ALLIANCE for JOURNALISTS' FREEDOM

Wednesday 18 December 2024
Level 11/10 Carrington St
Sydney 2000

AJF Submission to the Independent National Security Legislation Monitor's Inquiry into SLAID Act warrants.

1. Introduction:

1.1 The Alliance for Journalists' Freedom is an advocacy group established in 2017 to support press freedom in Australia and the Asia Pacific region. In 2019, we published a White Paper on Press Freedom in Australia which argued that a slew of national security legislation passed since 9/11 had undermined the ability of journalists to perform their democratic role as watchdogs monitoring state institutions. The AJF has advocated for a Media Freedom Act, based on the human rights acts in Queensland, the ACT, and Victoria, that would establish the principles of press freedom in a similar way to a constitutional amendment.

1.2 While we recognise the SLAID Act is intended to give security agencies powers to deal with serious organised crime, a close reading of the Act exposes troubling implications for journalists and their sources. We believe that while it is vital to give agencies the tools they need to deal with organised crime. If those tools also undermine media freedom, they ultimately harm the very democracy they are intended to protect. We believe this would be a perverse outcome that can be avoided with well-calibrated checks and protections for press freedom, without trading off security.

1.3 With the above in mind, we will limit our comments to those sections of the Act that are directly relevant to our area of interest.

2. Part 1. Overview of SLAID powers

2.1 In general, the AJF is deeply wary of legislation that undermines the principles of press freedom and the relationship between journalists and their sources. We are also wary of anything that undermines the principles of open justice, transparency and accountability. While we recognise the need for our security and intelligence agencies to have appropriate powers to tackle evolving threats to our society, we are concerned that some powers, such as those contained in the SLAID

Act, are unnecessarily excessive and undermine basic human rights and the rule of law.

2.2 While we recognise that the law is intended for serious organised crime, it is easy to imagine circumstances under which a journalist investigating organised crime could find themselves implicated by police using network activity warrants (NAWs), or have their work disrupted by data disruption warrants (DDWs). Similarly, a journalist investigating the government itself (and/or their sources) could become the target of SLAID warrants.

2.3 We note that in his recent report into Secrecy Provisions in 5.6 of the Criminal Code, the INSLM recommended (and the government accepted) that merely receiving security classified information should not form the basis of an offence. If that is the case, it may be that concern about the way a DDW might be used against a journalist's data is redundant. However, we note that this should be reflected in the bill or Explanatory Memorandum.

2.4 In the absence of any clarity around the use of the warrants, we are forced to take at face value the government's claim that they are intended only for the most serious of crimes. However, we note that the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 was similarly presented as necessary to investigate serious organised crime.[1] At the time, the government dismissed concerns about invasions of privacy, but in its submissions to a PJCIS review of the TIA Act four years later, the Communications Alliance (the peak body representing internet service providers) said its members received an average of 350,000 requests for metadata a year.[2] This would seem vastly in excess of anything required for serious organised crime. Indeed, the PJCIS review found the law had been used to gather data about a host of minor misdemeanours (including, in at least one case, by a local council investigating who might have left dog excrement on the pavement.)

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[1] For example, see the then-attorney general George Brandis's comments: https://www.smh.com.au/politics/federal/attorneygeneral-george-brandis-says-metadata-limits-jeopardise-criminal-investigations-20150123-12wjqr.html

[2] https://www.oaic.gov.au/engage-with-us/submissions/review-of-the-mandatory-data-retention-regime-submission-to-the-parliamentary-joint-committee-on-intelligence-and-security-pjcis

2.5 This leads us to be sceptical of promises that SLAID warrants will be limited to their stated purpose when the law appears to allow for far wider use than serious organised crime alone.

2.6 We are concerned that the lack of oversight and transparency around the use of warrants under the SLAID Act risks seeing them used in ways that may undermine privacy, and specifically for the AJF, for journalists investigating particularly sensitive issues related to organised crime or the government itself.

2.7 In general terms, we also believe that Australia should introduce mechanisms for protecting media freedom similar to those contained in the UK's Police And Criminal Evidence (PACE) Act 1984.[3] PACE requires inter-partes proceedings any time a security agency wishes to search a journalist's data. While we note that Australia's security agencies have opposed similar proposals in the past, in the UK, the measure has not led to security failures, is uncontroversial, and there appear to be no moves to repeal it.

2.8 If such a measure is deemed inappropriate or unworkable in Australia, we still believe that there needs to be far more rigorous oversight in issuing SLAID Act warrants. This will be discussed in more detail below.

2.9 We are also concerned that the threshold for crimes that can be investigated under a SLAID warrant falls well short of 'serious crimes'. In previous submissions, the AJF has expressed concern that some secrecy provisions in Part 5.6 of the Criminal Code criminalise otherwise legitimate journalistic reporting. Many of those offences meet the definition of 'relevant' in the SLAID Act, namely any offence punishable by three or more years. We believe a more appropriate threshold is five years, which captures most serious offences, including terrorism offences in part 5.3 of the Criminal Code.

[3] For a detailed analysis of the PACE Act, and similar legislation in other Five Eyes jurisdictions, see, https://classic.austlii.edu.au/au/journals/MelbULawRw/2023/8.html

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3 Issuing Warrants

3.1 Given the extraordinary powers that the SLAID warrants confer, the serious crimes they are intended to address, and the lack of transparency about their use, the AJF believes that the current system of oversight is not sufficiently robust. At present, 'eligible judges' and members of the Administrative Review Tribunal (ART) can issue Data Disruption and Network Activity Warrants, while only magistrates issue Account Takeover Warrants. The AJF agrees with the submission by the Law Council of Australia[4], which argued that only superior court judges should be allowed to issue them. This is partly because of the additional skills and experience they bring to the cases, but also to improve public confidence that the warrants are being issued appropriately.

3.2 Paragraph 4.28 of the Issues Paper discusses the idea of Public Interest Monitors making submissions whenever SLAID Warrants are sought for journalists. The PJCIS recommended PIMs, though the recommendation was not implemented. The AJF believes this is a significant flaw in the system. While the PIM system is not perfect, a very similar system of 'Public Interest Advocates' (PIA) is already accepted for warrants issued for journalists under the Telecommunications (Interception and Access) Act 1979 (TIA Act). In its 2020 inquiry into the effect of law enforcement on journalists, the PJCIS recommended (and the government accepted) that the system be expanded and strengthened.[5]

3.3 The AJF strongly recommends the PIA system be expanded to cover SLAID warrants. Australia's justice system is essentially adversarial, habitually inclined to weigh countervailing arguments. If there are no opportunities to argue against a warrant, they are more likely to be approved without question. While it is accepted that journalists might rarely be the subject of SLAID warrants, the potential remains, and that potential itself becomes a significant deterrent for the relationship between journalists and confidential sources. Given the

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[4] Law Council of Australia, Submission No 21 to PJCIS, *Review of Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020* (9 March 2021) 51 [97]-[98].
[5] See recommendations 2, 3 and 4 of the PJCIS Report.
https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report/section?id=committees%2freportjnt%2f024411%2f72438

opacity around SLAID warrants, the extraordinary extent of their powers, and the reported value of state PIM schemes, it would make sense to introduce the recommendations 2, 3 and 4 of the PJCIS report mentioned above and extend them to include the SLAID warrants.

4. Journalists and the public interest

4.1 The above discussion would appear to answer the question raised in 5.35.1 of the issues paper regarding whether the criteria provide sufficient safeguards for journalists. In short, we do not agree that there are sufficient safeguards.

4.2 The AJF generally opposes the idea of secret warrants being issued to investigate journalists' data, and we have been advocating for an inter-partes process that would give journalists the opportunity to contest the issuing of warrants. The AJF has spent considerable effort in drafting a Media Freedom Bill that includes what we believe to be a workable mechanism for such a process. (See Part 3 of the draft Bill, annexed to this submission).

4.3 Our model is designed to compel the courts to consider the public interest in accessing the story that a journalist may be investigating alongside the public interest in a criminal investigation. While we do not believe media freedom should be privileged in all circumstances, we submit that there is a significant public interest that the courts must recognise and account for when applying the law.

4.4 We note that the current system requires any authority seeking a warrant to investigate a journalist to consider extra factors. They include whether the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of journalists' sources and facilitating the exchange of information with journalists. We submit that in an adversarial system designed to test competing positions, this is insufficient protection.

4.5 Ideally, a journalist or their publisher would have the opportunity to contest a warrant in an inter-partes process, arguing for the public interest in their investigation. However, we recognise that this requires

more significant political action beyond the scope of this enquiry, therefore, in the interim, we support a robust PIM system as an alternative (if insufficient) form of oversight for journalists and their sources.

5. The lifecycle of data

5.1 Section 6.16 of the Issues Paper discusses the analysis and disclosure of information obtained under SLAID warrants. As the issues paper makes clear, there is immense complexity around the rules for authorised disclosures of information obtained under the warrants to other agencies. That discussion underlines the importance of treating anything obtained in relation to journalism with extreme caution.

5.2 The AJF believes that journalists' data, particularly in relation to information obtained from confidential sources, should be regarded as privileged, and be treated with the same regard for privacy as client information for lawyers or doctors.

5.3 We accept that there may be exceptional circumstances when it is necessary to breach that relationship. However, there should be an express requirement to consider the public interest in accessing the story that a journalist may be investigating, and that any disclosures of that information be both necessary and proportionate.

5.4 Given the lack of data around the use of SLAID warrants, it is difficult to know if the current disclosure and secondary disclosure provisions are appropriate. However, we note that the mere possibility of information being obtained from journalists, and disclosed to other agencies, is likely to have a serious chilling effect on the relationship between journalists and their sources, and therefore undermine the important democratic role that journalists play.

5.5 As discussed earlier, we are opposed in principle to anything other than inter-partes proceedings when seeking a warrant for journalists. If that recommendation is not accepted, we believe this underlines the importance of a PIM scheme that covers both the warrant and any information obtained.

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6 Recommendations

6.1 **Raise the threshold for 'relevant offences'** to any offence punishable by five years in prison.

6.2 **Introduce a mechanism for inter-partes proceedings before a superior court whenever a SLAID warrant for journalists is sought**. This mechanism could be based on the system contained in the UK's Police and Criminal Evidence (PACE) Act 1984.

6.3 If this is not accepted, at a minimum, **warrant applications should be held before superior court judges**.

6.4 Whenever journalists are the targets of a SLAID warrant application, the **courts should expressly consider the public interest in accessing the work of a journalist**, alongside the public interest in any criminal investigation.

6.5 **Expand the Public Interest Advocate scheme** contained in the Telecommunications (Interception and Access) Act 1979 to cover both the issuing of SLAID warrants and the use of data collected under them whenever journalists are the targets.