Australian Government
Attorney-General's Department

Information and
Security Law Division

04/1990

23 March 2004

Senator Marise Payne
Chair
Senate Legal and Constitutional
Legislation Committee
Parliament House
CANBERRA ACT 2600

By E-mail legcon.sen@aph.gov.au

Dear Senator Payne

Telecommunications (Interception) Amendment Bill 2004

I refer to the Committee's inquiry in relation to the above Bill, and the public hearings conducted on 22 March 2004 at which representatives of this Department gave evidence.

Further to the issues raised during the Department's evidence, I now set out information on a range of issues on which the Committee requested further information. I note that the Committee also requested information on issues which we have found necessary to address in a confidential submission. That information has therefore been provided separately, and we request that the information in that document not be published by the Committee.

You may also recall that we were not able to provide with certainty the date on which the Department briefed the Solicitor-General to seek a further Opinion. The further Opinion was sought in a brief dated 9 February 2004, following initial discussions with the Solicitor-General's Counsel Assisting foreshadowing the issue on 5 February 2004.

We understand that receipt of the brief by the Solicitor-General coincided with the start of the February sittings of the High Court of Australia, in which the Solicitor-General was heavily involved. In addition, the Solicitor-General led an Australian delegation to India in the week of 15 March 2004. That Opinion has, however, now been finalised. Some brief comments on the conclusions of that Opinion, as they relate to the matters before the Committee, are set out in the following pages.

You also noted during the hearings that both the AFP and NSW Police have expressed concerns in relation to consultation of those agencies on the amendments. I did not have the opportunity to offer details of the Department's consultation process during the hearings. However, to the extent that it assists the Committee, I note that the AFP, NSW Police and NSW Crime Commission, along with all intercepting agencies, were provided with a draft of the Bill on 21 January 2004. This was the first date that a draft Bill was available in a form suitable for circulation.

However, representatives of the AFP, NSW Police and the NSW Crime Commission, along with representatives of other intercepting agencies, were advised during the course of Interception Consultative Committee Meetings held in September and December 2003 that the Department's legislation program included the stored communication amendments now before the Committee. At each of those meetings, the Chair, as is the practice, extended an open invitation to agencies to provide submissions on any legislative issues on which they wished to offer views or proposals. None were received in relation to the amendments now proposed.

This Department offered, at the time of circulating the amendments to intercepting agencies, the opportunity to meet or to teleconference to discuss any issues or concerns. The Department met with representatives of the AFP and the DPP, and the Strategic Coordinator of the Action Group on Electronic Crime on 4 February 2004. At that meeting, the AFP, DPP and AGEC made clear that they continued to hold views initially expressed on 14 March 2002. The Department reiterated very clearly its own view, and its belief that the matter had been conclusively resolved by the Solicitor-General's initial Opinion of January 2002. Having regard to the inability to resolve that issue, the Department undertook to obtain a further clarificatory Opinion, and to pass on to the Solicitor-General any information or arguments that those agencies present considered relevant.

The Committee has also sought the Department's comments on two issues raised in a submission made by the NSW Minister for Police. Our comments are set out below.

Yours sincerely

Keith C Holland
Assistant Secretary
Security Law Branch

Telecommunications (Interception) Amendment Bill 2004

Questions taken on notice by the Attorney-General's Department

Solicitor-General's Opinion

As noted during the Department's appearance before the Committee, this Department has sought a further Opinion from the Solicitor-General clarifying his earlier views on the scope of the *Telecommunications (Interception) Act 1979* having regard to issues raised by the Australian Federal Police and the Director of Public Prosecutions in the consideration of the amendments now proposed.

Unfortunately the Solicitor-General had not been in a position to finalise that Opinion prior to the Committee's public hearings. However, the Solicitor-General has now provided the Department with a concluded Opinion on a number of the issues raised by the Australian Federal Police.

The Committee will recall that the AFP adopted advice given by the DPP that in operating a computer or telephone on order to download a stored message, an investigator does not intercept that message in the course of its passage over the telecommunications system.

The Solicitor-General concludes in his Opinion that that argument, while apparently plausible, ignores the statutory language of the Act. The Solicitor-General notes that his view on the use of a search warrant to access a communication depends on the operation of the service and the end-user equipment. In the case of communications stored on the end-user equipment, such as SMS messages, the message ceases to pass over the telecommunications system when it is downloaded. However, in the case of remote storage services, the message ceases to pass over the telecommunications system when it is first viewed from the server. Thus, the creation of a copy of the communication prior to that time would amount to interception, and could not be effected pursuant to a search warrant.

The Solicitor-General notes in his Opinion that those amendments that seek to specify a range of circumstances in which delayed access message service communications are taken to have ceased their passage over the telecommunications system clarify the current state of the law. Those amendments are consistent with the current operation of the prohibition against interception, and do not change the means by which communications may be accessed by law enforcement agencies. The current operation of the law would, as the Department indicated in its evidence, preclude a law enforcement agency from accessing an email stored at an intermediate point in transit, such as an ISP, in circumstances where that communication has not previously been accessed by the intended recipient, without a telecommunications interception warrant.

The Solicitor-General also considered in his Opinion the effect of the amendments extending the definition of interception to include reading or viewing of a communication in its passage over the telecommunications system. The Solicitor-General concludes that under these amendments viewing and reading will be intercepting and an interception warrant will be required in order to access remotely stored messages (which could previously have been viewed, provided such viewing did not result in the creation of an enduring copy of the message). These amendments do, as the Department made clear in its evidence to the Committee, change the definition of interception and therefore have an effect on conduct that was not otherwise prohibited. These amendments correct the anomalous result that voice communications are protected from listening, but remotely stored text communications are not protected from the analogous act of reading.

Finally, the Department asked the Solicitor-General to consider the effect of the amendments to prohibit reading or viewing of a communication in its passage over the telecommunications system on content-filtering software employed to prevent the entry of electronic communications containing malicious software or inappropriate content. The Solicitor-General concluded that the extension to reading does not preclude electronic content filtering of email communications. The Solicitor-General has expressed the view that, in the context of the proposed amendments, reading and viewing are limited to human reading or viewing – or at least to reading or viewing in a manner that would result in the sense and meaning of the message being apprehended and understood.

Submission of the NSW Minister for Police

The Committee has also asked the Department to comment on proposals set out in items 3(i) and 8 of an attachment to a submission made by the NSW Minister for Police. That attachment sets out a range of proposals advanced by the NSW Ministry of Police in relation to telecommunications interception in 2001.

The Department notes that the current Bill does not seek to address the particular issues raised at items 3(i) and 8. The Department also notes that a significant number of the amendments sought by the NSW Minister for Police in those earlier proposals have already been enacted , or are now before the Parliament in the current Bill. This is the case in relation to the ability to seek warrants for the investigation of child pornography and serious arson offences, which was addressed in the *Telecommunications Interception Legislation Amendment Bill 2002*, and the use of intercepted material in the dismissal of police officers on the basis of the Commissioner's loss of confidence in that officer. The proposal that warrants be available in connection with armament dealings is addressed in the amendments set out in the Bill now being considered by the Committee.

Proposal 3(i) notes that the NSW Crime Commission has received advice that there is some uncertainty whether an inquiry conducted by the Commission under its general powers of inquiry falls within the meaning of a prescribed investigation for the purposes of the Act, and request an amendment to ensure that the Commission is able to use intercepted material in this context. That particular issue is not addressed in the Bill. It raises questions as to the appropriate use of intercepted material, and is a matter that the Department will review in the context of its administration of this legislation.

Proposal 8 recommends that the Interception Act be amended to include proceedings under the *Criminal Assets Recovery Act 1990* (NSW) as exempt proceedings for the purposes of the Act. This would allow intercepted material to be used in connection with proceedings under that Act, which permits criminal assets to be recovered on the basis of the civil standard of proof. Legislation to establish a civil based confiscation regime was passed by the Commonwealth Parliament in September 2002. Having regard to the submissions made by NSW and others, the question of the use of intercepted material in civil confiscation proceedings was referred to Mr Tom Sherman AO, who conducted an independent review of the named person warrant regime and other pressing telecommunications interception issues in 2003.

Mr Sherman recommended in his report that the Interception Act be amended so that civil forfeiture proceedings are included in the definition of exempt proceeding in section 5B of the Act. Mr Sherman's report was tabled in November 2003, and the Government has not yet finalised its response to the recommendations made in the report. The question of extension of the definition of exempt proceedings to include civil confiscation regimes such as that in place in NSW will appropriately be considered in the context of responding to that review.

Finally, the Department takes this opportunity to note that, in response to consultations on the proposed amendments, the NSW Ministry wrote to the Department in an undated letter received on 27 February 2004. In that letter, the Director-General of the NSW Ministry of Police noted the Ministry's understanding that the NSW Police Service, Police Integrity Commission and NSW Crime Commission had provided comments on the Bill directly to the Department. The Director-General indicated that the Ministry had nothing further to add, beyond endorsing those agencies' support of the proposed amendments.