



## VICTORIA POLICE

1. Victoria Police is pleased to make this submission to the 'Inquiry into comprehensive revision of the *Telecommunications (Interception and Access) Act 1979*' (the **TIA Act**). Victoria Police's views on the Inquiry's terms of reference which are relevant to Victoria Police are detailed in the following themes:

- A. General review of the TIA Act**
- B. Objectives clause**
- C. Proportionality tests**
- D. Access thresholds**
- E. A single warrant regime**
- F. Attribute interception**
- G. Data retention**
- H. Information sharing**
- I. Record keeping and reporting requirements**
- J. Industry assistance obligations**

### A. General review of the TIA Act

2. Victoria Police strongly supports recommendation 71.2 of the Australian Law Reform Commission report, *For Your Information: Australian Privacy Law and Practice*, dated May 2008, that the Australian Government should review the effectiveness of the *Telecommunications Act 1997* (Cth) and the TIA Act in light of technological developments (including technological convergence), changes in the structure of the communications industries and changing community perceptions and expectations about communication technologies.
3. It is well documented that since the TIA Act's inception, we have become a technologically-dependent society. Frequent and ongoing use of mobile phones is a fundamental tool to communicate and conduct business. Technology migrated from analogue to digital platforms. The TIA Act's principles remain relevant however the framework is no longer comprehensive or sufficient to allow access to reflect the community's dependence on technology and the current criminal investigation environment.
4. Victoria Police submits urgent holistic reform of the TIA Act is critical if law enforcement agencies are to maintain an adequate investigative capability in terms of access to communications content and associated information.

5. Victoria Police supports recommendation 9 of the Parliamentary Joint Committee on Intelligence and Security's *Inquiry into the potential reforms of Australia's National Security Legislation* report (**PJCIS report**). The TIA Act should be reviewed to remove legislative duplication. This should occur as a component of a general review.

### **B. Objectives clause**

6. Victoria Police supports including an objectives clause in the TIA Act in accordance with recommendation 1 of the PJCIS report. This would ensure clarity in relation to the principles and aims of access to communications content and associated information for law enforcement purposes.

### **C. Proportionality tests**

7. Victoria Police supports an appropriate proportionality test to guide the circumstances in which law enforcement access to the content of communications is justified. Victoria Police notes recommendation 2 of the PJCIS report and the elements of proportionality identified [privacy impacts, public interest (including the gravity of the offence) and the availability of less privacy intrusive investigative techniques].
8. Issuing authorities consider these elements to determine whether to grant Victoria Police's interception warrant applications.
9. Victoria Police does not agree with these elements. Victoria Police recommends that an element of proportionality that should be included to require the issuing authority to consider if interception is the best available investigative tool. This is necessary to reflect the patterns of the community's technology use and the new ways in which some offences may be committed.

### **D. Access thresholds**

#### **Content**

10. Victoria Police supports recommendation 6 of the PJCIS report, that the Attorney-General's Department review the thresholds for accessing the content of communications.
11. Victoria Police submits the definition of 'serious offences' contained in section 5D of the TIA Act is complex and outdated for purposes of law enforcement. Victoria Police is concerned that serious offences for which communications content may provide direct evidence of offending are excluded unless additional conditions specified in subsection 5D(3) of the TIA Act are met. These conditions are rarely satisfied in practice. Excluded offences include threat to kill, blackmail, perverting the course of justice, theft, handling stolen goods, extortion and trafficking in firearms.
12. For example, the offence of trafficking in firearms in section 101A of the Firearms Act 1996 (Vic), will rarely satisfy the additional requirement in subparagraph 5D(3)(b) of sophisticated methods and techniques. The inability of police to access communications content between suspected offenders may render valuable evidence of offending or exculpatory evidence unavailable.

13. Victoria Police supports the Attorney-General's Department's proposal, cited at paragraph 2.11 of the PJCIS report, to revive the current interception threshold to a level between three years and seven years. This would more appropriately capture serious offences for which communications content is primary evidence of offending or interception is the most effective investigate tool.
14. Victoria Police notes the PJCIS's view in its report at paragraph 2.64 that there is little difference in the privacy impact if the communications are accessed in real-time or retrospectively. However, Victoria Police considers access to conversation dialogue in real-time to be privacy intrusive in terms of privacy considerations than access to content of a historical stored message service (SMS). Accordingly, Victoria Police supports retaining separate thresholds for access to real-time conversations versus historical content.

#### Prospective Data

15. A key role of law enforcement agencies is to ensure community safety. Victoria Police notes recommendation 5 of the PJCIS report and submits that any review of access to telecommunications data thresholds considers incorporating access to prospective telecommunications data where there is significant community interest in matters being managed or resolved. Two key circumstances are:
  - a. *Investigating parole violations.* Some parolees commit serious offences while avoiding arrest and being returned to prison. In circumstances of additional offending, Victoria Police has successfully accessed historical and prospective data to locate and arrest persons for post parole offences and return them to custody.

However, many persons have breached their parole for reasons other than criminal activity and avoid arrest. Examples of this include breaching reporting requirements, residential conditions, curfews and consorting bans. In this regard, investigators have been unable to access prospective data to aid in the parolees' capture and return to prison. Access to prospective data would assist in locating these people in a timely manner.

- b. *Locating missing persons.* Access to prospective data would assist locating persons formally reported to police as missing, such as persons who are children, mentally impaired, elderly or potentially lost, disorientated, or injured. Given that section 180 of the TIA Act requires the existence of an offence punishable by at least three years imprisonment, the only avenue available to police is pursuant to section 287 of the *Telecommunications Act 1997* (Cth) if the disclosure or use of the information is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of a person. In the overwhelming majority of cases it cannot be shown that any threat to these persons is imminent.

#### E. A single warrant regime

16. Victoria Police supports recommendation 10 of the PJCIS. A single warrant regime, subject to safeguards and accountability mechanisms should be implemented. The face of the warrant should reflect the conditions, including whether access to content is in real-

time or historical. Victoria Police anticipates a single warrant regime would lead to administrative efficiencies being gained.

#### **F. Attribute interception**

17. Victoria Police supports recommendation 7 of the PJCIS report in relation to attribute interception. Enabling access to specific attributes of communications would minimise the privacy intrusion of interception by assisting the better targeting and more efficient access to the communications that are relevant to the investigation.

#### **G. Data retention**

18. Victoria Police notes recommendations 42 and 43 of the PJCIS report. Victoria Police strongly supports the implementation of a data retention regime given the changes in the patterns of community usage of mobile phones (being that many persons use mobile phones daily and frequently for conversations or internet access) and changes in industry business practices.
19. Victoria Police recognises in many instances, carriers only retain data for commercial purposes such as billing. Data which is of interest to law enforcement is often not retained. Where data is retained, it is for varying periods of time. The community expectation for criminal activity to be sufficiently investigated and prosecuted justifies data retention to mitigate the risk that evidence will be unavailable.
20. Victoria Police recommends the following data be retained for a period specified by statute, in a manner that does not compromise data integrity and confidentiality:
  - a. subscriber information;
  - b. telephone numbers of the parties involved in the communication;
  - c. the date and time of a communication;
  - d. the duration of a communication;
  - e. Internet Protocol (IP) addresses and Uniform Resource Locators (URLs) to the extent that they do not identify the content of a communication; and
  - f. location-based information.

#### **H. Information-sharing**

21. Victoria Police supports recommendation 8 of the PJCIS report. Information-sharing provisions should be reviewed to simplify and reduce unnecessary complexity. Serious and organised crime is increasingly committed across jurisdictional boundaries, thus necessitating a multi-agency response. It is not uncommon, especially in joint taskforce situations, to provide or receive information to or from other law enforcement agencies.
22. Additionally, a review of the organisations that are able to receive lawfully interception information is necessary. There are often instances where lawfully intercepted information would be important to government departments, government agencies or statutory bodies with ownership of the function of investigating certain behaviour relevant to serious offences, but are not permitted to receive lawfully intercepted information.
23. For example, if interception identifies that a child is at risk of harm from their parents or carers, Victoria Police cannot communicate the lawfully intercepted information to child

protection agencies. If inappropriate dealings of a prison officer are identified, this information cannot be passed on to prison authorities. If systemic and serious corruption in sport is identified, this cannot be passed onto sporting integrity bodies.

### **I. Recordkeeping and reporting requirements**

24. Victoria Police supports recommendations 3 and 4 of the PJCIS report. Appropriate statutory recordkeeping and reporting obligations have the potential to assist in maintaining the integrity and transparency of the regime and in evaluating the effectiveness of a warrant.
25. However, current obligations and oversight arrangements are duplicative and require records to be created which do not demonstrate the effectiveness of access to communications, the probative value of information obtained or the extent of the privacy intrusion.
26. For example, in addition to reporting on statistics such as the number of warrants obtained each year, agencies report annually on the number of arrests and prosecutions made on the basis of information that was, or included, lawfully intercepted information. This statistic does not recognise that investigations may be long-term, and arrests or prosecutions will regularly occur in a different reporting period to that which the relevant warrant was obtained. Therefore it is limited in demonstrating the effectiveness of a particular warrant in advancing an investigation.

### **J. Industry assistance obligations**

27. Victoria Police supports recommendations 11, 13 and 14 of the PJCIS report in relation to industry assistance obligations. Telecommunications carriers and service providers providing services in Australia should have their obligations to provide assistance to law enforcement and security agencies clarified.
28. Victoria Police supports recommendation 17 of the PJCIS report. The specification of timeframes for assistance could be incorporated into assistance obligations. Victoria Police's practical experience is that in terms of interception, assistance is provided very quickly, however in relation to requests for data, this can take varying and considerable amounts of time, and expediting the process is very difficult.
29. Victoria Police supports recommendation 15 in the PJCIS report that Government should develop an implementation model based on uniform of obligations whilst acknowledging limited exemptions on the basis of practicability and affordability may be justifiable in particular cases. The burden should lie on the industry participants to demonstrate eligibility for exemptions. Victoria Police also submits that law enforcement agencies have discretion to review and comment on exemption applications.
30. Victoria Police notes recommendation 16 of the PJCIS report. Victoria Police supports the development of an offence for a telecommunications carrier or service provider to fail to provide assistance to law enforcement in decrypting communications. The offence should be punishable by appropriate and enforceable penalties.