Parliamentary Joint Committee on Intelligence and Security

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

Responses to Questions on Notice

Centre for Media Transition, 27.08.19

DR KELLY asked about further attempts to legislate for data protection in the EU and any specific journalism protection regimes in the EU.

Data retention

As far as we are aware, there is no EU level directive currently in place for the retention of metadata. While it appears that the retention of metadata is still a policy objective, there is nothing in place so far. This was confirmed in the conclusion of the Council of the European Union on Retention of Data for the Purpose of Fighting Crime, 27 May 2019.

In practice, different nation states have their own directives around data retention laws. Some of the pieces of domestic legislation were put in place by the states to comply with the EU Data Retention Directive (before it was overruled) and have not yet been repealed. This is a piecemeal approach with decisions being referred to the European courts from state courts. A recent example of this is *Secretary of State for the Home Department v Watson* [2018] which held that the Data Retention and Investigatory Powers Act 2014 (UK) contravened European Law.

While we have not found an example of a data protection regime that has been held to be compliant with the EU Charter of Fundamental Rights, a compliant scheme would need to be focused and proportionate in its approach. In seeking to achieve this, Germany has scaled back its data retention period from six months to 10 weeks. And while there are different approaches across European states to data collection and retention, it seems clear that the approach adopted in Australia – where all data must be retained for a period of two years – would be considered neither focussed nor proportionate.

Journalism protections

We are not able to provide further details on European schemes for protecting journalists, but we urge the Committee to consider the example of the Police and Criminal Evidence Act 1984 in the UK, which includes a regime for the protection of 'journalistic material'. The procedures include informing journalists in advance that police are seeking orders and allowing for contested hearings before a judge.

Although these procedures need not be followed in matters involving terrorism, the Terrorism Act 2000 does provide some indication of how the category of offence or investigation can be narrowed to a 'terrorist investigation'. Furthermore, the case of *Malik v Manchester Crown Court, Chief Constable of Manchester* [2008] EWHC 1362 shows how a court in the UK can narrow down the scope of a production order for journalistic materials under the Terrorism Act, with reference to Article 10 of the European Convention on Human Rights.

We note the importance here of both the European Convention and country level, constitutional protections. Legal responses to issues around accessing journalist source material across the EU will be guided and at times bound by explicit human rights considerations, specifically concerning freedom of expression and the freedom of the press.

Article 11 of the EU Charter of Fundamental Rights concerns 'Freedom of Expression and Information'. It states:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected.

Many European jurisdictions then have their own constitutional or legislative protections of these rights which also direct or guide their parliaments and courts in developing systems for access to journalist information and potential limits on publishing. For example:

- the Constitution of France includes in Article 4 a provision requiring that '… statutes shall guarantee the expression of diverse opinions and the equitable participation of political parties and groups in the democratic life of the Nation';
- in Germany, Article 5 of the Basic Law (Grundgesetz) provides that 'Freedom of opinion and freedom of the press receive protection from the German constitution';
- in Sweden, there is a Freedom of the Press Act, Article 1 of which provides: 'Freedom of the Press is the right of every Swedish citizen to publish written matter, without hindrance by a public authority or other public body'.

As Australia does not have a Charter of Rights or similar document, it is important that we consider including a first principle affirmation – or at the least an effective exemption for journalistic activity – within legislation.

MR DREYFUS asked about recommendations made by the Law Council of Australia in relation to changes to the test for issuing a computer access warrant for interception arising from the Access and Assist Act in 2018.

We support the principle advanced by the Law Council that, in general, the test for interception of communications passing over a telecommunications system should not be eroded from the matter being 'prejudicial to security' to it being 'important in relation to security'; further, the 'relevant offences' to which computer access warrants may relate should not be other than 'serious offences'.

However, our main concern is in relation to access to journalists' information and that we think the threshold should (as described below) be higher in this situation and that the decision maker should be a judge, not the Attorney-General.

We note here that we support the additional point made by the Law Council and by the Commonwealth Ombudsman that higher thresholds should apply not just to authorisations for direct access to the information of journalists and their employers, but also to other authorisations where the purpose is to identify a journalist's source.

MS KENEALLY asked about our recommendation for a more stringent test for access to journalistic information and about journalist shield laws.

<u>Test for access</u>

As we said at the public hearing, we acknowledge there is a range of views on the kind of criminal activities might legitimately be the subject of a warrant for access to journalistic information.

In our view, these warrants should be limited to investigations into the most serious criminal offences such as acts of terrorism that could result in loss of life, where there is reason to think the risk is imminent.

We note this would only arise in cases where a judge of a superior court decides that a warrant should be issued having given the journalist, publisher and Public Interest Advocate the opportunity to be heard; having found that the benefit of issuing it significantly outweighs the harm that might be caused to press freedom; and having formed the view that the information could not reasonably be obtained in some other way.

The two matters that prompted this Inquiry – the raids on the home of News Corp journalist Annika Smethurst and on the offices of the ABC – provide useful examples to consider such a test. It has been reported that the first concerned a proposal relating to the proposed widespread surveillance activities of a security agency, while the second involved conduct of Australian armed forces in Afghanistan at least six years ago. While we accept the need for interventions in the most serious criminal matters, including terrorist activity, we think these two cases (at least on the facts reported) reflect situations where warrants should *not* be issued because there is not the risk of imminent, serious harm. In short, there is no reason to undermine the public interest in Australia's government and public institutions being subject to the level of accountability that comes with public scrutiny.

Shield laws

The only additional point we wish to make on the operation of the shield laws (within the Evidence Act of the Commonwealth and of the states and territories) is in relation to their scope and the connection with other laws being examined by the Committee. The Committee is aware of the inconsistencies within the national shield laws and within other aspects of Commonwealth legislation on the application of journalistic protections, specifically on the subject of these exemptions or defences. We note the Committee's concerns about the possibility of abuse of journalistic protections by foreign operatives and while this is not strictly relevant to the operation of the shield laws, we think it is reasonable that the protections offered in these laws as well as in interception, data retention and secrecy laws are limited in scope to professional journalists, news organisations and their employees. This would also be an opportunity to achieve a broader level of consistency in the application of the shield laws across the various Australian jurisdictions.