



**NSW COUNCIL FOR CIVIL LIBERTIES**

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(Sent via email 23/03/2015)

Dear *{{all Senators}}*,

**NSWCCCL urges Senators to delay or significantly amend the Data Retention Bill**

For a democratic Government to mandate the mass collection and retention for two years of highly revealing personal data for all citizens for possible later access by government agencies is a very significant step with real consequences for individuals and society.

There is plenty of history, much of it recent, as to the corrosive impact that mass state surveillance has on personal privacy and valued freedoms that are fundamental to a liberal democratic society like ours.

The Government's intention is that this bill will be endorsed by the Senate without further amendment this week. If the ALP maintains its support, it will undoubtedly occur - though there are significant unresolved issues and no imperative, whatsoever, for urgency.

Although the deals appear to be done, NSWCCCL feels compelled to repeat our call for further consideration of this bill and its consequences following the truncated debate in the House of Representatives.

This bill will legalise a disproportionate trade-off of rights and liberties for highly questionable security gains. It is a step from which it will be difficult to retreat once it is embedded in our law and practice.

If passed without further amendment, it will mark a significant and dangerous transition point in Australia's attitude to the personal privacy and acceptable levels of state surveillance of the citizenry.

**Mass surveillance: never proportionate never acceptable**

The Government and the Labor Party claim the recent amendments have removed the need for any civil liberties concerns. This is abundantly not so. Although there have been significant and positive amendments to the bill, these are at the margins.

The core element of the proposed scheme remains unchanged: a mass data collection, retention and surveillance regime encompassing all citizens will be legislated and implemented.

The civil liberties councils around Australia are dismayed at the failure of the Government or PJCS to give any serious consideration to the far less intrusive and dangerous alternative of a targeted data collection and surveillance scheme. Especially as available evidence suggests a targeted scheme is at least as effective as the proposed indiscriminate mass data retention regime.

The only data retention regime that is compatible with robust democracy is one which targets suspects.

**The Senate provides the last forum where this can be openly examined as a viable alternative to the implementation of a regime which is profoundly disproportionate, unnecessary and antithetical to a free and democratic society.**

**Protection of journalists' sources and the place of warrants**

The most recent compromise giving journalists special safeguards for access to their metadata (and thereby

their sources) was very welcome. However, it only provides partial protection for journalists and their sources and leaves the rest of the citizenry totally exposed.

The new amendment provides for warrant authorization, a public interest test with the presumption being against access and the appointment of a public interest advocate to argue the public interest.

One problem is the apparent definition of a journalist. It is limited and will certainly exclude many on-line journalists' sites and blogs.

Undue secrecy is imposed with a two year penalty for revealing that a warrant is being sought. This would seem to preclude the public interest advocate from contacting the journalist (or the whistleblower) which would seem to limit the advocates capacity to understand the public interest argument against access.

Journalists will not be able to guarantee confidentiality to sources and potential legitimate whistleblowers are not likely to feel confident that their identity can be protected.

This is especially so with regard to ASIO related metadata.

ASIO is exempted from this amendment and will be able access journalists' data with Ministerial approval – a process not likely to generate confidence in journalists or whistle-blowers.

This legislation will not reduce the chilling impact of existing counter-terrorism laws aimed squarely at whistleblower's and journalists – notably the recent draconian s35P amendment to the ASIO Act which imposes up to a 10 year sentence for any disclosure of information relating to very loosely defined and secret 'special intelligence operations'.

It is surprising that media proprietors indicate satisfaction with the compromise amendment. It is understandable that the journalists union is not satisfied.

### **Other professions and the citizens**

The compromise was restricted to journalists. There are strong arguments for safeguards for the lawyer-client, doctor-patient and other professional relationships. Minister Turnbull's argument that only journalists have cause to be concerned about the confidentiality of their metadata is vigorously and rightly rejected by the legal profession.

But the central issue here is that ALL citizens should have the protection of an independent warrant and related safeguards before their private information is accessed by intelligence or enforcement agencies.

Arguments about administrative convenience, operation problems and cost should not outweigh the right to privacy and to effective safeguards from improper or unwarranted intrusions into citizens personal information.

NSWCCL urges the Senate to assert the right of all citizens to effective safeguards against unwarranted state surveillance and access to their personal information by amending the data retention bill to extend the safeguards provided to journalists' metadata to everyone.

#jesuisjournalist

Yours sincerely

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