

From the desk of Morgan Begg, Research Fellow



25 July 2019

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

Dear Secretary

Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

I refer to the above inquiry and provide a submission to the Joint Committee on Intelligence and Security (the **Committee**) on behalf of the Institute of Public Affairs (**IPA**).

Freedom of speech is an issue of great consequence to Australian democracy. This freedom is not merely the human right to say something; it is the right to listen and hear what is being said. Freedom of speech is also the right to disagree and engage in debate. Without this freedom, human dignity is diminished. Dignity only comes with the ability to make choices. Accordingly, a fundamental tenet of freedom of speech is the freedom to disseminate information that is of interest to other citizens.

An area of conflict arising in public policy is in national security and intelligence legislation. It is a fundamental role of the nation state to protect its citizens from threats, whether they are foreign or domestic. This is a serious responsibility, but policies which are intended to protect Australians should be measured against the parliament's responsibilities to respect the fundamental right of Australians to speak freely and to participate in public debate.

This is a freedom that applies to all Australians. However, much of the commentary surrounding the appropriateness of national security legislation often focusses on the impact it will have on one particular class of individuals: those engaged in the journalism profession and in media organisations. While it is likely that the weight of many such laws will fall on journalists and, in particular, investigative journalists seeking to report on the conduct of ASIO and other national security agencies, it is important to recognise that press freedom is not a standalone principle. It is a subset of the broader human right to freedom of expression.

Moreover, given the technological innovations and cultural changes in recent decades, the concept of journalism itself has changed. In effect, anyone can engage in journalism activities but not be employed by a traditional media organisation. In a time of civic journalism, the artificial distinction between press freedom and the broader right to freedom of speech is increasingly difficult to maintain.

A frequent method of reaching a balance between national security and freedom of speech is to include an exemption in criminal offences under intelligence and security laws for individuals who are members of the press. While it is true that a free media is vital to liberal democracy, the right to free speech in Australia does not depend on one's profession. It depends only on one's being a citizen of Australia.

A recent example illustrates this conflict. The *National Security Legislation Amendment Bill (No. 1) 2014*, which inserted section 35P into the *Australian Security and Intelligence Organisation 1979*, created a new regime of special intelligence operations (SIOs) to "provide ASIO officers and its human sources with protection from criminal and civil liability for certain conduct in the court of authorised

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intelligence operations.” Complementing this regime was the creation of a new criminal offence for unauthorised disclosures of information concerning SIOs. Concern was raised at the time that the exemptions from the new offence was overly limited. But as the Institute of Public Affairs noted at the time, the exemption approach itself was flawed in both practice and in principle.

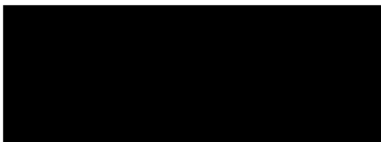
First, such an exemption is likely to be limited to a subset of overall journalists. The exemption provided for under the *Telecommunications (Intercept and Access) Amendment (Data Retention) Act 2015* restricts the relevant defence to persons “working in a professional capacity as a journalist”. The narrow definition failed to capture a range of individuals who engage in conduct which is comparable to that engaged in by professional journalists. Even in the event that the exemption can be guaranteed to protect some journalists from prosecution, that limited number is nonetheless a very small number, meaning the vast majority of the Australian population would not be afforded protection under the limited defence.

Secondly, the exemption approach is flawed in principle. The inclusion of an exemption for one group involves an inherent concession on the part of lawmakers that freedom of speech is a valid consideration. Failing to extend that exemption any further is therefore illogical and inconsistent. As Dr Chris Berg, adjunct fellow of the Institute of Public Affairs and senior research fellow at the Royal Melbourne Institute of Technology, noted in April 2015:

Even if a definition of “journalist” could be included which could guarantee coverage of a range of individuals engaged in a broader conception of journalism, the inclusion of such a defence would still be wrong. This is because such a provision operates to effectively grant special free speech privileges to certain groups in the form of a legal defence. Free speech does not depend on government-granted privileges. The issue is not that the exemption is not broad enough, it is that such an exemption is required in order to protect freedom of speech in the first place.¹

National security is an important task of the national parliament, but it must be cautious not to pass laws which disproportionately threaten freedom of speech – not just of journalists but of all Australians. To assist the Committee in its deliberations, I enclose a major report by the IPA, *The Case for the Repeal of Section 18C*. The report explores general principles relating to freedom of speech. The IPA trusts that this submission will be of assistance to the Committee.

Yours faithfully,



Morgan Begg
Research Fellow
Institute of Public Affairs

Encl.

¹ Chris Berg, *Submission to the Acting Independent National Security Legislation Monitor Inquiry into section 35P of the ASIO Act* (Institute of Public Affairs occasional paper, April 2015) 8.