Media, Entertainment & Arts Alliance (MEAA)

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

Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014

January 19 2015

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 elements of the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* – the third of three tranches of national security legislation being introduced by the government.

Journalists play a vital 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 such as the data retention proposed in the Bill will harm the ability of journalists to scrutinise the powerful and hold them to account, to expose corruption, to champion and campaign for important issues, and to gain the trust of our audience and our 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 Bill threatens to expose the identity of sources and journalists as well as the communications between them and information they exchange.

The Bill will undoubtedly undermine the crucial ethical obligation of journalists to protect the identity and information of confidential sources.

This erosion of journalist privilege that is the consequence of the Bill will have a chilling effect on whistleblowers seeking to expose illegality, corruption or wrongdoing.

Furthermore, the erosion of journalist privilege will have a chilling effect on journalists, compelling them to utilise other techniques in order to try to secure even the most normal communications and contact with their sources.

In short, the scope of the intrusiveness of the data retention proposed in the Bill will undermine the role of the fourth estate, make it harder for important news and information to be communicated to the audiences served by journalists and journalism, and will therefore undermine the health of Australian democracy.

Journalists' obligation to protect sources

Since 1944 all of 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 MEAA's *Journalist Code of Ethics* outlines the ethical obligations of journalists towards their sources. It details the principle of journalist privilege relating to the anonymity of a confidential source:

> "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 key principle is a bedrock position for the craft of journalism in our society.

It is a principle, recognised, understood and acknowledged the world over. In short, journalists do not reveal the identity of a confidential source. 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 journalists and the essential trust journalists must have with their sources, and with their audience but it would inevitably lead to sources of information drying up if they cannot be certain that their identity and the information they pass on to a journalist is to remain confidential. It would expose sources to immense danger.

In response to the legal pressures applied to journalists, seeking to compel them to reveal their confidential sources and break their 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 threats of jail terms, fines and criminal convictions, 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.

In Australia, shield laws have been enacted in most jurisdictions. The federal shield law is contained in the *Evidence Act (Journalist Privilege) 2011*. 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…
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> 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 Attorneys-General. It was not discussed.

MEAA wrote to new Attorney-General George Brandis on September 25 2013 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 *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (and indeed, in in the *National Security Legislation Amendment Bill (No. 1) 2014*) are totally at odds with this legal principle and will undermine the intent of the *Evidence Act (Journalist Privilege) 2011*.

The Bill

The Bill's Explanatory Memorandum states: "Telecommunications data provides [law enforcement] agencies with an irrefutable method of tracing all telecommunications from end-to-end. It can also be used to demonstrate an association between two or more people, prove that two or more people communicated at a particular time…"

It goes on to explain the scope and scale of the data the Bill is seeking to retain:

- The subscriber of the relevant service and accounts, telecommunications devices and other relevant services relating to the relevant service;
- the source of a communication ("the identifier or combination of identifiers which are used by the service provider to describe the account, service and/or device from which a successful or attempted communication is sent");
- the destination of a communication ("The retention of telecommunications data regarding the destination of a communication (such as telephone numbers and e-mail addresses) is necessary in order to connect a communication of interest to the particular telecommunications service being used to send or receive this communication");
- the date, time and duration of a communication m("time-calibrated information about a communication needs to be sufficiently precise to enable agencies to develop an accurate picture of a particular communication");
- the type of communication (the type of service used, including the type of access network or service or application service – "For example, whether the service or product provided is e-mail, internet access, mobile telephony services or mobile phone text messaging such as Short Message Services (SMS). For application services provided over the top of internet access, examples of service types include Voice over Internet Protocol (VoIP), instant messaging or e-mail. For services that provide access to a network or the internet, examples of service types include symmetric digital subscriber line (ADSL) or frequency division Long-Term Evolution (FD-LTE)"); and
- the location of the line, equipment or telecommunications device – which could include "a series of smaller communications," such as a download. "Examples include cell tower locations and public wireless local area network (WLAN) hotspots." ("Location-based data is valuable for identifying the location of a device at the time of a communication, providing both evidence linking the presence of a device to an event").

Such data could also be used to identify is a confidential source such as a whistleblower seeking to expose illegality, corruption or wrongdoing had communicated with a journalist. It not only captures the communications between a journalist and a source, it can also capture the fact that information has passed between them.

Once that is known, the other tranches of national security legislation, particularly *National Security Legislation Amendment Bill (No 1) 2014* can be used to jail both the source and the journalist for up to 10 years plus the information can be used to ensure that the media organisation's computer network is tampered with, not only threatening the news story from ever becoming public but also expose all the news stories by that media outlet, its journalists and their sources.

The development of a Stasi-like surveillance state that monitors every member of the population with a phone, a computer, an internet browser and an email account is an outrageous attack on personal privacy and freedom. The fact that the surveillance state can then utilise the data it has discovered to pursue and prosecute whistleblowers and the journalists who work with them is an outrageous assault on press freedom and freedom of expression.

The Bill acknowledges this: "…requiring providers of telecommunications services to retain telecommunications data about the communications of its subscribers or users as part of a mandatory dataset may indirectly limit the right to freedom of expression, as some persons may be more reluctant to use telecommunications services to seek, receive and impart information if they know that data about their communications will be stored and may be subject to lawful access."

The Bill then sweeps these significant concerns aside by stating that: "The Bill limits the extent to which the right to freedom of expression is abrogated by ensuring that only the minimum necessary types and amounts of telecommunications data are retained, and by limiting the range of agencies that may access telecommunications data."

This is not satisfactory. The right to freedom of expression as stated in Article 19 of the *Universal Declaration of Human Rights* is the bedrock on which the fourth estate's activities are based.

Journalists seek to ensure that society is informed about itself by scrutinising the powerful and holding them to account. Excusing the intrusions of the Bill by saying only minimum amounts of data are retained and only a limited number of agencies will be able to access the data is no argument that absolves the Bill from being a very fundamental assault on freedom of expression and press freedom.

But coupled with the fact that, under the previous tranches of counter-terror laws passed by the Parliament now allow journalists for up to 10 years for doing their jobs, freedom of expression has been very seriously undermined.

It must also be remembered that the previous tranches also now allow the surveillance state to tamper with computer networks means that it can then prevent the story ever getting out or tamper with any other stories it doesn't like.

The end product of such overwhelming surveillance is for sources and journalists to use the subterfuge methods of counter-surveillance to avoid, block or bypass the data retention methods being proposed in the Bill.

In short, rather than engaging in normal conversations and normal transmission of data, journalists and their sources will have to deliberately use means that avoid any form of detection by law-enforcement agencies, thus nullifying the aims of the Bill. And if law-abiding members of the public can seek these methods out, so too will law-breakers. And that is the problem with the Bill: by seeking to subject the entire population to overwhelming surveillance, ordinary people will utilise every method possible to evade monitoring and intrusion into their private lives.

Journalists doing their jobs

The Bill acknowledges that it undermines freedom of expression. It is clear that it threatens press freedom by eroding the ability of journalists to protect the identity and information of their confidential sources. Taken together with the other two tranches of counter-terror laws, the third tranche becomes a very frightening tool that could be used to intimidate the media.

Past experience in the Australian context has shown the real threat and appalling consequences from data retention powers being used against journalists and their confidential sources. Journalists' phone conversations have been accessed in an effort to uncover their alleged confidential sources in both the pursuit of whistleblower public servant Alan Kessing and the Michael Harvey and Gerard McManus case. Law enforcement officers in both examples accessed the phone records of incoming

calls made to the journalists in these cases in an effort to identify individuals communicating with them.

Lengthy trials took place, with Kessing received a nine-month suspended sentence even though the report in *The Australian* led to a much-needed and "beneficial" shake-up of airport security (Kessing continues to deny being the confidential source).

In the case of journalists Harvey and McManus, despite an appeals court dismissing charges against a public servant over the story, the two *Herald Sun* Canberra press gallery journalists still received a criminal conviction – with the conviction preventing one of the journalists from accompanying an Australian Prime Minister on a trip to an APEC meeting in Peru due the PM's aircraft refuelling in the US.

The Kessing and the Harvey and McManus examples, both where data retention powers were used to intimidate, harass and convict journalists and whistleblower sources were the impetus for the introduction of journalist shield laws in Australia.

MEAA believes that blatant attacks on press freedom, on individual journalists and their confidential sources will be likely if the data retention measures contained in the Bill are allowed to go through the Parliament. If it is easy to trample on international obligations such as freedom of expression then trampling on press freedom also becomes easy.

MEAA urges the Committee to consider the following questions:

- **How can the Government, and the Parliament that passed the first two tranches of counter-terror laws that have already undermined press freedom, legitimately decry the actions of Egypt in jailing our colleague Australian journalist Peter Greste for seven years for doing his job while, in the next breath, pass laws that will jail Australian journalists for up to 10 years for doing theirs?**

- **How can the Parliament permit such dramatic assaults on fundamental freedoms that, if enacted, represent such an assault on a healthy, functioning democracy?**

- **How can the Parliament that so recently enacted laws to protect the identity of confidential sources by acknowledging journalist privilege now pass new laws that attack that principle?**

Summary
As MEAA did with the first two tranches of national security legislation – the *National Security Legislation Amendment Bill (No 1) 2014* and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*– we urge the Australian Parliament to carefully consider the threats to press freedom and media rights contain in this third tranche: the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*.

The three tranches all carry grave implications for journalists seeking to carry out their duties in reporting legitimate news stories in the public interest and for whistleblowers seeking to legitimately shed light on wrongdoing. There are also concerns for freedom of expression and press freedom.

The Prime Minister told the Parliament when discussing the introduction of sweeping new counter-terror powers: "The delicate balance between freedom and security may have to shift." The proposals subsequently outlined represent an attack on fundamental freedoms and, in terms of curtailing the activities of the fourth estate and criminalising journalists and journalism, represent an outrageous assault on Australian democracy.

MEAA believes this third tranche is yet another appalling attack on all Australians. It assumes we are all suspects, all needing to be kept under surveillance, all potentially guilty. Such important legislation affecting, amending and undermining cherished rights and freedoms in Australian society deserves very careful consultation and consideration. MEAA notes that only this third tranche has been given sufficient time for that to even take place; its two predecessors were rushed through the Parliament with undue haste.

Assurances by the Attorney-General about the intent of the legislation or about prosecutions of journalists only proceeding with his approval provide no reassurance at all if the legislation that can lock-up a journalist for 10 years remains on the statute books. Nor do they provide any assurance that media organisations won't have their computer networks tampered with. No does it provide any assurance that the confidential relationship between a source and a journalist won't be compromised by a government agency.

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 counter-terror powers including intelligence gathering and surveillance.

MEAA believes the legislation should not proceed.

However, should the Committee consider otherwise, MEAA believes the Committee must take into consideration the threats to press freedom contained in the three tranches of legislation and should take steps to ensure that the media is protected from further assaults on their ability to do their jobs.

MEAA recommends that the three tranches of national security laws that have been presented to the Parliament be amended to include a media exemption to ensure that vital press freedoms are protected, understood and observed, and to ensure that journalists can go about their duties.

MEAA recommends that appropriate checks and balances be introduced to ensure that the national security laws cannot be used to impede, threaten, contain or curtail legitimate reporting of matters in the public interest and that journalists and their confidential sources are free to

continue to interact and communicate without being subjected to surveillance that would undermine the principles of press freedom.

MEAA further recommends that agencies involved in national security and law enforcement ensure their officers at all levels undergo substantial training in the role of press freedom in ensuring a functioning healthy democracy.

MEAA also recommends that the Independent National Security Legislation Monitor undertake an urgent review of the press freedom implications of Australia's national security law regime with a view to ensuring appropriate safeguards are in place to promote and protect press freedom.

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[i] MEAA *Journalist Code of Ethics*) http://www.alliance.org.au/code-of-ethics.html
[ii] *Ibid* MEAA emphasis