



TELSTRA CORPORATION LIMITED

Exposure Draft: Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018

Public submission

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EXECUTIVE SUMMARY

Telstra appreciates the opportunity to provide comments on the draft Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (draft Bill). We understand the challenges faced by the Government in relation to accessing clear communications for the purposes of law enforcement and share the Government's goal in ensuring national security risks are properly monitored and managed. We want to work with the Government to create a workable regulatory framework which strengthens the ability of the intelligence agencies and law enforcement (the agencies) to adapt as modern communications technology changes.

The draft Bill proposes a very broad set of discretionary powers which allow the agencies to seek assistance by issuing a Technical Assistance Notice (TA Notice) or a Technical Capability Notice (TC Notice). As these notices can apply to any party in the telecommunications supply chain (not just carriers and carriage service providers) and the manner or type assistance will be specified in each notice, it will be important to consult widely to ensure workability of the legislation and assess the likely impacts on individual companies within the sector and the industry as a whole. We believe this rigorous consultation process should include referring the Bill to the Parliamentary Joint Committee on Intelligence and Security in order to thoroughly test the draft Bill's provisions and minimise the risk of unanticipated impacts. We believe there are opportunities to improve the 'workability' of the proposed notice regime for both industry and agencies.

From our initial review of the draft Bill, we have identified a number of areas where we believe improvements can be made. These include:

- Building in a consultation process for TA Notices as well as TC Notices. Making an assessment about what is reasonable, proportionate, practicable and technically feasible will require consultation with the relevant designated communications provider (DCP).
- More clearly distinguishing TA Notices from TC Notices. We suggest the draft Bill expressly state TA Notices cannot require the development or implementation of a technical capability that the relevant DCP does not already have.
- Ensuring commercial interests are protected. While the draft Bill provides confidentiality provisions to protect against disclosure of commercially sensitive information, there is no commercial remedy for a DCP whose confidential technical information is compromised.
- Requirements to provide information in a 'specified format' should reference appropriate standards or be agreed with industry.
- Making provision for the protection parties other than the DCP to which a notice applies when they are adversely affected. For example, if a carrier is using equipment or software which has been 'modified' as a result of a TA Notice or TC Notice, this could result in an adverse impact to the carrier's network and its customers. While the immunity provisions protect the DCP who provided the assistance/capability under a TA Notice or TC Notice, there is no protection for providers in other parts of the supply chain which are adversely impacted by their use of the 'modified' piece of equipment or software.
- Inclusion of an evidentiary certificate regime, such as the regime under the *Telecommunications (Interception and Access) Act 1979*, so providers will not be required to attend court to explain what was done to comply with a TA Notice or TC notice.



01 Introduction

We appreciate the opportunity to provide comments on the draft Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (draft Bill). We are a major builder and supplier of telecommunications networks and services with a large customer base and a long history of providing lawful assistance to national security and law enforcement agencies. We understand the challenges faced by the Government in relation to accessing clear communications and share the Government's goal in ensuring law enforcement and national security risks are properly monitored and managed. However, the proposed draft Bill will require a framework of safeguards and oversight to be established that balances our important obligations to protect the privacy of our customers and the security of our networks (as set out by the Telecommunications Sector Security Reforms (TSSR)) against the equally important need to provide cost effective support to national security and law enforcement requirements in a timely, effective and sustainable way.

We recognise the need to ensure regulation remains relevant and appropriate to support critical national security and law enforcement requirements in a rapidly changing social and technological environment. However, consistent with the Government's Principles of Best Practice Regulation, in addition to identifying specific national security and law enforcement needs, the proposed amendments should be thoroughly evaluated to ensure the intended outcomes are achieved and not just place an additional burden on the telecommunications industry with the associated additional compliance costs and complexity.

To effectively implement these amendments we suggest the Government continue to work with industry in determining the most appropriate and effective ways of addressing these critical but competing public interests.

02 Comments on the draft Bill

We are pleased to see the draft Bill proposes a role for voluntary assistance and that such voluntary assistance can be provided via a negotiated agreement.¹ We believe a collaborative and cooperative approach is more likely to result in efficient and timely outcomes for the provision of assistance and for capability development. In the event the agencies and a DCP are not able to reach agreement about assistance or capability development and it becomes necessary to issue either a TA Notice or a TC Notice, we believe the DCP should always be allowed to recover its costs in providing the assistance or developing the capability. This should include the cost of resources, including the cost of the capital, deployed towards the activity required by the relevant notice.

2.1. Making an assessment about what is reasonable, proportionate, practicable and technically feasible will require consultation

While sections 317P and 317V expressly state a Technical Assistance (TA Notice) or Technical Capability Notice (TC Notice) can only be issued if the relevant authority is satisfied the requirements are reasonable, proportionate, practicable and technically feasible, the draft Bill only specifies a consultation process for a TC Notice. In order to reach a decision about whether the assistance required by a TA Notice or TC Notice is reasonable, proportionate, practicable and technically feasible, the decision maker will need to obtain information from the designated communications provider (DCP) about these matters. Accordingly, we believe a consultation process should also be specified for a TA Notice.

¹ Department of Home Affairs, [Assistance and Access Bill 2018: Explanatory Document](#), p. 32.



Further, the 'specified period' in the notice needs to be reasonable and the requirement to consult should expressly allow consultation timeframes to be extended. In setting timeframes, the decision maker should take account of the DCP's standard development and release cycles, the availability of relevant engineering and technical resources, the impacts on other planned service and network updates, the time required by a DCP to undertake their normal rigorous implementation, integration and regression and quality testing etc. DCPs may need to engage external consultants, contractors and vendors to complete the technical assistance request or notice or technical capability notice. A more practical approach would be for the DCP and agency to agree to a time frame rather than impose an arbitrary constraint which may not lead to an optimum outcome for the agency.

2.2. There should be an express provision stating a Technical Assistance Notice may not require development or implementation of a technical capability the relevant DCP does not already have

While the Explanatory Document indicates an intention that TA Notices be used only for assistance that can be provided using an existing capability, and that development of new capability may only be required under a TC Notice, this distinction is not clearly made in the draft Bill. While there is a general provision in the draft Bill to the effect that a DCP must only comply with a TA Notice where it is "capable of doing so", there would be cases where even if it does not currently have a relevant technical capability, the DCP may still arguably be capable of developing that capability in terms of knowledge and resources.

To create a clear distinction between the intent and purpose of each category of notice, the draft Bill would ideally be clarified to expressly state that a TA Notice may not require the development or implementation of a new technical capability that the relevant DCP does not already have.

2.3. Consideration should be given to commercial remedies (in addition to criminal remedies)

A TA Notice or a TC Notice may require a DCP to supply sensitive technical information, including software source code and service design documentation. Sharing this type of commercially sensitive information could, of itself, present a security risk if it ends up in the wrong hands. While there are provisions in the draft Bill obliging agencies to keep the information confidential (punishable by imprisonment), this will not provide a commercial remedy to a DCP if their information is compromised (e.g. if sensitive commercial information about upcoming product upgrades or features are disclosed).

We also note that device manufacturers normally share sensitive technical information with telecommunications service providers prior to launch of a new device for testing reasons. The potential requirement for DCPs to disclose this information to agencies (in breach of its contractual confidentiality obligations) could lead to these device manufacturers refusing to share this important information or even new and advanced technologies with Australian telecommunications providers. This has potential to adversely affect the competitiveness of Australian telecommunications providers in international markets and their ability to deploy the latest technology developments (e.g. new smart phones and IoT devices).

2.4. Requirements to provide information in a 'particular format' should reference appropriate standards and/or be agreed with industry

The draft Bill provides that a TA Notice may specify information provided by a DCP in connection with the execution of a warrant or authorisation is to be provided in a 'particular format'.² While we understand

² Subsection 317E(1)(d).



the desire for uniform data formats, we believe the discretion to specify format should be limited to recognised standards and/or be agreed with industry.

We believe the agencies should reach agreement on appropriate internationally recognised information standards (such as the *European Telecommunications Standards Institute* or *Commission on Accreditation for Law Enforcement Agencies* standards). Otherwise building bespoke solutions will incur additional costs (which will need to be passed onto agencies) and cause delays in building the desired capability. Reference to using internationally agreed (or well adopted) standards should be included in the Explanatory Document, if not the legislation itself.

2.5. Protection should be provided for other communications providers that might be affected by a TA Notice or a TC Notice provided to a DCP

The draft Bill covers the entire communications services supply chain, making it possible a TA Notice or TC Notice could require 'modification' to a piece of network equipment or its operating software without the knowledge or awareness of other communications providers. For example, if a telecommunications provider (such as a carrier or carriage service provider) uses equipment or software supplied by a third party, that third party may be separately required to provide technical assistance to an agency (potentially including the installation of software or equipment supplied by the agency) or to introduce new technical capability into their products.

Given the secrecy provisions of the draft Bill, this could occur without the knowledge of the telecommunications provider and could result in an adverse impact to its network and/or its customers' use of the network. Such adverse effects could include service degradation, network faults, or other impacts on its business, or on non-target customers. While the immunity provisions of the draft Bill would protect the DCP who provided the assistance/capability under a TA Notice or TC Notice, there is no protection for providers elsewhere in the supply chain if they (or their customers) are adversely impacted by the use of that 'modified' piece of equipment or software.

2.6. There should be an express provision prohibiting agencies requesting (or requiring) assistance that would involve the disclosure of content

The Explanatory Document states on a number of occasions the draft Bill is not intended to change the existing mechanisms that agencies use to lawfully access telecommunications content and data for investigations and that the intention is that agencies use existing warrant powers for such access.³ However, the draft Bill may apply to services that are not covered by that existing legislation, for example, it could apply to OTT messaging services that are not currently covered by the interception legislation. Accordingly, there is still scope under the draft Bill for TA Notices and TC Notices to require access to the clear content of communications sent or received on such services. If the principle is that the new powers under the draft Bill are not to be used in any circumstances for accessing content, then we suggest it would be appropriate to include a specific prohibition in the draft Bill (i.e. to include an express prohibition on agencies requiring assistance that would involve disclosure of content).

³ See, for example: Department of Home Affairs, *Assistance and Access Bill 2018: Explanatory Document*, p. 10.



2.7. There should be an express prohibition on TA and TC Notices requiring a DCP doing anything that would otherwise be an offence

Although section 317J provides civil immunity, there are potential criminal exposure issues which may apply. We believe the draft Bill should be amended to make it clear that TA and TC Notices cannot require a DCP to do anything that would otherwise be a criminal offence.