Media, Entertainment & Arts Alliance (MEAA)

submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into

the *National Security Legislation Amendment Bill (No. 1)* 2014

The Media, Entertainment & Arts Alliance (MEAA)

MEAA is the largest and most established union and industry advocate for Australia's creative professionals. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians. MEAA's Media Section members are bound by the MEAA *Journalist Code of Ethics*.

Introduction

The Media, Entertainment & Arts Alliance (MEAA) is concerned about many elements of the *National Security Legislation Amendment Bill (No. 1) 2014* – particularly the criminalisation of legitimate journalistic activity and the intrusion of invasive surveillance powers as journalists and their employers carry out their duties.

MEAA would like it noted that it has already made a submission to the Senate Legal and Constitutional Affairs References Committee inquiry comprehensive revision of *Telecommunications (Interception and Access) Act 1979*. MEAA has also appeared at its public hearings.

Given the *National Security Legislation Amendment Bill (No. 1) 2014* proposes several changes in concert with the *Telecommunications (Interception and Access) Act 1979* MEAA believes our concerns should be considered jointly, as reflecting the possible implications for amendments to both pieces of legislation.

MEAA believes our concerns about the threats to press freedom and media rights must be considered in any additional proposed amendments to legislation or new laws involving national security, anti-terror or intelligence gathering and surveillance. To fail to do so would represent a fundamental assault on the vital role of the media as the fourth estate and would have a chilling effect on journalists and their journalism.

Journalists in a democracy

Journalists play a crucial role in a healthy, functioning democracy. MEAA believes that any moves to increase the level of surveillance of journalists and their sources by intrusive means harm the ability of journalists to scrutinise, speak truth to power, hold institutions and individuals to account, to expose corruption, to champion and campaign for important issues and, just as importantly, to gain and maintain the trust of our audience.

Journalists' sources

Journalists rely on sources of information to carry out these duties. At times, those sources request anonymity – perhaps because they are in fear or could be subject to some form of violence, harassment or intimidation, particularly if they are a "whistleblower".

The definition of a whistleblower includes a person who discloses information he or she reasonably believes evidences: a violation of any law, rule or regulation; an abuse of authority; a substantial and specific danger; a gross mismanagement to public health; a gross waste of funds; a substantial and specific danger to public safety; a threat to the public interest.

Since 1944 MEAA's members working as journalists have operated under MEAA's *Journalist Code of Ethics*. To this day, all MEAA Media Section members, currently some 6000 professional journalists, are bound by the code.

The code states:

> "Respect for truth and the public's right to information are fundamental principles of journalism. Journalists describe society to itself. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember. They inform citizens and animate democracy. They give a practical form to freedom of expression. Many journalists work in private enterprise, but all have these public responsibilities. They scrutinise power, but also exercise it, and should be accountable. Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities. MEAA members engaged in journalism commit themselves to
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> *Honesty*
> *Fairness*
> *Independence*
> *Respect for the rights of others."*[i]

Clause 3 of the code outlines the ethical obligations of journalists towards their sources. It details the key principle of journalist privilege relating to the anonymity of a confidential source. The clause says:

> "3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. **Where confidences are accepted, respect them in all circumstances.**"[ii]

This is a key ethical principle for the journalist profession, recognised and acknowledged the world over: journalists do not reveal the identity of a confidential source. And despite numerous legal proceedings, threats, fines and jail terms, journalists will always maintain this crucial ethical obligation and responsibility. To do otherwise is unthinkable, not least because it would destroy the reputation of the journalist but it would undermine the essential trust journalists must have with their sources, and with their audience.

Journalists and "shield" laws

In response to the legal pressures applied to journalists, seeking to compel them to reveal their confidential sources and break this ethical obligation, journalists and their unions have been lobbying for "shield" laws – laws that would allow journalists to be shielded from contempt of court proceedings if they are called upon to reveal a confidential source.

These shield laws are an acknowledgement that journalists are ethically obliged to never reveal a confidential source and, despite the threat of jail terms, fines and criminal convictions for contempt of court, they will continue to protect the identity of a source and will also protect the source's information if that could identify the source were it to be revealed. The "shield" accepts this ethical undertaking and seeks to ensure that journalists are not punished for observing that obligation.

In Australia, shield laws have been steadily enacted in most jurisdictions. The current federal Attorney-General George Brandis was a leading early proponent of a federal shield law that became, with amendments, the *Evidence Act (Journalist Privilege) 2011*.

Having established a Commonwealth template for the recognition of the principle of journalists' privilege and established a "shield" to protect journalists from punishment for refusing to disclose the identity of a source, most other legal jurisdictions have followed the example by enacting a range of shield laws of their own modelled to varying degrees on the Commonwealth's law. Only Queensland, South Australia and the Northern Territory currently do not have a shield law.

In MEAA's 2014 state of press freedom report entitled *Secrecy and Surveillance*, Peter Bartlett, partner with law firm Minter Ellison, wrote:

> "The federal government and the state and territory governments of New South Wales, Victoria, Western Australia and the Australian Capital Territory have amended their respective Evidence Acts to introduce shield laws. These laws are a win for the protection of free speech in Australia and reinforce the long-standing argument of journalists that they have to protect the confidentiality of their sources.
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> However, it is important to note that these protections are not absolute. In all jurisdictions, the journalist must have promised anonymity to the source in order for the protection to be utilised. A court will also be able to decide against the applicant if it finds the public interest in disclosure outweighs any likely adverse impact on the informant or the ability for the news media to access sources of facts. Furthermore, state legislation defines "journalist" narrowly as someone "engaged in the profession or occupation of journalism", essentially excluding amateur bloggers from being covered by the protections…

> I have personally represented the media in eight cases in the last 18 months. We have successfully avoided seven applications, with one still pending.
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> There is still room for improvement. The legislation lacks uniformity, with the multiple jurisdictions diverging on important issues such as the definition of a journalist and whether the law covers subpoenas. In a technological era where national publication is ubiquitous, certainty is more important than ever in ensuring the freedom of the press."

In February 2013, MEAA called on federal, territory and state Attorneys-General to introduce uniform shield laws to ensure that powerful people cannot go jurisdiction shopping; and to properly protect journalist privilege through consistent, uniform legislation in every jurisdiction. The matter was due to be discussed in October 2013 by the council of Attorneys-General. It was not discussed.

MEAA wrote to new Attorney-General George Brandis on September 25 seeking a meeting to discuss several issues including shield laws. No response was received.

In short, the majority of legal jurisdictions, including the Commonwealth, recognise the principle of journalist privilege – the ethical obligation journalists have to protect the identity of their confidential sources. MEAA believes the amendments proposed in the *National Security Legislation Amendment Bill (No. 1) 2014* are at odds with this legal principle.

Section 35P and the protection of sources

The widespread data surveillance revealed by Edward Snowden, the subsequent treatment of whistleblowers Chelsea Manning and Snowden, and the detaining of David Miranda, the partner of a journalist working for the *Guardian* newspaper Glenn Greenwald, at Heathrow Airport have now created an environment that requires journalists to be mindful of how they interact with confidential sources, protect both the confidential information and their journalism they are preparing for broadcast or publication, and how they can protect their sources, colleagues, family and friends.

In terms of specifics in the Bill, MEAA is concerned about section 35P "Unauthorised disclosure of information" that relates to penalties applied to a person disclosing information about a special intelligence operation. The penalties in the Bill are jail terms of between five and 10 years.

The Explanatory Memorandum makes it clear that the offences outlined in section 35P would apply to "disclosures by any person" and "persons who are recipients of unauthorised disclosure of information, should they engage in any subsequent disclosure".

MEAA is concerned that this amendment would capture legitimate reporting by journalists and media organisations of activities in the public interest. In doing so, it would criminalise journalists and journalism. It would undermine the vital role they play in a healthy democracy of scrutinising government and its agencies. For example, this legislation would have made the legitimate reporting of the phone-tapping of the wife of Indonesian President Susilo Bambang Yudhoyono illegal – and the consequences of that reporting would be jail terms of between five and 10 years.

MEAA notes that the second reading speech for the Bill says: "As recent, high-profile international events demonstrate, in the wrong hands, classified or sensitive information is capable of global dissemination at the click of a button. Unauthorised disclosures on the scale now possible in the

online environment can have devastating consequences for a country's international relationships and intelligence capabilities."

What the second reading speech fails to acknowledge is that the Snowden and WikiLeaks revelations (to which it alludes) also revealed widespread illegal activity by intelligence agencies and other arms of government. The revelations exposed thousands of breaches of privacy rules and the widespread misuse of information – activities legitimately exposed as whistleblowing under the definition above. Furthermore, this whistleblowing was in the public interest – the public became aware of previously unknown widespread surveillance and metadata capture, usage and sharing by the government agencies of several nations.

Legitimate journalism played a crucial role in making the public aware of what governments have been doing in the name of the people. Whistleblowers speaking to the media in the public interest and the subsequent reporting by the media do not mean the information was "in the wrong hands" simply because it was made publicly available. It would be difficult to dispute that the public interest has been well served by these disclosures and that people have felt, rightly, that governments and their agencies should be subject to reform, scrutiny and monitoring of their powers, activities and use of the information they glean.

Penalties

As MEAA has written several times in our annual State of Press Freedom reports[iii], we are concerned at the imbalance in the penalties written into several acts of "anti-terror" legislation. The second reading speech states: "In addition, the Bill introduces new maximum penalties of 10 years' imprisonment for existing offences involving unauthorised communication of intelligence-related information, which at two years' imprisonment are disproportionately low. The higher maximum penalties better reflect the gravity of such wrongdoing by persons to whom this information is entrusted."

MEAA believes that these penalties could be used to intimidate, harass and silence the legitimate journalistic scrutiny and reporting on the activities of governments and their agencies.

As we have noted[iv] before, there is a serious disconnect between penalties in some areas of anti-terror legislation and the penalties handed down to journalists. For example, the *Anti-Terrorism Act* stipulates that an ASIO official who knowingly contravenes a condition or restriction of a warrant faces a two-year jail term. But if a journalist reports this abuse of power by the ASIO official, the journalist risks a five-year jail term – more than double the penalty imposed on the person who commits the original offence.

MEAA believes the penalties outlined in the Bill are unfairly weighted against legitimate reporting by journalists of events in the public interests. Journalists reporting legitimate news stories in the public interest should never be punished for doing their job – whether they are doing that job in Egypt like our colleague Peter Greste or in Australia.

As Prime Minister Tony Abbott, a former journalist, said in relation to the Greste case: "Peter Greste would have been reporting the Muslim Brotherhood, not supporting the Muslim Brotherhood. Because that's what Australian journalists do."[v] That distinction about the work that journalists do needs to be considered by the Australian Parliament and recognised in this Bill.

Third parties and computers

Elsewhere in the Bill, journalists and their employers can be determined to be a "third party" if they interview persons of interest to ASIO.

Consider the example of Australian barrister Bernard Collaery and his allegations that ASIO agents raided his Canberra office and seized electronic and paper files relating to the alleged bugging of the Timor Leste's government's Cabinet offices during negotiations for a treaty relating to the Timor Gap. Are journalists who interview Mr Collaery about this story, or any other story, now to be considered a "third party" and subjected to the additional powers of surveillance, investigation and punishment outlined in the Bill?

The Bill's new definition of "computer" (to include a computer system, or a network) has very grave implications for people and organisations designated "third parties". As a third party, the journalist's computer and their media organisation's computer network could be monitored, have information taken, and be "disrupted".

The Bill's overview regarding intelligence collection powers states the Bill enables ASIO to: "obtain intelligence from a number of computers (including a computer network) under a single computer access warrant, including computers at a specified location or those which are associated with a specified person" and the Bill's amendments also alter "the current limitation on disruption of a target computer". Under the Bill's proposed amendments "disruption" can include the addition, copying, altering or deletion of data if ASIO deems it necessary. This can happen to a third party's computer and/or communications in transit.

For journalists needing to protect confidential sources, and for media organisations operating computer networks involving stories being prepared for broadcast or publication, this is an appalling threat to press freedom and seriously undermines the journalist's ethical obligations.

The intrusion of surveillance software, devices and other technologies on media organisations and the power to monitor, alter, copy, or disrupt is also an outrageous threat to press freedom by the state.

For journalists, if their ability to respect and maintain confidences is eroded then the trust between sources and journalists, and between journalism and the audience, is lost.

Safeguards abandoned

There has been a spate of anti-terror legislation introduced in Australia over more than a decade. But increasingly, safeguards are being removed while at the same time powers are being increased leading to an increased susceptibility that those powers could be misused due to lack of independent oversight.

MEAA is concerned that crucial safeguards are being abandoned under the Bill. For instance, surveillance devices will not need a warrant according to the Bill. There are "new provisions providing for the use of a listening device, an optical surveillance device and a tracking device without a warrant".

There are also new provisions on raids (including access to third party premises). Given media organisations have been subjected to police raids on occasion in the past, the changes also represent an attack on press freedoms. Too often, raids are conducted that disrupt entire media businesses but also go on "fishing expeditions" for information by trawling through individuals' and corporate

files and systems that unnecessarily exposes the safety of confidential sources and their information. The February 2014 raid by almost 40 armed AFP offices on Seven West's media offices, or the 2008 raid by 27 fraud squad officers on *The Sunday Times*, are cases in point of a heavy-handed approach that can be applied by authorities who fail to appreciate the press freedom implications, and the journalist-confidential source concerns, that are paramount in a democracy.

The Bill proposes amendments that would:

- enable warrants to be varied;
- facilitate the Director-General of Security to authorise a class of persons able to execute warrants rather than listing individuals;
- authorise access to third party premises, and
- use force to carry out the activities set out in the warrant, not just on entry.

MEAA is concerned these powers could be misused against journalists and media organisations by permitting their homes and workplaces to be subjected to extraordinary powers of surveillance and search permitted under the Bill without proper safeguards, protections and monitoring.

Summary

MEAA urges the Australian Parliament to carefully consider the threats to press freedom and media rights in the *National Security Legislation Amendment Bill (No 1) 2014*. The implications not just for whistleblowers seeking to legitimately shed light on wrongdoing but also for journalists and media organisations whose work could be criminalised are grave. The assaults on press freedom that would arise from this legislation are real and pose a threat to the fourth estate's ability to operate in a manner expected in a healthy, functioning democracy.

Not only does the Bill threaten journalist privilege, it could also expose journalists to ethics complaints should those confidences be broken not by the journalist *per se* but by the identity of sources and their information being discovered by government agencies. This need not be sources that have any relation to the matters of interest to the government agency – it could be an inadvertent discovery of any news story being worked on by a journalist who falls within the powers granted to the agency.

The Bill in its current form will have a chilling effect on legitimate journalism in Australia. That outcome is the consequence of the unseemly haste associated with the creation of this Bill without proper consultation with affected parties or consideration of its implications on the broader community.

MEAA urges the Parliament and the Australian Government to take all steps to ensure that media rights and press freedoms are understood, protected and observed in all legislation it is considering relating to national security and anti-terror powers including intelligence gathering and surveillance.

References

[i] MEAA *Journalist Code of Ethics*) http://www.alliance.org.au/code-of-ethics.html
[ii] *Ibid* MEAA emphasis
[iii] http://www.pressfreedom.org.au/administration/press-freedom-report-archives
[iv] *ibid*
[v] *The Australian*, June 23 2014 http://www.theaustralian.com.au/media/tony-abbott-pleads-peter-grestes-case-directly-with-egypts-president/story-e6frg996-1226963400419