Surveillance Devices Bill (No. 2) 2004

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Surveillance Devices Bill (No. 2) 2004

Date Introduced: 24 June 2004
House: House of Representatives
Portfolio: Attorney-General
Commencement: Royal Assent

Purpose

To establish a statutory regime covering the use of surveillance devices by law enforcement officers investigating certain Commonwealth offences and State offences with a ‘federal aspect’. The Bill also regulates the use of information obtained from surveillance devices and enables surveillance devices to be used in relation to certain ‘child recovery orders.’

The Surveillance Devices Bill (No. 2) 2004 (the ‘No. 2 Bill’) replaces the Surveillance Devices Bill (No. 1) 2004 (the ‘No. 1 Bill’). With the exception of some amendments, the No. 2 Bill replicates the No. 1 Bill.

Background

Surveillance Devices Bill (No. 1) 2004

The No. 1 Bill was introduced into the House of Representatives on 24 March 2004 and passed that House on 1 April 2004. It was introduced into the Senate on 11 May 2004 and referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report.

The Committee reported on the Bill on 27 May 2004. Its report contained seven recommendations. In brief, these related to:

- the time in which an eligible judge or nominated member of the Administrative Appeals Tribunal (AAT) must give approval for an emergency warrant issued by an ‘appropriate authorising officer’. The No. 1 Bill provided that judicial or AAT authority must be obtained within two business days. This would allow an emergency warrant to remain unapproved for up to 4 days, if a warrant is issued late on a Friday.

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The Committee recommended that the period of two business days be replaced by a period of 48 hours (‘recommendation 1’)

- oversight by the Ombudsman. The Committee recommended that the Ombudsman be required to review records of the use of optical surveillance devices, along with warrant records (‘recommendation 2’)

- warrant shopping. Some concerns were expressed in evidence to the Committee that the No. 1 Bill would allow enforcement agencies to shop around for warrants under a variety of Commonwealth laws—including the *Telecommunications (Interception) Act 1979*, the *Crimes Act 1914* and the proposed surveillance devices legislation. The Committee was concerned that ambiguities in the statutory schemes have the potential ‘to give rise to the use of powers which would be proscribed under one statute but permitted under another.’ It recommended that ‘the bill and the *Telecommunications (Interception) Act 1979* be amended to ensure that the circumstances in which similar kinds of surveillance devices are authorised, are clearly described, and that the limitations on their respective use are also clear.’ (‘recommendation 3’)

- remedies for breach. The Committee recommended that the legislation include civil remedies for people who are harmed by the unlawful use of surveillance devices (‘recommendation 4’)

- retention and destruction of material derived from the use of surveillance devices. The Committee recommended that the legislation include a time limit of 5 years for the retention of material obtained from the use of surveillance devices. It also recommended that the destruction of material provisions in the Bill be brought into line with the statutory regime for the destruction of material obtained from telecommunications interception (‘recommendations 5 & 6’), and

- passage of the legislation. The Committee recommended that the Bill be passed, subject to the recommendations it had made (‘recommendation 7’).

Further information about the No. 1 Bill can be found in *Bills Digest No. 147*, 2003-04.

**Surveillance Devices Bill (No. 2) 2004**

The No. 2 Bill was introduced into the House of Representatives on 24 June 2004 in the hope that the Bill would pass both Houses before the Winter Recess. The Bill was passed in the House of Representatives on the same day but not introduced into the Senate until 3 August 2004 (ie after the Winter Recess).

An outline of differences between the No. 1 Bill and the No. 2 Bill are contained in the Attorney-General’s Second Reading Speech.

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Main Provisions

Some of the differences between the No. 1 and No. 2 Bills are described below.

Definitions

The No. 1 Bill defines ‘law enforcement agency’ and ‘law enforcement officer’ to mean the Commonwealth, State and Territory police and the Australian Crime Commission (clause 6).

The No. 2 Bill extends the definitions of ‘law enforcement agency’ and ‘law enforcement officer’ to include the New South Wales Crime Commission, the Independent Commission Against Corruption, the NSW Police Integrity Commission, the Queensland Crime and Misconduct Commission, and the Western Australian Corruption and Crime Commission (clause 6).

The effect of the amendments will be that officers of these agencies will be able to obtain surveillance device warrants for the investigation of certain Commonwealth offences and State offences that have a ‘federal aspect.’ They will also be able to obtain retrieval warrants and emergency authorisations, and use certain surveillance devices—including tracking devices—without obtaining a warrant. They will also fall within the record keeping and reporting requirements of the legislation.

Time frames for approval of emergency authorisations

In general terms, the proposed legislation requires law enforcement officers who want to use a surveillance device to first obtain a warrant from an eligible judge or nominated AAT member. However, there are a number of exceptions to this general rule. One exception is where the officer obtains an emergency authorisation from an ‘appropriate authorising officer’ (ie certain senior officers of law enforcement agencies). However, where an emergency authorisation is obtained, subsequent approval by an eligible judge or nominated AAT member is required.

The time in which an emergency authorisation must be brought before a judge or AAT member for approval is reduced from ‘two business days’ (in the No. 1 Bill) to 48 hours (in the No. 2 Bill)—see new subclause 33(1) of the No. 2 Bill. This change implements recommendation 3 of the Senate Legal and Constitutional Legislation Committee.

Destruction of information obtained from the use of surveillance devices

The proposed legislation imposes record keeping and reporting requirements on the law enforcement agencies who obtain surveillance device warrants and authorisations.
The No. 1 Bill required agencies to destroy records containing information obtained by the use of surveillance devices if those records were no longer needed—for instance, for court proceedings or criminal investigations. However, no maximum time limits were specified for the retention of such material.

The No. 2 Bill requires law enforcement and other agencies to destroy these records and reports within 5 years unless the chief officer of the agency is satisfied that relevant criminal or civil proceedings have been commenced or are likely to commence. If the material is retained it must be destroyed within a further 5 years, unless the chief officer is satisfied about its use in criminal or civil proceedings (and so on)—see new paragraphs 46(1)(b) and 46(2)(b). These amendments implement recommendation 5 of the Senate Legal and Constitutional Legislation Committee.

Civil remedies

Information obtained from the use of surveillance devices is called ‘protected information.’ The No. 1 Bill contained criminal penalties for illegal use of ‘protected information’ (see subclauses 45(1) and (2) of the No. 1 Bill; also subclauses 45(1) and (2) of the No. 2 Bill). For instance, it is an offence to intentionally use, record, communicate or publish protected information if its use is not permitted and the person is reckless about that circumstance [subclause 45(1)].

The Senate Legal and Constitutional Legislation Committee recommended that the legislation also provide civil remedies for people who are harmed by the unlawful use of ‘protected information.’ Clause 64 of the No. 2 Bill provides that if a person suffers loss or injury as a result of the AFP or the ACC using a surveillance device where the use of the device is prohibited by State or Territory law and is not in accordance with the Surveillance Devices Act, the Commonwealth is liable to pay compensation to the person. This amendment responds to recommendation 4 of the Senate Legal and Constitutional Legislation Committee.

Queensland Public Interest Monitor

Clause 45 (in both the No. 1 and No. 2 Bills) contains exceptions to the general prohibitions on the use of ‘protected information’. For instance, protected information can be used or admitted into evidence if necessary to investigate a ‘relevant offence’, to investigate complaints against public officers or for the purposes of inspections by the Ombudsman.

Under Queensland law, a Public Interest Monitor monitors police compliance with the statutory requirements for surveillance device warrants issued under Queensland law and appears at warrant hearings to ‘test the validity of the application.’

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New paragraph 45(5)(h), which is inserted by the No. 2 Bill, will allow the Queensland Public Interest Monitor to access ‘protected information’ (in relation to the performance of his/her functions under either the Crime and Misconduct Act 2001 (Qld) or the Police Powers and Responsibilities Act 2000 (Qld).

The use of surveillance devices and ‘informants’

Both the No. 1 Bill and the No. 2 Bill contain provisions allowing federal, State and Territory law enforcement officers to use surveillance devices without a warrant if they are acting in the course of their duties and are a party to the conversation being monitored (clause 38 in both Bills). An example would be where a law enforcement officer is acting ‘undercover.’

Subclauses 38(4) and 38(5) in the No. 2 Bill will also enable anyone ‘assisting’ a federal, State or Territory law enforcement officer to use a surveillance device without a warrant if they are a party to the conversation. The Second Reading Speech explains that these provisions will enable informants to use surveillance devices in these circumstances.18

Amendments relating to the recovery of children and child sex tourism offences

Under both the No. 1 and No. 2 Bills, surveillance device warrants can be obtained where a recovery order is in force for a child and a law enforcement officer suspects on reasonable grounds that the use of a surveillance device will assist in the location and safe recovery of that child.

The No. 1 Bill is limited to recovery orders issued under section 67U of the Family Law Act 1975 (clause 6). The No. 2 Bill extends the definition of ‘recovery orders’ to include court orders made under family law regulations which relate to international child abduction matters (clause 6).

Both Bills enable law enforcement officers to use surveillance devices without first obtaining a warrant in certain cases—for instance, if they have an emergency authorisation. These authorisations can be issued by senior officers in law enforcement agencies. They must later be approved by an eligible judge or nominated AAT member.

The circumstances in which emergency authorisations may be obtained are set out in clauses 28-30 of both Bills. They include urgent situations where there is a risk that evidence of specified Commonwealth offences will be lost. The No. 2 Bill adds child sex tourism offences to the list of specified Commonwealth offences [subparagraph 30(1)(a)(iii)] and so allows emergency authorisations to be granted when there is a risk that evidence of a child sex tourism offence will be lost, the use of a surveillance device is urgently required to prevent the loss of that evidence and it is not practicable to obtain a surveillance device warrant.

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Tracking device authorisations

A tracking device is an electronic device capable of detecting or monitoring a person or object. It emits a radio signal that allows the movement of vehicles or objects to be monitored.

Under the proposed legislation, the use of tracking devices by law enforcement officers does not need to be authorised by a warrant issued by an eligible judge or nominated AAT member. Instead, the No. 1 and No. 2 Bills enable a law enforcement officer to use a tracking device in certain circumstances with the written permission of an ‘appropriate authorising officer’. The device may also be retrieved without a warrant if written authorisation is obtained.

The No. 2 Bill amends the tracking device regime. For instance, it ensures that a tracking device authorisation cannot remain in force for more than 90 days [subclause 39(7)]. This places a limitation on the duration of tracking device authorisations that mirrors the surveillance device warrant period. The amendments also clarify that a tracking device authorisation authorises the installation, use and maintenance of a tracking device on relevant premises [see the reference to paragraph 18(2)(c)(i) in subclause 39(10) of the No. 2 Bill].

Amendments relating to the Commonwealth Ombudsman

The proposed legislation enables the Commonwealth Ombudsman (or his/her inspecting officers) to inspect the records of law enforcement agencies in order to determine whether the agencies are complying with their statutory record keeping obligations. For these purposes, the Ombudsman must be given ‘full and free’ access to agency records and may require relevant information to be provided. The Ombudsman can also exchange information with State and Territory authorities that have similar functions to the Ombudsman. The Ombudsman must report to the Minister on the results of the inspections. These reports must be tabled in Parliament.

The No. 2 Bill adds to the inspection powers of the Ombudsman. The Bill already provides that Ombudsman can inspect the records of the Australian Crime Commission (ACC) to determine whether the ACC has complied with its obligations under the Bill. As well as being given functions and powers under Commonwealth laws, State and Territory laws also confer powers and functions on the ACC. The No. 2 Bill thus provides that the Ombudsman can inspect ACC records to determine whether the ACC has complied with its statutory obligations under State or Territory surveillance device laws (where ACC officers have used those laws)—subclause 55(2).

The No. 1 Bill enables the Ombudsman to delegate almost all or any of his powers under the proposed law to State/Territory officials holding ‘an equivalent office’ to the Ombudsman (clause 59).

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The No. 2 Bill changes the wording of clause 59 so that the delegation to State/Territory officials will be to officials ‘having similar oversight functions to the Ombudsman’. The Explanatory Memorandum notes that this would include:

…the Parliamentary Inspector of the Corruption and Crime Commission under the Corruption and Crime Commission Act 2003 (WA), the Inspector of the Police Integrity Commission under the Police Integrity Commission Act 1996 (NSW), the Public Interest Monitor (appointed under either the Police Powers and Responsibilities Act 2000 (Qld) or the Crime and Misconduct Act 2001 (Qld) or both), other comparable anti-corruption bodies as well as State and Territory Privacy Commissioners.20

Concluding Comments

Readers of this Digest are referred to the Concluding Comments in the Bills Digest for the No. 1 Bill (Bills Digest No. 147, 2003-04).

Endnotes

1 For constitutional reasons, an eligible judge must first consent to being declared an ‘eligible Judge’ and the power to issue warrants is conferred on the judge in his or her personal capacity (clause 12).
2 AAT members who can issue warrants are Deputy Presidents, full-time senior members, part-time senior members and ordinary members. The last two classes of AAT member must be lawyers of at least 5 years standing (clause 13).
4 Ibid.
5 Ibid, p. 23.
6 Ibid.
7 Ibid, p. 27.
8 Ibid, p. 29.
9 Ibid.
12 Applicable Commonwealth offences are called ‘relevant offences’ and are defined in clause 6.
Part 2, Division 3.

See Part 4.

‘Protected information’ also includes information relating to an application for a warrant or the existence of a warrant, emergency authorisation or tracking device authorisation; and information likely to identify a person or premises specified in a warrant, emergency authorisation or tracking device authorisation (clause 44).


However, an ‘appropriate authorising officer’ cannot authorise the use of a retrieval warrant if it would involve entry onto premises without permission or interference with the interior of a motor vehicle without permission.

Explanatory Memorandum, para. 293.