

1 September 2003

The Secretary
Senate Environment, Communications,
Information Technology and the Arts
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Mr McLean,

Please find attached to this letter the submission by the NSW Council for Civil Liberties Inc. into the Inquiry of the Legislation Committee into the *Communications Legislation Amendment Bill (No.2) 2003*.

It is unfortunate that the timeframe for the inquiry has been so short. This has resulted in the slight lateness of our submission and the inability of many interested groups to prepare submissions for the Inquiry. It may interest you to know that a number of other non government organisations including other councils for civil liberties, privacy advocates, and electronic communications groups I have been in contact with are interested and concerned about the provisions of this bill. I am unaware if they have been able to provide submissions on time given the extremely short timeframe, but they indicated to me that they may also provide late submissions or would be prepared to give evidence at public hearings.

I would be please to provide more detailed information on any aspect of our submission or any other area of the Bill that is of interest to the Committee. Please advise me if the NSWCCCL can provide any further assistance by way of a more detailed submission or through attendance at public hearing. Please contact me at the address below or by telephone on 0411 769 769.

Yours sincerely,



Cameron Murphy
President

NSWCCL Submission to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts

Introduction:

The NSW Council for Civil Liberties is concerned that this bill would provide extraordinary power to the government to limit and control information. While the listed purpose of this bill is to “ensure that national security interests are considered in the carrier licensing process”¹ the mechanisms which it provides to ensure security are severe, unclear and without an effective process of review. Under this proposal there is no process to correct even the simplest of mistakes in the termination of telecommunications service. The bill provides for large increases in the monitoring of all telecommunications services including fixed line phone services, mobile phone services, and other electronic communication services such as email and internet. In our view it provides for wider scope of interception warrants while simultaneously reducing their accountability.

Submission:

In particular the NSWCCL is concerned that:

1. The bill proposes to exclude judicial review under the ADJR² of the Attorney-General's use of new powers under proposed amendments to the Telecommunications Act. In effect this will severely limit the ability to restore the communications service to a practical impossibility. It is beyond the reach of most telecommunications users to take alternative action to restore their service. In comparison, other areas that involve national security issues such as adverse security findings by ASIO³ are provided with a (limited) process of administrative review through the AAT or courts utilizing the ADJR. If a simple mistake is made and the wrong individual's service is terminated there is no practical process to find out why the service was terminated or to take steps to correct the mistake.
2. The bill significantly increases the information that will available under interception warrants in that it requires more than just the content of the communication to be provided. There has been a steady and significant increase in the amount of surveillance conducted in Australia under telecommunications interception warrants over the last ten years. We have seen a dramatic increase in the number of warrants issued, coupled with a relatively low rate of subsequent prosecution. In our view Australians are clearly the most spied upon people in the world, with more than double the number of warrants issued each year in Australia to that of the United States of America, with than 12 times the Australian population. The proposed amendments to Section 313 will radically expand the scope of interception warrants to include all *relevant information about*

¹ Communications Legislation Amendment Bill (No. 2) 2003, Explanatory Memorandum at page 1.

² *Administrative Decisions (Judicial Review) Act 1977*

³ *Australian Security Intelligence Organisation Act 1979*, Section 54

any communication. This terminology requires clarification, and in its current form will extend far beyond related technical data. This expanded definition could easily allow interception warrants to be used as a 'back door' to gathering substantially more information than under existing warrants to the detriment of the privacy of individuals. National security could become a convenient excuse to increase surveillance or conduct privacy invasive criminal investigation with less accountability.

3. In our view little consideration has been given to the practical operation of the provisions of the bill. For example if a telecommunications service provider is compelled to terminate service to a customer, under the provisions of the proposed laws, questions such as those of notification to the customer, or liability of the telecommunications service provider have not been adequately clarified or answered. If a customer should seek information about the termination of their service it is unclear what, if anything, they will be told. Should they seek redress against their service provider it is unclear whether the service provider is liable for the interruption or denial of service.
4. The bill provides extraordinary power to the Attorney-General without sufficient process or clarity in the scope of its use. The definitions of national security are unclear and could extend in their current form to situations beyond those envisaged in the Explanatory Memorandum. It is conceivable that political protest, industrial action, consumer boycotts etc. could all fall within the definition of national security, resulting in the termination or interruption of the telecommunications of such groups or individuals. In this way the proposed powers could be used to censor groups or individuals engaged in the promotion of views or information that dissent from those of government. Exemptions have been provided for political discourse, peaceful protest etc in other, and relatively similar national security legislation⁴.
5. The importance placed on 'national security' to justify the powers proposed in the bill is completely undermined in that it does not require that existing telecommunications service providers with current licenses be subject to security clearance. In our view this calls into question the necessity of these extreme measures. Why should there be any distinction between existing and new carriers?

⁴ *Defence Legislation Amendment (Aid To Civilian Authorities) Act 2000*