



13 March 2018

Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary,

The Joint Media Organisations – whose logos appear above – appreciate the opportunity to make this second supplementary submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (the Bill).

We make this submission following the submission of the proposed parliamentary amendments by the Attorney-General on behalf of the Government (submission 40).

We appreciate the Attorney-General's consideration of the issues raised by Australia's media organisations and the resulting amendments that address a number of our concerns. We are grateful for these amendments.

We hope that this submission and the recommendations contained herein are taken in the way that they are offered – to achieve legislation that is fit-for-purpose and minimises the chilling effect on public interest reporting.

Please note our reference to 'the Bill' in this submission is as if the original Bill is amended as proposed by the Government amendments contained in submission 40.

OVERARCHING CONCERN – THE BILL STILL CRIMINALISES JOURNALISTS FOR DOING THEIR JOBS

Notwithstanding the amendments it remains the case that journalists and their support staff continue to risk jail time for simply doing their jobs. This is why we believe that the way in which to deal with this appropriately is to provide an exemption for public interest reporting.

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, they are protected under section 12 of the *Human Rights Act 1998*.

Therefore we do not resile from our long-held recommendation for exemptions for public interest reporting in response to legislation that criminalises journalists for going about their jobs. The lack of such a protection – and the ever-increasing offences that criminalise journalists for doing their jobs – stops the light being shone on issues that the Australian public has a right to know.

The requirement for the prosecution to 'negative' a defence in order for a successful prosecution is no comfort and of itself chills public interest reporting

It has been explained that Commonwealth law requires the prosecution to 'negative' the defence for the defendant to be found guilty of the offence (due to the way that the Commonwealth Criminal Code and the Crimes Act work in practice).

It should not be surprising that this is not at all comforting.

So, in the case of a journalist and the offence provisions in the Bill, a journalist might fall foul of the offence and is charged. At this point it would be fair to say the prosecution would be confident of a successful prosecution – otherwise they would not have taken the case. The journalist mounts a defence – in court, up against the AFP or the Commonwealth DPP – and looking down the barrel of jail time, for doing their job. Then the prosecution – the AFP or the Commonwealth DPP – mounts their case in reply. It is unfathomable that the prosecution would not do all it can to negative the defence.

This is a useful illustration of why it is that criminalising journalists for doing their job chills public interest reporting – no one wants to be charged with an offence and have to defend themselves in court, with the risk of jail time, and facing a well-honed prosecution, and add to that a prosecution with every incentive to win, and no incentive to lose the case. That's not what journalists want to do when they get out of bed every morning. The result can be nothing but detrimental to the Australian public's right to know.

The rationale of a similar evidentiary burden applying for defences and exemptions is not a reason to only offer defences and not include exemptions

We note that the letter accompanying the drafting amendments submitted to the PJCIS explains that there is no material difference in the evidential burden of proof between exemption and defence, and also exception, justification and excuse.

We continue to hold that a media exemption should be provided for public interest reporting. It is far preferable for a journalist to have to establish a public interest reporting exemption than to be forced to defend themselves in court against a formal charge.

While the evidentiary burden may be the same for a defence and an exemption we continue to hold that to minimise the chilling effect on public interest reporting it would be significantly better to have an exemption rather than a defence.

ISSUES IN THE BILL THAT REQUIRE FURTHER CONSIDERATION & AMENDMENT

Notwithstanding the above, there remain three (3) outstanding issues presented by the redrafting that require further consideration and amendment.

SECRECY

1. The definition of *'deal' with information* and the terminology *'deals with and/or holds information'* is unchanged and requires amendment

To reiterate, we do not believe that journalists and editorial support staff (including, for example, the editorial chain, legal advisers, executive assistants) should be liable for the offence in the Bill. That, as we have said above, would appropriately be addressed by providing an exemption for public interest reporting.

Despite that, and regarding the Bill, we again raise serious concerns that the definition of 'deal' as it relates to 'dealing with information' is unnecessarily broad.

'Deal' is defined at section 90.1(1) of the *Criminal Code*. It says:

A person ***deals*** with information or an article if the person does any of the following in relation to the information or article:

- (a) receives or obtains it;
- (b) collects it;
- (c) possesses it;
- (d) makes a record of it;
- (e) copies it;
- (f) alters it;
- (g) conceals it;
- (h) communicates it;
- (i) publishes it;
- (j) makes it available.

(2) In this Part, dealing with information or an article includes:

- (a) dealing with all or part of the information or article; and
- (b) dealing only with the substance, effect or description of the information or article.

Our concerns are these:

- there has been no justification for the breadth of the scope of the definition; and
- this introduces serious criminal penalties for a range of passive activities – particularly (a) to (e) above (receives/obtains, collects, possesses, makes a record, copies).

This is particularly unreasonable in a situation where a journalist 'deals with' verbal information, such as via a simple conversation. In such a case a person:

- 'receives' or 'obtains' information if they are told it by another person or even if they overhear it in discussion;
- 'collects it' without actively seeking the information – its classification also remains most likely unstated and the journalist is not in a position to assess the nature or significance of the information or documents being provided until after an offence is potentially committed;

- Then ‘possesses’ it forever; and
- ‘makes a record’ of it by taking a file note of the conversation in which it is spoken.

We note that the terminology used in the Bill of ‘hold’ in association with ‘deal’ – as in deals with and/or holds information’ – has no definition, creates further ambiguity, and we recommend its removal.

No person involved in news media activities (and perhaps no one at all) should be subject to the possibility of criminal sanction for those acts.

We note again the ALRC's recommendation that the mere receipt or possession of information should not be covered in the general secrecy offence or in the subsequent disclosure offences.

RECOMMENDATION

We recommend that persons engaged in public interest reporting be exempted from offences in the Bill, including to ‘deal’ with information.

If this is not accepted, then an alternative is that the offence in s122.4A should only apply to a limited range of activities rather than the full list of activities currently listed under ‘deal’ in section 90.1(1).

Specifically subsections (a) to (e) should be removed from the definition of ‘deal’ such that only the ‘active’ activities remain as offences under s122.4A(2) – being (f), (g), (i) and (j). Activity (h) – ‘communicates’ should be excluded from the operation of s122.4A(2)(a).

This change would ensure that more passive activities, such as the mere receipt and internal copying of information or an article would not trigger a relevant offence provision under the Act (in particular, sections 91.1, 91.3, 122.4A). There does not appear to be any justification for extending those provisions to circumstances of passive and/or internal and unaltered use of any information.

The terminology of ‘and/or holds’ in ‘deals with and/or holds information’ under sections 122.5(6) and 122.5(7) should also be removed from the Bill, and replaced with references to ‘communicates or deals’. This is essential to ensure that the defence provided under section 122.5(6) clearly extends to all offences under the Division as intended.

2. The news media defence requires 3 changes

To reiterate, we do not believe that journalists and editorial support staff (including, for example, the editorial chain, legal advisers, executive assistants) should be liable for the offence in the Bill, and this would be appropriately addressed by an exemption.

This would mean that criminal liability does not arise in circumstances where the exemption is present.

Disappointingly the Bill does not offer an exemption, rather there is a defence to the ‘outsiders’ offence for news media at section 122.5(6).

Our concerns regarding the news media defence are:

- Only journalists are afforded the defence. The defence does not specifically extend to editorial support staff, for example legal advisers and administrative staff;
- It applies to a narrow range of news media formats; and
- Support staff should not be required to hold the belief that dealing with the information was in the public interest in order to rely on the defence.

All of these issues require addressing by amendment.

RECOMMENDATION

1. To address (i) and (ii) above the following amendments are required:

Section 122.5(6)(a) should be amended to extend to support staff and legal advisers and in relation to a broader range of news media formats:

"The person dealt with or held the information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media"

2. To address (iii) above, one of the following amendments is required:

Support staff should not be required to hold the belief that dealing with the information was in the public interest in order to rely on the defence. This could be done in one of two ways:

- > Amend s122.5(6)(b) so that it contains two sub-sections:

(b) at that time, the person:

- (i) reasonably believed that dealing with the information was in the public interest (see subsection (7)); or*
- (ii) was acting at the direction or under the instructions of a person who held such a belief*

OR

- > Amend s122.5(6)(b) so that it only relates to a person undertaking an activity which falls within subsections (f), (g), (i) and (j) of the definition of 'deals' with activity (h) 'communicates' excluded by operation of section 122.4A(2)(a).

3. We recommend that the Bill incorporate an exemption for public interest reporting.

This could be achieved in the Bill by framing section 122.5(6) – incorporating the requisite amendments above – as an exemption rather than a defence.

These changes would also make clear that any support staff and legal advisers dealing with information in the course of preparing news media could rely on this defence, and remove the need for support staff to prove "reasonable belief" of public interest under (b). These sorts of considerations do not arise for support staff and may not arise for legal advisers and it should be sufficient that the person instructing those persons holds the relevant belief.

Exemption rather than a defence is required

By framing 122.5(6) as an *exemption* rather than a *defence*, it would avoid criminal liability arising for journalists and their support staff or legal advisers for simply doing their jobs, where the relevant activity falls within the scope of the exemption (i.e. news reporting, current affairs, editorial or other content in news media).

We note here Linda Mottram's recent interview with the Attorney-General ABC Radio National PM program about the amendments and the Bill¹. A question was posed to the Attorney-General about the recent filing cabinet situation and the penalties that would apply under the Bill. The Attorney-General responded by saying that he didn't think you can make blanket assumptions about penalties, there are a range of defences and it would depend on the circumstances and on the contents of the document, so he couldn't say if the person (the purchaser of the filing cabinet or the journalist) would definitely face this or that charge, and noted in closing that every case is different and it's a very complicated and individualised situation.

We cannot emphasise enough that this is why an exemption for public interest reporting is the most appropriate outcome for Australia's democracy when laws – intentionally or unintentionally – criminalise journalists (and associated support personnel).

Linda Mottram's response illustrated the point: *Which in itself has got to have a chilling effect, doesn't it? Anybody who comes across documents is going to immediately say whoa, hang on a minute, it's complicated as the Minister said and there's possibly 10 years' jail at the end of this.*

ESPIONAGE

3. The offence of 'supporting' a foreign intelligence agency should not include news coverage in the ordinary course, and requires amendment

As raised in our original submission to the Committee, we remain significantly concerned by sections 92.7 and 92.8 of the Bill – which are unchanged from the original Bill.

These provisions regard foreign interference involving foreign intelligence agencies – specifically regarding 'support'.

The Explanatory Memorandum states that '*support*' in these sections is not defined but is to have its ordinary meaning, namely (according to the Oxford Dictionary) '*to give help or encouragement or approval to*'.

We are concerned that any communication – online, in print or by broadcast – that positively reports about a foreign intelligence agency would breach these sections.

We bring to the attention of the Committee a not dissimilar issue that the *Wall Street Journal* recently encountered, where a journalist wrote [an article](#) (attached) about all sides of conflict in a region, including interviewing and reporting the views of the PKK. Because the reporter gave the PKK a voice at all, the article was regarded as terrorist propaganda. This is the kind of subjective assessment that media organisations encounter each and every day.

Similarly, if a journalist reports on a foreign intelligence agency that journalist and the media company that employs them could – in all likelihood – breach the provision for upholding the ethics of the profession and reporting in the public interest. This is because of the matter of subjectivity.

In Australia, news.com.au wrote a story exposing Islamic State's use of popular online trading sites to target potential victims. News.com.au was directed to remove the story after the Classification Board found that the story indirectly provided instruction on the doing of a terrorism act. The story reported the instructions given to readers of an IS magazine. The Australian Press Council found that the story did not breach the Council's Standards of Practice.

¹ Radio National PM, 5 March 2018

This provision remains a significant concern, as per our original submission, that any communications and media coverage regarding any foreign intelligence agency – whether positive or otherwise – could breach these sections due to the definition of ‘support’ in the Bill the subjective nature of assessing such.

Our concerns regarding these provisions are amplified as the penalty is 10 to 15 years in jail, and there is no public interest exemption, nor a defence.

RECOMMENDATION

The present sections 92.7 and 92.8 should become sections 92.7(1) and 92.8 (1) respectively, and should be subject to sections 92.7(2) and 92.8(2) which should both read:

Publication of information by a journalist in the course of public interest reporting (which may relate to foreign intelligence agencies) does not amount to the provision of ‘support’ for the purposes of section [92.7(1) / 92.8(1)].

This change would assist in narrowing the breadth of the word ‘support’ in the present sections 92.7 and 92.8 (given its ordinary meaning of ‘give help or encouragement or approval’).

It would ensure that media companies would be able to publish stories that report about a foreign intelligence agency without committing an offence under section 92.7 or 92.8.

Other issues

We again bring to the attention of the Committee:

The defence for communicating information that has been previously communicated (section 122.5(8) is inadequate

This is an important issue and has a significant chilling effect. To take advantage of the defence, the following elements are required:

- (d) *at the time of communication. The person believes that the communication will not cause harm to Australia’s interests or the security or defence of Australia; and*
- (e) *having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.*

We restate here our comments made in our original submission – these requirements undermine the public interest significantly, and restrict the media from reporting material already in the public domain.

We recommend subsections 122.5(8)(d) and (e) be removed from the defence, allowing information that has already been communicated or made available to the public to continue to be freely communicated provided the person ‘*reasonably believed that the communication was in the public interest*’. This approach addresses an otherwise substantial chilling effect, and also ensures consistency with the ‘journalist defence’ outlined by s122.5(6).

The offences carry substantial penalties, and there is a very real risk of jailing journalists for doing their jobs – both of which have a chilling effect

The 'outsiders' offence for 'communicating' continues to carry a significant penalty of 10 years imprisonment.

To reiterate, the risk of journalists facing jail time for public interest reporting has a chilling effect regardless of the timeframe.

Notwithstanding this we reiterate the ALRC report where it was recommended (Recommendations 7-4 and 7-5) that both secrecy and 'subsequent disclosure' offences both attract a maximum penalty of 7 years imprisonment, given *'the level of culpability and potential harm encompassed by the subsequent disclosure offences is of a similar order to that reflected in the recommended general secrecy offence'*.

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WORLD

Wall Street Journal Reporter Sentenced to Prison by Turkish Court

Conviction on terrorist propaganda charges highlights government's increased targeting of journalists; reporter to appeal decision

Updated Oct. 11, 2017 4:39 p.m. ET

A Turkish court sentenced Wall Street Journal reporter Ayla Albayrak to two years and one month in prison Tuesday, declaring her guilty of engaging in terrorist propaganda in support of a banned Kurdish separatist organization through one of her Journal articles.

The conviction of Ms. Albayrak, who is currently in New York, highlights the increasing targeting of journalists in Turkey, where President Recep Tayyip Erdogan's government has gained attention for deteriorating media freedoms.

"This was an unfounded criminal charge and wildly inappropriate conviction that wrongly singled out a balanced Wall Street Journal report," said Wall Street Journal Editor in Chief Gerard Baker. "The sole purpose of the article was to provide objective and independent reporting on events in Turkey, and it succeeded."

Ms. Albayrak plans to appeal the decision. "Given the current climate in Turkey, this appalling decision shouldn't have come as a surprise to me, but it did," she said.

The New York-based Committee to Protect Journalists said it condemned the Turkish court decision.

"The conviction of Ayla in Turkey is a very worrying sign and an escalation of the crackdown on the press," said Nina Ognianova, the CPJ's Europe and Central Asia program coordinator, calling Turkey the world's top jailer of journalists. "We call on the Turkish authorities to overturn this decision immediately," she said.

Turkish legal actions against Ms. Albayrak began after the publication on Aug. 19, 2015, on the Journal's website of her article "Urban Warfare Escalates in Turkey's Kurdish-Majority Southeast." The article and accompanying video reported on the state of a conflict in Silopi, Turkey, between Turkish security forces and the outlawed Kurdistan Workers' Party, or PKK. It included interviews with the local mayor and residents, a Turkish government official, as well as a representative of an organization Turkey says is the youth unit of the PKK.

Turkey, the U.S. and the European Union consider the PKK a terrorist organization.

In November of the same year, Ms. Albayrak, who has dual Finnish and Turkish citizenship, received a written order on her door to visit her local police station in Istanbul where she was notified she was under investigation for spreading terrorist propaganda.

At the police station, she gave a statement saying the article accurately reflected the state of the conflict between the PKK and the Turkish government. In April 2016, a prosecutor in southeastern Turkey filed an indictment against Ms. Albayrak alleging that she violated antiterror laws.

Ms. Albayrak testified from the Istanbul court house to the Cizre court via video-link in January 2017.

William Lewis, Dow Jones's chief executive officer and publisher of The Wall Street Journal, said: "This ruling against a professional and respected journalist is an affront to all who are committed to furthering a free and robust press. We call on those who share this commitment to make their voices heard.

"The notion that our reporter's commendable and insightful work led to a criminal prosecution that has resulted in this wrongful conviction is intolerable," Mr. Lewis said. "We have stood by Ms. Albayrak's side for nearly two years as we have robustly pursued all available options to

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defend this baseless prosecution, and we will continue to stand with her as we seek to overturn this conviction.”

As part of the article she was convicted for, Ms. Albayrak interviewed a person who described herself as a member of the Patriotic Revolutionary Youth Movement, or YDG-H, which the Turkish government says is the youth unit of the PKK.

Ms. Albayrak said in a statement included in the court documents that the original article didn’t include any praise for the group, but rather provided a balanced and objective view of urban warfare that had gripped areas of Turkey’s predominantly Kurdish southeast at the time.

“The decision shows the extent to which the authorities did not want the operations that were going on in Turkey’s southeast to be reported on,” said Ms. Albayrak. “It also shows yet again, that the international media is not immune to the ongoing press crackdown in Turkey.”

The court decision comes amid an escalating diplomatic spat between Washington and Ankara that has seen the U.S. suspend nearly all types of visa services for Turks. The row erupted after a U.S. consulate employee was arrested on suspicion of having ties to U.S.-based Turkish cleric Fethullah Gulen, whom Ankara blames for last year’s failed coup. Turkey in response said it was suspending U.S. visa applications. Mr. Gulen denies the accusation.

Court documents filed against Ms. Albayrak say the Journal article and accompanying video, which included images of men and women bearing PKK emblems, provided fodder for 24 Turkish-language websites that translated parts of the article. Turkish officials sent a list of the websites’ articles in late August to the country’s Telecommunication Directorate to have them blocked.

Ms. Albayrak and the Journal have said they have no relationship with any of the Turkish-language websites that published only parts of her article. The Journal said excerpts published by the websites were distorted.

Ms. Albayrak said she was charged around the same time that the Turkish government had begun a crackdown on Kurdish-majority cities in the country’s southeast, where many members of the ethnic minority live.

Mr. Baker said Ms. Albayrak embodies The Wall Street Journal tradition, “spending years as an intrepid journalist producing insightful, fair and impartial coverage from Turkey. We will work tirelessly to overturn this preposterous conviction.”

The case is a rare instance of terrorism charges brought against a reporter working for a Western media outlet. Deniz Yücel, a prominent German-Turkish journalist for newspaper Die Welt, was arrested in Istanbul in February under terrorism suspicions and remains in pretrial detention without official charges despite repeated protests from the German government. Mr. Yücel has denied any wrongdoing.

In the wake of last year’s failed coup against Mr. Erdogan’s government, authorities have increased focus on journalists they suspect harbor sympathies for Mr. Gulen, as well as those who report on Kurdish separatism.

Mesale Tolu, a Turkish-German citizen who worked as a translator for the leftist-leaning Etkin Haber Ajansi, was detained earlier this year on suspicion of spreading terrorist propaganda and belonging to a leftist organization considered a terrorist group in Turkey, CPJ said. She is scheduled to go on trial on Wednesday.

Amnesty International and other rights groups say Turkey has more journalists jailed than any other country in the world. Authorities have closed more than 150 media outlets under the state of emergency’s executive orders, according to Human Rights Watch and Freedom House.

Turkey ranked 155 on Reporters Without Borders Press Freedom Index this year, worse than Russia or Pakistan. The index is based on statistics of violence against journalists, along with evaluations of pluralism, media independence, self-censorship and legislation.

“Media freedom and pluralism has largely been crushed,” said Johann Bühr, who analyzes Turkey for Reporters Without Borders.

Under the state of emergency in place since the coup, authorities have applied antiterrorism laws in some cases to restrict access to legal counsel and increase the duration of pretrial detention.

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Wall Street Journal Reporter Sentenced to Prison by Turkish Court - WSJ

The government “aggressively used the penal code, criminal defamation legislation and the country’s anti-terrorism law to punish critical reporting, and journalists faced growing violence,” said democracy advocacy group Freedom House last year.

The PKK picked up arms in 1984 to fight for an independent Kurdish homeland within Turkey’s borders.

Since the PKK’s first insurrection, the group has been responsible for numerous bombings of civilian and military targets in Ankara, Istanbul and numerous cities throughout the southeast.

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