

Greatest threat to our rights? The Attorney-General's Department

by Bernard Keane, Canberra political correspondent for *Crikey*

"The Attorney-General's Department serves the people of Australia by upholding the rule of law and providing support to the Australian Government to maintain and improve our systems for law and justice, national security, emergency management, and natural disaster relief."

That's from [the website](#) of the Attorney-General's Department, the 1400-strong, \$900 million per annum agency that sits physically on National Circuit in Canberra, literally on the right side of the Prime Minister and Cabinet department building.

Nearby resides the Australian Federal Police, with its 5000+ national staff. The 1700-odd staff of ASIO are to be found two or three minutes down the road, over King's Avenue Bridge, then hang a left. ASIO's nearly-lakeside building is standard corporate ugly.

AGD's website is misleading, of course. It's misleading in the obvious sense that the department does not serve the people of Australia, any more than any other department serves the people of Australia. Rather, they serve the government elected by the people of Australia, a crucial difference lost on most people outside the public service, especially when the elected government isn't one they like.

But it's misleading in a more significant sense: in several key areas, AGD does nothing to uphold the rule of law, or maintain law or justice. Instead, it is a profound threat to those things. In fact, AGD is the single greatest threat to the basic rights of Australians.

AGD was where Australia's draconian anti-terror laws were prepared, during Daryl Williams' and then Philip Ruddock's tenures as Attorneys-General (particularly the latter).

Two reports call for roll-back

Two separate reports have recently called for a rolling back of those anti-terror laws. One from the Independent National Security Legislation Monitor, Bret Walker QC, which the government [was forced to release a fortnight ago](#), recommended 21 changes to counter-terrorism laws. The other, a much-delayed review by [COAG, headed by Anthony Whealy QC](#), also made a number of recommendations to, *inter alia*, ameliorate the current regime.

The Monitor was that rare, indeed nearly unique thing: a case of Labor doing something on national security not aimed at further extending the powers of the state.

Nor is AGD enamoured of the idea of citizens being able to challenge its counter-terrorism framework. Despite the claim to uphold the rule of law, the *National Security Information Act 2004*, which was still being strengthened in 2009, enables for national

security-related trials closed courts, the locking of lawyers and defendants out of the room when certain evidence is being given, and requirements for government vetting and security clearances for defence lawyers.

The counter-terrorism regime put in place by AGD was done so at the request of the Howard government, which used the War On Terror (still ongoing, of course, and indeed designed to be permanent) as an excuse to significantly extend surveillance and law enforcement powers. However, even in the absence of a strong political imperative to continue to undermine basic rights, AGD has continued to seek to aggressively expand the powers of its portfolio agencies, routinely amending either the *Telecommunications (Interception and Access Act)* or the *ASIO Act* and other national security legislation.

Typical of AGD's approach is the constant hurry it claims is needed for each new set of amendments, with those TIA or ASIO Act amendments piling up one atop another; last year's expansion of data retention powers under the *Cybercrime Act* were still being considered in Parliament when the department publicly revealed its full data retention proposal. Its bills are often drafted in a rush — the *National Security Legislation Amendment Bill 2010* “appears to have been drafted in haste and poorly,” [one law professor told a Senate inquiry](#), declaring it “poorly conceived, at least in its technical drafting”.

The *Cybercrime Bill*, introduced in order that Australia could “accede” to the draconian European Cybercrime Convention, was in its original form drafted so poorly that it would actually have *prevented* accession, necessitating government amendments. As happened with that bill, committees examining AGD legislation (even when they identify, on a bipartisan basis, significant flaws in draft legislation) are routinely ignored in favour of bills being pushed quickly through Parliament.

Reflexive support for its agencies

This enthusiasm for extending national security powers was behind the department's development, on its own initiative, of a data retention regime in 2009. The department has tried to downplay this effort as a frolic by a mid-level manager having a chat with telcos and ISPs about the broad-brush problems with data retention. In fact this was a four-year process involving at least 12 meetings with industry, several meetings with other agencies, consultations on draft legislation, Regulatory Impact Statement preparations, a consultant, briefs to ministers and officials warning industry that the government might make a decision they wouldn't like.

A key reason why AGD is so assiduous in its attempts to expand law enforcement and intelligence-gathering powers is because of its reflexive support for its agencies, particularly ASIO. Relationships between agencies and portfolio departments vary across government and ministers, but there is no distance between AGD and its operational agencies. This was amply demonstrated in December 2007 when then-AGD secretary Robert Cornall, without consulting with government, formally complained to the NSW Judicial Commission about Justice Michael Adams.

In 2005, two ASIO agents, in the company of Federal Police, had abducted and falsely imprisoned medical student Izhar ul-Haque. After Adams criticised the two unidentified officers while throwing the case against ul-Haque out, Cornall quickly complained to the NSW Judicial Commission without waiting for any review of the case, despite then-ASIO head Paul O'Sullivan having already issued his own [incorrect criticism](#) of Adams.

AGD has repeatedly made it clear that the current national security reforms are being pushed by its agencies, admitting last week that agencies wanted the legal power to break into anonymisation and encryption software like Tor to better spy on Australians. What AGD is less good at is explaining the need for expansions in surveillance and law enforcement powers, even to Parliament, let alone to voters.

Fish fingers in your computer pie

The department's "WikiLeaks amendment", to enable ASIO to spy on Australians overseas, was famously justified by a departmental office as being aimed at illegal fishing, something not even within the remit of ASIO. Rather than a brain snap by a bureaucrat under pressure in a parliamentary committee, "illegal fishing" was typical of a department that had for many years not had to explain itself as it encroached ever more on the basic rights of Australians. It has thus lost the capacity to justify itself as it reflexively undertook whatever its agencies wanted.

That's why industry consultation on data retention was kept secret; indeed, one official from another agency asked when AGD was going to seek public comment on the proposal as discussions dragged on over four years. That's why throughout 2012 it conducted a secret consultation process to try to force ISPs to strike an agreement with the copyright cartel over filesharing; like data retention, there was no effort made by AGD to involve consumer groups. Unlike data retention, however, AGD [successfully blocked](#) an effort to use FOI to obtain some detail about the meetings.

And when time came to offer a public explanation for data retention and 43 other proposals to, in most cases, extend national security powers yet again, the department was unable to do so; its discussion paper contains virtually no reference to data retention at all, "about 2 1/2 lines in a dot point on page 13" as Labor Senator John Faulkner said in the course of slamming the department's paper last year. When asked at Senate estimates last week whether Faulkner's criticisms were fair, secretary Roger Wilkins uttered a brusque "yes".

AGD demonstrably fails in its purported goal of upholding the rule of law. On national security, it routinely and frequently changes the law, at the request of its own agencies, sacrificing quality drafting and parliamentary scrutiny for handing ASIO and the AFP whatever powers they seek, even before previous extensions of powers have finished passing through Parliament. By its own admission, it is poor at explaining to the public the need for extensions to those powers, and it prefers to develop proposals away from public scrutiny.

If this were a minor department working in an obscure area, this would be of limited relevance; the public service is inevitably a variable entity, with some departments

and agencies significantly better than others. But AGD's responsibilities go to the basic rights of Australians.

The department, on national security issues, serves its agencies very well, but Australians very poorly.

Correction: The precise locations of government departments have been corrected from the original, which had a wee error.

<http://www.crikey.com.au/?p=375631>

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