26 February 2014

The Executive Director

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To the Executive Director,

This submission is in response to the Australian Law Reform Commission’s call for submissions in response to Issues Paper 46. It will focus on Chapter 16 of the Traditional Rights and Freedoms - Encroachments by Commonwealth Laws Issues Paper, to which I make the following submissions regarding Commonwealth laws that unjustifiably authorise what would otherwise be a tort.

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# Summary

1. The Prime Minister Tony Abbott, in a statement before Parliament on 22 September 2014, said the following about the need for new national security legislation:

“Regrettably, for some time to come, Australians will have to endure more security than we are used to and more inconvenience than we would like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift. There may be more restrictions on some so that there can be more protection for others. After all, the most basic freedom of all is the freedom to walk the streets unharmed and to sleep safe in our beds at night.”[[1]](#footnote-1)

1. We submit that such proposition is not true, and that ‘delicate balance between freedom and security’ cannot shift without a comprehensive and rigorous analysis of measures that seek to encroach and infringe on fundamental freedoms. Tort law protects many of these freedoms.
2. Torts are wrongful acts that interfere with a person’s legally protected interests and rights. These include a person’s bodily security and integrity, mental health and well-being, reputation, property and financial resources. Infringement of these rights and interests gives rise to civil proceedings brought by a private individual seeking legal redress for the injury or loss caused by the wrong.[[2]](#footnote-2) Torts are generally created by common law, though there are statutory causes of action which are analogous to torts, and are often described as statutory torts.[[3]](#footnote-3)
3. Many torts protect fundamental liberties and rights, and provide protection from interferences by other people or entities and by the Crown. As such, any government action that authorises what would otherwise be tortious conduct can have a severe and unjustified impact on individuals’ freedoms and rights.
4. This submission will recommend that proportionality principles and criteria should be applied to determine whether a law that authorises what would otherwise be a tort is justified, taking into account the recognised inviolability of many of the freedoms and rights protected by tort law.
5. In particular, we will focus on two particular types of freedom, protected by tort law in Australia or elsewhere, that have been infringed on and curtailed by Commonwealth laws: the freedom from arbitrary detention or false imprisonment, and the right to privacy.
6. Commonwealth laws which authorise what would otherwise be a tort include the *Migration Act 1958*, the *Privacy Act 1988*, the *Telecommunications (Interception and Access) Act 1979*, the *Australian Security Intelligence Organisation Act 1979*, the *Surveillance Devices Act 2004*, the recently enacted counter-terrorism legislation, as well as the proposed data retention scheme embodied in the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014.

# General principles and criteria to be applied

1. This submission will address the first question posed by the Australian Law Reform Commission, by first outlining the general criteria for assessing whether a law that authorises what would otherwise be a tort is justified. It will then apply this criteria to the two torts that are the focus of this submission, taking into account the individual importance of each tort.
2. The criteria to be employed in determining whether a law authorizes what otherwise would be a tort is the proportionality test. As outlined in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, by Kiefel J, the proportionality test has three key criteria: suitability, necessity and appropriateness. The applicable test will draw on principles of German law, the main purpose of which was to protect fundamental freedoms.[[4]](#footnote-4)
3. We will go through each of the criteria and what is required to satisfy them so that a law authorising a tort is justified.

### Suitability

1. The law must be practically suitable for pursuing a legitimate objective.[[5]](#footnote-5) To discern this a two-stage test needs to be satisfied:
2. Define the objective of the law.
3. A judgment as to whether that objective is legitimate.
4. This inquiry will necessarily involve an analysis of the context in which the proposed law or measure that may infringe on freedoms arises.
5. In general, the threshold for satisfying this criterion is relatively low. In the case of authorisation of would otherwise be a tort, the threshold may be slightly higher for some torts, such as false imprisonment, because any measure that seeks to constrain a fundamental freedom such as individual liberty may require a more rigorous examination of its legitimacy.
6. Guidance on the legitimacy of a purpose which may encroach on fundamental freedoms can be found in Canadian jurisprudence on the Canadian Charter of Rights and Freedoms. The objective being pursued must be of sufficient importance, in that it relates to concerns which are pressing and substantial in a free and democratic society.[[6]](#footnote-6)

### Necessity

1. The satisfaction of this element requires a consideration of whether a less restrictive means of achieving a legitimate purpose is available, and whether that alternative approach is equally as practicable and likely to succeed.
2. Again, the relative inviolability and significance of the freedom or right being encroached upon will determine how high the standard is to meet this criterion. A fundamental freedom, such as from arbitrary detention, would require the impugned law to be the *sole* means of achieving the legitimate purpose. The existence of any other alternative would render the impugned law unnecessary. For such fundamental freedoms, alternative means that may be less practicable and effective may be accepted.

### Appropriateness

1. This requires a normative balancing exercise, where the social benefit of the objective being pursued is weighed against the importance of the freedom being infringed upon by the proposed law.
2. Given the established significance of many of the freedoms that are protected by tort law, the threshold to be met in satisfying this criterion is quite high, and will vary according to how essential and fundamental the freedom is, and how deleterious and severe the impact is on individuals. For the most intrinsic of individual freedoms it may be that no encroachment on that freedom, no matter how trivial or necessary, is appropriate.
3. We recommend for the most fundamental freedoms that the strict scrutiny approach favoured by the United States Supreme Court be adopted to determine the appropriateness of a proposed law. In these cases, the proposed law must seek to address a crucial or substantial societal concern, and must be narrowly confined such that it impacts only on that particular issue, and to a degree that is not unreasonable or arbitrary.

## False imprisonment

1. The freedom from arbitrary detention, or false imprisonment, is one of the fundamental human rights. The UK House of Lords has described the tort of false imprisonment as one of the “important safeguards of the liberty of the subject against the executive”.[[7]](#footnote-7) It is enshrined in article 9 of the *International Covenant on Civil and Political Rights*, to which Australia is a party, as well as article 9 of the *Universal Declaration of Human Rights*. Furthermore, article 5 of the European Convention for the Protection of Human Rights and Freedoms provides that everyone has a right to liberty and shall not be deprived of liberty except in a select number of cases and in accordance with lawful procedures. The Fifth Amendment and Fourteenth Amendment of the United States Bill of Rights states that:

“No person shall...be deprived of life, liberty or property without due process of law”

1. In Australia, section 21 of the Victorian *Charter of Human RIghts and Responsibilities* protects the right to liberty and security, including the right to not be arrested or detained except in accordance with the law. Justice Gummow, in *Al-Kateb v Godwin*[[8]](#footnote-8)approved a statement by Scalia J of the US Supreme Court that:

“The very core of liberty secured by the Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”[[9]](#footnote-9)

1. The High Court has previously stated that:

“The mere interference with the plaintiff's person and liberty constituted prima facie a grave infringement of the most elementary and important of all common law rights.”[[10]](#footnote-10)

1. In *Hamdi v Rumsfeld*,[[11]](#footnote-11) a case about the legality of detaining a US citizen captured as an enemy combatant and what due process is afforded the detainee, the majority of the US Supreme Court applied a less stringent version of the proportionality test than the one we have proposed. The test applied by the Supreme Court was articulated in *Matthews v Eldridge*, 424 U.S. 319 (1976), which dictates:

“...that the process due in any given instance is determined by weighing the ‘private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process”.[[12]](#footnote-12)

1. The majority reaffirmed the fundamental nature of the constitutionally protected right to be free from involuntary confinement without due process, and determined that this freedom outweighed the governmental national security interests of preventing a detainee returning to battle against the United States.
2. The above is an indication of the near inviolability of the freedom from false imprisonment or arbitrary detention, both in international law and in the common law in Australia. It is almost universally regarded as the fundamental and most basic right, inherent in all humans as a universal human right.
3. Any Commonwealth laws that seek to make lawful what would otherwise be the tort of false imprisonment must be absolutely vital for the continuing functioning of a viable democratic society and have no other remotely practicable alternatives, to be regarded as justifiable.

***Submission 1: The Commonwealth Parliament, when considering new legislation that may lead to the false imprisonment of people, should take into account the fact that the freedom from arbitrary detention or false imprisonment is regarded as one of the most inviolable human rights, and has been protected in the common law for centuries. Any attempt to authorise what would otherwise be false imprisonment should undergo the most rigorous of analysis against the strictest criteria as is the case when the US Supreme Court considers such violations of the fundamental freedom. Such laws should be passed only in the most dire and necessary of circumstances.***

## Invasion of privacy

1. The right to privacy is enshrined in article 17 of the *International Covenant on Civil and Political Rights* as a non-derogable right. Article 17 states:
   1. “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...
   2. Everyone has the right to the protection of the law against such interference or attacks.”
2. The right to privacy is also recognised as a fundamental human right in the *Universal Declaration of Human Rights* article 12 and other international instruments and treaties to which Australia is a party.[[13]](#footnote-13)
3. Article 8 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* states that:

“Everyone has the right to respect for his private and family life, his home and his correspondence.

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 well-being 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.”

1. The Australian Law Reform Commission reports that the European Court of Human Rights has interpreted this article broadly to protect an individual’s correspondence (including emails), physical integrity, home, identity, personal autonomy and personal development.[[14]](#footnote-14) In a seminal 2014 decision, the European Court of Justice confirmed there exists a right to be forgotten which allows individual’s to request the erasure of personal data.[[15]](#footnote-15) This right is derived from articles 7 (respect for private and family life) and 8 (protection of personal data) of the *Charter of Fundamental Rights of the European Union*.
2. The United Kingdom has not found there to be a common law tort of invasion of privacy,[[16]](#footnote-16) instead extending the cause of action for breach of confidence to encompass misuse or wrongful dissemination of private information.[[17]](#footnote-17) The House of Lords in *Campbell v MGN Ltd*,[[18]](#footnote-18) enunciated four key propositions about the balancing of competing freedoms or interests with privacy. These were summarised by Lord Steyn in *Re S*:
   1. “First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in an individual case is necessary. Thirdly, the justifications for interfering or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”[[19]](#footnote-19)
3. However, the United States has ‘a complex of four’ torts protecting privacy interests.[[20]](#footnote-20) These can be found in the *Second Restatement of Law, Torts* and include[[21]](#footnote-21):
4. Intrusion upon the plaintiff’s seclusion or private affairs;
5. Public disclosure of embarrassing private facts about the plaintiff;
6. Publicity which places the plaintiff in a false light in the public eye; and
7. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.
8. As the Australian Law Reform Commission noted in their *For Your Information* report, the United States privacy torts have proven to be of limited effected because of a constitutionally entrenched right to freedom of the press.[[22]](#footnote-22) Similar limitations may exist on such a tort in Australia because of the constitutionally protected freedom of political communication. Such an issue arose in *Australian Broadcasting Corporation v Lenah Game Meats.* The opposition of two important freedoms necessarily requires a balancing exercise to be undertaken within the proportionality analysis. However, Wragg argues that a statutory tort protecting against invasions of privacy will not only protect press freedom, but also enhance it.[[23]](#footnote-23)
9. The United States jurisprudence is in many ways more advanced in these circumstances, given that there is an existing tort of privacy as well as a constitutionally protected freedom of the press. How the proportionality test will be applied to balance the competing interests of privacy and information in the public interest should be guided by this jurisprudence.[[24]](#footnote-24) Also of some importance is the reasoning in the decision of the European Court of Human Rights in *Van Hanover v Germany[[25]](#footnote-25)*, which draws upon German constitutional principles of proportionality.
10. The tort of invasion of privacy has not yet developed in Australian common law, though the High Court left open the possibility in *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199. Two lower court decisions in Queensland and Victoria have recognised a tort of invasion of privacy.[[26]](#footnote-26)
11. However, numerous inquiries have recommended the creation of a statutory tort for invasions of privacy. The Australian Law Reform Commission’s proposed tort has five parts that the claimant must establish, the final one being that the invasion of privacy was not justified by a countervailing public interest.[[27]](#footnote-27) The New South Wales Law Reform Commission had a similar recommendation to integrate a public interest test into the cause of action.[[28]](#footnote-28) The Victorian Law Reform Commission, in contrast, recommends that public interest should constitute a separate defence to the cause of action as the integrated approach places a heavy burden on the plaintiff to prove a negative.[[29]](#footnote-29) The UK tort has a similar public interest defence.
12. We use this consensus, as well as the incremental development of the common law in that direction, as the basic assumption on which our analysis of Commonwealth laws authorising what would otherwise be a tort is built. Further, because competing freedoms and interests are already considered in the cause of action, this approach could be extended to any legislative authorisation that may impact on privacy concerns.
13. For further guidance on the existence of a tort for serious invasion of privacy in Australia please refer to Chapter 3 of the Australian Law Reform Commission’s report on *Serious Invasions of Privacy in the Digital Era.*

***Submission 2: The Attorney-General should adopt the numerous recommendations of the ALRC, NSWLRC and VLRC, as well as take heed of legislative and judicial developments in the recognition of a tort of privacy in the United States, United Kingdom, New Zealand and Ireland, and create a statutory tort for invasion of privacy. This would allow for greater protection of the individual’s fundamental right to privacy and would be a key factor in any proportionality analysis of prospective legislation encroaching on privacy.***

1. In *Australian Broadcasting Corporation v Lenah Game Meats*, Gummow and Hayne JJ concluded that if a tort of invasion of privacy were to exist, it would be for the benefit of natural, and not artificial (e.g. corporations), persons. This statement is in accordance with the numerous international human rights instruments that protect an individual’s privacy.
2. In our view, the normative balancing exercise required in applying the proportionality test will need to weigh the importance of privacy as human right with the legitimate objective of the proposed law. The freedom of privacy that may be encroached upon is perhaps not as absolute and fundamental as other freedoms, and thus lower thresholds may be sufficient to find any law appropriate and suitable. However, whether the law satisfies the proportionality test will essentially come down to the nature of the intrusion on privacy being authorised and the likely impact of the intrusion on an individual.
3. We recommend that the ‘ultimate balancing test’ as developed in the United Kingdom in *Campbell* and *Re S* be adopted to determine whether laws unjustifiably authorise what would otherwise be an invasion of privacy. Given the equal importance of many of the competing freedoms, it may be that most legislation is allowed, however, if that is the case, it is of even greater importance that a tort for serious invasion of privacy be created so as to allow the individual some protection from serious intrusions that cannot be countenanced, even if there is a public interest consideration.
4. An alternative balancing test may be based on the European Court of Justice’s ruling in *Google Spain v AEPD and Mario Costeja Gonzalez*.[[30]](#footnote-30) Here the ECJ held that:

“Given the ‘seriousness of the interference’ with a data subject’s rights, an operator’s economic interests were never sufficient to justify interference with privacy rights; moreover, privacy rights ‘override, as a rule…the interest of the general public’ in having access to personal information. This presumption could be overcome only ‘by the preponderant interest of the general public in having…access to the information’.”[[31]](#footnote-31)

1. However, this European Court of Justice was careful to ground its ruling in the text of the existing EU data protection laws, and the prioritisation of fundamental rights in the law.[[32]](#footnote-32) Whilst such an approach would be ideal for guaranteeing an individual’s freedom of privacy, it cannot be derived from existing common law in Australia, and as such is unlikely to occur. Nor is it necessarily the correct approach in balancing the right to privacy against other competing freedoms, which, as it has been stated above, may be of equal importance or value.
2. Further, in our view, any legislation that impacts on privacy should be restrictive, with the affected individual being able to contest the disclosure or infringement on privacy grounds, and the party arguing for a public interest defence should bear the onus of proving that such a defence exists in that particular case, guided by the Victorian Law Reform Commission’s recommended statutory tort for invasion of privacy. This would allow legislation infringing on privacy to satisfy the appropriateness and necessity elements of the proportionality test.

***Submission 3: The application of the proportionality test to determine whether laws unjustifiably authorise what would otherwise be an invasion of privacy should be guided by US and UK jurisprudence and case law in applying the proportionality test to invasions of privacy. In particular, the House of Lords decision in Campbell* *is noteworthy.***

***Submission 4: A statutory tort for invasion of privacy with separate defences, influenced by the various inquiries findings in Australia, needs to be created so as to allow individual’s greater protection, and a more considered approach to balancing competing interests and freedoms, based on the circumstances of each particular case.***

# Commonwealth laws that unjustifiably authorise what would otherwise be a tort

## Privacy Act

1. The *Privacy Act 1988* is the principal piece of Australian legislation protecting the handling of personal information about individuals.[[33]](#footnote-33) This includes the collection, use, storage and disclosure of personal information in the federal public sector and in the private sector.
2. The *Privacy Act 1988* contains a range of exemptions and exceptions. Many of these exemptions and exceptions could lead to encroachments on the right to privacy purportedly being protected by the *Privacy Act 1988*. The following are a list of entities exempt from privacy regulation to varying degrees:
   * ASIO
   * ASIS
   * The Office of National Assessments
   * Many small business operators
   * State and territory public sector authorities
   * Employee records; and
   * Media organisations
3. The exceptions are found in the Australian Privacy Principles. For example Australian Privacy Principle 6 provides exceptions to the prohibition on the use or disclosure of personal information in situations where an enforcement body is conducting enforcement related activities or ‘a permitted general situation’ exists.
4. The latter example is indicative of the somewhat convoluted system of exceptions and exemptions. The term ‘permitted general situation’ is defined elsewhere in the Act.[[34]](#footnote-34)
5. These exemptions and exceptions, by leaving gaps in the privacy law, essentially authorise what would otherwise be a tort.
6. Whether this is justified in all the legislative circumstances should be determined by the application of the proportionality criteria and principles outlined above.

### Proportionality analysis

1. The *Privacy Act 1988* has the objective of protecting privacy in the Commonwealth public sector, as well as a number of other areas. It does so by providing standards for the collection, use, disclosure and security of personal information. There are civil penalties for serious or repeated breaches of the standards.
2. The law meets the low threshold to satisfy the suitability criteria of the test.
3. Since, the *Privacy Act 1988* does not expressly authorise conduct that would otherwise be a tort, but does so impliedly, through the absence of protections, it is harder to prove that the law is not necessary in its current form. However, there are means of protecting an individual’s privacy, especially in relation to personal information, that are equally as practicable and as likely to succeed as the impugned law. One such means would be the creation of the statutory tort for serious invasions of privacy, with defences such as public interest and lawful authority that would allow for a limited number of acceptable encroachments on the freedom.
4. The current system of exemptions and exceptions is complex, and a simpler means could be adopted that would provide individual’s a greater understanding of how their privacy is protected, and to what extent.
5. The law thus fails to meet the criterion of necessity in the proportionality test.
6. Given the complex debates around the balancing of the public interest and the right to privacy, it is not immediately clear that the social detriment caused by the gaps in the *Privacy Act 1988* on an individual’s right to privacy are greater than the social benefit of the *Privacy Act 1988* in regulating privacy and allowing for infringements in certain situations by certain public and private entities. It is thus likely to meet the appropriateness criterion of the proportionality test.
7. Again, a statutory tort with separate defences would allow for a more considered approach that would balance the social benefit and social detriment based on the circumstances of each case.
8. Furthermore, the ‘right to be forgotten’, found in European human rights law, is one that can be implemented to better protect privacy in Australia, although with limitations on the exercise of the right that do not undermine the freedom of information and public interest. Any legislative action in this regard must undertake a robust proportionality analysis to determine how to best balance these completing interests. One factor that may favour implementing this right is the ALRC’s recommendation that a ‘take-down mechanism’ to delete, remove or de-identify personal information exist that is administered by the Privacy Commissioner.[[35]](#footnote-35)

***Submission 5: The Privacy Act 1988 exemptions and exceptions to privacy leave regulatory gaps that impliedly authorise what would otherwise be tortious interference with an individual’s privacy. The Act should be reformed in accordance with ALRC recommendations and with a view to making it more privacy-friendly.***

## Telecommunication (Interception and Access) Act

1. The *Telecommunication (Interception and Access) Act 1979* has the purpose of protecting the privacy of Australians by prohibiting the interception of communications or access to stored communications.[[36]](#footnote-36) The Act sets out certain exceptions to these prohibitions to permit eligible Australian law enforcement and security agencies to obtain warrants to intercept communications and access stored communications, as well as authorise the disclosure of telecommunications data.
2. The Commonwealth Government is currently seeking to have amendments passed to the Act that would allow for the implementation of a data retention scheme that will require telecommunications companies to keep for two years metadata, which is information about the circumstance of a communication.[[37]](#footnote-37)

### Proportionality analysis

#### Existing proportionality tests in Act

1. The *Telecommunications (Interception and Access) Act 1979* already contains proportionality tests that govern whether an agency can be issued a telecommunications interception warrant.
2. However, we submit that these proportionality tests are not stringent enough, and fail to adequately protect individual’s rights to privacy. We recommend that the Law Council of Australia’s recommendation that an additional stage to the proportionality test be adopted whereby the issuing officer must be satisfied on reasonable grounds that ‘the likely benefit to the investigation which would result from the disclosure *substantially outweighs* the extent to which the disclosure is likely to interfere with privacy of any person or persons [emphasis added]’.[[38]](#footnote-38)
3. This additional requirement would better protect the right to privacy, without compromising the legislation’s purpose or its efficacy. The law in its current form does not meet the proportionality criterion of necessity because there are less restrictive means of issuing warrants.
4. The NSW Council of Civil Liberties, in its submission to the Senate Legal and Constitutional Affairs Committee’s revision of the Act, recommends that warrants under the Act should:

“…only be issued where they are likely to assist in an investigation of an offence involving a risk to life and where there are no reasonable methods available to the agency to obtain the information it needs.”[[39]](#footnote-39)

#### Standardisation of thresholds for issuing warrants

1. Another difficulty is in the different thresholds for issuing warrants for interception and accessing stored information. We submit that the Senate Committee on Legal and Constitutional Affairs recommendation that the penalty thresholds in relation to the issue of stored communication warrants be raised to include only criminal offences be adopted, as it ensures that only genuinely serious cases invoke the public and national security interests that can overrule individual freedoms.[[40]](#footnote-40)

***Submission 6: Penalty thresholds for the issuance of interception or access to stored communication warrants should be raised so that interference is only justified in investigations into genuinely serious crimes.***

#### B-Party warrants

1. A final concern with the existing *Telecommunications (Interception and Access) Act 1979* is the B-party warrant, which allows for the interception of a service that is likely to be used by another person (a non-suspect) to communicate with the suspect.[[41]](#footnote-41) These warrants effectively allow the subjection of innocent third parties to covert surveillance, even when they are not communicating with the primary suspect of the investigation.
2. While there may be a credible national security reasons relating to terrorism to allow such interferences, the current provision offers no limitations, and could potentially be used to monitor whistleblowers or even intercept privileged communications such as between lawyer-client and doctor-patient.
3. These potential interferences on privacy are significant, and given that they impact on innocent third parties in a non-discriminating manner, do not seem at all appropriate. The social benefit of B-party warrants do not outweigh the significant breaches of the right to privacy of innocent citizens. They fail the proportionality test, and hence B-party warrants should be repealed.

***Submission 7: B-party warrants are an unjustified interference with the privacy of non-suspect third parties in law enforcement investigations. They fail to meet the standards of proportionality.***

#### Data retention

1. In terms of the proposed data retention scheme, numerous stakeholders have expressed concern with the scope of the proposed data retention scheme.
2. The UN Commissioner for Human Rights has rejected the suggestion that the collection of metadata does not constitute an interference with privacy, going even further and stating ‘even the mere possibility of communications information being captured creates an interference with privacy…’.[[42]](#footnote-42)
3. The Law Council of Australia has stated that the scheme’s necessity has not been sufficiently demonstrated, and that ‘the case for the mandatory data retention has not been made out’.[[43]](#footnote-43) While this brings into question whether the suitability criterion of the proportionality test is met, it perhaps more directly goes to the necessity criterion.
4. The Law Council of Australia and Mr Bernard Keane both pointed out that there is no evidence that data retention schemes provide assistance in reducing the crime rate, citing a German study that indicated a mandatory data retention scheme led to an increase in the number of convictions of only 0.006%.[[44]](#footnote-44)
5. Thus, given its lack of effectiveness, as well as the potential serious interference with an individual’s right to privacy, the mandatory data retention scheme cannot be considered proportionate, and fails to meet the necessity and appropriateness criteria of the test.
6. Further, the European Court of Justice has recently ruled that the European data retention scheme is invalid because of its disproportionate interference with the right to privacy.[[45]](#footnote-45) The Court found that the dataset required to be retained under the scheme, which is similar to the dataset in the proposed law, when taken as a whole:

“may allow very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained, such as the habits of everyday life, permanent or temporary places of residence, daily or other movements, the activities carried out, the social relationships of those persons and the social environments frequented by them.”[[46]](#footnote-46)

1. As the Human Rights Law Centre states:

“There is a heavy onus on the Australian government to explain ‘promptly, precisely and publicly why this wholesale intrusion into collective privacy is justified for the prevention of terrorism or other serious crime’.”[[47]](#footnote-47)

1. We submit that the Government has not satisfied this heavy onus, and has not been able to justify why there should be a mandatory data retention scheme with such scope and without adequate safeguards, which authorises what would otherwise be a tort against the individual’s right to privacy.

***Submission 8: That a mandatory data retention scheme, as proposed in the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, *would be an unjustifiable authorisation of what would otherwise be a tort as it fails to meet the requirements of proportionality.***

1. Commonwealth, *Parliamentary Debates,* House of Representatives, 22 September 2014, 9957 (Tony Abbott) [↑](#footnote-ref-1)
2. *Australian Law Dictionary* (Oxford University Press, 2010)- ‘tort’ [↑](#footnote-ref-2)
3. Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, Issues Paper No 46, 108 [↑](#footnote-ref-3)
4. *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [459] (Kiefel J) [↑](#footnote-ref-4)
5. *Rowe v Electoral Commissioner* (2010) 243 CLR 1, [460] (Kiefel J) [↑](#footnote-ref-5)
6. *R v Oakes* [1986] 1 SCR 103, [69] [↑](#footnote-ref-6)
7. *R v Governor of Brockhill Prisons (No 2)* [2001] 2 AC 19, 43 [↑](#footnote-ref-7)
8. *Al-Kateb v Godwin* [2004] HCA 37, [137] (Gummow J) [↑](#footnote-ref-8)
9. *Hamdi v Rumsfeld*,72 USLW 4607, 4621 (2004) [↑](#footnote-ref-9)
10. *Trobridge v Hardy* (1955) HCA 68, [3] (Fullagar J) [↑](#footnote-ref-10)
11. *Hamdi v Rumsfeld*,72 USLW 4607, 4621 (2004) [↑](#footnote-ref-11)
12. *Matthews v Eldridge*, 424 U.S. 319 (1976) [↑](#footnote-ref-12)
13. *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16; *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) art 14; *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 22 [↑](#footnote-ref-13)
14. Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 31 [↑](#footnote-ref-14)
15. *Google Spain SL v Agencia Espanola de Proteccion de Datos* (European Court of Justice, Case C-131/12, May 13 2014) [↑](#footnote-ref-15)
16. *Waiwright v Home Office* [2004] 2 AC 406 [↑](#footnote-ref-16)
17. *Campbell v MGN Ltd* [2004] 2 AC 457 [↑](#footnote-ref-17)
18. *Campbell v MGN Ltd* [2004] 2 AC 457 [↑](#footnote-ref-18)
19. *Re S* [2005] 1 AC 593, [17] [↑](#footnote-ref-19)
20. R Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383, 389 [↑](#footnote-ref-20)
21. *Restatement of the Law, 2nd, Torts 1977* (US) §§ 652B, 652C, 652D, 652E [↑](#footnote-ref-21)
22. Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) vol 3, 2540 [↑](#footnote-ref-22)
23. Paul Wragg, ‘Enhancing Press Freedom through Greater Privacy Law: A UK Perspective on an Australian Privacy Tort’ (2014) 36 *Sydney Law Review* 619 [↑](#footnote-ref-23)
24. Thomas I Emerson, ‘The Right of Privacy and Freedom of the Press’ (1979) *Faculty Scholarship Series,* Paper 2776. <<http://digitalcommons.law.yale.edu/fss_papers/2776>> [↑](#footnote-ref-24)
25. [2004] ECHR 294 [↑](#footnote-ref-25)
26. *Grosse v Purvis* [2003] QDC 151 (16 June 2003); *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (2007) [↑](#footnote-ref-26)
27. Paul Wragg, ‘Enhancing Press Freedom through Greater Privacy Law: A UK Perspective on an Australian Privacy Tort’ (2014) 36 *Sydney Law Review* 619, 624 [↑](#footnote-ref-27)
28. New South Wales Law Reform Commission. *Invasion of Privacy*, Report No 120 (2009) [↑](#footnote-ref-28)
29. Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010), 157 [↑](#footnote-ref-29)
30. *Google Spain SL v Agencia Espanola de Proteccion de Datos* (European Court of Justice, Case C-131/12, May 13 2014) [↑](#footnote-ref-30)
31. Recent cases, ‘Google Spain SL v Agencia Espanola de Proteccion de Datos’ (December 10, 2014) 128(2) *Harvard Law Review* 735, 738 quoting *Google Spain SL v Agencia Espanola de Proteccion de Datos* (European Court of Justice, Case C-131/12, May 13 2014) [74] – [99] [↑](#footnote-ref-31)
32. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC) [↑](#footnote-ref-32)
33. Attorney-General’s Department, Commonwealth, *Privacy*. Available at: <<http://www.ag.gov.au/RightsAndProtections/Privacy/Pages/default.aspx>> Accessed 15 February 2015. [↑](#footnote-ref-33)
34. *Privacy Act 1988* (Cth) s 16A [↑](#footnote-ref-34)
35. Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014) 312-314 [↑](#footnote-ref-35)
36. Attorney-General’s Department, Commonwealth, *Telecommunications interception and surveillance*. Available at: <http://www.ag.gov.au/NationalSecurity/TelecommunicationsSurveillance/Pages/default.aspx> Accessed 16 February 2015. [↑](#footnote-ref-36)
37. Attorney-General’s Department, Commonwealth, *Telecommunications interception and surveillance*. Available at: <http://www.ag.gov.au/NationalSecurity/TelecommunicationsSurveillance/Pages/default.aspx> Accessed 16 February 2015. [↑](#footnote-ref-37)
38. Law Council of Australia, Submission No 34 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Comprehensive Revision of Telecommunications (Interception and Access) Act 1979,* 14 March 2014, 17-18 [↑](#footnote-ref-38)
39. New South Wales Council of Civil Liberties, Submission No 42 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Comprehensive Revision of Telecommunications (Interception and Access) Act 1979*, 3 [↑](#footnote-ref-39)
40. Senate Committee on Legal and Constitutional Affairs, *Report on Inquiry into Provisions of the Telecommunications (Interception) Amendment Bill 2006*, 27 March 2006, recommendation 3 [↑](#footnote-ref-40)
41. *Telecommunications (Interception and Access) Act 1979* (Cth) s 46 [↑](#footnote-ref-41)
42. Office of the United Nations Commissioner for Human Rights, *The right to privacy in the digital age*, 27th sess, UN Doc A/HRC/27/37 (30 June 2014) [19] [↑](#footnote-ref-42)
43. Law Council of Australia, Submission 126 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 20 January 2015, 7 [↑](#footnote-ref-43)
44. Law Council of Australia, Submission 126 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 20 January 2015, 7; Bernard Keane, Submission No 37 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 14 January 2015, 4 [↑](#footnote-ref-44)
45. *Digital Rights Ireland Ltd v Minister for Communications and anor* (European Court of Justice, C-293/12, 8 April 2014) [↑](#footnote-ref-45)
46. *Digital Rights Ireland Ltd v Minister for Communications and anor* (European Court of Justice, C-293/12, 8 April 2014) [27] [↑](#footnote-ref-46)
47. Human Rights Law Centre, Submission No 71 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*, 19 January 2015, 6 citing Special Rapporteur, *Promotion and protection of human rights and fundamental freedoms while countering terrorism,* 69th sess, UN doc A/69/397 (23 September 2014) [18] [↑](#footnote-ref-47)