THE LAW SOCIETY
OF NEW SOUTH WALES

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22 July 2019

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Smithers,

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

Thank you for the opportunity to contribute to a Law Council submission to this inquiry. The Law Society's contribution is informed by the views of its Public Law, Human Rights and Privacy and Data Law Committees.

The recent raids on the home of a journalist and the headquarters of Australia's national broadcaster illustrate concerns held by the Law Society about broader deficiencies in the protection of the right to freedom of expression, the right to freedom of political communication and the freedom of the press. While we note there are various secrecy and other offences under Commonwealth laws that impact on freedom of the press, this submission will outline specific concerns with provisions recently inserted into the *Criminal Code Act 1995* (Cth) ("Commonwealth Criminal Code") through the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) ("EFI Act").

The Law Society agrees with recent statements by the President of the New South Wales Bar Association, Tim Game SC, that there is a real risk the absence of appropriate safeguards in the Commonwealth Criminal Code may limit "proper reporting and robust debate regarding matters of public importance in a democratic society".[1] In addition to an analysis of the implications of domestic legislation on freedom of the press in Australia, we raise international human rights considerations relevant to this inquiry.

1. Section 122.4A of the Commonwealth Criminal Code

The Law Society is concerned that s 122.4A of the Commonwealth Criminal Code (Communicating and dealing with information by non-Commonwealth officers etc.) lacks precision in its definition of an offence. Subsection (1)(d) provides:

> (1) A person commits an offence if:
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> (a) the person communicates information; and
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> (b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

[1] New South Wales Bar Association, 'Deficient Security Laws threaten essential rights and freedoms' (Media Release, 6 June 2019).

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and
(d) any one or more of the following applies:
(i) the information has a security classification of secret or top secret;
(ii) the communication of the information damages the security or defence of Australia;
(iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;
(iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public. ...
Penalty: Imprisonment for 5 years.

The Explanatory Memorandum for the EFI Act, which introduced s 122.4A into the Commonwealth Criminal Code, states (emphasis added):

> The term 'communicates' is taken to include references to 'publishes' and 'makes available', consistent with subsection 121.1(2). It is intended to include imparting or transmitting information **by any means**. It is not intended to require, as a rule, proof that the information was received by another person, or proof that another person read, heard or viewed the information. A person would communicate information where, for example, a person sends an email containing information, even if the email is not read by another person.[2]
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> ...
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> For subparagraph 122.4A(1)(d)(iv), the prosecution will have to prove that the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public. Unlike the offences that apply to current and former Commonwealth officers, the harm or prejudice will need to actually occur for the offence to be committed.
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> The fault element of recklessness applies to this element. Therefore, the prosecution will need to prove beyond a reasonable doubt that the person was aware of a substantial risk that the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public and having regard to the circumstances known to the person, it was unjustifiable to take the risk.

Notwithstanding the material in the Explanatory Memorandum, in our view there is insufficient definition of the threshold that would trigger the offence at s 122.4A. This lack of precision creates ambiguity and may dissuade a journalist from engaging in legitimate reporting of information obtained from a Commonwealth officer. In a joint submission to the inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), three UN Special Rapporteurs raised this concern, stating that:

> We are particularly concerned that these restrictions will disproportionately chill the work of media outlets and journalists, particularly those focused on reporting or investigating government affairs. The lack of clarity concerning these restrictions, coupled with the extreme penalties, may also create an environment that unduly deters and penalizes whistleblowers and the reporting of government wrongdoing more generally.[3]

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[2] Revised Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, 1337, 1584-1585.

[3] The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, and the Special Rapporteur on the situation of human rights defenders, *Submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (14 February 2018).

We recommend the Law Council liaise with the Commonwealth Attorney-General to propose the creation of guidance material for journalists, media organisations and public agencies on the practicalities of complying with the provisions of the Commonwealth Criminal Code inserted by the EFI Act. This guidance material could include:

- examples of the type of communication that may contravene s 122.4A; and
- a summary of relevant information included in the four explanatory memoranda that accompanied the EFI Act. It would be helpful for journalists, media organisations, and public agencies to have access to a condensed and compiled source of explanatory information on the operation of s 122.4A, coupled with practical examples.

2. Search warrants in relation to journalists and media organisations

The Law Society considers that any application for a warrant to search media premises for the purpose of investigations in connection with media reporting should require judicial oversight.

Search warrants in relation to journalists and media organisations also have implications on the right to privacy. Article 17 of *The International Covenant on Civil and Political Rights* (ICCPR) provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The UN Human Rights Committee ("UN HR Committee"), in a General Comment containing guidance on the interpretation of Article 17 of the ICCPR, stated that any interference with a person's right to privacy should be in accordance with the provisions, aims and objectives of the ICCPR and reasonable in the particular circumstances.[4]

We submit, therefore, that compliance with Australia's obligations under Article 17 of the ICCPR requires that a court examine the proportionality and reasonableness of any such warrant application in a judicial hearing. This would ensure a requirement to provide reasons and justiciability should the warrant be granted. More broadly, it would ensure compliance with Australia's obligations under the ICCPR.

3. Additional human rights considerations

The High Court of Australia has recognised freedom of political communication as a fundamental common law right necessary for our system of representative government.[5] Legislative restrictions on this freedom are only permissible to the extent that they are reasonably appropriate and adapted to a legitimate purpose.[6] While there may be legitimate reasons for curtailing freedom of the press where there are national security concerns (such as the impact of leaking of top secret information which would significantly compromise security), in our view there should be greater focus on providing guidance for journalists (as discussed above) and on more robust internal mechanisms that enable journalists discreetly to bring concerns to Government's attention.

At the international level, the right to freedom of opinion and expression is protected by Article 19 of the ICCPR. Any restrictions on this right must be provided by law, and conform

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[4] Human Rights Committee, *CCPR General Comment no. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, home and Correspondence, and Protection of Honour and Reputation*, 32nd session, HRI/GEN/1/Rev.9 (8 April 1988) 4.

[5] Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (2015), ALRC Report 129, 4.17.

[6] *Lange v ABC* (1997) 189 CLR 520.

to strict tests of necessity and proportionality.[7] The UN HR Committee has stated that "a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression" and "the public also has a corresponding right to receive media output".[8] The former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression noted in 2013 that surveillance of journalists can serve to stymie freedom of the press and – by implication – limit the right to freedom of opinion and expression.

> Journalists are ... particularly vulnerable to becoming targets of communications surveillance because of their reliance on online communication. In order to receive and pursue information from confidential sources, including whistleblowers, journalists must be able to rely on the privacy, security and anonymity of their communications. An environment where surveillance is widespread, and unlimited by due process or judicial oversight, cannot sustain the presumption of protection of sources. Even a narrow, non-transparent, undocumented, executive use of surveillance may have a chilling effect without careful and public documentation of its use, and known checks and balances to prevent its misuse.[9]

We also note that inadequate data protection can present implications both for an individual's right to privacy, and their right to freedom of expression, as the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, noted in 2011.

> [T]he Internet... presents new tools and mechanisms through which both State and private actors can monitor and collect information about individuals' communications and activities on the Internet. Such practices can constitute a violation of the Internet users' right to privacy, and, by undermining people's confidence and security on the Internet, impede the free flow of information and ideas online.[10]

Mr La Rue further stated that "States parties are required by Article 17(2) [of the ICCPR] to regulate, through clearly articulated laws, the recording, processing, use and conveyance of automated personal data and to protect those affected against misuse by State organs as well as private parties".[11] The UN HR Committee has stated, with regard to Article 17 of the ICCPR, that data protection laws must establish a person's right to access information held about them and, if need be, allow them to request rectification or deletion of personal data.[12]

Thank you for the opportunity to contribute to the Law Council's submission on this issue. If you have queries about this letter please contact Sue Hunt, Principal Policy Lawyer, by email to sue.hunt@lawsociety.com.au or by phone on (02) 9926 0218.

Yours sincerely,

Elizabeth Espinosa
President

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[7] Human Rights Committee, *General Comment No. 34 Article 19: Freedoms of opinion and expression*, 102nd session, CCPR/C/GC/34 (12 September 2011), 13.
[8] Ibid.
[9] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 23rd session, A/HRC/23/40, (17 April 2013), 52.
[10] Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, 17th session, A/HRC/17/27, (16 May 2011), 53.
[11] Ibid 58.
[12] Human Rights Committee, above n 2, 10.