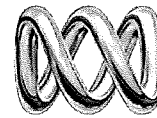


28 March 2014



Australian
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Corporation

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Dear Ms Dunstone

Inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters

We refer to your letter dated 12 March 2014.

The Australian Broadcasting Corporation (**ABC**) appreciates the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee.

The ABC would welcome reform to the Australian Federal Police's (**AFP**) investigative processes and powers in non-criminal matters, particularly as they relate to evidentiary thresholds for obtaining production orders and search warrants, and the capacity of media organisations to protect journalists' confidential sources.

While this submission does not seek to detail the precise terms of any proposed amendments to internal AFP procedures, the ABC sets out the following principles which we believe should strongly influence the investigative processes and powers of the AFP.

1. Code of Ethics and ABC Editorial Policy

While it is the normal practice of journalists to share the source of their information with its audience so they can assess their credibility, in some instances journalists are only offered information in the public interest from a source who asks that their identity be kept confidential.

It is a critical guiding ethical principle that journalists respect their confidences in all circumstances. Certainly, that position is expressly supported by the Media Entertainment & Arts Alliance's *Journalists' Code of Ethics*. The preamble to that Code states that without trust, journalists do not fulfil their public responsibilities.

If journalists are required to break confidentiality agreements and name their sources, then the flow of information from informants or whistleblowers would be impacted, making it more difficult for journalists to perform critical tasks such as scrutinising those in power and publishing other matters of public interest.

Journalists do not take lightly the notion of granting confidentiality to a source. At the ABC, for instance, strict editorial guidelines have been created on the use of confidential sources. Certain editorial tests must be met before a request for anonymity related to the publication and broadcast of material is approved, including mandatory referral to a senior ABC manager, scrutiny of the source's motivation for anonymity and consideration of an alternative attributable source.

Indeed, journalists may at times, as a consequence of their ethical obligations, be required to refuse to disclose a source notwithstanding that criminal penalties will follow.

2. *Progress in the protection of journalists' sources nationally*

Legal protections for journalists have improved nationally in recent years, with specific shield laws in place at the Federal level as well as in NSW, Victoria, Western Australia and the ACT. These laws have increased protection of freedom of speech and the right of journalists to protect the identities of confidential sources in an area where there was once little by way of legal protection. Such progress has been an acknowledgment by legislatures nationally that this area demands improved legal protection.

Unfortunately, legal protections are very limited in the situation of the AFP (and other regulatory bodies) exercising their investigative powers, including the issuing of search warrants. Specifically, no equivalent shield laws currently exist to protect media organisations – or their confidential sources – from AFP investigations. This can undermine legitimate news and current affairs reporting in the public interest. For example, its absence may hinder a media organisation's investigations into and reporting on allegations of illegal or unlawful activity, health and safety risks, fraud or negligence, unethical behaviour and other similar issues of legitimate public interest.

Lack of safeguards in this area has been the subject of government attention in the US when the US Department of Justice amended its news media protocols when targeting surveillance on journalists.¹

It should also be noted that Australia's media union is now pushing for uniform national shield laws across the country to ensure that the principle of protecting journalist's sources is enshrined nationally and not applied in a 'patchy and disparate'² way.

As a consequence of the matters above, and with reference to the matters set out in your 12 March 2014 letter:

1. From a policy perspective, it should be acknowledged that the exercise of search warrants and other investigative powers (such as interception of telecommunications) against media organisations, and even the risk and fear that a search warrant may be exercised, has the potential of adversely affecting freedom of speech and the freedom of the media. As has

¹ Statement of Attorney General Eric Holder on the Justice Department, *Report on Revised Media Guidelines*, <http://www.justice.gov/opa/pr/2013/July/13-ag-783.html>. For background to the incidents triggering DOJ's review, see <http://www.bbc.co.uk/news/world-us-canada-22532057>.

² Christopher Warren, 'Shield law demand after Rinehart case', *The Sydney Morning Herald* (online), 16 March 2014 <<http://news.smh.com.au/breaking-news-national/shield-law-demand-after-rinehart-case-20140316-34v78.html>>.

always been the position of the ABC (and other media organisations), strong protections for confidential sources are vital to ensuring that media organisations can publish stories that are in the public interest that would otherwise never be published. Such stories help to ensure political accountability, and contribute to democracy and a robust and informed public dialogue;

2. The ABC strongly supports amending/revising the AFP's current investigative processes and powers to ensure that they do not interfere with the newsgathering, current affairs and investigative operations of media organisations such that search warrants and other investigative powers are rarely (if ever) exercised in order to force a journalist or his or her media employer to breach their ethical obligations;
3. The ABC believes that if such interferences are to occur, then they should be rare and limited in scope. Consequently, the ABC supports the introduction of a higher evidentiary threshold which must be overcome before the AFP can exercise its investigative powers against a media organisation, and believes that this threshold should be particularly stringent in situations where the AFP might require a media organisation to disclose, against its will, information identifying a confidential source. To that extent, we refer to the requirements used in paragraphs (c)(4) and (c)(5) of the *US Code of Federal Regulations*, §50.10 'Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media'³;
4. Before such steps are taken by the AFP, we believe that the media organisations and journalists should be consulted so as to question the legitimacy or breadth of any intended warrant in an effort to avoid the unnecessary capturing of irrelevant/confidential information;
5. Equally stringent protections to those referred to in paragraphs 2, 3 and 4 should also be extended to include circumstantial information which, although it does not specifically name a confidential source, is nonetheless likely to reveal their identity (such as phone call records, employment information or meeting locations); and
6. Where information concerning a confidential source is forcibly collected by the AFP, efforts should be taken to limit the use or publication of confidential information obtained, and to destroy irrelevant or protected information that should otherwise remain confidential.

Thank you again for consulting with the ABC. We would also welcome the opportunity to comment on any recommendations that may be made in due course.

Should there be any further information you require, please let us know.

Yours sincerely

Michael Millett
Director Corporate Affairs

³ See <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=9c2f95c4ca9fa4a78d6acc616c6c1c98&rgn=div8&view=text&node=28:2.0.1.1.8.0.1.8&idno=28>