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AJF Supplementary Submission 1.0

Introduction

The Alliance for Journalists' Freedom (AJF) welcomes the recent submission from Home Affairs and the Australian Federal Police to the PJCIS Inquiry into *the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*. The submission is an important step forward as it implicitly acknowledges both the critical need to protect press freedom in our democracy, and the failure of our current legal system to fully provide that protection.

It would be a stark failure for a representative democracy like Australia if, in trying to protect our democracy, we undermined one of the key foundations of what we seek to protect.

This supplementary submission will address why the AJF believes the Home Affairs and AFP proposals do not go far enough. Although AJF agrees that press freedom is not unqualified, and that it must be 'balanced against other public interest considerations such as laws concerning defamation, the right to a fair trial and national security, as well as effective enforcement of the criminal law', there is a way of accommodating those objectives while still protecting press freedom. That involves meaningful and balanced legislative reform.

The AJF broadly agrees with the Right to Know Coalition's observations of the current Ministerial Directions and the proposed Notice to Produce framework, however, we differ in our approach which we believe is more collaborative, as spelt out below.

Ministerial Directions are not sufficient and leave the government departments vulnerable to accusations of political decision-making

The need for judicial oversight

The Ministerial Directions issued by the Home Affairs Minister on 8 August 2019, and the Attorney General on 19 September 2019, are welcomed. They implicitly acknowledge that the laws governing investigations of journalists are inadequate without additional protections for press freedom. The direction from the Home Affairs minister compels AFP investigators to take into account the importance of a free and open press in Australia's democratic society and to consider broader public interest implications before undertaking investigative action involving a professional journalist or news media organisation. Similarly, the Attorney General has directed prosecutors to seek his approval before charging journalists under certain laws.

However, these directives are flawed in fundamental ways. AJF queries the wisdom of allowing the AFP to form this view alone in this way. By denying the courts



independent judicial oversight of the issue of warrants, the Home Affairs directive violates the separation of powers principle that underpins our legal system, and leaves both the minister and investigators vulnerable to accusations of politically motivated police inquiries. Similarly, giving the Attorney General discretionary power to approve prosecutions rather than writing the principles into law in a manner that allows them or their application to be challenged in the courts, also exposes the Attorney General to complaints of politicised actions. In both cases, public confidence in the Ministers and their offices would be damaged.

It also presents the possibility that both Ministers will have power over police investigations and prosecutions of journalists who may themselves be reporting on Ministers and their staff. This clearly lends itself to outcomes that are both undemocratic and undesirable, as it undermines the integrity of our democratic process and the function that journalism has within it.

The need for security forces to move quickly

AJF acknowledges that Australia faces great challenges to its national security. Consequently, the AJF is sensitive of the need for police and security forces to be able to move quickly in certain circumstances.

Any judicial oversight would need to be sensitive enough to accommodate the genuine needs of our police and security forces in a balanced and impartial way.

The aim would be to strike the appropriate balance between the police and security forces' need to move quickly, and ensuring the appropriate independent accountability and transparency remains in place.

Legislation rather than regulation

Given the AJF's concerns, the AJF maintains that the most appropriate path forward is to enshrine the principles of press freedom in our law with a *Media Freedom Act*.

AJF agrees with the Home Affairs/AFP submission that media freedom is not absolute and must be balanced against other competing considerations including defamation, national security, criminal law and so on. However, AJF also believes that appropriate protections for the role of the press could be written into our laws in a way that does not unnecessarily hinder the work of our police or security services or undermine competing considerations.

In previous submissions, the AJF has outlined its views on how such an Act might work. However, there is a further point worth addressing here.

The Home Affairs/AFP submission argued that any attempt to create a system of contested warrants 'for a certain class of individual', would 'introduce complexity in the regime and risks creating confusion regarding the scope of contestability.' However, this element of the Home Affairs/AFP submission misses the point. The objective would not be to protect a certain class of persons per se. Rather, the purpose of the *Media Freedom Act* would be to provide independent safeguards around legitimate journalistic activities.



It is not necessary to create a 'certain class of individual', Rather, it is far more practical to define 'journalism'; the work rather than the person.

Thus, any police investigation into a work of journalism would need to be sensitive to the role of journalism in our democracy, with appropriate countervailing balances to protect national security and certain classes of individual rights. Naturally it would be for the AFP to demonstrate the need for a warrant to be issued in those circumstances before an independent judicial authority.

The Notice to Produce framework

The Home Affairs/AFP's proposed Notice to Produce framework appears to acknowledge the possibility of judicial oversight

According to the joint submission, the AFP should have the option to "apply to an independent issuing authority for a Notice to Produce in relation to investigations involving professional journalists or news media organisation." Further, the submission says that such a regime would "provide an opportunity for professional journalists and media organisations to put forward any strong, countervailing arguments to not produce material pursuant to such a Notice."

It is unclear from the submission whether the 'independent issuing authority' would be a member of the judiciary, but if so, this would appear to be a form of 'contestable warrants-lite' that still allows the AFP to resort to a traditional search warrant under circumstances they deem appropriate.

While the AJF welcomes the acknowledgement by Home Affairs and the AFP that news organisations and journalists should have an opportunity to argue against releasing certain material, the framework is inappropriate for a number of reasons.

First, the decision to use the NtP framework appears to be at the discretion of the AFP. If they deem circumstances justify a more traditional warrant, there appears to be no further restraint to that process. We agree with the Right to Know Coalition which argues under that framework, it seems unlikely that the police would go through the time and trouble to apply for a NtP when a traditional warrant is always available.

Second, the proposed NtP framework does nothing to give comfort to journalists or their sources that their confidential communications will remain secure from unnecessary police intrusion. As stated earlier, we recognize that there will be certain circumstances when the police will need to act with justifiable urgency, or be concerned that evidence may be destroyed, and the element of surprise is essential. However, we also believe those circumstances can be described in law, and that the default position when investigating an act of journalism should be for a contestable warrant. If the police have reason to believe that a traditional search warrant is appropriate, they should be able to explain their reasoning to a judge, who can make an independent assessment, measured against the implications of granting the warrant for press freedom.



Under that regime, journalists and their sources will have reasonable comfort that as long as their communications relate to stories that are in the public interest, and do not violate clearly described security and privacy provisions, they will be safe from government intrusion.

Maintaining the privacy of the relationship between journalist and source is fundamental to the oversight role that journalism is supposed to play in our democracy. If sources are too afraid to come forward because of the risk that they will be exposed, the system will collapse. Indeed, the evidence that academics at the University of Queensland have already gathered indicates that sources have dried up in the aftermath of the AFP searches on 5 and 6 June 2019.

Press Freedom is *part of* National Security

The AJF agrees that national security is the government's primary responsibility. Protecting the health, safety and wellbeing of Australian citizens is paramount. An essential part of protecting national security involves maintaining the integrity of our system of democracy. A free press capable of keeping watch over the inner workings of government is an essential component of that system.

The AJF also acknowledges that ASIO is aware of attempts by foreign powers to attack our democracy. In most cases, AJF understands those attacks have come from authoritarian states. It makes no sense to defend ourselves against authoritarianism by introducing measures that undermine our own press freedom.

Instead, there must be an ongoing relationship between the security forces and media, where each recognises the inherent importance of the other, and the need for both to perform their duties freely under our legislative framework. In order for this to be achieved, both sides must be protected in law. Thus, it is essential press freedom protections are written into our legal code. This is why AJF calls for *Media Freedom Act*.

Reinforces need for MFA and Taskforce

While the AJF continues to advocate for the reform of our legal code and a *Media Freedom Act* in particular, more informal mechanisms could assist in bridging the gulf in trust that appears to have developed between security agencies and the media in recent years. While there remains a necessary tension between the two sectors, there is urgent need for a Taskforce that brings together leading figures from both sectors so they are better able to understand one another, communicate at times of crisis, and resolve problems before they escalate.

Such a Taskforce would include security forces, media and organisations like the AJF. It would establish regular meetings, lines of communication, and an institutionalized way of discussing and resolving problems. Over time, the result would be a more cooperative, trusted and effective relationship. This is essential to the health of our democracy.

