

17 February 2015

Committee Secretary  
Parliamentary Joint Committee on Intelligence and Security  
PO Box 6021  
Parliament House  
CANBERRA ACT 2600

By email: [dataretention@aph.gov.au](mailto:dataretention@aph.gov.au)

Dear Secretary,

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and The West Australian – write regarding the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (the Bill).

Following our submission and evidence to the Committee regarding the Bill, we consider it important to succinctly state our recommendations regarding the Bill, as there are elements of the Bill that we believe will lead to a chilling effect on reportage and undermine the public's right to know.

Our central concern, as articulated in our previous submission, is that the collection and storage of metadata could be accessed to identify journalists' sources, making it less likely that sources will share information (including corroborating information) and therefore have a chilling effect on reporting in the public interest. We therefore believe that there must be strict limits on the purpose for which metadata is accessed, restrictions on the agencies that can access this data, prohibitions on the data being used to identify journalists and sources, and increasingly robust authorisation process for accessing the data.

#### **ISSUE 1 – ACCESS TO METADATA MUST BE STRICTLY LIMITED FOR THE PURPOSE OF NATIONAL SECURITY AND CRIMINAL LAW ENFORCEMENT ONLY**

Access to metadata must be only for the purposes of national security and criminal law enforcement, and these purposes must be stipulated in the legislation.

The range of agencies and bodies that are able to access metadata for these purposes must also be limited. It must not be the case that metadata is able to be used for civil law enforcement.

Even with these limitations, we remain concerned that journalists and their sources may be pursued through access to metadata, particularly in efforts to uncover whistle-blowers. Our concerns in this regard are detailed in our submission to the Committee, and are addressed at Issue 2 below.

**RECOMMENDATION 1 – Access to metadata must only be for the purposes of national security and criminal law enforcement.**

It must be clearly stated in the legislation that the Ministerial declaration scheme (at section 176A(3)(b)) be based on demonstrated investigative and operational need for national security and criminal law enforcement only.

We are of the view that it is not sufficient to incorporate this in the Explanatory Memorandum to the Bill.

## **ISSUE 2 – METADATA MUST NOT BE USED TO IDENTIFY JOURNALISTS AND THEIR SOURCES**

As outlined above, and detailed extensively in our submission to the Committee, we are concerned about the impact of large scale surveillance on news gathering.

This is due to the undermining of the confidentiality of sources, the lack of protection for whistle-blowers, and the risk of journalists being criminalised – all of which, separately and in aggregate, makes it increasingly difficult for news gathering and reporting in the public interest.

Further, the Bill exacerbates the detrimental impact of the first two tranches of national security legislation – the *National Security Amendment Bill (No 1) 2014* and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* – on freedom of the media.

### **RECOMMENDATION 2 – METADATA MUST NOT BE USED TO IDENTIFY JOURNALISTS AND THEIR SOURCES.**

**2(a) – Given the interrelationship between the three tranches of national security legislation, a media exemption must be given to all three tranches.**

**- If the Committee does not adopt Recommendation 2(a), we recommend:**

**2(b) – A media exemption be given for the Bill, specifically that metadata must not be used to identify journalists and their sources.**

**- If the Committee does not adopt Recommendation 2(b), we recommend:**

**2(c) – A warrant must be required if an agency is seeking access to the metadata of journalists and journalists' sources.**

## **ISSUE 3 – ROBUST UNIFORM PROCESSES FOR AUTHORISATION ARE REQUIRED TO ACCESS METADATA, AND MUST BE STIPULATED IN THE LEGISLATION**

We are concerned that the authorisation that is currently required to access metadata<sup>1</sup> is not adequate for scale and scope of data being considered (but not yet finalised), and requires increased rigour.

### **RECOMMENDATION 3 – ROBUST UNIFORM PROCESSES FOR AUTHORISATION ARE REQUIRED TO ACCESS METADATA, AND MUST BE STIPULATED IN THE LEGISLATION**

**If the Committee does not adopt Recommendation 2(c) – whereby a warrant must be required for access to metadata of journalists and journalists' sources – we recommend the following at a minimum:**

**3(a) The person/s empowered with authorising requests for access to data; and disclosures of data must be limited to the most senior officials of an authorised agency.**

**Specifically, for the purposes of authorising access to metadata at Chapter 4 of the TIA Act, the definition of an 'authorised officer' is too broad, and should be limited to the Commissioner of Police or the Deputy Commissioner of Police; or the head or deputy head of an enforcement agency. Similarly, the definition**

---

<sup>1</sup> Chapter 4 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act)

of an 'eligible person' should be limited to the Director-General of Security or the Deputy Director-General of Security. It may be practical to include an additional tier for both categories of authority, that being a Senior Executive Officer (SES) 3.

Additionally:

3(b) The subjectivity of authorisations be reduced by removing the phrase '...he or she is satisfied...'

For example, section 174(3) of the TIA Act currently states: *The eligible person must not make the authorisation unless he or she is satisfied that the disclosure would be in connection with the performance by the Organisation of its functions.*

Amending the provision in the manner recommended above, would result in the onus being more objective, as it would state: *The eligible person must not make the authorisation unless that disclosure would be in connection with the performance by the Organisation of its functions.*

We urge the Committee to consider these recommended amendments before proceeding with the Bill.



The West Australian



News Corp Australia

