



SENATE LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**INQUIRY INTO THE ANTI-TERRORISM
(NO 2) BILL 2005**

**JOINT SUBMISSION BY
THE COMMONWEALTH OMBUDSMAN
AND
THE INSPECTOR-GENERAL
OF INTELLIGENCE AND SECURITY**

Canberra
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Introduction

The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security have decided to make this joint submission in recognition of their shared interest in the oversight of government activities that have the potential to infringe liberty or to lead to adverse outcomes for individuals.

The Ombudsman and the Inspector-General are committed to working in a complementary and cooperative way to facilitate the effectiveness of their oversight activities. This is necessary, as in our view it is important to have suitable non-judicial safeguards as part of the new framework of anti-terrorism legislation.

Background

The office of Commonwealth Ombudsman is created by the *Ombudsman Act 1976* and the Ombudsman is tasked by that Act with investigating and reporting on the administrative actions of almost all Commonwealth agencies. Investigations can follow a complaint, or can be instituted on the Ombudsman's own motion.

The Commonwealth Ombudsman is also given functions by the *Complaints (Australian Federal Police) Act 1981* in relation to actions of the Australian Federal Police (AFP).

The Ombudsman's investigations are generally conducted on a cooperative basis, but the Ombudsman has power to require the provision of documents or information or that a person attend and answer questions.

The Ombudsman has also been given a range of inspection and oversight roles by:

- the *Telecommunications (Interception) Act 1979* (the TI Act)
- Part 1AB of the *Crimes Act 1914* in relation to law enforcement controlled operations;
- the *Surveillance Devices Act 2004*;
- Part 8C of the *Migration Act 1958*.

The Commonwealth Ombudsman is also the Defence Force Ombudsman and the Taxation Ombudsman. Under the Postal Industry Ombudsman Bill 2005, the Ombudsman would become the Postal Industry Ombudsman and, under the *Migration and Ombudsman Legislation Bill 2005*, the Ombudsman will become the Immigration Ombudsman. Under ACT Self-Government legislation, the Ombudsman is also the ACT Ombudsman, with responsibilities under the *Ombudsman Act 1989* (ACT) and other ACT legislation.

The Ombudsman is supported by a Deputy Ombudsman and a staff of about 140. The majority of staff are located in the ACT, but the Ombudsman's office is represented in every state capital and in Darwin.

The office is organised by function as well as by location, with major areas of responsibility (eg social security, child support, taxation, immigration, law enforcement, defence) being allocated to a team that specialises in that area.

The Ombudsman received over 17,000 complaints and over 12,000 other approaches in 2004-05 and conducted about 6,500 investigations. As well as investigations following complaints, the Ombudsman conducted a number of systemic investigations on his own motion.

The office of Inspector-General of Intelligence and Security is created by the *Inspector-General of Intelligence and Security Act 1986*. The Inspector-General conducts functions under that Act relating to Australia's six intelligence and security agencies:

- the Australian Security Intelligence Organisation;
- the Australian Secret Intelligence Service;
- the Defence Signals Directorate;
- the Defence Intelligence Organisation;
- the Defence Imaging and Geospatial Organisation; and
- the Office of National Assessments.

The Inspector-General deals with complaints about these agencies. As well, the Inspector-General has specific inspection and inquiry powers in relation to each of the intelligence and security agencies. For example, in relation to ASIO, the Inspector-General can at the request of the Attorney-General or the Prime Minister, or of his or her own motion, or in response to a complaint, inquire into:

- the compliance by ASIO with the laws of the Commonwealth and of the States and Territories;
- the compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister;
- the propriety of particular activities of ASIO;
- the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO; or
- an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Human Rights and Equal Opportunity Commission.

The Inspector-General is currently supported by a staff of five (with an additional staff member expected to commence in January 2006); and with additional resources being obtained as needed for particular inquiries. All staff are based in Canberra. The IGIS dealt with 78 new complaints in 2004-05, 33 of which required inquiry or investigation. The IGIS has extensive investigation and inquiry powers.

Relationship between offices

The offices of the Ombudsman and the Inspector-General enjoy a close and cooperative relationship. The Ombudsman prior to the current Ombudsman, Mr R N McLeod, AM, had previously been the Inspector-General, and the recently retired Inspector-General, Mr W J Blick PSM, had previously served as Deputy Ombudsman. The current Ombudsman has been appointed as Acting Inspector-General, when the occasion requires.

Both agencies avoid duplicating effort on matters in which they may both have a role and this objective will be further facilitated with amendment to s 16 of the IGIS Act effective from 2 December 2005, which provides clear authority for the IGIS to consult with the Ombudsman prior to commencing an inquiry to ensure each agency's activities are properly focussed.

The offices have different areas of focus, with the Ombudsman being concerned mostly with the way a large number of agencies interact with the public and the Inspector-General having a deeper oversight role in relation to the six intelligence and security agencies. A member of the public is usually aware of actions of the "Ombudsman" agencies in relation to him or her, but most of the "Inspector-General" agencies have few direct dealings with the Australian public and, for obvious reasons, they act discreetly.

ASIO is expressly outside the Ombudsman's jurisdiction. ONA and ASIS are both within jurisdiction, but the Ombudsman would almost invariably decline to investigate and suggest that the matter be taken up with the Inspector-General. In relation to the Defence-based agencies, the Ombudsman may decide to deal with Australian Defence Force personnel matters related to the Ombudsman's Defence Force Ombudsman role, and to suggest that matters related to intelligence functions be taken up with the Inspector-General.

The Ombudsman and the IGIS are developing at an administrative level a Memorandum of Understanding between their offices. The MOU will cover matters such as the exchange of information between both agencies relating to their complaint functions, the avoidance of duplication, and raising public awareness of their accountability and oversight role and how both agencies interact. The MOU will cover their oversight work in areas such as immigration, entry and search warrants, and questioning and detention warrants.

Aspects of the Bill relevant to the Ombudsman and the IGIS

The Anti-Terrorism (No 2) Bill 2005 was developed following an agreement between the Commonwealth, the States and the Territories. The Bill amends a number of Commonwealth Acts to target possible terrorist acts and organisations.

A person may be subjected to a control order that places limitations on what a person may do in relation to:

- attending or not attending at places;
- travel;
- wearing a tracking device;
- communicating with specified people and using specified forms of communications;
- possessing specified things or doing specified things;
- reporting as required;
- being photographed or fingerprinted; or
- being counselled or educated (with consent).

The object of such an order is to permit close monitoring of the person for a period of up to 12 months for a person aged over 18, or 3 months for a person aged between 16 and 18. The person is required to be informed of the existence and content of the order and the basis on which it was made.

Under limited circumstances, a person may be detained for a period under an order initially issued by the AFP (for up to 24 hours) and extended by an issuing authority (to a total of 48 hours). The person may be detained in a State or Territory prison or remand centre and State and Territory legislation may enable detention to be continued for longer periods. A person subject to a preventative detention order is subject to a prohibition on contact (other than with a single family member or a limited range of other people) during detention – and may only disclose that he or she is safe but not able to be contacted. The person may also contact a lawyer in relation to the detention.

The detainee, and a range of other people (including a lawyer) are subject to criminal sanctions for disclosing the detention. Police would have associated powers necessary to enforce detention orders, including the power to require a person's identity to be given and to enter and search premises. A person subject to a preventative detention order may be handed over to ASIO, if that is required by a warrant for questioning issued under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

A person subject to detention must be informed of the order and of his or her rights, including the right to complain to the Ombudsman under the *Complaints (Australian Federal Police) Act 1981* or State or Territory legislation dealing with complaints against police. That right is expressly preserved in the Bill. There is a capacity for a person detained, *ex post*, to seek AAT review of a detention order and a determination that the Commonwealth should compensate the person. A person affected by both a Commonwealth and a State order may seek review in a State or Territory court.

The *Crimes Act 1914* will permit stopping and searching in relation to suspected terrorist offences and will require a person stopped to give his or her name, address and reasons for being in a Commonwealth place. It will require aircraft or ship operators to provide information and require any person to comply with a notice to provide documents. A person may not disclose the existence of a

notice, other than in the course of complying with it or seeking legal advice or representation in relation to it.

Comment

The Bill has attracted attention for a number of reasons, including questions about constitutional validity, human rights law and criminal law issues. This submission does not address all the issues, as the Ombudsman and the Inspector-General believe discussion and debate on those matters are best left to others. Similarly, the Ombudsman and the Inspector-General accept that the view of the Government is that the community faces a risk from acts of terrorism and that stronger measures may be needed than if that were not the case.

An abiding theme in public discussion of the proposed legislation is the need for safeguards to ensure that there is adequate protection for members of the public in relation to the exercise of the far-reaching powers conferred by the proposed legislation. A strong focus in that public discussion is the need for judicial safeguards. This submission by the Ombudsman and the Inspector-General focuses instead on how non-judicial safeguards can make an important contribution in a number of areas. Our own offices can play an important role in that respect, in three areas:

- investigating individual complaints about actions taken under the legislation by federal agencies, such as ASIO and the AFP;
- working with other federal agencies to develop administrative protocols to accompany the legislation and to spell out the roles and responsibilities of different agencies; and
- monitoring in a general way how the legislation is being administered.

The following commentary deals in a combined way with those aspects of our roles and how they are relevant to the scheme of the proposed legislation.

Under the Bill, the liberty of individuals can be constrained by an administrative decision. That constraint is likely to require the cooperation of a number of agencies, at Commonwealth, State and Territory level. For example, a person may be taken into custody by the Australian Federal Police, supported by a state police service and questioned for limited purposes by those agencies; as well, perhaps, the person may be subject to attention by other Commonwealth agencies such as the Department of Immigration, Multicultural and Indigenous Affairs. On release, the person may be handed over to the Australian Security Intelligence Organisation if a warrant under the ASIO Act is in effect. The actions of those agencies can give rise to complaints that, at least for Commonwealth agencies, can be investigated by either the Ombudsman or the Inspector-General.

If the person is detained for a substantial period, that may require the cooperation of State and territory correctional authorities or detention contractors. Similarly, the reporting and monitoring of a person subject to a control order may involve actions taken by a range of Commonwealth, State and Territory agencies and, in

some cases, their contractors. The jurisdiction of the Ombudsman is to be extended by the Migration and Ombudsman Legislation Bill 2005 to cover the actions taken by Commonwealth contractors in discharging a function or service of the Commonwealth. Actions taken by agencies (such as State agencies) that are beyond the jurisdiction of the Ombudsman or Inspector-General can often be the subject of a complaint investigation by a counterpart agency. It is a familiar part of our work to refer a person to the appropriate oversight agency.

We turn now to look at the role we are able to play in the development of administrative protocols. Here it is instructive to compare the proposed preventative detention regime in the Bill with counterpart provisions in Part III, Division 3 of the ASIO Act. While both include a requirement that a person being detained be treated humanely, the ASIO Act provisions also require that a statement of procedures be issued. This protocol is a publicly available document and a copy is attached to this submission for ease of reference.

A detailed statement of this sort, of the guarantees that a reasonable person would expect to apply to detention in these circumstances, can be a useful document in establishing a framework for good administrative practice and the protection of individual rights. A second useful purpose of a statement of protocols, if the Bill either contained or required such a protocol to be developed, might be to further specify how preventative detention orders and questioning and detention warrants would operate together in a practical sense, if both applied to a given situation.

The current Bill does contain a number of additional safeguards compared to the earlier draft of the Bill. One of these is the right to appeal on the merits, to the security appeals division of the Administrative Appeals Tribunal (item 105.51 (5) – (9)). Such appeals can only be made after the order has ceased to be in force. It would seem useful for this right of appeal to be one of the matters of which the subject of the order is informed when taken into custody or detention. That is not currently a requirement in items 105.28 and 105.29.

Similarly, the subject of the order should be advised about the limitations in item 105.42 on what that person can be questioned about while in detention under the prevention detention order.

With effect from 2 December 2005 the IGIS Act will contain a clear right of the Inspector-General to attend any place used by ASIO for detention under a warrant. There is no corresponding provision in relation to detention under the Bill for any independent external reviewer, although the Ombudsman may be able to rely on general powers in section 30 of the Complaints (AFP) Act when conducting an investigation.

However, another safeguard now in the Bill is that there is to be a nominated senior AFP member to oversee the exercise of powers under, and the performance of obligations in relation to, each preventative detention order. This nominated senior AFP member must be someone who is not involved in the making of the application for the preventative detention order. While the general

obligation of the nominated senior AFP member is clear, consideration could be given to specifying an item 105.17(7) that the member's responsibilities include the requirement to ensure that the conditions of detention fully comply with item 105.33 (and with any statement of procedures, should that requirement be inserted in the Bill).

Perhaps this should go still further and require the nominated AFP member to advise the issuing authority and/or the Ombudsman where there is a breach of the statement of procedures.

Noting that prohibited contact orders are part of the arrangements proposed in the Bill and that events will move quickly in the scenarios envisaged, including additional mechanisms in the Bill to ensure visibility in situations such as where no legal adviser is available to the subject of the order.

Perhaps the nominated senior AFP member should be required to immediately provide the Ombudsman with a copy of the detention and contact orders, and of the summary of reasons, in cases where a legal adviser is not available to the subject of the order or orders.

The powers to stop, search and require identification and the power to require documents are powers which may cause disagreement or confrontation when exercised, leading to complaints.

It is suggested that some specification is required in the Bill which would safeguard against extensive "incidental" collection of information which is contained in documents requested for a specific purpose, particularly where the material may be of a sensitive nature (eg medical information).

Coordination

The Bill arose out of an agreement by all Australian governments for a coordinated approach to dealing with the threat of terrorism. That approach depends on a range of actions being taken at Commonwealth, State and Territory level.

The Ombudsman and Inspector-General intend to liaise with other oversight bodies to ensure that provisions for the conduct of investigations and the sharing of information can operate effectively and efficiently in dealing with the scheme created by the Bill.

There may be a need for further legislation to ensure that all actions taken under the new coordinated regime are capable of proper oversight to ensure that they meet acceptable standards of fairness and humane treatment.