

[REDACTED]

17 December 2024

Mr Jake Blight

Independent National Security Legislation Monitor

3-5 National Circuit

Barton ACT 2600

Via email: inslm@inslm.gov.au

Dear Mr Blight *Jake*

**Submission to INSLM review of certain powers given to the AFP and ACIC by the
Surveillance Legislation Amendment (Identify and Disrupt) Act 2021**

Thank you for your letter of 7 November 2024 and invitation to provide a submission into the INSLM review of certain powers given to the AFP and ACIC by the Surveillance Legislation Amendment (Identify and Disrupt) 2021 (SLAID Act).

I appreciate your invitation and engagement on matters of oversight arrangements between my Office and the Inspector-General of Intelligence and Security (IGIS) in relation to SLAID Act powers.

Please find attached a submission responding to the questions listed in your letter of 7 November and an additional observation in relation to reporting requirements.

Thank you for your ongoing work in improving these legislative arrangements. If you've any further questions or wish to discuss this matter further, please do not hesitate to contact me on (02) 6243 1659. If your staff have any questions, they may contact Julia Galluccio, Senior Assistant Ombudsman, Policy and Assurance Branch on (02) 6243 1661.

Yours faithfully,

[REDACTED]

Iain Anderson

Commonwealth Ombudsman

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OFFICIAL



Data disruption, network activity
and account takeover warrants
in the *Crimes Act 1914* and
Surveillance Devices Act 2004 –
INSLM Issues Paper

Submission by the Commonwealth Ombudsman, Iain Anderson

December 2024

Introduction and summary

I welcome the opportunity to make a submission to the Independent National Security Legislation Monitor (INSLM) in relation to their *Issues Paper – Data Disruption, Network Activity and Account Takeover Warrants – Review of Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (the Issues Paper).

Background

The purpose of the Office of the Commonwealth Ombudsman (**the Office**) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independent and impartial consideration of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Responses to the Issues Paper

This section sets out my responses to the questions in the Issues Paper pertaining to oversight arrangements. These issues are broadly described in Chapter 7 of the Issues Paper.

1. Is the current and proposed split of functions between IGIS and Ombudsman an efficient and effective way for the oversight of SLAID Act powers to operate?

The Issues Paper correctly describes the intention of the Intelligence Services Legislation Amendment Bill 2023 (ISLA Bill) to transfer oversight responsibility of the ACIC in its entirety and the intelligence functions of the AFP from my Office to the IGIS.



Currently only the AFP and ACIC are permitted to use data disruption, network activity and account takeover warrants. If the ISLA Bill is passed, my Office will have no role in relation to the ACIC's use of account takeover warrants (ATWs) and data disruption warrants (DDWs). On paper, responsibility for oversight of the AFP will be shared by the IGIS and my Office, with oversight of the AFP's use of the powers falling under the jurisdiction of the IGIS where it relates to an intelligence function of the AFP. In practice though, the effect of the ISLA Bill on my oversight of the AFP's use of covert and intrusive powers is minimal. This is because the AFP's use of covert and intrusive powers are almost always used for the law enforcement purpose of obtaining evidence of the commission of relevant offences. Indeed, the ISLA Bill provides, for the avoidance of doubt, that the AFP's intelligence functions exclude:

- the arrest, charging or detention of suspected offenders, or
- the gathering of evidence, or any activity undertaken to directly support the gathering of evidence.

The *Crimes Act 1914* is clear that the applications for ATWs must be for the purpose of gathering evidence.¹ Further, in relation to DDWs the purpose of frustrating the commission of an offence is not as clearly excluded as an intelligence function under the ISLA Bill, although we anticipate in most instances the use of DDWs will have a link to the gathering of evidence.

These practicalities may prompt broader questions for policymakers about the applicability of current covert and intrusive power frameworks, which have been legislated for use for law enforcement purposes, to intelligence functions. It is the nature of intelligence that it may or may not lead to or result in a law enforcement outcome. However, my Office has found that agencies are not always able to clearly demonstrate the link to law enforcement purposes where required.²

Finally, it is common for there to be overlap in oversight bodies' jurisdictions. Indeed, overlap is preferable to jurisdictional gaps, the latter sometimes manifesting as an

¹ See *Crimes Act 1914* s 3ZZUN (1)(c)

² See [Report to the Attorney-General on agencies' compliance with the Surveillance Devices Act 2004 \(Cth\) for Commonwealth Ombudsman inspections conducted from 1 January to 30 June 2024](#), p. 10.

unintended consequence of attempts to establish clear boundaries. Such overlaps are generally managed with high levels of cooperation and information sharing. However, as outlined at Question 3 below, information sharing by the IGIS may be limited.

2. Does each oversight agency have sufficient powers and functions? In particular, should the Ombudsman have a broader oversight mandate to assess the 'propriety' activities connected to SLAID warrants?

My preference is that rather than creating new concepts such as 'propriety', any legislative change could explicitly adopt language that is well understood and familiar in application. For example, under the *Ombudsman Act 1976* (Ombudsman Act), the Ombudsman may investigate action related to "matters of administration". While "matter of administration" is not defined, it is well understood in the context of 47 years of the Commonwealth Ombudsman exercising its functions.

After completing an investigation, section 15 of the Ombudsman Act provides that my Office can report views on, for example, whether that action was:

- contrary to law
- unreasonable, unjust, oppressive or improperly discriminatory
- wrong in all the circumstances.

I consider that being able to report in such a manner enables me to provide broader and more effective oversight than the current framework, which may be limited to reporting on agencies compliance with the Act(s). In practice, we report beyond this limitation by adopting a risk-based approach to our inspections, focusing on areas where agencies are, or may be, at risk of not complying with legislative requirements or best practice standards. However, we would prefer that legislation is clear on our ability to do so, and such reform would be more beneficial if applied consistently across all covert and intrusive legislative regimes, rather than just to the SLAID warrants.

3. Do the information-sharing provisions for Ombudsman and IGIS support the level of information sharing and cooperation likely to be required?



While the IGIS and I will be able to disclose information about the AFP under the Ombudsman Act and the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) respectively, the IGIS has advised that it will not be permitted to share information with me concerning the ACIC after the 18-month period has passed for the transition of oversight responsibility.³ At this stage and given the ACIC would no longer be relevant to my functions, not receiving information about the ACIC seems unproblematic. However, as a general principle, it is highly desirable that oversight bodies that share jurisdictions have strong information sharing powers so that they are able to share information about potential systemic issues in relation to the use of covert and intrusive powers without this being inhibited by an inability to share agency-specific information.

Other issues raised

4. Is the current requirement to report to the Minister only at the conclusion of a network activity warrant or data disruption warrant (regardless of how many extensions have been granted) appropriate?

I note the concerns of the INSLM that the extension of these warrants beyond 90 days may result in reports to the Minister being significantly delayed. While my Office does not oversee network activity warrants, we have not been advised of any extensions to a DDW. I have not been given cause to be concerned about these reporting arrangements in relation to my oversight role for DDWs.

5. Is annual reporting to Ministers (and Ombudsman) on account takeover warrants appropriate?

I am satisfied that, based on the relatively low use of the powers compared with other covert and intrusive powers, annual reporting to the Ombudsman for SLAID powers is sufficient to enable appropriate oversight.

³ Inspector-General of Intelligence and Security, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, February 2021 at p. 17.

6. Is there any additional information that should be included in reports?

The assistance orders may be granted by Magistrates requiring specified persons to provide information or assistance in respect of SLAID powers.⁴ In our view, agencies should be required to report on this information to increase transparency and accountability for the use of covert powers.⁵

7. Are the current requirements about notifying IGIS and the Ombudsman of certain matters operating in an efficient and effective manner? Is any additional reporting required?

I do not believe further notification requirements are required. As the usage of the powers is low compared with other powers, we consider our powers to inspect, and to obtain relevant information, are presently sufficient to identify and report on issues.

8. Would it support the work of issuing authorities to be provided with information about how SLAID warrants are used in practice and the outcomes of thematic reviews or inspections by oversight bodies?

I am supportive of a feedback loop being created to assist issuing authorities to gain greater understanding of how SLAID powers are being used. Across many of the different covert and intrusive legislative regimes the Ombudsman oversees, we note there is generally an absence of a requirement for law enforcement officers to specify how the powers will be employed. In many instances, such as telecommunications intercepts under the *Telecommunications (Interceptions and Access) Act 1979* (TIA Act), the capabilities may be well understood, allowing for a fully informed weighting of whether the proposed use of the powers are reasonable, necessary and proportionate. We are concerned however that the ability of issuing authorities to make fully informed

⁴ *Crimes Act 1914, s 3ZZVG, Surveillance Devices Act 2004 s 64A.*

⁵ see also Commonwealth Ombudsman, Submission to the Parliamentary Joint Committee on Intelligence and Security, Review of the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020, February 2021 at p. 4.



decisions may be reduced in respect of newer surveillance powers that involve higher degrees of technical complexity.

If a mechanism was established to provide technical advice to issuing authorities, I consider it would be appropriate for the Ombudsman to be involved in this process with the ability to share relevant information as required. There is a limitation to relying on findings produced in reports due to the requirement that it not contain information which could reasonably be expected to compromise any law enforcement agency's operational activities or methodologies.⁶

9. Adequacy of destruction requirements

The AFP is the only agency to have used DDWs or ATWs. As any material obtained from exercising these powers has not yet been identified for destruction, the AFP has not closed the lifecycle of date for any DDW or ATW usages. My Office has not inspected the destruction of any material obtained under DDWs or ATWs, and as such are not yet able to fully form a view on the effectiveness of the AFP or ACIC policies and procedures, as they specifically relate to these powers.

However, I have had some concerns about how agencies have approached destruction requirements in some other regimes for the exercise of covert and intrusive powers. For example, I have been concerned with the AFP and ACIC not destroying material that is no longer required for a purpose under the *Surveillance Devices Act 2004* (SD Act). In the case of the ACIC, I was also concerned with the agency's failure to review and destroy telecommunication interception records under the TIA Act.

The regular review for retention or destruction of records created using a covert and intrusive power is critical to the responsible use of the power. I consider it is incumbent on the AFP and ACIC to review and destroy any records when they are no longer required for a lawful purpose. Noting my concerns about agency compliance with destruction requirements under other regimes, the review and destruction of records created through use of DDWs and ATWs is an area of concern my Office will continue to closely monitor.

⁶ See for example *Crimes Act 1914* s 3ZZVX(2)



Further submission

10. Ombudsman reporting requirements are not harmonised

I report on the ATW regime at '12 monthly intervals' on the results of each inspection conducted. The intervals are not linked to a date specified in legislation.

This contrasts with more specific periods being provided for our controlled operations and delayed notification search warrant functions under the *Crimes Act 1914*, which specify annual and 6 monthly reporting following the passing of certain periods.⁷

I would prefer that the reporting requirements for the ATW regime were harmonised with other reporting under the *Crimes Act 1914* by specifying an annual date for delivery.

⁷ Section 15HO states that the Ombudsman must give a written report on controlled operations inspections as soon as practicable after 30 June each year, while section 3ZZGH(1) states that the Ombudsman must give a written report on delayed notification search warrants as soon as practicable after each 6-month period starting on 1 January or 1 July.

