



Submission to the Parliamentary Joint Committee for Intelligence and Security

Telecommunications Legislation
Amendment (International
Production Orders) Bill 2020

14 April 2020

Introduction

1. The Corruption and Crime Commission Western Australia (the Commission) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) concerning the *Telecommunications Legislation Amendment (International Production Orders) Bill 2020* (the Bill).
2. The Commission was conferred with the power to apply for interception warrants upon its creation.¹ Subsequently, the Commission was conferred with powers to authorise disclosure of telecommunications data² and apply for stored communications warrants³ when those powers were later introduced by Parliament.
3. The powers conferred under the *Telecommunications (Interception and Access) Act 1979* (TIA Act) are essential to the Commission performing its functions under the *Corruption, Crime and Misconduct Act 2003* (CCM Act).
4. The Commission welcomes the introduction of the Bill into Parliament and supports its passage. The Commission acknowledges the assistance it will provide by increasing the Commission's investigative capability. Ultimately, it will allow the Commission to obtain important and relevant evidence from designated communication service providers in foreign countries (foreign providers) to contribute to its investigations into serious misconduct within the Western Australia public sector.

Commission's Role

5. The Commission was established as a statutory body pursuant to the CCM Act on 1 January 2004, with functions with respect to serious misconduct by public officers and organised crime. Recent amendments to the CCM Act have expanded the Commission's role to include the ability to fight organised crime through the investigation, seizure and confiscation of unexplained wealth.

¹ *Telecommunications Interception and Other Legislation Amendment Act 2003*

² *Telecommunications (Interception and Access) Amendment Act 2007*

³ *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2014*

6. The Commission uses its investigative powers to identify and deal effectively with serious misconduct in the public sector. Serious misconduct in general terms includes corruption by public officers or serious offending whilst acting in an official capacity. The Commission also assists the Western Australia Police Force (WAPF) to combat organised crime by authorising the use of investigative powers not ordinarily available to WAPF.
7. Corruption is a difficult offence to detect and investigate. It is most often committed in secret, by a small group of like-minded individuals who have the necessary knowledge, skills and authority to conceal their corrupt activities. Historically, the interception of communications and accessing of telecommunications and stored communications data has been an effective investigative method for obtaining evidence of corrupt and other unauthorised activity. The Commission is operating in a criminal environment where corrupt conduct is becoming transnational in nature. The ability to obtain material from foreign providers will be invaluable in the Commission's investigation into such activities.

Submissions on the Bill

Part 1

8. The Commission supports use of a separate interpretation section to outline the concepts and terms associated with the international production order (IPO) framework.
9. The Commission supports the government's decision to adopt, where appropriate, words and phrases in the Bill that are already defined in the TIA Act. It will encourage consistency and will reduce uncertainty in the interpretation and application of the provisions.
10. The Commission is uncertain why the definition of 'eligible judge' requires amendment. It will create a distinction between judges that can grant an interception warrant and those that can grant an interception IPO. The Commission notes the definition of 'issuing officer' remains the same, therefore the power to grant a stored

communications IPO and a stored communications warrant is conferred on the same officer. It would assist law enforcement agencies if the officers granting an IPO are consistent with those granting the equivalent domestic warrant.

Part 2

11. The Bill will benefit the Commission by allowing it to intercept international material and access telecommunications and data that is stored outside Australia.
12. The application process, requirements and restrictions outlined for an IPO are consistent with what is required to obtain material from domestic communication service providers. The Commission does not foresee any significant impediments in the way the Bill is drafted in applying for, or obtaining an IPO.
13. The Commission is reassured by the decision to provide for an ability to apply for an IPO by telephone. In certain circumstances time constraints do not allow for the necessary applications to be made in writing. The Commission appreciates the pragmatic approach taken in identifying that on occasion, immediate action is required to ensure vital evidence is not lost. The Commission will benefit by bypassing the extensive formality requirements when required to meet operational priorities.
14. The Commission is apprehensive with conferring a power on an eligible judge or an issuing authority to direct that intercepted communications, a copy of stored communications or telecommunications data is provided to the Commission indirectly via the Department of the Attorney General. The material sought by the Commission may be time critical. The Department acting as a conduit for material may impede the effectiveness of utilising an IPO.

Part 4

15. The Commission welcomes the requirement to produce an IPO to the Department of the Attorney General to ensure it is compliant with the designated international agreement (agreement). The foreign provider may challenge an IPO when served or a third party may challenge the admissibility of material received under an IPO in subsequent proceedings. The ability to provide an IPO to the Department of the

Attorney General to ensure compliance affords an additional safeguard reducing the likelihood it will be subject to challenge at a later date.

Part 5

16. The Commission supports conferral of a power on the Commissioner to revoke an IPO if the grounds on which it was issued cease to exist. It ensures that the powers will be used appropriately and for the purpose for which they were conferred.

Part 5A

17. The foreign provider can object to an IPO if it is not compliant with the agreement. The Commission welcomes this ability being conferred on the foreign provider as it supports the integrity of the framework by ensuring that any material provided is based on the agreement that was entered into by the foreign government.
18. The Commission is concerned with conferring an unfettered ability on the Secretary of the Department of Attorney General (the Secretary) to cancel an IPO. The Bill should establish preconditions or outline a confined set of circumstances where such a power can or should be exercised. The Commission notes significant effort and resources will be required to obtain an IPO. The Secretary may not be aware of sufficient operational information to make a decision that is appropriate in all of the circumstances.

Part 6

19. The Commission supports the imposition of penalties for foreign providers that do not comply with an IPO. If the Bill is enacted, the Commission will expend significant resources in utilising the provisions. The creation of a mechanism to enforce an IPO is critical to ensure the powers are available and can be effectively used by law enforcement agencies, including the Commission. The Commission recognises that penalties will act as a deterrent for foreign providers to refuse to comply with the terms of an IPO.

Parts 7 and 7A

20. The Commission understands the importance of reporting and recordkeeping obligations given the nature of the powers conferred and their impact on privacy. The Commission already complies with the oversight, reporting and recordkeeping obligations in place under the TIA Act. The Commission has established an effective relationship with the Commonwealth Ombudsman. The Commission will have no difficulty in complying with the oversight, reporting and recordkeeping obligations proposed under the Bill.

Part 9

21. The Bill maintains the status quo with respect to what use can be made of material obtained under an IPO with that which is acquired domestically. The Commission supports the exceptions outlined in the Bill.

Part 9A

22. The Commission welcomes the provision for a foreign provider and the Commissioner to issue a written certificate that is admissible in evidence. It also welcomes the ability for the Commissioner to certify an IPO as a copy. The provisions will result significant resource saving in proceedings that utilise the material acquired.

Part 10

23. The Commission supports the minor defects provision. It may reduce the number of challenges received by the Commission in proceedings where material is relied upon leading to significant cost and time savings.

Examples that demonstrate the benefit to the Commission

24. The Commission investigations below illustrate how the powers conferred in the Bill would have assisted in the Commission's serious misconduct functions under the CCM Act.

OPERATION BRAYDON

Operation Braydon was an investigation into whether any public officer had engaged in serious misconduct in the performance of their role within a local government.

The Commission's investigation into serious misconduct was significantly hampered by the use of foreign providers in the planning of and engagement in serious misconduct. It's the Commission's opinion that the officers had used secure methods of communication to avoid detection by the Commission.

The Commission suspected that officers identified in this investigation had engaged in serious misconduct but was unable to establish this. The Commission believes had it been able to access the foreign email and cloud storage providers, it may have supported an opinion of serious misconduct and possible criminal charges.

OPERATION FUZE

Operation Fuze was an investigation into whether chief officers of a government trading entity had corruptly used their position to gain a benefit for themselves or others.

The Commission's investigation produced evidence of significant amounts of currency being provided to former public officers through a private venture capitalist consortium in the United States. The Commission was interested in the purpose of those payments and was suspicious of the use being made of the monies received.

The Commission is unable to utilise its coercive powers in the United States. The Commission could have applied for an IPO in order to assist its enquiry by obtaining the stored communications data from foreign providers located in the United States.

OPERATION NEIL

Operation Neil was an investigation into whether any public officer had engaged in serious misconduct in the performance of their role to gain a financial benefit for themselves or others.

The Commission's investigation focussed on the management and allocation of financial contracts by the agency. The Commission was able to support an opinion of serious misconduct.

The complexity and length of the investigation was extended as a result of the use of foreign providers, which under normal circumstances were not accessible by the Commission. Should this content have been available via an IPO, the financial, resource and physical cost would have been reduced. This information would likely have been beneficial to the current ongoing criminal prosecutions for corruption and fraud.

OPERATION HASTINGS

Operation Hastings was an investigation into whether a public officer had engaged in serious misconduct and acted corruptly by receiving a benefit from a relevant person.

The Commission's investigation established misconduct but the ability to further demonstrate offending over an extended period of time was unable to be proven. This was as a result of the public officer actively using an offshore email and cloud storage provider to communicate with the relevant person.

The Commission was unable to obtain the required information in a manner which was usable to the investigation. The Commission did not elect to pursue mutual assistance agreements to capture the content. Had the Commission been able to utilise an IPO, this content may have demonstrated the required level of offending resulting in a finding of serious misconduct.

Conclusion

25. The Commission plays a vital role in maintaining the integrity of the Western Australian public sector. The Commission's work helps to foster and maintain the community's trust in public sector bodies and decision making within the public service within Western Australia. The powers which will be afforded under the Bill will greatly assist the Commission in continuing to perform this vital role. The Commission commends the Bill to the Committee.