

**Legislative Assembly for the
Australian Capital Territory
Standing Committee on Legal Affairs**

SUBMISSION BY THE ACT OMBUDSMAN

**INQUIRY INTO TERRORISM
(EXTRAORDINARY TEMPORARY
POWERS) BILL 2005**

January 2006

BACKGROUND

The office of ACT Ombudsman is created by the *Ombudsman Act 1989* and is held by the person holding office as Commonwealth Ombudsman under the *Ombudsman Act 1976* (Commonwealth). That office has been held by Professor John McMillan since early 2003.

The Ombudsman is assisted by a Deputy Ombudsman and the office employs a staff of approximately 156, located in Canberra, all State capitals and Darwin.

The ACT Ombudsman investigates most administrative actions of most ACT agencies under the Ombudsman Act. The Ombudsman also conducts functions under the *Public Interest Disclosure Act 1994*.

The Commonwealth Ombudsman's roles include the oversight and conduct of investigations of the Australian Federal Police (AFP) under the *Complaints (Australian Federal Police) Act 1981*. Because the AFP provides the ACT with police services, the Ombudsman reports on it to both the Commonwealth Parliament and the ACT Legislative Assembly. The Commonwealth Ombudsman oversees and reports on certain law enforcement activities, including telecommunications interceptions¹, the conduct of controlled operations² and the use of surveillance devices³.

The Commonwealth Ombudsman is not authorised to investigate the actions of the Australian Security Intelligence Organisation (ASIO), but has a close working relationship with the office of the Inspector-General of Intelligence and Security (IGIS) who can investigate ASIO.

The Commonwealth and ACT Ombudsman conducts investigations in private and is subject to extensive secrecy provisions. The Ombudsman has strong coercive powers to acquire information, answers and records, but generally prefers to operate on a cooperative basis. The Ombudsman is not compellable in legal proceedings, but is subject to Commonwealth and ACT Freedom of Information legislation⁴. The Ombudsman's only substantive power is to report and make recommendations, but the Ombudsman must follow the procedural fairness requirements set out in the legislation and provided by common law when exercising this or any other power.

THE TERRORISM (EXTRAORDINARY TEMPORARY POWERS) BILL 2005

The history of the Bill's genesis in a Council of Australian Governments meeting is reasonably well-known. The Bill mirrors and expands on powers set out in the Commonwealth's *Anti-Terrorism Act 2005*; the Bill has, or will have, analogs in all States and the Northern Territory. A copy of the joint

¹ *Telecommunications (Interception) Act 1979*, Part VIII

² *Crimes Act 1914*, Division 2A, Part IAB

³ *Surveillance Devices Act 2004*, Part 6

⁴ The Commonwealth legislation is currently being reviewed including the question of whether the Ombudsman should be subject to the *Freedom of Information Act 1982*.

submission of the Ombudsman and the IGIS into that legislation is attached, along with a response to an issue raised and a copy of the relevant part of the transcript of the Senate Legal and Constitutional Affairs Legislation Committee. As is apparent from those materials, the Ombudsman does not seek to express a view on the public policy concerns underlying the Bill or on whether the Bill satisfies other legal standards, including (for example) the requirements of the ACT's *Human Rights Act 2004*.

The Bill expands the period of preventative detention available under the Commonwealth legislation and provides a mechanism for public interest monitoring. It provides for the exercise of special powers by police in limited circumstances related to terrorist threats or activities.

THE ROLE OF THE OMBUDSMAN UNDER THE BILL

Clause 48 of the Bill provides that a person detained under a preventative detention order is entitled to contact the Ombudsman.

The Bill makes a number of other provisions regarding the Ombudsman's role in relation to preventative detention:

- under cl 33(4)(c), the Ombudsman may make representations to the "nominated senior police officer" responsible for supervising the exercise of functions in relation to the preventative detention order;
- under cl 40(2), the Ombudsman is to be consulted about proposed detention arrangements which may be put to the Minister for approval;
- under cl 40(4)(f) and (g), the detention arrangements must provide for the Ombudsman to be told about all places where a person is detained and to be able to visit any such place at a reasonable time;
- under cl 40(6), the Ombudsman is to be given a copy of the detention arrangements and any amendments;
- under cl 41(2)(g), a detained person must be informed of his or her rights, including the right to complain to the Ombudsman about the application for a preventative detention order, the detention itself and their treatment during it;
- Clause 54 indicates that unlike contact with other persons, the right to contact with the Ombudsman is not subject to a prohibited contact order under cl 29. Clause 49 provides that a person may contact a lawyer in relation to making a complaint to the Ombudsman.

Clause 55 prevents questioning of a person in detention, except for the purposes of ascertaining the person's identity (cl 55(1)(a)), assuring their wellbeing (cl 55 (1)(b)), or complying with the Bill's provisions on preventative detention (cl 55 (1)(c)). The Ombudsman suggests that cl 55(1)(c) should be read so as to permit the Ombudsman to question a detainee who has made a complaint, or a detainee in a place being visited by the Ombudsman in relation to the subject of a complaint or a matter related to the application for the order or the detention⁵.

⁵ But see cl 55(6) which contemplates questioning by family members, lawyers and the public advocate

Insofar as police action within the ACT is concerned, the Ombudsman would appear to have jurisdiction to investigate any complaint about the exercise of police powers under a preventative or investigative authorisation, or the exercise of the authorised special powers. The Ombudsman notes the requirement (cl 84) that damage from the use of special powers be minimal and the provision (cl 85) for compensation for damage arising from their use.

Monitoring

As with many intrusive actions which Government agencies may be required to take, there is a need to ensure that the powers granted under the Bill are exercised lawfully, proportionately and on an appropriate basis. The panel of public interest monitors appointed under cl 59 and given functions under cl 15 and cl 53 would meet this need in individual cases going to a hearing, and in situations where a police officer wishes to monitor contact with a lawyer; the role of the public advocate⁶ is also relevant, as is the requirement (cl 92) for a report on the authorisation and exercise of special powers. The Ombudsman considers that there is also a need for systemic review by the Ombudsman or the Human Rights Commissioner to satisfy public and legislature concerns about the exercise of intrusive powers. The inspection roles given to the Ombudsman under some Commonwealth legislation may provide a model.

Coordination

The Ombudsman has noted that the exercise of powers under related Commonwealth legislation will require a degree of cooperation between oversight agencies. Cooperation can increase certainty and confidence, minimise duplication and reduce the possible exposure of sensitive information to those without a substantial need to know. The Ombudsman suggests that the present Bill could contain provisions authorising consultation and the exchange of limited information between the Ombudsman, the public advocate and affected members of the public interest monitor panel. For example, it may be productive if the oversight agencies worked to produce a standard form of advice about complaint rights and oversight and the related processes.

General Oversight

The Ombudsman acknowledges that the enactment of counter-terrorism legislation by all legislatures in Australia has excited a great deal of concern, both in the legislatures and in public debate. An issue that has been uppermost in that debate is the need for protection of individual rights, and the importance of effective oversight and accountability of the way that policing powers are exercised. The ACT Ombudsman, as part of the oversight and accountability framework of government, is committed to ensuring that those public concerns are acted upon.

⁶ In relation to persons whose decision-making ability is impaired

The ACT Ombudsman takes seriously the role proposed for it under the Terrorism (Extraordinary Powers) Bill 2005. This will require an active role that is self-initiated and does not rely solely upon an inquiry or complaint from a member of the public. To that end, the Ombudsman has already initiated discussions at a senior level with the Australian Federal Police to ensure that the Ombudsman can play a role in developing the administrative protocols to accompany the counter-terrorism legislation, and that the Ombudsman is regularly briefed on action being taken by the policing authorities. This active role being developed by the Ombudsman will embrace the responsibilities conferred on the Ombudsman, directly and implicitly, by the proposed ACT Terrorism (Extraordinary Powers) Bill 2005.

Canberra, January 2006