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29 September 2022

Mandatory Data Retention Regime – Australian Privacy Foundation Response to Report from the Office of the Commonwealth Ombudsman September 2002

The Australian Privacy Foundation (APF) has long been of the view that the Mandatory Data Retention Regime (MDRR) should be repealed. It is our position that the MDRR:

- Has not been demonstrated as necessary or proportionate to achieve the declared ends;
- Is highly likely to have been used for purposes other than those stated (i.e. serious crime and national security);
- Is poorly drafted leading to confusion over its application and the availability of loopholes allowing a wide range of agencies (beyond law enforcement) to use the access rights; and
- Is an unwarranted and dis-proportionate intrusion into the privacy of all Australians.

The APF has released this statement in response to the recent [report](#) from the Office of the Commonwealth Ombudsman (tabled in Parliament by the Attorney General in September 2002).

The attached report details the continued and growing non-compliance of 19 of Australia's most prominent and well known law enforcement agencies with the MDRR legislation. In view of these escalating and serious breaches, Australians cannot be certain that their most personal data is being handled with the trust and respect that should be expected from the agencies entrusted with upholding our laws.

Given the most recent findings of the Ombudsman Report, we call again for the MDRR to be repealed. There is no real evidence to support the contention that the MDRR is necessary to protect Australians. Failing that, we strongly urge that the recommendations from the JCIS review be implemented in their entirety.

Thank you for your consideration.

Yours sincerely

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Background

The APF has always opposed the MDRR.

The APF lodged a detailed submission opposing the during the original consultation in 2014/2015. The APF also made a [submission](#) to the Parliamentary Joint Committee on Intelligence and Security (JCIS) review of the MDRR in 2019.

In that submission, the APF made the following points:

- The only support for the MDRR came from government agencies, which were largely ranged against civil society which opposed the legislation;
- The MDRR is a breach of our human rights and of Article 17 and 19 of the International Covenant on Civil and Political Rights;
- The MDRR is also a breach of the privacy rights of all Australians because of the indiscriminate over-collection and retention of personal data and the very limited restrictions around access and use.

Although the APF's position has always been that the MDRR should be repealed, we have also recommended that if it continues that:

- All access should require a court order;
- The bodies that can access this data, and the purposes for which they can use it, should be subject to regular review and substantial reduction;
- Evidence should be used to evaluate the necessity of the access and the entirety of the MDRR.

Report from the Commonwealth Ombudsman September 2002

All of the concerns that underpinned the APF's opposition to the MDRR have been validated by the recent [report](#) from the Office of the Commonwealth Ombudsman (tabled in Parliament by the Attorney General in September 2002).

That report found that every one of the 19 law enforcement agencies reviewed as part of the report had failed in some way to comply with the MDRR between 2019 – 2020 (the period under review). Some of the issues identified in the Report included:

- Securing warrants from unauthorised sources and the use of template wording and “rubber stamping” of signatures.
- The collection of excessive or unrelated material that was not checked or deleted.
- Failure of systems to record why metadata access requests were approved or the “use and disclosure” of metadata by recipient officers.

This is clear evidence of the issues that the APF has been concerned about such as the over-collection of personal data and its almost unchecked collection.

What is perhaps of even greater cause for alarm, is the evidence that Australia's law enforcement agencies are not concerned by these failures and their non-compliance with the MDRR.

The report records an increase in serious compliance and unfinished remediation issues. A recommendation reflects a serious compliance issue or an issue on which an agency has not made sufficient progress in implementation. In the latest report, the ombudsman made 29 recommendations in relation to six agencies, compared to 21 for three agencies the year before.

This represents a 38 percent year-on-year increase in serious compliance and unfinished remediation issues.

A further 386 suggestions and 116 better practice suggestions were made across the agencies inspected. In the previous period – there were 237 suggestions and 77 better practice suggestions.

We believe that law enforcement agencies have been shown to have an almost cavalier approach to the flimsy safeguards that were built into the system and a failure to appreciate the power they have been entrusted with to access the personal information of Australians, in some case without court approved warrant, relying on their own authorisation. This is particularly demonstrated by the inability of law enforcement agencies to provide simple information to the JCIS inquiry - such as the number of authorisations that related innocent parties or what happened to accessed data where a person is ruled out from suspicion.¹

The APF Position

Given the most recent findings of the Ombudsman Report, we call again for the MDRR to be repealed.

There is no real evidence to support the contention that the MDRR is necessary to protect Australians.

The [JCIS report](#)² (released following the enquiry in 2019) notes that the oversight function of the PJCS, which included the evaluation of the effectiveness of the regime, was made difficult because of the absence of consolidated data about the operation of the MDRR. ‘There was no accurate information available on the number of authorisations made for particular types of offences nor any ability to scrutinise the reason why an individual’s information was accessed.’³

It has never been clear that the serious incursions into the privacy rights of all Australians that are permitted under the MDRR are justifiable limitations on their human rights and there remains no evidence available for an appropriate human rights assessment to take place.

In the absence of data about the effectiveness of the regime and given the clear evidence of the failure by agencies to comply with the protections built into the regime to safeguard the rights of Australians, the MDRR cannot be supported as a necessary or proportionate law.

We fail to see any likelihood law enforcement agencies can bring themselves into compliance with the MDRR, given their historical performance. Accordingly, the APF once again calls for the repeal of the legislation.

Failing the repeal of the MDRR, we believe that any access – whether to metadata or stored communications – should require a court issued warrant. In our view, this is the only way to ensure that proper processes are in place to ensure the validity of requests to access data.

We strongly urge that the recommendations from the JCIS review be implemented in their entirety including the following:

- Publication of guidance on the operations of the mandatory data retention scheme to ensure greater clarity, consistency and security in respect of requests for and collection of metadata by LEA’s across Australia;
- Clarify the term ‘content or substance of a communication’ particularly in regard to distinguishing between metadata and content;

¹ JCIS Report 35, 36.

² http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Data_Retention

³ JCIS Report, 101.

- Provision of additional reporting requirements to provide greater transparency including the type of offences that authorisations relate to;
- Better reporting to oversight agencies, including (among other things) information about the type of offence and reasons why the disclosure is necessary, whether or not the data was used to rule someone out or charge/convict someone of a crime:
- Reduce the number of officers who may be designated as authorised officers (to issue warrants etc).
- Clarify that access to stored information can only be authorised in relation to the investigation of a serious offence.
- Include a specific list of those agencies allowed to access telecommunications data.

We also support more continuous monitoring of agency compliance with the MDRR.

The immediate implementation of all of the above (court ordered warrants, continuous monitoring and implementation of the JCIS report recommendations) will go some way towards redressing the imbalance between the rights of Australians and the powers of agencies which is embodied in the current MDRR.