

## COMMENTS

### **Telecommunication Devices for the Deaf and the *Telecommunications (Interception) Act 1979***

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On several occasions in recent years, there has been considerable media attention given to the prosecution of individuals for illegally recording conversations conducted over the public telecommunications system, usually the telephone. There has also been controversy relating to the controls over law enforcement agencies' and other security agencies' rights to intercept such conversations. Although it does not seem directly associated with these events, another recent development also raises questions about the operation and interpretation of the *Telecommunications (Interception) Act 1979* (Cth). We refer to the more widespread use of various kinds of Telecommunications Devices for the Deaf (TDDs) and in particular Telephone Typewriters for the Deaf (TTYs). These assistive devices have become a frequent way for people too deaf to use normal or volume control telephones to obtain access to the public telecommunications network. The use of these devices raises some serious questions regarding the recording of telephone conversations as defined by the *Telecommunications (Interception) Act 1979*.

#### **Telephone Typewriters for the Deaf**

Many deaf people are seriously inconvenienced in private life and employment because they are too deaf to use a telephone, even one fitted with adjustable volume controls. In recent years TTY's have begun to

overcome this problem. TTY's have become the most commonly used telecommunications device used by deaf people who are unable to use volume-assisted or normal telephones (computers and faxes are also used to some extent). The TTY consists of a modem using the telecommunications system in a manner similar to computer links through the telephone network. The deaf user, in communicating with another TTY user (deaf or hearing), uses a keyboard which transmits the message through the modem in either Baudot or ASCII code to the receiving instrument. Telephone conversations may be carried relatively normally in this way.

Despite the fact that use of TTYs is not without problems regarding their availability, cost and useability, this use would seem to be becoming more widespread in terms of the number of registered users.<sup>1</sup> The Telecom Directory lists almost 2000 individual and organisational users, including over 300 State and Commonwealth Government departments and services. Australian associations of deaf people and TTY relay service providers (see below) consider that there are many more TTY users than are currently registered with Telecom. With North American and European experience as a guide, numbers will continue to expand at a rapid rate.

### **The operation of TTY's**

The focus of this article concerns the implications for TTY users and manufacturers of the provisions of the *Telecommunications (Interception) Act* 1979. Current instrumentation allows for the incoming message to be received in two ways. The first involves a Liquid Crystal Display (LCD) readout of the typed transmission from the sender which is presented on a one-line display which disappears as incoming words are added. The second means of message receipt on most TTYs involves a simultaneous printout of the transmitted message on a paper roll, providing a permanent record of the conversation, both incoming and outgoing. The print roll is thus a visual analogue of taperecording the conversation. Importantly, this printed message, unlike the rapid fading LCD signal, may be retained by the receiver of the message or subsequently by others.

While no one would dispute this system is both helpful for the deaf person and reasonable in the sense of providing viable alternatives to vocal telecommunication, there are a number of legal aspects which require

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<sup>1</sup> G R Leigh & C Smith, "Telephone Typewriters (TTY's): A survey of usage and perceived problems" (1989) 6(1) *Australian Hearing and Deafness Review* 10-14.

consideration and clarification. Not only are TTYs used between deaf people for private purposes, but they are also used between deaf people and public organisations, eg, in communication with the Taxation Office, Legal Aid Services, transport facilities, other government offices or private organisations such as insurance companies. These organisations or a relay service may use or retain a printout of the conversation in ways which are unknown to and/or not approved by the deaf person.

### **Relay services**

Because many hearing or deaf people or services such as police, ambulance, fire services or other government agencies may wish to communicate with deaf people but do not have a TTY, relay services have been established throughout Australia. There are presently over 15 relay services provided by government or deaf consumer groups. The relay service assists anyone who does not have a TTY to communicate with someone who does, and who cannot use a regular telephone. Either user calls the relay service (through a hearing operator) who uses voice and a TTY to establish contact between the two callers: for example, a deaf person using a TTY may use the relay to call their general practitioner who has only a regular phone. Crucially for the present article, a third person and an "outside" organisation is introduced to the conversation. Although ethical considerations are usually highlighted in the operation of relay services, there is concern among some deaf people that the maintaining (even for a short period for accounting and record-keeping) of printout transcripts of conversations, presents a risk in terms of the security of their conversations (sometimes regarding personally or legally sensitive matters).

Whether the communication is between two deaf people, between a deaf person and a hearing person/organisation or between a deaf person and a third party through the mediation of a relay service, wherever a print roll is used to record the basis of the conversation, there is a concern that the principles of the *Telecommunications (Interception) Act 1979* are compromised. This concern relates to the availability of the print roll as a recording of the conversation for any official or other purpose. For example, in the case of a hearing person making a phone enquiry relating to a taxation matter or an insurance matter the spoken conversation is not retained as a record. Further, it would be illegal to record that conversation without the person's knowledge and consent. In the case of a deaf person communicating with a TTY a printout of the conversation could be made and retained on the individual's file without his/her knowledge or consent. This takes place, not

by the addition of a secret recording device but by using the TTY in the normal manner for which it was designed. This situation is clearly different from the general use of answering machines where the caller is made aware of the recording facility.

There have been cases in the United States where print roll transcripts from TTY's were used as evidence in trials of a civil and of a criminal nature. For example, a recent Wisconsin Court of Appeals decision involved a deaf person as a defendant in a case of first degree murder of his deaf roommate. The deaf person appealed the "guilty" verdict on the basis of the use of a TTY and a printed conversation tendered as evidence. Apparently on the day of the murder the defendant had been arrested for a traffic offence and had used the TTY in the Sheriff's office to call the victim requesting a ride home. He argued he had an expectation of privacy in this conversation and the police and the courts had no right to use that transcript as evidence of his association with the victim on the day of the murder. The appellate court ruled the defendant should not expect any privacy in a conversation using a TTY and the trial court had correctly accepted the printout as evidence.

An Australian example concerns a deaf woman who communicated with a state government department via her TTY alleging her husband had been having unlawful relations with their daughter. When the mother later withdrew her support for subsequent charges, as frequently occurs in such cases, the departmental officials attempted to proceed with the case based on her TTY transcript as evidence. While the authors are not aware of other examples in Australia, there are other situations in which an "expectation of privacy" cannot be assumed or assured. These include random breath testing and drug testing. It is therefore possible a court could decide to admit printouts as evidence even though the user may claim privacy.

The present design of TTYs does not inform the sender of the message whether the receiver is using a printout facility. This may mean individuals or organisations receiving information, whether for official purposes or of a personal/confidential nature, could use it inappropriately. This may place the communicator in a situation of disadvantage and in some cases, could infringe their rights to privacy.

The focus of this article therefore, is on this somewhat paradoxical situation. How can the design and principles of use of the TTY (and possibly other TDDs; the principle would be the same if the conversation was recorded on a computer disk) be modified to ensure that as well as providing important

access to telecommunications for deaf people, there is no compromise of their civil rights or privacy? More particularly, does the making and retention of a printout from a TTY conversation represent a case for "interception" under the *Telecommunications (Interception) Act 1979*?

A number of aspects seem worthy of further consideration. These include: (a) the legality of the "interception" in the form of a printed transcript of the conversation, (b) the possibility of abuse in terms of the retention or use of transcripts of TTY conversations, and (c) the importance of consent or knowledge by the sender of the message for print recording of TTY communication.

### **Interception**

The *Telecommunications (Interception) Act 1979* defines three key terms as follows:

- (a) "Communication" includes conversation and a message, and any part of a conversation or message, whether in the form of speech, music or other sounds; data; text; visual images, whether or not animated; signals; or in any other form, or in any combination of forms (s 4);
- (b) "Telecommunications system" means a service for carrying communication by means of guided or unguided electro-magnetic energy or both, being a service the use of which enables communication to be carried out over a telecommunications system operated by a carrier, but not being a service for carrying communication solely by means of radio communication (s 4); and
- (c) "Interception" of a communication is defined as listening to or recording, by any means, such a communication without the knowledge of the person making the communication (s 6(1)).

The definitions of "Communication" and "Telecommunication system" are quite broad and would seem to include the operating features of phone-text devices and print transcripts. The *Telecommunications (Interception) Act 1979* places high value on ensuring telephone communications remain private and confidential. Indeed, the Act strictly prohibits the use of unauthorised interception or "tapping" of phonecalls with only a few narrowly defined exceptions being permitted. The question arises as to whether phonetext instruments such as TTYs fall within the Act standard. Section 7 of the Act

prohibits the "interception" of any "communication passing over a communication system". Of the three key terms, "communication", "telecommunication system" and "interception", the third, and arguably the most crucial, carries a qualification that considerably narrows its scope.

Like a chain with three links, the Act's definition is only as strong as its weakest link. Any narrowing of the scope of the term "interception" would seem to allow the use of phone-text TTYs to escape the reach of the Act. The third term "interception", although broadened to include "recording by any means", and therefore made broad enough to encompass transcript services, is qualified by the requirement that "interception" proper must occur "without the knowledge" of the communicator. Therefore a transcript of the conversation cannot lawfully be made or kept unless it is either:

- (a) made with the knowledge of the sender (Semble, under s 6(1) the sender would need to have this knowledge before, or while, he/she "makes the communication" - afterwards would not suffice); or
- (b) authorised by a warrant, in the same manner as police-tapping or interception, in accordance with the *Telecommunications (Interception) Act 1979*.

Without such knowledge or authorisation, making a transcript in this way would seem to fall squarely within the s 7(1) prohibition of the interception of any "communication passing over a telecommunication system". A person making a printout of a TTY conversation without the knowledge of the sender may therefore be in breach of the Act.

The important legal distinction here is that a transcription made with the sender's knowledge is not an interception at all; whereas the transcript made without such knowledge, but authorised by warrant is an interception, albeit a lawful one. Therefore any other transcript not coming within either category would be an unlawful interception. It could be suggested that a deaf person who uses a TTY device does have the required "knowledge" that transcripts may be taken as a result and indeed, would not use the TTY in the first place unless he/she knew about the possibility of recording of that conversation (cf. the US decision noted on p 184). This assumption would seem to create a number of difficulties. Most importantly it could restrict the access that deaf people have to the telecommunications system as private citizens and the equity they would lose if such access was restricted. It would soon create an

unequal burden. Would normally hearing citizens accept a similar risk for their use of the phone?

### Access

The next question to arise concerns who would legally have access to transcripts printed out by TTYs. If a transcript is unlawful under s 7 because it is made without knowledge or authorisation, then no-one would legally have any right of access to it. Instead, it would be either confiscated or destroyed, except perhaps for use as evidence, and certainly not made available for public perusal. In the case of transcripts lawfully made, access would be regulated or in some cases restricted by the general laws governing freedom of information. If the transcript is made by a Commonwealth Government Agency (eg, the Australian Taxation Office) then presumably s 11 of the *Freedom of Information Act 1982* (Cth) would apply, giving "every person" a "legally enforceable right to obtain access" to "a document of a (Commonwealth) Agency, other than an exempt document".<sup>2</sup> Under the FOI Act all federally-held documents are prima facie accessible, apart from documents specifically exempted on defined grounds by other provisions of the Act (eg, s 12, ss 33-47). If the transcript is made by a State or Local Government Agency, then the relevant State freedom of information laws would apply.

Generally these follow the same model, and provide for similar grounds of exemption from a general right of access as does the Federal legislation outlined above. Transcripts made by private individuals or groups (which as explained above, can be lawfully made only with the receiver's knowledge) are outside the scope of the Commonwealth or State freedom of information laws, for these bind only the public sector. Similarly, the obligations of confidence imposed in the *Privacy Act 1988* (Cth) are aimed at Commonwealth Agencies or Officers in the course of performing their public duties and information recorded by a TTY would not seem to be protected by this Act. In the case of criminal proceedings, some data protection provisions in the *Crimes Act 1914* (Cth) (e.g s 105) prohibit unauthorised access to data held by the Commonwealth on a computer.<sup>3</sup>

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<sup>2</sup> G Hughes *Data Protection in Australia*, The Law Book Company, Sydney, 1991.

<sup>3</sup> See also, G Tucker, *Information Privacy in Australia*, Longman, Melbourne, 1992.

## Manufacturers

The question may also arise, as to whether and how far manufacturers of TTYs may be liable if their products are used for what amounts to illegal interception. S 7(1) of the *Telecommunications (Interception) Act, 1979* forbids any person to:

- (a) Intercept;
- (b) Authorise, suffer or permit another person to intercept;
- (c) Do any act or thing that will enable him or another person to intercept, a communication passing over a telecommunication system.

Section 7(1)'s scope is very broad and paragraphs (b) and (c), in particular, would appear to catch out manufacturers of TTYs if these machines are, or even could be used, to make unlawful transcripts. Can manufacturers escape this liability? Some guidance may be found, by analogy, in the legal treatment of photocopying machines. Photocopying machines can be used to commit unlawful breaches of copyright. Clearly, the individual who makes the photocopy is guilty of the breach. But does such liability extend to those who manufacture or provide the photocopying machines?

In the case of *University of New South Wales v Moorhouse* (1975) 133 CLR 1, the High Court ruled the University was responsible for "authorising" a breach of copyright because it has installed photocopying machines in its Library and, moreover, had left them unsupervised. The High Court rejected the interpretation that "authorised" in s 36 of the *Copyright Act 1968* (Cth) was limited to the usual (ie, commercial) meaning of authorisation given to an agent by a principal. Instead, the Court ruled such authorisation could also include "sanctioning, approving or countenancing". Unless manufacturers and providers take "reasonable steps to limit use to legitimate purposes", liability may also fall on them.

What then would be reasonable in the case of a TTY manufacturer so that users were protected in terms of potential for making or maintaining TTY transcripts? The first step might be to attach warning devices to the machines themselves, advising users that a sender must be warned before a transcript can be made. Would this be sufficient? Giving notice to users of their legal duty is an important first step and failure to do so resulted in a ruling against the University of New South Wales. But it might well be held by the court



that merely attaching warning notices to machines, while necessary, is not sufficient. Other "reasonable steps" might also need to be adopted so as to limit the use of the instruments to legitimate purposes. Perhaps a light on the sender's machine could switch on whenever the receiving machine engaged the print transcription option. This would supply the required "knowledge", constructive if not actual, that would take such a recording outside the s 6(1) definition of "interception".

## Conclusion

There are requirements on manufacturers, their users and other private and public receivers of TTY communication. The provisions of the *Telecommunications (Interception) Act 1979* would seem to generally apply and specifically prohibit the making and, more contentiously, retaining of print transcripts quite unlawful.

What then should be done to reduce or eliminate the disadvantageous effect the present legislation would seem to have for deaf people who use TTY's? A number of responses would seem to be required. They include:

- \* Determination of the need for amendments to the provisions of legislation which determine the admissibility of evidence in criminal and civil proceedings to specifically consider the use of TTY transcripts.
- \* Review of the *Telecommunications (Interception) Act 1979* to determine whether associated amendment of that legislation is required.
- \* Modification of the design features of TTY devices to include a facility, eg, a light signal on the sender's machine, which indicates the receiver's print roll function was operating. This would permit "knowledge" of the recording of the conversation to exist for the sender of the message. Based on precedents, it would seem manufacturers and organisational providers of TTY's have a responsibility here.

Following these developments there should also be:

- \* The design and use of guidelines for TTY relay services which define activities within the provisions of the *Telecommunications (Interception) Act 1979* and restrict the making and use of TTY print materials without appropriate notice.

- \* A program to make deaf users of TTY's more aware of their individual responsibilities, especially about revealing personal details, address or phone numbers which may identify or implicate them in subsequent legal proceedings or infringements of personal privacy.

If appropriate responses are made to these matters then the full potential of the TTY and other TDD's may be realised for deaf and hearing-impaired people.