



CDPP

Australia's Federal Prosecution Service



Reform of Australia's Electronic Surveillance Framework Discussion Paper

Submission by the Commonwealth Director of Public Prosecutions

Introduction and role of the Commonwealth Director of Public Prosecutions

1. The Commonwealth Director of Public Prosecutions (CDPP) welcomes the opportunity to make a submission to the Reform of Australia's electronic surveillance framework discussion paper.
2. The CDPP is an independent prosecution service established by Parliament to prosecute alleged offences against Commonwealth law. The CDPP aims to provide an effective, ethical, high quality and independent criminal prosecution service for Australia in accordance with the *Prosecution Policy of the Commonwealth*.
3. The CDPP receives briefs of evidence from investigative agencies for assessment as to whether a prosecution should commence or continue and undertakes any resulting prosecution. The CDPP is not an investigative agency.
4. At this stage, there is one potential legislative gap that the CDPP wishes to point out when it comes to the reform of Australia's electronic surveillance framework.

Section 474.4(1) of the *Criminal Code* (Cth) and the definition of "apparatus" or "device"

5. A potential legislative gap occurs when considering the definitions of "apparatus" and "device" in section 474.4(1) of the *Criminal Code* (Cth) (the Code).
6. Section 474.4(1) of the Code provides:
 - 474.4 Interception devices
 - (1) A person commits an offence if:
 - (a) the person:
 - (i) manufactures; or
 - (ii) advertises, displays or offers for sale; or
 - (iii) sells; or
 - (iv) possesses;
 - an apparatus or device (whether in an assembled or unassembled form);
 - and

(b) the apparatus or device is an interception device.

Penalty: Imprisonment for 5 years.

7. This section criminalises the conduct of persons who manufacture, advertise, sell or possess and “apparatus” or “device” that is an “interception device”. There are no legislative definitions of “apparatus” or “device”. Consideration of related legislation suggests that the word “device” may be interpreted as being a **tangible** object.
8. With the ongoing growth and advancement of technology, the interception of digital and online communications is now largely conducted using various forms of digital software, as opposed to physical objects such as wires and microphones. There is a risk that digital software may be likely regarded as an intangible, as opposed to tangible, objects.
9. Under the current provisions, the conduct of person advertising and selling a program that is capable of the functions of an interception device, such as monitoring the activities on another person’s phone, may therefore not be captured by the offence under section 474.1(1) of the Code. This is because the program being advertised or sold may not amount to a “device” or “apparatus”.
10. An example of such a product is the mobile phone monitoring software advertised by Spousebusters ([Mobile Phone Monitoring Software | SpouseBusters](#)).