

Ground Floor, 1 Farrell Place ■ Canberra
GPO Box 442 ■ Canberra ACT 2601
Phone 1300 362 072 ■ Fax 02 6249 7829
ombudsman@ombudsman.gov.au
www.ombudsman.gov.au

Our ref: A/2005-2548031

19 January 2007

Secretary
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Secretary

I refer to the Committee's inquiry into the provisions of the *Crimes Legislative Amendment (National Investigative Powers and Witness Protection) Bill 2006* and attach a submission by the Ombudsman to the inquiry.

We look forward to attending the hearing scheduled for 22 January 2007.

Yours sincerely

Dr Vivienne Thom
Acting Commonwealth Ombudsman

**SENATE
LEGAL
AND
CONSTITUTIONAL AFFAIRS
COMMITTEE**

**INQUIRY INTO
THE PROVISIONS OF
THE CRIMES LEGISLATIVE AMENDMENT (NATIONAL
INVESTIGATIVE POWERS AND WITNESS PROTECTION)
BILL 2006**

**SUBMISSION BY
THE COMMONWEALTH OMBUDSMAN**

JANUARY 2007

The Commonwealth Ombudsman

The office of Commonwealth Ombudsman is established by the *Ombudsman Act 1976* and the Ombudsman acts under that Act to investigate administrative actions by almost all Commonwealth agencies and actions of the Australian Federal Police. The Commonwealth Ombudsman is also the Defence Force Ombudsman, the Taxation Ombudsman, the Immigration Ombudsman, the Postal Industry Ombudsman, the Law Enforcement Ombudsman and, under ACT self-government legislation, the ACT Ombudsman.

2. The Ombudsman typically receives between 17 to 20,000 complaints per year, and investigates about a third of them. As well as cases generated by complaints, the Ombudsman conducts investigations on an “own motion” basis into wider issues in public administration. The Ombudsman has extensive investigation powers, but prefers to investigate with less formality and greater efficiency where possible.

3. Under a range of other legislation, the Ombudsman has roles relating to scrutiny of intrusive or contentious actions taken by officials in areas such as law enforcement, national security and immigration detention:

- *Telecommunications (Interception and Access) Act 1979*, Parts 2-7 and 3-5
- *Surveillance Devices Act 2004*, Part 6
- *Crimes Act 1914*, Part 1AB
- *Criminal Code Act 1995*, Divisions 104 and 105
- *Migration Act 1958*, Part 8C

Although each piece of legislation is different, in general the Ombudsman’s role in these areas is to examine records and conduct inquiries to ensure that there has been proper compliance with the requirements imposed by Parliament. The Ombudsman reports to the Attorney-General or the Presiding Officers on most matters of this kind.

4. The Ombudsman is assisted by about 150 staff, working from offices in Canberra and all capital cities. The Ombudsman publishes an annual report, and reports on most of the specialist roles set out above, and releases some investigation reports publicly.

Focus of submission

5. The *Crimes Legislative Amendment (National Investigative Powers and Witness Protection) Bill 2006* (the Bill) amends the *Crimes Act 1914* (Crimes Act) by replacing Part 1AB dealing with controlled operations and establishing a scheme for the issue of delayed notification search warrants. It also replaces Part 1AC of the Crimes Act dealing with assumed identities and protection of witness identity.

6. Our comments are confined to the schedules dealing with controlled operations and delayed notification search warrants. No issues of concern to us arise in respect of the other two areas and we were not consulted on the preparation of the legislation.

Controlled Operations

7. The replacement provisions dealing with controlled operations are based on a model law on controlled operations, assumed identities and protection of witness identity that was developed by the Joint Working Group of the Standing Committee of Attorneys-General and the Australasian Police Ministers Council. The model law was published in November 2003 in the Joint Working Group’s *Cross-Border Investigative Powers for Law Enforcement Report*. The stated intention of this model law was to harmonise, as closely as possible, the controlled operations, assumed identities and protection of witness identity regimes across

Australia. The Bill has departed from the model law in numerous details, in some cases at the Ombudsman's request, for example, by having the Ombudsman report on the Ombudsman's work and activities rather than the work and activities of the agencies inspected. However, there is no reason to believe that the important objective of harmonization will not be achieved. At this stage only Victoria has adopted legislation based on the model law but we understand that this is likely to be amended before it comes into effect in order to take into account the position of the Commonwealth as set out in the Bill.

8. Broadly speaking the Ombudsman's concerns when consulted on the proposals to amend Part 1AB of the Crimes Act were to ensure that the Ombudsman was given the powers needed to carry out his functions; that the reporting process would operate effectively; and that the amended scheme as a whole would be more efficient from an administrative point of view without losing transparency and accountability. We worked closely with the Attorney-General's Department and other agencies on the development of the legislation and are satisfied that these concerns have generally speaking been met.

Ombudsman's powers

9. The powers given to the Ombudsman in the 2001 amendments to the Crimes Act setting up the controlled operations regime were scant. The Ombudsman was not consulted on that legislation until the last minute and no attempt was made to align the Ombudsman's power with those at his disposal under other legislation where he exercised powers of inspection. This has been corrected in the Bill. Some issues arose over the extent of the Ombudsman's powers but these were resolved after discussion. A provision based on the Ombudsman Act was added to clarify that legal professional privilege is not affected by the Ombudsman having access to documents.

10. I would like to flag the desirability of having a set of powers which are automatically available to the Ombudsman whenever he exercises an inspection role. At present there is a different set of powers for every inspection regime. They have much in common but vary sufficiently to cause confusion and misunderstanding. It would have been useful if standard provisions for the Ombudsman's inspection powers could have been incorporated into the Bill by reference from the Ombudsman Act, on the basis that there should be common powers applicable to all inspection regimes. We hope that this approach will find favour with the Parliament in due course.

Controlled Operations Reporting Process

11. The reporting process under the amendments may need time to bed down. The previous provision for quarterly reports by agency heads to the Minister has been replaced by a provision for **6-monthly** reports (s 15HH(1)). Under the model law these would have been submitted only to the Ombudsman but wisely in our view the Minister will continue to receive the reports as well as the Ombudsman.

12. The information now required specifically to be included in quarterly reports has been pared down in the Bill. However, the Ombudsman may require the chief officers to include information in the 6-monthly reports additional to the information required by s 15HH. This might include the reasons for decisions to issue or not issue authorities, which is a requirement under the present provisions of Part 1AB but is not specifically required under the Bill. It might also include other information that could conceivably result in the 6-monthly reports containing more information than the current quarterly reports.

13. The proposed s 15HI requires the chief officers of each authorising agency to prepare an annual report on the controlled operations activities of the agency. The chief officer must

advise the Minister of any information that should be excluded from the report if it could reasonably be expected on publication to endanger a person's safety or prejudice an investigation or prosecution, both of which are grounds for exclusion in the current legislation. The Bill adds two further grounds for exclusion, namely that publication could reasonably be expected to compromise operational activities or methodologies, or would be contrary to the public interest for any other reason (proposed s 15HI(2)). If satisfied as to these grounds the Minister must exclude the information before tabling the report in Parliament.

14. 'Public interest' is not defined in the Bill, although it is usual in Commonwealth legislation to circumscribe its meaning if 'public interest' is available as a ground for not disclosing information. Section 24 of the *Human Rights and Equal Opportunity Commission Act 1986* is one example of the more usual approach; s 14 of the *Administrative Decisions (Judicial Review) Act 1977* is another; and ss 9(3) and 35B of the *Ombudsman Act* are another. Even where, under s 375 of the *Migration Act 1958*, the Secretary may withhold documents from the Tribunal because the Minister has certified disclosure to be contrary to the public interest, 'public interest' is strictly defined as meaning prejudicial to the security, defence or international relations of Australia, or involving the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet. Under the *Freedom of Information Act 1982* 'public interest' may be invoked as a ground for exclusion once a document has been categorised as sensitive, but not as an alternative ground as appears to be the case under s 15HI.

Annual report by Ombudsman

15. Exclusion of material on the grounds of public interest has, appropriately, been omitted from the grounds on which material must be excluded from the Ombudsman's annual report to the Minister. Section 15HJ also makes it clear that the Ombudsman's report is on the work and activities of the Ombudsman under the controlled operations regime, not on the work and activities of the law enforcement agencies as provided in the model law.

16. The Ombudsman will also report on controlled operations conducted by the Australian Crime Commission under corresponding State controlled operations laws, which at present are not subject to external scrutiny.

17. The Minister is required to table the Ombudsman's report under s 15HJ in Parliament.

18. As the explanatory memorandum highlights, the enhanced reporting role of the Ombudsman reflects the reliance that has been placed on the Ombudsman to provide external oversight of controlled operations. This has been accompanied by a reduction in external oversight of the controlled operations approval process by dispensing with the Australian Administrative Tribunal's role of approving extensions to controlled operation certificates. Although the latter is technically 'real time' oversight, in practical terms it may amount to less scrutiny than inspection by the Ombudsman after the event.

Efficiency of the authorisation process

19. A number of changes have been made to the authorisation process to make it more efficient.

We have no difficulty with a definition of 'serious Commonwealth offence' that does not require identifying the nature of the criminal activity, provided that the offence is genuinely serious. The requirement that the offence be punishable by at least three years imprisonment is sufficient protection against possible abuse. We also accept the argument in favour of extending protection from liability from criminal sanctions to informers in certain

circumstances. The exclusion of informers under the present legislation has encouraged avoidance action which satisfies neither the objective of catching criminals nor the objective of keeping the supervision of informers under control and accountable.

20. Drafting anomalies which affected the interpretation of the Act for inspection purposes have been corrected, such as references to modes of communication. In general we consider that the Bill will make the approval process more efficient and no less transparent than the current provisions.

Delayed notification search warrants

21. The provisions for delayed notification search warrants are not included in the model law on cross-border investigative powers for law enforcement. However, the Ombudsman was consulted on the delayed notification provisions, which add an additional inspection function to the Ombudsman's office.

22. The proposed delayed notification search warrant scheme will enable police officers covertly to enter and search premises for the purposes of preventing or investigating serious Commonwealth offences, without giving notice to the occupier of the premises until operational sensitivities allow. The Bill also allows for adjoining premises to be entered with similar notification requirements.

23. Given the highly intrusive nature of the power it is appropriate that the delayed notification search warrant will be available for investigation of Commonwealth offences and State offences with a Federal aspect punishable on conviction by imprisonment for a period of 10 years, namely the high end of suspected serious offences. There are other offences for which a warrant may also be available, not all of which are punishable by 10 years' imprisonment. The list is diverse and includes recruitment of mercenaries and recruitment of members of organizations engaged in hostile activities towards foreign governments, politically motivated violence, dealing with assets frozen under UN sanctions, sexual slavery or use of communications services to make death threats. Other offences may in time be added to the list and it is hoped that any additions will be limited only to the most serious criminal conduct.

24. The Bill provides for an inspection role for the Ombudsman with powers along the same lines as those contained in the provisions relating to controlled operations. Record keeping requirements are also in line with those for the proposed controlled operations provisions. A maximum 30 day limitation on warrants is also provided for. There are no provisions for a warrant to be extended although the time within which the occupier must be notified of the search may be extended.

25. Some of the Ombudsman's suggested changes have been incorporated into the Bill, which represents a reasonable balance between what is needed to deal with sophisticated criminal activity and the need to protect persons from the abuse of intrusive power. The Ombudsman's position under the legislation is satisfactorily dealt with and we would question only one small procedural anomaly of the reporting requirements.

26. The reporting anomaly we have identified is that s 3SZF requires a report every 6 months whereas an inspection is required only every 12 months. It would seem more logical if the report to the Minister was every 12 months. This would also make the reporting requirements consistent with that for controlled operations and link the Ombudsman reporting requirements into the requirement for an annual report to the Minister by the agencies.