

1992

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

LISTENING DEVICES BILL 1992

EXPLANATORY MEMORANDUM

Circulated by authority of

TERRY CONNOLLY MLA

ATTORNEY GENERAL

LISTENING DEVICES BILL 1992

EXPLANATORY MEMORANDUM

The object of this Bill is to prohibit the use of listening devices by ACT private citizens and bodies corporate to record or listen to a private conversation unless consent has been given by the subject/subjects. The intent of the legislation is not to discriminate as between the various types of devices but instead to ensure that devices, regardless of their type, are used only in legitimate circumstances.

Coverage of the proposed legislation does not extend to the Australian Federal Police (AFP) as police are already regulated in the use of listening devices under the Australian Federal Police Act 1979. A provision to bind the Crown, however, is included to ensure that ACT Government agencies are regulated.

The principal offence under this Bill will be the use of a listening device to listen to or record a private conversation to which the person is not a party, or in the circumstance where the person is a party to a private conversation, without the consent of the other parties involved in the conversation.

Other significant provisions in the legislation include the prohibition to communicate or publish a record of a private conversation if obtained without consent.

The legislation also creates an offence to possess a record of a private conversation knowing that it was obtained unlawfully and makes an unlawfully obtained record of a private conversation inadmissible as evidence in any civil or criminal proceedings unless consent of the principal parties is given, or the court determines the admissibility of evidence in serious criminal offences.

The financial implications of the proposed legislation are minimal. It will be enforced and otherwise administered by the Australian Federal Police, the Director of Public Prosecutions and the Courts within existing resources.

The Bill contains the following provisions:

PART I - PRELIMINARY

Clause 1 specifies the short title of the proposed Act.

Clause 2 is definitional. In particular, "private conversation" is defined as a conversation which any of the parties to the conversation desires the conversation to be listened to only by themselves; and a "listening device" applies to any instrument or piece of equipment capable of allowing a person to listen to or record a conversation but precludes a hearing aid used to hear sounds audible only to the human ear as a listening device.

Clause 3 provides that the Crown is bound by the proposed Act but does not render the Crown liable to be prosecuted for an offence.

PART II - OFFENCES

Clause 4 is the principal object of the Act prohibiting the use of a listening device to record or to listen to a private conversation whether or not a person is a party to the conversation. Sub-clause (2) precludes an unlawful act of the use of a listening device if an authority is granted by or under a Commonwealth law or a private conversation has been heard unintentionally by the use of a listening device. Sub-clause (3) allows the use of a listening device if each party to the private conversation consents to a listening device being used by a person party to the conversation, or where a person to a private conversation considers it necessary for the protection of his or her lawful interests (for example, where a person believes he or she may be blackmailed in the course of a pending conversation), or the recording of the private conversation is recorded with the intention of not communicating or publishing the conversation (or a report of the conversation) to any person who is not a party to the conversation. Sub-clause (4) tightens the interpretation of sub-clause (3) regarding the use of a listening device by a party to the private conversation to protect the party's lawful interests to ensure that ACT Government agencies are exempted from using a listening device under the 'lawful interests' provision.

Clause 5 prohibits the communication or publication of a record of a private conversation made by the use of a listening device by a party to a private conversation. Sub-clause (2) allows the communication or publication of a private conversation if it is made to another party to the conversation, or has the consent of each party to the private conversation, or is made in the course of civil or criminal proceedings, or is considered by the party making the communication or publication necessary for the protection of his or her lawful interests, or is made to a person who is believed by the party to have a reasonable interest in the conversation, or is made by an authority granted by or under a Commonwealth law. Sub-clause (3), similar to sub-clause 4(4),

tightens the interpretation exempting ACT Government agencies from using a listening device by or on behalf of the ACT Government's lawful interests.

Clause 6 prohibits the communication or publication of a private conversation which has come to a person's knowledge as a result of the unlawful use of a listening device if the communication or publication contravenes clause 4 or does not comply with the circumstances in clause 4, that is, the unintentional hearing of a private conversation by a listening device, or each principal party to the private conversation consents to the use of a listening device, or a principal party considers the use of a listening device necessary to protect his or her lawful interests or the recording of the private conversation is not intended to be published or communicated to any person who is not a party to the conversation. Stipulating the circumstances in clause 4, *inter alia*, safeguards the potential for a record of a private conversation that was recorded with the intention of not further communicating/publishing the conversation (or a report of the conversation) after the record of the private conversation has been made.

Clause 7 prohibits a person possessing a record of a private conversation knowing that it has been obtained by the unlawful use of a listening device unless the possession of the record relates to proceedings for an offence against the Act, or consent of each principal party to the conversation has been obtained for the possession of a listening device by a person, or as a result of a communication or publication of the record to that person in circumstances that do not constitute an offence against the Act.

Clause 8 prohibits the manufacture, supply or possession of a listening device for unlawful use. This provision will deter persons from using the ACT as a dumping ground for or distribution point of unlawful listening devices.

PART III - EVIDENCE

Clause 9 is an interpretation provision in regard to giving evidence of a private conversation and includes a reference to the production of a record of such a conversation.

Clause 10 renders evidence inadmissible in civil or criminal proceedings if it was obtained by a person by the unlawful use of a listening device. Sub-clause (2), enables any such evidence to be admissible if, *inter alia*, each principal party to the conversation consents to the evidence being given; in proceedings for an offence against the Act, or a court determines the admissibility of evidence in serious criminal offences. Sub-clause (3) exempts the admissibility of evidence obtained by the use of a listening device by a Government agency acting by or on behalf of the ACT Government. Sub-clause 4 provides guidelines to the court in determining whether to admit evidence. Sub-clause (5) enables the court to forbid the publication of any evidence (or any report of any evidence) admitted in proceedings to ensure

that no further dissemination occurs of information obtained by the use of a listening device .

Clause 11 provides for the establishment of the state of mind of a body corporate or a natural person in relation to particular conduct for the purposes of a prosecution for an offence against the proposed Act.

PART IV - ENFORCEMENT

Clause 12 enables a court, in addition to any penalty the court imposes, to order the forfeiture or destruction of listening devices or records of a private conversation to which an offence relates or which was obtained by the use of a listening device. Sub-clause (2) requires the court to give notice and hear persons as the court thinks fit prior to making a forfeiture or destruction order. Sub-clause (3) is an appeal provision and sub-clause (4) allows a police officer to seize a listening device or record in order to give effect to the court order.

Clause 13 provides penalties for a body corporate convicted of an offence against the Act.

Clause 14 provides for regulations to be made to exempt a person from the proposed Act.

Clause 15 authorises the making of regulations by the Executive and the penalties for offences which may be prescribed by regulations.