

Impact on the exercise of law enforcement and intelligence powers on the freedom of the press

Response to Questions on Notice, Friday 20 September
2019 - Parliamentary Joint Committee on Intelligence
and Security

3 October 2019

CONTENTS

Who we are	4
Introduction	5
Definition of 'journalist' and 'journalism' (pp14-15 of proof)	5
Offences from which journalists and their sources should be excepted (p15)	6
Attorney-General's Department and Department of Home Affairs response relating to a Media Freedom Act (pp15-16).....	7

Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA provides this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security ('the Joint Committee') inquiry into the Impact on the exercise of law enforcement and intelligence powers on press freedom, in response to questions raised by the Committee to the ALA spokesperson Mr Greg Barns who appeared before the Committee on Friday 20 September. These are detailed on pages 14-16 of the Proof Committee Hansard transcript of the hearing.

Definition of 'journalist' and 'journalism' (pp14-15 of proof)

2. As noted in its submission, the ALA submits that the term "journalist" should be defined to include to both professional journalists and individuals who report on what they have seen or heard in their private capacity. The ALA considers that the concept of public interest journalism refers to journalism that enriches political debate, including assisting the community to examine the conduct of government officials or other power-brokers.
3. Section 126J of the *Evidence Act 1995* (Commonwealth) defines a "journalist" as "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium."
4. The ALA submits that this definition of "journalist" is appropriate as it includes not only those persons who are "in the business of reporting news", but also covers persons who report or disclose via social media platforms which are not-for-profit, or individuals who report on what they have seen or heard in their private capacity. As noted above, the concept of public interest journalism includes these private and not-for-profit avenues of reporting.
5. In developing an appropriate definition of "journalist" the ALA submits that it is important to recognise that the practice of journalism can be undertaken by anyone – whether employed by a publication or not – who gathers information with the intent to disseminate it to the public. In addition, the definition should recognise that the medium by which such information is disseminated can include any sort of publication which affords a vehicle of information and opinion.

Offences from which journalists and their sources should be excepted (p15)

6. In its original submission the ALA noted that the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* and the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* criminalised certain disclosure activity in such a way as to excessively encroach upon journalists' freedoms. This effectively criminalises the conduct of journalists who publicly disclose any information relating to a security agency's operations, even if disclosure uncovers serious misconduct by operatives of that security agency, or criminal conduct. The ALA is concerned that protection only through a defence rather than as a specific exception to an offence, places a burden on journalists of raising the defence, rather than placing a burden on the prosecution to prove that the exception does not apply.
7. In terms of the offences to which there should be a specific exception, the ALA submits that all of the offences listed in Part 5.2 (Espionage and related offences) of the *Criminal Code Act 1995* (Commonwealth), as amended by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* should be subject to the specific exception from prosecution. In particular, the following offences should have an exception for journalists undertaking news reporting:
 - Section 91.1 Espionage—dealing with information etc. concerning national security which is or will be communicated or made available to foreign principal;
 - Section 91.2 Espionage—dealing with information etc. which is or will be communicated or made available to foreign principal;
 - Section 91.3 Espionage—security classified information etc.;
 - Section 91.6 Aggravated espionage offence;
 - Section 91.8 Espionage on behalf of foreign principal;
 - Section 91.11 Offence of soliciting or procuring an espionage offence or making it easier to do so;
 - Section 91.12 Offence of preparing for an espionage offence.

8. The ALA also submits that where a national security organisation engages in misconduct or illegal activity the disclosure of which does not pose any immediate risk to national security, there should be no threat of prosecution of journalists who have reported on this misconduct or illegal activity, or their sources.

Attorney-General's Department and Department of Home Affairs response relating to a Media Freedom Act (pp15-16)

9. The ALA has had an opportunity to consider the Supplementary submission from the Department of Home Affairs and the Attorney-General's Department ('the Departments'), and its reference to the submissions calling for a Media Freedom Act. The ALA notes that, in summary, the Department do not consider that a Media Freedom Act is necessary given existing common law protections for freedom of speech related to public affairs and political matters, and the implied constitutional freedom of political communication. The supplementary submission cautions that press freedom is not absolute and a broad immunity from the application of Australian laws is not appropriate.
10. The ALA does not accept the position of the Departments in the Supplementary Submission regarding this matter.
11. The ALA has previously expressed its strong support for a federal legislative human rights charter, noting that Australia is the only western democracy without a national Human Rights Act, Bill of Rights or Charter of Rights. The ALA considers that a charter of human rights is an essential adjunct to the institutions of parliamentary democracy and the common law.
12. However, in the absence of an overarching bill or charter of rights, the ALA considers that there is a need for separate legislation that guarantees media freedom and provides protection for journalists engaged in legitimate journalistic work, and also their sources.
13. The ALA does not agree with the Departments' supplementary submission that existing common law protections for freedom of speech related to public affairs and political matters, and the implied constitutional freedom of political communication, provide sufficient protections for the confidentiality of journalists' material and notes, nor does it protect journalists from being forced to reveal their sources by government agencies.

14. The ALA previously submitted that there is a significant current imbalance between the legislative framework governing Australia's national security and the need to maintain and protect public accountability and government transparency through a free and independent media. A Media Freedom Act would go some way to addressing this imbalance.
15. The ALA rejects the supplementary submission from the Departments that such legislation would provide broad ranging immunity and is therefore not appropriate. The ALA submits that a Media Freedom Act would enable a process by which the protected freedoms could be stated to be subject to reasonable and proportionate limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. In considering whether the protected rights and freedoms should be limited, consideration would need to be given to the importance of the purpose of the limitation, the nature and extent of the limitation and whether there is any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Andrew Christopoulos



President

Australian Lawyers Alliance