

25 July 2019

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

By electronic submission

Dear Committee,

Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

The Australian Human Rights Commission (the Commission) welcomes the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security (the Committee) inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

The existence of a free press is a vital safeguard for human rights, and is essential to the functioning of our democracy. The press, including the various conventional and new types of media through which journalists report, plays a vital role in disclosing human rights abuses, including those that can result from the exercise of coercive power by the state.

A free press cannot exist unless journalists and their sources can receive and communicate information free from fear of arbitrary reprisal and other unwarranted restrictions. The Commission has discussed this issue in the context of national security and law enforcement in submissions to several previous inquiries.¹

The Terms of Reference for this inquiry focus on how journalists and the press may be affected by the activities of law enforcement and national security agencies.

This submission outlines the protections for the media required in international human rights law, to assist the Committee in assessing the necessity and proportionality of current limitations on press freedom.

Background

The Commission commends the Government for referring this inquiry to the Committee. It is timely. As the Committee's Chair has acknowledged, the Government referred this inquiry 'based on concerns raised in relation to recent search warrants executed on members of the press, and the issue of balancing national security with the freedom of the press'.² This is a reference to the recent raids by the Australian Federal Police of the home of journalist Annika Smethurst and the Sydney offices of the Australian Broadcasting Corporation.³ These raids have rightly invited scrutiny of the extent to which Australia's criminal and national security law, policy and practice impinge upon the right to freedom of expression and the freedom of the press — matters which are of fundamental importance to the rights and freedoms of all Australians.

Most recently, Australia has been ranked 21 out of 180 countries in press freedom.⁴ Reporters without Borders, which publishes the rankings, observed that in Australia '[t]he space left for demanding investigative journalism has ... been reduced by the fact that independent investigative reporters and whistleblowers face draconian legislation ... [and] its laws on terrorism and national security make covering these issues almost impossible'.⁵

Human rights and freedom of the press

A free press is a fundamental prerequisite to a fully informed population and to accountable government decision-making. A press free from government interference and intimidation has been a part of liberal democratic thought for centuries, from John Milton's caution over government censorship in 1640s England,⁶ to inclusion as the First Amendment to the United States Constitution.⁷ It has been described as 'the freedom *par excellence*; for without it, no other freedom could survive'.⁸

Press freedom is explicitly protected in both international and regional human rights treaties.⁹ The United Nations Human Rights Committee has described it both as 'an indispensable condition for the full development of the person' and 'a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.¹⁰

Just this month, a number of experts, including the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, recognised in a joint declaration the need to:

Ensure protection of freedom of expression as a matter of domestic legal, regulatory and policy frameworks in accordance with international standards, including by limiting criminal law restrictions on free speech so as not to deter public debate about matters of public interest.¹¹

The freedom of the press is guaranteed in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). That article also guarantees the right to freedom of expression more generally. It expressly protects both the freedom to impart information and the freedom to seek and receive it. It therefore requires that appropriate protection be afforded to whistleblowers and journalists' sources.

Australia, including its law enforcement and intelligence agencies, is obliged not to 'engage in any activity or perform any act aimed at the destruction ... of [the right to freedom of expression] or [its limitations] to a greater extent than is provided for in the [ICCPR]'.¹²

Like many human rights, the right to freedom of expression is not absolute. The purposes which may justify limitations on the right are exhaustively set out in paragraph 3 of article 19.¹³ These are where the restrictions in the law are necessary 'for respect of the rights and reputation of others'¹⁴ and 'for the protection of national security or of public order, or of public health or morals'.¹⁵ Any such limitation must also be:

- *provided by law* — laws limiting the right must be made accessible to the public, and must provide sufficient guidance both to those executing the laws and to those whose conduct is being regulated,¹⁶ and
- *necessary and proportionate* — to achieve a permissible purpose. At the very least, the law must restrict the right only to the absolute minimum degree necessary to achieve the legitimate purpose for the law.¹⁷

'National security' and the right to freedom of expression

As noted above, one of the legitimate purposes that may justify some limitation on the freedom of expression is the 'protection of national security'. But this does not give governments free rein. The United Nations Human Rights Committee observed in its commentary on the right to freedom of expression, that:

Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that

conforms to the strict requirements of paragraph 3 [of article 19]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.¹⁸

The Human Rights Council has also stressed ‘the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression’.¹⁹ UN and other international experts have made similar observations. For example, a UN Special Rapporteur has observed that national security considerations should be ‘limited in application to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government’.²⁰

A number of soft law instruments give further context to the content of this right and this particular basis for limiting the right. For example, the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles) state:

National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.²¹

The Siracusa Principles go on to observe that the systematic violation of human rights undermines ‘true national security’.²²

The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* also note the following:

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

....

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.²³

The *Global Principles of National Security and the Right to Information* (Tshwane Principles) contain similar provisions.²⁴ For instance, they provide that certain types of disclosure should be protected, including those which reveal corruption or human rights violations.²⁵

In summary, these passages tell us that Parliament must ensure that whistleblowers and journalists may exercise the right to freedom of expression in a full and meaningful way, recognising that their exercise of this right benefits all. More specifically, Parliament cannot pass laws inimical to this right in the name of national security. International law does not permit, for example, freedom of expression to be limited in circumstances where the added protection to national security is slight or questionable.

Law enforcement, secrecy provisions, and press freedom

As illustrated by the recent Australian Federal Police raids, journalists and media organisations can become the subjects of law enforcement and intelligence powers. The nature of their work necessarily involves the receipt, possession, and dissemination of information, including information that others (including

governments) might prefer not to be disclosed. This means that news professionals and organisations are particularly likely to be affected by secrecy laws, and by investigations into suspected breaches of those laws.

Journalists and media organisations may be subject to the exercise of search and seizure powers in relation to investigations concerning their own conduct, and to prosecution for breaches of secrecy provisions. They may also be subject to the exercise of search and seizure powers in investigations into suspected conduct of those who supply them with information. All of these circumstances involve the limitation of the right protected by article 19 of the ICCPR.

Even when prosecutions are not brought, the very existence of criminal laws prohibiting the dissemination of information, or the exercise of search and seizure powers by police or other authorities (whether under warrant or otherwise) can have a chilling effect on the work of journalists — where the fear that a coercive power might be exercised could inhibit the journalist or media organisation from undertaking reporting that is in the public interest. For this reason, it is vital that such laws are carefully crafted to ensure that they apply only in circumstances where strictly necessary in pursuit of a compelling public interest, such as the protection of the community or of national security in the strict sense.

The Commission of course acknowledges that there will be some circumstances which will warrant the existence of secrecy provisions. The Australian Law Reform Commission (ALRC) and the Independent National Security Legislation Monitor (INSLM) have both accepted that harm is likely implicit in any disclosure of information obtained or generated by intelligence agencies.²⁶ But this does not mean that all current secrecy provisions are justified.

As the Commission has noted in previous submissions to the Committee,²⁷ Parliament should consider seriously the ALRC's recommendations in its report *Secrecy Laws and Open Government in Australia*,²⁸ and the views of the INSLM in his review of the non-disclosure provisions linked to 'special intelligence operations' under the *Australian Security Intelligence Organisation Act 1979* (Cth).²⁹ Some principles which may be drawn from those reviews and the human rights analysis above include:

- secrecy offences in Australia should be rationalised — many secrecy offences should be abolished, and a new, general secrecy offence should be created. A multiplicity of laws makes it more difficult for all citizens to know their rights and plan their conduct accordingly

- there is a need to distinguish between criminal sanctions directed at 'insiders' (such as employees of government agencies entrusted with sensitive information) and those that apply to 'outsiders' (all other persons)
- laws criminalising disclosures by outsiders, including journalists and whistleblowers, should contain an express harm requirement³⁰
- laws should contain adequate defences to protect the legitimate work of journalists
- a defence should be available for disclosures of information that is already widely known or easily accessible. A disclosure or the possession of information that has already been placed in the public domain through an unauthorised disclosure will not necessarily further harm the interests of the Commonwealth
- there should be an adequate defence available for whistleblowers who make disclosures that are in the public interest
- any secrecy offences should contain appropriate mental elements. For instance, the fact that a document has a particular security classification should not be a matter of strict liability.

As noted above, journalists and their sources may be affected by the existence of secrecy laws, as well as by investigation of suspected breaches and by prosecutions. The Commission therefore urges the Committee to include in its review an analysis of the policies, practices and procedures of law enforcement and security agencies insofar as they relate to journalists and news organisations.

Conclusion

As one of the United States' founders, Thomas Jefferson, astutely warned:

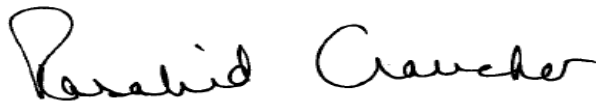
... the only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed.³¹

The Commission urges the Committee to scrutinise closely those laws, policies, practices and procedures which permit the investigation and prosecution of journalists, their sources, and their employers; and to recommend that these be revised to ensure they do not impermissibly limit the right to freedom of expression.

Yours faithfully



Edward Santow
Human Rights Commissioner



Rosalind Croucher AM
President

¹ See, e.g., Australian Human Rights Commission, Submission: Inquiry into the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, 12 October 2018, available at <<https://www.aph.gov.au/DocumentStore.ashx?id=a7b9ff25-7c09-41e9-b97a-56dae1ac0e94&subId=661055>>(last accessed 25 July 2019); Australian Human Rights Commission, Submission: Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, 24 January 2018, available at <<https://www.aph.gov.au/DocumentStore.ashx?id=1482dc19-ac10-430d-b02f-bae8d11ce99d&subId=562820>> (last accessed 25 July 2019); Australian Human Rights Commission, Submission: Inquiry into the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014, 14 January 2015, available at <<https://www.aph.gov.au/DocumentStore.ashx?id=7cee3a76-9d53-4b97-a7aa-725bfb309f49&subId=302630>> (last accessed 25 July 2019).

² Parliamentary Joint Committee on Intelligence and Security, 'Committee to scrutinise the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', Media Release (5 July 2019), available at <<https://www.aph.gov.au/DocumentStore.ashx?id=b8f9b45c-d4be-4778-a94b-51941a420493>> (last accessed 25 July 2019).

³ Australian Federal Police, 'AFP statement on activity in Canberra and Sydney', Media Release (5 June 2019), available at <<https://www.afp.gov.au/news-media/media-releases/afp-statement-activity-canberra-and-sydney>> (last accessed on 25 July 2019).

⁴ According to the 2019 *World Press Freedom Index*, published by Reporters without Borders, available at <<https://rsf.org/en/australia>>.

⁵ *ibid.*

⁶ John Milton, *Areopagitica: A Speech by Mr John Milton for the Liberty of Unlicenced Printing, to the Parliament of England*.

⁷ 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' (emphasis added)

⁸ Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

⁹ In addition to article 19 of the *International Covenant on Civil and Political Rights*, see, e.g., *Universal Declaration of Human Rights*, article 19; *European Convention on Human Rights*, article 10; *American Convention on Human Rights*, article 13; *African Charter on Human and Peoples' Rights*, article 9; *ASEAN Human Rights Declaration*, article 23.

¹⁰ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [2]-[3].

¹¹ *Twentieth Anniversary Joint Declaration: Challenges to Freedom of Expression in the Next Decade*, 10 July 2019, available at

<https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration10July2019_English.pdf> (last accessed 25 July 2019).

¹² *International Covenant on Civil and Political Rights*, article 5(1).

¹³ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [22].

¹⁴ *International Covenant on Civil and Political Rights*, article 19(3)(a).

¹⁵ *International Covenant on Civil and Political Rights*, article 19(3)(b).

¹⁶ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [25].

¹⁷ *ibid.*, [34].

¹⁸ *ibid.*, [30].

¹⁹ Human Rights Council, Resolution 7/36, UN Doc. A/HRC/7/36 (28 March 2008).

²⁰ UN General Assembly, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression', UN Doc. A/71/373, 6 September 2016, [18].

²¹ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), [29]-[31].

²² At [32].

²³ *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1996), available at <<http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> (last accessed 25 July 2019).

²⁴ *The Global Principles of National Security and the Right to Information* (Tshwane Principles) (2013), available at <<http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>> (last accessed 25 July 2019).

²⁵ Principle 37.

²⁶ See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009); Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015).

²⁷ Australian Human Rights Commission, Submission: Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, 24 January 2018, available at <<https://www.aph.gov.au/DocumentStore.ashx?id=1482dc19-ac10-430d-b02f-bae8d11ce99d&subId=562820>> (last accessed 25 July 2019).

²⁸ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

²⁹ Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015).

³⁰ *ibid.*, 18 [30].

³¹ Thomas Jefferson, *Letter to Marquis de la Fayette*, 4 November 1823.