

## **Media, Entertainment and Arts Alliance**

### **Comments in response to INSLM Issues Paper, Data Disruption, network activity and account takeover warrants in the *Crimes Act 1914* and *Surveillance Devices Act 2004***

The MEAA's interest in the questions arising in the Issues Paper concerns mitigating the risk that the use of SLAID warrants may, in particular circumstances, be destructive to the public interest in the work of journalists and media organisations.

The starting point for MEAA's present contribution is the principle of *contestability*, a principle which MEAA has previously articulated, together with other stakeholders and colleagues in journalism, media and publishing, in respect of warrants and compulsory document production generally: *Submission to Parliamentary Joint Committee on Intelligence and Security Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on Freedom of the Press, Australia's Right to Know Coalition* (Submission 23, July 2019). That principle can be applied in consideration of SLAID warrants.

#### **Principle of contestability**

1. Applications for the issue of all warrants and compulsory document production powers associated with journalists and media organisations undertaking their professional roles must be contestable. This requires:
  - a. Applications for all warrants must be made to an independent third party with experience in weighing evidence at the level of a judge of the Supreme Court, Federal Court or High Court. The best outcome is for this to occur in open court in the Supreme Court, Federal Court or High Court.
  - b. The journalist/media organisation being notified of the application for a warrant
  - c. The journalist/media organisation being represented at a hearing, presenting the case for the Australian public's right to know including the intrinsic value in confidentiality of journalists' sources and media freedom
  - d. The independent third party deciding whether to authorise the issuing of a warrant – or not – having considered the positions put by both parties

- e. That a warrant can only be authorised if it is necessary for its stated statutory purpose and the material sought cannot be obtained via other means
  - f. That a warrant can only be authorised if the public interest in accessing the metadata and/or content of a journalist's communication outweighs the public interest in NOT granting access, including, without limitation, the public interest in the public's right to know, the protection of sources including public sector whistle-blowers and media freedom
  - g. That there be a presumption against allowing access to confidential source material
2. The journalist/media organisation has a reasonable period after the warrant is authorised to seek legal recourse including injunctions and judicial review
  3. A transparency and reporting regime for application of and decisions regarding issuing and authorisation of warrants.

There are conventional objections to contestability regimes, borne of a fear that the target of a warrant may destroy evidence or disclose protected information to a person who is under suspicion of having committed the offence under investigation. Some may say that a contestable regime for warrants would take the element of 'surprise' out of the equation, and as a result evidence would be destroyed. This objection is not insurmountable. Legislative provisions may be drafted which prohibit destruction of evidence, or disclosure of protected information to investigation targets or others, upon receipt of the notification of the application for a warrant.

### **Issuing authority**

The issue raised at 4.47.1 of the Issues Paper concerns specifying the nature of the office capable of issuing SLAID warrants. The essential elements for specifying the nature of the office or person are independence and expertise. The relevant independence is the independence of a judicial officer with all of the protections and tenure associated with a member of a superior Chapter III court (or a state superior court comprised of judicial officers enjoying the same protections and tenure). The relevant expertise is the expertise in balancing competing principles and evaluating evidence. That expertise is best and most appropriately exercised in an adversarial contest.

### **Technical advice**

The issue raised at 4.47.2 of the Issues Paper concerns the question of making relevant technical advice and information available to the decision maker. That question is one of fact-finding, such that the decision maker can understand the consequences of the application before them. The decision-maker's burden of fact-finding, including in respect of that subset of technical facts of a kind that might require consideration of expert evidence in ordinary civil or criminal proceedings, is best supported in a contested procedure, involving those persons best placed, or at least most motivated, to gather and present the relevant technical material.

In the absence of contestability, and in a context where the operation, reach and consequences of SLAID warrants may be opaque to a non-expert decision maker, the decision maker ought have access to resources, including expert technical advice, independent of the applicant.

#### **'Public Interest Monitor'?**

The issue raised at 4.47.3 of the Issues Paper concerns whether there should be identified 'some sort of public interest monitor (PIM)' with the function of reviewing applications and assisting the issuing authority.

The concept of a PIM is a means to introduce some of the features of an adversarial process (including a capacity for the decision maker to receive some submissions or other input from a person other than the applicant), without embracing other features of an adversarial process.

The introduction of PIM may be marginally safer to the procedures supplied in existing legislation, but it would be substantially inferior to embracing the principles of contestability set out above.

A PIM is, conceptually, in no substantially different position to the decision maker, in its capacity to advance the public interest in the work of journalists and media organisations. A PIM might have a statutory responsibility to articulate that public interest; the decision maker might have a statutory responsibility to have regard to that public interest. But in each case the PIM might make a submission, and the decision maker might give consideration, in the abstract.

Only the journalists and media organisations immediately concerned are in a position to advance evidence and submissions properly informed about how any given warrant application may undermine the public interest in the work of journalists and media organisations generally, and the

particular journalists and media organisations concerned. The decision maker would be most effectively assisted by evidence led by, and submissions made on behalf of, the journalists and media organisations concerned.

If a PIM model is embraced over the principle of contestability, then careful attention would be required to be given to the *purposes* of such an office, the *tools* and *training* within which that office is armed, the manner in which that office systematically *engages* with critical participants such as journalists and media organisations, and the manner in which the office *reports* upon its procedures and the success or otherwise in meeting its purposes. In all of those respects – purposes, tools and training, systematic engagement and reporting – the design of the office ought be intended to put the PIM in a position which is as close to that of a journalist or media organisation would be, as a participant capable of assisting the decision-maker with material and the most robust and apposite submissions protective of the public interest in the work of journalists and media organisations.

### **Reporting and review cycle**

The novelty and invasiveness of SLAID warrants justifies the implementation of detailed operational reporting requirements – in public and to the INSLM – and a tight cycle of repeated review. In particular there ought be a special purpose review as soon as reasonably practicable after the exercise of any SLAID warrant powers upon a journalist or media organisation.

### **Scope of material which may be collected, and data retention**

MEAA will deliver a separate note on this topic.

MEAA  
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