Submission to the Department of Home Affairs
Consultation

Review of The Assistance and Access Bill 2018
**Introduction**

Thank you for the opportunity to make a submission on the proposed stance and Access B 2018 ("B "). We note the re at ve y short t me frame ava. ab e for subm ss ons and trust that subm ss ons rece ved w be
given due cons derat on.

Th s subm ss on s on beha f of and jo ntly authored by Future W se.¹ We are a group of Austra an profess ona s of var ed backgrounds who seek to promote deas wh ch mprove the ong-ter m d rect on of Austra a, part cu ar y n the areas of techno gy, hea th and educat on. More nformat on about Future W se s ava. ab e on our webs te.² We are happy to prov de further c ar f cat on of any of the po nts n the subm ss on, or for one of the authors to attend the hear ng n person f requ red.

**Summary of Submission**

Our concerns w th the B nc ude:

1. Its const tu on va. d ty, there be ng no ce ar head of power that w support the scheme.
2. Desp te assert ons as to the need for the enhanced powers granted by the B , secur ty responses to
terror th res ts n need to be we ghed up as a necessary and proponate response n ght of the
mperat ves of pr vacy, transparen cy, and the overarch ng funct on ty of encr ypted on ne serv es. The
ater vaues are not adecate y addressed n the B .
3. The B exb ts overreach as to:
   a. the purposes of the scheme, wh ch extend we beyond the secur ty concerns c ted;
   b. those who are covered by the scheme, where the scheme s scope encompasses a most any
      person broad y engaged n common uses of hardware and software;
   c. the mandat ng of pr vate se ctor ca b ty-bu d ng wh ch s not prox mate to an nstance of
      a nged poten a harm, or act v es that are suf c ent y removed from harm as to ca nto
      quest on the urgenc y of the secur ty mperat ve.
4. Desp te assert ng a prob t on backdoor systems, the scheme necessar y v no ves creat on of
encrypt on backdoors. Further, there s no den ted thresho d of s ngu ar backdoors wh ch co ect ve y
wou d create a system . Th s w resu t n un ntended consequenc es that und erm ne nformat on
secur ty.
5. The lang uage of freedom s used to mask the coerc ve effect of the scheme wh ch s d s ngenous at
best, and at worst, generates amb gu ty n the mean ng and operat on of the B .
6. There are nsuff c ent report ng and overs ght mecha ns to generate transparen cy.
7. The process of dec s on-mak ng acks accountab ly.
8. Pena tes are not proponate or reasonab e.

¹ Th s subm ss on comp ements the jo nt subm ss on by the Austra an Pr vacy Foundat on, D gg ta Rghts Watch,
E ctron c Front ers Austra a, the Queens and Counc for C v L bert es, the New South Wa es Counc for C v
L bert es, Access Now, and B epr nt for Free Speech.
² https://www.futurew.se.org.au
The issues dent ed w th th s b and ts far-reach ng mpact on c t zens, nc ud ng those who may unwt ng y become commun cat on prov ders, and the re at onsh ps between the government and these groups mean that the B shou d at the very east, undergo a far more extens ve and r gorous d ssu s on n the pub c doma n. Of part cu ar concern, the foundat on of the B es n the power of the government to command pr vate sector decrypt on of nformat on. Desp te the assert on that the government has no n terest n underm n ng systems that protect the fundamenta secur ty of commun cat on, th s s exact y the ntent of the B. Even a s ng e nstance of a backdoor underm n es nformat on secur ty that supports the on ne na rastructure of government serv ces, the market, and soc ety.

Ut mate y, prov s ons seek ng to fo cr m na act v ty, nc ud ng those n the B, w spaw n new ways of h d ng such act v ty to work around the scheme—ut mate y reduc ng or negat ng the effect veness of the B. The prob em w th th s ts that the pr ce w be pa d for by soc ety at ar ge, n hav ng a weakened nformat on secur ty na rastructure on wh ch con tem porary serv ce de very, nc ud ng government serv ce de very, depends.

The government has not yet made the case that the ass stance and access pro ded for n the B s necessary, rea onable, or pro por onate, re y ng in s tead on mere assert on. In ght of the mportance of encrypt on n con tem porary government, econom y, and soc ety more broad y, the prem se of decrypt on s unac ceptab le and the scheme as ts art cu ated n th s B s fundamenta y fawed and shou d not be passed.

We address be ow the quest on of const tut ona ty as we as the fo ow ng spec fc aspects of the B:

- Its purpose
- Who s covered
- What s covered
- Dec s on mak ng
- Comp ance and enforcement

Constitutional Power

The Const tut ona power under wh ch th s B s to be enacted s unc ear. It s uncer ta n that reg u lar heads of power, such as the corpor ons power, woud be suff cant to support such an extens ve scheme. The post and te egraph power may cover the subject-matter of the B, but the app cab ty of the power to internet serv ces s assumed rather than aff med. It appears that Aus tra a through ts F ve Eyes secur ty network may have agreed to mplement decrypt on prov ons. Th s may br ng the externa affa rs power n to p ay. However, the status of th s arrangement s yet to be deter ned.

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5 Constitution, s51(xx). In seek ng to app y to nd v dua s as we as corpor ons, the B woud, n any event, need to come under an add t ona power.
6 Constitution s51(v).
7 Ms Sm th, F ve Eyes Threatens to Force Encrypt on Backdoors, Says “Pr vacy s Not Abso u te” CSO (3 September 2018) <https://www.csoon ne.com/art c/e/3301353/secur ty/f ve-eyes-threaten-to-force-encrypt on- backdoors-pr vacy-s-not-abso u te.htm>.
8 Constitution s51(xx).
In *Thomas v Mowbray* the High Court of Australia confirmed, by a majority of 5:2, that the defence power could support eg s at on dea ng w th threats other than an externa threat, or war between nat ons. In th s case, the power extended to enact ng eg s at on to protect the pub c from terror st acts. On th s reason ng, the defence power may be invoked to support th s B , but on y to the extent that t prov des protect on aga nst terror st acts. The scope of the B concern ng protect ng revenue, or respond ng genera y to cr m na behavior our, for example, s beyond the rem t of the defence power. Further, the power to mandate bu d ng capab ty s not prox mate to the threat, be ng a onger term and ess certa n goa . Th s s n contrast to the nature of the aws uphe d n *Thomas v Mowbray* ca ng nto quest on whether these prov ons have const tut ona eg t macy.

Th s B appears to have a shaky const tut ona bas s, at best. At the very east, ts scope shou d be cons derab y curta ed to br ng t w th n the power of Par ament.

**Purpose**

The B s exp anatory notes set the context for ts purpose as dea ng w th terror sm.

...encrypted dev ces and app cat ons are erod ng the ab ty of our aw enforcement and secu ty agenc es to access the nte g be e data necessary to conduct inves t gat ons and gather ev dence. 95 per cent of the Austra an Secur ty Inte nce Organ sat on’s (ASIO) most dangerous counter-terror sm targets act ve y use encrypted messages to concea the r commun cat ons.

The content on s that modern fe (notably through encrypt on) makes t d ff cu t to gather nte gence and therefore nte gence serv ces seek the power to nterrupt modern fe through mandat ng pr vate sector decrypt on. Desp te express y proh b t ng bu d ng system c weaknesses nto products or serv ces, th s purpose fa s to comprehend the enormos mpact of decrypt on on nformat on on secu ty.

Further, and of s gn f cant concern, the B s sts not on y mmated and grave terror st offences w th n the purpose of the scheme, but extends a so to:

- enforc ng the cr m na aw and aws mpos ng pecun ary pena tes
- ass st ng the enforcement of the cr m na aw n force n a fore gn country, or
- protect ng the pub c revenue...

Enforc ng cr m na aw exceeds the purported mperat ve for nat ona secu ty or terror sm-re ated dangers. That aws mpos ng pecun ary pena tes are a so nc ued, expands the rem t of the eg s at on to a most any regu tory of fence wh ch s a gross y d spro onate response.

There s no safeguard n re at on to fore gn aw enforcement that other secu ry agenc es must adhere to any overs ght mech an sms or human rghts. Th s examp f es the w ngness of government to put at r sk foundat on pr nc p es of c v soc ety n pursu t of surve ance mech an sms.

Protect ng pub c revenue, wh e a worthy and necessary funct on of government, s a purpose beyond the stated terror sm and nat ona secu ty purpose of th s B and no case s made for ts nc us on. The recent Centre

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10 Constitution, s51(v).
12 See, eg, s317A.
automated co ect on system———w de y regarded as a s gn f cant ncurs on on c t zens awfu behav our\textsuperscript{13}———s an example of circumstances that mght fa w th n the B s rem t. To just fy decrypt on n the hope of d scover ng an h stor ca anom y n Centre nk payments s overk . The scheme n the B s ne ther reasonab e nor proport onate to the purpose of protect ng pub c revenue.

Even f nat ona secur ty cou d be a purpose that just fed some k nd of mandated decrypt on, the rema nde of the sted purposes shou d be removed.

**Who is Covered by the Bill**

*Designated communications provider s defined n s317C to encompass the fu range of part c pants n the g oba commun cat ons supp y cha n, from carr ers to over-the-top messag ng serv ce prov ders. Th s ref ects the mu tayered nature of the commun cat ons env ron ment and the types of ent t es that cou d mean ngfu y ass st aw enforcemen t and nat ona secur ty agenc es.\textsuperscript{14} Certa n y, the st of those ab e to part c pat e s extens ve.

Of note, a number of categor es of commun cat ons prov ders are so w de y framed that the scope may——unwnt ng y or otherw se——encompass a most any one us ng nformat on commun cat on technogy. For examp e:

- persons who prov de an e con t c serv ce that has one or more end-users n Australia a e a ow ng end-users to access mater a us ng a carr age serv ce th s s any one who has a b og, or a webs te.
- persons that access dev op, supp y or update software used, for use, or ke y to be used, n connect on w th a sted carr age serv ce or an e con t c serv ce that has one or more end-users n Australia a wou d capture anyone who uses open source software and deve ops an interoperab e app or code, and students who are deve op ng software. The examp e c ted: des gn ng trust nfrast ructure used n encrypted commun cat ons or software ut sed n secure messag ng app cat ons ms eads as to the breadth of th s category.
- persons that manufacture, supp y, nsta , ma nta n or operate a fac ty nc udes any part of te e commun cat ons nfrast ructure. Th s wou d embrace most homes and bus nesses that connect to the nternet.
- persons that connect a fac ty to a te e commun cat ons network n Australia a...[nc ud ng] mesh networks, pr vate networks : hom es and bus nesses w th pr vate networks wou d be caught by th s def n t on.

The scope of the nternet of th ng s——wh ch connects potent a y every common y ava ab e dev ce and app an ce to the nternet n a g oba web of nformat on capture——w pace a most every c t zen w th n the amb t of the g oba commun cat ons supp y cha n through the nsta at on of hardware, down oad ng of software, and transfer of nformat on. As nterconnected contemporary and future nformat on technolog es become common pace, the B s scope w mass ve y overreach n terms of ts professed a ms. Further, as d suss ed be ow, any backdoor capab ty puts the nternet of th ng s system at r sk.

The scope of commun cat ons prov ders prov ded n the B bears no proport ona ty to the ostens be purpose of the B . Wh e we acknow edge the cha enge of comprehend ng those w th the requ s te ro e n the nformat on


\textsuperscript{14} AAB Explanatory Document, 24.
What is Covered by the Bill
The Bill permits law enforcement agencies to seek assistance to decrypt n-format on the execution of law enforcement functions. The types of assistance required are enumerated in ss17E, but additional forms of assistance may be required for technical assistance requests and technical assistance notices (but not technical capability notices).

The Bill framed, clear, to address concerns regarding backdoors to encrypted data. To achieve this, there is a problem on a requirement to implement or build system weaknesses (ss17ZG). The Expository Document states that this ensures that a provider could not be required to notice or use any agency software or equipment that weakens security across non-target devices or services. (ss17(1)(c)).

This ignores the reality that creating any backdoor weakens encryption on an end product. The broad-rang ng purposes (such as ng protect on of revenue) these prov s on create s ghat cant scope for weakens ng n-format on securely over a.

There is a further problem, namely that the scope of the capability at the time is requested does not reflect the end product: build any such as capability may inadvertently generate a structura backdoor. However, by the time we be too late. The eg s at on s mp y cannot prevent structure backdoors by building them. For the B to purport to provide an assurance of the s to protect serious concerns with decrypt on s m s ead ng at best.

A further concern with the scope of the scheme is the proximity of the key n-format on prob em to the mandated act vty. Th s s part cy r a y the case with the technical capability notice wh ch may require s ghn cant nvestment of prate y-owned resources to build a new capability with the stated purpose of ass st ng aw enforcement agenc es. That th s w take tme and resources d stand the effort from any mmed ate threat; the nature of the backdoors s nd rect re at ve to any aw enforcement ssue. Th s ca s nto quest on the proport onat ty of the scheme to address the professed prob em.

Together, the act of s covered by the B compre a d saastrous weakness of the scheme and just fes reject ng the B outright. Assert ng that the scheme does not introduce backdoors m s ead ng ng of the exp ct purpose of the eg s at on.

Decision-Making
Th s part addresses weaknesses n the way wh ch each of the three types of request or not ce s made.

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Voluntary Technical Assistance Request (TAR)

Th s requ es a person to do a th ng or to deve op the capab ty to ass st aw enforcement to carry out ts funct ons. TAR thus no ves more than s mp y the supp y of nformat on—n requ ng the vo untary bu d ng of capab ty, t amounts to government co-opt ng pr vate sector resources for the purpose of aw enforcement.

It s stated to be ent re y vo untary but must be cons stent w th the powers and funct ons of the request ng agency. Immed ate y th s ra ses the quest on of why there s a need for cons stency w th agency power f undertak ng the work s n fact vo untary. Th s s a trou bng aspect of the scheme n terms of author ty. Under what author ty s the re evant agency, or the government, mak ng the request f t s to be undertaken on a vo untary bas s?

In deve op ng a new capab ty for the government, government s effect ve y commandeer ng pr vate serv ces as f under a war foot ng. The author ty for government to usurp pr vate property and bus ness requ es appropr ate and const tut on a author ty and th s seems to be eschewed n fram ng the work as vo untary. As to whether the government has suff c ent power to requ re pr vate enterpr se to ass st n th s way s open to quest on.

Even f t cou d be argued that the war aga ns terror mght just fy commandeer ng pr vate property, the scope of the purpose—nc ud ng protect on of pub c revenue for exam p e—s so extens ve that th s power s un ke y to have suff c ent eg tacy. Of note, pub c revenue n these prov c ons ncudes f ses, charges, and debt co ect on. The nat ona econom c we-be ng takes the purpose to another eve ent re y.16 Th s s an extreme y broad rem t that wou d not support what mght be cons dered emergency powers.

The persons who can make techn ca ssance requests occupy the most sen or pos t on n the r organ sat on and can exerc se su tab e judgment about the prop ety of a request….17 Aga n th s s mere assert on as to the capab ty of dec s on-makers and acks pr nc p es of accountab ty, transparency, and overs ght. Such dec s ons, f they are to be made, requ re extens ve overs ght. The prov s ons as they stand fa to prov de su tab e overs ght mechan sm s and shou d at the very east, be cons dered.

The request mght a so be ssued ora y. Th s prov des for no accountab ty and s ent re y napprop rate g ven the nature of the request be ng put, and what s at stake for the subject of that request. The same can be sa d of an ora var at on of a wr tten request (s317JA).

Technical Assistance Notice (TAN)

The B st pu ates that n ssu ng a not ce, the dec s on maker must be sat sf ed that:

- the requ ements mposed by the not ce are reasonab e and proport onate; and
- (b) comp ance w th the not ce s:
  - ( ) pract cab e; and
  - ( ) techn ca y feas b e18

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16 See s317E(j)(v).
17 See s317G.
18 S317P.
Wh e t he B tse t does not d ent fy anyth ng further, the AAB Explanatory Document states that thessue of a TAN requ es a subject ve state of m nd. Th s ref ects the common aw requ ements of execut ve dec s on- mak ng. The AAB Explanatory Document further enumerates the we gh ng up of thent erests of the agency and prov der, the w der pub cnterest, pr vacy, cyber-secur ty and n nocent th rd part es. Yet none of these we gh ng factors arencorporated nto the text of the B tse t. In ght of the s gn f cant eros on of c v ert es attendant upon th s B , t shou d prov de more rgour n the dec s on-mak ng process.

The TAN s not subject to mer ts rev ew. Wh e th s s apparen t y cons stent w th recommendat ons of theAdm n strat ve Rev ew Coun c, the AAB Explanatory Document says that there are n-bu t safegua rds to ensure that the scope of the powers do n not go beyond what s reasonab e and necessary to ass st agenc es. However, there appear to be few safegua rds n the dec s on-mak ng or overs ght process. If th s process s to come nto force, there must be greater safegua rds bu t nto the B.

**Technical Capability Notices (TCN)**

Dec s on-mak ng on the sssue of a TCN s restr cted to the highest ev es of government. Aga n, mere assert on of the capab ty of dec s on-mak ers does not make for good or transparen t government. More s requ ed.

As w th the capab ty-bu d ng purpose of a vo unta ry TAR, these not ces effect ve y commandeer pr vate resources for government purposes ak n to a compu sory acqu s t on. These act v tes n part cu ar contrib ute to construc on of a government surve ance infrastruc ure n an economy thr v ng on data. It usurps bus ness act v ty for the ends of a war economy where the war s on terror. Aga n, the breadth of purposes n the B s ne ther reasonab e nor propor onate, and ca s nto quest on the eg t macy of these prov s ons.

These prov s ons shou d be rejected.

**Compliance and Enforcement**

The Exp anoty Document s rep ete w th the nguage of cooperat on and vo unta ress. Th s s ref ects a so n the use of the term enforcement remed es when what s prov ded for are pena tes des gned to compe and deter. Yet t conta ns coerc ve powers and harsh pena tes for non-comp ance w th the reg me, and a cack of ear protect on for prov ders. The Exp anoty Document thus m s as to the true purpose of the B.

Pena tes for d sc ourse of requ s toned serv ces are harsh, nc ud ng mpr sonment for up to f ve years. There s no requ ement for harm. The prem se s therefore that the government may co-opt ord nary peop e to ass st n top secret aw enforcement act v tes, and may mpo se str ct secrecy on those peop e at the r sk of harsh pena tes. The construc on of the scheme s pun ve and napp op r ate g ven the breadth of scope and purpose.

At the very east, the pena tes prov s ons shou d be recons dered to reect the breadth of the coer c ve powers ava ab e and those targeted by the powers.

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21 AAB Explanatory Document 41.
22 Ib d.
23 S317ZF.
In undertaking work pursuant to a technical assistance request, a provider has a duty to provide a description of the purpose and the powers further required to ensure that the provider's actions are what the purpose requires. This leaves the provider no obligation to assess whether the work they are undertaking complies with the undertaking.

The demand by you prob emat c. First, the work undertaken is to be voluntary rather than mandated which can extend to any question on how a provider might assess the reasonableness of good faith as not done by a provider to undertake the work. Second, the mechanics for protecting on of voluntary as opposed to mandated work is unclear as the work does not occur under a state of egalitarian.

Secondary Impacts of the Bill

Law enforcement arguments in favour of decrypt on seem to depend down to the possibility just of cat on that encrypted nformat on shou d be read y when there is a government des for access to t.

If this true and any enforcement agenc es would on y seek access to encrypted nformat on persons n whom they have a eg t mate aw enforcement nterest, then the onus n an open and free democrat c socitey must be on the aw enforcement agenc es to prove that they have th s eg t mate nterest. The aw enforcement agenc es have not prov ded suff c ent just f cat on that, f access s requ red, t shou d be undertaken w thout a warrant, covert y as we as overt y, through the co-opt of pr vate resources, and by pr ac ng the foundat on of nformat on secuy at r sk.

To the extent that eg s at on commands pr vate sector or nd v dua s to support enforcement capab es n decrypt on, t generates s gn f cant neff c ency and oss of product v ty, n that s gn f cant resources are requ red to meet aw enforcement needs. Th s w a so nvo ve opportun ty cost n bu d ng capab ty for obscure and secret ve purposes at the expense of the r own enterpr se. Desp te prov s ons for compensat on for capab ty bu d ng, the government s pos t on seems to prefer pr vate commun cat ons prov ders to bear the cost of that neff c ency.

Conclusions

Future will see pos t on s that the government s proposa s for access and ass stance as art cu ated n the B are ne ther necessary and proponate25 and that the B shou d be rejected.

We reject absolute y the assert on that any form of decrypt on for government purposes (e mandated or vo utary) s safe or propon onate to reso ve ostens b e cha enges of aw enforcement n dea ng w th nformat on secuy ty.

24 S317G.
Summary of Recommendations

1. The Bill not be presented to parliament at all
2. The period of consultation for the Bill be extended to allow more input from stakeholders but also the general public

If the Department is not persuaded of the position, we urge to at a strict minimum, accept the following recommendations:

- Purpose: Narrow the purpose of the eg sa on to embrace on y nat ona secur ty threats
- Scope: Narrow the definition of commun cat ons prov der to dent fy more spec f ca y and real st ca y those who should be the subject of not ces
- Oversught: Record keep ng requirements of the aw enforcement agenc es that have ssued not ces or requests needs to nc ude the type of request, the purpose, how the capab ty was used, whether t a tered the outcome of the nvest gat on n a mater a way, a og of staff nvo ved n the capab ty and conf rm at on that the capab ty was dea t w th n a secure manner such that t wou d no onger be ab e to prov de a backdoor
- Sunset c ause or mandatory rev ew of the eg sa on