



**This is a new edition of a Bills Digest previously prepared for the 40<sup>th</sup> Parliament**

## Surveillance Devices Bill 2004

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## Surveillance Devices Bill 2004

**Date Introduced:** 17 November 2004

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** Royal Assent

### Purpose

To establish a statutory regime governing 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 contains requirements for reporting, record-keeping and oversight by the Ombudsman.

This Bill is reintroduced from the 40<sup>th</sup> Parliament with some minor changes.

### Background

A Surveillance Devices Bill 2004 (the ‘March Bill’) was introduced into the House of Representatives on 24 March 2004.

The March Bill was passed by the House of Representatives on 1 April 2004 and introduced into the Senate on 11 May 2004. It was referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report. The Committee reported on 27 May 2004.

On 24 June 2004, the Surveillance Devices Bill (No. 2) 2004 (the ‘June Bill’)—in part, the Government’s response to the Senate Committee report—was introduced into the House of Representatives. It replaced the March Bill and passed the lower house on the same day. It was introduced into the Senate on 3 August 2004. However, Parliament was prorogued for the 2004 General Election before the Senate dealt with the June Bill and so it lapsed.

The Surveillance Devices Bill 2004 (the ‘November Bill’) was re-introduced into the House of Representatives on 17 November 2004. Apart from some minor changes, it replicates the June Bill. It establishes a statutory regime governing the use of surveillance devices by law enforcement agencies. These devices include data surveillance devices, listening devices, optical surveillance devices, tracking devices<sup>1</sup> and devices prescribed by regulation.

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In general, law enforcement agencies will be able to use such devices only under the authority of warrants issued by eligible federal judges<sup>2</sup> or nominated Administrative Appeals Tribunal members.<sup>3</sup> There are exceptions to this rule. For instance, authorisation from a senior law enforcement officer can be sought in urgent and serious circumstances, certain uses of surveillance devices will not need a warrant, and tracking devices will, in certain circumstances, be able to be used with the authorisation of a senior law enforcement officer.

The Bill also provides for recording keeping requirements, contains rules for the use of information obtained from surveillance devices and provides for monitoring by the Ombudsman.

There are two areas of difference between the June Bill and the November Bill:

- changes that relate to the commencement of the Legislative Instruments Act on 1 January 2005, and
- the insertion of a provision relating to defective warrants, emergency authorisations and tracking device authorisations.

Readers of this Digest are referred to:

- [Bills Digest No. 147](#), 2003-04<sup>4</sup> for an account of the background and main provisions of the March Bill. The June Bill contained a number of changes to the March Bill (see below). Nevertheless, in general, the legislative scheme remains the same
- the [report](#) of the Senate Legal and Constitutional Legislation Committee into the March Bill,<sup>5</sup> and
- [Bills Digest No.24](#), 2004-05,<sup>6</sup> which includes details of the amendments proposed by the June Bill. Among the amendments proposed by the June Bill were a reduction in the time in which an emergency authorisation must be brought before a judge or nominated AAT member for approval (from ‘two business days’ to 48 hours); a requirement that information obtained from the use of a surveillance device should, in general, be destroyed within 5 years (the March Bill contained no time limits); the addition of civil remedies for anyone harmed by the unlawful use of surveillance devices (the March Bill contained criminal penalties only); a provision enabling anyone ‘assisting’ a law enforcement officer to use a surveillance device without a warrant if they are a party to the conversation (this amendment would cover informants); and a provision ensuring that tracking device authorisations cannot remain in force for more than 90 days (in line with the surveillance device warrant period). These provisions are also included in the November Bill.

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## Main Provisions

### New provisions relating to the *Legislative Instruments Act 2003*

The Legislative Instruments Act will commence on 1 January 2005. It defines a legislative instrument as a written instrument:

- (a) that is of a legislative character; and
- (b) that is or was made in the exercise of a power delegated by the Parliament.<sup>7</sup>

If an instrument is a legislative instrument then, in general, it must be registered in the Federal Register of Legislative Instruments, tabled in Parliament, is subject to parliamentary scrutiny and disallowance and is subject to sunsetting (ie automatic repeal 10 years after it commences or is required to be registered.)

Not all instruments are legislative instruments—for example, they may not be legislative in character, the Legislative Instruments Act may identify them specifically as not being legislative instruments, their primary legislation may declare them not to be legislative instruments or the Attorney-General may certify that they are not legislative instruments.

The November Bill provides that a number of instruments made under it are not legislative instruments. These are:

- instruments declaring federal judges to be ‘eligible judges’ [**subclause 12(6)**]. (Eligible judges and nominated AAT members will be responsible for issuing surveillance device warrants)
- records of emergency authorisations granted under the legislation [**subclause 31(2)**]. In some serious and urgent circumstances an application can be made to a senior law enforcement officer for an emergency authorisation to use a surveillance device (rather than an application for a warrant being made to an eligible judge or nominated AAT member). The emergency authorisation must subsequently be submitted to an eligible judge or nominated AAT member for approval
- applications to eligible judges or nominated AAT members for approval of emergency authorisations [**subclause 33(4)**]. An application for approval must be made within 48 hours after an emergency authorisation is issued
- records of tracking device authorisations that are issued under the legislation [**subclause 40(2)**]. Tracking devices can be used by law enforcement officers without a warrant in certain circumstances. Records of tracking device authorisations need to be kept
- records that must be kept by law enforcement agencies about their applications for warrants, emergency authorisations and tracking device authorisations and the use of the information they obtain [**subclause 52(2)**], and

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- the register of warrants, emergency authorisations and tracking device authorisations that must be kept by each law enforcement agency [**subclause 53(5)**].

### **New provisions relating to non-substantial defects in warrants, emergency authorisations and tracking device authorisations**

**Clause 65** provides that the fact that a warrant or authorisation is defective in a non-substantial way does not invalidate the use of the device or affect the admissibility of evidence obtained from that use. So long as the defect is non-substantial then the use of the device is to be treated as being valid and information obtained from its use can be dealt with in any proceeding.

## **Concluding Comments**

### **Amendments relating to the Legislative Instruments Act**

The *Legislative Instruments Handbook* issued by the Attorney-General's Department states:

The determinative factor of legislative character is the effect of the instrument. If the instrument establishes a new rule of law or legal regime, or alters the content of the law, it is a legislative instrument.<sup>8</sup>

The amendments relating to the Legislative Instruments Act therefore seem unexceptional—it appears unlikely that any of the instruments listed are legislative in character.

### **Amendments relating to defects in warrants, emergency authorisations and tracking device authorisations**

As stated earlier in this Digest, the Bill provides that if a warrant or authorisation contains a non-substantial defect, the warrant is to be treated as being valid and information obtained from it is admissible in proceedings (**clause 65**).

The Explanatory Memorandum gives examples of minor and more serious defects that could occur in surveillance device warrants.

An example of a minor defect would include, but is not limited to, where a signature appears in the wrong location on the warrant or where it is incorrectly dated by the issuer. An example of a more serious defect that would not be of a minor nature would include, but is not limited to, where the warrant has been issued for an offence which is not a 'relevant offence' as defined by the Bill. Another example might be where the Judge or AAT member who issued the warrant was not in fact an eligible

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Judge or nominated AAT member for the purposes of the Bill at the time the warrant was issued.<sup>9</sup>

**Clause 65** of the Bill differs from another piece of Commonwealth legislation dealing with defective warrants. [Section 75](#) of the *Telecommunications (Interception) Act 1979* (Cwlth) enables information obtained under a defective TI warrant to be admitted into evidence in what are called ‘exempt proceedings’<sup>10</sup> if a court or tribunal is satisfied that:

- (a) but for an irregularity, the interception would not have constituted a contravention of the warrant requirements, and
- (b) in all the circumstances the irregularity should be disregarded.<sup>11</sup>

An irregularity is defined in section 75 of the *Telecommunications (Interception) Act* as a defect or irregularity other than an substantial defect or irregularity connected with the issue of the purported warrant or connected with the execution of the warrant or purported warrant.

In contrast to section 75, **clause 65** of the Bill assigns no role to a court in deciding whether the irregularity should be disregarded in all the circumstances. It simply directs that use of the device is to be treated as being valid and provides that information obtained from its use is admissible. Parliament may wish to consider—given the intrusive nature of surveillance devices and the use that can be made of information obtained from them in legal proceedings—whether section 75 of the *Telecommunications (Interception) Act* provides a better model.

## Endnotes

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- 1 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.
- 2 For constitutional reasons, a federal judge must first consent to be declared an ‘eligible judge’ and the power to issue warrants is conferred on the judge in his or her personal capacity.
- 3 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.
- 4 <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd147.pdf>
- 5 Senate Legal and Constitutional Committee, *Provisions of the Surveillance Devices Bill 2004*, May 2004 [http://www.aph.gov.au/senate/committee/legcon\\_ctte/completed\\_inquiries/2002-04/surveillance/report.pdf](http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/surveillance/report.pdf)
- 6 <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd024.pdf>

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- 7 Subsection 5(1), *Legislative Instruments Act 2003*.
- 8 Attorney-General's Department, *Legislative Instruments Handbook*, October 2004, p. 10.
- 9 Explanatory Memorandum p. 48.
- 10 "Exempt proceedings' are proceedings by way of a prosecution for a prescribed offence and proceedings such as police disciplinary proceedings, proceeds of crime applications, extradition proceedings and proceedings under the *Mutual Assistance in Criminal Matters Act 1987* (Cth), s 13. A 'prescribed offence' is a class 1 or class 2 offence under the *Telecommunications (Interception) Act 1979* (Cth), an offence against *Telecommunications (Interception) Act 1979* (Cth), ss 7(1) or 63, other phone tap related offences in *Crimes Act 1914* (Cth), Pt VIIB, and any other offence punishable by imprisonment for a maximum period of at least three years." See Law Book Company, *The Laws of Australia* 11.1.413[413].
- 11 The provision covers warrants for obtaining foreign intelligence.

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