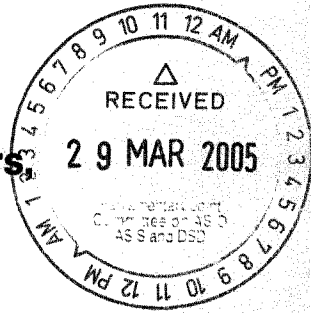


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**Submission by Commonwealth Ombudsman to the
Review of the ASIO Questioning and Detention Powers
March 2005**



Background

The office of the Commonwealth Ombudsman is created by the *Ombudsman Act 1976*. The Ombudsman Act provides that the Ombudsman is to investigate the administrative actions of Commonwealth agencies. The Act also sets out limits on jurisdiction.

The Ombudsman Act provides the Ombudsman with an extensive range of powers to investigate actions following complaints, to initiate own motion investigations and to decline to investigate.

The Ombudsman Act enables the Ombudsman to report in a number of ways following an investigation, although it requires the investigation itself to be conducted in private and with fairness to anyone likely to be criticised.

The *Complaints (Australian Federal Police) Act 1981* (the Complaints Act) establishes the mechanism by which complaints can be made about the actions of Australian Federal Police (AFP) appointees.

The ASIO Act Provisions

The relevant provisions of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) allow the Australian Security Intelligence Organisation (ASIO) to obtain questioning and detention warrants in relation to persons believed to have information about terrorist offences.

These provisions allow a detainee to complain to the Commonwealth Ombudsman about the actions of Australian Federal Police (AFP) members making an arrest or overseeing detention. Such complaints would be made under the Complaints Act.

The Commonwealth Ombudsman has no jurisdiction over ASIO, although complaints about ASIO can be made to the Inspector-General of Intelligence and Security (IGIS).

The ASIO Act facilitates access to the Ombudsman complaints mechanism, by providing, for example:

- That a person must be informed of their right to make a complaint to the Ombudsman in relation to the Australian Federal Police orally or in writing (subsection 34E(1)); and
- That although a person is not permitted to contact anyone while in custody or detention, this does not affect contact with the Ombudsman (subsection 34F(8)).

The role of the Ombudsman

Complaints Profile

A review of case management records in relation to general search warrants indicates that in November 2002, the Ombudsman's office received four complaints resulting from joint ASIO and AFP warrants. There was one further complaint about an AFP search warrant in August 2003 regarding alleged funding of a banned organisation, but there appears to have been no ASIO involvement in the warrant. This was however, a complaint arising from a sequence of nationally executed warrants.

In relation to the new powers inserted into the ASIO Act in 2003, the ASIO annual report for 2003-2004 stated that these new powers were used three times in the reporting period, and each instance was for questioning. No detention warrants have been issued.

These figures indicate that the exercise of the Ombudsman's functions in relation to ASIO warrants is, and is likely to continue to represent a small number of complaints. However, when cases arise they are likely to absorb resources at the senior level and require sensitive handling.

Public Confidence

The right to complain about treatment during arrest or detention is viewed as highly important to those affected. The existence of this right as a safeguard is also important to the community at large, illustrated by the public discussion about the questioning and detention issue in relation to the ASIO Act, and in light of the public claims of Mr Habib.

This office believes that there is always likely to be public unease about the conferral upon security and intelligence bodies of the power to detain and question or, at the margins, to interrogate those suspected of being a threat to security. This office is mindful of its role in providing the public with assurances that there is an integrated, effective and visible accountability mechanism associated with the ASIO Act powers.

Accountability mechanisms such as the Commonwealth Ombudsman perform an important function in ensuring that counter-terrorism and intelligence-gathering powers will be used in the manner intended, and in maintaining public confidence that this will be the case.

Ombudsman's response

In considering the role that the Commonwealth Ombudsman would take if complaints were made, it was concluded that a detainee should be able to make a complaint to the office at any time, given the circumstances under which these warrants would be issued. Equally, staff should be able to respond to any complaint in a timely manner.

The Ombudsman's office has therefore taken steps to ensure that a detainee could contact a representative of the office at any time. The Director of the Law Enforcement Team now carries a mobile phone specifically for that purpose, and the AFP has been advised of the contact details that should be given to any detainee who wishes to make a complaint.

The Commissioner of the AFP has indicated that there will be immediate advice to the Ombudsman if the AFP receives any complaint.

Agency Liaison

A representative of the Ombudsman's office met with the AFP, ASIO and IGIS (the agencies) to discuss warrants executed by ASIO (both general, and questioning and detention warrants) in August 2004. The meeting discussed issues such as:

- the role of police officers in assisting ASIO;
- the role of AFP versus State police;
- the wearing of identification by police;
- the notification of people when police powers were being exercised;
- notification of the Commonwealth Ombudsman shortly after entry into a premise;
- video taping and the Commonwealth Ombudsman's access to video and audio records;
- how ASIO officers would identify themselves; and
- arrangements for informing people of their right to complain.

These discussions will be supplemented by a further meeting with the agencies in April 2005, seeking to progress these agreements, and further consider the recently tabled report of the Parliamentary Joint Committee on ASIO, ASIS and DSD that recommended the development of more formal arrangements between IGIS and this office¹.

Possible Accountability Gap: State and/or Territory Police

This office has a concern about the operation of the ASIO Act provisions in regard to the possible involvement of State and/or Territory police services in the absence of a defined accountability mechanism.

The ASIO Act provisions limit the oversight of the Ombudsman to the AFP (through reference to the Complaints Act) and the IGIS (for the actions of ASIO). The Ombudsman's office has been advised that State and/or Territory police services may be used by ASIO for the provision of "watchhouse" or custodial services.

Action taken by a state police agency is beyond the jurisdiction of the Commonwealth Ombudsman. At most, a complaint received by the Ombudsman about state police activity could be referred to a state

¹ *Review of the administration, expenditure and financial statements of ASIO, ASIS and DSD*, March 2005, at [3.16].

ombudsman or police complaints authority under the power conferred upon the Commonwealth Ombudsman by the Complaints Act (section 41A) to disclose information in the public interest.

The ASIO Act does not expressly preserve the right of a person to complain to a State Ombudsman or police complaints authority about the actions of a state police officer in providing assistance to ASIO. It may be that the right to complain still exists under state legislation, but equally the answer could vary depending upon the nature of the arrangements between ASIO and the state authority and the terms of the state legislation conferring power upon the Ombudsman or police complaints authority. At the least, there is the possibility of uncertainty and confusion when a complaint is first made about actions taken by a state authority. The absence of any safeguard in the legislation has also meant that this issue has not received the same attention as the relationship between ASIO, IGIS and the Commonwealth Ombudsman has received.

The recent report of the Parliamentary Joint Committee on ASIO, ASIS and DSD drew attention to this problem, recommending 'greater liaison between the IGIS and the Commonwealth Ombudsman (and State Ombudsman), including the development of a memorandum of understanding or protocol governing possible joint reviews of combined ASIO/police operations" at [3.16]). As noted above, the Commonwealth Ombudsman is currently acting on this recommendation. It may be desirable as well that consideration be given to legislative change to provide a sounder footing for oversight and accountability of the use of the sensitive powers of detention and questioning. The absence of any provisions addressing that issue poses the risk of an accountability gap in the legislative framework.