

A BILL

entitled

CONSULTATION DRAFT - TELECOMMUNICATIONS AMENDMENT BILL

Citation

1 This Act, which amends the Telecommunications Act 1986 (the “principal Act”), may be cited as ....

Inserts new Part IVA

2 The principal Act is amended by inserting immediately after Part IV the following—

“PART IVA

COMMUNICATIONS ASSISTANCE FOR LAW  
ENFORCEMENT

Definitions

28C In this Part—

“call-identifying information” means dialing or signalling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any telecommunication apparatus, facility or service of a Carrier;

“commercial mobile service” means any mobile telecommunication service that is provided for profit and makes interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public;

“electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo-electronic or photo-optical system, but does not include—

- (a) any oral communication;
- (b) any communication made through a tone-only paging device;
- (c) any communication from a tracking device; or
- (d) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

“facility” means any facility, telecommunication apparatus or other thing that is used for telecommunications or for any operation directly connected with telecommunications;

“mobile service” means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes—

- (a) both one-way and two-way radio communication services; and
- (b) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation;

“pen register” means a device or process which records or decodes dialing, routing, addressing, or signalling information (other than the contents of a communication) transmitted by an instrument or facility from which a wire or electronic communication is transmitted, but does not include—

- (a) any device or process used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider; or
- (b) any device or process used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business;

“telecommunication apparatus” means any telecommunication apparatus the principal functions of which are one or more of the following—

- (a) the switching or routing of communications;
- (b) the input, capture, storage, organization, modification, retrieval, output or other processing of communications;
- (c) the control of the speed, code, protocol, content, format, switching or routing or similar aspects of communications; or
- (d) any other function that is similar to one described in paragraphs (a) to (c);

“telecommunication support services” means a product, software, or service used by a Carrier for the internal signalling or switching functions of its telecommunications network;

“trap and trace device” means a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing and signalling information (other than the contents of a communication) that is reasonably likely to identify the source of a wire or electronic communication.

#### Assistance capability requirements

28D (1) Subject to subsections (2) to (5), a Carrier shall ensure that its telecommunication apparatus, facilities and services that

provide a customer or subscriber with the ability to originate, terminate or direct communications are capable of—

- (a) expeditiously isolating and enabling the Police, pursuant to a court order or other lawful authorization, to intercept, to the exclusion of any other communications, all wire and electronic communications carried by the Carrier within a telecommunication service area to or from telecommunication apparatus, facilities, or services of a subscriber of such Carrier—
  - (i) concurrently with their transmission to or from the subscriber's telecommunication apparatus, facility or service; or
  - (ii) at such later time as may be acceptable to the Police;
- (b) expeditiously isolating and enabling the Police, pursuant to a court order or other lawful authorization, to access call-identifying information that is reasonably available to the Carrier—
  - (i) before, during or immediately after the transmission of a wire or electronic communication (or at such later time as may be acceptable to the Police); and
  - (ii) in a manner that allows it to be associated with the communication to which it pertains;
- (c) delivering intercepted communications and call-identifying information to the Police, pursuant to a court order or other lawful authorization, in a format such that they may be transmitted by means of telecommunication apparatus, facilities, or services procured by the Police to a location other than the premises of the Carrier; and
- (d) facilitating authorized communications interceptions and access to call-identifying information unobtrusively and with a minimum of interference

with any subscriber's telecommunications service and in a manner that protects—

- (i) the privacy and security of communications and call-identifying information not authorized to be intercepted; and
- (ii) information regarding the interception by the Police of communications and Police access to call-identifying information.

(2) This section does not authorize the Police—

- (a) to require any specific design of telecommunication apparatus, facilities, services, features, or system configurations to be adopted by any Carrier or provider of telecommunication support services; or
- (b) to prohibit the adoption of any telecommunication apparatus, facility, service or feature by any Carrier or provider of telecommunication support services.

(3) The requirements of subsection (1) do not apply to telecommunication apparatus, facilities and services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting Carriers.

(4) In emergency or exigent circumstances, a Carrier at its discretion may comply with subsection (1)(c) by allowing monitoring at its premises if that is the only means of accomplishing the interception or access.

(5) A Carrier that—

- (a) provides a commercial mobile service offering a feature or service which allows subscribers to redirect, hand off or assign their wire or electronic communications to another service area or another Carrier or to utilize facilities in another service area or of another Carrier; and
- (b) had been providing assistance for the interception of wire or electronic communications or access to call-identifying information pursuant to a court order or

other lawful authorization but no longer has access to the content of such communications or call-identifying information within the service area in which interception has been occurring as a result of the subscriber's use of such a feature or service,

shall ensure that information is made available to the Police (before, during or immediately after the transfer of such communications) identifying the provider of a wire or electronic communication service that has acquired access to the communications.

#### Capacity requirements

28E (1) The Minister shall, after consulting with the Minister responsible for public safety, publish in the Gazette a notice of —

- (a) the actual number of communication interceptions, pen registers, and trap and trace devices, representing a portion of the maximum capacity set forth under paragraph (b), that the Minister responsible for public safety estimates the Police may conduct and use simultaneously by the date that is three years after the date of publication of the notice; and
- (b) the maximum capacity required to accommodate all of the communication interceptions, pen registers, and trap and trace devices that the Minister responsible for public safety estimates the Police may conduct and use simultaneously after the date that is three years after the date of publication of the notice.

(2) Within one year after the publication of a notice under subsection (1), a Carrier shall ensure that its systems are capable of accommodating simultaneously the number of interceptions, pen registers, and trap and trace devices set forth in the notice under subsection (1)(a).

(3) Within three years after the publication of a notice under subsection (1), a Carrier shall ensure that it can accommodate expeditiously any increase in the actual number of communication interceptions, pen registers, and trap and trace devices that the

Police may seek to conduct and use, up to the maximum capacity requirement set forth in the notice under subsection (1)(b).

(4) The Minister responsible for public safety may from time to time, after consulting with the Minister, vary the maximum capacity requirement issued under subsection (1)(b) and the date for compliance with the varied requirement and the Minister shall publish a notice of any such variance in the Gazette.

#### Systems security and integrity

28F A Carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization.

#### Cooperation of providers of telecommunication support services

28G (1) A Carrier shall consult, as necessary, in a timely fashion with providers of telecommunication support services for the purpose of ensuring that current and planned telecommunication apparatus, facilities, and services comply with the requirements referred to in sections 28D and 28E(2) and (3).

(2) A provider of telecommunication support services shall, on a reasonably timely basis and at a reasonable charge, make available to Carriers using its telecommunication apparatus, facilities, or services such features or modifications as are necessary to permit such Carriers to comply with the requirements of sections 28D and 28E(2) and (3).

#### No degradation of capabilities

28H A Carrier that meets, in whole or in part, a requirement referred to in sections 28D or 28E(2) or (3) in respect of telecommunication apparatus that the Carrier operates shall continue to so meet that requirement.

#### Maintaining capabilities in respect of new services

28I A Carrier that meets, in whole or in part, a requirement under sections 28D or 28E(2) or (3) in respect of telecommunication

apparatus that the Carrier operates in connection with any of the Carrier's telecommunication services shall meet that requirement to the same extent in respect of any new service that the Carrier begins to provide using that telecommunication apparatus.

#### Beginning to operate telecommunication apparatus

28J (1) A Carrier that begins to operate any telecommunication apparatus for the purpose of providing telecommunication services shall meet the requirements under sections 28D and 28E(2) and (3), whether by means of the telecommunication apparatus itself or by any other means.

(2) Subsection (1) does not apply in respect of telecommunication apparatus that a Carrier acquires from another Carrier and operates in order to continue to provide the same telecommunication service to approximately the same users.

(3) Notwithstanding subsection (2), the acquiring Carrier shall continue to meet any requirement referred to in subsection (1) that the Carrier from whom the telecommunication apparatus was acquired was obligated to meet.

#### New software

28K (1) When a Carrier installs new software for any telecommunication apparatus that the Carrier operates, the Carrier shall meet the requirements under sections 28D and 28E(2) and (3) in respect of that telecommunication apparatus to the extent that the Carrier would be enabled to meet those requirements by the installation of the software in the form available from the software's manufacturer that would most increase the Carrier's ability to meet those requirements.

(2) Subsection (1) applies even if the form of the software in question would require the Carrier to acquire additional software licences or telecommunications facilities to achieve that increased ability.

#### Maximum capacity limit

28L A Carrier is not required, under sections 28H to 28J, to increase the Carrier's capability to enable simultaneous

interceptions beyond the maximum capacity limit referred to in section 28E.

#### Order suspending obligations

28M (1) The Minister may, by order made on the application of a Carrier, suspend in whole or in part any obligation of the Carrier to meet a requirement under section 28D or 28E(2) or (3) that would arise from the operation of section 28I or 28J.

(2) Before making an order, the Minister shall take into account the public interest in national security and law enforcement and the commercial interests of the Carrier as well as any other matter that the Minister considers relevant.

(3) The Statutory Instruments Act 1977 does not apply to an order issued under subsection (1) in respect of an individual Carrier.

#### Ministerial directives

28N (1) The Minister may, at the request of the Minister responsible for public safety, if in the Minister's opinion it is necessary to do so, issue a directive to a Carrier requiring that Carrier—

- (a) to comply with any obligation under sections 28D and 28E(2) and (3) in a manner or within a time that the Minister specifies;
- (b) to comply, in a manner or within a time that the Minister specifies, with any confidentiality or security measures respecting interceptions that the Minister specifies; or
- (c) to meet a requirement under section 28D or 28E(2) or (3) in respect of telecommunication apparatus operated by the Carrier that the Carrier would not otherwise be required to meet.

(2) Section 6 of the Statutory Instruments Act 1977 does not apply to a directive issued under subsection (1).

Mandatory reporting — acquisition of telecommunication apparatus

28O (1) A Carrier that acquires telecommunication apparatus referred to in subsection 28J(2) shall, before using it in providing telecommunication services, submit to the Minister a report containing the following information—

- (a) the prescribed information concerning the extent to which the Carrier meets the requirements under sections 28D and 28E(2) and (3) in respect of the telecommunication apparatus; and
- (b) any prescribed information relevant to the administration of this Act.

(2) A Carrier shall, at the request of the Minister, submit a report or further report in the form and manner, and within the period, that the Minister specifies containing the information referred to in paragraphs (1)(a) and (b) and any additional related information that the Minister specifies.

(3) Every report submitted under this section must include a written statement certifying that it does not contain any untrue statements or omissions of material facts, that it fairly presents the Carrier's operations at the time of submission and that the signatory has taken steps to ensure the report's accuracy and promises to correct any material error that is detected in the report after its submission and to submit a revised report to the Minister as soon as possible, with another similar written statement accompanying it.

(4) The statement must be signed—

- (a) if the Carrier is a corporation, by one of its officers or directors; and
- (b) in any other case, by an individual who is an owner of the Carrier or by an officer or a director of a corporation that is an owner of the Carrier.

Exemption order

28P (1) The Minister may, after consultation with the Minister responsible for public safety, by order, exempt any class of Carrier from all or part of the obligations under sections 28D, 28E(2) and (3), 28H to 28J, 28O or under any regulation made for the purposes of any of those sections.

(2) Before making an order under subsection (1) the Minister shall take into consideration—

- (a) whether compliance with the assistance capability requirements is reasonably achievable through application of technology available within the compliance period;
- (b) the extent to which the exemption would adversely affect national security or law enforcement;
- (c) whether the Carriers can comply with the obligations from which they would be exempted;
- (d) whether the costs of compliance with those obligations would have an unreasonable adverse effect on the business of the Carrier; and
- (e) whether compliance with those obligations would unreasonably impair the provision of telecommunication services to the public or the competitiveness of Bermuda's telecommunications industry.

(3) An order under this section shall be subject to such conditions as the Minister may impose and shall extend for no longer than the earlier of—

- (a) the date determined by the Minister as necessary for the Carrier to comply with the assistance capability requirements; or
- (b) the date that is two years after the date on which the order was granted.

Extension of compliance date for telecommunication apparatus, facilities and services

28Q (1) A Carrier proposing to install or deploy, or having installed or deployed, any telecommunication apparatus, facility or service prior to the date that this section comes into operation may petition the Minister for one or more extensions of the deadline for complying with the requirements under section 28D.

(2) The Minister may, after consultation with the Minister responsible for public safety, grant an extension if the Minister determines that compliance with the requirements under section 28D is not reasonably achievable through application of technology available within the compliance period.

(3) An extension under this subsection shall extend for no longer than the earlier of—

- (a) the date determined by the Minister as necessary for the Carrier to comply with the assistance capability requirements; or
- (b) the date that is two years after the date on which the extension is granted.

Enforcement orders

28R (1) A court that authorized an interception or the use of a pen register or a trap and trace device by a particular Carrier or, the Supreme Court, on application by the Attorney-General in respect of any other Carrier, may issue an enforcement order—

- (a) directing the Carrier to comply with any of the requirements of any of sections 28D, 28E(2) and (3) and 28H to 28K forthwith; or
- (b) directing a provider of support services to the Carrier to furnish forthwith any modifications necessary for the Carrier to comply with the requirements of section 28D or 28E(2) or (3).

(2) The court may only issue an order under subsection (1) if the court finds that—

- (a) the Carrier has failed to comply with any of sections 28D, 28E(2) or (3) or 28H to 28K;
- (b) alternative technologies or capabilities or the facilities of another Carrier are not reasonably available to the Police for implementing the interception of communications or access to call-identifying information; and
- (c) compliance with the requirements of this Part is reasonably achievable through the application of available technology to the telecommunication apparatus, facility or service at issue or would have been reasonably achievable if timely action had been taken.

(3) Upon issuing an order under subsection (1), the court shall specify a reasonable time and conditions for complying with its order, considering—

- (a) the good faith efforts of the Carrier or provider to comply in a timely manner;
- (b) any effect on the Carrier's or provider's ability to continue to do business;
- (c) the degree of culpability of the Carrier or provider or their delay in making efforts to comply; and
- (d) such other matters as justice may require.

#### Civil penalty

28S (1) A court that issues an order under section 28R against a Carrier or a provider of telecommunication support services may impose a civil penalty of up to \$10,000 per day for each day—

- (a) after the order is issued that the Carrier or provider is in contravention of it; or
- (b) after such future date as the court may specify that the Carrier or provider is in contravention of the order.

(2) In determining whether to impose a civil penalty and its amount, the court shall take into account—

- (a) the nature, circumstances, and extent of the contravention and the Carrier or provider's degree of culpability;
- (b) the Carrier or provider's ability to pay and any effect the penalty may have on their ability to continue to do business;
- (c) the Carrier or provider's good faith efforts to comply in a timely manner and the length of any delay in undertaking efforts to comply; and
- (d) such other matters as justice may require.

Record keeping requirements

28T (1) A Carrier shall keep—

- (a) accurate records of subscriber information and changes to that information as they arise; and
- (b) a database containing the names and addresses of all subscribers to which the Carrier provides telecommunication services, the type of services provided and, where applicable, information concerning the communication device used by the subscriber.

(2) The Carrier shall, on demand by an inspector designated under section 18, provide access to the subscriber records and database referred to in subsection (1).

(3) For the purposes of inspecting the subscriber records and database, an inspector shall have all the powers, and a Carrier shall have all the duties, referred to in sections 18(2) to (4).

(4) A Carrier shall keep information entered on subscriber records or the subscriber database available for inspection for a period of at least one year after the date on which the information was entered or modified.”.

Amends section 40

3 Section 40 of the principal Act is amended in paragraph (a) by deleting the words “or 22(3)” and substituting the words “, 22(3), or 28N”.

Inserts section 43A

4 The principal Act is further amended by inserting after section 43 the following—

“Contravention of section 28O an offence

43A A Carrier that fails to comply with the reporting requirements of section 28O commits an offence and is liable on summary conviction to a fine of \$5,000 per day for each day that the Carrier fails to comply.

Contravention of section 28T an offence

43B A Carrier that fails to comply with the record keeping requirements of section 28T commits an offence and is liable on summary conviction—

- (a) in the case of a failure to comply with subsection (1) to a fine of \$5,000 per day for each day that the Carrier fails to comply; and
- (b) in the case of a failure to comply with subsection (2) to a fine of \$25,000.”.

Amends section 59

5 Section 59 of the principal Act is amended—

- (a) by inserting immediately after subsection (3) the following—

“(3A) The Minister may, after consultation with the Minister responsible for public safety, make regulations for the carrying out of the purposes and provisions of Part IVA and in particular, without prejudice to the generality of the foregoing, respecting the obligations of Carriers under that Part including—

- (a) the requirements referred to in sections 28D and 28E(2) and (3) and the obligations to be performed by Carriers under those sections;
- (b) the time, manner and form in which an intercepted communication is to be provided to the Police; and

- (c) the information to be provided in reports required under section 280 and the time, manner and form for providing that information.”; and
- (b) in paragraph (4) by replacing all the words after the word “exceed” with the following—
  - “(a) in the case of regulations made under subsection (3A), a fine of \$10,000; and
  - (b) in any other case, a fine of \$2,000 or imprisonment for a term of twelve months, or to both.”.

**Consequential amendment**

6 The Fifth Schedule of the Customs Tariff Act 1970 is amended by inserting immediately after CPC 4183 the following—

“Description	Electronic surveillance equipment
CPC	4184
Duty Rate	0%
Eligible Beneficiary	Carriers providing public telecommunications services to whom a licence, permit or certificate has been issued under the Telecommunications Act 1986.
Qualifying Goods	Telecommunications equipment, apparatus and machinery.
End-Use Conditions / Restrictions	<p>1. Goods must be imported and used for the purposes of law enforcement.</p> <p>2. Goods must be required by the Carrier to assist the Bermuda Police Service in carrying out electronic surveillance and intercepting electronic communications.</p> <p>3. The Director of Telecommunications shall certify that the goods are eligible for this relief.</p>
Specific Controls / Diversion”	

**Commencement**

7 (1) This Act, or any provision of this Act, shall come into operation—

- (a) in respect of Carriers other than Information Service Providers, on a day or days appointed by the Minister by notice in the Gazette; and
- (b) in respect of Information Service Providers, on a day or days appointed by the Minister by notice in the Gazette, that is later than the day or days appointed under paragraph (a).

(2) In this section “Information Service Provider” means a Carrier that offers a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, including—

- (a) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;
- (b) software-based services that enable the sharing of data, images, sound, writing, or other information among computing devices controlled by the senders or recipients of the messages; and
- (c) electronic publishing,

but does not include a Carrier that offers such capability only for its internal management, control, or the operation of its telecommunications network.