



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into the Integrity Commission
Amendment Bill 2022 (No 2)

Submission Number: 002

Date Authorised for Publication: 07 December 2022

Integrity Commission Amendment Bill 2022 (No 2) – submission by the ACT Integrity Commission

Executive summary

This Bill represents a crucial step in the Commission gaining recognition under the *Telecommunications (Interception and Access) Act 1979* (Cth) ('**TIA Act**'), and in turn, access to vital forensic tools for the thorough investigation and exposure of corruption in the Territory.

However, it is submitted that a 'public interest monitor' role, as contemplated by the Bill, is not necessary or desirable. The TIA Act already contains a longstanding, extensive and rigorous oversight framework that applies to every agency that accesses its powers. Furthermore, the Territory already permits interception warrants to be granted and used against its citizens by ACT Policing. There does not appear to be any evidence that human rights concerns have been raised in relation to this frequent reliance on the TIA Act, such as would suggest that the introduction of a public interest monitor role in relation to the Commission is necessary.

If the Assembly determines that a public interest monitor role is required, then the role ought be separate from that of the Inspector to the Commission. The present proposal collapses three distinct functions and bestows them on one entity, the Commonwealth Ombudsman/ACT Inspector. This creates an inevitable conflict between operational involvement on the one hand and scrutiny of operations on the other. Structural separation of the public interest monitor role from the agency's general oversight, and TIA Act compliance, is a feature of all other Australian jurisdictions that have a public interest monitor.

The Bill must also be consistent with the TIA Act. While Territory legislation will always cede to a Commonwealth Act to the extent of any conflict, for the avoidance of doubt (and to prevent any inadvertent unlawful disclosure of information, among other things), suggestions for clarifying amendments are set out below.

A number of other suggestions for amendments are also made, with a view to making the proposals consistent with the *Integrity Commission Act 2018* ('**Act**') and/or more functional.

The Commission needs telecommunications interception powers

This Bill provides the necessary Territory legislative framework that is a precondition to the Commission gaining recognition in the TIA Act. The investigatory tools accessible through the TIA Act (via lawfully granted warrants and permissions) are of crucial importance to enabling the Commission to adequately investigate corrupt conduct in the Territory.

The Commission does not repeat here the arguments in favour of that position. Those arguments have appeared in the Commission's Annual Reports for 2019-2020, 2020-2021 and 2021-2022. They have also been articulated in submissions provided to the Chief Minister and his Directorate. However, should submissions on this topic be considered helpful in the Assembly's consideration of this Bill, further submissions can be provided.

A ‘public interest monitor’ is not required or desirable

The Commission submits that a ‘public interest monitor’ role, as contemplated by proposed subdivision 3.5.4A.2, is not necessary or desirable.

The TIA Act already contains a longstanding, extensive and rigorous oversight framework that applies to every agency that accesses its powers. While two States (Victoria and Queensland) do have a public interest monitor, this is, in effect, duplicates the role of the Judge or Tribunal member, who is already charged with the responsibility of considering and determining whether the relevant human rights considerations have been appropriately addressed in the application with little or no practical benefit. In effect, s 46 (in relation to the issue of a warrant relating to the investigation of one or more serious offence, which may be considered the general template for all Part 2.5 warrant applications), specifies all the relevant human rights and policy considerations and requires them to be taken into account by the Judge or Tribunal member (see Attachment A). There is also an extensive and intrusive scheme of oversight by the Commonwealth Ombudsman under Chapter 4A of the TIA Act. This structure significantly exceeds the requirements attaching to obtaining search and electronic surveillance warrants, which involve substantial interference with both privacy and physical as well as personal integrity. It is difficult to see how, in principle, telecommunication interception (covert in the same way as electronic surveillance) raises human rights considerations such as to require a substantial change of procedure by the interposition of a public interest monitor.

Furthermore, the Territory already permits interception warrants to be granted and used against its citizens by ACT Policing. ACT Policing officers can apply for those warrants under the auspices of the Australian Federal Police (which is not subject to the public interest monitor system), but in connection with Territory offences. As a result, Territory citizens are frequently subjected to these intrusive powers as an ordinary part of law enforcement in this jurisdiction. In light of such a tight framework of protections it was to have been expected that there would be no cause for valid human rights complaint, and indeed the Commission is not aware of any human rights concerns having been raised in relation to ACT Policing’s reliance on the TIA Act to date. While past experience is no guarantee of future performance, it is reasonable to presume that there remains no reasonable prospect that the introduction of a public interest monitor role would be practically advantageous when interception is sought by the Commission.

Likewise, there is no evidence that the issuing authorities, who have judicial independence, have ever failed to appropriately weigh the statutory criteria in accordance with their duty, or that the interposition of a public interest monitor is likely to provide any practical assistance to them in that task.

In short, the need for additional resources to cope with the public interest monitor’s involvement and the procedures necessary to enable their interrogative role adds an additional burden to an already (appropriately) burdensome framework with little demonstrable advantage.

For completeness, the Commission notes that in the two jurisdictions where there is a public interest monitor – Victoria and Queensland – the role applies equally to the integrity agencies and police services.

While ultimately it will be a matter for Government, should the Assembly maintain the view that a public interest monitor type role is required, the additional costs associated with resourcing the monitor, the Inspector and the Commission — to handle all the additional compliance obligations that would arise — would appear to be questionable.

Any public interest monitor should not also be the Inspector

Should the Assembly remain of the view that a public interest monitor role is required, then the role ought be separate and distinct from that of the Inspector to the Commission. The present proposal collapses three distinct functions and bestows them on one entity, the Commonwealth Ombudsman. This is not appropriate for the following reasons –

- (1) The Commonwealth Ombudsman has oversight of the TIA Act and agencies' use and handling of information and data acquired under it. If the Commission gains recognition under the TIA Act, it will be subject to the Commonwealth Ombudsman's rigorous scrutiny in the same way as all other agencies.
- (2) The Commonwealth Ombudsman is also the Inspector of the Commission (due to their parallel role as ACT Ombudsman, in conjunction with s 229 of the Act). The Inspector's present role is, in essence, to oversee the Commission's activities under the Act. This is an 'after the fact' scrutiny role, and does not require (nor would it be appropriate for) the Commission, for example, to seek the Inspector's involvement in the discharge of its operational functions.
- (3) If the Inspector were to perform the public interest monitor role, this would involve them actively in the making of operational decisions which, as Commonwealth Ombudsman, they would have to consider under the supervisory role provided in the TIA Act. And, as Inspector, they might have to evaluate these same operational decisions if a complaint were made under the Act or it was otherwise necessary for the matter to be considered pursuant to their wider role under the Act.

The Commission submits there is in principle a necessary and highly inappropriate conflict between operational involvement on the one hand and scrutiny of operations on the other. While the proposed clause 137Q, appears intended to provide some separation between the Inspector's performance of 'inspectorate' functions as distinct from 'public interest monitor' type functions, this is insufficient to remedy this problem. Amongst other reasons, the application for an interception warrant could only take place in the context of an ongoing investigation and, thus, the monitor's involvement would not be limited to the application itself but must inevitably engage with the operational elements of the investigation itself. Moreover, the investigation – and the application for the warrant in respect of it – is very likely to reflect approaches taken in other investigations. The proposed solution in clause 137Q does not, therefore, resolve in any substantial or practical way the problem of conflict between operational involvement on the one hand and scrutiny on the other. Furthermore, there are other instances where the information sharing provisions (which by logical extension, capture information obtained in the 'public interest monitor role'), effectively merge the roles – see for example, clause 137Y.

Structural separation of the public interest monitor role from the agency's general oversight, and TIA Act compliance, is a feature of all other Australian jurisdictions that have a public interest monitor. In particular, in Victoria, the Inspectorate is an independent statutory office that oversees the Independent Broad-based Anti-Corruption Commission ('**IBAC**') and its officers. The Commonwealth Ombudsman performs their usual role of oversight in relation to the TIA Act. However, significantly, the Public Interest Monitor performs, in respect of the IBAC, all the functions contained in proposed new subdivision 3.5.4A.2 and presently assigned to this Commission's Inspector (see Part 1A of the *Telecommunications (Interception) (State Provisions) Act 1988* (VIC) ('**Victorian Act**'). In short, in relation to telecommunications interception, the IBAC answers to three separate and distinct oversight bodies, each of which have a unique role, but combined cover the necessary field. The position is the same in Queensland, where there is a separate Public Interest Monitor (see Part 2 of the *Telecommunications Interception Act 2009* (Qld) ('**Queensland**

Act') in particular) that engages with applications made by the Crime and Corruption Commission ('CCC'). Again, the Queensland Public Interest Monitor is distinct and independent from the Parliamentary Inspector of the CCC and the Commonwealth Ombudsman.

Accordingly, should the Assembly remain of the view that there is a need for a public interest monitor role in relation to Commission applications under Part 2.5 of the TIA Act, then a structural separation of the kind that exists in Victoria and Queensland ought be adopted. It is submitted that there is no valid reason to depart from those models. Significant public policy concerns attach to the proposal in the Bill in its present form that conflate and collapse three roles into one body.

The Bill must be consistent with the Commonwealth legislation

Applicants under the TIA Act are broader than 'investigators'

The TIA Act, particularly in Part 2.5, refers to an 'agency' as the applicant in the context of warrant applications, rather than 'investigators'. In the context of the role of the Victorian and Queensland 'public interest monitors' the TIA Act refers to 'persons' making applications on behalf of relevant agencies (rather than 'investigators'). Furthermore, in section 5 of the TIA Act, a broad definition of 'officer' of specified kinds of (relevant) agencies is provided, which includes a member of staff of the various integrity/anti-corruption agencies in Australia. The Bill should adopt similar general language, rather than confining key roles to an 'investigator' of the Commission.

Further suggestions for amendment in relation to the class of warrant applicants are set out below.

Disclosure of information by the Inspector is limited by the TIA Act

Clause 137U of the Bill confers on the Inspector extensive powers of entry and broad powers to obtain information for the purposes of inspecting the Commission's TIA interception records. A note in clause 137U provides:

Note The inspector may disclose information to certain entities if it is relevant to the exercise of the entity's functions and the inspector considers it appropriate (see s 274).

Section 274 empowers the Inspector to disclose information in a broad set of circumstances, and to a wide audience. The Commission considers this extension of s 274 to be impermissibly broad, and in conflict with the strict disclosure regime contained in Part 2.6 of the TIA Act (see s 63 in particular). While Territory legislation will always cede to a Commonwealth Act to the extent of any conflict, for the avoidance of doubt (and to prevent any inadvertent unlawful disclosure) section 274 ought be amended to make it clear that the TIA Act restrictions prevail.

Disclosure by others is limited by the TIA Act

Clause 137ZA of the Bill creates an offence for unauthorised disclosure of information received under the 'division' (ie the new sections to be inserted into the Act if s 4 of the Bill is enacted).

The Commission considers that clause 137ZA suffers from some ambiguity in language in relation to its application to anyone who 'receives or obtains information or a record because of **the administration of this**

division’ (emphasis added). It is not sufficiently clear what is intended by ‘administration of this division’ and precisely who it applies to. For completeness, the Commission notes that comparable legislation uses similar but significantly different phraseology: in Victoria the equivalent provision (s 22) appears confined to persons under ‘the Minister’s administration’ and in Queensland the section refers to a ‘person ... engaged in the administration of this Act’ (s 34).

This ambiguity assumes greater importance when this clause is considered in light of the TIA Act, with which it appears to be in conflict. In particular, paragraph 137ZA(2)(b) could be potentially incompatible with the Commonwealth restrictions on information disclosure contained in Part 2.6 of the TIA Act (see s 63 in particular). A person’s ‘performance of [their] functions under this Act’ encompasses the entirety of the Act and is necessarily broader in scope than telecommunications interception alone. As a result, there will be instances where a function under the Act will be outside what the TIA Act concerns or permits in relation to disclosure. While a Territory provision will always be read down to the extent of any inconsistency with a Commonwealth instrument, it would be preferable for this clause to be amended to make it clear that a permitted disclosure is ultimately determined by the parameters of the TIA Act.

Miscellaneous

Expansion of applicants for telecommunications warrants

The proposed new subdivision 3.5.4A.2 applies where an ‘investigator’ intends to apply for a Part 2.5 warrant on behalf of the Commission (per clause 137D). The Commission submits the use of the term ‘investigator’ to be too narrow in this context. The Commission suggests that the term be replaced with either ‘the Commissioner or staff of the commission’ (which would then, by the operation of existing s.47 of the Act, include the CEO, staff, consultants and contractors) or ‘officer of the Commission’ with an accompanying new definition to be included to ensure that the Commissioner is captured as well as relevant staff of the Commission. This change is suggested because ‘investigator’ is too limiting, and would exclude a lawyer of the Commission making an application on the Commission’s behalf. It would also potentially (and presumably inadvertently) establish a separate system from that where the Commissioner (as the embodiment of the Commission) intended to make the application themselves. Furthermore, ‘investigator’ has a technical meaning in the Act and requires a specific appointment (per s 113) – it is not a general term or classification that flows from employment into an investigatory role at the Commission.

The Commission notes that the equivalent Victorian and Queensland legislation use the more general term of ‘officer’ (s 4 of the Victorian Act and s 6 of the Queensland Act). Furthermore, the Victorian Act includes a broad definition of ‘officer’ that includes the Commissioners, staff and consultants.

If this suggestion were accepted, then consequential substitutions would need to be made to various sections in the proposed new subdivision 3.5.4A.2.

Using the more general language of ‘issuing authority’ would be beneficial

The Bill contains several references to the class of persons who are empowered to issue warrants under Part 2.5 of the TIA Act. In the Bill (and also the Queensland legislation) the phrase ‘eligible Judge or nominated AAT member’ is used. By contrast, the Victorian legislation uses the phrase ‘issuing authority’. Given that the class of persons who may be issuing authorities is presently under consideration at the Federal level, it may be beneficial to adopt the more general Victorian legislation language, so that an amendment at the ACT level is not required in the near future.

Meaning of ‘staff’ in clauses 137K(1)(f) and 137L(a)(ii) needs to encompass the Commissioner

Clause 137K deals with the making and maintenance of records concerning communications of material obtained via a Part 2.5 TIA Act warrant. Clause 137(1)(f) concerns ‘each communication of lawfully intercepted information by a member of staff of the commission to a person or entity other than a member of staff of the commission’. Under the Act, the Commissioner is not encapsulated within the definition of ‘staff of the Commission’. Therefore, this provision would impose a recording obligation every time a member of staff communicated something to the Commissioner. It seems unlikely that this is what was intended (especially given that the warrant would have been obtained on the Commissioner’s behalf, and the Commissioner is the embodiment of the Commission). Accordingly, the Commission submits that this provision ought be amended to ensure that the Commissioner is not treated as a person external to the Commission.

A consequential amendment to clause 137L(a)(ii) would also be required.

Clause 137P may be unnecessary due to the extant role of the Commonwealth Minister

Clause 137P provides that the Commissioner must not allow a restricted record to be destroyed under section 137O unless—

- (a) the Commissioner has received the requisite written notice under the TIA Act from the Commonwealth that the relevant entry in the General Register (relating to the warrant under which the restricted record was obtained) has been inspected by the Commonwealth Minister; and
- (b) the Commissioner has notified the Inspector that the Commissioner intends to destroy the record and given the Inspector an opportunity to inspect the record.

Paragraph (a) operates by virtue of the current provisions of the TIA Act. However, paragraph (b) creates an additional obligation, being one which is not imposed in other comparable situations, for example on the IBAC.

The Commission queries the necessity of clause 137P(b) given the oversight regime that already operates at the Commonwealth level, and which engages the Commonwealth Ombudsman (who has responsibility for monitoring and scrutinising the storage and destruction of such records).

Distribution list for inspection reports to Speaker may need to be narrowed

Clause 137S in the Bill provides that the Inspector must give inspection reports to the Speaker on an annual basis. The Inspector can also give additional ad hoc inspection reports to the Speaker, as well as when requested by the Speaker. The Inspector must give the information in such reports (other than lawfully intercepted information or interception warrant information) to both the Commissioner and the relevant Assembly Committee (which is presumed to be the Justice and Community Safety Committee).

The Victorian Act contains a similar provision (at s 15), but limits the distribution list to the IBAC Commissioner and the State Attorney-General. The position in Queensland in relation to the CCC is more reflective of what is proposed in the Bill, with distribution to the CCC Commissioner and the relevant Parliamentary Committee (s 24).

The Commission raises for consideration whether the wider distribution group of the Assembly Committee – which is naturally composed of several individuals – is the most appropriate option given the inherent sensitivity of the information, and whether the Attorney-General would be preferable.

Notice ought be given before entering premises

Clause 137U of the Bill governs the circumstances and manner in which the Inspector may conduct an inspection of the Commission's records (under the relevant subdivision). In particular, it provides that the Inspector may enter the Commission's premises at any reasonable time. No provision is made for notice to be given to the Commissioner in advance. By contrast, s 18(1) of the Victorian Act provides that the IBAC's Inspector may enter the IBAC premises at any reasonable time after notice has been given to the IBAC Commissioner. Section 26 of the Queensland Act enshrines an equivalent for the CCC Commissioner. The Commission requests that a similar notice requirement be included in the Bill.

ACT Integrity Commission

28 November 2022

Attachment A

The TIA Act enshrines a raft of protections to ensure that rights and liberties of Australian citizens are not unduly impinged, including the right to privacy. This is because a Part 2.5 warrant decision-maker (either an eligible Judge or a member of the Administrative Appeals Tribunal ('AAT')) must reach a high level of satisfaction that the warrant ought be issued before granting it. Furthermore, the TIA Act requires the decision-maker to advert expressly to a range of criteria in order to be satisfied the warrant is appropriate. For example, in s 46 of the TIA Act, which governs the issue of a warrant relating to the investigation of one or more serious offence (and which may be considered the general template for all Part 2.5 warrant applications), the Judge or AAT member must be satisfied of **all** of the following:

- (a) the **procedural requirements** of an application (as dictated by Division 3 of Part 2.5) **have been met**;
- (b) **in the case of a telephone application**—because of urgent circumstances, **it was necessary** to make the application by telephone;
- (c) there are **reasonable grounds for suspecting that a particular person is using**, or is likely to use, **the service**;
- (d) **information** that would be likely to be obtained by intercepting under a warrant communications made to or from the service **would be likely to assist in connection with the investigation** by the agency of a serious offence, or serious offences, in which:
 - (i) the particular person is involved; or
 - (ii) another person is involved with whom the particular person is likely to communicate using the service; and
- (e) **having regard to the matters referred to in subsection (2), and to no other matters**, the Judge or nominated AAT member **should issue a warrant** authorising such communications to be intercepted (emphasis added).

Section 46(2) establishes a balancing test, whereby the decision-maker must weigh the benefits of granting the warrant (ie the public interest in the proper and thorough investigation of serious crime) against the impact on individuals' privacy. In particular, the decision-maker **must** consider **all** of the following:

- (a) how much the privacy of any person or persons would be likely to be interfered with;
- (b) the gravity of the conduct constituting the offence(s) being investigated;
- (c) how much the information likely to be obtained would be likely to assist in connection with the investigation of the offence(s);
- (d) to what extent methods of investigating the offence(s) that do not involve interception have been used by, or are available to, the agency;
- (e) how much the use of such methods would be likely to assist in connection with the investigation;
- (f) how much the use of such methods would be likely to prejudice the investigation of the offence(s), whether because of delay or for any other reason; and

(g) in the case only of Victorian and Queensland applications, any submissions as to these matters

(h) made by the relevant public interest monitor.

All of these criteria (and no others) must be considered by the decision-maker in assessing whether the warrant ought be issued.

Extra criteria must also be met for warrants to which s 46(1)(d)(ii) applies (known as 'Party B' warrants), per s 46(3).