

Mr Peter Hallahan
Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan,

TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) AMENDMENT BILL 2009

The Law Council has been invited to comment on the provisions of the *Telecommunications (Interception and Access) Amendment Bill 2009* (the Bill).

The Law Council anticipates that other organisations, with more detailed and direct knowledge of the operation and maintenance of computer networks, will provide comment to the Committee on the network protection provisions and, in particular, whether the definition of “network protection duties” is sufficiently precise.

The Law Council also anticipates that other organisations, which represent the interests of staff in agencies and authorities covered by the disciplinary action provisions, will provide comment to the Committee on the adequacy of the protections afforded to staff under those provisions.

On that basis the Law Council's comments are confined to proposed section 63E. That section provides that:

“A responsible person for a computer network may communicate lawfully intercepted information (other than foreign intelligence information) to an officer of an agency if:

- (a) the information was communicated to the responsible person under paragraph 63C(2)(a); and*
- (b) the responsible person suspects, on reasonable grounds, that the information is relevant to determining whether another person has committed a prescribed offence.*

A *prescribed offence* is defined in subsection 5(1) of the *Telecommunications (Interception and Access) Act 1979* (“the Act”) and is generally an offence punishable by imprisonment for a maximum period of at least three years.

In effect, proposed section 63E allows for a person to voluntarily disclose to a law enforcement agency information which has been intercepted in the course of undertaking network protection duties.

The Law Council does not object in principle to this provision.

However, the Law Council would be concerned if law enforcement agencies were to use this voluntary disclosure provision to obtain information by request, when they would otherwise require a warrant to access it.

Anticipating this concern, the Explanatory Memorandum states at page twelve that:

An agency may not compel or request the disclosure of information obtained [in the course of engaging in network protection duties].

The Law Council accepts that an agency would not have the power under the Act to compel the disclosure of such information. However, the Law Council submits that an agency is not expressly prohibited or prevented from requesting the disclosure of information under proposed section 63E.

Chapter Four of the Act deals with access to telecommunication data. It sets out a process by which ASIO and certain enforcement agencies may authorise the disclosure of telecommunications data. Chapter Four also contains voluntary disclosure provisions (see sections 174 and 177) which are similar in effect to proposed section 63E. These provisions permit information to be disclosed in the absence of a formal authorisation where it is necessary for certain purposes, such as the enforcement of the criminal law. Unlike proposed section 63E, the voluntary disclosure provisions in Chapter Four expressly provide that the section does not apply where ASIO or the enforcement agency has requested the disclosure of the information. In that way, the voluntary disclosure provisions in Chapter Four can not be used to circumvent the authorisation process.

On that basis, the Law Council submits that a further subsection should be added to proposed section 63E which provides that the section does not apply where an agency has requested the disclosure of the information. The Law Council submits that such an amendment would safeguard against the potential misuse of the section to circumvent the warrant requirements of the Act.

Yours sincerely,



Bill Grant
Secretary-General

9 October 2009