Australian Government

Attorney-General's Department

Deputy Secretary
Criminal Justice and Security

18 May 2004

The Acting Secretary
Senate Legal and Constitutional Legislation Committee
Parliament House
Canberra

Dear Jonathan

Surveillance Devices Bill 2004

At the Committee's public hearings on the Surveillance Devices Bill 2004 the Department undertook to provide the Committee with further information on a number of matters. These matters, which have been discussed with the ACC and AFP, are addressed below.

(1) Definition of Law Enforcement Officer

The Department has sought the views of the ACC and the AFP on the breadth of the definition of "law enforcement officer" particularly in the context of persons who can apply for warrants. In addition, a number of States have contacted the Department requesting that agencies not staffed by police such as the NSW Crime Commission and police integrity bodies be given the power to seek warrants for the investigation of Commonwealth offences.

The ACC is of the view that members of staff of the ACC other than sworn officers need to be included in the definition of "law enforcement officer" for the following reasons:

The retention of the general definition would ensure flexibility. For instance, many of its technical surveillance officers (those who install and retrieve the devices) and senior investigative managers are not currently police officers, but are former officers. It would be preferable, from a management and accountability perspective, if applications for warrants could be made by experienced officers who are under longer term engagement in the ACC, rather than being confined to seconded officers who may be with the ACC for short periods.

While the current provision technically encompasses all ACC staff, the ability to apply for a warrant is confined and closely controlled by internal practice and procedures. An application for a warrant is a serious, technical and complex procedure in which the applicant must clearly meet the three grounds set out in s14 (1) among other things. Further, in a subsequent prosecution, the applicant may be subject to vigorous cross-examination in relation to their application for a warrant and would be called upon to convincingly explain and justify their actions. As a result, the ACC confines applications to those who are suitably qualified and experienced.

The AFP also believes that employees other than sworn officers should be included within the definition of 'law enforcement officer'. It would want the ability for AFP employees to obtain SD warrants to remain broad as it has a number of persons who perform operational, intelligence and technical roles who aren't members, but who may be the appropriate subject-matter experts to swear a warrant. Not all of the AFP's technical experts are police officers and these people require the power to do whatever is necessary to install and retrieve certain surveillance device warrants. The AFP has indicated that all AFP employees are subject to the same internal employment standards and accountability and all are subject to the operation of the Complaints (Australian Federal Police) Act 1981.

(2) Infra-red Devices

By way of background, infrared (IR) is electromagnetic radiation of a wavelength longer than visible light. Infrared is used in night vision equipment and night time speed cameras where there is insufficient visible light to see an object. IR is commonly used in simple domestic communication applications such as television remote control units, alarm sensors and audio transmission systems. IR is also widely used by Defence and for emergency search and rescue in conditions where there is little or no light.

In the case of the ACC, IR is used in conjunction with video image capturing and recording equipment and as an aid to physical observations and covert undertakings. The ACC has provided the following examples:

Where a person under investigation has a stash of narcotics in dense bush and only goes to it under the cover of darkness, IR may be used to flood the scene with 'invisible light'. IR sensitive cameras are used to capture the image. In the situation described, the bush is a public place. There would be no requirement for a warrant in these circumstances under the proposed legislation. The IR component of this installation is an aid and works in conjunction with the optical equipment to capture a recognisable image.

IR scopes and goggles are used by physical surveillance personnel to maintain observations in public places that are not illuminated, or insufficiently illuminated to identify activity. These situations are sporadic and physical surveillance operatives need the flexibility to use IR equipment as and where required. A warrant regime under these circumstances would be unworkable.

Technical surveillance operatives may use IR scopes or goggles so they can work under the cover of darkness to avoid compromise. In this case the IR equipment is used as an optical aid to facilitate safety. A warrant regime in these circumstances is not appropriate as the technology is used on an 'as needs' basis.

These examples would not seem to infringe the ruling in the Kyllo case, the headnote of which states in part 'the Government uses a device that is not in general public use to explore the details of a private home that would previously have been unknowable without physical intrusion...'. Assuming that a thermal imaging device has the capacity to be used to 'record visually or observe an activity' it would constitute an optical surveillance device within the meaning of clause 6 of the Bill.

The AFP has advised that it does not use technology (including IR technology) which has the capacity to observe through opaque walls or objects.

(3) Approval of Emergency Authorisations/Provision of Affidavits with Respect to Remote Applications

AGD notes that the various periods in which an emergency authorisation must be approved or an affidavit provided with respect to a remote application are not consistent with each other or with equivalent provisions in the TI Act. They are the same as those in the model Bill proposed by the Joint Working Group. In the consultation on the Joint Working Group discussion paper, Privacy Victoria raised concerns about the period of 2 business days before judicial approval of an emergency authorisation must be sought. The Joint Working Group report indicates that it considered this issue again in light of those concerns but endorsed the 2 business days as 'consistent with the majority of jurisdictions that currently provide for the use of a surveillance device without a warrant on emergency situations.'

The AFP has stated that it strongly supports the existing time periods in the SD Bill.

(4) Destruction of SD Material

Philip Moss, Senior Assistant Ombudsman has provided the following response on this issue:

'I note that the Ombudsman's accountability role in relation to the destruction of telecommunications interception (TI) material does not extend to monitoring the actual destruction of the material. Rather the role is procedural, involving retrospective inspection of the agency's record-keeping and the decision-making process. This approach raises a question of the Ombudsman's accountability role in relation to SDs should be any different.

In my view the mere attendance of an Ombudsman staff member when the material is destroyed would not provide any additional degree of accountability concerning the destruction process. In order to provide such a level of assurance, Ombudsman staff would need to exercise comprehensive oversight in relation to the whole process, from the point of the records' creation to their destruction. This regime would necessarily entail a significant amount of 'real time' monitoring within the agencies and would not be feasible with existing resources.

In our view, it would be more desirable if the Ombudsman's accountability role in relation to destruction of SD material were consistent with his role in relation to TI material. This role would enable retrospective procedural inspection of the destruction process (such as the identification, approval and destruction of SD material) without being present when the material is destroyed.'

The provision in the Surveillance Devices Bill is very similar to section 79 of the *Telecommunications (Interception) Act 1979*. It contains the core requirement in the equivalent TI provision (that material must be destroyed when the chief officer is satisfied that the material is not likely to be required for a permitted purpose) but it differs from the TI provision in two respects: (i) the SD Bill provision also contains a secure storage provision which is not directly replicated in the TI Act; and (ii) the TI Act provision contains a requirement to notify the AFP which is peculiar to the TI Act because of the AFP's special role in that legislation as a 'gatekeeper' with respect to other intercepting agencies.

Matters of clarification

AGD stated to the Committee that a remote microphone listening device would not be covered by the warrantless power in clause 37. However, whether the use of such a device would require a

warrant would depend on relevant prohibitions in State listening device laws; State laws would probably prohibit the use of such a device but this will depend upon the jurisdiction in question.

During the discussion of the extraterritorial use of surveillance devices, Senator Scullion asked a question: 'So FOC vessels are exempt-the flag of convenience vessels that do not actually profess to belong to anywhere.' to which Mrs Jackson responded 'yes'. It should be pointed out that vessels that do not belong anywhere are generally referred to as stateless vessels and no consent would be required in the case of such vessels. True flag of convenience vessels belong to a state which is not particularly concerned with compliance with shipping regulations. The consent of such a state would be required under the provisions of the Bill.

The action officer for this matter is Nick Smith who can be contacted on 62506475.

Yours sincerely

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