23 April 2004

The Secretariat
Senate Legal & Constitutional References Committee
Room S1.61
Parliament House
CANBERRA ACT

By Fax (02) 6277 5794

Dear Sir/Madam

Re: Inquiry into Provisions of the Surveillance Devices Bill 2004

This submission is made on behalf of the New South Wales Council for Civil Liberties in respect of the Surveillance Devices Bill 2004 and the changes proposed by that legislation. The Council is concerned about various provisions of this bill and the general thrust of the legislation. Having regard to the very strict time restraints that have been imposed in relation to making submissions on this bill, we make the following general points and would be happy to elaborate further.

The Council is in general concerned about any extension of power to place innocent Australian citizens under surveillance. While the Bill proposes to regulate the use of data, optical and listening surveillance devices and tracking devices in much the same way that telephone tapping is regulated by the Telecommunications (Interception) Act 1979 (TI Act), the issue of warrants by members of the AAT has seen a great increase in telephone warrants.

The Bill attempts to balance the concerns of privacy and those of security and the prevention of crime. Privacy is partly protected by the requirement that the judge or AAT member to take it into account, and by restrictions on the use of information obtained by surveillance. It is further protected, but inadequately, by restrictions on the use to which information may be put, and by the requirements that the content of surveillance be destroyed in certain circumstances

The exceptions and the penalties however raise concerns. Concerns arise from the limitations of Section 45, on offences and penalties. The passing on of warranted or authorised but non-warranted information is prohibited except in specified circumstances, and there are substantial penalties. But collecting it without authorisation is not made an offence. The use of any information collected is limited, and further limitations apply to information obtained from emergency authorisation where no warrant is subsequently obtained.

Under section 45(5)(d), information obtained without authorisation (and information from emergency authorisations that are not subsequently approved) may be used in the investigation of complaints against any public officer, which appears to mean any public servant, teacher, army officer or other employee of a State, Federal or Territory government. Such investigations may be of any complaint, and may be used to determine whether the public officer should be dismissed. All five privacy concerns are prejudiced here and in addition, whistle blowing is made riskier.

The Bill allows surveillance to be authorised in emergency situations by a senior police officer or the heads of intelligence services, or their nominees. Such authorisations must be approved without two business days. But though approval may be refused, the judge may not order the destruction of the information. Now all emergency approvals and all authorisations are reported to the Minister, including details of the person surveyed and of the offence or the reasons is for the surveillance. Thus unjustified surveillance may prejudice the Minister, and bring about the dismissal of a whistle blower. Though the Minister in turn is prohibited from passing the information on, hints of serious problems would be enough to do damage.

The unauthorised use of hidden surveillance devices by police or intelligence officers could be made illegal. Researchers engaging in secret research, however, are not restricted as this Bill applies only to police officers and members of the intelligence services. Instead, the uses of unauthorised and non-warranted surveillance could be further restricted to cases where serious harm may be prevented. Judges should be able to order the destruction of material obtained by authorised surveillance for which they refuse a warrant, and of material collected by unauthorised surveillance.

We apologise for the shortness of this submission but given the time constraints with the intervening Easter break during the period from which the legislation has become available and the period in which to make submissions, we have not had the opportunity to give more detailed submissions in respect of a bill of 80 pages. If you wish us to elaborate further please do not hesitate to contact us.

Yours faithfully

DAVID BERNIE
Vice President
New South Wales Council for Civil Liberties