



**ACT**  
Government

Justice and Community Safety

Ms Anne Sheehan  
Assistant Secretary  
Communications Security Branch  
Attorney-General's Department

Mr Brian Kelleher  
Assistant Secretary  
Infrastructure Security and Resilience Branch  
Department of Communications and the Arts

Dear Ms Sheehan & Mr Kelleher

### **Consultation Paper - Access to Retained Data in Civil Proceedings**

I refer to your letter of 29 November 2016 inviting my Directorate to make a submission to the Commonwealth review of access to retained telecommunications data by parties to civil proceedings.

I note the review is in response to the recommendation of the Parliamentary Joint Committee for Intelligence and Security that the federal government review the prohibition on the production of telecommunications data in civil proceedings. This data is retained by service providers solely for the purpose of complying with data retention obligations under the *Telecommunications (Interception and Access) Act 1979* (TIA Act).

I am pleased to provide responses to each of the questions posed in the consultation paper, which are included at Attachment A.

Should you have further questions or wish to discuss our submission, my contact officer in the first instance is Mr Sean Costello, Director of the Civil Law, Legislation, Policy and Programs Branch on telephone (02)62078303 or via email [jacslpp@act.gov.au](mailto:jacslpp@act.gov.au).

Thank you for providing an opportunity to comment. I look forward to seeing the outcomes of this review process in due course.

Yours sincerely

  
David Pryce  
Acting Director-General

30 January 2017

**Submission by the ACT Justice and Community Safety Directorate**

In response to Question 1:

Telecommunications data has been sought in circumstances such as civil tribunal matters, family law and domestic violence cases and coronial proceedings. Workers' compensation cases concerning psychological injury resulting from bullying or harassment also benefit from the ability to access telecommunications data.

The rationale the ability to subpoena telecommunication data and supporting a move to allow access to metadata information is that these types of proceedings can lead to criminal sanctions, and the behaviour of concern is often akin to, or overlaps with, criminal conduct (e.g. stalking, harassment etc).

In response to Question 2:

The impact of prohibition will depend on the types of civil proceedings in question. If the data is relevant to a point in issue in serious proceedings, such as applications for protection orders, the impacts may be catastrophic. For example family and childrens' safety is supported through the protection order process, which relies on the ability of the system to make fully informed assessments of risks posed by family member.

At a higher level, inability to access information impacts adversely on the public interest in accurate and fair decision making in courts and tribunal matters, and undermines public confidence in the system. An inability to access data may also generally lead to the wrong result for the parties, dissatisfaction, more applications for appeal along with further expense and delays.

There have been civil matters in the ACT Law Courts and Tribunal in which criminal proceedings may also be on-foot in relation to the same facts and parties. For example, occupational discipline matters where criminal offences were allegedly committed could also give rise to an occupational discipline application.

Under the current system, telephone records relevant to the alleged offences or facts would be compellable and admissible evidence in the criminal proceeding but would not be compellable for the civil proceeding. This would cause evidentiary confusion, delay in litigation and further cost to the parties and the public.

**Submission by the ACT Justice and Community Safety Directorate**

In response to Question 3:

We would support use of the regulation making power to allow access to metadata in domestic/family violence orders and protection orders in proceedings of the kind under the following legislation:

- *Domestic Violence and Protection Orders Act 2008 (ACT)*
- *Family Violence Act 2016 (ACT)*
- *Personal Violence Act 2016 (ACT)*; and
- *Children and Young People Act 2008 (ACT)*

There may also be significant benefit in allowing access to metadata in serious civil proceedings including workers compensation proceedings, civil penalty proceedings, criminal assets confiscation proceedings and coronial inquests/hearings.

The review could also consider whether the regulation making power should provide exclusions for any circumstance in which a decision maker is empowered by statute to compel production of evidence. Such powers are ordinarily exercised by reference to accepted tests of relevance, public interest, oppressiveness etc and there is a large body of law constraining the exercise of such powers which are applied on a routine basis. These existing frameworks would provide sufficient privacy safeguards while allowing probative evidence to be produced in circumstances where there is a demonstrable public benefit in regulation of conduct.