligence personnel with a claimed PID of a significant matter within defined categories of law and propriety should be given scope to approach Committee staff and to make a disclosure without prior reference to their agency of employment. When significant law-breaking, as defined, is alleged, lawyers cleared to act for such employees given leave to make a PID should have the statutory right with immunities to file proceedings before a superior Court with necessary redactions.
41. Recently, with support from Shadow Attorney-General Mark Dreyfus, Labor Leader in the Senate Katy Gallagher attempted to support a motion by Senator Rex Patrick that Attorney-General Michaela Cash appear before the Parliamentary Joint Committee on Intelligence and Security and explain in camera why it is in the public interest that I be prosecuted. The Committee Chair was advised that amendments moved to the *Intelligence Services Act 2001* prevent any enquiry into operational matters of the type I am accused of conspiring to provide information about. The whole world appears to know something that cannot be confirmed or denied even in camera and none of our trusted elected representatives are entitled to ask about an operation that did or did not happen more than 17 years ago. Kafkaesque I dare say.

Thank you