

# TELECOMMUNICATIONS (INTERCEPTION CAPABILITY AND SECURITY) BILL

## CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: TELECOMMUNICATIONS (INTERCEPTION CAPABILITY AND SECURITY) BILL

3 MAY 2013

1. We have considered whether the Telecommunications (Interception Capability and Security) Bill (PCO 17379/3.0) ('the Bill') is consistent with the New Zealand Bill of Rights Act 1990 ('Bill of Rights Act'). We understand that the Bill is likely to be considered by Cabinet at its meeting on Monday, 6 May 2013.

2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching this conclusion, we have considered the consistency of the Bill with ss 14 (freedom of expression), 21 (unreasonable search and seizure), and 27(1) (right to natural justice) of the Bill of Rights Act. Our analysis under those sections is set out below.

## THE BILL

3. The Bill repeals and replaces the Telecommunications (Interception Capability) Act 2004. The main objectives of the Bill are to ensure that interception obligations are clear and reflect the changing telecommunications structure and that network operators are obliged to engage with the government on network security matters. To that end, the Bill sets up a framework for network operators and the government to work together where matters of network security intersect with New Zealand's national security and economic well-being.

## CONSISTENCY WITH THE BILL OF RIGHTS ACT

### Section 14 - Freedom of Expression

4. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>1</sup> We have identified some clauses in the Bill that may limit s 14.

5. The Bill requires all network operators to register and provide some basic information to the government for the purposes of the Act. The Bill also provides surveillance agencies with the power to request information. The Ministry of Business, Innovation & Employment has advised that this power is to be used to obtain technical or business information about the network operator. A network operator must comply with a request for information even if

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<sup>1</sup> *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

compliance involves a disclosure of commercially sensitive information or a breach of an obligation of confidence.

6. It is arguable whether the disclosure requirements in the Bill amount to compelled 'expression' for the purposes of s 14 of the Bill of Rights Act because network providers are not required to express opinions or ideas but simply to provide factual information. We have, nevertheless, considered whether the relevant clauses are justifiable under s 5 of the Bill of Rights.

7. The disclosure of relevant information by network providers is designed to enable surveillance agencies to investigate, respond to and enforce national security matters, and serious criminal offences, to ensure public safety and security. This is an important and significant objective. Given the information asymmetry between the agency and the network operator, there appears to be a rational and proportionate connection between the powers and the objective.

## **Section 21 - Search and Seizure**

8. Section 21 of the Bill of Rights Act affirms the right to be secure against unreasonable search or seizure, whether of the person, property, correspondence or otherwise.

9. The Bill requires network operators to provide access to their network for interception equipment when presented with a warrant by a surveillance agency. These provisions do not appear to limit the right to be free from unreasonable search and seizure because the Bill does not amend the substantive law applicable to search and surveillance powers. It simply requires a network operator to provide access to its network for otherwise lawful search and surveillance activity (for example, in the execution of a warranted search power).

10. The Bill also enables minor non-compliance to be dealt with by way of breach notice. The notice may ask a network operator to consent to the surveillance agency entering the premises for the purpose of gathering evidence. These powers appear to be reasonable in terms of s 21 of the Bill of Rights Act, as they are necessary to monitor compliance with the Act.

## **Section 27 (1) - Right to Natural Justice**

11. Section 27(1) of the Bill of Rights Act provides that every person whose interests are affected by a decision by a public authority has the right to the observance of the principles of natural justice.

12. Section 27(1) is engaged by those provisions in the Bill that require a court, in proceedings relating to the administration and enforcement of the Bill and on request by the Attorney-General, to receive or hear classified security information in the absence of one or more of the defendants or the defendant's lawyers. Classified security information is defined in the Bill and includes:

- information that might identify the type of operational methods available to a surveillance agency;
- information about operations proposed to be undertaken by a surveillance agency; and
- information for which disclosure is likely to prejudice the security or defence of New Zealand, or endanger the safety of any person.

13. In considering whether these provisions are justifiable under s 5 of the Bill of Rights Act we take into account that they would apply only to applications for a compliance order or a pecuniary penalty order against telecommunications providers.

14. The Bill also allows the court to appoint a barrister or solicitor (with appropriate security clearance) as a special advocate to represent the defendant's interests. The special advocate can have access to the classified security information. The court may also approve a summary of the classified security information to be given to the defendant.

15. Given the safeguards set out above and the need to keep classified security information confidential, we consider that the limitation to s 27 (1) is justifiable.

## **CONCLUSION**

16. We have therefore concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

Jeff Orr

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**Office of Legal Counsel**

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