PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECUTITY

Inquiry into the Impact of the exercise of Law Enforcement and Intelligence powers on press freedom

Public Hearing on Wednesday, 14 August 2019

Office of the Commonwealth Ombudsman

Questions taken on Notice

The Committee asked the following question/s:

Senator FAWCETT: On page 1 of your submission you talk about the fact that your role is really looking at compliance with the legislation as opposed to the reasons why an agency chose to actually exercise their powers, which sort of accords with some evidence that was given to us yesterday by media organisations about that dispute of the efficacy of PID schemes as they currently stand. They argued that both your role and that of IGIS were merely compliance—no offence intended, but a box-ticking exercise: 'Have they followed the process and complied with the law?' as opposed to whether an action was justified, reasonable, moral or any other caveat you may wish to place on it.

Do you agree with that contention, and what would need to change if we were to insist that the PID scheme was the only satisfactory method for a Commonwealth employee who has access to classified information? Within your remit, the AFP or Home Affairs may be the sorts of agencies we're talking about. The contention from the media bodies is that they don't just want exemptions for journalists; they want blanket exemptions for somebody who's making a public interest disclosure, which we find untenable from the point of view of maintaining the trust of our allies and other intelligence partners. What else would we need to do to make your scheme robust for public interest disclosure?

Mr Manthorpe : Our submission doesn't talk about the PID scheme per se. So when I say we don't look at the merits of matters where we're inspecting law enforcement agencies' compliance with the various covert activities that is because there is an existing mechanism for the merits to be examined. That is an issuing authority—a judge, a tribunal member or whoever it might be, depending on the different regimes. So there is a way to look at the merits there, and then there is a way to look at the merits if a matter is eventually brought to court. Courts look at the merits. That's what I was driving at with respect to my comments about the merits.

With respect to the PID scheme, we didn't address that in our submission because I don't think it was mentioned in the terms of reference. But I acknowledge that there is a conversation going on about the efficacy of that. The point I'd make about the PID scheme is that there are some who perceive that it doesn't provide adequate protection to whistleblowers or people who've got some wrongdoing to disclose and/or it doesn't provide adequate assurance that wrongdoing is acted on, at least in the minds of some disclosers. That is one of the factors that then might encourage people to disclose things elsewhere—to journalists, to people such as yourselves or to anybody else.

I haven't come prepared with a detailed set of statements about the precise policy settings of the PID scheme, but I think it is a scheme that is worth a look. Quite recently, concerning matters that pertained to things that went on in this building, a judge referred to it as 'impenetrable'. We certainly observe that it's quite a complex piece of legislation both for agencies and disclosers to work with.

Senator FAWCETT: In the absence of a specific inquiry, what we're seeing out of the evidence provided yesterday is that many of the witnesses are calling for exemptions to be applied to whistleblowers. On the basis that that's not a workable option for us, we need to make sure that the PID scheme is efficacious: if somebody has a legitimate concern, they need to have a pathway whereby it can be evaluated independently and acted upon as appropriate.

I'm interested in understanding your view on what the current shortfalls are, if any, and what recommendations you would have to enable people within the agencies that you oversee to make a public interest disclosure internally, effectively treating yourself as an internal person to report to? Could you take that on notice?

Mr Manthorpe : Sure; I'm happy to take that on notice. I note that we're not a policy agency, but we will reflect on your question and come back with what we think is appropriate.

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

The *Public Interest Disclosure Act 2013* (PID Act) enables public officials to report wrongdoing in the public sector and receive protections from reprisal. There are two primary pathways for public officials to report wrongdoing under the PID Act. Generally, a disclosure must first be made internally.[1] In limited circumstances information can be disclosed 'externally', including to a journalist or media organisation, however the PID Act does not protect external disclosure of intelligence information.[2]

In 2016, the *Review of the Public Interest Disclosure Act 2013*, conducted by Mr Philip Moss AM (the Moss Review) made 33 recommendations to improve the operation of the PID Act. Amongst other things, the recommendations aimed to strengthen the public sector's pro-disclosure culture, increase the capacity of this Office and of IGIS to oversee the Act, and make it easier for disclosers, witnesses and public officials administering the scheme to get help and support.

Key recommendations include:

- requiring agencies to provide the Commonwealth Ombudsman or IGIS with a copy of a PID investigation report
- enabling the Commonwealth Ombudsman to share information about the handling of a disclosure with relevant investigative agencies
- amending the definition of disclosable conduct to exclude conduct solely related to personal employment-related grievances, to better focus the scheme on allegations of fraud, serious misconduct and corrupt conduct
- creating a positive obligation on agencies to support disclosers and witnesses, and extending the protections afforded to witnesses.

The recommendations of the Moss Review remain relevant and are likely to assist in sharpening the focus of the PID Act, providing better oversight and assurance around outcomes, and making the scheme simpler to navigate for agencies and disclosers.

[1] Internal disclosures are made to the agency to which the person belongs, to the agency to which the conduct relates, to the Ombudsman or to the Inspector General of Intelligence and Security (IGIS) where the conduct relates to an intelligence agency.

[2] Intelligence information is broadly defined and includes: information that originated with, or has been received from, an intelligence agency, or which might reveal information about the operations of an intelligence agency; information received from an authority of a foreign government that has functions similar to that of an intelligence agency; information that originated with or was received by the Department of Defence that might relate to operational intelligence; information that identifies a person as having been an agent or staff member of the Australian Secret Intelligence Service or the Australian Security Intelligence Organisation, or through which the identify of such a person could be inferred or established; sensitive law enforcement information.

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECUTITY

Inquiry into the Impact of the exercise of Law Enforcement and Intelligence powers on press freedom

Public Hearing on Wednesday, 14 August 2019

Office of the Commonwealth Ombudsman

Written Questions on Notice

The Committee asked the following question/s:

1. On which date was the 2016/17 Metadata report completed by the Ombudsman?
2. On which date was the 2016/17 Metadata report provided to the Minister for Home Affairs?
3. On which date was the 2016/17 Metadata report tabled in Parliament?

4. On which date was the 2017/18 Metadata report completed by the Ombudsman?
5. On which date was the 2017/18 Metadata report provided to the Minister for Home Affairs?
6. On which date was the 2017/18 Metadata report tabled in Parliament?

7. On which date was the 2018/19 Metadata report completed by the Ombudsman?
8. On which date was the 2018/19 Metadata report provided to the Minister for Home Affairs?

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

2016-17 Report

The Office completed its 2016-17 report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the *Telecommunications (Interception and Access) Act 1979* on 29 October 2018. Printing of the report was completed on 13 November 2018.

The report was delivered to the Office of the Hon Peter Dutton MP, Minister for Home Affairs on 15 November 2018. The report was tabled in the House of Representatives on 21 February 2019, and subsequently tabled in the Senate on 22 July 2019.

At the conclusion of our inspection, we verbally explain our preliminary findings. This allows agencies to act promptly on our feedback. We then prepare a written report with any findings, suggestions or recommendations. These reports are used as the basis of our reports to the Minister which are then tabled in Parliament. As outlined to the Committee during the public hearing, the Office has prioritised recruitment to the relevant team and streamlined its internal processes, which has ensured timelier reporting to the Minister.

2017-18 Report

The Office completed its 2017-18 report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the *Telecommunications (Interception and Access) Act 1979* on 20 March 2019. Printing of the report was completed on 29 March 2019.

The report was delivered to the Office of the Hon Peter Dutton MP, Minister for Home Affairs on 29 March 2019.

The Act provides for the Minister to table the report in each House of Parliament within 15 sitting days.

2018-19 Report

The Office is in the process of finalising its reports detailing the results of inspections undertaken in the 2018-19 financial year. Once these reports are complete, the Office will prepare its 2018-19 annual report on the monitoring of agency access to stored communications and telecommunications data.

The Act requires the Ombudsman to provide the report to the Minister 'as soon as practicable' after 30 June.