

Australian Privacy Foundation

Legal and Constitutional Affairs References Committee

Comprehensive Revision of Telecommunications (Interception and Access) Act 1979

Re "evidence concerning data retention and the draft legislation"

Speaking Notes for Evidence given on 2 February 2015

Background

During in the last decade, the APF has made about 20 Submissions relating to this Act to Parliamentary Committees.

APF has previously provided to this Committee:

- a lengthy Submission of 17 March 2014
- verbal evidence of 29 July 2014
- a shorter Submission of 14 October 2014

APF has provided to the PJCIS:

- a lengthy Submission of 19 January 2015
- a Supplementary Submission of 31 January 2015

On 1 February, APF submitted to this Committee copies of the two Submissions to PJCIS.

APF has great concerns about both the TIAA in general and the data retention proposals in particular. The Submissions address many specific aspects.

Observations

The PJCIS Report of 2013 made many Recommendations. Some key Recommendations have been ignored by the Attorney-General's Department (AGD) and the Government in bringing forward the data retention proposals. We draw attention in particular to Recommendations 18 and 42 that "revision of the TIA Act be undertaken in consultation with interested stakeholders, including privacy advocates".

The AGD has not only failed to engage with civil society, but has failed to even acknowledge receipt of some requests for involvement, and in one case expressly rejected engagement because civil society is not important enough

The APF uses a body of 8 Principles to assess whether evaluation processes are appropriate. A copy is attached to the Supplementary Submission that we provided to the PJCIS over the weekend. We've provided a copy of that Submission to this Committee.

We submit that the process relating to the Data Retention Bill has been extremely deficient, as measured against any standards, but especially against what we believe are the appropriate standards.

Because the process was so deficient, **there are many serious substantive errors in the proposal put forward by AGD, in the Bill, and in the 'draft data-set' and other aspects, which the AGD proposes be delegated by the Parliament to the Executive.**

Some of these deficiencies have been well-documented in Submissions to, and Evidence before, the PJCIS, but many have not been subjected to as much examination as they should, because of the sheer volume of work involved, and the shortness of time.

In addition to the process issues, a number of substantive Recommendations of the PJCIS have been ignored in the AGD's data retention proposals:

- Recommendation 2 re proportionality tests, both generally and specifically
- Recommendation 5 re reducing the number of agencies – which has only nominally been complied with, because the list would be infinitely extensible by Regulation
- Recommendation 42, that:
 - "the data should be stored securely by making encryption mandatory"
 - "the costs incurred by providers should be reimbursed by the Government"
 - there should be "a robust, mandatory data breach notification scheme"

Summary of Position

Briefly:

1. **The APF submits that the proposals are far more substantial than its proponents misleadingly suggest.** It imposes requirements that have never previously existed. It encompasses far more forms of communication than agencies have had access to in the past. It would likely result in vast increases in the volume of access by agencies to people's communications. And the data that is accessed will be extremely revealing.
The proposal is not for targeted personal surveillance, but for mass surveillance, of the kind imposed in countries that we have hitherto looked down upon as being un-free.
2. **The APF submits that the proposals are not justified.** The AGD hides behind anecdotes that fall far short of being evidence, and depend on *in camera* briefings that are not able to be subjected to critical consideration. We submit that the potential benefits are grossly exaggerated.
Moreover, there is **substantial counter-evidence.** The AGD ignores it, and seems to hope that the two Committees and the Parliament will ignore it as well. This evidence shows that where data retention schemes have been imposed they have made no meaningful contribution to counter-terrorism or law enforcement operations.
3. Similarly, the APF's Submissions show that **the proposals lack Proportionality, involve seriously deficient Safeguards, and are subject to seriously inadequate Controls.**
4. Alternatives to the blanket surveillance regime that is proposed have not been given proper consideration. In particular, a **targeted and circumscribed data preservation regime, with adequate procedural safeguards,** would satisfy law enforcement interest in specific telecommunications data while limiting the risks to privacy.
5. In other countries, legislation such as that proposed here is subject to challenge in superior courts, and has been disallowed by them. In Australia, on the other hand, the Parliament has failed its obligation to give effect to the rights specified in the International Covenant on Civil and Political Rights (ICCPR). As a result, **the Parliament, and this Committee, have an obligation to apply as much care to the evidence before it as the High Court would if it had the opportunity to do so.**
6. We trust that this Committee will not show excessive respect for evidence provided by the large official parties paraded before PJCIS by the AGD, ASIO and AFP. Instead, we submit that the Committee needs to pay full credence to the large amount of evidence provided by civil society organisations, and to conclude that **the Parliament should not countenance authorising mass surveillance of the kind proposed in the Data Retention Bill.**