3 October 2014

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

Dear Secretary,

The media organisations that are parties to this correspondence AAP, ABC, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News – welcome the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill).

We note the very short timeframe provided for submissions on the Bill, which is both complex and extensive.

The parties to this submission regard free speech, a free media and access to information as fundamental to Australia's modern democratic society that prides itself on openness, responsibility and accountability.

However, unlike some oft pointed to modern democracies such as the US and UK, Australia does not have similar 'rights' to freedom of communication and freedom of the press as those that are enshrined in the First Amendment of the United States' Constitution and enacted by state and federal laws, and s12 of the *Human Rights Act* respectively.

To safeguard the more threatened freedoms in Australia, there are a number of keystones that are fundamental to ensure journalists are able to do their jobs. These include the ability for journalists to go about their ordinary business and report in the public interest without the risk of being jailed, the protection of confidential sources, protection for whistle-blowers, and the maintenance of an appropriate balance of power between the judiciary, the executive, the legislature and the media.

That being the case, the media organisations that are parties to this submission contend that our producers, editors and journalists do not seek to undermine Australia's national security, nor the safety of the men and women involved in intelligence and national security operations.

Rather, the opposite is the case. Over many years there has been useful dialogue between security officials and producers and editors of media organisations in certain circumstances which have led to considered outcomes. We hold that this approach should continue to be preferred over attempts to codify the decisions relating to news reporting and criminalise journalists for doing their jobs.

We are therefore concerned that the Bill includes provisions that erode freedom of communication and freedom of the media, including but not limited to the issues detailed below.

1. ADVOCATING TERRORISM

Proposed section 80.2C of the *Criminal Code* provides that a person commits an offence if they advocate (defined as 'counsels, promotes, encourages or urges') the doing of a terrorist act and the person engages in that conduct reckless as to whether another person will engage in the act or commit terrorism.

The element of 'recklessness' and the ambiguity with the definition of 'advocates' has the potential to limit discussion, debate and exploration of terrorism in news and current affairs reporting, even in the context of the good faith defence (below).

We recommend that section 80.2C of the *Criminal Code* be amended to include an element of 'intention' in this offence, as required for the other offences set out in Subdivision C.

2. GENERAL EXCEPTION FOR GOOD FAITH REPORTING AND COMMENTARY IS CRITICAL

We note that section 80.3 of the *Criminal Code Act* provides a good faith defence in relation to a number of provisions, including the new offence of "advocating terrorism" in the Bill at proposed new section 80.2C.

Relevantly, section 80.3 states:

> *(1) Subdivisions B and C do not apply to a person who:*
> *…*
> *(f) publishes in good faith a report or commentary about a matter of public interest.*

In discussing the application of this defence to the new proposed section 80.2, the Explanatory Memorandum to the Bill states that:

> *The existence of a good faith defence in section 80.3 for the offence created by new section 80.2C provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.*
>
> *This legislative safeguard, taken together with the ordinary rights common to criminal proceedings in Australian courts, provide certainty that human rights guarantees are not disproportionately limited in the pursuit of preventing terrorist acts or the commission of terrorism offences.*[1]

[1] Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* at paragraphs 139 and 140.

The parties to this submission agree with the sentiments expressed in these paragraphs – that free expression and the ability to report on matters of public interest is vital, and that certain human rights guarantees should not be disproportionately limited in the pursuit of preventing terrorism.

In that context, it is critical that a similar exception allowing the publication of good faith reports and commentary be applied to the provisions regarding the publication and communication of certain material, as discussed below.

3. 'PUBLISHING RECRUITMENT ADVERTISEMENTS' CRIMINALISES LEGITIMATE BUSINESS PRACTICES AND PEOPLE, OVERREACHES AND REQUIRES DEFENCES

New Division 119 of Part 5.5 of the *Criminal Code Act 1995* – section 119.7

The new Division 119 of Part 5.5 of the *Criminal Code Act 1995* addresses foreign incursions and recruitment. Proposed section 119.7 deals with the recruitment of persons to serve in or with an armed force in a foreign country; and proposed subsections 119.7(2) and 119.7(3) address *'publishing recruitment advertisements'*[2] which include news items that may relate to such matters.

- Lack of clarity about the 'news items' that are the source of recruitment or information about serving in or with an armed force in a foreign country

  There is a lack of clarity regarding 'what' it is – particularly at 119.7(3), and particularly as it relates to a news item – that is being targeted.

- Lack of clarity regarding who the offence is targeting

  There is also lack of clarity regarding 'who' the person is, or who is the target of the offence, that is committing the crime by 'publishing' the advertisement or news item.

  It could be envisaged that 119.7(2) and 119.7(3) may apply to – and not be limited to – the following separately, or a combination of any or all:

  - Persons associated with a media company's advertising arm or agency, including people responsible for advertisement bookings; and/or
  - Persons associated with a media company's newsroom or production; and/or
  - A director of a company; and/or
  - Editors, producers, journalists; and/or
  - Other persons that may be a party to any of the publishing/broadcast functions associated with (i) and (ii) of 119.7(2) and 119.7(3) and the above.

- Serious risk to innocent publication of advertisements and news items

  We have grave concerns regarding 119.7(3) and the implications for publication of legitimate advertisements and news.

  This is particularly the case when the advertisements or news items may, on face value, be benign and indeed legitimate, and also lack 'reckless' conduct in their publishing.

[2] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s976_first-senate/toc_pdf/1420720.pdf;fileType=application%2Fpdf, p91

Further, the relevant information (such as location or travel information) or purpose (such as recruitment) of such advertisements or news items may only be known after the fact – and possibly still not known by the advertiser, or the person taking the ad booking, or the journalist or the editor. That is, it may only be known some time afterwards that the purpose of, or information contained in the ad or news item, or the location or place indicated in the ad or news item, or the travel information in an ad or news item, was instructive about or related to, serving in any capacity in or with an armed force in a foreign country.

To illustrate, if a broadcaster or publisher was to run an advertisement or a news item about a prayer meeting or a picnic, and it comes to pass that the event – which may or may not have been central to the advertisement or story – was used as cover for a recruitment drive or to disseminate information about, or direct people to another source of information about possible opportunities to serve in armed forces in foreign countries, then it is possible that any or all people involved in broadcasting or publishing the advertisement or story would be imprisoned for 10 years. This would be the case even if the conduct was not 'reckless.'

Such measures will almost certainly impact on the free flow of information in society – especially when the parties to the advertisements and news items are acting in good faith and communicating in the public interest. The serious implications of such a broad provision for news gathering and reporting, and also for legitimate business interests, cannot be overstated.

We recommend that 119.7(3) be removed from the Bill.

- Lack of defence to publishing recruitment advertising – no element of 'recklessness'

We note here that our concerns with subsection (3), which does not require the conduct to be *'reckless'* are heightened when there is no defence available to 'publishing recruitment advertisements' at subsections (2) and (3).

If the Government is minded to not remove 119.7(3) from the Bill, we recommend that the Government include defences for acts done in good faith and news reporting in the public interest at 119.7(4).

Such a provision could read as follows:
(4) Subsections (2) and (3) above do not apply to a person:
(a) who publishes in Australia:
(i) an advertisement in good faith; or
(ii) a report or commentary about a matter of public interest in good faith.

- Inconsistent penalties

We also note that the penalty for all 3 provisions at section 119.7 is imprisonment for 10 years. Specifically:

- Subsection (1) – Imprisonment for 10 years for someone that recruits (119.7(1) another person to serve in any capacity in or with an armed force in a foreign country;

- Subsection (2) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that is for the purpose of recruiting persons to serve (in any capacity) with an armed force in a foreign country; and
- Subsection (3) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that contains information about how to serve (in any capacity) with an armed force in a foreign country.

The lack of 'sliding scale' in the application of penalties seems disproportionate, particularly in the application to subsections (2) and (3) where the penalty applies to the indirect persons that may indirectly be associated with the 'reckless' conduct of publishing an ad or news item (at subsection (2)) and without 'reckless' conduct (at subsection (3)) relative to the same penalty applying to those directly responsible for recruiting foreign fighters (at subsection (1)).

We recommend that the defences outlined above are essential to differentiating the potential role of persons who may be inadvertently implicated in 'publishing recruitment advertisements' – recklessly or not – caught by the offences in undertaking their legitimate jobs in good faith and /or in service of the public interest in a democratic society.

We also recommend that the Government consider a sliding scale of penalties. This is in addition to the necessity to include defences as recommended above.

Notwithstanding these recommendations, our overarching recommendation is for subsection (3) to be removed from the Bill. In the alternative, the provision should include an exception for good faith reporting, commentary and advertisements.

- <u>Low threshold of subsection 119.7(2)</u>

  We are concerned with the low threshold of subsection 119.7(2), in that it would only need to be proved that a person – including but not limited to a director of a company, an editor, a journalist, a person responsible for advertisement bookings, a combination of any or all of these people, and possibly additional persons that may be a party to an advertisement or a news item; where 'consideration' was provided – was 'reckless' as to the purpose of the advertisement or news item (that being to recruit persons to serve in any capacity in or with an armed force in a foreign country).

We recommend that *'reckless'* be removed from 119.7(2)(b). We recommend that 'intention' be used instead.
Therefore, we recommend that 119.7(2)(b) be amended so that it reads: *'the person intended the publication of the advertisement or item of news to be for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country.'*

- <u>The breadth of 'procured by' and 'or any other consideration' infringes on legitimate news gathering</u>

  Both 119.7(2)(a)(ii) and 119.7(3)(a)(ii) stipulate that an element of the offence is that the person publishes in Australia *'an item of news that was procured by the provision or promise of money or any other consideration.'*

It is unclear from whom the promise of money or any other consideration needs to come from. For example, a news item that is licensed or purchased by a media organisation from a news agency and subsequently broadcast could be captured by this provision.

'Any other consideration' could be satisfied by buying a source, confidential or otherwise, a cup of coffee, or paying a taxi fare or train ticket – all of which are legitimate aspects of news gathering.

Also, and similar to comments made above, it is unclear what behaviour this qualification is targeting.

In the absence of clarity, combined with the breadth of the element and the fact that it would apply to legitimate news gathering, in our view the proposed element overreaches and infringes on legitimate news gathering processes.

We recommend that 'any other consideration' be deleted from 119.7(2)(b) and 119.7(3)(b).

4. DEFINITION OF JOURNALIST

New Division 119 of Part 5.5 of the *Criminal Code Act 1995* – section 119.2

Description of journalist requires amendment

The new division 119 of Part 5.5 of the *Criminal Code Act 1995* addresses foreign incursions and recruitment.

The signatories to this submission acknowledge the inclusion of an exception for journalists (at 119.2(3)(f)) to the offence of entering, or remaining in, declared areas (at 119.2(1)). Specifically, 119.2(3)(f) states that the exception applies if the person enters, or remains in the area for the purpose of:

> *'making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist.'*[3]

We are concerned that the terminology *'in a professional capacity'* is inconsistent with other well-established and well understood Commonwealth legislation which applies to journalists including at section 126G of the *Evidence Act 1995* whereby the term 'journalist' is not qualified, but is defined.

Additionally, we note that as specified in the legislation at 119.2(3) it is the defendant that bears the evidential burden in relation to the matter in that subsection. In our view, it would therefore be appropriate that the defendant bear the burden of proving that they entered, or remained in the area for the purpose of making a news report of events in the area, where they were working as a journalist or assisting another person working as a journalist.

[3] The Bill, p83

We recommend, having regard to the evidential burden, that the qualification *'in a professional capacity'* is not required and therefore both references to should be removed from 119.2(3)(f) and also references to this qualification in the Explanatory Memorandum at [223] and [833].

5. JAILING JOURNALISTS FOR DOING THEIR JOBS

Amendment to the *Crimes Act 1914* to include section 3ZZHA – Unauthorised disclosure of information

The insertion of section 3ZZHA to the *Crimes Act 1914* (the Crimes Act) would see journalists jailed for undertaking and discharging their legitimate role in our modern democratic society – reporting in the public interest. Such an approach is untenable. We recommend that this provision not be included in the legislation.

If, however, the Government is not minded to remove the provision, we request that a public interest exception be included at proposed section 3ZZHA(2).

Given that the Explanatory Memorandum of the Bill states that this '*mirrors a similar offence for disclosing information relating to the controlled operation (section 15HK of the Crimes Act)*'[4] we request that Bill be amended to incorporate a similar change to section 15HK of the *Crimes Act 1914*.

We recommend that 3ZZHA be removed from the Bill.

If the Government is minded to not remove 3ZZHA from the Bill, we recommend that the Government include a defence for a report that is in the public interest at proposed section 3ZZHA(2), and the Bill be updated to include an amendment to section 15HK of the *Crimes Act 1914* to provide for a defence for a report that is in the public interest.

6. LACK OF PROTECTION FOR WHISTLE-BLOWERS

Amendment to the *Crimes Act 1914* to include section 3ZZHA – Unauthorised disclosure of information

The parties to this submission note that the insertion of section 3ZZHA to the Crimes Act also entrenches the deficient protections for whistle-blowers regarding intelligence information. As a keystone of freedom of communication, we draw attention to this matter and highlight that it further erodes freedom of speech and freedom of the press in Australia.

Specifically, section 3ZZHA makes it a criminal offence punishable by jail for anyone, including a whistle-blower, disclosing information that relates to an application for; or the execution of; or a report in relation to; or a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in relation to; a delayed notification search warrant.

Therefore the effect of section 3ZZHA would likely be to discourage whistle-blowing – particularly in the absence of protections and the real risk of jail – further impairing the lack of protection for persons driven to resort to whistle-blowing in the public domain.

[4] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_d5aff32a-9c65-43b1-a13e-8ffd4c023831/upload_pdf/79502em.pdf;fileType=application%2Fpdf at [643]

7. JAILING JOURNALISTS AND A LACK OF PROTECTION FOR WHISTLE-BLOWERS

In combination, the two substantial issues outlined above means that a whistle-blower with no other avenue than whistle-blowing in the public domain and the person/s who make it public – most likely a journalist doing their job and reporting in the public interest – will face time in jail. As we stated in our previous submission to the Committee regarding the *National Security Amendment Bill (No 1) 2014*, such an approach does not serve a free and open democratic society well.