

PROFESSIONAL ASSOCIATION DEFINING JOURNALISM MEDIA FREEDOM ACT

Policy
DOCUMENT

MEDIA FREEDOM ACT

ALLIANCE *for*
JOURNALISTS'
FREEDOM



The Alliance for Journalists' Freedom has a vision for journalism that raises ethical and professional standards whilst giving journalists in Australia the legal protections necessary for them to report the stories we need to hear.

That model contains two key components, a Media Freedom Act (MFA) to provide the basic legal protection for press freedom that simply doesn't exist in Australia at present, and a professional association which would admit members based on their commitment to a high level of ethical and professional conduct.

Why write an act? In 2019, our original White Paper on the state of press freedom in Australia, we recommended a Media Freedom Act to introduce a protection already in the legal codes of almost every other liberal democracy. We recognised that simply asking for a bill would be a difficult argument to prosecute, so we decided to write it ourselves.

The Act took years to write and was only made possible through hundreds of pro-bono hours by from the team at Thomson Geer led by Marlia Saunders, former legislative drafter Philippa Horner, and UQ law scholar Rebecca Ananian-Welsh, as well as many others who helped to review, and consider the Act as it was being developed.

This document is a summary of the MFA, written in plain English, that explains how each section is designed to work. For more information, or for a copy of the draft Bill, please contact the AJF.

**PETER
GRESTE,**
Executive Director



AJF
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OUR REFORM MODEL

Policy Document - November 2024^[1]

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR), which includes Article 19 as a guarantee of freedom of opinion and expression. Article 19 includes the freedom to *“the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers ... through any ... media ... ”*.

Article 19 (ICCPR)

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

However, Australia is unique among Western democracies in having no national Bill or Charter of Rights or similar human rights legislation. The closest protection for media freedom in the Australian Constitution is the “implied freedom of political communication” which offers a minimum degree of protection from legislation which impacts on communication on political matters.

The AJF believes this has allowed parliament to pass legislation that has unnecessarily undermined media freedom and the ability of journalists to protect their data, including the identity of sources.

The AJF recognises the challenges of constitutional reform in Australia, so our approach mirrors the human rights legislation in Queensland, the ACT and Victoria by embedding the principles of media freedom in Commonwealth legislation, thus enhancing the public’s right to information articulated in Article 19.

[1] Unless indicated otherwise, the material in boxes is taken directly from the draft Bill. The details of the draft Bill have been simplified for clarity. Please refer to the Bill for complete clauses and definitions.

Who does the Bill cover?

This Bill protects anyone 'engaging in journalism'. A person is engaging in journalism if, for the purposes of disseminating or publishing reports through a news medium:^[2]

- they gather information to prepare and present those reports; and
- the reports relate to local, national or international events or other matters of public interest.^[3]

In deciding if someone is engaging in journalism, consideration may be given to:

- whether the person regularly engages in those activities;
- whether the person complies with a recognised professional standard or code of practice;
- whether the news publisher complies with a recognised professional code of practice; and
- any other matter considered relevant.^[4]

The bill has 4 main features.

1. Media Freedom to be protected^[6]

Reflecting Australia's obligations under Article 19, the Bill first articulates the need to recognise, protect and promote media freedom to support and enhance:

- freedom of expression and opinion; and
- democracy, by fostering the communication of information and ideas about public and political issues including between citizens, elected representatives and candidates; and
- the media's crucial role of informing the public about matters of public interest, and in helping to ensure accountability and transparency in government and society.^[6]

It then identifies four requirements essential to recognising, protecting and promoting media freedom:

1. the media should be able to access and receive information, including on public affairs, political issues and matters of public interest, so it can carry out its functions; and
2. the public should be able to receive information, commentary, opinion, analysis and ideas from a diverse and independent range of media sources; and
3. media independence and editorial freedom should be protected; and
4. journalists should not be precluded or discouraged from carrying out their legitimate activities.^[7]

[2] 'News medium' is defined as a medium for the dissemination to the public or a section of the public, of news and observations on news. This is the same definition as in the 'shield' provisions in the Commonwealth Evidence Act 1995.

[3] Subsection 6(1) of the Bill.

[4] Subsection 6(2) of the Bill.

[5] Section 8 of the Bill.

[6] Subsection 8(1) of the Bill.

[7] Subsection 8(2) of the Bill.

2. The Parliamentary Joint Committee on Human Rights (PJCHR) to monitor legislation^[8]

Currently, the PJCHR assesses all bills that come before the Commonwealth Parliament for their consistency with Australia's international human rights obligations.

This Bill, in addition, requires the PJCHR to:

- include an assessment of the bill's consistency with the requirements of media freedom; and
- identify any provisions that are not consistent with these requirements, and say whether any such inconsistencies are reasonable and proportionate, and
- make recommendations designed to mitigate any impact on those requirements and thus media freedom.

This means anybody formulating new legislation, whether it is the Government, a non-government party or a private member, will have a positive obligation to make sure their bill does not limit any of those four requirements for protecting and promoting media freedom. If there are such limitations, they will have to be explained and justified in the statement accompanying the legislation.

If the PJCHR identifies limitations, its report will alert the bill's sponsor, the Parliament and the public, and suggest possible amendments, thus providing material for debate.

3. The courts to interpret Commonwealth legislation in line with media freedom^[9]

Under this Bill, the courts will have to interpret existing Commonwealth legislation in ways that are consistent with the requirements of media freedom. If it is unclear what the legislation means, how it should be interpreted in certain circumstances, or what Parliament intended, the court should interpret the legislation in a way that upholds the requirements of media freedom as much as possible.

For instance, if a court considered that a particular offence could apply to journalist while engaging in journalism, and that it would preclude or discourage journalism, the court must try to find a different interpretation which is less intrusive on media freedom. However, any conclusion about the interpretation or application of legislation must be consistent with its purpose.

[8] 'News medium' is defined as a medium for the dissemination to the public or a section of the public, of news and observations on news. This is the same definition as in the 'shield' provisions in the Commonwealth Evidence Act 1995.

[9]. Section 9 of the Bill.

4. Warrants for journalistic material^[10]

The Bill sets out new rules that any Commonwealth agency has to follow if it wants to seize material from a journalist in a criminal investigation. In 2019 the AFP used warrants issued under the Commonwealth Crimes Act to raid Annika Smethurst and the ABC. In future, any agency wanting to carry out similar raids would have to follow these rules.

Only a judge can issue warrants for journalistic material. In addition to the usual grounds for issuing warrants, the judge would need to be satisfied of further basic criteria:

- other methods of obtaining the material have been tried and failed, or were bound to fail, and
- the scope of that material is appropriate given its nature and the nature of offence under investigation^[11]

What is journalistic material?^[12]

Journalistic material is any document or other material that is acquired or created by a journalist for the purposes of engaging in journalism.

'Document' is defined very broadly in section 2B of the Commonwealth Acts Interpretation Act as any record of information. This includes anything on which there is writing, marks, figures, symbols or perforations that carry some kind of meaning. It also includes anything from which sounds, images or writings can be reproduced, as well as maps, plans, drawings and photographs.

Member journalists and other journalists

This Bill makes a distinction between those who routinely produce journalism in a way that is accountable to a code of conduct, and others who are still producing "journalism", but who might fall outside a formal mechanism. Under the Bill, someone who is part of a system of accountability is called a "member journalist", and they will have the right to contest a warrant for their journalistic material on public interest grounds before it is issued.^[13]

Those outside a formal system are called "non-member journalists" and they will still be able to contest access under a warrant for their material, but only after it has been issued and the relevant material has been located.^[14]

[10] Part 3 of the Bill.

[11] Section 19 of the Bill.

[12] Section 13 of the Bill.

[13] Division 2 of Part 3 of the Bill.

[14] Division 3 of Part 3 of the Bill.

Someone is a “member journalist” if they are:

- 1... a member of, or an associate to, an organisation, committee, council or governing body that:
 - a. promotes recognised professional standards of journalism practice; and
 - b. investigates and responds to complaints made by the public; and
 - c. has a system for holding members to account for breaches of those standards, including by publishing findings in response to complaints.

OR

- 2... employed or commissioned by an organisation which implements a standard or code of conduct that:
 - a. promotes recognised professional standards of journalism practice; and
 - b. investigates and responds to complaints made by the public about journalism practice; and
 - c. has a system for holding journalists to account for breaches of those standards, including by publishing findings in response to complaints.

OR

- 3... employed or commissioned by an organisation which is a member of, or an associate to, an organisation, committee, council or governing body that:
 - a. promotes recognised professional standards of journalism practice;
 - b. investigates and responds to complaints made by the public about journalism practice; and
 - c. has a system for holding journalists and news media to account for breaches of those standards, including by publishing findings in response to complaints^[15]

Warrants for journalistic material of member journalist

Any Commonwealth agency (usually the AFP) applying for a warrant to seize material from a member journalist will have to notify them first. The member journalist can object to the issuing of the warrant and make submissions in a hearing (via a lawyer if preferred).

Apart from applying the ‘basic criteria’, to issue the warrant a judge must also decide where the public interest lies. The judge must be satisfied that the public interest in the agency accessing journalistic material for its investigation outweighs the public interest in the media’s ability to access sources and communicate facts and opinion.^[16]

Criteria for considering the public interest

If a member journalist claims the material is confidential (that is, they gave an undertaking to hold it in confidence^[17]), the judge must consider:

- a. the public interest in the public’s right to know information, commentary, opinion or analysis, and the ability of journalists to communicate that to the public; and

[15] Section 14 of the Bill.

[16] Subsection 26(4) of the Bill.

[17] Section 10 of the Bill.

- b. the ability of journalists to access sources of information for those purposes; and
- c. the likely chilling effect that the issuing of a warrant or the examination or accessing of confidential material^[18] would have, and the extent to which either of those events is likely to deter other people from giving information to journalists; and
- d. where the confidential journalistic material would disclose the identity of an informant, or enable their identity to be ascertained;
 - i. any likely adverse effect of the disclosure on the informant or any other person, and whether the effect can be mitigated;
 - ii. the nature and seriousness of the offence under investigation;
 - iii. the underlying purpose for which the material is to be used, including whether it is to identify a whistleblower;
 - iv. the importance of the material and the informant's identity to the investigation and the availability of other evidence;
 - v. whether the informant's identity as the source is already in the public domain; and
- e. any other matter considered relevant.^[19]

An 'informant' is a person who gives information to a journalist in the normal course of the journalist's work, and the journalist understands that the identity of the person is to remain confidential.
(Section AAA of the Bill.)

In assessing the public interest where the journalistic material is not confidential, the judge must consider:

- a. the public interest in the public's right to know information, commentary, opinion or analysis, and the ability of journalists to communicate that to the public; and
- b. the ability of journalists to access sources of information for those purposes; and
- c. the extent to which the issuing of the warrant or the examination or accessing of journalistic material under the warrant is likely to deter other people from giving information to journalists; and
- d. whether the material is already in the public domain;^[20]

The judge must also consider:

- a. the public interest in the enforcement of the criminal law; and
- b. the seriousness of the alleged offence; and
- c. fairness to any potential defendant (the material could be exculpatory); and
- d. any other relevant matters.^[21]

[18] Where a warrant is issued under Division 3 in relation to the journalistic material of a journalist who is not a member journalist, the question is whether the access of the journalistic material under the warrant is likely to have that effect.

[19] Section 20 of the Bill.

[20] Section 21 of the Bill.

[21] Section 22 of the Bill.

What if the circumstances are urgent?

In certain circumstances such as a risk of serious injury or death, or a serious threat to security, an agency can apply for a warrant without notifying the member journalist (which would trigger a hearing). In that case, the judge needs to be satisfied of one of the following:

- a. there is an urgent risk of serious injury or death to any person; or
- b. any delay potentially caused by the giving of notice would seriously frustrate the execution of the warrant; or
- c. giving notice might seriously prejudice the investigation; or
- d. it is necessary to prevent the concealment, loss or destruction of the journalistic material; or
- e. the circumstances are otherwise serious and urgent; or
- f. publication or other disclosure of the material would seriously undermine Australia's security because:
 - i. the journalistic material discloses the operations, capabilities, technologies, methods or sources used by a domestic or foreign law enforcement or security agency; or
 - ii. it would harm Australia's security within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979.^[22]

Before a judge can issue the warrant, they must still consider the public interest criteria outlined above, and the same matters as if it were a hearing with the member journalist. This includes considering where the public interest lies.

Warrants for journalistic material of non-member journalists

A judge can issue a warrant to access the journalistic material of a non-member journalist without giving them an opportunity to object in advance, but the judge must still be satisfied about the basic criteria for protecting media freedom.^[23]

Unless the agency persuades the judge that the matter is urgent as described above, they cannot however examine any journalistic material if the journalist objects. In that case, the material must be sealed or securely stored,^[24] so the journalist can then go before the judge to contest access on public interest grounds.

The judge must apply the same criteria as an objection by a member journalist. The agency can only get access to the secured material if the judge is satisfied that the public interest in accessing the material for the purposes of the investigation outweighs the public interest in communicating facts and opinion, and the ability of the journalists to access sources.^[25] Otherwise, the material must be returned to the journalist.^[26]

[22] Subsection 23(2) of the Bill.

[23] Sections 29 and 30 of the Act in Division 3 of Part 3 of the Bill.

[24] Sections 31, 32 and 33 of the Bill.

[25] Section 22 of the Bill.

[26] Subsection 34(2) of the Bill.

If the agency can persuade the judge that the matter is urgent as described above, the judge can issue the warrant so the journalistic material can be seized and examined without further consideration.

But the judge must still be satisfied about the same matters as if it were a hearing with the journalist, including about where the public interest lies.

[27]

The mechanics

Because Part 3 of the Bill replaces other legislation that give Commonwealth government agencies the power to seize journalistic material, it also sets out the powers exercisable under the warrants and obligations of the person executing it, the rights and obligations of the occupier of the premises being searched, and matters relating to the seizure of materials. These powers and provisions are consistent with existing federal laws and best practice^[28] relating to warrant powers.

[27] Sections 29 and 30 of the Bill.

[28] Division 4 of Part 3 of the Bill.

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