The Hon Linda Burney MP
Minister for Indigenous Australians

Reference: MS22-000603

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the matters raised by the Senate Scrutiny of Bills Committee (the Committee) in *Scrutiny Digest 7 of 2022* in relation to the Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022 (the Bill). I welcome the opportunity to respond to the Committee's comments, as outlined below.

Why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 29(1A) of the Bill.

Proposed subsection 29(1) provides that a person is not eligible to be an executive member of the Wreck Bay Aboriginal Community Council (the Council) unless the person is a registered member and a fit and proper person. Proposed subsection 29(1A) of the Bill provides that anything done by or in relation to a person purporting to hold the office of an executive member is not invalid merely because the person is not a fit and proper person. This has been identified as a no-invalidity clause.

The Council is a corporate Commonwealth entity. Its functions include holding title to Aboriginal land, exercising powers as land owner and conducting business enterprises for the economic and social benefit of the community. As such the Council enters into contracts and other arrangements with other parties. It is important that parties dealing with the Council, and who have no means of establishing whether or not the Council's internal governance requirements have been satisfied, have certainty when transacting in good faith with the Council.

Further, the Council's executive committee is comprised of nine members and decisions are made by a majority of votes (at a meeting of the executive committee, five executive committee members constitute a quorum). The no-invalidity clause means that if an individual member of this committee was found not to be fit and proper, then the decisions of the committee as a whole would not be undermined. The executive committee is the accountable authority of the Council and its members must comply with the duties set out in the *Public Governance, Performance and Accountability Act 2013* including the duty to act honestly, in good faith and for proper purpose.

Changes to the explanatory memorandum will be prepared to include the information provided in this response and tabled in the Parliament as soon as practicable.

Whether the Bill could be amended to require that the Council Chief Executive Officer (CEO) and the executive committee, when exercising the delegation power under proposed subsections 34E(1) and 36(1), must be satisfied that the relevant person has the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

I have considered the Committee's recommendation that the CEO and the executive committee should be satisfied of certain criteria when exercising the delegation power under proposed subsections 34E(1) and 36(1).

I agree with the committee that factors such as the training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions are relevant to the ability to exercise a delegated power.

A request will be made to the Office of Parliamentary Counsel to draft the relevant amendment to the Bill and a supplementary explanatory memorandum will be prepared. Appropriate policy authority will also be sought and consultation undertaken to progress this amendment.

I thank the Committee for its consideration of this important Bill.

Yours sincerely

The Hon LINDA BURNEY MP
Minister for Indigenous Australians

7 DEC 2022

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC22-004616

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Dean Chair

The Senate Scrutiny of Bills Committee (the committee) has sought my advice as to whether Appropriation Bills (Nos. 1 and 2) 2022-2023 can be amended by either providing inclusive definitions of 'natural disaster' and 'national emergency' as they relate to the Advance to the Finance Minister (AFM) provisions in the Bills, or by including guidance on the exercise of the Finance Minister's power in relation to those concepts.

It is no longer possible to make amendments to Appropriation Bills (Nos. 1 and 2) 2022-2023 as they commenced on 30 November 2022 following Royal Assent. However, for the committee's information, I confirm that in order to exercise these powers, I am required to satisfy myself that an event is a natural disaster, or that circumstances constitute a national emergency, after considering the natural and ordinary meaning of these concepts.

I am satisfied that the above requirement, together with additional guidance in explanatory memoranda to the Appropriation Bills and the strong accountability and transparency arrangements that will continue to apply to the AFM, will provide assurance to Parliament and the public that the power to make an AFM determination would be exercised in an appropriate and transparent manner.

I trust this advice will assist the committee in its deliberations.

Yours sincerely

Katy Gallagher

12 DEC 2022

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS22-002291

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Via email: scrutiny.sen@aph.gov.au

Dear Chair, Dean

I write in response to the additional observations of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 (the Bill) in the *Scrutiny Digest 7 of 2022* (the Digest).

As indicated in the Digest, I provided advice on 10 November 2022 on the Committee's initial observations on the Bill in *Scrutiny Digest 6 of 2022*. The Committee has sought further advice on two matters identified in the Digest. After careful consideration of the Committee's additional observations, I provide the following advice.

a) The committee requests that an addendum to the explanatory memorandum be tabled in the Parliament;

Consistent with the views of the Committee, I acknowledge the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

In response to the Committee's request, on 25 November 2022 I tabled in the Senate an addendum to the Bill's explanatory memorandum that contains key information that I previously provided to the Committee in relation to the proposed exemptions from the disallowance process and the no-invalidity clauses.

I attach the addendum to the explanatory memorandum to this letter.

b) ***The committee requests the minister's further advice as to whether the bill can be amended to provide that decisions made under sections 632 and 633 of the Biosecurity Act 2015 be subject to independent merits review;***

As I noted previously, an alternative mechanism for relief is available within section 27 of the *Biosecurity Act 2015* (the Biosecurity Act) which enables persons who are dissatisfied with the Director's decision under sections 632 and 633 to institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Section 27 of the Biosecurity Act addresses the issue of compensation for acquisition of property, including property damaged or destroyed by the Commonwealth. It prevents the Commonwealth from acquiring property from a person otherwise than on just terms. In such cases, the Commonwealth would be liable to pay reasonable compensation to that person. It also provides that, in the event of a disagreement between the parties as to the amount of compensation, the person may institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines. The court, in making a decision under section 27, would be able to authoritatively determine whether, and to what extent, compensation should be paid by the Commonwealth for any acquisition of property. The court's remit in such a matter would not be limited only to questions of law, but would also include making a determination as to the amount of compensation payable should the court determine that compensation is owing.

For the above reasons, including the special nature of the existing review mechanism in that it allows a court to determine the quantum of compensation, I respectfully do not propose to amend the Bill to provide that independent merits review is available in relation to decisions under either section 632 or section 633 of the Biosecurity Act.

I thank the Committee for raising these issues for my attention.

Yours sincerely

MURRAY WATT 30 /11 / 2022

Attachment: Addendum to the Explanatory Memorandum of the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MS22-002306

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111 Parliament House
CANBERRA ACT 2600

Dear Senator Smith

I write in response to the request by the Standing Committee for the Scrutiny of Bills (Committee) in the Scrutiny Digest 7 of 2022 for advice on the potential role of an independent merits review in relation to a decision made under the proposed subsection 91(2A) of the Broadcasting Services Amendment (Community Radio) Bill 2022 (the Bill).

The proposed new subsection 91(2A) seeks to clarify the nature of the Australian Communications and Media Authority's (ACMA) existing discretion to refuse to renew community broadcasting licences. It also confirms that the community broadcasting licence renewal process is not competitive. In this respect, new subsection 91(2A) intends to preserve the original intent of the *Broadcasting Services Act 1992* (the Act). The ACMA's decisions under existing subsection 91(2A) are not subject to merits review and this position would remain unaltered by the revised version of that provision.

Community broadcasting licences authorise the licence holder (being a community entity) to use an assigned frequency in the broadcasting service band (BSB) of spectrum within a designated licence area to provide community broadcasting services on a not-for-profit basis. The services meet the purpose identified for the local community. When considering whether to allocate or renew a licence, the ACMA must refer to the relevant Licence Area Plan, which sets out detailed technical specifications that licensees must follow, including the assigned frequency that stations can use to broadcast services in the particular area. The spectrum available for BSBs is limited due to the finite nature of spectrum.

The use of the particular frequency for a long-term community broadcaster is exclusive to the licence holder within the particular licence area. Therefore, in granting a community broadcasting licence and making decisions about the renewals of such licences (including decisions to refuse the renewal of such licences), the ACMA is essentially allocating a finite resource. It is not always possible to grant a community broadcasting licence in a particular area to each and every aspirant.

Further, it is possible that the ACMA may have already allocated a new community broadcasting licence for the same spectrum band that was previously occupied by the

community broadcaster whose licence renewal was refused. In this case, the new licensee would be affected by overturning the ACMA's original decision to refuse the previous broadcaster's licence renewal application. Making the decision to refuse to renew a community broadcasting licence subject to merits review would adversely affect the allocation of that resource to another party.

As decisions made by the ACMA under the existing and proposed new subsection 91(2A) relate to the allocation of spectrum, which is a finite resource, I do not consider the availability of a merits review to be appropriate. This is consistent with the advice provided in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* Paragraph 4.11 recognises that decisions relating to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, are generally considered by the Council to be inappropriate for merits review.

I trust this information addresses the Committee's concerns. I thank the Committee for its consideration of the Bill.

Yours sincerely

Michelle Rowland MP

30 / 11 /2022

Attorney-General

Reference: MS22-002434

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6100
Parliament House
CANBERRA ACT 2600

Via email: scrutiny.sen@aph.gov.au

Dear Senator Smith

I am writing in relation to the Senate Standing Committee for the Scrutiny of Bills' *Scrutiny Digest 6 of 2022* dated 26 October 2022, addressing the *Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022*.

I note the Committee's request at paragraph 2.21 that an addendum to the Explanatory Memorandum, containing the information provided to the Committee in my letter of 12 October 2022 be tabled in the Parliament as soon as practicable.

The Bill passed the House on 28 September 2022 and the Senate on 27 October 2022. The Table Office in the Department of the Senate has advised that as the Bill has now passed both Houses of Parliament, there is no opportunity for an addendum to be tabled.

I note however that my second reading speech substantially addressed the matters that are the subject of the Committee's request, and this may be used as extrinsic material for interpreting the Bill in accordance with s 15AB(2)(f) of the *Acts Interpretation Act 1901*.

I trust this information is of assistance to the Committee.

Yours sincerely

THE HON MARK DREYFUS KC MP
1/12/2022

Attorney-General

Reference: MC22-025438

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: Scrutiny.Sen@aph.gov.au

Dear Senator

I refer to your letter of 1 December 2022 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding *Scrutiny Digest 6 of 2022,* which contains comments on the Crimes Amendment (Penalty Unit) Bill 2022.

The Committee has asked why it is necessary and appropriate to increase the amount of the Commonwealth penalty unit from $222 to $275. I note that the Bill passed the Senate on 28 November 2022 and received Royal Assent on 12 December 2022.

This Bill delivers on an election commitment by the Government to the Australian community. The public expects that courts have appropriate financial penalties available to them when sentencing individuals and corporations for relevant offending.

I note that increasing the value of a penalty unit increases the maximum penalty for a relevant criminal offence or civil penalty provision. However, courts are still required to impose the most appropriate penalty in all the circumstances of the case.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
20 /12 /2022

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Reference: MC22-048128

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suit 1.111 Parliament House
CANBERRA ACT 2600

By email: scrunity.sen@aph.gov.au

Dear Senator Smith Dean

Thank you for your correspondence of 24 November 2022 on behalf of the Standing Committee for the Scrutiny of Bills (Committee) regarding the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Bill).

The Bill would amend the *Fair Work Act 2009* (FW Act) and related legislation to improve the workplace relations framework, including, relevantly, by:

- abolishing the Australian Building and Construction Commission and making transitional arrangements and consequential amendments to the *Building and Construction Industry (Improving Productivity) Act 2016*;
- inserting a new prohibition on sexual harassment into the FW Act and accompanying dispute resolution framework to implement recommendation 28 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* Report; and
- simplifying requirements that need to be met for an enterprise agreement to be approved by the Fair Work Commission (FWC).

I thank the Committee for its consideration of the Bill and respond to issues raised during the Committee's assessment of the Bill in *Scrutiny Digest 7 of 2022* below.

1. **The Committee requests the minister's detailed advice as to whether the Bill can be amended to:**
    - **provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; or**
    - **at a minimum, require that the Federal Safety Commissioner, when making a delegation under proposed paragraph 40(1)(ab), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.**

As stated in the Bill's explanatory memorandum, the Federal Safety Commissioner already has the power to delegate to APS employees because of a transitional provision of the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016* preserving a regulation made under the *Fair Work (Building Industry) Act 2012*. Item 317

would repeal the *Building and Construction Industry (Consequential and Transitional Provisions) Act 2016.* As such, this provision would ensure the Federal Safety Commissioner's current delegation powers are preserved.

For the Office of the Federal Safety Commissioner, there is only one SES employee, who is the Federal Safety Commissioner himself. Apart from the Federal Safety Commissioner, the only officeholders are Federal Safety Officers (FSOs). The Federal Safety Commissioner is empowered to delegate to FSOs under paragraph 40(1)(a) of the *Building and Construction Industry (Improving Productivity) Act 2016*. There are a small number of FSOs, all of whom are contractors engaged from the private sector for their building industry safety experience and it would not be appropriate to delegate to these officeholders in all circumstances.

The delegation power enables the Federal Safety Commissioner to enable appropriately trained and experienced Australian Public Service Executive Level Officers to make routine or minor decisions related to companies accredited under the Work Health and Safety Accreditation Scheme – for example, to vary an accreditation to reflect a name change.

Appropriate safeguards and parliamentary oversight exist:

- The Federal Safety Commissioner would be required to publish details as soon as practicable after delegating any power or function.
- Delegates would be required to comply with any directions of the Federal Safety Commissioner. Where such a direction is written and of general application, it would be a legislative instrument subject to parliamentary oversight.
- The Federal Safety Commissioner is accountable to Parliament through Senate Estimates hearings.

The Government believes these arrangements would strike an appropriate balance that ensures the Federal Safety Commissioner can effectively and efficiently discharge its duties while providing appropriate safeguards and Parliamentary oversight.

2. **The Committee requests the minister's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the Australian Building and Construction Commissioner, the Fair Work Ombudsman (FWO), a Fair Work Inspector, consultants and staff members of the Office of the FWO and any persons assisting the FWO.**

The Fair Work Ombudsman (FWO) and members of the FWO's office would be given immunity that is purely transitional in nature so it can manage the Australian Building and Construction Commission's residual caseload. The ABC Commissioner and ABC Inspectors have extensive powers to carry out investigations under the *Building and Construction Industry (Improving Productivity) Act 2016*. This conduct might otherwise be unlawful. The FWO may need to deal with cases involving the use of these powers as part of the transition.

It is appropriate and proportionate that the FWO has the same immunity and privileges to continue these investigations in order to discharge its transitional functions. Preserving the immunity in relation to cases involving the Australian Building and Construction Commission would mean that officials working for the FWO have appropriate protection for carrying out their transitional functions. This would ensure they are able to fully meet their responsibilities in relation to the pending caseload without risk of personal legal liability, particularly as they did not initiate or respond to these proceedings in the first place.

In terms of proportionality, the immunity is sufficiently limited in terms of its application. A limited class of individuals would be afforded protection from liability in their professional capacity in a limited number of cases. Additionally, the immunity is time-bound, and would conclude with the finalisation of the matters transferred to the FWO. A person would still be able to bring a civil action against the Commonwealth.

Item 303 of the Bill would not transfer any immunity to the Federal Safety Commissioner. Rather, item 303 would change the heading of section 118 to reflect that the position of the ABC Commissioner would be abolished by the Bill. The Bill seeks to maintain existing arrangements for the Office of the Federal Safety Commissioner. The Federal Safety Commissioner is already given immunity for actions in good faith under section 118. This would remain unchanged.

3. **The Committee requests the minister's advice as to whether the Bill can be amended to provide high-level guidance regarding how the application fee in proposed subsection 527H(1) will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.**

I acknowledge the Committee's concerns regarding this matter. I advise that the regulation-making power allowing a fee to be prescribed for sexual harassment applications cannot be read as authorising the imposition of a tax. This is because section 15A of the *Acts Interpretation Act 1901* provides that every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth.

It is therefore unnecessary to amend the Bill to include a provision stating that the fee must not amount to a tax.

Further, the power is modelled on existing regulation-making powers in the FW Act that provide for the *Fair Work Regulations 2009* (Regulations) to prescribe application fees for other types of applications, including sections 367, 373, 395, 775 and 789FC. These other provisions do not include guidance on how the application fee will be calculated, or a provision clarifying that they do not permit the imposition of a tax. It is possible that to include such provisions for the purposes of sexual harassment fees could cause confusion about the intended operation of existing provisions in the FW Act. As for these other provisions, regulations setting fees for the purposes of subsection 527H(1) would be disallowable.

4. **The Committee requests the minister's detailed advice regarding:**
    - **why it is considered necessary and appropriate for the Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service to be provided with broad powers under proposed sections 527N, 527P and 527Q to declare by legislative instrument that some or all of the stop sexual harassment order provisions do not apply; and**
    - **whether the Bill can be amended to provide at least high-level guidance regarding the exercise of these powers on the face of the primary legislation.**

The operation of stop bullying and/or sexual harassment provisions in the FW Act has always been subject to the protection of important national security, intelligence and defence interests. The Bill maintains this position in moving the existing stop sexual harassment order provisions into a new part of the FW Act dealing exclusively with workplace sexual

harassment by maintaining the existing declaration powers for the Director-General of Security, the Director-General of the Australian Secret Intelligence Service (ASIS) and the Chief of the Defence Force that apply in relation to stop sexual harassment orders.

A detailed justification for these measures was provided in the Statement of Compatibility with Human Rights for the Bill; see paragraphs 72 to 76 of the Revised Explanatory Memorandum. As noted in that statement:

- these provisions align with the existing framework for exemptions under the *Work Health and Safety Act 2011*, which reflects the sensitive nature of the work that is undertaken by Australia's defence and security personnel;
- the requirement that declarations issued by the Chief of Defence Force, Director-General of Security and the Director-General of ASIS be in the form of legislative instruments would remain, ensuring any such declarations would be subject to scrutiny by both Houses of Parliament as part of the disallowance process; and,
- approval of the Minister for Employment and Workplace Relations would continue to be a requirement for the making of a declaration and provide further scrutiny.

These provisions are aimed at achieving the legitimate objective of ensuring that the stop sexual harassment order provisions do not interfere with Australia's defence, national security or covert or international law enforcement activities. The provisions achieve this objective in a reasonable and proportionate way by providing flexibility for future, unforeseen needs to be accommodated, while maintaining Parliamentary scrutiny. Without these provisions, future unforeseen changes in the national security landscape could not be accommodated in a timely manner, as enacting primary legislation would, in most circumstances, take longer than making a legislative instrument.

These limitations also only apply in relation to stop sexual harassment orders. All workers, prospective workers and persons conducting businesses or undertakings, including those in the Defence Force and security personnel, would have access to other remedies for sexual harassment in connection with work under the FW Act. Other military sanctions may also apply that could have a similar effect as a stop sexual harassment order.

A regulation-making power has been included which would enable the Regulations to specify circumstances in which defence members may make stop sexual harassment order applications. A regulation made under this new power could only be used to narrow the limitation on defence members, not broaden it. Any regulations would be subject to scrutiny by both Houses of Parliament and subject to disallowance.

The *Legislation Act 2003* consultation requirements would also apply to declarations made under these provisions. This means that the Chief of the Defence Force, Director-General of Security or Director-General of ASIS would have to be satisfied that appropriate and reasonably practicable consultation has been undertaken before making a declaration.

It would not be appropriate to amend the Bill to provide high-level guidance regarding the exercise of these powers on the face of the primary legislation as raised by the Committee. Such an amendment would undermine the purpose of the powers, which is to provide flexibility to adapt the legislative framework to accommodate future changes to the national security landscape which cannot be predicted with any certainty in advance.

5. **The Committee requests the minister's detailed advice as to:**
    - **the exceptional circumstances that are said to justify exempting the statement of principles made under proposed subsection 188B(1) from the usual parliamentary disallowance process; and**

The exceptional circumstance which justifies exempting the statement of principles made under proposed new subsection 188B(1) of the FW Act from parliamentary disallowance is that the process of the FWC making the statement of principles is clearly divorced from the political process and should therefore be independent of Parliament.

The Final Report for the *Inquiry into the exemption of delegated legislation from parliamentary oversight*, issued by the Standing Committee for the Scrutiny of Delegated Legislation on 16 March 2021, notes that the above rationale has previously been accepted to justify exemption of legislative instruments from disallowance (see paragraphs 4.28-4.39 of the Final Report). My department also obtained advice from the Attorney-General's Department to this effect during the drafting of the Bill.

Context for statement of principles

Item 509 of Part 14 of Schedule 1 to the Bill proposes to introduce new section 188B ('Statement of principles on genuine agreement') into the FW Act. New section 188B provides that:

- The FWC must, by legislative instrument, make a statement of principles for employers on ensuring that employees have genuinely agreed to an enterprise agreement.
- The FWC must publish the statement on its website and by any other means it considers appropriate.
- The statement must deal with the following matters:
    - informing employees of bargaining for a proposed enterprise agreement;
    - informing employees of their right to be represented by a bargaining representative;
    - providing employees with a reasonable opportunity to consider a proposed enterprise agreement;
    - explaining to employees the terms of a proposed enterprise agreement and their effect;
    - providing employees with a reasonable opportunity to vote on a proposed agreement in a free and informed manner, including by informing employees of the time, place and method for the vote;
    - any matter prescribed by the regulations for the purposes of this paragraph;
    - any other matters the FWC considers relevant.
- The statement is a legislative instrument, but section 42 (disallowance) of the *Legislation Act 2003* does not apply to the statement.

Broadly, Part 14 of the Bill is intended to simplify requirements that must be met before the FWC can approve an enterprise agreement. These requirements have long been regarded as overly prescriptive and complex. The Bill adopts a simpler, 'principles-based' approach to enterprise agreement approval by replacing the current rigid steps (with exceptions for single-enterprise agreements) with a broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement. To supplement this, the statement of principles made by the FWC under section 188B would set out guidance for employers to ensure that relevant employees have genuinely agreed to a proposed enterprise agreement. Subsection 188(1) also requires the

FWC to take into account the statement of principles in determining whether it is satisfied that an enterprise agreement has been genuinely agreed to by the relevant employees.

Exceptional circumstances

The statement of principles is intended to provide useful guidance and would not create any new rights or obligations for employers or their employees. Should Part 14 of Schedule 1 to the Bill commence in its current form, Parliament will have already scrutinised the minimum requirements for the statement of principles, including the matters in subsection 188B(3) with which the statement must deal. The need for further parliamentary oversight of the statement of principles would therefore be redundant.

The FWC, as the body charged with developing the statement of principles, is an independent statutory tribunal. The FWC is also required to take the statement of principles into account to determine whether it is satisfied that an agreement has been genuinely agreed to by relevant employees, so that the agreement can be approved and commence operation. The FWC will therefore rely on the statement in a technical manner to exercise the function of approving enterprise agreements conferred on it by the FW Act. Allowing Parliament to scrutinise the statement through the disallowance may undermine the FWC's decision-making and independence and could potentially frustrate the enterprise agreement approval process. The making of the statement of principles therefore needs to be separated from the political process.

- **whether the Bill could be amended to provide that the statement of principles is subject to disallowance to ensure that they receive appropriate parliamentary oversight.**

My preference is for the statement of principles to remain exempt from the disallowance process.

If the statement of principles was ultimately disallowed, in addition to having the potential to frustrate the decision-making processes of the FWC when approving enterprise agreements, as outline above, this may also create uncertainty for employers who may seek to rely on the statement to ensure they follow the law when making an enterprise agreement. Disallowance may also create concern or bring into question the integrity of any enterprise agreements approved by the FWC where it has considered the statement in making its approval decision.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

THE HON TONY BURKE MP

30/11/2022

Attorney-General

Reference: MC22-025188

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

By email: scrutiny.sen@aph.gov.au

Dear Senator

Thank you for your email of 24 November 2022 regarding the Senate Scrutiny of Bills Committee's *Scrutiny Digest 7 of 2022* request for information about issues relating to the Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022 (the Bill). The Bill passed both houses of Parliament on 28 November 2022.

Paragraph 1.132 – proposed subsection 52(5A)

After investigating a complaint or a matter commenced on the Australian Information Commissioner's (Commissioner's) own initiative, the Commissioner may make a privacy determination. If an interference with privacy is substantiated, the Commissioner may make a variety of orders in the determination including requiring changes in conduct or awarding compensation. The proposed subsection 52(5A) provides the Commissioner with an express power to publish determinations made before or after the commencement of the Bill on the Office of the Australian Information Commissioner's (OAIC's) website.

Currently, the Commissioner is able to publish details of determinations on the OAIC's website once the determination has been finalised and sent to the parties. The Commissioner relies on her powers under section 12 of the *Australian Information Commissioner Act 2010*. The OAIC publishes determinations to ensure transparency and accountability around the use of its privacy regulatory powers, and encourage compliance by increasing awareness and knowledge of privacy rights and obligations, and deterring contravening conduct. It would be within the reasonable expectations of all parties and the community that such information would be disclosed and published.

Further, as set out in the OAIC's *Guide to privacy regulatory action*, the Commissioner will adhere to the principles of natural justice and procedural fairness in determining a matter. Those principles include the parties having the opportunity to examine and comment on the information the Commissioner relies on in making a determination which includes the OAIC providing each party with the submissions and information received from the other party.

The decision to publish a determination will not be subject to independent merits review. However, a party may apply under section 96 of the *Privacy Act 1988* (Privacy Act) to have a decision under subsections 52(1) or (1A) to make a determination reviewed by the Administrative Appeals Tribunal. A party may also apply under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* to have the determination reviewed by the Federal Circuit Court or the Federal Court of Australia.

As the amendment formalises existing practices, the Government did not amend the provision or explanatory material to provide additional criteria before the Commissioner can decide to publish a determination.

The OAIC's *Guide to privacy regulatory action* notes that the Commissioner will generally publish the name of the respondent but will generally not publish the names of complainants, respondent individuals or any third-party individuals. The OAIC will update its policies and procedures, including the publicly-available *Privacy regulatory action policy* and *Guide to privacy regulatory action* to take into account the changes proposed in the Bill including the Commissioner's express power to publish determinations.

Paragraph 1.140 – defence of reasonable excuse for proposed subsection 66(1AA)

The Guide to Framing Commonwealth Offences (the Guide) notes that an offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the *Criminal Code Act 1995* (Criminal Code) or to design more specific defences.

The existing section 66 in the Privacy Act sets out guidance on when a defendant may, or may not, have a reasonable excuse, which is more specific than the general defences in the Criminal Code and contemplates conduct that is more applicable in the privacy context. For example, a journalist has a reasonable excuse if giving the information, answering the question or producing the document or record would tend to reveal the identity of a person who gave information or a document or record to the journalist in confidence. Such conduct should excuse a person from prosecution under subsection 66(1AA), but would not be covered in the defences of general application in Part 2.3 of the Criminal Code. Therefore, a more specific defence of reasonable excuse as set out in subsection 66(1B) and related provisions is necessary.

The Guide also notes that creating a defence is more readily justified if the offence carries a relatively low penalty. A penalty of 300 penalty units when a body corporate engages in multiple instances of non-compliance that constitute a system of conduct or a pattern of behaviour is relatively low. Where there is a less serious contravention, the body corporate would instead be subject to the proposed civil penalty in subsection 66(1), which is subject to an infringement notice. This will allow the Commissioner to issue a civil penalty or an infringement notice for minor instances of non-compliance without having to resort to the prosecution of a criminal offence.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
5/12/2022

OFFICIAL

The Hon Michelle Rowland MP

Minister for Communications

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600
By email: scrutiny.sen@aph.gov.au

Dear Chair

Thank you to your letter of 1 December 2022 regarding Senate Scrutiny of Bills Committee *Scrutiny Digest 8 of 2022*, which requests further information to assist its scrutiny of the *Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022* (the Bill).

I appreciate the time the Committee has taken to consider the Bill, and for the opportunity to clarify the operation of the proposed amendments and their engagement with privacy.

I enclose a response to the request for information made by the Committee in relation to the Bill.

Furthermore, I note the Committee's suggestions to update the Bill's explanatory memorandum. The Government will address the recommendations as set out in the report and update the explanatory materials to the Bill accordingly.

Yours sincerely

Michelle Rowland MP

16 / 12 / 2022

Encl. *Response to scrutiny report of the Committee*

Australian Government

Department of Infrastructure,
Transport, Regional Development,
Communications and the Arts

Response to Scrutiny of Bills Committee

Telecommunications Legislation Amendment (Information Disclosure, National Interest, and Other Measures) Bill 2022 (the Bill)

In its *Scrutiny Digest 8 of 2022,* the Senate Scrutiny of Bills Committee (the Committee) considered that further information was required in order to assess the potential of the Bill to trespass on an individual's right to privacy.

The Bill seeks to improve the functioning of the *Telecommunications Act 1997* (the Act) by clarifying existing provisions, improving their operation and by introducing new safeguards. The most important measure in the Bill improves the ability of police to find missing people – in two recent coronial inquests, it was found that a specific provision of the Act may have contributed to the deaths in question.

The Government does not accept that the Bill reduces, in any way, the right of privacy, and in many areas, the Bill introduces new privacy safeguards into the existing Act. Furthermore, the Bill engages and enhances other rights, such as the right to life as specified in Article 6 of the International Covenant on Civil and Political Rights. Considering drafting improvements and the safeguards introduced, the Bill strikes the right balance to enhance the right of privacy and assist emergency service organisations in finding people and protecting lives.

Shortly prior to finalisation of the explanatory materials required for introduction of the Bill, a number of non-publication orders were made in relation to the *Inquest into the disappearance of CD*, the findings of which were not yet public at the time. As such, references made to the findings in the Explanatory Memorandum to the Bill were either removed or limited as a precautionary measure.

This was to ensure that the Government did not inadvertently contravene an order through its reliance on any materials provided in confidence before the publication of findings. As the findings are now available online, the Government will issue an updated Explanatory Memorandum and statement of compatibility to address the Committee's concerns.

On 24 November 2022, the Senate referred the Bill to the Environment and Communications Legislation Committee. While described generally in the *Inquest into the disappearance of CD* and the response provided, the Government appreciates the position of law enforcement agencies that outlining specific details about the operational methodology of how missing persons investigations are conducted would expose vulnerable people to unjustifiable risk. My Department considers that this information may be of significant value to the Senate Committee in its appraisal and scrutiny of the Bill, and would be happy to facilitate a discussion with relevant agencies if it is of interest to the Committee.

Attachment A provides a factsheet in relation to the Bill.

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Privacy

Committee view

The Committee requests the Minister's detailed advice as to the safeguards protecting information that may be used/disclosed under proposed subsection 285(1B) and proposed sections 287 and 300, including:

(a) to whom information may be disclosed;
(b) what kinds of information may be disclosed;
(c) the process by which information may be requested and disclosed; and
(d) what safeguards would operate in respect of information disclosed under these provisions and why the minister considers that these safeguards are sufficient.

Minister's response

Subsection 285(1B) – Access to Information from the Integrated Public Number Database (IPND)

(a) To whom may information be disclosed?

The Bill facilitates the disclosure of information about unlisted numbers - including the name and residential address associated with the number - from the Manager of the IPND to the Emergency Call Person (ECP).

Disclosure of unlisted information through the proposed measure will be limited in practice to dispatching services (such as police, firetrucks or ambulances) and routing calls to either Triple Zero or the Australian 106 Text Emergency Relay Service for people who have a hearing or speech impairment. In law, disclosures are strictly limited to matters raised by a call to an emergency service number.

Further information about how disclosures occur from the IPND is set out under response (c).

(b) What kinds of information may be disclosed?

The proposed amendment to section 285 of the Act is mainly focused at promoting clarity in the legislative framework around the disclosure of unlisted number information. As set out in paragraph 13 of the *Notes on Clauses* in the Explanatory Memorandum for the Bill, the intention is to remove unnecessary complexity in the interpretation of the Act.

The exception in section 285, and the proposed amendment, applies only to information contained in the IPND, only to the Manager of the IPND, and only for purposes of dealing with a matter raised by a call to an emergency service number. In practice, this includes the name and service address associated with the number calling emergency services, as contained in the IPND. Further information about the kinds of information available on the IPND is set out under response (c).

Noting the concerns of the Committee, further detail about the IPND – including the kinds of information which is kept and can be disclosed under the proposed measure – will be set out in updates to explanatory materials for the Bill, and is summarised under response (d) below.

(c) What is the process by which information may be requested and disclosed?

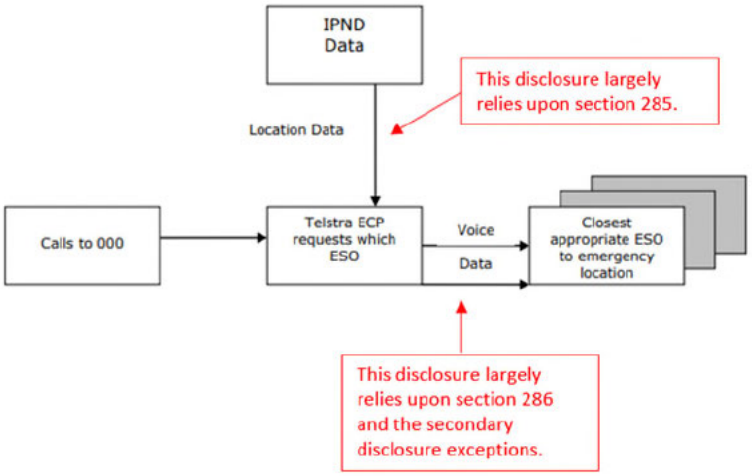
When a caller dials an emergency service number in need of emergency assistance, the call is first answered by the ECP (currently Telstra for 000/112, and the National Relay Service provider for 106). The ECP asks the caller which emergency service is required – police, fire, or ambulance – and then connects the caller to the relevant emergency service centre that services the caller's location[1].

When the call is transferred to the requested emergency service, the customer name and residential address of the caller is automatically transmitted from the IPND and displayed on the control screen of the emergency service operator handling the call. In most cases, the operator is able to confirm the appropriate dispatch location directly with the caller.

[1] Page 14 of the IPND Data G619:2017 Communications Alliance Industry Guideline outline the processes relating to emergency service calls, including how information derived from the IPND is used for the purpose of emergency call services.

However, if this location cannot be confirmed, in some cases, assistance is dispatched to the address associated with the phone number of the caller, as listed on the IPND. The IPND, which is managed by Telstra under clause 10 of its carrier license conditions,[2] contains a record of each telephone number issued by carriage service providers to their customers in Australia, including the customer's name and residential address. Access to information in the IPND – including storage, transfer, use, or disclosure of unlisted information – is strictly regulated through the Act, a number of legislative instruments, and enforceable industry standards. Further information is provided under response (d).

Figure 1: An overview of what happens on an emergency call (image courtesy of the Communications Alliance)



The proposed amendment merely seeks to clarify that disclosure about unlisted numbers from the IPND Manager to the ECP (for example, to allow the dispatch of an ambulance because the person on the call using an unlisted number is asphyxiating) is lawful.

(d) What safeguards would operate in respect of information disclosed under these provisions and why are these safeguards considered sufficient?

The amendment builds upon the existing Part 13 safeguards by introducing a requirement that it must be unreasonable or impracticable to seek the consent of the person to whom the disclosure relates. The use and disclosure of this data is restricted only to those necessary in providing an emergency service response. Through the interaction between several pieces of legislation which regulate either access to information in the IPND and/or the provision of emergency call services, information disclosure through the measure is restricted to police, fire and ambulance services.

Beyond this, the general safeguards that apply across Part 13 of the Act remain in place. For example, Division 2 of the Act sets out that use or disclosure of information received under these exceptions must be for the authorised purpose, contravention of which is an offence punishable on conviction by 2 years imprisonment, for example.

Telstra, as the IPND Manager and the ECP, has publicly available procedures in place to ensure that information disclosed between the IPND Manager and the ECP is handled appropriately.[3] Obligations on IPND access seekers are specified in an enforceable industry code[4] and in the data access agreements with Telstra.[5] These technical implementations limit the ability for disclosures to occur for purposes or to entities separate to those mentioned above.

The Government will issue an updated Explanatory Memorandum which comprehensively sets out the process by which disclosures under proposed subsection 285(1B) would occur, including the legislative instruments that regulate access to the IPND. Noting that there are several legislative and regulatory safeguards outside Part 13 of the Act for the handling, use, storage, and destruction of any information contained on the IPND, the updated Explanatory Memorandum will also draw out these specific provisions to provide assurance regarding the strictly limited scope of the exception and the proposed amendment.

[2] See: *Telecommunications (Carrier Licence Conditions - Telstra Corporation Limited) Declaration 2019*

[3] Part 8 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Telecommunications (Emergency Call Service) Determination 2019* set out obligations relating to the provision of emergency call services, including call information.

[4] See: Integrated Public Number Database C555:2020 *(industry code registered under Part 6 of the Act)*;

[5] For example, Data Users and Data Providers Technical Requirements for IPND outlines technical requirements of the IPND, including for file formatting and storage, data security, and reporting. IPND homepage link: https://www.telstra.com.au/consumer-advice/ipnd

Sections 287 and 300

(a) To whom may information be disclosed?

In practice, the provision generally only applies when a carrier or service provider is contacted by the police.

For the proposed exception in section 287 of the Act to apply, the carrier or carriage service provider must believe on reasonable grounds that the disclosure is reasonably necessary to prevent or lessen a serious threat to the life or health of a person. The Bill also introduces the safeguard that the carrier or carriage service provider must be satisfied that it would be unreasonable or impracticable to obtain the consent of the person to which the information disclosed relates to. The OAIC's Australian Privacy Principle Guidelines (C.5) on the equivalent use/disclosure principle in the *Privacy Act 1988* provides helpful interpretative guidance about the scope and appropriate meaning of these terms in relation to the circumstances where a use or disclosure is likely to be permitted.

As set out in the Explanatory Memorandum to the Bill, it is the intention of the proposed measure that regulated entities would be largely reliant on the representations made by law enforcement or emergency service organisations to determine whether a threat was 'serious'. This approach is consistent with the existing operational approach of law enforcement agencies, and recognises that police or emergency service organisations have access to information, systems and resources that telecommunications companies do not.

It is important to note that the amendments to the exception in section 287:

- do not compel the disclosure of information - even in cases where a request from police clearly satisfies the threshold for the exception to apply, disclosure remains at the discretion of the carrier;
- do not provide access to the contents or substance of a communication, or any other information which would ordinarily require a warrant; and
- do not allow for information received through the exception to be used for another purpose – the amendments to section 300 of the Act require that any secondary disclosure or use of information by police or emergency service organisations must relate back to the purpose of the original request. Failure to do so is an offence punishable on conviction by 2 years imprisonment.

Rather, the exception provides that a carrier or carriage service provider does not commit a criminal offence for disclosing information about the 'affairs or personal particulars' of a person where it has a reasonable belief that doing so is reasonably necessary for preventing or lessening a threat to the person's life or health. The secondary disclosure exception in section 300 of the Act can only be relied upon where doing so was for the purposes of preventing a serious threat, or if the disclosing entity believes on reasonable grounds that the disclosure is reasonably necessary to prevent or lessen a serious threat to life or health.

For example, if a carrier were to rely upon section 287 to disclose triangulation information to the NSW Police about a missing person, and the triangulation data showed that the approximate location of the missing person's phone was somewhere in Queensland, NSW Police would be able to rely on section 300 to disclose that triangulation data to Queensland Police if NSW Police believes on reasonable grounds that doing so was reasonably necessary to prevent a serious threat to the person's life.

In practice, secondary disclosures will be further limited through the proposed amendment as the section 300 exception will now require that it is unreasonable or impracticable to obtain the person's consent before the secondary disclosure exception can apply. This ensures that further disclosure of the information always requires consideration of whether the person's consent was able to be sought at that specific point in time.

(b) What kinds of information may be disclosed?

Section 287 of the Act reads:

> Division 2 does not prohibit a disclosure or use by a person (the ***first person***) of information or a document if:
>
> (a) the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and
>
> (b) the first person believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of a person.

Division 2 prohibits the primary use and disclosure of such information, and contravention is an offence punishable on conviction by 2 years imprisonment. For avoidance of doubt, the prohibition extends to the content or substance of the communication, including the content of voice calls, text messages, or voicemail, as well as any other information or document that relates to the communication, such as call logs. It also extends to any information that relates to a person's affairs or personal particulars, including numbers or addresses which are not publicly listed, or location information.

The exception in section 287 of the Act, and the proposed amendment, does not allow for the content or substance of a communication to be made available in any circumstance. The proposed measure in the Bill will not change or increase the type of information which can be requested and disclosed through the operation of the provision.

The exception only applies to information relating to the 'affairs or personal particulars of a person', a meaning which includes location information as clarified by section 275A of the Act. Carriers do not typically have access to GPS information, and triangulations do not use GPS technology. Instead, a triangulation provides an approximate area of where a handset might be located, based on the location of one or more nearby cell towers. While there can be an enormous variance in the accuracy of this information, triangulations remain a useful tool in missing persons investigations, assisting in locating high-risk missing persons in about 20% of occasions in NSW.

As set out in paragraph 177 of the *Inquest into the Disappearance of CD*, if deemed necessary and proportionate following the initial risk assessment of relevant factors in a missing persons case, consideration may also be given to the use of Live CAD – which provides the time and date of activation of a mobile phone to the network, whether those activations consist of incoming or outgoing calls, and cell tower location.

(c) What is the process by which information may be requested and disclosed?

In relation to missing persons, a formal request from law enforcement agencies to providers is required, but internal procedural requirements also apply for law enforcement to help establish that the thresholds for reasonable belief and reasonable necessity in the exception are met for section 300 of the Act.

This includes mandatory risk assessments, exhaustion of less intrusive methods, and internal authorisation requirements prior to initiating the process for a request. Broadly speaking, this also includes adherence to the Australia New Zealand Policing Advisory Agency *Missing Persons Policy (2020)* and *Guiding Principles*. In both the *Inquest into the death of Thomas Hunt*, and the *Inquest into the disappearance of CD*, a formal request to the provider was never made because NSW Police were not able to satisfy themselves that the threshold could be met by the circumstances.

The Government recognises the particular sensitivity that may attach to the personal information of individuals who have been reported missing. Such individuals may have exercised their free choice to disassociate themselves from friends and family for legitimate reasons, including removing themselves from harmful environments. Accordingly, a claim made by a member of the general public, without support or confirmation from emergency service organisations or law enforcement agencies, would not meet the threshold for the exception to apply. This is made plain in the explanatory memorandum to the Bill. However, the Government will clarify the process through which requests under the section 287 exception are invoked through amendments to the Bill's explanatory materials.

(d) What safeguards would operate in respect of information disclosed under these provisions and why are these safeguards considered sufficient?

The Bill introduces a new safeguard into sections 287 and 300 that it must be impracticable or unreasonable to obtain the consent of the person the disclosure relates to. In doing so, the proposed measures in the Bill ensure that any secondary use or disclosure of information received under these exceptions must be for the authorised purpose, contravention of which is an offence punishable on conviction by 2 years imprisonment.

In consultation with law enforcement agencies, the Department understands the management of such data is received and managed according to well-established protocols, and also subject to a range of safeguards of which only one is the Act (which, for example, prohibits disclosure except in specified circumstances, and for which the penalty is two years imprisonment). These procedures and protocols are not public, to avoid disclosure of operational police practices.

The Department can assist to arrange private briefing with law enforcement agencies with the Committee if that would be of assistance, and will be coordinating a similar process for the benefit of the inquiry of the Senate Environment and Communications Committee. These protocols and practices are also subject to a range of oversight mechanisms, including at the federal level by a number of oversight bodies.

Immunity from civil liability

Committee view

The Committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing carriers, carriage service providers, and intermediaries with further civil immunities so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Minister's response

Section 313(5) of the Act provides that a carrier or carriage service provider is not liable to an action or other proceeding for damages if an act is done or omitted in good faith under subsections 313(1), (1A), (2), (2A), (3) or (4) of the Act. However, it does not include subsection 313(4A) and (4B). The amendment in the Bill is consistent with similar provisions relating to safeguarding national security and public revenue in the Act, and corrects an error in the National Emergency Declaration Bill 2020, introduced by the former Government.

Under the *National Emergency Declaration (Consequential Amendments) Act 2020* (NED(CA) Act), subsections 313(4A) and (4B) were inserted into the Act. These subsections introduce a duty on telecommunications providers to provide reasonably necessary help during certain emergencies.

It was intended that these entities would not be liable to an action or other proceeding for damages for or in relation to an act done or omitted in good faith in fulfilment of that duty. The policy intention was set out in the Explanatory Memorandum to the *National Emergency Declaration (Consequential Amendments) Bill 2020* that immunities would extend to the duties under subsections 313(4A) and (4B). Due to an error in drafting, the measures were not included in the Bill, and unfortunately section 313(5) was not amended to give effect to the then Parliament's intention.

Right to an effective remedy

While the Government believes that the Bill does engage the right to an effective remedy under Article 2(3) of the ICCPR, to the extent that it does limit that right, the limitation is reasonable, necessary and proportionate to the objective.

Further information on the compatibility of the measure with the right to an effective remedy was provided to the Parliamentary Joint Committee on Human Rights, and the Government will update the explanatory materials to the Bill to comprehensively outline the engagement of the right in the statement of compatibility.

The Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022 (The Bill) – Fact sheet

Helping Police Find Missing Persons

On 16 September 2022, NSW Deputy State Coroner, Magistrate Erin Kennedy, released her findings on the *Inquest into the disappearance of CD*:

> *"The need for potential amendment of s 287 (of the Telecommunications Act 1997) and the **'serious and imminent'** threshold test requires urgent consideration."*[1]

In response to the Deputy State Coroner's recommendation to reform the *Telecommunications Act 1997* (Tel Act), the Government has introduced a Bill aimed at saving lives, into the Australian Parliament.

- Telecommunications companies are prohibited from disclosing information about their customers. The penalty for disclosure is 2 years imprisonment.
- There are some limited exceptions. One exception, known as section 287, is where sharing information about a customer is needed to prevent or lessen a serious and imminent threat to a person's life or health.
- This provision is used by police and emergency service organisations to get help from telecommunications companies to find missing people using 'triangulation'.
- Triangulation allows telecommunications carriers to estimate the location of mobile phone based on the cell towers that the phone is connected to.
- Triangulation is not perfect – it can only estimate where a phone is – but it is hard to overestimate how important it is in helping police to save lives.
- In missing people cases, time is of the essence. Delays in getting triangulation data can cost lives. In two recent cases, NSW State coroners have highlighted how difficult it is for telecommunications companies and police to reach a conclusion that a threat to a missing person is 'imminent'.
- In fact, NSW Deputy State Coroner, Magistrate Erin Kennedy in the inquiry of into the disappearance of CD has said that reform to section 287 is urgent.
- The Government has introduced a new bill into the Parliament to solve this problem, to help police save lives.
- The bill removes the requirement that telecommunications companies need to reach the conclusion that a threat is imminent. They still need to believe the threat is serious – as the Australian Law Reform Commission has noted, consideration of whether a threat is 'serious' will include consideration of imminence.
- The Government believes that helping police save lives is of utmost importance, but also wants to improve privacy protections. That is why the bill includes new privacy protection safeguards.
- For example, the bill introduces a requirement that it is 'unreasonable' or 'impracticable' to get the consent of the person involved. The Act also includes strict 'secondary disclosure' prohibitions that have been strengthened in the bill – meaning that police are only allowed to use information from telecommunications companies for the purposes that it has been provided for.
- Taken altogether, the bill strikes the right balance, will contribute to saving lives, and will help police to do their critical jobs in finding missing people.

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[1] Inquest into the disappearance of CD, paragraph 197

"Legislative amendment is of course a matter solely within the province of Parliament. However, it is consistent with my death prevention role to highlight the urgent need for review given the current construction and operation of s 287 in the context of missing person investigations, as was highlighted by this Inquest and that of the Thomas Hunt Inquest."[2]

The case of CD

On 17 June 2019, CD, a NSW man went missing. On 21 June 2019, a NSW Police Detective contacted the Duty Operations Inspector, requesting triangulation of CD's phone. This request was declined on the basis there was no 'serious or imminent threat to the life or health' of CD within the meaning of the Act.[3].

The Chief Inspector who denied the triangulation has expressed his frustration in the position he was in, as he felt legally obliged to decline the triangulation in this case, and articulated the need for legislative change.[4]

The Detective Chief Inspector (DCI) managing the Missing Persons Registry at NSW Police reviewed the investigation into CD's disappearance and formed the following opinion: "... I also believe a triangulation should have been requested to discover the location of CD's phone". The DCI believes the triangulation tool should be used for all 'high risk' missing persons investigations.[5]

The case of Thomas Hunt

On 22 March 2017, Thomas Hunt went missing. As part of the effort to find Thomas, two NSW police officers raised the possibility of organising the triangulation of Thomas' phone. However, despite concerns of Thomas' mental health, police were not confident that they would be able to make out 'imminent threat' threshold, and a triangulation request was not made.[6]

NSW State Coroner, Magistrate Teresa O'Sullivan commented that "it is therefore of some concern that the bar is set high for applications under s. 287 [the relevant provision of the Act] by the State Coordination Unit".[7]

Why is it important to help police find missing people?

In Australia a missing person is anyone who is reported missing to police, whose whereabouts are unknown, and where there are fears for their safety or welfare.

Unfortunately, missing people in Australia is a serious problem.

An estimated 38,000 people are reported missing to police each year; that is one person every 15 minutes.

A long-term missing person is someone who has been missing for more than three months. There are over 2,500 people listed as a long-term missing person.

The increased occurrence of natural disasters over the last few years during the summer period has the potential to heighten missing persons statistics.

If you have concerns for someone's safety and welfare, and their whereabouts is unknown, you can file a missing person's report at your local police station.

"...the decision whether to triangulate can be a matter of life and death".[8]

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[2] Inquest into the disappearance of CD, paragraph 136
[3] Inquest into the disappearance of CD, paragraph 48
[4] Inquest into the disappearance of CD, paragraph 123
[5] Inquest into the disappearance of CD, paragraph 95
[6] Inquest into the disappearance of Thomas Hunt, paragraph 62
[7] Inquest into the disappearance of Thomas Hunt, paragraph 67
[8] Inquest into the disappearance of CD, paragraph 127

COMMON QUESTIONS/ASSUMPTIONS ABOUT THE BILL

Q: Does the legislation make it easier for abusers to track down victims of domestic violence?
A: No. The changes will only allow for information to be disclosed by a telecommunications company (telco) where there is a serious threat to life or a person's health and where it is impracticable or unreasonable to obtain the consent of the person in question. A telco would be relying on the advice of law enforcement and/or emergency services organisations, in accordance with existing practices. A claim made by a member of the general public, without support or confirmation from law enforcement agencies, would not meet the threshold for disclosure.

Q: Does the legislation reduce privacy protections?
A: No. The changes improve privacy protections. Whilst the 'imminent' qualifier has been deeply problematic and may very well have contributed to loss of life, the changes to the legislation insert a requirement that disclosure from the telco can only occur where is it is impracticable or unreasonable to obtain the consent of the person in question.

Q: Will police get access to my GPS data when they triangulate my phone data?
A: No. Triangulations by carriers do not use GPS technology. A triangulation uses one or more cell towers to provide an approximate area where the handset may be located. Triangulations assist in locating missing persons in about 20% of high-risk missing persons cases in NSW.

Q: Why does there need to be reasonable belief? Why can't it be reasonable suspicion?
A: The use of 'reasonable belief' is consistent with equivalent provisions set out in the Privacy Act. The lower-threshold of 'reasonable suspicion' would create inconsistencies with the Privacy Act if it was applied to the Telecommunications Act.

The Government's approach is consistent with the Australian Privacy Principle Guidelines, where the 'reasonable suspicion' test is used for things like misconduct or unlawful activity, while the higher-threshold of 'reasonable belief' is to be used for locating a person reported missing.