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## **SUBMISSION BY THE ALLIANCE FOR JOURNALISTS' FREEDOM TO THE ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE INQUIRY INTO PRESS FREEDOM.**

### **WHO WE ARE**

*The Alliance for Journalists' Freedom* is an advocacy group. We are independent of any business or political interests, formed in 2017 to advocate for media freedom both in Australia and across the Asia-Pacific region.

### **INTRODUCTION**

A free, independent media is essential to a functioning democracy. In a democracy like Australia, the media provides important transparency, keeping track of those in power, for the public.

We agree, for the most part, the government and the public service behave with professionalism and integrity; however, an independent media outside the traditional three pillars of government (executive, legislature and judiciary) helps to keep the system honest.

A free press also acts as a whistle-of-last-resort for people exposing abuses of power, corruption and mismanagement.

Journalists cannot properly fulfil that important role if their capacity to investigate the inner workings of government and protect their sources is unnecessarily limited.

We endorse the updating of laws to give our security agencies the capacity to deal with evolving threats. That is clearly necessary. We believe, however, that if those laws either explicitly or implicitly undermine another of our key democratic pillars, then national security is not served. As both security and press freedom are essential parts of a functioning democracy, both must be protected.

### **DIMINISHED TRUST**

Central also is the issue of trust. While the Alliance for Journalists' Freedom accepts that the Australian Federal Police may believe it was acting in accordance with the law in conducting their raids on the News Corp journalist Annika Smethurst and the ABC offices, their conduct was widely interpreted as being politically motivated, and in the process it undermined public trust in all parties, namely the AFP, the media and the government.

Any attempt to resolve the crisis therefore must take into account the need to restore trust and confidence in those parties.

The AJF urges all sides of government to assess this issue for what it is: one that goes beyond the media, security forces, or politics, to trust. Trust is the essential aspect of any society.

The way the Government responds to this issue will set both a benchmark and a trajectory for Australia, our region and the world.



## **AJF INITIATIVES**

To restore trust the AJF, after the June AFP raids, called for the establishment of a Taskforce to bring together people opposing views, to better understand each other and to search for common solutions. Justification for this is below.

Earlier, to strengthen democracy, in February this year the AJF called for the introduction of a Media Freedom Act. Justification for this shield law is also below.

## **BACKGROUND**

The AJF was formed following the jailing for 400 days of Peter Greste in Egypt. Greste and two colleagues who worked with the Greste family for his release, Gilbert + Tobin partner, Chris Flynn, and former journalist and communication specialist, Peter Wilkinson, set up the AJF to:

- Work with Australian governments to strengthen legislation to protect journalists' freedom;
- Campaign to increase the ability for journalists in the APAC to work with freedom and safety.

In January 2019, the AJF began working with Gilbert + Tobin researchers to examine the way Australia's legal code affects the work of journalists, and in May – a month before the AFP raids – we published a White Paper outlining the findings.

Essentially, the White Paper anticipated the way security legislation passed since 9/11 could be used to target legitimate journalism, undermining one of the key pillars of our democracy. It also articulated seven ways in which the law could be amended to support press freedom, without weakening the capacity of security agencies. The White Paper is attached for reference.

The AJF is not an extension of the media in Australia. The AJF community includes lawyers, academics, journalists, traditional media organisations, new media, and other influencers.

As well, the AJF has an MOU with the University of Queensland to conduct research on areas of joint interest.

Our objective is to work constructively with governments., media companies, lawyers and academics to find solutions to recognised press freedom issues.

### **1. INQUIRY TERMS OF REFERENCE**

*(a) disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation;*

The AJF recognises and agrees that key branches of government must be able to operate with a degree of secrecy to protect the operational integrity of our security services, commercially sensitive information, and the privacy of individuals. However, we also believe that it is essential to protect the media's role as a whistle of last



resort, and as a watchdog over government and other powerful people on behalf of the public. That implies an appropriate balance between these two essential elements of our democracy – the secrecy demanded by security services, and transparency required by the media.

To enable this, we make the following recommendations:

**i. Provide exceptions from prosecution for journalists over national security offences, rather than merely defences.**

The existing News Reporting Defence and new protections should operate as exceptions to offences in circumstances where journalists are engaged in legitimate journalistic work.

Under such amendments, any law enforcement agency seeking a warrant would be required to demonstrate to a judge why that exception should *not* apply.

This ensures the burden of proof falls on investigators, and restores the presumption of innocence for journalists. It would deter law enforcement agencies from seeking to prosecute without a clear case that the journalist in question has engaged in illegal conduct.

Importantly, it would limit the potential for the threat of prosecution to gag journalists and thus undermine our democracy.

**ii. Allow journalists to report on intelligence and security agency misconduct that does not impact national security.**

National security organisations are just as vulnerable to misconduct as any other branch of government. Arguably more so because a lot of their work is behind closed doors.

Where a national security organisation engages in misconduct, the exposure of which poses no clear risk to national security, journalists and their sources should be able to report on it without the threat of prosecution.

**iii. Amend legislation so computer access warrants and assistance orders may not be issued to access data obtained by a journalist in the legitimate course of their work, unless the following conditions are satisfied:**

- a) the warrant is required to mitigate the immediate danger to a person's safety; and
- b) there is no other way to obtain the data.

**iv. Amend shield laws in both Commonwealth and State legislation via COAG so that:**

- a) in civil matters, journalists may refuse to disclose information that would reveal their sources; and
- b) in matters regarding law enforcement and national security, journalists be given



the right to refuse the disclosure, unless the authority seeking the disclosure can establish that the disclosure is necessary to protect an immediate threat to a person's safety and that the threat could not otherwise be averted.

*(b) the whistleblower protection regime and protections for public sector employees;*

Whistleblower protections must be enhanced to ensure the appropriate transparency and accountability of our democratic institutions. Without making these enhancements, we will further instil a culture of secrecy and silence in the face of possible corruption. The AJF provides three recommendations to enhance whistleblower protections in our White Paper. These recommendations are:

- I. that disclosures made in the public interest by whistle-blowers to journalists are protected, regardless of any steps by the organisation that is the subject of the disclosures to address its misconduct<sup>1</sup>;
- II. the concept of 'disclosable conduct' as a requirement for public sector disclosures is abolished; and
- III. a court process that regulates whistle-blower disclosure to journalists is established.

Whistle-blowers and journalists that speak out in the public interest should be protected by legislation establishing a court process that regulates whistle-blower disclosure to journalists. This should be proactively subject to a presumption that misconduct should be disclosed, unless the security agency concerned can establish on the balance of probabilities that the disclosure would pose a risk to national security or the operational effectiveness of the security agency concerned.

*(c) the adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information;*

The AJF is not adequately informed about the internal referral practices of the Australian Government, and so not in a position to make any specific comments or recommendations. However, we note that after the AFP raids in June, there was considerable public discussion about the way the investigations *appeared* to be politically motivated, and so undermined public trust and confidence in the AFP. Whether it is true or not, perception matters, and any steps taken by the government must address the perception that referrals are politically motivated.

*(d) appropriate culture, practice and leadership for Government and senior public employees;*

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<sup>1</sup> This recommendation does not apply to whistle-blower disclosures in the intelligence and national security sectors. In those contexts, the interests of public accountability and national security must be carefully balanced – see recommendation 2 in the AJF White Paper.



This term of reference is beyond the scope of the AJF's mandate.

*(e) mechanisms to ensure that the Australian Federal Police have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters;*

This is beyond the scope of the AFJ's expertise and mandate, however we recognise the critical need for strong, independent security services. It is our belief that the recommendations we have provided will serve to strengthen, rather than weaken, both the security forces and the press by creating more clarity and trust between both those parties, the Government and the public.

*(f) any related matters.*

**I. The Alliance for Journalists' Freedom recommends a Taskforce be established post inquiry, to ensure trust is rebuilt and a more cohesive democracy is achieved.**

We welcome this inquiry. However, a separate and independent body should be established to enquire into, and make ongoing recommendations on, the issues raised above. A real or perceived lack of independence in any body doing so will fail to reduce suspicion between security forces and journalists. It will also fail to rebuild trust, which is the core of the problem.

A Taskforce, made up of representatives of the security services, the government, traditional media, new media, law and academia, and established as an ongoing action-group post the inquiry, would rebuild both the cohesiveness of these institutions and the public's trust in them. This enables people with opposing views to understand others' views and search for mutually acceptable solutions.

The importance of this has been demonstrated during the PJCIS hearings, which we believe hardened divisions between the security forces and the media. We believe the PJCIS hearing further damaged the reputations of those tasked with keeping our democracy strong.

In a time of changing roles and responsibilities, and increasing global and regional instability, repairing these relationships and ensuring their longevity will take time and ongoing collaboration.

**II. Introduce a Media Freedom Act.**

Finally, the purpose of the security forces and the press, at their most basic essence, is the same: to enable, support and protect democracy. It follows then, that their actions must serve to uphold that purpose.



A Media Freedom Act will aid the media's ability to do this, by enshrining press freedom in legislation and more clearly define its democratic role. It would clarify the boundaries between appropriate transparency and necessary secrecy.

An Act of this kind will serve as both a restraint on legislative overreach, and a yardstick for the courts in cases involving the media. It can be introduced through Federal legislation under the External Affairs power of the Constitution, giving effect to Article 19 of the International Covenant on Civil and Political Rights.

The notion of 'support' is a positive one, so without this principle being positively enshrined, Australia cannot genuinely support press freedom.

## **CONTACT**

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