Commonwealth OMBUDSMAN

Senate Legal and Constitutional Committee

SUBMISSION BY THE COMMONWEALTH OMBUDSMAN

INQUIRY INTO THE PROVISIONS OF THE *TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 2006*

March 2006

BACKGROUND

The Commonwealth Ombudsman has a longstanding oversight role in relation to the use of telecommunications interception powers by Commonwealth law enforcement agencies.

Section 82 of the *Telecommunications (Interception) Act 1*979 (the Act) confers on the Ombudsman a statutory inspection and reporting role in relation to records of telecommunications interception activity by the Australian Federal Police and the Australian Crime Commission.

Section 83 of the Act requires the Ombudsman to inspect each of these agency's records at least twice in each financial year to ascertain the extent to which they have complied with the provisions of sections 79, 80 and 81 of the Act dealing with the destruction and maintenance of records. Under section 85, the Ombudsman may also report on any other breaches of the Act detected in the course of an inspection.

Under section 84, the Ombudsman is required to report to the Minister within three months after the end of each financial year about the results of the inspections conducted under section 83 in relation to each agency during that financial year.

As a consequence of amendments to the Act which came into effect in July 2005, I am now required to include in my annual report to the Minister particulars of any deficiencies identified in those inspections that may impact on the integrity of the telecommunications interception regime and particulars of any remedial action taken or proposed to address those deficiencies.

The Ombudsman is further empowered under the Act to do anything incidental or conducive to the performance of any of the above functions.

The Ombudsman's inspection and reporting functions do not extend to actions taken under the Act by the Australian Security Intelligence Organisation (ASIO). These are subject to a separate inspection and reporting regime by the Inspector General of Intelligence and Security.

Subject to certain provisions of the Act, the Ombudsman is not precluded from undertaking own motion investigations under the *Ombudsman Act 1976* into other matters relating to the conduct of telecommunications interceptions by law enforcement agencies.

THE ROLE OF THE OMBUDSMAN UNDER THE BILL

The *Telecommunications (Interception) Amendment Bill 2006* will, if enacted, affect my role in several ways:

- I will acquire a new function under section 152 to inspect certain records (*access records*) kept by a range of agencies (*enforcement agencies*) authorised under the legislation to access stored communications;

- I will acquire a new function under section 153 to report to the Minister each financial year about the results of each inspection carried out under section 152 during that year; and

- I will no longer have an explicit responsibility under section 82 to check the accuracy of entries in the General and Special Registers currently maintained by the Australian Federal Police and to be maintained in future by the Attorney-General's Department. Checking of the Registers will continue, however, to be a necessary part of an inspection.

- the Bill proposes that the Telecommunications Interception Remote Authority Connection (TIRAC) function currently exercised by the Australian Federal Police will be discontinued. As a consequence, I will no longer have a role in inspecting the Australian Federal Police's records relating to interception warrants issued to other eligible agencies.

IMPLICATIONS

There are several aspects of the Bill that I would like to bring to the attention of the Legal and Constitutional Committee.

Expanded inspection functions

The operations of my office will expand considerably through the assumption of the new function of inspecting access records under the proposed section 152. This expansion will not be mandatory, since in theory I could decide not to carry out any inspection of an enforcement agency's records under this provision. However, I would see it as an abrogation of my responsibility not to take on inspection of the access records of enforcement agencies if, through these proposed amendments, Parliament creates an expectation that I will do so.

One difficulty in planning an inspection program and estimating the resources required to implement it will arise from the fact that the number of enforcement agencies which may seek access to stored communications is unknown and open-ended. There will not be a government approved list of agencies which may apply as there is under section 34 of the Act in respect of telecommunications interception warrants. The Bill envisages that any Commonwealth, State or Territory agency that meets the same definition as in section 282 of the *Telecommunications Act 1997* can become an enforcement agency by virtue of being granted a stored communications warrant by an approved issuing authority.

At this stage it cannot be accurately predicted how many agencies that are potentially eligible to apply for stored communications warrants will seek to become an enforcement agency. The extent of the extra inspection and reporting activity will also depend on how much use the agencies make of the new warrant regime. These uncertainties are reflected in the non-mandatory nature of my function under section 152.

Whether my office is able to inspect most, if not all, agencies, in the spirit of the proposed amendments, or whether we will be able to inspect only a few, will depend on whether additional resources are available. Not only will staff need to be available to carry out inspections but preparatory work on methodologies and the internal procedures of each agency to be inspected will need to be done. If the resources are available to meet both my mandatory inspection obligations and my function under proposed section 152, my aim would be to have a program of inspections covering all agencies which have accessed stored communications in the relevant year.

Timing of reporting functions

An additional difficulty arises with regard to the proposed reporting requirements envisaged in the draft Bill.

The proposed section 152 does not require that inspections be carried out within any particular timeframe. However, for each agency inspected under section 152, section 153 requires that a report to the Minister be completed within three months of the end of the financial year in which the inspection was conducted.

It is noted that this timeframe is the same as that for the statutory reporting requirements for telecommunications interceptions. If I inspect a considerable number of enforcement agencies accessing stored communications, the reporting timeframes may be difficult to meet.

It would be preferred if the proposed reporting timeframes for section 153 reports could be extended to six months instead of three. This should not interfere unduly with the accountability objective while allowing more time for reports to be prepared that are as useful and comprehensive as they can be.

B party warrants

A significant feature of the Bill is the extension of telecommunication interception warrants to permit the interception of B party services in specified circumstances. If the Bill passes in its present form, it will be permissible for interception agencies to intercept the telecommunications service of another person who is not the subject of the agency's investigation but is likely to use that service to communicate with the person of interest.

Due to the obvious privacy implications involved in intercepting the telecommunications services of persons not suspected of committing a serious offence, the Bill attempts to introduce safeguards through subsection 46(3) which will limit the availability of B party intercepts. This amendment stipulates that the issuing authority must, before granting the warrant, be satisfied that the agency has exhausted all other practicable methods of identifying the service used or likely to be used by the person of interest. This means that an application for a B party warrant must contain sufficient detail to satisfy the issuing authority of these conditions. It would be desirable to make this requirement clear in the legislation or regulations as appropriate.

Another feature of the new Bill relates to the proposed section 108(2)(b) which will allow stored communications to be accessed on an interception warrant. It is my expectation that if this practice is permitted under the amended legislation, it should be spelt out clearly in written affidavits accompanying applications for interception warrants and in the warrants themselves that such access is to take place. It would be useful if this expectation were clearly supported in the legislation (or regulations).

I will continue to look broadly at agency practices for managing telecommunications interception warrants and will report where required under section 85 on any breaches of the Act that are visible to my inspection officers.

General and Special Registers

The proposed amendments appear to reduce the scope of my functions by removing the explicit requirement under section 82 to inspect the records of a Commonwealth agency (the Australian Federal Police) to check the accuracy of the General and Special Registers.

Checking the General and Special Registers will nevertheless continue to be an important part of any inspection of the records to which they relate. The removal of the explicit checking function thus will not translate into a reduction in the work which needs to be done in respect of each inspection.

My office is working with the Attorney-General's Department to ensure that the Registers will continue to be accessible for inspection purposes and also to deal with the overlap between the relevant section 82 and section 83.

Summary

The primary purpose of the Act is to protect the privacy of people using the telecommunications system for legitimate purposes.

The legislative changes envisaged in this Bill will permit wider covert information gathering powers to become available to an increased number of government agencies. These changes will also have potential privacy implications for an increased number of Australian citizens.

The Ombudsman's inspection and reporting role is an important safeguard in ensuring that these powers are not misused and in maintaining public confidence in the integrity of the new warrant regime. It would be contrary to the intent of the legislation if this office were forced to curtail these activities for want of resources to fulfil this role.

I take seriously the expanded role proposed under the Bill and my office has already discussed its implications with the Attorney-General's Department. My office will consult further with the Department and affected law enforcement agencies to ensure a smooth transition to the new warrant regime.

Prof. John McMillan
Commonwealth Ombudsman
March 2006