

## Reform of Australia's electronic surveillance framework - Discussion Paper

### **Submission from Western Australia Police Force**

The comprehensive review of the legal framework of the national intelligence community, conducted by Mr Dennis Richardson AC, identified that current laws (including the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and the *Surveillance Devices Act 2004* (SD Act) are complex, inconsistent, outdated and inflexible. The Western Australia Police Force (WA Police Force) are users of both the SD Act and far more regularly the TIA Act to support investigations.

This electronic surveillance reform project (the reform project) aims to repeal the TIA Act, SD Act and parts of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and replace it with a single new Act that is clear, coherent and better adapted to modern technology and the criminals who seek to exploit it. The aim is to establish technology-neutral definitions, concepts and warrants. WA Police Force broadly supports these proposals and understands whilst they apply more significantly to Commonwealth agencies there are benefits from a law enforcement perspective in this State. The following provides only general comments at this stage and we welcome the opportunity to consider the Consultation Draft when it becomes available.

In general, covert access to personal information and data is protected by blanket prohibitions under the TIA Act and SD Act. Elements of the prohibitions on interception of a private communication and access to stored communications under the TIA Act currently rely on outdated terms and assumptions. Applying these outdated assumptions to modern technology results in complexity and ambiguity.

It is noted that Commonwealth legislation does not prohibit the use of surveillance devices. This is governed by state and territory legislation. For example, sections 5,6,7 and 9 of the *Surveillance Devices Act 1998* (WA). Covert access to this personal information and data is done by exception to these prohibitions. This recognises law enforcement agencies require electronic surveillance powers to effectively investigate serious crime and respond to national security threats. The reform project does not propose to remove any existing powers under the TIA Act, SD Act or ASIO Act from any law enforcement agencies, a proposal that is supported by WA Police.

Modernising the definition of 'communication' under the TIA Act will result in more information being protected and better controls on access to that information. Law enforcement agencies will only be able to access this broader range of information under a warrant or authorisation, and this access will be subject to oversight and safeguards. WA Police advise that the interaction between the new definition of 'communication' and other legislation that relies upon that terminology will need to be considered. For example, the *Telecommunications (Interception and Access) Western Australia Act 1996*.

Under the current framework, agencies need separate warrants to intercept communications, access stored communications, access computers or use surveillance devices to access information. Despite the overlap between powers and their similar impact on privacy, they are not subject to consistent thresholds, purposes, safeguards or accountability. It is proposed the new warrant framework will change this so instead of separate warrants for individual methods of access, it is being considered that the new Act will contain more consolidated outcomes-based warrants.

The reform project is of the view where powers are functionally equivalent, they should be subject to the same thresholds, controls and safeguards. WA Police are supportive of consideration of this approach.

Due to the anonymous and borderless nature of the internet, it is becoming increasingly difficult for law enforcement agencies to connect online activities to specific individuals. Sophisticated cyber actors often operate in groups to undertake their criminal activities. However, law enforcement agencies face significant challenges when it comes time to apply for warrants, because of the requirement to be able to attribute specific actions to a specific person, when applying for existing person-based warrants. The consideration of introducing a dedicated group warrant regime for law enforcement agencies, to apply consistently across all warrant types is supported by WA Police.

The reform project notes the TIA Act contains more than 54 provisions relating to use and disclosure of information. The purposes for which information may be used and disclosed differ based on law enforcement agency and type of information. Some of these provisions prevent the effective use and disclosure of information. The reform project will consider how to implement a simple, principles-based scheme on how information can be used and disclosed. The WA Police are supportive of these considerations.