Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters

This document responds to the call by the Senate Legal and Constitutional Affairs References Committee for submissions regarding the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters.

Overview

Overreaching by the Australian Federal Police (AFP) in investigation of non-criminal matters poses substantive concerns regarding both the legitimacy of action by that agency and misuse of resources that should be directed to the enforcement of law that deals with serious crime. Regulatory creep through misuse, by the AFP and other law enforcement agencies, of criminal powers and through non-warrant access to telecommunication information in the course of investigating non-criminal matters is inappropriate. It should not be condoned by the Attorney-General, the Australian Parliament or state/territory legislatures.

Recent action involving the AFP and Seven West Media in connection with Schapelle Corby has called the AFP into disrepute. It poses substantive questions about misallocation of resources in an environment where law enforcement bodies recurrently state that they are under-equipped and accordingly cannot achieve their core goals. It also fosters suspicions that bureaucratic convenience – or a desire for headlines – trumps concerns regarding free speech and use of the criminal investigation hammer to crack civil walnuts. Australian and state/territory ministers and their officials should not reach for that hammer whenever they face a difficulty or wish to shape public opinion?

Basis

The submission is made by Bruce Baer Arnold and Benjamin Smith.

Mr Arnold is an Assistant Professor, Law, in the Law School at the University of Canberra. His research centres on privacy, confidentiality and data protection. He has published widely on privacy and law enforcement. He is currently working with constitutional law scholar Dr Susan Priest on research into Australian and overseas 'celebrity criminal' and literary proceeds of crime regimes.

Mr Smith is studying at the ANU College of Law and is project leader of the police integrity project. He has contributed to law reform inquiries on topics such as anti-corruption, counter-terrorism, pornography laws, racial profiling and human trafficking.

The submission is made independent of the University of Canberra and the Australian National University.

The following paragraphs address the Committee's terms of reference.

(a) thresholds, including evidentiary thresholds, relating to the obtaining of production orders and search warrants, and in particular whether these reflect the rules applicable to civil litigation discovery rather than coercive search;

In addressing that reference we offer several comments.

Civil and Criminal

It is axiomatic that the Australian justice system differentiates between civil and criminal justice. It is also axiomatic that the national government should behave as a model litigant, with a recognition by members of the Australian Public Service, officers of the Australian Federal Police and contracted service providers (eg legal advisors) that the government should be wary of misusing

- statutory powers
- information and
- financial or other resources

in civil and criminal litigation. In particular, the government should not confuse the public interest (ie benefit to the community at large) with public curiosity, avoidance of ministerial embarrassment or opportunities for a headline with the public interest.

Thresholds and Priorities

As discussed in more detail below, law enforcement bodies in Australia have finite resources. Given our scrutiny of findings in courts and tribunals we consider that it is important for officials in initiating litigation to act on the basis of self-evident priorities. Litigation must relate to matters of substance rather than being determined by headlines.

Law enforcement agencies are inevitably tempted to confuse what is bureaucratically convenient with what is necessary and lawful. On occasion they also tempted to confuse what is important for public administration with what will provide an headline and thereby win the favour of Ministers and Committees in an environment where all agencies compete for resources and where many agencies are losing so many staff that their capacity to perform key functions is increasingly uncertain.

Recent action involving the Australian Federal Police, Seven West Media and a law firm illustrates that some agencies misunderstand priorities and – presumably because of poor direction – have taken advantage of weak thresholds for gaining warrants for investigation. Problems with action by the Australian Federal Police are correctly highlighted by Jagot J in *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263.

In essence, the Australian Federal Police failed to act correctly. Embarrassment and expense would have been avoided if the operational threshold had been higher, ie the Police and advisers had

- paid greater attention to detail
- thought about the appropriateness of action ('just because you can do something doesnt mean that you should' or that you are right)
- not assumed that failures in drafting and targeting are irrelevant.

Warrants

We endorse the Committee's concern with the use and potential misuse of warrants, including perceptions among some law enforcement agencies that in dealing with offences it is better to ask forgiveness than gain permission. We suggest that agencies should not perceive magistrates as rubber stamps who will blithely authorise coercive searches under the legal authority of a warrant, particularly a warrant that has been ineptly drafted (either because the agency or its advisers lack expertise and the resources to offset a very tight timeframe or because officials assume that failure to address formal requirements does not matter).

Transparency

Law enforcement and national security activity necessarily involves some circumspection. Australians do not expect minute by minute disclosure of law enforcement action. However, there

is a legitimate need for information, in retrospect, that indicates the

- extent to which law enforcement and other agencies used warrants or gained access to information outside a warrants framework
- the numbers used for particular types of offences
- measures of the extent to which the warrants/orders were associated with convictions.

It is reasonable to expect that information should be collected by agencies on an ongoing basis and should be provided systematically, through for example agency websites or a central clearinghouse, rather than having to be extracted through Freedom of Information applications (which are often resisted by operational agencies) or responses by Ministers to Parliamentary Questions. Access is consistent with the Open Government commitment from which Australia has not resiled. It is also consistent with the Freedom of Information Act. The national government should serve as a model for disclosure by the state police forces and other state/territory agencies.

Transparency fosters trust in the Executive and in the legitimate conduct of law enforcement. It is fundamental to a liberal democratic state and to the freedoms espoused by the national Government.

On that basis we note our regret that the Australian Government is abolishing the Independent National Security Legislation Monitor, an office that has provided cogent advice about the shape and implications of Australian law. Abolition will not save substantial funds; it is in essence an instance of 'penny wise, pound foolish'.

We also note our regret that the Office of the Australian Information Commissioner, which should provide an example for all agencies in positive responses to requests for information under the Freedom of Information Act, has warned that agencies may 'game the system' in inhibiting access but – on the basis that access to its own activity is not a significant responsibility – has been highly resistant to disclosures that would allow public assessment of its own effectiveness.

(b) procedures preparatory to seeking production orders and search warrants, including taking into account the conduct of the recipient of such orders;

We have referred above to transparency because the shape and effectiveness of quality control regarding orders and warrants sought by the Australian Federal Police and other agencies is unclear. Comments by Jagot J noted above indicate that in dealing with Seven West and other entities the action by the Australian Federal Police was poorly advised, ineptly executed and complacently explained.

We believe that Seven West and associated lawyers are in a position to identify problems and contest inappropriate warrants. The same cannot be said for everyone who might receive a warrant or an order. As indicated above, the national government should embody best practice in exercise powers regarding information-seeking, irrespective of whether it is dealing with a terrorist or a major corporate criminal or someone who is in the wrong place at the wrong time and has fewer resources than a billion dollar media group.

It is desirable that there should be an internal review of procedures within the Australian Federal Police (in particular) and within other law enforcement agencies.

A broader review by the Australian Law Reform Commission of the use of warrants and orders by government agencies *per se*, including local government bodies, is suggested.

(c) procedures for executing search warrants;

As per above

(d) safeguards relating to the curtailment of freedom of speech, particularly in relation to literary proceeds matters;

The Government has signalled the importance of free speech as a basis of the implied political communication discerned by the High Court as fundamental to Australia as a liberal democratic state and more broadly as a foundation for cultural, social and economic vitality.

We suggest that both the Committee and the Parliament should condemn action that is driven by headlines regarding 'celebrity criminals'. There are compelling rationales for restrictions on vilification and other hatespeech directed at people on the basis of sexual affinity, religion, political belief or ethnicity. Broadcasters and individuals have a 'right to be a bigot'; that 'right' coexists with responsibilities not to harm. Ownership of tonsils, golden or otherwise, or an electronic pulpit does not free a speaker from responsibility.

Along with many Australians we abhor the offences, such as murder and drug trafficking, that were committed by criminals who have become celebrities. It is appropriate that those offenders be deprived of assets (such as shares, gold, sportscars, residential property, art works and pleasure craft) that were acquired, prior to conviction, *through* their criminal conduct.

However, a fundamental principle in Australian law is that punishment should be proportionate. Another fundamental principle is that punishment should not be independent of conviction. It is appropriate for courts to order seizure of assets gained in the course of crime. Once people have been duly convicted for breaking the law and paid the penalty, in particular through time in prison, their punishment in principle should be complete. Society might legitimately protect is members through complementary restrictions (eg prohibiting sex offenders from undertaking certain occupations and professions) but we should not seize wealth that is created *post*-conviction on the basis of notoriety.

The sale of 'murderabilia' and accounts by celebrity offenders is repellent and should be abhorred by all right thinking people. However, it is inappropriate to regard autobiographies, authorised biographies, interviews, films and similar media as requiring confiscation under Proceeds of Crime regimes.

The best response to the celebrity criminal, post-punishment, is public contempt rather than a high profile 'raid' on a media group or journalist.

(e) safeguards for ensuring the protection of confidential information, including journalists' sources, obtained under search warrants, and particularly where that information does not relate to the search warrant;

We consider that a failure to respect to confidentiality will have a deleterious effect on practice in the media.

We suggest that there is a need for a coherent national 'shield' law regarding journalism. In considering that law the Committee may wish to note cautions provided by the investigations in Australia and the UK, eg the intial report by the Leveson Inquiry in the UK. It is clear that media organisations on occasion lack credibility regarding claims of effective self-regulation; a shield regime should not encourage the sort of egregious misbehaviour that has seen leading News Group executives and journalists in the dock.

We also foresee that inappropriate action by law enforcement personnel will be subverted by journalists, by other authors and by media organisations. Writers for example who – on the basis of the recent Seven West incident – perceive that they are likely to be visited by an unduly aggressive and inadequately briefed team of police officers will presumably not maintain information on corporate networks that are readily accessible.

(f) the powers available to the Australian Federal Police to intercept telecommunications in circumstances where the matter being investigated does not involve criminal conduct;

Civil society advocates and legal specialists and civil society advocates such as the Australian Privacy Foundation have recurrently highlighted the scope for warrantless access by a wide range of public and private sector entities to telecommunications data.

Those include the Australian Federal Police, NSW Police Force, NSW Independent Commission Against Corruption, Ipswich City Council, Wyndham City Council, Australia Post, Knox City Council, WA Department of Fisheries, and the RSPCA in three states.

There were some **320,000** authorisations for access by such entities between July 2012 and June 2013 inclusive.

In that respect we note recent statements by the Inspector General of Intelligence & Security that strongly emphasised the importance of privacy, recognised the difference between what is bureaucratically convenient and what is necessary for law enforcement (the two are not synonymous), and the need for proportionality in balancing privacy with the needs of law enforcement (the two are not antithetical).

We respectfully suggest that the Committee should be wary of claims by the Australian Federal Police and other entities that easy access to telecommunications metadata and content is essential. The Committee should be particularly wary about endorsing additional powers in relation to investigations that do *not* involve criminal conduct.

In the land of Kafka zealous officials may believe that warrantless access to all email, webbrowser records, geolocation data, voicemail, personal/corporate hard drives and conversations will allow them to enforce law regarding overdue library books, parking infringements, disregard of the *Copyright Act 1968* (Cth) and other matters. However, Australia is not a surveillance state.

We accordingly suggest that the Committee should

- critically evaluate self-interested claims by law enforcement agencies,
- recall a succession of detailed reports and submissions by representatives of the legal profession, law reform bodies, other Committees, industry and civil society bodies over the past decade regarding 'surveillance creep' and warrantless data collection
- ask where is the proof that increased powers to the wide range of national, state/territory and local government bodies is producing commensurate results.

(g) the priorities of the Serious and Organised Crime Division, and the circumstances under which they should appropriately be deployed in relation to non-criminal matters; and

Submissions by the Attorney-General's Department, Australian Federal Police and Australian Crime Commission over the past decade – along with the annual reports of those entities and media states or speeches – have recurrently claimed that there is an unmet need for additional resources to deal with crime under Commonwealth law. Similar claims have been made by state law enforcement agencies.

Those claims relate to terrorism, child sex offences, murder, drug trafficking, people trafficking and other criminal activity that is of undoubted seriousness and should accordingly be addressed within an appropriate legal framework. By appropriate we mean a framework that

- is consistent,
- is transparent,
- is proportionate, and
- does not privilege bureaucratic convenience.

All governments in Australia have finite resources and must prioritise. Provision of additional resources to law enforcement agencies to better enable those bodies to fight crime, typically the 'serious crime' that features in mass media headlines, comes at the expense of other bodies.

We are perplexed that the national government appears to be simultaneously seeking additional resources for national security and criminal law enforcement purposes yet has the resources to

engage (albeit apparently unsuccessfully) in activity outside the legitimate ambit of the Serious & Organised Crime Division.

In essence, we respectfully suggest that the Attorney-General, Minister for Justice and Serious & Organised Crime Division have a misplaced sense of priorities. Given past claims attention must be concentrated on serious crime rather than on non-criminal activity.

If the Government has sufficient resources to spare on non-criminal activity that generates media headlines but is otherwise of little importance for justice its claims that more bodies and money are needed for 'the war on serious crime' are unpersuasive. It is inappropriate to waste resources in order to gain media coverage. Recent action against Seven Yahoo! for example brings both the Ministers and their agencies into disrepute while reinforcing the celebrity status of an individual who should be regarded with contempt.

We suggest that if the national government *does* have sufficient resources to deploy the Serious & Organised Crime Division in dealing with non-criminal matters there are numerous targets regarding trade practices and other matters that have a significant effect on Australia's economic performance and the wellbeing of ordinary people. If it *does* have resources for operating outside the Division's responsibilities we are, regretfully, unable to take demands for new resources with much seriousness.

If on the other hand resources are insufficient we consider that use of those resources in non-criminal matters is inappropriate.

We also look forward to articulation by the Attorney-General in a coherent and detailed justice statement of the priority given to different areas of law enforcement and the rationale for use of Serious & Organised Crime Division personnel in dealing with issues that better addressed through non-criminal law mechanisms.

(h) any related matters.

The matters addressed by the Committee are serious and deserve proper attention by legal practitioners, civil society advocates, law enforcement personnel and the wider community.

It is regrettable that the time allowed for public comment to the Committee is so short, particularly as there appears to have been little publicity about the inquiry. We recognise that the Committee – and more broadly both the national legislature and government – do not have the luxury of an indefinite time for consideration of all matters. However, there is a danger that 'fast-track' consultation results in inadequate advice or a non-response by stakeholders, with consequent poor policymaking and undesirable oversight by the Parliament.

We consider that there is a substantive danger of regulatory creep. In the absence of condemnation and formal constraint law enforcement bodies, which are driven by institutional imperatives, will incrementally move beyond legitimate investigation. The subtle erosion of lawfulness through a hundred small moves, especially moves that are poorly oversighted by the Minister and Parliament (and that are not apparent or understood by society at large) will lead law enforcement personnel into error and erode the respect for legal principles that is a foundation of Australia as a legal democratic state.

As we indicated above, law enforcement agencies (along with all bureaucracies) have an imperative to push the bounds and unless reminded that they serve society will recurrently mistake what is convenient for what is right. A desirable outcome of the Committee's inquiry is a reminder to both the Government and agencies that Australia expects responsibility and proportionality in law enforcement.