



Submission No 10

Inquiry into potential reforms of National Security Legislation

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The Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

BY EMAIL AND POST

Dear Sir

Inquiry into potential reforms of national security legislation

I refer to your letter of 9 July 2012 received on 17 July and, as the Inspector of the Independent Commission against Corruption of NSW, wish to make submissions in relation to the following terms of reference:

- 3) The Committee should have regard to whether the proposed responses:
 - a) contain appropriate safeguards for protecting the human rights and privacy of individuals and are proportionate to any threat to national security and the security of the Australian private sector.

Telecommunications (Interception and Access) Act 1979

1. Strengthening the safeguards and privacy protections under the lawful access to communications regime in the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

The role of the Inspector of the Independent Commission Against Corruption of NSW (Inspector of the ICAC) was established in 2005 with the inclusion of Part 5A of the *Independent Commission Against Corruption Act 1988 (NSW)* (the ICAC Act) to provide a means of monitoring the extensive and intrusive powers of the ICAC so as to ensure that its use of those powers are appropriate for achieving its objectives.

To enable this to be done the Inspector is required under section 57B (1)(a) of the ICAC Act "to audit the operations of the Commission for the purpose of monitoring compliance with the law of the state" and, under section 57B (1)(d), "to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities".

Under section 57C the Inspector:

- (a) may investigate any aspect of the Commission's operations or any conduct of officers of the Commission,
- (b) is entitled to full access to the records of the Commission and to take or have copies made of any of them,
- (c) may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and
- (d) may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission.

My attempt to conduct an audit of the ICAC's applications for and use of information from warrants and intercepts made under the provisions of the TIA Act were met by the justified response of the Commissioner that the TIA Act places stringent restrictions on access to material prepared for or obtained under its warrant provisions and that the provisions of such material to the Inspector for the purpose of a general audits are probably outside the scope of the exception in the TIA Act that allows access by the Inspector.

This view was confirmed by an advice received from the Senior Legal Officer, Telecommunications and Surveillance Law Branch, National Security Law and Policy Division of the Commonwealth Attorney General's Department. The officer's advice concluded that the TIA Act would enable the Commission to provide the Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct had occurred.

The difficulty that now confronts the Office of the Inspector is that it is prohibited by the current wording of paragraph (eb) of section 68 from conducting such an audit.

The obtaining of a warrant and subsequent interception pursuant to the TIA Act are normally unknown to the person(s) who is the object of the warrant and interception. It is therefore only in rare circumstances that a complaint would be received from such a person(s).

Although the TIA Act places obligations upon the NSW Ombudsman, those obligations are limited to ensuring compliance with legal requirements and the keeping of records. The NSW Ombudsman does not check to see whether those powers are being exercised appropriately.

Thus, a warrant and interception under the TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but for personal purposes unrelated to those objectives. It is for this reason, among others, that the exercise by the Inspector of its powers of audit have been considered by the NSW legislature to be so important.

The ICAC Act vests in the Inspector powers which provide safeguards for protecting the human rights and privacy of individuals and strengthening the safeguards and privacy protections under the lawful access to communications regime in the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) – both matters included in your Committee’s Terms of Reference.

The current form of the TIA Act, however, impedes the Inspector from exercising those powers.

It is, therefore, respectfully submitted that the TIA Act be amended to enable the Inspector of the ICAC to conduct an audit of the ICAC’s applications for and use of information from warrants and intercepts made under the provisions of the TIA Act. This could be achieved by amending section 68(eb) of the TIA Act to the following effect:

(eb) if the information relates, or appears to relate, to a matter that may give rise to an investigation or audit pursuant to section 57B of the Independent Commission Against Corruption Act 1988 (NSW) by the Inspector of the Independent Commission Against Corruption - to the Inspector of the Independent Commission Against Corruption.

Please let me know if any further information is required.

Yours sincerely

Harvey Cooper AM
Inspector