

11 January 2017

Communications Security
The Department of Communications and the Arts
CommunicationsSecurity@ag.gov.au

Your ref

Our ref: Litigation Rules:KB

Dear Communications Secretary

Access to retained data in civil proceedings

Thank you for the opportunity to provide a submission in respect of the review of access to retained telecommunications data by parties to civil proceedings.

The Queensland Law Society (the Society), in carrying out its central ethos of advocating for good law and good lawyers, endeavours to be an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

In making this submission, the Society notes the submission of the Law Council of Australia (the Council) dated 20 January 2015 in respect of the then Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. We note the Council's reference to the Report of the Inquiry into Potential Reforms of Australia's National Security Legislation which stated:-

*"A mandatory data retention regime raises fundamental privacy issues, and is arguably a significant extension of the power of the state over the citizen. No such regime should be enacted unless those privacy and civil liberties concerns are sufficiently addressed."*¹

In its submission, the Council, and other stakeholders, called for the introduction of a warrant process to ensure that the data was being appropriately and justly accessed. In respect of accessing data for use in the civil proceedings, the Society would like to see the same judicial oversight applied.

The Society notes the importance of protecting individuals' data and does not wish to see this data being used to intrude into someone's life without a proper and demonstrated need, scrutiny and oversight. However, we are also aware that if this data is to be retained by

¹Joint Parliamentary Committee on Intelligence and Security, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*, (2013) 190.

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telecommunications providers, it can provide significant efficiencies in civil litigation. To be faithful to the original bargain which facilitated retention of this metadata, we believe that a judge considering the merits of each request for access is warranted. It would be a matter for the parties to a proceeding as to whether they wish to bear the costs of that application. We submit that the amending legislation should stipulate the criteria a judge must assess when making a decision to allow the release of this data and that such criteria should be similar to the criteria which enables parties to access documents under notices of non party disclosure and subpoenas.

An example of where this data will be useful can be found in a claim brought by a worker for damages for personal injuries arising from the alleged negligence of their employer. In this case, the worker may need to access telecommunications data to prove that they telephoned their supervisor to report the details of the incident. Access to this data to prove that a call was made by the worker to the supervisor on a particular date will greatly assist in establishing that the incident occurred and was reported.

In this example we note that in Queensland, a worker has three years from the date that their cause of action arises to commence a proceeding and so they may need to access data that is years old.

In other types of actions though, the Society is mindful that this data could be misused by a party in an action to frustrate the other party. For example, a party to family law or civil domestic violence matter may wish to obtain data on their former partner or spouse for nefarious gain or to perpetuate the intimidation and harassment aspects of domestic violence through use of the court system. This should not be permitted.

Accordingly, the Society advocates the Government ensures that the legislation only allows the data to be available for “commercial matters” and that “commercial matters” should be defined to exclude civil domestic violence and family law matters but to include other civil actions.

We reiterate that there is a need to ensure the legislation offers proper protections for individuals but, where the data exists and can have a significant benefit to parties to a proceeding, we would welcome such data being made available if a judge decides on a case by case basis that it is in the interests of justice, balancing privacy considerations, to do so.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Kate Brodnik, Policy Solicitor, on 3842 5851 or via email K.Brodnik@qls.com.au.

Yours faithfully



Christine Smyth
President