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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By Email: pjcis@aph.gov.au

Dear Secretary,

RE: REVIEW OF THE MANDATORY DATA RETENTION REGIME

We appreciate this further opportunity to make submissions in relation to the mandatory data retention regime prescribed by Part 5-1A of the *Telecommunications (Interception and Access) Act 1979* ("**the Act**"). EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

EFA thanks its Policy Committee for their assistance with the preparation of this submission. Information about EFA's Policy Committee is located here: https://www.efa.org.au/our-work/policy-team/

Yours sincerely

[redacted]

Angus Murray
Chair of the Policy Committee
Electronic Frontiers Australia

Introduction

We acknowledge the Committee's resolution to focus on certain aspects of mandatory metadata retention since the passage of the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* ("**the Bill**").

At the outset, the Committee ought to be aware that EFA made a substantive submission to the Committee dated 19 January 2015. That submission contained eight (8) recommendations which commenced with a recommendation that the Bill be withdrawn due to "*the lack of consideration for civil liberties, the ease with which its effects can be expanded without parliamentary scrutiny and oversight, and the lack of evidence that it will achieve its stated goals combine to make the Bill unacceptable*". Since the passing of the Act, the government has not slowed its campaign of human rights intrusive legislation.

EFA maintains its position that any legislation that impacts human and digital rights ought to be measured against the principles of necessity, proportionality and adequacy. It is unfortunate that the focus on a purported necessity has trumped a proper and informed discussion about the adequacy and proportionality of proposed legislation. It is also concerning that a myopic focus on national security has seriously damaged and eroded Australia's promotion and protection of human rights.

In this regard, EFA reiterates its longstanding and explicit urge for the government to introduce a Federal enforceable human rights framework.

Australians deserve a fair benchmark for the protection of their fundamental rights and, although we have broadly responded to the Committee's terms of reference, this submission ought to be read with an overarching and strenuous recommendation that the Act be repealed and the Parliament focus on rapidly introducing an enforceable Federal human rights framework.

Response to Terms of Reference

We respectfully submit that the Committee ought to focus on the following key recommendations in relation to the Act:

1. That the Act be repealed.

2. That the government initiate a comprehensive review of the human rights compliance of national security related legislation to assess the cumulative effect on Australians' human rights.

3. That the Act be amended to provide a specific definition for the data to be retained; and

4. That the Act be amended to require a judicial warrant for all information released under the Act.

It is EFA's first submission that the Committee ought not look at the Act in isolation. Since the introduction of the Bill, the government has introduced several significant Bills which fundamentally shift Australia into a surveillance culture[1]. While we naturally accept that it is the

[1] For example: *Identity-matching Services Bill 2018*; *Australian Passports Amendment (Identity-matching Services) Bill 2018*; and *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*.

government's sovereign mandate to ensure that Australians' freedom is protected from security threats, it is equally important to understand that surveillance undermines Australians' other fundamental rights including a citizen's reasonable expectation to privacy, the freedom of political opinion, the freedom of speech and the freedom of association and self-determination.

We recommend that this greater landscape (described in our previous submissions as a "scope creep") requires a careful analysis as to the overall effect of surveillance culture. It is trite that the Act has incurred a cost of approximately $200,000,000.00 to the Australian[2] taxpayer; however, this cost does not factor the cost of lost technology and innovation investment, the cost of technology-based small business becoming unwilling or unable to start-up and the general unease of a society being covertly monitored by government. It is our position that such a review is clearly required given the recent actions taken by law enforcement in relation to the ABC[3] and the treatment of journalists as criminals[4].

Secondly, it is relevant to note that the Full Court of the Federal Court has now had the opportunity to deliberate the categorisation of metadata[5] in the context of the following grounds of appeal[6]:

1. *The Tribunal erred by determining that it was required to answer a threshold question raised by the definition of "personal information" regarding whether information was "about an individual"... The parties had not identified this issue as one in dispute...*

2. *The Tribunal erred by misconstruing the expression "about an individual" in s 6 of the Privacy Act 1988 (Cth) by failing to consider whether the information in dispute related to or concerned the complainant*

3. *The Tribunal erred by posing a test that it had to determine whether the information was about the complainant or about something else…*

4. *If the Tribunal had posed the correct test, it should have found that the information held by the Respondent was about the complainant because the information could be used to identify the complainant.*

In essence, the Full Court determined that "*the Privacy Commissioner did not seek to establish that any of the information was about Mr Grubb. The appeal was argued only at the high level of generality concerning whether the AAT was correct to give content to the words 'about an individual'*"[7]. The Court ultimately finding that metadata information sought by Mr Grubb was information about a service rather than an individual. As a consequence of the manner in which the Privacy Commissioner's grounds of appeal were formulated (and with respect), the Full Court was not able to properly consider at what point information that is about a service becomes information that can reasonable identify an individual. For example, cell-tower location metadata in disaggregate may clearly be information about a service; however, when aggregated over a period of time and with other information about a service (such as the color of a device together with the time, date, duration and network type used for a telecommunication) it may become more difficult the point at which information becomes about an individual who is reasonably able to be identified. More explicitly, information about a service;

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[2] See: https://www.homeaffairs.gov.au/nat-security/files/telecommunications-interception-access-act-1979-annual-report-16-17.pdf; https://www.homeaffairs.gov.au/nat-security/files/telecommunications-interception-access-act-1979-annual-report-15-16.pdf.
[3] https://www.smh.com.au/national/if-you-aren-t-worried-about-the-abc-raids-here-s-why-you-should-be-20190606-p51v0h.html.
[4] https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810.
[5] *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4.
[6] *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 at [46].
[7] *Privacy Commissioner v Telstra Corporation Limited* [2017] FCAFC 4 at [65].

such as the colour of a telephone and the location of a cell-tower is not likely to be about an individual until that information is used to triangulate the usual walking path of an individual using that phone where the colour of the phone can be used to discriminate that individual from a crowd.

In our submission, the Act requires a clear and meaningfully drafted definition of metadata and telecommunication data that adequately and proportionately expresses the point(s) at which metadata (and telecommunication data) falls within the definition of personal information. It is our position that this definition ought to set a low threshold to ensure that Australians' personal information is respected.

Thirdly, we consider that *any* request for assistance by law enforcement to access retained data (whether metadata, content data or both) ought to be the subject of a judicially issued warrant. We respectfully appreciate the warrant-protection afforded to journalists; however, all Australians deserve the oversight and balance provided by the judiciary.

EFA appreciates the opportunity to make this submission and please do not hesitate to contact Mr Angus Murray should you require any further information or comment.