

**Inquiry into the provisions into the  
Telecommunications (Interception and Access) Amendment Bill 2008**

**Answers to questions on notice**

***Balance of Probabilities versus the use of the term likely***

In response to the question on notice from the Committee as to whether the Department would be willing to look at changing the test from 'likely to use' to 'on the balance of probabilities', the Department considers that 'likely to use' is an appropriate test to enable either the issuing of a warrant or the addition of services or devices to named person warrants.

The 'likely to use' expression in section 46A provides a mechanism that enables intelligence gathering where something is likely to occur in the future. Human action is difficult to predict. However, in the context of the TIA Act, the term 'likely' should be interpreted as being analogous with a 'real risk'<sup>1</sup> or 'probable'<sup>2</sup> that the named person is using or likely to use a device. To satisfy such a test would require evidence as to why an agency suspects that a person is likely to use a device.

This approach is analogous with the 'likely to engage' test outlined in section 14 of the *Australian Passports Act 2005*. A competent authority can make decisions regarding a request or cancellation based on suspicions that a person would be likely to engage in conduct prejudicial to security or that might endanger the health or safety of other persons.

The Department considers that the 'likely to use' mechanism ensures that the privacy of individuals is protected while appropriately balancing the need for law enforcement and national security agencies to undertake investigations.

***Comparison with UK Telecommunications Interception legislation – RIPA***

In response to the question on notice from the Committee about the provisions relating to the addition of devices to a warrant in the United Kingdom (UK), the provisions in RIPA are mostly comparable to the provisions included in the Telecommunications (Interception and Access) Amendment Bill 2008 (the TIA Bill).

In the UK, the interception of communications is governed by the *Regulation of Investigatory Powers Act 2000* (RIPA). RIPA makes provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, as well as other investigatory techniques. An important difference between RIPA and the Australian *Telecommunications (Interception and Access) Act 1979* (the TIA Act) is that the UK regime is non-evidentiary based. As the intercepted material is not used in evidence, RIPA has different approaches to the collection of information, use and disclosure, and record keeping requirements.

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<sup>1</sup> *Secretary, Department of Employment, Education, Training Youth Affairs v Suzanne Barrett & Anor* (1998) 82 FCR 524

<sup>2</sup> *Australian Telecommunications Commission v Krieg Enterprises Pty Ltd* (1976) 14 SASR 303 at 309-313

The equivalent of device-based named person warrants is provided in RIPA subsections 8(1) and (2) which allow for interception based on person and apparatus (a device). The relevant subsections are extracted below:

### **8 Contents of warrants**

- (1) An interception warrant must name or describe either—
  - (a) one person as the interception subject; or
  - (b) a single set of premises as the premises in relation to which the interception to which the warrant relates is to take place.
- (2) The provisions of an interception warrant describing communications the interception of which is authorised or required by the warrant must comprise one or more schedules setting out the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying the communications that may be or are to be intercepted.

The description of the device, number (service), or any other factor used for identifying the communications to be intercepted are to be contained in a schedule to the warrant.

RIPA section 10 (modification of warrants) allows the addition of devices to an existing warrant. Additionally, a modification may be the deletion of a communications identifier; similar to TIA Act provisions, RIPA requires that if a device/service has been identified as no longer relevant to the investigation it must be removed from the warrant. A modification to a schedule does not extend the original duration of the warrant and the additional schedule will expire at the same time as the warrant expires.

Whilst only a Secretary of State is authorised to issue a warrant, scheduled parts of a warrant may be modified by a Secretary of State or by a senior official acting upon their behalf (this, except in urgent cases, does not include the senior official who made the warrant application). A senior official is defined in subsection 81(1) of RIPA as a member of the Senior Civil Service or a member of the Senior Management Structure of Her Majesty's Diplomatic Service. These designations are equivalent to the Australian Senior Executive Service and represents a similar proportion of the entire Civil Service/Public Service workforce<sup>3</sup>.

As mentioned above, RIPA also provides an additional authorisation process for the modification of a warrant in urgent cases. In urgent cases, and where the warrant specifically authorises it, the person who submitted the application (they are listed in subsection 6(2) and are Heads of Agencies, ie Director-General of the Security Service, the Commissioner of Police of the Metropolis etc) or a subordinate (where identified in the warrant) may modify scheduled parts of the warrant. These modifications are valid for five working days only unless endorsed by a senior official acting on behalf of the Secretary of State.

The Report of the Interception of Communications Commissioner for 2006 for the period 1 April 2006 – 31 December 2006 for interception (although includes both telephonic and postal) indicates that there were 1333 warrants issued (does not include warrants issued by the Foreign Secretary of the Secretary of State for Northern Ireland) and 3489 modifications made.

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<sup>3</sup> In the 2006-2007 year Senior Executive Service officers represented 1.7% of the entire Australian Public Service workforce. In the 2006 reporting year, Senior Civil Service officers represented approximately 1% of the UK Civil Service Workforce (this figure does not include members of the Senior Management Structure of Her Majesty's Diplomatic Service).

While this does not necessarily reflect the number of modifications made to add devices to a warrant, it demonstrates that the legislative authority to modify the schedule of a warrant is widely used in the UK.