

Opening Statement



19 October 2018

Public Hearing: Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018

Opening Statement: Parliamentary Joint Committee on Intelligence and Security

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[Check Against Delivery]

1. My name is Arthur Moses SC and I am the President-elect of the Law Council of Australia. As the Committee would be aware, the Law Council is the peak national body representing the legal profession in Australia.
2. I would like to thank the Committee for the opportunity to provide evidence to its inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018.
3. If enacted, the Bill would confer significant expansions of existing powers on law enforcement agencies, the Australian Security Intelligence Organisation, the Australian Signals Directorate and the Australian Secret Intelligence Service.
4. The Bill would create a new regime for law enforcement and national security agencies to compel designated communications providers to assist them in decrypting information, create a new covert computer access warrant regime and strengthen existing search and seizure powers under warrant.
5. The Law Council acknowledges that there is significant value to public safety in allowing law enforcement and national security agencies faster access to encrypted information where there are threats to national security or in order to prevent the commission of serious criminal offences. The Law Council also acknowledges that there is merit in facilitating prompt international cooperation and assistance to deal with serious crimes which occur across multiple jurisdictions.
6. However, the Bill would authorise the exercise of intrusive covert powers with the potential to significantly limit an individual's right to privacy, freedom of expression, and liberty.
7. The Law Council considers that when legislation such as the current Bill is before us, it must be demonstrated that the measures are both necessary and proportionate.
8. In this instance, the Law Council has serious reservations that these requirements have been met. To this end, the Law Council has identified a number of areas where technical improvements should be made to the Bill, prior to its enactment.
9. For the purposes of this opening statement, I will briefly focus on five of the Law Council's key concerns and suggestions for improvement.

*The Law Council of Australia is the national voice of the legal profession,
promoting justice and the rule of law.*

10. *First*, the Bill includes proposed new powers to provide compulsory assistance to law enforcement or ASIO in certain circumstances where there is uncertainty as to whether there is a potential for individuals to effectively be detained. If a person is required to attend a place to provide information or assistance this may arguably amount to detention of the person, particularly as they may be arrested on suspicion of proposed new offence if they attempt to leave. This possibility of detention needs to be reconsidered with a view to ensuring that there are appropriate safeguards in place for detention, such as: allowing a person to contact a lawyer or family member; prescribing for maximum periods for giving assistance; requiring explanations of legal rights and responsibilities; the availability of interpreters where required and ensuring that the person is treated humanely and with respect for their human dignity.
11. *Secondly*, there is uncertainty as to whether law enforcement agencies and ASIO may be able to make a technical assistance request and whether ASIO may be able to make a voluntary assistance request requiring a provider to undertake certain acts or things, including telecommunications interception, for which they would otherwise require a warrant. The Law Council considers that the voluntary assistance request and the technical assistance request schemes, in addition to the technical assistance notices and technical capability notices, should not be used as means of avoiding the important safeguard of a warrant. Where law enforcement agencies or ASIO would otherwise require judicial or Administrative Appeals Tribunal, or Ministerial authorisation or approval, they should not be able to make a voluntary assistance request or a technical assistance request and this should be made clear on the face of the legislation. The safeguards that currently exist to protect the privacy and rights of Australian citizens should not be able to be sidestepped which may occur if this Bill is allowed to pass in its present form.
12. *Thirdly*, there are significant expansions of power proposed for law enforcement and ASIO in relation to the proposed new computer access warrants, including:
 - a) ability to access telecommunications interception on the basis of lower thresholds than that which currently apply;
 - b) permitting telecommunications interception and temporary removal of computers and things for the purpose of entering premises rather than gaining access to relevant data; and
 - c) an ability to use force against persons or things to engage in telecommunications interception.
13. These matters should be reconsidered. The Law Council considers that the existing thresholds that currently apply for telecommunications interception in the *Telecommunications (Interception and Access) Act 1979* (Cth) should not be diminished by the new computer access warrant scheme.
14. *Fourthly*, the decision-making powers in relation to Schedule 1 of the Bill for industry assistance do not task the relevant decision maker, when making a 'reasonable and proportionate' determination, to determine whether perceived law enforcement or national security should outweigh affected individuals' and businesses' reasonable expectations of confidentiality and privacy of communications. There is also no express requirements for necessity and proportionality in the decision-making criteria for the issuance of a technical assistance request. The Law Council considers that the decision making criteria should be improved by including for example: an express requirement that the decision maker must consider reasonable commercial interests of the provider to whom the notice relates; a requirement to consider the fundamental right to privacy of affected individuals; and requiring necessity and proportionality to be expressly included the decision-making criteria for the issuance of a technical assistance request.

15. *Fifthly and finally*, the Bill would allow for the conferral of civil and criminal immunities for providers that provide assistance to law enforcement or security agencies. In some cases, they would appear to allow a senior bureaucrat of ASIO to for example confer civil immunity. The Law Council considers that this proposal has not been adequately justified and recommends that the conferral of civil immunity powers in the case of ASIO should be by the Attorney-General.
16. My colleagues and I are happy to answer any questions the Committee may have. Thank you.

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