



## SENATE LEGAL AND CONSTITUTIONAL COMMITTEE

### Inquiry into the provisions of the Surveillance Devices Bill 2004

The Senate Legal and Constitutional Legislation Committee (the Committee) has advised that it is inquiring into the provisions of the *Surveillance Devices Bill 2004* (the Bill).

#### Overview of the Commonwealth Bill

2. The *Surveillance Devices Bill 2004* seeks to consolidate and update the regulatory regime for the use of surveillance devices by Commonwealth agencies. The Bill is broadly based on the model surveillance devices legislation developed by the Joint Working Group on National Investigation Power with some necessary adaptation for the Commonwealth jurisdiction. The Bill takes into account the unique nature of the AFP's national and international business.
3. The Bill establishes a structured process for law enforcement use of surveillance devices. For the purposes of the regime, surveillance devices include data surveillance devices, listening devices, optical surveillance devices and tracking devices.
4. Importantly, the Bill establishes a strict regime, similar to that in the *Telecommunications (Interception) Act 1979*, to regulate the uses to which surveillance device product is put, its communication, publication, storage, and destruction. The Bill also establishes a vigorous reporting and inspection regime which allows for scrutiny of the exercise of powers under the Bill by the Ombudsman, the Attorney-General and the Parliament.
5. The AFP supports the Bill. Surveillance is a crucial tool for effective and efficient law enforcement. The advent of comprehensive surveillance device legislation modernises and clarifies AFP surveillance device powers and aligns them with those of State and Territory police. Such powers are necessary to equip the AFP to investigate Commonwealth offences and to keep pace with targets that increasingly make use of advanced technology to evade law enforcement detection and disruption.

6. Comprehensive Commonwealth legislation will complement intra-jurisdictional and cross-border surveillance device initiatives being developed by the States and Territories under the auspices of the Standing Committee of Attorneys-General (SCAG) and the Australasian Police Ministers Council (APMC).

### **Operational overview of the Bill**

7. It is proposed that the AFP may use surveillance devices for the investigation of Commonwealth offences which carry a maximum penalty of at least three years imprisonment or to assist the recovery of a child where the Family Court of Australia has issued a recovery order. The AFP may also use them to investigate a State offence which has a federal aspect that meets the three year threshold.
8. Under the provisions of the Bill, the AFP may only use surveillance devices with a warrant issued by a judge or an AAT member unless special circumstances of urgency exist involving serious risk to a person or property, urgent circumstances relating to the recovery of a child or where there is risk of loss of evidence for certain listed offences such as drug offences, terrorism, espionage, sexual servitude and aggravated people smuggling offences. In such cases, a Senior Executive Member of the AFP may issue an emergency authorisation. Judicial approval of the emergency authorisations must then be obtained within two business days.
9. Tracking devices generally require a warrant to be issued unless the device can be installed and retrieved without entering the premises, or interfering with the interior of a vehicle without permission. In these cases, a Senior Executive Member of the AFP can give permission for the use of the device. Optical surveillance devices can be used for the performance of the AFP's functions without a warrant in similar circumstances.
10. In recognition of the transnational aspect of many AFP investigations, the Bill allows the use of surveillance devices for the investigation of Commonwealth offences outside Australia. The consent of an appropriate official of the foreign country or the country of registration of the vessel or aircraft is required before use of the device is lawful.

### **Role of the Australian Federal Police**

11. The AFP is the primary Commonwealth law enforcement agency and the chief source of advice to the Commonwealth Government on policing issues in Australia. Its role is to enforce Commonwealth criminal law, protect Commonwealth and national interests from crime in Australia and overseas, and provide a secure and safe environment in the Australian Capital Territory (ACT) and external territories. The AFP is also Australia's international law enforcement and policing representative.

12. The AFP's functions are set out in section 8 of the *Australian Federal Police Act 1979*. The way in which these functions are pursued may be refined by Ministerial Directions, which essentially outline the Government's priorities and expectations for the AFP.
13. The current Direction states that the AFP will pursue (in part) the following outcomes:
  - that criminal activity is deterred in areas impacting on the Commonwealth Government's interests;
  - that those individuals and interests identified by the Commonwealth Government or the AFP as being at risk are kept safe and secure as a result of AFP protective services;
  - that policing activity creates a safer and more secure environment in the ACT, Jervis Bay and Australia's external territories;
  - that the Commonwealth Government contributes effectively to international law enforcement interests; and
  - that community confidence in the honesty, effectiveness and accountability of the AFP is high.
14. Given this breadth of function, the AFP occupies a unique position in the Australian criminal justice environment as an agency with an international, national and community policing role.

#### **Surveillance devices – necessary investigative tools**

15. The success of the AFP in bringing to justice those involved in the commission of serious crimes such as terrorism, drug offences, people trafficking and money laundering depends on available tools of investigation, information gathering capabilities and the admissibility of that information in proceedings in Australian courts.
16. Increased accountabilities and safeguards accompany the introduction of Commonwealth surveillance device powers. High thresholds of accountability similar to those imposed under the *Telecommunications (Interception) Act 1979* cover record-keeping, monitoring and reporting measures in relation to use of surveillance device powers.
17. The Commonwealth Bill implements the electronic surveillance model legislation developed by the SCAG and APMC Joint Working Group with some adjustments necessary to ensure its effectiveness within the Commonwealth jurisdiction.
18. The model legislation was developed in response to Resolution 15 of the Leaders' Summit on Terrorism and Multi-jurisdictional Crime. In April 2002, the Prime Minister, State Premiers and Territory Chief Ministers agreed to legislate through use of model laws for all jurisdictions and mutual recognition for a national set of

powers for cross-border investigations including for electronic surveillance devices.

19. The model legislation was the result of national consultation. The draft model bill was released as a public discussion paper in February 2003. Nineteen submissions were received including submissions from privacy and civil liberties groups. The final Bill took into account the issues and concerns these parties raised as a result of the exposure draft.

### **Adjustments to the model legislation required for the Commonwealth jurisdiction**

20. The model legislation developed by the Joint Working Group is intended to deal with State and Territory investigations that cross from one jurisdiction into another and to complement existing intra-jurisdictional legislation. The model bill's main application is aimed at dealing with cross border situations, for example, where a listening device is installed on a vehicle that a suspect drives over the border from Albury to Wodonga (ie, from NSW into Victoria).
21. The Commonwealth Bill entails some adjustments to the model bill to ensure that Commonwealth investigations are not disadvantaged by differing provisions in State and Territory legislation where the Commonwealth currently has no provisions. Adjustments include:
  - Internal authorisation for tracking devices where there is no entry on to premises or interference with the interior of a vehicle without permission;
  - Power to use optical surveillance devices without warrant where there is no entry on to premises or interference with the interior of a vehicle without permission;
  - Availability of emergency authorisations for risk of losing evidence of certain serious offences; and
  - Extraterritorial application of warrants.

#### *Tracking devices – internal authorisation*

22. The internal authorisation model is similar to the existing Commonwealth controlled operations regime and was discussed by the SCAG/APMC Joint Working Group as an alternative model for the proposed legislation. The proposed tracking device provisions align with accountability measures (reporting and record keeping) that the Government has already legislated.
23. Tracking devices provide security for prohibited goods in transit. Because a tracking device only monitors the location of a person or an object, rather than recording a person's activities or conversations, it represents a lower level of intrusion than other types of surveillance devices. Tracking devices are less intrusive than other devices and provide important information in the early stages of an investigation about the location of suspects and prohibited goods. The

adjustment to permit internal authorisation of tracking devices where installation and use does not require entry onto premises or access to the interior of a vehicle without permission recognises the requirement for law enforcement to respond in the most effective way in time critical investigations into serious offences.

24. The AFP advises that there are numerous cases where use of a tracking device is a decision that has to be taken in a matter of minutes. For example, in a controlled operation suspects under physical surveillance may deliberately change vehicles (perhaps hire cars) and conduct counter surveillance techniques. Rapid response is essential to ensure continuity of evidence.
25. Use of tracking device authorisations does not go unchecked. The following thresholds and safeguards are among the strict accountabilities proposed in the Commonwealth Bill:

#### No entry or interference without permission

When the level of intrusion increases (because the device is to be used inside a vehicle or involves entry onto private land without permission) a full warrant must be sought from a judge or AAT member.

#### High level authorisation

Only the Commissioner, Deputy Commissioner, or a nominated Senior Executive AFP employee, may authorise a tracking device authorisation under these provisions. This is consistent with controlled operations authorisations. Controlled operations authorisations have proven effective.

#### Transparency

Records of tracking device authorisations must be made by the appropriate authorising officer. Monitoring, compliance and record keeping requirements must be adhered to. Decisions and processes are reviewable by the Ombudsman and must be reported to Parliament.

#### Penalties

Failure to comply with safeguards subjects an officer (including an appropriate authorising officer) to internal scrutiny and possible legal or disciplinary action as well as placing any information obtained at risk of being ruled inadmissible as a result of being unlawfully or improperly obtained.

#### *Tracking devices - reporting requirements*

26. The Bill recognises that tracking devices are one of the least intrusive forms of obtaining information given that objects containing tracking devices are often

already in the lawful possession of law enforcement (eg, packages containing narcotics). The proposed provisions require three layers of written reporting: application, record of authorisation and report of authorisation. The AFP is aware of numerous cases where use of tracking devices may be essential to prove the mental elements of a criminal offence. The proposed reporting requirements impose a significant administrative burden on the AFP given the likelihood of the number of tracking device authorisations that would be issued.

27. The proposed reporting measures are in addition to existing accountabilities that apply to the AFP, including:
- secrecy provisions in section 60A of the *Australian Federal Police Act 1979* that apply criminal sanction to the unlawful disclosure of information;
  - AFP Professional Standards Regime;
  - the discretion of a court to exclude evidence from obtained from a tracking device if it is found to be irrelevant, or to have been obtained unlawfully or improperly; and
  - Ombudsman's oversight.

*Optical devices – use without warrant*

28. The AFP works closely with other Australian and international law enforcement bodies to enhance safety and security in Australia and to provide a secure regional and global environment.
29. The Bill provides a mechanism for an investigator to apply for warrants for the investigation of relevant offences. The AFP's role extends beyond the investigation of criminal offences and includes providing protection services to high office holders including the Prime Minister, foreign dignitaries and crucial witnesses. Binoculars and cameras are frequently used in fulfilling these functions.
30. Optical surveillance devices, such as cameras outside Commonwealth premises, are also used to effectively fulfil statutory responsibilities such as protection and guarding.
31. The definition of optical surveillance device in the model bill developed by the Joint Working Group is broad and potentially captures a wide range of devices including binoculars and cameras. It would be operationally unworkable to obtain a warrant for use of devices such as cameras and binoculars when fulfilling statutory functions.
32. The model bill is designed to complement existing provisions under State and Territory legislation for intra-jurisdictional investigations. It does not affect the existing laws of the states which prohibit the use of certain devices. Only some jurisdictions regulate or prohibit the use of optical surveillance devices. Without

the power in the Commonwealth Bill to use optical surveillance devices without a warrant in some circumstances, Commonwealth investigations would be subject to the differing provisions of the States and Territories.

33. A number of State and Territory jurisdictions already formally exempt Commonwealth law enforcement officers from their surveillance device regulation.
34. When the level of intrusion increases (because use of the device involves interference with a vehicle or thing, or involves entry onto private land without permission) a full warrant must be sought from a judge or AAT member.
35. Inappropriate disclosure of material obtained through use of an optical surveillance device may render an AFP employee liable to disciplinary or criminal action pursuant to the *Australian Federal Police Act 1979* (section 60A) or the *Crimes Act 1914* (section 70).

#### *Emergency authorisations*

36. Existing legislation in Victoria, New South Wales, Western Australia, Queensland and the Northern Territory provides for the use of a surveillance device without a warrant in certain emergency situations where it is not practicable to obtain a warrant.
37. The AFP's role is to enforce Commonwealth criminal law and protect Commonwealth and national interests from crime in Australia and overseas, and provide a secure and safe environment in the Australian Capital Territory (ACT) and external territories. The AFP is also Australia's international law enforcement and policing representative.
38. Due to the unique nature of the AFP's jurisdiction and the types of situations the AFP is often faced with when investigating serious offences (terrorism, treason and trafficking of drugs and people), it is important that investigators have immediate access to an authorisation process for Commonwealth investigations.
39. The Bill proposes that emergency authorisations be available where there is imminent risk of:
  - serious violence to a person where use of a surveillance device may assist in preventing an incident. For example, an emergency authorisation may be necessary to listen to a suspect to determine location of an imminent terrorist attack;
  - death or substantial property damage where use of a surveillance device may assist in preventing the incident. For example, an emergency authorisation may be necessary to install a surveillance device in a vehicle that has just been

identified as an imminent meeting place for conspirators planning a terrorist attack; and

- abduction of a child who is the subject of a recovery order and that the use of a surveillance device may assist in recovering the child before the child is harmed, or removed from the country.

40. In the investigation of offences such as terrorism and trafficking of drugs or people, information may be presented leaving the AFP little time to respond. The Bill also proposes that emergency authorisations be available where there is imminent risk of the loss of evidence in these types of serious offences. This is important where evidence may be disposed of easily, such as drugs or documents.
41. The AFP is concerned that emergency authorisation where the risk relates to a loss of evidence does not extend to Part IIIA of the *Crimes Act 1914* which deals with child sex offences overseas. The AFP considers that this is a potentially serious omission given the gravity of these offences. An appropriate amendment is required to ensure that the AFP is able to obtain an emergency authorisation for surveillance devices where it is necessary to prevent the loss of evidence relevant to such an investigation.
42. Use of emergency authorisations will not go unchecked. The law enforcement officer must suspect that the circumstances are so serious and urgent as to warrant the use of a surveillance device without court authorisation and that it is not practicable to apply for a surveillance device warrant in the normal manner. The following thresholds and safeguards accompany the application of the proposed emergency authorisation provisions:

#### High level authorisation

Only the Commissioner, Deputy Commissioner or a nominated senior executive AFP employee can issue an emergency authorisation under these provisions. This is consistent with controlled operations authorisations.

#### Subsequent judicial approval

Subsequent approval must be obtained from a nominated AAT member or eligible judge within two working days of the authorisation, having regard to the seriousness and urgency of the circumstances and the impracticality of applying for a warrant through the normal application process (including by remote application).

#### Transparency

Records of an emergency authorisation must be made by the appropriate authorising officer. Monitoring, compliance and record keeping requirements



must be adhered to. Decisions and processes are reviewable by the Ombudsman and must be reported to Parliament.

### Penalties

The Bill includes prohibitions on the use and communication of information. Failure to comply with safeguards subjects an officer (including an authorising officer) to internal scrutiny and possible legal or disciplinary action as well as placing any information obtained at risk of being ruled inadmissible as a result of being unlawfully or unfairly obtained.

### Destruction of records

Consistent with the existing Commonwealth listening device provisions and the *Telecommunications (Interception) Act 1979*, destruction of records can be directed by the Commissioner if he is satisfied that it is not likely to be required for a permitted purpose in relation to the agency (eg, criminal proceeding, disciplinary or civil forfeiture investigations).

The Bill proposes that destruction of records must be ordered by the Commissioner if he or she is satisfied that it is not likely to be required for a permitted purpose in relation to the agency (eg, criminal proceeding, disciplinary or civil forfeiture investigations).

### *Extraterritorial application of warrants*

43. The AFP works closely with other Australian and international law enforcement bodies to enhance safety and security in Australia and to provide a secure regional and global environment, through combating:
  - terrorism;
  - organised crime;
  - transnational crime;
  - money laundering;
  - major fraud;
  - illicit drug trafficking; and
  - e-crime.
44. Globalisation of crime has resulted in increasing Commonwealth influence in dealing with the above emerging issues. The Commonwealth has recognised the challenges posed by the transnational nature of crime and introduced a number of offences with extended Category D jurisdiction (eg, offences involving terrorism and harm to Australians overseas). The provisions proposed in the Surveillance Devices Bill are essential in ensuring that law enforcement can effectively investigate transnational offences.

45. As mentioned in paragraph 12 above, the Bill provides for use of surveillance devices for the investigation of Commonwealth offences outside Australia. The Bill does not extend law enforcement powers beyond what is currently allowed under international law and incorporates international law requirements within a warrantable process. The consent of an appropriate official of the foreign country or the country of registration of the vessel or aircraft is required before use of the device is lawful.
46. The AFP is concerned about the risk to investigations that the requirement for overseas approval may pose to investigations where those countries, or their officers, are complicit in the alleged criminal activities. For example, where a ship belonging to country A is flying a flag of convenience from country B and sailing to Australia to off-load prohibited drugs, the AFP will be required to disclose its law enforcement activity to these countries irrespective of the potential that these countries may compromise the investigation or evidence.

#### *Mutual Assistance requests*

47. The AFP considers that the proposed mutual assistance provisions are very important. The AFP needs to be able to offer full assistance to law enforcement counterparts around the world, especially in light of the transnational nature of AFP investigations and the level of cooperation the AFP provides and seeks from overseas countries. The Bill proposes that surveillance device material may be provided to overseas law enforcement agencies under the auspices of a mutual assistance request. The AFP strongly supports this proposal. The mutual assistance proposal provides a mechanism that complements the AFP's mandate to work closely with overseas law enforcement agencies towards enhancing safety and security in Australia and providing a secure regional and global environment.

#### **Conclusion**

48. The *Surveillance Devices Bill 2004* will allow the Commonwealth to consolidate and modernise its surveillance device laws, and provide law enforcement agencies with access to the surveillance tools necessary to prevent, detect, and investigate crime, and to protect Australians and Australian interests.