CHAPTER 5

NOTIFICATIONS TO AND FROM STATE MINISTERS

Concerns about the proposal

5.1 A number of submitters to the inquiry expressed disquiet about the proposed removal of the requirement in the TIA Act for state agencies to provide a copy of each warrant and instrument of revocation to the responsible state minister. Several witnesses expressed concern that removing the requirement for state agencies to provide copies of warrants to state ministers represented a lessening of accountability safeguards that currently apply to the warrants process; a shifting of responsibility to the Commonwealth Attorney-General's Department; and may possibly lead to agencies acting outside of their current legislative requirements.

5.2 The Victorian Privacy Commissioner disagreed with the removal of the mandatory requirements for state interception agencies to report to state ministers, noting that the approach of state ministers to warrants may differ from that of the Commonwealth Attorney-General. The Commissioner said that this is particularly so in jurisdictions like Victoria, which has a Charter of Human Rights and Responsibilities with which all state agencies, including law enforcement agencies, are required to comply. The Commissioner concluded that the existing mandatory reporting provides a better safeguard and should be maintained.[1]

5.3 The Australian Privacy Foundation (Privacy Foundation) also opposed the removal of the mandatory requirement. The Privacy Foundation noted that the change was ostensibly to 'avoid duplication', but questioned whether it was desirable to:

> …cut the State governments out of the routine reporting loop in the way proposed. Keeping State Ministers informed of warrants is a useful safeguard-they may question them when the Commonwealth Attorney would not. No information has been provided about the views of the States on this change. The provision for 'optional' State reporting doesn't necessarily address the issue – State governments may well not take the trouble to 'opt-in' and then quietly forget all about the interception being done by their agencies-there is merit in our view having them 'force fed' the warrant information. While this cannot ensure that they apply an appropriate degree of scrutiny, the potential for them to do so is another important safeguard.[2]

5.4 At the hearing, a representative of the Privacy Foundation explained that when copies of warrants are provided to state ministers, this opens up an opportunity

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1 *Submission* 5, p. 2.

2 Australian Privacy Foundation, *Submission* 10, p. 2.

for a second person to potentially observe any patterns of use that may be of concern; and that this was a safeguard that the Privacy Foundation would be loath to lose:

> If it is all entirely left to the federal Attorney-General, you only have one watchdog. In our view, it is more important to have two watchdogs that, whilst they might not bite very often, at least occasionally might be awake.[3]

5.5 The committee questioned representatives of the Attorney-General's Department about whether removing the requirement for state ministers to receive copies of warrants would somehow lessen their accountability or responsibility for the activities of their agencies. Representatives disagreed with this proposition, stating that the oversight activities of the ombudsmen in each state addressed this potential problem:

> There is the oversight requirement that ombudsmen or like agencies in the states have to undertake a review of the interception reporting requirements and accountability reports are made to each state minister by those particular oversight authorities which actually give them details of the activity that has been undertaken by the agencies within their jurisdiction. That is a much more meaningful report than receiving a copy of a warrant in a bundle with others, which is then passed on to a Commonwealth minister.[4]

Committee findings

5.6 The committee notes that the proposal in the Bill is apparently consistent with aspects of the Blunn review and Mr Blunn's observations that there is little purpose in a state minister acting merely as a conduit between the state agencies and the Commonwealth Attorney-General.

5.7 However, as described in Chapter 2 of this report, Mr Blunn also raised concerns about whether the minister was meeting the intention of the TIA Act by relying on reports of the Ombudsman, a concern that the committee shares.

5.8 It is difficult for the committee to form a view about this issue in the absence of more detailed information. As a matter of principle, the committee shares the view of Mr Blunn that responsibility for the actions of state agencies must ultimately rest with their ministers:

> There should be no suggestion that the agencies are reporting directly to the Attorney-General who is then responsible for their actions. In my opinion that responsibility must rest with the State Minister.[5]

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3 *Committee Hansard,* 17 April 2008, p. 25

4 *Committee Hansard*, 17 April 2008, pp 28-29.

5 A.S. Blunn AO, *Report of the Review of the Regulation of Access to Communications*, 2005, p. 68.