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Parliamentary Joint Committee on Intelligence and Security

Review of the
*Telecommunications and
Other Legislation
Amendment (Assistance
and Access) Act 2018*

January 2019

Submission by the
Australian Federal Police

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Table of contents

Introduction.....	3
TOLA Act benefits to law enforcement.....	3
Actions taken by the AFP since commencement of the TOLA Act.....	3

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Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS) Review into the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act).
2. The TOLA Act strengthens the ability of the AFP to address existing and future obstacles to lawfully accessing digital content. The tempo and complexity of the criminal threat environment driving the operational urgency of the reforms last year have not abated. Technology is advancing at an incredible rate, with serious criminals understanding law enforcement's technical impediments and proactively and with clear criminal purpose operating outside law enforcement reach.
3. This submission focusses on the operational benefits to the AFP derived from the TOLA Act and the actions taken by the AFP since commencement of the TOLA Act.
4. The AFP supports the position of the Department of Home Affairs on the amendments made during parliamentary consideration of the reforms. In particular, the AFP shares the Department's concerns about the amendments giving the AFP Commissioner approval authority over State and Territory Technical Assistance Notices (TANs). The AFP is concerned that this role could interfere with the independent operational decision making processes of policing agencies and may be unworkable. The AFP refers to the comprehensive concerns detailed by the Department of Home Affairs on this specific issue and emphasises agreement with those concerns. A co-ordination as opposed to approval role for the AFP Commissioner is more appropriate in relation to State and Territory Police use of TANs.

TOLA Act benefits to law enforcement

5. Schedule One of the TOLA Act enables collaboration between industry and law enforcement to develop solutions to complex technical issues. Schedule One provides a framework for engaging with providers to ensure that requests or notices are reasonable, proportionate, technically feasible and relate to the AFP's mission to enforce criminal law.
6. Schedule Two of the TOLA Act provides the AFP with a covert investigative tool and Schedule Three improves the operation of the electronic evidence gathering provisions in relation to overt search warrants issued under section 3 of the *Crimes Act 1914*. These amendments ensure that the AFP's core policing powers have kept pace with changes in technology.

Actions taken by the AFP since commencement of the TOLA Act

Schedule One – Industry assistance

7. The AFP is conscious of the non-disclosure requirements set out in section 317ZF of the *Telecommunications (Interception and Access) Act 1979* in relation to information about Technical Assistance Requests (TARs), TANs or Technical Capability Notices (TCNs). Cooperation with the Committee is critical and the following information is provided to meet the Committee's oversight role. We welcome the opportunity to expand privately to the Committee as appropriate.
8. Since commencement, Schedule One has provided significant operational benefit to address a number of emerging and urgent operational issues and provided industry with the legal confidence to productively engage on potential technical options which

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will lead to TARs being finalised. The Schedule has accelerated the collaboration previously being experienced and this has been of significant value to the AFP's investigative effectiveness.

9. The AFP is in the advanced stages of negotiation in relation to forms of assistance that will be provided pursuant to the issuing of multiple TARs. This has involved engagement and collaboration between the AFP and designated communications providers to ensure that the forms of assistance are proportionate and technically feasible. These TARs are being sought in support of active AFP investigations into serious Commonwealth crime.

Schedule Two – Computer access warrants

10. The AFP continues to ensure we have explored less intrusive options for our current active investigations before application for a computer access warrant. Computer access warrants are necessary and the ability to escalate to this level of access is critical to operational effectiveness. However, the AFP takes the application of such intrusive powers very seriously and with due consideration. These warrants will be used in a very measured and considered way.

Schedule Three – Amendments to the Crimes Act 1914

11. Unlike the powers provided for in Schedules One and Two, the AFP is not legislatively or ordinarily required to maintain and report on the number of times we conduct search warrants and related provisions. Comprehensive records are retained on individual law enforcement activities but the ability to draw accurate statistics across existing systems on the application of Schedule Three would require an impractical diversion of manual resources.
12. The AFP provides the following contemporary, operational case studies to demonstrate the utilisation of Schedule Three provisions:
 - a. *Investigation into the importation of illicit drugs:* The AFP executed a section 3E search warrant on a premises following the suspected procurement and importation of illegal drugs with cryptocurrency via a dark web marketplace. During the execution of the search warrant the accused was served a notice to assist in accordance with the updated section 3LA provisions. Following consideration of the order and being advised of the new penalties, the accused advised the AFP of the passwords to a number of devices as well as a number of cloud hosted accounts in which he had facilitated the importation. Through the provision of this assistance, the AFP was able to successfully access, identify and collect otherwise secure and encrypted communications and digital records as evidence of the alleged offending.
 - b. *Investigation into the distribution and possession of electronic child exploitation material:* Following receipt of information relating to the distribution of child exploitation material the AFP executed a section 3E search warrant on a premises. The search resulted in the identification of several devices containing child exploitation material. However, a number of devices could not be accessed due to the application of encryption and electronic protections. Those devices that the AFP was unable to access the contents of at the premises were subsequently moved under section 3K for further examination, which did not prove successful. The accused was issued a section 3LA order signed by a judicial authority to provide assistance. Following being advised of the conditions of the order and the penalties that can apply for non-compliance, the accused provided information to enable access to the contents of the locked devices, which identified further evidence.

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Implementation

13. Internal implementation of the TOLA Act has been a priority, with work beginning prior to the commencement of the Act.
14. The initial stage of implementation focussed on giving AFP appointees a broad overview of the Act and providing them with key points of contact for further information, and centralised areas to approach to use the powers provided for in Schedules One and Two. Essential documents, including warrant templates, were also drafted.
15. Subsequent stages of implementation have included a range of training, procedures, and legal support to ensure delegated officers are well aware of the need for lawful and proportionate application of the Act's provisions. Examples of implementation activities undertaken by the AFP include:
 - a. Internal communication to all staff, both general and targeted to Investigator networks and forums, providing information on the amendments and key points of contact.
 - b. Updating of the Investigator's Toolkit which is a 'one stop shop' for Investigators seeking information on the full range of police powers and procedures emphasising recording keeping requirements and other support resources including Legal advice.
 - c. Updated training curricula as well as delivery of training to state/territory police.
 - d. Weekly emphasis and consideration at relevant operational committees in the context of specific operations and investigations.
16. The following internal AFP documents are in the process of being developed or updated:
 - a. The section 3E search warrant template and affidavit.
 - b. The section 3LA application for an order to provide information or assistance and affidavit.
 - c. The computer access warrant template and affidavit.
 - d. The template for issuing a technical assistance request.
 - e. The *Rights of the Occupier* and *Rights of the Person Searched* statements. These are also being translated into various languages.
 - f. Instruments of delegation.
 - g. The *Better Practice Guide on Crimes Act 1914 Search Warrants*.
 - h. The *National Guideline on Surveillance Devices*, to incorporate information regarding computer access warrants.
17. The AFP would be happy to provide further information on implementation of the TOLA Act should the Committee require it.

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