

Patrick Emerton  
Faculty of Law  
Monash University  
VIC

The Secretariat  
Senate Legal and Constitutional Committee  
Room S1.61, Parliament House  
Canberra ACT 2600  
AUSTRALIA

Dear Madam/Sir

**Submission to inquiry into the provisions of the Surveillance Devices Bill 2004**

I refer to the Committee's present inquiry into the Surveillance Bill 2004 ('the Bill'). I hereby provide a submission to assist the Committee in its inquiry. I am also prepared to appear before the Committee to give oral evidence if that should assist the Committee's inquiry.

Yours faithfully

Patrick Emerton  
Assistant Lecturer, Faculty of Law

## **SUBMISSION TO INQUIRY INTO THE PROVISIONS OF THE SURVEILLANCE DEVICES BILL 2004**

Due to the limited period of time I have had to make a submission, my remarks are brief and in some respects sketchy. Nevertheless, I believe that the implications of this Bill are sufficiently serious that it is important that I make some comment on them. In particular, my submission draws attention to certain features of the Bill which seem apt:

- to increase the threat to privacy posed by the surveillance activities of law enforcement agencies;
- to undermine accountability of law enforcement agencies in the carrying out of surveillance activities.

### Privacy issues

Surveillance activities by law enforcement agencies inevitably pose a threat to the privacy of those investigated. A fundamental right of those in a free society is to live their lives free of government surveillance. The right of privacy is a right Australia is committed to upholding, pursuant to Article 17 of the *International Covenant on Civil and Political Rights*.

When the importance of this right is kept in mind, certain provisions of the Bill seem to pose a disproportionate threat to privacy.

Paragraph 18 (1) (a) permits a surveillance device warrant to be issued with respect to premises. The issue of such a warrant clearly poses a threat to the privacy of those who use the premises in question, but who are not suspects in an investigation. Given this threat to privacy, the Bill does not seem to impose sufficient restrictions on the issuing of a warrant with respect to premises (for example, of the sort that currently apply under subsection 12G (6) the *Australian Federal Police Act 1979*).

Subsection 37 (1) permits the use of optical surveillance devices without the need for a warrant, provided that there is no entry to or interference with premises or property involved. In his second reading speech, the Attorney-General suggests that the purpose of this is to permit the use by police of binoculars without the need for a warrant. However, the definition of 'optical surveillance device' makes it clear that visual recording as well as visual observation without a warrant would be permitted by this subsection. Permitting the making of visual recordings by investigators, without obliging those investigators to make out a case in a warrant application, has the potential to undermine the privacy of those subject to investigation.

## Accountability issues

Part 3 of the Bill would establish a regime of emergency authorisation of the use of surveillance devices, without the need for a warrant. While section 33 would require a review of the emergency authorisation by a judicial officer or member of the AAT within 2 days, it is not clear that this is sufficient to ensure accountability of the police in the conduct of surveillance. In particular, subsection 33 (6) would seem to prohibit the reviewing officer from ordering the destruction of the information recorded under the emergency authorisation.

Part 6, Division 1 of the Bill establishes a secrecy regime. Subsection 44 (1) defines 'prohibited information' to include any information relating to the issuing of or existence of a warrant. Section 45 makes it an offence to publish prohibited information. This is punishable by 2 years imprisonment (subsection 45 (1) ), or by 10 years imprisonment if it poses a threat to the conduct of an investigation (subsection 45 (2) ).

These are sweeping secrecy provisions. They do not simply oblige police officers to protect the integrity of investigations they are engaged in. They seem to prohibit any discussion, whether by suspects, journalists or any members of the public, of the details of any surveillance activities by the police. The offence created under subsection 45 (2) seems particularly extreme, as there is no requirement that the offender have any intention to obstruct justice or an investigation in communicating the prohibited information.

## Conclusion

I urge the Committee to scrutinise very closely these provisions of the Bill, which appear to undermine both privacy and accountability. If that scrutiny confirms my suggestion that these provisions pose an unjustified threat to privacy and accountability, then the Committee ought to recommend that those provisions of the Bill be opposed.