The Senate

Legal and Constitutional Legislation Committee

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

June 2005

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TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 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*.

Recommendation 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

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

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'.

Recommendation 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

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

ABBREVIATIONS

ACA	Australian Communications Authority
AFP	Australian Federal Police
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
the Bill	Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005
the Criminal Code	*Criminal Code Act 1995*
the Department	Attorney-General's Department
DPP	Commonwealth Director of Public Prosecutions
DSD	Defense Signals Directorate
EM	Explanatory Memorandum
the Law Council	Law Council of Australia
the Legislative Instruments Act	*Legislative Instruments Act 2003*
NECWG	National Emergency Communications Working Group
NSWCCL	New South Wales Council for Civil Liberties
SAPOL	South Australia Police
the Sherman Report	Mr Tom Sherman AO, *Report of the Review of Named Person Warrants and Other Matters*, Canberra, 2003
TI Act	*Telecommunications (Interception) Act 1979*
TI Bill	Telecommunications (Interception) Amendment Bill 2004
WAPS	Western Australia Police Service
the 1999 Bill	Telecommunications (Interception) Legislation Amendment Bill 1999

CHAPTER 1

INTRODUCTION

Background

1.1 On 11 May 2005, the Senate referred the Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005 (the Bill) to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 14 June 2005. On 14 June 2005, the Senate agreed to extend the reporting date to 17 June 2005.

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

- allow the interception (without a warrant) of communications to and from certain declared emergency services facilities;
- allow the interception (without a warrant) by authorised radiocommunications inspectors who are fulfilling their statutory obligations under the *Radiocommunications Act 1992*;
- allow telecommunications interception warrants to be obtained in connection with the investigation of the ancillary office of accessory after the fact for a 'class 1' offence under the TI Act;
- implement the recommendations dealing with statistical information for named-person warrants, reports by the Commonwealth Ombudsman and civil forfeiture regimes contained in the *Report of the Review of Named Person Warrants and Other Matters*, completed by Mr Tom Sherman AO in 2003 (the Sherman Report); and
- clarify the meaning of the term 'an employee of a carrier'.

Conduct of the inquiry

1.3 The committee advertised the inquiry in *The Australian* newspaper on 18 and 25 May 2005, and invited submissions by 27 May 2005. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 60 organisations and individuals, including police, fire and ambulance services in each state and territory.

1.4 The committee received 10 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public. The committee held a public hearing in Canberra on 15 June 2005.

1.5 Given the short timeframe between the public hearing and the reporting date, the committee has not had the opportunity to consider fully the issues raised at the public hearing. The committee's report therefore relies on the evidence provided in submissions. However, the committee also presents the proof Hansard transcript of the public hearing at Appendix 2 of the report to assist the Senate in its consideration of the Bill.

Acknowledgement

1.6 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

Note on references

1.7 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Significant provisions of the Bill

2.1 The Bill seeks to amend the Criminal Code and the TI Act 'to ensure that they operate in a manner that enhances rather than hinders the functioning of [Australia's] law enforcement agencies'.[1] The amendments contained in the Bill will primarily affect the TI Act.

Schedule 1 – Amendment of the Criminal Code Act 1995

2.2 The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004* repealed the telecommunications offences in the *Crimes Act 1914* and replaced them with new and updated telecommunications offences in the Criminal Code. The Criminal Code provides a 'law enforcement officer' who acts in good faith in the course of his or her duties and whose conduct is reasonable in the circumstances of performing those duties with a defence to these and other offences.[2]

2.3 Currently, the expression 'law enforcement officer' is defined with reference to the Australian Federal Police (AFP), state/territory and foreign police forces, the Australian Crime Commission, the Commonwealth Director of Public Prosecutions and similar offices established under state/territory law.

2.4 Item 1 of Schedule 1 expands the definition of 'law enforcement officer' to encompass officers of the New South Wales (NSW) Crime Commission, the Independent Commission Against Corruption, the Western Australia (WA) Corruption and Crime Commission, staff of the NSW Police Integrity Commission, or any other agency that is prescribed by regulation. This will mean that a defence is available when an officer of those agencies engages in activities ancillary to telecommunications interception.

2.5 Any regulations prescribing agency employees as a 'law enforcement officer' must be tabled in Parliament and are subject to disallowance by either House.

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1 Senator Chris Ellison, Minister for Justice and Customs, Second Reading Speech, *Senate Hansard*, 16 March 2005, p. 1.

2 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, pp 11-12. Chapter 2 draws heavily on this paper.

2.6 The proposed amendment will commence retrospectively on 1 March 2005. This is the date that the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004* commenced.

Schedule 2 – Amendment of the Telecommunications (Interception) Act 1979

Part 1 – Emergency Services

2.7 At present, subsections 6(2A) and (2B) of the TI Act provide that listening to or recording communications to prescribed emergency services *numbers* operated by the police, a fire service or an ambulance service does not constitute an interception for the purposes of the TI Act. Item 1 of Schedule 2 of the Bill repeals subsections 6(2A) and (2B).

2.8 Items 3 and 4 insert new subsections 7(2) and (3) into the TI Act. The effect of these new subsections is that the interception of communications made to or from a telecommunications service that is located within premises that are declared as an emergency service *facility* will be exempted from the general prohibition on the interception of telecommunications contained in subsection 7(1) of the TI Act. The term 'premises' is defined in section 5 of the TI Act as including any land, any structure, building, aircraft, vehicle, vessel or place (whether built on or not), and any part of such a structure, building, aircraft, vehicle, vessel or place.

2.9 The effect of Items 3 and 4 is that calls made within premises that are declared as an emergency service facility may be lawfully recorded without a warrant and without the need for an automated or manual warning that recording will occur.

2.10 The Bill also effects other changes to provisions relating to emergency services. These include the following:

- the exemption will apply to 'emergency services facilities' rather than 'emergency services numbers', meaning that 'hundreds, if not thousands, of numbers'[3] will be covered. There are only three numbers currently prescribed for the purposes of the TI Act (000, 106 and 112);
- unlike the existing provision which only covers calls made *from* emergency services numbers, the amendments will potentially capture calls made *from* as well as *to* emergency services facilities;
- as well as police, fire and ambulance services, an 'emergency services facility' will include services for despatching or referring matters to the police, fire service or ambulance services (which is intended to capture outsourced services); and

3 Senator Chris Ellison, Minister for Justice and Customs, Second Reading Speech, *Senate Hansard*, 16 March 2005, p. 1.

- unlike the current exemption in the TI Act which applies to a person 'lawfully engaged in duties',[4] there is no requirement in the Bill for emergency services interceptions to occur lawfully in the course of a person's duties.[5]

2.11 One of the major changes proposed by the Bill is that under new subsections 7(3AA) and (3AB), the Attorney-General may, by written instrument, declare 'premises' to be an 'emergency services facility' if the Attorney-General is satisfied that certain conditions are met. 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.

2.12 New subsection 7(3AC) is included to clarify that the Attorney-General's declaration is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (the Legislative Instruments Act). Currently, 'emergency service numbers' are prescribed by regulation.[6] An important difference between an instrument that is not a legislative instrument and a regulation is that the former is not subject to parliamentary scrutiny, need not be tabled in Parliament and is not subject to parliamentary disallowance.[7]

2.13 The Explanatory Memorandum (EM) states that the reason a declaration under new subsection 7(3AB) is not a legislative instrument is to 'ensure that the locations of emergency services facilities are not publicly available'.[8] The EM states further that:

> No attention is drawn to the locations of these emergency services facilities, which are in as innocuous a location as possible. These facilities represent critical operational infrastructure which needs close protection as their loss would endanger the public for as long as these services were unavailable. There are few benefits in having the location of these facilities made public, and any that do exist are far outweighed by the potential risks.[9]

2.14 The amendments relating to emergency services commence on proclamation or six months after Royal Assent, whichever is earlier. They do not operate retrospectively and therefore may expose some emergency services workers (such as

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4 Subsection 6(2B).

5 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 13.

6 *Telecommunications (Interception) Regulations 1987*, reg 2A.

7 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 13.

8 *Explanatory Memorandum*, p. 5.

9 *Explanatory Memorandum*, p. 5.

those who may have recorded conversations on numbers other than 000, 106 and 112) to penalties under the TI Act.

Part 2 – Interception by radiocommunications inspectors

2.15 Items 5-7 amend subsection 7(2) of the TI Act to create an exception to the general prohibition against the interception of communications to allow the interception (without a warrant) by the Australian Communications Authority (ACA). The exception is limited to interception in the performance of a statutory spectrum management function, or the exercise of a related power, under the *Australian Communications Authority Act 1997* or the *Radiocommunications Act 1992*. The interception must be in the course of identifying the source of interference to critical radiocommunications frequencies.

2.16 The EM states that, while a radiocommunications network is not generally subject to the TI Act, the TI Act will apply where a radiocommunications network is connected to the telecommunications system. To the extent that the TI Act applies to a radiocommunications network, the ACA is prevented from intercepting radiocommunications where they interconnect with fixed line telecommunications. According to the EM, the Bill will remove an impediment to the effective performance of an important statutory function with potentially significant consequences by providing a limited exception to this prohibition.[10]

Part 3 – Ancillary offences

2.17 The TI Act enables law enforcement interception warrants to be granted in relation to 'class 1' and 'class 2' offences. 'Class 1' offences include murder, kidnapping, narcotics offences, terrorism offences, and ancillary offences involving aiding or conspiring to commit other 'class 1' offences. 'Class 2' offences include offences punishable for life or a period of at least 7 years where the offender's conduct involves death or serious personal injury, drug trafficking, serious fraud, bribery, dealing in child pornography, people smuggling, money laundering or cybercrime.[11]

2.18 Item 8 of the Bill expands the definition of 'class 1' offence in the TI Act to include conduct comprising the offence of accessory after the fact. The effect of this provision is that a 'class 1' telecommunications interception warrant will be available in relation to a person who is an accessory after the fact in relation to a 'class 1' offence.

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10 *Explanatory Memorandum*, p. 6.

11 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 4.

Part 4 – Civil forfeiture proceedings and named person warrants

2.19 The amendments in Part 4 of the Bill are the Federal Government's statutory response to three recommendations made by the Sherman Report.

2.20 The origins of the Sherman Report can be traced to a recommendation made by this committee in relation to its inquiry into the Telecommunications (Interception) Legislation Amendment Bill 1999 (the 1999 Bill). The 1999 Bill, which became the *Telecommunications (Interception) Legislation Amendment Act 2000*, contained a number of important amendments to the TI Act, particularly the addition of 'named person warrants'.[12]

2.21 While the committee recommended that the 1999 Bill proceed, it also recommended that the Bill 'provide for a review of its operations within three years of coming into effect', having regard to the need for the new named person warrant, the adequacy of safeguards and the adequacy of reporting mechanisms.[13]

2.22 The Federal Government responded to the committee's report by agreeing to a review of the operation of the Bill, to take place within three years of the Bill coming into effect. The former head of the National Crime Authority, Mr Tom Sherman AO, was asked to complete the review.

2.23 The Sherman Report was completed in June 2003. It concluded that the regulatory regime in relation to the TI Act generally contained adequate safeguards and reporting mechanisms and had a strong compliance culture which was well audited by the inspecting authorities. However, it also made several recommendations which envisaged statutory changes, along with procedural and administrative changes.[14]

2.24 Item 9 of Schedule 2 of the Bill substitutes new paragraph 6K(c) of the TI Act to include civil forfeiture proceedings within the meaning of 'proceedings for the confiscation or forfeiture or for pecuniary penalty' for the purposes of paragraph 5B(b) of the TI Act. The effect of this amendment, which implements Recommendation 7 of

12 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 8.

13 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Telecommunications (Interception) Legislation Amendment Bill 1999*, May 2000, p. vii.

14 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 9.

the Sherman Report, is to allow the use of information lawfully obtained (with a warrant) under the TI Act in aid of civil forfeiture.[15]

2.25 Item 9 also removes the list of Commonwealth and state/territory proceeds of crime legislation currently contained in paragraph 6K(c) of the TI Act. It will instead provide the power to prescribe by regulation such relevant Commonwealth and state/territory legislation as necessary. The regulation will be a legislative instrument and subject to parliamentary scrutiny.

2.26 Item 10 amends section 84 of the TI Act to require the Ombudsman to include in its annual report to the Minister a summary of the telecommunications interception inspections conducted in the relevant year, together with a summary of any deficiencies identified and any remedial action taken. The EM states that the amendment implements Recommendation 6 of the Sherman Report.

2.27 Items 12 and 14 amend section 100 of the TI Act which deals with the statistics that must be included in the Attorney-General's annual report to Parliament. The amendments implement Recommendation 4 of the Sherman Report. They will require the report to include aggregate statistics about:

- the number of applications for named person warrants, telephone applications, renewal applications, applications that involved entry onto premises, and how many named person warrants were issued subject to conditions;
- how many named person warrants involved the interception of a single telecommunications service, how many involved the interception of between 2-5 services, 6-10 services and more than 10 services; and
- the total number of telecommunications services intercepted by way of named person warrants.

2.28 These figures will also be broken down by each relevant Commonwealth and state agency.

Part 5 – Employees of carriers

2.29 The purpose of Part 5 is to clarify the expression 'employee of a carrier' as it appears in the TI Act.[16] Item 15 defines an 'employee of a carrier' as a person 'who is engaged by the carrier or whose services are made available to the carrier'. This would

15 Material obtained with a warrant issued for the investigation of 'class 1' and 'class 2' offences under the TI Act can already be used in conviction-based restraining order proceedings. However, such material cannot be used in civil forfeiture proceedings that are not conviction-based and where a civil standard of proof is used to determine the derivation of the proceeds of crime: Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 14.

16 *Explanatory Memorandum*, p. 9.

include anyone who might not have been employed in a strict legal sense by a carrier, for example contractors.

2.30 The definition of the term will apply to all references to an 'employee of a carrier' in the TI Act. The EM states that the term has always been interpreted as including contractors or persons working for a carrier while employed by a company that is a subsidiary of, or related to, the carrier. Therefore, since the provision does not seek to alter the definition, the amendment will take effect from the date of commencement of the TI Act (1 June 1980).[17]

17 *Explanatory Memorandum*, p. 9.

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.'

Additional Comments and Points of Dissent by Senator Brian Greig on behalf of the Australian Democrats

The Australian Democrats welcome the fact that the Government has finally responded to the recommendations made by Mr Tom Sherman AO in his Review of Named Person Warrants, which was completed in June 2003. However, we are also frustrated that it has taken two years to respond to Mr Sherman's recommendations, given that the Parliament has debated at least two telecommunications interception bills during that time.

Mr Sherman's report sets out a number of constructive amendments for improving the current named person warrants regime, with a particular focus on improving accountability mechanisms. While the Democrats are pleased that the Government has decided to implement a number of these recommendations, we are disappointed that it has chosen not to implement others.

Most particularly, we are disappointed that the Government will not be implementing Recommendation 5 of Mr Sherman's report, which calls for the Australian Security Intelligence Organisation (ASIO) to publish in the public version of its Annual Report the total number of telecommunications interception warrants and named person warrants applied for, refused and issued in the relevant reporting year.

The Democrats have long advocated for the introduction of a basic public reporting mechanism in relation to ASIO's telecommunications interception activity. Indeed we have sought to amend a number of bills to achieve exactly this. On the most recent such occasion, the Government indicated that it would not support our amendment because:

> "Mr Tom Sherman conducted an independent review of parts of the telecommunications interception regime in June last year. He recommended that ASIO publish in the public version of its annual report the total number of warrants applied for, refused and issued in the relevant reporting year. The government have not yet made any decisions in relation to whether and in what form Mr Sherman's recommendations are to be implemented, and we believe that to do so on the run would be inappropriate.[1]"

The Government also indicated its belief that "a considered approach to Mr Sherman's report is the way to go". Yet, now that the Government has had two years to formulate a response to Mr Sherman's report, it has decided against this recommendation.

In doing so, it apparently disregarded the views of the Federal Privacy Commissioner, which were sought in March 2004 to assist the Government in formulating its

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1 Senator the Honourable Chris Ellison, Minister for Justice and Customs, speaking to the *Telecommunications (Interception) Amendment Bill 2004*, 1 April 2004, Senate Hansard, page 22648.

response to the report. The Commissioner recently indicated that she supports Mr Sherman's recommendation that ASIO should publicly report on its interception activity[2].

The Democrats maintain our view that ASIO should be required to publicly report on the extent of its interception activity in Australia and we recommend that this Bill be amended to achieve this.

Recommendation:

That the Bill be amended to implement Recommendation 5 in Mr Sherman's Review of Named Person Warrants, so that ASIO is required to publish in the public version of its Annual Report the total number of telecommunications interception warrants and named person warrants applied for, refused and issued in the relevant reporting year.

Senator Brian Greig

[2] Office of the Privacy Commissioner , Submission No 48, Inquiry into the Privacy Act 1988.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submittor
1	Queensland Police Service
2	South Australia Police
3	Australian Communications Authority
4	Commonwealth Director of Public Prosecutions
5	Law Council of Australia
5a	Law Council of Australia
6	Western Australia Police Service
7	Australian Federal Police
8	New South Wales Council for Civil Liberties
9	Tasmania Police
10	New South Wales Police

APPENDIX 2

COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005

WEDNESDAY, 15 JUNE 2005

CANBERRA

CORRECTIONS TO PROOF ISSUE

This is a **PROOF ISSUE**. Suggested corrections for the Bound Volumes should be lodged **in writing** with the Committee Secretary (Facsimile (02) 6277 5794), **as soon as possible but no later than:**

Wednesday, 17 August 2005

BY AUTHORITY OF THE SENATE

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SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Wednesday, 15 June 2005

Members: Senator Payne *(Chair)*, Senator Bolkus *(Deputy Chair)*, Senators Greig, Kirk, Mason and Scullion

Participating members: Senators Abetz, Barnett, Bartlett, Mark Bishop, Brandis, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Hogg, Humphries, Knowles, Lightfoot, Ludwig, Lundy, Mackay, McGauran, McLucas, Nettle, Robert Ray, Ridgeway, Sherry, Stephens, Stott Despoja, Tchen and Watson

Senators in attendance: Senators Kirk, Ludwig, Mason and Scullion

Terms of reference for the inquiry:

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

WITNESSES

Committee met at 5.30 pm

BAKER, Mr Sean, Lawyer, Law Council of Australia

NORTH, Mr John, President, Law Council of Australia

WEBB, Mr Peter, Secretary-General, Law Council of Australia

ACTING CHAIR (Senator Scullion)—This is the hearing for the Senate Legal and Constitutional Legislation Committee's inquiry into the Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005

The inquiry was referred to the committee by the Senate on 11 May 2005 for report by report 14 June 2005. On 14 June 2005 the Senate agreed to extend the reporting date to 17 June 2005. The bill proposes to amend the Criminal Code Act 1995 to extend the defences to certain offences under part 10.6 of the Criminal Code Act to all agencies who may exercise power under the Telecommunications (Interception) Act 1979.

The bill also proposes to amend the Telecommunications (Interception) Act to, amongst other things, allow the interception without warrant of communications to and from certain declared emergency service facilities. The committee has received 10 submissions for this inquiry, all of which have been authorised for publication and are available on the committee web site.

Witnesses are reminded of the notes they have received relating to parliamentary privilege and to the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. The committee prefers all evidence to be given in public but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. I would also ask the witnesses to remain behind for a few minutes at the conclusion of their evidence in case Hansard staff need to clarify any terms of references.

I now welcome Mr Peter Webb, Mr John North and Mr Sean Baker from the Law Council of Australia. You have lodged submission No. 5 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr North—No, thank you.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr North—Mr Chair, Senators, thank you for inviting the Law Council of Australia to speak with you this afternoon. I would just like to take a few moments to outline the concerns of the Law Council and to amplify some of the matters that we have commented on in our submission. Before starting, I note the submission of the New South Wales Council for Civil Liberties. The Law Council agrees with many of their recommendations and commends them to you. The Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill is, in many respects, when you first look at it, an innocuous bill. It purports to make only minor changes to the telecommunications interception regime, and in many ways this may be correct. However, the bill contains several concerning elements that we believe should be amended or clarified.

The bill, in our view—and this is something we would like to stress—is simply one in a long list of bills brought before this parliament to increase the powers of law enforcement agencies, often at the expense of individual community members' rights and liberties. This was illustrated starkly for me last week when I spoke before a joint parliamentary committee looking into the questioning and detention powers that were set up to look at the sunset clause placed on those questioning and detention powers. It seems clear from talking to that committee that these powers may well continue in some form beyond the current sunset clause, and it may even be that the powers are restated without a further sunset clause.

At the time that this legislation was introduced, the Law Council expressed concern that it would not only mean individuals could be detained for excessive periods but it would also allow people to be detained even when they were not suspected of any criminal behaviour. Despite the fact that so far these laws have not been abused—in fact, there have been only eight instances where people have been arrested pursuant to those warrants—it leads us to our criticism of particular aspects of the present bill which is before you today, and that is that we have been unable to see any justification, in the setting out of the bills, for why law enforcement agencies require or need these expanded powers. It seems that the law enforcement agencies in this climate of

fear have asked for and obtained from parliament very extensive powers, without anyone giving us concrete reasons as to why people's rights and liberties should be affected in this way.

We have not been given any statistics or examples as to why the powers need to be expanded, as they are in this act, and we have four particular matters that we bring to your attention that are set out in our submission, the first being the power to intercept communications from emergency service facilities, which includes mobile phones, as well as email in some instances. There appears to be no distinction made for personal calls being made to or from the facilities, or for the types of devices which can be intercepted.

The Law Council recommends that controls be placed on the types of communications and the instances in which these communications from a facility can be intercepted. There is no empirical justification given by those seeking these extra powers for what possible use can be made of listening in to these private conversations at these emergency service facilities.

The second point we talked about was the prescribing of emergency service facilities. This bill envisages that the Attorney-General can prescribe facilities and these will not be legislative instruments and therefore not open to your parliamentary scrutiny. This is justified by stating that these key facilities have locations that cannot be disclosed publicly. We believe that parliamentary scrutiny of these extra powers is absolutely essential and that it can be achieved by bringing it under the Legislative Instruments Act and therefore within proper parliamentary scrutiny, and a provision to remove information as to location can be easily implemented.

The third point is the power to regulate members of other agencies as law enforcement officers. This power is ill defined. 'Agency' is not specified in the Criminal Code Act 1995. A clearer distinction should be made as to what bodies could come under the regulatory power to make their employees, and possibly even contractors or agents, law enforcement officers for the purposes of this act. The council recommends that this regulatory power be amended to clearly specify which agencies can be prescribed.

The final point is the creation, we see, of a new offence for the purposes of intercepting the telecommunications of a person who has received or assisted someone who has committed a class 1 crime. The granting of a warrant for this offence is, in a sense, based on an assumption of the first crime, which then leads to this secondary crime. The fact that the person receiving or assisting must know that the other person is guilty of a class 1 crime is unprovable at the time of interception. This was one of the points we were making about the ASIO legislation that allowed people who had not committed a crime or even been properly suspected of having committed a crime to be arrested and held for periods of up to one week. It is when you add these bills, one on top of the other, that you begin to see the true infringement of our rights as citizens in a democratic nation.

I would recommend that this fourth matter, namely this offence, be removed from the bill. No evidence has been provided, that we can see, that this is necessary or that it will result in more convictions and therefore a safer country, and we do not see why we should reduce such individual liberties. We would be happy to answer any questions, thank you, Senators.

ACTING CHAIR—Thank you, Mr North.

Senator LUDWIG—I am interested in examining the issue of the people within the emergency facility. It seems to me that it is open that the exclusion would apply to personal communications—to both personal mobiles and emails—and, assuming there is some sort of control in terms of how internally they might regulate, there would still be personal traffic.

It would also cover non-emergency numbers if there were administration numbers within the establishment. There does not seem to be any ability to cut down or reduce that number of exempted communications that then could be potentially intercepted and then no reason as to why you would include those in that. It seems logical, in some respects, for the emergency numbers but it seems illogical for outside of that unless they are used as part of the network or could be incorporated into the network. That would hardly extend to personal mobiles people bring in unless they are excluded from those. Is that your understanding of how it would operate?

Mr North—Yes, it is. I should put on the record that we believe that the emergency numbers should be and need to be reported because there have been instances where dire results have occurred when an emergency number has been telephoned and appropriate action has not been taken. I am reminded of a case in New South Wales where an emergency number was rung when a woman was attacked in her home, tied up and left. For some reason the emergency services broke down and she remained in that state for 14 days and eventually

died. We agree that there is real need to listen in to communications in a proper and organised fashion but not to extend it, as this bill appears to do.

Senator LUDWIG—You raised the issue of how it should be then described. It seems that this provides for a process which is not transparent and is counter to the original Sherman report which provides a level of scrutiny, at least of TI warrants, particularly named warrants, and other mechanisms to ensure the Ombudsman has a review. There are a couple of others and I will go to those in a second. I was more interested in trying to examine an alternative process that you might have considered. Whilst maintaining the import of the bill, in what manner could it be reported which would allow parliament to have some scrutiny of that whilst still maintaining the withholding of location specific details?

Mr North—First of all, parliament must maintain scrutiny of these prescribed emergency service facilities. Therefore, every single thing should fall under the Legislative Instruments Act but there is no need to say, when you are looking at the particular facility, where it actually is. There might be a proper form of scrutiny of each and every one of these that the Attorney-General so prescribes. Otherwise, we really are moving into an area where there is no parliamentary scrutiny of what the Attorney-General and the people that he delegates power to say are going to be the emergency service facilities. As I was saying before, we have a lot in the ASIO field where what we say are strong and excessive laws have only been used eight times. That was reliant upon Dennis Richardson, who was head of ASIO. Every time you bring in a bill like this it relies very much on the strength and integrity of the people who have this power.

Mr Baker—The details that go to parliament could have things such as a general area that the facility is operating under, or a description of what the facility does, without disclosing the specific location.

Senator LUDWIG—Or the emergency service provider.

Mr Baker—Yes.

Senator LUDWIG—Then the subcontracted provider, if there is one.

Mr Baker—Yes.

Senator LUDWIG—There may be a way of detailing without even providing an area. It could be by state.

Mr Baker—Yes, by state or region or something of that nature.

Senator LUDWIG—Do you think that would be sufficient?

Mr Baker—Obviously there is a tension here between ensuring the security and integrity of the facility—and a lot of these are very important base stations et cetera—and also making sure that parliament has an appropriate role in looking at that and looking at what the Attorney-General is prescribing. That tension can be dealt with under the legislation. At the moment it is not addressed at all. You could envisage drafting of a provision which would allow that to be dealt with using as much detail as possible but also protect the location of the facility.

Senator LUDWIG—Could you comment on this. Given that we now have a new Legislative Instruments Act, you would at least expect a bit better effort to ensure that you can come within it, rather than seek blanket exemption from it at first instance. Given that we have now moved to a new regime for legislative instruments, it would seem that you would at least make an attempt. Would you agree with that?

Mr Baker—I would agree with that. The Legislative Instruments Act has been specifically drafted to address issues like this. There is a capacity under its provisions to allow this kind of tension to be dealt with. It does allow greater public scrutiny of legislative instruments but that is a good thing.

Senator LUDWIG—There were two recommendations made by the Sherman report which dealt with TI legislation. They are recommendation Nos 5 and 6. I could not see anything about them in your submission, so I wonder if you could comment on them. I am happy for you to take them on notice. One is whether the TI Act should be amended to require the public version of ASIO's annual report to contain the total number of TI warrants and named person warrants applied for, refused and issued. That would at least provide for better reporting. As you can appreciate, the named person warrants are a later addition but the reporting seems to be not as good as it could be.

The second recommendation is whether there should be legislative amendment to implement recommendation No. 6 of the Sherman report and require the Commonwealth Ombudsman annual report to parliament to contain details of inspections of the AFP and ACC conducted during the year, particularly of deficiencies revealed and remedial action taken or proposed. Those two may go some way in addressing in

part the scrutiny of this type of power that is proposed, but not perhaps to all the other issues. You may want to take that on notice but we do have a very short timetable. If you are able to, you can provide a comment.

Mr North—One of our criticisms has been that there is no evidence to back up why this request has been made, either by government or by law enforcement agencies, for these extended powers. You have just said there would be an absolutely necessary check to see how many of these interception warrants et cetera are being issued each year. If you look at the Civil Liberties paper, you will see that they say there is quite an extraordinary number when you compare Australia with somewhere like the United States. Working in the criminal law field, we are seeing ever-increasing loads of interceptions in many different criminal matters. One of the cases I have at the moment has 16,000 pages of telephone intercepts. We are not seeing a proper increase in terms of either convictions or in what we would all be hoping to achieve, which is a drop in the crime rate. We do need that, but we might take both points on notice and give you a slightly better response. What is your time limit? You said it was quite tight.

Senator LUDWIG—Therein lies the problem. Unfortunately, we were meant to have this about a week ago. Your overview touches on some of those matters, but I was interested in perhaps a more targeted view.

Mr North—It is absolutely essential that there be this type of scrutiny, otherwise we are departing from things that we have held dear in a democratic nation without any proper evidence for it.

ACTING CHAIR—Mr North, I think that it is reasonable to accept until midday tomorrow. It will be cutting it fine, but we would be happy to accept any questions on notice or further submission by midday tomorrow.

Mr North—Thank you.

Senator LUDWIG—The other area, before I move on, was the civil forfeiture orders. I know there are some differing views amongst the submitters about this. Your view, as I understand it, is that it conforms with the Sherman report and is a reasonable extension of the power. Is that a fair summary, if I put the caveat on it that it is subject, of course, to your four main points?

Mr North—Yes.

Senator MASON—Mr North, you alluded briefly to the lack of empirical evidence. I will speak in general terms if I can. Could you argue that the Telecommunications (Interception) Act is over 25 years old, that the technology has changed a lot, that the threat has changed a lot with the war on terror, that law enforcement procedures have changed a lot and that, in a sense, this is simply not so much an infringement on civil liberties but, in a way, making the act more contemporary and more utilitarian? What do you say to that?

Mr North—You could argue that, but the very purpose of the act is now being whittled away by these constant changes. The purpose of the act was to stop communications interception, except for very good reason and in a very narrow band. What we are saying is that there is a distinct lack of evidence that current law enforcement procedures, techniques, surveillance and everything else working within the act is going to achieve a clear-up of crimes without needing to infringe on people's rights and liberties by moving in such a wide way.

Although we have only identified a number of things, because this is a small piece of legislation, what we are seeing from parliament increasingly since 2001 is bill after bill that whittles away at these points, so we keep standing up and saying this and getting shot down, but we believe implicitly that you really should show the Australian people why the law enforcement agencies need to have to these expanded powers.

Senator MASON—So the onus of proof is very much on them.

Mr North—Yes.

Senator MASON—And you cannot argue that they are doing this, in a sense, as a matter of insurance or security. You would say that they have to prove it beyond a reasonable doubt, in effect.

Mr North—Yes. They should prove it, because they have become more sophisticated. The law enforcement agencies have moved with the times. They are relying a lot more on forensic evidence and on interception type evidence to solve a lot of serious, complicated crimes. We are just asking why they need to expand it so that the powers are being given to ever-wider groups of people without scrutiny by you, as senators of the Australian parliament, and for the reasons set out in our report. Utility does not work with us. We have fought too long and too hard to live in a country that we like so much without saying, 'Well, it makes things a bit easier for the law enforcement agencies.' That does not go down well.

Senator MASON—Is it the tyranny of incrementalism?

Mr North—That is right. Although we have only picked four or five points for you today, we have tried to make the point that it ties in with all the other legislation.

Senator MASON—I understand that. Thank you.

ACTING CHAIR—Thank you, Mr North, Mr Webb and Mr Baker.

Proceedings suspended from 5.56 pm to 6.06 pm

BIBBY, Dr Richard Martin, Committee Member, New South Wales Council for Civil Liberties

MURPHY, Mr Cameron, President, New South Wales Council for Civil Liberties

ACTING CHAIR—Thank you. You have lodged submission No. 8 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Murphy—Not at this stage.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to answer questions. I also advise you, as you are on teleconference and it may not be evident to you, as the Senate is sitting tonight, witnesses should be aware that the committee may need to adjourn for a short period of time to respond to a division if necessary. I now invite you to make a short opening statement.

Mr Murphy—I would like to take the opportunity to thank the committee for giving us this opportunity to provide evidence on the bill. I will just say that the bill generally should be rejected or amended. It provides a severe reduction in the privacy of individuals without establishing good reasons for the interference with that privacy. It provides a massive increase in the scope of telecommunications interceptions.

It fails to adequately safeguard those increased powers and it does not adequately implement the reporting recommendations of the Sherman report, particularly in relation to ASIO interceptions. It allows the use of interceptions to assist in the seizure of assets which may be the proceeds of crime. In this sense, it is allowing a powerful criminal tool to be used to gain evidence that will ultimately be available in proceedings with a civil burden of proof. That is the general problem with the bill. I will hand over to my colleague Martin Bibby who will elaborate slightly on those points.

Dr Bibby—The prime purpose of the basic act is to outlaw interceptions of telecommunications, not to create a large class of permitted interceptions. The original Telecommunications (Interception) Act permitted interceptions on very few grounds but there are now many. There has also been an increase in the bodies that are permitted to conduct surveillance. This bill proposes not only to extend further the grounds for interception and to increase the bodies that may intercept, but in three of its clauses, it removes the power of parliament to control what further exceptions can be made. There is a slippery slope at work here and it is time for the parliament to draw a line.

Mr Murphy—That is all we would like to say in our opening statements.

ACTING CHAIR—Thank you.

Senator KIRK—Thank you, gentlemen, for your submissions. I wondered if you could perhaps expand a bit on some of the points that you made. I am interested in particular in the point you make about these amendments being contrary to the overall purpose of the act or at least the initial intention of the act. Perhaps you could explain for us why it is that you see that as problematic.

Mr Murphy—Certainly. In answer to that question, the original purpose of the act was clearly to confine or limit the scope of telecommunications interceptions. When someone intercepts a telecommunications phone line, a computer line or other device it affects the personal privacy of users of that service. Many people may use a phone. While law enforcement may intercept a telecommunications line for legitimate purposes to obtain evidence about that individual, they are also invading the privacy of the many other users of that telephone line or computer.

The problem with this bill is that it greatly enlarges the scope for law enforcement authorities to obtain interception warrants. It provides a number of ancillary purposes for which they can be obtained—for proceedings which generally are not criminal in their nature, such as the seizure of assets that are proceeds of crime, for example.

Senator KIRK—Are you able to comment on some of the definitions that changed in the bill, in particular the definition of 'law enforcement officer'? Perhaps you could let us know what your views are about the expansion of that definition.

Mr Murphy—Yes. The definitions in the bill, as I understand it, changed to broaden the definition of a law enforcement officer. What the bill does is include a number of additional agencies that will be able to act to intercept communications. The primary problem with that section of the bill is that it allows people to intercept communications or to use communication services to transmit or intercept child pornography. While that in

itself is desirable, the structure of the bill will allow investigative officers to use this legitimate goal as an excuse to trawl through people's computers generally. It is undesirable, I think, for officers to be promoting and distributing child pornography in some attempt to snare offenders.

One only has to look at the findings reported in the New South Wales Ombudsman's report into the misuse of police email to look at the way in which that can go wrong. The definition of 'law enforcement officer' is expanded so that other officers who intercept telecommunications may be covered, as is the manner in which they are protected, and they have a general defence if they believe they are acting legitimately in their interception.

Senator KIRK—Would some of the problems you have highlighted be overcome if the legislation were amended so as to specify more clearly the agencies that are intended to be caught—in other words, prescribing the agencies that the legislation will apply to?

Mr Murphy—I think that parliament needs to make very clear which agencies are able to access this. As I understand it, the bill will allow the government of the day, through the Attorney-General, by regulation, to allow other agencies to access these warrants. I think that it should be confined. Parliament should determine who is able to access these warrants by specifying both the agencies that are able to access them and the class or type of officer who is able to access a warrant and use a warrant in those agencies.

Dr Bibby—There is a further concern that the range of offences that state bodies are able to investigate is determined by state acts and not acts of the Commonwealth so that what the bill does is put in the hands of the states the powers to effectively allow people to increase the types of crimes for which interceptions are permitted, so the federal parliament loses its power over the extent to which interceptions are permitted.

Senator KIRK—But if it were amended so that those agencies were specified, at least then it would provide for better clarity, surely, wouldn't it, than if it were just permitting the minister by regulation to regulate this? Would you agree?

Mr Murphy—I think that is right. But, along with that, the bill should also be amended to specify and define the types of crimes for which these interceptions can be used. If that is done, it may well overcome this problem.

Senator KIRK—From what I have seen there is no specification at all as to the types of crimes that can be intercepted under this legislation. Am I right?

Mr Murphy—Sorry, I missed that.

Senator KIRK—Are you saying that it would be better if the types of crimes were specified? From my looking at it, there appears not to be any list of specific crimes or categories of crimes.

Mr Murphy—If there were some schedule that would provide the categories of crime, the types of crimes for which interceptions could be used, along with the agencies which could use them, that would assist in tightening up the application of the interception power and the warrants that can be obtained, and that would be desirable.

Senator KIRK—Can you expand on your views about the exemption for an emergency services facility and where you see the problems are in those provisions?

Dr Bibby—At present there is a provision for emergency services to use specified telephone numbers and to record interchanges on those numbers. We do not object to that because obviously it is useful when somebody calls in who may not be entirely coherent. It is useful if what they say is recorded. But what is proposed is an unlimited expansion of that to all the telephone numbers, emails or anything else which may be used within an emergency service. It also allows the Attorney-General to specify which agencies will be involved and which premises will be involved without parliament having any oversight at all. The first interferes or allows the interference with the privacy of employees at emergency services and it allows the numbers to be used for interception more or less without limit. The second, as I say, removes the powers of parliament to keep track of what is going on and, indeed, removes the power of anybody to keep track of who is being allowed to conduct interceptions. We think the bill should be amended in the way that we propose to avoid those problems.

Mr Murphy—The essential problem with this is that the Attorney can declare any facility to be an emergency services facility. It is conceivable that, for example, an entire police station and all the telecommunications lines in and out of that police station could be declared. I think what the bill should do is clearly indicate that it is only an emergency services phone line that is used for that purpose and not for any other purpose.

Senator KIRK—Would you also want to see it limited such that emails and other forms of communication are excluded?

Mr Murphy—Yes. It is not my experience that people will contact triple 0, for example, by text message or by email, so it is unclear whether this is going to have any benefit in that sense. I do not think people in an emergency go to the computer and send an email, or send a text message when they need assistance, and I think that this just enlarges the scope of interceptions and will make it easier for it to be misused. For example, if an entire police station is declared an emergency services centre, then any of those facilities coming in and out—email, text messages and so on—may be covered by this and misused.

Senator KIRK—The explanatory memorandum says that the subsection that we are referring to, 7(3A), is not a legislative instrument. Of course, if it were a legislative instrument then a different regime would be in place. Do you think that the problems that you have identified could be overcome if this were to be declared a legislative instrument?

Dr Bibby—No, only in part. It would at least keep track on things so that parliament and the people could find out what extensions were being given, but it still means that all the communications that take place within a facility would be subject to interception. It would not protect the privacy of employees of, say, the police station and it would still allow the misuse of the section for the setting up of communications with people, and then recording them, which have nothing to do with the emergency purposes for this clause.

Senator KIRK—Yes, I understand.

ACTING CHAIR—Thank you very much, Mr Murphy and Dr Bibby.

[6.22 pm]

CORBY, Superintendent Michael, New South Wales Police

LUCAS, Sergeant Karen Margaret, Australian Federal Police Representative, National Emergency Communications Working Group

LUTTRELL, Mr Denis Raymond, Chairman, National Emergency Communications Working Group, and Director, Information Management, Queensland Police Service

MAHONEY, Assistant Commissioner Reginald, National Emergency Communications Working Group

ACTING CHAIR—I now welcome representatives from the National Emergency Communications Working Group to the table. Do you have any comments to make on the capacity in which you appear?

Supt Corboy—I am currently commander, public affairs. I was formerly with the communications branch for three years.

ACTING CHAIR—Thank you. You have lodged submission No. 1 with the committee. Do you wish to make any amendments or alterations to that statement?

Mr Luttrell—No.

ACTING CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members from the committee to ask questions.

Mr Luttrell—Thank you very much for the opportunity to address the committee. The National Emergency Communications Working Group is a group consisting of senior representatives of emergency services organisations—police, fire and ambulance—within Australia. It includes Telstra, the Australian Communications Exchange, which is the referral party for hearing- and speech-impaired people, the Australian Communications Authority and Emergency Management Australia, all working towards improving the quality of the service that operates around the Emergency Call Service, which is triple 0, 112, 106 and those sorts of numbers that provide assistance to the public.

There are 13,500,000 of these calls made annually to the Emergency Call Service. About 50 per cent of these calls are received by emergency services organisations and less than 10 per cent of them are genuine. Emergency services organisations communication centres exist to field calls from the public, directly or indirectly, as expeditiously as possible. Calls may be to the emergency call numbers, as I mentioned, or direct to ESOs and internally referred, although that does not happen often.

Real calls are time critical. Many can be life threatening. Communication centres are designated areas set up for the specific purpose to receive these calls and arrange for response action. As well as arrange for emergency services dispatch, it can involve a number of outgoing calls to other appropriate services, such as—in the case of police, for example—to ambulance, fire, health departments, local council et cetera, and even back to the caller, if need be, depending upon the circumstances and the nature of the issue.

Ideally, all communications should be recorded in and out so that a complete record is available for inquiry or follow up. Recording tapes are subject to very close control. These tapes are often called for to establish what occurred. For example, in Queensland not so long ago a claim was made that an ambulance did not turn up in response to a sick child. We were able to establish in subsequent investigations that no calls were received, as claimed in media statements. The need for recording is associated with high levels of accountability—internal or external investigations, coronial investigations, broader evidentiary inquiries, subpoenas, royal commissions, media statements and reviews in respect of incident follow up.

During emergency calls, emotions are often running high. At difficult times, claims made are often just recollections. Sometimes the content of calls needs to be played back to operators during the event, to be clear about what is being said. Complaints from the public are an increasingly common event. There is often a high expectation from the public and the legal community that ESOs be able to account for their actions and the level of service provided.

In an emergency, communications procedures are very closely controlled. Operators are trained for a considerable time before they are allowed to operate, which often involves a four- to six-week training period. Internal procedures and policies advise operators that recording is undertaken. They are advised that, if they wish to make a private call, they should go to a separate area, be that an administration area, rest or meal room, where calls are not recorded. The same is true for incoming calls. Operators are very aware and are

reminded of recording occurring. The recent NECWG meeting of senior communications centre representatives affirmed that this is the case in all jurisdictions.

Calls to these areas are taken and made on fixed phone services on call taker and dispatch desks. NECWG confirmed that mobile calls come through the fixed network. That ensures that they get priority routing. Present legislation only allows recording without announcement of calls to specially designated call numbers and then only into such centres. Not all incoming calls requiring action are originally made to those numbers. No call out is presently allowed to be recorded without announcement. This makes it very difficult to conform with the legislation, because it makes procedures very difficult in what can be quite stressful circumstances.

Emergency services organisations fully support the legislative changes proposed, as they simplify procedures and provide for the complete recording of all activity. Procedures and policies operating in communication centres give full recognition of and capability for personal communications of ESO operators. New Zealand and the United Kingdom presently have a similar regime. Legislation and regulation permit it. Our understanding is that these operate very successfully. The proposed legislation meets all of the ESO concerns and provides suitable protection for the wider public interest, certainly as ESOs experience it. Thank you.

ACTING CHAIR—Thank you.

Senator LUDWIG—A couple of the submitters raised the issue of the need for this legislation. You have gone to some of those reasons. They are operational reasons, if I could couch it in that way, and seem to be relevant to people in the course of their employment within emergency services and the like. Is that what you have responded to?

Mr Mahoney—That is part of it. In our recruitment processes we clearly set out in the job descriptions what the job is—working in an emergency call centre. They all know that calls are recorded. As Mr Luttrell said, there are very clear guidelines on where they can go if they want to make private calls. The essential nature of what we are talking about here, of course, is the increased accountability for all of us to be clear in regard to what is heard and what is not heard over the telephone lines. As Mr Luttrell indicated in the presentation, sometimes we replay all the time because of the people who ring us in an emergency, not only because of emotion and hysteria, but often they are also drug- and alcohol-affected. For a lot of the people calling triple 0 and the emergency lines, that is the case.

Since 9-11, our reflection as a national body is to look at how we can capture more information in our emergency centres. Because of the interdependency between emergency services centres now, we contact each other in a different way than we did before, particularly in response to critical incidents. We do not do that on emergency lines. We do it on lines attached to the communications centre. With the amendment we are trying to clarify what has changed operationally and also administratively in our response to critical incident management in Australia.

Senator LUDWIG—What do you envisage will be the lines that are captured by this legislation or that you require to be captured by this legislation?

Mr Mahoney—Incoming and external calls to the emergency call centre.

Senator LUDWIG—And those which you just mentioned, the ones which are effectively an adjunct to—

Mr Mahoney—Yes, that is covered in the amendment.

Senator LUDWIG—What about personal computers and emails, personal mobile phones and administrative phones that are not used or not designated as part of the network? Is it the intention to have those monitored as well?

Mr Mahoney—No. As I indicated in the opening remarks, the telephone lines that are designated to people we employ in our centres are not recorded.

Senator LUDWIG—I cannot recall that I have been into an emergency services facility, other than perhaps the fire brigade at some point, or a fire brigade control room. The type of place that you are outlining is like a call centre facility; there are lines which you can identify as incoming or outgoing, that you can then monitor, and those which you want exempt from the telecommunication legislation. Am I right about that?

Mr Mahoney—That is part of it. Also there is dispatch, where you have a telephony support person who is getting phone calls from police stations and phone calls from members of the public put through by other agencies to provide a more timely response to critical incidents. There is a whole range of telephones in there.

With inquiries and investigations that occur as the nature of our business, we need to adequately ensure that it is not just what a person thought someone said; it is actually what someone said.

Senator LUDWIG—And then in terms of setting up a quick response, is there a facility where you then also want to check communications on CV or HF or other frequencies? Is that a facility that you have considered as part of this?

Mr Mahoney—You are talking about voice-over, IP and other new technologies coming on board?

Senator LUDWIG—Yes.

Mr Mahoney—I am on the Premier of New South Wales' task force on the channels and access strategy, but all around the nation we are encouraging members of the public to communicate with government. A lot of that is SMS and through digital means. All the teenage population I think are accessing their exam results by SMS rather than looking in the papers.

Senator LUDWIG—Yes.

Mr Mahoney—We are trying, as an emergency services facility, to ensure that the legislation will cover both current technology and emerging technology on a day to day basis. We are already taking reports of matters over the internet and through emails in regard to specific crimes. We are linking with other government departments about major crimes in schools, to better share information, get more timely lists of what has been stolen, and any possible modus operandi of offenders.

Senator LUDWIG—Do you have dedicated computers or computer terminals with particular IP addresses that you use for that facility? You can use mobile phones or access telecommunications through the internet for SMS as well for that type of traffic.

Supt Corboy—No, not at this stage.

Senator LUDWIG—It is only calls that you have at this point in time?

Mr Luttrell—The recording is essentially in the communications centres. The equipment there is provided for that purpose, so what comes into that centre is what is recorded. It is invariably limited to that sort of room, but the way technology is developing, there is increasing pressure on us to take SMS calls. We prefer not to do that at the moment, mainly because of the reliability of the service. We do not want to push people into SMS if there is no guarantee that that call is going to get through.

Senator LUDWIG—Sometimes, as you can appreciate, it can take two days to get an SMS.

Mr Luttrell—Indeed. In fact, we advise against it but I think the reality is that that sort of technology is going to improve. What the bill provides for is that capacity to do it if and when it gets to a point that we would be comfortable with it.

Senator LUDWIG—Some of the submitters also say, in terms of the definition of who is in and who is out, there does not appear to be a clear line between those lines which are covered and those lines which are not covered, including mobile phones and—

Mr Luttrell—It is not so much the lines; it is the facility which is actually taking the calls and dealing with the calls.

Senator LUDWIG—If you had a personal mobile phone inside the facility, that would then be captured by the legislation?

Mr Luttrell—No.

Senator LUDWIG—How would it not be?

Mr Luttrell—Because it is not linked to that network.

Sgt Lucas—None of us currently have the facility to intercept mobile phone calls in the air and it is not something that we are looking at instigating.

Senator LUDWIG—No, but you can go to the ISP with a telecommunications interception warrant or an exemption, as the case may be, and obtain the communication. It is not about intercepting it in the air; it is about intercepting it at the communications carrier.

Mr Luttrell—We are talking about recording, without announcement, the normal routine calls that are coming through. In the same way as this is being recorded, if your mobile went off now, it is not recorded as part of this facility. It works exactly the same way.

Senator LUDWIG—How would it not be covered?

Mr Luttrell—It is not connected to that mechanism and therefore—

Senator LUDWIG—Where does the legislation say that it has to be connected to your network?

Mr Luttrell—It does not, in that sense, but that is not what happens. That is the point I am making.

Senator LUDWIG—Unfortunately, I have only got the legislation to go on. I do not know what you do other than the submissions that I have received in terms of operations. How do you rule out the telecommunications interception warrant being excluded from a mobile phone or a computer email or an SMS from within that facility, be it personal or even from the tearoom, or from a line which is not part of the network as such? In other words, a phone in the tearoom for personal use would be covered, as I read it.

Mr Mahoney—I think I could talk for my colleagues there: (1), once you walk into the communication facility with a dispatch, you cannot have a mobile telephone on. That is the instruction to employees in regard to those facilities; (2), as indicated in the submission, the only mobile phones that are recorded are the ones that come through and then go onto the fixed line for us, which are recorded. The other question is in regard to the designation of the facility, which I think was raised previously about the numbers of police stations which would appear in the schedule. We have had to nominate what an emergency service facility is, and that is where our emergency centre is located in each of our states and territories for the point of this legislation.

Supt Corboy—I think you were describing the nature of the call rather than the technological aspects of the call.

ACTING CHAIR—Just to get this clear, you do have the capacity to prescribe a discrete area of a building or area. I think in some of the submissions there was an assumption that there was quite a large area or building simply to be prescribed, hence the normal activities that would take place outside of the needs of an emergency call centre would not be able to take place. Can you give me some assurances that the prescribed area will also have the capacity to be controlled in terms of being able to be easily identified by the occupants and the staff of that area?

Mr Luttrell—Invariably it is an area that is secured and people just do not walk in and out. It requires particular access and egress.

ACTING CHAIR—Mr Luttrell, can you give me an example of the sorts of security measures you would have to go through to get in there? Is there some sort of identification pass?

Mr Luttrell—Could I ask Sergeant Lucas to describe what she does in the AFP.

Sgt Lucas—At our centre, the Winchester Police Centre, ACT Communications, to get into the building you come through the front door, where there is a guard; you are required to be signed in if you are not a member. Even as a member, you come in through that main door and you go down a corridor to a first entry door. You buzz, say who you are and why you are there. That is assessed by the communications sergeant. If he believes that you should be coming through that door, he lets you in. You walk down the corridor to a second door and that is the door into the facility itself.

ACTING CHAIR—There can be no mistake when you are inside that facility—

Sgt Lucas—You are coming into a secure area.

ACTING CHAIR—that the mobile phone in your pocket might not be protected by the normal mechanisms. Perhaps you could just give us a quick brief on specifically how you ensure that everybody who works within that facility or adjacent to that facility understands the nature of the calls that are made from within the facility itself, and the difference between the nature of those calls and calls that will be made in other areas of the building, rather than the facility.

Sgt Lucas—In our centre, members of communications have six weeks training when they first come in. One of the first things they are told is that all their phone calls, apart from those in the designated area like the meal room, will be recorded, and it is recorded for their benefit as well as for the benefit of the caller. The other members outside the communications centre who are contacting us backwards and forwards are also aware that all the calls are being recorded. It is common knowledge.

ACTING CHAIR—I can understand how that may be in the facility you describe, Ms Lucas, but there are a number of other facilities—for example, a fire station—that may not be used to the level of security amenity that you would be used to.

Sgt Lucas—I do not know about the other states, but I know that in the communications centre at Curtin Emergency Services Authority in the ACT again you have several levels of security to go through to get into their communications centre which handles fire and ambulance for the ACT.

Supt Corboy—Both the New South Wales Fire Brigades and the New South Wales Ambulance Service have equal levels of security in their comms centres to us. They are not seeking any telephony into their fire stations or ambulance stations, which are not public numbers anyway.

Mr Luttrell—Senator, it is not reasonable to describe these locations as fire stations. They really are emergency communications centres.

ACTING CHAIR—I am just dealing with the perceptions in some of the submissions.

Senator KIRK—We have just been talking about various facilities, the ones that obviously come to mind like fire, police et cetera, but my understanding under this legislation is that the definition of such a facility is going to be broadened considerably by the declaration of the minister, so whereas what you have said is quite reassuring as regards security, how can we be sure that these other facilities that this is going to extend to will have the same kind of security in place? You can see our concerns.

Mr Luttrell—I am not aware that that extension is anticipated in that sense. Each emergency service would be required to identify the location of their devices and those centres. I do not see any broadening of the issue, with respect, from the way it presently operates.

Senator LUDWIG—Do you have a manual that covers contracted-out call centres? Do you have contracted-out call centres or are they all dealt with by emergency services personnel?

Mr Luttrell—Contractors in the sense of?

Senator LUDWIG—The phone, receiving the phone calls and passing them on.

Mr Luttrell—No, they are invariably either sworn officers or members of the service, all covered by the rules and regulations that operate in those services. Contractors in the sense of telecommunications technicians and people who might come in to repair things?

Senator LUDWIG—No, I mean in terms of calls.

Mr Luttrell—There are no contracted call centres in Australia, none at all.

Senator LUDWIG—At the moment. Is there any intention to have them?

Mr Mahoney—I have not heard anything.

Mr Luttrell—I am aware of none. It certainly does not apply in any of the facilities in Queensland.

Senator LUDWIG—So all the facilities we are talking are all either uniformed or within a service?

Mr Luttrell—Yes.

ACTING CHAIR—Mr Luttrell, in your opening comments you made reference to a group that you consulted with that were voice challenged in some form. Perhaps you could think about that. In reference to Mr Murphy's submission when he said you do not usually use email or SMS messages to call an emergency centre, was that in reference to the potential for using SMSs to try to get in? Could you perhaps enlarge on why that was the case?

Mr Luttrell—We push the triple 0 number very hard. In fact, we prefer to have only one channel that is well known, reliable, the number that comes to mind when you have an emergency. We accept that technology is changing things. The difficulty is if you get an email and it is clear what it is about, then it has to be investigated. We have no option but to do that. So that message has to get into the facility. It is not one we would anticipate, it is not one we would encourage. SMS is one such thing, exactly the same case. The Australian Communications Authority has issued an edict to discourage carriers and carriage service providers from talking about SMS in respect of emergency calls.

ACTING CHAIR—But because it is a possibility that people may use that amenity to contact an emergency centre, that is why it is being included in the purview of this, for information.

Mr Luttrell—Essentially, yes. We just do not know whether the technology is going, frankly.

Sgt Lucas—It has taken us three years to get to this point. Technology is changing so quickly these days that we do not want to be back to see you next year and the year after and the year after because technology is getting ahead of us.

Senator LUDWIG—It is highly likely you will be. This is about the fourth time we have the telecommunications interception legislation before us, so do not be disappointed if you are wrong.

ACTING CHAIR—Thank you very much for providing evidence today.

Sgt Lucas—Thank you, sir.

[6.47 pm]

GEORGE, Mr Anthony, Manager, Compliance and Technical Services, Communications Operations and Service Group, Australian Communications Authority

THOMAS, Mr Donovan Harry, Team Member, Compliance and Technical Services Team, Communications Operations and Service Group, Australian Comunications Authority

LAMMERS, Federal Agent Rudi, Manager, Technical Operations, Australian Federal Police

NEGUS, Federal Agent Tony, Acting Deputy Commissioner, Australian Federal Police

WHOWELL, Mr Peter Jon, Manager, Legislation Program, Australian Federal Police

GIFFORD, Mr Cameron, Senior Legal Officer, Security Law Branch, Attorney-General's Department

McDONALD, Mr Geoffrey, Assistant Secretary, Security Law Branch, Attorney-General's Department

SELLICK, Ms Suesan Maree, Principal Legal Officer, Security Law Branch, Attorney-General's Department

ACTING CHAIR—The Australian Federal Police and the Australian Communications Authority have lodged submissions Nos 7 and 3 respectively with the committee. Do you wish to make any amendments or alterations to these submissions?

Mr George—Not for the ACA.

ACTING CHAIR—Before we commence, can I remind senators that under the Senate procedures for the protection of witnesses, departmental representatives should not be asked for opinions or matters of policy. If necessary they must also be given the opportunity to refer these matters to the appropriate ministers. I now invite each of you to make a short opening statement, at the conclusion of which I invite members of the committee to ask questions.

Mr McDonald—Thank you. Those involved in organised crime activity and those who are most likely to subvert national security need to be able to communicate in order to get done what they want to do. Like any business of this nature, they like to use sophisticated techniques when it suits them and sometimes believe that communications are quite safe and foolproof; but every once in a while with these communications they make mistakes and give the game away. That is where telecommunication interception becomes a very effective tool in the fight against crime and enhancement of national security. Our current regime recognises that there is a need to guard against infringements of personal privacy in this process. That is why we have a strict accountability regime. We have warrants which are used as a last resort and there is extensive oversight by the parliament and the Ombudsman.

I mention all this because it is important when we look at these amendments that we do not just look at the specific amendment but think about what we are amending and the framework that is in place which provides for accountability. These amendments are in many ways a refinement of the legislation and do not have the significance of the framework that we are attaching them to.

It is important that when we have legislation like this, it does not impede the operations of law enforcement agencies, particularly emergency services and the Australian Communications Authority work. These services amendments are very much about assisting law enforcement and ensuring that we can provide adequate emergency services coverage. There is another amendment, which is essentially a fix-up amendment to the Criminal Code, which is totally unrelated to telecommunications interception but we found it convenient to use this bill as a vehicle. You might recall last year when I was in the criminal law branch we put through some updated telecommunication offences. Some of those offences were to do with the use of child pornography on the net and issues like that.

In that legislation there were exemptions for law enforcement agencies. There were some agencies which we should have exempted. Although we had consultation on the bill, these agencies were not specified, so that amendment is included in this bill and is a Criminal Code amendment. It is to do with allowing lawful law enforcement related activity.

The committee has indicated it is particularly interested in the proposed amendments that will enable interception of communications made to and from the declared emergency service facilities. Currently, listening to or recording calls made on an emergency service number is not to be an interception for the purposes of the interception act. Such numbers are those on which assistance in emergencies may be sought

from the police, fire or ambulance services. The primary emergency service number, triple 0, and the mobile and teletype equivalents, 112 and 106, have been designated in the regulations for this purpose.

It was intended that the list of prescribed numbers could be extended to accommodate the needs of emergency service organisations. However, state and territory ministers have indicated that the prescriptions mechanism is not practical in the following ways. The exception only allowed recording of incoming calls, not those calls subsequently made by emergency services organisations that deliver emergency services. Obviously there is an incoming call and there is a delivery side. The prescription method was also proven to be administratively cumbersome as it required identification of potentially thousands of numbers at which emergency assistance calls are received within communications centres. It would therefore require endless regulatory amendments.

Finally, the publication of emergency service numbers presents a significant threat to this very important part of our critical infrastructure. The numbers could be used in a malicious manner to shut down a communications centre by engaging all the lines in a centre simultaneously.

We only have to look at how this city has been disrupted over the last few weeks to see how there are more than enough people around who might be motivated to do this, let alone those who might have something else more serious in mind. Clearly, we do not want to be facilitating any problems of that nature.

In response to these concerns the amendments will move away from prescribing emergency service numbers and move to the concept of declaring emergency service facilities, therefore allowing the interception of communications made to and from those facilities. This will enable the interception of all forms of communication, including email and text messages. While communication is usually in the form of voice calls, it is essential that the act remain technologically neutral and recognise just how much text communication is used. Recently we texted the wording of some proposed amendments on a phone because we could not contact anyone except in that way. Text messaging is getting to the point where—

Senator LUDWIG—Another island in paradise.

Mr McDonald—It was Cambodia. It is very well served with mobile phone service. It shows just how strongly that is used. Obviously it can be used in that way, particularly with younger people using it all the time. Sure, it will enable the interception of private communications. We have a situation here where professional people are running the emergency services line and they are fully aware that they are private calls. Of course there is awareness that in these circumstances it will be recorded. However, the details of the facilities to be declared will be kept as tight as possible, even down to declaring a particular part of a particular floor, depending on the structure of the facility. Staff will be aware that in all other areas communications are not being intercepted. In law enforcement type of facilities there is quite strong control over the areas in which people can go.

Finally, it is also true that there are details of those facilities that we do not intend to make public. That is reflecting the need to protect our critical infrastructure. If the emergency services system cannot work because of sabotage, then the problems are potentially pretty horrible. I think I have already mentioned the Criminal Code amendment and explained the situation with it. From some of the submissions it seems that people are getting confused that these amendments are really about the interception regime. In fact that is not the case. It is focused on the telecommunication offences.

Those offences deal with everything including threatening to kill people, threatening to cause people harm, hoaxes, the child porn side of things which I mentioned earlier—all of which are issues where law enforcement needs to be investigating whether the organisation that we have listed clearly have some need to be involved in some of the activities. One was to do with mobile handsets and the rebirthing of those. Sometimes you might need to be involved in doing something like that to try and deal with people who are doing that sort of thing. In certain circumstances law enforcement agencies may be legitimately engaged in conduct that does fall foul of one of these offences. In the event that this involves surveillance, then the Surveillance Devices Act, which we had passed last year, would apply. It is quite strict in its procedures. The consequences of not complying with that act are not only that we will have admissibility problems but also there are sanctions underpinning it.

These amendments are, in the scheme of things, not earth-shattering. I would like to suggest that fundamental aspects of it are totally within the spirit of the foundation legislation which I outlined in the first place.

There was some criticism that we were proposing to list additional bodies that might be created over time by regulations and there was some concern about that. Of course, if it is done by regulation—and there are many important things listed by regulation—then it can be disallowed in that situation if there is a problem. Clearly we have in mind that they are often reconstituting and renaming organisations or creating new ones and it is obviously much more practical to do it by regulation. Thank you for giving us an opportunity to appear here tonight. I look forward to any questions you might want to ask.

ACTING CHAIR—I am glad you are looking forward to questions, Mr McDonald.

Mr McDonald—We always look forward to questions.

Senator LUDWIG—In terms of the odd one out, which is the first one, it does not seem to be limited by the number you can include within the regulation you make. It seems to be open-ended in the number of agencies you could include by regulation. What was the purpose of making it open-ended?

Ms Sellick—As Mr McDonald just mentioned, these agencies we currently prescribe often have restructures. The Crime and Misconduct Commission in Queensland is the most recent one. By prescribing them in the primary legislation we immediately run the risk that once there is a change in the name of the body, the primary legislation no longer covers them. Yes, it is an open-ended regulation-making power, but must take into account any of the agencies that may be engaged in this conduct, those that are generally permitted under surveillance device legislation. Should a new body come on board, they would like to be able to give them the advantage of the defence that is available to other law enforcement officers.

Mr McDonald—In a sense it would require a recommendation of the relevant state government to the Attorney-General before we would be looking at listing these additional organisations.

Senator LUDWIG—When you look at the definition of 'emergency services facility' there is now no longer a requirement for the emergency services interception to occur in the course of a person's duties. That seems to have been removed. Why is that no longer necessary?

Ms Sellick—That was an unintended drafting consequence. We thank the submissions that brought this to our attention. It is something the government certainly is going to be looking at.

Senator LUDWIG—Does that mean you might have a favourable view to an amendment?

Ms Sellick—I cannot answer for what the government might do, Senator.

Senator LUDWIG—So you say it is a drafting oversight and it should not have been deleted?

Ms Sellick—There is a possibility that we should have stuck to the words in the legislation and not tried to be fancy and reinvent the wheel.

Senator LUDWIG—Do not tell parliamentary counsel that one. In terms of the definition of 'emergency services facility' it has the ability to include at (d) a service for dispatch of, or referring matters to the attention of a force. Is there any subcontract about emergency services facilities at the moment, or dispatching centres?

Ms Sellick—Not that I am aware of. I am aware that in Victoria they did have a relay service at one point.

Senator LUDWIG—The ambulance, wasn't it? It was subject to adverse press, if I recollect correctly.

Ms Sellick—It is something for the emergency services to address; whether they bring it back within the coverage of their own jurisdictions or whether they stick to a centre that takes all the calls. Telstra is at the moment the owner of the triple 0 calls. In fact, they are part of the services we would need to declare for the purposes of this provision. They are not police, ambulance or fire, but they are certainly the first point of contact for the triple 0 calls.

Senator LUDWIG—There do not seem to be any others. Telstra then is the organisation that would be included at the moment.

Ms Sellick—Not that we are aware at this stage, but of course it is a fracturing market up there.

Senator LUDWIG—It seems that (c) is to enable that force or service or another force or service to deal with a request for assistance in an emergency. Does that limit the stretch of (3AB)?

Ms Sellick—It certainly is not allowing the prescription of any facility. It does have to be tied back to the fire, police or ambulance services.

Senator LUDWIG—Is that also tied to deal with the request for assistance in an emergency? There are a number of elements to that: it is 'deal with' a request, so it has to be a request and then it has to be an assistance in an emergency.

Ms Sellick—Yes.

Senator LUDWIG—They are words of limitation.

Ms Sellick—Yes.

Senator LUDWIG—So unless it was an emergency—

Ms Sellick—All calls coming in are going to be. The people who are intercepting the calls cannot declare at one particular moment or not whether a call is an emergency call, which is why we need to be able to intercept all calls coming into these facilities.

Mr McDonald—But it is a clearly marked emergency line.

Ms Sellick—Yes.

Senator LUDWIG—But people make wrong calls.

Mr McDonald—It would be pretty hard to make a mistake with triple 0, though.

Senator LUDWIG—You are braver than I to say that.

Mr McDonald—It is probably unlikely, I would say.

Ms Sellick—Basically the Attorney must be satisfied that the facility, before he declares it, is a facility that will enable the force or service to deal with a request for assistance in an emergency. That is the reason the facility is established; to be able to deal with a request for assistance in an emergency. It might receive a call that is not, in hindsight, an emergency call but it has in fact been established to receive and deal with calls in an emergency.

Senator LUDWIG—So far as the retrospective operation of triple 0, 106 and 112 numbers, it seems that only goes back to March.

Ms Sellick—We have not sought retrospective commencement of these provisions. They will commence on royal assent.

Senator LUDWIG—Who would not be protected then? Was there any consideration as to whether retrospective protection should be given to workers in emergency facilities who may have listened to or recorded emergency calls or numbers other than triple 0, 106 and 112?

Ms Sellick—It was something that came up very early. Because emergency services are professional organisations—we are not quite sure of the legal standing of it—we have formed a view that people should know when they call these services they are recorded, and certainly the people operating in the services know they are recorded. It probably is not an interception anyway, because everyone is aware that it will be recorded. It is a grey land again. We have certainly taken note of the submission that brought this to our attention.

Senator LUDWIG—The area of the recommendations by Mr Sherman under the TI Act, particularly 5 and 6, seems to be that there is no sufficient reporting to parliament in terms of the number of TI warrants, named-person warrants applied for, refused and issued during each reporting year in an annual report, or to parliament through ASIO's annual report or some other annual report, or through the TI reporting mechanism itself. That seems to be a recommendation Mr Sherman sees as a modest step towards greater disclosure and accountability. Why has that not been included in the legislation?

Ms Sellick—We have, Senator, in part 4, the provision dealing with civil forfeiture proceedings in named-person warrants. We certainly pick up Mr Sherman's recommendation about the statistics the agencies are required to provide to the Attorney-General, for him to include in the annual report to parliament on named-person warrants.

Senator LUDWIG—So you will be including those applied for, refused and issued during each reporting year.

Ms Sellick—Yes. In fact, those statistics were included in the annual report for 2003-04.

Senator LUDWIG—In respect of recommendation 6, the Commonwealth Ombudsman's annual report to parliament contained details of inspections of the AFP and ACC during the year, particularly of deficiencies revealed and remedial action taken or proposed.

Ms Sellick—Yes. Item 10 in part 4 gives effect to that recommendation. The provision will require the Ombudsman to include in the annual report to the Attorney-General a summary of the inspections, deficiencies and particulars of remedial action taken.

Senator LUDWIG—Yes, but that is to the Attorney-General. Mine is to parliament.

Ms Sellick—It is our intention that the Attorney-General will include in his annual report to parliament the statistics that will—

Senator LUDWIG—But he does not have to.

Ms Sellick—Not at this stage, no. We have made it clear in a supplementary explanatory memorandum that that was the intention, to give full effect to the spirit of Mr Sherman's recommendation in this regard. There is an issue about the detail which the Ombudsman can include in his annual report. At the moment he is restricted in what he can, in fact, report in his annual report on TI information.

Senator LUDWIG—Why wouldn't you amend the legislation rather than put it in an EM which makes it inconsistent with the legislation, in my view?

Ms Sellick—We can certainly specify, if the government so wishes, that this is to be included in the annual report. My understanding is that it was the government's intention to give effect to Mr Sherman's recommendation No. 6.

Senator LUDWIG—In terms of the more general proposition raised by the Law Council about the ancillary offences—it seems that they regard them as a legislative creep—is there a justification that you can provide, or an example, of where that power would assist in prosecuting a particular case?

Ms Sellick—I might defer to my law enforcement agency friends, but I can say that in any situation where crimes are conducted it is only after the event that you are starting the process of identifying who the person is or where the person is. Nine times out of 10, they are going to have some sort of assistance after the fact. It is going to be an essential tool for law enforcement agencies to be able to obtain an interception warrant for the investigation of an accessory after the fact to assist with the apprehension and investigation of the primary offender.

Mr McDonald—It is quite usual right through the legislation to cover the ancillary offences. Obviously, they go hand in glove with each other.

Federal Agent Negus—Obviously, these are class 1 offences and very serious offences, like murder, kidnapping and terrorism. Certainly, from the AFP's perspective, if there was an accessory after the fact it would be something of an inhibitor if we were unable to apply for a proper telephone interception warrant in that circumstance. It is a shortfall in the current environment and, as I said, only for very serious offences.

Mr McDonald—The other point is that the penalties for ancillary offences are quite significant. They are serious penalties.

Ms Sellick—They are not secondary offences, they are offences in their own right.

Senator LUDWIG—What is your answer, though, to the claim that they can be abused to intercept and record communications of a person who is only suspected of aiding and abetting after the fact and would cause a breach of privacy? This was an issue raised by the council.

Mr McDonald—Ancillary offences contain their own fault elements; contain elements of a serious offence in their right. It is an area of criminality that has been identified by the parliament anyway. It is not really correct to say that they are of no substance. If the parliament decides that ancillary conduct is to be criminal and prescribes a significant penalty, then it should be treated like other offences.

Senator LUDWIG—But only in relation to class 1 offences.

Ms Sellick—Yes. We have not extended the definition of 'ancillary offence' for class 2 offences. This is only for class 1 offences.

Federal Agent Negus—The same checks and balances exist for the ancillary offences as exist for the primary offences, so there is still a very rigorous regime: the issuing of the warrant, the sufficient standard of proof being met at that particular time and then the regulation around that of how the documents and other things are handled as a consequence.

Senator LUDWIG—So you are not going to come back to class 2 offences for the application of ancillary offences in the foreseeable future?

Ms Sellick—Senator, if I had a crystal ball in relation to the Telecommunications (Interception) Act and amendments that were required—

Senator LUDWIG—We would not be here for the fourth or fifth time, would we?

Ms Sellick—The year is but young!

Senator LUDWIG—There is a review as well going on in relation to this legislation. Can you tell me where that is up to?

Mr McDonald—The review has engaged around quite extensive consultation. There have been written submissions and also Mr Blunn has visited many different organisations and locations in a consultative capacity. They are at the point where they are writing aspects of the report and developing the report. That is going along fairly well, and I expect that the review is still pretty well on track for August.

Senator LUDWIG—The extension to where it can cover emails, SMSs and information not connected with emergencies: it seems to be that the legislative reach of this is—and we have had a couple of examples provided to us—stretches to where you have a computer within the facility and it might have private emails. I do not know. People cannot always say who is going to send them an email. Then you have mobile phones that people may have, for a range of reasons. Although you say it may not exist now, if you couple it with a service or with a dispatch and they then are contracted out into the future—because this legislation seems to also have a future content to cover a range of circumstances that may not exist now—you have those covered as well, which could include private conversations and private communications.

Ms Sellick—The intention is to cover anything occurring within the facility. It is not limited to particular forms of communication or particular styles of communication. I think the National Emergency Communications Working Group has addressed the issue of the need to ensure that the legislation moves forward should there be a change in the way people communicate. It is not looking at designated numbers. That became too prohibitive in the way that we could prescribe them. It is looking at changing the focus to being what is actually in the emergency service facility.

Mr McDonald—People working in a facility will be very much aware of the circumstances of their particular workplace. They will no doubt have some faith in their colleagues to the effect that they probably will not be too concerned about that issue anyway.

Federal Agent Negus—My experience over 23-odd years now is that people who work in those areas understand the environment that they are in. It is very important after the event to make sure that you have the details right and if you can replay a phone call or even reconstruct things several days later to make sure that you have the right sequence of events, in the case of bushfires and other things, it becomes an absolutely important mechanism for us to do that. The way that the structure is now, that is limited to a certain number of phones. In an emergency situation, you may well have everyone in a centre on a different phone looking at different communications with different agencies. It is very instructive to be able to put that back together again at a later time.

Mr Gifford—The term 'facility' was quite purposely chosen because it is defined in section 5 of the interception act to have the same meaning as it has for the telecommunication act. It is defined in that act to mean a building, a vessel—I will stay with 'building' because that is the part I need—'or any part of that building'. That gives the Attorney-General the ability to declare only one part of the building. If we use the example of this room, he could declare this room to be a facility, thereby allowing emergency services organisations to ensure that, perhaps where the Hansard operators are this evening, they are not recorded lines. It is making sure that those privacy concerns can be met by ensuring that what is outside of that facility will not be recorded.

Senator LUDWIG—How can they be met when nobody knows whether a part or the whole of the building has been designated, if it is a report to the Attorney-General which is not a legislative instrument and cannot be reviewed by parliament?

Mr Gifford—As the representative from the National Emergency Communications Working Group has said, all personnel within the particular facility would be made aware of which part of the particular facility is a declared facility and that things outside of that facility, including things such as a mess room, would not be recorded and that those particular lines would be available for personal communications and administrative communications.

Senator LUDWIG—Where is the legislative requirement for that?

Mr Gifford—There is no legislative requirement for that.

Senator LUDWIG—No.

Mr McDonald—The situation is that surely it is not necessary to go to that sort of level of detail in the legislation. It is a workplace and a workplace which has all of the usual workplace relations issues that any workplace would have, in the sense of making sure that people are aware of what the situation is and having other areas where that would not be the case. Is there any advantage in perhaps outlining what these facilities are like?

Federal Agent Negus—From the AFP's perspective, we would not intend to designate buildings as such. It would be specific areas within buildings. I think communications centres and elements like that would be the general areas that we are talking about here. There is certainly no intention to widen that out to areas where investigators might be sitting, just because there might be the odd call come into those people. From our perspective, it is very much a closed environment now. We would certainly be looking at supplying or providing other telephones for people. We acknowledge that people need to make personal calls during work time and there is a tolerance for that, as long as that is reasonable. We would certainly have no issue with providing that sort of service.

I think Sergeant Lucas outlined, from the AFP's perspective, that these are very much contained units, very secure units, and people do not just wander in and out of them willy-nilly. If you are in there, you are in there to do a specific task. From my experience in these particular places, people look to have some sort of reassurance that they have not missed an important call and there is an ability to recapture that at a later time. As far as intruding on people's privacy, as has been said a couple of times before, these are very professional people who work in a high-pressure environment where they might have numerous calls coming in in a very short space of time and, for most of them, I think they would appreciate this, as long as they had an opportunity to use communications devices outside of that environment which we would certainly look to provide.

ACTING CHAIR—Mr McDonald, I had a fairly high degree of certainty a moment ago that the staff adjacent to these facilities would be (a) very clear where the facility was and areas outside. I have to say, from the contribution of Mr Gifford, he perhaps suggested we would be proscribing those areas not that were the facility but in fact proscribing areas within a building that were outside that facility. I would like some clarification that it is the intention—because we do not have any other opportunity to clarify that since it is outside of the parliamentary purview—that these areas will in fact be proscribed; will be an area within a building quite clearly proscribed. Perhaps you can clarify that.

Ms Sellick—The declaration that the Attorney makes will certainly be declaring facilities. It could be part of a building, it could be a particular floor within a particular building, depending where the call centre—commonly called—is situated within a building. That particular thing will be declared to be the emergency service facility. It is within the normal then standing operation procedures of the professional services that that area is then made known to the staff within those areas—that that area that has been declared by the Attorney is the area within which telecommunications will be intercepted.

In the same way that there is no requirement for security clearances to be identified as to where you go within a particular area, there is no legislation that says you need to have a top secret or a secret clearance before you can go within an area. It is a standard operation procedure of all Commonwealth government departments, and even private contractors, that you need to have a particular clearance to go somewhere. That is what we are looking for here. We are not overproscribing. We are simply saying that, once it has been declared by the Attorney, the staff will be made known through the normal operation procedures of those organisations. That was our intention.

Senator LUDWIG—But the legislation does not preclude the Attorney-General from being satisfied of other facilities outside of what you have described being proscribed. That is the case, isn't it?

Mr McDonald—We are still limited by the purpose of the legislation, which is about the emergency services functions. It is not a question of there being a capacity to proscribe buildings willy-nilly. It is tied to that function.

Ms Sellick—We come back to the point that you raised at the beginning, Senator: the premises themselves have to have been established for the purpose of dealing with emergency service facilities. If, in the end, that is a caravan out in operational field for whatever crisis takes place, if the Attorney is satisfied that that particular premises for that particular time is, in fact, the emergency call centre, that is what will be proscribed. But before he declares it to be such, we have to be satisfied that it was in fact established for dealing with requests for assistance in an emergency.

Senator LUDWIG—There is no review of that, once the decision is made.

Ms Sellick—Correct.

Senator LUDWIG—There is then no subsequent check whether or not you can then override that, expand it, once the (3AB) test is applied. You can then come back and alter it as many times as you like. That is true, isn't it?

Mr McDonald—Yes, I think so. But you would need to have that sort of flexibility, I would have thought, where you have adjustments in the facilities. I do not think you have had any difficulties in terms of expectations about how staff would react to it. We are not aware of any concerns of that nature.

Federal Agent Negus—No, that is right. Since the submission has gone in, there has certainly been no contact from the Federal Police Association or any other body or any member of staff, as far as we are aware.

Ms Sellick—Ultimately, Senator, if the evidence came down to be used and they challenged the validity of the interception on the basis that it was not a declared facility, then any attempt to use the evidence would be thrown out. Once again, it comes back to the integrity of the situation. There is that final call that maybe you get a situation where the lawyers or the defence is arguing that a warrant should have been obtained because the situation was not a facility established for the reception of an emergency. Ultimately, it is challenged in that way.

Mr McDonald—Yes. It has to be work within its purpose; the purpose if the legislation. It would be pretty easy to establish what the purpose of the facility was.

Senator LUDWIG—I think we have just about run out of time. But I am interested in the evidentiary basis where you have decided that you require this power, in the sense of the need, the mischief it is solving. We have heard some from, I think, the emergency services people themselves, but from the way that the legislation is structured and the need for the Attorney-General to have that facility which does not have parliamentary scrutiny, it seems to me that there is a lack, at least from the submitters, of reasons that have been put forward by the Attorney-General to substantiate why these powers are required. But given the nature of the time, I am happy to take that on notice, if you are wanting to.

Mr McDonald—Yes. As we said in the opening, the rationale for designating a facility all goes down to the practicality of trying to do it by numbers. Given that these facilities are all government facilities with ministerial involvement, it is one of these areas where legislative proscription of every detail is simply not as necessary as it would be if we were trying to regulate the private sector.

Senator LUDWIG—You could limit the legislation to government agencies only?

Mr McDonald—The legislation is such that we have been given administration of this by the Attorney-General in terms of declaring the areas. It would be a little difficult for us to absolutely rule out some private aspect to it, even though it would appear that these are predominantly government facilities.

Senator LUDWIG—But they are not all government? You changed it to 'predominantly'.

Mr McDonald—My understanding is they are, but we would not want to have a situation where we were ruling it out. Of course Telstra is involved—

Senator LUDWIG—I did not want to go there!

Mr McDonald—What I was driving at is that the emergency services are administered by responsible government officials. Consequently, we cannot equate this with trying to regulate masses of small businesses. That is a totally different kettle of fish.

ACTING CHAIR—Mr McDonald, you may have taken a question on notice there.

Mr McDonald—I am sure we have that option.

ACTING CHAIR—You will have to provide that by 1200 hours tomorrow.

Mr McDonald—I think that can be done pretty easily.

Senator KIRK—That is noon in layman's terms.

Mr McDonald—Yes.

ACTING CHAIR—I thank the witnesses who have given evidence to the committee today. I now declare the meeting of the Legal and Constitutional Legislation Committee adjourned.

Committee adjourned at 7.34 pm