

“WE'RE THE ONES THAT STAND UP AND TELL YOU THE TRUTH”: NECESSITY OF ETHICAL INTELLIGENCE SERVICES

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ABSTRACT

The concept of *ethical intelligence* is sometimes cited as an oxymoron. However, as the ultimate responsibility for intelligence agencies work lies with the government of the day, it is posited that intelligence-related decisions are ethically sound. This is because ethical standards provide the confidence that decisions can be judged fairly, giving governments legitimacy to carrying out what may otherwise be considered questionable activities.

Keywords: Ethical professional behaviour, code of conduct, public accountability, intelligence services, Australian intelligence community, national security

The concept of *ethical intelligence* has long been considered by many as an oxymoron (Bar-Joseph, 2010: 23). However, there exists a flaw in the logic behind such an assumption based on what the concept of what *ethics* means. When interviewed by America’s CBS reporter Scott Pelley, former-Director of Central Intelligence, George Tenet stated:

We're the ones that stand up and tell you the truth about when we're wrong. It's a great thing about this government. The only people that ever stand up and tell the truth are who? Intelligence officers. Because our culture is, never break faith with the truth. We'll tell you, you don't have to drag it out of us... Truth matters to us. (Pelley, 2007).

His quote would indicate that ethical behaviour is inherent in intelligence, due to the focus on truth. Yet Goldman’s statement that, “‘Truth’ is a goal, yet deception, secrecy and morally troubling compromises are often necessary” (Goldman, 2006:

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x) implies that ethical behaviour is incompatible with the secrecy and deception often associated with intelligence.

Nevertheless, without a working definition of *ethics*, either judgment is presumptuous at best. Furthermore, when intelligence is discussed as a function of a nation state (Herman, 2004: 343), it becomes representative of that government; holding the government accountable for the actions of the function. Therefore, without ethical legitimacy, a government is unlikely to be able to use intelligence agencies with the full support of the general public, risking the choice between public support and effective use of its intelligence services. By losing the capability in favour of public support, a government leaves itself open to concerning threats, both in peacetime and war, and in doing so disregards one of its responsibilities of as a nation—the protection of its citizens. Conversely, a government that is unable to present itself as ethical, risks losing power through public dissatisfaction.

Nonetheless, it is important to recognise that there are other dimensions to intelligence that do not involve national governments; that is, law enforcement intelligence, business intelligence, and private intelligence (e.g. intelligence units of NGOs) (Goldstone, 2008). This paper focuses on national security intelligence that are under the auspices of federal governments.

RATIONALE

A liberal democratic government is answerable to its citizens and as a representation of them, is not unreasonable for those citizens to expect their government to act ethically. It follows that as a function of government, intelligence services should be expected to act ethically. As a result, practices that risk being considered by the public as unethical, such as espionage or telephone/Internet tapping, also risk indicting the government that allowed them, reducing the support given by those they represent. This is made more problematic given that intelligence operations that are, by nature, secret.

This is not to say that intelligence agencies act unethically because they operate in secrecy, but they do act in ways that may be seen by some in the community as unethical because they are not privy to the inner workings of these agencies who are legitimately targeting threats to civil society.

It is posited that if the secret work of intelligence agencies were able to be gauged against a code of conduct in keeping with the public's expectations, yet

worded as aspirational in its crafting (rather than prescriptive), then it might be more difficult to accuse a government of acting inappropriately (and perhaps, illegally) regarding the use of its intelligence agencies.

STATEMENT OF PURPOSE

This paper argues that by carrying-out its work ethically, intelligence agencies are more likely to be seen as beneficial in standing-up for liberal democratic principles by increasing public support. While there are certainly intelligence operations that may seem questionable, having a set of ethical guidelines can be used to justify these actions, whether based on risk of conducting them, or by not conducting them.

To this end, there is support to posit that Australian, as well as the Five Eyes intelligence nation's it works in conjunction with, would benefit from a code of conduct to guide intelligence personnel. What this paper will not discuss is exactly how such a code would be constructed; that is outside the scope of the argument.

INTELLIGENCE AS A FUNCTION OF GOVERNMENT

Intelligence and ethical theory have been compared to Just War Theory in attempts to create a context by which intelligence operations can be held accountable (Prunckun, 2015: 353). While Just War Theory deals with attempts to explain the ethics of both going to war (*jus ad bellum*) and the ethics of actions during war (*jus in bello*) (Quinlan, 2007: 3), Charles Lathrop (2004: 205) argues that intelligence professionals are constantly at war, due to the adversarial nature of intelligence operations, which if accepted, means that *jus in bello* becomes the prominent component.

The use of Just War Theory to address intelligence operations can be problematic due to the lack of open conflict that Just War Theory is designed to address, however its broader purpose is to codify ethical behaviour for events normally considered to be unethical. It is in this sense that it can be used to support ethical intelligence; what is considered ethical in a peacetime environment does not always apply on the battlefield, and similarly, the relatively clear ethical guidelines of normal society are not necessarily appropriate for intelligence organisations. If it is then accepted that intelligence practitioners *are* constantly in a state of war (Gates cited in Lathrop, 2004: 205), then the Clausewitzian tenet that war is a “true political instrument” (Clausewitz, 1976: 87) can be applied, and

as such the way in which a government conducts intelligence operations is likewise an instrument, for which the wielder holds ultimate responsibility.

The concept of governmental responsibility has already featured in the history of the Australian intelligence community (Hope, 1974). Although Justice Hope's Royal Commission on Intelligence and Security (1974) was conducted over forty years ago (at this writing), his statement about Australia requiring high quality and timely intelligence, and acknowledgement that intelligence is still relevant (Hope, 1976: 4). Furthermore, the 1977 decision of then Prime Minister Malcolm Fraser to publically acknowledge the existence of the Australian Secret Intelligence Service (ASIS, 2014), and the 2001 establishment of the same service through legislative means through the *Intelligence Service Act, 2001*, as opposed to through executive order, demonstrate that at times when intelligence was considered most crucial, leaders have made them *more* transparent to the public, and provided *more* government oversight, allowing for *more* external critique.

By bringing the government's primary foreign intelligence service into public knowledge, then transferring the power from prime ministerial control to legislated processes, the government not only took responsibility for what could be argued as the most secretive component of the Australian intelligence community, but it also opened it up to public critique. By being ultimately responsible for the actions of the intelligence services, the government now ensured that there were ethical boundaries by which the intelligence community adhered.

BENEFIT TO GOVERNMENT

There is a tangible benefit to a government that engages in ethical intelligence operations. Although *jus ad bellum* has questionable relevance to intelligence work, *jus in bello* is closer related because it considers the constant (secret) adversarial nature of intelligence operations. Antonia Chayes (2013: 310–131) argues that not only does a government require an ethical declaration of war, but are required to be ethical in victory as well. She points out that the latter is not through any legal requirement, but because of the inherent benefits for being an ethical actor.

Such a stand can only be achieved by applying the principles of *jus in bello*, emphasising ethical conduct during conflict. As such, if it held true that *jus in bello* is relevant to intelligence personnel, then the conclusion that immediately

presents itself is that as a function of a nation state, intelligence operations are of more benefit to the government when they are conducted ethically.

COMPETING THEORIES

Before making a judgment on intelligence activities though, it is necessary to determine an appropriate ethical framework from which to work. Additionally, any professional code of conduct should work towards something; it cannot exist simply for the sake of existing. According to Andrew Abbott (1983: 856), professional codes of ethics exist as recognition of societal obligations. The Australian intelligence community's obligations are to the Commonwealth Government, and therefore any ethical code needs to enable it to meet such obligations. Rather than discuss all existing frameworks, this paper will focus on two in particular: 1) deontological ethics; and 2) utilitarian ethical theory. These are opposing theories, with the deontological approach focussing on justifying the means as a priority, while utilitarianism focussing on the result to determine righteousness.

Deontological Approach

The term *deontological* is derived from *deon*; the Greek for *duty*. In deontological ethics it is through a set of rules that duty is defined. Therefore, the focus for this approach to ethics is based rules rather than the outcome of the rules. As philosopher Immanuel Kant considered the moral code to be, obligatory and universal, disregarding the final outcome as a consideration (Elshtain, 1981: 210). Rather than determine the rules himself though, Kant considered these factors to be a test by which actions can be determined as *good* or *bad*.

If intelligence practitioners were to use a deontological system, it would require treating all information, activities and products by the same set of ethical guidelines, and adhering to them regardless of the outcome. The limitation with this approach was demonstrated when former-US President Bill Clinton decided not to order a strike on Osama bin Laden's location in 2000. President Clinton's decision was based on the possible number of civilian casualties; it could easily be argued that minimising collateral damage could be accepted as a universal rule, however the consequence of not ordering the strike meant that bin Laden was able to lead al-Qaeda in the 9/11 attacks that killed thousands of innocent people (Phythian, 2010: 6).

This theory only has its advantages if a practitioner is unsure of the morality of taken (or avoiding) a particular action, like President Clinton's where, presumably he did not have intelligence that advised him of the threat bin Laden posed alive. However, deontological theory has another weakness in that it requires universal application. So, applying this approach to the 2000 Clinton/bin Laden situation, the minimisation of civilian casualties would have been considered an obligatory rule regardless of the outcome, even if President Clinton had known of the yet to come attacks on the September 11, 2001. That is because deontological ethics would have prevented him from authorising the strike. Additionally, deontological theory's universalism does not allow for adjustment between different settings. Therefore, they are "...applied to all rational, moral members of the community rather than to just some." (Poon and Hoxley, 2010: 263)

The inappropriateness of this approach can be demonstrated by examining the 2013 case where the Australian government was alleged to have eavesdropped on the telephone calls of the Indonesian president's family. If honesty was expected of the Australian intelligence community under this doctrine, then an admission or denial would have been required (based on whichever was accurate). But Australian government policy is not to comment on intelligence operations because any comments could undermine agencies' ability to conduct effective operations. As such, this case is a simple demonstration where the universalism of the virtue of honesty is not appropriate. Therefore, a strict deontological code of ethics would prevent the Australian intelligence agencies to meet their obligations to keep Australians safe.

Utilitarian Approach

In contrast to a deontological approach is the theory of utilitarianism. This philosophy focuses on the outcome as a priority. Under a utilitarianism system, secrecy and deception would pose no barrier to action, provided that the desired outcome was successful. Some may argue that although this system is more applicable to intelligence operations, its application in practice could be used to justify torture, and assassination. It was argued by Stansfield Turner, former Director of the Central Intelligence, that "...the overall test of the ethics of ... intelligence activities ... is whether those approving them feel they could defend their actions before the public if the actions became public" (Turner, 1985: 48), and it is against this Turner Test that utilitarian intelligence operations fail.

By way of example, the inappropriateness of utilitarianism can be seen in this historical case of covert intelligence operations: mercenaries fighting against Italy during World War II fought according to a set of terms, one of which included a licence to rape Italian women (Walzer, 2006: 133–134). While there may have been a necessity to hire mercenaries in accordance with the Turner Test, it is inconceivable that there was a legitimate justification for awarding such a licence.

A more recent example was that of former-US Vice President Dick Cheney whose approach to national security issues post- the 9/11 attacks was the so-called “one percent doctrine”; that is, justifying pre-emptive strikes against any threat that presents a probability of even one percent (Suskind, 2006). Using utilitarian doctrine, the act of first strike could be justified because the intent was to prevent substantial damage to the US—potentially mass US casualties—but without evidence or intelligence to underscore the probability of a future attack, such a doctrine amounts to Orwellian “thought crimes” (Orwell, 1992).

Discussion

The adaptation of one or other of these philosophic approaches appears unworkable for intelligence operations. Even grappling with the thought of constructing a hybrid philosophy does not have instant appeal and so leads one to conclude that there may not be a universal system for intelligence ethics.

Supporters of such claims often focus on asserted universal concerns about mortality and vulnerabilities (Barry, 1998: 20–26), with Barry (1998: 8) stating that “...virtually *any* conception of the good life goes better in the absence of physical injury.” However, this outlook is not consistent with history events. If such a philosophical approach held true, then one could argue that suicide bombers would not exist.

The culture of extremism generally states that one will have had a good life if they die in service to their cause. However, in contrast to Barry’s assertion, this is a retrospective gain. Many cultures, including, but not limited to the Samurai, would prefer suicide over shame as well. Even in modern, Western cultures, the participation in sport and extreme activities, such as sky-diving, imply that people are more than happy to risk injury or death for the purposes of pleasure. Similarly, the idea that an action can be justified by the outcome begs the question *which outcome?* The US Senate Select Committee on Intelligence report on the use of torture by the CIA has been opposed by John Brennan as its Director, who claimed the methods were necessary to defeat the threats, and ultimately the enhanced

interrogation techniques saved lives (Brennan, 2014). However, the report stated in its first two findings that enhanced interrogation techniques were not effective in gaining either intelligence or detainee cooperation, and that the claimed success of such techniques were inaccurate, at times having no impact whatsoever (Senate Select Committee on Intelligence, 2012: 2).

Even giving the enhanced interrogation techniques program the benefit of the doubt, and accepting Brennan's claim, the unintended consequence of questionable practices has led to a lack of faith in the CIA by the US Senate, and arguably by the world public. With regard to long-term consequences, any short-term gains the CIA claimed have led to allegations of torture, and losing some of the CIA's integrity in the eyes of those who determine how much oversight, funding, and independence, the agency should be afforded. These consequences suggest that a utilitarian approach is ambiguous for application to intelligence operations.

Whether agencies look to a rules approach or a consequence-based mode of ethics, there are limitations. A fairly safe conclusion is that intelligence work does not allow for a universal moral compass. This does not mean that achieving an intelligence code of conduct is impossible. Because the Australian intelligence community exists as a function of the Commonwealth Government, it follows that it is the government that needs to establish the code. Logically, this would need constitutional compliance through bipartisan agreement. It is argued here that in order to achieve an intelligence community that is effective, yet ethical, the government needs to draft a code of conduct that has its base in the goals of these intelligence agencies.

INTELLIGENCE CODE OF ETHICS

Even though there is no specific code of ethics for intelligence agencies, there is a more general code of conduct that the Australian intelligence community adheres to—that of the Australian Public Service. At this stage, five of the six intelligence agencies use the Australian Public Service *Code of Conduct*, with the Australian Security Intelligence Organisation being the only agency with its own.¹ However, the ethical considerations of various professions are not identical. To quote Alexandra and Miller (2009: 99), "...the moral obligations of doctors are different to those of waiters." The implication for intelligence work is that the variety of roles within the Australian Public Service does not equate to the roles of intelligence personnel.

One example of this already being the case is with the medical profession. Despite being in the Australian Public Service, any medical practitioner, whether working for the Commonwealth Government or elsewhere, is required to be registered with one of the recognised boards of the Australian Health Practitioner Regulation Agency (AHPRA) (Australian Health Practitioner Regulation Agency, 2013). The AHPRA has a code of conduct that must be adhered to by practitioners, lest their certification be revoked. This is far from a directly transferable structure, but it provides a basic frame by which Australian intelligence agencies could form a professional set of ethics.

In the instance of intelligence operations, a similar code exists within the Australian Institute of Professional Intelligence Operators (AIPIO). Nevertheless, there is no requirement for intelligence personnel to join, negating the ability to ensure consequences for breaching the Code (AIPIO, 2012). Moreover, the Australian Public Service *Code of Conduct* is generic, tailored for no specific profession, so it is not entirely appropriate for intelligence personnel. While the *Code of Conduct* is likely to have been based on broad social norms and expectations, there are a recurring number of instances in intelligence work when these societal norms are out of step with an intelligence agency's mandate.

Another component of a professional code of conduct would be that it is effective. This might mean that it needs to be an aspirational code, rather than one that is prescriptive. If intelligence personnel are required to make judgments based on incomplete information, dubious sources and varying skillsets, then a prescriptive code, which cannot foresee all situations would not be realistic. It would likely restrict personnel in their options, and conceivably place them and their colleague's lives in danger (Gup, 2000). While complete freedom is not an option being advocated, prescriptive restrictions and permission are already in place in the form of the legislation, and ministerial and parliament oversight.

Rather than dictate further than what is required, an aspirational code could have the potential to complement existing legislation. Where a second layer of prescriptive doctrine may act only to add extra restrictions, having the potential to contradict if done poorly, an aspirational code could provide guiding principles that allow for judgment of personnel to be taken into account. An additional benefit to this approach would be to empower personnel. This becomes important when dealing with some of the morally grey areas in intelligence work.

One issue that presents itself is that of breaching human rights, specifically rights such as privacy, freedom of association, and freedom of beliefs (Gill, 2009). In a similar vein to intelligence legislation, the European Union Commission of Human Rights (EUHCR) provided a prescriptive statement that divides rights into three categories; 1) absolute; 2) limited; and 3) qualified. Of these, it specifies which rights fit into which categories, and when each category can be legitimately breached. In essence, it takes from the strength of both deontological and utilitarian ethics; it sets out universal rights that apply to all people, before stating under which conditions, based on consequence, these rights may be broken.

This approach by the EUHCR is helpful, but does not take into account the incomplete information some intelligence personnel may be working with (or, in some cases, outright deceptive information). Therefore, judgments as to when different rights can be breached would not be based solely on consequence, but also the risk of that consequence. Using a prescriptive code, it would be difficult to deal with a potential consequence that may or may not fit into a specific category.

Still, an aspirational code enables personnel to make judgments according to the information they have. For example, if a member of the public was known to be intending on engaging in an act of terrorism, the consequence of not conducting intelligence for the sake of maintaining rights to privacy would be disastrous, and there is a solid argument for breaching such rights. Yet, what of someone who is only suspected of planning such an act, with incomplete evidence to support it, and no history that would suggest such an act? In such a situation, trusting the intelligence operators dealing with the case according to the principles set out by the government, and based around their obligations to that government, would enable the operators to use their experience and skillsets to best effect. In this way, an aspirational code complements prescriptive legislation to create a situation that relies on the professional judgement of the operator, providing a tangible benefit to operations.

At the time of this writing, the Australian intelligence community was still (technically) bound by the Australian Public Service *Code of Conduct*, which contains adherence to the values of honesty, trustworthiness, and "...to uphold Australia's good reputation overseas" (Australian Government, n.d.). At times, this will not be possible for decision makers or intelligence personnel. These generic ethical guidelines are simply inappropriate for intelligence agencies to hold out to their personnel. Honesty, for instance, is a virtue for many professions,

but the use of false, misleading and deceptive information, common to counterintelligence operations, can also be a virtue. The misdirection of the enemy prior to the Allies D-Day invasion of Nazi-occupied Europe appropriately used misdirection (Prunckun, 2012: 50) despite the act's utter dishonesty. Take also the case where intelligence personnel collect data in relation to a foreign target, it is unlikely Australia's "good" reputation will be maintained, as demonstrated by the Indonesian telephone-tapping allegations of 2013. Finally, intelligence personnel may be required to hide their true names and occupation during a posting, or be required to keep information hidden in a manner that may be interpreted as dishonest. But to do otherwise would be contrary to the effective operating procedures and jeopardise their mission—and their lives.

In these situations, and many more intelligence related operations where context changes everything, and where the ethics put forward in the Australian Public Service *Code of Conduct* are glaringly inappropriate for intelligence operations. This does not make the intelligence work unethical, but rather due to their nature of the work, it makes adapting the Australian Public Service *Code of Conduct* inappropriate.

CONCLUSION

A code of conduct cannot simply be built around an agency's activities, as the resulting code would likely be more utilitarian-leaning and self-serving. Nonetheless, if intelligence work is to be considered as a profession, then a code of conduct needs to be established that specifically addresses the work intelligence personnel conduct for their agencies.

As intelligence operations are important to the function of liberal democratic governments, the decisions of intelligence agencies are reflective of the government's morality; and as such, should be ethical. The standard by which they are considered ethical is one that needs to be considered, empowering intelligence agencies rather than restricting them, while instilling confidence in the public that the government is acting ethically. In regard to the Australian intelligence community, this could be achieved by creating a professional code of conduct, perhaps overseen by an external professional body. This type of approach is consistent with the manner in which other licensed professions are overseen: doctors, lawyers, accountants, teachers, nurses, and so on.

Having such a professional body allows for the creation of a code of conduct specific to intelligence agency personnel, against which decisions can be tested

and ethical standards can be enforced. This provides legitimacy to the government should they be required to defend the intelligence community against unethical behaviour, without compromising or detailing specific decisions. Therefore, while not restricting the ability of the government to protect its citizens, it still allows for the concept of ethical intelligence to become less of an oxymoron through the advantages it gives to the nation state that employs them.

NOTE

1. The Defence Intelligence Organisation, Office National Assessment, Australian Signals Directorate, and Australian Geospatial Organisation belong to the Australian Public Service, while the Australian Secret Intelligence Service's claims to adhere to the APS *Code of Conduct* is stated on its website found at: <https://www.asis.gov.au/About-Us/Mission-and-Values.html>, which was access 10 February 2016. The Australian Security Intelligence Organisation stated it values through its website found at: <http://www.asio.gov.au/About-ASIO/Mission-and-Values.html> and accessed 10 February 2016.

DISCLAIMER

The views expressed in this paper are those of the author and are not intended to represent the views of the Commonwealth Government or any of its agencies.

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