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NSWCCL SUBMISSION

THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR REVIEW

OF THE

SURVEILLANCE LEGISLATION AMENDMENT (IDENTIFY AND DISRUPT) ACT 2021 (COMMONWEALTH)

December 2024

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

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1 Introduction

1.1 The NSW Council for Civil Liberties (NSWCCL) thanks the Independent National Security Legislation Monitor (INSML) for the opportunity to make a submission to the INSLM Review of the *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) (SLAID Act) and thanks the INSLM for the opportunity to participate in the roundtable discussion held in December 2024.

1.2 We reiterate the views made in our submission to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the SLAID Bill on 5 February 2021. We understand that cyber-enabled serious and organised crime exists and should be targeted by law enforcement using appropriate and proportionate means. However, the three SLAID warrants are part of a broader "accelerating wave, strengthening the powers of the state without any humility about the cumulative erosion of democratic freedoms they entail".

1.3 The SLAID warrants are an overreach of power for law enforcement agencies and, in order to protect civil liberties, the legislation creating them should sunset on 4 September 2026 and not be replaced.

1.4 If the SLAID warrants are to remain in place, then it is vital that additional safeguards and oversight be put in place to ensure the powers are not abused and that they are limited to tolerably protect the public interest.

2 How have the SLAID warrants been used to date?

2.1 It is instructive to examine how the SLAID warrants have been used to this point and to consider the statements made prior to their introduction explaining why their proponents considered them necessary.

2.2 In the tables below, we have set out the number of each type of SLAID warrant granted in each of the past three years:

ACIC			
	2021/22	2022/23	2023/24
DDW	0	0	0
NAW	1	2 (from 2 applications)	0
ATW	0	0	0

AFP			
	2021/22	2022/23	2023/24
DDW	0	0	1 (from 1 application)
NAW	1	1 (from 1 application)	2 (from 2 applications)
ATW	2 (no prosecutions)	3 (no prosecutions)	6 (from 6 applications) (no prosecutions)

2.3 When the SLAID Bill was before parliament, Peter Dutton, then Minister for Home Affairs, stated "*[t]hese key new powers are critical in enabling law enforcement to tackle the fundamental shift in how serious criminality is occurring online. Without enhancing the AFP and ACIC's powers, we leave them with outdated ways of attacking an area of criminality that is only increasing in prevalence.*"[1]

[1] Second reading speech 3 December 2020 introducing SLAID Bill, pg. 10434 House of Reps Hansard, Link: House of Representatives_2020_12_03_8388_Official.pdf;fileType=application/pdf.

2.4 The ACIC stated that the SLAID Bill was necessary to "*protect Australians against the most sophisticated and high-threat actors*"[2] and the AFP made a similar submission that the powers would be used to tackle "*highly-sophisticated organised criminal syndicates*"[3].

2.5 However, it seems that this has not been the case in practice. The powers have been used for less serious crimes and threats, and the low number of warrants applied for and issued, combined with the extremely low prosecution rates, demonstrate that the representations made in favour of the SLAID warrants were grossly overstated. In particular, the fact that ACIC have not used the data disruption (DDW), or account takeover warrants (ATW), casts doubt over the ACIC's need to access such warrants at all.

3 Who should issue warrants?

3.1 Currently, the 'issuing authority' for DDWs and network activity warrants (NAWs), are 'eligible judges' and certain members of the ART. ATWs, on the other hand, may only be issued by a magistrate.

3.2 All of the DDWs and NAWs issued to date have been issued by a small number of members of the Administrative Appeals Tribunal, now the ART. ART members are eligible to become issuing authorities for DDWs and NAWs, if they have been enrolled as a legal practitioner for at least 5 years.

3.3 The Issues Paper suggests an Issuing Body could be established, however, NSWCCL does not support such a body for several reasons:

1) To function properly, an Issuing Body would be comprised of experts with the requisite skills and experience to apply necessary scrutiny to applications/ensure their compliance with the legislative regime. In reality, an Issuing Body, given its limited functions and capabilities, is susceptible to becoming a 'rubber stamp' for warrant applications, particularly if there is no obligation for the body to receive submissions from another party.

2) There is a risk of lacking the **appearance** of independence. NSWCCL wants to be clear that we are not suggesting an Issuing Body would not act independently or be unduly influenced, however, there is a risk the body would not be viewed by the public as being entirely independent of the law enforcement agencies and that appointments to the Issuing Body would become politicised. To be trusted by the public, it is vital that there is both an appearance of independence and actual independence in decision making. Given that the Issuing Body would be reviewing all SLAID warrant applications, there is a clear risk that the public would take a view that there is a working relationship or connection between the law enforcement agencies and the Issuing Body, and so it may appear that they are not entirely independent. This risk would be avoided by only empowering superior court judges to issue the warrants.

3) It is unlikely that those appointed to the Issuing Body would have the same skills and experience as a superior court judge. This point is not intended to disparage any person's abilities, but rather to emphasise the skillset and experience of a superior court judge, particularly when it comes to balancing competing rights.

3.4 NSWCCL believes that there would be much greater protection for the public if all three SLAID warrants could only be issued by a superior court judge. It goes without saying, that a superior court judge would have suitable seniority and the breadth of experience required to be entrusted with the power to issue such intrusive warrants. Further, as tenured officials, there is far less risk that they would appear to the public to lack independence.

3.5 NSWCCL is aware that arguments may be made about the potential undue burden of assessing SLAID warrant applications placed on superior court judges. However, in our view such claims are not grounded in fact. Given the relatively small number of SLAID warrant applications, as set out in

[2] Australian Criminal Intelligence Commission submission to the review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, page 2.
[3] Supplementary submission by the AFP to the Parliamentary Joint Committee on Intelligence and Security, Review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2022, paragraph 4.

the tables above, arguments that the workload could not be managed by superior court judges are inaccurate and unfounded.

3.6 Overall, given the invasive nature of the SLAID warrants, they should only be issued by a superior court judge rather than a specialist Issuing Body or ART members.

4 Review body for oversight of SLAID warrant applications

4.1 As mentioned, in our view, SLAID warrants should be removed as they allow for an overreach of power by law enforcement. However, if they are to remain, it is vital that a Public Interest Monitor (**PIM**) be established to oversee each warrant application and to protect the public interest.

Public Interest Monitor – Powers

4.2 As detailed in the Issues Paper, in Queensland and Victoria, PIMs, and in NSW, the Surveillance Devices Commissioner (**SDC**), review warrant applications and provide feedback to the applicant law enforcement agency to address any deficiencies. The PIMs may also make submissions to the issuing authority, and in Queensland the PIM reviews compliance with issued warrants and publishes reports.

4.3 We submit that a newly established Federal PIM should have the full range of oversight powers afforded to the existing PIMs and the NSW SDC. This means the PIM would be empowered to:

- Review SLAID warrant applications from the AFP and ACIC before they are submitted to the issuing authority, including all evidence the agency intends to rely on;
- Provide feedback to the agency to address any deficiencies, for example, if the scope of the application is too broad for the purpose, or if a less intrusive method of surveillance is more appropriate, and ensure it meets fundamental standards in terms of structure, evidence use and presentation;
- Make submissions to the issuing authority to contest the application as a counterbalance and, in appropriate cases, to be a contradictor. It must be stressed that the PIM should make submissions even if the application is urgent, and further detail on these urgent scenarios is set out separately below;
- Inspect the compliance of the AFP and ACIC with warrants that have been granted, and publish reports on the findings; and
- Work with the law enforcement agencies to proactively develop and improve their templates to streamline applications and ensure more compliant applications which expedite determinations. The NSW SDC takes this approach and it has proven to be particularly effective and efficient, with the NSW SDC reviewing more applications per staff member compared to the QLD and Vic PIMs. These root level quality control improvements filter down efficiencies throughout the entire application process.

4.4 If a PIM is established with these powers, it would place a greater responsibility on the AFP and ACIC to submit appropriate applications, and provide balance to their overarching powers. For example, in Victoria and Queensland, proportionally fewer police interception warrants are sought and issued compared to states where there is no PIM (or NSW where the SDC has no power over interception warrants) – we submit that this is not a coincidence and although there are certainly other factors influencing this, establishing a PIM would in our view at the very least lower the risk of unnecessary and inappropriate applications for SLAID warrants.

4.5 Establishing a PIM would also reduce the risk of an issuing authority granting an application without full and detailed consideration of the complex technical details. For example, in 2019, an AAT report set out that in one instance a warrant application under the SD Act was assessed by the AAT in one minute, which we submit is far too short a time for it to have been considered properly. Furthermore, having an informed and independent third party review and, if necessary, make submissions on an application, would address issues associated with the lack of training the issuing authority may have received (mentioned at 4.17 of the Issues Paper), or in the case of a superior court judge provide an added check, and ensure the technical details and risks are properly considered.

4.6 As the SLAID warrants are relatively new, it is imperative that inspections are carried out to determine how exactly they are being used and to map trends as their use develops. The PIM would be ideally placed to carry this out and their reports would be key to identifying future improvements to the process.

Public Interest Monitor – Structure

4.7 We propose that the best approach for the PIM is to be appointed as a full-time employee of the government, along with full-time deputies. It would be vital to appoint a person with the requisite legal skills and experience as PIM, for example an experienced solicitor or barrister. The envisaged role of PIM would require a person's full capacity and attention, and so it would be necessary to employ a full-time PIM, rather than a part-time or *ad hoc* engagement of a person in private practice. Similarly, properly resourcing the PIM with deputies would be necessary to ensure the workload can be managed efficiently.

What about urgent applications?

4.8 It is important to directly address the question of "urgent" applications as law enforcement agencies may argue that the application process involving the PIM would unduly delay these applications. However, as we submitted in 2021, if an exception were made for urgent applications to be expedited and bypass the PIM, it is inevitable that contestable applications would simply be labelled as "urgent".

4.9 Fears of delay can be addressed by employing a full-time PIM with deputies who are properly resourced, allowing applications to be responded to in a timely manner. Further, at least one of the PIM and deputies should be contactable 24/7. If the AFP or ACIC are able to contact an issuing authority such as a judge, then the full-time PIM should be contactable also.

4.10 This may sound onerous on the PIM, however, in the past three years the number of applications has been quite low and would be manageable for the PIM. It is also clear from the Issues Paper, that existing PIMs and the NSW SDC do not delay urgent applications, instead working with the law enforcement agency to agree timeframes for applications. It is clear that the risks of allowing the PIM to be bypassed would far outweigh the possibility that an application would be unduly delayed by the PIM.

5 Summary

5.1 Checks and balances are a central tenet of the administration of a democratic society and they are central to the discussion around the SLAID warrants. NSWCCL strongly believes that these SLAID warrants are an overreach of power and the power to make them should be removed.

5.2 However, if they are to remain in place, then there must, at the very least, be adequate checks and balances introduced in order to protect the public and the public interest. A key step is to establish a PIM to represent the public interest by overseeing applications and ensuring they are considered in detail from all angles. Moreover, only allowing superior court judges to issue the SLAID warrants would offer some assurance to the public that there is ultimately an experienced, independent person with the final say.

We trust this submission will be useful to the committee.

Yours sincerely,

Adam Connor
Secretary
NSW Council for Civil Liberties

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