

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

Submission to Parliamentary Joint Committee on
Intelligence and Security

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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 welcomes the opportunity to have input into the inquiry conducted by the Parliamentary Joint Committee on Intelligence and Security ('the Committee') into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.
2. This submission makes comment on Term of Reference (c), in relation to changes 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 and the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats.
3. The ALA submits that media freedom is a cornerstone of Australia's democratic framework and that the media play a vital role in holding governments and security agencies to account for the exercise of power, including law enforcement and coercive powers. In this regard, media freedom in Australia plays an essential role in the protection of human rights for all people resident in Australia.
4. 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. The ALA considers that the word "journalists" includes both professional journalists and individuals who report on what they have seen or heard in their private capacity.

Australia's national security framework encroachment on journalistic freedom

5. While the ALA accepts that there is need for legislative security measures that responds appropriately to the threats posed by terrorism, the ALA submits that recent legislation has created a framework that fails to strike the appropriate balance between national security and the need to maintain and protect public accountability and government transparency through a free and independent media. In particular, the ALA is concerned that the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* and the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* has criminalised certain disclosure activity in such a way as to excessively encroach upon journalists' freedoms. The ALA notes that the United Nations Special Rapporteur on the

promotion and protection of the right to freedom of opinion and expression has indicated that this legislation imposes 'draconian criminal penalties on expression and access to information that is central to public debate and accountability in a democratic society.'²

6. The ALA is concerned that the 2018 legislation 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 submits that journalists who disclose in the public interest such misconduct, based on the reports of agency whistle-blowers, should be protected by legislation that established appropriate court processes that regulates whistle-blower disclosure to journalists. The ALA agrees with the Alliance for Journalists' Freedom ('AJF') that this process should be subject to a presumption that misconduct should be disclosed unless the security agency can establish on the balance of probabilities that the disclosure would pose a risk to national security.³ The ALA also considers that such disclosure by journalists refers 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.
7. The ALA also submits that the defence to this charge of news reporting (i.e. for information communicated by persons engaged in business of reporting news) is inadequate for the following reasons:
 - The defence only applies to secrecy offences and does not cover espionage or foreign interference offences;
 - The defence only covers those persons who are "in the business of reporting news". It does not cover reporting or disclosure via social media platforms which are not-for-profit, or individuals who report on what they have seen or heard in their private

² United Nations' Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, February 15 2018, available at https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Opinion/Legislation/OL-AUS-2-2018.pdf&action=default&DefaultItemOpen=1

³ Alliance for Journalists Freedom (2019), *Press Freedom in Australia*, White Paper, May 2019, 9-10.

capacity. As noted above, the concept of public interest journalism includes these private and not-for-profit avenues of reporting;

- 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.
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. In these circumstances, the principles of public accountability are no different to those that are applicable to other public or private sector organisations engaged in misconduct or illegal activity, and the public interest warrants disclosure and reporting of such misconduct.

Protection of journalists' confidential data

9. The ALA agrees with the Media Entertainment and Arts Alliance and the AJF that several provisions in the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* significantly undermine the ability of journalists to protect their confidential sources.⁴ These include:

- The ability of Government agencies to issue notices to designated communication providers requiring them to assist with criminal law enforcement functions;
- Providing Australian law enforcement agencies with the power to seize and access information through computer access warrants, which may be issued even if the individual or organisation that is the target of the warrant is not being investigated for an underlying offence;
- The ability of law enforcement officers to apply for assistance orders requiring specified persons to provide information or assistance that is reasonably necessary to allow access to data held in a computer or device subject to a computer access warrant.

⁴ Alliance for Journalists Freedom, see n 3 above, 13.

10. The ALA submits that the legislation requires urgent amendment to ensure that computer access warrants and assistance orders should not be issued to access data held by a journalist in the legitimate course of their work, unless the warrant is required to address the immediate danger to a person's safety, and that there is no other way to obtain the data.

The need for enhanced whistle-blower protections

11. The ALA submits that current legislative protections for whistle-blower disclosures to journalists are inadequate. The ALA submits that these protection need to be enhanced so that disclosures made in the public interest by whistle-blowers to journalists (including both professional journalists and individuals who report on what they have seen or heard in their private capacity) are protected, regardless of any steps taken by the organisation that is the subject of the disclosures to address its misconduct.
12. The ALA also submits that public interest disclosures should not be limited by imposing a requirement of 'disclosable conduct' under the *Public Interest Disclosure Act 2013* (Cth), where the term 'disclosable conduct' is defined (and thereby limited to the contents of the definition). The ALA submits that the section in the legislation which list the conduct that is included within the definition of 'disclosable conduct' should be repealed so that all public interest disclosures of public sector misconduct are protected.

The need for further legislative protection of media freedom

13. The ALA submits that, in the absence of a Federal legislative human rights charter that enables an appropriate balancing of the Australia's national security laws and the essential human rights of freedom of expression (which includes the freedom to seek, receive and impart information and ideas of all kinds), 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. A Media Freedom Act would go some way to addressing the 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.
14. The ALA submits that a Media Freedom Act should include the following:
 - Explicit legislative recognition of the freedom of the press;

- Subject to reasonable and proportionate limits, explicit recognition of the right to freedom of opinion and expression, as articulated in Article 19 of the *International Covenant on Civil and Political Rights*;
- Amend national security legislation to better protect journalists from criminal prosecution for journalistic work. In particular, replace the defences currently available to journalists for particular national security offences with exceptions from prosecution where the underlying conduct in question relates to legitimate journalistic work;
- Protect the confidentiality of journalists' material and notes developed in the course of legitimate journalistic work;
- Protect journalists from being forced to reveal their sources by government agencies; and
- Safeguard journalists and their sources through enhanced whistle-blower protections.

Conclusion

15. The Australian Lawyers Alliance (ALA) appreciates the opportunity to respond to the committee's inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. The ALA would welcome the opportunity to appear before the Committee to further explain its views.

Andrew Christopoulos



President

Australian Lawyers Alliance

