

TELECOMMUNICATIONS (INTERCEPTION AND ACCESS) (EMERGENCY SERVICE FACILITIES – NEW SOUTH WALES) AMENDMENT INSTRUMENT (NO. 1) 2024

EXPLANATORY STATEMENT

Issued by the Authority of the Attorney- General
in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The purpose of the *Telecommunications (Interception and Access) (Emergency Service Facilities – New South Wales) Amendment Instrument (No. 1) 2024* (the Amendment Instrument) is to specify that the emergency service facilities operated by NSW Ambulance in the geographic region of Sydney Olympic Park.

The Amendment Instrument is made under subsection 6(2D) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) and amends the *Telecommunications (Interception and Access) (Emergency Service Facilities – New South Wales) Instrument 2020* (the Instrument).

Background

The TIA Act establishes a general prohibition against the interception of communications passing over a telecommunications system. However, there is an exception in section 6 that allows a person to listen to or record emergency calls at emergency facilities declared by the Attorney-General in certain circumstances.

Under subsection 6(2B), the Attorney-General may declare premises to be emergency service facilities if the Attorney-General is satisfied that the premises are operated by a police, fire, ambulance or dispatching service to enable emergency services to deal with requests for assistance in an emergency.

NSW Ambulance notified the Attorney-General's Department that there is a new premises in Sydney Olympic Park that handles requests for assistance in emergencies. NSW Ambulance has also confirmed that there will be signs clearly visible at the entrance to the facility notifying persons that communications to or from that facility may be listened to or recorded, and that there are arrangements in place to protect callers' privacy.

The Attorney-General subsequently declared the premises in Sydney Olympic Park operated by NSW Ambulance to be an emergency service facilities.

Subsection 6(2D) of the TIA Act provides that if the Attorney-General makes a declaration under subsection 6(2B) of the TIA Act, the Attorney-General must, by legislative instrument, specify the name of the emergency service and the geographic region in which the premises is located.

Details of the Amendment Instrument are set out in **Attachment A**. The Amendment Instrument satisfies the Attorney-General's obligations under subsection 6(2D) of the TIA Act.

The Amendment Instrument is a disallowable instrument under section 42 of the *Legislation Act 2003* and therefore a Statement of Compatibility with Human Rights has been provided at **Attachment B**.

CONSULTATION

The Amendment Instrument was made to reflect the new premises advised by NSW Ambulance. Consultation was undertaken with NSW Ambulance on the draft instrument and NSW Ambulance did not raise any concerns.

It was not necessary to conduct consultation beyond NSW Ambulance as the Amendment Instrument is technical in nature in that communications are already being recorded and listened to by NSW Ambulance's other emergency facilities. The Amendment Instrument merely updates the locations of these facilities.

The Office of Impact Assessment (OIA) has confirmed that a Regulatory Impact Statement is not required for this instrument (OIA Reference OIA23-06259). The OIA considered the Amendment Instrument unlikely to have a more than minor impact, introducing no significant regulatory burden or impact for Australian individuals, businesses, or community organisations.

NOTES ON SECTIONS

Section 1 – Name

Section 1 provides that the Amendment Instrument is the *Telecommunications (Interception and Access) (Emergency Service Facilities – New South Wales) Amendment Instrument (No. 1) 2024*.

Section 2 – Commencement

Section 2 provides that the Amendment Instrument commences the day after the Amendment Instrument is signed. This provides clarity and promotes transparency by aligning the commencement of the instrument with the commencement of the declaration that allows calls to be intercepted at the new emergency service facilities. Aligning the commencement dates does not affect any person's right, and ensures that the instrument can best serve its purpose of notifying the public.

Section 3 – Authority

Section 3 provides that the Amendment Instrument is made under subsection 6(2D) of the *Telecommunications (Interception and Access) Act 1979*. In addition, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Section 4 - Schedule

Schedule 1 of the Amendment Instrument amends Schedule 1 to the *Telecommunications (Interception and Access) (Emergency Service Facilities – New South Wales) Instrument 2020* to insert a new premises operated by NSW Ambulance in the geographic region of Sydney Olympic Park.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

The *Telecommunications (Interception and Access) (Emergency Service Facilities – New South Wales) Amendment Instrument (No. 1) 2024* (the Amendment Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Amendment Instrument

The Attorney-General has, under subsection 6(2B) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act), declared a premises in New South Wales to be an emergency service facility.

The purpose of the Amendment Instrument is to specify the geographical location of the premises that has been declared to be an emergency service facility.

Human rights implications

Interference with a person's privacy or correspondence

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) provides that:

No one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The right to privacy under Article 17 can be permissibly limited in order to achieve a legitimate objective and where the limitations are lawful and not arbitrary. The term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted 'reasonableness' in this context to imply that 'any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case'.

Despite the general prohibition on the interception of communications in subsection 7(1) of the TIA Act, subsection 6(2F) ensures that listening to or recording a communication passing over a telecommunications system to and from a declared emergency service facilities by a person who is lawfully engaged in duties related to the receiving and handling of communications is not an interception of communications.

The purpose of this exception is to ensure that emergency services are able to assist emergency callers and respond to emergency situations as quickly as possible, without first notifying callers of the recording. This ensures that persons requiring emergency assistance are provided with efficient and timely assistance. Recording calls enables an emergency service to undertake appropriate clarification, review and audit in dealing with emergency situations, which may involve a threat to life. Where relevant, such recordings may also be used in subsequent investigations and coronial inquests.

The effect of the Amendment Instrument is reasonable and proportionate to achieving the objective of providing assistance in emergency situations. The Amendment Instrument is subject to a number of safeguards, including:

- the exception applies only if the Attorney-General is satisfied that the premises is operated by a police, ambulance, fire or dispatching service to enable them to deal with a request for assistance in an emergency,
- under subsection 6(2G), the facility must erect signs easily visible at each entrance to the facility notifying persons that communications to or from the facility may be listened to or recorded and NSW Ambulance has confirmed that it will do this, and
- the instrument is subject to disallowance and sunseting.

Consultation occurred with NSW Ambulance to understand the privacy arrangements in place at the new premise. NSW Ambulance will conduct new inductions for all staff and provide new induction material. This material contains notifications of the recording of communications and policies on the requirements for access to the calls. Access to recorded communications is limited to specific responsible staff and areas.

Accordingly, to the extent that the measures in the Amendment Instrument may limit the prohibition on arbitrary and unlawful interference with privacy in Article 17 of the ICCPR, the limitation is proportionate to the legitimate objective of protecting public order, public health, public safety and the rights and freedoms of others, such as the right to life under Article 6 of the ICCPR and the right to health under Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In addition, under Article 12(3) of the ICCPR, limitation of rights may be permissible where they are necessary to protect interests including national security, public order, public health or the rights and freedoms of others, such as the right to life under Article 6 of the ICCPR and the right to health under Article 12(1) of the ICESCR.

The Amendment Instrument positively engages both the right to life under Article 6 of the ICCPR and the right to health under Article 12(1) of the ICESCR.

The commencement of the Amendment Instrument from the day after it is signed provides clarity and promotes transparency. The legislative instrument merely gives notice of the declaration of the emergency service facilities under subsection 6(2B) by the Minister. The legislative instrument does not affect any person's rights or liabilities in any way (rather this is achieved with the declaration). The date of commencement of the instrument has therefore been aligned with the date of commencement of the declaration to ensure that it can best serve its purpose of notifying the public.

Right to life and right to health

The Amendment Instrument positively engages the right to life under Article 6. The right to life under Article 6 of the ICCPR includes obligations to promote life, including taking appropriate steps to protect the right to life of those within its jurisdiction. The Amendment Instrument also positively engages the right to health under Article 12(1) of the ICESCR. The right to health under Article 12(1) includes a wide range of socio-economic factors that promote the conditions for a healthy life, and entails a right of access to a variety of public

health and health care facilities and services necessary for the realisation of the highest attainable standard of health.

As discussed above, the Amendment Instrument ensures that the premises in Sydney Olympic Park, which has been declared as an emergency service facilities, can provide appropriate and timely assistance for persons in emergency situations. Emergency services are critical to delivering first responder functions to people located in New South Wales, including facilitating access to health care facilities and medical treatment for patients, as well as facilitating police or fire fighter responses to emergencies (including life-threatening situations). In this regard, the Amendment Instrument promotes the right to life under Article 6 of the ICCPR and the right to health under Article 12(1) of the ICESCR.

Conclusion

The Amendment Instrument is compatible with human rights because it promotes the right to life under Article 6 of the ICCPR and the right to health under Art 12(1) of the ICESCR. To the extent that it limits human rights under Article 17 of the ICCPR, those limitations are permissible because they are authorised by law and are necessary, reasonable and proportionate to achieve a legitimate objective.