New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

SURVEILLANCE LEGISLATION AMENDMENT (IDENTIFY AND DISRUPT) BILL 2020 INQUIRY

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About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020

The NSW Council for Civil Liberties (NSWCCL) thanks the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make a submission concerning its inquiry into the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020.

1. Introduction

This Bill is a catch-all formula for abuse of power without demonstrated need or regard for proportionality.

Since 2001, we have seen an extraordinarily intensive period of legislative activity on law enforcement and intelligence gathering powers – possibly unrivalled in any other liberal democratic nation. We have seen the 'anti-encryption' *Assistance and Access Act* and the *Australian Security Intelligence Organisation (ASIO) Amendment Act* expanding the role and powers of law enforcement and intelligence agencies.

We have seen the extension of ASIO's extraordinary detention powers, which were due to expire in September 2020, until March 2021. And in 2020, we have seen the introduction of the *International Production Orders Bill* to allow sharing of data with foreign law enforcement and security agencies.

Now this Bill proposing the introduction of three new warrants is the next in an accelerating wave, strengthening the powers of the state without any humility about the cumulative erosion of democratic freedoms they entail.

NSWCCL appreciates that cyber-enabled serious and organised crime exists and should be targeted by law enforcement.

The three new warrants are:

- Data disruption warrants to enable the AFP and the ACIC to disrupt data by modifying, adding, copying or deleting in order to frustrate the commission of serious offences online
- Network activity warrants to allow agencies to collect intelligence on serious criminal activity being conducted by criminal networks, and
- Account takeover warrants to provide the AFP and the ACIC with the ability to take control of a person's online account for the purposes of gathering evidence to further a criminal investigation.

The key problems with the three new warrants are:

- the breadth of their application;
- the widening of spy agency remits to allow intelligence gathering on Australian citizens; and
- the overall risk of abuse of power.

2. Criminalising speech taken to a new level

While the focus in the Minister for Home Affairs' second reading speech is on child sexual abuse, terrorism and the trafficking of firearms and illicit drugs, these warrants will apply to any Commonwealth offence with a maximum term of imprisonment of 3 years or more.

This is an extraordinary catch-all, encompassing fauna importation, fraud, and importantly, such vaguely worded offences as 'communication and other dealings with inherently harmful information by current and former Commonwealth officers' under sections 121 and 122 of the Criminal Code.

These secrecy provisions have already been used to intimidate whistle blowers in several high profile cases over the last few years. They are framed in a way that prevents vital information regarding government wrongdoing from ever coming to the attention of the public.

This Bill builds on this ominous trend and takes it to a new level, providing unprecedented new powers for law enforcement to interfere and 'disrupt' communications of citizens without effective restraint.

We have enough experience now to say the ritual reassurances from the Minister about 'robust safeguards' are hollow. Inspectors-Generals and Ombudsman offices are not empowered to be a real counter-weight to law enforcement. The abuse of power this Bill enables will happen, as it already has under the other laws NSWCCL has opposed.

Enough is enough.

3. Abuse and overeach

The problem with each such conferral of additional powers on intelligence and law enforcement agencies is the increased invitation at every such step for abuse of power and overreach.

This is particularly the case given Australia's lack of human rights protections either constitutionally or in statute.

This is not an idle concern.

We have seen in recent months journalists raided on the basis of warrants issued by a magistrate but later found to be invalid and police investigations carried on for 12 months only to be dropped. In the meantime, the uncertainty they generated has undoubtably had a chilling effect on free speech. There remains the likelihood that this was the intention.

As the Bill provides for the ASD to assist under this new type of warrant, the Bill opens the door wider to spying on Australians.

4. No demonstrated need

The key question of what problem we are solving with this Bill remains unanswered. It is far from clear there is any shortcoming with existing powers that creates the need for additional powers.

The complex but essential balance between tackling cyber-enabled crime and democratic values is at the heart of the necessary and proportionate test that we accept as defining how far we are willing to go as a nation in encroaching on rights and liberties.

The explanatory memorandum says:

> "Without the critical first step of being able to identify potential offenders, investigations into serious and organised criminality can fall at the first hurdle. Being able to understand

> the networks that criminals are involved in and how they conduct their crimes is also a crucial step toward prosecution."

However there is no real explanation of how investigations in areas of legitimate public concern are currently falling "at the first hurdle" due to shortcomings in legal powers.

In relation to data disruption warrants, we are not aware of, and no evidence is presented of, any inabilities faced currently by law enforcement in preventing any of the offences mentioned in the explanatory memorandum – online child grooming, distribution of child abuse material or preventing online terrorist communication (examples from the explanatory memorandum at 50-53) that would necessitate the introduction of a special new warrant.

In relation to network activity warrants, the explanatory memorandum provides no real examples of intelligence on criminal activities that is going uncollected which would otherwise be collected.

The statement that such a warrant would "allow the AFP and the ACIC to more easily identify those hiding behind anonymising technologies" is unconvincing as a justification for such far-reaching powers. It is claimed the Bill prevents a 'fishing expedition', however this is precisely what the broad range of offences that are included would allow.

This warrant is not to be used for any particular investigation and information gathered won't be admissible in court, but rather is to allow surveillance on the suspicion that a crime gang is using an online site.

In relation to account takeover warrants, no specific examples are provided on how this materially improves law enforcement's toolkit against areas of legitimate public concern, however it is explicitly noted the warrant is "designed to support existing powers, such as computer access and controlled operations, and is not designed to be used in isolation".

This would also indicate that when weighed against the potential pitfalls, a new warrant is not justified.

5. Minority Report warrant

It is important to note the data disruption warrants and the account takeover warrants are not warrants as we are accustomed to in our system of law enforcement. They are not traditional evidence gathering tools, but are effectively "crime prevention" tools.

We cannot accept a new species of warrant that is based on the notion that the role of law enforcement is to stop possible future offences from being committed where the breadth of their application is so wide. The Minister's focus on the need to, for example, delete online child abuse material, distracts from the real implications of this Bill and pretends law enforcement agencies are not already taking appropriate action against such material.

It is important to emphasise our opposition is based on the cumulative effect of repeated widening of the powers of law enforcement and spy agencies to monitor Australians. The rationale advanced is always the same – fighting child sexual abuse, terrorism, and trafficking of drugs and firearms. This justification has reached its limit and must be rejected.

The elastic notion of 'suspicion' as the trigger for these laws will permit a generalised, permanent state of surveillance because there is never likely to be a time when there will not be a suspicion of these activities occurring online somewhere.

6. PROPOSED AMENDMENTS

If the proposal as currently drafted were to proceed, it is difficult to see how the Government can claim necessity and proportionality. The Inspector-General of Intelligence and Security would need a significant boost to its resourcing at a bare minimum.

The rest of this submission addresses some of the major issues that would have to be addressed to ensure a better balance.

i) Restrict the scope to specific offences

The application of the proposed warrants must be restricted to the specific offences which are ostensibly the areas of concern as set out by the Minister: child sexual abuse, terrorism, and trafficking of drugs and firearms. The Bill's application to any Commonwealth offence with a maximum term of imprisonment of 3 years or more must be removed.

ii) Create a Public Interest Monitor

A Public Interest Monitor (PIM) currently exists at the State level in Queensland and Victoria and to some extent in NSW in the form of the Surveillance Devices Commissioner to protect the public interest regarding applications by law enforcement agencies for various warrants and use of other covert, surveillance and coercive powers. It is important to note the NSW and Queensland positions were created by Liberal and National Party governments respectively.

At the Commonwealth level, the Independent National Security Legislation Monitor (INSLM) does not fulfil this important role. It is only a part-time role and only tasked with reviewing the operation of legislation.

A necessary counterbalancing of the extraordinary new powers should include a Public Interest Monitor to oversight the use of these warrants and report to Parliament.

The PIM should have the power to contest warrants, with the obligation on those seeking a warrant to inform the PIM. The PIM should be empowered and expected to provide argument and evidence before a warrant is issued. This should be the case even where a warrant is urgent. The PIM could be reachable by phone at any time if necessary. If the procedure were not required for urgent warrants, there would be the inevitable tendency for every possibly contestable warrant to be labelled as urgent.

iii) Limit the power to issue warrants

The power to issue warrants should be limited to judges. Magistrates are not tenured and often do not have the background needed to properly examine requests under pressure and to be prepared to reject them. It should be remembered the High Court in April 2020 found in Smethurst v Commissioner of Police that a magistrate had signed off on a search warrant that both misstated the offence being investigated and used language that was so vague ("not in the interest of the Commonwealth") that it provided no real limit on the nature of the search.

Achieving legal correction of this unlawful process took some nine months and the enormous financial resources of large media companies. We cannot now again entrench a process that has been proven to be so flawed.

This submission was prepared by Jonathan Gadir on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Parliamentary Joint Committee on Intelligence and Security.

Yours sincerely,

[redacted]

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