

Wednesday, 19 February 2020

Independent checks on de-encryption powers needed

The Law Council of Australia has welcomed comments by the Independent Security Legislation Monitor (INSLM) that there is a strong argument for better safeguards on requests to telecommunications companies to give access to encrypted private information.

The comments by the INSLM, Dr James Renwick SC, reported in the *Australian Financial Review* justify concerns expressed by the Law Council at the time *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (TOLA) was passed by the Australian Parliament in December 2018.

The INSLM is currently reviewing the legislation and the Law Council will this Friday attend a public consultation as part of the review.

Law Council President Pauline Wright said the absence of judicial review of the powers of law enforcement and intelligence agencies to access encrypted data will erode social licence for the use of these powers and undermine reasonable expectations of confidentiality and privacy.

“The Law Council acknowledges there is significant benefit to public safety in allowing law enforcement authorities faster access to encrypted information where there are imminent threats to national security and in order to prevent the commission of serious criminal offences,” Ms Wright said.

“However, the measures introduced by the TOLA Act go far beyond these threats and have broad application, applying to the enforcement of any criminal law in force in any foreign country, or domestic laws which attract a maximum penalty of three years imprisonment.”

In its submission to the INSLM, the Law Council has suggested the TOLA Act would be improved if:

- the definition of 'serious offences' is made consistent with the *Telecommunications (Interception and Access) Act 1979* (Cth), that is, punishable by a maximum term of imprisonment of seven years or more, not the currently prescribed three years;
- the 'reasonable and proportionate' test within the Telecommunications Act specifically requires the decision maker to determine whether perceived law enforcement imperatives demonstrably outweigh the reasonable expectation of confidentiality in electronic communications between individuals and businesses; and
- decisions made under Part 15 of the Telecommunications Act are to be made by a judicial officer. In the alternative, it is recommended that judicial review of Part 15 decisions should be available.

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