Parliamentary Joint Committee on Intelligence and Security

Submission in respect of the Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press
By the following NGOs:
Blueprint for Free Speech
And
Digital Rights Watch

Introduction

On 4 July 2019, the Parliamentary Joint Committee on Intelligence and Security commenced an inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

The inquiry was referred by the Attorney-General, The Hon Christian Porter MP who noted that the Government will consider proposals from media organisations and interested bodies which aim to ensure the right balance is struck between a free press and keeping Australians safe.

This submission is made by the Australian-based NGOs Blueprint for Free Speech and Digital Rights Watch. We support freedom of expression and digital rights. A particular focus of Blueprint for Free Speech's work is on research into and protection of the journalist-source relationship. Related to that is our aim to improve protection of public interest whistleblowers. We focus on these areas because they provide a foundation pillar for a free and open society where the citizenry can both freely express themselves and also make informed choices in their democracy. Digital Rights Watch's mission is to ensure that Australian citizens are equipped, empowered and enabled to uphold their digital rights. Both organisations view digital rights as human rights which see their expression online.

We note the that there has been a marked increase in national security-related legislation over the past seven or so years, and this legislation has encroached on citizen's individual privacies in a manner that chills freedom of expression. Many of the recommendations provided by civil society organisations as well as both industry and academic experts about improvements to these proposed laws have been ignored by this committee and/or by the government of the day.

Now this encroachment has moved very squarely into the media freedom space. We are pleased this inquiry is happening for this reason. However, we note that the time frame for submission has been extremely short, and this makes it difficult for not-for-profit organisations to respond fully and properly.

We draw your attention to two important points in this context regarding acting on recommendations from this and other civil society submissions.

1. If the committee and the government of the day continue to ignore the recommendations for reform of encroaching legislation, you discourage civil society away from participation in our democratic processes. The message sent is: don't bother engaging with Canberra – because it doesn't want to engage with the rest of Australia.

Civil society organisations don't have endless resources. If we determine that bringing these concerns to committees such as this one is a waste of those resources because there is no ear genuinely **listening and acting on it**, then we must turn attentions elsewhere to evoke positive change.

This is a poor outcome for many reasons, some visible, and some less so. One of the less visible reasons relates directly to the brief of this committee - national security.

Civil society organisations contribute to Australia's national security. They call out undue influence, particularly influence which is against the Australian public interest. They work to ensure protections for larger entities – such as the media and a free internet – that do the same.

A healthy, vigorous and fearless civil society community in Australia that is well-engaged with the parliamentary processes is a formidable safeguard against undue influence from pressure points external to Australia.

There are many reasons to engage – meaningfully and with ears open – with civil society organisations in Australia on the topic of this inquiry, but this is a particularly important one.

2. Less free, open and democratic countries watch Australia. We cannot send a message to them that it is 'okay' to reduce the space for journalists to report freely in Australia - but then criticize them for their less free, open and democratic approaches to governance.

Shrinking the space for the media to operate freely in Australia implies condoning a reduction in freedom of expression in other countries as well.

As a leader in the region, Australia must do exactly the opposite to this, and lead by example.

These two points provide a lens relevant to national security and intelligence which is suitable for viewing the following recommendations.

Recommendations

We make the following recommendations:

1. Improvements to whistleblower protection

The Public Interest Disclosure Act was an important step forward for Australian in protecting public sector whistleblowers. It provides good coverage in many areas – but there are also glaring gaps in coverage. It is now time for an overhaul, to be consistent with the international standards which have increasingly been adopted by other countries in the intervening years.

Breaches of human rights should be included in the list of disclosable conduct covered by PIDA.

Progress of Whistleblower Protection in Europe

In April this year in Strasbourg, the European Parliament passed what has been colloquially known as the EU Directive for whistleblower protection. This was passed with a resounding 591 votes in favor in the parliament, with only 29 votes against and 33 abstentions. Blueprint for Free Speech actively supported the

civil society movement to win the passage of this Directive. The passage of this Directive can be seen as one of the most successful collaborative partnerships between law makers and civil society in recent history anywhere in the world. It is a case study in democracy at work, and is being studied by some of the largest, most high-impact philanthropic foundations in the world.

The Directive is binding and it applies to the EU's 28-member countries, each of whom are required over the next two years to undergo a process of 'national transposition' – that is, translating the elements of the binding Directive into their own national laws. It is the first time that whistleblowers have been given EU-wide protection. Blueprint is also presently bringing our expertise to national coalitions in EU member states in this process.

The Directive provides broad retaliation protection for whistleblowers and proposes access to free advice and support.

Ireland can also provide valuable example for Australia to learn from in the process of expanding protections in this law. Ireland is relevant not only for its strong law, but also because the courts have already taken notice of the law. Further, Ireland has undergone a difficult process as a nation, struggling with revelations of wrongdoing committed by institutions long held sacred in Irish society. Visible whistleblower cases - reported on by the media – have gone some way to deal with this crisis and start a healing process. Through it, trust between the citizenry and the institutions they have come to distrust may successfully be rebuilt over time.

Blueprint can provide helpful background to the committee regarding Europe's progress on this issue if it would like further information.

Broadening whistleblower protection is not simply an ethical question – it is also a financial one. A 2017 study carried out for the European Commission estimated the loss of potential benefits due to a lack of whistleblower protection, in public procurement alone, to be in the range of €5.8 to €9.6 billion each year for the EU as a whole.

Needless to say, integrity systems that work in practice, such as properly protective, comprehensive, 3-tier whistleblower protection laws, reduce corruption. And reducing corruption improves national security.

Needed changes to Australia's PIDA include:

1.1. Inclusion of intelligence agency / law enforcement staff, as well as staff of Members of Parliament in full and equal protection regimes with others in the public sector.

1.2. Full protection – including from reprisal – for 'third tier' whistleblowing.

First tier whistleblowing is internal to an organisation. Second tier is going to a regulatory agency, such as an EPA. Third tier is going to external entities, such as the media, members of parliament, NGOs and other such organisations.

Whistleblowing ecosystems cannot work well without proper protection for going to third tier avenues. The existence of this competitive third channel keeps the first two channels healthy, honest and working well.

Previous polling of the Australian public around the time of the PIDA bill being passed revealed that 87% of Australians believed that whistleblowers should also **be able to use the media or the internet** to draw attention to wrongdoing. Newspoll conducted this survey, which was a stratified random sample poll of 1,211 Australians.

Australia's current PIDA legislation has a large and deliberate carve-out of protections in this space for the intelligence agencies. This supposes that either internal avenues always work, or that no wrongdoing ever occurs inside these agencies – neither of which is borne out by our extensive experience in this field.

2. Accessing of metadata and communications should require a full judicial warrant.

The recent targeting of journalists' metadata and data is an inappropriate overreach by the State.

It upsets the balance of the power between the individual and the state. The state must be accountable to the citizenry.

The rationale behind the mandatory data retention scheme and the Assistance and Access Act are very bad for press freedom.

Both regimes proceed on the assumption that any law enforcement or national security agency should be entitled to access metadata and ultimately data about almost anything on their own initiative without a warrant.

The weak Journalist Information Warrant provision does not protect whistleblowers or sources (only journalists and their employers - and only weakly). The premise of this scheme is that metadata is less significant that direct content that may be accessed by a warrant. This assumption is false.

Metadata data over time provides as much or more accurate factual information about a data subject than a warrant, and it can be significantly more privacy-intrusive than any intercept. Metadata should be available only on application to a judicial officer – and the law should be amended to reflect this.

Further, the Assistance and Access Act inserted a new Part 15 into the Telco Act that expressly allows national security and law enforcement agencies to install any device or software into just about any system without controlling what the device or software may do, copy, take or share. This provision further weakens the Journalist Information Warrant provision, rendering it virtually meaningless in certain contexts. This is massive legislative problem with that puts all journalists and whistleblowers at risk of surveillance. The relevant laws need to be modified to correct this.

However, it is not only journalists' metadata and communications that should be protected by independent oversite; **these protections should apply to everyone in Australia**.

There are a number of reasons why this is so.

First, there is clearly an emerging public expectation of the right to privacy in the face of new technologies of surveillance. The free speech chill factor cannot be emphasized enough.

Second, journalism is a profession in transition. Blog writers, social media reporters, and YouTube-only video journalists are part of a new generation of media. You do not need to work for one of a handful of traditional TV stations or newspaper mastheads to be a journalist anymore. Further, there is the question of freelancers. Like so many industries, journalism has turned into a sea of contractors. Because the financial transition of the industry has caused so many journalists to become independent contractors, many journalists now 'wear several hats' – finding paid work in other industries much of the time. Does this mean they are no longer journalists?

The lines of 'who is a journalist?' are also shifting in other ways, as we head into a technology-moderated world where news stories are generated and reported by AI algorithms. This is already starting to happen.

In algorithmic journalism, software programs evaluate large amounts of data and produce news articles automatically based on this – without human intervention.

The software can now be programmed to write with a particular writing style or voice. AI companies have already commercialised these products and sold their services to major traditional media outlets, such as the *LA Times*. In other cases, mastheads such as the *Washington Post* have developed their own AI journalists. These AI journalists are fast, cheap and capable of trawling much more information than a human journalist in short timeframes.

There has been some dispute as to who or what the by-line should be on such stories, with one proposal being that the software programmer should be credited. Are software programmers then to be journalists?

Thus, you can see the difficulties in trying to define 'who is the journalist'.

Determining whether someone is or isn't a journalist is not the role of government. A scheme where government decides who is and isn't a journalists would set a dangerous precedent, and one which is antithetical to the principle of a free press. It would also potentially stifle innovation, in the development and uptake of new technologies in the field.

For this reason, legal protections should attach **to the process of investigating and reporting** on information in the public interest (for example, wrongdoing that has been revealed by a whistleblower) rather than to specific individual people who might be classified as 'a journalist'. **The sharing and communication of this information by anybody should be protected.**

If the committee insists on offering protections in law 'only to a journalist', then the term journalist must be defined very widely. This might for example include someone who is researching and commentating on a matter in the public interest, regardless of whether or not he or she does this 'most of the time' or earns 'most of his/her income' from this. And it should also include algorithmic journalism programmers.

3. Legislation is needed that stops the over-classification of information held and gathered by government – and applies penalties for such over-classification.

This applies to information that should not be made classified in the first instance, as well as material that is given a higher standard of classification than it should receive.

The previously mentioned Newspoll, commissioned as part of a larger study by Griffith and Melbourne Universities, also had findings regarding public opinion on this issue: **half of all Australians (50%) believed too much information is kept secret in organisations in our society.**

Falsely classifying documents – or over-classifying them must include some penalties. Without this, there will always be the temptation to deny information to the public for reasons other than real and genuine national security need.

FOI must be made easier and more accessible to use. Australia needs a proper independent public review process for fixing this, inclusive of academic experts, civil society, the media and technologists. This latter category becomes important with the advent of data journalism. There is public interest in accountability from not only making particular documents available to the citizenry, but also data sets and archives of documents as a set. This is so that patterns of behaviour and decision making by government can be determined by the public and journalists as their public interest agents. We want the accountability processes of our democracy to function well in the digital age.

Conclusion

In conclusion, previous legislation must be modified in order to meet the threshold of a free, independent media ecosystem that is expected by the Australian community.

We strongly urge this committee to adopt the recommendations in this submission.

Blueprint for Free Speech would like to take this opportunity again to thank the Committee for its time in considering our submission and reiterates interest in assisting the Committee further in whatever way might be helpful, including making a verbal submission in person to the Committee.

Please feel free to contact us about this submission or any other matter.

- Blueprint for Free Speech
- Digital Rights Watch