

9 February 2015

Mr Dan Tehan MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box Parliament House
CANBERRA ACT 2600

By email: picis@aph.gov.au

Dear Mr Tehan

Supplementary Submission – Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

Thank you for the opportunity to provide a submission to and appear before the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (the Bill).

The Law Council does not resile from the recommendations of its submission dated 20 January 2015 as the most appropriate way to respond to the challenges presented by the Bill. However, in light of discussions with the Committee, the following further options were raised to improve certainty and enhance oversight for the proposed data retention scheme. The adoption of some of these options may allay several of the concerns raised in the Law Council's submission provided that our other recommendations are accepted, such as those relating to more comprehensive reporting, the retention period, confidential communications and security of the retained data.

Oversight mechanisms in the Bill need to be adequate to safeguard privacy. The proposed oversight of access to data in the Bill is after the fact and there is no provision for pre-access oversight of authorisations. Some oversight at the pre-access stage has the best chance of striking a balance between the privacy and security.

Limited independent tribunal warrant regime

The Law Council's submission recommended an independent tribunal warrant be established to determine all access to telecommunications data.¹ As a result of the Law Council's appearance before the Committee on 30 January 2015, the Law Council appreciates that an independent tribunal warrant regime may be considered by some members of the Committee to unduly impede investigations. If the Committee is of this view, a warrant regime could be limited to:

- any telecommunications data other than subscriber details. This data, such as geolocation information, may be considered to be more privacy intrusive requiring greater independent oversight; or
- telecommunications data for investigating less serious offences. Given the privacy impacts of the scheme for access to telecommunications data for low-level crime and the reduced risk to public health or safety, the higher threshold for access of a warrant may be more appropriate.

¹ Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security* (2015) 18-20.

Independent pre-access assessment

Further to the observation in our submission that all current and proposed oversight mechanisms in the TIA Act are directed at reviewing telecommunications data access powers *after* they have been exercised,² an alternative approach could be to amend the Bill to require a pre-access oversight of a proportion of successful authorisations. For example, this may require the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security to randomly review a proportion of cases *before* the authorisation for access is implemented. The oversight body could make a recommendation as to the lawfulness, necessity and proportionality of the proposed access.

Divergent results between the recommendation of the oversight body and the initial authorising officer could be resolved by the head of the Government agency. A classified report of compliance or departure from oversight recommendations should be produced for inspection by the Attorney-General with a de-classified and de-identified report issued publicly. Obligations of this nature are consistent with the Law Council's recommendations made in its submission about the need for increased reporting requirements to Parliament to add transparency and accountability to the scheme.³

A pre-access regime of the kind described may present an opportunity to also establish and incorporate procedures to address the Law Council's concerns about access in cases of potentially privileged and confidential communications.

Regulation making powers in the Bill

The Law Council's submission recommended that the matters which the Bill addresses in regulations should be provided for in primary legislation.⁴ However, as intimated at our appearance before the Committee, if regulations are the preferred legislative mechanism, the Bill should be amended to include requirements for:

- the Privacy Commissioner and the public to be consulted before the making, or variation, of regulations;
- a privacy impact assessment to be conducted by the Privacy Commissioner on any proposed changes to the regulations; and
- any proposed changes to the regulations to come into effect after Parliament has reviewed the proposal and the disallowance period has expired.

The Committee would also be well placed to review any proposed changes to the regulations prior to them coming into effect.

Thank you for the opportunity to provide these comments.

Yours sincerely,



Duncan McConnel
President

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² Ibid, p. 18.

³ Ibid, p. 7-8.

⁴ Ibid, pp. 9, 14-15.