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New South Wales Council for Civil Liberties

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Laura Wells
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SYDNEY NSW 2OOO

14 August 2006

Dear Ms Wells,

RE: Draft Surveillance Bill

The NSW Council for Civil Liberties ("CCL") is appreciative of the invitation to comment on the draft bill.

1. Privacy and surveillance

1.1. Like the Listening Devices Act (the LDA) before it, the Bill attempts to balance the interest in the detection and prosecution of crime with the protection of privacy against what the NSW Law Reform Commission rightly calls 'a power of a highly intrusive nature'.[1] The draft bill retains most of the protections in the LDA. The CCL is conscious however of how such powers have been abused in other jurisdictions, and seeks to have some further protections inserted. We are concerned about any increase in the powers of the police or other authorities to conduct surveillance activities.

1.2. Privacy is no trivial matter. Intrusion upon it lays the victim open to vicitimisation and discrimination. Covert intrusions leave a person vulnerable to mistaken data-matching. The knowledge that words and actions may be being monitored restricts autonomy and hampers personal growth and the development and enjoyment of relationships. In the hands of the unscrupulous, covert surveillance leaves victims open to blackmail.

[1] New South Wales Law Reform Commission Report 91 'Surveillance: An Interim Report 5.72.

1.3. Major changes proposed in the draft include the extension of a period for which a warrant may be issued to 90 days, coverage of optical devices and tracking devices, the introduction of new arrangements for emergency authorisation of the use of surveillance devices. The CCL rejects the need for the first, and has some suggestions for improvement of the others.

1.4. The CCL proposes some changes which would add protections against abuse of the powers intended for law enforcement officers. We recommend the appointment of an experienced barrister whose role would be to defend the interests of potential targets and of the public interest whenever covert surveillance is proposed. Like the Queensland Public Interest Monitor, the New South Wales monitor should have powers to make submissions to issuing authorities, to question applicants for warrants and also witnesses, and to report to the appropriate ministers and to Parliament.

1.5. Reporting requirements should be increased to protect against fishing expeditions and the hounding of individuals.

1.6. The CCL accepts that in some instances surveillance may be required urgently. The conditions on this are appropriate. However, it is not desirable that remote applications also be available under proposed section 18, unless these are subject to the same checks within 48 hours.

1.6. The draft bill proposes numerous minor changes, some of which increase protections against unauthorised surveillance, and some of which make it easier for law enforcement officers in NSW or in other jurisdictions to conduct surveillance in NSW. The total effect of these minor changes is considerable. The CCL proposes some variations in these, and other changes.

2. Summary of recommendations

Recommendation 1. That the existing limit on the period for which warrants are in force be retained.

Recommendation 2. That where, under subsection 8(2)(c), an optical device is to be installed with the permission of the occupier of a building and without a warrant being issued by an eligible judge, the occupier be required to ensure that persons are informed that their actions may be observed and recorded. Any covert use should require a warrant.

Recommendation 3. That when, under subsection 7(3)(b), a recording is to be made by a principal party to a conversation and without a warrant being issued by an eligible judge, the party be required to inform the other participants that the recording is being made.

Recommendation 4. That if a warrant is granted in response to a remote application, that a fresh hearing be held within 48 hours, when the warrant may be confirmed or revoked.

Recommendation 5. That the Government legislate for the appointment of an experienced barrister with powers to make submissions to issuing authorities, to question applicants for warrants and also witnesses, and to report to the appropriate ministers and to Parliament. Submissions should not be valid unless the monitor has been advised of the hearing under arrangements to be determined by the monitor. Until the legislation is enacted, powers should be given to the Ombudsman to perform a similar role.

Recommendation 6. That under section 47, the annual report to the Minister include an account of the occasions on which evidence was used in relation to offences other than those for which warrants were obtained. The account should list, for each case, the offence or suspected offence for which the warrant was obtained and the offence(s) for which evidence was used.

Recommendation 7. That subsection 19(2) include a requirement that the eligible judge take into account any previous warrants issued in respect of the same target.

Recommendation 8. That the eligible judge be able to revoke a warrant once the affidavit that follows a remote application is received or on application by the Attorney-General, the ombudsman, or if one is appointed, the public interest monitor.

3. The extension of the period for which a warrant is in force to 90 days.

3.1 The Wood Royal Commission recommended this increase. In response, the Law Reform Commission commented 'Applying a time limit on the period during which a warrant is in force ensures that the surveillance is carried out within the shortest time possible to prevent any more intrusions on an individual's privacy than is necessary under the circumstances. However, this safeguard has to allow a realistic time frame for the installation and removal to the surveillance device, and for the actual surveillance to take place effectively.' On the proposal for 90 days, they responded 'A term longer than [30 days] weakens the high degree of accountability which covert surveillance requires and which a shorter time frame secures. It also encroaches on justifiable [limits] of intrusion into the privacy of individuals.'[2]

3.2. The CCL agrees with these comments. The existing period of 21 days allows plenty of time for an investigating officer to seek an extension of a warrant; and the requirement to explain to the issuing authority why an

[2] 5.71

extension is needed provides some, though not enough, protection against misuse. We see no justification for an extension even to 30 days.

Recommendation 1. That the existing limit on the period for which warrants are in force be retained.

4. Restrictions on the use of optical devices and tracking devices.

4.1. The CCL welcomes the regulation of the use of these devices. Each increase in the ways in which people's actions and words may be monitored and recorded, however, adds to the need for safeguards against abuse.

4.2. Enacting the draft would allow the occupier of a premises to authorise surveillance outside of the checks and safeguards that are provided in the draft. There is no requirement for the devices to be visible or for notices to be displayed informing people that they are being watched.

4.3. The draft thus would thus authorise the occupier to substitute for an authorised judge, with none of the checks and safeguards that apply when a warrant must be obtained.

4.4. The relevant privacy principle is that people are entitled to know who their audience is. The occupier of a building should be required in such a case to ensure that the device is visible or that a notice is displayed informing persons that their actions may be recorded. Any covert use of optical devices should require a warrant.

4.5 Similarly, the recording of a conversation under subsection 7(3)(b)(i) should require the other participants in the conversation to be made aware that recording is occurring.

Recommendation 2. That where, under subsection 8(2)(c), an optical device is to be installed with the permission of the occupier of a building and without a warrant being issued by an eligible judge, the occupier be required to ensure that persons are informed that their actions may be observed and recorded. Any covert use should require a warrant.

Recommendation 3. That where, under subsection 7(3)(b), a recording is to be made by a principal party to a conversation and without a warrant being issued by an eligible judge, the party be required to inform the other participants that the recording is being made.

5. The emergency authorisation of surveillance devices.

5.1. The CCL accepts that under emergency conditions, surveillance should commence before an application can be heard by a judge; but considers

sections 34, 35 and 36 and the reporting requirements contain essential safeguards. Sections 18 and 19 appear to deal with intermediate cases, where there is time for an application to be heard but not for the applicant to travel to appear before the judge. It is preferable, in our opinion, for an application to be heard over the telephone than for it not to be heard at all. In other respects, however, remote applications should be treated like emergency authorisations, and be subject to subsequent revision or revocation. The NSW monitor, if one is appointed, or otherwise the Ombudsman, should be a party to the telephone application, and to a subsequent hearing, to be held within two days of the granting of the original warrant, when the warrant may be confirmed or revoked.

Recommendation 4. That if a warrant is granted in response to a remote application, that a fresh hearing be held within 48 hours, when the warrant may be confirmed or revoked.

6. Protecting the rights of targets and the public interest.

6.1. In any kind of covert operation, the rights of the target need to be protected. Although the bill includes a number of important safeguards there is no arrangement by which this can be done adequately, with the target, ex hypothesi, being absent.

6.2. In Queensland a significant further protection is provided by the Public Interest Monitor. In brief, the Monitor has the entitlement to attend all hearings of applications for warrants for covert operations, to present submissions and to question the applicant and any witnesses. The Monitor also makes reports to the relevant ministers and to the parliament. A full account of the powers and duties of the Monitor is given in the appendix.

6.3. There are considerable benefits from this scheme. The Monitor, having records and experience of all applications, is able to discover evidence of misuse of powers under previous warrants, of fishing expeditions and of hounding of suspects. The appointment of a similar officer in New South Wales would reduce significantly the opportunities for misuse of the powers granted under this and other acts.

6.4. Under the LDA the NSW Attorney-General must be provided with a copy of the application for a warrant and has the power to address the judge before a warrant is issued. According to the Law Reform Commission, this power is not used.

6.4. Since the inspecting authority under this draft is the Ombudsman, until such time as a monitor is appointed, the Ombudsman could be vested with similar powers.

Recommendation 5. That the Government legislate for the appointment of an experienced barrister with powers to make

submissions to issuing authorities, to question applicants for warrants and also witnesses, and to report to the appropriate ministers and to Parliament. Submissions should not be valid unless the monitor has been advised of the hearing under arrangements to be determined by the monitor. Until the legislation is enacted, powers should be given to the Ombudsman to perform a similar role.

7. Other proposals.

7.1. Section 4. The definition of 'private conversation'.

While a conversation held in a public place *might* be overheard, one would not normally expect others to be listening. In this respect, conversations differ from overt actions, which are visible from a distance. The position would be improved if the limitation on in the second part of subclause (b) of the definition were changed from 'might be overheard' to 'would be overheard'.

7.2. The definition of 'relevant offence'.

The range of offences which may be held to justify invasion of privacy is in our opinion too large. Warrants for covert surveillance should be granted only when there is danger of serious harm to persons or serious damage to property.

7.3. Fishing expeditions.

Subsection 11(2)(b) permits the use of materials recorded, whether legally or illegally, in legal proceedings without restriction. The CCL recognises that if evidence is obtained about a really serious offence, it should be able to be used in order to prevent the offence occurring of recurring; and that the evidence should be admissible, for example in bail proceedings.

However, the section also encourages fishing expeditions—obtaining a warrant supposedly for one purpose, but really in order to obtain evidence on lesser offences. It is desirable that the extent of such misuse is made public.

The Law Reform Commission recommended (recommendation 80) that an account should be included in annual reports of 'the extent to which "incidental" information is obtained and used, including, for example, information relating to the commission of an offence by a person not identified in the warrant or authorisation'.

The CCL recommends that this be done, by adding to the reporting requirements a report on the occasions on which evidence is used for proceedings in relation to an offence other than that for which the warrant was obtained. If there are few cases, the reports will protect the police from accusations of misuse of their powers. If there are many, that may prompt the Ombudsman to an investigation.

Recommendation 6: That under section 47, the annual report to the Minister include an account of the occasions on which evidence was used in relation to offences other than those for which warrants were obtained. The account should list, for each case, the offence or suspected offence for which the warrant was obtained and the offence(s) for which evidence was used.

7.4. Previous warrants.
Subsection 19(2)(e) requires the eligible judge to take into account any previous warrants issued in respect of the same offence before issuing a warrant. In order to keep a check on the hounding of persons should also require him or her to take into account any other warrants issued in respect of the same target. A similar change should be made in subsection 53(1)(i).

Recommendation 7. That subsection 19(2) include a requirement that the eligible judge take into account any previous warrants issued in respect of the same target.

7.5. Section 24. Revocation of a warrant.
This section is too restrictive. The issuing judge, or another eligible judge, should be able to revoke a warrant once the affidavit that follows a remote application is received[3], or on application by the ombudsman, or if one is appointed, by the public interest monitor, and on application by the Attorney-General whether or not one of those is agreed to.

Recommendation 8. That the eligible judge be able to revoke a warrant once the affidavit that follows a remote application is received or on application by the Attorney-General, the ombudsman, or if one is appointed, the public interest monitor.

7.6. Retrieval of devices.
The CCL favours the existing provision, so that where a device is capable of continuing to transmit information, it must be removed subject to permission being given by an eligible judge.

In other cases, where for example it is desired to retrieve the device in order to keep the technology or the practices of an enforcement agency secret, a warrant should be required.

7.7. Sections 45 and 46.
These two sections provide alternative reporting requirements. The contents of the reports should include all the requirements found in either clause.

As argued above, a copy of the report should be given to a public interest monitor or to the Ombudsman; and as at present, to the Attorney General.

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[3] This is parallel to Subsection 36(4).

As argued above, the annual reports should include information about the number of cases in which information obtained under a warrant has been used in proceedings in relation to a different offence from those for which the warrant was issued. In addition there should bde a report of the types of offences for which warrants were issued

7.8. Section 49. Register of warrants etc.
This section enables the ombudsman to determine if a person is being spied upon unreasonably. But there is no arrangement for an eligible judge to be given this information when a warrant is applied for, other than in the six-monthly report of the ombudsman.

7.9. Section 54(2).
This section is too restrictive. A surveillance application might be justified, in that the applicant innocently relies on false evidence; and the surveillance may show that the suspect was innocent. The clause should require notification unless a judge orders otherwise.

Appendix: Powers of the Queensland Public Interest Monitor

The Public Interest Monitor was created by the Borbidge Government of Queensland by the Police Powers and Responsibilities Act 1997.

The major concern leading to the decision to introduce the office was that the issue of warrants by a judge in his or her chambers, with only a police lawyer present, was unduly closed and secretive. The treatment of Matthew Heery provided an impetus. (Heery was subjected to surveillance for 600 hours, and was finally charged merely with burning a Telstra telephone bill that related to activities which were under investigation. He was acquitted. It was widely felt that the police had abused their powers.)

The powers of the Monitor are now governed by the Police Powers and Responsibilities Act 2000, The Crimes and Misconduct Act 2001 and the Terrorism (Preventative Detention) Act 2005. Further powers are given to the Monitor by the Commonwealth Criminal Code.

The Queensland Acts require applicants for surveillance warrants, covert search warrants, additional powers warrants and preventative detention warrants (whether for interim orders, final orders or extensions of either) to inform the Monitor, under arrangements determined by the Monitor. The advice must include the time and place of the hearing of the application. The requirement is the same for all applicants, whether they are police officers or officers of the Queensland Crime and Misconduct Commission.

The Monitor has the power to be present at hearings of these applications in the courts, where he or she may cross-examine or otherwise question the applicant and any witnesses. The judge is required to consider any

submissions made by the Monitor, including representations made by telephone, fax or in any other reasonable way.

In the case of surveillance warrants and covert search warrants, the Monitor is required to monitor compliance with the laws in relation to matters concerning applications.

In the case of an emergency warrant, the Monitor must be advised within two days, when the applicant applies to the Supreme Court for approval of the exercise of the powers.

The Monitor possesses these powers and responsibilities both when the target is excluded from a hearing and when the target and the target's lawyer are entitled to be present, as in the issue of final warrants for preventative detention.

Similar arrangements apply when an application is made to revoke or vary an order, whether by a detainee or a police applicant.

Information obtained by surveillance or covert searches may be disclosed to the Monitor. Reports on the covert searches are required within seven days of execution, and must be given to the Monitor as well as to the Supreme Court judge who issued the warrant.

Under the Commonwealth Criminal Code section 104 subsections (12), (18), (19) and (23), if an interim control order is made concerning a resident of Queensland, or if the issuing court made the order in Queensland, a member of the Australian Federal Police must give a copy of the order to the Monitor. The Monitor must be given notification of a hearing to confirm an interim control order, or to vary or revoke a control order, and is empowered to adduce additional evidence (including calling witnesses) and to make submissions.

The Monitor is required by Section 160 of the Police Powers and Responsibilities Act to give annual reports to Parliament via the minister on the use and effectiveness of surveillance warrants, covert search warrants and preventative detention warrants.

Under the Terrorism (Preventative Detention) Act 2005, an annual report must include the following:
(a) the number of initial orders for preventative detention made during the year;
(b) the number of final orders made during the year;
(c) whether the person was taken into custody under each of those orders and, if so, for how long the person was detained;
(d) particulars of any complaints about the detention of a person under a preventative detention order made or referred during the year to the Ombudsman or the Crime and Misconduct Commission;

(e) the number of prohibited contact orders made during the year;
(f) the use of preventative detention orders and prohibited contact orders generally.

An annual report must include the following matters under the Criminal Code, division 104:
(a) the number of control orders confirmed declared void, revoked or varied during the year;
(b) the use of control orders generally.

The Minister must table a copy of the report in the Legislative Assembly within 14 days of its receipt.

A report must also be given to the Police Commissioner on non-compliance with any of these acts. For this purpose or for any other functions, the Monitor may inspect the police service and the Crime and Misconduct Commission registers of covert actions.

Yours faithfully,

Martin Bibby
New South Wales Council for Civil Liberties