Law Council
OF AUSTRALIA

10 May 2004

Mr Jonathon Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Parliament House
Canberra ACT 2600
Email to: acc.committee@aph.gov.au

Dear Mr Curtis,

Thank you for the invitation to comment upon the Senate Legal and Constitutional Committee's inquiry into the *Surveillance Devices Bill 2004* ("the SD Bill").

The Law Council of Australia is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- ACT Bar Association;
- Bar Association of Queensland;
- Law Institute of Victoria;
- Law Society of the ACT;
- Law Society of NSW;
- Law Society of the Northern Territory;
- Law Society of South Australia;
- Law Society of Tasmania;
- Law Society of Western Australia;
- New South Wales Bar Association;
- The Northern Territory Bar Association;
- Queensland Law Society;
- the Western Australia Bar Association; and
- the Victorian Bar.

The Law Council notes that in relation to this matter separate submissions may be lodged by some of these bodies.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council of Australia welcomes the opportunity to comment upon this important piece of legislation and apologises for the delay in providing its submission. The Law Council apologies for being unable to complete this submission prior to the 23 April deadline but we are sure the committee will appreciate that we have had to contend with a number of competing priorities in recent times.

The Law Council reserves the right to make further submissions on this matter. Indeed, the Business Law section of the Law Council is still considering some aspects of this matter and may wish to make further submissions on this issue in the near future. It should also be noted that this submission has not been considered or endorsed at a full meeting of the Council of the Law Council of Australia.

The SD Bill proposes to increase the powers currently available to Australia's law enforcement agencies in relation to the use of surveillance devices. It proposes a number of important changes to current law and comment on these matters is dealt with on an issue-by-issue basis below.

Expansion of the types of surveillance devices used

The Bill proposes to allow officers of the Australian Federal Police, the Australian Crime Commission or a State or Territory police force investigating a Commonwealth offence to use a greater range of surveillance devices. The explanatory notes describe the four types of surveillance devices as listening devices (LDs), optical surveillance devices ("OSDs"), tracking devices ("TDs") and data surveillance devices (DSDs). The explanatory memorandum advises that, with the exception of LDs, use of these devices is not currently covered by Commonwealth law. It is further proposed in the Bill that a clause be provided to allow the types of SD covered by the Act to be added to by regulation.

The Law Council recognizes that it is important for the Government to utilize latest technology to assist law enforcement agencies to fight crime and it does not offer any opposition to the proposed addition of the devices covered in this Bill. However, it is concerned by the proposal to allow the Government to add future SD devices by regulation rather than including them in legislation. While the addition of an unsuitable device would be subject to a disallowance motion, it is argued the gravity of the powers granted to authorities under this Bill, i.e. to monitor covertly a citizens communications and activities with (on some occasions) only retrospective court approval, warrant the inclusion of all surveillance devices within the legislation itself. This will allow for proper and considered scrutiny of any future addition of a SD to the legislative scheme. The technical development of a new SD could be normally expected to take sufficient time to allow for inclusion in the legislative program of the day.

Offences for which Surveillance Devices can be sought

The Bill proposes to allow the use of SDs in relation to any Commonwealth offences, or State offences which have a federal aspect, carrying a maximum penalty of at least three years' imprisonment (a 'relevant offence'). It is said that the three year threshold is in recognition of the privacy concerns raised by the use of SDs, balanced against the benefits of their use by law enforcement agencies in the investigation of serious offences. Several other types of offences are also specified as offences for which a warrant may be obtained. This includes offences against the *Financial Transaction Reports Act 1988* which relate to the failure to declare the import or export of money in excess of $A10,000 and operating a bank account in a false name. It is argued that these offences are included because they are often indicative of other underlying criminal conduct of a more serious nature. It is also proposed in the Bill that a SD order be permitted to be sought in relation to various offences against the *Fisheries Management Act 1991* and where a child recovery order has been issued by the Family Court to assist with the location and safe recovery of any child who is subject to an order.

Under current legislation, contained in Division 2 of Part II of the *Australian Federal Police Act 1979*, a warrant to use a listening device (LD) in respect of a person or premises can be approved by a judge or member of the Administrative Appeals Tribunal (AAT) in circumstances where the offence being investigated falls into one of two categories (class one or class two general offences). Class one general offences broadly cover offences relating to murder and kidnapping. Class two general offences cover a range of offences in the *Criminal Code Act 1995* (including producing false or misleading document, bribery of a commonwealth official, corrupting a public commonwealth official, abuse of public office, and falsification of documents), the *Crimes Act 1914* (including oppressive conduct by a judge, corruption of a witness, conspiracy to defeat justice and attempting to pervert justice), and any other crime (other than a class one offence) punishable by seven years imprisonment where the conduct constituting the offence involves a threat to person or property or involves trafficking in narcotics.

In relation to the first category of offences for which the Bill proposes that SD orders should be able to be sought (those carrying a penalty of three years' imprisonment or more), the Law Council is concerned by the broad nature of the provision. Considering the Bill will confer extensive powers upon an authority to use a SD (once a warrant has been granted), and that these powers apply not only to Federal offences but also State offences with a Federal element, the Law Council believes the Bill should place greater limits upon the types of offences for which a SD can be sought. For example in Queensland, warrants for surveillance devices (listening devices, optical surveillance devices and tracking devices) may only be obtained in connection with a serious indictable offence having regard to the conduct involved. Indeed the approach of the SD Bill might be contrasted with the applicable provisions in the *Crimes Act 1914* (the Crimes Act) dealing with controlled operations (ss15H-15U). Under the Crimes Act, controlled operations can only be undertaken in relation to a "serious Commonwealth offence" which is limited to offences provided for at s15HB, which provides:

> *For the purposes of this Part, serious Commonwealth offence means an offence against a law of the Commonwealth:*

(a) that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports, or that involves matters of the same general nature as one or more of the foregoing or that is of any other prescribed kind; and
(b) that is punishable on conviction by imprisonment for a period of 3 years or more.

The Law Council believes that limits should be placed on the types of offences for which a SD warrant can be sought, and the appropriate limit should be "serious Commonwealth offences" as defined in the *Crimes Act* in relation to controlled operations.

The Law Council offers no comment at this point on the inclusion of specific provisions to deal with offences under the *Financial Transaction Reports Act 1988* which relate to the failure to declare the import or export of money in excess of $A10,000 and operating a bank account in a false name, the various offences against the *Fisheries Management Act 1991*, and to allow a SD to be used where a child recovery order has been issued by the Family Court to assist with the location and safe recovery of any child who is subject to an order.

Warrants

It is proposed under the Bill that a SD or retrieval warrant may be issued by an eligible Judge or by a nominated AAT member. Clause 14 provides a three part procedure for applying for a warrant. Firstly a law enforcement officer may only apply for the issue of a SD warrant if they suspect, on reasonable grounds, that a relevant offence (or relevant offences) has been, is being, is about to be or is likely to be committed and secondly that an investigation into that offence (or offences) is being, will be or is likely to be conducted. The third part of the test is contained in subclause 14(1)(c) which states that the there must be reasonable grounds to believe that the use of the SD is required for the conduct of the investigation for evidence-gathering purposes in relation to the relevant offence or offences, the identity or location of the offender.

Given the intrusive nature of SDs the Law Council strongly endorses court supervision over their use, and welcomes the adoption of strict procedures for warrant applications. However, in relation to clause 14(6), which permits the application for a warrant without a supporting affidavit in certain circumstances, that this should be limited to exceptional cases, rather than simply cases where it is "impractical" to prepare and swear a supporting affidavit.

Emergency and Other Authorisations

It is proposed that a surveillance device may be used without a warrant in circumstances where an "emergency authorisation" has been obtained. Under the Bill an emergency authorisation may only be granted by an appropriate authorising officer, who may be: a Commissioner, Deputy Commissioner or authorised SES level employee of the Australian Federal Police; the Chief Executive Officer or authorised senior executive service employee of the Australian Crime Commission; or a Commissioner, Assistant Commissioner or Superintendent of a State or Territory police force. It is proposed that an emergency authorisation will only be permitted in certain circumstances: to deal with an imminent risk of serious violence to a person, or substantial damage to property; to urgently recover a child subject to a Family Court recovery order; or to prevent the loss of evidence in an investigation of a specified serious offence, including terrorism, serious drug offences, treason, espionage and aggravated people-smuggling. When an emergency authorisation is granted the authorising officer must apply within two business days for retrospective approval by an eligible Judge or AAT member,

The Law Council agrees that situations may present themselves where an emergency approval is required. However, such circumstances will be rare and authorising officers must be convinced that they are truly exceptional. The Law Council is concerned at the potential for abuse of the "imminent danger" test. Furthermore, we submit it would be dangerous to allow such a provision to proceed without firm evidence of the existence of internal disciplinary procedures within law enforcement agencies to ensure such abuse is dealt with appropriately. In the absence of such disciplinary procedures there is little detriment to be suffered by an offending officer other than the obvious loss of the evidence obtained during an illegal SD operation.

It is also noted that clause 30, dealing with situations in which an emergency warrant may be granted to prevent the loss of evidence in an investigation of a specified serious offence, including terrorism, serious drug offences, treason, espionage and aggravated people-smuggling, did not form part of the recommendations of the SCAG/APMC joint working group which provided a discussion paper on national investigative powers which assisted the preparation of this Bill. The Law Council is again concerned at the potential for misuse of this provision, though it notes it applies to a restricted number of serious offences. It is the Law Council's submission that, given the exceptional nature of this type of emergency authorisation, the approval in this instance should fall to either the Commissioner or Deputy Commissioner (or their equivalent) of the applicable law enforcement agency.

The Bill provides for a number of other scenarios in which a SD can be used without a warrant:

- Subclause 37(1) provides that where the use of an optical surveillance device will not involve entry onto premises without permission or interference without permission with any vehicle or thing, a law enforcement officer (not including a police officer of a State or Territory police force) may, without a warrant, use such a device in the course of their duties. It is proposed a State or Territory officer will be granted the same power but only in the investigation of a relevant federal

offence and not a State offence with a federal aspect (in which case the powers of their own jurisdiction would need to be used).

- Subclause 38(1) proposes to permit a Federal law enforcement officer, in the course of their duties, to use a SD for any purpose involving listening to or recording words spoken without a SD warrant. However, the ability of an AFP or ACC employee (including those seconded to the agency) to carry out this surveillance is limited to the functions of officers, employees or staff members of either agency as set out in the AFP and ACC Acts respectively.

- Clause 39 allows limited use of a tracking device with internal police authorisation only. It is said this is in reflection of the less intrusive nature of TDs as compared with other types of SD. However, where such use requires a greater level of intrusion (such as entry onto premises without permission) a full SD warrant would be required. The authorising officer must give their permission in writing.

The Law Council repeats it's concern that there is potential for misuse of SDs in circumstances where they are used without the granting of a warrant and in some circumstances (clauses 37, 39) where the use may be quite intrusive. Given this, it is our submission that the powers contemplated in clauses 37 and 39 should only be permitted in relation to "serious indictable offences". We would also repeat our request that the Committee satisfy itself that appropriate disciplinary procedures are in place to deal with any abuse of these exceptional powers. In the absence of such procedures, the Law Council is reluctant to support these measures.

Compliance and monitoring

It is proposed that a number of safeguards will be put in place to safeguard against misuse of the powers contained in the Bill. These include:

- Prohibition on use, recording, communication or publication of protected information or its admission in evidence (clause 45). Protected information is broadly speaking any information obtained during a SD operation with or without a warrant. Penalties range from two to ten years' imprisonment.

- Obligations to maintain a register of each warrant or authorisation given.

- Obligations to report annually to the Minister detailing a range of information in relation to the use of the powers that year, and the Minster must present this to Parliament within 15 days.

- Obligations to secure documents connected with warrants and authorisations and in some circumstances, to destroy information not required for a recognised purpose under the Act;

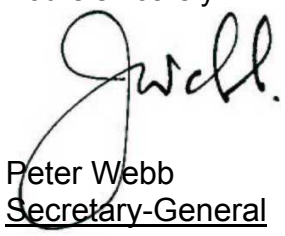
- The bill also provides for regular inspections of records by the Commonwealth Ombudsman and a half-yearly report by the Ombudsman to the Minister.

The Law Council welcomes these safeguards, and particularly the provisions relating to the prohibitions on the publication of information and inspections by the Ombudsman.

As noted above, the Law Council has some concerns in relation to the capacity of law enforcement agencies to ensure that the powers to be granted under this Bill, some of which are of a highly intrusive nature, are not misused. Although it is outside the scope of this legislation to address matters relating to police procedure, two areas which the Law Council would like to see the Committee investigate are (i) the existing disciplinary procedures in place to deal with senior officers who are shown to be inclined to inappropriately and/or unlawfully approve SD operations and (ii) the existence of appropriate training schemes and police procedures to assist officers in making appropriate determinations in relation to the use a surveillance device in preference to other less intrusive but perhaps equally effective methods of investigation. The Law Council views the existence of such measures as being entirely appropriate in the context of the Committee's consideration as to the adequacy of the safeguards attached to this important piece of legislation.

Thank you for providing the Law Council with the opportunity to comment upon this important piece of legislation.

Yours sincerely



Peter Webb
Secretary-General