



Submission by the
Commonwealth Ombudsman

**COMPREHENSIVE REVISION OF THE
*TELECOMMUNICATIONS
(INTERCEPTION AND ACCESS) ACT 1979***

Submission by the Commonwealth Ombudsman, Colin Neave

February 2014

1 Introduction and background

On 12 December 2013, the Senate referred the following matter to the Legal and Constitutional Affairs References Committee for inquiry and report – a comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (the Act), with regard to:

- a. the recommendations of the Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* report, dated May 2008, particularly recommendation 71.2; and
- b. recommendations relating to the Act from the Parliamentary Joint Committee on Intelligence and Security *Inquiry into the potential reforms of Australia's National Security Legislation* report, dated May 2013.

In August 2012, we made a submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) inquiry into potential reforms of national security legislation (Attachment A). In that submission we discussed:

- the oversight role of the Commonwealth Ombudsman under the Act, in particular, the need for greater clarity about our role and the desirability of a public reporting mechanism to improve transparency and accountability
- the importance of legislative safeguards and minimum standards to ensure agencies can sufficiently demonstrate compliance with the legislation
- the need for clarity in the Act or any reformed legislation to ensure that it is practical for law enforcement agencies to comply with their requirements.

Additionally, in July 2013, we made a submission to the Standing Committee on Legal and Constitutional Affairs regarding its inquiry into the Telecommunications Amendment (Get a Warrant) Bill 2013. This Bill sought to amend the Act to require standard warrant authorisation procedures for law enforcement and intelligence agencies that wish to access telecommunications data. Our submission is at Attachment B.

This submission focuses on the recommendations made in the Committee's report of May 2013 regarding the oversight arrangements under the Act, and the importance of legislative clarity in any proposed amendments or reforms to the Act.

2 Rigorous and robust oversight

The Commonwealth Ombudsman forms part of the oversight mechanisms under the Act. A number of the Committee's recommendations refer to 'rigorous' and 'robust' oversight to ensure accountability under the Act.¹ In order to achieve this, we consider the below factors necessary.

- The role of the Ombudsman needs to be clarified. This includes a clear requirement for the Ombudsman to ascertain agencies' compliance with the telecommunications interception and stored communications access provisions – not just agencies' record keeping obligations (as the Act currently requires). This would align with the Ombudsman's inspection roles under the *Surveillance Devices Act 2004* and Part IAB of the *Crimes Act 1914*.

¹ Including recommendations 4, 7, 10, 18 and 42.

- The Ombudsman should have a public reporting mechanism. Publicly reporting on whether agencies have used their powers lawfully is a key element in providing accountability and transparency. Again, this would align with the Ombudsman's inspection roles under the *Surveillance Devices Act 2004* and Part IAB of the *Crimes Act 1914*.
- The Ombudsman's oversight powers should be clearly articulated in the Act, including appropriate delegations of those powers.
- The Ombudsman should be appropriately funded to perform any oversight role under the Act. In October 2012, our office was given an additional oversight function under the Act for preservation notices. However, this was done without any additional funding. Our office is not in a position to continue to absorb expanding oversight functions without appropriate funding, particularly if it is to continue to provide an appropriate level of assurance to Parliament.

Further details on these issues are provided in [Attachment A](#).

We also support the Committee's proposal of Parliamentary oversight (Recommendation 10). As a part of the Ombudsman's oversight role of controlled operations under Part IAB of the *Crimes Act 1914* (Cth), the Ombudsman reports annually on agency compliance to the Parliamentary Joint Committee on Law Enforcement and the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity. We would support a similar reporting mechanism under the Act.

3 Legislative clarity

Through our inspections, we have identified ambiguous provisions in the Act, which may not be apparent even if intercepted or accessed communications are adduced as evidence in court. This creates uncertainty for agencies that have applied the relevant provisions with the intention of meeting their statutory obligations, invested resources and relied on the intercepted or accessed communications. For example, the *Telecommunications (Interception and Access) Act 1979 – Report for the year ending 30 June 2012* reports on an ambiguity we have identified regarding the definitions surrounding when a stored communications warrant is executed.²

With any amendments or proposed new provisions to the Act, the legislation needs to be clear so that agencies can comply with the Act and this compliance can be assessed. Furthermore, legislative clarity is particularly important when agencies must rely on third parties, such as carriers, to exercise their powers.

4 Support for reform

Our comments in this and our attached submissions are informed by our experience and insight gained from our various inspection functions and oversight of Commonwealth, state and territory agencies. Overall, we welcome the proposed reforms to the Act to establish a regime that is explicit in its meaning, intention and safeguards, and provides for effective oversight of agencies' use of covert and intrusive powers.

² Page 57