RESPONSE BY COMMONWEALTH OMBUDSMAN AND INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY TO QUESTIONS TAKEN ON NOTICE 17 NOVEMBER 2005

Question 1 (p.79 Proof Hansard)

Our comments were sought on establishing a statutory office or function termed a Statutory or Public Interest Monitor. Examples cited (but not at length) in the material before the Legal and Constitutional Affairs Committee are:

- *United Kingdom*: A person has been appointed to provide reports pursuant to the *Terrorism Act 2000*, s 126, which provides that the "The Secretary of State shall lay before both Houses of Parliament at least once in every 12 months a report on the working of this Act". The current monitor is Lord Carlile of Berriew QC. We have had the opportunity to read those of his reports which are available on the internet. We note that the UK *Prevention of Terrorism Act 2005*, s 14, also provides for review of the operation of that Act.

  The *Terrorism Act 2000* also provides for a special advocate to be appointed by the Law Officers of the Crown "to represent the interests of an organisation or other applicant in [the] proceedings …". We have not had sufficient time or opportunity to examine this arrangement.

- *Queensland*: The Public Interest Monitor is appointed under the *Crime and Misconduct Act 2001*, s 34, to monitor applications for and the use of surveillance warrants and covert search warrants. A principal function of the Monitor is to appear before a court hearing an application for such a warrant, to test both the appropriateness and the validity of the application before the court, including by cross-examination of the person applying for the warrant (s 326). The Monitor can also gather statistical information about the use and effectiveness of warrants.

Some aspects of a statutory monitoring role could be conferred on the Ombudsman or Inspector-General, but other aspects of the Queensland and United Kingdom models would be at odds with the present role of those offices. The following points bear consideration:

- Both the Ombudsman and Inspector-General have statutory authority to conduct inquiries on their own motion. For the purpose of any such inquiry they can require that they be given access to documents, premises and people. It is therefore presently open to each agency to put procedures in place to be notified of any action taken by a federal agency pursuant to existing or proposed anti-terrorism legislation.

- It would be compatible with the established role and function of the Ombudsman and Inspector-General to be given an extended statutory monitoring function. For example, statute could require the Australian Federal Police to provide to the Ombudsman a copy of any submission for a control monitoring order or a preventative detention order. Furthermore, both the Inspector-General and Ombudsman could be required to prepare an independent report each year on action taken pursuant to some or all of the proposed provisions in the Anti-Terrorism Bill. Such a report could include the observations of the Inspector-

General or Ombudsman on difficulties or weaknesses apparent in the design or administration of the anti-terrorism legislation.

- In the case of the Inspector-General, s 35 of the *Inspector-General of Intelligence and Security Act 1986* lists some matters which must be included in his or her annual report to Parliament (eg compliance by agencies with privacy rules under *the Intelligence Services Act 2001*; and, from 2 December 2005, inquiries into ONA statutory independence). The Inspector-General goes further in the reports to Parliament and deals with sensitive new powers and capabilities, to the maximum extent possible (eg, training and carriage of weapons by ASIS staff).

- The *Ombudsman Act 1976* provides that the Ombudsman shall prepare an annual report to the Parliament on the operations of the Ombudsman during the year (s 16(1)), and may submit a special report to the Parliament at any time on any matter arising in the work of the Ombudsman (s 16(2)). Under those general reporting powers the Ombudsman can present a report if the Ombudsman is of the opinion that an administrative policy or legislative rule is "unreasonable, unjust, oppressive or improperly discriminatory" (s 15(1)(a)(iii)). The Ombudsman has some special reporting obligations to the Parliament (eg, to report on the monitoring of controlled operations by the AFP and the Australian Crime Commission (*Crimes Act 1914*, s 15UC); and to report on the detention of any person who has been detained for two years or more (*Migration Act 1958*, s 486O).

- The Ombudsman and Inspector-General both have advantages to offer in any larger scheme of statutory monitoring or oversight. Both are permanent, full-time offices, by contrast to the part-time character of the UK and Queensland offices; both have an established public profile and are easily accessible by members of the public, via telephone, email, letters and in person; they have a complement of staff who are available to deal with urgent or temporary spikes in work; they are in regular contact with comparable state oversight agencies, such as ombudsmen and police complaints agencies; both the Inspector-General and the Ombudsman hold the top level of security clearance; and the Ombudsman maintains eight offices around Australia, enabling ready contact with people, agencies and locations.

- It would not be compatible with the existing role or function of the Ombudsman or Inspector-General to be given the function of the Queensland Public Interest Monitor or UK special advocate, of appearing in court as a "friend of the court". That role includes an advocacy function that is incompatible with the traditional conception of both the Ombudsman and the Inspector-General, as neither an advocate nor representative of a complainant or government agency, but as a body that brings an independent mind and a balanced perspective to all aspects of a case.

- In creating any new monitoring function, it is important to distinguish between monitoring, on the one hand, the immediate operation of specified legislative provisions and, on the other hand, the overall effectiveness and efficiency of arrangements and the relevant agencies.

In our view it is better for the latter type of monitoring to be dealt with by a body specially appointed for the purpose, that is properly resourced and with comprehensive terms of reference. Two recent examples of such reviews in Australia are the 2004 Inquiry into Australian Intelligence Agencies by Mr Philip Flood AO (whose recommendation for a periodic external review of the intelligence community has been accepted by the Government) and the 2005 Airport Security and Policing Review by the Rt Hon Sir John Wheeler JP, DL.

- It may be that in Australia the better model for undertaking a periodic review of the operation of legislation concerning criminal offences and how these are handled in the criminal justice system, is a body like the Security Legislation Review Committee, established by the *Security Legislation Amendment (Terrorism) Act 2002*. The function of that Committee is presently limited to reporting on the 2002 package of counter-terrorism legislation, after conducting a public inquiry. The Committee could be given a continuing function. The Inspector-General and the Ombudsman are ex-officio members of that Committee, along with the Human Rights Commissioner and the Privacy Commissioner (together with other appointees). Of course, the effectiveness of this model is not yet proven.

- Whatever mechanism might be considered for reporting on offences and the criminal justice system, our view is that at a minimum there is a need for periodic public reporting of key data such as the number and type of charges and arrests under anti-terrorism provisions, and the number of instances where assets are seized or accounts frozen.

In summary, we make the following comments:

a) The Ombudsman and the Inspector-General will, as part of their existing roles, monitor and report on the proposed new provisions.

b) If there is thought to be a need at the Commonwealth level for a more intensive program of monitoring and reporting on the new anti-terrorism provisions, the Ombudsman and Inspector-General are of the view that they are well-positioned (provided there is resource supplementation) to be tasked with that function.

c) Three matters would be best handled by other arrangements:

   (i) Advocacy for, or representation of, a person in respect of when orders are sought.

   (ii) Intensive review of the overall effectiveness and efficiency of anti-terrorism arrangements and agencies.

   (iii) Review of the operation of criminal offence provisions in the criminal justice system.

d) The Security Legislation Review Committee could be asked to offer recommendations on how (iii) immediately above and periodic statistical reporting, might best be handled in an ongoing way.

Question 2 (p.80, Proof Hansard)

Proposed s 104.29 in Schedule 4 of the Bill requires the Attorney-General to present an Annual Report to Parliament covering a number of listed matters in respect of control orders and prohibited contact orders. The list is not intended to be exhaustive and clearly there may be a number of things beyond the listed items which might, depending on events, appropriately be covered in such a report.

However, it would be worthwhile adding to the listed items, while still ensuring that the list is not as seen as exhaustive. Three matters which could readily be added would be:

a) Number of applications refused under s 104.4, s 104.7 and s 104.9.

b) Number of instances where the Attorney-General refused consent to an urgent interim control order under s 104.10.

c) Number of instances where an order was not confirmed.

It would also seem useful for there to be an indication of the number of cases involving a person aged 16-18, and for some sort of statistical information on the broad nature of the obligations, prohibitions and restrictions imposed by orders given in the 12 month period. The latter information could either be by the items listed in s 104.5(3) or some groupings of those items if there is particular sensitivity about reporting against each of the items separately.

There are offences in the proposed s 104.27 for contravention of orders. Some data in relation to those would also be useful. This connects with a more general point we made in responding to question one; that is, there should be some sort of statistical reporting on matters such as arrests and charges concerning terrorism offences. Public discussion will be better informed by having readily accessible in the public domain the sort of annexes that Lord Carlile attaches to his reports on the UK Terrorism Act 2000.

Turning to preventative detention orders, there are disclosure offences proposed in s 105.41 and these should also be reported statistically.

Proposed s 105.47 lists matters which should be included in an Annual Report to Parliament by the Attorney-General concerning preventative detention and related orders. As with s 104.29, there is a list of items which is not intended to be exhaustive and we believe that approach should be maintained. However, consideration should be given to adding to the list the following items:

i) The number of applications (either for preventative detention or prohibited contact) refused.

ii) The number (and type) of orders revoked.

iii) The number of orders where s 105.39 was relevant (ie cases where the person is either under 18 or incapable of managing their own affairs).

iv) Any instances where a person was released because it was found they were under 16 (s 105.5).

v) By general categorisation, the nature of the facility where the person was held (ie whether a state or territory facility or Commonwealth facility, and the general nature of the facility).

Question 3 (p.81 Proof Hansard)

We were asked to expand on the brief reference in our written submission to Schedule 6 in the Bill. Our submission sought to highlight the proposal in Schedule 6 to insert a new s 3ZQO in the *Crimes Act 1914*, which would permit the AFP to seek from a Federal Magistrate a written notice requiring a person to produce documents relating to serious offences.

The central justification given by Deputy Commissioner Lawler for this proposal at the hearing on 17 November 2005 was as follows:

> "*With regard to notices to produce, the AFP believes that notices to produce are necessary to facilitate essential and basic inquiries related to the investigation of a terrorist and other serious offences, such as confirming the existence of an account; account holder details, including residential address; account history; and payment details. The British police have such a power, which was invaluable during the response to the London bombings to identify the suspected terrorists and verify their movements and associations at a very early and critical stage. In the past the AFP would have benefited from having these powers, in particular in relation to identifying potential terrorists travelling to Australia. The AFP believes that a notice to produce power is necessary to provide enough certainty to the private sector to assist the AFP in all circumstances.*
>
> *Some organisations have been reluctant, or have refused, to provide information requested by the AFP under the national privacy principle No. 2. A notice to produce would alleviate these problems. As the existing alternative is seeking search warrants to access information that firms are able to disclose under the NPPs, the national privacy principles, during a terrorist event there could be insufficient evidence on which to ground such a warrant.* …
>
> [W]*hat we are progressively seeing, as I think I indicated in my opening remarks, is that, particularly in the corporate sector, where information is available and able to be released, there are businesses and entities that are unsure of their legal standing. We are finding more and more reluctance to release information to the AFP, which can be legitimately released in these instances. We are also finding that businesses, companies and corporations are effectively looking for some legal cover, some legal protection, for abiding by the relevant privacy principles. So we are seeing more and more a need for such a notice to produce.*"

We are not in a position to question the need for notices to produce in relation to terrorism offences. However, we do suggest further consideration be given to allowing this capacity – as currently drafted – to be used in relation to other serious offences as proposed in s 3ZQO.

The justification given by the Deputy Commissioner suggests that in many instances it would be sufficient for a notice to seek "information" rather than a "document" or "documents". The latter are likely to contain some extraneous and possibly sensitive information. While the proposed s 3ZQP attempts to narrow the types of documents

which can be sought (but in the case of at least proposed (i) and (k), not successfully in our view), there is still the potential to encourage “fishing” or “trawling”.

It is noteworthy that the proposed s 3ZQM allows an authorised AFP officer to obtain either “information” or “documents” from the operator of an aircraft or ship, whereas s 3ZQO refers only to “documents”.

The following suggestions therefore arise:

(a) Proposed s 3ZQO (and perhaps proposed s 3ZQN) should include the capacity for a notice to require the production of either information or of documents.

(b) Proposed s 3ZQO (2) should specifically require the Federal Magistrate to include in his or her considerations whether:

    (i) it is appropriate that the notice require the production of “documents” rather than “information”, and

    (ii) in cases where documents are sought, whether the source and documents nominated are the most appropriate ones for obtaining the information of relevance to the investigation.

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