Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

Future of Public Interest Journalism

Submission to Senate Select Committee on the Future of Public Interest Journalism

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Protecting and promoting justice, freedom and the rights of the individual

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

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Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of the inquiry into the Future of Public Interest Journalism being conducted by the Senate Select Committee on Public Interest Journalism.

2. This submission makes comments on the first Term of Reference. In particular, we highlight federal laws restricting freedom of speech and undermining privacy that negatively impact the ability of journalists to report freely in the public interest.

3. In this submission, the term 'journalist' refers both to professional journalists and individuals who report on what they have seen or heard in their private capacity. 'Public interest journalism' is understood to refer to journalism that enriches political debate, including assisting the community to examine the conduct of government officials or other power-brokers.

(a) the current state of public interest journalism in Australia and around the world, including the role of government in ensuring a viable, independent and diverse service

4. The Commonwealth government has passed a swathe of laws in recent years that restricts the ability of journalists and others to report on matters that are in the public interest. These laws fall into two broad categories: those that restrict the ability of journalists to report on certain facts, and those that undermine the ability of journalists to communicate confidentially with their sources. Both of these trends undermine the state of public interest journalism by restricting the ability of journalists to report on matters that are of relevance to the public.

5. The laws that impose these restrictions have generally been passed as a part of national security law reforms, or law reform related to asylum seekers and refugees. They generally do not meet the threshold of being necessary and proportionate burdens on freedom of speech and the right to privacy, however, meaning that they impose an illegitimate burden on these rights. They also undermine the

accountability facilitated by journalists who report in the public interest and hold politicians and other power-brokers to account.

Australian laws compromising public interest journalism

6. The rights to freedom of expression and to privacy are fundamental rights for a healthy journalism sector. Journalists must be able to report on what they know without the threat of legal sanction. They must also have the assurance that they are able to communicate with their sources confidentially, so that they are not putting their sources at risk when gathering sensitive information in the public interest.

7. There are currently a number of laws in Australia that restrict both the rights to freedom of expression and privacy. These include laws regarding national security and border protection, as well as metadata retention. The *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), the *Australian Border Force Act 2015* (Cth) and the *Telecommunications (Interception and Access) Act 1979* (Cth) all illustrate this trend.

Freedom of expression compromised by Australian laws

8. Section 35P of the ASIO Act creates 'Special Intelligence Operations' (SIOs), around which reporting is prohibited. An SIO is effectively any operation that assists the Australian Security Intelligence Organisation (ASIO) to perform a special intelligence function, which includes gathering, evaluating and communicating intelligence relevant to security; obtaining and communicating foreign intelligence; or co-operating with or assisting other agencies, including law enforcement and other intelligence agencies: s35C.

9. Anyone, including journalists, who reveals information relating to an SIO can be liable for a maximum five-year prison sentence. This provision was amended in 2016 to restrict liability to circumstances in which health, safety, or the ASIO activities, are endangered before criminal penalties would apply. There is no requirement that the endangering ASIO activities have a national security or public safety nexus before this exception enlivens the penalty. Further, there is no public interest

exception, and no requirement that national security be (potentially) compromised by the disclosure. This means that reporting that would not compromise national security, but would be in the national interest (such as on corruption, for example) could still attract a prison sentence of up to five years if it endangered ASIO activities.

10. Further, there is no requirement that ASIO identify an operation as an SIO. This secrecy, combined with such harsh penalties, is likely to give rise to a chilling effect in terms of any reporting that relates to ASIO activities. Public interest journalism can only be compromised in such an environment.

11. The ASIO Act also provides for questioning warrants and questioning and detention warrants, allowing for a five-year prison sentence for disclosing 'operational information' in relation to such warrants. This prohibition applies for two years after the warrant ceases to be in force.[2] 'Operational information' is information that ASIO has or had, or a source of information that ASIO has or had.[3] It is possible that any information relating to these warrants could be caught, giving rise to prison sentences for reporting on matters of genuine public interest, such as mistreatment or intimidation by AISO officers, for example.

12. Outlawing speech in this way has real potential to undermine accountability, as well as conflict with Australia's international obligations relating to freedom of speech. In relation to SIOs, the Parliamentary Joint Committee on Human Rights noted:

> 'as the non-aggravated offence applies to conduct which is done recklessly rather than intentionally, a journalist could be found guilty of an offence even though they did not intentionally disclose information about a SIO. As SIOs can cover virtually all of ASIO's activities, the committee considers that these offences could discourage journalists from legitimate reporting of ASIO's activities for fear of falling foul of this offence provision. This concern is compounded by the fact that, without a direct confirmation from ASIO, it

[2] Section 34ZS.

[3] Section 34ZS(5).

would be difficult for a journalist to accurately determine whether conduct by ASIO is pursuant to a SIO or other intelligence gathering power.'[4]

13. While there is no doubt that restrictions on reporting on the conduct of intelligence agencies can be necessary at times, such restrictions should be the exception rather than the rule. There should be a need to demonstrate that the information does in fact have the potential to compromise national security before penalties might arise. The public interest in releasing the information should also be considered. Ultimately, while always supporting the Commonwealth's role in protecting national security, it is essential that the law is tightly drafted and prohibits only disclosures that have the potential to cause harm, and minimise the risk of concealing facts that the public deserves to know.

14. The *Australian Border Force Act 2015* (Cth) has also been criticised for unduly limiting the ability of immigration workers to reveal misconduct or infringements of legislation that might arise in immigration detention facilities. Section 42 of that Act renders workers who reveal information relating to their workplace liable to a two-year prison sentence, unless an exception applies. These workers may otherwise be inclined to reveal what they know about how the Australian government manages detention centres if they feel it is in the public interest.

15. While the *Public Interest Disclosure Act 2013* (Cth) provides some protection for people who reveal misconduct in breach of the above provisions, the reality is that these protections are limited. Given the severe penalties that exist if the protections for whistleblowers are found not to apply in the circumstances in question, these provisions are unlikely to provide much comfort to journalists wanting to report on government activities in the public interest.

[4] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, 16th Report of the 44th Parliament (2014), [2.108]. This statement was made prior to the 2016 amendments that limited circumstances in which the penalties might apply.

Right to privacy compromised by Australian laws

16. In addition to these burdens on speech, the privacy of journalists is undermined by the *Telecommunications (Interception and Access Act) 1979* (Cth), Part 5-1A. That Part requires telecommunications providers to retain all metadata created as a part of telecommunications for two years, and allows ASIO or 'enforcement agencies' to access this data without a warrant.[5]

17. Metadata is the data that is created around a communication, as opposed to its content. It can reveal substantial personal details, including who the subject is in contact with, how often they are in contact, the length of the contact and, with mobile devices, the location of the individual. This information could compromise a journalist or their sources by identifying who they have had contact with.

18. While there is a provision that limits access to journalists' metadata under this Act, this is restricted to individuals who are 'working in a professional capacity as a journalist' or their employer.[6] This phrase is not further defined in the legislation, although the Supplementary Explanatory Memorandum provides some guidance: '[i]ndicators that a person is acting in a professional capacity include regular employment, adherence to enforceable ethical standards and membership of a professional body'.[7] In an age where the nature of journalism is changing rapidly as technology develops, it is unlikely that this definition would provide sufficient protection to everyone who engages in public interest journalism.[8]

19. In any case, Australian Federal Police (AFP) Commissioner Andrew Colvin revealed that a journalist's metadata had been accessed by an AFP investigator in

[5] Part 4-1, Divs 2-4.

[6] *Telecommunications (Interception and Access) Act 1979*, s180H(a). See generally Part 4-1, Div 4C.

[7] Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, *Supplementary Explanatory Memorandum*, [178].

[8] Many independent news websites publish articles from 'citizen journalists' who are not paid for their work or only engage in paid journalistic work intermittently. Such individuals contribute valuable insights into the national debates. Limiting their privacy limits their ability to engage in public interest journalism.

contravention of the law in April 2017. No repercussions followed this revelation for the investigator who had accessed this information illegally, as it was considered that 'no ill will' was involved. However, the Commissioner acknowledged that what the investigator had seen could not be 'unseen', and that they were considering how much weight to place on the information. The journalist concerned was not informed,[9] and as far as the ALA is aware has not been offered any reparation for the violation of their rights.

20. Incidents of this nature confirm fears that journalists' sources are less secure under this regime, and that journalists will have no way of knowing (a) if their metadata has been accessed and (b) if the access complied with the law.

Human rights and public interest journalism

21. Many of these restrictions may well be contrary both to the constitutional freedom of political communication, as well as Australia's obligations under international human rights law. However, without rulings to that effect, the penalties will continue to be available, and act as a threat, to be used against journalists seeking to publish restricted information in the public interest.

22. Internationally, Australia has agreed to be bound by the *International Covenant on Civil and Political Rights* (ICCPR). Articles 17 and 19 of this Covenant protect the rights to privacy and freedom of expression respectively. The Human Rights Committee, which oversees the implementation of the ICCPR, has clarified what is required by states parties to implement these rights.

Freedom of expression

23. Like privacy, any restriction on the right to freedom of expression in the name of national security must be necessary and proportionate to the risk identified. According to the Human Rights Committee, '[r]estrictions must be applied only for

[9] Luke Royes, 'AFP officer accessed journalist's call records in metadata breach', *ABC News*, 29 April 2017, http://www.abc.net.au/news/2017-04-28/afp-officer-accessed-journalists-call-records-in-metadata-breach/8480804.

those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated'.[10] The Committee highlighted the particular risk that national security laws might pose to the right to freedom of expression, which is protected in article 19 of the ICCPR:

> It is not compatible with [article 19] paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information'.[11]

Right to freedom of political communication

24. The role that journalists play in our political discourse cannot be overemphasised. It is essential that journalists are able to report on matters in the national interest, including the activities of government departments and security agencies. As recognised in a long line of High Court authorities, this reporting is essential for a healthy and robust democracy to thrive.[12]

25. In Australia the High Court has recognised that freedom of political communication is an essential right that underpins our system of representative democracy. Legislative restrictions on this freedom are only permissible to the extent that they are reasonably appropriate and adapted to a legitimate purpose.[13]

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[10] Human Rights Committee, *General Comment No. 34 Article 19: Freedom of opinion and expression)*, adopted at the 102nd session of the Human Rights Committee, 12 September 2011, [22].

[11] Human Rights Committee, *General Comment No. 34 Article 19: Freedom of opinion and expression)*, adopted at the 102nd session of the Human Rights Committee, 12 September 2011, [30].

[12] See, for example, *Nationwide News PL v Wills* (1992) 177 CLR 1; *ACTV PL v Commonwealth* (1992) 177 CLR 106; *Lange v ABC* (1997) 189 CLR 520; *McCloy v NSW* [2015] HCA 34.

[13] *Lange v ABC* (1997) 189 CLR 520.

26. The activities of ASIO forcibly questioning individuals who are not suspected of committing any crime could often be relevant political dialogue. The activities of any government agency should be subjected to scrutiny to ensure that they are operating in line with their mandates and not misusing or exploiting their power. They are also entrusted with spending public funds, for which they should be publicly accountable.

27. Oversight of law enforcement and security agencies is particularly important, given the considerable power that they wield. While there are certainly times that oversight will not be possible for national security reasons, in all other activities oversight, including communication about them, is essential. Any secrecy based on national security must be tightly constrained and genuinely founded in a concern for public safety. Any extension beyond this risks undermining human rights, trust in the government and, ultimately, genuine national security efforts, as well as infringing the freedom of political communication.[14]

28. Given the breadth of the ban on disclosure of activities under Division 3 Part III, which does not require any link with a risk to national security before these significant penalties become available, it is difficult to see how this secrecy provision could be considered reasonably appropriate or adapted to a legitimate purpose, thus giving rise to a risk of conflict with the Constitutional freedom of political communication.

29. Restricting access of journalists and thus their ability to report on conditions in immigration detention is also concerning. A High Court challenge to the *Australian Border Force Act 2015* has been mounted, although no decision has been reached as yet.[15]

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[14] The default position must be in favour of public oversight. If the government imposes restrictions under the guise of national security, with no genuine grounding in a threat to public safety or the life of the nation, over time the population will lose respect for the serious risk that national security challenges can pose.

[15] Following the filing of the claim in the High Court, the Department exempted doctors from the secrecy provisions. It is not clear whether the challenge will proceed or not at this stage. See Nicole Hasham, 'Doctors launch High Court challenge against Border Force gag laws' *Sydney Morning*

Privacy

30. Any restriction on the right to privacy must not be either 'unlawful' or 'arbitrary'. This means it must both be allowed under law, and that the law must comply with the terms of the ICCPR.[16]

31. The UN Special Rapporteur on freedom of opinion and expression has emphasised the impact that inadequate privacy protections can have on journalists and their ability to work confidentially with sources:

> 'In order to receive and pursue information from confidential sources, including whistleblowers, journalists must be able to rely on the privacy, security and anonymity of their communications. An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources. Even a narrow, non-transparent, undocumented, executive use of surveillance may have a chilling effect without careful and public documentation of its use, and known checks and balances to prevent its misuse.'[17]

32. In light of these concerns, the Special Rapporteur made it clear that any restriction on the right to privacy must be 'strictly and demonstrably necessary to achieve a legitimate aim' and be proportionate, and 'not employed when less invasive techniques are available'.[18]

33. In the Australian context, it is clear that protections for journalists must be improved, particularly in light of the revelations that a journalist's metadata had

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Herald, 27 July 2016, http://www.smh.com.au/federal-politics/political-news/doctors-launch-high-court-challenge-against-border-force-gag-laws-20160726-gqdre2.html.

[16] Human Rights Committee, *General Comment No. 16: Article 17 (Right to Privacy)*, adopted at the 32nd session of the Human Rights Committee, 8 April 1988, [4].

[17] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40, [52].

[18] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, A/HRC/23/40, [83].

been illegally accessed earlier this year. It is likely that the most effective means of achieving this would be to increase privacy rights for everyone. Implementing a streamlined warrants-like system to access metadata would be one way to achieve this outcome.

Recommendations

The ALA makes the following recommendations to enhance the ability of journalists to engage in public interest journalism:

- There should be a presumption that all reporting is legal unless any national security threat can be clearly demonstrated, and that secrecy is necessary, proportionate and the least restrictive means of preserving national security. If a secret hearing is required to make this assessment, the interests of the journalist should be represented by an independent advocate;
- The ASIO Act should be redrafted to ensure that any restriction on freedom of expression in the name of national security is necessary, proportionate, and the least restrictive means of achieving that aim. Prison sentences relating to reporting on national security should be reformed and more proportionate punishments implemented, if they are necessary;
- The secrecy provisions in Part 6 of the *Australian Border Force Act 2015* should be repealed; and
- The *Telecommunications (Interception and Access) Act 1979* should be amended so as to prevent access to journalists' metadata without a warrant, which should only be available in the same circumstances as are warrants for the contents of communications. If journalists' metadata is accessed in breach of this rule, they should be informed and adequately compensated, and sanctions imposed as appropriate.