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Commonwealth Director of Public Prosecutions

Your reference:

Our reference: HA05100375/1

13 March 2006

Mr Jonathan Curtis
Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Mr Curtis

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

I refer to your letter dated 3 March 2006 inviting this Office to make a submission to the current Parliamentary inquiry into the *Telecommunications (Interception) Amendment Bill 2006*.

Given the limited time frame we have not been able to provide the Committee with detailed comments, however we hope that the comments below are of assistance.

Schedule 1 – Stored Communications

Schedule 1 of the Bill provides for a regime for the control of access to stored communications via a telecommunications carrier. The Bill will replace the current regime under the *Telecommunications (Interception) Amendment (Stored Communications) Act 2004*, which will cease to operate on 14 June 2006.

The provisions contained in Schedule 1 are complex. This Office notes that the intention is to provide a means of access with a stored communications warrant to stored communications held by a telecommunications carrier. The intention is that investigative agencies will continue to be able to access stored communications overtly through lawful access via the person of interest, their equipment or relevant premises.

One matter that the Committee may wish to consider is the time limit provisions in relation to the further issue of stored communications warrants, contained in the proposed sub-section 119(5). That provision prevents a further warrant being issued in relation to the same telecommunications service within 3 days after the execution of a previous warrant. While this Office understands the policy objective of preventing repeat warrants which may in effect undermine the separate interception regime, the strict 3 day waiting period for the issue of a further warrant may interfere with an investigation and the collection of important evidence. Circumstances may arise whereby there is a clear and justifiable need for a further warrant

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within the 3 day time period. An alternative approach would be to require the issuing authority to consider whether or not a previous warrant has been issued as a relevant matter under the proposed subsection 116(2).

A further issue that arises from the Bill is the apparent inability of persons who lawfully access stored communications in the course of the operation or maintenance of equipment under the exceptions provided for in the proposed subsection 108(2)(d) and (e), to notify relevant authorities of information that they obtain from such access.

For example, if a system administrator becomes aware through the operation of a firewall system of the receipt of child pornography, it is not clear that the system administrator would be able to bring that fact to the attention of relevant authorities in order that a warrant might be obtained. It is noted that Mr Blunn AO in his report recommended a regime whereby a person who had legitimate access for the purpose of maintaining a system could, while not disclosing the exact content of the material, be able to report their view that there may be evidence of criminality.

Schedule 2 – B Party Interceptions

Schedule 2 of the Bill provides for a regime to limit, control and regulate the interception of telecommunications services used by persons who are likely to be in communication with a person of interest.

A scenario to which such interception applies is in relation to the monitoring of communications between an undercover police officer and a person who is suspected of committing a serious offence for instance, a drug importation. It may not be possible to identify the telecommunications service used by the person of interest, however it will be known that the person of interest will contact the undercover police officer and it will be necessary that those communications be intercepted in order to collect relevant evidence.

This Office has held the view, based both on its interpretation of the current legislation and the decision of the Full Federal Court of Australia in *John Flanagan v The Australian Federal Police* 134 ALR 495, that B Party interceptions are authorised under the current law.

The proposed provisions in Schedule 2 will clarify that availability of B Party interceptions and provide for a strict regime for such interceptions. The provisions are in accordance with the recommendations by Mr Blunn AO in his report of August 2005.

Schedule 3 – Equipment-based Interception

Schedule 3 provides a mechanism whereby named persons warrants can be issued on the basis of permitting the interception of communications from particular identified telecommunication devices, rather than being limited to telecommunications services.

The proposed amendments offer a sensible solution to some of the technical difficulties encountered by investigative agencies in intercepting communications by persons who use developing technology to counter such interceptions. This Office notes that Mr Blunn AO supported amendments to deal with this issue in his report.

Schedule 4 – Class 1 and 2 Offences

Schedule 4 removes the distinction between the current class 1 and class 2 offences in relation to interception warrants. This Office understands and supports the proposal.

It is noted that Mr Blunn AO supported such an approach but also recommended that rather than specifically identifying offences for which interception warrants can be obtained, such offences be identified solely by reference to the term of imprisonment specified for the offence.

Schedule 5 - Transfer of Functions

The Commonwealth Director of Public Prosecutions has no comments in relation to these provisions.

Schedule 6 – Other Amendments

The Commonwealth Director of Public Prosecutions has no comments in relation to these provisions.

Thank you for the opportunity to provide this submission to the Committee.

Yours sincerely

Mark de Crespigny
Acting Senior Assistant Director