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Privacy
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**Law Enforcement Legislation Amendment (Public
Safety) Act 2005: Lockdown powers**

Issues Paper, December 2006

<http://www.ombo.nsw.gov.au/show.asp?id=447>

Submission to the NSW Ombudsman

February 2007

The Australian Privacy Foundation

The Australian Privacy Foundation (APF) is the leading non-governmental organisation dedicated to protecting the privacy rights of Australians. We aim to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians.

Since 1987 the Australian Privacy Foundation has led the defence of the rights of individuals to control their personal information and to be free of excessive intrusions. We use the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed.

For further information about the organisation, see www.privacy.org.au

Introduction

We welcome the invitation to comment on this important matter and compliment you on a clear and concise Issues Paper which clearly identifies some significant privacy issues. Unfortunately a number of other concurrent enquiries have overloaded our limited all-volunteer resources, and we have not been able to review the paper as thoroughly as we would have liked, and we regret that we were not able to meet your submission deadline. We hope you will be nonetheless be able to accept and consider the main points below.

General Comments

The extraordinary powers granted to police by the legislation allow them to significantly intrude into the privacy of individuals in NSW, in ways which would normally be considered abhorrent and contrary to the legitimate expectations of citizens and residents in a free and democratic society.

The haste with which the legislation was enacted in response to specific incidents of public disorder did not allow for the normal level of scrutiny and debate that should accompany such radical laws. The current review is therefore a welcome opportunity to take a more considered and balanced view of the 'proportionality' of the powers, relative to the risk and severity of fortunately rare instances of public disorder.

We note that the balance of interests justifying the continued need for Part 6A is a major focus of the review, and look forward to your considered recommendations taking into account the importance of privacy and civil liberties considerations.

Specific Comments

This section identifies and briefly comments on the most serious problems which APF has concerning the Part 6A powers, in response to specific questions in the Issues Paper.

Q.6 – We would normally argue for any such powers as these to be subject to judicial approval from the outset (see also our response to Qs 14&15). However, we acknowledge the public interest arguments for

allowing police discretion to authorise the use of the powers (subject to our later comments) in 'emergency' situations of sudden public disorder.

Q.7 - The present limitation on authorisation to officers of Assistant Commissioner rank or above is appropriate, and an essential safeguard against abuse.

Q.9/10 – It is not appropriate for Part 6A powers to be used in relation to private property – the police appear to already have adequate powers to deal with actual or suspected wrongdoing on private property, which have appropriate 'reasonable cause' protections.

Q.11 – the police practice to date of authorising whole local government areas or police commands is disturbing. It should be possible for the powers to be invoked much more selectively in relation to specific geographic locations.

Q.14/15 - The requirement to seek Supreme Court approval for extension is also an important safeguard but in our view should apply after a lesser period – we suggest no longer than 24 hours after the initial authorization.

Q.16 – Senior police should be required to set out the grounds for authorisation – this is an essential deterrent against excessive use and accountability device.

Q.18 – the power to require disclosure of identity is a major intrusion into privacy and freedom and must be strictly rationed and controlled. The 'reasonable suspicion' criterion is therefore an essential safeguard.

Q.19 – the 'reasonable excuse' exception in s.87L(3) must remain – there are numerous good reasons – many of them in the public interest – why individuals may need to give limited information. Failure to provide proof of identity should not be an offence – many people do not routinely carry evidence of identity and it would significantly change the character of society if this became a problem for them.

Q.21 – we strongly endorse the views of the Legislative Review Committee that the absence of a 'reasonable suspicion' test for stop and search powers is a violation of important legal principles and of civil liberties.

Q.23 – we share the concern of the NSW Council for Civil Liberties, cited in the Issues Paper, concerning the power to search the 'contents' of mobile phones and other communications devices. We submit that there need to be additional safeguards in relation to police access to information stored on mobile phones, PDAs, portable computers etc. The starting point should be judicial authorisation, with only the minimum exceptions required in relation to messages relevant to the particular public disorder. The powers granted by Part 6A must not become a licence for police to carry out a 'fishing expedition' for other information.

Q.26 – It would seem that the provision for use of the special powers without authorisation are on the one hand subject to conditions which are too onerous for them to be useful, while on the other being subject to relatively few safeguards. We submit that the provision is probably unnecessary and should be removed. If it is to remain it should be made subject to strict safeguards including senior officer authorization, time limits and reporting requirements.

Q.35 – There should be a requirement for detailed annual reporting, oversight by an external agency, and a periodic review of the need for Part 6A.