093390650.

NEW SOUTH WALES

Minister for Police

Ms Louise Gell
Secretary
Legal & Constitutional Legislation Committee.

By fax: **6277 5794**

Dear Ms Gell

I refer to the Committee's consideration of the *Telecommunications (Interception) Amendment Bill* 2004 (the TI Bill).

There was a very brief period for law enforcement agencies to consider and comment on the Bill.

Since that time, NSW law enforcement agencies have had the opportunity to consider the Australian Federal Police (AFP) submission on the Bill. In particular, they support the AFP comments about the difficulties that extending the definition of "interception" to "reading and viewing" will have on currently accepted email firewall and monitoring arrangements.

New South Wales also supports the AFP's comments on stored communications.

Whilst New South Wales supports the definition of "Class 1 offence" being amended to refer to specific terrorism related offences in the Commonwealth *Criminal Code*, it should be acknowledged that State and Territory law enforcement and investigative agencies play a vital role in investigating terrorist-related activity. It should also be acknowledged that terrorists do not necessarily confine their criminal activity to *Criminal Code* offences.

New South Wales is undertaking a major review of all NSW offences which could be linked to any terrorist act or threat. The review will also consider whether there are any gaps between Commonwealth and State laws in this area. New South Wales may, as a result of this review, ask the Commonwealth to ensure that the TI Act recognises the significance of relevant terrorist-related State offences.

I would also like to draw the Committee's attention to proposals for TI Act reform that New South Wales has previously raised with the Commonwealth. I enclose, for the Committee's information, a copy of the New South Wales Government's 2001 submission on the TI Act.

Whilst some of those suggested amendments have been progressed, a number have not found their way into this, or previous, amending Bills. My predecessors and I are yet to receive a formal response from the Commonwealth on these matters.

Level 34, Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 Telephone: (02) 9228 4866 Facsimile: (02) 9228 4855

Most of the issues raised by New South Wales could be addressed through minor amendments to the Act and impact on the capacity of New South Wales agencies, particularly the New South Wales Crime Commission, to respond to serious crime, including terrorist related activity.

In particular, I draw the Committee's attention to Part 3(1) of the New South Wales submission. The Commissioner has confirmed that some of the Commission's activities in relation to terrorist-related offences may be conducted under the Commission's general powers of inquiry. It would obviously be undesirable for investigations in this area to be compromised, and I would urge support for the proposed minor amendment to the TI Act's definition of "prescribed investigation".

The proposed amendment to the TI Act's definition of "member of the Crime Commission" at Part 3(2) of the NSW submission also appears simple and non-controversial.

Whilst the definition of "exempt proceeding" at s5B of the TI Act has been amended to refer to a proceeding of the Western Australian Crime and Misconduct Commission, the Commonwealth has still not addressed the New South Wales request to extend the definition to "a proceeding of the Crime Commission", as proposed at Part 6 of the NSW submission.

Part 8 of the NSW submission repeated a long standing request that s6K(c) of the Act extend to proceedings under the New South Wales *Criminal Assets Recovery Act 1990*, which is the most frequently used asset confiscation Act. Section 6K(c) currently only extends to proceedings under the NSW *Confiscation of Proceeds of Crime Act 1989*. The Commonwealth initially objected to covering civil based confiscation schemes in s6K(c), but has now extended that section to the Commonwealth's own civil based *Proceeds of Crime Act 2002*. Again, the amendment sought by NSW is simple and will greatly improve the response to organised criminal activity.

New South Wales has previously proposed a rationalisation of Class 1 and Class 2 offences, as outlined at Part 2 of the NSW submission. Whilst it is accepted that this issue cannot be considered for the purposes of the current Bill, New South Wales wants the Committee to be aware of its previous submissions in this regard.

The Commissioner of the Crime Commission, Mr Phillip Bradley, would be happy to appear before the Committee, should scheduling permit, to expand upon the issues raised in this letter. Mr Bradley may be contacted on (02) 9269 3888.

I appreciate having been given the opportunity to have made these comments.

Yours sincerely

John Watkins, MP
Minister for Police

PROPOSED AMENDMENTS TO THE *TELECOMMUNICATIONS (INTERCEPTION) ACT 1979* – SUBMISSION TO THE COMMONWEALTH

1. TI warrants to be issued for the investigation of an offence, rather than for the investigation of a person involved in an offence

Sections 45(d) and 46(d) of the *Telecommunications (Interception) Act* ("the TI Act") restrict the issue of a TI warrant to circumstances where the information obtained under the warrant would be likely to assist the investigation of a class 1 or class 2 offence in which the person the subject of the warrant is involved.

Section 6B of the TI Act provides that a person shall be taken to be involved in an offence only if they:

(a) have committed, or are committing, the offence; or

(b) are suspected on reasonable grounds of having committed, of committing, or of being likely to commit, the offence.

The TI Act does not enable a warrant to be issued in respect of an accessory after the fact to a class 1 or class 2 offence, or a witness to such an offence who is suspected of falsifying or concealing evidence. It also poses problems for the investigation of criminal groups reasonably suspected of class 1 or class 2 offences, where it is not possible to identify the individual members of the group who have committed those offences.

Whilst the Commonwealth has regulatory responsibility for TI surveillance, the States and Territories are responsible for regulating other surveillance activity.

The restrictive approach of the TI Act is at odds with the position adopted in State and Territory listening device and surveillance legislation, where warrants may be issued for the investigation of prescribed offences, rather than for identified or suspected offenders.

TI would not appear to be more intrusive than the use of listening devices. Indeed, it is arguable that the placement of a listening device, which often involves some physical trespass on a person's property, is more intrusive than an intercept, which generally does not involve such a trespass.

Given the support of Australian jurisdictions for a move towards consistent national surveillance legislation, the TI Act's focus on the offender, rather than the offence, would appear to be out of step with national surveillance policy trends. This focus also significantly inhibits the ability of law enforcement agencies to effectively investigate serious criminal offences and protect the community.

It is strongly submitted that TI warrants should be able to be issued for the investigation of prescribed offences: that is, in respect of a subject other than a person taken to be involved in a prescribed offence. The subject of the

warrant and the telecommunications service would obviously still need to be specified if such an amendment were made.

2. Rationalisation of class 1 and class 2 offences

NSW law enforcement agencies are concerned that the current definitions of class 1 and class 2 offence are overly complicated and restrictive. This is particularly true of class 2 offences involving planning and organisation, as specified at s5D(3) of the TI Act.

State and Territory Acts enable listening device and other surveillance warrants to be issued in respect of a much wider range of offences than allowed for under the TI Act. Some jurisdictions enable warrants to be issued for all offences, whilst others such as New South Wales and Queensland generally limit the issue of warrants to indictable offences. The restrictive offence eligibility criteria under the TI Act would appear to be out of step with national surveillance policy trends.

It is submitted the test for class 1 and class 2 offences should be replaced with a simpler and less restrictive test that better meets the needs of law enforcement agencies in investigating and prosecuting serious crime.

The Commonwealth might consider extending the Act to all offences that may be dealt with by way of indictment, as occurs under the listening device and surveillance legislation of a number of States and Territories. Alternatively, given the different systems for determining summary and indictable offences, it may be appropriate to lower the current class 2 offence threshold (7 years) to a time period more in tune with the community's legitimate law enforcement expectations (perhaps 3 years).

At the very least, the restrictive and artificial distinction between serious offences (s5D(2)(b)) and offences involving planning and organisation (s5D(3)(d)) should be abandoned, with the categories of offence for the latter being dealt with in the same manner as the former.

In the event that this approach is not supported, it is proposed TI warrants should be able to be sought for the following offences in the manner set out below.

(i) Sexual and indecent assault offences

Discussions between NSW officers and members of your administration suggest that it is the Commonwealth's view that sexual/indecency offences carrying a maximum penalty of seven or more years fall within the definition of class 2 offence by virtue of s5D(2)(b)(ii) of the TI Act.

Whilst it is certainly arguable that many such offences are class 2 offences, on the basis that they involve serious personal injury or serious risk of personal injury, it is unlikely that all such offences meet s5D(2)(b)(ii) criteria.

Certainly, not all sexual or indecent assaults result in physical injury, serious or otherwise. It may also be difficult to establish that psychological harm arising from such an assault constitutes serious personal injury, given the cautious approach that courts have often taken in psychological harm matters.

The Act itself would seem to envisage that some sexual assaults do not result in serious personal injury or serious risk of such injury. Section 5D(3)(d)(xi) of the Act enables a sexual offence against a person under 16 to be classified as a class 2 offence, in the limited circumstances where other s5D(3) criteria are met. This provision would be completely unnecessary if s5D(2)(b)(ii) of the Act extended to sexual offences carrying a maximum penalty of seven years or more.

The Royal Commission into the NSW Police Service Paedophile Inquiry ("the Wood Royal Commission") was of the view that s5D(2)(b)(ii) of the TI Act could not be used in respect of all sexual offences as it specifically recommended that all offences relating to the sexual assault of children should be recognised as class 2 offences (recommendation 98).

Limiting the use of TI warrants to sexual assault cases where serious personal injury (or the serious risk of such injury) can be established does not treat sexual assault sufficiently seriously.

It is therefore submitted that s5D(2)(b) should specifically extend to sexual and indecent assault offences.

(ii) Offences involving the publication or possession of child pornography

The Wood Royal Commission noted TI warrants could not be sought for offences involving the possession or publication of child pornography. The Commission suggested the Commonwealth consider amending the TI Act to cover offences relating to the possession, distribution and production of child pornography (recommendation 98).

It is submitted that warrants should be able to be sought in respect of such offences, irrespective of whether the offences carry a maximum penalty of seven or more years. New South Wales, like most other jurisdictions, provides maximum penalties for these offences that do not meet the current 7 year threshold for class 2 offences.

It is understood that the current class 2 threshold of seven years has been established to limit the use of TI warrants to appropriately serious offences. Whilst the seriousness of an offence should certainly be considered in determining whether a TI warrant is appropriate, it is submitted that other factors are of particular relevance when considering child pornography offences.

Telecommunications services are often used to commit child pornography offences, with images being downloaded from the internet or transmitted via email. Paedophiles and child pornographers have embraced email/internet communication as messages can be encrypted and the identity of communicators better concealed.

There is a considerable body of research that demonstrates the link between child pornography offences and paedophilic offending. Paedophiles often subscribe to child pornography services on the internet or place images of themselves assaulting children on that medium. Disturbingly, a number of paedophiles also transmit child pornography to groom children as potential victims.

Investigators attached to the NSW Police Service's Child Protection Enforcement Agency (CPEA) have submitted that paedophiles are known to communicate over the internet to exchange child pornography and information about their experiences. They have advised that enabling TI warrants to be issued for child pornography offences will also result in investigators gaining evidence that can be used in the investigation of paedophile rings and the prosecution of serious child sex offences.

Whilst the seriousness of an offence should be a prime consideration in determining whether a TI warrant should be available, it is submitted that the use of the telecommunications medium in the commission of many child pornography offences, and the established link between child pornography and serious paedophilic behavior, mean that TI warrants should be available in respect of all child pornography offences, not just those carrying a maximum penalty of seven years or more.

(iii) Armament dealings

If the Commonwealth determines that the class 1 and class 2 distinction should remain, it is submitted that consideration should be given to armament dealings offences being classified as class 1 offences.

This would reflect the increased commitment of the Commonwealth, New South Wales and other Australian jurisdictions to protect members of the community from firearms.

The NSW Police Service has raised concerns about whether the illegal dealing in a single firearm constitutes "armament dealings" within the meaning of the TI Act. Consideration might be given to defining that term in the Act to resolve any ambiguity as to its precise scope.

(iv) Arson offences

It would be appropriate for the TI Act to specifically extend to arson offences, for the reasons put forward to, and approved by, the Australasian Police Ministers Council on 13 December 2000.

(v) Stalking and intimidation offences

Section 562AB of the *Crimes Act 1901 (NSW)* establishes the offence of stalking or intimidation with intent to cause fear or physical or mental harm.

The NSW Police Service is of the view that intercepts would be useful and appropriate for the investigation of this offence. The offence is viewed extremely seriously by the Service as it may precede serious sexual and violent offences. The increasing use of email in such offences increases the importance of TI as an investigative tool.

The extension of the Act to such offences may enable law enforcement agencies to save victims from the ongoing trauma of harassment and prevent serious physical and sexual assaults.

(vi) Public justice offences

Part 7 of the *Crimes Act 1900* (NSW) establishes a range of public justice offences for persons who interfere with the administration of justice. These offences can result in the guilty being found innocent and, more importantly, the innocent being found guilty.

Whilst some public justice offences involving a public official may fall within the definition of class 2 offence, other public justice offences do not.

The NSW Police Service has advised that many public justice offences might only be effectively investigated through the use of TI. As the TI Act does not generally allow such use, the investigation of public justice offences is impeded.

It is submitted that offences which undermine the integrity of the justice system, and which can lead to the conviction and imprisonment of innocent persons, are of sufficient seriousness to justify the issue of TI warrants (irrespective of the penalty attaching to any such offence). It is therefore proposed to amend the TI Act to enable TI warrants to be issued for offences under Part 7 of the *Crimes Act 1900 (NSW)* and the corresponding legislation of other jurisdictions (providing those jurisdictions support such an extension).

(vii) Accessory after the fact offences

The following proposed amendment will not be necessary if the amendment proposed at section 1 of this submission is made.

The TI Act enables TI warrants to be issued in respect of persons who are accessories before the fact to class 1 and class 2 offences. However, there is no provision to obtain a TI warrant in respect of a person who is known or suspected of being an accessory after the fact.

Section 349 of the *Crimes Act 1900 (NSW)* provides that accessories after the fact to murder shall be liable to imprisonment for 25 years, and accessories after the fact to robbery with arms or kidnapping shall be liable to imprisonment for 14 years. Section 350 provides a penalty of five years for accessories after the fact to other serious indictable offences.

The NSW Police Service advises that the use of TI would be particularly effective in the investigation of accessory after the fact offences because of time lapse, proximity and witness availability issues in such cases. The use of TI in such cases could also assist in the identification and prosecution of the offender responsible for the principal offence.

If it is determined to retain the current class 1 and class 2 tests, it is suggested that consideration be given to enabling TI warrants to be sought in respect of accessories after the fact to class 1 offences. TI warrants might also be issued in respect of persons who are accessories after the fact to all other principal offences for which TI warrants may be issued, with consideration being given to limiting the admissibility of TI evidence in proceedings brought against the accessory (but enabling that evidence to be admissible in proceedings against the principal offender).

(viii) Offences where the use of a telecommunications service is an element of the offence

There would appear to be difficulties in investigating an offence involving the improper use of a telecommunication service, where an intercept cannot be conducted to conclusively prove that improper use.

Whilst these are all Commonwealth offences, States and Territories have a valid interest in their proper enforcement as they may precede the commission of a State/Territory offence.

For example, section 85ZE of the *Crimes Act* (Cth) relates to the use of a telecommunication service to menace or harass a person. This activity may be a precursor to an assault or other serious offence against the person.

It is submitted the Act should be amended to enable the issue of a TI warrant for any offence involving the unlawful use of a telecommunication service, irrespective of the penalty attaching to that offence.

3. Prescribed investigations and members of the NSW Crime Commission

(i) "Prescribed investigation" to extend to inquiries under s6(1B) of the *New South Wales Crime Commission Act 1985 (NSW)*

An investigation that the NSW Crime Commission is conducting in the performance of its functions under the *New South Wales Crime Commission Act* ("the CC Act") is a "prescribed investigation" under the TI Act.

The Commissioner of the Crime Commission has recently received three separate advices that suggest there is uncertainty as to whether investigative action taken pursuant to the Commission's general powers of inquiry under s6(1B) of the CC Act is a "prescribed investigation" within the meaning of the TI Act. Whilst the Commission's ability to investigate matters under its general power of inquiry may well be implied, the uncertainty arises from the Commission's specific investigative functions being connected to references from the Commission's Management Committee (see s6(1)(a)-(b1) of the Act).

It is submitted this uncertainty could be resolved by amending paragraph (b) of the TI Act's definition of "prescribed investigation" to read "... an investigation or inquiry that the Crime Commission is conducting in the performance of its functions under the Crime Commission Act".

(ii) Amendment to definition of member of the Crime Commission

The TI Act currently defines a member of the Crime Commission as "a person who is, or who is acting in the office of, the Chairperson, or a member, of the Crime Commission".

The Commission no longer has a Chairperson. Section 5(3) of the CC Act provides that the members of the Commission are the Commissioner and any Assistant Commissioner.

It is therefore submitted that the TI Act definition of "member of the Crime Commission" should read "*a person who is, or who is acting in the office of, the Commissioner or Assistant Commissioner of the Crime Commission*".

4. Certifying officers of the Police Integrity Commission (PIC) and Crime Commission

The TI Act definition of certifying officer extends to:

(a) a member of the Crime Commission; and

(b) the Commissioner and Assistant Commissioner of PIC, and a member of staff of PIC who is a Senior Executive Service officer within the meaning of the *Public Sector Management Act 1988 (NSW)* and who is authorised in writing by the PIC Commissioner to be a certifying officer.

This limits the Crime Commission as the only current member of the Commission is the Commissioner (there being no Assistant Commissioners appointed at this stage).

Also, senior staff of the Crime Commission and PIC are generally appointed under the CC Act and the *Police Integrity Commission Act 1996 (NSW)*, rather than the *Public Sector Management Act*.

It is submitted that the approach adopted in respect of the Western Australian Anti-Corruption Commission and Queensland Crime Commission should apply to PIC and the Crime Commission. That is, a certifying officer should include a member of staff of PIC or the Crime Commission who is, or who occupies an office or position at an equivalent level to, a Senior Executive Officer within the meaning of the *Public Sector Management Act*, and who is authorised in writing by the relevant Commissioner to be a certifying officer.

5. "Police disciplinary proceedings" to extend to management action under Part 9 of the *Police Service Act 1990 (NSW)*

Section 5B(e) of the TI Act provides that a "police disciplinary proceeding", which includes proceedings against police and administrative officers of Australian Police Forces, is an exempt proceeding for the purposes of the Act. Lawfully obtained TI evidence is admissible in exempt proceedings.

Section 68(d)(ii) of the TI Act enables the chief officers of TI capable agencies to provide the Commissioner of the NSW Police Service with TI information that relates, or appears to relate, to an act or omission by an officer of the NSW Police Service that may give rise to a .... police disciplinary proceeding.

Following recommendations made by the Wood Royal Commission, Part 9 of the *Police Service Act* 1990 removed all references to "discipline" and "disciplinary proceedings" and replaced the disciplinary system for sworn police officers with a system for the "management of conduct within the Police Service". Division 3 of Part 9 preserves the general NSW public sector disciplinary system for administrative officers of the NSW Police Service.

Under section 173 of the *Police Service Act* the Commissioner can make a variety of orders to address the misconduct or unsatisfactory performance of a sworn police officer.

Under section 181D of the *Police Service Act*, the Commissioner can order the removal of a police officer from the Police Service if the Commissioner does not have confidence in the officer, having regard to the officer's competence, integrity, performance or conduct.

A right of review for s181D and some s173 orders lies to the NSW Industrial Relations Commission. Divisions 1A and 1C of Part 9 respectively outline the s173 and s181D Industrial Relations Commission review processes. Subsections 173(10) and 181D(7A) provide that nothing in those sections

limits or otherwise affects the jurisdiction of the Supreme Court to review administrative action.

It would appear that the management of conduct in respect of sworn officers under Part 9 of the *Police Service Act* does not meet the current definitional requirements of "police disciplinary proceedings" under the TI Act.

It is therefore requested that the TI Act be amended so that the action taken by the Commissioner under Part 9 of the *Police Service Act*, and any subsequent Industrial Relations Commission or Supreme Court review, falls within the TI Act definition of "police disciplinary proceedings".

These amendments are urgent as they potentially impact on the ability of the Commissioner to remove corrupt officers from the Service, thereby compromising the integrity of the criminal justice system.

6. "Exempt proceedings" to extend to proceedings under the *New South Wales Crime Commission Act 1985 (NSW)*

Part 2 Division 2 of the CC Act details the Commission's power to hold hearings. These hearings are proceedings for the purposes of the TI Act, but are not exempt proceedings within the meaning of s5B of the Act.

The Commission has previously used lawfully obtained TI product in such proceedings, having resort to other provisions of the TI Act. However, it's power to do so has not been judicially tested and it would be better for s5B to explicitly include "a proceeding of the Crime Commission" as an exempt proceeding, in much the same way that s5B(k) applies to proceedings of the Police Integrity Commission.

7. "Exempt proceedings" to extend to certain proceedings under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*

The TI Act currently prevents TI product that has not already been admitted in "exempt proceedings" within the meaning of s5B of the Act from being admitted in care and alternative parenting proceedings under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ("the CYPCP Act").

Chapter 5 of the CYPCP Act outlines Children's Court proceedings for the care and protection of young people. The Court has the power, under that Chapter, of making a range of orders for the care and protection of a child or young person.

Chapter 7 of the CYPCP Act outlines Children's Court proceedings where the Court may make orders in circumstances where the differences between a child or young person and their parents are so serious that it is no longer possible for them to continue to live with their parents.

The NSW Department of Community Services (DoCS) is generally a party to Chapter 5 and Chapter 7 proceedings.

In the past, the NSW Police Service has been prevented from providing the Department of Community Services (DoCS) with lawfully obtained TI product relevant to care and protection proceedings, which means that pertinent evidence does not come before the Children's Court.

In one case, the Service obtained TI evidence in a case where a baby had sustained serious injuries from his parents. The TI evidence demonstrated the baby's parents were having unsupervised access to the baby, in breach of care orders made by the Children's Court. As this TI evidence had not been admitted in criminal proceedings, the Service was prevented making it available to DoCS for submission to the Court.

The TI Act's current restriction on the ability of the Service to disclose TI evidence to DoCS, and for that evidence to be admitted in the above Children's Court proceedings, has resulted in children staying in positions of extreme risk.

It is submitted that TI evidence should be able to be submitted to DoCS for the purpose of supporting Chapter 5 and Chapter 7 proceedings, and that those proceedings should be "exempt proceedings" for the purposes of the TI Act. It would be appropriate to deal similarly with certain Family Court proceedings and care and protection proceedings in other Australian jurisdictions, should relevant jurisdictions support this arrangement.

The *Family Law Act 1975 (Cth)*, like the CYPCP Act and the care and protection legislation of other Australian jurisdictions, recognises the paramount rights of the child. It is difficult for these rights to be upheld in the absence of the above amendments being made.

8. "Exempt proceedings" to extend to proceedings under the *Criminal Assets Recovery Act 1990 (NSW)*

It is submitted that section 6K(c) of the TI Act be amended to include proceedings under the *Criminal Assets Recovery Act 1990 (NSW)* ("CARA"). This approach is strongly supported by the New South Wales Crime Commission, NSW Police Service and Police Integrity Commission. I also understand the National Crime Authority, in submissions to your Department's May 1999 review of the TI Act, supported civil confiscation proceedings being exempt proceedings for the purposes of the Act.

There has been a significant policy shift since this matter was last considered in 1997, which justifies CARA proceedings and other civil based confiscation proceedings being exempt proceedings for the purposes of the Act.

The Australian Law Reform Commission's 1999 review of the Commonwealth *Proceeds of Crime Act 1987 (Report No. 87 – Confiscation that Counts)* found that Act was inadequate to bring to account the profits obtained by means of continuous or serial wrongdoing, particularly activities related to drugs, fraud and money laundering.

The Commission's report demonstrates the importance of civil confiscation schemes, such as CARA, in attacking serious crime through targeting the profits of criminal activity. The Commission strongly endorsed the adoption of a civil-based confiscation regime.

It is understood the Commonwealth is likely to move towards a civil based confiscation scheme and that other jurisdictions, through a variety of national forums, are also considering such an approach.

Telecommunications interception is a vital tool for combating the organised criminal activity that is the primary target of CARA. If the Commonwealth is serious about attacking drug and other organised crime, then TI product must be admissible in CARA and other civil confiscation proceedings.

There is precedent for the TI Act to recognise civil proceedings as exempt proceedings. Section 6K currently enables lawfully obtained TI product to be used in certain civil proceedings under the *Customs Act 1901 (Cth)*. Section 75A of the Act, as inserted by the *Telecommunications (Interception) Legislation Amendment Act 2000*, also enables previously admitted TI product to be used in any proceedings (criminal, civil, or otherwise).

In light of these factors, it is submitted section 6K(c) of the TI Act should be amended to include CARA proceedings.

9. Reactivation of a temporarily suspended interception

Operational factors sometimes make it necessary to cease an interception within the period of the warrant.

It is submitted that, where it is desired to resume interception, the interception should be able to be reactivated for the remainder of the 90 day warrant period, rather than a further warrant being sought.

The current policy requirement that a second warrant be sought serves no particular privacy protection, and has administrative and cost burdens for bodies involved in the interception process.

10. Section 57 revocation process

Section 57 of the TI Act seems to establish an unnecessary two step process of warrant revocation. Chief executive officers of TI agencies are required to inform the Commissioner of the AFP of the proposal to revoke a warrant and

then provide written notification that the warrant has been revoked. It is submitted that TI agencies should be able to revoke a warrant without having given notice of the intention to revoke, with notice being provided to the AFP Commissioner only after revocation.

The pre-revocation notification does not appear to offer any particular protection to the TI process and is unduly burdensome.

11. Email communications

On 30 March 2000 the Federal Privacy Commissioner released guidelines on email use which acknowledged the legitimacy of certain employer monitoring of employee's emails. These guidelines were launched and endorsed by the Federal Attorney-General.

Clarification is sought on whether it is necessary to amend the TI Act to give effect to the above Commonwealth policy guidelines and, if so, whether any amendment is contemplated.

Section 6 of the TI Act provides that there is no interception (and therefore no need for a warrant) where a telecommunication is listened to or recorded with the knowledge of the person making the communication. Whilst courts have generally held that the person making a telephone communication extends to both parties to the communication, it is arguable that email (and facsimile) communications are distinguished from such communications. In a telephone communication both parties communicate at the same, or at a proximate, time. When an email message is sent, it is arguable that the receiving party only makes a communication if a reply is sent (and that reply is a separate communication).

In telephone monitoring there is limited capacity to make a second party to a communication aware that their communications may be monitored. However, this limitation does not apply to email messages where an employer may attach a notice of their monitoring policy to all emails originating from an employee who is using the employer's email facilities.

Clarification is sought as to the Commonwealth's policy on the knowledge requirements for both parties to an email or facsimile communication and whether section 6 clearly reflects that policy.