



**BEFORE THE PARLIAMENTARY JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY**

**INQUIRY INTO THE IMPACT OF THE EXERCISE OF LAW
ENFORCEMENT AND INTELLIGENCE POWERS ON THE FREEDOM OF
THE PRESS**

**SUBMISSION ON BEHALF OF THE ASSOCIATION FOR
INTERNATIONAL BROADCASTING (AIB)**

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Contents

1. INTRODUCTION	1
2. THE ASSOCIATION FOR INTERNATIONAL BROADCASTING	4
3. INTERNATIONAL CONTEXT	5
Australia's influence within the Indo-Pacific region.....	5
International reaction to Australia's legal restrictions	6
4. THE NEED FOR POSITIVE PROTECTION FOR FREEDOM OF EXPRESSION	8
5. WARRANTS AUTHORISING INVESTIGATIVE ACTION IN RELATION TO JOURNALISTS AND MEDIA ORGANISATIONS.....	8
6. ACCESS TO ELECTRONIC DATA ON DEVICES USED BY JOURNALISTS AND MEDIA ORGANISATIONS	11
7. CONCLUSION	12

1. INTRODUCTION

1.1 Earlier this month, the Hon. Christian Porter MP, the Attorney-General, Minister for Industrial Relations and Leader of the House, made a referral to the Parliamentary Joint Committee on Intelligence and Security ('the Committee'), pursuant to the Intelligence Services Act 2001. The Committee was tasked with conducting an inquiry into "*the impact of the exercise of law enforcement and intelligence powers on the freedom of the press,*" and reporting back to both Houses of Parliament by 17th October 2019.

1.2 In the letter of referral, Mr. Porter MP indicated the rationale for the referral:

"The recent execution of search warrants on journalists' premises has resulted in significant public discussion about the importance of press freedoms, especially in relation to matters of public interest and national security.

The Government is committed to ensuring our democracy strikes the right balance between a free press and keeping Australians safe – two fundamental tenets of our democracy. As such, the Government will consider proposals that aim to ensure that balance. This includes carefully reviewing all materials and proposals that media organisations and interested bodies provide to the Government."

1.3 This is a timely inquiry. The immediate trigger for it appears to be what is described in the referral letter as the "*significant public discussion*" which followed the Australian Federal Police ('AFP') raids on the home of News Corp Australia journalist Annika Smethurst and on the Australian Broadcasting Corporation ('ABC') in early June 2019 – raids which were the subject of widespread condemnation from media organisations, journalists and freedom of expression experts both within Australia and internationally, including many of AIB's members.

1.4 However, the June 2019 raids were not isolated incidents. For example, it is understood that a number of months previously, on 1st April 2019, the AFP sought fingerprints and palm prints from two senior ABC journalists who two years earlier had produced stories on the activities of Australian special forces soldiers in Afghanistan between 2009 and 2013, a matter of intense public

interest.¹ It has also been reported by the *Sydney Morning Herald* that the AFP requested, and indeed obtained, from Qantas the travel details of one of these journalists. Securing fingerprints and flight details of investigative journalists in this way has understandably raised very grave concerns. As the ABC's head of investigative journalism, John Lyons, put it,

*"Australian journalism had come to this: two journalists were being treated the same way as someone suspected of breaking into a house."*²

1.5 In January 2019 the Commonwealth Ombudsman published a report concerning its inspection of the AFP under the Telecommunications (Interception and Access) Act 1979 for compliance with Journalist Information Warrant provisions. The report described an AFP breach of the 1979 Act which involved access to the metadata of a journalist for the purpose of identifying the journalist's source without a Journalist Information Warrant, and subsequent inspections.³

1.6 More generally, a wide range of legislative provisions have been passed in recent years which limit and in some instances even criminalise legitimate journalistic activity, and make it increasingly difficult for journalists to protect their sources. The Media Entertainment and Arts Alliance ('MEAA') said in a recent report that, *"in Australia, waves of new laws are passed in the name of 'national security' but are really designed to intimidate the media, hunt down whistle-blowers, and lock-up information,"*⁴ and the Alliance for Journalists' Freedom has recently published research demonstrating that Australian legislation, *"is criminalising what used to be considered legitimate journalistic inquiry into the inner workings of government"* and simultaneously, *"espionage and data retention laws are exposing whistle-blowers to legal sanction at a time when they ought to be protected and honoured."*⁵

¹ See further <https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>.

² See footnote 1 above.

³ See further http://www.ombudsman.gov.au/_data/assets/pdf_file/0034/96748/A-report-on-the-Commonwealth-Ombudsmans-inspection-of-the-Australian-Fe....pdf.

⁴ MEAA, 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 3.

⁵ White Paper, available at <https://www.journalistsfreedom.com/ajf-white-paper-plots-law-reform-pathway-for-press-freedom/>.

- 1.7 Tensions and concerns such as these are not unique to Australia. Historically, national security and counter-terrorism have frequently been cited by Governments – democratic and otherwise – to justify curtailment of the right to freedom of expression, and other rights such as the right to a fair trial. Careful scrutiny of the extent of the intrusion upon the rights of journalists, media organisations and the public, the justification for that intrusion, and its proportionality is essential. AIB is concerned that Australia, both in its legal framework and in how that legal framework is implemented in practice, fails to strike the right balance between national security and freedom of expression, or, as Mr. Porter MP puts it, “*between a free press and keeping Australians safe.*”
- 1.8 Further, AIB emphasises at the outset that this is in any event often a false dichotomy, and steps taken to undermine freedom of expression may in themselves undermine national security. AIB’s position has long been that a free media is a safety valve for democracy, and a bulwark against authoritarianism, against tyranny, and against secret – as opposed to transparent – government. The media – both print and electronic, publicly-funded and commercial – has a vital role to play in supporting democracy, rule of law and civil society through the reporting of facts, investigating injustices, and uncovering abuses of power. It has an essential role in holding power to account and reporting events that are in the public interest. Without a strong and free media, abuses of power will remain concealed. These are important protections for democracy and national security.
- 1.9 The Association for International Broadcasting (‘AIB’) is grateful for the opportunity to contribute to this Inquiry through written submissions. These submissions have been prepared at speed and AIB will consider supplementing them with further detail following the closing date for initial submissions. AIB’s CEO, Simon Spanswick, is also available to give oral evidence if required, and to make further written submissions addressing additional matters arising from other contributors.
- 1.10 AIB concentrates in this submission upon issues raised by paragraphs (c) and (d) in the terms of reference set for this Inquiry.

2. THE ASSOCIATION FOR INTERNATIONAL BROADCASTING

2.1 The Association for International Broadcasting is the trade association for international, national and regional broadcasters. Founded in 1993, it supports its members. Members are located in countries throughout the world, from New Zealand through to the USA, commercially- and publicly-funded. It is estimated that the audience reach of AIB members is around one billion.⁶

2.2 The AIB Secretariat is located in the United Kingdom, with additional part-time staff based in Geneva and New Delhi.

2.3 The AIB provides support in a number of ways including, but not limited to:

- intelligence briefings that examine threats and opportunities that exist in media markets globally;
- specialised Working Groups that bring AIB Members together to share knowledge and exchange best practice in cyber security, sustainability, media freedom and regulatory affairs;
- advocacy on key issues of interest to Members;
- promotional work;
- conferences and events on specific subjects.

2.4 In addition, for the past 15 years, the AIB has run an international competition for factual productions across television, radio and online platforms. This annual contest has a global panel of judges and attracts entries from more than 40 countries. The competition enables the AIB to share best practice in factual programme-making amongst broadcasters and production companies globally, helping to increase capacity particularly in least developed countries.

⁶ Combined audience figures for all AIB Members, including estimates where specific measurement is not undertaken.

3. INTERNATIONAL CONTEXT

Australia's influence within the Indo-Pacific region

- 3.1 In considering the terms of reference, AIB submits that it is important the Committee recalls that Australia plays an important and influential position in the Indo-Pacific region. It is the leading democratic nation and has positioned itself over many decades as a role model for societies across the region. Other nations in the region look to Australia for moral leadership. At a time when nations across the world are struggling to maintain liberal democratic ideals, Australia should be demonstrating and promoting its strong commitment to transparent government on the world stage, and the Indo-Pacific region in particular.
- 3.2 At the same time, other nations that do not share Australia's democratic ideals are seeking to expand their sphere of influence across the Indo-Pacific region through the use of economic and soft power tools.
- 3.3 There is a significant danger that nations in the region that have not yet achieved democracy look to legislation that Australia enacts to support their own restrictive regimes. This has the effect of slowing the growth of these nations, which in turn could cause additional challenges for Australia in its role in maintaining the continued prosperity and safety of the region.
- 3.4 Australia must lead by example to ensure its security and this involves ensuring respect for international law and norms. Australia must demonstrate that it respects and encourages media freedom and the ability of journalists to report on their government and its activities without the chilling effect of legislation. AIB suggests that the concerns raised by the AFP raids in early June 2019, and the wider climate of criminalisation of investigative journalists and journalism, is not only a threat to human rights within Australia – of journalists and the audience – but it also has potential ramifications within the region, as Australia's lead may be followed by others.
- 3.5 A similar point was made earlier this month by the then UK Foreign Secretary's Special Envoy on Media Freedom, Amal Clooney. Speaking at the Global

Conference on Media Freedom organised jointly by the UK and Canadian governments, and attended by the Australian Foreign Minister Marise Payne in London on 10th and 11th July 2019, she said: “*We have to be vigilant and we also have to know that what happens in a country like Australia or the UK or the US will be looked at by every other leader in the world and potentially used as an excuse to clamp down even further on journalists.*”

International reaction to Australia’s legal restrictions

3.6 This Association notes that at the time Australia’s new security laws were announced in 2014, there was an overwhelmingly negative international reaction to the proposals. Organisations with responsibility for protecting freedom of expression objected to the draft legislation, highlighting the dangers that these potential restrictions pose for accurate, unbiased reporting of stories that were in the public interest in Australia.

3.7 Earlier this year, two United Nations experts expressed concern at Australia rushing through legislation with very serious ramifications for freedom of expression without adequate time for consideration. Professor David Kaye, the Special Rapporteur on freedom of opinion and expression, said:

“Australia has adopted a law that would penalize platforms and their executives for a failure to control what it calls “abhorrent violent material.” The law is deeply problematic, as was the extraordinarily compressed timeframe for its adoption (basically two days). The Special Rapporteur on Counter-Terrorism and Human Rights, Professor Fionnuala Ni Aolain, and I had intended to provide comments to the Government as the legislation was being considered — but the Government acted faster than we could.”⁷

3.8 Although the statutory horse had by that time bolted, both Professor Kaye and Professor Ní Aolain nevertheless published their comments, raising serious concerns about Australia’s approach, both substantively and procedurally.⁸

⁷ <https://freedex.org/2019/04/04/comments-on-new-australian-law-on-online-abhorrent-violent-material/>

⁸ See further <https://freedex.org/2019/04/04/comments-on-new-australian-law-on-online-abhorrent-violent-material/>.

- 3.9 The June 2019 raids on journalistic organisations and individual reporters by the AFP were reported globally. The raids carried out on the ABC and a News Corp journalist's home produced immediate, negative international reaction.
- 3.10 The BBC, the world's largest publicly-funded broadcaster, said that it was "*deeply troubling*" for a raid to take place on the ABC and that the raid targeted an organisation "*doing its job of reporting in the public interest*".
- 3.11 Jennifer McGuire, Editor in Chief of Canada's public broadcaster CBC, said: "*CBC News and our colleagues at Radio-Canada are deeply troubled by the news this week that the Australian Federal Police conducted a high-profile raid in the newsroom at the headquarters of the Australian Broadcasting Corporation. A raid of this nature is highly unusual, and for this reason we felt we needed to express our concerns.*"
- 3.12 Radio New Zealand issued a statement: "*RNZ wishes to express its deep concern at the Australian police raid on the ABC. We view its actions as an affront to the vital work being done by our public media counterparts at the ABC. At a time when media freedom is repeatedly under threat across the world, we are dismayed to see this being played out so close to home.*"
- 3.13 Noel Curran, Director General of the European Broadcasting Union said: "*We are extremely alarmed by the police raid on the premises of... ABC. This raises serious concerns about freedom of the press which should be inviolable in any democratic country. We need to ensure journalists can do their job without interference, protect their sources and continue to report in the public interest.*"
- 3.14 Daniel Bastard, the head of Reporters Without Borders's Asia-Pacific desk, said: "*Persecuting a media outlet in this way because of a report that was clearly in the public interest is intolerable.*"

4. THE NEED FOR POSITIVE PROTECTION FOR FREEDOM OF EXPRESSION

4.1 AIB shares the concern expressed by many academics and media freedom organisations regarding the lack of positive protections for freedom of expression, journalists and media organisations at federal level in Australian law. There is no equivalent of the USA's First Amendment, or Article 10 of the European Convention on Human Rights which is in turn enshrined in the domestic laws of Council of Europe countries (such as, in the UK, by the Human Rights Act 1998).

4.2 AIB considers it imperative that, in conducting this Inquiry, the Committee does not focus solely on the specific matters identified in paragraph (d) of the terms of reference, important as they undoubtedly are. There is a far wider concern, relating to the absence of proactive, positive protection for freedom of expression and media freedom. This could be corrected in many ways, including through the adoption of a Charter of Rights, or a Media Freedom Act such as that proposed by the Alliance for Journalists' Freedom. AIB does not in these short submissions address the detail of such potential mechanisms, but emphasises the important point of principle: there is a jurisprudential gap in Australian law which must be filled in order to provide meaningful and robust protection for journalists, media organisations, their sources and the wider public.

5. WARRANTS AUTHORISING INVESTIGATIVE ACTION IN RELATION TO JOURNALISTS AND MEDIA ORGANISATIONS

5.1 One specific matter raised in the terms of reference is the question of "*whether, and in what circumstances, there could be contested hearings in relation to warrants authorising investigative action in relation to journalists and media organisations.*" AIB considers this to be a question of critical importance, and it urges the Committee to closely examine the mechanism already in place in England and Wales under the Police and Criminal Evidence Act 1984 ('PACE')

which recognises that journalistic material is very different to other forms of material, and should attract additional safeguards.

- 5.2 Under PACE, whilst a magistrate has the general power under section 8 to issue a search warrant on an *ex parte* application by a constable if satisfied, among other things, that there are reasonable grounds for believing that an indictable offence has been committed and that there is material on the relevant premises which is likely to be of substantial value to the investigation, that general power does not apply in relation to material which is defined in the Act as “excluded material” (section 11) or “special procedure material” (section 14).
- 5.3 “Excluded material” includes “journalistic material” which a person holds in confidence. “Special procedure material” includes journalistic material other than excluded material. “Journalistic material” means material acquired or created for the purposes of journalism, provided that it is in the possession of a person who acquired or created it for the purposes of journalism (section 13).
- 5.4 There is a special procedure for a constable to apply for access to excluded or special procedure material under section 9 and schedule 1. The application has to be made to a circuit judge and paragraph 7 requires it to be made *inter partes*.
- 5.5 The UK Supreme Court in 2014 considered the question whether, on hearing such an application under section 9 and Schedule 1 of PACE, the court may have regard to evidence adduced by the applicant which has not been disclosed to the respondent. The Supreme Court held that it could not: *R (BSkyB) v. Commissioner of Police for the Metropolis* [2014] UKSC 17.
- 5.6 Whilst there are some shortcomings to the PACE mechanism, and in 2019 it would be preferable to craft a new provision rather than import a provision which is now a number of decades old, the principle under PACE is clear and should plainly also apply in Australia: *ex parte* hearings to obtain production orders in relation to journalistic material are not appropriate; and at such hearings the court should not have regard to evidence adduced by the applicant

police force or law enforcement body which has not been disclosed to the respondent.

- 5.7 In addition to the PACE mechanism, AIB wishes to make further submissions to the Inquiry regarding the grave ramifications for media organisations and journalists when warrants are executed against them, as occurred in early June 2019 in Australia, and regarding the important underpinning legal principles regarding protection of sources and common law fairness. Some brief observations are made here, but AIB will make further submissions by Monday 29th July 2019.
- 5.8 These are inherently intrusive orders, to use the term adopted by Eady J in *R (BSkyB and Others) v. Chelmsford Crown Court and Essex Police* [2012] 2 Cr. App. R. 33 at [31]. The direct impact upon media bodies (organisations or individuals) is very serious. The material sought may reveal confidential sources; it may undermine time-sensitive investigative journalism; it is likely to disrupt the work of journalists and media organisations; and it exposes them to the risk of criminality for undertaking legitimate journalistic activities.
- 5.9 The indirect impact may be even more so. First, it has been recognised before the European Court of Human Rights in Strasbourg that such measures are capable of discouraging the press from conducting their vital role in gathering and disseminating information on matters of legitimate public concern: see e.g. *Bergens Tidende v. Norway* (2001) 31 EHRR 16 at [52].
- 5.10 Second, there is a potential ‘chilling effect’ arising whenever journalists or media organisations are perceived to be assisting in the identification of anonymous sources: see e.g. *Financial Times and Others v. UK* (2010) 50 EHRR 46; *Telegraf Media Nederland Landelijke Media BV v. The Netherlands* App. No. 39315/06, judgment of 22nd November 2012. This may discourage sources and potential sources from cooperating with the media or bringing concerns to their attention.
- 5.11 Third, and closely related to the second submission above, is the linked issue of the potential impact upon journalists (as distinct from the potential impact upon

sources or potential sources of journalistic material). As Eady J put it in the *Chelmsford Crown Court* case, at [25], in relation to those responsible for visual news coverage in particular, *“if the perception takes hold that such people are working on behalf of the police, or are likely to cooperate with them by supplying such material routinely, life could become very difficult. They might find it more difficult to gain access to areas where demonstrations are taking place or to work in the vicinity of those who are prone to violence... At the moment, to the extent that they are perceived as being separate from the police and relatively neutral... they have more opportunity of carrying out their task and correspondingly the public has a greater opportunity of receiving the coverage they intend to provide.”*

6. ACCESS TO ELECTRONIC DATA ON DEVICES USED BY JOURNALISTS AND MEDIA ORGANISATIONS

- 6.1 The terms of reference also refer, at paragraph (d)(b), to the appropriateness of current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists and media organisations. AIB has serious concerns regarding the current threshold which fails to provide adequate safeguards for the protection of journalists and freedom of expression.
- 6.2 AIB also considers this to be part of a broader picture, as indicated at the outset when we gave the example of the AFP seeking fingerprint, palm print and flight data for journalists, and the concerns of the Commonwealth Ombudsman. There have also been alarming figures published by the *Sydney Morning Herald*, indicating that the AFP used national security laws to access the metadata of journalists nearly 60 times in one year.
- 6.3 AIB shares concerns expressed by MEAA regarding a number of provisions in the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 undermining journalists’ ability to protect their confidential sources.
- 6.4 Many of these powers are breathtakingly broad and their scope belies any claim to proportionality or necessity. Australian law enforcement agencies have, for

example, the power to seize and access information through computer access warrants which may be issued even if the individual or organisation that is the target of the warrant is not being investigated for an underlying offence. AIB agrees with the Australian Lawyers' Alliance that urgent amendment to the legislation is required to ensure that computer access warrants and assistance orders should not be issued to access data held by a journalist in the legitimate course of their work unless there is a 'clear and present danger' and strict necessity. In the short time available AIB has not yet been in a position to produce a revised draft provision, but it would be happy to assist with such drafting.

7. CONCLUSION

- 7.1 This Inquiry concerns issues of vital importance for press freedom in Australia, the Indo-Pacific region and internationally. The world's eyes turned to Australia in early June 2019 when the AFP raids took place. It appears the AFP took notice, as it has been reported that planned further raids were halted due to the outcry. This is an opportunity to redress the skewed balance between freedom of expression and national security in Australia's laws and law enforcement practices.
- 7.2 The Association for International Broadcasting and its Members call upon the Committee to ensure that law enforcement and intelligence powers are not used to stifle reporting of stories that are in the public interest. It is not for the intelligence and security community to decide what is in the public interest – indeed, the very nature of intelligence and security work calls for absolute secrecy. It is therefore essential that the powers vested in the intelligence and security community are not used to suppress reporting. This is not in the public interest, and the intelligence and security community serves the public.

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