

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter briefly outlines the main provisions of the Bill.

Significant provisions of the Bill

2.1 The Bill seeks to amend the Criminal Code and the TI Act 'to ensure that they operate in a manner that enhances rather than hinders the functioning of [Australia's] law enforcement agencies'.¹ The amendments contained in the Bill will primarily affect the TI Act.

Schedule 1 – Amendment of the Criminal Code Act 1995

2.2 The *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004* repealed the telecommunications offences in the *Crimes Act 1914* and replaced them with new and updated telecommunications offences in the Criminal Code. The Criminal Code provides a 'law enforcement officer' who acts in good faith in the course of his or her duties and whose conduct is reasonable in the circumstances of performing those duties with a defence to these and other offences.²

2.3 Currently, the expression 'law enforcement officer' is defined with reference to the Australian Federal Police (AFP), state/territory and foreign police forces, the Australian Crime Commission, the Commonwealth Director of Public Prosecutions and similar offices established under state/territory law.

2.4 Item 1 of Schedule 1 expands the definition of 'law enforcement officer' to encompass officers of the New South Wales (NSW) Crime Commission, the Independent Commission Against Corruption, the Western Australia (WA) Corruption and Crime Commission, staff of the NSW Police Integrity Commission, or any other agency that is prescribed by regulation. This will mean that a defence is available when an officer of those agencies engages in activities ancillary to telecommunications interception.

2.5 Any regulations prescribing agency employees as a 'law enforcement officer' must be tabled in Parliament and are subject to disallowance by either House.

1 Senator Chris Ellison, Minister for Justice and Customs, Second Reading Speech, *Senate Hansard*, 16 March 2005, p. 1.

2 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, pp 11-12. Chapter 2 draws heavily on this paper.

2.6 The proposed amendment will commence retrospectively on 1 March 2005. This is the date that the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No.2) 2004* commenced.

Schedule 2 – Amendment of the Telecommunications (Interception) Act 1979

Part 1 – Emergency Services

2.7 At present, subsections 6(2A) and (2B) of the TI Act provide that listening to or recording communications to prescribed emergency services *numbers* operated by the police, a fire service or an ambulance service does not constitute an interception for the purposes of the TI Act. Item 1 of Schedule 2 of the Bill repeals subsections 6(2A) and (2B).

2.8 Items 3 and 4 insert new subsections 7(2) and (3) into the TI Act. The effect of these new subsections is that the interception of communications made to or from a telecommunications service that is located within premises that are declared as an emergency service *facility* will be exempted from the general prohibition on the interception of telecommunications contained in subsection 7(1) of the TI Act. The term 'premises' is defined in section 5 of the TI Act as including any land, any structure, building, aircraft, vehicle, vessel or place (whether built on or not), and any part of such a structure, building, aircraft, vehicle, vessel or place.

2.9 The effect of Items 3 and 4 is that calls made within premises that are declared as an emergency service facility may be lawfully recorded without a warrant and without the need for an automated or manual warning that recording will occur.

2.10 The Bill also effects other changes to provisions relating to emergency services. These include the following:

- the exemption will apply to 'emergency services facilities' rather than 'emergency services numbers', meaning that 'hundreds, if not thousands, of numbers'³ will be covered. There are only three numbers currently prescribed for the purposes of the TI Act (000, 106 and 112);
- unlike the existing provision which only covers calls made *from* emergency services numbers, the amendments will potentially capture calls made *from* as well as *to* emergency services facilities;
- as well as police, fire and ambulance services, an 'emergency services facility' will include services for despatching or referring matters to the police, fire service or ambulance services (which is intended to capture outsourced services); and

3 Senator Chris Ellison, Minister for Justice and Customs, Second Reading Speech, *Senate Hansard*, 16 March 2005, p. 1.

- unlike the current exemption in the TI Act which applies to a person 'lawfully engaged in duties',⁴ there is no requirement in the Bill for emergency services interceptions to occur lawfully in the course of a person's duties.⁵

2.11 One of the major changes proposed by the Bill is that under new subsections 7(3AA) and (3AB), the Attorney-General may, by written instrument, declare 'premises' to be an 'emergency services facility' if the Attorney-General is satisfied that certain conditions are met. The Bill provides that the Attorney-General may only declare premises to be an 'emergency services facility' if he or she is satisfied that the premises are operated by a police, fire, ambulance or related service for the purpose of dealing with requests for assistance in emergencies.

2.12 New subsection 7(3AC) is included to clarify that the Attorney-General's declaration is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (the Legislative Instruments Act). Currently, 'emergency service numbers' are prescribed by regulation.⁶ An important difference between an instrument that is not a legislative instrument and a regulation is that the former is not subject to parliamentary scrutiny, need not be tabled in Parliament and is not subject to parliamentary disallowance.⁷

2.13 The Explanatory Memorandum (EM) states that the reason a declaration under new subsection 7(3AB) is not a legislative instrument is to 'ensure that the locations of emergency services facilities are not publicly available'.⁸ The EM states further that:

No attention is drawn to the locations of these emergency services facilities, which are in as innocuous a location as possible. These facilities represent critical operational infrastructure which needs close protection as their loss would endanger the public for as long as these services were unavailable. There are few benefits in having the location of these facilities made public, and any that do exist are far outweighed by the potential risks.⁹

2.14 The amendments relating to emergency services commence on proclamation or six months after Royal Assent, whichever is earlier. They do not operate retrospectively and therefore may expose some emergency services workers (such as

4 Subsection 6(2B).

5 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 13.

6 *Telecommunications (Interception) Regulations 1987*, reg 2A.

7 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 13.

8 *Explanatory Memorandum*, p. 5.

9 *Explanatory Memorandum*, p. 5.

those who may have recorded conversations on numbers other than 000, 106 and 112) to penalties under the TI Act.

Part 2 – Interception by radiocommunications inspectors

2.15 Items 5-7 amend subsection 7(2) of the TI Act to create an exception to the general prohibition against the interception of communications to allow the interception (without a warrant) by the Australian Communications Authority (ACA). The exception is limited to interception in the performance of a statutory spectrum management function, or the exercise of a related power, under the *Australian Communications Authority Act 1997* or the *Radiocommunications Act 1992*. The interception must be in the course of identifying the source of interference to critical radiocommunications frequencies.

2.16 The EM states that, while a radiocommunications network is not generally subject to the TI Act, the TI Act will apply where a radiocommunications network is connected to the telecommunications system. To the extent that the TI Act applies to a radiocommunications network, the ACA is prevented from intercepting radiocommunications where they interconnect with fixed line telecommunications. According to the EM, the Bill will remove an impediment to the effective performance of an important statutory function with potentially significant consequences by providing a limited exception to this prohibition.¹⁰

Part 3 – Ancillary offences

2.17 The TI Act enables law enforcement interception warrants to be granted in relation to 'class 1' and 'class 2' offences. 'Class 1' offences include murder, kidnapping, narcotics offences, terrorism offences, and ancillary offences involving aiding or conspiring to commit other 'class 1' offences. 'Class 2' offences include offences punishable for life or a period of at least 7 years where the offender's conduct involves death or serious personal injury, drug trafficking, serious fraud, bribery, dealing in child pornography, people smuggling, money laundering or cybercrime.¹¹

2.18 Item 8 of the Bill expands the definition of 'class 1' offence in the TI Act to include conduct comprising the offence of accessory after the fact. The effect of this provision is that a 'class 1' telecommunications interception warrant will be available in relation to a person who is an accessory after the fact in relation to a 'class 1' offence.

10 *Explanatory Memorandum*, p. 6.

11 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 4.

Part 4 – Civil forfeiture proceedings and named person warrants

2.19 The amendments in Part 4 of the Bill are the Federal Government's statutory response to three recommendations made by the Sherman Report.

2.20 The origins of the Sherman Report can be traced to a recommendation made by this committee in relation to its inquiry into the Telecommunications (Interception) Legislation Amendment Bill 1999 (the 1999 Bill). The 1999 Bill, which became the *Telecommunications (Interception) Legislation Amendment Act 2000*, contained a number of important amendments to the TI Act, particularly the addition of 'named person warrants'.¹²

2.21 While the committee recommended that the 1999 Bill proceed, it also recommended that the Bill 'provide for a review of its operations within three years of coming into effect', having regard to the need for the new named person warrant, the adequacy of safeguards and the adequacy of reporting mechanisms.¹³

2.22 The Federal Government responded to the committee's report by agreeing to a review of the operation of the Bill, to take place within three years of the Bill coming into effect. The former head of the National Crime Authority, Mr Tom Sherman AO, was asked to complete the review.

2.23 The Sherman Report was completed in June 2003. It concluded that the regulatory regime in relation to the TI Act generally contained adequate safeguards and reporting mechanisms and had a strong compliance culture which was well audited by the inspecting authorities. However, it also made several recommendations which envisaged statutory changes, along with procedural and administrative changes.¹⁴

2.24 Item 9 of Schedule 2 of the Bill substitutes new paragraph 6K(c) of the TI Act to include civil forfeiture proceedings within the meaning of 'proceedings for the confiscation or forfeiture or for pecuniary penalty' for the purposes of paragraph 5B(b) of the TI Act. The effect of this amendment, which implements Recommendation 7 of

12 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 8.

13 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Telecommunications (Interception) Legislation Amendment Bill 1999*, May 2000, p. vii.

14 Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 9.

the Sherman Report, is to allow the use of information lawfully obtained (with a warrant) under the TI Act in aid of civil forfeiture.¹⁵

2.25 Item 9 also removes the list of Commonwealth and state/territory proceeds of crime legislation currently contained in paragraph 6K(c) of the TI Act. It will instead provide the power to prescribe by regulation such relevant Commonwealth and state/territory legislation as necessary. The regulation will be a legislative instrument and subject to parliamentary scrutiny.

2.26 Item 10 amends section 84 of the TI Act to require the Ombudsman to include in its annual report to the Minister a summary of the telecommunications interception inspections conducted in the relevant year, together with a summary of any deficiencies identified and any remedial action taken. The EM states that the amendment implements Recommendation 6 of the Sherman Report.

2.27 Items 12 and 14 amend section 100 of the TI Act which deals with the statistics that must be included in the Attorney-General's annual report to Parliament. The amendments implement Recommendation 4 of the Sherman Report. They will require the report to include aggregate statistics about:

- the number of applications for named person warrants, telephone applications, renewal applications, applications that involved entry onto premises, and how many named person warrants were issued subject to conditions;
- how many named person warrants involved the interception of a single telecommunications service, how many involved the interception of between 2-5 services, 6-10 services and more than 10 services; and
- the total number of telecommunications services intercepted by way of named person warrants.

2.28 These figures will also be broken down by each relevant Commonwealth and state agency.

Part 5 – Employees of carriers

2.29 The purpose of Part 5 is to clarify the expression 'employee of a carrier' as it appears in the TI Act.¹⁶ Item 15 defines an 'employee of a carrier' as a person 'who is engaged by the carrier or whose services are made available to the carrier'. This would

15 Material obtained with a warrant issued for the investigation of 'class 1' and 'class 2' offences under the TI Act can already be used in conviction-based restraining order proceedings. However, such material cannot be used in civil forfeiture proceedings that are not conviction-based and where a civil standard of proof is used to determine the derivation of the proceeds of crime: Jennifer Norberry, Parliamentary Library, *Crimes Legislation Amendment (Telecommunications Interception and Other Measures) Bill 2005*, Bills Digest No. 147 2004-05, p. 14.

16 *Explanatory Memorandum*, p. 9.

include anyone who might not have been employed in a strict legal sense by a carrier, for example contractors.

2.30 The definition of the term will apply to all references to an 'employee of a carrier' in the TI Act. The EM states that the term has always been interpreted as including contractors or persons working for a carrier while employed by a company that is a subsidiary of, or related to, the carrier. Therefore, since the provision does not seek to alter the definition, the amendment will take effect from the date of commencement of the TI Act (1 June 1980).¹⁷

17 *Explanatory Memorandum*, p. 9.

