



Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

19 October 2018

Dear Committee Members,

**Telecommunications and Other Legislation Amendment (Assistance and Access)
Bill 2018 (the Assistance and Access Bill)**

MEAA seek the Committee's indulgence to provide late comment on the above Bill.

The legislation enables:

- Computer access warrants - search warrants to be granted to seize and access computers and other electronic devices
- Assistance Orders applying to device owners
- Technical assistance requests and notices applying to designated communications providers to permit law enforcement authorities' access to devices
- Remote execution of search warrants

Although MEAA does not doubt the criminal class's use of digital communications, MEAA is gravely concerned that the proposed legislation is neither reasonable nor proportionate. The legislation as it stands carries too few safeguards and exceeds the threats it seeks to manage. It typifies the sledgehammer to crack a walnut approach that is now commonplace in Government attempts to bolster national security and community safety.

MEAA's journalist members are especially concerned that warrants and orders may be issued in cases where matters of public interest have been reported through the provision of information by confidential sources and which attract penalties under the Commonwealth Crimes Act. The breach of such a confidence by a journalist offends the Code of Ethics and endangers coverage of issues deserving public scrutiny.

Coupled with the surveillance of journalists available through the Journalists Information Warrant Scheme in the Telecommunications (Interception and Access) Act 1979 and the recently canvassed Espionage and Foreign Influence Bills, law enforcement agencies' powers pose a very real threat to public interest journalism that, frankly, has nothing to do with preserving national security or the safety of the community.

Computer Warrants

Under the proposed legislation, a law enforcement agency may apply for a warrant to covertly search electronic devices and access content. The warrants permit the search of electronic devices to determine whether it is relevant and covered by the warrant, which seems to be a process of reverse logic. We are concerned that the test for enhanced search warrants of 'suspecting on reasonable grounds that evidential material is held in a device' will allow fishing expeditions into the communications activity of an ever-escalating number of citizens, including MEAA's members.

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Although the Government asserts that a computer access warrant does not authorise the addition, deletion or alteration of data, the explanatory materials also state that such adjustments can be made 'where necessary to execute the warrant'.

Assistance Orders

These can be issued by a judicial officer to require a device owner to provide access to the device where it is reasonably suspected that 'evidential material' is held on a device. The penalty for refusing to assist authorities will increase to a maximum of five years' imprisonment. These measures are not confined to what may be considered serious risks of harm to community safety, but to all forms of misconduct. It is inappropriate to compel members of the community to permit access to personal information without some regard for the severity and nature of an offence.

Technical Assistance Orders

The legislation seeks the introduction of Technical Assistance Requests (TAR), Technical Assistance Notices (TAN) and Technical Capability Notice (TCN). These apply to communications providers operating in Australia.

TARs are voluntary and are issued at agency head (or delegate) level. If the request is acted upon by a provider, that provider and their agents are granted civil immunity.

The TAN is a compulsory order requiring a provider to give assistance wherever capable of doing so. TANs are issued by security and law enforcement agency heads or their delegate(s).

TCNs are also compulsory orders may only be issued by the Attorney General. The distinction between a TAN and TCN is that the TCN can require a communications provider to build a capability or functionality to provide the assistance sought. A TAN can only seek the application of mechanisms that already exist.

Notices must be for the purpose of enforcing criminal laws, protecting public revenue or safeguarding national security. Each exercise must be reasonable and proportionate.

MEAA is gravely concerned that judicial approval for the issue of notices is not required, although we are advised that the device for which assistance is being sought must be subject of an underlying search warrant. We strongly oppose the ability of departmental officers and the Attorney General being able to issue requests and notices, where only the slimmest of evidential tests may be applied.

Additionally, the proposed transparency of the new regime is fundamentally inadequate. Other than the remote prospect of a compliance audit conducted by the Ombudsman, nowhere is it proposed that detailed public scrutiny of requests, notices, orders and warrants will be possible. Citizens must be contented with reviewing the annual reports of up to twenty-one law enforcement agencies to determine the number of new law enforcement instruments applied for and issued.

Finally, MEAA must register its strongest objections to enabling Commonwealth agencies to disturb – if not destroy – the integrity of encrypted communications systems. It seems clear to all outside of law enforcement bodies that allowing such trespasses will lead to widespread breaches of personal and professional privacy and of course, lead to journalists being disabled from ensuring that their sources are protected.

We call upon the Committee to set the proposed legislation aside so that a proper period of consultation – including with the news media industry – can occur. At a bare minimum, we seek the incorporation of exemptions for persons engaged in journalism and the media industry to ensure that matters of public interest can continue to be reported without fear of government agencies seeking warrants and orders to pursue journalists that shine the light on matters of public interest.

Yours sincerely

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