

DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security
Review of the amendments made by the Telecommunications and Other Legislation
Amendment (Assistance and Access) Act 2018

7 August 2020

QoN Number: 01

Subject: Consultation

Asked by: Kristina Keneally

Question:

Senator KENEALLY: I will ask a few more questions and then I will defer to some of my colleagues here. You've developed administrative guidelines to ensure that the powers are used consistently. You've noted that this reflected the 'department's ongoing engagement with a consultation group of industry organisations and peak bodies'. With respect, we've heard a slightly different story from various witnesses and industry groups around consultation for this legislation. To that end, can you tell us which industry organisations and peak bodies you did consult with in the development of this guidance? Did all those you approached participate?

Mr Warnes: I don't have the details in front of me, but I'm happy to take it on notice and provide it. We did consult a number of those bodies. There are a lot of bodies out there, so I'm not sure which ones have said we didn't. We'll take it on notice and provide you with that answer.

Answer:

As part of the development of the Administrative Guidance for the use of industry assistance powers (Part 15 of the *Telecommunications Act 1997*), the Department shared a draft for comment with representatives from the following groups:

- Ai Group
- Amazon
- Apple
- Atlassian
- Austcyber
- Australian Information Industry Association
- Blackberry
- BSA | The Software Alliance
- Cisco
- Communications Alliance
- DIGI
- Facebook

- Fastmail
- Google
- IGEA
- Internet Architecture Board
- Internet Australia
- Macquarie Telecom
- Microsoft
- NBN Co
- Optus
- Senetas
- Snap
- StartupAus
- Telstra
- TPG Telecom
- Vodafone

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QoN Number: 02

Subject: Consultation with technology companies

Asked by: Mark Dreyfus

Question:

Mr DREYFUS: ... Perhaps I'll ask you a more focused question. Was it a mistake for the Department of Home Affairs not to consult with a single Australian technology company before the release of the exposure draft of the assistance and access bill on 14 August 2018, a year in to the development of the bill?

Mr Warnes: Sorry, what was the date you provided?

Mr DREYFUS: It was 14 August 2018. Before then, as I understand it, the department had not consulted a single Australian technology company.

Mr Warnes: Potentially, depending on how you characterise some of the companies we did consult, Telstra may well see itself as a technology company as well as a provider of communications and they were certainly consulted. I acknowledge there were other technology companies which weren't consulted, yes, which is what I said previously.

Mr DREYFUS: Give me an example other than Telstra of another—

Mr Warnes: They include Optus, Telstra, NBN, Macquarie Telecom.

Mr DREYFUS: And you say they were all consulted before 14 August 2018?

Mr Warnes: Yes, many of those just mentioned were invited to the confidential consultations roundtable discussion that was held by Minister Taylor on 28 June.

CHAIR: Mr Warnes, for the assistance of the committee, perhaps you could take it on notice and give us an exhaustive list rather than having to reach back 18 months ago and potentially miss one or two.

Mr Warnes: Yes, absolutely, Chair.

Answer:

The Department conducted preliminary consultation with industry between July 2017 and April 2018 with the following companies:

- Apple
- Communications Alliance
- DIGI
- Facebook
- Google

- Microsoft
- Optus
- Telstra
- TPG
- Twitter
- Vocus
- Vodafone

In the lead-up to introduction, the Department then conducted targeted consultation—including a roundtable hosted by the then Minister for Law Enforcement and Cybersecurity, the Hon Angus Taylor MP on 28 June 2018—with the following companies:

- Ai Group
- Amazon Web Services
- Apple
- Facebook
- Google
- Internet Australia
- Macquarie Telecom
- Microsoft
- NBN Co
- Optus
- Telstra
- TPG
- Vodafone

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QoN Number: 03

Subject: Consultation with Inspector-General of Intelligence and Security

Asked by: Mark Dreyfus

Question:

Mr Warnes: Thank you, Chair. What I was going to say was I'm not sure when the Inspector-General of Intelligence and Security heard. I have heard her evidence; I accept that. I don't contradict that. We did consult with her office prior to the media reporting about the legislation. That would be my answer.

Mr DREYFUS: That sounds to me like a contradiction. Are you saying that she was wrong?

Mr Warnes: No, I'm saying we consulted with the office. I'm happy to give you a time, on notice, when we provided it.

Answer:

The Office of the Inspector-General of Intelligence and Security was sent a draft of the Assistance and Access legislation on 27 September 2017 and a limited circulation version of the exposure draft of the Assistance and Access legislation on 5 July 2018.

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QoN Number: 04

Subject: Timing of the government response to the INSLM report

Asked by: Mark Dreyfus

Question:

Mr DREYFUS: Thank you. I want to turn to the INSLM report. Senator Keneally has asked you a number of questions directed at the recommendations and you provided a submission to us yesterday about the INSLM report. Will the government respond formally to that INSLM report?

Mr Coles: It's the intention that there would be a government response, yes.

Mr DREYFUS: Do you know when?

Mr Coles: No.

Mr DREYFUS: In a month? In two months? In a year?

Mr Coles: I think there's an issue about when this committee makes its report and how those two processes dovetail.

Mr DREYFUS: Is that the government's intention? Not to assist this committee with a response to the INSLM report, but rather just sit on it?

Mr Coles: I'll have to take the matter of timing on notice, Mr Dreyfus. I can't give you a—

Mr DREYFUS: If you could let us know, that would assist us in the preparation of our report.

Mr Coles: Yes.

Answer:

The Department of Home Affairs understands that the Committee's review will be informed by the recent findings of the former Independent National Security Legislation Monitor, Dr Renwick. That is why the Department provided a supplementary submission to the Committee's review of the Assistance and Access Act, outlining the Department's analysis of Dr Renwick's findings. The Department further outlined its analysis of Dr Renwick's findings during the public hearing held by the Committee on 7 August 2020.

The Government will carefully consider and respond in due course to the findings made by Dr Renwick, and by the Committee when it completes its third review of the Assistance and Access Act.

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QoN Number: 05

Subject: Meeting with Australian business groups

Asked by: Mark Dreyfus

Question:

Mr DREYFUS: When was the last time that the Department of Home Affairs met with Australian business groups to discuss the industry impact of the assistance and access act?

Mr Warnes: It has been a number of months. I'd have to take it on notice to give you an answer to that.

Mr DREYFUS: That'd be helpful. Perhaps you could indicate in that answer on notice which groups you met with.

Mr Warnes: Absolutely.

Answer:

The Department of Home Affairs most recently met with industry stakeholders to discuss the impact of the Assistance and Access Act on industry, including representatives of Senetas on 15 October 2019, and at the Interception Consultative Committee (ICC) meeting on 29 October 2019. Industry attendees at the ICC included Telstra, Optus, Vodafone, NBN Co and Vocus. A further ICC meeting was scheduled for 30 April 2020, however due to the coronavirus pandemic the meeting was postponed.

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QoN Number: 06

Subject: AFP powers

Asked by: Mark Dreyfus

Question:

Mr DREYFUS: Yes. Going back to the Prime Minister's proposition that the same rules apply to the real world that should apply in the digital world, does the Australian Federal Police have the power to compel an innocent person unconnected to an investigation to chase a suspect?

Mr Warnes: Not that I'm aware of. An example we've given previously is the Australian Federal Police being able to, if executing a search warrant, get assistance from a safecracker to go and unlock a safe. It's not dissimilar to the types of assistance—

Mr DREYFUS: That is not something that the AFP has power to compel, is it?

Mr Warnes: I'd have to take that on notice.

Mr DREYFUS: I'd be grateful if you could identify a power anywhere in Australian law that permits an Australian Federal Police officer to compel a technician to open a safe.

Mr Warnes: I think you're correct, but I'd just like to take it on notice to make sure I'm accurate.

Mr DREYFUS: Does the Australian Federal Police have the power to compel an innocent person or an innocent company unconnected to an investigation to allow police officers to occupy the person's home for the purposes of an investigation—a stake-out, for example? Could the AFP compel a person to provide that assistance without a warrant?

Mr Coles: We'll take that on notice.

Answer:

An established assistance provision of this kind exists in the *Crimes Act 1914* under section 3G. This provision is extracted below:

3G Availability of assistance and use of force in executing a warrant

In executing a warrant:

(a) the executing officer may obtain such assistance; and

- (b) the executing officer, or a person who is a constable and who is assisting in executing the warrant may use such force against persons and things; and
- (c) a person who is not a constable and who has been authorised to assist in executing the warrant may use such force against things; as is necessary and reasonable in the circumstances.

In this context, the use of force against property by a person assisting may be necessary, for example, where the assistant is an expert safe cracker. Use of force against persons should be confined to those with a high level of training and accountability and not to persons playing an assisting role. The provision remains neutral on whether this power can be used to compel a person to provide this assistance.

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QoN Number: 07

Subject: Effectiveness of the legislation

Asked by: Mark Dreyfus

Question:

Mr DREYFUS: This is quite important. It goes to the reason for this legislation. The government made some very big claims about the importance of the industry assistance provisions in the assistance and access act, and we've heard anecdotally that Australian technology businesses have suffered as a direct result of this legislation, which would mean fewer jobs for Australians, less tax revenue and businesses moving offshore. The government apparently doesn't accept that anecdotal evidence, but you're asking this committee and the Australian people to accept your anecdotal evidence, or the AFP's anecdotal evidence, that the legislation is working as intended. But it seems to us that you're just asserting it, Mr Warnes.

Mr Warnes: The only other thing I can add to that is that the INSLM undertook a review and also found that these powers were likely to be necessary.

Mr DREYFUS: Now you're off on a different tack, which is whether or not these are necessary. I was very much focusing on the assertion that somehow, by some magical process, the existence of these coercive powers, which have never been used, has made companies more willing than they were before, but neither you nor the Australian Federal Police have offered the slightest evidence for that assertion. I think you should take it on notice and see if you can come up with some basis for this assertion that's been put forward, which you're prepared to back in but not prepared to provide any evidence on.

Mr Coles: Just in response to that point, what we have been quite clear on is that, in order to provide an answer to that question, we would have to be talking very closely to the AFP and ASIO about it, because, as I've said, those are the agencies that, if you will, have the direct contact with the designated communication provider around the exercise of these powers. It's not necessarily something that would be in the department's purview. If we're taking it on notice, then, just to be clear, we'll be talking very closely with the AFP, in particular, about it.

Mr DREYFUS: Thank you

Answer:

Please refer to the Australian Federal Police's (AFP) response to its question on notice in relation to the AFP's submission statement on industry's increased willingness to assist.

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QoN Number: 08

Subject: Process for government response to the INSLM report and the Committee's final report

Asked by: Jenny McAllister

Question:

Senator McALLISTER: Your supplementary submission leads with some preliminary observations about the INSLM's report and says:

The Government will carefully consider the findings made by the Monitor, and by the Committee, when it completes its third review of the Assistance and Access Act.

Can you provide some indication of the government's processes—what work plan you're constructing—to respond to the INSLM's report and to respond to our committee's report when we've finalised our work.

Mr Coles: We took a very similar question to that on notice earlier and would seek to do the same.

Senator McALLISTER: I suppose I'm troubled by—perhaps this is merely a comment and you can reflect on this in preparing your answer. I'm troubled by the idea that you have a very thorough product, a report produced by the INSLM, a report that was based on very extensive consultation in which industry participated extensively, and there's not yet a plan that you can make public about how you're going to deal with that report. I'd invite you to reflect on whether that is going to be satisfactory from a public policy perspective, irrespective of the work being done by this committee. You've got some very detailed recommendations. I'm not sure that you shouldn't be getting on with processing them, to be honest, and talking to the industry about them.

Mr Coles: Thank you, Senator. As I said, we'll take it on notice, except to say that, clearly, the fact that we have moved to provide the supplementary submission indicates that we are giving the INSLM's report very close and careful and thorough consideration, and certainly that theme will continue to underpin our response to it.

Answer:

Please see response to question 4 above.

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QoN Number: 09

Subject: Minister briefing

Asked by: Jenny McAllister

Question:

Senator McALLISTER: Has the minister requested a briefing about that [INSLM] report?

Mr Warnes: We provided a short briefing about the report is my recollection, yes.

Senator McALLISTER: A verbal briefing?

Mr Warnes: I might take it on notice, just to be sure, but I think it was a written briefing that was provided.

Senator McALLISTER: Okay. Thank you, Chair.

Answer:

The Minister received a written briefing concerning the Independent National Security Legislation Monitor's findings ahead of a meeting with the Monitor on 18 June 2020.