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Retained Data in Civil Proceedings Consultation
Communications Security Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600 Australia

By email: communicationssecurity@ag.gov.au

Dear Sir/Madam,

Submission on Access to Telecommunications Data in Civil Proceedings

Liberty Victoria (**Liberty**) thanks the Department of Communications and the Arts and the Attorney-General's Department for the opportunity to provide a submission on section 280 of the *Telecommunications Act 1997*. In this submission Liberty will address, in general terms, the issue of access to civil litigants of the telecommunications data retained pursuant to Part 5-1A of the *Telecommunications (Interception and Access) Act 1979*.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty is actively involved in the development and revision of Australia's laws and systems of government. Further information on our activities may be found at www.libertyvictoria.org.au.

Human rights implications of a data retention regime

1. In its submission[1] to the inquiry by the Joint Committee on Intelligence and Security into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 the councils for civil liberties across Australia (**CCLS**) submitted that the mass retention of telecommunications data was a major intrusion into the right to privacy of all citizens, including those who are not suspected of any participation in unlawful activity. Moreover, the regime proposed in the Bill, which now has become law, does not limit access to telecommunications data to agencies investigating serious contraventions of the law. For the reasons set out in their submission the CCLS opposed the data retention regime proposed in the Bill.

2. The position advanced by the CCLS in their submission to the Joint Committee is consistent with the recent judgment by the European Court of Justice in ***Tele2 Sverige AB v Post- och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others***[2] delivered on 21 December 2016. At [102] and [103] the Court stated:

> Given the seriousness of the interference in the fundamental rights concerned represented by national legislation which, for the purpose of fighting crime, provides for the retention of traffic and location data, only the objective of fighting serious crime is capable of justifying such a measure...
>
> and
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> Further, while the effectiveness of the fight against serious crime, in particular organised crime and terrorism, may depend to a great extent on the use of modern investigation techniques, such an objective of general interest, however fundamental it may be, cannot in itself justify that national legislation providing for the general and indiscriminate retention of all traffic and location data should be considered to be necessary for the purposes of that fight...

3. Liberty continues to be of the view that the data retention regime under the *Telecommunications (Interception and Access) Act 1979* is a disproportionate limitation on the privacy of the individual. However, having said that, the question regarding access to telecommunication data by private litigants raises

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1 *Submission 129*, 20 January 2015.

2 Joined Cases C-203/15 and C-698/15.

different policy considerations than those set out in the CCLS submission to the Joint Committee. There is a fundamental difference in the activities characteristic of States or public authorities and the fields in which individual litigants are active. The European Court of Justice in the ***Tele2 Sverige AB case*** acknowledged the requirement to make such a distinction from a human rights perspective.[3]

Balancing the rights of civil litigants

4. In the context of civil litigation the task of the Court hearing the dispute is to do justice between the parties. Where one is considering opposing rights of civil litigants justice is usually best served by allowing for a fair balance to be struck between such rights. This approach is consistent with human rights law under the European Convention on Human Rights.[4] Moreover article 8(2) of the European Convention on Human Rights, concerning the right to privacy, provides:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (*emphasis added*)

5. Accordingly, the rights and freedoms of others may impose a necessary limit on the right to privacy. In ***Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*** the European Court of Justice held that the right to privacy and the confidentiality of personal information does not preclude member states of laying down rules allowing for the disclosure of personal telecommunication data if such disclosure was necessary to protect the right to property of others. [5] Accordingly, from a human rights point of view, a blanket prohibition on access to the retained telecommunications data of others may not be the best way to achieve a fair balance between the competing rights of civil litigants.

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[3] At [72] in which the Court referred to its judgment in ***Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*** , C-275/06, EU:C:2008:54, delivered on 29 January 2008.

[4] ***Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU*** , C-275/06, EU:C:2008:54, delivered on 29 January 2008 at [50] - [54] and [68].

[5] Ibid. See also ***Rugby Football Union v Consolidated Information Services Ltd*** [2013] 1 All ER 928 at [23].

6. A good example of how courts in England have sought to achieve this balancing act is the factors that courts take into account when asked to make a Norwich Pharmacal order. Such an order is made for the disclosure of documents or information that is available in the United Kingdom. It is granted against a third party which has been innocently mixed up in wrongdoing, forcing the disclosure of documents or information. The information sought is disclosed in order to assist the applicant for such an order to bring legal proceedings against individuals who are believed to have wronged the applicant. A Norwich Pharmacal order was first granted by the House of Lords in 1974 in ***Norwich Pharmacal Co. v Customs and Excise Commissioners***[6]. Later cases have emphasised the need for flexibility and discretion in considering whether the remedy should be granted. The essential purpose of the remedy is to do justice and a court will only make the order if it is a necessary and proportionate response in all the circumstances of the case.[7] The courts in England have identified the following factors as relevant to the discretion whether the remedy should be granted:

   6.1. the strength of the cause of action contemplated by the applicant for the order;

   6.2. the strong public interest in allowing an applicant to vindicate its legal rights;

   6.3. whether the making of the order will deter similar wrongdoing in the future;

   6.4. whether the information could be obtained from another source;

   6.5. whether the respondent to the application knew or ought to have known that he was facilitating arguable wrongdoing;

   6.6. whether the order might reveal the names of innocent persons as well as wrongdoers, and if so whether such innocent persons will suffer any harm as a result;

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6 [1974] AC 133.

7 ***Rugby Football Union v Consolidated Information Services Ltd*** [2013] 1 All ER 928 at [14]-[16].

6.7. the degree of confidentiality of the information sought;

6.8. the privacy rights under article 8 of the European Convention on Human Rights of the individuals whose identity is to be disclosed;

6.9. the rights and freedoms under the EU data protection regime of the individuals whose identity is to be disclosed; and

6.10. the public interest in maintaining the confidentiality of journalistic sources.[8]

7. It is Liberty's view that the factors taken into account by English courts in the making of Norwich Pharmacal orders may serve as a template of how courts in Australia may approach the question of whether a civil litigant should be allowed to have access to the retained telecommunications data of another person.

8. Moreover, it should be acknowledged, that in the context of civil litigation documents produced under compulsion of the court (whether under subpoena or on discovery) is subject to an obligation not to use, or permit to be used, any copy, or any knowledge acquired from inspection, otherwise than for the purposes of the proceedings, without the consent of the owner of the documents, or the leave of the court (at least where the document is of a confidential nature). Breach of that obligation may constitute a contempt of court, and the court may secure compliance with the obligation by requiring undertakings to be given as a condition of permitting the inspection or copying of any document, or by limiting access to particular individuals or classes of individuals.[9] In Victoria an analogous obligation is provided for under s 27 of the *Civil Procedure Act 2010* to information or documents disclosed in accordance with the overarching obligations. The rationale for the obligation is that the disclosure of relevant documents and information between civil litigants promotes the public interest in securing that justice between parties is done, and is considered to outweigh the private and public interest in maintaining confidentiality, but since the process constitutes a serious invasion of the privacy and confidentiality of a party's affairs,

[8] Ibid at [18].

[9] ***United States Surgical Corp v Hospital Products Int Pty Ltd*** (NSWSC, ED No 2094/90, 7 May 1982, unreported, BC8200010).

it will not be permitted to place on a party any harsher or more oppressive burden than is strictly required for the purpose of securing justice.[10] This means that courts in Australia already have powers either under the rules of court or under statute to ensure that in the context of civil litigation the privacy of individual litigants are not compromised beyond what is strictly necessary in order to do justice between the parties.

Section 280 of the *Telecommunications Act 1997*

9. S 280 of the Telecommunications Act 1997 is obscurely drafted but seeks to prohibit the disclosure of telecommunications data by service providers in response to subpoenas, notices of disclosure or an order of court in connection with civil proceedings, where the data is kept by the service provider solely for the purpose of complying with its data retention obligations under Part 5-1A of the *Telecommunications (Interception and Access) Act 1979*. The fact that disclosure is only prohibited if the data is retained by the service provider solely for the purpose of complying with its data retention obligations, implies that if the data is retained for ordinary business purposes then there would be no prohibition against its disclosure in civil proceedings.

10. It is submitted that the operation of s 280 as it currently stands is unsatisfactory for three reasons. First it may be difficult from a practical point of view to determine whether a service provider is collecting or retaining telecommunications data solely for the purpose of complying with its data retention obligations.[11] A party to a civil proceeding may find it difficult to know, let alone establish, the purpose for which telecommunications data is collected or retained. Second, it makes the availability of telecommunications data retained by a service provider to a civil litigant dependent on the intention of the service provider. In our view access to such information should turn on what is just between the parties and not on the intention or the business requirements of the service provider. Third, in cases where the telecommunications data may be available because it is retained for ordinary business purposes, the data would be

[10] ***Home Office v Harman*** [1982] 1 All ER 532 at 540.

[11] *Fishing By Subpoena in the Rising Ocean of Communications 'Metadata',* Peter Leonard, September 2015, 3.

available by way of a subpoena which is issued out of court by administrative staff without judicial consideration of whether the disclosure of the information constitutes a necessary or justifiable limitation on the privacy of the individual who's personal information is being sought.

11. In Liberty's view access to retained telecommunications data by civil litigants should only be available by way of an order of court. Courts hearing such applications should be given a broad discretion to decide whether disclosure should be allowed. The guiding principle in the exercise of such a discretion should be what is just within the circumstances of each case. We believe that the balancing exercise and the type of factors employed by English courts in the granting of Norwich Pharmacal orders provides a useful template in how courts in Australia may approach the question whether to allow access to retained telecommunications data.

12. Civil litigants may potentially seek access to the telecommunication data of individuals or legal entities not a party to the proceeding. In such circumstances the legislation should provide that anyone whose telecommunications data is the subject of an application for disclosure should be given notice and the right to be heard.

Conclusion

13. In light of the matters set out above Liberty submits that from a human rights perspective it is necessary to draw a clear distinction between the use of retained telecommunications data by the State or public authorities and the use of such data in the context of civil litigation. As the European Court of Justice held in the ***Promusicae case*** the use of telecommunications data in civil litigation is not necessarily antithetical to the provisions of the European Convention on Human Rights. The reason for this is that often the right that a private individual seeks to enforce in a civil court, such as the right to property, is also a right that is protected by the European Convention on Human Rights. If the right to the protection of the property of one party comes in conflict with the right to privacy of another such conflict must be resolved by striking a fair balance between the two competing interests.

14. Therefore Liberty would support a legal framework within which civil litigants have access to retained telecommunications data only by an order of court. Such access should be available irrespective of whether the data is retained for business purposed or in order to comply with the service provider's data retention obligations. Any application for such access should be on notice to the individual or legal entity whose data is the subject of the application. Such a framework will allow courts to do justice between the parties and make appropriate orders to protect the confidentiality and privacy of those whose data may be subject to disclosure.

Thank you for the opportunity to make this submission and for the extension of time granted to do so. Please contact Liberty Victoria President Jessie Taylor by email: president@libertyvictoria.org.au, or the Liberty office on 9670 6422 or info@libertyvictoria.org.au if we can provide any further information or assistance. This is a public submission and is not confidential.

Yours sincerely

Jessie Taylor

President, Liberty Victoria