

SUPPLEMENTARY REPORT WITH ADDITIONAL COMMENTS OF DISSENT BY THE AUSTRALIAN DEMOCRATS

1.1 The Democrats commend the Chair and Committee Secretariat on the comprehensive and considered nature of the Committee's report and agree with the majority of the Committee's recommendations.

1.2 We believe that the recommendations made by the Committee will provide additional privacy protections and improve the overall accountability of the telecommunications interception regime.

1.3 However, the Democrats have a number of additional concerns which we consider should be addressed before the bill is passed.

The Government's attitude to legislation affecting national security

1.4 The Government contends that the main purpose of this bill is to amend the TIA Act to extend by eighteen months the operation of the network protection provisions which are due to sunset on 13 June 2008. For this reason, Parliament was asked to consider the bill time critical and the Government initially sought to have it included in the non-controversial legislation list.

1.5 It was asserted in the Attorney-General's second reading speech that the remainder of the bill implements a number of 'minor yet important technical amendments', and that the bill 'contains no new powers for security or law enforcement agencies in relation to telecommunications interception, stored communications or access to data, but ensures that these agencies have the necessary tools to combat crime in this age of rapid technological change'.

1.6 It is of great concern to the Democrats that on the first occasion that the new Government turns its mind to any form of legislation that impacts upon Australia's national security regime, it has labelled the bill 'time critical' and sought to limit debate.

1.7 Indeed, during a detailed debate on the 2006 amendment bill which carried over three days in the Senate Chamber, the then Opposition moved a series of amendments to the TIA Act. The amendments focussed on the then Opposition's concern that the legislation did not adequately protect individual privacy, particularly in relation to B-Party warrants

1.8 Senator Ludwig, the then Shadow Minister for Justice and Customs and Manager of Opposition Business in the Senate, carried the debate. During the third reading speech, Senator Ludwig said:

'The position we have now got to is that the government has voted down sensible amendments which came out of the committee process.....It is unfortunate that this

government has not picked up the amendments that Labor has proposed, safeguards which would have struck the right balance. It really comes down to a lazy Attorney-General, who has not had the opportunity to look at the recommendations, to bring forward amendments and to argue for them in here. That is why this extended process has occurred: because of a lazy Attorney-General. There is no other way of putting it.

The government could have picked up our recommendations during this debate. They have not. Therefore, they have not struck the right balance. Privacy is not sufficiently protected so far as B-party intercept warrants are concerned.¹

1.9 However, in one of its first legislative acts in the new Parliament, the Government has revisited this legislation, attempted to curtail debate, and has made no attempt to address the numerous concerns that it had with the legislation in 2006.

1.10 Further, it is clear from the nature and extent of submissions received to this inquiry and from the detailed consideration and conclusions contained in the Chair's report, that the amendments proposed by this bill are far from 'minor' or 'technical'. Indeed, the Chair has concluded (at paragraph 4.30) that the amendments in relation device-based warrants 'propose to remove an important existing safeguard'.

1.11 The Democrats also recommended a series of amendments to the TIA Act when the 2006 amendment bill was passed, particularly in relation to B-party warrants, and recommended further amendments when the 2007 amendment bill was before the Senate, particularly in relation to warrantless access to prospective or 'real time' telecommunications data.

1.12 In the circumstances, the Democrats consider that the TIA Act requires significant further amendment in areas which have not been addressed by this bill.

Recommendation 1

The Democrats recommend that the Government immediately review the privacy protections available under the TIA Act with a view to implementing amendments moved by the then Opposition and the Australian Democrats when the TIA Act was amended in 2006 and 2007.

Extension of the sunset provisions

1.13 The Democrats agree with the Chair's conclusion that the extension of the sunset provisions under subsections 5F(2) and 5G(2) of the TIA Act should be allowed to pass without amendment.

1.14 The Democrats also support the Chair's recommendation that any further legislation to address network protection provisions should include a thorough and considered response to achieving a balance between individual privacy rights and network protection requirements.

¹ *Senate Hansard*, Thursday, 30 March 2006, p.59.

1.15 However, the Democrats are concerned that progress in relation to a permanent legislative solution has not progressed beyond a draft discussion paper that has not been circulated outside the Attorney-General's Department².

1.16 The Democrats consider that such progress is unacceptably slow and urge the Government to work towards a permanent solution to this issue as expeditiously as possible.

1.17 The Democrats also note there is a degree of uncertainty surrounding the application of the TIA Act to organisations other than law enforcement and intelligence agencies that do not have the benefit of an exemption.

1.18 As Electronic Frontiers Australia stated during this inquiry:

*'Simply put, it seems now that ASIO, the police and anticorruption agencies may be able to legally filter viruses and spam from their incoming email but there is a good chance that organisations in the private sector and indeed government organisations not specifically provided for in the legislation may be committing an offence by doing that.'*³

1.19 The Democrats note recent comments from the Attorney-General that indicate that the Department is developing a solution to this problem.

1.20 The Democrats consider that any uncertainty surrounding the application of the TIA Act to non-exempt organisations should be addressed as a matter of urgency and, if clarifying legislation is required, it should be developed commensurate with the permanent legislative solution in respect of law enforcement and intelligence agencies.

Recommendation 2

The Democrats recommend that the Government develop a permanent legislative solution in relation to the monitoring of electronic communications by both Government and non-Government organisations as a matter of urgency.

Device-based named person warrants

1.21 Device based interception warrants were introduced by the 2006 amendment bill.

1.22 During the Committee inquiry into the 2006 amendment bill, the Democrats considered that there was significant uncertainty surrounding the ability to uniquely identify communications devices and recommended that the provisions of the 2006

² *Committee Hansard*, Thursday, 17 April 2008, p.28.

³ *Committee Hansard*, Thursday, 17 April 2008, p.16.

amendment bill relating to device based warrants be delayed until it was possible to determine the full scope of their operation⁴.

1.23 The Democrats note the concern expressed by privacy and civil liberties groups, as reflected in the Chair's report, regarding the continued uncertainty in relation to unique identifiers.

1.24 Accordingly, the Democrats support the Committee's recommendation to implement recommendation 3.2.5 of the Blunn report and that and priority given to developing a unique and indelible identifier of the source of telecommunications.

1.25 However, the Democrats consider that the implementation of recommendation 3.2.5 of the Blunn report should be a condition precedent to access to telecommunications via device-based warrants.

1.26 The Blunn report did not recommend the introduction of device-based warrants, rather 'that priority be given to developing a unique and indelible identifier of the source of telecommunications **and therefore as a basis for access**' (emphasis added).

1.27 The Democrats consider that to allow the development and expansion of the device-based warrant regime before the development of a 'unique and indelible identifier' is to 'put the cart before the horse'. We consider that the risk posed by inadvertent privacy invasion due to inaccurate or incorrect device identification is too high.

1.28 Accordingly, the Democrats consider that the provisions in the bill in relation to device based warrants should be deleted.

1.29 Notwithstanding, while the Democrats maintain an in-principle objection to the expansion of the device-based warrant regime, we support the Committee's conclusions (at 4.48 to 4.50) that:

- 'after the fact' reporting is insufficient to adequately assess issues associated with individuals' privacy and rights; and
- internal accountability mechanism are unacceptable and the best practice is to maintain independent scrutiny, should agencies be authorised to add devices to a warrant, except in exceptional circumstances.

1.30 We consider that the Committee recommendations numbers 3, 4 and 5 in Chapter 4 will improve the bill immeasurably by creating a more transparent and independent authorisation mechanism for device-based warrants.

1.31 If the Senate considers it appropriate to proceed in line with these recommendations, the Democrats consider that an appropriate addition to recommendation 4 would provide that, where an issuing authority determines that a

⁴ Committee report on the provisions of the *Telecommunications(Interception and Access) Amendment Bill 2006*, p. 65.

person has been subject to unlawful interception, that person shall be notified of the interception immediately unless such notification would materially prejudice the conduct of an ongoing investigation.

1.32 The Democrats also reserve the right to move additional amendments subject to the final form of the bill when it is debated in the Senate.

Recommendation 3

The Democrats recommend that the provisions in the Bill in relation to device-based named person warrants should be deleted.

Recommendation 4

The Democrats recommend that, if the provisions in the Bill in relation to device-based named person warrants are passed with a requirement for independent examination by an issuing authority and the authority determines that the addition of devices to an existing warrant was unlawful, the person subject to the unlawful interception should be notified of the interception immediately unless such notification would materially prejudice the conduct of an ongoing investigation.

International, national and state obligations

1.33 The Democrats support the Committee's recommendations that the Government commission an independent review of the operation of the TIA within three years; and that the TIA Act be amended to provide a statutory requirement for independent review every five years.

1.34 The Democrats also support the Committee's conclusion that a summary statement in the EM of consistency with international obligations (in lieu of an express right to privacy under Australian law) would be a useful guide when considering any further legislative amendments.

Public Interest Monitor

1.35 The Democrats view this Bill as an expansion of the telecommunications monitoring powers of the Commonwealth. The Democrats also consider that the significant other amendments made to the TIA Act during 2006 and 2007 did not adequately address privacy concerns.

1.36 As a result, there is a significant risk that the powers available to law enforcement and security agencies under the TIA Act could breach the privacy rights of Australian citizens.

1.37 As such it is appropriate that there be an independent umpire to balance necessary, lawful, and proportionate access by law enforcement agencies to telecommunications data with the public's right to communicate free from surveillance.

1.38 The Democrats note that in relation to the area of listening devices, a model can be found in Queensland, where a Public Interest Monitor is authorised under the *Police Powers and Responsibilities Act 2000* (Qld) to intervene in applications for listening devices warrants, and to monitor and report on the use and effectiveness of the warrants.

1.39 The Democrats see merit in adopting the Queensland public interest monitor model to improve accountability.

Recommendation 5

The Democrats recommend that the TIA Act be amended to require law enforcement and intelligence agencies to consult with a Public Interest Monitor (PIM) before they apply for an authorisation under the TIA Act.

Senator Natasha Stott Despoja

Australian Democrats