

1989

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1989

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendments to be Moved on Behalf of the Government)

(Circulated by the authority of the Hon. Lionel Bowen, M.P.,
Deputy Prime Minister and Attorney-General)

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AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT TO THE LAW
AND JUSTICE LEGISLATION AMENDMENT BILL 1989

OUTLINE

The amendments to be moved by the Government to this Bill contain several amendments of a policy nature to the Australian Federal Police Act 1979, the Australian Security Intelligence Organization Act 1979 and the Judiciary Act 1903, as well as some minor consequential and technical amendments to the Customs Act 1901 and the Telecommunications (Interception) Act 1979. The most significant amendments will -

- . add a new Division to Part II of the Australian Federal Police Act 1979 to regulate the use of listening devices by members of the Australian Federal Police (AFP) in the investigation of Commonwealth offences (other than narcotics offences) and ACT offences. The provisions will make it unlawful for a member of the AFP to use a listening device in the investigation of these offences except under a warrant issued by a Judge. A warrant will only be available for the investigation of a serious offence of a specified kind;
- . amend the Australian Security Intelligence Organization Act 1979 to exclude the application of the Privacy Act 1988 where information is given by Commonwealth agencies to the Australian Security Intelligence Organization (ASIO);
- . make a number of minor drafting changes to Division 1A of Part XII of the Customs Act 1901 which regulates the use by members of the AFP and the National Crime Authority (NCA) of listening devices

in the investigation of narcotics offences under that Act by providing the same protection and immunity to Judges who issue warrants under that Division as a Justice of the High Court has in relation to proceedings in that Court; providing for the nominating by the Attorney-General of Federal and ACT Supreme Court Judges to be Judges who can issue warrants under the Division; by adding a definition of "premises" to that Division; and other minor drafting changes;

- . amend the Judiciary Act 1903 to allow the Australian Government Solicitor to give advice to a number of parties in relation to the same matter.

FINANCIAL IMPACT STATEMENT

The amendments will have an insignificant financial impact.

NOTES ON AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT TO
THE LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1989

AMENDMENT (1)

This amendment to subclause 2(2) of the Bill will ensure that proposed Part 1B of the Bill comes into operation on Royal Assent.

AMENDMENT (2)

2. This amendment will insert 2 new Parts into the Bill - Part 1A, Amendments of the Australian Federal Police Act 1979 (the AFP Act) and Part 1B, Amendment of the Australian Security Intelligence Organization Act 1979.

PART 1A - AMENDMENTS OF THE AUSTRALIAN FEDERAL POLICE ACT 1979

Clause 2A - Principal Act

3. Formal.

Clause 2B - Insertion of new heading:

Division 1 - General

4. This clause inserts a new Division heading before section 6 of the Principal Act.

Clause 2C - Insertion of new Division

Division 2 - Use of listening devices in
relation to general offences

5. Subclause 2C(1) inserts a new Division into Part II of the Principal Act to regulate the use of listening devices by members of the AFP in the investigation of Commonwealth offences that are not narcotics offences or in the investigation of ACT offences.

Section 12B - Definitions

6. Proposed section 12B contains the following definitions:

"class 1 general offence" is a general offence in relation to the investigation of which an application for a warrant under proposed subsection 12G(2) may be made. It covers the same non-narcotic offences as those "class 1 offences" in relation to which a warrant may be sought under the Telecommunications (Interception) Act 1979. They are the following Commonwealth and ACT offences -

- . murder, or an equivalent offence;
- . kidnapping, or an equivalent offence; and
- . an offence constituted by aiding, abetting, counselling, procuring, being knowingly concerned in or party to the commission of, or conspiring to commit, an offence of that kind.

The test to be applied by a Judge under proposed subsection 12G(2) for determining whether a warrant should issue for the investigation of a particular offence will vary depending on whether a class 1 or class 2 offence is involved.

"class 2 general offence" is a general offence in relation to which an application for a warrant under proposed subsection 12G(2) may be made. It covers the following Commonwealth and ACT offences -

- . an offence punishable by imprisonment for 7 or more years which involves loss of a person's life, serious personal injury, or serious risk of such loss or injury; serious damage to property in circumstances endangering a person's safety; serious fraud or serious loss to the revenue of the Commonwealth or ACT; and
- . an offence constituted by aiding, abetting, counselling, procuring, being knowingly concerned in or party to the commission of, or conspiring to commit, an offence of that kind.

The definition also covers bribery and corruption offences under the Crimes Act 1914 and the Secret Commissions Act 1905. The Crimes Act offences are judicial corruption (section 32), official corruption in relation to offences (section 33), Judge or magistrate acting oppressively or when interested (section 34), corruption of witnesses (section 37), conspiracy to defeat justice (section 42), attempting to pervert justice (section 43), compounding offences (section 44), fraudulent falsification of records by Commonwealth officer (section 72), corruption and bribery of Commonwealth officer (section 73), corruption and bribery of member of Parliament (section 73A), false returns by Commonwealth officer (section 74) and buying or selling offices (section 88). Offences against the laws of the Australian Capital Territory of trafficking in narcotic drugs and offences against sections 13 (fraudulent falsification of records by Territory officer), 14 (corruption and bribery of Territory officer), 15 (corruption and bribery of member of Legislative Assembly), 16 (false returns by Territory officer) and 20 (buying or selling offices) of the Crimes (Offences Against the Government) Act 1989 (ACT) are also included.

"customs narcotics offence" is an offence punishable under section 235 of the Customs Act 1901 and is not an offence in relation to which a warrant for a listening device may be applied for under the AFP Act. A warrant is obtainable under the Customs Act to use a listening device in the investigation of these offences;

"designated technical officer" refers to a person appointed under proposed section 12E;

"eligible Judge" refers to a Judge whom the Attorney-General has nominated under section 12D to be a Judge to whom an application for a warrant to use a listening device may be made. Only those Judges who are Judges of a court created by the Parliament and who consent may be nominated;

"general offence" is an offence against the law of the Commonwealth (other than a customs narcotics offence) or the law of the ACT. The provisions will make unlawful the use by the AFP without a warrant of listening devices in the investigation of general offences;

"general offence inquiries" is defined to mean inquiries in relation to a general offence that has been committed or that is reasonably suspected of having been committed, and, where there are circumstances giving rise to the suspicion that a general offence is likely to be committed, inquiries in relation to the likely commission of the offence;

"listening device" is defined in the same terms as in Division 1A of Part XII of the Customs Act 1901 as any instrument, device or equipment capable of being used to record or listen to spoken words;

"official" is defined to cover members of the AFP and designated technical officers. Only technical officers who are employed by the AFP (but are not themselves

police officers) will be authorised by the Commissioner under proposed section 12E for the purposes of assisting in the installation, testing and maintenance and recovery of listening devices;

"premises" is defined in similar terms to the definition of premises that is being inserted in Division 1A of Part XII of the Customs Act 1901 by clause 22 of the Bill, and includes aircraft, ships and vehicles.

Section 12C - Application of Division

7. It is proposed that regulations will be made under proposed subsection 12C(1) to ensure that the operation of the Listening Devices Act, 1972 (South Australia) is preserved to the extent that it provides for the application by members of the AFP who are members of the staff of the NCA for listening device warrants under that Act "for the purposes of the investigation of a matter". The circumstances to be prescribed for the purposes of proposed subsection 12C(1) will be limited to the situation where a warrant is issued to such a member in relation to the investigation by the NCA of a Commonwealth offence that is neither a customs narcotics offence nor a class 1 general offence or a class 2 general offence in relation to which a warrant may be sought under proposed section 12G.

8. Proposed subsection 12C(2) has the effect of "disapplying" the listening device provisions where the use of a listening device is regulated under the Telecommunications (Interception) Act 1979.

Section 12D - Judges eligible to issue warrants for use of listening devices

9. Proposed section 12D provides for the nomination by the Minister of Judges to be eligible Judges for the purposes of issuing warrants under section 12G. Only a person who is a Judge of a court created by the Parliament may be nominated to be an eligible Judge, and only if that Judge has consented in

writing to being nominated. Proposed subsection 12D(3) provides that a person who is an eligible Judge has, in relation to the performance of a function or exercise of a power under proposed Division 2, the same protection and immunity as a High Court Justice has in relation to proceedings in the High Court. In order to overcome any possible argument that Parliament is attempting to confer non-judicial power on a court, the section makes it clear that the power to issue warrants for listening devices is conferred on individual persons who happen to be Judges of a court.

Section 12E - Designation of technical officers

10. Proposed section 12E allows the Commissioner to declare persons who are employed by the AFP but who are not police officers to be designated technical officers. The proposed section is similar to provisions being added to section 55 of the Telecommunications (Interception) Act 1979 by clause 44 of the Bill.

Section 12F - Use of listening devices in relation to general offences

11. Proposed subsections 12F(1) to (4) (inclusive) are in similar terms to subsections 219B(1) to (4) (inclusive) of the Customs Act (which allows members of the AFP and NCA to seek warrants to use listening devices in the investigation of narcotics offences). Proposed subsection 12F(1) makes it unlawful for a member of the AFP or a designated technical officer to use a listening device to listen to or record words spoken by a person in the investigation of a Commonwealth (non-narcotics) offence or an ACT offence unless -

- . the member or officer is speaking the words or is a person who the speaker intends that the words should be heard by;
- . the person expressly or impliedly consents to the listening or recording; or

- . where the investigation is of a "class 1 general offence" or a "class 2 general offence", it is done under a warrant issued under section 12G.

12. Proposed subsection 12F(2) makes it unlawful for a person acting by arrangement with a member or designated technical officer to use a listening device unless the person is the speaker of the words or is a person by whom the speaker intends that the words should be heard.

13. Proposed subsection 12F(3) imposes an obligation on the Commissioner of the AFP to take steps to ensure that subsections 12F(1) and (2) are not breached.

14. Proposed subsection 12F(4) ensures that any person to whom subsection 12F(1) or (2) applies does not act unlawfully under any law of a State or Territory where the act is not unlawful under those subsections by reason of the exceptions contained in those subsections.

Section 12G - Warrants for use of listening devices

15. Proposed subsection 12G(1) allows a member of the AFP to apply for the issue of a warrant to use a listening device to target a particular person or particular premises. An eligible Judge may, under proposed subsection 12G(2), issue a warrant authorising the use of a listening device for use in the investigation of a "class 1 general offence" or a "class 2 general offence" in relation to a particular person. In both cases, the Judge must be satisfied, by information on oath, that the person has committed, or is suspected on reasonable grounds of having committed, or of being likely to commit, the offence and that information that could be obtained by the use of a device would be likely to assist inquiries into the commission or likely commission of the offence.

16. The other matters to be considered by the Judge depend on whether the offence involved is a "class 1 general offence" or

"class 2 general offence". In both cases, the Judge must be satisfied, having regard to the matters set out in proposed subsection 12G(6), that the information available from the use of a listening device could not be obtained by the use of alternative methods of investigation otherwise available to the AFP. If it is a class 2 general offence, the Judge must, in addition to being satisfied of that fact, also have regard to the matters set out in proposed subsection 12G(7) in deciding whether to issue the warrant.

17. The warrant may authorise officials to enter any premises in which the person is, or is likely to be, in order to install, maintain, test, use or recover a listening device (proposed subsection 12G(3)) and authorise the use of a listening device in premises situated anywhere in Australia.

18. Proposed subsection 12G(4) allows the Judge to issue a warrant authorising the use of a listening device in relation to premises anywhere in Australia where the Judge is satisfied by information on oath that the premises are suspected of having been or of being likely to be used in the commission of a "class 1 general offence" or a "class 2 general offence" and that the information that could be obtained by the use of a device in the premises will be likely to assist in inquiries into that offence. In both cases, the Judge must be satisfied, having regard to the matters set out in proposed subsection 12G(6), that the information available from the use of a listening device could not be obtained by the use of alternative methods of investigation otherwise available to the AFP. If it is a class 2 general offence, the Judge must, in addition to being satisfied of that fact, also have regard to the matters set out in proposed subsection 12G(7) in deciding whether to issue the warrant.

19. Under proposed subsection 12G(5) the warrant may authorise entry to the premises for the purpose of installing, maintaining, testing, using or recovering the device.

20. Proposed subsection 12G(6) sets out the matters to which a Judge is to have regard when considering whether to issue a warrant. They involve an assessment by the Judge of the use of alternative methods of conducting inquiries which would not involve the use of a listening device, including whether those methods have been used or are capable of being used by the AFP, whether information which could be obtained from using a listening device could be obtained by these alternative methods and how much use of these alternative methods would prejudice inquiries. Under proposed subsections 12G(2) and (4), the Judge must be satisfied that, taking these matters into account, information available from a listening device cannot be obtained by these alternative methods.

21. Proposed subsection 12G(7) sets out the additional matters to which a Judge is to have regard in deciding to issue a warrant to use a listening device where the investigation involves a "class 2 general offence". These are how much any person's privacy will be interfered with by the use of a listening device, the gravity of the conduct involved and the extent to which information from the listening device could assist in inquiries.

22. Warrants under the section must be signed by the Judge, be in accordance with the prescribed form (proposed subsection 12G(8)) and may be subject to any conditions or restrictions specified (proposed subsection 12G(9)). Where a warrant authorises entry on premises, the warrant is to state whether entry can be at any time or only during specified hours. The Judge may also specify that entry may be made without permission first being sought (proposed subsection 12G(10)). Proposed subsection 12G(11) limits the time during which a warrant under the section may remain in force to not more than 6 months, but proposed subsection 12G(12) states that this does not prevent the issue of a further warrant.

Section 12H - Information to be given in support of application for warrant

23. Under proposed section 12H, information given to a Judge for the purpose of an application for a warrant may be given orally or in any other manner, but must include material on which the applicant considers it necessary that the warrant should issue.

Section 12J - Exercise of powers under warrant

24. This section provides that only members of the AFP or designated technical officers who are authorised by the Commissioner or by a person appointed by the Commissioner, may exercise the authority under a warrant. Designated technical officers can only do so when providing technical assistance to a member who is exercising the authority conferred by the warrant. Providing assistance includes doing any act in connection with the installation or removal of a listening device and the maintenance, testing or use of a listening device. It is necessary to make special provision for technical officers so that they do not act unlawfully if they happen to listen to a conversation while providing technical assistance to an AFP member. The provisions are in similar terms to those added to section 55 of the Telecommunications (Interception) Act 1979 by clause 44 of the Bill.

Section 12K - Discontinuance of action before expiration of warrant

25. Proposed section 12K requires the revocation of the warrant and the taking of steps necessary to ensure that action under the warrant is discontinued where the Commissioner is satisfied that the grounds on which the warrant was issued have ceased to exist.

Section 12L - Application of certain provisions of Customs Act

26. The effect of this proposed section is to apply a number of provisions in Division 1A of Part XII of the Customs Act 1901 in relation to the use of listening devices under the AFP

Act. The proposed section applies sections 219F, 219G, 219H and 219K of the Customs Act with appropriate amendments so that -

- . the communication by a person of information obtained by the use of a listening device in the investigation of a general offence is prohibited except in specified circumstances. Those circumstances are, where communication is made for the purposes of the investigation of that general offence; where the information relates to an offence punishable by imprisonment for a period of 3 or more years, the communication is made to a State or Territory police force or to the NCA; and where the information relates to activities prejudicial to security, the communication is made to ASIO (subsections 219F(1) and (2) as applied). The offence covers not only the communication of information obtained by means of a listening device under a warrant in relation to a "class 1 general offence" or a "class 2 general offence" inquiries but also by means of a listening device used in inquiries into other general offences. This use is of course not unlawful if either proposed paragraph 12F(a), (b) or (c) apply;
- . a person can communicate information obtained from a listening device used for the investigation of a general offence for a purpose connected with a decision whether to commence a "relevant proceeding" and the conduct of such a proceeding. A "relevant proceeding" is a prosecution for any offence punishable by imprisonment for 3 or more years, a proceeding for confiscation, forfeiture or imposition of a pecuniary penalty in connection with such an offence and extradition proceedings. A court's discretion, to exclude information obtained from a listening device where it would be unfair to

the accused to admit the information, is retained (subsections 219F(3) and (4) as applied);

- . the Commissioner of the AFP is obliged to destroy a record or copy made by virtue of a warrant authorising use of a listening device where satisfied that it cannot assist in the investigation of a general offence, be used in relation to "relevant proceedings" as described above, and will not be required for the purpose of communicating it to another police force or the NCA (section 219G as applied);
- . warrants, documents used in relation to applications for warrants, and instruments of revocation are retained in the records of the AFP (section 219H as applied);
- . the Minister is supplied with copies of those documents and with a report on the use made by members of the AFP of information obtained by using a listening device and the communication of such information (section 219K as applied).

27. Subclause 2C(2) is a transitional provision which has the effect of altering the reference to "staff member" in proposed section 12E of the Australian Federal Police Act 1979 to "person under authority of the Commissioner" pending the enacting of the Australian Federal Police Legislation Amendment Bill (No. 2) 1989.

PART 1B - AMENDMENT OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANIZATION ACT 1979

Clause 2D - Principal Act

28. Formal.

Clause 2E - Insertion of new section

Section 93A - Application of Privacy Act

29. Proposed subsection 93A(1) provides that the Privacy Act 1988 does not apply to an act or practice of an agency to the extent that the act or practice involves the disclosure of information to ASIO.

30. Proposed subsection 93A(2) provides that, for the purposes of section 93A, an agency is to be taken to have done an act, or engaged in a practice, if the agency would, for the purposes of the Privacy Act 1988, be taken to have done the act or engaged in the practice.

31. Proposed subsection 93A(3) provides that, in section 93A, "agency" has the same meaning as in the Privacy Act 1988 and that the reference to information includes "personal information" within the meaning of that Act.

AMENDMENT (3)

32. This amendment substitutes the amendment to Division 1A of Part XII of the Customs Act 1901 in clause 22 of the Bill and adds 4 new amendments to Division 1A of that Act.

Clause 22 - Interpretation

33. This clause -

- . amends the definition of Judge to refer to a Judge whom the Attorney-General has nominated under proposed section 219AA to be a Judge to whom an application for a warrant to use a listening device

may be made. These Judges have to consent before they can be nominated under the section;

- . substitutes the definition of "prescribed offence" in subsection 219B(1) of the Principal Act to make it clear that all narcotics offences, whether or not punishable by imprisonment for 3 years or more, are prescribed offences;
- . inserts a definition of "premises" into subsection 219B(1) to make it clear that this expression, when used in the listening device provisions of that Act (Division 1A of Part XII), includes any land, structure, building, ship, vehicle or aircraft. A listening device warrant may be issued in relation to premises suspected of being used in the commission of a narcotics offence or in relation to a person suspected of committing such an offence. In each case, the warrant may authorise entry on premises for the purpose of installing, maintaining, using or recovering a listening device or part of a listening device.

Clause 22A - Insertion of 2 new sections

Section 219AA - Certain Judges eligible to issue warrants for use of listening devices

34. Proposed section 219AA provides for the declaration by the Minister of Judges to be eligible Judges for the purposes of the issuing of warrants under section 219B. Only a person who is a Judge of the Federal Court or the ACT Supreme Court may be nominated to be an eligible Judge, and only if that Judge has consented in writing to being nominated. In order to overcome any possible argument that Parliament is attempting to confer non-judicial power on a court, the section makes it clear that the power to issue warrants for listening devices is conferred on individual persons who happen to be Judges of a specified court. As there is no

legal impediment to conferral of a non-judicial power on a Judge of a State Supreme Court or of the Northern Territory Supreme Court where an arrangement has been made by the Governor-General under section 11 of the Customs Act, proposed subsection 219AA(2) is limited to Judges of the Federal Court and of the ACT Supreme Court.

Section 219AB - Immunity of Judges

35. Proposed section 219AB provides that a person who is a Judge has, in relation to the performance of a function or exercise of a power under Division 1A, the same protection and immunity as a High Court Justice has in relation to a High Court proceeding.

Clause 22B - Use of listening devices

36. This clause amends subsection 219B(12) of the Principal Act. That subsection "disapplies" the listening device provisions in Division 1A where use of a listening device would constitute an interception under the Telecommunications (Interception) Act 1979. As a consequence of the amendments made to that Act which came into operation on 1 July 1989, the reference in that subsection to the interception of a communication passing over a system controlled by Telecom now requires minor amendment. This clause makes the necessary alteration by referring to the interception of a communication within the meaning of that Act.

Clause 22C - Certain information not to be disclosed

37. This clause amends subsection 219F(1) of the Principal Act by increasing the penalty for unlawful disclosure of information obtained by using a listening device to a maximum period of imprisonment of 3 years. By reason of the operation of section 4G of the Crimes Act 1914, a court could, in addition or as an alternative, impose a fine not exceeding the amount calculated in accordance with that section. The clause also amends paragraph 219F(2)(a) to clarify for what purpose

information obtained by using a listening device may be communicated by the Commissioner of the AFP and the Chairman of the NCA to other law enforcement agencies. Subsection 219F(2) allows the Commissioner and the Chairman to communicate information obtained by using a listening device which relates, or appears to relate, to the commission of a "prescribed offence" (defined as a narcotics offence or any other offence against a law of the Commonwealth or of a State or Territory punishable by imprisonment for a period of not less than 3 years). As presently drafted the subsection allows the information to be communicated to members of that agency or to members of the other agency "for the purposes of investigations into the offence", or to an officer of the Police Force of a State or Territory.

38. To overcome any argument about the situations in which this information may be communicated, the paragraph is being amended by this clause so that the qualification "for the purposes of the investigation of the offence" applies to the communication by the chief officer of the AFP or NCA to officers of the State or Territory police as well.

Clause 22D - Certain records to be destroyed

39. Section 219G of the Principal Act provides that, where the chief officer of a Commonwealth law enforcement agency is satisfied that a record or copy made by virtue of a warrant authorising use of a listening device will not be required for any of the purposes for which the chief officer is permitted under subsections 219F(2) and (3) to deal with information obtained under a warrant, the record or copy is to be destroyed. In the amendments made to Division 1A by the Crimes Legislation Amendment Act (No. 2) 1988 to allow the NCA to obtain warrants for the use of listening devices in the investigation of narcotics offences, subsection 219F(3) was replaced, rendering the cross-reference in subparagraph 219G(b)(i) to paragraphs 219F(3)(b) and (c) incorrect. The amendment made by the clause is a consequential amendment and replaces subparagraph 219G(b)(i) with a new subparagraph which

refers to the purpose permitted under subsection 219F(3) for which the record or copy may be required.

AMENDMENT (4)

40. This amendment inserts a new Part 10A in the Bill providing for the amendment of the Judiciary Act 1903 by inserting a new subsection 55E(9A).

Clause 28A - Principal Act

41. Formal.

Clause 28B - Australian Government Solicitor

42. Proposed new subsection 55E(9A) will make it clear that the Australian Government Solicitor may give advice to a number of parties in relation to the same matter. However, the present position whereby in litigation the Australian Government Solicitor does not act for parties on opposite sides of the record will not be affected. The parties for whom the Australian Government Solicitor is or may be authorised to act are set out in subsection 55E(3) of the Judiciary Act.

AMENDMENT (5)

43. This amendment to clause 44 of the Bill (which amends section 55 of the Telecommunications (Interception) Act 1979) substitutes new proposed subsections 55(7) and (8) of that Act consequential to changes made to the Australian Federal Police Act 1979 by the Australian Federal Police Legislation Amendment Bill (No. 2) 1989.

AMENDMENT (6)

44. This amendment adds a transitional provision to clause 44 of the Bill and has the effect of altering the reference to "staff member" in proposed subsections 55(7) and (8) of the Telecommunications (Interception) Act 1979 to "a person under the authority of the Commissioner" pending the enacting of the Australian Federal Police Legislation Amendment Bill (No. 2) 1989.



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