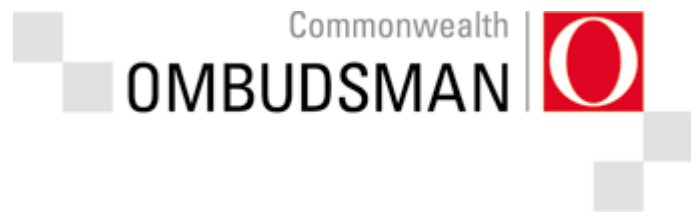


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Submission by the
Commonwealth Ombudsman

**Inquiry into the Telecommunications
(Interception and Access) Amendment
(Data Retention) Bill 2014**

Submission by the Commonwealth Ombudsman, Colin Neave

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1 Introduction

On 27 November 2014 the Parliamentary Joint Committee on Intelligence and Security commenced its inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the Bill). In addition to the implementation of a mandatory telecommunications data retention regime, the Bill proposes amendments to Chapters 3 and 4 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) regarding the Commonwealth Ombudsman's oversight arrangements. Under the proposed provisions, the Commonwealth Ombudsman will be responsible for providing independent oversight of agencies' activities through inspecting their records in order to provide assurance as to whether agencies have lawfully applied their powers under Chapters 3 and 4 of the TIA Act.

I welcome these proposed amendments to the Commonwealth Ombudsman's oversight arrangements. My office has the experience and expertise to not only perform the proposed statutory oversight functions under Chapters 3 and 4 but to investigate any broader systemic issues. We also have an established productive working relationship with agencies involved. However, if my office is not appropriately resourced, we will be unable to perform these functions. For any new or expanded oversight function, it is critical that my office is resourced to discharge its legislative responsibilities to Parliament.

As with other government agencies, during the past three years my office has experienced a noticeable reduction in staff, by approximately 20 per cent. However I am concerned that this reduction has coincided with my office being prescribed additional statutory oversight functions without funding, as has occurred for preservation notices under Chapter 3 of the TIA Act and delayed notification search warrants under Part IAAA of the *Crimes Act 1914*. I have also recently been appointed as the Norfolk Island Ombudsman without additional resources.

If my office continues to be prescribed statutory oversight functions without funding, this will reduce the level of assurance we can provide in overseeing covert and intrusive powers, as well as impacting on my office's ability to discharge its statutory responsibilities and investigate matters of administration regarding Commonwealth agencies.

The role of the Commonwealth Ombudsman has been cited as one of the safeguards integrated into this Bill, such as a safeguard against unnecessary interference with a person's privacy. I agree that this is one of the functions of the Commonwealth Ombudsman in providing independent oversight of agencies' covert and intrusive activities. My office is able to fulfil these roles, but it will need to be appropriately resourced to do so.

My submission addresses the following issues:

- 1) the impact of the proposed amendments on my office;
- 2) a broad outline of how my office conducts inspections and reports on agencies' use of covert and intrusive powers, in light of the Committee's focus on the proposed oversight arrangements; and
- 3) our proposed proactive approach to telecommunications data inspections under Chapter 4 of the TIA Act.

Additionally, I would like to emphasise the importance of legislative clarity as it has been my office's experience that legislative ambiguity can negatively impact our ability to assess

compliance with legislation. Therefore, clarity of key definitions, such as those surrounding telecommunications data, will be necessary for my office to perform the proposed oversight function under Chapter 4.

2 The impact of the proposed amendments on the Office of the Commonwealth Ombudsman

There are two proposed amendments to the TIA Act that, if passed, will have significant impact on my office and its oversight role under the TIA Act, namely:

- the expanded oversight function regarding access to stored communications under Chapter 3 of the TIA Act; and
- the proposed new oversight function regarding access to telecommunications data under Chapter 4 of the TIA Act.

My office has the experience and expertise to perform the proposed roles, based on our current legislative oversight responsibilities. In addition to the two oversight functions currently performed under the TIA Act, namely under Chapter 2 (telecommunications interceptions) and Chapter 3 (preservation notices and stored communications access), my office is responsible for inspecting the records of, and reporting on, agencies' use of intrusive, covert and coercive powers under the:

- *Surveillance Devices Act 2004*
- Part IAB of the *Crimes Act 1914*
- Part IAAA of the *Crimes Act 1914*
- *Fair Work (Building Industry) Act 2012*
- *Crimes (Surveillance Devices) Act 2010* (ACT)
- *Crimes (Controlled Operations) Act 2008* (ACT).

The Bill proposes to change the emphasis of some of the oversight arrangements under the TIA Act by requiring the Commonwealth Ombudsman to assess agency compliance with the regimes under Chapter 3 (stored communications access) and Chapter 4 (access to telecommunications data) as a whole, rather than specific provisions. Currently the Commonwealth Ombudsman is only required to determine agency compliance with certain record keeping and destruction provisions under the TIA Act. However, as the TIA Act also provides that the Ombudsman may report to the Minister (the Commonwealth Attorney-General) on any other contravention, we also currently assess the veracity of the records we are required to inspect and confirm that agencies have in place processes to ensure that they are only dealing with lawfully intercepted and accessed information. The Bill's proposal to require the Commonwealth Ombudsman to assess compliance with the regimes as a whole provides for more robust oversight and greater assurance. Furthermore, the proposed provisions in the Bill align with the requirements of my other, more recently prescribed oversight functions, such as those listed above.

The Bill also proposes that the Ombudsman's report on the results of Chapters 3 and 4 inspections must be tabled in Parliament by the Minister, thus making the report publicly available. Currently there is no requirement for the Minister to table in Parliament the Commonwealth Ombudsman's reports on the results of our inspections of each agency's stored communications records under Chapter 3 of the TIA Act. This differs from the reporting arrangements under the *Surveillance Devices Act 2004* and the *Crimes Act 1914*, where the relevant Minister is required to table my reports in Parliament. As the purpose of an independent oversight mechanism is to increase accountability and transparency and to

maintain public confidence in agencies' use of covert and intrusive powers, I support the proposed reporting requirements in the Bill.

The proposed functions, if passed, will significantly increase our workload in inspecting agencies' use of covert and intrusive powers. These expanded and new functions include inspections of Commonwealth, state and territory agencies. The powers under Chapter 4 are frequently used and there is a trend of increasing use of powers under Chapter 3 of the TIA Act. In terms of inspections under Chapter 4, it is anticipated that the total number of days my officers will spend on inspections will be double of that of our current inspection days. It is important to note that this number of days does not include other key elements of our oversight such as the ongoing familiarisation with agencies' procedures and risk assessments, meeting our statutory reporting obligations, and providing the expected level of assurance to Parliament on the functioning of the regime. These estimates are based on the prescribed agencies proposed under the Bill and do not take into account additional agencies that may be declared by the Minister as eligible to use the powers under Chapter 4.

3 Our approach to inspections relating to the use of covert and intrusive powers

I note that the Committee is focusing on the proposed oversight arrangements under the Bill in conducting its inquiry. To assist the committee in its considerations, I have provided a broad outline of my office's approach to inspections.

If the Bill is passed, our approach to the new oversight function under Chapter 4 would be similar to how my office performs its other functions. For each regime we oversee, my office develops a specific set of inspection methodologies based on the requirements of the relevant legislation for each regime. We conduct our inspections based on best practices in auditing standards and on the principles of transparency, accountability, and procedural fairness. We apply the same assurance methodology to every agency for each regime.

Prior to an inspection, agencies are provided with a broad outline of our inspection criteria, to focus agencies on what we will be assessing. All agencies are given the opportunity to comment on our draft reports before they are finalised and presented to the relevant Minister and/or tabled in Parliament. Where our reports are made public, our findings are desensitised in accordance with relevant legislative requirements.

Additionally, we appreciate that agencies have their own internal systems of checks and balances. In addition to conducting statutory inspections, we engage with agencies to familiarise ourselves with how agencies manage the use of their powers. We value this engagement as it informs our assessment of risk, and our understanding of agencies procedures and best-practices. This in return increases the level of assurance we can provide that agencies are using their powers as Parliament intended. These areas will be the focus of our upcoming 2015 inspections.

4 Our proposed approach to telecommunications data inspections

In meeting our inspection and reporting requirements under the proposed amendments to the TIA Act, our preference would be to have early engagement with agencies in advance of commencing the telecommunications data inspections. This would allow us to pursue a proactive oversight role, where we can familiarise ourselves with agencies' procedures, identify best-practices, and confirm any areas of high-risk on which to focus our inspections.

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This process would also ensure that agencies are aware of the provisions of the TIA Act against which they will be assessed and reported on, prior to conducting our first inspections. Some agencies have already expressed in-principle support to our proposal and we appreciate their ongoing cooperation and positive attitude towards our independent oversight.

Again, this engagement serves to increase the level of assurance my office can provide regarding agencies' use of their covert and intrusive powers. However, we would only be in a position to provide this level of assurance if sufficiently funded to do so.

Lastly, I welcome the opportunity to further discuss the Bill with the Committee later this month.

Colin Neave
Commonwealth Ombudsman

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