11 May 2015

Senator the Hon George Brandis QC
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

We write regarding the regulations to implement the Journalist Information Warrant (JIW) scheme pursuant to section 180X of the *Telecommunications (Interception and Access) Act 1979* (the Act).

The enabling legislation was the *Telecommunications (Interception and Access) Amendment Bill 2015* (the *Bill), which passed the parliament in March 2015.*

As indicated in your letter of 26 March 2015, the Government intends to address operational aspects of the role of the Public Interest Advocate (PIA), including the process by which the PIA will be notified that a warrant application is being made, in regulations.

Following are outstanding issues with the JIW scheme which should be addressed as a matter of importance.

Inconsistent approach to application for content and data of journalists' communication

To ensure the consistent application of laws, the JIW process should apply equally to accessing the content of journalists' communications. It would be illogical if as a result of this scheme the process for accessing the content of a communication is less onerous than the process for accessing the metadata in relation to that communication.

Lack of connection between establishment of the PIA and being notified of a request for a JIW – s180L and 180T

The Bill made provision for the establishment of a PIA but did not set out the operational aspects of that role or clearly link the PIA's role with the JIW process.

This connection is required to be established in the regulations, and must include:

- A requirement that the Minister (in the case of ASIO) or issuing authority must not issue a JIW unless:
    - Notice of the request for a JIW is given to the PIA;
    - The PIA has been requested to make submissions;
- The process for how PIA submissions are made;
- Details of what PIA submissions must include; and
- A requirement that the PIA must present the public interest argument in favour of freedom of speech (i.e. the PIA must be required to argue for the public interest in NOT providing access to the journalist's data).

The JIW is focused on the purpose rather than effect of accessing the data – s180H(1)(b) and (2)(b)

Currently, a JIW is only needed if the enforcement agency knows they are looking for a journalist's source. Specifically:

- only in circumstances where the authorising body knows or reasonably believes that it is a journalist involved; and
- the purpose of making the authorisation would be to identify another person known or reasonably believed to be a source.

However, the JIW process should apply regardless of whether (or not) the journalists' data is accessed for the purpose of identifying sources. This is because it is highly likely that the effect of accessing journalists' data will be the identification of sources – regardless of the stated purpose for accessing the data.

To put it another way, limiting the application of the JIW process to circumstances where the purpose of data access is to identify journalists' sources provides inadequate protection to journalist's sources which are revealed when the data is accessed for any other purpose – and not subject to the JIW process. This makes the JIW scheme vulnerable to circumvention.

The application of the JIW process to revealing/identifying journalists' sources where that is the effect of accessing journalists' data (or where it is not the stated purpose for the access) requires clarification.

Matters to have regard to – s180L(2)(b) and 180T(2)(b)

There is nothing in the legislation that acknowledges any free-standing value in the confidentiality of sources and a free media.

The JIW scheme should include a clear requirement to take into account the intrinsic value in confidentiality of journalists' sources and freedom of the media.

Offences regarding disclosure/use of JIW information – s182A

The offences should be limited to investigations that are ongoing.

Other matters for consideration

While we raise these matters here we acknowledge that some of these may require changes to legislation.

- Definition of journalist is required

  We recommend this be consistent with the definition of journalist in the *Evidence Act 1995(Cth)* (shield law).

- No transparency regarding JIW applications and/or authorisations

  We recommend that reporting provisions are required, including in the annual reports of the Attorney-General's Department's *Telecommunications Intercept and Access Act 1979* and the Inspector General of Intelligence and Security (IGIS).

  We are strongly of the view that reporting requirements regarding JIWs must be separate from reporting in relation to interception and stored communications warrants.

- Inconsistency between ASIO and other agencies in applying for a JIW

  We recommend that a consistent process for application of JIWs is required, specifically that ASIO should have to apply to an issuing authority in the same way as other agencies.

- Issuing Authority is currently one of the persons authorised to give Part 3 warrants – judge, magistrate, member of AAT etc

  We recommend that this be amended such that only judges of a higher court can issue JIWs.

JIW scheme operation must not be delayed

Lastly, but my no means of least importance, is the matter of timeliness of the regulations. We note that the data retention scheme has a two (2) year delay before it becomes operational.

We are of the view that it would be entirely unsatisfactory for such a delay to relate to the drafting, consultation and introduction of the JIW regulations; and operation of the JIW scheme given that access to journalists' data is not contingent on the implementation of the data retention scheme. It is a real and live issue now, having been an element of the Telecommunications Interception Act for many years. There should not be any delay in making the JIW scheme operational.