

Parliamentary Joint Committee on Intelligence and Security

Review of AFP Powers

Attorney-General's Department

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Question 1. Mark Dreyfus MP asked the following question:

Mr DREYFUS: You'll have to take this on notice, but I am interested in knowing how many of the respondents to the contested control order applications have required some form of legal assistance.

Mr Walter: It may be a little bit tricky for us to get that information, because they might have applied, for example, to Legal Aid for assistance, and Legal Aid, quite rightly, won't tell us, because of privacy concerns. We'll see what we can find out by talking to those involved, but it might actually be quite tricky for us to get a definitive answer on that.

Mr DREYFUS: Just so you know where I'm going and where the committee might be going with this, we've had raised with us by the Law Council—this is for your assistance at the Attorney-General's Department—serious concerns about the availability of legal assistance to respondents to control order applications. I'm trying, through you, to get some factual and financial basis to what the scope of the problem is. So I would ask you to take on notice as well what assistance the Commonwealth has provided.

The response to the Member's question is as follows:

As the Australian Federal Police (AFP) noted in its evidence to the Committee at the hearing, there have been two contested control order applications, in relation to Mr Harun Causevic and Ms Zainab Abdirahman-Khalif.

In accordance with longstanding practice, the Attorney-General's Department does not comment on whether it has received a legal financial assistance application from any individual, or on the details of such assistance.

The department is subject to particular obligations in relation to the confidentiality of any application made under the legal financial assistance schemes. These obligations are reflected in a privacy collection notice issued under Australian Privacy Principle 5 of the *Privacy Act 1988*. The confidentiality requirements for the department are also acknowledged in the Commonwealth Guidelines for Legal Financial Assistance (paragraph [9.6]).

In relation to the provision of legal aid, legal aid commissions do not report the level of information to the department to ascertain how many respondents to control order applications have received legal aid. Legal aid commissions also have obligations in relation to confidentiality.

Question 2. Mark Dreyfus MP asked the following question:

Mr DREYFUS: We heard some evidence from the Law Council just this morning about the level of representation on the Commonwealth side of the bar table in these control order applications. How many barristers generally would the Commonwealth use? Is it silk and two juniors—that sort of thing?

Mr Walter: Again, AFP run this part of the process, so quite genuinely I don't know. But I can see whether we can get some indicative sense of that.

Mr DREYFUS: That would be helpful. Can you get some indication—you won't have this to hand, but some indication—of how much the Commonwealth, by which I suppose I mean the Australian Federal

Police, spends on its lawyers and its experts in a typical control order application, just to get an indicative sense of the amount of money that these cost?

Mr Walter: Yes.

The response to the Member's question is as follows:

For information generally on the cost of control order proceedings for the Commonwealth, the department refers to the response on this matter provided by the AFP.

Question 3. Mark Dreyfus MP asked the following question:

Mr DREYFUS: In May 2018 the government said, in response to the most recent Independent National Security Legislation Monitor review of these measures, that the Attorney-General would give further consideration to the adequacy of legal aid for respondents in control order proceedings. Can you tell me whether the Attorney-General has given further consideration to this matter and what has happened?

Mr Walter: What I can say is that, as you know, the government has recently renegotiated the National Legal Aid Partnership Agreement with all the states and territories, which is now a \$2 billion agreement, and obviously a whole range of factors were discussed with the states and territories and raised by the states and territories in negotiating that agreement, and of course there is some guidance about what are priority areas under that agreement. One of those is absolutely providing assistance to people who are in detention. That would clearly cover something like a continuing detention order, for example, and ESO, if that scheme came into force.

Mr DREYFUS: I'm specifically asking about control orders. By definition these are people not in detention. So, I don't think that part of the legal aid scheme will help much!

Mr Walter: Yes, sorry—I was thinking you'd asked about one or the other, and I got the wrong one. My apologies.

Mr DREYFUS: We'll come to the continuing detention order in a minute, but right now we're asking about legal assistance matters relating to control orders. The specific question, first of all, was: what has happened following on from the Attorney-General saying in May 2018, more than two years ago, responding to the independent monitor, that it would be 'looked at'? I'm wanting to know what's happened. This is legal assistance for control orders.

Mr Walter: Yes, I understand your question, and yes, I'm aware of the commitment and the Attorney-General's response. I will need to take that on notice and come back to you. But I completely understand the question.

The response to the Member's question is as follows:

The Attorney-General finalised negotiations on the National Legal Assistance Partnership (2020-25) (NLAP) which was agreed by the Commonwealth and all states and territories and commenced on 1 July 2020. Under the NLAP, the Australian Government will provide more than \$2 billion in legal assistance funding to the states and territories over five years from 2020-21. To respond to demand in the legal assistance sector, under the NLAP, the Australian Government committed more than \$248 million in additional funding for legal assistance services. Legal aid commissions will receive approximately \$1.2 billion in baseline funding over five years to provide a range of services. This includes assistance in relation to Commonwealth civil law matters, which could include assistance in relation to a control order matter.

Under the NLAP, legal assistance providers are required to plan and focus their services toward national priority clients, for example, people in custody and/or prisoners (noting that a number of recent control order applications have been made in relation to terrorist offenders ahead of their release). In addition, under the NLAP, the legal assistance sector is not excluded from assisting clients that fall outside the national priority client groups. Legal aid commissions are independent statutory authorities and make decisions regarding eligibility for legal aid grants and resource allocation within their available funding.

Question 4. Mark Dreyfus MP asked the following question:

Mr DREYFUS: To move to continuing detention orders and the legal assistance aspects of that, there was a story in *The Australian* newspaper last week about a continuing detention order application, believed to

be the first ever under this regime. It relates to Mr Nacer Benbrika. According to the report, Mr Benbrika had a pretty junior solicitor appearing for him in that case—acting pro bono. She told the court that her client was unable to pay for legal counsel and he had made a request for funding for legal assistance which had been denied by the Commonwealth. Why did the Commonwealth deny the funding request?

Mr Walter: You would appreciate that it would be very inappropriate for me to talk about individual cases in an open hearing as to whether they made an application or didn't make an application and the particular circumstances. I think it really wouldn't be appropriate for me to be talking about a particular individual case.

Mr DREYFUS: I don't accept that, Mr Walter. It's been reported in a daily national newspaper that the first ever case of an application for a continuing detention order in this country has been aired in open court and, in a formal application to the court, the solicitor for the respondent to that continuing detention order application has told Justice Dixon of the Supreme Court of Victoria that the Commonwealth has denied the request for funding. You won't be revealing anything because it's already been revealed in open court. My question to you is why the Commonwealth has denied the request for funding?

Mr Walter: Again, there are two things there. Firstly, obviously, the matter is before the court and the court has a range of options open to it, assuming we accept that version. Secondly, it would be going—

Mr DREYFUS: Stop, Mr Walter! Is it true that the Commonwealth has denied the request for funding?

Mr Walter: I really think it would be better not to talk about individual cases in this instance. But I understand where you're coming from, so let me see what I can do on notice and see if there's a way in which we can help the committee in that way. I'm very uncomfortable talking about an individual matter that is before the courts and there could be a—

Mr DREYFUS: Why is that, Mr Walter? This is a hollow excuse, I'm sorry. Why is it that are you uncomfortable talking about one case? It's an unprecedented case. It's the first of its kind. It's in public, open court. It's been reported on in the daily national newspapers. It might be that the position that the Commonwealth has taken, to deny funding, is a very uncomfortable one for you—it's not personal to you. Why is it that there's a problem answering this question?

CHAIR: Mr Walter, you can take that on notice and come back to us. Mr Dreyfus, I ask you to move on.

The response to the Member's question is as follows:

In accordance with longstanding practice, the Attorney-General's Department does not comment on whether it has received a legal financial assistance application from any individual, or on the details of such assistance.

The department is subject to particular obligations in relation to the confidentiality of any application made under the legal financial assistance schemes. These obligations are reflected in a privacy collection notice issued under Australian Privacy Principle 5 of the *Privacy Act 1988*. The confidentiality requirements for the department are also acknowledged in the Commonwealth Guidelines for Legal Financial Assistance (paragraph [9.6]).

The Commonwealth is paying the reasonable party/party costs and expenses of Mr Benbrika's legal representation in these proceedings, under an order of the Supreme Court of Victoria.

Question 5. Mark Dreyfus MP asked the following question:

Mr DREYFUS: Earlier I took you to the part of the Attorney-General's website on the need for equality of arms to ensure a fair hearing in both criminal and civil cases. I'm asking you, having described to you what we can all learn from reading the newspaper, about relative levels of representation between a respondent facing three more years in detention and the Commonwealth. I'm asking you about someone who is represented by a junior solicitor acting pro bono with no experience—nobody in Australia has experience of this kind of proceeding; there has never been an application under this section before. She's on one side of the bar table, and on the other side of the bar table we have got one of Australia's most senior silks, two junior counsel and an unknown number—but certainly a number—of solicitors. Is that equality of arms?

Mr Walter: I think the way forward with this discussion, because I don't think I can respond to your question—I'm not trying to be difficult; I just don't think I can give you a response—is: why don't we come back with some more information about the type of support that is available across the various schemes, because you're interested in all of them. Why don't we do some more information for the committee about that, and also responding to those earlier questions about the previous recommendation. We'll try and give you as much information as we can about when and history and those types of things, as you've previously

asked. I'm not sure how much we'll be able to get, but we'll use our best endeavours to get as much as we can. That will give the committee a better picture of what the legal assistance picture is in relation to these kinds of orders.

The response to the Member's question is as follows:

The Australian Government provides funding through the National Legal Assistance Partnership, and through a range of statutory and non-statutory schemes to assist individuals with their legal problems. In accordance with the National Strategic Framework for Legal Assistance, funding is intended to keep the justice system within reach in Australia and help focus resources towards areas of greatest legal need.

In relation to continuing detention orders specifically, if the offender, due to circumstances beyond the offender's control, is unable to engage a legal representative in relation to the proceeding, the court may also order the Commonwealth to pay the reasonable legal costs of a respondent to a continuing detention order under s 105.15A of the Criminal Code. This has occurred in relation to current application for a continuing detention order (further detail in response to question 8, below).

Question 6. Mark Dreyfus MP asked the following question:

Mr DREYFUS: We were talking before about the Attorney-General considering the adequacy of legal assistance in control order proceedings. Can you tell me if the Attorney-General is also considering the adequacy of legal aid for respondents in continuing detention order proceedings?

Mr Walter: We'll look at that as part of that answer.

The response to the Member's question is as follows:

The Attorney-General finalised negotiations on the National Legal Assistance Partnership (2020-25) (NLAP) which was agreed by the Commonwealth and all states and territories and commenced on 1 July 2020. Under the NLAP, the Australian Government will provide more than \$2 billion in legal assistance funding to the states and territories over five years from 2020-21. To respond to demand in the legal assistance sector, under the NLAP, the Australian Government committed more than \$248 million in additional funding for legal assistance services. Legal aid commissions will receive approximately \$1.2 billion in baseline funding over five years to provide a range of services. This includes assistance in relation to Commonwealth civil law matters, which could include assistance in relation to a continuing detention order. Under the NLAP, the list of Commonwealth civil law areas is for guidance only, and the legal assistance sector should consider how to best meet civil law needs collectively.

Under the NLAP, legal assistance providers are required to plan and focus their services toward national priority clients, for example, people in custody and/or prisoners (noting continuing detention orders will be sought in respect of offenders while they serving a term of imprisonment for an eligible offence). In addition, under the NLAP, the legal assistance sector is not excluded from assisting clients that fall outside the national priority client groups. Legal aid commissions are independent statutory authorities and make decisions regarding eligibility for legal aid grants and resource allocation within their available funding.

Question 7. Andrew Hastie MP asked the following questions:

CHAIR: I have a follow-up question to Mr Walter regarding legal aid. I know you're circumspect about talking about a matter before the court, and it is worth noting that the proceedings relating to Mr Benbrika are subject to a suppression order, or at least part of the proceedings are. Mr Walter, what are Mr Benbrika's legal aid options?

Mr Walter: Chair, there are a couple of options. How about I speak in the general, and we will provide more information to the committee on that, because, firstly, legal aid is not my specialty and, secondly, I want to make sure the committee has before it the fullest information. There are a number of potential avenues for a person who is the subject of an application for a continuing detention order. Obviously, if they have their own funds, they can seek personal representation of their choice. In some cases there might be pro bono providers as well. However, in the circumstances where they do not have access to their own funds, they can obviously go to their legal aid provider in whichever state and territory they are in. In some

circumstances, if that, for whatever reason, is not an option, I understand there might be a number of other potential legal assistance regimes that might assist, but I would need to come back with some more fulsome information for the committee on that. It is not my field; I don't want to misrepresent that.

CHAIR: But, just to be sure, was the application for legal aid by Mr Benbrika in the state of Victoria or the Commonwealth?

Mr Walter: Again, I'd rather not talk about an individual case. I have no idea whether he applied or didn't apply. But what I will undertake to do across those three areas that we're concerned about today is to provide what kinds of assistance options would be available to a person for those proceedings.

CHAIR: Sure, if you could take that on notice.

Mr Walter: And I did, of course, say that I would take on notice the more specific personal questions, and if there is a way that we could communicate that.

The response to the Member's question is as follows:

There are a number of avenues a respondent to a continuing detention order can take in order to obtain legal assistance.

- They may engage private representation.
- They may apply for legal aid in the relevant state or territory. To receive assistance, individuals will need to meet certain eligibility requirements, including the relevant means and merits tests set by the legal aid commission. Legal aid commissions are independent statutory authorities and make decisions regarding eligibility for legal aid grants and resource allocation within their available funding.
 - Under the National Legal Assistance Partnership (2020-25) (NLAP), the Commonwealth funds legal assistance providers such as legal aid commissions for Commonwealth civil matters, which would include both control orders and continuing detention orders.
- They may apply to one of the statutory and non-statutory legal financial assistance schemes administered by the Attorney-General's Department.
 - Most schemes are targeted to helping people who do not qualify for legal aid and could not otherwise afford to pay for their legal costs.
 - Further information can be found on the department's website –<https://www.ag.gov.au/legal-system/legal-assistance/commonwealth-legal-financial-assistance>
- They may also seek to engage a lawyer to act pro bono.

If a respondent in continuing detention order proceedings is unable to engage a legal representative due to circumstances beyond their control, the court may order the Commonwealth to pay their reasonable legal costs under s 105.15A of the Criminal Code.

Question 8. Andrew Hastie MP asked the following questions:

CHAIR: Could you also, on notice, find out if the court has ordered the Commonwealth to pay costs in the case of Mr Benbrika?

Mr Walter: I will do that.

The response to the Member's question is as follows:

On 17 September 2020, at the first directions hearing for the continuing detention order application in relation to Mr Benbrika, the Supreme Court of Victoria made an order under section 105A.15A for the Commonwealth to cover Mr Benbrika's reasonable legal costs for up to three weeks, while other funding arrangements are pursued.

On 1 October 2020, the Supreme Court of Victoria ordered that the Commonwealth bear all of the reasonable party/party costs and expenses of Mr Benbrika's legal representation for the proceedings.