# Submission No 98

## Inquiry into potential reforms of National Security Legislation

**Organisation:** The Media, Entertainment & Arts Alliance

**SUBMISSION BY**

**MEDIA, ENTERTAINMENT & ARTS ALLIANCE**

**TO**

**THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

**RE: INQUIRY**

**INTO**

**POTENTIAL REFORMS OF NATIONAL SECURITY LEGISLATION**

**The Media, Entertainment & Arts Alliance**

The Media, Entertainment & Arts Alliance (the Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Media industry members of the Alliance are bound by the Media Alliance *Journalist Code of Ethics*.

**Introduction**

Journalists have substantial obligations to meet as they carry out their duty including respect for the truth, the public's right to information, scrutinising power and the protection of confidential sources.

Journalist privilege is recognised in federal legislation and it is reasonably anticipated that similar legislation will soon be enacted in every state and territory.

Despite this, a raft of anti-terror legislation has, since 2001, been introduced that threatens journalists' ability to do their jobs, undermine sources trust that journalists will keep the source's identity confidential, and allows various government agencies to go on fishing expeditions (sometimes in secret) to discover what journalists know and what information they have.

**The Media Alliance is concerned that any expansion of telecommunications interception powers and the powers of intelligence agencies as proposed in the *Terms of Reference* have the potential to threaten press freedom. The Media Alliance believes efforts should be made to ensure that press freedom, including the confidentiality of journalists' sources and their information, should be protected and guaranteed under any proposed legislative changes being considered.**

**The role of the journalist**

Journalists have substantial obligations to meet as they carry out their duty. The Media Alliance *Journalist Code of Ethics*[1] states:

> *"Respect for truth and the public's right to information are fundamental principles of journalism. Journalists search, disclose, record, question, entertain, comment and remember. They inform citizens and animate democracy. They scrutinise power, but also exercise it, and should be responsible and accountable."*

The Code goes on:

> *"Alliance members engaged in journalism commit themselves to:*
> - *Honesty*
> - *Fairness*
> - *Independence*
> - *Respect for the rights of others."*

**Ethical obligations**

The Code applies to all journalist members of the Media Alliance. Further, the Code is acknowledged by nearly all large media workplaces as a requirement on their employees, regardless of whether they are Media Alliance members, and is usually cited in the employers' codes of conduct and codes of practice at these workplaces.

The Media Alliance Code requires journalists to adhere strictly to maintaining confidentiality of sources of information. Clause 3 of the Code states:

> *"Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances."*

**Shield laws**

Government legislation is recognising journalist privilege. On March 21 last year the *Evidence Amendment (Journalists Privilege) Act 2011*[2] passed the federal parliament.

The explanatory memorandum[3] circulated when the bill was being debated states:

---

[1] http://www.alliance.org.au/code-of-ethics.html
[2] http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation/billhome/R4468
[3] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4468_ems_c4f894a3-d7da-4031-bca2-2b24aa6f51f1/upload_pdf/EM%20Evidence%20Amd%20Journalist%20Priv.pdf;fileType=application%2Fpdf

> *"This Bill provides that if a journalist has promised an informant not to disclose his or her identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable their identity to be ascertained."*

The states are steadily rolling out their own shield laws that also acknowledge journalist privilege and provide shield protection to journalists from revealing their confidential sources. Earlier this year, a Federal Court case provided the first crucial test of the application of the federal shield laws[4]. Parties to the case accepted the contention that the journalist did not have to reveal confidential source(s)[5].

It should be remembered that just as shield laws are being acknowledged as necessary in state and federal legal regimes, so too is the need for whistleblower protection and freedom of information laws with the aim of exposing corruption, ensuring whistleblowers are not subjected to retribution, and ensuring open and transparent government and the public's right to know.

Journalists play a vital role in these activities. They are trusted by their sources to bring issues to the public's attention – often at great risk to the source despite the protections that may be in place.

Any attempt to circumvent or undermine journalist privilege, or to access privileged information, is an attack on press freedom.

The Media Alliance has been cataloguing press freedom issues in Australia since 2001 with its reports on the state of press freedom in Australia released on or around World Press Freedom Day (May 3) each year[6].

For several years, the Media Alliance has expressed grave concern about the broad sweep of new powers enacted since September 11, 2001 that threatens press freedom in Australia.

With regard to the current inquiry and the proposed "reforms", the Media Alliance continues to be concerned that these existing powers will be expanded under the proposals outlined in the *Terms of Reference*, specifically those relating to:

- the expansion of interception activities,
- failing to assist in the decryption of communications, and
- the implications of the intention of extending data retention periods and how these may have an adverse impact on the role of journalists and their ethical obligations, as cited above.

---

[4] http://www.theaustralian.com.au/media/journo-shield-laws-face-first-test-in-federal-court/story-e6frg996-1226424883301

[5] http://www.smh.com.au/opinion/political-news/ashby-text-messages-allowed-as-evidence-20120720-22efq.html

[6] For the most recent and earlier reports: http://issuu.com/meaa/docs/press_freedom_2012

Furthermore, the Media Alliance has used its annual press freedom reports to highlight concerns it has on the increase in powers available to intelligence agencies with regard to their operational activities and warrants and the prevention of journalists to put intelligence agencies under the same scrutiny that other government agencies should be subject to in a modern, functioning democracy.

Therefore, in light of the proposals in the *Terms of Reference*, the Media Alliance believes it is crucial to restate the substance and history of its concerns as a way of underlining that any attempt to expand the relevant laws could serve to further weaken press freedom.

The rise of so-called "anti-terror" legislation in the years since September 11, 2001 has seen many fundamental press freedoms trampled on and the public's right to know severely curtailed under an avalanche of provisions designed to prevent scrutiny, impede reporting and muzzle free expression. Powers have been misused by subjecting journalists and their sources to investigation in what can only be described as "fishing expeditions".

As documented each year in our press freedom reports[7], on numerous occasions Australia's star chambers – those "anti-terror" bodies, anti-corruption bodies and investigatory organisations that are given extraordinary coercive powers and yet are permitted to operate largely in secret – have seized information and/or questioned journalists or with the aim of finding out what a journalist "knows" – i.e. it is not because they believe the journalist has been involved in any wrongdoing, rather bodies seek to exploit a journalist's knowledge and information in order to further the bodies' own investigations.

The Parliamentary Joint Committee will recall that in August 2009, the Media Alliance – as part of the Australia's Right to Know Coalition – made a detailed submission[8] to the Attorney General's office proposing important changes to the raft of legislation addressing national security, sedition and anti-terror laws.

Our submission noted that there had been 44 separate pieces of legislation – or amendments to existing legislation, between September 11, 2001 and the federal election of November 2007.

The submission noted our concerns that, while "badged with the impeccable objectives of deterring, detecting, disrupting and ultimately punishing terrorism… 9/11 and threats to terrorism should not be 'used' as a way to expand laws which dubiously justify infringements of free speech and other civil liberties".

---

[7] http://issuu.com/meaa/docs/press_freedom_2009, http://issuu.com/meaa/docs/press_freedom_2010, http://issuu.com/meaa/docs/press_freedom_report_2011, and http://issuu.com/meaa/docs/press_freedom_2012

[8] http://www.ag.gov.au/Documents/SLB%20-%20ARTK%202009.pdf

Some of this raft of legislation had, the submission noted, impacted adversely on the media's ability to report on issues of national security and on terrorism-related stories. In his study *The Journalist's Guide to Media Law*, Bond University professor of journalism, Mark Pearson, summarised these effects as follows:

- leaving reporters exposed to new detention and questioning regimes;
- exposing journalists to new surveillance techniques;
- seizing journalists' notes and computer archives;
- closing certain court proceedings, thus leaving matters unreportable;
- suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
- restricting journalists' movement in certain areas where news might be happening;
- exposing journalists to new risks by merely associating or communicating with some sources; and
- exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism.

**Phone tap laws threaten press freedom**

Due to the rise of telecommunication inceptions, journalists must assume their conversations with sources could be intercepted – obliterating any professional right the journalist has to protect the confidentiality of their source and, thus, negating the intent of shield laws that recognise and protect journalist privilege.

The rise of phone interceptions and access and the way they threaten to assault press freedom are at odds with the broad move among Australian legislatures to recognise journalist privilege.

Phone intercept laws deter confidential sources and may lead to a culture of self-censorship. Without public faith in a journalist's promise to protect sources, much crucial information in the public interest would not come to light.

Any attempt to destroy this trust will result in fewer people speaking out and the public left with nothing but government spin, media stunts and government agencies free from scrutiny.

**There is considerable concern about the power of police and intelligence agencies to intercept communications, a concern not given proper consideration in the *Terms of Reference*. The Media Alliance believes that substantial efforts must be made to protect and guarantee press freedom by acknowledging journalist privilege and the subsequent need to protect journalists' confidential sources and information from exposure due to telecommunication interception. A review of the Telecommunications Act is urgently required as part of any constructive reform of national security legislation.**

**Intelligence agency powers**

From its very first press freedom report, the Media Alliance has been concerned with ASIO officers and their powers.

We remain concerned that any expansion of their powers coupled with severe restrictions on the reporting of their activities is a fundamental attack on press freedom and the public's right to know[9].

We have long been concerned that ASIO legislation effectively prohibits any media exposure of active ASIO operations and muzzles the media for a considerable time afterward. We are concerned that a broad definition of "operational information" relating to ASIO's activities act as an effective gag on the media preventing responsible reporting of ASIO.

The proposal to permit ASIO's Director-General to authorise criminal conduct by its agents, and the proposal to remove limitations on computer access warrants, while continuing to effectively muzzle the media from reporting these activities for an extensive time frame runs counter to the belief in open and transparent government.

Government agencies, including those that form the "intelligence community", should be subject to rigorous scrutiny so that the public can be assured that the actions they carry out in our name are in the public interest.

**The Media Alliance urges the inquiry to carefully consider the repercussions of any moves to expand the powers of ASIO, ASIS and other intelligence agencies that may prevent journalists from carrying out their duty of ensuring the public's right to know. The Media Alliance further urges the inquiry to take steps to ensure that journalist privilege and the confidentiality of sources' and their information is guaranteed and protected under any legislation.**

[9] *Turning Up The Heat – the decline of press freedom in Australia 2001-2005* Inaugural Media, Entertainment & Arts Alliance report into the state of press freedom in Australia http://issuu.com/meaa/docs/press_freedom_2001-2005