UTS

CENTRE FOR MEDIA TRANSITION

Impact of the exercise of law enforcement and intelligence powers on the freedom of the press

Submission to the Parliamentary Joint Committee on intelligence and security

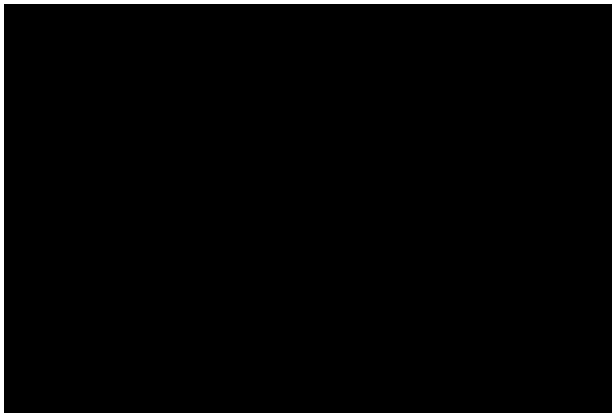
PROFESSOR PETER FRAY
PROFESSOR DEREK WILDING
RICHARD COLEMAN

DATE: 31 JULY 2019

About the Centre for Media Transition

The Centre for Media Transition is an interdisciplinary research centre established jointly by the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

We investigate key areas of media evolution and transition, including: journalism and industry best practice; new business models; and regulatory adaptation. We work with industry, public and private institutions to explore the ongoing movements and pressures wrought by disruption. Emphasising the impact and promise of new technologies, we aim to understand how digital transition can be harnessed to develop local media and to enhance the role of journalism in democratic, civil society.



Thank you for the opportunity to make a submission to this inquiry.

1. Summary

In this submission about the impact of legal provisions entitling law enforcement and intelligence agencies to access the confidential information of journalists, we comment mainly on the journalism information warrants scheme introduced by the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (the metadata law). There are other aspects of the legal framework that we consider raise concerns for press freedom, but which we are unable to address here. Examples include:

- the access to data on journalists' devices enabled by the Telecommunications and other Legislation Amendment (Assistance and Access) Act 2018
- the treatment of journalists in the context of special intelligence operations under the Australian Security Intelligence Organisation Act 1979 and
- the offences in relation to secrecy contained in the Criminal Code Act 1995.

While we appreciate that journalist information warrants were introduced as a means of addressing concerns over press freedom, we think these protections are ineffective. Taken together, the various laws that allow access to journalists' confidential information or which preclude access to information about government activities have compromised a core requirement of Australian journalism: that confidences given in the course of journalistic work will be protected. This protection of sources is not an end in itself. The public interest in the freedom of journalists to investigate and report on matters likely to be of concern to the Australian community is a key part of the accountability of executive government in democratic societies. In the legitimate weighing of national security against access to information and freedom of expression, Australia has now moved too far down the path of secrecy and suppression. In short, the scope of the law is no longer proportional to the perceived risk. We believe these laws impose onerous penalties on journalists and their publishers. We believe the secrecy invoked in these acts is excessive.

It is therefore appropriate that these laws be reviewed and we acknowledge the important role of the Committee in this work. While we think there would be benefit in a more comprehensive review of the impact of the law on journalism, we make the following recommendations on targeted amendments to the journalism information warrants scheme.

Recommendations:

1. The journalism information warrant scheme should be amended to prohibit access to a journalist's confidential information *except* where there is a serious threat to Australia's national security. This would be determined by a judge of a superior court on application for a warrant.
2. The application would seek a declaration that there is a serious threat to Australia's national security and the issuing of a warrant to access the journalist's confidential information.
3. Where such an application is made, the journalist and his or her publisher and the Public Interest Advocate must be provided with adequate notice of the hearing and be given the opportunity to put the case against the issuing of the warrant or to make representations on how terms of access can be appropriately restricted.
4. A public interest test should apply to the issuing of the warrant so that the benefit of issuing it significantly outweighs the harm that might be caused to press freedom.

As part of these changes, we further recommend:

- that an annual report on the operation of these laws be tabled in Federal parliament;
- that the operation of these laws be reviewed after three years to examine their effectiveness.

2. Background

We note the Committee's chair in his media release said the inquiry was called in response to the concerns raised over the search warrants recently executed on members of the media. There were, of course, widespread concerns expressed in Australia and overseas about the circumstances surrounding the Australian Federal Police's execution of those search warrants. We believe it is important that these recent concerns be seen in the larger context of warnings made by various individuals and groups over the last several years about the dangerously restrictive and punitive effect that a series of new security laws was having on the foundations of Australian democracy.

To give one prominent example: in 2015 Professor George Williams conducted a broad search of then current Commonwealth, state and territory laws and identified 350 provisions which in his view infringed one or other of a number of democratic freedoms he identified as supporting Australia's system of representative democracy.[1] Those freedoms were freedom of speech, freedom of the press, freedom of association, freedom of movement and freedom to protest. Of those 350 provisions, he noted that 209 had been enacted since the September 11, 2001 attacks on the World Trade Center in New York, which he therefore concluded was the date of an important turning point in lawmaking in Australia:

> Those attacks and the compelling need to respond forcefully to the threat of terrorism, gave greater license to our legislators to depart from long accepted conventions and understandings about the preservation of democratic rights in Australia. As a result, the abrogation of democratic rights, including stringent measures that were previously unthinkable, have become common place.

Since 2015, further Commonwealth enactments have been made which we say have borne out his concerns. Among them are:

- the Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015 (the metadata law);
- the National Security Amendment Act (No 1) 2015;
- the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018;
- the Telecommunications and other Legislation Amendment (Assistance and Access) Act 2018 (the assistance and access law).

We note that we have already made submissions to this committee about the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.[2]

Given the short timeframe of this inquiry and its indicated focus, we will concentrate this submission on what we perceive to be the deleterious effect the metadata law is having on the practice of journalism in Australia.

3. The metadata law

The Australian metadata law of 2015 should be seen in its international context, as part of a world-wide tightening of national security laws in the wake of the September 11 attacks and, in particular, the Snowden leaks of classified and sensitive information in 2013.

The law implemented a national data retention scheme – by way of amendment to the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) – under which telecommunications service providers are obliged to retain certain types of telecommunications data for two years. A number of criminal law-enforcement agencies can have access to these records and can do so without judicial oversight.

[1] George Williams, 'The Legal Assault on Australian Democracy' (2015) 16(2) *QUT Law Review* 19.
[2] Submission of the UTS Centre for Media Transition by Professors Peter Fray and Derek Wilding, February 2, 2018.

Concerns over the adverse impact the new metadata law would have on journalism, and in particular on a journalist's ability to maintain the confidentiality of sources, prompted the amendment to the proposed act introducing the journalist information warrant scheme. Under this scheme, agencies wanting to search retained metadata to identify a journalist's source are required to first obtain a journalist information warrant. Such warrants are issued at the discretion of an issuing authority. For law enforcement agencies, this is a judicial officer approved by the minister, a member of the Administrative Appeals tribunal or a lawyer specially appointed by the minister. For ASIO, it is the Attorney-General. Under the law, the issuing authority must undertake a balancing exercise of competing public interests when considering whether or not to grant a journalist information warrant. The public interest in the issue of the warrant must outweigh the public interest in maintaining the confidentiality of the source.

The law enshrouds this whole process in secrecy. The journalist or media company whose metadata is being targeted by the agency will not be informed that the metadata is being sought. This secrecy is enforced by a potential two-year jail sentence for revealing the existence of a journalist information warrant. While the targeted journalist or media organisation can therefore have no input into the consideration of an application for a journalist information warrant, the newly created Public Interest Advocate can. The current Public Interest Advocates were appointed by the Prime Minister. They are entitled to make submissions when a journalist's metadata is being sought by an agency which must be considered before the application is granted or rejected.

Following the introduction of the metadata law there was a move from some in the media and media commentators to rely on encryption to conceal communication with sources. This move has been rendered nugatory with the passing the recent Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018.

4. The EU experience

In 2014, the Grand Chamber of the European Court of Justice (ECJ) declared that the European Union's Data Retention Directive (Directive 2006/24/EC) was invalid. The Library of Congress report on the ECJ's decision[3] noted that the data required to be retained by telecommunication providers included the number dialling, the number dialled, user IDs as well as call-forwarding and call transfer records. The retention period was up to two years. The purpose of the retention was to prevent, investigate, detect and prosecute serious crimes such as organised crime and terrorism. The content of individual communications was not retained. The EU's data retention scheme therefore had many similarities with the subsequent Australian metadata laws.

The data retention directive was held to be invalid on the grounds that it exceeded the limits of proportionality. It was held it entailed serious interference with the rights to privacy and personal data protection of individuals guaranteed by the EU's Charter of Fundamental Rights and failed to establish limits on access by competent national authorities, such as prior review by a judicial authority.

It was held that while the retention of data was an appropriate and valuable tool in combatting serious crime or terrorism, it affected not only those who might be engaged in such criminal or terrorist conduct but also the large swathe of European citizens for whom there was no evidence of involvement in serious crime or terrorism. Further, it was held the directive failed to establish substantive or procedural limits on access to the retained data and failed to make access by state authorities conditional on a prior review carried out by a court or other independent administrative authority. As regards the retention period of up to two years, it held that the directive did not set any objective criteria to limit the appropriate retention period to what was strictly necessary.

[3] http://www.loc.gov/law/help/eu-data-retention-directive/eu.php

As a result, the Data Retention Directive was rendered void ab initio and EU member states which had transposed the directive into their national laws had to ensure compliance with the ECJ judgment.

While the ECJ judgment arises from a consideration of its impact on the EU's Charter of Fundamental Rights, many of the shortcomings of the EU data retention scheme are common to the Australian metadata retention scheme.

5. Importance of protecting journalist sources

To understand journalists' concerns about the intrusions of the metadata law and the access and assistance law, it is useful to give a brief explanation of the importance of maintaining confidentiality in the practice of journalism and a brief outline of the limited protections that had been granted over the years to journalists prior to the introduction of the metadata law and the interception and access law.

Code of Ethics

The protection of confidential sources is fundamental to Australian journalism. It is formulated in article 3 the MEAA (Media, Entertainment & Arts Alliance) Code of Ethics:

> 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.

This ethical code is universally observed throughout the media industry even though such observance has occasionally resulted in journalists being jailed and fined. That is because the observance of such an ethical code will put the journalist into direct conflict with the court's duty to serve the broad interests of justice. We accept that judges are sometimes put in very difficult positions when a journalist refuses to answer questions because of this ethical stance. As a result, from time to time, individual journalists have come into direct conflict with the courts when they have abided by the code of ethics in the face of a court order that they reveal their source. For example, in 1989 Tony Barrass, a journalist on The Sunday Times in Western Australia, was sentenced to seven days' jail by a Perth magistrate for refusing to reveal who had given him two tax files in a case against a tax clerk accused of leaking information. He served that time and was then fined $10,000 for maintaining his refusal when the case reached the District Court. (The tax clerk was convicted even without Tony Barrass's evidence. His penalty: a fine of $6,000.) In 2007 two Herald Sun journalists, Gerard McManus and Michael Harvey, were convicted of contempt for refusing to reveal their source for a story about the Howard government scaling back recommended benefits for war veterans. They were spared jail but fined $7,000 each for contempt with their convictions recorded against them.

Shield laws

Partly as a result of criticisms of the handling of the McManus and Harvey case, 'shield laws' were introduced by the Commonwealth and states. While an improvement for the media, the shield laws fell well short of granting journalists immunity from having to reveal their sources. Ultimately, it is up to the judge to decide, after hearing from the publisher, whether to grant the journalist's claim for privilege. The relevant provisions of section 126K of the Commonwealth Evidence Act 1995 are:

(1) If a journalist has promised an informant not to disclose the informant's 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 that identity to be ascertained.

(2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the

public interest in the disclosure of evidence of the identity of the informant outweighs:
(a) any likely adverse effect of the disclosure on the informant or any other person; and
(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

Newspaper rule

In defamation law, media defendants are frequently put at a disadvantage because of their determination to protect the identity of their confidential sources. It is common practice in defamation cases not to put journalists with source problems into the witness box. This can mean that the media defendant has to attempt to defend the action with one hand tied behind its back.

Partial recognition of the journalist's obligations of confidentiality resulted in the development of the Newspaper Rule. However, the Newspaper Rule is a rule of practice and not of law. It allows media defendants to not reveal a confidential source in the preliminary stages of a defamation case such as discovery of documents and answering interrogatories. It does not extend to protecting journalists in the witness box.

6. Problems with the metadata law

In a recent paper, Professor Spencer Zifcak , Allan Myers Professor of Law at the Australian Catholic University, wrote that the journalist information warrant regime offers journalists 'next to no protection at all'.[4] The main problems with the journalist information warrant regime are that the public interest test itself is inadequate and that there is no independent and impartial assessment of the warrant application by a superior court judge. Though not specifically concerned with access to journalists' metadata, the ECJ had similar concerns about the EU's Data Retention Directive referred to above. The warrant application will be determined by an authority appointed by the minister. The journalist's interests may or may not be represented by the public interest advocate, an official appointed by the Prime Minister. We think it is important to retain the position of Public Interest Advocate in order to cover matters where a journalist or smaller publisher is not able to access the significant resources needed to present arguments before a judge. However, we think the law needs to address the fact that this whole process is undertaken without the knowledge or participation of the journalist or media company, in strict secrecy with severe penalties for revealing even the existence of such a warrant. Professor Zifcak pointed out the ABC warrant was issued by a court registrar and wrote 'This is hopelessly unsatisfactory'. We agree with that assessment and believe journalists and publishers should be given the opportunity to appear before a judge who will determine first whether there is a serious threat to national security, and second whether a warrant should be issued.

In civil litigation, media companies are regularly subpoenaed for documents and information or served with suppression orders. From time to time they challenge the scope and purpose of such subpoenas and orders. Their challenges are frequently heard by superior court judges. It is not uncommon, in fact, it is all too common, that such applications attract extensive suppression orders which journalists and their publishers invariably respect.[5] Even allowing for the fact that the law enforcement agency might be involved in very sensitive investigations, there is no reason, based on this experience, why journalists or publishers should not be given notice that they are the subject of a journalist information warrant and be given the chance to be heard on the application by a superior court judge. To maintain the current regime would be another example of what Professor Williams described above as the 'abrogation of democratic rights' and the imposition of 'stringent measures that were previously unthinkable'.

[4] Spencer Zifcak, 'Journalists, Media Freedom and the Law', published on the Pearls and Irritations website, johnmenadue.com.
[5] According to the count of a News Corp media lawyer, in 2018 over 700 suppression orders were made by Australian courts, including 169 from NSW and 301 from Victoria.

7. A question for the Committee

Amid this necessarily legalistic discussion, this Committee may wish to consider a more textured question: to what extent does the public interest as defined and practised by the news media coincide with the protecting of the public and interests as enshrined in various security legislation? This is not dinner party banter: both informing the public (and holding the powerful to account) and protecting it are within the sphere of the public interest. While we do not seek to equate protecting public from, say, acts of terrorism with the multiple roles played by the news media, we would wish to note the positive effects of public interest journalism, a term which has multiple definitions, but, as the economist Henry Ergas notes, 'is best interpreted to mean journalism that confers large positive "externalities" on the public, in the sense that the social gains exceed whatever monetary payment the journalist might earn from publishing an article'.[6] Ergas adds a further definition: that investigative and public interest journalism primarily focuses on situations involving the abuse of private or public power.

Another consideration is the public value inherent in professional journalistic standards of accountability, accuracy and ethical conduct. For journalism to work in the public interest, it must prove on a minute to minute basis its value to the public. It does so by producing news and information which would otherwise not be in the public domain and adhering, in the process of doing so, to a set of external and internal standards. These standards are subject to scrutiny by various industry, legal and regulatory bodies. They are, regrettably, breached on rare occasions, but to a large extent, they are not. These standards – and the practices they inspire – sit at the very core of journalism's proposition to act in the public interest and to produce positive externalities for doing so. Any journalist, editor or publisher wishing to work in the public interest ignores them at their peril.

8. Conclusion

The rapid development of cyber technology in the last several years has increased the scope for cyber crime and the risks to national cyber security. But the very same advances have given law enforcement and security agencies new tools to combat such threats. Parliament has not been slow in deploying these tools, such as in the legislation being examined by this inquiry. Parliament's determination to counter such threats is, of course, proper and prudent. But we have sought to argue in this submission that the almost certainly unintended by product of Federal parliament's efforts has been an overriding of civil freedoms that have been developed, sometimes with great difficulty, during the long evolution of our system of liberal democracy. The fact this inquiry has been called shows that Parliament is not insensitive to these risks.

We have attempted to put our concerns about the two specific acts, the metadata law and the assistance and access law, into the broader picture of freedom-infringing legislation introduced in particular since September 11, 2001. We believe they render impossible, or potentially impossible, a core requirement of Australian journalism: that confidences given in the course of journalistic work will always be protected. They expose journalists and their publishers to very severe penalties. And they enshroud this whole process with alarming strictures of secrecy.

[6] H Ergas, J Pincus and S Schnittger, (2017) *The Crucial Role of Public Interest Journalism in Australia and the Economic Forces Affecting It*, Green Square Associates.