



# Legislative Assembly

## Communications Interception Legislation Amendment (Ombudsman Oversight) Bill Hansard

### Extract

09/05/2002

#### Second Reading

**Mr TINK** (Epping) [10.16 a.m.]: I move:

That this bill be now read a second time.

The object of the bill is to provide for the Ombudsman to monitor the use of listening devices under the Listening Devices Act 1984. The object is also to enable the Ombudsman to report to Parliament and to the Attorney General on the Ombudsman's findings and recommendations, and to enable the Ombudsman to furnish to Parliament reports made by the Ombudsman to the Minister administering the Telecommunications (Interception) (New South Wales) Act 1987. On 2 July 1996, the New South Wales Law Reform Commission was given a reference by the Government to, among other things, look at the current scope and operation of the Listening Devices Act 1984. Work is ongoing in that area and an issues paper on surveillance was released in May 1997.

Last year the commission released the report entitled "Report 98 (2001) Surveillance: an Interim Report" dated February 2001. This morning Law Reform Commission officers told me that that work is ongoing. Nevertheless, matters have come to my attention that are deeply troubling and warrant an attempt by the Opposition, hopefully with the support of the House, to do something in relation to both those Acts on a more urgent basis. Some time ago the *Four Corners* program broadcast material that had been given to it by the Police Integrity Commission. Some of the material was broadcast on an exclusive basis before the material had been entered into evidence before the Police Integrity Commission.

On 16 October 2001 I raised this matter in the House. Subsequently, the Inspector of the Police Integrity Commission published a report dated 8 November 2001, raising a number of issues relating to the Police Integrity Commission's handling of its powers under both the Telecommunications (Interception) (New South Wales) Act and the Listening Devices Act. I will return to that report later. I referred a copy of that report to the Ombudsman. The Ombudsman, Mr Bruce Barbour, responded by letter on 22 February 2001. It is important that I read his entire letter because it is important to an understanding of why I have introduced this bill today. The letter states:

Dear Mr Tink,

Thank you for sending a copy of the report by the Inspector of the Police Integrity Commission concerning the release of listening device and telecommunication intercept product to staff of the ABC's *Four Corners* program.

While Mr Findlay's report is certainly of interest, I am only able to pursue the issue of the propriety of the release of the material to a limited extent.

As you are aware, the Ombudsman has a certain duties relating to the inspection of records of eligible authorities under the Telecommunications (Interception) (New South Wales) Act ("the Act"). My officers are currently in the process of conducting an inspection of the TI records of the Commission and the issue of the releases to the ABC is obviously a key focus of that inspection.

However, my function under the Act is basically restricted to ascertaining the extent of compliance by the authority's officers with their record keeping obligations under the Act, as distinct from ascertaining whether there is compliance with the general requirements of the Act and its parent Commonwealth legislation. My role in respect to controlled operations inspections is not so restricted.

I will be making either a special or Annual Report to the Attorney General that will include my assessment of the PIC's compliance with its record keeping obligations under the legislation. Where, as a result of an inspection, I form the opinion that the authority has contravened a provision of the Commonwealth Act, the Act allows me to include in my report to the Attorney General a report of the contravention.

Until my officers have completed their bi-annual inspection, I am not in a position to form an independent opinion on the critical issue of whether the release of the TI material was for a permitted purpose.

Apart from the reports to the Attorney General, the Act unfortunately prevents me from reporting on the results of my inspection work in any other forum.

That includes Parliament, and that is one of the fundamental reasons for the introduction of the bill. The letter

continues:

I will therefore not be able to convey to you the outcome of my final deliberations on this issue.

The next portion of the letter is also critically important:

I have no inspecting or monitoring role with respect to the use of listening devices which is currently a significant gap in the accountability framework.

That is a further fundamental reason for the introduction of the bill. The letter continues:

The general propriety of the releases, over and above the legal issue of whether the release of lawfully obtained TI information was for a permitted purpose, is not a matter that I am able to investigate due to section 125 (1) of the Police Integrity Commission Act and various causes of Schedule 1 of the Ombudsman Act. The ICAC similarly is prevented from investigating complaints about the PIC.

I hope this information is of some assistance, and I will certainly pursue the issue to the full extent of my limited powers in this jurisdiction.

That is the context in which the bill has been introduced. I now return to the report of the Inspector of the Police Integrity Commission, because the report formed the basis of the Ombudsman's letter to me and, I believe, outlines the importance of the introduction of the bill. I understand that prior to the Police Integrity Commission considering the dissemination of material to *Four Corners* it was provided internal legal advice by Mr Naylor, the solicitor for the Police Integrity Commission at that time. In his report the Inspector of the Police Integrity Commission referred to the legal advice provided to the commission as follows:

In the circumstances at hand, there is a purpose connected with the communication other than the Commission's permitted purpose, namely, the production of a television program for the ABC. This purpose is not in relation to the Commission and is not a permitted purpose. It follows that the proposed communication to Mr Masters under s 67 is unlawful. Were the program to be produced for the Commission, as distinct from the ABC, the situation would be altogether different since the only purpose would belong to the Commission. That, however, is not the case.

Mr Sage, the Acting Commissioner of the Police Integrity Commission, disagreed with that advice. To be fair to the acting commissioner, the view had been expressed that it was not unreasonable to disagree with the legal advice given. However, the legal advice was given, and it indicates the extremely high stakes in relation to what occurred and, in my view, underscores the need for appropriate oversight by the Ombudsman in relation to these powers. I was then concerned by further issues raised by the Inspector of the Police Integrity Commission in relation to the Police Integrity Commission's record keeping of the material that was allowed to be disseminated. At page 10 of his report the inspector states:

Regrettably, searches have failed to locate the original, signed certificates relating to the dissemination of 17 September and to Ms Ellison.

I understand that the Police Integrity Commission is required to sign certificates indicating the reasons for the dissemination of the material. However, the commission's record keeping was not able to locate that documentation, which I regard as an exceptionally serious matter. At page 11 of his report the inspector states:

The Commission is not in possession of a written record of reasons in support of the determination to divulge listening device and other records to Mr Masters and his team in advance of the commencement of the Operation Florida hearing.

In my view, it is an exceptionally serious matter that the Police Integrity Commission does not have in place a system that enables it to maintain its records in order in relation to the authorisation and reasons for the dissemination of this type of material. If a police officer whose work was in question came before the Police Integrity Commission and the police failed to keep proper records in relation to telephone listening device taps and so on, the weight of the world would fall on the police. What is good for police must be good for the Police Integrity Commission as well, and the standards that are set for others must be met by the commission itself. This underscores the importance of stronger oversight of these matters by the Ombudsman and the importance of the Ombudsman providing reports to Parliament. By way of justification for some of what occurred, the Police Integrity Commissioner wrote back as follows:

I note further that the Listening Devices Act is silent on the question of further dissemination of information and evidence obtained by use of a listening device otherwise in contravention of s 5 of the Act.

Interestingly, in relation to that comment by the Police Integrity Commissioner, the Inspector of the Police Integrity Commission stated in his report:

I do not accept that, because the Listening Devices Act "is silent on the question of further dissemination of information and evidence obtained by the use of a listening device otherwise in contravention of s5 of the Act" that somehow this justified the Commission permitting its broadcast by the ABC, to whom it had provided the material, without such material being tendered in evidence prior to such broadcast.

Essentially, this amounts to the Inspector of the Police Integrity Commission admonishing the Police Integrity Commissioner about his attitude towards the Listening Devices Act, but it also flags with a big red flag the need for further work to be done on the Listening Devices Act. It is simply not good enough that the Act is silent on these

matters. The Listening Devices Act should be at least as strong as the Telecommunications (Interception) Act with respect to these matters. Hopefully the Law Reform Commission will take these comments on board and address the matter as a top priority. Some of the problems that occurred were truly extraordinary, as indicated by the Inspector of the Police Integrity Commission in his report. The information under the Telecommunications (Interception) Act was communicated to Mr Masters and his team pursuant to section 67 of that Act. The inspector's report continues:

Mr Masters was informed that notwithstanding that he had been afforded access to TI product prior to the commencement of the Operation Florida hearing, insofar as he desired to broadcast some of this information on his Four Corners program, he would only be permitted to make use of information that had first been exhibited in hearings of the Commission. At no time did the Commission provide Mr Masters or members of his Four Corners team with permission to broadcast any TI product it had provided other than that adduced into evidence before the Commission ...

Officers of the Commission, along with members of the Crime Commission, were afforded a preview of the Four Corners program by Mr Masters ... During the preview [a] Commission officer made notes of any material ... which to his knowledge was not to be aired during Counsel Assisting's opening the following Monday ...

In the course of preparing this response to your letter ... it has come to my attention that a portion of one conversation intercepted under the TI Act was in fact broadcast on the Four Corners program without having first been produced into evidence before the Operation Florida hearing.

The commissioner's conclusion is extraordinary. It reads:

It seems likely that Mr Masters obtained access to the tape from the custody of the NSW Crime Commission, perhaps while Mr Masters and Crime Commission staff were present in the operations room on level 6 of the PIC's premises. The Commission is unaware of the precise circumstances of any such access. For example, whether it was formally disseminated to Mr Masters by an appropriate member of the Crime Commission, and if so the restrictions which might have been placed on its subsequent use by Four Corners.

I recall Ministers in this House pleading with the Federal Government to give the Police Integrity Commission [PIC] power to tap telephones. It is an important, but draconian, power the PIC should have. Unfortunately, to some extent by design but most substantially by complete default the Police Integrity Commission and the Crime Commission are playing very fast and loose with material that should not be in the public domain until it has been entered into evidence before the Police Integrity Commission. Under no circumstances should any media outlet be given, by design or default or a combination of both, access to any material yet to be led in evidence before the Police Integrity Commission. Nothing short of an undertaking by the Police Integrity Commission that it will never happen again will suffice.

Nevertheless, these powers remain with the PIC and the Crime Commission. Oversight by the Ombudsman must be beefed up to ensure that such a situation never occurs again. The findings of the Police Integrity Commission Inspector in relation to the Police Integrity Commission were damning. He found that the commission failed to ensure that all material it had disseminated to the ABC and was broadcast had been introduced during the opening at the hearing of the commission and that the system introduced by the commission failed or was defective, or that those responsible were at fault for its carriage. As he exclaimed, "What happened should not have happened!" To make sure that it does not happen again, the amendments to the two Acts before the Chamber this morning to beef up the oversight powers of the Ombudsman are critically important.

The three items of unfinished business arising out of the inspector's recommendations to the commission are that the commission review the events leading to the publication of the material on *Four Corners* on 8 October, from such a review it formulate a mechanism to put into operation on any future occasion to reduce the risk of a recurrence of the problem the subject of this report, and that such consideration of proposals be advised to the inspector. I want to know whether the commission has responded to those three points raised by the inspector and whether the inspector has been so advised. I respectfully request the inspector, I hope on behalf of the whole Parliament, to make a report to Parliament advising where the Police Integrity Commission is up to on this, and table such report.

The inspector said, "I do not consider the functions which I have legislative authority to fulfil require that I pursue any inquiries with Mr Masters or the Crime Commission in this regard. It is a matter for the commission itself, should it see fit to make such inquiries." The integrity and the reputation of the Police Integrity Commission are on the line. What is good for the goose is good for the gander. What is good for police is good for the commission. In this case the commission must make inquiries and find out what happened between the Crime Commission and Mr Masters. Let us get to the bottom of this and find out who stuffed up, and who did or did not do what they should or should not have done. The Parliament needs to know what happened, who stuffed up, what was stuffed up, why this stuff was broadcast before it was entered into evidence, and who let that happen.

To regain its reputation the Police Integrity Commission must see to that. It is not something it can do at its leisure. It must be done and a report must be made to the Parliament. Unless and until this happens the air will not be cleared. It is patently obvious that with these draconian tapping powers the commission's record to date, if this is an illustration, is ordinary in the extreme. Greater oversight by the Ombudsman is an absolute necessity. I commend the Police Integrity Commission Inspector for his work in this regard. But I ask him to let the Parliament know what the commission has been doing by way of follow up, and to require the commission to get to the bottom of what happened between the Crime Commission and Mr Masters. We need to know. Unfortunately, there is a very high risk

of repetition unless we find out what happened and what this Parliament needs to do to ensure that it does not happen again.