



Quaker Peace & Legislation Committee

WATCHING BRIEF 21-10: GOVERNMENT SURVEILLANCE

As Quakers we seek a world without war. We seek a sustainable and just community. We have a vision of an Australia that upholds human rights and builds peace internationally, with particular focus on our region. In our approach to government, we will promote the importance of dialogue, of listening and of seeking that of God in every person. We aim to work for justice and to take away the occasion for war.

September 2021

Recently the Parliament passed legislation that increases the capacity of the federal government's security agencies to access and manipulate the electronic data of any citizen. This has serious implications for privacy and freedom of expression. This Brief outlines the legislation and discusses the responses.

The Legislation

The *Surveillance Legislation Amendment (Identity and Disrupt) Bill 2021* was passed by Federal Parliament on 25 August and given formal assent by the Governor-General on 3 September 2021. In summary, it amends the Surveillance Devices Act 2004, the Telecommunications Act 1979, and the Crimes Act 1914, to enable the Australian Federal Police (AFP) and the Australian Criminal Intelligence Commission (ACIC) to

- disrupt data by modifying, adding, copying or deleting data in order to frustrate the commission of serious offences on-line;
- collect intelligence on criminal activity; and,
- take over a person's on-line account to gain evidence for a criminal investigation.

Warrants can be issued by a judge or a member of the Administrative Appeals Tribunal. Penalties may apply to anyone who does not follow a direction from AFP or ASCIC.

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During the Senate debate, Senator Anne Ruston (on behalf of the Government) said:

Multiple layers of technologies that conceal the identities, IP addresses, jurisdictions, locations and activities of criminals are increasingly hampering investigations into serious crimes. This includes child sexual abuse, terrorism and the trafficking of firearms and illicit drugs.....

These key new powers are critical in enabling law enforcement to tackle the fundamental shift in how serious criminality is occurring online. This Bill demonstrates the Government's commitment to equipping the AFP and ACIC with modern powers that ensure serious criminality targeting Australians is identified and disrupted as resolutely in the online space as it is in the physical world.

Senator Kristina Keneally (speaking for the ALP) said:

Labor's goal in supporting this bill is to ensure that our agencies have the tip of the spear when confronting the most serious cyber-enabled crimes and that the AFP and the ACIC have the settings appropriate to a crime landscape that is forever changing with technological advances. It is a more robust bill as a result of the PJCIS's recommendations, and, as a result, Labor will be supporting it. It is vital we continue to work constructively in the interests of national security.

Senator Lydia Thorpe (on behalf of the Greens) said:

The scope of the new powers is disproportionate compared to the threats of serious and organised cybercrime to which they are directed. There is a lack of evidence justifying the need for warrants of this nature beyond those already available to the AFP and ACIC. No other country in the Five Eyes alliance has conferred the powers on its law enforcement agencies that this bill will. What's more, the government moved 60 amendments in the other place, as a block, at the last moment, and now we're all here, expected to jump through hoops, without the time to scrutinise the legislation properly.

For more information on the legislation, see

https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6623

Commentary

Paul Karp (*The Guardian*, 25 August 2021) said the Bill was passed by the Coalition and Labor in the Senate. The main basis for support was concern that cybercrime was increasing. Some amendments to improve oversight and safeguards were suggested by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), but the only major change made was for a sunset clause. The Greens and Rex Patrick sought further amendments without success. The Law Council president Jacoba Brasch said the Council believed the significant breadth and intrusive scope of the warrants demanded decisions by judicial officers only. This was echoed by the submission from the Information Commissioner.

Greg Barnes (Australian Lawyers Alliance) published an article on 5 September (www.michaelwest.com.au) in which he said the passing of this law showed little respect for privacy or the rule of law. It adds to the already wide suite of powers that security agencies have. It means that an officer of AFP or ACIC can apply to a judge or a member of the Administrative Appeals Tribunal for a 'data disruption warrant' to interfere with data

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in a computer. The basis for such a warrant is suspicion that an offence has been, is being or might be committed and that such disruption of data will help prevent the crime. There is also provision for a 'network activity warrant' by which law enforcement can access the dark web; and for an 'account takeover warrant' to obtain evidence.

He continued that although the legislation will be overseen by the Inspector-General of Intelligence and Security and the Independent National Security Monitor, it represents a failure of the legislature to scrutinise and check the power of executive government. Without a human rights charter, Australia is vulnerable to the manipulation of on-line accounts and the entrapment of individuals by authorities. The media have also failed to highlight the increasingly intrusive powers being given to security agencies.

James Kang and Jumana Abu-Khalaf (Edith Cowan University) wrote in *The Conversation* on 7 September that the law (a) gives unprecedented powers for 'hacking', (b) has insufficient safeguards for free speech and press freedom, and (c) was passed despite a Parliamentary committee's recommendation to limit the powers under the new law. They point out that any legitimate need to intercept on-line information (e.g. about child exploitation material) requires standards such as those used by the European Telecommunications Standards Institute or the Privacy Act 1988. "Government use of hacking tools may result in worse cyber security overall. The warrant powers given to Australian law enforcement agencies may protect public safety and national interests, but they may also provide powerful means for adversaries to access government data".

Manal aq-Sharif (an immigrant from Saudi Arabia), on 12 September (*Pearls and Irritations blog*), compared the powers of a dictatorship such as Saudi Arabia with the Australian government's new powers. "When we lose privacy, we lose part of ourselves that is in the making. We become so scared to look up our unpopular opinions and views, even privately. Losing privacy means self-censoring out for fear of who is listening....I see Australians sitting idly by while their government increases their unchecked powers, not realising what's being taken away".

Wider Context

This legislation needs to be viewed in the context of the large number of laws initiated and passed in the post 9/11 period by both Coalition and Labor governments and the Parliament. A recent report for *GetUp* summarises the situation as follows:

- In the two decades since 9/11, Australia has enacted 92 counter-terrorism laws amounting to more than 5000 pages of powers, rules, and offences. This is significantly more than comparable western nations.
- Most of these laws received scant debate in Parliament, and give the government more powers than in wartime.
- Secrecy and espionage offences have a chilling effect on public interest journalism.
- National security is defined very broadly to include Australia's political relations with other countries.
- A culture of secrecy has become the hallmark of the coalition government and the Department of Home Affairs, undermining the free information flow needed for an effective democracy.

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The report (*State of Secrecy*, authored by Dr Keiran Hardy, Dr Rebecca Ananian-Welsh, and Dr Nicola McGarrity) advocates a number of changes to improve transparency, protect journalists, strengthen oversight, including:

- A review of the Public Interest Disclosure (PID) Act to strengthen whistleblower protection.
- A change in the definition of 'national security' to confine it to the guidelines for ASIO's intelligence gathering.
- Ensuring that journalists' confidential sources and material are protected.
- Transferring the extensive powers of the Home Affairs Minister to the Attorney-General.
- Strengthening the resources of the National Security Monitor, and the role of the Parliamentary Joint Standing Committee on Intelligence and Security in overseeing intelligence operations.

For a summary of the main findings, see www.getup.org.au/campaigns/democracy

During a webinar on 15 September, the authors were joined by several other speakers, and the following additional points emerged:

- Keiran Hardy (Griffith University) emphasised the trend towards pre-emptive laws that can be triggered well before a crime is committed. The elevation of Home Affairs to a 'super-department' has occurred despite many doubts among politicians, public servants and counter-terrorism experts.
- Nicola McGarrity (University of NSW) said that there have been 10 anti-terrorism bills passed in the past two years – excessive by any measure.
- Scott Ludlam (former Greens Senator) said the rapid passage of bills was caused by the heightened fear among politicians to be seen to be not tough enough on terrorism. The ideal of transparency for the powerful and privacy for others was being turned on its head.
- Rebecca Ananian-Welsh (University of Queensland) said that the use of secret trials was becoming more common, leading to less transparency.
- Zaahi Edries (legal counsel for *GetUp*) pointed out that secrecy provisions make it difficult for anyone charged under security legislation to find out exactly what they are charged with. He drew attention to the harmful impact of such legislation on ethnic minorities in particular.

The overall mood of the webinar was that, in the absence of a willingness of the major political parties to reverse the current trends, civil society needs to take a stronger stand for human rights and democratic processes, and to speak out wherever possible. In particular, there is need for greater support to be given to a bill/charter of rights for Australia.

Canberra, September 2021

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