10 December 2015

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

Dear Committee Secretary,

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and The West Australian (together the Joint Media Organisations) – welcome the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Counter-Terrorism Legislation Amendment Bill (No.1) 2015* (the Bill).

As the Committee is aware, the Joint Media Organisations have previously expressed concerns regarding particular provisions in previous national security bills. As we have expressed previously, we 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.

The Bill is constituted of many schedules that amend existing Acts. Out comments are focused on provisions in Schedule 9 – telecommunications interception; Schedule 10 – surveillance devices; and Schedule 11 – offence of advocating genocide.

**DEFERRED REPORTING**

Both Schedule 9 and Schedule 10 – that amend the *Telecommunications (Interception and Access) Act 1979* and *Surveillance Devices Act 2004* respectively – introduce 'deferred reporting' provisions relating to the issuing/existence of warrants to monitor a person, via covert intercept and/or surveillance, who is subject to a control order.

These new 'deferred reporting' arrangements at section 50A of the SD Act and section 103B of the TIA Act are described in the Explanatory Memorandum to the Bill (EM), that they:

> *'permit the chief officer of an agency to defer public reporting on the use of a monitoring warrant in certain circumstances, balancing the public interest in timely and transparent reporting with the public interest in preserving the effectiveness of this covert power'*[1]*;* and
>
> *'permit the chief officer of an agency to delay public reporting on the use of interception in relation to a control order in certain circumstances. Due to the small number of control orders which are issued, immediate reporting of any warrants for interception may enable an individual to determine whether they are the subject of interception. If a person knows, or suspects that there is an interception warrant in place, they are more likely to be able to modify their behaviour to defeat those lawful surveillance efforts. Also, if a person knows or suspects that their communications are not being monitored, the deterrence value of the control order is limited to the extent that the person*

[1] At [142], Explanatory Memorandum of the Bill, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s1023_ems_1cae0288-701f-445f-9cea-0e9d371374bb/upload_pdf/504234em.pdf;fileType=application%2Fpdf

> *believes they can engage in proscribed activity without risk of detection. Deferred reporting balances the public interest in timely and transparent reporting with the need to preserve the effectiveness of control orders to prevent individuals from committing terrorist acts."*[2]

We do not make any comment on the justification for such 'deferred reporting' provisions. However, we do not accept that the provisions will 'balance' the public interest in the free flow of information with security considerations. In principle, we believe these are two contrary interests and the clear choice is being made to prioritise one over the other. The public discourse surrounding national security laws which impinge on the freedom of the media needs to acknowledge this compromise, rather than suggesting a balance has been achieved.

In terms of the substantive provisions, we are concerned by the lack of oversight on the decisions to defer reporting. We are not questioning the decision-making ability or judgement of the chief officer of the agency; rather we would like to ensure that there is an oversight body appointed to ensure that decisions to defer reporting are made on appropriate grounds.

Further, the new 'deferred reporting' provisions include provisions at section 50A(4) if the SD Act and section 103B(4) of the TIA Act – addressing the inclusion of the previously 'deferred information' in subsequent reports. It should be noted that the legislation as drafted does not require the deferred information to be included in the next report by default, and allow for the chief officer to assess otherwise and enable another 'deferral' option. Rather the legislation is drafted such that if information has been deferred from being reported, if the chief officer is subsequently satisfied that the information – if tabled in Parliament and included in a public report – would no longer meet the risk threshold which warranted the original decision to defer reporting, then the information will be included in the next report.

Again, we believe that the appointment of an overseer of the 'deferred reporting' provisions will ensure that information is made publicly available within the most appropriate timeframes, and there are checks and balances in place to ensure the Australian public's right to know is met – without jeopardising national security and the safety of the public and our law enforcement and security personnel.

**We recommend** that the Commonwealth Ombudsman and/or the Inspector-General of Intelligence and Security be provided with the power to investigate and oversee the new 'deferred reporting' provisions.

**ADVOCATING GENOCIDE**

Proposed section 80.2D of the *Criminal Code Act 1995* provides that a person commits an offence if they publicly advocate (defined as 'counsels, promotes, encourages or urges') genocide.

As we articulated regarding the introduction of section 80.2C of the *Criminal Code* regarding the offence of advocating terrorism, the ambiguity with the definition of 'advocates' has the potential to limit discussion, debate and exploration of terrorism in news and current affairs reporting – notwithstanding the defence at section 80.3 of the *Criminal Code* for acts done in good faith, and detail included in the Explanatory Memorandum[3] of the Bill.

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

[2] Ibid. at [197]
[3] Ibid. at [969 & 697]

**OTHER**

Lastly, we take this opportunity to raise with the Committee outstanding matters from previous Joint Media Organisation submission regarding national security bills that were considered by the Committee during 2013 and 2014.

While we will not repeat chapter and verse here, we draw particular attention to the unintended consequences of drafting in the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* – now provisions in the *Criminal Code Act 1995* and *Crimes Act 1914* – which we outlined in detail in our submission to the Committee. We would appreciate the Committee, if it was so minded, to revisit our previous submission in full.