ALLIANCE for JOURNALISTS' FREEDOM

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SUBMISSION BY THE ALLIANCE FOR JOURNALISTS' FREEDOM TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY PRESS FREEDOM INQUIRY.

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. Although, for the most part, government and the civil service behave with professionalism and integrity, 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 by the law, or the threat of legal sanction. In the same way that the legitimacy of other public institutions depends on the trust of the public, the media's role is further diminished if confidence in its independence and integrity is undermined. According to a survey by the Media, Entertainment and Arts Alliance (MEAA), 90% of Australians who took part believed that press freedom has deteriorated in the past decade.[1]

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 one of our key democratic pillars, then national security is not served, and a better balance needs to be found.

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.

Finally, the AJF wishes to express its concern over the short timeframe for submissions to this inquiry. We welcome the government's desire to address the issue

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[1] *Media Entertainment and Arts Alliance (**MEAA**), 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 10. Survey of 1532 people, conducted online by MEAA from February to early April 2019*

swiftly, however it has been extremely difficult to develop a comprehensive, fully-researched submission in the time available.

BACKGROUND

The AJF was formed in response to concern about the way the Egyptian government used national security laws to accuse one of the AJF's co-founders, journalist Peter Greste, of terrorism offences. The laws effectively criminalised what was widely recognised as legitimate journalism. Greste and co-founders, Gilbert + Tobin senior partner Chris Flynn, and crisis communications specialist and former journalist Peter Wilkinson, recognised that journalism across the Asia–Pacific region was under similar threat, including in Australia, and realised that there was no independent group devoted to tackling the problem. 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, media organisations, and other influencers. We have an MOU with the University of Queensland to conduct research on areas of joint interest.

Our objective is to work constructively with governments to find solutions to recognised press freedom issues.

INQUIRY TERMS OF REFERENCE

(a) The experiences of journalists and media organisations that have, or could become, subject to the powers of law enforcement or intelligence agencies performing their functions, and the impact of the exercise of those powers on journalists' work, including informing the public.

Because the AJF is an advocacy group rather than a media company, as an organisation it has little experience of its own of the way that media organisations and journalists themselves have been affected by the law or security agencies. The AJF is aware, however, of several submissions by media organisations that will directly address this term of reference.

(b) The reasons for which journalists and media organisations have, or could become, subject to those powers in the performance of the functions of law enforcement or intelligence agencies.

In the process of developing our White Paper, lawyers at Gilbert + Tobin closely examined the legislation and reached a number of conclusions about the way the law, as it is currently drafted, affects and could affect the work of journalists.

I. Australia is unusual in the Western world for having no constitutionally mandated protection for media freedom. (In 1992, the High Court ruled that there is an implied freedom of political communication that by extension protects journalists, but that is inferred rather than explicitly stated.[2]) In the absence of such a protection, lawmakers have been relatively free to pass legislation that either directly or indirectly intrudes on the capacity of journalists to investigate government and protect sources in the process.

II. *The National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (EFI Act)* has great potential to encroach on journalistic freedom. It criminalises a wide range of political expression, without requiring proof of harm, or association with illegitimate foreign interests. The act's definition of 'national security' is overly broad, and includes not only national defence, but Australia's political and economic relations with other countries. That makes fair public interest reporting on Australia's foreign affairs particularly hazardous. While we note assurances that the act is not intended to target legitimate journalism, history suggests that if the law can be interpreted in such a way, at some point it will be.

III. Under the EFI Act, it is a criminal offence to disclose any information relating to a security agency's operations even if the disclosure exposes misconduct, the issue is clearly in the public interest, and the reporting does not reveal anything that explicitly damages national security. Journalists argue that this was the case in the ABC's story of alleged war crimes committed by members of the ADF in Afghanistan. The ABC's story is a good example of the way in which the law criminalises public interest journalism, and thus stifles whistleblowing essential to the functioning of Australia's democracy.

IV. The EFI Act captures journalists working for foreign-owned news organisations such as the BBC or Reuters, if they cover any issue that has a security classification (regardless of whether they are aware of the classification), or that concerns Australia's national security, and if they are reckless about the potential for the story to prejudice Australia's national security or advantage the national security of another country. This is unnecessary and overly restrictive of reporting legitimate debates about Australia's place in the world.

V. Such provisions do not contain any scope for challenge on the basis of public accountability and the right to free speech. They give no consideration to the value of that kind of reporting in the public interest.

VI. The *Public Interest Disclosure Act 2013* regulates disclosures in the security and intelligence sectors, but it prohibits any public disclosure outside of an overly narrow set of circumstances, and there is no acknowledgement of the media's role as a

[2] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2FT0610%22;src1=sm1

whistle-of-last-resort, even in cases where the internal mechanisms have failed and there is no clear threat to national security.

VII. While there is an existing defence for 'information communicated… by persons engaged in the business of reporting news…' it applies only for secrecy offences and there is no equivalent for offences related to espionage or foreign interference.

VIII. While the security agencies' work in relation to matters of national security needs specific protection, the law unnecessarily extends to matters not related to issues of national security. For example, journalists reporting on corruption or sexual misconduct in the security agencies would be just as vulnerable to prosecution as those covering security issues. This unnecessarily hinders the work of journalists in keeping *all* sectors of government accountable.

IX. *The Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, was passed explicitly to give law enforcement agencies the power to identify and intercept terrorist communications. We note the government's decision to include the Journalist Information Warrants (JIWs) as a response to media industry concerns about the integrity of their data. However, evidence from researchers at the University of Queensland suggests that scheme fails to give due regard to the importance of the relationship between journalists and their sources, or the integrity of journalists' data. This is not to suggest that the data retention regime should be dismantled or that journalists should be immune from investigation. Rather, there needs to be a higher threshold for the security agencies to access that data, and opportunities for journalists to contest JIWs.

X. While the *Assistance and Access Act 2018* was passed to give law enforcement agencies the capacity to access telecommunications in an increasingly encrypted digital environment, it also exposes confidential communications between journalists and sources. Again, we note assurances that the purpose of the act is to investigate serious crimes and not undermine legitimate public interest journalism. Recent events, however, have called into question the value of those assurances, particularly in politically sensitive cases that intersect with security services (as happened with the ABC's stories of alleged war crimes in Afghanistan, and Annika Smethurst's reporting of the Australian Signals Directorate). As before, the AJF is not advocating that the law be repealed, or journalists be granted immunity from prosecution. Rather, the AJF believes amendments should be made that permit legitimate public interest reporting and protect communications between journalists and sources.

XI. Protecting public interest journalism is only half of the equation. It is meaningless if the other link in the chain – journalists' sources – doesn't also enjoy the same protections. Currently, some legislation deals with whistleblowers[3] and discourages corporations from misconduct, but it remains weak on the public's right to know, and the role of journalists as a whistle-of-last-resort. Several well-publicised cases of whistleblowers who have suffered as a result of their disclosures, even in cases that were clearly in the public interest, indicate that the protections are inadequate.

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[3] *See Corporations Act 2001 (Cth), ss 1317AB, 1317AC, 1317AAE; Public Interest Disclosure Act 2013 (Cth) ss 10, 13 – 16.*

(c) Whether any, and if so what, changes could be made to procedures and thresholds for the exercise of those powers in relation to journalists and media organisations to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats.

The Alliance for Journalists' Freedom's White Paper provides seven recommendations for legislative change to achieve a more appropriate balance between press freedom and law enforcement and intelligence agencies. This balance must be struck to ensure a healthy democracy. With that in mind, 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 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.
Where a national security organisation engages in misconduct, the exposure of which poses no immediate risk to national security, journalists and their sources should be able to report on misconduct of security organisations 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:
i) the warrant is required to mitigate the immediate danger to a person's safety; and
ii) there is no other way to obtain the data.

IV. Enhance private and public sector whistle-blower protections so that:
i) 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[4];
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.

[4] *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.*

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.

V. Amend shield laws in both Commonwealth and State legislation via COAG so that:
i) in civil matters, journalists may refuse to disclose information that would reveal their sources; and
ii) 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.

(d) Without limiting the other matters that the Committee may consider, two issues for specific inquiry are:

a. whether and in what circumstances there could be contested hearings in relation to warrants authorising investigative action in relation to journalists and media organisations.

We have not had time to consider the concept of contested warrants in sufficient detail to provide appropriate comment, however, we note several points:

I. The concept of contested hearings for warrant applications to investigate journalists already exists in Australian law. As noted earlier, the Data Retention scheme provides for 'public interest advocates' to contest applications to search journalists' metadata. We are concerned about recent reports[5] that suggest it has not been working as intended, however, we believe such a scheme could be improved and the model reproduced for other forms of warrants.

II. In the UK the Investigatory Powers Act 2016 provides a wide suite of investigatory powers to law enforcement agencies, but even within that there are substantive and procedural protections where journalistic materials are concerned. This includes giving notice of applications, thus allowing them to be contested. During the passage of the Investigatory Powers Bill there was (and remains) considerable debate in the UK about the adequacy of these protections but the Act nonetheless provides a point of reference against which the Australian Parliament might consider the laws in this country. We recommend closer study of the UK experience, with a view to adapting an improved system for Australia.

[5] *https://www.theguardian.com/australia-news/2019/jul/23/police-made-illegal-metadata-searches-and-obtained-invalid-warrants-targeting-journalists*

b. the appropriateness of current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists and media organisations.

See the above recommendations with regard to the thresholds for law enforcement and intelligence agencies' access to journalists' electronic data. We believe recent examples of security services accessing journalists' data suggest that the current thresholds are either inappropriate, ineffective, or both, and urgently need to be reviewed and updated.

FINAL RECOMMENDATIONS

We acknowledge the inquiry's limited terms of reference, and have done our best to answer them in the time available. We wish, however, to place the following additional recommendations on the record:

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 the PJCIS inquiry. However, a separate and independent body should be established to enquire into, and make 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, implemented 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.

In a time of changing roles and responsibilities, and increasing global and regional instability, finding the right balance and ensuring its longevity will take time and ongoing collaboration, not just a single inquiry.

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 would aid both institutions' ability to do this, by enshrining press freedom in legislation, therefore supporting democracy and re-framing the currently combative relationship between the press and security forces into one that is fundamentally cohesive.

An Act of this kind would work as a yard-stick for judicial overreach and could 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.

CONCLUDING REMARKS

Trust is diminished on a global scale. There are myriad forces pushing it downwards, including: social media, globalisation, the role of big tech, the changing media landscape, unstable governments, reckless leaders, intractable global problems (Brexit), and access to information.

To invert this downward trajectory, we must restore trust by building a framework that supports, rather than further diminishes, our democracy. A critical part of that framework is a free press, able to work in mutual respect with responsible national security forces.

Collaboration and transparency are necessary for the democratic process. A democracy lacking in either is no democracy. The press and the security forces must be able to work cohesively with one another, and not necessarily in opposition to each other. This is currently hindered by the lack of positive legislation to protect journalists.

The international implications of Australia's action on this issue are of the utmost importance. In a region where democracies are shrinking and the influence of regimes is growing exponentially, Australia must set a strong example of a healthy democracy to ensure our country and indeed the region has a stable future.

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