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Questions on notice deriving from my appearance before the Senate Legal and Constitutional Affairs Committee on Monday, November 14, 2005.

Question 1

From Senator Stott Despoja:

Senator STOTT DESPOJA—*There is a question I would like to put on notice—I do not have time to ask it—to the Attorney-General's Department* as to whether any consultations were requested or made with the Privacy Commissioner; that is, did the Privacy Commissioner provide information as to whether the bill as a whole complied with international privacy law and whether privacy was weighed up, particularly in relation to section 105.38? (my italics)

Please note that this question was actually put on notice to the Attorney-General's department, not myself.

Questions 2 and 5

I shall be answering questions 2 and 5 together, as there is a common recommendation that will hopefully satisfy both the questions.

Question 2 was from Senator Bob Brown:

Mr Abraham—I would recommend that, in acknowledging it, when legislation is put up before committees like this, Australia's international human rights obligations are paramount in deciding whether this is good law or not—rather than passing the legislation, attaching the ICCPR to the end of it, and then leaving it up the courts to decide how best to deal with it. I think that would be a far better approach for protecting safeguards.

Senator BOB BROWN—Would you like to look at that and come back to us with any specific ideas you have about how it might best be acknowledged?

Mr Abraham—Yes.

Question 5 was from the Chair, Senator Payne:

CHAIR—Just trying to think laterally, though, the reason I asked you specifically about your suggestion regarding the ACT Human Rights

Commissioner is that one has to deal in the realms of reality and what is acceptable to the Commonwealth government. I am hedging my bets here, but I do not think that it would work if we were to go down the road of having that sort of recommendation regarding that particular office. So you might like to give a little more thought—although not necessarily here and now—to how we might do that within the structures that already exist at the Commonwealth level. For example, the Inspector-General of Intelligence and Security has been suggested as an alternative.

We believe that the best way to ensure both human rights-focussed statutory oversight and the inclusion of the provisions of the International Covenant on Civil and Political Rights (ICCPR) in that oversight, is to extend the brief of the Inspector-General of Intelligence and Security to include oversight of the antiterrorism activities of the Australian Federal Police, with reference to the human rights contained in international human rights instruments.

The Inspector-General is charged with oversight of a variety of departments including ASIO, ASIS and the DSD, as section 8 of the Commonwealth's *Inspector-General of Intelligence and Security Act 1986*. Thus, there would appear to be no inherent problem with the brief of the Inspector-General being extended to include the Australian Federal Police. One would also desire legislation at the State and Territory level to ensure that State and Territory police, in their antiterrorism capacity, are held to the same standards as the AFP and security services. My focus, however, remains on what the Commonwealth Parliament can legislate for.

The *Inspector-General of Intelligence and Security Act 1986* could be amended in a relatively simply manner to better ensure the protection of human rights.

Currently, section 8(1) of the Act holds that

Subject to this section, the functions of the Inspector-General in relation to ASIO are:

- (a) at the request of the responsible Minister, of the Inspector-General's own motion or in response to a complaint made to the Inspector-General, to inquire into any matter that relates to:
 - (i) the compliance by ASIO with the laws of the Commonwealth and of the States and Territories;
 - (ii) the compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister;
 - (iii) the propriety of particular activities of ASIO;
 - (iv) the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO;
- or

(v) an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the *Age Discrimination Act 2004*, the *Racial Discrimination Act 1975* or the *Sex Discrimination Act 1984*, being an act or practice referred to the Inspector-General by the Human Rights and Equal Opportunity Commission ...

Section 8(2) of the Act contains similar powers in relation to ASIS and the DSD and section 8(3) contains similar powers in relation to the DIO and the ONA. Thus, it is not difficult to conceive of an amendment to section 8 of this Act that includes the AFP in its antiterrorist security capacity being included.

I note that section 8(1)(v)¹ allows the Inspector-General - of her or his own volition or under direction for the Minister - to inquire into 'an act or practice of ASIO that is or may be inconsistent with or contrary to any human right' as directed by HREOC. We note that the *HREOC Act 1986* includes the International Covenant of Civil and Political Rights annexed as Schedule 2 and the United Nations' Declaration on the Rights of the Child² annexed as Schedule 3. We note also that significant provisions of the ICCPR and other international human rights instruments are included in the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. Violations of these Commonwealth Acts may also be investigated by the Inspector-General under section 8(1)(v).

The human rights elements of section 8 could be amended to specifically include Australia's international human rights obligations, alongside Australia's domestic human rights legislation. Thus, alongside the human rights included in the Commonwealth's *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*, the human rights that the Inspector-General is charged with ensuring are not violated in Australia's efforts to ensure its security, would also include the international human rights law instruments that Australia has ratified, namely:

- The International Covenant on Civil and Political Rights;
- The Convention on the Rights of the Child;
- The Convention on the Elimination of All forms of Racial Discrimination;

¹ Also, section 8(2)(b)(iv) and (3)(b)(i) in relation to other federal security services.

² Though not, we note, the preferable treaty instrument, the Convention on the Rights of the Child (1989).

- The International Covenant of Civil and Political Rights;
- The Convention on the Elimination of All Forms of Discrimination Against Women;
- The Convention Against Torture, And Other Cruel, Inhuman and Degrading Treatment or Punishment.

Further, the mandate of the Inspector-General, as contained in the recently amended *ASIO Act 1979*, is an excellent model that could well be extended, through incorporation into the *Inspector-General of Intelligence and Security Act 1986*, to include oversight of the Australian Federal Police. I note in section 20 of the *ASIO Act 1979*, one of the roles of the Inspector-General is to ensure:

- (a) the work of the Organisation is limited to what is necessary for the purposes of the discharge of its functions; and
- (b) the Organisation is kept free from any influences or considerations not relevant to its functions and nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community, or with any matters other than the discharge of its functions.

This reflects several of our concerns about the application of the amendments of the Bill.

First, the issue of necessity; ensuring that what is done in the name of anti-terrorism is only, following section 20(a) ‘what is necessary’ to protect Australians from the direct threat of terrorist violence. Further, section 20(b), holds that the Inspector-General must ensure that ASIO is ‘kept free from any influences or considerations not relevant to its functions’. Thus, if the measures that are made available for the Federal Police to engage in under this Bill are being used in ways not absolutely necessary for the protection of Australia’s security, the Inspector-General should be able to report upon this misuse of the legislation.

Secondly, this section includes important non-discrimination protection. In section 5.2 of our submission, under the heading ‘non-discrimination’, we reassert the government’s obligation to regulate in a non-discriminatory manner and, equally, the obligation to ensure that there is no *perception* of discriminatory application of

legislation. The Inspector-General is charged with ensuring, in section 20(b), that ‘nothing is done that might lend colour to any suggestion that it is concerned to further or protect the interests of any particular section of the community.’ This strikes us as a rather awkward way of articulating the need for federal security services to act in an impartial and non-discriminatory manner. It may be beneficial for both the federal security and law enforcement services and the Australian community as a whole, for this section to be amended so as to closer reflect the explicit references to non-discrimination contained in section 8 of the *Inspector-General of Intelligence and Security Act 1986*.

We believe that through minor amendments to existing legislation, the oversight of this new anti-terrorism legislation may be extended to provide for effective monitoring of the consequent effects on the human rights of all Australians, including Australian’s human rights contained in international instruments.

Questions 3 and 4

Question 3 was from Senator Brandis:

Senator BRANDIS—Pardon my ignorance, but what is the standard of proof for apprehended violence orders?

Mr Abraham—That would be the criminal one.

Senator BRANDIS—Are you sure of that?

Mr Abraham—I am not certain of that.

Senator BRANDIS—Can you take that on notice? I suspect you are wrong.

Mr Abraham—I will certainly take that on notice.

Question 4 was from Senator Stott Despoja:

Senator STOTT DESPOJA—We are working on it! I have a final point which relates to Senator Brandis’s comments when he has referred to whether or not AVOs and the orders are comparable—and I would urge you, Chair, to make sure that the Castan Centre can review those comments in relation to AVOs.

We have suggested that a criminal burden of proof is preferable for Control orders, under division 104 of the *Anti-Terrorism Bill (No. 2) 2005*, should they be extended beyond the first year of operation.

We were mistaken to suggest that intervention and similar orders operate on the criminal standard of proof.

In Australia, intervention and apprehended violence orders operate on the civil standard of proof. For example, the Victorian *Crimes (Family Violence) Act 1987* and New South Wales' *Crimes Act 1900* employ the language 'on the balance of probabilities'. It should be noted however, that the burden of proof and use of evidence in these matters is informed, in part, by the unique nature of the proceedings, typically involving violent and abusive domestic relationships where prolonged and hostile court proceedings are undesirable.

We agree with Senator Brandis that control orders in division 104 of the Bill share the same philosophical basis as intervention and apprehended violence orders. However, we remain concerned that the possibility of the imposition, for ten successive years until the sunset provision sets in, of control orders that may well go beyond those envisaged under the existing State and Territory intervention and apprehended violence orders.

Whilst we acknowledge that the majority of the prohibitions imposed by section 104.5(3) are not especially onerous or different from those that can now be imposed by the states, there are prohibitions that go beyond what is currently imposed by the States on the civil burden of proof.

We believe that there remains an argument that a criminal burden of proof be required for the prohibitions to be imposed after the initial 12-month period. We would note especially that section 104.5(3)(c) can require a person to 'remain at specified premises between specified times each day, or on specified days' and thus goes beyond the prohibitions that are imposed currently under intervention and apprehended violence orders.