ALLIANCE for JOURNALISTS' FREEDOM

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SUPPLEMENTARY SUBMISSION BY THE ALLIANCE FOR JOURNALISTS' FREEDOM TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY
Press Freedom Inquiry

This is a supplementary submission by the Alliance for Journalists' Freedom (**AJF**) following the public hearing of the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) held on 13 August 2019.

1 INTRODUCTION

The AJF accepts that Australia's national security laws need to operate in a way that facilitates the operational integrity of Australia's security agencies. We support amendments to national security legislation that places Australia on par with its Five Eyes partners in terms of both national security and the preservation of representative democracy and responsible government, through adequate protection of press freedom and the public's right to know.

Australia's national security legislation is similar to that of its Five Eyes partners, both in its object and drafting. However Australia is the only Five Eyes nation without an overarching human rights framework.[1] The absence of an equivalent framework in Australia fundamentally changes the way in which our national security legislation (including its interpretation and enforcement) operates when compared to our Five Eyes counterparts.

In Canada, New Zealand, the United Kingdom and the United States, national security laws are subject to:

- constitutional; or
- otherwise entrenched human rights regimes,

that protect free speech, democratic participation and other freedoms on which press freedom is founded. The regimes in these jurisdictions require national security principles to be balanced against those fundamental freedoms wherever they come into conflict. Having no such overarching human rights framework, Australia's national security laws have no equivalent restraint. This highlights the need for in-built protections, within the relevant national security legislation, to ensure such rights and freedoms are preserved.

AJF has advocated for a *Media Freedom Act* that would operate in a similar way to other nations' human rights regimes with respect to press freedom.[2] In order for press freedom to be protected in Australia (in the absence of a constitutional or other human rights framework), protections must occur in the terms of the relevant national security legislation itself.

[1] *New Zealand Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK); US Constitution; Canadian Charter of Rights and Freedoms.

[2] AJF, 'Press Freedom in Australia' – White Paper (May 2019).

2 NATIONAL SECURITY

2.1 In relation to the broad definition of "national security", does AJF have a better recommendation for how it should be defined?

AJF submits that in Australian legislation that interferes with press freedom, "national security" should be defined consistently with a common sense understanding of that term that coheres with its common usage. For instance, the Macquarie Dictionary defines 'national security' as "the protection afforded to a nation against any external or internal threat to its existence, often increased in times of war and involving measures taken against espionage, infiltration, sabotage, etc."

"National Security" is not defined consistently in Australian legislation, and indeed, in many Acts to which national security is a core concept, it is either not defined at all or is defined extremely broadly. Further consideration should be given to simplifying the meaning, removing any circularity and ensuring a uniform definition of "national security", "security" and "national interests" applies across Commonwealth legislation.

The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (**EFI Act**) introduced the following definition of "national security" into the *Criminal Code Act 1995* (Cth):

> (1) The national security of Australia or a foreign country means any of the following:
>
> (a) the defence of the country;
>
> (b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2);
>
> (c) the protection of the integrity of the country's territory and borders from serious threats;
>
> (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);
>
> (e) the country's *political*, military or *economic relations* with another country or other countries.
>
> (Emphasis added.)

That Act contains offences carrying sentences of up to 25 years for dealing in 'national security information'. Under the broad definition above, these dealings could capture a broad range of legitimate journalistic investigation into matters about which the public's right to know should be protected. Journalists should not be subject to jail sentences of up to 25 years for reporting on economic and political matters.

In the *Intelligence Services Act 2001* (Cth) (**ISA**), which provides the statutory basis for much of the Australian Intelligence Community, 'national security' is not defined.

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With few exceptions, s 39 of the ISA makes it an offence for any ASIS staff member, contractor or subcontractor to communicate "any information or matter that was acquired or prepared by or on behalf of ASIS in connection with its functions or relates to the performance by ASIS of its functions". Such communication will not attract liability if it is within the course of the person's duties, has been authorised or is with an authorised person.[3] Section 39(2) makes it lawful to communicate any "information or matter that has already been communicated or made available to the public with the authority of the Commonwealth", and s 39(3) makes it lawful if:

> [T]he person communicates the information or matter to an [Inspector-General of Intelligence and Security] official for the purpose of the Inspector-General of Intelligence and Security exercising a power, or performing a function or duty, under the *Inspector-General of Intelligence and Security Act 1986*.

The Inspector-General's powers relevantly include inquiring into matters relating to the propriety of ASIS conduct and its compliance with laws.[4]

Section 39 captures matters relating "to the performance by ASIS of its functions". ASIS' functions, set out in s 6(1), are broad. They are:

(i) to obtain, in accordance with the Government's requirements, intelligence about the capabilities, intentions or activities of people or organisations outside Australia; and

(ii) to communicate, in accordance with the Government's requirements, such intelligence; and

(iii) to provide assistance to the Defence Force in support of military operations and to cooperate with the Defence Force on intelligence matters; and

(iv) to conduct counter-intelligence activities; and

(v) to liaise with intelligence or security services, or other authorities, of other countries; and

(vi) to co-operate with and assist bodies referred to in section 13A in accordance with that section;[5] and

(vii) to undertake activities in accordance with section 13B;[6] and

(viii) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.[7]

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[3] ISA, s 39(1)(c).

[4] *Inspector-General of Intelligence and Security Act 1986* (Cth), s 8(2).

[5] being the Australian Secret Intelligence Organisation (**ASIO**), a Commonwealth authority or a State authority that is prescribed by the regulations for the purposes of s13A(1)(c), the Australian Geospatial Intelligence Organisation and the Australian Signals Directorate: ISA s13A(1)(c).

[6] being activities undertaken in relation to ASIO.

[7] ISA s 6(2)–(3A) sets out certain restrictions on the exercise of the function in s 6(1)(e) that do not apply to the other functions.

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Section 11 requires ASIS' functions to be performed:

> only in the interests of Australia's national security, Australia's foreign relations or Australia's national economic well-being and only to the extent that those matters are affected by the capabilities, intentions or activities of people or organisations outside Australia.

Section 12 prohibits ASIS from undertaking any activity that is not necessary for the proper performance of its functions, or authorised or required by or under another Act.

The effect of this is that any communication by an ASIS operative of matters relating to ASIS functions, other than within ASIS or to the Inspector-General, is an offence under the ISA. Importantly, this captures disclosures of circumstances where ASIS has failed to act in accordance with its functions, because such disclosures relate to ASIS' *performance* of its functions. While it is important to ensure operational integrity and secrecy, the breadth of this provision has clear implications for accountability and transparency of government misconduct or illegality, particularly in circumstances where such disclosure does not prejudice national security.

Intelligence organisations need to be able to perform their functions under the secrecy required to protect the integrity of their operations. However, where that conduct is unrelated to actual national security concerns, it should be capable of being subject to an appropriate level of public oversight, facilitated by a free press, that representative democracy and responsible government requires.

2.2 AJF advocates that legislation should provide exceptions to prosecution for journalists in relation to national security offences, rather than merely defences. Based on previous forums, the PJCIS acknowledges concerns raised about the potential for journalism to be used as a cover by hostile intelligence forces. Can AJF provide examples of how other legislative frameworks manage the problem of preventing the abuse of such exemptions?

AJF acknowledges that certain classes of Commonwealth officers and operations require secrecy (particularly as regards the identity of those officers or detail as to specific operations or activities). An appropriate balance must be reached between these important policy considerations and the need to ensure transparency and accountability of government misconduct.

The provision of exceptions to prosecution for journalists, rather than defences, is not a common feature of the national security frameworks of our Five Eyes partners. Although this would seemingly position Australia on par with these jurisdictions, the absence of a constitutional or statutory bill of rights that (a) informs the interpretation of national security legislation, or (b) provides a basis for challenging national security legislation when it is passed or when enforced against individuals (for example, through criminal provisions) weakens the position in Australia with respect to press freedom.

The table in Attachment A to this supplementary submission provides a high-level overview of how human rights (particularly those relating to freedom of speech and freedom of the press) can be protected by the regimes in those jurisdictions.

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Although these jurisdictions do not provide express exceptions for journalists to prosecution in relation to national security offences, the legislative framework in these countries typically facilitates the consideration of free speech (and free press):

- by parliament when new legislation is introduced;
- by public sector decision-makers; and
- by the judiciary when the relevant legislation is interpreted and applied.

Australia's legislative framework does not contain the same constitutional or statutory human rights regime. As such, protections must be embedded within the legislation itself.

The EFI Act risks creating a basis under which journalists may face imprisonment for speaking-out about matters relating to Australia's national security even where the disclosure of that information is in the public interest and steps have been taken to ensure identifying information has not been disclosed. This has clear implications for freedom of speech, political communication, journalism and public interest reporting.

The espionage offences cover circumstances where a person '***deals with***' (broadly defined) information or an article that is made available to a foreign principal or a person acting on behalf of a foreign principal. The various espionage offences are distinguished on the basis of whether the information or article:

- has a security classification; and/or
- relates to Australia's national security; and,

whether the person intended or was reckless as to whether their conduct:

- will prejudice Australia's national security;
- will advantage the national security of another country; or
- will result in information being made available to a foreign principal.

The existing news reporting defence that applies with respect to secrecy offences does not apply to espionage offences. With very limited protection under the EFI Act, journalists are at risk of having to defend legitimate journalistic conduct against criminal charges. Jurisdictions with constitutional or statutory enshrined human rights or wide-reaching human rights legislation typically require national security legislation such as this to balance its imperatives against the rights it infringes, such as free speech, and to be subject to legal challenge on that basis.

Conversely, the espionage offences in the EFI Act give no apparent consideration to the protection of journalistic freedom and freedom of speech. We recommend that the EFI Act (and other relevant pieces of national security legislation) include an express exception to offences that have the potential to criminalise legitimate journalistic activity. Any exception should recognise that the direct and indirect activities of foreign

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intelligence services (or their agents) will not be considered legitimate journalistic activity.

The exception could be drafted as follows:

> '*(a) Subject to (b), this offence does not apply to journalists engaged in legitimate journalistic activity.*
>
> *(b) The indirect or direct activities of foreign intelligence services or their agents, will not be considered legitimate journalistic activity for the purpose of the exception set out in (a).*'

3 WHISTLEBLOWING

3.1 What is a whistleblower?

AJF adopts the definition of 'whistleblowing' put forward by Janet Near and Marcia Miceli in their seminal article on whistleblowing, 'Organisational Dissidence: the Case of Whistleblowing':[8]

> '[T]he disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action'.

As Professors Paul Latimer and A J Brown have pointed out:[9]

> 'Whistleblower' or 'whistleblowing' is not a technical term and it does not have a common legal definition. A whistleblower is sometimes described as an 'internal witness', or as a person making 'public interest disclosure', or 'protected disclosure' or giving 'public interest information'.

Whistleblowing covers disclosure to employers, managers, organisational leaders, regulators and ultimately disclosures to the public (including disclosures to the public via the media). It excludes the airing of complaints and personal grievances, even though these may have a public interest dimension, where such grievances are not able to be resolved. In the words of Calland and Dehn, '[w]histleblowing is now used to describe the options available to an employee to raise concerns about workplace wrongdoing'. The test is not the whistleblower's subjective motives or ethics (complaints or grievances) but the whistleblower's perception or reason to believe that there has been wrongdoing.

There are different perspectives on the importance of whistleblower disclosures. Whilst some may focus on the primary public interest in protecting whistleblower disclosures due to the pressure it places on public and private institutions to conduct themselves properly, AJF considers the public's right to know to be paramount in the context of whistleblower disclosures.

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[8] Janet Near and Marcia Miceli, 'Organisational Dissidence: the Case of Whistleblowing' (1985) 4 *Journal of Business Ethics* 1, 4.

[9] Paul Latimer and A J Brown, 'Whistleblower Laws: International Best Practice' (2008) 31(3) *UNSW Law Journal* 766, 768.

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It's important that the PJCIS understands the AJF does not advocate for whistleblowers. We advocate for legislative reform to protect journalists' freedom.

Generally when a whistler 'blows' to a journalist they know only too well the consequences. Contacting the media is the 'nuclear option' – a much more serious undertaking than simply reporting a wrong-doing to a senior manager or going through internal mechanisms. Whistleblowing to a journalist is almost always a complaint of last resort, when all other means are exhausted, and which almost inevitably destroys the whistler's career.

While the AJF acknowledges the need for a clear definition of whistleblowing, our main concern remains that the police or security services should not access journalists' contacts as a way to get to whistleblowers. Journalists sources should be protected as a pillar of press freedom, unless there is a demonstrable threat to national security."

3.2 The AJF advocates for the abolishment of 'disclosable conduct' for public sector disclosures, why is that the case?

Under the *Public Interest Disclosure Act 2013* (Cth), 'disclosable conduct' is defined to include a closed list of activities that may attract protection if disclosed in a public sector context.

As a liberal democracy, Australia should start from the position that representative democracy and responsible government require the public to be able to oversee the conduct of the Executive branch of Government in order to hold it to account. That accountability cannot be realised without a free press that reports on Government conduct to the public.

Representative and responsible government does not allow governments to cherry-pick the matters on which they may be held accountable. Rather, if there are compelling public policy reasons for information about government conduct to be withheld from the public – for example, to protect genuine national security interests or the privacy of individuals – those matters should be excluded from an otherwise general assumption in favour of public accountability through freedom of disclosure.

3.3 AJF's preliminary submission recognises that:

> **'It is meaningless if the other link in the chain – journalists' sources – doesn't also enjoy the same protections.'**
>
> **Some people argued that the Ombudsman and IGIS do not have sufficient remit to be an effective internal whistleblowing pathway. Does AJF have any comments for the PJCIS as to what additional powers the Ombudsman and IGIS would need to make sure there is a pathway where an individual can report on what they see as unethical, criminal or other behaviour within an agency?**

While the design of the *Public Interest Disclosure Act 2013* (Cth) (**PIDA**), which regulates public interest disclosures in the security and intelligence sector, encourages internal disclosures and the resolution of misconduct internally and confidentially by the agency

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in question, it undermines the principles of responsible and representative government by prohibiting any public disclosure outside narrow circumstances.

Accountability, proportionality and protection for whistleblowers and journalists who speak out in the public interest could be protected by establishing a regulated process with court oversight that facilitates the disclosure of important public interest information to the public. This process should be subject to a presumption that misconduct should be disclosed, unless the 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 organisation concerned. When that threshold is satisfied, a framework should be established for disclosing the conduct at such time as the risk has passed.

Where misconduct in the course of national security operations occurs, a process for bringing the relevant information to light without jeopardising operational integrity could, for example, function as follows:

1 Any internal process for disclosing the relevant misconduct must be followed.

2 If following the internal disclosure process does not lead to a public disclosure that notifies the public of the nature and extent of the misconduct, the whistleblower may disclose the conduct to a journalist.

3 If the journalist wishes to report the disclosure, the journalist must provide a draft of the report to the agency concerned before publication.

4 The relevant agency may then either agree to the disclosure or negotiate with the journalist as to the extent of the disclosure.

5 At any time, the whistleblower, journalist or organisation may refer the matter to a closed court, which may hear arguments in order to determine the appropriate time for and extent of disclosure concerning the misconduct, balancing the democratic imperatives of public accountability against any risk to national security or the operational effectiveness of the organisation concerned.

This process would allow the imperatives of national security and accountability to be brought into balance.

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Attachment A

US	In the US, freedom of speech, or of the press, is a right secured by the First Amendment (Amendment I) to the United States Constitution. The freedom of speech and press can be upheld by: · declaratory relief: where a citizen brings a suit to have a law declared unconstitutional; · injunctive relief: for example, where a citizen brings a suit to prevent a government from enforcing a law that the citizen claims is unconstitutional (the citizen must be able to show irreparable harm is likely to be suffered); or · as a defence: where, while being prosecuted, a citizen argues that they are not guilty because the law under which they are being prosecuted is unconstitutional.
UK	In 1998 the UK incorporated the European Convention, and the guarantee of freedom of expression it contains in Article 10, into its domestic law under the UK *Human Rights Act 1998* (**UK HRA**). Article 10 of the UK HRA provides that "everyone has the right to freedom of expression" in the UK. Pursuant to the UK HRA, legislation "must be read and given effect" in accordance with Convention rights.[10] Alternatively, superior courts may declare a provision in an Act of Parliament incompatible with the Convention.[11] The UK HRA makes it unlawful for a public authority to act incompatibly with Convention rights. Where the offending legislation is found in primary legislation, the court may issue a "declaration of incompatibility," permitting the government opportunity to ameliorate. If this does not occur, the claimant may have the right to take the case to the European Court of Human Rights, to seek to have the offending legislation struck down.
NZ	Human rights protections in NZ stem from two main sources: (1) the *New Zealand Bill of Rights Act 1990* (**NZBOR**) and the *Human Rights Act 1993*. The NZBOR contains various civil rights and freedoms, including the right to freedom of expression. The enforcement of the NZBOR is primarily the responsibility of the Courts. If a member of the public believes that one of their rights or freedoms under the NZBOR has been impeded upon, they can make a claim, and try to seek a remedy, at the New Zealand High Court. The Courts of New Zealand have the authority to issue a declaration of inconsistency in respect of a piece of legislation which impedes upon the rights and freedoms under the NZBOR. This declaration is a formal judicial statement that a law impedes upon the NZBOR and instructs Parliament to reconsider the legislation passed.

[10] HRA s 3(1).

[11] HRA s 4.