CHAPTER 3

KEY ISSUES

3.1 The majority of submissions received by the committee expressed support for particular aspects of the Bill's proposed operation[1]. Only two submissions provided detailed analysis of the Bill in a broader sense.[2] These submissions expressed strong opposition to several parts of the Bill.

3.2 This chapter discusses the main issues and concerns raised in submissions in relation to:

- expansion of the definition of 'law enforcement officer' in the Criminal Code (Schedule 1 of the Bill);
- exemption for telecommunications interception to and from an 'emergency services facility' in the TI Act (Part 1 of Schedule 2);
- telecommunications interception by radiocommunications inspectors under the TI Act (Part 2 of Schedule 2);
- expansion of the definition of 'class 1' offence in the TI Act to include conduct comprising the offence of accessory after the fact (Part 3 of Schedule 2);
- civil forfeiture proceedings and named person warrants (Part 4 of Schedule 2); and
- clarification of the term 'employee of a carrier' (Part 5 of Schedule 2).

Definition of 'law enforcement officer' (Schedule 1)

3.3 Three submissions commented specifically on the proposed expansion of the definition of 'law enforcement officer' in the Criminal Code to include four state-based organisations and 'any other agency that is prescribed by the regulations' (all of which would be capable of intercepting communications under the TI Act).

3.4 Western Australia Police Service (WAPS) submitted that the proposed extension of the definition to include a reference to the WA Corruption and Crime Commission 'will assist that agency with its investigative powers concerning corruption within the Public Sector and organised crime'.[3]

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1 Queensland Police Service/National Emergency Communications Working Group, *Submission 1*; South Australia Police, *Submission 2*; Australian Communications Authority, *Submission 3*; Commonwealth Director of Public Prosecutions, *Submission 4*; Western Australia Police Service, *Submission 6*; Australian Federal Police, *Submission 7*; Tasmania Police, *Submission 9*; New South Wales Police, *Submission 10*.

2 Law Council of Australia, *Submission 5*; New South Wales Council for Civil Liberties, *Submission 8*.

3 *Submission 6*, p. 1.

3.5 The Law Council of Australia (the Law Council) expressed concern that the reference in proposed paragraph 473.1(k) to 'a member or employee of any other agency that is prescribed by the regulations' as a 'law enforcement officer' is extremely wide:

> 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 D[irector] of P[ublic] P[rosecutions] 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.[4]

3.6 The Law Council suggested that paragraph 473.1(k) should be amended to specify more clearly which agencies may be prescribed.[5]

3.7 The New South Wales Council for Civil Liberties (NSWCCL) articulated similar concerns, although it went further by arguing that proposed paragraph 473.1(k) should be removed from the Bill:

> No limit is set on what kinds of agencies may be included…[T]he power to determine the range of bodies given interception powers [should] be kept in [the] hands of parliament.[6]

3.8 Further, NSWCCL argued that:

> The legitimacy for providing the means to intercept depends on the legitimacy of the provision of the powers to do so. There is ground for concern that the range of offences that the bodies investigate is determined by State acts, not acts of the Commonwealth. An amendment to the NSW Crimes Commission Act, for example, would enable officers of the Crimes Commission to seek warrants in relation to crimes beyond its current concern with drug offences.[7]

Exemption for an 'emergency services facility' (Part 1 of Schedule 2)

3.9 Most submissions received by the committee focussed their comments on the proposed provisions relating to the exemption for an 'emergency services facility'. Submissions from the Queensland Police Service/National Emergency Communications Working Group (NECWG), South Australia Police (SAPOL),

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4 *Submission 5*, p. 5.

5 *Submission 5*, p. 5.

6 *Submission 8*, p. 2.

7 *Submission 8*, p. 2.

WAPS, the AFP, Tasmania Police and New South Wales Police expressed support for the exemption from the general prohibition on the interception of communications made to, or from, a declared 'emergency services facility'.[8]

3.10 However, the Law Council and the NSWCCL were highly critical of the proposed provisions in relation to emergency services. They argued, amongst other things, that:

- there is little apparent justification for such increased ambit of the power to intercept telecommunications;
- the range of communication devices and the scope of information captured by the proposed amendments is extremely wide;
- the exemption of declarations of an 'emergency services facility' from the scope of the Legislative Instruments Act significantly and inappropriately weakens scrutiny and accountability mechanisms; and
- there is no requirement in the Bill for emergency services interceptions to occur lawfully in the course of a person's duties.

3.11 These arguments are set out more fully below.

Increase in permitted interceptions

3.12 NSWCCL contended that the 'prime purpose of the [TI Act] is to outlaw interceptions of telecommunications, not to create a large class of permitted interceptions'[9] and that any increase in permitted interceptions of telecommunications results in the TI Act moving further away from its original purpose:

> Each inclusion of new grounds for interception permits further invasion of the privacy of innocent persons. Each extension of the agencies permitted to intercept increases the likelihood of misuse. Proposals that can only be supported on the grounds that they are "important legislative tool[s] not available to enforcement agencies" should be rejected.[10]

3.13 NSWCCL also pointed out that the number of telecommunications warrants issued in Australia has increased without a commensurate increase in the number of relevant crimes reported or convictions recorded:

> The number of warrants issued annually in Australia under the [TI Act] has been increasing substantially, to the point where it exceeds the number issued for similar purposes in the United States of America. There are few refusals of requests for warrants, and none from any member of the Administrative Appeals Tribunal. There has been no significant increase in the number of such crimes reported, to justify this increase. Nor has there

8 *Submission 1*; *Submission 2*; *Submission 6*; *Submission 7*; *Submission 9*; *Submission 10*.

9 *Submission 8*, p. 1.

10 *Submission 8*, p. 1.

> been a commensurate increase in criminal convictions of the most serious crimes.[11]

3.14 The Law Council agreed that '(i)t is unclear from the Explanatory Memorandum or second reading speech what justification is advanced for the increased ambit of the power' in relation to emergency services facilities.[12]

Range of communication devices/scope of information

3.15 Both the Law Council and NSWCCL took issue with the potential breadth of the emergency services provisions in the Bill. The Law Council stated that, in its view:

> The scope of information that the amendments of the Bill capture…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.[13]

3.16 The Law Council recommended 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'.[14]

3.17 NSWCCL also commented on the wide range of communications encompassed by the Bill:

> All telecommunications—by fax, email, web access, mobile, text message or telephone not connected with emergencies—may be recorded, without warrant or advice.[15]

3.18 NSWCCL were unsure why such broad application of the exemption would be necessary:

> There may be point in recording a call to an emergency service, for vital information may be missed by the person taking the call. The justification given in the Second Reading Speech of the Minister for Justice for the proposed extension is that emergency services use hundreds of numbers behind the scenes in responding to a call. It is not clear to the [NSW]CCL

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11 *Submission 8*, p. 1.

12 *Submission 5*, pp 3-4.

13 *Submission 5*, p. 4.

14 *Submission 5*, p. 4.

15 *Submission 8*, p. 3.

> how recording all these calls will assist the provision of emergency aid. What might they hope to discover?[16]

3.19 In its submission, WAPS made some operational observations about the scope of the exemption in relation to personal mobile phone calls and emails within an 'emergency services facility'. In relation to personal mobile calls, it submitted that the only time they would be recorded by WAPS would be in circumstances where an employee is under investigation. In any case, such a recording would not take place in the WAPS Communications Centre but by the Telecommunications Interception Unit 'in accordance with a warrant obtained in relation to that specific mobile phone ID'.[17]

3.20 WAPS also pointed out that:

> …the recording of mobile telephone conversations both personal and those made over a Western Australia Police issued mobile telephone is a far more complex issue in general circumstances and cannot be recorded as a broad base connection…The ability to capture conversations made to or from any mobile telephone within an emergency service facility is technically complex and costly.[18]

3.21 Further:

> …the technical ability to constrain interception of mobiles only to a small complex would seem problematic and there is a high risk that other (non Police staff) mobile users in the same area may also be recorded. Current WAPS business rules do not allow the use of any mobile phones within the Emergency Communications Centre.[19]

3.22 In relation to the interception of emails, WAPS noted that the 'technical ability to isolate a small number of messages that are sent from an emergency services facility would also be difficult'.[20]

Prescribing an 'emergency services facility'

3.23 The Law Council expressed reservations in relation to the exemption of declarations of an 'emergency services facility' from the scope of the Legislative Instruments Act under proposed subsection 7(3AC) of the Bill:

> 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 integral part of the *Legislative Instruments Act*

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16 *Submission 8*, p. 3.

17 *Submission 6*, p. 1.

18 *Submission 6*, pp 1-2.

19 *Submission 6*, p. 2.

20 *Submission 6*, p. 2.

> *2003* and to remove it weakens the regime of scrutiny and ministerial responsibility.[21]

3.24 Further, the Law Council suggested that the Bill should be amended to remove proposed subsection 7(3AC) so that a declaration under proposed subsection 7(3AB) would be deemed a legislative instrument for the purposes of the Legislative Instruments Act:

> 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.[22]

3.25 NSWCCL also noted its apprehension in this regard:

> …there is no requirement for [declarations by the Attorney-General] to be made public, and it is clear that the intention is that they will not be. The Parliament will not have the power to over-ride them (save by fresh legislation).
>
> There is nothing in the Bill to prevent a future (rogue) Attorney-General from declaring all police premises emergency facilities.[23]

3.26 NSWCCL submitted that, in any case, '(i)t would not be difficult for an emergency service to restrict emergency traffic to a limited number of phone lines and radio frequencies'.[24] It also suggested that the Bill should be amended to restrict 'the recording of communications to those relating to an emergency current at the time of the call' and that '(t)he determination of premises should be restricted by reference to the kind of service provided'.[25]

No requirement to be in the course of a person's duties

3.27 As the committee noted in Chapter 2[26], unlike the current exemption in the TI Act which applies to a person 'lawfully engaged in duties', there is no requirement under the Bill for emergency services interceptions to occur lawfully in the course of a person's duties. NSWCCL speculated that this has been done 'to allow communications by other means than telephones to be included'[27] but was unsure why such an approach was being taken:

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21 *Submission 5*, pp 4-5.

22 *Submission 5*, p. 5.

23 *Submission 8*, p. 4.

24 *Submission 8*, p. 4.

25 *Submission 8*, p. 4.

26 Para 2.10.

27 *Submission 8*, p. 3.

> Again, it is not clear what it is hoped will be gained. People do not report emergencies by text message or by email. Requests for emergency back-up might be sent by radio or mobile; but they are sent to dedicated receivers, lest they be lost in the general noise.[28]

3.28 Further, NSWCCL commented that such a provision might be problematic in practice, possibly encouraging illicit behaviour:

> This proposal would allow a rogue police officer (a species that has been found in Australia) to intercept any conversation through a police station (or indeed to initiate and record one), evading the accountability procedures of the Act and subverting its principal intention, to outlaw interception.[29]

Interception by radiocommunications inspectors (Part 2 of Schedule 2)

3.29 This part of the Bill was supported by those submissions that made comment on it.[30]

3.30 The ACA stressed the operational significance of the proposed amendments from its point of view in relation to radiocommunications inspectors. It submitted that the amendments are 'a prudent regulatory response that will allow radiocommunications inspectors to effectively perform their spectrum management functions for the benefit of the community'.[31]

3.31 The ACA explained that the spectrum management functions undertaken by radiocommunications inspectors employed by the ACA include investigating interference to radiocommunications services, investigating interference to radio and television broadcasting reception, and investigating offences relating to the operation of radiocommunications transmitters. Further, it noted that the ACA places high priority on investigating interference that affects safety of life services.[32]

3.32 The ACA pointed out that, in many cases, radiocommunications inspectors have been able to perform their functions, including aural monitoring of radiocommunications, without contravening the TI Act, since the interception of communications provided solely by means of radiocommunications is not prohibited by the TI Act. However:

> It has now become commonplace for radiocommunications systems to be connected to a telecommunications network. In such cases aural monitoring and recording of the radiocommunications system may contravene the TI Act. ACA investigators may not, in the first instance, know if the

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28 *Submission 8*, p. 3.

29 *Submission 8*, p. 3.

30 SAPOL, *Submission 2*; ACA, *Submission 3*; NSWCCL, *Submission 8*.

31 *Submission 3*, p. 2.

32 *Submission 3*, p. 1.

> radiocommunications traffic they are monitoring is carried over a telecommunications network. In some instances, the system concerned may switch between a stand alone radiocommunications system and a system that connects to a telecommunications network. For example, high frequency radio systems used for outback communications have this facility as do some taxi services in regional areas. At present radiocommunications inspectors must discontinue aural signal monitoring and recording when it becomes apparent that the radiocommunications being monitored are carried over the telecommunications network.[33]

3.33 The ACA also noted that the ability of radiocommunications inspectors to listen to the information carried by a radio system is critical to the early detection and suppression of interference and unauthorised transmissions. Its submission gave examples of interference incidents that have affected safety services:

> ACA radiocommunications inspectors have investigated emissions from imported cordless telephones that interfered with Air Traffic Control frequencies at major airports and nuisance calls to the 000 emergency call services in Melbourne using a taxi radiocommunications system. This simply underlines the need for radiocommunications inspectors to be able to legally intercept radiocommunications and telecommunications in the performance of their spectrum management functions.[34]

3.34 NSWCCL commented that, while it had no objection to the proposed amendment in relation to radiocommunications inspectors, 'any information concerning the content of such material should be isolated from the provisions in the [TI Act] that permit the use of legally obtained material for other purposes'.[35]

Ancillary offences (Part 3 of Schedule 2)

3.35 Several submissions expressed specific support for the proposed amendment in relation to expansion of the definition of 'class 1' offence in the TI Act to include conduct comprising the offence of accessory after the fact.[36] For example, SAPOL submitted that it has experienced 'recent and current Major Crime investigations that would have been assisted by the amendment being in force'.[37]

3.36 SAPOL submitted further that the amendment to include accessory after the fact will be particularly useful for SAPOL since accessory after the fact is no longer an offence in South Australia.[38]

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33 *Submission 3*, p. 2.

34 *Submission 3*, p. 2.

35 *Submission 8*, p. 4.

36 SAPOL, *Submission 2*; WAPS, *Submission 6*; Tasmania Police; *Submission 9*; New South Wales Police, *Submission 10*.

37 *Submission 2*, p. 1.

38 *Submission 2*, p. 1.

3.37 WAPS submitted that the amendment will assist it and other law enforcement agencies in Western Australia to combat organised crime.[39]

3.38 However, the Law Council and NSWCCL held serious misgivings about this aspect of the Bill. The Law Council noted that the amendment would 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. It argued that such a 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'.[40]

3.39 The Law Council continued:

> 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.[41]

3.40 The Law Council suggested that the ancillary offence provision be removed from the Bill since 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'.[42]

3.41 NSWCCL was similarly critical:

> It is an example of the slippery slope: of a dubious extension of the powers to intercept, especially given the problems created by the definitions of terrorism offences, and some of the circumstances in which profits are made from a crime. While aiding and abetting a murder before the event creates an emergency, helping a person dispose of the profit on a map recklessly supplied to someone who turns out to be a member of a terrorist organisation does not.[43]

3.42 NSWCCL also argued that:

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39 *Submission 6*, p. 2.

40 *Submission 5*, p. 5.

41 *Submission 5*, p. 5.

42 *Submission 5*, p. 6.

43 *Submission 8*, p. 4.

> The proposal that these offences be made class one (rather than class two) offences is not justified. There is no reason why a judge or an A[dministrative] A[ppeals] T[ribunal] member should be prevented from considering the gravity of an offence and privacy considerations before issuing a warrant allowing interception in relation to these offences.[44]

Civil forfeiture proceedings and named person warrants (Part 4 of Schedule 2)

3.43 The committee received submissions from several organisations expressing broad-level support for the proposed amendments in relation to civil forfeiture proceedings and named person warrants.[45]

3.44 However, NSWCCL were strongly opposed to Item 9 of Schedule 2[46] and suggested that it be removed from the Bill.[47] Amongst other things, it contended that:

> The civil forfeiture acts are obnoxious. They enable persons to have their assets removed if it is held that it is more likely than not that they have committed a crime. These persons do not have to have been convicted of the crime. Instead, the acts are used where no conviction is possible, because the guilt of the accused person cannot be proved beyond reasonable doubt.[48]

3.45 In relation to Items 10, 12 and 14 of Schedule 2,[49] NSWCCL welcomed the 'amplification of the requirements on the ombudsman' and the requirement for agencies to report annual statistics relating to named person warrants.[50] However, NSWCCL were concerned that Recommendation 5 of the Sherman Report is not being implemented by the Bill.[51] It argued that:

> Accountability procedures for ASIO are particularly important, given both its past history and the necessary secrecy under which it operates. ASIO is not being asked to reveal its targets, nor how many they are, nor to indicate what kinds of interceptions it uses, nor anything else about its methodology.

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44 *Submission 8*, p. 4.

45 SAPOL, *Submission 2*; AFP, *Submission 7*; Tasmania Police; *Submission 9*; New South Wales Police, *Submission 10*.

46 See explanation in paras. 2.24 & 2.25.

47 *Submission 8*, p. 6.

48 *Submission 8*, p. 5.

49 See explanation in paras. 2.26 & 2.27.

50 *Submission 8*, p. 6.

51 Recommendation 5 of the Sherman Report was as follows: 'ASIO should publish in the public version of its Annual Report the total number of TI warrants and named person warrants applied for, refused and issued in the relevant reporting year.' See further Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, pp 10-11.

> Such limited reporting would not enable any target person or organisation to take counter-measures.[52]

3.46 NSWCCL also submitted that the number of telecommunications interception warrants refused should be published[53] since this 'is important information, not only for ASIO's accountability, but also for its reputation, and the confidence with which citizens can support it'.[54] It suggested that the Bill be amended to implement Recommendation 5 of the Sherman Report.[55]

3.47 NSWCCL also objected strongly to the failure of the Bill to implement Recommendation 8 of the Sherman Report.[56] It noted that:

> Legislation that restricts keeping records of originals of interceptions but permits the keeping of copies is ill-conceived. All the reasons that apply to restricting the availability of originals apply also to copies.
>
> It is true that some forms of copying are difficult to police. But that does not mean that they should be legalised.[57]

Clarification of 'employee of a carrier' (Part 5 of Schedule 2)

3.48 Only two submissions commented on, and supported, the proposed clarification of the definition of 'employee of a carrier'.[58] The Commonwealth Director of Public Prosecutions (DPP) submitted that:

> This definition widens the concept of "employee of a carrier" to include contractors or people working for a subsidiary company of the carrier. This office welcomes the widening of this definition as it reflects the practice of carriers to use the services of contractors and, in particular, it would allow evidentiary certificates to be issued by a Managing Director or Secretary of a carrier under section 61(1) of the Act which included acts or things done by contractors to the carrier.[59]

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52 *Submission 8*, p. 6.

53 As recommended in Recommendation 5 of the Sherman Report.

54 *Submission 8*, p. 6.

55 *Submission 8*, p. 6.

56 Recommendation 8 of the Sherman Report was: 'The definition of restricted record which existed prior to the 2000 amendments to the Interception Act should be reinstated.' The 2000 amendments resulted in copies of records being exempt from the record-keeping and destruction requirements of the TI Act. See further Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 11.

57 *Submission 8*, p. 7.

58 DPP, *Submission 4*; Tasmania Police, *Submission 9*.

59 *Submission 4*, p. 1.

The committee's view

3.49 The committee acknowledges submissions and evidence that were strongly supportive of the Bill. However, the Committee also notes the serious concerns raised by some submissions and witnesses. In particular, the committee is mindful of the apprehension expressed by the Law Council and NSWCCL, particularly with respect to the proposed exemption for telecommunications interception to and from a declared 'emergency services facility'.

3.50 In light of these concerns, the committee encourages further consideration of the Bill's provisions by the Blunn review of regulation of access to communications under the TI Act. The Government has appointed Mr Tony Blunn AO to review of the regulation of access to communications under the TI Act. The review will consider the effectiveness and appropriateness of the Act in light of new and emerging communications technology. The Committee also understands that the review will look into relevant privacy concerns and the need to balance these with the benefits stemming from telecommunications interception carried out by enforcement and national security agencies. Key law enforcement and national security agencies, representatives from the telecommunications industry, civil liberty advocates and the legal profession are to be consulted.[60]

Definition of 'law enforcement officer'

3.51 The committee notes the concerns raised in relation to the proposed expansion of the definition of 'law enforcement officer' under proposed paragraph 473.1(k) of the Bill. The committee acknowledges advice from the Attorney-General's Department (the Department) that the aim of the provision as currently drafted is to provide a practical way of allowing new, restructured or renamed agencies to come within the operation of the definition in the future.[61] The committee notes further that, under paragraph 473.1(k), any such agencies would be prescribed by regulation for the purposes of the definition (which is subject to disallowance by Parliament). Nevertheless, the committee is of the view that the Bill should be amended to specify more clearly which agencies may be prescribed or included in the definition.

Recommendation 1

3.1 The committee recommends that proposed paragraph 473.1(k) of the Bill be amended to identify more clearly which agencies may be included for the purposes of the definition of 'law enforcement officer' in the *Criminal Code Act 1995*.

60 For further information see www.ag.gov.au.

61 See *Committee Hansard*, 15 June 2005.

Exemption for an 'emergency services facility'

3.52 The committee notes the need for emergency services call centres to be able to record incoming and outgoing communications. It also appreciates that exempting such recording under the TI Act by means of references to telephone numbers is impractical. However, the committee also acknowledges arguments criticising the broad nature of the Bill's provisions and its potential intrusive consequences.

3.53 The committee notes the significant consequences of declaring premises to be an 'emergency services facility'. As explained elsewhere, it will mean that a very wide range of communications (including information of a personal nature and information unrelated to emergencies) within, and to and from, any premises designated as an 'emergency services facility' may be lawfully recorded without the need to obtain a warrant and without the need for any warning that this recording will occur. The committee acknowledges that the Bill provides that the Attorney-General may only declare premises to be an 'emergency services facility' if he or she is satisfied that the premises are operated by a police, fire, ambulance or related service for the purpose of dealing with requests for assistance in emergencies. However, the exercise of this power – and the extent to which these prerequisites are met – does not appear to be subject to parliamentary or other scrutiny. One would reasonably expect executive powers to exempt law enforcement from regulatory requirements (that is, such as the requirement to obtain a warrant) to be subject to scrutiny and review.

3.54 Departmental representatives acknowledged the lack of scrutiny, but suggested that any potential misuse of this power would be avoided by the risk of evidence gathered by telecommunications interceptions being rendered inadmissible on the grounds of illegality.[62] However, the committee has serious reservations about this constituting the primary check on the integrity of the powers since information obtained in such a way may not necessarily be relied on as evidence in court proceedings and, even if it were, this would be well after the power has been exercised.

3.55 Of particular concern to the committee are proposed subsections 7(3AA), (3AB) and (3AC). These new subsections denote a major change from the current provisions in the TI Act with respect to an 'emergency services number'. The committee acknowledges that emergency services facilities 'represent critical operational infrastructure which needs close protection as their loss would endanger the public for as long as these services were unavailable'.[63] However the committee is not satisfied that this warrants any declarations of an 'emergency services facility' as being exempt from parliamentary scrutiny.

3.56 In this context, the committee notes subsections 6(3) and (4) of the TI Act relating to the permitted interception without a warrant of telephone calls to publicly

62 See *Committee Hansard*, 15 June 2005.

63 *Explanatory Memorandum*, p. 5.

listed Australian Security Intelligence Organisation (ASIO) numbers. These subsections were inserted into the TI Act by the Telecommunications (Interception) Amendment Bill 2004 (the TI Bill), which was the subject of an inquiry conducted by this committee. The TI Bill removed the requirement that ASIO notify callers that their calls are being recorded.

3.57 In its report in relation to the TI Bill[64], the committee noted that the proposed amendments were restricted to incoming calls only, and to calls made to publicly-listed numbers. The committee was of the view that, while the benefits of such an approach (or at least the arguments in support of such an approach) are limited, the invasion of the privacy of individuals would be minimal.[65]

3.58 The same cannot be said about the Bill's proposed amendments in relation to prescribing an 'emergency services facility' which include no such restrictions. For example, as the Minister for Justice and Customs has stated the operation of the Bill may capture 'hundreds, if not thousands, of numbers'.[66] The committee is concerned that the balance between protecting the interests of law enforcement and protecting the privacy of individuals, including employees of an 'emergency services facility', may not be met appropriately in this case.

3.59 Therefore, the committee is of the view that any declaration under proposed subsection 7(3AB) should be deemed a legislative instrument for the purposes of the Legislative Instruments Act to allow full and proper scrutiny by Parliament. However, in order to protect the interests of vital infrastructure, the committee considers that the Bill should provide that there is no requirement for the information provided to Parliament to detail the specific location of the emergency services facility. Information contained in the relevant legislative instrument could include identification of the town or city, the region and the state/territory in which the 'emergency services facility' is located. Specification of the facility and the service concerned in general terms without identification of location would not, in the committee's view, compromise the security of such facilities, but would enable appropriate parliamentary scrutiny of this ministerial power.

3.60 In relation to concerns that the Bill does not contain a requirement for emergency services interceptions to occur lawfully in the course of a person's duties, the committee notes advice from the Department that this was a drafting oversight.[67]

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64 Senate Legal and Constitutional Committee, *Provisions of the Telecommunications (Interception) Amendment Bill 2004*, March 2004.

65 Senate Legal and Constitutional Committee, *Provisions of the Telecommunications (Interception) Amendment Bill 2004*, March 2004, pp 25-26.

66 Senator Chris Ellison, Minister for Justice and Customs, Second Reading Speech, *Senate Hansard*, 16 March 2005, p. 2.

67 See *Committee Hansard*, 15 June 2005.

Recommendation 2

3.2 The committee recommends that the Bill be amended to provide that any declaration of an 'emergency services facility' under proposed subsection 7(3AB) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Recommendation 3

3.3 Further to Recommendation 2, the committee recommends that the Bill be amended to authorise any declaration of an 'emergency services facility' under proposed subsection 7(3AB) not to include details of the specific location of an 'emergency services facility', but at the same time contain adequate information to allow appropriate scrutiny by Parliament (such as the name of the service and the region in which it is located, if possible).

Recommendation 4

3.4 The committee recommends that the Bill be amended to require emergency services telecommunications interceptions 'to occur lawfully in the course of a person's duties'.

Ancillary offences

3.61 The committee acknowledges the explanation given by the Department at the hearing in relation to the Bill's ancillary offence provision.[68] The committee notes that the ancillary offences are not insubstantial offences. They attract significant penalties. As such, the committee considers it reasonable that they be treated in the same way as other criminal offences for the purposes of telecommunications interception. The committee also notes evidence that recourse to telecommunications interception for these ancillary offences will be subject to the same checks and balances as those that apply to primary offences.

3.62 The committee acknowledges concerns raised in relation to Recommendation 5 of the Sherman Report. However, the committee notes that the Federal Government has formally rejected Recommendation 5 of the Sherman Report. Further, the committee notes that the Parliamentary Joint Committee on ASIO, ASIS (Australian Secret Intelligence Service) and DSD (Defense Signals Directorate) did not recommend such a change. The Federal Government has also argued that ASIO discharges its accountability responsibilities by providing classified reports both to the Federal Government and the Opposition. In light of this, the committee does not consider it necessary to revisit this issue in the context of the Bill.

68 See *Committee Hansard*, 15 June 2005.

3.63 In relation to Recommendation 6 of the Sherman Report,[69] the committee understands that the Bill proposes to amend section 84 of the TI Act to require the Ombudsman to include in its annual report to the Minister a summary of telecommunications interception inspections conducted in the relevant year, together with a summary of any deficiencies identified and any remedial action taken. The committee notes that this is at odds with Recommendation 6 of the Sherman Report which required a report to *Parliament*.

3.64 Representatives from the Department advised the committee that it is intended that the Department's annual report to Parliament prepared pursuant to the TI Act would include a summary of the information recommended by the Sherman Report. However, the committee notes that there would be no statutory obligation or requirement for the Attorney-General to table such information in Parliament. The committee is therefore of the view that this intention should be expressly specified in the TI Act.

Recommendation 5

3.5 The committee recommends that the Bill be amended to require that the Attorney-General Department's annual report prepared under Division 2 of Part IX of the *Telecommunications (Interception) Act 1979* include a summary of telecommunications interception inspections conducted in the relevant year, together with a summary of any deficiencies identified and any remedial action taken (including with respect to emergency services telecommunications interceptions).

Recommendation 6

3.6 Subject to the preceding recommendations, the committee recommends that the Senate pass the Bill.

Senator Nigel Scullion
Acting Chair

69 Recommendation 6 of the Sherman Report was: 'All inspecting authorities should include in their annual reports to Parliament a summary of the TI inspections conducted in the relevant year together with a summary of any deficiencies identified as well as any remedial action taken.'