Date introduced: 4 June 1986
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

DIGEST OF BILL

Purpose

To extend the interception powers of the Australian Federal Police (AFP) and to give interception powers to State and Territory Police and to certain Authorities and Commissions.

Background

Electronic communications were introduced in Australia in the mid 1800s when the telegraph was adopted and privacy quickly became an issue. As a result, the first statutes in respect of telecommunications, such as the Electric Telegraphs Act 1857 (NSW), were designed to protect the privacy of the people using the devices regulated by those statutes. At the international level, the need to preserve the privacy of telecommunications and the mail has long been recognised through conventions such as the International Telecommunications Convention. Both the Australian Telecommunications Commission (Telecom Australia) and the Overseas Telecommunications Commission (OTC) are required by their respective statutes to implement Australia's obligations under such treaties.[1]

The Telecommunications (Interception) Act 1979 (the Principal Act) was introduced to complement the Australian Security Intelligence Organization Act 1979. The Principal Act gives the Australian Security Intelligence Organization (ASIO) the power to intercept communications passing over telecommunication systems in certain circumstances.

In December 1983 the Law Reform Commission presented its report on Privacy.[2] The Commission's...
deliberations on interference with communications started from the general principle that a person's private communications should not be monitored or intercepted without that person's consent. On the basis that technology does not change the essence of the act of communicating, the Commission did not hesitate to extend the principle to telecommunications.[3]

Amongst the Law Reform Commission's recommendations were:

1. that the availability and suitability of other methods of obtaining the evidence be taken into account by the Judge when considering an application for the grant of a warrant to intercept a telecommunication (paragraph 1162);
2. that a warrant authorising the use of secret surveillance devices to intercept telecommunications should remain in force for a maximum of 30 days (paragraph 1165);
3. that an application for a warrant to intercept a telecommunication should be able to be made by telephone, where it is impracticable to make the application to a Judge in person (paragraph 1171).

The Royal Commission of Inquiry into Alleged Telephone Interceptions (the Stewart Royal Commission)[4] was established in March 1985 and volume one of its report was tabled in the House of Representatives on 1 May 1986. The Commission's terms of reference included inquiring into the alleged unlawful interception of telephone conversations in New South Wales on or about 28 March 1985. Another task of the Commission was to make recommendations arising out of its inquiry as it thought appropriate, including recommendations as to the legislative changes which might be considered necessary or desirable in the light of the results of the inquiry.

To a large degree the Stewart Royal Commission endorsed the legislative changes proposed by the Law Reform Commission, including the recommendations noted above. A further recommendation of the Law Reform Commission, which was endorsed by the Stewart Royal Commission, was that the
scope to issue a warrant to intercept a telecommunication should be broadened to include the investigation of "serious offences" as opposed to simply "narcotic offences". Unlike the other recommendations, this recommendation is not adopted in the present Bill. The Attorney-General moved a resolution on 4 June 1986 to establish a Joint Select Committee to examine and report on the Bill, with particular emphasis on the question of extending the interception powers to cover "serious offences".

Main Provisions

For a detailed analysis of the clauses of the Bill, refer to the Explanatory Memorandum.

A number of new definitions will be added to section 5 of the Principal Act by clause 3.

Clause 4 will insert new sections 6A, 6B, 6C and 6D into the Principal Act. Proposed section 6A will allow the Minister to nominate Judges of the Federal and ACT Supreme Courts to act as Judges for the purposes of the Bill. Similarly the Governor-General will be able to arrange for certain State and Northern Territory Judges to act as Judges for the purposes of this Bill (proposed section 6B). Proposed section 6D will require the Minister to table annual reports with respect to operations carried out under different parts of the Bill. Proposed sub-section 6D(3) will ensure that such reports are made in a manner so as not to lead to the identification of individuals.

Section 7 of the Principal Act generally prohibits the interception of telecommunications. In order to provide for a number of new exceptions section 7 will be reorganised into four parts: section 7 itself will continue to prohibit interceptions while new sections 7AA, 7AB and 7AC will be inserted into the Principal Act by clause 6. Proposed section 7AA will generally prohibit the disclosure of information gained by intercepting a telecommunication by virtue of a warrant. In 18 sub-sections, section 7AA strictly outlines the exceptions which will be made with respect to this prohibition, for instance, where information is communicated amongst officers of ASIO, the National Crime Authority (NCA), the Drug Crime Commission or the Federal or State Police in the course of their investigations into activities prejudicial to security. Proposed section 7AB sets out when the giving of evidence of information obtained by intercepting a telecommunication under a warrant will not be an offence. Where the interception of a
telecommunication or the disclosure of information gained by such an interception does not come within any of the exceptions, an indictable offence will have been committed and the penalty will be a $5,000 fine or 2 years imprisonment (proposed section 7AC).

Applications to Judges by the AFP for warrants to intercept telecommunications are dealt with by section 20 of the Principal Act. Sub-clause 9(a) will amend sub-section 20(1) so that a Judge need only be satisfied that the person making the telecommunication can be reasonably suspected of committing a "serious trafficking offence" as opposed to the more narrow "narcotics offence". The Judge however will also have to consider whether the information sought by the AFP might readily be available from another source, without the necessity for a warrant to intercept a communication having to be issued (sub-clause 9(c)) which will insert a new sub-paragraph 20(1)(c)). Sub-clause 9(e) will insert new sub-sections (20(3A)-20(3E)) into the Principal Act which will provide for applications for warrants to be made by telephone in circumstances of urgency. The maximum period during which a warrant may remain in force will be reduced from 6 months to 90 days by sub-clause 9(f) amending sub-section 20(5) of the Principal Act.

Similar amendments to those made to section 20 of the Principal Act will be made to section 21 of the Principal Act (by clause 10) which deals with the issue of warrants for the AFP to inspect telegrams.

The Commissioner of Police has the power to stop an interception by revoking a warrant (section 23 of the Principal Act). Clause 12 will amend section 23 to extend this power to the Deputy Commissioner. Section 24 of the Principal Act deals with the destruction of copies of telecommunications and telegrams which are no longer required for the assistance of the AFP. Clause 12 will amend section 24 so that where a document is in the possession or control of the AFP, it will be the Commissioner of Police who will be responsible for the necessary destruction of the document.

The NCA will be given interception powers similar to those which will apply to AFP - clause 18 which will add a new Part VI, headed "Warrants Authorising the National Crimes Authority to Intercept Telecommunications" to the Principal Act.
Clause 18 also inserts a new Part VII into the Principal Act, headed "Warrants Authorising Certain State and Northern Territory Authorities to Intercept Telecommunications".

Proposed section 42 defines a number of words and phrases for the purposes of the new Part VII. The Premier of a State will be able to request that the Attorney-General declare a particular eligible authority in that State to be a declared authority for the purposes of Part VII (proposed sub-section 43(1)). Before making such a declaration the Attorney-General will have to be satisfied that the laws of State provide for such things as the approval of people who will be able to carry out interceptions pursuant to warrants and the keeping of proper records of intercepted communications (proposed sub-section 43(2)). The States will also have to enter into an agreement to meet all the expenses associated with the issuing of warrants and the intercepting of telecommunications (proposed sub-section 43(3)). The Minister will have power to revoke a declaration for a number of reasons (proposed sub-section 43(4)).

Proposed section 44 will provide for the issue of warrants for the interception of telecommunications on the application of a declared authority of a State. The provisions are the equivalent of those which will provide for applications by the AFP, that is, section 20 of the Principal Act as amended by clause 9 of this Bill.

Clause 20 will make a consequential amendment to section 4 of the Telecommunications (Interception) Amendment Act 1984.

For further information, if required, contact the Law and Government Group.

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References

2. Ibid.
3. Ibid. para. 1141.