



Australian Federal Police Association

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Telecommunications (Interception and Access) Amendment Bill 2009

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Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Legislation Committee
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Parliament House
Canberra ACT 2600
Australia

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Dear Madam Chair,

RE: Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Telecommunications (Interception and Access) Amendment Bill 2009*.

It is with pleasure that we present this submission to this Committee's Inquiry into the *Telecommunications (Interception and Access) Bill 2009* on behalf of the members of the Australian Federal Police Association.

The Australian Federal Police Association Branch (AFPA) of the Police Federation of Australia (PFA) strives to enhance the operational capability of the Australian Federal Police (AFP) through representing its people, the law enforcement professionals themselves. The AFPA has industrial coverage of all AFP employees however our role is greater than mere industrial representation. The AFPA has an obligation to ensure that the AFP operates to the best of its capabilities and that our members, as law enforcement and national security professionals, are provided with the tools and protections to perform their duty of protecting Australia and Australians from criminal attack.

The AFPA strongly supports the current and proposed provisions which enable the use of telecommunications intercepts, stored communications and telecommunications data for enforcement of the criminal law, including against corruption. However, beyond the criminal law, it is vital that the community's rights to privacy, which are an essential element of our human rights, are upheld. We argue that there is no justification for legislating on the basis that the rights of persons who happen to be police officers should be of a lesser standard than those of other citizens.

We have made an important recommendation in relation to proposed s63D which will ensure that the Bill does not adversely affect persons employed under the *Australian Federal Police Act 1979*.

Yours faithfully,

Jon Hunt-Sharman
National President
Australian Federal Police Association

Dealing in information for disciplinary purposes (Proposed s63D)

Legislative Concerns

"*police disciplinary proceeding*" under s5 of the Act means:

a disciplinary proceeding, before a tribunal or body that is responsible for disciplining members of the Australian Federal Police or officers of a Police Force of a State, against a member of the Australian Federal Police, or an officer of that Police Force, as the case may be, not being a proceeding by way of a prosecution for an offence.

"*proceeding*" under s5 of the Act means:

- (a) a proceeding or proposed proceeding in a federal court or in a court of a State or Territory;
- (b) a proceeding or proposed proceeding, or a hearing or proposed hearing, before a tribunal in Australia, or before any other body, authority or person in Australia having power to hear or examine evidence; or
- (c) an examination or proposed examination by or before such a tribunal, body, authority or person.

In a letter to the Police Federation of Australia regarding the proposed *Telecommunications (Interception and Access) Amendment Bill 2007* the then Attorney General, the Hon. Phillip Ruddock MP stated:

It should be noted that within the TIA Act, 'police disciplinary proceeding' has a meaning limited by the definition in section 5 of the term 'proceeding', which requires a proceeding or proposed proceeding in the Federal Court, a state or territory court, or a tribunal, authority, body or person having the power to hear or examine evidence. This definition therefore excludes low-level purely internal administrative or managerial actions.¹

Proposed s63D under the *Telecommunications (Interception and Access) Amendment Bill 2009*, refers to 'disciplinary action' and 'disciplinary purposes' and not a 'disciplinary proceeding' as under previous amendments to the Act. In essence, these amendments in their current form will now inappropriately remove the definitional limitation, allowing electronic material to be used for low-level purely internal administrative or managerial actions. The AFPA submits that this is against the spirit of the original legislative amendments and does not balance the privacy of our members against public interests.

Recommendation

The AFPA recommends that proposed s63D should be amended to replace all references to 'disciplinary action' or 'disciplinary purposes' with 'disciplinary proceeding'. This provides express exclusion of low level purely internal administrative and managerial actions, or any investigation and decisions under Part V of the *Australian Federal Police Act 1979* from any dealing in information under proposed s63D.

¹ Submission 4 Attachment, Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the *Telecommunications (Interception and Access) Amendment Bill 2007*, Parliament of Australia (Mark Burgess, CEO Police Federation of Australia).

Rationale

There is the possibility that information dealt with for disciplinary action under s63D, *may include the Professional Standards process* under Part V of the *Australian Federal Police Act 1979*, leading to an unintended and onerous affect on AFP employees.

The *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* repealed the *Australian Federal Police (Discipline) Regulations 1979* and therefore also the disciplinary tribunal under s56 of the *Complaints (Australian Federal Police) Act 1981* which expired in 2005.

The establishment of a replacement AFP Tribunal was recommended by the AFPA in its submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the provisions of the *Law Enforcement Integrity Commissioner Bill 2006*, the *Law Enforcement Integrity Commissioner (Consequential Amendments) Bill 2006* and the *Law Enforcement (AFP Professional Standards and Related Measures) Bill 2006* and the submission to the Senate Education Employment and Workplace Relations Legislation Committee Inquiry into the *Fair Work Bill 2008*.

Despite the recommendations of the AFPA and of Justice Fisher in *A Review of Professional Standards in the Australian Federal Police* (the Fisher review), there is still no legislated internal appeal for non-reviewable matters and there is no external independent review of matters with punitive outcomes, other than a breach of the rules that may apply to termination under the *Fair Work Act 2009* with respect to a s28 termination of employment under the *Australian Federal Police Act 1979*.

The net result for AFP employees would be that the dealing of such information for disciplinary purposes, if used in an investigation under Part V of the *Australian Federal Police Act 1979*, may lead to a non-reviewable outcome with a punitive action. This unfairly impacts on those employed under the AFP Act compared with Commonwealth public sector employees, who are able to seek merit review as well as judicial review of disciplinary action taken using this evidence.

Inadequate Protections for AFP employees – s63D(4)

The Explanatory Memorandum to the Bill states:

Network protection information will only be able to be communicated or used for disciplinary purposes by Commonwealth agencies, security authorities and eligible authorities as defined under the TIA Act...Additional protections for workers in these agencies and authorities will be inserted in this Bill.'

This limitation [s63D(4)] further protects workers in agencies and authorities covered by these provisions by ensuring that their employer cannot circumvent any relevant Commonwealth, State or Territory workplace relations requirements or workplace surveillance laws by accessing information under the TIA Act.

The 2nd Reading Speech to the Bill states:

...there is a real risk that information can be used inappropriately against network users. The network protection regime set out in this Bill clearly addresses this gap providing specific direction to all network owners and operators about the circumstances in which communications can be accessed for the purposes of network protection activities and the legitimate purposes for which information can be used.

Further aggravating the disparity in the application of this Bill, is that the basic protection in s63D(4) may not apply to AFP employees.

Section 63D(4) prevents a person communicating or making use of information intercepted under subsection (2) if the person would contravene another law of the Commonwealth, State or Territory.

While the purpose of s63D(4) is to provide protection for workers in agencies covered by Commonwealth, State or Territory workplace relations requirements, it is ambiguous whether AFP employees would receive any protection from this provision.

This is because the legislative process under Part V of the Australian Federal Police Act 1979 pertains to the discipline of the AFP.

As the Hon. William Kenneth Fisher AO QC explained in the *Fisher Review*:

This distinction between the Commissioner's employment and command powers also defines the boundary between employment issues covered by the Workplace Relations Act 1996(Cth) and command issues covered by the AFP Act which are not so reviewable. The Workplace Relations Act 1996 (Cth) applies only to employment decisions but does not apply to the Commissioners command powers or the discipline of the AFP.²

The fact that this protection will not apply to AFP employees in relation to provisions of the *Fair Work Act 2009* further supports the AFPA's argument that this Bill should be amended to ensure any dealing in information under s63D applies only for 'disciplinary proceedings', and not the broader undefined terms 'disciplinary action' and+ 'disciplinary purposes'.

The AFPA's recommended amendment will ensure that s63D of the Bill only relates to cases where an independent body will have the power to hear or examine the evidence presented under oath. This will ensure that the Bill is consistent in relation to the purpose that such network material can be used without warrant.

² A Review of Professional Standards in the Australian Federal Police, February 2003, 19.