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Surveillance Devices Bill 2007

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SURVEILLANCE DEVICES BILL 2007

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Bill introduced on motion by Mr David Campbell.

Agreement in Principle

Mr DAVID CAMPBELL (Keira—Minister for Police, and Minister for the Illawarra) [8.23 p.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Surveillance Devices Bill 2007. The bill replaces the Listening Devices Act 1984 and will expand the application of the legislation so that it applies to three other categories of surveillance devices, including data surveillance devices, optical surveillance devices and tracking devices. The bill implements national model legislation that was developed by a joint working group of the Standing Committee of Attorneys-General and the Australasian Police Ministers' Council on National Investigation Powers. Serious crimes like murder, terrorism, drug manufacture and importation make it essential that our law enforcement agencies have every possible tool at their disposal to make their investigations and prosecutions as successful as possible.

Surveillance is a critical factor in major investigations and emerging technologies are being used to track suspects in increasingly sophisticated ways. Surveillance device warrants under the new legislation will permit the use of surveillance devices on specified vehicles or premises, on specified objects, such as containers that might be used for drug manufacturing, to record conversations and to monitor activities. These new laws will also allow police and law enforcement agencies like the Police Integrity Commission, the Independent Commission Against Corruption and the New South Wales Crime Commission to use surveillance warrants during cross-border operations. This means they will be able to fight and track crime across the country without the red tape burden of having to get a warrant in other States.

It will also recognise warrants from other States and Territories in New South Wales, meaning greater cooperation between Australia's law enforcement agencies. This kind of cooperation is of paramount importance not only in confronting the very real threat of an act of terrorism occurring on Australian soil but also in tackling the important major and organised crime being committed across our borders. This new bill will assist the operational needs of police by regulating new technology, which is needed to track, monitor and investigate serious crime, and to match the increasingly sophisticated techniques used by criminals. This bill will also allow for remote applications by phone or fax where it is not practical to make the application in person. We all know that criminals do not operate within borders or rules, and this bill gives police better flexibility to be able to confront these criminals without the burden of cumbersome red tape restrictions.

I now turn to the detail of the bill. Clause 2 provides that the bill will commence on proclamation, allowing all the necessary training and administrative procedures to be put in place before the new scheme comes into force. Clause 4 of the bill defines key words and expressions used in the bill including surveillance device, listening device, private conversation, relevant offence, law enforcement officer, law enforcement agency, corresponding law, corresponding warrant, corresponding emergency authorisation, participating jurisdiction, eligible judge and eligible magistrate.

Part 2 of the bill replaces the offences concerning listening devices contained in part 2 of the Listening Devices Act with new offences relating to all of the new devices that will be covered by the scheme; namely, data surveillance devices, listening devices, optical surveillance devices and tracking devices. Clause 7 makes it an offence, with specified exceptions, to knowingly install, use or cause to be used, or to maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is or is not a party. The maximum penalty remains at five years imprisonment and/or 500 penalty units. This offence is consistent with the existing listening device offence in the Listening Devices Act.

Clause 8 creates a new offence of installing, using or maintaining an optical surveillance device to record or observe an activity if the installation, use or maintenance of the device involves entry onto or into premises or a vehicle without consent. Clause 9 creates a new offence of knowingly installing, using or maintaining a tracking

device to determine the geographical location of a person or an object without the consent of the person or the person having lawful possession or control of the object. Clause 10 creates a new offence of installing, using or maintaining a data surveillance device to record the input or output of information from a computer without the person having the consent of the owner of the premises or the person having control of the computer or computer network.

The offences in clauses 8 to 10 will apply only when the installation, use or maintenance of the device involves interference with property in the lawful control of others or entry onto premises without consent, and so will not capture people who have security devices in their own home or premises. Other regulatory schemes will also apply in specific situations, such as the Workplace Surveillance Act. Of course, none of the offences created by clauses 7, 8, 9 or 10 will apply if the surveillance device is used under a warrant or under an emergency authorisation. Clauses 11 to 14 create offences in relation to the publication and use of illegally gained material and also the manufacture and use of devices for unlawful use.

Clause 11 makes it an offence, with specified exceptions, to publish or communicate a private conversation or record of such a conversation that has come to a person's knowledge as a result of a surveillance device used in contravention of proposed part 2. Clause 12 makes it an offence to possess a record of a private conversation or the carrying on of an activity knowing that it has been obtained in contravention of proposed part 2. Clause 13 makes it an offence to manufacture, possess, supply or offer to supply a surveillance device with the intention of it being used in contravention of proposed part 2. Clause 14 creates a new offence that prohibits, with specified exceptions, a person from publishing or communicating any information regarding the input of information into, or the output of information from, a computer obtained as a result of the use of a data surveillance device in contravention of proposed part 2.

Part 3 of the bill relates to the issue of surveillance device warrants. Division 1 of part 3 sets out the types of warrants that may be obtained, including surveillance device warrants and retrieval warrants. This part also provides for eligible judges to deal with an application for any warrant and confers power on an eligible magistrate to issue warrants with respect to tracking devices only. Warrants in relation to all other devices will be issued by judges of the Supreme Court. Clause 17 provides for a law enforcement officer to apply for the issue of a surveillance device warrant. It requires the law enforcement officer to have reasonable grounds to suspect that a relevant offence has been, is being, is about to be or is likely to be committed and that an investigation into the offence is likely to be conducted and the use of the device is necessary to obtain evidence in relation to the offence or the identity or location of the offender. The application must specify the applicant's name, the nature and duration of the warrant sought, be accompanied by an affidavit and be heard in a closed court.

Clause 18 enables the making of warrant applications by telephone, fax, email or other means when it is impractical for a law enforcement officer to apply in person or when immediate use of a surveillance device is necessary. Clause 19 sets out the matters that an eligible judge or eligible magistrate must take into account when determining warrant applications. Judicial officers will be required to consider the gravity of the offence, the extent to which the privacy of any person will be affected, alternative investigation methods, the evidentiary value of the material that might be gained, and any previous warrants in relation to the same investigation. Clause 20 sets out the matters to be specified in a surveillance warrant—that is, the period during which the warrant is to be in force, the name of the applicant and the officer primarily responsible for executing the warrant to be specified. A warrant will last for a period of up to 90 days.

Clause 21 sets out what a surveillance device warrant authorises, including installation, use, maintenance, retrieval in relation to particular premises, and doing anything necessary to conceal the fact that these activities have been carried out. Clause 22 enables a law enforcement officer who has been issued with a warrant to apply to an eligible judge or eligible magistrate for an extension or a variation to an existing warrant. Clause 23 enables an eligible judge or eligible magistrate, depending on who issued the warrant, to revoke a surveillance device warrant at any time before it expires. Clause 24 imposes obligations on the chief officer of a law enforcement agency to ensure that the use of a surveillance device is discontinued and an application is made for the warrant to be revoked if the use of the device is no longer necessary.

Division 3 of part 3 relates to the issue of retrieval warrants. All the provisions relating to the application, granting, variation and revocation of retrieval warrants mirror the requirements for general warrant applications—but retrieval warrants will be granted only for the purpose of retrieving the device. Any information obtained during this retrieval process will be inadmissible in any court proceedings. Division 4 of part 3 of the bill deals with emergency authorisations. Clause 31 permits a law enforcement officer to use a surveillance device without a surveillance device warrant in limited circumstances when there is an imminent threat of serious personal violence or substantial damage to property or an imminent threat of a serious narcotics offence being committed.

Clause 32 enables a law enforcement officer to apply to a senior officer of the agency for an emergency authorisation for the use of a surveillance device in a participating jurisdiction. The authorisation may be given only if the senior officer is satisfied that the use of the device in New South Wales is authorised under New South Wales law in connection with an investigation of a relevant offence. This requirement is consistent with the national model law. Clause 33 requires the law enforcement agency to apply to an eligible judge for retrospective

approval to use a surveillance device without a warrant no later than five days after the surveillance device is used.

Clause 34 sets out what an eligible judge must take into account when considering an application for approval. The factors that a judicial officer will consider in granting a retrospective authority for emergency use of a device will mirror those for a general application. In addition, however, the judge will consider the issue of urgency, including the nature of the risk or potential loss if the device was not used immediately, how the immediate use reduced that risk, the terms of the existing authorisation, and the practicability of making a normal application at the time. Clause 35 sets out what an eligible judge must be satisfied of before approving the emergency use of powers under clauses 31 or 32. The scheme will require judges to be satisfied that there was a serious threat of the kind outlined in clause 31, that using a device may have helped reduce that risk, and that it was not practicable to apply for a normal warrant at that time.

Part 4 of the bill provides for the recognition of corresponding warrants and emergency authorisations so that warrants and emergency authorisations issued in New South Wales will be applicable in other States and Territories that have adopted the model law. Importantly, Queensland, Victoria and Tasmania have already adopted the model laws, which will greatly improve the ability of the New South Wales Police Force to use devices in cross-border situations. Part 5 of the bill deals with compliance and monitoring. Division 1 of part 5 relates to restrictions on use and communication and publication of information that has been gained through the lawful use of a surveillance device. Clause 39 defines protected information.

Clause 40 creates two new offences that prohibit a natural person or body corporate from using, communicating or publishing protected information and an aggravated offence to commit such an offence when the protected information is used, communicated or disclosed with the intention or knowledge that it will endanger a person's health or prejudice the effective investigation of an offence. Clause 41 requires the chief executive officer of a law enforcement agency to ensure that records or reports obtained by use of surveillance devices are kept in secure places and are destroyed when they are no longer required. Clause 42 enables a person to object to the disclosure of information relating to surveillance devices in proceedings on the basis that it will reveal details of the technology, methods of installation, use or retrieval of surveillance devices. This provision is a codification of the common law public interest immunity claim. The provision balances the need to protect the practice and procedures of law enforcement investigations with that of a fair trial.

Clause 43 makes it clear that a person is not entitled to search any protected information in the custody of a court unless the court otherwise orders in the interests of justice. Division 2 of part 5 relates to reporting and record keeping. Clause 44 requires a person who has been issued with a surveillance device warrant or who has used an emergency authorisation to provide a report to an eligible judge or magistrate and the Attorney General detailing the use of the device.

Clause 45 requires the Attorney General to prepare an annual report relating to applications for warrants and emergency authorisation during a financial year and empowers the Attorney General to require the chief executive officer of a law enforcement agency to furnish such information for the preparation of the report. The substance of both of these provisions is consistent with current requirements in the Listening Devices Act. Clause 46 requires the chief officer of a law enforcement agency to keep such records as may be determined by the Attorney General in consultation with the chief officer relating to the use of surveillance devices. Clause 47 requires the chief executive officer of the law enforcement agency to ensure that a register of warrants and emergency warrants be kept.

Division 3—clauses 48 and 49—relates to inspections and requires the Ombudsman to inspect records of a law enforcement agency to monitor compliance with the Act and to report to the Minister every six months on the results of the investigations. This report is to be tabled in Parliament. Clause 50 enables certain evidentiary certificates relating to procedural matters in connection with the execution of warrants and emergency authorisations to be issued by senior law enforcement officers. Evidentiary certificates ensure that numerous police officers are not called at trial to give evidence of simple procedural matters.

Part 6 outlines a range of miscellaneous provisions. Clause 51 requires notification to be given to the Attorney General of warrants issued under part 3 of the bill. Clause 52 creates a power for the court to order that a subject of surveillance be informed that they have been recorded in circumstances where the use of the surveillance device was not justified. Clause 53 allows code names to be used in warrants if the judge is satisfied that this is necessary to protect the safety of the person. This may be particularly relevant to warrants issued to undercover police officers who are infiltrating criminal organisations. Clause 56 of the bill provides that the Attorney General must consent to any prosecution for offences contained in the Act. This requirement is consistent with the Listening Devices Act. Pursuant to clause 63 this regulatory scheme will be reviewed after five years of operation.

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act. Schedule 2 contains a range of consequential amendments to the Criminal Procedure Act 1986 and the Electricity (Consumer Safety) Regulation 2006. In summary, the bill facilitates the use of surveillance devices by law enforcement agencies in cross-border investigations and allows for the extra-geographical operation of New

South Wales warrants. Most importantly, this bill implements a more modern regulatory scheme for law enforcement surveillance devices. I commend the bill to the House

Debate adjourned on motion by Mr Thomas George and set down as an order of the day for a future day.

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