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16 March 2006

Committee Secretary
Senate Legal and Constitutional Legislation Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Via Email: legcon.sen@aph.gov.au

Dear Sir

Inquiry into the provisions of the Telecommunications (Interception) Amendment Bill 2006

We attach herewith EFA's response to a question on notice. We also take the opportunity, in the attached document, to confirm verbal advice to a Secretariat staff member of a correction to EFA's submission concerning Section 280 of the *Telecommunications Act 1997* and draw to the Committee's attention that there appears to be uncertainty between government departments concerning which department is responsible for administering Section 280, and associated parts, of that Act.

Yours faithfully

Irene Graham
Executive Director
Electronic Frontiers Australia Inc.

Electronic Frontiers Australia Inc. (EFA)
Answer to Question on Notice & Additional Information

To: Senate Legal and Constitutional Legislation Committee
Re: Inquiry into the provisions of the Telecommunications (Interception) Amendment Bill 2006

16 March 2006

Answer to Question on Notice

During the Committee hearing on 15 March 2006, EFA's Executive Director was asked by Senator Ludwig to consider recommendations made in the Law Council of Australia's submission ("LCA submission") concerning "B−Party" interception and advise whether or not EFA agrees with those recommendations.

Recommendations 2(d), (g) and (h) in the LCA submission are similar to suggestions made in EFA's submission concerning renewal of warrants and privileged communications, hence EFA considers such amendments would be an improvement. Recommendations 2(a) and (b) in the LCA submission would have the effect of reducing the breadth of the circumstances in which a B−Party warrant may be issued and who may be targeted by a B−Party warrant, accordingly EFA considers implementation of those recommendations would also be an improvement. In relation to LCA recommendation 2(c) EFA shares the LCA's concerns regarding issuing of warrants by persons other than independent judicial officers, especially in relation to covert surveillance of innocent people's communications, and therefore considers that B−Party warrants should not be able to be issued by the Attorney−General; they should only be able to be issued by independent judicial officers.

With regard to LCA recommendation 2(i), it is our understanding that the provisions of the existing Act would result in a requirement for reporting on the matters referred to in 2(i)(i) and (ii) in relation to warrants issued to enforcement agencies. However there appears to be no existing requirement for equivalent reports about warrants issued by the Attorney General to ASIO. We consider that if B−Party warrants are to be issued to ASIO (irrespective of who is the issuing authority) then equivalent reporting provisions should apply in relation to such warrants. Furthermore, as stated in our submission, the Bill does not require that numbers etc. in relation to B−Party warrants be reported on separately from numbers concerning other types of interception warrants. If the B−Party provisions were to be enacted, it should required that reporting on all B−Party warrant provisions be set out in a separate section of the reports to the Minister and Parliament. We are not sure quite what is intended by LCA recommendations 2(i)(iii) and (iv), however we consider that there would be merit in requiring reports to set out the grounds upon which each warrant was issued in relation to why it was not practicable or possible to use a telecommunications service or named person warrant, or some other method of surveillance, in order that the Parliament and public may monitor the circumstances in which such warrants are being sought and issued.

EFA is extremely dubious about the merits of recommendations concerning a requirement for future review of the B−Party provisions and/or a sunset clause (e.g. LCA recommendations 2(e) and (f)). In our view such provisions are increasingly being used as an excuse to enact bad law on the basis that problems and undesirable effects could be rectified at some time in the future. In practice, such future reviews often result primarily in an opportunity for government agencies to call for even greater powers to invade the privacy of citizens together with attempts to justify continuation of the legislation that is the subject of review on the basis that because the powers have been available for a period of time they should not now be withdrawn. A specific example is the attempts by agencies during the Committee's hearing on 15th March to justify various aspects of the stored communications provisions (e.g. very low threshold for use of accessed information) on the claimed ground that because agencies have had such powers since legislation with a sunset clause was enacted 15 months ago, such powers should not be withdrawn.

We take this opportunity to reiterate our absolute opposition to the B−Party interception provisions (Schedules 2 and 3). The inclusion of a review requirement or sunset clause would make no difference whatsoever to the strength of our opposition, nor would amendments incorporating all of the suggestions and recommendations made in EFA's and the LCA's submissions.

We remain of the view that no adequate justification for the B−Party provisions has been provided and that there has not been adequate public consultation on proposed B−Party interceptions, notwithstanding the Committee's inquiry conducted within the very short time frame set by the Senate. While B−Party interceptions were referred to in the Blunn Report, the Blunn Review did not provide members of the public with the opportunity to comment on these extraordinarily invasive powers (no mention of such a proposal was contained in the terms of reference, nor to our knowledge have such controversial proposals been mentioned during prior inquiries in relation to the TI Act); submissions to that review were not made public; and Mr Blunn did not (to our knowledge) refer any submissions calling for such powers to other submitters for comment. The first indication to the public that the government intended to introduce legislation containing B−Party interception provisions appears to have been a brief media report published a few days before the Bill was tabled in the House on 16 February.

EFA urges the Committee to reject Schedules 2 and 3 of this Bill. If the Committee is of the view that there are circumstances in which B−Party interception would be justified, and/or that amendments to the B−Party provisions should be made, we consider such provisions and/or amendments should not be drafted in the rush that would be necessary to be included in a Bill with the stored communications provisions (due to the sunset clause date). A separate Bill containing any B−Party interception provisions would be necessary and would need to be made the subject of a separate Parliamentary and public inquiry.

Correction to EFA Submission dated 12 March 2006

We confirm verbal advice in response to a question from a Secretariat staff member in Sydney on 15 March 2006 that Section 3.4 of EFA's submission dated 12 March 2006 (Submission No. 3) contains an error. The recommendation paragraph in Section 3.4 incorrectly refers to "Section 280 of the *Telecommunications (Interception) Act 1979*". Consistent with the other text of Section 3.4, the recommendation was intended to, and should, refer to "Section 280 of the *Telecommunications Act 1997*". Similar text also appears in item (q) of the Executive Summary and it also should refer to "Section 280 of the *Telecommunications Act 1997*" not the interception Act.

Which Government Department administers Section 280/Part 13 of the Telecommunications Act 1997

In relation to EFA's submission concerning the need to amend Section 280 of the *Telecommunications Act 1997* effective from the same date as the stored communications provisions of the Bill, we take this opportunity to draw to the Committee's attention that it appears there is uncertainty between departments concerning which government department is responsible for administering Part 13 of the *Telecommunications Act 1997* which includes Section 280.

We refer to the following extract from the transcript of the Committee's hearing on 15 March:

> "*Senator LUDWIG—Notices to produce: we have heard from ASIC and they put an interesting position. There is also an EFA position which says that section 280 of the telecommunications legislation might in fact cause ASIC some difficulty in what they are currently doing. Do you have a view about that, representing the first law officer?*
>
> *Mr McDonald [Attorney−General's Department]—That particular provision will be something that we will take ASIC through when we have an opportunity to talk to them. We do not administer that provision—it is the communications department—so I would not really want to be expressing a view on it. However, the position is that —*"

While it appears that Mr McDonald was stating that the Department of Communications administers the provisions of Section 280 of the *Telecommunications Act 1997*, according to the Blunn Report, Mr Blunn was told by officers of the Department of Communications that such provisions are administered by the Attorney−General's Department:

> "*1.8.9. In my view, and as illustrated by the issue of stored communications, the provisions of these Parts [Parts 13, 14 and 15 of the Telecommunications Act 1997] which deal fundamentally with access to data for security and law enforcement purposes do not sit comfortably in the Telco Act. I am advised by officers of the Department of Communications, Information Technology and the Arts (DCITA) and AGD that the day−to−day administration of the provisions rests with the AGD and indeed I would be surprised were it to be otherwise.*
>
> *1.8.10. Accordingly, at least in−so−far as they relate to accessing telecommunications data for security and law enforcement purposes, I have recommended that they be incorporated into legislation dealing comprehensively and over−ridingly with data access. This would provide a basis for consistency in application, greater responsiveness and remove the confusion caused by different legislation providing different regimes and using different language for what are basically the same issues.*"

EFA hopes that the Government intends to give effect to Mr Blunn's recommendation referred to in para 1.8.10 above. In addition to the reasons stated by Mr Blunn, it would also remove the apparent current ability of government departments to claim that administration of the provisions of Part 13 of the *Telecommunications Act 1997* are the responsibility of some other department.
