

Civil Liberties Australia



Submission to the
House Standing Committee
on
Infrastructure and Communications
inquiry into
the use of Subsection 313(3) of the
Telecommunications Act 1997 by Government
Agencies to Disrupt the Operation of Illegal
Online Services

Civil Liberties Australia (CLA) is a not-for-profit association, which reviews proposed legislation to help make it better, as well as monitoring the activities of parliaments, departments, agencies and forces to ensure they match the high standards Australia has traditionally enjoyed, and continues to aspire to.

We work to keep Australia the free and open society it has traditionally been, where you can be yourself without undue interference from 'authority'. Our civil liberties are all about balancing rights and responsibilities, and ensuring a 'fair go' for all Australians.

1 Response

Civil Liberties Australia thanks the Standing Committee on Infrastructure and Communications for the chance to respond to the Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services.

It is readily apparent that section 313 of the Telecommunications Act has been interpreted too broadly and without sufficient oversight. This is largely because it was written when the implications of the Internet were poorly understood and the rapid advance of technology was not foreseen. Ideally, the whole section should be repealed and replaced with new, technology agnostic language more specifically targeting the necessary law enforcement requirements with strong public safeguards.

There should be a single designated government agency that has sole authority to liaise with carriers and providers to exercise government regulation of this industry. All other government agencies should then petition this agency when they believe they have discovered illegal services or material. This agency should be civilian, rather than based in law enforcement, but have significant expertise in telecommunication systems, the current regulatory and legal frameworks, while maintaining positive relationships with carriers and providers. A strong, positive working relationship with the Australian Federal Police would also be highly desirable. This would seem a natural fit for an agency under the remit of the Communications Ministry.

This is preferable to the current system, where each individual agency attempts to contact carriers or providers themselves, and may have separate interpretations of what is and isn't illegal. It would also provide a single list of illegal and potentially illegal services that can more easily be reviewed to provide transparency and accountability. A single agency would also be a single voice on the characteristics of illegal or potentially illegal online services, but accountability and transparency must come from a separate, independent agency well disconnected from the Department of Communications, and populated with a significant representation of the Australian community, such as the Classification Board.

The language of any new legislation should be particularly precise. Section 313 appears to be attempting two different things. The first is requiring carriers and providers to "do their best" to prevent a carriage service being used to commit criminal offences. The second is requiring carriers and providers to give "necessary help" to law enforcement after an offence has been committed. These should not be conflated under a single banner, as they are fundamentally different things.

In the first case, carriers and providers are utilities, not publishers. They must be allowed to be agnostic of the data they are transmitting to customers. This analogues how electricity providers are not considered liable for what their customers use the electricity for. It follows that what "do their best" means is necessarily limited, and this should be confirmed in the legislation. While it still makes sense that carriers and providers should have immunity for collateral damage when acting un-

der orders from government agencies, as part of a good accountability package, the government, however, should assume liability for any unintended effects on innocent parties.

As to “necessary help” to law enforcement, this is largely about assisting with gathering evidence for prosecution. As such, judicial oversight, namely a warrant, must be required before carriers or providers are required to comply with law enforcement. This is a necessary requirement for accountability.

Further comment largely depends on the proposed directions to take this legislation. To emphasise again, it is important that the two functions of section 313 of the Telecommunications Act are discussed separately. The issues raised by blocking access to specific content or services under the guise of preventing future crimes are very different to the issues raised by retaining personal data under the guise of prosecuting crimes that have occurred. Conflating these issues only injects confusion into the discussion.

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