

## **A RIGHT TO PRIVACY? COMMENTS AS PART OF A DISCUSSION ON DATA COLLECTION / SURVEILLANCE**

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Privacy is a fundamental element of one's humanity, of one's human dignity. It connotes autonomy, and control of one's personhood in society. It is a fundamental human right protected under article 12 of the *Universal Declaration of Human Rights*. Yet now we see a multibillion dollar international industry, the largest and most wealthy corporations in the world have built up, in a very short period, trading on our private information, our personal information. That is the value on which they are trading.

Social media, ad brokers, information brokers comprise a supply chain in which the currency is our private and sensitive information. We are asked, when we engage with these so called free services, to give consent under their privacy policies. I do not believe that that agreement is indeed in the form of consent or that those contracts are enforceable, I believe they are probably unconscionable. I do not believe that the consent given is informed consent.

I do not think any of us can conceive the way in which data is being collected, aggregated and analysed on a massive scale in order to profile us. This rich profile enables advertisers and others who have access to that data to manipulate us and control us. Indeed, there are many anecdotal accounts where retailers have known that customers are pregnant or ill long before the customers themselves know. These people who have this data know more about us in many ways than we know about ourselves and yet we are freely giving up this information. This makes us very vulnerable to these wealthy and powerful organisations.

Next we have the spectacle of governments, such as the American government, in the interests of national security, both unlawfully and lawfully tapping into that information. Presumably this includes information about us when we have been in contact with the United States. The justification is that this intrusion is to improve their national security. I do not think any of us has given our informed consent to that either. In effect, the government has outsourced national security data collection to social media to which we are willingly providing this information.

Our forebears fought and defeated authoritarian regimes whose law enforcement, national security and espionage agencies could never, in their wildest dreams, have hoped to obtain a fraction of the data that we are giving to these corporations and through them to governments. Yet, we are acquiescing to this in order to receive ads to spend money. I think this is a concern.

The new developments in terms of metadata retention raise the question about whether there is any data which is not personal data. I do not believe that there is any data pertaining to us that is not personal data. That is because of the manner in which it can be aggregated. Even if cookies can be removed from your system so you cannot be tracked, your search engine, your fingerprint can be identified and any fragment of data which you may consider inconsequential can be added to this rich tapestry. That makes us vulnerable and it undermines our ability to function as humans and as citizens.

Privacy is recognised as a human right because one needs one's privacy in order to think and develop one's ideas. It is a prerequisite to freedom of expression. You cannot work out what you think and what you are going to say unless you have some privacy. Speaking personally, the ability to enjoy seclusion and solitude when I choose is among my most precious possessions.

Now, in the interests of national security, we see government requiring service providers to gather our metadata and once they have the metadata they do not need the content. By linking that information, organisations can obtain a good picture of what a person is doing and what are their interests. The compulsory collection and retention of metadata fundamentally alters the relationship of the citizen to the state.

Our ancient freedoms and liberties are compromised by this. Now my metadata is being collected, I am a potential suspect. It has long been the case that unless a law enforcement officer has a reasonable suspicion, if they ask you who are you, where are you going, what have you got in your hand, you can say that is none of your business. Unless they are investigating with a reasonable suspicion, they are not entitled to get an answer from you or to detain you in any way. That is what it means to me to be an Australian citizen. We enjoy rights to privacy we have inherited from British institutions and the common law.

This raises the question: why protection cannot be provided for our privacy, by requiring that unless there is a reasonable suspicion, the law enforcement agencies, the security agencies cannot get a warrant to obtain information about us. At present, they start to investigate and they need to gather the necessary data, and if necessary, the data and communications of the associates, and if there is a conspiracy, the warrant may provide for access to a wide collection of information.

Now I know that somebody is collecting my data, that limits my freedom and even if that data is not accessed, I know I am being watched. That changes my behaviour and changes my standing in respect to the state. In the movies, you know who the 'baddies' are. They are the ones who officiously stop people as they go about their business and demand 'show me your papers please'. We don't have that affront in our society. You don't have to justify yourself to the state. You don't have to allow your personal information to be accessed by the state, by law enforcement or by corporations unless there's a good reason for it, a need to know.

I am not in a position to know whether there is a need to know information about a particular person. I do not know enough about security threats to know whether this intrusion is warranted. But it is a concern to me. It diminishes me as a person and as a citizen and removes my rights as a citizen. So in Australia, we don't have a right to our privacy. There is no tort or a statutory right, as has been recommended by many, to protect our personal privacy. The Privacy Act protects our information, but that is a regulatory protection about how entities can use our personal information. It is not based on the right of the individual to their private information.

In response to the technological developments and the awesome ways in which our data is now being gathered, aggregated, analysed and traded and the power which this gives to the wealthiest corporations and to the state to manage its citizens in unprecedented ways, we need to strengthen the protection of both our personal privacy and our information privacy.