

Submission by the
Commonwealth Ombudsman

**Review of the *Telecommunications and
Other Legislation Amendment
(Assistance and Access) Act 2018***

Submission by the Commonwealth Ombudsman, Michael Manthorpe PSM

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Introduction

The Office of the Commonwealth Ombudsman (the Office) welcomes the opportunity to provide a submission to the Independent National Security Legislation Monitor's (the INSLM) review of amendments made to Commonwealth legislation by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (the Assistance and Access Act).

Background

The purpose of the Office of the Commonwealth Ombudsman is to:

- provide assurance that the organisations we oversight act with integrity and treat people fairly
- influence systemic improvement in public administration in Australia and the region.

We seek to achieve our purpose through:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action; and
- providing assurance that Commonwealth, State and Territory law enforcement, integrity and regulatory agencies are complying with statutory requirements and have sound administrative practices in relation to certain covert, intrusive and coercive powers.

Of particular relevance to the INSLM's review are the Office's roles to:

- receive notifications from agencies about their use of industry assistance powers under Part 15 of the *Telecommunications Act 1997* (the Telecommunications Act)
- inspect and report¹ on the extent of agencies' compliance when obtaining and using industry assistance powers
- receive notifications from agencies about certain actions taken in respect of a computer access warrant under the *Surveillance Devices Act 2004* (the Surveillances Devices Act)
- inspect and report on the extent of agencies' compliance when obtaining and using computer access warrants.

Our Office has received notifications, in accordance with the Telecommunications Act, that agencies are using the industry assistance powers.² However, the retrospective nature of our

¹ Section 317ZRB provides that the Ombudsman *may* inspect agencies' use of industry assistance powers. We expect that, in most instances, notices under Part 15 will be issued along with a surveillance device warrant under the *Surveillance Devices Act 2004* or an authorisation under Chapter 4 of the *Telecommunications (Interception and Access) 1979*. This may mean that, for practical purposes, inspections under Part 15 of the Telecommunications Act are conducted in conjunction with an inspection under either the SD Act or the TIA Act.

² The Assistance and Access Act included provisions in the Telecommunications Act requiring interception agencies to notify the Commonwealth Ombudsman within seven days after a request, variation, extension or revocation is made in relation to a technical assistance request, technical assistance notice or technical capability notice.

inspections means we will only commence assessing the associated records during our 2019—20 inspections. We have not yet assessed any agencies' use of these powers.

We also intend to engage with agencies to understand their policies and procedures for using the industry assistance powers, including how they are training staff to understand their obligations. We will use this information and the results of our inspections to develop an understanding of how the powers are being used in practice and where there may be room for improvement. We welcome the opportunity to brief the INSLM, to share our insights, as the use of the powers develops.

Response to terms of reference

We understand this review is being conducted concurrently with the review by the Parliamentary Joint Committee on Intelligence and Security (PJCIS). We provided a similar submission to the PJCIS to that set out below. We have limited our comments to the following issues that are directly relevant to our Office's role in inspecting and reporting on enforcement agencies' use of the new and expanded powers created by the Assistance and Access Act:

- the power for the Minister for Home Affairs to omit content from Ombudsman reports when tabling them in Parliament
- clarity of the complaints role in relation to technical assistance notices
- defining a time limit for the expiry of technical assistance requests
- resourcing for the Ombudsman's expanded functions.

Power for Minister to delete content from Ombudsman reports

Subsection 317ZRB(7) of the Telecommunications Act provides that the Minister for Home Affairs (the Minister) may, before tabling a report from the Ombudsman, delete information that, if made public, could reasonably be expected to prejudice an investigation or prosecution, or compromise an interception agency's operational activities.

The Office has made submissions to the PJCIS to explain the reasons we believe the Minister's power to redact the Ombudsman's reports should be reconsidered. Specifically, this power is not available to a Minister in any other legislation under which the Ombudsman may issue a report and, in our view, is inconsistent with the Ombudsman's role as an independent and impartial office.

Further, subsection 317ZRB(4) of the Telecommunications Act provides that "...a report under s 317ZRB(3) must not include information which, if made public, could reasonably be expected to prejudice an investigation or prosecution, or compromise any interception agency's operational activities." The Ministerial redaction provision repeats, verbatim, this same consideration.

Accordingly, were the Ministerial redaction power to be used, the Office would be in breach of s 317ZRB(4).

Our Office routinely consults with agencies to identify whether a draft report contains operationally sensitive material that should be removed or amended before it is published. Further, the Office only inspects and reports on records that have ceased or expired so as to avoid any risk to ongoing operations.

The efficacy of this approach is evidenced by the Office's record in providing reports that are informative without revealing operationally sensitive details. The Office's record is unblemished in this regard, and we expect to maintain the same high standard when inspecting and reporting on the use of the industry assistance powers.

Section 317ZRB(7) is inconsistent with the Office's independence and unnecessary in light of s 317ZRB(4). We ask the INSLM to consider recommending that it be removed.

Receiving complaints regarding technical assistance notices

We note that s 317MAA(4) makes specific reference to the requirement for the chief officer of an interception agency to notify the communications provider of their right to make a complaint to the Commonwealth Ombudsman (or an authority that is the State or Territory inspecting agency in relation to the interception agency) regarding the conduct of the chief officer, or the interception agency, in relation to a technical assistance notice (TAN).

We understand this provision was likely included to ensure communications providers are apprised of their options for redress if they are dissatisfied with an agency's actions when issuing a TAN. Our Office welcomes and encourages efforts to bolster awareness of the right to complain, but questions whether the inclusion of this provision only in respect of TANs may cause confusion or even be misleading.

Under the *Ombudsman Act 1976*, our Office has jurisdiction to handle complaints about the administrative actions and decisions of Australian government agencies and certain contracted providers. Accordingly, the Office automatically has jurisdiction to consider complaints about the administrative actions of the Australian Federal Police and the Australian Criminal Intelligence Commission. In our view, this would cover complaints not only about the conduct of an agency in relation to TANs but also in relation to technical assistance requests (TAR) and technical capability notices (TCN).

By imposing a requirement on the chief officer to notify communication providers of their right of complaint in relation to TANs only, it may be open to providers to incorrectly assume the same right of complaint does not extend to TARs and TCNs.

We suggest the INSLM consider whether the requirement to notify a communications provider of their right to complain should be extended to apply to TARs and TCNs.

Defining a time limit for expiry of technical assistance requests

Section 317HA of the Telecommunications Act provides that, unless revoked sooner, a TAR expires either on the expiry date specified in request or at the end of the 90-day period beginning when the request was given. We understand this to mean that, if an agency chooses to specify an expiry date on the request, there is no maximum time for which the request can remain in force.

This is inconsistent with ss 317MA and 317TA of the Telecommunications Act which relate to TANs and TCNs, both of which include the subsection:

(1A) an expiry date specified in a [notice] must not be later than 12 months after the notice was given.

While we acknowledge the voluntary nature of a TAR may mean that the risks associated with a long standing notice are lower than with a TAN and TCN, we recommend that TARs are subject to the same time limitation as TANs and TCNs for consistency and clarity.

If the INSLM is not minded to recommend a similar time limit for expiry on TARs, we would support the suggestion made by the Inspector General of Intelligence and Security (IGIS) in her November 2018 submission to the PCJIS that, at a minimum, TARs should be subject to an express periodic review requirement.³ This would ensure appropriate oversight of the way in which agencies use TARs.

Resourcing for Ombudsman's expanded functions

The Assistance and Access Act provided the Office with new and expanded functions in receiving notifications about, inspecting and reporting on enforcement agencies' use of covert and intrusive powers. Prior to the passage of that legislation, our Office advised the Department of Home Affairs and the PJCIS that this expansion of our role would require additional funding.

In its report of April 2019 regarding the Assistance and Access Act, the PJCIS recommended (Recommendation 3):

The Government continues to ensure the Inspector-General of Intelligence and Security (IGIS) and the Commonwealth Ombudsman have sufficient resources to ensure that they can properly execute their additional responsibilities under the Assistance and Access Act.⁷

In the IGIS's submission to the PJCIS, she highlighted that without a sophisticated understanding of communications and security technologies, particularly in a space where technology is constantly changing, oversight bodies face challenges developing capacity to assess compliance.⁴ We are similarly mindful that developing methodologies to inspect compliance in an area of an increasingly technical nature is likely to require significant training to upskill inspection officers and/or outsourcing for independent advice, both of which also factor into resourcing requirements.

We will continue to explore this issue through the usual budget process.

³ Inspector-General of Intelligence and Security, Submission No 52 to Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*, p 24.

⁴ Inspector-General of Intelligence and Security, Submission No 52 to Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*, p 27.