Joint Media Organisations

Submission to Australian Law Reform Commission

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

Issues Paper

INTRODUCTION

The parties to this submission regard free speech, free press and access to information as fundamental to a democratic society that prides itself on openness, responsibility and accountability.

The parties to the submission welcome the opportunity to make a submission to the Australian Law reform Commission (ALRC) Issues Paper, *Traditional rights and Freedoms – Encroachments by Commonwealth Laws*.

This submission addresses the following issues:

- Commonwealth laws that unjustifiably interfere with freedom of speech

- Overarching issue – Australia lacks a legislative protection for freedom of speech

- Egregious examples – but not a definitive list – of Commonwealth laws that unjustifiably interfere with freedom of speech
    - Tranches 1, 2 and 3 of the 2014-15 national security laws
    - Criminalising journalists for doing their jobs
    - Inadequate protections for whistle-blowers and lack of real avenue for 'unauthorised' disclosures

- Issues with drafting, implementation and operation of laws
    - Rushed consultation
    - Reliance on existence of 'similar' but flawed laws to justify new laws
    - Critical elements of laws put into regulations – and those regulations not available at the time of consultation of the enabling bill
    - Shortfalls in independent oversight and accountability, and transparency

- State laws also interfere with freedom of speech

1. COMMONWEALTH LAWS THAT UNJUSTIFIABLY INTERFERE WITH FREEDOM OF SPEECH

OVERARCHING ISSUE – AUSTRALIA LACKS A LEGISLATIVE PROTECTION FOR FREEDOM OF SPEECH

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, freedom of expression is protected under section 12 of the *Human Rights Act 1998* subject to appropriate restrictions to protect other rights that are considered necessary in a democratic society.

In the absence of such clear protections, there are a number of keystones that are fundamental in Australia to ensure journalists are able to do their jobs. These include:

- The ability for journalists to go about their ordinary business and report in the public interest without the real risk of being jailed;
- Protection of confidential sources;
- Protection for whistle-blowers; and
- An appropriate balance of power between the judiciary, the executive, the legislature and the media.

Against this backdrop, following are egregious examples – but not a definitive list – of Commonwealth laws that unjustifiably interfere with freedom of speech.

We provide here a brief overview of the issues with the provisions, and detailed analysis can be found in the submissions cited.

TRANCHES 1, 2 & 3 OF THE 2014-2015 NATIONAL SECURITY LAWS

1. Section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)

Enacted under the *National Security Laws Amendment Bill (No. 1) 2014* – criminalises journalists for unauthorised disclosure of information relating to secret Special Intelligence Operations.

The Joint Media Organisations made a submission to the Parliamentary Committee on Intelligence and Security (PJCIS) regarding section 35P.[1]

In short, 35P of the ASIO Act makes it a criminal offence to disclose information relating to a Special Intelligence Operation. The penalty is imprisonment for 5 or 10 years.

As we noted in that submission, our concerns with the provision are as follows.

- *Criminalises journalists for undertaking and discharging their role in a modern democratic society*

[1] Submission 17, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Submissions

Section 35P does not include an exception for journalists and the media for public interest reporting. Nor is there an exception, or a defence, for journalists and the media for reporting in the public interest.

- *Further erodes the already inadequate protections for whistle-blowers (under the Public Interest Disclosure Act 2013) and has a chilling effect on sources*

  If a whistle-blower were to emerge from the ranks of intelligence personnel, then the Bill now imposes a 10 year jail sentence for disclosing information, further discouraging whistle-blowing and sources.

  35P further impairs the lack of protection for persons, including intelligence agency personnel, driven to resort to whistle-blowing in the public domain. It is now unequivocal that the whistle-blower and the person/s who make the information public – most likely a journalist doing their job and reporting in the public interest – will face time in jail. Such an approach does not serve a free and open society and a modern democracy.

Amendments to the enabling legislation

In response to recommendations by the PJCIS, the Government[2]:

- Amended the Explanatory Memorandum of the Bill[3] such that the Commonwealth Director of Public Prosecutions (CDPP) is required to consider the public interest in the commencement or continuation of a prosecution. It would be open to the CDPP, in making independent decisions on this matter, to have regard to any public interest in the communication of information in particular instances as the CDPP considers appropriate; and
- Inserted a note to 35P that refers to s 5.6(2) of the Criminal Code as the source of the fault element of recklessness.

Joint Media Organisation position

We remain of the view that neither of these amendments adequately addresses the unjustified interference with freedom of speech imposed by 35P of the ASIO Act.

We also remain of the view that the appropriate way to address the unjustified interference with freedom of speech posed by 35P of the ASIO Act is for a media exemption to be applied.

2. Provisions enacted under the *Counter-Terrorism Legislation (Foreign Fighters) Amendment Bill 2014* (Foreign Fighters Bill)

Specifically:

a) Section 119.7 of Division 119 of Part 5.5 of the *Criminal Code Act 1995*, particularly subsections 119.7(2) and 119.7(3) that address *'publishing recruitment advertisements'*[4] which include news items that may relate to such matters; and
b) Section 3ZZHA of the *Crimes Act 1914* – Unauthorised disclosure of information

[2] http://www.attorneygeneral.gov.au/Mediareleases/Documents/ResponsePJCISreportNSLAB.pdf
[3] at [582], http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s969_ems_ad580183-6b63-4ad6-a73a-2147d31444a4/upload_pdf/79764RevisedEM.pdf;fileType=application%2Fpdf
[4] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s976_first-senate/toc_pdf/1420720.pdf;fileType=application%2Fpdf, p91

The Joint Media Organisations made a submission to the PJCIS[5] regarding the Foreign Fighters Bill.

Details regarding (a) are included in the submission, and we refer the ALRC to that document.

Regarding (b), the same issues arise as with 35P of the ASIO Act, namely criminalising journalists for doing their jobs, and further eroding the protections for whistle-blowers – both of which have a chilling effect on reporting in the public interest.

We noted in our submission that section 80.3 of the *Criminal Code Act* provides a good faith defence in relation to a number of provisions – but not those raised by the Joint Media Organisations – *for publishing in good faith a report of commentary about a matter of public interest*[6].

The Explanatory Memorandum to the Foreign Fighters Bill describes the application of the defence as follows:

> *The existence of a good faith defence in section 80.3 for the offence created by new section 80.2C provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.*
>
> ***This legislative safeguard, taken together with the ordinary rights common to criminal proceedings in Australian courts, provide certainty that human rights guarantees are not disproportionately limited in the pursuit of preventing terrorist acts or the commission of terrorism offences.***[7] [our emphasis added]

Amendments to the enabling legislation

No amendments to the enabling legislation were made to address the unjustified interference with freedom of speech raised by the Joint Media Organisations submission.

Joint Media Organisation position

We remain of the view that the appropriate way to address the unjustified interference with freedom of speech posed by the Foreign Fighters Bill is for a media exemption to be applied.

3. The lack of protection for access to, and use of, telecommunications data (meta data) to identify journalists' sources enacted under the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (the Data Retention Bill)

[5] Submission 23, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions
[6] Section 80.3(f) of the *Criminal Code Act 1995*
[7] at [148 and 149], http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_c21ea737-5e59-4cdb-bceb-7af5e22aa6a9/upload_pdf/398980.pdf;fileType=application%2Fpdf

The Joint Media Organisations made two submissions to the PJCIS[8] regarding the Data Retention Bill.

As the ALRC will be aware, at the time of making this submission, the Government has responded to the PJCIS Report regarding the Data Retention Bill, but the Parliament has not yet resumed debate.

The issue central to the Data Retention Bill and the existing legal framework – the *Telecommunications Interception Act 1979* – is the ability for agencies to access the metadata of journalists' communications and use that data to identify journalists' sources. This undermines confidentiality of sources and driving sources and whistle-blowers further away from sharing information.

The specified retention scheme, by virtue of an increased awareness if, will increase the degree of difficulty that will be encountered by journalists going about their day-to-day jobs: to report in the public interest particularly as it relates to undermining the confidentiality of sources, and the willingness of sources to come forward and share information including non-classified material, which in turn also makes it more difficult to corroborate information and details, which means it takes longer to get the stories that matter.

A recent report by Human Rights Watch (regarding the US), *With Liberty to Monitor All – How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy*[9] (the HRW Report) states:

> *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.*[10]

The HRW Report dedicates a section of the report to the impact of surveillance on journalists.[11] It says:

> *While most journalists said that their difficulties began a few years ago, particularly with the increase in leak prosecutions, our interviews confirmed that for many journalists large- scale surveillance by the US government contributes substantially to the new challenges they encounter.* ***The government's large-scale collection of metadata and communications makes it significantly more difficult for them to protect themselves and their sources, to confirm details for their stories, and ultimately to inform the public****.*[12] [emphasis added]

Regarding the increasing concerns about how to maintain confidentiality of sources, and the concerns of both journalists and the sources, the HRW Report goes on to say:

> *'Journalists expressed diverse views as to when and why reporting conditions began to deteriorate… The most common explanation, however, was a combination of increased surveillance and the Obama Administration's push to minimize unauthorized leaks to the press (both by limiting government employees' contact with journalists, such as through the Insider Threat Program, and by*

---

[8] Submission 125 and Supplementary Submission 125.1, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Data_Retention/Submissions

[9] http://www.hrw.org/reports/2014/07/28/liberty-monitor-all-0, *With Liberty to Monitor All - How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, Human Rights Watch in conjunction with the American Civil Liberties Union (2014), p4

[10] Ibid, p4

[11] Ibid p22-48

[12] Ibid p23

ramping up prosecutions of allegedly unauthorized leaks, as described above). That trend generates fear among both sources and journalists about the consequences of communicating with one another—even about innocuous, unclassified subjects;'[13] and

'Yet, beyond the leak investigations and administrative efforts to prevent leaks, many journalists said that the government's increased capacity to engage in surveillance— and the knowledge that it is doing so on an unprecedented scale—has made their concerns about how to protect sources much more acute and real.'[14]

The impact of such is that large-scale surveillance makes it difficult for journalists to communicate with sources securely, with each and every call or email leaving a trail. This means that meeting 'in person' may be the most 'secure' way of maintaining a source. However, such meetings also need to be arranged, which means that even 'in person' meetings are likely to create a record of some sort. Furthermore, some sources may not want to have their identities known at all, including to the journalists that they may work with. In such cases, meeting face-to-face is not an option.

The HRW Report says:

'[M]any journalists said the amount of information provided or confirmed by sources is diminishing. For one, sources are becoming less candid over email and phone.'[15]

It also says that sources are less willing to discuss sensitive matters, including where the matter is not 'classified'. It reports one journalist saying:

'[There is] much greater reluctance from sources to talk about sensitive stuff…There just isn't a bright line between classified and not.... There's a huge gray area. That's where the reporting takes place. [But s]ources are increasingly unwilling to enter that gray zone.'[16]

The HRW Report also describes the fear and uncertainty that arises in the media due to large-scale surveillance. It says:

'Journalists interviewed for this report described the difficulty of obtaining sources and covering sensitive topics in an atmosphere of uncertainty about the range and effect of the government's power over them. Both surveillance and leak investigations loomed large in this context—especially to the extent that there may be a relationship between the two. More specifically, many journalists see the government's power as menacing because they know little about when various government agencies share among themselves information collected through surveillance, and when they deploy that information in leak investigations.'[17]

The impact is a chilling effect on news gathering through increasing the perceived risks to sources including whistle-blowers – in an environment which has also heightened the risk to news gathering by criminalising some reportage and not providing adequate protections for some categories of whistle-blowers (details of which are in our previous submissions to the Committee).

Such an impact is supported by the HRW Report regarding the situation in the US. It states:

[13] Ibid p24-25
[14] Ibid p27
[15] Ibid, p41
[16] Ibid, p41
[17] Ibid, p23

'What makes government better is our work exposing information,' argued Dana Priest, a Pulitzer Prize-winning national security reporter at the Washington Post. 'It's not just that it's harder for me to do my job, though it is. It also makes the country less safe. Institutions work less well, and it increases the risk of corruption. Secrecy works against all of us.'[18]

Amendments to the enabling legislation

Responding to a report by the PJCIS, the Government has agreed that the PJCIS can further consider the appropriate approach to the disclosure and use of data to identify journalists' sources.[19]

We are further concerned with both Recommendation 27 of the PJCIS Report, and the Government response, regarding the acknowledgment that metadata will be accessed by agencies for the purpose of identifying journalists' sources.

Joint Media Organisation position

We remain of the view that the appropriate way to address the unjustified interference with freedom of speech posed by the Data Retention Bill is for a media exemption to be applied to the Bill and the existing Act before the Bill passes the Parliament.

4. Interaction between the three national security bills

As noted above, the Joint Media Organisations have made submissions to the PJCIS regarding all three tranches of national security laws during 2014-2015.

Each and every one of those laws contains specific provisions that unjustifiably interfere with freedom of speech, including:

- emasculating the confidentiality of sources;
- exacerbating the lack of protection for whistle-blowers including by potentially witch-hunting sources of 'unauthorised' leaks; and
- criminalising journalists for discharging their roles in a democracy

All of which, separately and in aggregate, makes it increasingly difficult for news gathering and reporting in the public interest.

We are of this view that this is untenable and does not serve the Australian democracy well.

Joint Media Organisation position

We remain of the view that the appropriate way to address the unjustified interference with freedom of speech is for media exemptions to apply to each of the laws.

[18] Ibid, p45

[19] Recommendation 26, http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.aspx

CRIMINALISING JOURNALISTS FOR DOING THEIR JOBS – SECTIONS 15HK and 15HL OF PART IAB OF THE *CRIMES ACT 1914*

These sections were introduced into the Crimes Act in 2010 via the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010.*

In short, these sections of the Crimes Act make it a criminal offence to disclose information relating to a controlled operation. The penalty is imprisonment for 2 or 10 years.

Exceptions are listed for both of these provisions.

However there is not an exception for journalists and the media for public interest reporting. Nor is there an exception, or a defence, for journalists and the media for reporting in the public interest.

These provisions do have a chilling effect on freedom of speech and freedom of communication. This is particularly so in light the lack of an enshrined protection for freedom of speech in Australia.

Joint Media Organisation position

We are of the view that the appropriate way to address the unjustified interference with freedom of speech is for media exemptions to apply.

INADEQUATE PROTECTIONS FOR WHISTLEBLOWERS AND LACK OF REAL AVENUE FOR 'UNAUTHORISED' DISCLOSURES – *PUBLIC INTEREST DISCLOSURE ACT 2013*

The Government introduced this Bill to provide a framework for Commonwealth public sector whistle-blowers – more appropriately described as members of the public sector who disclose information that would otherwise not be disclosed. Such information is not necessarily of a classified nature, or of a commercial nature.

The Joint Media Organisations submitted to the Inquiries into the Bill undertaken by both the House of Representatives Committee on Social Policy and Legal Affairs[20] and the Senate Committee on Legal and Constitutional Affairs[21].

While the final Bill did contain amendments to the draft Bill, there remain inadequate protections for public sector whistle-blowers.

Details of some of the outstanding issues with the Bill:

- The Bill does not cover intelligence agency personnel – they remain without protection if they go public;
- Staff of Members of Parliament are not protected;
- Wrong-doing of Members of Parliament is not included in the Bill;
- Public interest test remains skewed against external disclosure;
- Presumption of criminal liability should not lie against the media for using or disclosing identifying

[20] Submission 20, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=spla/bill%202013%20public%20interest%20disclosure/subs.htm

[21] Submission 19, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/publicinterestdisclosure/submissions

information during the course of responsible news gathering; and
- the Bill lacks a real avenue for 'unauthorised' disclosures.

The inadequate protections for public sector whistle-blowers is further exacerbated when laws, such as the three tranches of 2014-2015 national security laws, not only provide no protection but criminalise information disclosure (external or otherwise) – and therefore unjustifiably interfere with freedom of speech.

2. ISSUES WITH DRAFTING, IMPLEMENTATION AND OPERATION OF LAWS

The scope of the reference given to the ALRC also states that ALRC should consider what, if any, changes should be considered regarding how laws are drafted, implemented and operate in practice; and any safeguards provided in laws, such as rights of review and accountability measures.

As a brief case study, we offer an overview of the issues arising through the development of the three tranches of the 2014-2015 national security laws.

1. Rushed consultation

Tranche 1 – *National Security Laws Amendment Bill (No. 1) 2014*

- 16 July 2014 – Introduced into Parliament
- 18 July – announced Parliamentary Inquiry by PJCIS – submissions due 30 July
    - Only 9 business days for written responses (including the day of the announcement of Inquiry)
    - Report due by 8 September
- 29 July – announced extensions for submissions to 6 August
    - Provided 14 business days for written responses
    - Report due week beginning 22 September
- 15 and 18 August – PJICS Public hearings
- 17 September – PJCIS Report
- 19 September – Government response to PJCIS Report
- 1 October – Bill passed both Houses

Tranche 2 – *Counter-Terrorism Legislation (Foreign Fighters) Amendment Bill 2014* (Foreign Fighters Bill)

- 24 September 2014 – Introduced into Parliament
- 25 September – announced Parliamentary Inquiry by PJCIS – submissions due 12noon 3 October
    - Only 6.5 business days for written responses (including the day of the announcement of Inquiry)
    - Report due by 17 October
- 2, 3 and 8 October – PJICS Public hearings – 2 of the 3 hearing dates on or before submissions closed
- 17 October – PJCIS Report
- 22 October – Government response to PJCIS Report
- 30 October – Bill passed both Houses

We expressed our views, including in writing in our submission to the Foreign Fighters Bill, that the timeframes for submissions were exceptionally short, particularly given the complex and extensive nature of the Bills.

2. Reliance on the existence of 'similar laws' to justify new laws

We were, and remain concerned, that it is the case that the existence of 'similar laws' and provisions are relied upon to justify new laws and provisions.

Tranche 1 – *National Security Laws Amendment Bill (No. 1) 2014*

At the time of making a submission regarding 35P of the ASIO Act enabling legislation, we expressed concern – which still remains – that the Bill is characterised as being similar to the controlled operations regime in Part IAB of the *Crimes Act 1914* (the Crimes Act).[22] As we stated in our submission to the PJCIS:

> *The existence of controlled operation provisions in the Crimes Act does not automatically justify the imposition of similar provisions in the context of Special Intelligence Operations.*

Tranche 2 – *Counter-Terrorism Legislation (Foreign Fighters) Amendment Bill 2014* (Foreign Fighters Bill)

Similarly, regarding section 3ZZHA(2) of the Foreign Fighters Bill, the Explanatory Memorandum states that this:

> '*mirrors a similar offence for disclosing information relating to the controlled operation (section 15HK of the Crimes Act)'*[23]

Therefore our view is that a media exception should be provided for the new provision/law and the provision/law being referenced as justification.

3. Critical elements of laws put into regulations – and those regulations not available at the time of consultation on the enabling Bill

Regarding the Data Retention Bill we raised the issue that the specific types of data to be retained under the mandatory data retention scheme will be stipulated in regulations that support the Bill.

At the time of consultation on the Bill, those regulations were not available for consultation. Rather, the Attorney General's Department has published a Proposed Data Set.

We did not make any comment regarding the materiality or substance of the data set that could/would be retained by ISPs. However, we expressed concern that given the prominence of the data retention issue, and the context of national security, it would be optimal for public policy reasons to have the details of the data to be retained under the scheme available for consultation with the Data Retention Bill.

It would be a prudent public policy approach for details of the data to be retained by ISPs to be available at the time of consultation, to enable the subsequent discussion to occur – that being whether or not the details of the data to be retained by ISPs exists in regulations (as proposed by the Data Retention Bill) or in legislation.

4. Shortfalls in independent oversight and accountability, and transparency

As expressed in our submission to the PJCIS regarding the Data Retention Bill, while the Government has established some checks and balances, we are of the view that shortfalls remain, including:

- Limitations on public reporting of data retention scheme by the Commonwealth Ombudsman;
- Authorisation for access to any telecommunications data currently does not require independent oversight and accountability. It merely requires authorisation within the agency seeking the access.

We acknowledge the PJCIS Report into the Data Retention Bill and the Government's Response[24].

---

[22] at [463], http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s969_ems_2dbf9bb1-59cd-44ed-8e6a-d106c5535c72/upload_pdf/396762em.pdf;fileType=application%2Fpdf , and relates to section 15HK of the *Crimes Act*

[23] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_d5aff32a-9c65-43b1-a13e-8ffd4c023831/upload_pdf/79502em.pdf;fileType=application%2Fpdf at [643]

PJCIS Recommendation 27	Government Response – Supported
The Committee recommends that the *Telecommunications (Interception and Access) Act 1979* be amended to require agencies to provide a copy to the Commonwealth Ombudsman (or Inspector General of Intelligence and Security (IGIS) in the case of ASIO) of each authorisation that authorises disclosure of information or documents under Chapter 4 of the Act for the purpose of determining the identity of a journalist's sources.	The Government will amend the Bill to require agencies to provide all authorisations issued for the purpose of determining the identity of journalists' sources be provided to the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security as appropriate at the next relevant inspection.
The Committee further recommends that the IGIS or Commonwealth Ombudsman be required to notify this Committee of each instance in which such an authorisation is made in relation to ASIO and the AFP as soon as practicable after receiving advice of the authorisation and be required to brief the Committee accordingly.	The Government will amend the Bill to require agencies to notify the Attorney-General of each such authorisation and further require that the Attorney-General provide a report to the PJCIS annually.

These safeguards are inadequate to address the interference with freedom of speech posed by the Bill and the existing legal framework in the Telecommunications Interception Act.

The safeguards consist of reporting that occurs after access to the data has been approved. They do not address the fact that there is no independent assessment prior to accessing and using the data to identify sources. And they cannot stop a journalists data being accessed and used to identify sources.

[24] http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/Government-Response-To-Committee-Report-On-The-Telecommunications-Interception-And-Access-Amendment-Data-Retention-Bill.aspx

3. STATE LAWS ALSO INTERFERE WITH FREEDOM OF SPEECH

While the Terms of Reference limit this ALRC Inquiry to Commonwealth laws that encroach on traditional rights and freedoms, we would like to highlight that state-based laws (or lack thereof) also unjustifiably interfere with freedom of speech.

These include, but are not limited to:

- Some aspects of defamation laws including
  - Criminalising journalists,
  - Unintended consequences of operation of the laws, and
  - Worthy reforms, for example, the need in the digital age of a single publication rule;

- A lack of shield laws in some states, and inconsistencies across the Commonwealth and states;
- FOI laws;

- Laws governing suppression orders. For example, statutory provisions empowering courts and tribunals to make suppression orders prohibiting or restricting reporting of court proceedings vary significantly between jurisdictions in terms of the frequency with which they are made, the breadth and duration of such orders and the threshold that is required to be met before an order is made[25];

- Legislative restrictions on the reporting of matters affecting or involving children and in family law matters[26];

- Legislative restrictions on the reporting of matters affecting or involving sexual offences and sexual assault victims[27];

- Legislative restrictions on the reporting of matters affecting or involving coronial inquiries[28];

- Laws restricting publishing accounts of bail applications[29]; and

- Laws governing access to court records, documents and files. These laws are complex and vary considerably between jurisdictions. To provide an example, the procedural requirements for obtaining police records of interview in Victoria are particularly onerous: The media representative is required to file an application seeking release of the relevant record of interview, the application

[25] See also, Australia's Right to Know, *Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information*, 13 November 2008

[26] For example see: Family Law Act 1975 (Cth), s.121; Children and Young Persons (Care and Protection) Act 1988 (NSW); Children and Young People's Act 1999 (ACT); Youth Court Act 1993 (SA); Guardianship and Administration Act 1986 (Vic); Children (Care and Protection) Act 1987 (NSW); Children (Criminal Proceedings) Act 1987 (NSW); Guardianship Act 1987 (NSW); Mental Health Act 1990 (NSW); Juvenile Justice Act 1983 (NT); Child Protection Act 1999 (Qld); Children's Court Act 1992 (Qld); Juvenile Justice Act 1992 (Qld); Children's Protection Act 1993 (SA); Mental Health Act 1993 (SA); Child Welfare Act 1960 (Tas); Children and Young Persons Act 1989 (Vic); Crimes (Family Violence) Act 1987 (Vic); Victorian Civil and Administrative Tribunal Act 1998 (Vic); Children's Court of Western Australia Act 1988 (WA); Criminal Code (WA), s.635A

[27] For example see: Evidence Act 1971 (ACT); Crimes Act 1900 (NSW); Evidence Act 1939 (NT); Criminal Law (Sexual Offences) Act 1978 (Qld); Evidence Act 1929 (SA); Summary Offences Act 1953 (SA); Evidence Act 2001 (Tas); Judicial Proceedings Reports Act 1958 (Vic); Supreme Court Act 1986 (Vic); County Court Act 1958 (Vic); Magistrates Court Act 1989 (Vic); Evidence Act 1906 (WA).

[28] Evidence Act 1971 (ACT); Coroners Act 1980 (NSW); Coroners Act 1993 (NT); Evidence Act 1939 (NT); Coroners Act 1958 (Qld); Coroners Act 1985 (Vic); Coroners Act 1996 (WA)

[29] s 37A Justices Act 1959 (Tas)

requires a supporting affidavit explaining the reasons why the interview should be released and what it will be used for, the prisoner needs to be served with a copy of the application and affidavit, and proof of service then needs to be provided to the Court. The prisoner then has the right to oppose the release of the interview in writing and in the event that it is so opposed, the matter is listed before a judge. These procedural requirements, costs and the processing times involved act as a deterrent to reportage[30].

[30] *Crimes Act 1958 (Vic)*, s 464JA and 464 JB