



Telecommunications Interception Legislation Amendment Bill (No.2) 2008

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Law and Bills Digest Section

Contents

Purpose	2
Background	2
Committee consideration	4
Financial implications	4
Main provisions	4
Schedule 1	4
Schedule 2	5
Concluding comments	7

Telecommunications Interception Legislation Amendment Bill (No.2) 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Schedule 1 will commence on the later of Royal Assent and the commencement of the required Queensland legislation. Schedule 2 will commence on the day after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to include the Public Interest Monitor (PIM) of Queensland into the TIA Act which will facilitate Queensland law enforcement agencies to come under the TIA Act.

Background

In the second reading speech to the Telecommunications Interception Legislation Amendment Bill (No.2) 2008 (the Bill) the Attorney-General makes the following statements:

The inclusion of Queensland agencies will mean that the interception regime established by the TIA Act will become truly national. Queensland is currently the only jurisdiction whose law enforcement agencies do not have interception powers.¹

...

Finally, it is important to note that this Bill does not of itself give Queensland law enforcement agencies access to interception powers.²

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1. Hon. Robert McClelland, Attorney-General, 'Second reading speech: Telecommunications Interception Legislation Amendment Bill (No.2) 2008', House of Representatives, *Hansard*, 3 December 2008, p. 12299.

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In the Queensland Parliament in August 2008 it was announced by the Premier in a Ministerial Statement:

Members may recall that there have been ongoing discussions between the state and federal governments about making phone-tapping powers available to Queensland law enforcement agencies. I am very pleased to advise the House today that the Prime Minister has written to me confirming that the Australian government will now support telecommunication interception powers for the Queensland Police Service and the Crime and Misconduct Commission. Kevin Rudd has accepted that these powers should be subject to the involvement of the Public Interest Monitor, an independent barrister who represents the public interest. Phone tapping (*sic*) is a highly effective law enforcement power, but it is also a highly intrusive one. We have always said that we would consider these powers, but we have also said that they had to come with appropriate safeguards for people's privacy, and we make no apologies for that.³

Before the Attorney-General can declare an agency to be eligible under the TIA Act, States must have legislation in place to meet the accountability and record keeping requirements of the Commonwealth law. For Queensland to be able to comply with these requirements it is necessary for the Commonwealth to recognise in the law the existence and role of the PIM in Queensland.⁴ Once this is in place, Queensland will be able to enact laws without running into Constitutional inconsistency problems under section 109 of the Constitution.⁵ As Queensland intends to give the PIM an oversight role in the application process in the Queensland legislation, similar to that function he or she has under the preventative detention application process, the Commonwealth must give specific reference to the PIM so that there is consistency between the two regimes. At the time of this Digest there is no Queensland Bill before that Parliament, however, once the Queensland Bill is passed, this Bill will commence.⁶

Under the TIA Act it is prohibited to intercept, or authorise interception, of a communication passing over a telecommunications system. However, the Act provides a number of exemptions, including to the officers of law enforcement and security agencies,

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2. *ibid*, p. 12300.
 3. Hon. A.M. Bligh, *Ministerial Statement*, Queensland Hansard, 28 August 2008, p. 2425.
 4. At the time the Commonwealth, States and Territories were making anti-terrorism laws and preventative detention orders, Queensland was the only State to make provision for the Public Interest Monitor to be present (to witness) at the time an application for an order is being made. *Terrorism (Preventative Detention) Act 2005* (Qld) sections 16, 24.
 5. Section 109 of the Constitution provides when a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail to the extent of the inconsistency.
 6. See also Explanatory Memorandum, Telecommunications Interception Legislation Amendment Bill (No.2) 2008, p. 3 which says, Schedule will not commence at all if the *Telecommunications Interception Act 2009* of Queensland does not commence.

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under warrant, if the Attorney-General is satisfied that the communications system is being used by a person engaged in, or likely to be engaged in, or reasonably suspected to be engaged in, activities or purposes that are prejudicial to security.⁷

Committee consideration

This Bill has not been referred to Committee, but Telecommunications Interception Bills have been the subject of previous Committee reports. The Senate Legal and Constitutional Affairs Committee conducted inquiries into the 2006, 2007 and 2008 amending Acts to the TIA Act. The Reports have various recommendations and can be found on the Committee's website.⁸

Financial implications

There will be no financial impact until Queensland agencies are declared by the Attorney-General to be eligible under the TIA Act. Once agencies start applying for warrants there will be a financial impact on the Courts and the Administrative Appeals Tribunal which will be hearing these applications.⁹

Main provisions

Schedule 1

Items 1 and 2 insert definitions of deputy public interest monitor and public interest monitor (PIM) into the definitions section of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

Proposed section 45, item 4, is the key provision of the Bill and enables the PIM to appear before a Judge or tribunal member who is hearing an application for a warrant in respect of a telecommunications service. The section applies if an interception agency of Queensland makes such an application.¹⁰

7. *Telecommunications (Interception and Access) Act 1979*, Chapter 2. A useful background on previous Bills, reports and inquiries can be found in Bronwen Jagers, 'Telecommunications (Interception and Access) Amendment Bill 2008', *Bills Digest*, no. 71, Parliamentary Library, Canberra, 2007-08.

8. [Senate Legal and Constitutional Affairs Committee completed inquiries.](#)

9. Explanatory Memorandum, Telecommunications Interception Legislation Amendment Bill (No.2) 2008, p. 2.

10. Once a State agency has been declared to be an eligible agency for the purposes of the TIA Act, it can make an application for a warrant under section 39.

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The PIM can make submissions orally or in writing (**proposed subsection 45(2)**), and question the applicant or other person providing information to the Judge or tribunal member (**proposed paragraphs 45(3)(a) and (b)**). The PIM can delegate these powers to a deputy PIM in writing, and a deputy PIM must comply with any directions in the exercise of these powers (**subsections 45(4) and (5)**).

Proposed section 45A preserves any law of Queensland that authorises or requires an applicant or proposed applicant for a warrant to notify the PIM of the application and related information, and provide the PIM with related documents in the application for a warrant.

Telecommunications service warrants and named persons warrants are issued by a Judge or AAT member under section 46 and section 46A of the TI Act. **Item 6** requires the Judge or member to have regard to any submissions made by the PIM during the course of hearing an application by a Queensland agency under **proposed section 45**.

Item 3 inserts **proposed paragraph 35(1)(ha)** to provide that persons who make an application for a warrant or who perform a function or exercise a power in an application for a warrant under **proposed section 45** cannot undertake an inspection of an eligible authority's records for ascertaining compliance with record keeping requirements. Existing section 35 sets out the preconditions for the Attorney-General to be satisfied of before he or she can declare an eligible authority to be an agency under the TIA Act. The Attorney-General has to be satisfied each State has made satisfactory legislative provision of certain things, such as requiring the chief officer to keep records and copies of warrants¹¹, keeping things in possession of the authority in a secure place¹² or destroying records if the record is not likely to be required for a permitted purpose.¹³ The effect of the **proposed paragraph 35(1)(ha)** will be that not only will persons appearing before a Judge or the AAT for a warrant be unable to carry out accountability inspections, nor will the PIM of Queensland if the PIM has appeared or made submissions during the course of the hearing under **proposed section 45**.¹⁴

Schedule 2

The *Surveillance Devices Act 2004* establishes procedures for warrants, emergency authorisations and tracking device authorisations for using surveillance devices in criminal

11. *Telecommunications (Interception and Access) Act 1979* paragraph 35(1)(a).

12. *ibid* paragraph 35(1)(f).

13. *ibid* paragraph 35(1)(g).

14. The Explanatory Memorandum says at p. 4, '[T]his will ensure that the same person cannot be involved in both the application process for an interception warrant and the subsequent inspection in relation to that warrant. This is to minimise any risk of conflict of interest.'

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investigations and related matters.¹⁵ **Items 1 and 2** of this Schedule amend the definition sections in that Act, and the TIA Act, to reflect changes that have been made to the organisational structure of the Queensland Crime and Misconduct Commission (CMC) to refer to the chairperson or assistant commissioner of the CMC.

Items 3 and 4 are designed to ‘correct an error introduced by the *Telecommunications Interception Legislation Amendment Act 2008* (the Amendment Act).’¹⁶ As paragraph 5(1)(f) stands, the Commissioner of a State police force can only authorise a senior executive Australian Federal Police (AFP) **employee** who is a member of the AFP to be a certifying officer of the State police force. The proposed amendment will ensure that a State Commissioner can authorise a **State police officer** (whose rank is equivalent to that of a senior executive AFP employee) to be a certifying officer for the State police.

The Amendment Act was necessary to address the decision of *Hong Kong Bank of Australia Ltd v Australian Securities Commission* (1992) 108 ALR 70 which held that the power to confer authority could only be found to exist when the authorisation was expressly conferred.¹⁷ Therefore persons must be identified to be specifically authorised under the effected provisions. At the time, for the AFP, the term ‘certifying officer’ included ‘the Commissioner of Police, a Deputy Commissioner of Police or a senior executive employee who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner of Police for the purposes of this paragraph’.¹⁸

Item 4 will ensure that authorisations made by AFP senior executive employees before the amendment will be still valid (if any). After the amendment is passed, AFP senior executive employees will no longer be able to be certified to make authorisations, at least under this particular paragraph.¹⁹ This drafting error means that until it is remedied there has been and is no power to authorise senior State police officers to exercise the powers of certifying officers under the TIA Act.²⁰

15. *Surveillance Devices Act 2004*, section 3.

16. *ibid*, Second reading speech, p. 12301.

17. For further background on this Bill, see Monica Biddington, ‘Telecommunications Interception Legislation Amendment Bill 2008’, *Bills Digest*, no. 3, Parliamentary Library, Canberra, 2008-09.

18. Telecommunications Interception Legislation Amendment Bill 2008, [Explanatory Memorandum](#), p. 5.

19. They will continue to be authorised under subsection 35(1) of the TIA Act.

20. One of the main functions of certifying officers under the TIA Act is to certify that document copies are true copies of the original.

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Concluding comments

The Bill has the main single purpose of facilitating Queensland's entry into the telecommunications interception regime, and also makes some amendments to remedy significant errors in the current Act. The opportunity is not being taken at this time to address previous recommendations of the Senate Legal and Constitutional Affairs Committee for reforms and improvements to the operation of the TIA Act.

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