Quintus-Bosz, Donna (REPS)

From: Greg Carne [greg.carne@deakin.edu.au]
Sent: Wednesday, 25 May 2005 2:24 PM
To: Swieringa, Margaret (REPS)
Cc: Greg.Carne@deakin.edu.au; Quintus-Bosz, Donna (REPS)
Subject: Fwd: ASIO Committee Review: 1. Canada Statistics 2. Constitutionality issues

Submission No: 100
Date Received: 25-5-05
Secretary:

To: Margaret Swieringa
Secretary
Parliamentary Joint Committee
on ASIO ASIS and DSD
Parliament House
Canberra

Dear Ms Swieringa,

Re: Review of ASIO's Questioning and Detention Powers

I have copied below an e-mail sent today to Senator Ray, providing detailed answers to two questions he asked me at the hearings on Friday 20 May 2005.

Would you please send a copy of this e-mail to all other members of the Parliamentary Joint Committee.

Thank you for your assistance

Yours faithfully,

Greg Carne

25 May 2005

> Date: Wed, 25 May 2005 13:20:43 +1000
> To: senator.ray@aph.gov.au
> From: Greg Carne <greg.carne@deakin.edu.au>
> Subject: ASIO Committee Review: 1. Canada Statistics 2. Constitutionality issues
> Cc: Greg.carne@deakin.edu.au
>
> Dear Senator Ray,
>
> **Re: Follow up information from two questions to me at Committee hearing of Friday 20 May 2005: Review of ASIO questioning and detention powers**
>
> I am pleased to provide the further following information to assist you and the Committee in your deliberations.
>
> **1. Canadian Statistics**
>
> At the Committee's hearings last Friday 20 May, you asked me:

"Do you have any knowledge of or statistics on how many people may have been detained in Canada since the bill went through in, I think, July 2002?"

I am pleased to provide two e-mail attachments in answer to your question:

(a) Extract of transcript of evidence from the Canadian Attorney General, Irwin Cotler, to the Special Senate Committee on the Anti-Terrorism Act 21 February 2005 indicating that the preventative arrest power has not been used

(b) Extracts from the Annual Reports of the Minister of Justice and Attorney General and the Solicitor General (as required under s.83.31 of the *Criminal Code* (Canada) as available on the Canadian Justice Ministry website.

All data from this website indicates nil returns. Any provincial annual reports would need to be accessed individually.

The Canadian legislation creates an investigative hearing, with attendance (not detention) requirements. S.83.29 permits arrest by warrant re the investigative hearing only in circumstances of evading service of the order, absconding , failure to attend or to remain in attendance.

In contrast, the preventative arrest power (s.83.3) is founded on a belief on reasonable grounds that a terrorist activity will be carried out and a suspicion on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity.

There are 24 hour and 72 hour judicially supervised time limits on such arrest: see s.83.3 (6) and s.83.3(7)(C)(ii) of the *Criminal Code* (Canada).

A clear and succinct summary of these provisions by the Canadian Justice Department is included at the start of the reports, as included in the weblinks in the second e-mail attachment.

In the transcript of evidence to the Committee of 20 May 2005, Mr Lenehan of HREOC advised that "There was some discussion in the department's (Attorney-General's) evidence yesterday as to the grounds to detain, but there may have been some confusion there".

I would agree with Mr Lenehan's comment that s.83.28(4)(b)(referred to in the evidence of the department of 19 May 2005), relates to the power to question non suspect persons before an investigative hearing, and not to a power to detain.

It is *not* a power to detain non suspects. Such persons are required to remain in attendance at the hearing, but they are not detained. There is both derivative and direct use immunity re information obtained under the obligation to answer questions.

There is a qualitative difference between being under arrest and in custody and being required to attend. A good analogy is the obligation to perform jury service or sequestration of a jury, as the Americans call it.

I have previously identified earlier confusion from the 2002 Senate Committee hearings: see the *Deakin Law Review* article at pages 611-612 (on the Committee's website, submitted as an attachment to my submission 67).

I am unable to understand how this apparent confusion exists in the department.

The non-use by the Canadian Federal authorities of these detention provisions places the issue of 8 questioning warrants (and the last resort argument) in Australia in perspective and context.

This is particularly so as Canada has a larger population of 32 million (SBS *World Guide*), its geographical proximity to the United States (major world terrorist target) and the Canadian legislation has been in operation longer than the Australian questioning and detention provisions.

It reinforces the case submitted to the Parliamentary Joint Committee that the Committee must have a legislated, continuing review role, linked to a sunset clause expiring the legislation in Australia.

2. Constitutionality issues

At the Committee's hearings last Friday 20 May you also asked me about the constitutionality of the legislation, stating "We are assured by the Attorney-General's Department that the Chief General Counsel has given as good an assurance as he can that this is constitutional - of course, we are not permitted to look at that"

There are arguments both before and against constitutionality relating to the *detention* aspect of the legislation. It is not an open and shut case, given the purposive nature of the relevant constitutional powers and the extent to which Chapter III judicial power interacts with the legislative use of those powers.

I would largely agree with the views of Professor Williams in his transcript of evidence on this point.

I raised a number of issues about constitutionality in the *UNSW Law Journal* article I attached to my submission 67 (the article is available on the Committee's website). Those issues are still relevant (albeit in modified form) following the High Court's decisions in 2004 relating to detention under the s.51(xix) aliens power: *Al Kateb, Behrooz* and *Re Woolley:* see in particular the postscript to the article. The aliens power is not a power that constitutionally underpins the questioning and detention provisions.

The most relevant pages in the article to your question about the level and availability of constitutional advice are at pages 525-527, which track and document the advice (in the footnotes) as presented to the Senate Committee, including the quotation from Dr Gavan Griffith QC, former Solicitor General of the Commonwealth.

My recollection (as it is) is that legal advice at that stage had only been sought from AGS and Parliamentary Counsel and this in part prompted Dr Griffith's observations, which are in a fuller version in the *Hansard*.

The High Court has presently reserved judgment in another case, *Taylor v Ruddock*, which may provide further insights into a executive power to detain when judgments are handed down later in the year. Comments on this case are made by Peter Prince of the Parliamentary Library in a paper:

http://www.aph.gov.au/library/pubs/rb/2004-05/05rb14.pdf

I note that advice as to the Committee's procedures in relation to the secrecy provisions of the questioning and detention warrants under s.34VAA of the *ASIO Act 1979* (Cth) as they relate to the seeking and receiving of evidence for the Committee's inquiry was

received from Bret Walker SC of the Sydney Bar.

May I suggest that if these constitutional matters are an issue, advice could be sought from Mr Walker on this point also, who I believe has a background in constitutional law.

I hope the above information is of assistance to the Committee. Please let me know if further information is required.

Yours faithfully,

Greg Carne

Senior Lecturer
Faculty of Law
University of Tasmania

Phone: (03) 9244 6058
E-mail: Greg.Carne@deakin.edu.au

Proceedings of the Special Senate Committee on the Anti-terrorism Act

Meeting of February 21, 2005 Morning Meeting (extract of evidence of Canadian Attorney General and Minister for Justice Hon Irwin Cotler PC MP)

Access at (full transcript)

http://www.parl.gc.ca/38/1/parlbus/commbus/senate/Com-e/anti-e/02cv-e.htm?Language=E&Parl=38&Ses=1&comm_id=597

The Chairman: I will intrude slightly here, noting that we have now 45 minutes left, and we still have three senators on the first round. I do not know if there is any leeway in time here, Minister Cotler, but I know that all the senators are eager to have an opportunity to ask questions.

Senator Fraser: Minister, I note your eloquence in defence of prevention. I cannot imagine that any Canadian citizen would quarrel with the absolute importance of preventing terrorist acts.

I would like to ask you about what may have been the most controversial single element of this law, and that is the provision for preventive arrest. It is very comforting that we have not had any in the past three years, but nonetheless the law is there. It represents a significant departure from what Canadians had previously understood to be the protections that they had in our society. One can end up imprisoned for as much as a year under these provisions. The grounds for the arrest provision can be as simple as a police officer suspecting on reasonable grounds that you might be about to commit an offence under the act, such as harbouring somebody, et cetera.

Is this a reasonable provision? I am asking you because of your profound background in human rights law. It is still very hard for me to swallow that we have things like this in Canadian law. Are there ways in which we could refine it?

Mr. Cotler: I wrote rather extensively about the question of recognizance with conditions or preventive arrest, as it has been sometimes called, which permits a judge to impose a recognizance with conditions on a person in order to prevent the carrying out of terrorist activity.

You are correct that we are dealing here with a preventive approach because punishment after the fact is not enough. While often described as preventive arrest, the purpose of the provision is not to arrest the person but to put that person under judicial supervision in order to prevent the carrying out of a terrorist activity. The recognizance with conditions power has numerous safeguards built into it. I will only identify some, because while there is an understandable concern with a ``démarche" that is novel under the criminal justice system, it may appear to be less aberrant if it is appreciated and is part of, as I said, prevention rather than after-the-fact law enforcement, which may be too late.

Let me look at some of the safeguards. Except in exigent circumstances, the consent of the appropriate Attorney General is required before a peace officer may lay an information to bring a person before a provincial court judge. The peace officer needs to meet two standards before an information is laid. The officer must believe on reasonable grounds that a terrorist activity will be carried out and suspect on reasonable ground that the arrest of the person or the imposition of a recognizance on the person is necessary to prevent the terrorist activity. Only a provincial court judge can receive an information and has the residual discretion not to issue process where an information is unfounded or the arrest of the defendant would be excessive and unwarranted.

You have here an approach that has built-in safeguards. I would go further to say that a person detained in custody must be brought before a provincial court judge without unreasonable delay and, in any event, within 24 hours of arrest, so we are not talking about indefinite, unsupervised and unreviewable detention, unless a judge is not available within that period, and the maximum period of detention can only be 72 hours. I have heard this thing with regard to a year, but that is ignoring the process and the process of ``reviewability.'' Where an information has been properly laid and a person is taken before a provincial court judge, the judge must order — and this is important — the release of the person unless the peace officer can show cause why the detention of the person is justified. The judge may order that the person enter into a recognizance to keep the peace and be of good behaviour and may prescribe any other reasonable conditions. A recognizance may not exceed 12 months in duration, having regard for the ongoing supervisory safeguards in this regard. In other words, a person entering into the recognizance has the right to apply to vary the conditions under the recognizance order, and the recognizance with a conditions provision is subject, as we know, to annual reporting requirements, and is subject also to a sunset clause.

While this is something that understandably has caused concern, one must appreciate the purpose and the nature of it, which is a preventive one; the safeguard features, which are there by way of oversight; and the particular ongoing supervisory capacity in that regard.

As a general approach I take to your deliberations and to my presence here, I welcome any engagement with any of these provisions or with the operations of the act that can improve upon what we now have. This is an opportunity for a three-year retrospective. You can come up with suggestions that say, ``Well look, you had this preventive arrest provision; we know you have safeguards, but looking at it three years later, has the provision proven itself? Do we still need it? Do the potential breaches of civil liberties that may be involved therein outweigh the remedial and purposive approaches in enacting it to begin with?'' These are things your committee can look at.

Senator Stratton: Has this ever been used?

Mr. Cotler: No.

CANADA: STATISTICS: 2004, 2003, 2002

Extracts from website: http://canada.justice.gc.ca/en/anti_terr/reports.html

Annual Reports

Minister of Justice and Attorney General of Canada

- The *Anti-terrorism Act* - Annual Report concerning Investigative Hearings and Recognizance with Conditions, December 24, 2003 - December 23, 2004
- The *Anti-terrorism Act* - Annual Report concerning Investigative Hearings and Recognizance with Conditions, December 24, 2002 - December 23, 2003
- *Anti-terrorism Act*: Annual Report concerning Investigative Hearings and Recognizance with Conditions - December 24, 2001 - December 23, 2002

Minister of Public Safety and Emergency Preparedness (Solicitor General)

- Annual Report on the Use of Arrests Without Warrant Pursuant to the *Anti-Terrorism Act* Subsection 83.31(3) of the Criminal Code - 2003
- Annual Report on the Use of Arrest without Warrant pursuant to the *Anti-terrorism Act* - 2002 (PDF)

SECTION III - STATISTICS

Reporting requirements under subsection 83.31(1) (Investigative hearing)

- The number of consents to make an application that were sought, and the number that were obtained by virtue of subsections 83.28(2) and (3);
- The number of orders for the gathering of information that were made under subsection 83.28(4); and
- The number of arrests that were made with a warrant issued under section 83.29.

Report on the operation of sections 83.28 and 83.29 (Investigate Hearing)

From December 24, 2003, to December 23, 2004, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no applications initiated under these sections of the *Criminal Code*. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(1) (a) to (c), concerning the investigative hearing provisions.

Reporting requirements under subsection 83.31(2) (Recognizance with conditions)

- The number of consents to lay an information that were sought, and the number that were obtained, by virtue of subsections 83.3(1) and (2);
- The number of cases in which a summons or a warrant of arrest was issued for the purposes of subsection 83.3(3);
- The number of cases where a person was not released under subsection 83.3(7) pending a hearing;
- The number of cases in which an order to enter into a recognizance was made under paragraph 83.3(8)(a), and the types of conditions that were imposed;
- The number of times a person failed or refused to enter into a recognizance, and the term of imprisonment imposed under subsection 83.3(9) in each case; and
- The number of cases in which the conditions fixed in a recognizance were varied under subsection 83.3(13).

Report on the operation of section 83.3 (Recognizance with Conditions)

From December 24, 2003, to December 23, 2004, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no cases initiated under this section of the *Criminal Code*. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(2)(a) to (f), concerning the recognizance provisions.

SECTION III - STATISTICS

Reporting requirements under subsection 83.31(1) (Investigative hearing)

- The number of consents to make an application that were sought, and the number that were obtained by virtue of subsections 83.28(2) and (3);
- The number of orders for the gathering of information that were made under subsection 83.28(4); and
- The number of arrests that were made with a warrant issued under section 83.29.

Report on the operation of sections 83.28 and 83.29 (Investigate Hearing)

From December 24, 2002, to December 23, 2003, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no applications initiated under these sections of the *Criminal Code*. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(1) (a) to (c), concerning the investigative hearing provisions.

Reporting requirements under subsection 83.31(2) (Recognizance with conditions)

- The number of consents to lay an information that were sought, and the number that were obtained, by virtue of subsections 83.3(1) and (2);
- The number of cases in which a summons or a warrant of arrest was issued for the purposes of subsection 83.3(3);
- The number of cases where a person was not released under subsection 83.3(7) pending a hearing;
- The number of cases in which an order to enter into a recognizance was made under paragraph 83.3(8)(a), and the types of conditions that were imposed;
- The number of times a person failed or refused to enter into a recognizance, and the term of imprisonment imposed under subsection 83.3(9) in each case; and
- The number of cases in which the conditions fixed in a recognizance were varied under subsection 83.3(13).

Report on the operation of section 83.3 (Recognizance with Conditions)

From December 24, 2002, to December 23, 2003, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no cases initiated under this section of the *Criminal Code*. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(2)(a) to (f), concerning the recognizance provisions.

.....

SECTION III - STATISTICS

Report on the operation of sections 83.28 and 83.29 (Investigate Hearing)

From December 24, 2001, to December 24, 2002, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no applications initiated under these sections of the Criminal Code. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(1) (a) to (c), concerning the investigative hearing provisions.

Report on the operation of section 83.3 (Recognizance with Conditions)

From December 24, 2001, to December 24, 2002, both the Royal Canadian Mounted Police and the Department of Justice (Federal Prosecution Service) report that there were no cases initiated under this section of the Criminal Code. As such, there are no data to report in relation to the reporting requirements in paragraphs 83.31(2)(a) to (f), concerning the recognizance provisions.

.....

SECTION III - STATISTICS

Paragraphs 83.31(3)(a) and 83.31(3)(b) of the *Criminal Code* require the Solicitor General of Canada to report on an annual basis information relating to:

83.31(3)(a)

- The number of arrests without warrant.
- The period of the arrested person's detention in each case.

From December 24, 2002, to December 23, 2003, both the Royal Canadian Mounted Police and the Department of Justice Federal Prosecution Services report that there were no arrests without warrant pursuant to subsection 83.3(4) of the *Criminal Code*. As such, there is no data to report in relation to the period of the arrested person's detention.

83.31(3)(b)

- The number of cases where a person arrested without a warrant was released by a peace officer.
- The number of cases where a person arrested without a warrant was released by a judge.

Since no arrests without warrant were made under subsection 83.3(4), there is also no data to report as per paragraph 83.31(3)(b). This has been confirmed by the Royal Canadian Mounted Police and Department of Justice Federal Prosecution Services.

.....

SECTION III – STATISTICS

Paragraphs 83.31(3)(a) and 83.31(3)(b) of the *Criminal Code* require the Solicitor General of Canada to report on an annual basis information relating to:

83.31(3)(a)

- **The number of arrests without warrant.**
- **The period of the arrested person's detention in each case.**

From December 24, 2001, to December 24, 2002, both the Royal Canadian Mounted Police and the Department of Justice Federal Prosecution Services report that there were no arrests without warrant pursuant to subsection 83.3(4) of the *Criminal Code*. As such, there is no data to report in relation to the period of the arrested person's detention.

83.31(3)(b)

- **The number of cases where a person arrested without a warrant was released by a peace officer.**
- **The number of cases where a person arrested without a warrant was released by a judge.**

Since no arrests without warrant were made under subsection 83.3(4), there is also no data to report as per paragraph 83.31(3)(b). This has been confirmed by the Royal Canadian Mounted Police and Department of Justice Federal Prosecution Services.