

Parliamentary Joint Committee on Intelligence and Security

ANSWERS TO QUESTIONS ON NOTICE

Office of the Commonwealth Ombudsman

13 AUGUST 2020 (by email)

Department/Agency: Office of the Commonwealth Ombudsman

Topic: Inquiry into the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*

Question: 1

Senator Kristina Keneally: To what extent do the INSLM's recommendations address the concerns the Ombudsman raised in the July 2019 written submission to the PJCIS Inquiry? The following issues were listed, can you please note whether the INSLM's recommendations addressed the concern in each case. If there are any remaining issues please also note.

- a) The power for the Minister to delete content from Ombudsman reports.
- b) Clarity of the complaints role in relation to technical assistance notices.
- c) Defining a time limit for the expiry of technical assistance requests.
- d) Resourcing for the Ombudsman's expanded functions.

Answer: In his report of 30 June 2020, the INSLM recommended (recommendation 29) that subsection 317ZRB(7) of the *Telecommunications Act 1997* (Telecommunications Act) be repealed so that the Minister cannot remove material from an Ombudsman report under that provision. If recommendation 29 is implemented, this would address issue (a) above.

The INSLM's report did not address issues (b) – (d) above.

In relation to issue (b), it remains my Office's position that the current construction of the Telecommunications Act may create a misapprehension among interception agencies and communications providers that providers cannot make a complaint to my Office with respect to a technical assistance request (TAR) or a technical capability notice (TCN). This is because section 317MAA only requires the chief officer of an interception agency to notify a communications provider about their right to make a complaint to my Office about certain issues with respect to a Technical Assistance Notice (TAN). No equivalent provision exists with respect to TARs or TCNs.

Under the *Ombudsman Act 1976* (the Ombudsman Act) my Office has jurisdiction to handle complaints about the administrative actions and decisions of Australian government agencies and certain contracted providers, so omitting TARs and TCNs from the complaints provisions

in the Telecommunications Act does not, in fact, prevent providers from making a complaint to my Office. However, to avoid doubt or confusion I consider there should be clear and unambiguous equivalent provisions for TARs and TCNs within the Telecommunications Act.

With respect to issue (c), it is possible for a TAR to exist indefinitely. By contrast, technical capability notices (TCN) and technical assistance notices (TAN) cannot be in force for longer than 12 months. My Office acknowledges that the voluntary nature of a TAR means the risks associated with long standing notices are lower, however it may provide some consistency and clarity if TARs were subject to the same time limitation as TANs and TCNs.

In relation to issue (d), please see the answer to question two below.

Question: 2

Senator Kristina Keneally: The Ombudsman's submission notes that the Assistance and Access Act has given the Ombudsman 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, the Ombudsman advised the Department of Home Affairs and the Committee that this expansion of role would require additional funding.

- a) What specific FTE and/or funding requirements did you have in relation to this this Act? Did any funding or positions come through? Please also note whether these requirements have now increased or decreased from what was originally anticipated.
- b) Please list the agency/mechanisms through which this has been raised, date, details and response.

Answer: My Office is in ongoing discussions with the Department of Home Affairs (as the policy department) and the Attorney-General's Department (as our portfolio department) about funding for my Office's oversight of agencies' use of powers under the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Assistance and Access Act).

These funding discussions have been premised on my Office monitoring use of the industry assistance powers by the AFP, the Australian Criminal Intelligence Commission, the Australian Commission for Law Enforcement Integrity and each of the state and territory police forces. If the Government were to implement the INSLM's recommendation to extend the industry assistance powers to state and territory anti-corruption bodies (recommendation 1), my Office may need to seek appropriate funding to ensure it has capacity to also monitor those agencies.

Question: 3

Senator Kristina Keneally: In addition to the Assistance and Access Act, what additional, specific FTE requirements does the Ombudsman have in relation to the oversight requirements levied on the office by recent or proposed national security legislation? For example (but this is not limited to) the Telecommunications Amendment (International Production Orders) Bill 2020 (please list all other national security legislation that has oversight/resourcing implications for the Ombudsman).

- a) Please list the specific FTE and/or funding requirements and what legislation they are tied to if possible.
- b) Please list the agency/mechanisms through which any requested were raised, date, details and response.

Answer: Since December 2019 my Office has been engaging with the Department of Home Affairs and the Attorney-General's Department about the resources it will require to monitor agencies' use of the powers proposed by the Telecommunications Amendment (International Production Orders) Bill 2020.

My Office was also consulted on the potential resourcing impacts of overseeing other functions included in Bills not yet before Parliament.

Question: 4

Senator Kristina Keneally: In a submission to the Inquiry, the IGIS noted 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."

- a) Do you agree with this statement? Why or why not?
- b) Does the Ombudsman's Office have the necessary technical expertise to carry out its role in relation to the Assistance and Access Act and other technical, national security legislation such as the Telecommunications Amendment (International Production Orders) Bill 2020?
- c) Beyond funding, is there, or do you anticipate, other impediments that would prevent you from gaining the qualified staff to carry out these duties? For example, expertise or security clearances?

Answer: We agree that the powers that have been given to law enforcement agencies in recent years tended to be increasingly complex in nature. In turn, this can require oversight agencies to build technical capabilities to properly understand the legal, technical and operational contexts in which the powers are being used.

As with all regimes, it will take my Office time to build knowledge and capability in monitoring new powers such as international production orders. However, we are confident that, with appropriate resourcing and lead in time, we can develop this expertise.

Question: 5

Senator Kristina Keneally: The Ombudsman's written submission noted the intent 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. Home Affairs released Administrative Guidance for agency engagement with DCPs on the use of certain powers under the Act last year.

- a) Was the Ombudsman consulted in the drafting of this guidance? Please provide details.
- b) Does the Ombudsman have any position on its inclusions and suitability for purpose from an oversight perspective?

Answer: The Department of Home Affairs' administrative guidance for agency engagement with designated communications providers contains high level guidance about the administrative processes and best-practice for using the industry assistance powers.

My Office was invited to provide comments/input to the guidance document and did so. Without my Office having reviewed any industry assistance notices, it is difficult to comment on how effective the guidance is in supporting operational compliance.

Question: 6

Senator Kristina Keneally: Is the Ombudsman routinely consulted by Home Affairs in the bill drafting process when the proposed legislation has oversight implications for the office? Please provide specific examples (with dates and detail) over the last two years and any details of engagement specifically on the TOLA draft.

Answer: Consultation by the Department of Home Affairs with the Commonwealth Ombudsman's Office with respect to the TOLA draft Bill was relatively time limited. However, since then, the Department of Home Affairs consulted with my Office on subsequent legislation and we had greater opportunities to comment on proposed oversight functions for this Office.

My Office welcomes the opportunity to provide input when the Department of Home Affairs is developing oversight arrangements proposed for my Office. My Office would also be open to being involved at earlier stages of drafting, when our experience and observations of how agencies use their existing powers might benefit the way new or expanded powers are legislated.

Engagement with the Department of Home Affairs on the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (TOLA)*

Date	Nature of consultation
09/10/2017	The Office’s legal team became aware of the draft Telecommunications and Other Legislation Amendment (Encryption and Other Measures) Bill 2017 and sought a copy from the Attorney-General’s Department (which had responsibility for TOLA at that time).
17/10/2017	Office staff met with officers from the Attorney-General’s Department to discuss the proposed Bill.
10/9/2018	Ombudsman Office provided a submission to the Department of Home Affairs’ consultation on an exposure draft of the TOLA Bill.
27/11/2018	Telephone discussion between Office staff, the Department of Home Affairs and the AFP about the proposed Bill.
1/12/2018 3/12/2018 4/12/2018 6/12/2018	The Department of Home Affairs provided my Office with drafts of the TOLA Bill for comment.

Engagement with the Department of Home Affairs on the Telecommunications Amendment (International Production Orders) Bill 2020 (IPO Bill)

Date	Nature of consultation
19/12/2019	Officers from my Office met with officers from the Department of Home Affairs to hold an initial discussion about the IPO Bill.
09/01/2020	The Department of Home Affairs asked my Office to comment on an “oversight and reporting” discussion paper.
30/01/2020 12/02/2020 19/02/2020 20/02/2020	My Office received drafts of the IPO Bill for comment.

