



FAMILY COURT OF AUSTRALIA

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

By email: CommunicationsSecurity@ag.gov.au

Dear Ms Sheehan

Review - Access to retained Data in Civil Proceedings - Section 280 of the *Telecommunications Act 1997* (TIA Act)

I refer to the letter dated 29 November 2016 from you and Mr Brian Kelleher to Mr John Fitzgibbon of this Court regarding the review of the question of access to retained telecommunications data by parties to civil proceedings being undertaken by the Minister for Communications and the Attorney-General.

As noted in the consultation paper accompanying your letter, at the time of the introduction of the requirements for telecommunications providers to retain for two years certain metadata, primarily for law enforcement and national security purposes, a number of submissions were made regarding the privacy issues that would arise if this data was to be available for use more broadly.

The Parliamentary Committee on Intelligence and Security (the Committee) considered those conflicting policy issues. It also noted the potential for unintended consequences resulting from a prohibition on courts authorising access to data required to be retained under the amended legislation.

After balancing the conflicting policy issues the Committee formed the view that, as the proposed data retention regime was being established specifically for law enforcement and national security purposes, as a general principle it would be inappropriate for the data retained under that regime to be drawn upon as a new source of evidence in civil disputes.

As a result, the Bill was amended to include a prohibition on civil litigant access to telecommunications data retained solely for the purpose of complying with the mandatory data retention regime. However a regulation making power to enable provision for appropriate exclusions was recommended with a further recommendation that the current review be undertaken. Family law proceedings relating to violence or international child abduction cases have been identified as possible appropriate exemptions to the prohibition.

Your letter invited the Family Court of Australia (the Court) to make submissions to assist the Ministers in the review and in particular identified three questions on which views were sought.

The first relates to the circumstances in which parties to civil proceedings currently request access to telecommunications data in the dataset outlined in section 187AA of the TIA Act.

The Court does not have available statistics regarding the circumstances in which parties to civil proceedings currently request access to telecommunications data. Anecdotally it appears that the number of occasions would be very low.

The second and third questions relate to the possible impact on civil proceedings if parties were unable to access the data and whether there are particular kinds of civil proceedings or circumstances in which the prohibition should not apply.

Whilst judicial decision making is always enhanced with the availability of the best relevant evidence, in terms of the impact access to this information might have in matters before the Court it is important to note two particular aspects of the jurisdiction of the Court.

The Court has jurisdiction in matters which involve the abduction of children and a significant proportion of matters before the Court also involve allegations of family violence.

Australia is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction which governs arrangements for the return of children who have been wrongfully removed from or retained outside their country of habitual residence.

The Convention operates on the guiding principles that the child's welfare is best protected by a rapid response to a parent having removed a child from their country of habitual residence and that child abduction in general must be prevented.

The Court's jurisdiction encompasses cases which fall for consideration under the Hague Convention. Information of the type set out in section 187AA of the TIA Act could provide critical evidence in such a case.

Similarly in domestic abduction cases or where there are allegations of child abuse or family violence that information could provide evidence, for example of the location of the alleged perpetrator at the relevant time. Such evidence may be particularly useful in determining the questions for decision by the Court.

It is noted that these cases differ in some respects from usual *inter partes* litigation. In deciding whether to make recovery orders for example, the Court must regard the best interests of the child as the paramount consideration. Section 43 of the *Family Law Act 1975* also specifically provides that in the exercise of its jurisdiction under the Act the Court will have regard to the need to protect the rights of children and to promote their welfare and the need to ensure protection from family violence.

Given the concerns that have been expressed in relation to privacy issues, or misuse of such information it is appropriate to mention briefly the parameters that currently exist in relation to the use of information obtained by subpoena in matters before the Court.

With the exception of certain interim, ancillary, procedural or other incidental matters a subpoena for the production of documents can only be issued with the permission of the Court. A subpoena will not be issued for a self-represented litigant without the permission of the Court. Permission will not be granted where there is no legitimate forensic purpose relevant to the issues in dispute in the proceedings for such a request.

Where the Court issues a subpoena for production of documents an application may be made to set aside the subpoena, if, for example, it is oppressive, too wide, ambiguous, "fishing", or conflicts with privilege. Where such an application is made it must be referred to the Court for hearing and determination.

Similarly objection may be taken to the inspection or copying of a document identified in the subpoena and this too must be referred to the Court for hearing and determination. In addition, as an example of the safeguards in place around the inspection of highly confidential material, there are specific provisions in place to deal with inspection of confidential medical records

Where documents are produced without objection, they are subject to restrictions on their use for any purpose other than that for which they were sought, unless received into evidence. In addition the Court may grant an injunction further restricting the use of the material, or place conditions on the use of material in order to safeguard its confidentiality. The Court is frequently called upon to deal with cases involving highly confidential or commercially sensitive material and in appropriate cases takes necessary steps to protect the privacy of third party information.

Thus, relevant to the review, it can be seen that there are ample checks and balances in place in the Family Court to prevent the obtaining by subpoena of retained telecommunications data which has no relevance to the particular proceedings, and to prevent the unlawful disclosure or use of that information once obtained through the subpoena process, that being the process by which access to the retained telecommunications data would be achieved.

While it would be inappropriate for the Court to offer any comment on what policy position the Government should adopt I trust the above information may assist in the review and the policy formulation.

If you require any clarification or have any questions about any of the matters mentioned above please contact me.

Yours sincerely,



Patricia Christie
Chief Executive Officer
and Acting Principal Registrar