

Ms Jackie Morris  
Committee Secretary  
Senate Legal and Constitutional Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Ms Morris

**Comments from the NSW Ombudsman on changes to telecommunications legislation**

Thank you for your invitation by email to make a submission to the inquiry into the Telecommunications (Interception and Access) Amendment Bill 2007.

First, I should explain that under Part 8A of the *Police Act 1990* (NSW), the NSW Police Force is primarily responsible for investigating complaints about police officers. The Ombudsman provides independent scrutiny of complaints involving allegations of serious misconduct, including criminal conduct. In deciding whether the NSW Police Force has properly conducted an investigation, we consider a number of factors, including whether the investigator has addressed the key issues, interviewed key witnesses and explored appropriate lines of inquiry, and reached reasonable findings on the available evidence. Division 6 of Part 8A of the *Police Act* provides that as soon as practicable after the investigation of a complaint has been concluded and a report of the investigation finalised, the Commissioner of Police must provide the Ombudsman with a copy of the finalised report. For the purpose of determining whether a complaint has been properly dealt with, the Ombudsman can request documentary or other information relating to the investigation of the complaint.

In February 2007, Assistant Commissioner Catherine Burn of the NSW Police Force Professional Standards Command provided me with the NSW Police Force's suggested amendments to the draft bill (see attached). These included that:

- proposed section 178 provide for authorisations for access to existing information relating to investigations into police misconduct under Part 8A of the *Police Act*
- proposed section 180 provide for authorisations for access to prospective information relating to investigations into police misconduct under Part 8A of the *Police Act*
- proposed section 184 (now proposed section 182) provide for the use and disclosure of information relating to investigations into police misconduct under Part 8A of the *Police Act*, and that the NSW Police Force be allowed to disclose this information to

oversight agencies, in particular the NSW Ombudsman and the Police Integrity Commission, and

- the NSW Police Force be permitted to communicate, make use of or record lawfully accessed information and stored communications warrant information in relation to investigations into police misconduct under Part 8A of the *Police Act*.

On 12 March 2007 I wrote to Mr Jonathan Curtis, Director, Legislation and Strategic Development Branch, Telecommunications and Surveillance Law Branch, Attorney General's Department indicating my support for the above proposals. I note they appear not to have been included in the Telecommunications (Interception and Access) Amendment Bill 2007 and I would like to indicate my support for them again.

#### Provision of call charge records and reverse call charge records

I would also like to draw your attention to the current practice of the NSW Police Force not to provide the Ombudsman's office with call charge or reverse call charge records.

In January 2007 the NSW Police Force provided us with an investigation report, which referred to the use of call charge records and the police analysis of those records, but did not attach the actual records. When we requested a copy of the records, police advised that the Commonwealth telecommunications legislation prevented them from being able to provide the records to the Ombudsman.

While police investigators may rely on records such as call charge records and reverse call charge records in the investigation of a Part 8A complaint, it is not clear that this information can legally be provided to the Ombudsman. Depending on the other evidence available, the failure of the NSW Police Force to provide such information may prevent this office from being able to discharge its functions fairly and effectively.

For this reason, we suggest that the legislation be amended to ensure the NSW Police Force is able to provide the Ombudsman with all relevant investigation documents.

#### Use of intercepted material in police discipline matters

A further issue we would like to raise is the current limitation on using intercepted material in police discipline matters.

There has been considerable discussion in recent years about whether the NSW Police Force could legally provide this office with telecommunications intercept material. Currently, police do provide the Ombudsman with intercepted material, a practice which was adopted following consultation with the Security and Critical Infrastructure Division of the Commonwealth Attorney General's Department. Intercepted material is handled by this office in accordance with the requirements of the *Telecommunications (Interception and Access) Act* and the Ombudsman's own business rules on the proper handling of intercepted material.

There has also been some discussion about whether senior police officers should be able to use intercepted material in deciding disciplinary action arising from misconduct, where the disciplinary action falls short of terminating the officer's employment. As currently drafted, the legislation permits the use of intercepted material in relation to proceedings for removing officers under section 181D of the *Police Act*. However, there is no provision permitting the use of intercepted material in deciding disciplinary action other than termination of

employment. For example, there is no provision permitting use of intercepted material where a reduction in rank would be appropriate, although this action would only be taken where an officer is found to have engaged in serious misconduct.

The *Telecommunications (Interception and Access) Act* clearly intends that intercepted material should be subject to strict controls and should only be used in serious matters. However, in our view it is not clear why intercepted material can be used in matters where police officers are removed, but cannot be used in matters where serious disciplinary action is necessary but removal is not warranted. For this reason, we would support changes to the legislation to permit the wider use of intercepted material in police discipline matters.

Restriction on disclosure by Ombudsman's office

I note that Ombudsman officers are generally prohibited from disclosing information obtained in the course of office, by the *Ombudsman Act* and the *Privacy and Personal Information Act 1998*. This is in addition to the requirements of the Commonwealth telecommunications legislation.

If there are any matters you would like to discuss, please contact Katrina Sanders on 02 9286 1000.

Yours sincerely

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Simon Cohen  
Assistant Ombudsman