

O Canada!

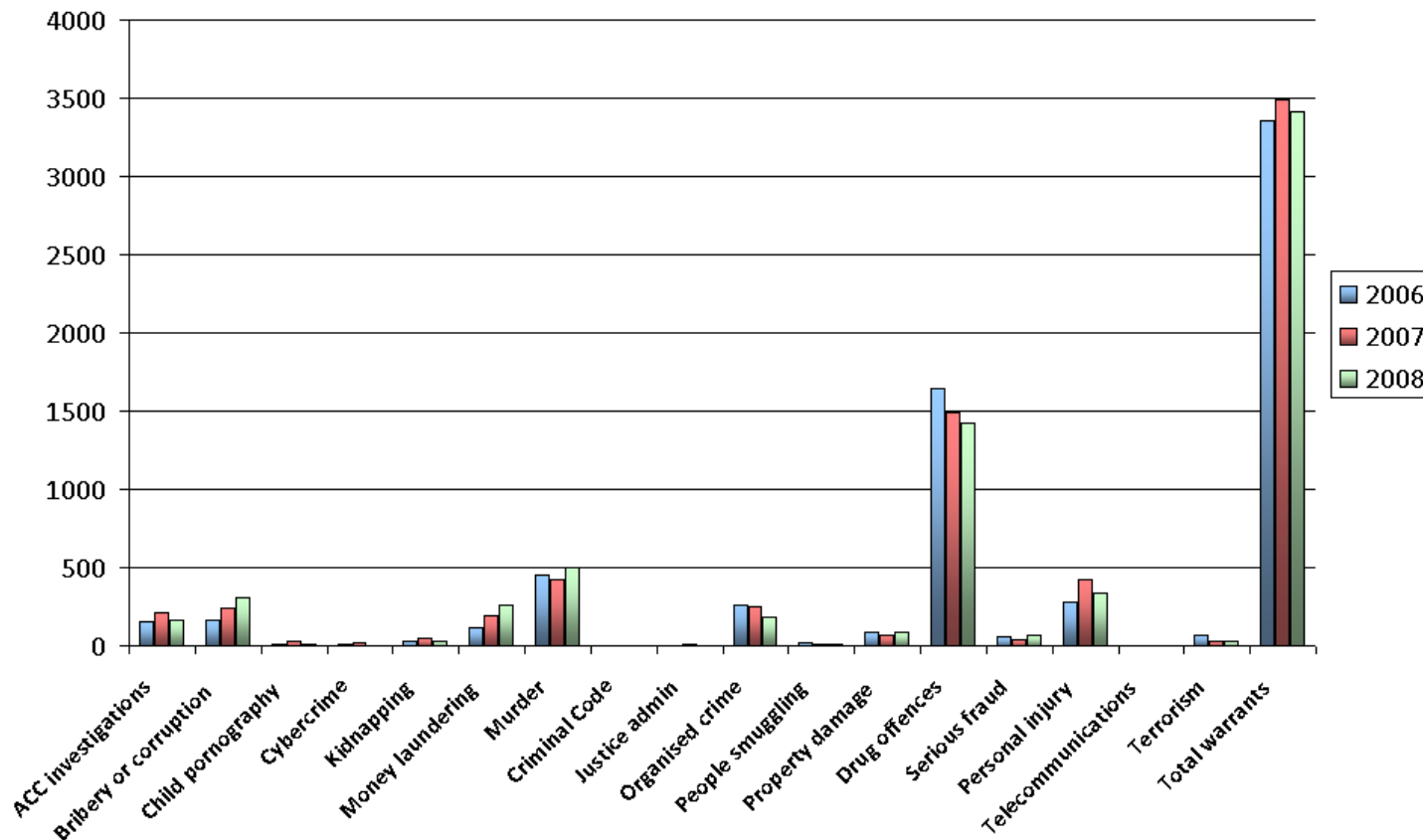
Telecommunications Interception Policy as Embedded Liberalism

Rob Nicholls and Michelle Rowland
19 November 2009

Issues

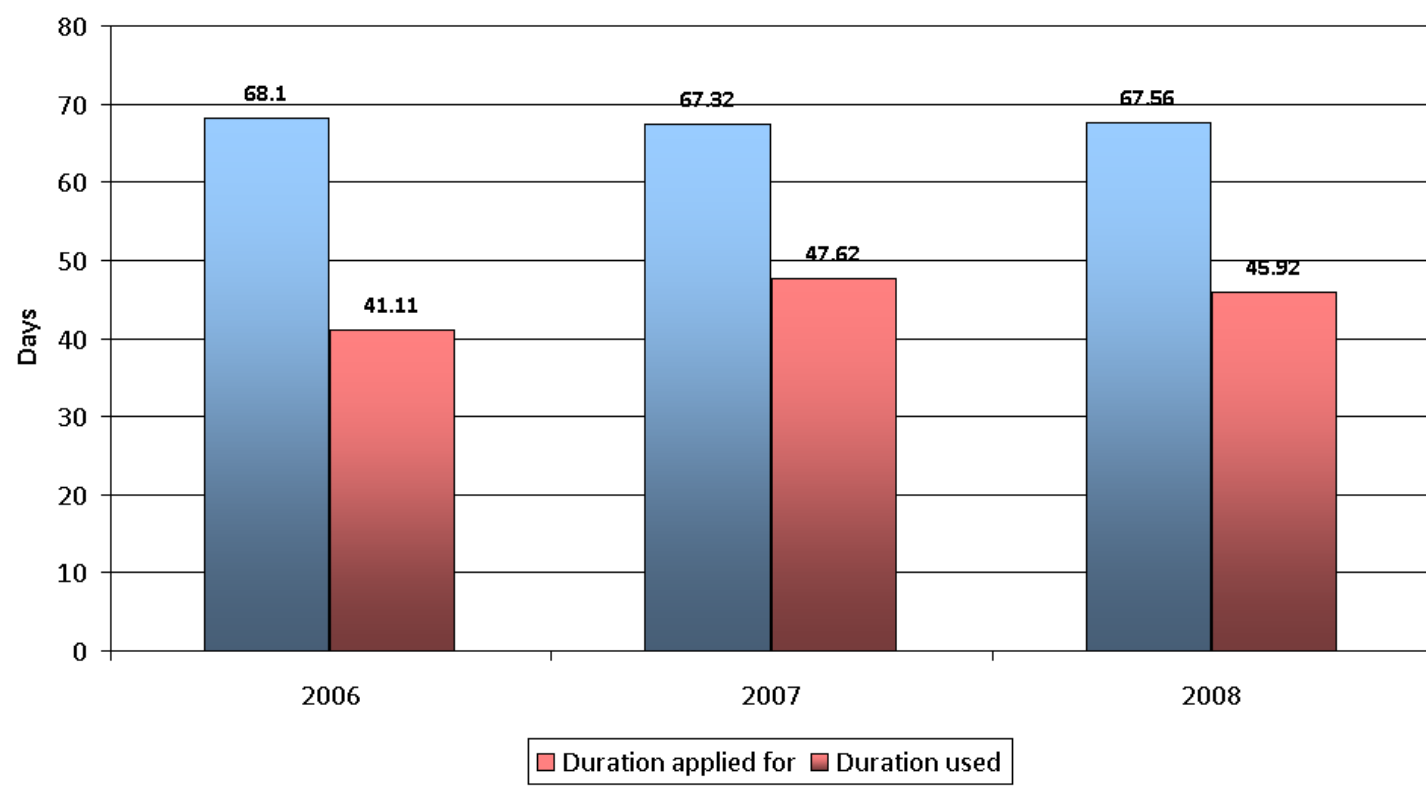
- The international stage
 - Australia
 - US
 - Canada
 - UK
- Interactions
 - A Human Rights Act
 - Interaction with current regime
 - The Canadian turn
 - The British “big brother”

Australia – warrants by year and crime



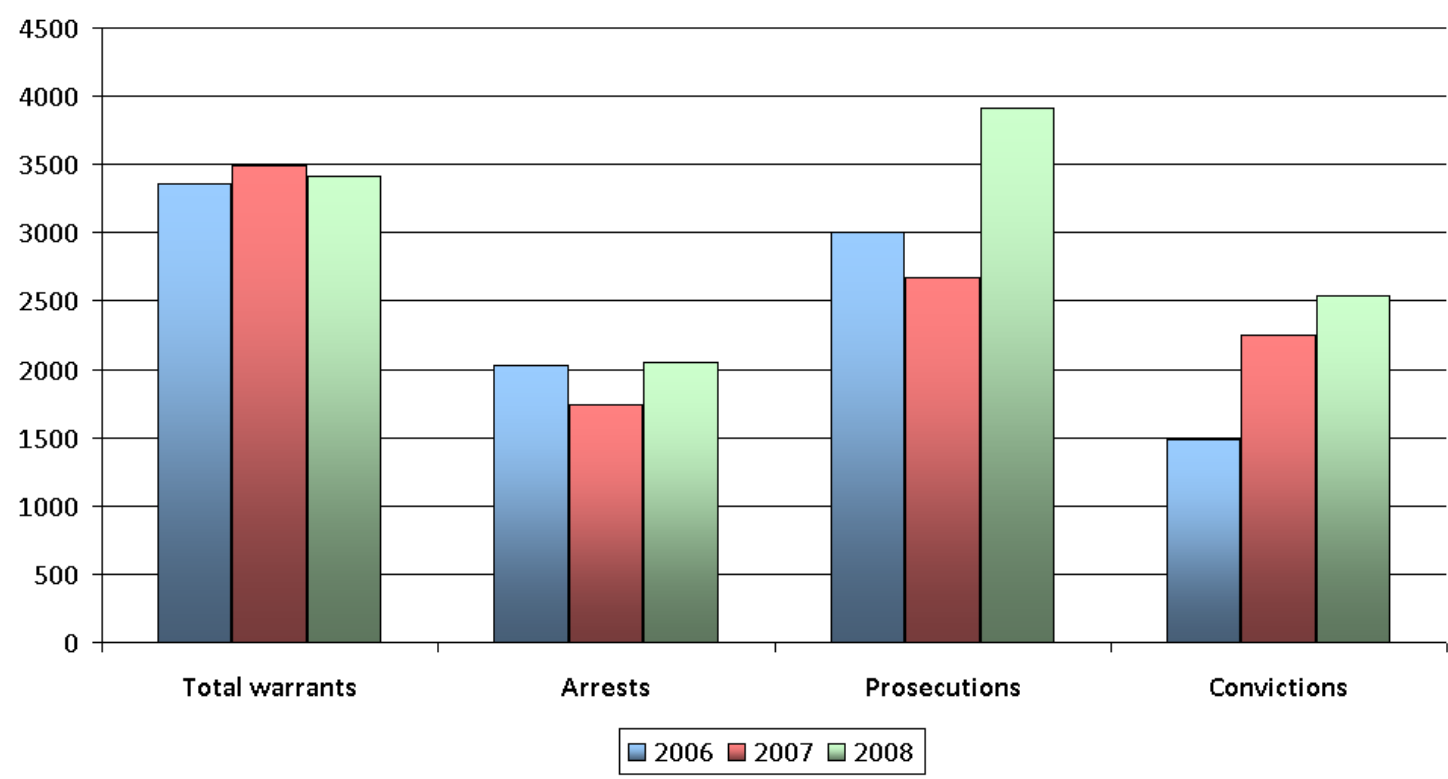
Australia

Warrant duration



Australia

Arrests and convictions - interception



Australian stored communications – the 1st full year

- 117 warrants applied for
- 45 arrests
- 1 conviction

“Many enforcement agencies do not have prosecutions and convictions as a primary aim” – AG’s

Australia – Telecommunications data

Historical

| Matter | Number |
|--------------|---------|
| Criminal law | 183,099 |
| Other | 5,649 |
| TOTAL | 188,748 |

Prospective:

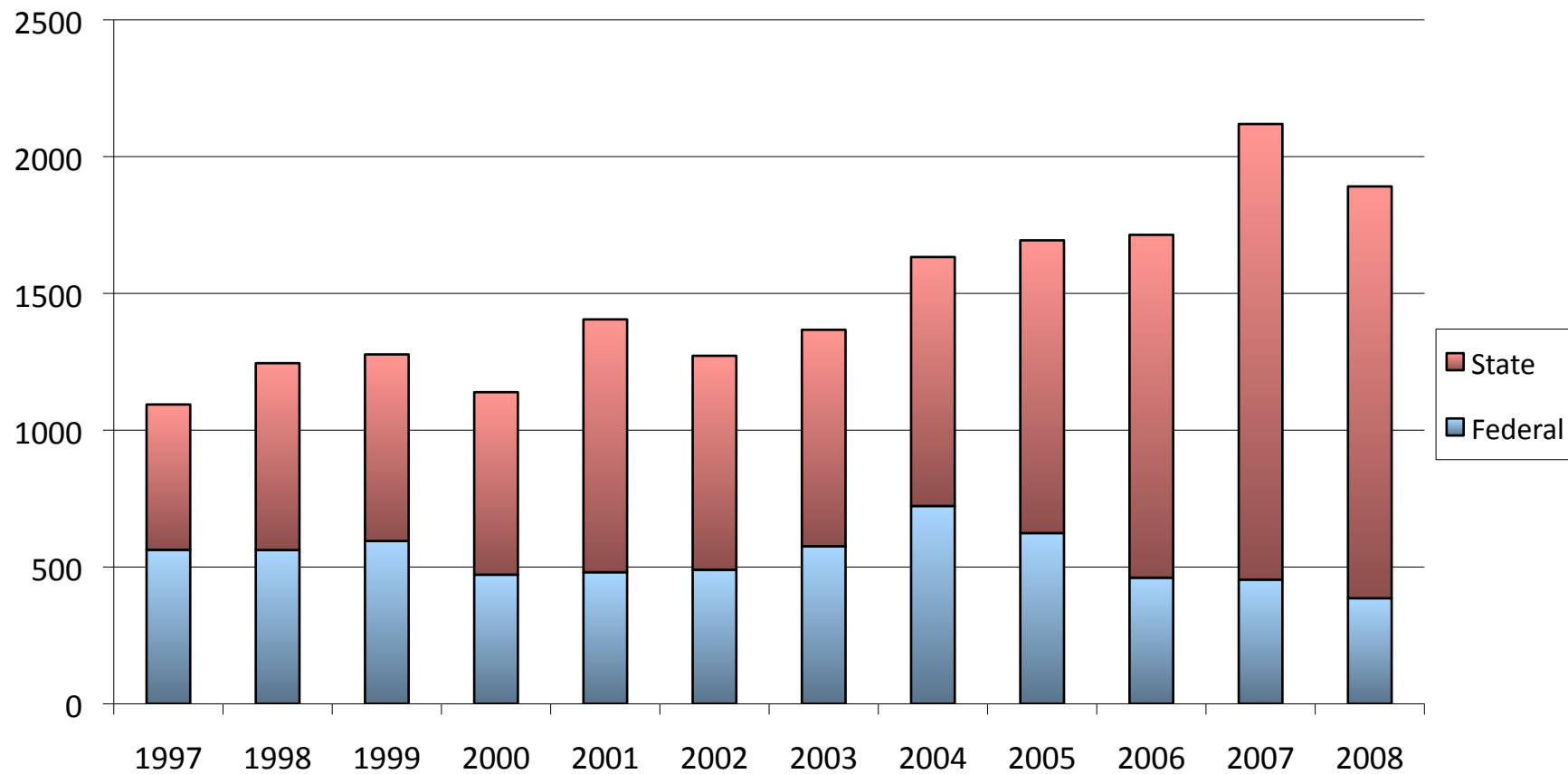
- 1,315 with an average 18 days in force (29 days applied for)

The US has fewer warrants than Australia!

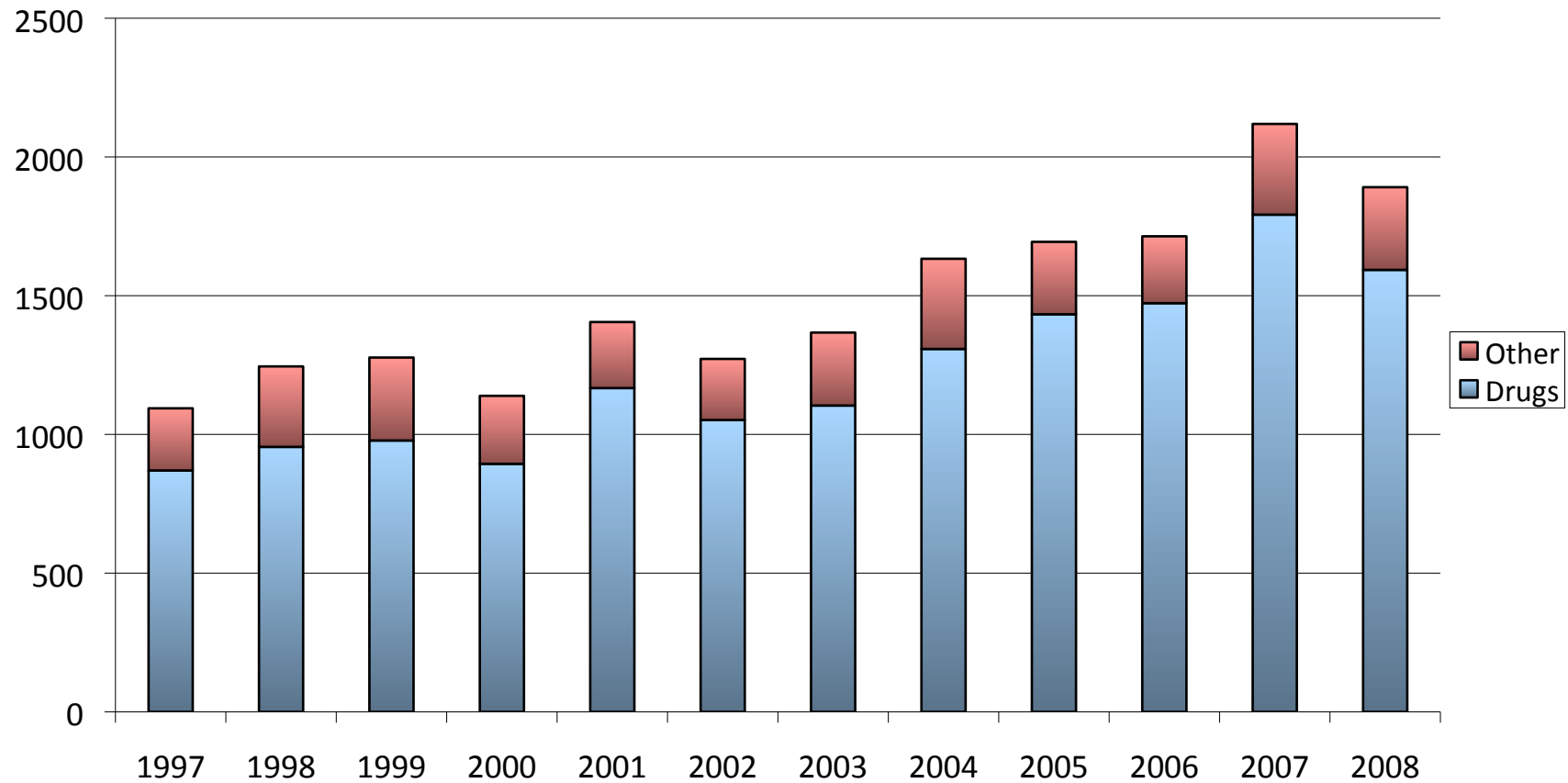
| 2008 | Warrants | Arrests | Convictions |
|--------------|----------|---------|-------------|
| TOTAL | 1,891 | 3,331 | 2,698 |

- Average warrant duration in 2008 was 41 days
- Average cost per intercept in 2008 was \$US47,7624 made up of \$70,536 (Federal) and \$US41,154 (State)
- Warrant use is steady
- Mainly drugs related

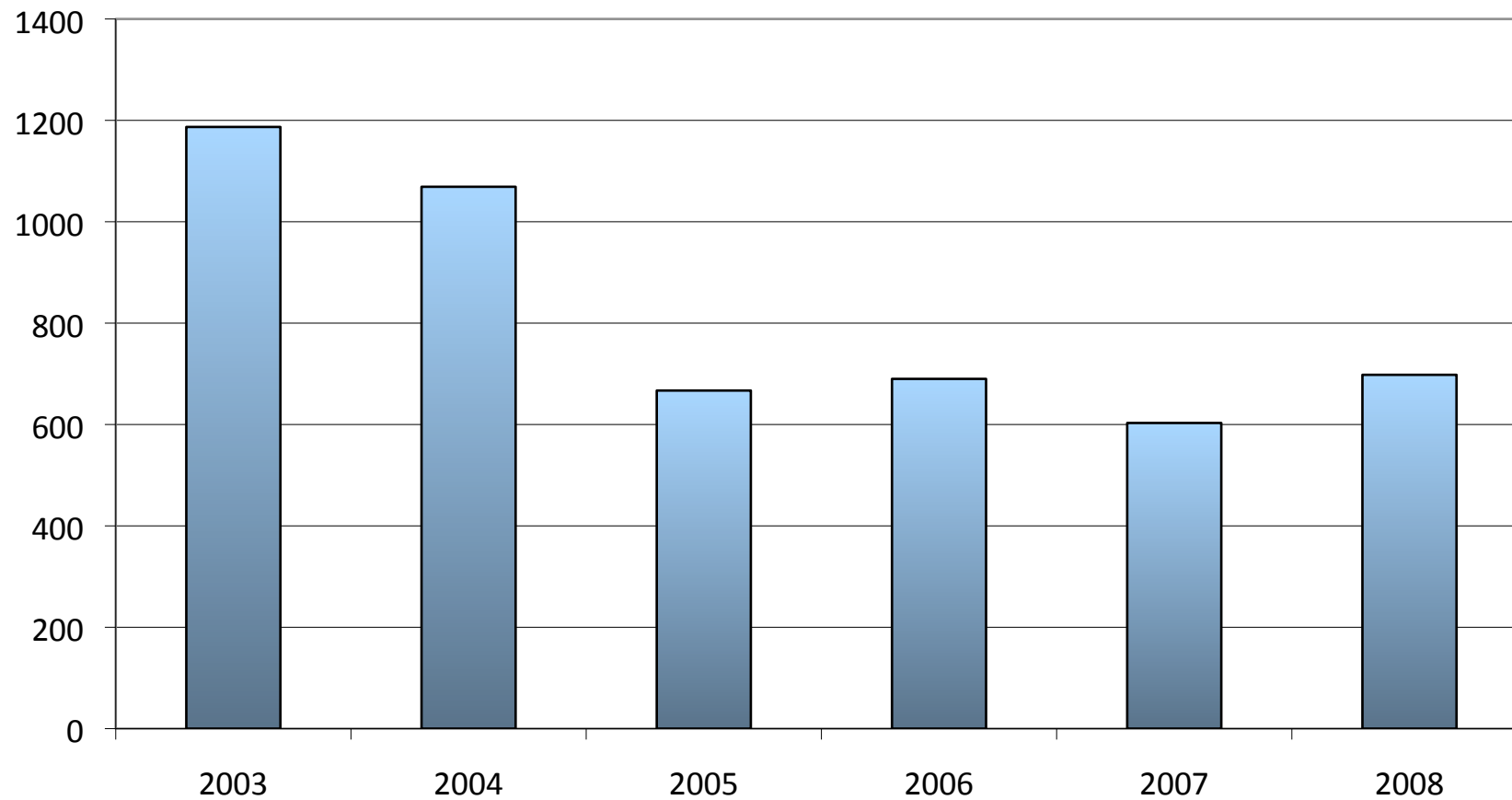
US warrant use is steady



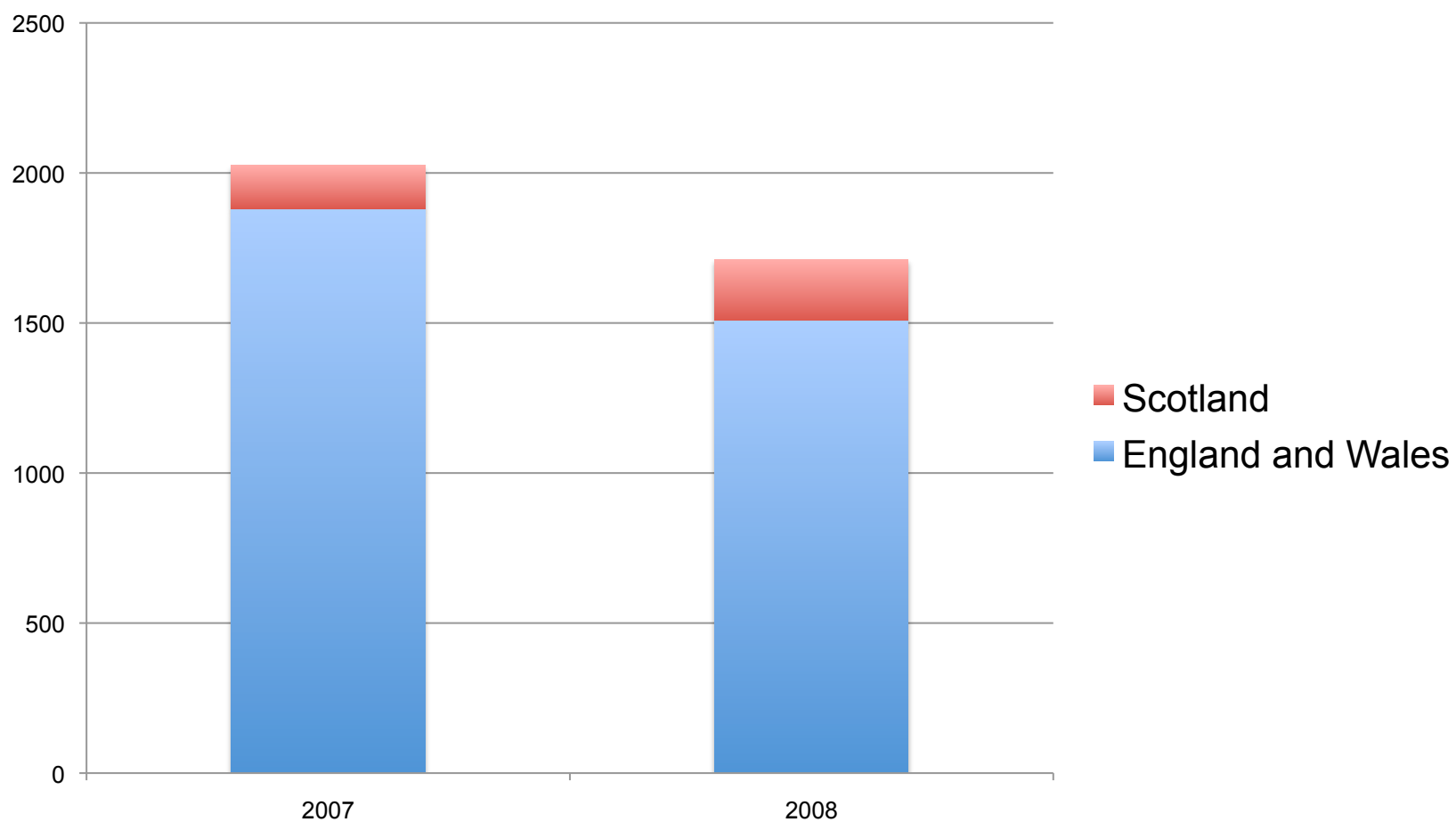
Mainly drugs related



Canada has far fewer warrants than Australia



As does the UK

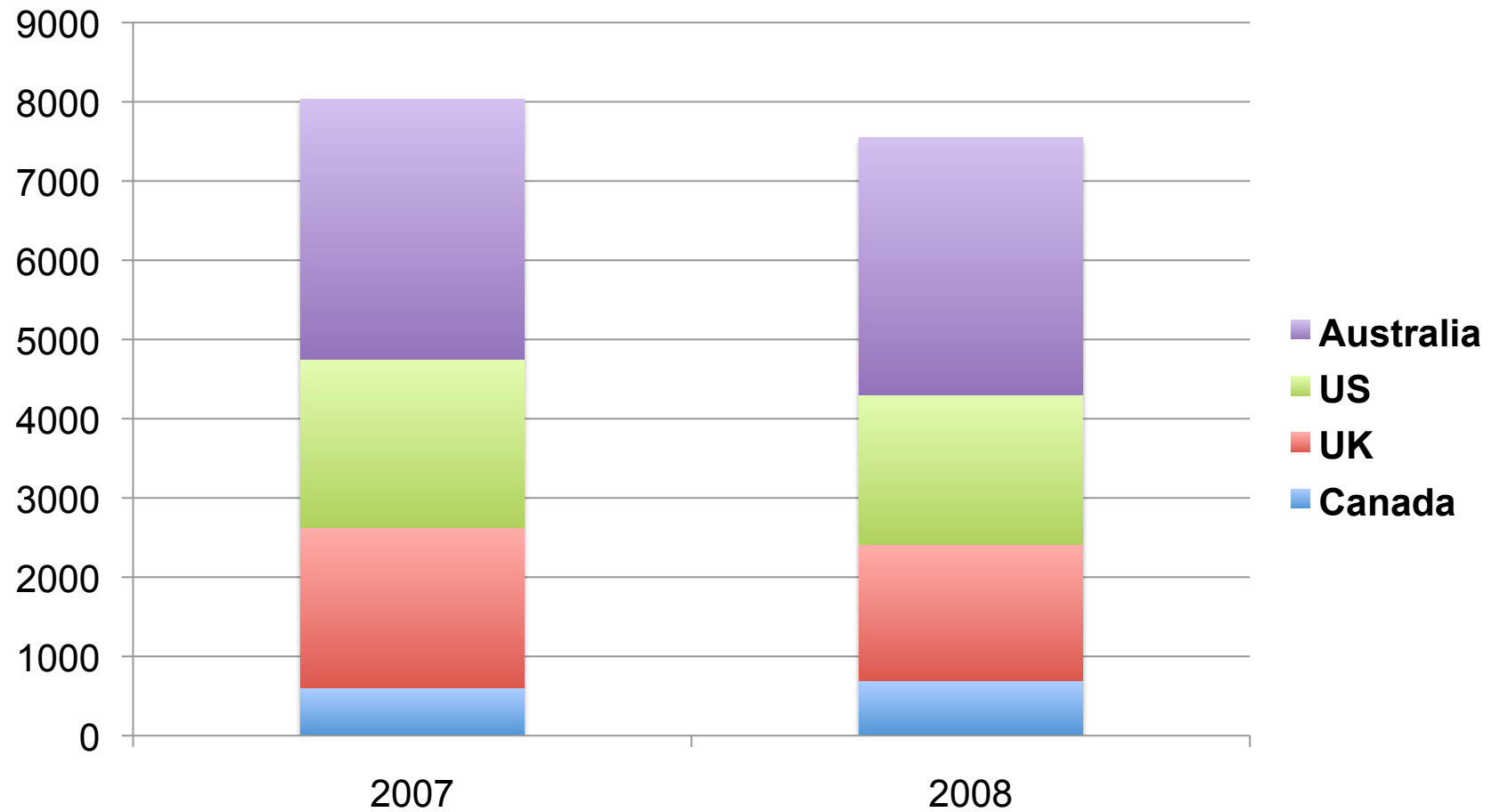


UK has a Human Rights Act and fewer warrants

| Responsibility | Number in 2008 |
|--------------------|----------------|
| Home Secretary | 1,508 |
| Scottish Executive | 204 |
| TOTAL | 1,712 |

- 504,073 requests for communications data in 2008 (comparable to Australia in per capita terms)
- Reporting is by the Interception of Communications Commissioner who reports in the context of the Human Rights Act

Overview of international comparison



A Human Rights Act

- Comprehensive human rights protection
- Dominant Human Rights Act model:
 - Statutory, not constitutionally entrenched
 - Bills of Parliament to be scrutinised against HRA
 - Public authorities required to conform to HRA
 - Court cannot strike down incompatible legislation: only issue a declaration of incompatibility
- ‘Dialogue model’ that preserves Parliamentary supremacy
- Focus on achieving better accountability, and public service decision making
- Protection of, at least, civil and political rights

Human Rights Act – Impacts

- A Human Rights Act would:
 - make the federal Parliament consider how laws impact on human rights
 - make the federal government respect human rights when developing policy
 - make public servants respect human rights when making decisions and delivering services
- What should happen if a public authority breaches a person's human rights? Options include:
 - the public authority could be required to mediate with the person to agree on a solution or compelled to cease the behaviour
 - the person could have a right to damages

Interaction with current regime

- Telecommunications (Interception and Access) Act, 1979 is amended regularly – more than once per year in recent years
- “Human Rights Impact Statement” will be required on each occasion
- Senior officers have an obligation currently to “take into account” the privacy of targets – will they need to take into account their basic right to dignity and their ability to take part in society?
- Will firms which choose to “opt-in” to a charter of rights and decline to assist agencies when they think that rights are threatened?

But is it likely?

- Al Kateb v Godwin [2004] HCA 37
 - It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution: **Justice McHugh para 74**

The Canadian response

- Conservative Government introduced legislation as an early priority
- Similar to the Australian approach
- Now in limbo
- Not clear that the draft legislation will meet relevant human rights requirements

The British “big brother”

Telegraph.co.uk

State to 'spy' on every phone call, email and web search

All telecoms companies and internet service providers will be required by law to keep a record of every customer's personal communications, showing who they have contacted, when and where, as well as the websites they have visited.

Despite widespread opposition to the increasing amount of surveillance in Britain, 653 public bodies will be given access to the information, including police, local councils, the Financial Services Authority, the ambulance service, fire authorities and even prison governors.

They will not require the permission of a judge or a magistrate to obtain the information, but simply the authorisation of a senior police officer or the equivalent of a deputy head of department at a local authority.

BBC NEWS

UK surveillance plan to go ahead

The British “big brother”



November 10, 2009

Ministers cancel 'Big Brother' database

By Nigel Morris and Robert Verkaik

Plan to store details of every phone call and email 'kicked into long grass' after furore

Plans to store information about every phone call, email and internet visit in the United Kingdom have in effect been abandoned by the Government.

The Home Office confirmed the "Big Brother" scheme had been delayed until after the election amid protests that it would be intrusive and open to abuse. Although ministers publicly insisted yesterday that they remained committed to the scheme, they have decided not to include the contentious measure in next week's Queen's Speech, the Government's final legislative programme before the election.

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