



Public Submission to the Department of Home Affairs in response to the Reform of Australia's electronic surveillance framework

Introduction

The Australian Criminal Intelligence Commission (ACIC) welcomes the opportunity to provide a public submission to the Department of Home Affairs in response to the Reform of Australia's electronic surveillance framework Discussion Paper.

The ACIC is Australia's national criminal intelligence agency, uniquely charged with intelligence, investigative, evidentiary and information delivery functions. The ACIC is responsible for identifying new and emerging serious and organised crime threats and trends to inform the national strategic intelligence picture, and works with partner agencies to disrupt transnational serious and organised crime (TSOC) impacting Australia.

Contemporary TSOC actors are more sophisticated than ever before. They leverage global connections and infrastructure to impact Australia from all parts of the globe, with some individuals directing illicit activities while permanently based overseas as they seek to evade Australian authorities. They utilise cutting edge technology (sometimes developed specifically by criminals exclusively for illicit purposes) and legitimate and 'grey' service providers to enhance their effectiveness, including seeking to remain anonymous to evade identification and criminal justice. And they increasingly operate as **networks**, which can involve loosely connected individuals and service providers who may not be members of the core group.

As such, the need for criminal intelligence and the ability for the ACIC to identify, investigate and understand transnational serious and organised criminal networks has never been greater. Increasingly this involves investigation to gather intelligence to understand a threat and identify the individuals involved **before** an investigation moves to a more typical law enforcement footing of gathering evidence against individuals and groups with a view to disruption and prosecution. Without pre-evidence **intelligence** gathered by the ACIC, law enforcement agencies will go increasingly dark on TSOC networks. To gather this intelligence, the ACIC needs the new electronic surveillance framework to support its statutory capabilities as efficiently and nimbly as possible.

Furthermore, technology and telecommunications have evolved exponentially, rendering current warranted collection capabilities limited by their specific terminology framed around outdated methodologies and the investigation of an offence. For example, mobile phones are no longer used only – or primarily – for traditional voice to voice phone calls over a standard telephone line. Increasingly mobile phones are used with a variety of over the top applications such as commercial messaging platforms with data no longer available to traditional telecommunications providers.

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The ACIC welcomed the introduction of Network Activity Warrants under the *Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* as it provided the ability to conduct limited electronic surveillance collection against a criminal network explicitly for intelligence purposes. While this capability is nascent, it is already assisting the ACIC to more effectively identify individual nodes in a criminal network currently under investigation.

Reform

The ACIC offers the following comments in response to the discussion paper on the proposed reform to electronic surveillance legislation:

- The reforms must not diminish existing powers, impair existing covert collection capabilities or unduly complicate existing approval processes.
- The new framework should enable the ACIC to execute the full range of its functions (including intelligence related functions) set out in the *Australian Crime Commission Act*, consistent with other agencies in the National Intelligence Community.
- A simplified warrant framework whereby agencies can apply for an electronic surveillance warrant (or the term adopted) based on the purpose for collection as it aligns with the relevant agency's statutory functions is welcomed by the ACIC. Each separate purpose (intelligence or evidence) would attract different conditions relating to use, disclosure and oversight of material obtained pursuant to the warrant(s).
- The new warrant framework should be technology neutral and focus on the approval of particular outcomes (for example the collection of communications/movement/audio/optical information/data) rather than approval of a methodology (for example – interception of a communication or use of a tracking device). This approach will assist with future-proofing this warrant framework regardless of technological evolution impacting tools and techniques.
- Necessity, proportionality and propriety of the activities being requested under the warrant(s) in general – not only in consideration of privacy – must remain key pillars of the framework.

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