Review of phone tapping law

Beverley Schurr discusses some disturbing aspects of the A-G's review of phone tapping powers.

In 1989 the Federal Attorney General's Department embarked upon a review of the *Telecommunications (Interception) Act 1979*. This review followed the extension of phone tapping power to state police and investigation agencies following amendments to the Act in September 1988.

In August 1991 a draft Report was circulated to the fifteen agencies which contributed submissions — fourteen of them solicited and one (from the NSW Council for Civil Liberties) unsolicited. In the course of inviting submissions the Department clearly had a very limited view of the public interest when it determined which groups were 'most affected by the Act'. Seven police forces, four State investigation agencies, the Commonwealth Director of Public Prosecutions and Ombudsman and Telecom were contacted and made submissions.

The authors have recommended fundamental changes to the law in this draft report which is now being given final form for submission to Attorney-General Duffy.

Unfortunately the authors do not refer to the Commonwealth Government's obligations under the Constitution and international conventions to protect the privacy of the telecommunications network and its users.

Tapping without warrant

The report recommends that any party to a telephone conversation be permitted to tape that conversation without the knowledge or consent of the other party/parties. This practice is known as 'participant monitoring'. At present, the law prohibits taping of phone calls without a warrant issued by a Federal judge. The authors of the report state:

"the existing prohibition is limited in scope, difficult to enforce at present and, with the increase in the numbers of providers of telecommunications equipment, will be increasingly so and is difficult to justify as being required to preserve individual privacy."

Both the 1986 Royal Commission into Alleged Telephone Interception (Stewart report) and the 1986 Joint Select Committee on Telecommunications Interception (Parliamentary Committee) took the opposite course to the Attorney-General's review and recommended, despite the difficulties in enforcement, prohibition against the possession of interception equipment. That recommendation was accepted and the prohibition is now contained in section 85KZB, Crimes Act.

The report sets out further arguments in support of the recommendation. One is that participant monitoring is permitted under State listening devices laws. In fact, most listening device laws are about twenty years old. The more recent amendments acknowledge the importance of privacy and prohibit participant monitoring (refer NSW *Listening Devices Act 1984; SA Listening Devices Amendment Act 1989).* There is also reference to the 1983 Australian Law Reform Commission's (ALRC) Privacy report, which accepted participant monitoring. The ALRC's recommendation was not adopted by the two more recent reviews of phone tapping legislation — the Stewart Report and Parliamentary Committee report, or by the New South Wales or South Australian parliaments.

Tapping radio signals

The report raises the option of permitting tapping of communications which are transmitted in part through radio signals. Acceptance of such an option would remove protections from users of cellular mobile phones, pager services and public access cordless telephones. Permitting the medium of communication to determine the extent of privacy protection is justified on the grounds that:

"The review team believes that the application of the Act's protection to communications being carried over the radiocommunications part of a telecommunications system is anomalous and gives rise to practical difficulties...[T]he Act ..served to protect the privacy of the persons using those facilities to communicate. However, that policy appears to be inappropriate for services which partly employ radiocommunications as a means of making or receiving communications..."

Telecom has acted to protect the privacy of its customers' calls by scrambling all cellular phone call signals.

The report's recommendation would overturn the decision in *Edelsten* v *The Investigating Committee of NSW* (1986). In that case it was held that cellular phone messages 'pass over' the telecommunications system even when the radio signals are travelling from a car phone to the radio base station and are therefore protected by the *Telecommunications (Interception) Act.*

Extending the scope warrants

The draft report recommends the extension of the class of offences for which phone tap warrants may be obtained to include:

- offences likely to involve serious loss to crown revenue;
- clarification of 'serious fraud';
- computer fraud;
- conduct involving official corruption; and
- conduct which involves substantial planning and organisation (such as car theft rackets).

The vagueness of some of these concepts is astounding.

The report states that consideration should be given to direct interception by State law enforcement agencies (not just police forces) and recommended a trial of reducing the central role of the Australian Federal Police (AFP) could be reduced.

Federal oversight was introduced as a pre-condition to extending phone tap powers to State agencies. Its origins lie in the sorry history of state agency illegal phone tapping activity, particularly in NSW (as was detailed in the Stewart Report).

The authors rejected the proposals of the NSW Council for Civil Liberties to include more details in the annual report required under the Act. Such proposals would have brought the Australian Act into line with the detail required by Canadian and US law. The additional information would include the financial and privacy costs of telephone tapping, including the number of persons overheard on each warrant and the average cost of intercepts. In 1986 the AFP estimated that the average cost of a telephone intercept was $75,000!

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