Telecommunications Interception Bill 2009

Explanatory Notes

Title of the Bill

Telecommunications Interception Bill 2009

Policy Objective

The policy objectives of the Telecommunications Interception Bill 2009 are to:

- enable the Queensland Police Service (QPS) and the Crime and Misconduct Commission (CMC) to apply for telecommunications interception warrants under the Commonwealth *Telecommunications (Interception and Access) Act* 1979 (the Commonwealth Act) for the investigation of serious offences; and
- do so in a manner that provides a role for Queensland's Public Interest Monitor (PIM) prior to, and at hearings of, applications for interception warrants, to represent the public interest and test the validity of applications.

Reasons for the objectives and how the objectives will be achieved

Queensland law enforcement agencies do not have direct access to telecommunications interception powers. It is desirable that they should have such access. Telecommunications interception is a highly effective way to investigate serious and organised criminal activity. As an investigative tool: telecommunications interception is efficient, has the potential to protect law enforcement officers from safety risks, and has the potential to provide highly probative information.

Telecommunications interception is governed by the federal regime set up in the Commonwealth Act. State law enforcement agencies cannot access interception warrants unless the federal Attorney-General makes a

declaration under section 34 of the Commonwealth Act that they may do so. The declaration can only be made in relation to a state law enforcement agency if the law of that state makes satisfactory provision for the agency to comply with the recording, reporting and inspection obligations specified in section 35(1) of the Commonwealth Act.

Accordingly, the Bill will achieve its first objective by providing for the recording, reporting and inspection regime required by the Commonwealth Act.

Part 3 of the Bill sets out obligations on the QPS and CMC to: keep comprehensive documents relating to interception warrants; make records of each interception and the use made of intercepted information; and report such information to the State Minister in relation to each warrant. The QPS and CMC must report annually to the State Minister about the numbers of applications made and warrants issued, and provide information about the effectiveness of the warrants. The State Minister must give copies of the reports to the federal Attorney-General. Under the Commonwealth Act, the federal Attorney-General is required to table a report annually in the Commonwealth Parliament containing the information provided in the state annual reports.

Part 4 of the Bill establishes inspecting entities to inspect the QPS and CMC's records, and ascertain and report on the agency's compliance with Part 3. The PIM is the inspecting entity of the QPS. The Parliamentary Crime and Misconduct Commissioner, established under the *Crime and Misconduct Act 2001,* is the inspecting entity of the CMC. Together Parts 3 and 4 of the Bill (and some provisions of Part 5) set out the 'back-end' accountability arrangements required by the Commonwealth Act.

Telecommunications interception is highly intrusive on the privacy rights of individuals. This is why the Queensland Government has insisted on the further safeguard of providing an appropriate 'front-end' accountability role for the PIM in Queensland applications for interception warrants.

The PIM, appointed under the *Police Powers and Responsibilities Act 2000* and the *Crime and Misconduct Act*, is a feature of Queensland's law enforcement legislation that distinguishes it from other states' legislation. The PIM represents the public interest by being consulted before, and present at, hearings of applications brought by Queensland law enforcement authorities for intrusive State law enforcement powers, specifically surveillance powers and covert search powers. In addition, the PIM has been provided a further role in hearing applications for

terrorism-related control orders and preventative detention orders under recent Commonwealth and Queensland legislation.

The PIM is an independent statutory office-holder. The position is resourced through the police service but is not part of it organisationally. The PIM is accountable, through annual reports, to the relevant Minister to Parliament.

Part 2 of the Bill will achieve the Bill's second objective, of requiring the involvement of the PIM in the interception warrant application process, by:

- requiring the QPS and CMC to consult with the PIM before making an application under the Commonwealth Act;
- entitling the PIM to appear at and make submissions to hearings of the warrants;
- requiring the QPS and CMC to fully disclose to the PIM all relevant matters, both favourable and adverse to the issuing of a warrant; and
- enabling the PIM to report to the State Minister about any non-compliance by the QPS or CMC with the State or federal Acts.

Given that telecommunications interception is governed by the Commonwealth Act, Part 2 of the Queensland Bill will only be effective if it is supported by appropriate Commonwealth amendments. To this end, on 3 December 2008, the federal Attorney-General introduced the Telecommunications Interception Legislation Amendment Bill (No. 2) 2008 into the House of Representatives. The Commonwealth amendment Bill replicates aspects of this Bill's provisions concerning the PIM and further provides that nothing in the Commonwealth Act affects the operation of a law of Queensland authorising or requiring PIM involvement in the interception warrant application process. Queensland and Commonwealth officials worked closely together in developing the respective pieces of legislation.

Alternatives to the Bill

There are no other ways by which the policy objectives of the Bill can be achieved.

Estimated Cost for Government Implementation

Government is continuing to consider the financial implications of introducing telecommunications interception capabilities for the QPS and CMC. There will be implementation costs relating to:

- a federal telecommunications interception scheme 'buy-in' fee of up to $1.1M, which involves contributions for previously developed interception and delivery capabilities;
- annual contributions to the scheme of up to $0.11M;
- procuring and developing the necessary interception information technology;
- establishing premises for monitoring;
- recruiting and training staff for communications and technical support; a monitoring unit; a systems administration unit; a legal and affidavit preparation unit; evidence preparation; record management; and transcription;
- specialist costs such as interception line set up, connections, communication maintenance, associated fees, software maintenance and office running costs; and
- the additional imposts placed on the PIM and the Parliamentary Crime and Misconduct Commissioner.

Consistency with Fundamental Legislative Principles

Telecommunications interception will result in the infringement of the privacy of certain individuals. However, the potential breach of fundamental legislative principles is justified, given:

- the utility of telecommunications interception powers; and
- that the two objectives of the Bill are entirely directed towards addressing concerns about fundamental legislative principles; namely the provision of the recording, reporting and inspection safeguards required under the Commonwealth Act and the additional front-end safeguard of the PIM, discussed under the above heading 'Reasons for the objectives and how the objectives will be achieved'.

The Commonwealth Act provides safeguards in addition to those referred to above. Most notably, applications for an interception warrant must be made to an independent issuing authority officer, namely an eligible Judge

of the Federal Court or nominated member of the Administrative Appeals Tribunal.

In issuing the warrant, the issuing authority must consider the matters set out in sections 46(2) and 46A(2) of the Commonwealth Act, including:

- the privacy of persons likely to be affected;
- the gravity of the offending conduct;
- the probative value of the interception information for the investigation of the offence;
- the extent to which other methods of investigation have been used or are available to the agency;
- the degree of utility of other methods of investigating the offence; and
- the degree to which other methods of investigation would be likely to prejudice the investigation, including through delay.

In addition, interception warrants can only be granted for 'serious offences', defined extensively in section 5D of the Commonwealth Act to include:

- murder, kidnapping, drug importation and terrorism offences;
- offences punishable by a maximum period of at least seven years where the offence involves risk of loss of life or serious injury, serious damage to property in circumstances endangering a person's safety, serious arson, trafficking, serious fraud, serious loss of revenue to state or federal governments, bribery or corruption by a state or federal officer, or organised crime involving certain offences;
- child pornography; 'telecommunications offences'; slavery and people trafficking; money laundering; certain cybercrime offences;
- most serious drug offences under the Commonwealth *Criminal Code*;
- conspiracy and aiding or abetting relating to the commission of serious offences;
- theft of Commonwealth property or abuse of a Commonwealth position; and
- offences against the Commonwealth *Crimes Act 1914* relating to perverting justice.

Consultation

Consultation was undertaken with:

- the Queensland Solicitor-General;
- the Commonwealth Attorney-General's Department and, through that department, the Australian Government Solicitor, Federal Court and Administrative Appeals Tribunal;
- the Department of the Premier and Cabinet;
- the Treasury Department;
- the Queensland Police Service;
- the Crime and Misconduct Commission;
- the Department of Justice and Attorney-General; and
- the Public Interest Monitor.
- Copies of the draft Bill were also provided for comment to the:
- Parliamentary Crime and Misconduct Committee and, through the Committee, the Parliamentary Crime and Misconduct Commissioner;
- Queensland Ombudsman;
- Office of the Director of Public Prosecutions;
- Queensland Bar Association;
- Queensland Law Society;
- Legal Aid Queensland; and
- Queensland Council for Civil Liberties.

Complementary with legislation of the Commonwealth

The Bill complements the Commonwealth *Telecommunications (Interception and Access) Act 1979* and should be read in conjunction with that Act.

Notes on Provisions

Part 1 Preliminary

Clause 1 establishes the short title as the Telecommunications Interception Act 2009.

Clause 2 provides for the commencement of the Bill.

Clause 3 provides that the schedule defines words used in the Bill.

Clause 4 provides that, unless a word is defined in the schedule of the Bill, any definitions provided by the *Telecommunications (Interception and Access) Act 1979* (the Commonwealth Act) apply.

Clause 5 provides that the objective of the Bill is:

- to enable the QPS and CMC to use telecommunications interception as a tool for investigating serious offences;
- achieved by establishing the recording, reporting and inspection regime required under the Commonwealth Act. The provision of this regime will enable the Commonwealth Minister to declare the QPS and CMC to be agencies under the Commonwealth Act.

Part 2 Notification to and appearance of PIM

Clause 6 states that Part 2 of the Bill applies to an officer of the QPS and CMC intending to apply for an warrant issued under Part 2-5 (Warrants authorising agencies to intercept telecommunications) of the Commonwealth Act.

Clause 7 provides that an officer must notify the PIM of any intention to apply for an interception warrant. Subclause (2) provides that if the officer intends to make the warrant application in writing, the officer must give the PIM a copy of the written application and the accompanying affidavit required by section 42 of the Commonwealth Act.

The information required to be given in the affidavit under section 42 of the Commonwealth Act includes:

- facts and other grounds on which the application is based;
- the period for which the warrant is required and justification for the time period;
- the number of previous related interception warrant applications, and the number and use of previous related interception warrants issued; and
- if the application is for a named person, the name or names by which the person is known, and sufficient details to identify the telecommunications device the person is using or likely to use.

Subclause (3) provides that, if the officer intends to make the warrant application by telephone, the officer must give the PIM the information required under section 43 of the Commonwealth Act.

The information required to be given under section 43 of the Commonwealth Act includes:

- details about the circumstances causing the officer to make an urgent application by telephone;
- all the information required to be given in an affidavit under section 42 of the Commonwealth Act; and
- any other information the issuing authority directs.

Clause 8 provides that the officer must disclose fully to the PIM all matters known by the officer, whether favourable or adverse to the issuing of the warrant.

Clause 9 provides that the officer must give the PIM any further information the issuing authority requires of the officer under section 44 of the Commonwealth Act. Section 44 of the Commonwealth Act enables the issuing authority to require further information to be given orally or in writing in connection with the application.

Clause 10 entitles the PIM to appear at a hearing of an application for an interception warrant. The PIM may ask questions of any person giving information to the issuing authority. The PIM may also may make submissions to the issuing authority about the matters that, under sections 46(2)(a) to (f) or 46A(2)(a) to (f) of the Commonwealth Act, the issuing authority is to have regard to in considering whether to issue a warrant. The

PIM may make submissions in person or by phone, fax, email or other reasonable way. Subclause 10(3) provides that the PIM must return to the agency all documents provided to the PIM in the lead up to, or during, the application.

Clause 11 states that information required to be given to the PIM must be given even if there is an obligation imposed by legislation or a rule of law not to disclose it.

Clause 12 provides that the PIM may report any non-compliance with the Bill or Commonwealth Act on the part of the QPS or CMC to the State Minister. Subclause (2) acknowledges the disclosure prohibitions of the Commonwealth Act and provides the report must not contain interception warrant information or lawfully or unlawfully intercepted information. Subclause (3) provides that if the report is about non-compliance on the part of the CMC, the PIM must give a copy of it to the Parliamentary Crime and Misconduct Commissioner and the Parliamentary Crime and Misconduct Committee. If the report is about non-compliance on the part of the QPS, the PIM must give a copy of it to the Police Minister. Copies of clause 12 reports need not be provided to the Commonwealth Minister.

Clause 13 states the *Police Powers and Responsibilities Act 2000* and *Crime and Misconduct Act 2001* provide for the appointment of the PIM and Deputy PIMs but that any functions and powers of the PIM and Deputy PIMs under those Acts do not apply for the purposes of this Bill.

Part 3 Record-keeping and related functions of eligible authorities

Clause 14 requires the chief officers of the QPS and CMC to ensure their agencies keep certain records, including: each approval to exercise the authority conferred by warrants given under section 55(3) of the Commonwealth Act; appointments of officers to be approving officers under section 55(4) of the Commonwealth Act; warrants issued to the authority; copies of documents provided by the PIM to the agency, except for documents returned by the PIM under section 10(3), copies of notifications given under section 59A(2) of the Commonwealth Act; instruments revoking warrants; copies of evidentiary certificates issued under section 61(4) of the Commonwealth Act; and authorisations to

receive intercepted information made under 66(2) of the Commonwealth Act.

Clause 15 requires the chief officers of the QPS and CMC to ensure their agencies make – and under subclause (4) keep - records of matters such as:

- details of each application for an interception warrant, including information provided to the issuing authority and whether the application was issued;
- details about the execution of an interception warrant, including the date and time interception commenced, how long each interception lasted and who carried out the interception;
- details about each restricted record that has been in the agency's possession, including each time the record came into or left the agency's possession and who else outside the agency had possession of it;
- details of each use of the intercepted information;
- details of each communication of the intercepted information to agencies or people outside the agency; and
- details of each occasion intercepted information was given in evidence in a proceeding.

Subclause (2) requires that the records must be made as soon as practicable after a relevant event. Subclause (3) provides that, if an interception warrant names a person, the records must particularise the service in relation to which each interception was undertaken.

Clause 16 provides that, after each interception warrant stops being in force, a report on the use made of the intercepted information and any communication of intercepted information to anyone outside the agency must be provided to the State Minister. The chief officers of the QPS and CMC must provide the report within three months of the warrant no longer being in force. The chief officers of the QPS and CMC must also provide to the State Minister an annual report setting out how many applications for interception warrants were made, how many warrants were issued, particulars of the duration of these warrants, information about the effectiveness of the warrants, and any interceptions conducted without a warrant. The specific details of what is to be provided are set out Part 2-8, Division 2 of the Commonwealth Act.

Clause 17 provides that the State Minister must forward copies of reports provided to the Minister under clause 16 to the Commonwealth Minister.

Clause 18 requires the QPS and CMC to store restricted records securely.

Clause 19 requires the QPS and CMC to destroy restricted records when satisfied they are not likely to be required for any further permitted purpose under the Bill or the Commonwealth Act. However, for this provision, a permitted purpose does not include a purpose connected with an inspection by the inspecting entity. In other words, the responsibility to destroy a restricted record is not displaced by the mere fact that the record has not yet been inspected. Clause 19 is subject to clause 20, which includes a requirement that the QPS and CMC notify the inspecting entity of the intention to destroy the record, and give the inspecting entity the opportunity to inspect the record.

Clause 20 provides that a restricted record must not be destroyed under clause 19 unless:

- the chief officer has received written notice from the Secretary of the Commonwealth Attorney-General's Department that the Commonwealth Minister has inspected the general register entry relating to the relevant warrant; and
- the chief officer has notified the inspecting entity of the intention to destroy the record and the inspecting entity has had the opportunity to inspect the record.

Part 4 Functions and powers of inspecting entity for inspections

Clause 21 provides a definition of officer for the purposes of Part 4.

Clause 22 confers on inspecting entities functions and powers to inspect agency records, monitor agency compliance with provisions of the Bill and report to the State Minister about the results of the inspections. The inspecting entity for the QPS is the PIM; the inspecting entity for the CMC is the Parliamentary Crime and Misconduct Commissioner. This reflects existing legislative oversight arrangements in relation to the two agencies.

Specifically, clause 22 requires the inspecting entity to:

- inspect the agency's records - as required under clause 23 – to ascertain the extent of compliance by the agency's officers with clauses 14 to 16 and 18 to 20; and
- report to the State Minister about the results of the inspections.

Subclause (2) provides that, in relation to the QPS, the inspecting entity in any particular case cannot be the PIM who was consulted in relation to, or appeared at the hearing of, the relevant warrant application.

Subclause (3) makes arrangements for inspection by a deputy PIM if subclause (2) applies.

Subclause (4) provides that a deputy PIM must produce their instrument of nomination or a copy of it if asked by an affected person to do so.

Clause 23 provides that the inspecting entity must inspect the agency's records to determine the extent to which the agency's officers have complied with clauses 14 to 16 and 18 to 20. The inspections must take place at least twice a year, and at least once during the first financial year that the agency is enabled to apply for interception warrants. However, the inspecting entity may inspect the agency's records at any time.

Clause 24 provides that the inspecting entity must report annually to the State Minister about the results of inspections. The annual report must include a summary of inspections conducted in the financial year, particulars of any material deficiencies in agency compliance and particulars of remedial action taken or proposed to be taken to address the deficiencies. However, the inspecting entity may report to the Minister at any time about the results of a Part 4 inspection, and must do so if requested by the Minister.

Subclause (4) provides that the inspecting entity must give the information in the reports prepared under subclauses (1) and (3), other than interception warrant information or lawfully or unlawfully intercepted information, to the agency's chief officer and:

- if the agency is the CMC, to the Parliamentary Crime and Misconduct Committee;
- if the agency is the QPS, to the Police Minister.

Under clause 31, the State Minister must give the Commonwealth Minister copies of reports received by the Minister under subclause (1).

Clause 25 provides that, if the inspecting entity considers an agency officer has contravened the Commonwealth Act or that the chief officer of an

agency has contravened clauses 16 or 20 of this Bill, the inspecting entity may include in the inspection report a report on the contravention. In preparing the report on the contravention, the inspecting entity must allow the chief officer to comment on the report and must include in the report any comments made.

Clause 26 provides that the inspecting entity has the power to enter premises (after notifying the agency's chief officer), access and copy records, and require an agency officer to give information relevant to the inspection.

Further, the chief officer must ensure officers assist the inspecting entity in the performance of the inspecting entity's functions.

Clause 27 provides the inspecting entity with the further power to require, by writing, an officer to give information relevant to an inspection to the inspecting entity in writing or answer questions relevant to the inspection at a reasonable place and time.

Clause 28 provides that a person must answer questions or give information or documents to the inspecting entity even if it would contravene a law, be contrary to the public interest, or tend to incriminate the person or make the person liable to a penalty.

However, subclause (2) provides that the information so provided and any information derived as a result of its provision is not admissible in evidence against the person other than in a prosecution for an offence under clause 35.

Clause 29 provides that, in relation to the information stipulated in the provision, the inspecting entity may give the information to another inspecting entity or deal with the information despite any other law.

Clause 30 enables the inspecting entity and Commonwealth Ombudsman to exchange certain information in certain circumstances.

Part 5 Miscellaneous

Clause 31 provides that the State Minister must provide the Commonwealth Minister copies of reports received by the Minister under clause 24(1).

Clause 32 provides for delegations by the Parliamentary Crime and Misconduct Commissioner. The delegate must produce the instrument of delegation or a copy of it if asked by an affected person to do so.

Clause 33 provides for delegations by the PIM to a deputy PIM, though the PIM cannot delegate a power to report to the Minister. The delegate must produce the instrument of delegation or a copy of it if asked by an affected person to do so.

Clause 34(1) states that a person must not disclose any information or record obtained by the person under the Bill unless the disclosure is made:

- under the Commonwealth Act;
- for the discharge of the person's functions under the Bill;
- to the PIM for the discharge of the PIM's functions under Part 2 (Notification to and appearance of PIM); or
- to an inspecting entity for the discharge of the inspecting entity's functions under Part 4 (Functions and powers of inspecting entity for inspections).

The maximum penalty is 100 penalty units or two years imprisonment.

Subclause (2) provides that subsection (1) applies despite disclosure provisions of another Act.

Subclause (3) provides that subsection (1) does not apply to information received from the PIM under section 12 or from an inspecting entity under section 24(4).

Clause 35 provides that it is an offence, to:

- fail to comply with a direction of the inspecting entity made under section 27; or
- obstruct a person in connection with the exercise of an inspecting entity's functions; or
- give the inspecting entity false or misleading information.

The maximum penalty is 20 penalty units of 6 months imprisonment.

It is not necessary for the prosecution to prove whether the information was false or whether it was misleading; it is sufficient for the complaint to state the information was 'false or misleading'.

Clause 36 provides that the prosecution of an offence against this Bill must be dealt with summarily. The time limitations for the commencement of proceedings are: within 12 months of the commission of the offence; or within 12 months of the offence coming to the complainant's knowledge, but within 2 years of the commission of the offence.

Clause 37 provides that an inspecting entity is protected from civil liability if the inspecting entity's actions are honest and do not involve negligence. The clause does not protect the State from civil liability in cases where the inspecting entity is protected.

Subclause (4) provides that an inspecting entity may not be called to give evidence or produce any document in any proceedings in relation to any matter coming to the inspecting entity's knowledge while performing functions under the Bill.

Clause 38 provides that decisions made under the Bill are not subject to judicial review.

Clause 39 provides that the *Public Records Act 2002* does not apply to an activity or a record under specified provisions of the Bill.

Clause 40 provides that the Governor in Council may make regulations under the Bill.