



Australian Government
Department of Home Affairs

Supplementary submission to the review of the amendments made by the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018

Parliamentary Joint Committee on Intelligence and Security

Supplementary submission

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Introduction

1. The Department of Home Affairs (the Department) welcomes the opportunity to provide a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) review of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Assistance and Access Act). This submission is made on behalf of the Department, and includes material provided by the Australian Federal Police, Australian Security Intelligence Organisation, Australian Criminal Intelligence Commission and New South Wales Police Force. This submission has been made at the request of the Committee.
2. Australian agencies have used the powers introduced by the Assistance and Access Act in support of their activities since they commenced on 9 December 2018. Statistics in relation to the use of powers introduced by the Assistance and Access Act were published for the first time in the 2018-19 *Telecommunications (Interception and Access) Act 1979* (for industry assistance powers) and *Surveillance Devices Act 2004* (for computer access warrants) annual reports. This submission provides additional information and details in relation to the requests, notices and orders issued under provisions introduced by the Assistance and Access Act.
3. The disclosure of further details on the use of powers introduced by the Assistance and Access Act is restricted due to operational sensitivities and the secrecy provisions in the relevant legislation. Specifically, section 317ZF of the *Telecommunications Act 1997* and section 45 of the *Surveillance Devices Act 2004* restrict the disclosure of information except in very limited circumstances. As such, this information cannot be disclosed in an unclassified form.
4. The Department is restricted from gathering information in relation to the use of powers introduced by the Assistance and Access Act outside the legislated annual reporting obligations.
5. Through its classified submission to the review, the Australian Security Intelligence Organisation has provided the Committee with information on its use of the Assistance and Access provisions.

Use of powers introduced by the Assistance and Access Act

Schedule 1 - Industry assistance framework in Part 15 of the *Telecommunications Act 1997*

6. Since the Assistance and Access Act commenced on 9 December 2018, agencies have used the industry assistance powers in support of their investigations and operations into serious crimes and matters of national security. As noted in the Department's main submission to the Committee's review, agencies are taking a collaborative approach with

industry by seeking assistance on a voluntary basis pursuant to the technical assistance request regime to engender support and cooperation.¹

7. No technical assistance notices or technical capability notices have been applied for or issued by an agency under the industry assistance framework to date. In addition, no State and Territory police forces have sought the Australian Federal Police Commissioner's approval for the issue of a technical assistance notice. Communications providers have been willing to provide assistance on a voluntary basis, meaning that as yet, the use of technical assistance notices and technical capability notices has not been required.

Law enforcement agencies

8. As at 31 December 2019, a total of **16** technical assistance requests have been issued by law enforcement agencies under Part 15 of the *Telecommunications Act 1997* (as amended by Schedule 1 of the Assistance and Access Act).
9. The Australian Federal Police has issued **seven** technical assistance requests to designated communications providers. Two of these were subsequently revoked. All technical assistance requests issued by the Australian Federal Police were given to the relevant designated communications provider in writing, and no requests have been varied.
10. The New South Wales Police Force has issued **nine** technical assistance requests to designated communications providers.
11. All technical assistance requests were sought for the relevant objective of enforcing the criminal law, so far as it relates to serious Australian offences.
12. According to the 2018-19 *Telecommunications (Interception and Access) Act 1979* Annual Report, the seven technical assistance requests made during the reporting period were used to enforce sixteen serious Australian offences,² specifically:
 - **six** cybercrime offences
 - **one** homicide offence
 - **one** illicit drug offence
 - **two** organised offences
 - **five** telecommunications offences, and
 - **one** theft offence.³

¹ Department of Home Affairs Main Submission (Submission 16) to the Parliamentary Joint Committee on Intelligence and Security review of the amendments made by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* p. 9

² The total number of offences is larger than the number of requests issued, as a single request can relate to the enforcement of one or more than one serious Australian offence.

³ *Telecommunications (Interception and Access) Act 1979* Annual Report 2018-19, Table 46, p. 77

13. Further information in relation to the use of the industry assistance framework is operationally sensitive and disclosing this information publicly may reveal operational methodology or compromise ongoing investigations. The disclosure of technical assistance information is limited by the secrecy provision in section 317ZF of the *Telecommunications Act 1997* which is designed to protect sensitive information. The Department does not currently hold this information and, due to the secrecy provisions, there is a risk that agencies might not have a lawful basis on which to disclose such information to the Department.

Australian Security Intelligence Organisation

14. The Australian Security Intelligence Organisation has made use of the industry assistance framework and will provide further information in their classified supplementary submission to the Committee's review.

Compulsory assistance orders

Schedule 2 – Assistance orders under section 64A of the *Surveillance Devices Act 2004*

15. Section 64A of the *Surveillance Devices Act 2004* (Surveillance Devices Act) was introduced by Schedule 2 of the Assistance and Access Act to allow for assistance orders to be made requiring a person with knowledge of a computer or computer system to provide information or assistance that is reasonable and necessary to enable access to data held in a computer that is the subject of a computer access warrant.
16. All section 64A assistance order applications must be made to, and approved by, an eligible Judge or nominated AAT member.
17. Agencies are not required to report on the use of section 64A assistance orders.
18. Further information in relation to section 64A assistance orders is operationally sensitive and disclosing this information publicly may reveal operational methodology or compromise ongoing investigations. The disclosure of this information is limited by the offence provision in section 45 of the Surveillance Devices Act which is designed to protect sensitive information. The Department does not currently hold this information and, due to the secrecy provisions, there is a risk that agencies might not have a lawful basis on which to disclose such information to the Department.

Schedule 3 – Assistance orders under section 3LA of the *Crimes Act 1914*

19. Section 3LA of the *Crimes Act 1914* (Crimes Act) was amended by Schedule 3 of the Assistance and Access Act in order to, amongst other things, increase the penalties associated with non-compliance with this section. The amendments made by the Assistance and Access Act were made to increase the effectiveness of existing section 3LA which allows for assistance orders to be made requiring a specified person to provide information or assistance that is reasonably necessary to access data held in a computer or device found during a search of a person that is authorised by a search warrant under section 3E of the Crimes Act.
20. Schedule 3 of the Assistance and Access Act also amends Part IAA of the Crimes Act to improve law enforcement agencies' ability to collect evidence from electronic devices under

a search warrant. The Australian Federal Police has used the enhanced search warrant provisions amended by Schedule 3 of the Assistance and Access Act **very regularly across a variety of investigations**. The new search warrant framework has enabled more accurate targeting of suspects and improved identification, access and collection of otherwise secure and encrypted communications.

21. All search warrant applications under section 3E of the Crimes Act must be made to, and approved by, an eligible Judge or nominated AAT member.
22. Schedule 3 of the Assistance and Access Act primarily amends existing search and seizure powers exercised by law enforcement agencies. Accordingly, separate statistics are not available on the use of the amendments, including section 3LA assistance orders, introduced by this schedule.

Schedule 5 – Assistance orders under section 34AAA of the *Australian Security Intelligence Organisation Act 1979*

23. Section 34AAA of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) was introduced by Schedule 5 of the Assistance and Access Act to allow for assistance orders to be made requiring a specified person to provide any information or assistance that is reasonable and necessary to allow ASIO to access data held in, or accessible from, a computer or data storage device relating to a warrant. Section 34AAA also allows for the copying and conversion of such data.
24. Use of the Australian Security Intelligence Organisation's powers provided for in Schedule 5 of the Assistance and Access Act is included in classified annual reporting, consistent with the warrant reporting requirements set out in the ASIO Act.

Computer access warrants

25. Law enforcement agencies have relied on the use of computer access warrants as a key intelligence collection and evidence gathering tool since they came into effect on 9 December 2018. Computer access warrants issued under the Surveillance Devices Act authorise law enforcement agencies to covertly access devices to investigate serious crimes, search devices (such as laptops, mobile phones and USBs) and collect information, and conceal the fact that a device has been accessed.
26. According to the 2018-19 Surveillance Devices Act Annual Report, a total of **eight** computer access warrants under provisions introduced by Schedule 2 of the Assistance and Access Act have been issued as at 30 June 2019.
27. The Australian Federal Police was issued **seven** computer warrants, with one refused by a nominated AAT member. The Australian Federal Police reported that the warrant was refused due to concerns raised by an AAT member that a physical computer had to be identified. The Australian Federal Police also applied for, and were issued, two extensions of computer access warrants, which were granted due to ongoing investigations.
28. The Australian Criminal Intelligence Commission applied for, and were issued, **one** computer access warrant.
29. The Department is aware of a further two computer access warrants issued during the period 30 June and 15 November 2019. This information was provided by the Department

to Senator Kristina Keneally in response to a question on notice from the supplementary budget estimates in October 2019. The provision of any further details in relation to these warrants are restricted by legislative provisions in the Surveillance Devices Act.

30. During the 2018-19 reporting period, no remote applications were made for computer access warrants and no applications were made as a result of an international assistance authorisation.
31. Law enforcement agencies may apply for computer access warrants when investigating 'relevant offences' which generally carry a maximum imprisonment term of at least three years. All computer access warrant applications under the Surveillance Devices Act must be made to, and approved by, an eligible Judge or nominated AAT member.
32. Further information in relation to computer access warrants is operationally sensitive and disclosing this information publicly may reveal operational methodology or compromise ongoing investigations. The disclosure of computer access warrant information is limited by the offence provision in section 45 of the Surveillance Devices Act which is designed to protect sensitive information. The Department does not currently hold this information and, due to the secrecy provisions, there is a risk that agencies might not have a lawful basis on which to disclose such information to the Department.

Conclusion

33. Since the legislation commenced on 9 December 2018, the powers introduced by the Assistance and Access Act have supported law enforcement and national security agencies in addressing technological obstacles to investigations into serious crime and national security matters.
34. Agencies have used the powers in the Assistance and Access Act in support of their existing investigatory powers provided for under the broader electronic surveillance framework. The powers have proven critical in ensuring that agencies can obtain valuable evidence and intelligence, where it would otherwise have been encrypted and unreadable.
35. It is imperative that our agencies are able to access the information they need to protect the Australian community from serious crime and threats to national security. The powers introduced by the Assistance and Access Act have ensured that Australian agencies can continue to operate effectively in the evolving technological environment.