



1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General,
the Honourable Michael Lavarch, MP)



TELECOMMUNICATIONS (INTERCEPTION) AMENDMENT BILL 1993

OUTLINE

Purpose of Bill

The Bill will give effect to certain of the recommendations arising out of a review of the Telecommunications (Interception) Act 1979 carried out by the Attorney-General's Department in 1991 and 1992.

The proposed amendments are directed at resolving pressing practical problems and at improving the operational and administrative effectiveness of the Act, while retaining its current balance between privacy interests and law enforcement objectives.

The main amendments are to:

- (a) enable the replacement of the present system of routing interceptions through Canberra with a system under which the AFP maintains control of State interceptions by means of computer links but without listening to, or recording, those communications;
- (b) permit law enforcement agencies to:
 - (i) monitor or record telephone conversations to which they are a party without warrants in emergencies involving actual or threatened loss of life or threat of serious injury or of serious damage to property; and
 - (ii) monitor the telephone conversations of a likely recipient of kidnapping or extortion demands without a warrant where they have that person's consent; and
- (c) remove the geographical restriction on State law enforcement agencies provided interceptions made by them are within their functions.

The Bill will also include computer-related offences under Part VIA of the *Crimes Act 1914* which, by their very nature, are likely to involve the use of telecommunications facilities.

Financial Impact Statement

The replacement of the present system of routing interceptions through Canberra is estimated to achieve savings of about \$2 million for all agencies.

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 specifies the formal citation of the proposed Act and defines the term 'Principal Act' to mean the *Telecommunications (Interception) Act 1979*.

Clause 2 – Commencement

2. Apart from those sections relating to the updating of the means by which interceptions are carried out (see clause 5) which are to commence upon Proclamation, the proposed Act is to commence upon the Royal Assent. A specific date for commencement of the former sections has not been fixed because it is uncertain when the required technical changes will be completed. However, it is anticipated that the Act will be proclaimed to commence on 1 January 1994. If the amendments have not been proclaimed to commence on 1 March 1994, they will commence on that date.

Clause 3 – Interpretation

3. Subclauses 3(1) and (2) amend section 5 of the Principal Act to provide the following:

- (a) to extend the class of 'certifying officers' for the purposes of sections 60 and 61 of the Act to include the rank of Assistant Commissioner in the case of the AFP and corresponding ranks in the case of State police forces, Senior Executive Service officers of the NCA and members of the Queensland Criminal Justice Commission;
- (b) to include the Queensland Criminal Justice Commission within the class of 'eligible authorities' and the Chairman of that Commission within the class of 'chief officer' and to include definitions of associated expressions;
- (c) to substitute the term 'prescribed substances' for 'narcotic drugs' in subparagraph (a)(iv) of the definition of 'Class 2 offence' which better accords with the State offences the provision is intended to cover;
- (d) to include the computer related offences in Part VIA of the *Crimes Act 1914* among class 2 offences;
- (e) to include new definitions of 'Commissioner', the 'Criminal Justice Act', the 'Criminal Justice Commission', the 'Deputy Director-General of Security', 'officer', 'prescribed substance', 'Register', 'restricted record', 'secretary' and 'staff member';
- (f) to update an obsolete reference to the NSW Crime Commission in the definition of 'prescribed investigation'; and
- (g) to remove obsolete references to telegrams and to repealed provisions.

4. Subclause 3(3) saves authorisations of prescribed officers under subsection 60(4) of the Principal Act made before the commencement of the proposed

Act by stipulating that they are to be regarded as authorisations of certifying officers under subparagraph (b)(ii) of the definition of 'certifying officer' in subsection 5(1) of the Principal Act. Clause 14 substitutes 'certifying officer' for 'prescribed officer' in section 60 of the Principal Act.

Clause 4 – Communicating etc. certain information

5. This clause amends section 5A of the Principal Act to remove obsolete references.

Clause 5– Interception of a communication

6. This clause amends section 6 of the Principal Act by omitting words made unnecessary by the definition of 'premises' in subsection 5(1) and by omitting subsections 6(3) and (4). The repeal of subsections 6(3) and 6(4) and the amendment to section 47 (see clause 14) will allow the Telecommunications Interception Remote Authority Connection (TIRAC) system to be substituted for the present system of telecommunications links between the AFP and intercepting agencies.

Clause 6 – Investigation of an offence

7. Clause 6 makes an amendment to section 6A of the Principal Act which is consequential upon the inclusion of the Queensland Criminal Justice Commission as an eligible authority.

Clause 7 – Lawfully obtained information

8. Clause 7 makes an amendment to section 6E of the Principal Act which is consequential upon the repeal of obsolete provisions and the amendment to section 65A.

Clause 8 – Relevant proceeding

9. Clause 8 makes an amendment to section 6L of the Principal Act which is consequential upon the inclusion of the Queensland Criminal Justice Commission as an eligible authority.

Clause 9 – Declaration of staff members of State Police Forces

10. Clause 9 inserts new section 6N into the Principal Act to authorise the Minister to declare that a specified class of members of a law enforcement agency occupy positions corresponding to those of staff members of the AFP. Staff members of the AFP are subject to the control of the Commissioner of Police and are subject to the same disciplinary measures as uniformed police.

Clause 10 – Telecommunications not to be intercepted

11. This clause amends section 7 of the Principal Act to ensure that neither a person who is lawfully engaged in duties relating to the installation, connection or maintenance of equipment to be used to effect interceptions under warrant nor an officer of the Australian Security Intelligence Organization (ASIO) who incidentally intercepts a communication while performing his or her normal function of securing premises against listening devices, is in breach of subsection 7(1).

12. Clause 10 also amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication between police and a suspected offender in emergencies where there are reasonable grounds for suspecting that the offender (who is the other party) is involved in the actual or threatened loss of life, or threat of serious injury or of serious damage to property. This will allow police to take appropriate action in sieges and other like situations where it is impracticable to seek a warrant under Part VI of the Principal Act beforehand.

13. Clause 10 similarly amends section 7 to provide that a member of the AFP or of a police force of a State may listen to or record, without a warrant, a communication with the consent of a person to whom the communication is directed. This amendment will allow police to take appropriate action in cases of kidnap or extortion or similar threats. As the consent of the innocent party is a prerequisite, the provision is not limited to emergencies.

Clause 11 – Evidentiary certificates

14. Clause 11 inserts new section 18, which corresponds to existing section 61, into Part III of the Principal Act to provide for evidentiary certificates to prove routine, formal matters in exempt proceedings where the interception was conducted by ASIO. The proposed section will give the Managing Director or Secretary of a telecommunications carrier a discretion to issue conclusive certificates stating the acts which the carrier or its employees did to execute a warrant, and the Director-General or Deputy Director-General of Security a discretion to issue *prima facie* certificates stating the acts which ASIO did in relation to the warrant. In addition to replicating the specific matters already set out in existing paragraphs 61(4)(a)-(d) of the Principal Act, proposed subparagraph 18(4)(b)(iv) will allow the Director-General or Deputy Director-General to certify relevant facts as to the custody of records of intercepted information.

Clause 12 – Functions

15. Clause 12 amends section 33 of the Principal Act to redefine the functions of the Telecommunications Interception Division of the AFP to include taking action to enable warrants issued to agencies other than the AFP to be executed and other functions assigned in writing by the Commissioner of Police. This amendment is consequential upon the amendments to sections 6 and 47 which allow for the introduction of the TIRAC system.

Clause 13 – Agency may apply for warrant

16. Clause 13 amends section 39 of the Principal Act by removing the existing territorial limitation on warrants issued to State law enforcement agencies. The effect is to allow a State agency to seek a warrant in respect of a telecommunications service located outside the State, provided the interception is otherwise within its functions.

Clause 14 – Limit on authority conferred by warrant under section 45 or 46

17. Clause 14 amends section 47 to require that action must be taken by an AFP officer or staff member to enable a warrant to be executed before an interception under the warrant may begin. This will allow implementation of the TIRAC system whereby an AFP officer or staff member will be able to activate a switch from the Telecommunications Interception Division (the TID) of the AFP in Canberra after

satisfying himself or herself that the interception is in accordance with the warrant. Activation of the switch will allow the intercepted signals to be received direct by the law enforcement agency instead of being routed through the TID in Canberra as at present.

Clause 15 – Judge may revoke warrant where section 51 contravened

18. This clause amends section 52 to require a copy of the instrument of revocation, rather than the original, to be sent to the AFP.

Clause 16 – Notification to Australian Federal Police of issue of warrants to other agencies

19 This amendment to section 53 of the Principal Act is consequential upon the amendments to sections 6 and 47 which allow for the introduction of the TIRAC system. Agencies will be required to send copies of their section 45 and 46 warrants rather than the originals as currently required.

Clause 17 – Entry into force of certain warrants and exercise of authority conferred by warrant

20. New section 54 is consequential upon the amendments to sections 6 and 47 which allow for the introduction of the TIRAC system. The new provision stipulates that a warrant issued to a law enforcement agency other than the AFP does not come into force until the AFP receives:

- (a) in the case of a telephone application – the notification required by paragraph 53(1)(b) of the Principal Act;
- (b) in the case of a section 45 or 46 warrant – a copy of the warrant; or
- (c) in the case of a section 48 warrant – the original warrant.

21. Clause 17 also replaces section 55 of the Principal Act, consequential upon the amendments to sections 6 and 47 which allow for the introduction of the TIRAC system. The section will provide that an officer or a staff member of the agency which obtained the warrant, who is duly approved by the chief officer or an appointed approving officer of that agency, may execute a section 45 or 46 warrant. There will be no change to the execution of section 48 warrants authorising entry onto premises: the AFP will continue to execute these on behalf of other agencies.

22. Subclauses 17(2) and 17(3) are savings provisions applying the existing provisions to approvals of certifying officers and declarations of designated technical officers made before new section 55 comes into force.

Clause 18 – Revocation of warrant issued to Australian Federal Police

23. This clause amends section 56 of the Principal Act to simplify administration by conferring the power to revoke warrants on a certifying officer rather than the Commissioner of Police or a Deputy Commissioner. This will ensure that a warrant may be revoked as soon possible after it is decided that an interception is no longer necessary. The definition of ‘certifying officer’ inserted by paragraph 3(1)(l) of the Bill ensures that certifying officers are of appropriately senior levels in each agency.

Clause 19 – Revocation of warrant by chief officer of other agency

24. This clause amends section 57 of the Principal Act to enable the chief officer of an agency to delegate to a certifying officer the power to revoke a warrant before it expires. Delegation of this power will ensure that a warrant may be revoked as soon as possible after it is decided that the interception is no longer necessary. The clause also amends paragraph 57(3)(b), consequential upon the amendments to sections 6 and 47 to allow the TIRAC system to be introduced, to require an agency other than the AFP to send a copy of the instrument of revocation to the AFP rather than the original.

Clause 20 – Notification to Managing Director of carrier of issue or revocation of certain warrants

25. This clause amends section 60 of the Principal Act to simplify administration by providing that a ‘certifying officer’ instead of a ‘prescribed officer’ has the function of certifying copies of warrants for the purpose of notifying the carrier. The definition of ‘prescribed officer’ in subsection 60(4) will become redundant and consequently will be omitted.

Clause 21 – Evidentiary certificates

26. Clause 21 amends section 61 of the Principal Act to simplify administration by –

- (a) authorising the secretary, as well as the Managing Director, of a carrier or its parent company to issue evidentiary certificates; and
- (b) extending the power of certifying officers of law enforcement agencies to issue *prima facie* evidentiary certificates about routine factual matters about the execution of warrants to cover certification as to the custody of records of intercepted information.

Clause 22 – Certified copy of warrant

27. This clause amends section 61A, consequential upon the amendments to sections 6 and 47 which allow for the introduction of the TIRAC system, to substitute ‘an agency’ for the AFP in relation to certificates for use in proceedings under the Act.

Clause 23 – Employee of carrier may communicate information to agency

28. Clause 23 amends section 65A of the Principal Act to authorise employees of a carrier to communicate intercepted information which they may acquire in the performance of their duties to a law enforcement agency, provided the communication is for a purpose connected with the investigation of a serious offence. The amendment will permit such employees to communicate lawfully obtained information to State law enforcement agencies: at present they may communicate that information only to the AFP or the NCA.

Clause 24– Destruction of restricted records

29. Subclause 24(1) amends section 79 of the Principal Act to ensure that restricted records are not destroyed before the Minister has inspected the Register of

warrants in accordance with proposed section 81B (see clause 21 below). Subclause 24(2) will ensure that existing section 79 continues to apply to restricted records obtained from interceptions of telegrams taking place before the provisions repealing section 11 and Part IV come into force.

Clause 25 – Commonwealth agencies to keep documents connected with issue of warrants

30. Clause 25 amends section 80 of the Principal Act, which deals with the obligation of Commonwealth agencies to keep records of interceptions, by:

- (a) omitting paragraph 80(1)(a) which is redundant as a telegram service no longer exists;
- (b) changing references to relevant warrant documents to reflect the proposed procedure whereby the agency which obtains a section 45 or 46 warrant keeps the original and sends a copy to the AFP for retention in its records, which is the converse of the present requirement.

31. Subclauses 25(2) and (3) are savings provisions which apply the existing provisions to documents created before the proposed amendments commence.

Clause 26 – Other records to be kept by Commonwealth agencies in connection with interceptions

32. This clause amends section 81 of the Principal Act consequential upon the repeal of provisions relating to the interception of telegrams and places staff members of an agency in the same position as officers in relation to the communication of lawfully obtained information.

Clause 27 – Register of Warrants

33. Clause 27 inserts new sections 81A and 81B into the Principal Act. Proposed section 81A requires the Commissioner of the AFP to have a register kept showing particulars of all section 45, 46 and 48 warrants. The required particulars will be:

- (a) the date of the issue of the warrant;
- (b) the Judge who issued the warrant;
- (c) the agency to which the warrant was issued;
- (d) the telecommunications service to which the warrant relates;
- (e) the name of the person specified in the warrant as the person using or likely to use the telecommunications service;
- (f) the period for which the warrant is to be in force; and
- (g) each serious offence in relation to which the Judge who issued the warrant was satisfied, on the application for the warrant, as mentioned in paragraph 45(d) or 46(1)(d), as the case may be.

34. Proposed section 81B will oblige the Commissioner of the AFP to deliver to the Minister every three months so much of the Register as has not been previously inspected. The first inspection will be due three months from the date on which the new section comes into force.

Clause 28 – Functions of Ombudsman

35. This clause amends section 82 of the Principal Act to include the Register in the documents which are subject to inspection by the Ombudsman.

Clause 29 – Exchange of information between Ombudsman and State inspecting authorities

36. Clause 29 inserts new section 92A into the Principal Act to allow the Ombudsman to give information obtained in the course of performing his/her functions under section 82 to his/her State counterparts but only where that information relates to an agency of that State and the Ombudsman is satisfied that the information is necessary to enable the State inspecting authority to perform its functions.

37. Proposed subsection 92A(4) also authorises the Ombudsman to receive corresponding information from a State inspecting agency.

Clause 30 – Annual reports regarding applications and warrants under Part VI

38. This clause amends section 94 of the Principal Act, which deals with the obligations of Commonwealth agencies to report to the Minister, by removing an obsolete reference to telegrams and inserting a new requirement to report on the total costs of interception during the reporting year.

Clause 31 – Annual reports by State authorities

39. Clause 31 amends section 96 of the Principal Act, which imposes corresponding reporting requirements on State authorities, by inserting new requirements to report on their use of the new powers to monitor calls in emergencies such as sieges and, with appropriate consents, in kidnapping and extortion cases (see clause 6) and on the total costs of interception during the reporting year.

Clause 32 – Report regarding interceptions without warrant and other information to be included in report

40. This clause inserts new section 102A into the Principal Act to require the Minister's annual report to the Parliament under section 99 to include details of the use of the new powers to monitor calls referred to above.

41. Clause 32 also replaces existing section 103 of the Principal Act with a provision which requires the annual report under section 99 to include details of the total costs of interception for law enforcement purposes and any other information which may be prescribed in the regulations.

Clause 33 – Repeals

42. This clause repeals redundant and obsolete provisions.

Clause 34 – Further amendments

43. This clause makes minor grammatical and consequential amendments, listed in the Schedule, to remove obsolete references to telegrams and to repealed provisions and to omit specific pecuniary penalties in subsections 105(2), (4) and 107(2) and section 106. Reference to pecuniary penalties is unnecessary as section 4B of the *Crimes Act 1914* imposes pecuniary penalties by a formula which fixes the penalty by reference to the term of imprisonment.



