

Submission to the Senate Legal and Constitutional Committee

Re: Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005

A Submission from Kenneth Kuhlmann,
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This submission relates to Schedule 6 of the Bill which inserts a new Division 4B into Part IAA of the Crimes Act 1914 to provide police with new powers to obtain information from organisations and persons for the purposes of investigating terrorism and other serious (non-terrorism) offences

Summary

Schedule 6 provides the police with radical new powers to obtain documents through document production orders when investigating terrorism offences.

However Schedule 6 contains a provision relating to non-terrorism matters which many would find objectionable; both in its character and in the circumstance of its introduction to the Parliament.

The provision in question is Section 3ZQO in the new Division 4B of Part IAA of the Crimes Act whereby the information gathering powers proposed for the investigation of terrorism offences will be extended to all other serious offences.

The government policy objectives and the need for this particular extension of police powers is not addressed in the Bill's Explanatory Memorandum (EM). In this area one could read the EM as being disingenuous and less than informative on the effects of this provision. (I do not intend that as a discourtesy to the Attorney-General who presumably did not draft the EM himself. The deficiency may be the result of hasty drafting which the Attorney-General may well correct.)

To my knowledge no Minister of the Government has raised this matter in public discourse and the need to apply these far reaching powers to law enforcement generally has not been the subject of public debate - despite the fact that the new Section appears to be substantially at odds with what the Australian community would regard as a "fair thing" with regard to the balance between the law enforcement need for effective information gathering powers and the community's expectation that it can live free from secret and pervasive police surveillance.

It is reasonable to assume that public attention to the detail of this Bill has been directed to the substantial terrorism provisions and that the single section to which I refer has simply passed unnoticed. It is also fair to say that the community generally is completely uninformed about this proposed section and its possible consequences.

In drawing the Committee's attention to the new Section 3ZQO11 of the Crimes Act I ask the Committee to inquire closely into

1. the character of the provisions in Schedule 6 as they bear upon police powers to investigate non-terrorism offences
2. the need for the new powers and their effect upon existing statutory and customary civil rights, including their effect upon relationships between the community and policing agencies
3. the effect upon the business operations of record keepers, including the costs of compliance
4. the need to include the powers of Section 3ZQO in the present Bill.

The Committee may agree with me that

1. because the new Section 3ZQO has nothing to do with terrorist offences, it can be excised from this Bill with no detriment to the Bill's primary purpose or its provisions dealing with terrorism, and
2. the new Section 3ZQO can be conveniently presented to Parliament in a separate Bill wherein the merits of new police powers for investigating non-terrorism offences can be considered without the distraction of other more urgent matters.

The Committee might also inquire into the following matters of concern about document production orders in general:

1. Unlike the provisions in Schedules 4 and 5 of the Bill, there is no sunset provision in relation to either terrorism or non-terrorism offences in Schedule 6.
2. There is no time limit on the operation of the orders themselves or the associated orders for secrecy.
3. The provisions in Schedule 6 appear to allow the ongoing surveillance of individuals through permanent orders requiring the production of documents from electronic record keeping systems whenever documents of the type specified in an order and relating to a specified individual become manifest in the system.
4. There is no means for Parliament to scrutinise the use of document production orders.
5. There is no form of judicial review of document production orders in Schedule 6.
6. There is no means of appeal for a record keeper who might find compliance with a document production order economically onerous, or technically infeasible in some respect.

Supporting Submission

One of the problems with Schedule 6 is that it, like the rest of the Bill, is concerned with Terrorism and Terrorist Acts, but also adds to the Crimes Act a single new Section 3ZQO which relates to non-terrorism matters. The provision of radical new powers in relation to ordinary offences can almost escape one's attention if one is distracted by terrorism, sedition, preventive detention and control orders.

Schedule 6 applying to terrorism offences

Schedule 6 provides the police with radical new powers to obtain documents through document production orders when investigating terrorism offences.

The purpose of these powers is not stated in the Bill's Explanatory Memorandum but analysis of the nature of the documents covered by the orders suggests that the powers could be useful in identifying relationships between people which might be indicative of membership in a terrorist conspiracy.

The documents which can be obtained are specified in the new Section 3ZQP and include records of bank accounts and transactions, transfers of assets, telecommunication accounts and phone calls, utility service accounts and documents relating to travel. The information obtainable includes related accounts and details of other persons associated in accounts, transactions, phone calls or travel movements.

Orders may be given to anyone to produce a document of the type specified in the new Section 3ZQP relating to anyone whosoever. Documents need not be of an evidential character. It suffices that a person has a document about another person which might be useful to an investigator. Documents must be produced as soon as is practicable.

Apart from the limitation on the subject matter of the documents the only condition on the issuing of a document production order is that "an authorised AFP officer considers on reasonable grounds that a person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious terrorism offence" (New Section 3ZQN).

New Section 3ZQR appears to provide no excuse for not producing a document. Explicitly the Bill excludes the excuse of "legal professional privilege or any other duty of confidence

The notice of a production order may specify that the notice itself must not be disclosed.

The Bill creates an offence in disclosing the existence of a production order which is more serious than the offence of failing to comply with the order; disclosure attracting a penalty of 120 penalty units or imprisonment for two years or both whereas failing to produce the document attracts a penalty of only 30 penalty units.

There is no limit on the duration for which the production order might remain effective; nor any limit on the duration for which its existence must remain secret.

Unlike the provisions in the Bill which relate to preventative detention or control orders there is no sunset provision in Schedule 6. Nor is there a means of judicial review of orders or a means of appeal by a document holder against orders whose compliance might be financially onerous or infeasible in some way.

Schedule 6 applying to non-terrorism offences

I have set out the character of the provisions relating to gathering information in terrorism investigations not to argue against new police powers in that regard but to enable a comparison with the powers which the Bill provides in relation to ordinary serious offences.

The extraordinary fact about the new Section 3ZQO is that between the two classes of offences for which orders can be sought, there is no difference in the character of the orders or substantial difference in the powers provided to the police.

The only substantial difference lies in the manner of issuing the order and the deadline for compliance with it; that is

- a terrorism order can be issued by an authorised AFP officer whereas a non-terrorism is issued by a Magistrate on application by an authorised AFP officer, and
- a terrorism order must be complied with as soon as practicable whereas a non-terrorism order allows 14 days for compliance.

The policy imperatives of the non-terrorism provisions has not been stated by the Government. The need to apply these new information gathering powers to non-terrorism offences is not stated in the Bill's Explanatory Memorandum. Nor is there any identification of need to bundle the non-terrorism provisions into a Bill substantially dealing with terrorism and directly related matters. However, one can speculate upon the utility of the new Section 3ZQO in a number of types of non-terrorism investigation; for example,

- criminal conspiracies such as drug dealing syndicates;
- identifying the participants in conspiracies to defraud the revenue through the promotion and use of tax evasion schemes;
- offences against the corporations and trade practice laws where associations between individuals engaged in unlawful business practices might be difficult to document;
- conspiracies to breach industrial relations laws;
- social security fraud such as cases where pensioner couples in de facto relationships falsely claim benefits a single individuals.

Document Production Orders as Surveillance or Monitoring Orders

A feature of the legislation is the power to order production of documents kept in electronic form, presumably from the information systems of organisations. Considering that

- there is no limit on the duration of effect of a notice to produce documents,
- the ease with which electronic records can be searched
- the possibility that all new records arriving in a system can be examined for relevance to an outstanding document production order
- the existence of an order can be secret
- the consequence is that Schedule 6 will allow the establishment of secret systems of monitoring or ongoing surveillance of individuals.

That can be achieved through permanent monitoring orders requiring the production of documents from electronic record keeping systems whenever documents of the type specified in an order and relating to a specified individual become manifest in the system.

Surveillance of this kind may be considered necessary to deal with an immediate terrorist threat but whether such powers should be in place for all serious offences is a matter which deserves full disclosure to the Australian community in preparation for serious and measured consideration.

Recall that there is no sunset provision in relation to these powers; no judicial review, and no mechanism for Parliamentary oversight.

Compare these powers with the carefully constructed legislation, protocols and reporting arrangements of the Data Matching Agency.

Statutory Precedents

The Explanatory Memorandum states that the new Division 4B (the subject of Schedule 6) is based on models in the Australian Crime Commission Act 2002 and the Proceeds of Crime Act 2002. That would lead one to believe that there is nothing in the new proposal to warrant concern because all of it has been tried and proven in earlier legislation. That is not the case. I believe that the EM seriously mis-characterises the provisions in the new Division as being based on existing legislation.

Certainly there are some common elements between Schedule 6 and the other Acts but the overall character of the new police powers are substantially different in their effect and lack some of the safeguards and limitations in the other Acts.

For example, the Australian Crime Commission Act (Ss 29 – 29B) includes a power for an examiner to require the production of documents and require that the production order be kept secret; but the secrecy order lapses as soon as it serves no investigatory purpose or after the lapse of 5 years.

The production orders of Schedule 6 do have a closer relationship with the regime of production orders in the Proceeds of Crime Act 2002 (S.202 et seq) but there is a substantial difference in the character of the orders issued. The new Section 3ZQP defines many classes of document and the documents need not be relevant to any specific criminal offence or relate to a criminal suspect.

On the other hand the Proceeds of Crime Act (POC Act) is only concerned very narrowly with “property tracking” documents which can identify the existence and location of assets which are the proceeds of criminal offences which have been proven to have occurred or can be reasonably inferred to have occurred.

The POC Act includes provisions to avoid disruption of a record keeper’s business activities and allows the record keeper to appeal against the production of a record which is essential to the conduct of his business.

Moreover the POC Act specifically limits monitoring orders to a duration of 3 months.