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Telecommunications (Interception and Access) Amendment Bill 2008

Supplementary Submission to the Senate Legal and Constitutional Affairs Committee

April 2008

Further to our initial submission and in light of discussion at the Committee's hearings on 17 April, the APF would like to offer a practical solution to one of the issues raised.

Device-based named person warrants

We maintain our opposition to any further relaxation of the authorisation requirements. We hope that it will be possible for the Committee to publish the information it requested about the volume, frequency and type of investigations that have been jeopardized by these requirements, which we expect to show that this is a very exceptional problem.

However, if the Committee decides to accept the case put by the Attorney-General's Department and law enforcement agencies that there is sometimes an operational necessity to intercept additional devices more quickly than applying for normal authorisation would allow, then we make the following suggestion.

Agencies could be given an 'exceptional discretion' to intercept additional devices in relation to an existing named person warrant where timing or other operational circumstances made it impracticable to seek prior authorisation. However, exercise of this discretion would be subject to 'after the event' confirmation by an issuing authority, on presentation not only of the 'likely to be used' justification but also of the reasons for prior authorisation having been impracticable.

Such an application for confirmation would be required within a fixed but short period after the interception of the additional device commenced. An issuing authority not persuaded by the case for the device could order immediate cessation of the interception. If the issuing authority found the reasons for the exercise of the discretion to be unconvincing, it could issue a 'reprimand' to be immediately reported to relevant Ministers and agency heads, and to the relevant Ombudsman or Inspector-General.

This confirmation process and the possibility of revocation and reprimand would act as a deterrent against inappropriate use of the exceptional discretion, while the exceptional discretion would give agencies the flexibility they claim to need for operational reasons.

There is a clear precedent for this 'emergency authorisation' process in section 10 of the T(I&A) Act, which provides for the Director-General of Security to issue a warrant without the normal prior approval, subject to subsequent reporting to the Attorney-General and the Inspector-General.

We also take this opportunity to confirm our support:

- for the suggestion that the 'likely to be used' test should be defined as 'on the balance of probabilities' throughout the legislation (not just in the amendments)
- for a requirement to notify individuals whose services and/or devices have been the subject of interception after the conclusion of any investigation or proceedings – this is a safeguard which we have called for in previous submissions on the Interception legislation but omitted to repeat in the most recent submission. It is based on existing practice in the United States under wire-tapping laws.