

16 October 2014

Ms Vickie Chapman MP
Shadow Attorney-General
Parliament House
ADELAIDE SA 5000
By email: Vickie.chapman@parliament.sa.gov.au

Dear Ms Chapman,

Listening and Surveillance Devices (Miscellaneous) Amendment Bill 2014

The media organisations that are parties to this correspondence – AAP, ABC, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian Newspapers – are writing regarding the *Listening and Surveillance Devices (Miscellaneous) Amendment Bill 2014* (the Bill).

As you are aware, we are broadly supportive of the Bill. We particularly acknowledge that the concerns outlined in previous correspondence regarding the Government's *Surveillance Devices Bill 2014* have been addressed. Specifically we note that the Bill is narrowly focused on the police related provisions and the existing law, the *Listening and Surveillance Devices Act 1972*, as it relates to the media, will continue to operate. We welcome this approach and appreciate the moves taken by the Opposition to address our concerns.

However, we wish to draw attention to a provision in the Bill that limits the capacity of journalists to communicate and report in the public interest. Proposed section 28 makes it an offence to wrongfully disclose information. It states:

28 – Offence to wrongfully disclose information

A person must not knowingly communicate or publish information or material about a surveillance device warrant or a surveillance device (emergency) authority except –

- a) As required to do so under this Act; or*
- b) For the purposes of a relevant investigation; or*
- c) For the purposes of a relevant action or proceeding; or*
- d) In the course of proceedings for an offence against this Act; or*
- e) Otherwise in the course or duty or as required by law.*

Maximum penalty:

- a) In the case of a body corporate – \$50,000;*
- b) In the case of a natural person – \$10,000 or imprisonment for 2 years.*

As we have stated in other fora, we cannot countenance journalists being jailed for going about their usual jobs.

We therefore recommend that a public interest exception be included at section 28 of the Bill.

We suggest that following could be adopted to fulfil the recommendation:

(f) for making a disclosure in good faith for the purpose of the information being included in a report or commentary about a matter of public interest; or
(g) for publishing in good faith a report or commentary about a matter of public interest.

Such an exception provides an appropriate balance between the competing interests. Section 28 would remain in the Bill, ensuring that material about relevant police activities is not inappropriately disclosed, while journalists and the media would be able to continue to undertake their rightful roles in a democratic society.

We are of the view that this is an appropriate amendment for the following reasons:

The risk of journalists being jailed for doing their jobs is unacceptable

Proposed section 28 could see journalists jailed for undertaking and discharging their legitimate role in a modern democratic society – reporting in the public interest. Such an approach is untenable, and should not be included in the legislation; or should be amended with a public interest exception.

This alone is more than adequate reason to remove the proposal as the proposed provision significantly curtails freedom of speech and reporting in the public interest. We understand that the Opposition is not minded to remove the section. On this basis the provision must be amended to incorporate a public interest exception (in the terms recommended above).

No evidence of a problem

As we have expressed in previous correspondence regarding the Government's *Surveillance Devices Bill 2014*, there is no evidence of a problem involving reporting in the public interest by media that the provision provides a 'fix' for. Given the absence of such a public policy failure, there is no need to apply a 'fix' in this regard.

The lack of a problem renders the offence provision at proposed section 28 unjustified and unwarranted. On this basis alone the section should not be pursued as it pertains to reporting in the public interest.

Limiting the ability for news gathering, including on law enforcement matters, is contrary to the public interest

Limits on the ability of journalists to report in the public interest on matters of intelligence, national security and law enforcement must always be carefully considered and minimised. A recent report by Human Rights Watch, regarding the US, notes that:

This situation has a direct effect on the public's ability to obtain important information about government activities, and on the ability of the media to serve as a check on government. Many journalists said it is taking them significantly longer to gather information (when they can get it at all), and they are ultimately able to publish fewer stories for public consumption. ...[T]hese effects stand out most starkly in the case of reporting on the intelligence community, national security and law enforcement – all areas of legitimate – indeed, extremely important – public concern.¹

¹ Human Rights Watch in conjunction with the American Civil Liberties Union (2014) *With Liberty to Monitor All* at page 4; www.hrw.com

Dialogue between the media and law enforcement has led to considered outcomes – this should continue

The media organisations that are parties to this submission do not seek to undermine South Australian law enforcement operations, the safety of the men and women involved in those operations, nor the safety of the South Australian community.

Over many years there has been useful dialogue between law enforcement and producers and editors of media organisations that has led to considered outcomes. Journalists and editors have demonstrated over time that such matters can be approached in a reasoned and responsible manner. We hold that this approach should continue to be preferred over attempts to codify news reporting and criminalise journalists for doing their jobs.

Attempts to amend the Bill to allow public interest reporting to take place in certain circumstances is unpalatable

We understand that some thought may have been given to limit the prohibition to communicating and publishing to ‘prior to a prosecution being made’ and/or other means.

While we appreciate that consideration is being applied to minimising the circumstances under which communicating and publishing is prohibited. However, this will still give rise to circumstances that see a journalist facing jail time for doing either of those in the public interest and in the course of their jobs. It remains the case that communicating and reporting, including in the public interest is still being limited. This remains unacceptable to the parties to this correspondence.

Such an approach is also problematic as it places inflexible parameters on the matters that can be reported. It would prohibit reporting in a range of scenarios that would not compromise police activity, such as reporting after the conclusion of surveillance, and also preventing the reporting of potentially improper surveillance activity that did not proceed to prosecution.

As outlined above, we are of the view that communicating and publishing in any/all circumstances that are in the public interest must be allowed. This would ensure the maintenance of a cornerstone of democratic society.

Recent examples of this type of public interest reporting

On 18 September 2014 members of the Australian Federal Police, ASIO and state law enforcement agencies mounted an anti-terrorism operation across a number of Australian states.

The reporting of that operation, in which many locations were raided, contained references to intercepted phone calls, targets being under surveillance by law enforcement, surveillance operations, and ongoing operations. We attach to this correspondence a range of illustrative news items.

This public interest reporting is of the very kind that section 28 would prohibit – and indeed make aailable offence. Furthermore, such reporting would have been prohibited if communicating and reporting was prohibited ‘prior to a prosecution being made.’ It is very possible that such legitimate reporting would have been prohibited under any regime which limited public interest reporting in any manner.

We therefore believe that the only appropriate way of addressing our concerns, and ensuring the public's right to know, is by incorporating a public interest exception as we outline above.

Thank you for considering the issues raised in this letter, and your constructive approach to these issues to date.

