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No to expanded powers-2

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Abstract

This document contains the transcript of the 11-minute video on the proposed expansion of powers for State and Territory corrective services agencies allowing them to access telecommunications data (refer to Volume 2, Issue 2, Article 3 at right). For the full article, refer to Volume 2, Issue 2, Article 1 at left.

SLIDE 1 (Title – 00:00)

My name is Cameron Russell and I'm from the Australian Prison Reform Journal. In this session, we'll be discussing the expansion of powers proposed for State and Territory corrective services agencies allowing them to access telecommunications data.

SLIDE 2 (Panopticon – 00:12:15)

The rights of prisoners and ex-prisoners are often disregarded for reasons of security, smooth operations, political expediency or punishment. There may be good reasons for the surveillance, but it affects the mind, emotions and rehabilitative prospects of prisoners, creating an 'us versus them' dynamic. There are always reasons for utilitarian methods, but little thought is given to possible alternatives that achieve security while preserving prisoner privacy, dignity, health and human rights. This is because, as Professor Baldry observed, there are no votes in rehabilitative investment.

SLIDE 3 (Yard – 00:45:00)

As the success of Norwegian prisons demonstrates, trusting prisoners and allowing them social interaction and privacy can be restorative, whereas observing inmates at all times and locations makes them adversarial, recidivistic and cunning in avoiding surveillance. A study of CCTV in Queensland prisons interviewed prison managers who said that the gym, industry workshops and program rooms had no cameras because people went there for the right reasons and were engaged. Cameras were also absent in exercise yards so prisoners could have (in their words) 'a bit of a chat' and be given 'a degree of privacy.' Enlightened decisions such as these strike the right balance between safety, security, prevention and operability on one hand, and privacy, dignity, freedom and health on the other.

SLIDE 4 (Peanuts – 01:27:00)

There may be some safety, security, prevention and operability risks associated with excluding corrective agencies from telecommunications data access, but as the Court of Appeal explained in *Nigro against Secretary to the Department of Justice,* 'some level of risk is acceptable in a democratic society that values the rights of an individual to freedom and privacy.' A study by Mann and colleagues found individual privacy rights tend to give way to collective security rights, especially when surveillance powers are extended or threats exaggerated. We should therefore favour privacy and human rights, or at least reduce the intrusiveness of surveillance and seek complementarity.

SLIDE 5 (Big brother – 02:02:00)

Noah Berlatsky refers to a study of many writers which found that just one book was used to explain NSA surveillance – George Orwell's 1984. Berlatsky regrets this because we only see surveillance as the problem rather than the hidden bureaucracy that uses the data. Even more importantly, 1984 is about a totalitarian state whereas most people in the US or Australia are not directly confronted with a police state. Berlatsky draws attention to the qualifier, "most people." He observes there are some citizens who are systematically watched, for example the massive prison population in the US (and it could be added,

Australia) which experiences 1984-like surveillance and control. Muslims, our First Nations peoples, gays and activists have similarly been observed more closely in Australia by our intelligence community. Oppression is distributed unequally so we need not just liberty but also justice.

SLIDE 6 (Metropolis - 02:51:00)

This presentation shall examine Recommendation 78 of the *Richardson Review* (with which the Government agreed) and which is as follows:
'As part of the development of a new electronic surveillance Act, corrective services authorities should be granted the power to access telecommunications data, if the relevant state or territory government considers it… necessary' (2020a:70; 2020b:279).

SLIDE 7 (Data – Vague – 03:10:00)

The recommendation that corrective authorities should be granted the power to access telecommunications data if the relevant State or Territory government considers it necessary is very vague. It raises such questions as:

- What is the process by which State or Territory Government conveys to Federal Government that it considers the powers necessary?
- What is the process by which the Federal Government grants the expanded power?; and
- Does the State/Territory government need to prove necessity, and if so, on what basis? For example, a government wishing to win an election could conceivably argue that data access is necessary to be tough on crime.

The *TIA Amendment (Data Retention) Bill 2014* as originally introduced would have required State and Territory governments to prove a 'demonstrated need' to access the data and we would recommend the same. The level of any discretion afforded the State/Territory Government requires limitation within strictly defined boundaries.

SLIDE 8 (Data – substantive necessity – 04:01:00)

As Kirby stated, 'Citizen surveillance is only justified in very limited circumstances.' We recommend that the demonstrated need for data access be substantive, only justified in such limited circumstances as preserving national security or human life (and not for political gain, suppression or PR damage control).

SLIDE 9 (Truman – 04:19:00)

Michael Kirby said that the breadth of earlier NIC surveillance on him and its unjustifiability demonstrated the need for effective controls to avoid the dangers.

These 'effective controls' would require major reforms for the Parliamentary Joint Committee on Intelligence and Security. De Zwart and colleagues argue for independent oversight of coercive or invasive data collection by engaging a jurist to review the collection of big data; which would be constructive.

SLIDE 10 (Data – Kirby's effective controls – 04:45:00)

It is not recommended, however, that the PJCIS be replaced with a body independent of the three branches of Government because then any findings would be mere recommendations to the Legislature. A balanced mix of Senators and Representatives, and of both major parties, with greater input from the cross-benches, is necessary, together with greater power and wider scope to hold the NIC and Executive to account.

SLIDE 11 (Data – Definition – 05:07:00)

'Telecommunications data' is not defined in the current legislation, but it is understood to be metadata such as date, time, duration, type of communication, telephone numbers, IP addresses, URLs and location information. 'Telecommunications data' does not, however, include the content of the communication.

We should recommend that 'telecommunications data' not be defined in the new *Electronic Surveillance Act* so that legislation remains technology-neutral.

SLIDE 12 (Data – Government response – 05:31:10)

The Government response to the *Richardson Review* merely stated that they agreed. The Government discussion paper, however, gave insight into conditions for being granted the additional powers. The electronic surveillance powers must be needed for corrective services to perform their functions and they must provide the Federal Government with a 'clear and compelling case' to receive the powers.

SLIDE 13 (Plan A & B – 05:49:09)

Since the expansion of corrective services into policing, national security and intelligence roles is a significant shift, it is recommended that corrective services need to apply for access to data. It's recommended that requirements specifically for corrective services be included in the new Act regarding procedures, reporting, human rights, transparency, accountability and oversight. Important safeguards would include:

(a) For each corrective agency to be listed under s.101A of the TIA Act or the new Act, if their respective government considers it necessary, having regard to the effectiveness of any existing arrangements; and
(b) only after the State/Territory government proves a 'demonstrated need' to access the data; and
(c) The 'demonstrated need' must be substantive, with the relevant State/Territory government making a 'clear and compelling case'; and
(d) Every use of electronic surveillance powers by the corrective agency must be needed to perform its functions. This could be ensured with warrants and/or strong oversight.

SLIDE 14 (Minority Report – 06:09:00)

Rival Alameddine and Hamzy crime family members have been limited to one mobile phone and restricted from using encrypted messaging apps or speaking with known associates and rivals under parole conditions, bail conditions, serious crime prevention orders and non-association orders. It could be argued that the latter two orders are unlawful because they limit the telecommunications of free people, but the High Court of Australia held that SCPOs

are lawful and constitutional. With non-association orders, freedom of association is not expressly protected in the Australian Constitution and there is no free-standing right to association implied in the Constitution. Freedom of movement is protected by s92 of the Constitution except in the public interest where there are conflicting rights or clear legislative intent to restrict movement.

However, these restrictions contravene most rule of law principles including equality before the law, accountability to the law, fairness and proportionality in the law's application, separation of powers, legal certainty, presumption of innocence and procedural and legal transparency. These orders are examples of Austin's 'lawful illegality' and are an injustice for free people who are innocent or reformed. Fundamental human rights and freedoms of association, movement and expression are being curtailed by these 'Minority-Report'-style 'PreCrime' measures. It is recommended that State/Territories laws that allow these orders be repealed, instead sanctioning people if they actually break the law.

SLIDE 15 (Electronic ankle bracelets – 07:18:00)

Bagaric and colleagues identify three main areas that technology may be used as alternatives to incarceration, all involving telecommunications: (a) wearing electronic ankle bracelets that remotely monitor location; (b) wearing sensors so that unlawful or suspicious activity can be monitored remotely; and (c) wearing a conducted energy device (or CED) to remotely immobilize prisoners who attempt to escape their area of confinement or commit other crimes.

It's recommended that the CED option not proceed in Australia because it is brutal, perilous, subject to abuse and sets a dangerous precedent, as well as unnecessary since the police could be called out instead. Wearing ankle bracelets and sensors may be suitable as an alternative to ineffective incarceration (for example, in the NSW Domestic Violence Electronic Monitoring program), but it would need to be governed by stringent regulations to mitigate dangers such as:

1) Data from the sensors being interpreted wrongly;
2) Technology being expanded with privacy implications, for example in the US, some ankle bracelets can listen in on conversations, measure heart beats, and issue warnings to wearers

3) One prisoner wearing a stun belt at trial appealed the death penalty in California because fear made him appear passive regarding his crimes
4) Stun belts can easily be abused. One Texan judge ordered that a defendant be shocked multiple times for pleading the 5th and saying he had a mental illness, resulting in a mistrial (stun belts issue 50,000 volts for 8 seconds causing immobilization and possibly uncontrolled defecation and serious injury or death)

There may also arguably need to be consent to bracelets and sensors due to current telecommunications laws.

SLIDE 16 (Village of the damned – 08:22:08)

The use and expansion of this technology raises many complex issues that cannot be covered in this presentation, but it may be noted that 'lawful illegality' is again relevant in two Victorian complexes that house 85 released former sex offenders who are still considered an unacceptable risk of re-offending. These complexes outside Ararat require the residents to wear ankle bracelets. It is recommended that the only way to restore the rule of law would be to repeal the *Serious Offenders Act 2018 (Vic),* which would tend to increase sentences for serious sexual and violent crimes while retaining the non-parole period. Telecommunications devices such as ankle bracelets and sensors could then more properly be dealt with as parole conditions to which prisoners agree.

SLIDE 17 (CCTV – 08:59:07)

If the expansion of corrective agency powers is to proceed, it is not recommended that all States/Territories receive the expanded powers at once because of the Recommendation that they first prove pressing necessity and Finding 27.48 in the Richardson Review regarding insufficient evidence to justify this. However, if all State/Territory governments are to receive such powers at once, it is recommended that model Federal legislation be developed with input from the States and Territories, preferably within the new Act, with each State or Territory passing their own same or similar legislation. This method has been successfully used to establish the National Construction Code and model Work Health and Safety laws.

SLIDE 18 (Peacock – Conclusion – 09:36:10)

It is recommended that the powers of corrective agencies not be extended to permit access to telecommunications data because: (a) mobile phones and Internet access are already disallowed in NSW prisons, leaving only telephone calls with approved people; (b) despite administrative burden in making applications to access data, corrective agencies can source data through the police when needed; (c) for offenders under orders in the community, there is even less justification for Corrective Services data access because the police and NIC are in a better position for surveillance, data access and investigation/intelligence roles than Corrective Services NSW; (d) corrective services were excluded from the list of 20 'criminal law-enforcement agencies' that could access telecommunications data when the *TIA Act* was amended in 2015; (e) where freed people are being monitored by Corrective Services NSW, fundamental human rights and freedoms of association, movement and expression are curtailed; and (f) supervision orders to override these rights tend to compromise the rule of law and separation of powers, resulting in 'lawful illegality.'

Video may be viewed at:

https://youtu.be/T8Y0tcdeslk

Duration: 10min 55 sec