

Inquiry into the Crimes Legislation  
Amendment (Telecommunications  
Interception and Other Measures)  
Bill 2005

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Senate Legal and Constitutional Legislation  
Committee, Department of the Senate

27 May 2005

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## **Executive Summary**

The Law Council of Australia (the Council) appreciates the opportunity afforded to comment on the Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005 (the Bill). The Council believes there are issues with several aspects of the Bill which require resolution or possible amendment of the Bill. The Recommendations of the Council to the Senate Committee are as follows:

### **1. Range of communication devices**

The Council recommends that controls be placed on the type of communications and the instances in which these communications to or from an emergency services facility can be intercepted.

### **2. Prescribing emergency services facilities**

The Council recommends that Subsection (3AC) be removed and that the declaration under Subsection (3AA) be deemed a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This will allow appropriate scrutiny of the power by Parliament. If necessary, a provision should be inserted which removes the requirement to detail the specific location of the facility from the information provided to Parliament to protect the interests of critical infrastructure, yet still gives sufficient information for Parliament to adequately monitor the regulatory power.

### **3. Regulating members of other agencies as ‘law enforcement officer’**

The Council strongly recommends that paragraph (k) of drafting item 1 of Schedule 1 to the Bill be amended to specify more clearly which agencies may be prescribed.

### **4. Offence to receive or assist**

The Council recommends that this ancillary offence provision be removed from the Bill. It is an unjustified removal of civil liberties and has the potential to be misused and cause a significant breach of the privacy and civil liberties of those only suspected of crime.

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## 1. OVERVIEW

The Bill will amend the *Criminal Code Act 1995* (the Criminal Code) to extend the defences to certain offences under Part 10.6 of the Criminal Code to all agencies who may exercise powers under the *Telecommunications (Interception) Act 1979* (the Interception Act). The Bill will also amend the Interception Act to, amongst other things:

- allow the interception (without a warrant) of communications to and from certain declared emergency services facilities;
- allow the interception (without a warrant) by authorised radiocommunications inspectors who are fulfilling their statutory obligations under the *Radiocommunications Act 1992*; and
- implement the recommendations dealing with statistical information for named-person warrants, reports by the Commonwealth Ombudsman and civil-forfeiture regimes contained in the *Report of the Review of Named Person Warrants and Other Matters* (completed by Mr Tom Sherman AO in 2003).

The Council is concerned with the following areas of the Bill:

1. range of communication devices covered;
2. method for prescribing emergency services facilities;
3. regulating status as law enforcement officers for other agencies; and
4. auxiliary offence to receive or assist.

## 2. ISSUES

### 2.1 Range of communication devices

The Bill, by the effect of items 1, 3 and 4 of Schedule 2 will give law enforcement and security agencies new powers to intercept telecommunications from an emergency service facility without a warrant.

Previously, the exceptions to the prohibition against interception were limited to those in subsections 6(2A) and (2B) of the Interception Act:

6(2B) If a person who is lawfully engaged in duties relating to the receiving and handling of communications to an emergency services number listens to or records a communication passing over a telecommunications system to the emergency services number, the listening or recording does not, for the purposes of this Act, constitute the interception of the communication.

The amendments in the Bill significantly extend the reach of the power to intercept telecommunications without a warrant and should be scrutinised fully. It is unclear from

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the Explanatory Memorandum or second reading speech what justification is advanced for the increased ambit of the power.

The Interception Act defines 'communication' in Section 5 as:

**communication** includes conversation and a message, and any part of a conversation or message, whether:

- (a) in the form of:
  - (i) speech, music or other sounds;
  - (ii) data;
  - (iii) text;
  - (iv) visual images, whether or not animated; or
  - (v) signals; or
- (b) in any other form or in any combination of forms.

The Interception Act goes on, in Section 5, to define 'telecommunications service':

**telecommunications service** means a service for carrying communications by means of guided or unguided electromagnetic energy or both, being a service the use of which enables communications to be carried over a telecommunications system operated by a carrier but not being a service for carrying communications solely by means of radiocommunication.

The scope of information that the amendments of the Bill capture, therefore, is extremely wide. The Bill will, for example, allow the interception of phone calls, email and potentially mobile telephone calls to or from the emergency service facility. Despite the increased reporting and statistical observation of interceptions contained in the Bill, the ability to intercept a communication of this kind from an emergency service facility, potentially of a personal nature, is subject to little control. Personal communications of personnel of these services may be intercepted and recorded, without a warrant and without notice.

The Council therefore recommends that controls be placed on the type of communications and the instances in which these communications to or from an emergency services facility can be intercepted.

## 2.2 Prescribing emergency services facilities

Emergency services facilities are prescribed by the Attorney-General under Item 4 of Schedule 2 of the Bill. Subsection (3AA) notes that the Attorney-General may declare a premises as an emergency services facility 'by written instrument'. However, Subsection (3AC) states that this declaration is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

As outlined in the Explanatory Memorandum, subsection (3AC) is designed 'to ensure that the locations for emergency service facilities are not publicly available.' This is apparently justified because such facilities are part of Australia's critical operational infrastructure and their location must not be disclosed.

However, exemption of declarations made under subsection (3AA) from the scope of the *Legislative Instruments Act 2003* removes such declarations from Parliamentary scrutiny. Without scrutiny of any kind, these provisions allow the Attorney-General to prescribe any facility he or she sees fit as an emergency facility, with no legislative requirement to justify the purpose or reason for doing so. Parliamentary scrutiny is an

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integral part of the *Legislative Instruments Act 2003* and to remove it weakens the regime of scrutiny and ministerial responsibility.

The Council recommends that Subsection (3AC) be removed and that the declaration under Subsection (3AA) be deemed a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. This will allow appropriate scrutiny of the power by Parliament. If necessary, a provision should be inserted which removes the requirement to detail the specific location of the facility from the information provided to Parliament to protect the interests of critical infrastructure, yet still gives sufficient information for Parliament to adequately monitor the regulatory power.

### **2.3 Regulating members of other agencies as ‘law enforcement officer’**

Drafting item 1, Schedule 1, sets out the members of organisations that are defined as ‘law enforcement officers’ for the purposes of the Criminal Code, and who are therefore capable of intercepting telecommunications under the Interception Act.

The provision specifies four state based organisations and provides, at paragraph (k), that a member or employee of any other agency may be prescribed by the regulations as a ‘law enforcement officer’. This paragraph gives wide discretion to the Attorney-General and Minister for Justice and Customs conferring broad powers upon members of agencies not fully defined by regulation. It is unclear from the Bill, Explanatory Memorandum or second reading speech which agencies are envisaged by this provision. Section 473.1 of the Criminal Code currently defines law enforcement officers as members of police forces of Australia or another country, members of the DPP and other law enforcement agencies. This new paragraph may allow private security firms, or agencies with little control or monitoring to have employees or members classified as law enforcement officers, with all the powers of telephone interception of the Interception Act.

The Council strongly recommends that paragraph (k) of drafting item 1 of Schedule 1 to the Bill be amended to specify more clearly which agencies may be prescribed.

### **2.4 Offence to receive or assist**

Drafting item 8 of Part 3 establishes a new class 1 offence for the purposes of the Interception Act for ‘receiving or assisting a person’ guilty of a class 1 offence under section 5(1) ‘class 1 offence’ in the Interception Act (also known as aiding and abetting after the fact).

This would effectively allow a warrant to intercept the communications of a person who may be under suspicion for receiving or assisting a person who is believed to have committed a class 1 offence (such as murder, terrorist activities, a narcotics offence). This power has the potential to be abused to intercept and record communications of a person who is only suspected of aiding and abetting after the fact. There is no further justification for this new power other than comments in the Explanatory Memorandum that “[Because this power is not presently available] ... an important investigative tool is not available to law enforcement agencies ...” There is no further justification, no precedent and no statistical evidence to substantiate the removal of important rights of citizens to privacy in their telecommunications. The argument expressed in the Explanatory Memorandum is simply that law enforcement agencies would like this power, and the Bill will deliver it to them. There is no justification, no balancing of the rights of individual citizens weighed against this desire for the power.

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The Council recommends that this ancillary offence provision be removed from the Bill. It is an unjustified removal of civil liberties and has the potential to be misused and cause a significant breach of the privacy and civil liberties of those only suspected of crime.

## **Attachment A**

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### Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 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;
- Northern Territory Bar Association;
- Queensland Law Society;
- The Victorian Bar; and
- Western Australian Bar Association.

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 is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.