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9 April 2008

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan,

Inquiry into the Telecommunications (Interception and Access) Amendment Bill 2008

I refer to your letter dated 25 March 2008, and thank you for the invitation to make a submission in relation to the above Bill. My concerns with the privacy implications of the Bill are detailed below.

The effect of the proposed amendments in the Bill, taken in their totality, have the effect of diluting the requirements that any warrant for interception of or access to communications through telecommunications devices must be specific and only as wide as is necessary in the circumstances.

Items 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 35 and 37 remove the requirement for the telecommunications device subject to access or interception to be "identified in the warrant". Items 6, 11 and 20 remove the requirement that warrants for such interception or access to include identifying details of the telecommunications devices subject to the warrant. Instead, these Items allow for the telecommunications devices subject to the warrant to be described merely in detail "to the extent these are known to the Director-General of Security". Items 5, 6, 11, 20 and 23 extend the ability to access and intercept communications beyond those that are being used by persons of interest to telecommunications devices that they are "likely to use".

I have read the excellent submission by the Law Council of Australia, already published on the Committee's website. I share the Law Council's concerns and endorse the submission and the recommendations therein.

These amendments render ineffective the requirement to describe the telecommunications devices subject to interception and access in any detail at all and therefore allow *any* telecommunications devices that are likely to be used by persons of interest to be monitored under a warrant. The vague nature of these Items may result in the ability for monitoring of any communication across any telecommunications device without any requirements to show necessity or cause for such monitoring prior to obtaining a warrant.

As noted in submissions to your committee by the former Victorian Privacy Commissioner, Paul Chadwick, in March and June 2004:

> Access to one's communications through the interception of telephone and electronic communications is unlikely to be detected by either the sender or recipient. Unlike a broken seal on an envelope or a hovering eavesdropper, interception can take place invisibly, during the transit of the communication and prior to its receipt. Where a search warrant is executed at a remote location (e.g. at an ISP's premises), there is unlikely to be any opportunity for the sender to know of, much less question, the scope or execution of the search warrant. This may allow for overly broad and indiscriminate access to all of a person's communications that would otherwise be protected from disclosure (e.g. those subject to legal professional privilege).
>
> Since there is no opportunity for the subject of the surveillance to tests its validity under law, the procedural safeguards and independent oversight are especially important.

These concerns are amplified by the effect of the proposed amendments.

Item 15 repeals paragraph 35(1)(b) to remove the mandatory requirement for a state interception agency to provide a copy of each warrant and instrument of revocation to the responsible State Minister. Item 19 inserts a new section 36 to allow State legislation to make provision for the relevant responsible State Minister to receive a copy of each warrant and instrument of revocation where they wish to maintain this role. This is an optional feature of State legislation.

I have concerns about the removal of mandatory requirements for state interception agencies to report to State Ministers. The approach of State Ministers to warrants may differ from that of the Commonwealth Attorney-General. This is particularly so in jurisdictions like Victoria, which has a *Charter of Human Rights and Responsibilities* which all State agencies, including law enforcement agencies, are required to comply with. While such reporting remains possible, the existing mandatory reporting provides a better safeguard and should be maintained.

The effect of this Bill on the privacy of individuals is significant.

With the increase in the uptake and use of technology, communication over the internet and telephones (including mobile phones) is the primary method of communication today. Individuals communicating through telecommunications devices are likely to exchange all sorts of information, ranging from private health information to personal business affairs, the nature of professional advice received as well as sensitive information concerning their health, sexual orientation and practices, political opinions and religious views.

Australians have the right to expect that the State will not intercept or access their communications without just cause and due process. The greater impact a warrant will have on an individual's rights (including their right to privacy), the more stringent the requirements for obtaining the warrant should be. If granted, any such warrant should be as specific, finite and limited as is reasonable in achieving its aims. In particular, the ability of the warrant system to protect individual privacy depends on the issuing authority considering each individual device from which telecommunications are to be intercepted under the warrant.

The goals of public protection and respect for human rights are not mutually exclusive: both can be achieved if human rights are encroached upon only to the extent that is necessary to achieve public protection and where the process is open and accountable. The Bill in its current form lacks the checks and balances that are required to achieve these dual aims. It should be amended so as to better achieve this balance.

Yours sincerely,

[redacted]

for
HELEN VERSEY
Victorian Privacy Commissioner