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Submissions to the Department of Home Affairs on its Public Consultations regarding the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018

Nyman Gibson Miralis

1. This submission is made to the Department of Home Affairs ('Department') with respect to its public consultation regarding the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth) ('Bill').
2. Nyman Gibson Miralis is a leading Australian criminal law firm specialising in international criminal law and has acted and advised in matters involving encryption enabled technology in Australian connected to criminal investigations and proceeds of crime proceedings as well as international criminal cases involving encryption based offending.
3. Nyman Gibson Miralis has also engaged with various Australian authorities and departments concerning encryption enabled devices on behalf of encryption suppliers and distributors.
4. In particular, our submission will focus on the human rights considerations relevant to the proposed legislative changes, as well as issues of oversight, transparency, and accountability.

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Introduction

5. In publicised materials concerning consultation, the Department has asserted that the Bill is not aimed at the creation of 'backdoors' into people's communications. This is correct because as it stands, the bill empowers the Government to demand the key to the front door.
6. In a broad sense, the Bill presents a worrying shift towards private enterprise being engaged into being the eyes and ears of law enforcement agencies. This type of model is also found in a number of foreign regimes renowned for exercising excessive control over their citizens' lives.
7. We acknowledge that, in certain circumstances, access to encrypted communications may be a legitimate means for law enforcement to disrupt or investigate serious crime. However, we contend that the Bill does not propose a reasonable approach to this issue, but rather represents governmental overreach that would have profound implications for privacy within Australian society.

Human rights considerations

8. Through the Five Country Ministerial Statement of Principles on Access to Evidence and Encryption of 2018,[1] the Government recently affirmed its commitment 'to personal rights and privacy' pursuant to Australia's human rights obligations under international law.
9. In particular, the right to privacy under article 17 of the International Covenant on Civil and Political Rights is relevant. In relation to this right, the United Nations Human Rights Committee has noted that 'competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society'.[2] However, in our view the Bill proposes powers that go well beyond what is 'essential'.
10. In a discussion of cyber-technology experts facilitated by the United Nations General Assembly, it was expressed that laws concerning government access to communications (e.g. encrypted communications) must be precise (not broad or discretionary), and must avoid governments being granted direct access to networks.[3]
11. It cannot be said that the present Bill conforms with the principles stated above.

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1 Five Country Ministerial, 'Statement of Principles on Access to Evidence and Encryption' (2018).

2 Human Rights Committee, *General Comment 16*, 23rd session 1988, U.N. Doc. HRI/GEN/1/Rev.1 (8 April 1988) [7].

3 United Nations General Assembly, *Summary of the Human Rights Council panel discussion on the right to privacy in the digital age*, UNGAOR, 28th sess., Agenda items 2 and 3, UN Doc A/HRC/28/39 (19 December 2014) [25]-[26].

Independent oversight

12. A concerning aspect of the Bill is the proposed endowment of authority on government officials (the Attorney-General and Director-General of Security), pursuant to draft sections 317L and 317T of the *Telecommunications Act 1997* (Cth) ('*Telecommunications Act*'), to legally oblige agencies to assist or develop capabilities for the purpose of accessing private information on encrypted applications.
13. The Department points to the fact that, in order to issue such a notice, government agencies must be already acting under the broader authority of a judicially issued warrant as evidence of adequate oversight. However, the decision to issue a technical capability notice or technical assistance notice is a specific, escalated measure of information gathering. Its distinctiveness from ordinary actions taken pursuant to a general warrant is reflected in the decision making criteria contained in draft sections 317P and 317V.
14. It is essential that these decisions and authorisations are exercised by independent judicial authorities, not government personnel.
15. Highlighting the importance of judicial oversight of executive decisions, Sir Robin Cooke noted that:

> the judicial role is ... to act as a check or keep the ring, trying to ensure that those responsible for decisions in the community do so in accordance with law, fairly and reasonably.[4]

16. We submit that a more appropriate course of action would be amendment of section 3LA of the *Crimes Act 1914* (Cth), as necessary, to apply to *specific* information contained within encrypted applications. This provision already provides a framework granting significant powers to law enforcement in gaining access to encrypted material.
17. Amending this section to accommodate information stored in encrypted applications would at least result in independent judicial oversight of the process and ensure consistency with established procedures for the obtaining of information in analogous situations.

Transparency and accountability

18. Additionally, the Bill is wholly inadequate in regards to the transparency of, and accountability for, the exercise of powers it seeks to authorise.

<u>The proposed review scheme</u>

19. The Department has stated that 'Australian courts will retain their inherent powers of judicial review of a decision of an agency head or the Attorney-

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[4] Robin Cooke, 'The Struggle for Simplicity in Administrative Law' in Michael Taggart (ed), *Judicial Review of Administrative Action in the 1980s* (Oxford University Press, 1986) 5.

General to issue a notice.'[5] Notably however, this is limited by the fact that decisions made under draft Part 15 of the *Telecommunications Act* (e.g. issuing assistance and capability notices) would be expressly excluded from the ambit of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), concerning the merits of decisions.

20. Additionally, draft section 317S of the *Telecommunications Act* requires that an annual ministerial report be prepared detailing the number of technical assistance notices and technical capability notices issued in that financial year. According to the Department, this will provide the public with 'visibility of the use of the new powers'.[6]

The need for transparency in ministerial decisions and oversight of the executive

21. The critical importance of transparency and oversight of executive decisions cannot be overstated.

22. Transparency is a core tenant of accountability. The accountability of government is essential to the proper functioning of Australia's system of representative democracy. As highlighted by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth*:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people.[7]

23. Moreover, subjecting executive decisions to a process whereby their lawfulness can be realistically challenged is a key component to the rule of law. The Full Court of the Federal Court has affirmed that:

> It is not an interference with the exercise of Executive power to determine whether it exists in relation to the subject matter to which it is applied and whether what is done is within its scope.[8]

24. In our submission, the above statements highlight the indispensability of a legislative regime that enables persons subject to serious government incursions in their private lives a truly accessible avenue to contest the validity of that action.

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5 Department of Home Affairs, *Assistance and Access Bill 2018*, Explanatory Document (2018) 11.
6 Department of Home Affairs, *Assistance and Access Bill 2018*, Explanatory Document (2018) 11.
7 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 137-138.
8 *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at 242.

Faults in the Bill

25. By focussing only on the agency providing carriage of communications, the persons who are ultimately subject to monitoring of their communications are cut out of a process with significant implications on their own privacy. As a result, the possibility of seeking any review of the legality of a decision to monitor their communications is rendered illusory.
26. We submit that provision should be made in Commonwealth legislation for affected individuals to be properly notified when such action is taken. This would allow persons to whom such decisions have their greatest effect the opportunity to at least challenge their legitimacy and lawfulness.
27. Further, draft section 317S of the *Telecommunications Act* merely stipulates that an annual ministerial report be prepared containing bare numbers of notices issued in that year. Such a requirement offers no real ability to assess whether the proposed powers have been exercised in a proper and responsible manner. Whilst not compromising the confidentiality of ongoing investigations, it is submitted that the Department additionally be required to publish detailed of the nature alleged offences connected with the exercise of such powers in the case and information about the basis upon which access to the communications was sought.

[redacted]

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on behalf of
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