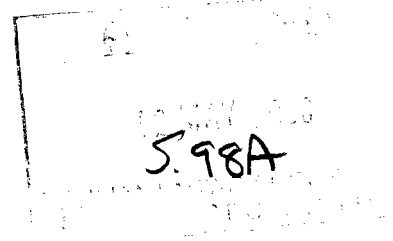


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Mr Geoff Wilson MP
Chairman
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Parliament House
George Street
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May 12, 2006



Dear Mr Wilson,

RE: THREE YEARLY REVIEW OF THE CRIME AND MISCONDUCT COMMISSION

BACKGROUND

1. Thank you for inviting a submission on the three yearly review into the Crime and Misconduct Commission.
2. I assume the invitation came after an article published in The Courier-Mail on March 1, 2006 entitled Tapping Into Our Liberties, in which I was critical of the call by the CMC's chair for telephone interception powers.
3. My submission addresses only the issue of telephone interception, commonly referred to as telephone tapping.
4. My background is as follows: I am a barrister practicing in crime, family law and industrial relations. I was formally legal adviser to Attorney-General Denver Beanland and assisted the Attorney in the largest review ever of Queensland's Criminal Code (after receiving advice from a working party consisting of former Supreme Court Judge Peter Connolly, Judge (formerly barrister) Julie Dick, barrister Adrian Gundelach and solicitor Michael Quinn). Before going to the Bar I was a journalist, having been employed by The Canberra Times, The Courier-Mail, the ABC and for shorter periods the Gold Coast Bulletin and The Daily Telegraph in Sydney and employed mainly on police rounds. I was a Public Relations Officer for the Australian Federal Police for a short period.
5. In the past year, I have contributed to The Courier-Mail's Perspective pages commenting on both legal and political affairs.

SUBMISSION

6. Policing generally became a prominent issue in recent years due to terrorism.
7. The Commonwealth and state parliaments have given police and security agencies extraordinary powers, expecting them to professionally prevent or investigate any outrageous crimes, such as bomb attacks on civilians by people who could be described as “mad, bad and dangerous”.
8. Police investigational powers have been increased and now Queensland policing agencies want access to telephone tapping powers, one of the grounds being that police in others states have such powers.

STRENGTHS

9. Telephone interception powers are among extraordinary measures which in some cases would be a truly useful addition to police investigational powers and could provide decisive evidence of a criminal offence, as powerful as that provided by eyewitness, fingerprint or DNA confirmation.
10. Being an intrusive covert power, telephone tapping could be useful when suspicion exists that a crime could be committed and for the gathering of criminal intelligence. This has been called proactive investigation, as opposed to reactive investigation which occurs after a crime is committed.
11. There is nothing intrinsically wrong with proactive policing.
12. But such powers are not a “magic potion” as some policing agencies seem to believe. Usefulness should not be confused with mere convenience to replace more reliable methods of investigation and accountability must remain the most important factor when arming police with extraordinary powers, in order to ensure that such powers are lawfully used.

WEAKNESSES

13. The major legal weakness of telephone tapping evidence is that the voices have to be identified and voice identification, like eyewitness identification, is fraught with danger.
14. Lawyers are aware of the “*fallibility of human perception and memory*” as Stephen J put it in Alexander v R (1981) 145 CLR 395.
15. Mistaken identification could always be present, as well as mistaken intention, bias or certainty.
16. These trial issues for a court are not necessarily matters of interest to your committee, but they should be understood when claims are made which appear to state that telephone tapping will solve crimes.

17. For the non-lawyer members of your committee, I refer to the famous case of Beck, in which a number of witnesses gave eyewitness identification of Beck being a fraudster, but were wrong. Beck was released from prison after the real culprit was apprehended and convicted. The English Parliament viewed the miscarriage of justice caused to Beck so seriously it created the Court of Criminal Appeal in 1907.
18. The major social and political weakness of telephone tapping is the potential for misuse of recorded conversations.
19. Having been legal adviser to former Attorney-General Denver Beanland, I have an appreciation of the CMC's role and the need generally to equip policing agencies with powers to keep up with technology to investigate crime.
20. However, I am also aware that the nature of policing and investigation, especially by authorities which are authorised to carry out covert operations and surveillance, needs to be overseen so that their work is accountable and authorised, justified or excused by law.¹
21. Unless there are strict and protective safeguards, information from telephone tapping can be used for purposes other than criminal investigation which can not only destroy confidence in policing agencies, but destroy the confidence which both legitimate businesses and private citizens hold in their privacy.
22. While I cannot say for certain that the common law recognizes a right to privacy, I would think most right minded people would believe that there should be no general intrusion into privacy by government agencies without legitimate, powerful reasons and without sufficient safeguards to ensure the evidence or information was used only for the purpose for which it was obtained and for no other reason.
23. History records instances where people in positions of authority have gone beyond their jurisdictions, sometimes acting well outside their lawful position and sometimes outside the law, when dealing with information gathered covertly.
24. A striking example was the revelation in March this year that the Chief Commissioner of London's Metropolitan Police, Sir Ian Blair, secretly taped the Attorney-General during a telephone conversation.

That any public servant or statutory appointee would tape a conversation with his or her Minister is against all tenants of public service and displays a disregard for duty to the office held and to the Government of the day. It

¹ I use the word excuse in the narrow legal sense. I am not advocating illegal use of telephone tapping powers whereby a court is called upon to use its discretion as to whether illegally gathered evidence should be admitted against an accused in the public interest, see *Bunning v Cross* (1978) 141 CLR 54 and the case law which has grown since that decision.

appears to my mind that the person, not the office, assumed all importance and this was possibly part of a police culture which was highly undesirable.

The taping was plainly insulting to the Attorney-General as well as sheer affront to the electorate which values accountability above all else.

25. In Australia, it was reported nationally during April (see *The Age*, April 9, 2006) that an Australian Federal Police officer was suspended pending an investigation into the release of unauthorized information to a clairvoyant.

If this was true it was an example that an investigator in a position of authority relative to the general public will not always act with a sense of duty, decorum and lawfulness.

26. Queensland's own history is worse than the above examples as was discovered during the Fitzgerald Inquiry into police corruption.

27. The need for accountability on the issue of telephone tapping can be understood in Fitzgerald's words, at page 200 of his report (although Fitzgerald was not referring to telephone tapping): *"A police force is numerically strong, politically influential, physically powerful, and armed... Each police officer has extensive authority over all other citizens, however powerful, coupled with wide discretions concerning its exercise. Subsequent stages in the criminal justice process, including courts and prisons, are largely dependent on the activities of the police force and will inevitably be affected by its deficiencies..."*

28. In referring to the then Government headed by Sir Joh Bjelke-Petersen, at page 201, Fitzgerald said: *"Probably at least in part through ignorance, the police culture was officially tolerated for political advantage, including police support in controversial political issues... Any criticism of the Police Force was rejected, and the critic trenchantly attacked, often under Parliamentary privilege, sometimes with false information provided by the police"*.

29. Each successive government since the report was delivered has, in my opinion, acted to ensure accountability from the Queensland Police Service so that those acts which brought it into disrepute would not occur again.

30. The history of our police service is not covered in glory, although Fitzgerald made a point of stating that corruption and indolence did not extend to the majority of officers.

31. If police and agencies are to be given a telephone tapping power in the future then the best protections possible must be instituted and maintained to guard against misuse and privacy.

32. That we live in a Westminster system is no guarantee that a person's rights and privacy will be protected from unlawful or immoral acts unless safeguards are enacted.

33. My original article in The Courier-Mail was written because I was concerned at reported comments from the chair of the Crime and Misconduct Commission, Mr Robert Needham, that police and public servants were getting away with crimes because of a lack of telephone tapping ability.
34. Although I may be wrong, I treated the statement with skepticism.
35. The so-called "war on terror" has changed the philosophy of governments, but not so much that George Orwell's Big Brother Government is to be tolerated.
36. There are aspects of intrusion which can go far beyond crime investigation.
37. I was recently contacted by telephone by a senior public servant. He had a very sensitive legal issue but not one which would invite scrutiny by the police or the Crime and Misconduct Commission. If telephone tapping became a norm of criminal investigation, rather than a resource for very exceptional circumstances, that public servant in seeking advice may have been disadvantaged for mistaken or improper reasons should our conversation have been monitored. It would also be an unjustified intrusion into his legal professional privilege.
38. In the past I was contacted by telephone by a Labor Minister with a sensitive matter concerning the acts of a person. Should such calls have been monitored, even for another investigation, the information if used out of context could have embarrassed the Minister.
39. Is it likely that such telephone calls on common legal matters could be monitored? I understand that during the Bjelke-Petersen era, some members of the then state Labor opposition believed they were targeted for Special Branch operations, as well as the late Federal Labor Senator George Georges, who disagreed with the Premier's ban on street march protests. Should members of the Greens or parties which oppose the framework of anti-terror legislation be monitored, because they dare to speak out against such legislation? If a society panics, then it may be unproblematic to justify or mask intelligence gathering operations on the ground of national security.
40. I do not know if the claims by Labor members during the Bjelke-Petersen era were true, but all politicians should be able to have faith that the government of the day does not indulge in such activities against them. It is an important issue affecting not only politicians but the electorate as well. Private citizens should be treated no differently.

SAFEGUARDS

41. The question then arises, what is an appropriate safeguard?
42. I have examined carefully Commonwealth legislation regarding telephone tapping and new legislation regarding the viewing of electronic message repositories.

43. My concern is that the legislative safeguards are not strong enough.
44. The Federal Government recognizes that such interceptions are not to be given to policing agencies as a right without intervention of a Court, but then it accepts that a judge alone is equipped to make decisions on applications.
45. One of the tests a judge has to decide is that legitimate privacy interests are not intruded upon.
46. The problem is simple, how does a Judge tell?
47. Naturally applications for an interception warrant are made without the target-party being informed but the dangers arise when the target-party is an innocent person.
48. Courts exist to make decisions on the law and on the facts before the Court. It would indeed be wrong for a judge to make a decision otherwise and so if the evidence accompanying an application for a warrant is sufficient at law, then the warrant should be granted.
49. I noted after my article was published that Premier Peter Beattie stated there would be no telephone tapping without the intervention at the application for a warrant by the Public Interest Monitor.
50. Opposition Leader Lawrence Springborg responded stating he would allow telephone tapping in Queensland and Federal Attorney-General, Philip Ruddock, blamed the Premier for standing in the way.
51. The nature of politics is to resort to war but then issues of debates such as this, in my opinion, become distorted.
52. While the Public Interest Monitor system is not foolproof, it is a strong safeguard to ensure that authorities are lawfully carrying out their investigations.
53. The Crime and Misconduct Act gives the Public Interest Monitor certain powers of appraisal of applications for a covert warrant, to be raised in the Court context, and more significantly, the directive to issue an annual report to the Minister, which must be tabled in Parliament.
54. The police then must perform their role legally and professionally and a level of accountability is reached which should help prevent the misuse of telephone tapping powers. Right minded people have faith in the Queensland judiciary and it provides a powerful protection when such matters come before it.
55. It is important to note that there does not appear to be a public call by policing agencies to do without the intervention of the Public Interest Monitor, a call which seems to emanate from some on the conservative side of politics. In fact, many police who just want to get on with their investigative job may well

realize that the intervention of the Public Interest Monitor offers them a protective regime.

56. In the past our Governments have acted slowly and reluctantly to allow its policing agencies to intrude lawfully into privacy.
57. Telephone tapping, if it became just another investigative power, also threatens some aspects of journalism and freedom of speech.
58. Those in Government and those who have worked for Government have all felt "journalistic heat" and sometimes unfairly. But by and large, the media provides another plank by which our rights, sometimes called civil liberties, are protected. Since the federal and state constitutions do not offer protective rights to privacy, telephone tapping can threaten journalistic contacts. Because government is of a representative nature, citizens have a right to know what decisions are being made - if those decisions are not for criminal investigation purposes or classified as national security decisions.
59. Telephone tapping could allow policing agencies access to perhaps quite sensitive political information which had nothing to do with criminal activity but which could be used to advantage or disadvantage parties or individuals at will.
60. If the privacy issue is taken out of the argument, then telephone tapping becomes an issue of accountability. Without lawful and functional control by our courts the community can have no real protection from misuse of the power.
61. I have no doubt that an argument can be mounted that Government agencies now hold far more information on us than ever before, but the manner in which it is held and used highlights the difference between departments holding records for departmental purposes and policing agencies holding intelligence data, perhaps questionably.

There is a difference of purpose to a policing agency acquiring lawfully held information on people for an investigation and holding information in a criminal tracking system when no crime has been committed or the person is eliminated from investigations.

62. Further, there should be provision to have tapes which have no utility or no likely connection to an investigation, if monitoring is allowed, destroyed.
63. That police in other states have telephone tapping powers is not to the point of the Queensland Government's control of its police service. Since technology and the demands of policing will probably move the state to allow telephone tapping at some time in the future, I submit that it should only be for the most serious crimes, all applications should be the subject of intervention by the Public Interest Monitor and the view of police and the public ought to be sought as to the safeguards believed sufficient before such powers are given.

64. Finally, it is a simple and appealing argument to say the concerns I (and others) have raised are nonsense and fantasy, but that is to ignore the history of aspects of Queensland policing and to place undue confidence on mere assertions that such powers will always be used lawfully. Time and again courts and juries decide against the acts of police officers and while most officers acquit themselves properly, some do not.
65. I do not doubt the sincerity of politicians and policing agencies who have implemented telephone tapping powers and who want powers extended, but legislative regimes providing protection against misuse of information cannot hinder or be objectionable.

[Original Signed]

S P Coates

Chambers