The Senate

Environment and Communications References Committee

[redacted] freedom of the press [redacted]

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2.46 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, should aim to build on the work of the Australian Law Reform Commission, by examining how the public interest in a free press and open and accountable government can be better balanced with protection for classified and sensitive government information.

Recommendation 2

2.87 The committee recommends that the Australian Government work with the Office of the Australian Information Commissioner to identify opportunities to promote a culture of transparency consistent with the objectives of the *Freedom of Information Act 1982* among Ministers, Senior Executive Service and other Freedom of Information decision-makers.

Recommendation 3

3.20 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine whether the general secrecy of information offences within the *Criminal Code Act 1995*[1] should be amended to include an express harm requirement in line with the recommendation of the Australian Law Reform Commission.

Recommendation 4

3.37 The committee recommends that the Australian Government provide additional resources to the Auditor-General and the Australian National Audit Office to ensure that the potential audit listed in the Australian National Audit Office's *Annual Audit Work Program 2020-21* regarding the implementation of the revised Protective Security Policy Framework can be expedited without undermining or delaying the other important work that is on the Auditor-General's agenda.

Recommendation 5

3.40 The committee recommends that, if not already in place, the Australian Government, in consultation and collaboration with relevant stakeholders, develop guidance material to assist journalists and media organisations to comply with secrecy and unauthorised disclosure provisions in

[1] Division 122 of Part 5.6.

Commonwealth law, including the identification of classified information and information related to Special Intelligence Operations.

Recommendation 6

3.51 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine the best way to amend section 35P of the *Australian Security Intelligence Organisation Act 1979*, to protect journalists and media organisations who, in good faith, make public interest disclosures about Special Intelligence Operations. This amendment should ensure that information which is genuinely likely to result in serious harm is not publicly disclosed.

Recommendation 7

3.73 The committee recommends that the Australian Government gives consideration to amending the *Criminal Code Act 1995*,[2] and other relevant Commonwealth legislation, to remove the evidential onus on journalist defendants to establish that an unauthorised disclosure is in the public interest.

Recommendation 8

3.77 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine whether national security legislation, including the *Australian Security Intelligence Organisation Act 1979*,[3] should require the prosecution to establish that a secrecy or unauthorised disclosure offence, including in relation to a Special Intelligence Operation, is not in the public interest.

Recommendation 9

3.87 The committee recommends that the Attorney-General revoke the Direction issued on 19 September 2019 under subsection 8(1) of the *Director of Public Prosecutions Act 1983*, to respect and support the operational independence of the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

Recommendation 10

4.62 The committee recommends that the Australian Government expedite long-awaited reforms to the *Public Interest Disclosure Act 2013* to address

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2 *Criminal Code Act 1995*, Division 122.

3 *Australian Security Intelligence Act 1979*, s. 35P.

the recognised deficiencies within the existing legislative protections for disclosers.

Recommendation 11

4.81 The committee recommends that the Australian Government formulate options to strengthen and modernise shield provisions in the *Evidence Act 1995*, to set a high standard in relation to the harmonisation of national shield laws.

Recommendation 12

4.110 The committee recommends that the Australian Government reconsider the proposed scope and powers of the Commonwealth Integrity Commission. In particular, the government should allow the proposed commission to hold, in appropriate circumstances, public hearings and reconsider the proposed thresholds to ensure that the Commission is not prevented from investigating serious and systemic corruption.

Recommendation 13

5.42 The committee recommends that the Australian Government introduce legislation to amend the *Crimes Act 1914*, and other Commonwealth legislation, to reflect the Direction issued on 8 August 2019 under section 37 of the *Australian Federal Police Act 1979* by the Minister for Home Affairs. In particular, the amendments should ensure that, prior to the use of any intrusive or coercive power in relation to a journalist or media organisation, the importance of a free press in Australia's democratic society and broader public interest factors are taken into account.

Recommendation 14

6.105 The committee recommends that the Australian Government urgently introduce legislation to implement Recommendation 2 (contested warrants) and Recommendations 3 to 5 of the Parliamentary Joint Committee on Intelligence and Security's report into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

Recommendation 15

6.107 The committee recommends that the Australian Government, in developing legislation to implement Recommendation 2 of the Parliamentary Joint Committee on Intelligence and Security's report into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, provide for a review of the operation of the new arrangements.

Recommendation 16

7.75 The committee recommends that the Australian Government initiate an independent review of law enforcement and national security laws, with a view to reducing duplication and inconsistencies, as well as aligning those laws with Australia's international human rights obligations, including the right to freedom of expression. In particular, this review should include express consideration of the definition of 'national security' in national security laws and how the definition might be amended to conform more closely with international law and jurisprudence.

Recommendation 17

7.78 The committee recommends that the Commonwealth Director of Public Prosecutions urgently reconsider, on strong public interest grounds, whether the prosecution of Mr David McBride should be continued.

Abbreviations

ABC	Australian Broadcasting Corporation
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979*
AGD	Attorney-General's Department
AJF	Alliance for Journalists' Freedom
ALRC	Australian Law Reform Commission
APS	Australian Public Service
APS Commissioner	Australian Public Service Commissioner
ARTK	Australia's Right to Know
ASD	Australian Signals Directorate
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
CDPP	Commonwealth Director of Public Prosecutions
Crimes Act	*Crimes Act 1914*
Criminal Code	*Criminal Code Act 1995*
EFI Act	*National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*
Evidence Act	*Evidence Act 1995*
FOI	Freedom of Information
FOI Act	*Freedom of Information Act 1982*
Home Affairs	Department of Home Affairs
HRLC	Human Rights Law Centre
ICCPR	International Covenant on Civil and Political Rights
IFJ	International Federation of Journalists
IGIS	Inspector-General of Intelligence and Security
JERAA	Journalism Education and Research Association of Australia
JIW	Journalist Information Warrant
Law Council	Law Council of Australia
MEAA	Media Entertainment & Arts Alliance
Minister	Minister for Home Affairs
PID	public interest disclosure
PID Act	*Public Interest Disclosure Act 2013*
PIJI	Public Interest Journalism Initiative
PJCCFS	Parliamentary Joint Committee on Corporations and Financial Services
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PM&C	Department of the Prime Minister and Cabinet
SIO	special intelligence operation
Telecommunications Act	*Telecommunications Act 1997*

TIA	Transparency International Australia
TIA Act	*Telecommunications (Interception and Access) Act 1979*
TOLA Act	*Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*
UNHRC	United Nations Human Rights Committee

Chapter 1
Introduction and context

Referral and terms of reference

1.1 In early June 2019, the Australian Federal Police (AFP) executed two search warrants at the home and offices of several well-known and widely respected Australian journalists. The first warrant was executed at the home of a News Corp Australia journalist (Ms Annika Smethurst) and the second at the Australian Broadcasting Corporation (ABC) head office in Sydney.[1]

1.2 These dramatic developments attracted wide spread media attention, both in Australia and across the globe.[2]

1.3 These events, which are outlined below, led the Senate, on 23 July 2019, to refer the following matters to the Environment and Communications References Committee (committee) for inquiry and report by 4 December 2019:

> (a) disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation;
>
> (b) the whistleblower protection regime and protections for public sector employees;
>
> (c) the adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information;
>
> (d) appropriate culture, practice and leadership for Government and senior public employees;
>
> (e) mechanisms to ensure that the Australian Federal Police have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters; and
>
> (f) any related matters.[3]

1.4 Subsequently, the Senate granted several extensions of time to report: first, to 16 March 2020;[4] then until 20 May 2020,[5] 17 February 2021 and finally 19 May 2021.[6]

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1 Australian Federal Police, 'AFP statement on search warrant in Kingston, ACT', *Media release*, 4 June 2019; Australian Federal Police, 'AFP statement on search warrant in Sydney', *Media release*, 5 June 2019.

2 See: paras. 1.14–1.17.

3 *Journals of the Senate*, No. 5, 23 July 2019, pp. 181–182.

4 *Journals of the Senate*, No. 20, 14 October 2019, p. 609.

5 Senate Environment and Communications References Committee, *Inquiry into press freedom, Progress report*, 16 March 2020, p. 1.

Conduct of the inquiry

1.5 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions by 30 August 2019. The committee continued to accept submissions received after this date. The committee received 48 submissions, which are listed at Appendix 1.

1.6 The committee held five public hearings in Canberra on 18 October 2019, 15 November 2019, 10 February 2020, 12 August 2020 and 31 August 2020. A list of witnesses who participated in these hearings is at Appendix 2.

1.7 The public submissions, additional information, *Hansard* transcripts and tabled documents are available on the committee's website at www.aph.gov.au/senate_ec.

Acknowledgement

1.8 The committee would like to thank all the individuals and organisations who contributed to the inquiry.

Note on references

1.9 In this report, references to the *Committee Hansard* transcript are to the proof (that is, uncorrected) transcript. Page numbers may vary between the proof and official transcripts.

Structure of the report

1.10 This report comprises seven chapters as follows:

- Chapter 1 provides an introduction and context to the inquiry;
- Chapter 2 outlines the media and national security law environment;
- Chapter 3 discusses the disclosure and public reporting of sensitive and classified information, and legislative protections to protect press freedom;
- Chapter 4 focuses on legislative protections for public sector whistleblowers;
- Chapter 5 considers the independence of the Australian Federal Police, particularly in relation to politically sensitive matters;
- Chapter 6 discusses access to journalistic material; and
- Chapter 7 examines the right to freedom of expression in Australia.

Background to the inquiry

1.11 As outlined above, on 4 and 5 June 2019, the AFP executed two search warrants—the first at the home of News Corp Australia journalist Ms Smethurst and the second at the ABC's head office in Ultimo, Sydney.

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6 *Journals of the Senate*, No. 97, 11 May 2021, p. 3393.

1.12 According to the AFP, these activities related to 'separate allegations of publishing classified material, contrary to provisions of the *Crimes Act 1914*, which is an extremely serious matter that has the potential to undermine Australia's national security'.[7]

1.13 Media organisations later reported that the first search warrant related to a story concerning the surveillance capabilities of the Australian Signals Directorate. The second search warrant reportedly related to a series of stories published in 2017 by the ABC concerning the covert operations of Australia's Special Forces in Afghanistan (the Afghan Files).

National and international reaction

1.14 The AFP activities elicited strong national and international reaction. ABC Friends National, for example, submitted that it had been 'overwhelmed by members and supporters expressing their anger and disbelief'.[8]

1.15 Several submitters and witnesses commented on press freedom in Australia, compared to other countries. They noted the Reporters Without Borders' World Press Freedom Index which in 2020 ranked Australia 26th (down from a ranking of 21st in 2019).[9] Others referred to the Global Conference for Media Freedom held in London in July 2019 where human rights legal expert Mrs Amal Clooney described challenges to media freedom globally and, before referencing recent developments in Australia, commented that problems 'exist in democracies that otherwise have a strong tradition of free speech'.[10]

1.16 Major international media was among those who reacted to the AFP activities. For example, the BBC News Press Team tweeted:

> This police raid against our partners at ABC is an attack on press freedom which we at the BBC find deeply troubling. At a time when the media is becoming less free across the world, it is highly worrying if a public

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7 Australian Federal Police, 'AFP statement on activity in Canberra and Sydney', *Media release*, 5 June 2019. The search warrants were issued under (now repealed) Parts VI and VII of the *Crimes Act 1914*.

8 ABC Friends National, *Submission 23*, p. 1.

9 See, for example: Dr Christopher Ambrey, *Submission 3*, p. 1; Human Rights Law Centre, *Submission 12*, p. 1; Queensland Council for Civil Liberties, *Submission 32*, p. 1. Also see: Reporters Without Borders, 'Australia', rsf.org/en/australia (accessed 4 February 2021), which evaluates the level of freedom available to the media in 180 countries.

10 Gov.uk, A. Clooney, 'Addressing threats to media freedom: Amal Clooney's speech', *Speech*, 10 July 2019, www.gov.uk/government/speeches/addressing-threats-to-media-freedom-amal-clooneys-speech (accessed 4 February 2021).

> broadcaster is being targeted for doing its job of reporting in the public interest.[11]

1.17 In the United States of America, the *New York Times* observed that there is a global trend toward the targeting of journalists in order to 'ferret out leaks, silence critics and punish information sharing'. However:

> Even among its peers, Australia stands out. No other developed democracy holds as tight to its secrets, experts say, and the raids are just the latest example of how far the country's conservative government will go to scare officials and reporters into submission.[12]

1.18 Legal experts Professor Johan Lidberg and Dr Denis Muller questioned why Australia has taken such an approach:

> The key question that needs to be posed is why Australia is the only country among the Five Eyes intelligence-sharing community, and indeed among mature liberal democratic countries, that sees a need to equip its security and intelligence agencies with powers that extend to issuing and executing search warrants against individual journalists and media organisations justified by hunting down public interest whistleblowers in the name of national security?[13]

1.19 Ms Caoilfhionn Gallagher, a human rights and media law expert, said that there is a spectrum of tactics and 'pernicious everyday steps' designed to silence journalists and halt investigative reporting. However, there are also many journalists at risk due to work environments that do not adequately support investigative journalism:

> We quite often see a death by a thousand cuts…where you have journalists who face risks on a wide range of fronts, including because of risks of defamation, undermining of protections in open justice, restrictions on freedom of information and so on.[14]

1.20 The International Federation of Journalists (IFJ) commented that, when democratic countries like Australia 'criminalise, stigmatise and target journalists and independent media', it sets a dangerous precedent:

> …we must consider recent events in Australia which threaten to damage the standing of the government and raise serious questions about its longstanding commitment to media freedom in the eyes of the

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[11] BBC News Press Team, 'BBC statement on Australian Broadcasting Corporation (ABC) police raid', 5 June 2019, twitter.com/bbcnewspr/status/1136217979757256705?lang=en (accessed 3 March 2020).

[12] D. Cave, 'Australia May Well Be the World's most Secretive Democracy', *The New York Times*, 5 June 2019, www.nytimes.com/2019/06/05/world/australia/journalist-raids.html#commentsContainer (accessed 4 February 2021).

[13] Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 22*, p. 3.

[14] Ms Caoilfhionn Gallagher QC, personal capacity, *Committee Hansard*, 15 November 2019, p. 59. Also see: Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, p. 11.

> international media community. More worryingly it can be seen to give a green light to other non-democratic governments to attack media and journalists' rights.[15]

1.21 The Association for International Broadcasting referred particularly to Australia's position in the Asia-Pacific region. Its submission argued that, after promoting itself as a democratic model, Australia must now display and promote its strong commitment to transparent government:

> Australia must demonstrate that it respects and encourages media freedom and the ability of journalists to report on their government and its activities, without fear of sanction.[16]

1.22 Professor Peter Greste from the Alliance for Journalists' Freedom expressed a similar view on the need for geopolitical leadership:

> Unless we move decisively to address our own weaknesses over press freedom, we will become an example to the region's autocrats rather than a beacon for its democrats.[17]

1.23 For many, the AFP activities highlighted ongoing and broader concerns about governments' disregard for press freedom in Australia. The Rule of Law Institute of Australia expressed a view that there has been a consistent failure to support press freedom, with a distinct lack of appropriate action to restore faith and trust in Parliament, courts and tribunals, and the public service.[18]

Actions resulting from the 'raids'

1.24 On 24 June 2019, the ABC commenced action in the Federal Court of Australia, challenging the search warrant issued in respect of its journalist, Mr Daniel (Dan) Oakes, and his alleged source, Retired Major David McBride.[19]

1.25 Two days later, News Corp Australia applied to the High Court of Australia (High Court) seeking—among other things—to have the search warrant issued in respect of Ms Smethurst quashed and to obtain a mandatory injunction

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[15] International Federation of Journalists, *Submission 44*, p. 2. Also see: Support Assange & WikiLeaks Coalition, *Submission 1*, p. 5.

[16] Association for International Broadcasting, *Submission 43*, p. 4.

[17] Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 11. Also see: p. 12, where Professor Greste described more precisely how Australia influences press freedom in the Asia-Pacific region.

[18] Rule of Law Institute of Australia, *Submission 24*, p. 6, which argued also that this lack of government action highlights the important role of a free press in holding power to account.

[19] Federal Court of Australia, Notice of Filing, www.fedcourt.gov.au/__data/assets/pdf_file/0004/59890/2019.10.18-Submissions-second-and-third-respondent.pdf (accessed 4 February 2021). Mr McBride was charged in relation to alleged unauthorised disclosures about covert Special Forces operations in Afghanistan; Mr Oakes was charged with unlawfully obtaining that information and dishonestly receiving stolen property.

requiring the AFP to return or destroy the material seized from Ms Smethurst.[20]

1.26 On 15 April 2020, the Full Bench of the High Court unanimously ruled that the Smethurst search warrant was invalid but allowed the AFP to retain the seized material.[21]

1.27 Nearly six weeks later—on 27 May—the AFP decided to finalise its investigation into the unauthorised disclosure that resulted in the execution of the search warrant at Ms Smethurst's home. Announcing the decision, the AFP Deputy Commissioner Investigations, Mr Ian McCartney, said:

> …the AFP has reviewed all available material and determined there is insufficient evidence to progress the investigation in relation to the unauthorised disclosure of the classified document.[22]

1.28 Following that decision, Mr Campbell Reid from News Corp Australia advised that Ms Smethurst was taking 'a sabbatical from her craft' due to the immense 'toll' that the 'ordeal' had taken on her:

> Annika has put on an incredibly brave face and been incredibly courageous through it, and, like other people undergoing a crisis, she wants you not to know that a lot of the time, and she has repeatedly said she didn't want to be the poster girl for press freedom. When she spoke about just the way her own home was a place she didn't like going to anymore and the dread of returning to it and the reminder of that day, I think the word that came to my mind was just the weight of the possibility bearing down on you that, you know, you could go to prison at any time…that dread that's in the back of your mind, that sort of sense of foreboding that you're actually facing the possibility of going to jail...the length of time that these people were under that threat…is just totally unacceptable in terms of the toll it's taking on these people's lives and all the people around them.[23]

1.29 In August 2020, Mr Gaven Morris from the ABC spoke similarly of the situation that Mr Oakes faced:

> …it's been more than three years since the ABC published the Afghan Files, stories reported by our journalist Dan Oakes exposing alleged crimes by Australian Special Forces. It's been more than a year since the Australian Federal Police raided the ABC's headquarters in Ultimo hunting

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[20] High Court of Australia, *Smethurst & Anor v Commissioner of Police & Anor (S196/2019), Short Particulars*, www.hcourt.gov.au/cases/case_s196-2019 (accessed 4 February 2021).

[21] *Smethurst & Anor v Commissioner of Police & Anor* [2020] HCA 14, eresources.hcourt.gov.au/downloadPdf/2020/HCA/14 (accessed February 2021).

[22] Australian Federal Police, 'AFP statement on the finalisation of the News Corp investigation', *Media release*, 27 May 2020, www.afp.gov.au/news-media/media-releases/afp-statement-finalisation-news-corp-investigation (accessed 4 February 2021).

[23] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 5. Also see: p. 1.

> for Dan's confidential sources. It's been more than a month since the AFP gave a brief of evidence concerning Dan to the Commonwealth Director of Public Prosecutions. Yet Dan's fate remains totally uncertain, with the spectre of criminal charges still hanging over his head for the 'crime' of doing journalism and revealing information that we believe the public has a right to know.[24]

1.30 Mr Morris highlighted the 'untold stress' that this protracted process placed upon Mr Oakes:

> The length of time he's had to endure this is, frankly, unacceptable. Sure, pursue these matters if one must, but for this to have dragged on to the extent that it has—we're a year on now from those raids. Look at the toll that this has taken on Annika in terms of her career. I don't think the toll has been any less on Dan.[25]

1.31 On 15 October 2020, the AFP announced that it had finalised its investigation regarding Mr Oakes. Although the Commonwealth Director of Public Prosecutions (CDPP) advised that there were reasonable prospects of conviction in relation to two of three charges, the CDPP determined that, in the particular circumstances of the case, the public interest did not require a prosecution.[26]

1.32 The following week Mr David Anderson, Managing Director of the ABC, told the Senate Estimates hearings that 'this matter should never have gone so far'.[27]

National media campaign

1.33 The national commentary regarding press freedom in Australia continued throughout this inquiry. For example, in October 2019, every major newspaper in Australia blacked out its front page in an unprecedented and unanimous show of support for press freedom and the public's right to know (Figure 1.1).

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[24] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 2. Also see: A. Galloway, 'AFP wants charges considered over ABC's 'Afghan Files' stories', *Sydney Morning Herald*, 2 July 2020, www.smh.com.au/politics/federal/afp-wants-charges-considered-over-abc-s-afghan-files-stories-20200702-p558jj.html (accessed 4 February 2021), which noted also that a second journalist for the broadcaster—Mr Sam Clark—would not be charged.

[25] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 4.

[26] Australian Federal Police, 'AFP statement on investigation into ABC journalist', *Media release*, 15 October 2020, www.afp.gov.au/news-media/media-releases/afp-statement-investigation-abc-journalist (accessed 4 February 2021).

[27] Mr David Anderson, Managing Director, Australian Broadcasting Corporation, Environment and Communications Legislation Committee, *Estimates Hansard*, 21 October 2020, p. 77.

Figure 1.1 Australian newspapers, front page, 21 October 2019

Source: ABC News, Mr Matthew Doran

1.34 The national media campaign—launched by Australia's Right to Know (ARTK), an alliance of key media organisations—has called for legislative change in six key areas. Some of the ARTK's proposals are discussed throughout this report.[28]

1.35 The Deputy General Secretary of the IFJ, Mr Jeremy Dear, noted that, internationally, 'there have been successful campaigns to provide protections for media and journalists within security legislation that's been introduced'.[29]

Parliamentary Joint Committee on Intelligence and Security

1.36 Following execution of the June 2019 search warrants, then Attorney-General, the Hon Christian Porter MP, referred an inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press to the Parliamentary Joint Committee on Intelligence and Security (PJCIS).[30]

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[28] C. Miranda, 'When government keeps the truth from you, what are they covering up', *News Corp Australia*, 21 October 2019, www.heraldsun.com.au/news/national/when-government-keeps-the-truth-from-you-what-are-they-covering-up/news-story/b7e8d17423bd679156c79e74d203d291 (accessed 4 February 2021).

[29] Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, p. 13.

[30] See: Parliament of Australia, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress (accessed 4 February 2021).

1.37 The Attorney-General emphasised that the aim of the PJCIS inquiry was to ensure that Australian law 'strikes the right balance between a free press and keeping Australians safe—two fundamental tenets of our democracy'.[31]

1.38 The PJCIS reported on 26 August 2020 and made a number of findings and recommendations which are referred to throughout this report.[32]

1.39 The Australian Government responded to the PJCIS report on 16 December 2020 and some of its responses are also referred to throughout this report.[33]

[31] Hon Christian Porter MP, Attorney-General, Letter of referral, received 4 July 2019, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Additional_Documents (accessed 4 February 2021).

[32] Parliament of Australia, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press'.

[33] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, October 2020, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Government_Response (accessed 4 February 2021).

Chapter 2
Media and national security law environment

2.1 Media stakeholders acknowledged the importance of Australia's national security laws but argued that press freedom is also essential to democracy. These stakeholders argued that national security laws—in conjunction with factors such as an increasing culture of government secrecy and the weak application of freedom of information laws—does not pay due regard to the importance of press freedom.

2.2 This chapter discusses the national security law environment within which the media operates and how that environment and associated factors tend to undermine press freedom in Australia.

2.3 The major topics of this chapter include:

- the need for balance between national security and press freedom;
- the media's relationship with government; and
- the limitations of the *Freedom of Information Act 1982*.

National security and press freedom

2.4 Submitters and witnesses recognised the critical role of Australia's law enforcement and intelligence agencies, as well as the need to keep certain government information secret in the interests of national security. For example, Mr Simon Spanswick from the Association for International Broadcasting (AIB) said:

> There are state secrets that are important and that should not see the light of day—at least not until the 50-year rule or whatever you might have down here [in Australia]… I would hope that people with access to sensitive information would not willy-nilly go to the press to try to reveal things that are not in the national interest, that are not in people's interests, because it might impinge on national security.[1]

2.5 Professor Peter Greste from the Alliance for Journalists' Freedom (AJF) said:

> We recognise that we live in a world where the threat of terrorism is a clear and present danger, and that governments must have the capacity to keep some things secret.[2]

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[1] Mr Simon Spanswick, Chief Executive, Association for International Broadcasting, *Committee Hansard*, 10 February 2020, p. 18.

[2] Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 50. Also see: Mr Chris Flynn, Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 16.

2.6 Likewise, Professor Johan Lidberg commented that 'for governments to run properly in certain aspects of national security issues they do need to keep certain things secret'.[3]

2.7 Law and media experts from the University of Queensland—led by Dr Rebecca Ananian-Welsh—pointed to the need for robust democracies to balance both 'secrecy and openness':

> A healthy democracy requires that government operates with the greatest possible degree of openness and transparency…[but] government requires a degree of secrecy in order to operate effectively and to protect national security. Thus, both secrecy and openness are required in order for Australian society and democracy to thrive.[4]

2.8 Professor Greste agreed that Australian interests are protected through national security considerations but it is also important to value the role of a free press, which is a critical component of a democratic state:

> If in the process of protecting our physical safety we undermine the very foundations of our political system, we believe that national security is not served. We are not advocating for completely unfettered media freedom or radical transparency, but we do believe there is a better way of protecting our security that also respects the role of the media in keeping our democracy strong and healthy.[5]

2.9 Many other submitters and witnesses—including government departments and agencies—commented similarly on the importance of the media role.[6] For example, Australia's Right to Know (ARTK) representatives highlighted that, during the current COVID-19 pandemic, the media has played an integral part in informing the Australian community about health impacts, responses and strategies.

2.10 Mr Chris Uhlmann, political editor with Nine News and a member of ARTK said:

> …this pandemic has been a great example of how the media does its job. To a large extent, the media has done everything in its power, including broadcasting endless press conferences from the prime ministers or

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[3] Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University, *Committee Hansard*, 18 October 2019, p. 63.

[4] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 4. Also see, for example: Australian Signals Directorate, *Submission 25*, p. 1; Australian Federal Police, *Submission 40*, p. 6; Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 4.

[5] Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 50. Also see: *Committee Hansard*, 12 August 2020, pp. 11–12.

[6] See, for example: Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 3. Also see, for example: Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, p. 17.

> premiers of the day to make sure that the public gets the message. But it's also been applying scrutiny to the way the government is doing its job, and important gaps that have exposed people to danger have been exposed by all parts of the media. Look at nursing homes and the work that has been done on that.[7]

2.11 Another member of ARTK, Mr Campbell Reid from News Corp Australia, said that the COVID-19 pandemic has highlighted how communities want to be kept informed:

> …the pandemic has really focused all of us globally on what's really important to us all, and 'knowing' is right at the top of that list. The evidence of that is that every trusted and established news company globally has seen a surge in viewers, readers and consumers back to their trusted news sources in somewhat unprecedented numbers… The pandemic, a genuine once-in-a-lifetime emergency, has really starkly focused us on the important fundamentals.[8]

International human rights law

2.12 In international law, the *International Covenant on Civil and Political Rights* (ICCPR) protects the right to freedom of expression (Article 19).[9] Although Australia ratified the treaty on 13 August 1980, Dr Julie Posetti, a legal expert with the International Center for Journalists, University of Sheffield and University of Oxford, expressed some scepticism about Australia's adherence to this treaty:

> One of the things that has stood out to me and to others is what appears to be inherent disrespect or failure [to] acknowledge UN conventions and resolutions that provide special protections and recognition of the need for such protections for those who undertake acts of journalism. Those are essential to democratic functions of a free and critical press.[10]

2.13 Other submitters specifically referenced statements issued by the United Nations Human Rights Committee (UNHRC). The UNHRC has commented that a free press is one of the cornerstones of a democratic society and incorporates two specific rights: the right of the media to receive information

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7 Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 12 August 2020, p. 3. Also see: Mr James Chessell, Group Executive Editor, Nine Network, *Committee Hansard*, 12 August 2020, p. 4.

8 Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 3. Also see: Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, pp. 13 and 15.

9 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed 4 February 2021). Article 19 is discussed further in Chapter 7.

10 Dr Julie Posetti, personal capacity, *Committee Hansard*, 10 February 2020, p. 22.

in pursuance of its function; and the right of the public to receive information from the media.[11]

2.14 The ARTK emphasised the importance of a free media to ensure the public's right to be informed of actions taken by government.[12] Mr Gaven Morris, who represented ARTK on behalf of the Australian Broadcasting Corporation (ABC), said: 'this is about the public's right to know and about the health of our democracy'.[13]

2.15 Mr Reid, also representing ARTK, similarly emphasised the media's interest in keeping the public informed: 'all of us here have championed our cause of the Australian public's right to know with great vigour over all of our histories'.[14]

2.16 Legal expert Dr Lawrence McNamara said that, when discussing issues associated with press freedom, the focus should be on the end result:

> …protections for the press are a means to an end, so protection is not received because people are journalists or because they are sources; it is about the wider public interests at stake here and those public interests—the right to know about what the state is doing to combat threats, what those threats are and to know that the state is complying with the rule of law. These are the types of public interests and protections that underlie democratic, credible transparency and accountability.[15]

2.17 Another legal expert, Mr Bret Walker, who previously held the Commonwealth role as the first Independent National Security Legislation Monitor, expressed some scepticism as to whether the Australian public can be confident that government is being open and accountable:

> The phrase I like best in the whole of the Commonwealth Law Reports is in a joint judgement which described us as 'a free and confident society'. The freedom is, at least in comparative terms, something we might feel relaxed about. I'm not at all relaxed about whether we are a confident society—that is, in relation to understanding what is being done in our name, in an understanding of how the processes of government are actually achieving executive action and, in particular, whether the rule of law is being observed as intimately as it should, particularly in executive agencies… This is not a crisis. It's something that we, bit by bit,

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[11] United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para 13, www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (accessed 4 February 2021). Also see, for example: Castan Centre for Human Rights, Monash University, *Submission 14*, pp. 5–6.

[12] Australia's Right to Know, *Submission 34*, p. 1.

[13] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 2.

[14] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 6.

[15] Dr Lawrence McNamara, personal capacity, *Committee Hansard*, 10 February 2020, p. 21. Also see: Dr Julie Posetti, personal capacity, *Committee Hansard*, 10 February 2020, p. 22.

> imperceptibly, boiling-frog style, are losing—that is, an expectation, part of being free and confident, particularly confident, that we will have means of finding out what's being done in our name and what's being done, if you like, to us.[16]

Culture of government secrecy

2.18 Notwithstanding recognition of the importance of both national security and press freedom, several submitters and witnesses contended that there has been too much emphasis on the former, leading to a pervasive culture of secrecy in Australia.[17]

2.19 ARTK representative Mr Uhlmann said that this culture of secrecy has steadily worsened over the years:

> …things have always been pretty bad when it comes to having a free flow of information inside a democracy like Australia, much worse than it is in the United States or in the [United Kingdom], some of our comparable democracies. Information here is much harder to come by and across a whole range of levels… The system has been getting steadily worse.[18]

2.20 Mr Morris stated that the events of June 2019 have, however, changed the tempo, as the issue of source confidentiality has become more pressing:

> We spend more and more of our time working on how we can find secure ways to handle information so that we can attempt to say to our sources, 'Don't worry. That bond that we've always had between journalists and whistleblowers in the interests of the public to tell a story—we will do our best to maintain that.' However, it is very difficult when you have police coming through your newsroom.[19]

2.21 Mr Paul Murphy, Chief Executive of the Media, Entertainment and Arts Alliance (MEAA), voiced a common concern that national security law, criminal investigation and the threat of prosecution are having a 'chilling effect' on public interest journalism:

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[16] Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, p. 2.

[17] See, for example: Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 22*, p. 4. Also see: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 1, who noted that there has also been an increase in the amount of national security and counter-terrorism legislation with related offences for unauthorised disclosures of government information.

[18] Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 18 October 2019, pp. 2–3. Also see: Mr Simon Spanswick, Chief Executive, Association for International Broadcasting, *Committee Hansard*, 10 February 2020, p. 19, who commented that a creep toward 'getting nothing published' should not happen in a functioning democracy.

[19] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 4. Also see: C. McMurtie, 'ABC launches SecureDrop for whistleblowers to securely and anonymously contact journalists', 28 November 2019, www.abc.net.au/news/2019-11-28/securedrop-installed-for-contacting-abc-journalists-anonymously/11708200 (accessed 4 February 2021).

> …[journalists] clearly see the nature of [the June 2019] raids as being government agencies sending a message, not just to journalists but also to whistleblowers… You would have to characterise the actions of government agencies as quite reasonably being seen as intimidating.[20]

2.22 Also referring to the Australian Federal Police (AFP) actions in June 2019, Mr Uhlmann noted that the execution of search warrants undoubtedly has a chilling effect on journalists and their reporting:

> Immediately after [the raid on Ms Smethurst's home], and from the time that she returned to journalism, you could tell that the way she went about her reporting had been affected by the raid on her house. So, of course it has a chilling effect on her and on other journalists in Australia.[21]

2.23 Mr Murphy suggested that, of the three factors which have a calming effect on public interest journalism (listed in para. 2.21), Australia's national security legislation is the most concerning as it does not recognise the importance of public interest journalism:

> You look in that legislative base for anywhere a recognition of the vital importance of public interest journalism to our democracy. You will not find it. What you find is an increasing number of potential criminal offences that journalists and whistleblowers face. The only acknowledgements are very limited and weak defences, but they are defences. In other words, the presumption in the legislation is that it is not in the public interest for this information to come forward, and it then falls on to the journalist or the whistleblower to prove why it was in the public interest.[22]

2.24 The Castan Centre for Human Rights at Monash University also commented on the three factors identified by Mr Murphy and agreed that national security laws profoundly impact public interest journalism:

> Regardless of whether action is taken, the mere existence of vague and overbroad provisions regulating disclosure may have a chilling effect on members of the press and whistleblowers who may resort to self-censorship to avoid potential adverse consequences. This in turn supports a culture of secrecy in favour of non-disclosure of matters which may otherwise be in the public interest.[23]

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[20] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 18 October 2019, pp. 8–9. Also see, for example: Associate Professor Gordon Gates, *Submission 29*, p. 1; Mr James Chessell, Group Executive Editor, Nine Network, and Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 4; Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 47.

[21] Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 12 August 2020, pp. 2–3.

[22] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 18 October 2019, p. 9.

[23] Castan Centre for Human Rights, Monash University, *Submission 14*, p. 5. Also see, for example: Law Council of Australia, *Submission 10*, pp. 20 and 32; Associate Professor Johan Lidberg and

2.25 The Law Council of Australia (Law Council) submitted that Australian law has developed in such a way that there is now a stark imbalance between press freedom and the powers granted to law enforcement and intelligence agencies:

> ...secrecy provisions have developed in an ad hoc, inconsistent manner, alongside the granting of increased powers to law enforcement and security agencies to intercept and access the data, and encrypted data, of Australian citizens. As a result, there is a stark imbalance between press freedom and the powers of law enforcement and intelligence agencies, in favour of the latter.[24]

2.26 The University of Queensland experts similarly submitted that the expansion of national security laws has 'overlooked' the importance of a free press.[25] In their view:

> …transparency and accountability must be defining characteristics of the Australian government, and that exceptions to this must be narrowly tailored to suit the national interest. A combination of legislative complexity and overreach have fostered a culture of secrecy in the public sector and undermined press freedom in Australia.[26]

2.27 The Law Council referred to the 2009 Australian Law Reform Commission (ALRC) inquiry into options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government, consistent with Australia's obligations under international law (particularly the right to freedom of expression).[27]

2.28 The ALRC recommended 'a new and principled framework striking a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential'.[28]

Dr Denis Muller, *Submission 22*, p. 4; Transparency International Australia, *Submission 26*, p. 1; Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 6; Australia's Right to Know, *Submission 34*, p. 1.

[24] Law Council of Australia, *Submission 10*, p. 6. Also see, for example: Human Rights Law Centre, *Submission 12*, p. 9.

[25] Also see: Transparency International Australia, *Submission 26*, p. 1; Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 46.

[26] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 4. Also see, for example: Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 39*, p. 1.

[27] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* ALRC Report No. 112, December 2009, www.alrc.gov.au/publications/report-112 (accessed 4 February 2021).

[28] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* ALRC Report No. 112, December 2009, p. 23.

2.29 The Law Council argued:

> In light of the fact that the recommendations of the [ALRC] Secrecy Report, published almost ten years ago, have not been fully implemented, as well as developments in the area of national security measures, particularly the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*… The Law Council considers it timely that a broader, comprehensive review be undertaken of the secrecy provisions that exist within Australia's national security framework.[29]

2.30 In this regard, the committee notes that, at the time of writing, the Attorney-General's Department (AGD) has commenced a review into secrecy provisions in Commonwealth law:

> The review will assess whether approximately 300 Commonwealth secrecy offences continue to be required, or require amendment, in view of the enactment of general secrecy offences in the *Criminal Code Act 1995* in 2018, and whether these offences and defences to them adequately protect public interest journalism. The review will also consider whether approximately 200 non-disclosure duties criminalised by section 122.4 of the *Criminal Code Act 1995* should be converted into stand-alone specific secrecy offences or have criminal liability removed. The review will involve broad consultation with the approximately 15 portfolios that administer secrecy provisions.[30]

Journalists' duty to protect confidential sources

2.31 Source confidentiality is one of the hallmarks of professional journalism. MEAA's *Journalist Code of Ethics* directs its journalist members to:

> Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.[31]

2.32 Some submitters and witnesses reflected on the importance of journalists' professional obligation to maintain source confidentiality. The ABC's Mr Morris said it has become harder for journalists to comply with this obligation:

> If we cannot look a source in the eye and say, 'No, no. If you tell us this and we deal with it responsibly and we put it on the public agenda, you can have confidence that you'll be protected and that we will never give up the information that we take with our journalism bond.' It is more difficult to say that now. That is the first time in my [30-year] career, the first time

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29 Law Council of Australia, *Submission 10*, p. 6.

30 Attorney-General's Department, 'Career and Mobility Opportunities', careers.ag.gov.au/ci/en/job/494710/494710eoiisd-legal-officerpolicy-officer-aps-level-6 (accessed 23 September 2020).

31 Media, Entertainment and Arts Alliance, 'MEAA Journalist Code of Ethics', Standard 3, www.meaa.org/meaa-media/code-of-ethics/ (accessed 4 February 2021).

> in the experience of journalism in a democracy that I can think of, where that is more equivocal than it was.[32]

2.33 Dr Ananian-Welsh and her colleagues quoted Mr Mark Maley, Editorial Policy Manager for the ABC, who described how espionage legislation critically undermines journalists' capacity to protect their sources:

> [The national security laws] make stories too risky to do because you're exposing people to criminal sanctions, whether your own journalists or whether your sources. I think you'll find that most experienced investigative journalists now will tell you that they've been contacted by sources in a way which has been insecure with stories and they've gone back to the source and said, 'Forget it, if we run this story on the basis of your information, you will be caught and you will, at the very least, lose your job and find yourself in jail'.[33]

2.34 Mr Andrew Fowler, previously a reporter for the ABC's *Four Corners* program, posed the following question: 'how many journalists will be prepared to expose government wrong-doing and failure in areas of surveillance and security and risk jail for doing their job?'[34]

The need for journalistic protections

2.35 Several submitters and witnesses observed that the Australian Constitution does not expressly provide for the right to freedom of expression or freedom of the press.[35]

2.36 Legal expert Dr Keiran Hardy noted however that Australia has a limited implied freedom of political communication, which provides some protection for press freedom. This implied freedom is not the same as an express freedom:

> …there is no constitutional protection for freedom of speech or freedom of the press, and it's clear that the implied freedom of political communication would only apply to discussions about government… But a couple of things are clear. One is that the High Court has come back again recently and confirmed that that is not the same as having an individual right to freedom of speech. The other thing we know about the implied freedom is that it can be overridden by other purposes, and certainly national security would do that. Without more explicit

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[32] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 25. Also see: Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, p. 18, who highlighted that the agency similarly relies on confidential sources.

[33] Mr Mark Maley quoted in Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 7.

[34] Mr Andrew Fowler, *Submission* 7, p. 3.

[35] See: Chapter 7.

> protections, even just statutory ones in the law, there's a huge gap there in terms of protecting free speech and freedom of the press.[36]

2.37 Associate Professor Lidberg advised that, internationally, there is a common view that this is 'a hole in [Australia's] legal and democratic system'. In his view, if there were constitutional protection for press freedom, it would act as a check on national security law. He added that 'the lack of such an instrument …is most likely the strongest contributing factor to why Australia resorted to hyper-legislation after September 11'.[37]

2.38 Submitters pointed out that, unlike Australia's Five Eyes intelligence partners, Australian law also does not clearly enshrine the right to freedom of expression or freedom of the press. For example, Mr Chris Flynn from the Alliance for Journalists' Freedom said:

> The difference between Australia and some of our allies would be that in those allies, particularly those Five Eyes powers, there were already pre-existing protections in place in most cases—in Canada with a bill of rights, in the United Kingdom particularly with European Union law but also some common law positions and other statutory law positions in the United Kingdom, the First Amendment in the United States, and other laws in New Zealand. But in Australia we followed the same trajectory with respect to national security as our Five Eyes allies without the insurance and without the backup.[38]

2.39 The Law Council's Mr Arthur Moses agreed that the lack of a national human rights protection framework in Australia is 'troubling', as 'we are the only country in the Five Eyes network that does not have explicit protections for journalists'.[39]

2.40 The committee notes that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) has recommended that, in the department's review of the secrecy provisions contained in Commonwealth legislation, the Attorney-General specifically consider whether these provisions adequately protect public interest journalism.[40]

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[36] Dr Keiran Hardy, personal capacity, *Committee Hansard*, 15 November 2019, p. 14.

[37] Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University, *Committee Hansard*, 18 October 2019, p. 62. Also see: Ms Caoilfhionn Gallagher QC, personal capacity, *Committee Hansard*, 15 November 2019, p. 59.

[38] Mr Chris Flynn, Director, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, pp. 51–52. Also see: Mr Andrew Fowler, *Submission 7*, pp. 1–2; ABC Friends Armidale Branch, *Submission 8*, p. 1; Queensland Council of Civil Liberties, *Submission 32*, p. 2.

[39] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 2.

[40] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 6.

Committee comment

2.41 The committee acknowledges the importance of national security laws to protect Australia and the Australian community from harm. For these purposes, the committee accepts that at times it is in the national interest for information relating to national security to be kept from public view. At the same time, it is also vital for government to be open and accountable. A free press helps to ensure that power is held to account.

2.42 While national security and freedom of the press are both fundamental pillars of Australian democracy, neither is absolute. It is the committee's view that Australia's interests are best served when a proportionate, appropriate and reasonable balance is struck between these two tenets of our liberal democracy.

2.43 The committee heard from media and legal experts that over time national security imperatives have been given precedence over press freedom. A combination of factors—such as the enactment of extensive national security laws, and a willingness to investigate and prosecute journalists under these laws—has intensified an existing culture of government secrecy and exacerbated the chilling effect that undermines and discourages the media from fulfilling its democratic function.

2.44 The committee agrees that over the past two decades national security has been prioritised over press freedom. The committee supports the 2009 recommendation of the ALRC that there should be legislative reform aimed at establishing a new and principled framework to strike 'a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential'.[41]

2.45 The committee agrees that the AGD review of the secrecy provisions contained in Commonwealth legislation should enhance public debate in this area. However, in the committee's view, that review should have a greater focus on developing a better balance between Australia's national security laws and press freedom.

Recommendation 1

2.46 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, should aim to build on the work of the Australian Law Reform Commission, by examining how the public interest in a free press and open and accountable government can be better balanced with protection for classified and sensitive government information.

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41 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* ALRC Report No. 112, December 2009, p. 23, www.alrc.gov.au/publications/report-112 (accessed 4 February 2021).

2.47 The committee understands that journalists have a professional obligation to maintain source confidentially. The committee acknowledges media concern that certain national security and criminal laws undermine journalists' ability to comply with this obligation, as application of those laws could result in the involuntary identification and prosecution of a confidential source.

2.48 The Australian Constitution does not expressly protect the right to freedom of expression or freedom of the press, nor are those rights expressly protected in Commonwealth legislation (see Chapter 7). The committee acknowledges that this lack of protection—in conjunction with myriad criminal and national security laws prohibiting the unauthorised disclosure of certain government information—could render journalists liable to criminal investigation and prosecution 'for doing their job'.

Media's relationship with government

2.49 Several submitters and witnesses reflected on the media's relationship with government. Mr Reid remarked that 'there has always been a very open, frank and always good conversation' where either an agency's investigation or life is at risk. However:

> …what we're talking about now is the creeping censorship of things where lives aren't in clear and present danger but that same kind of pressure is applied to shut down the revelation of those stories.[42]

2.50 Dr Ananian-Welsh and her colleagues submitted that there has been a recent deterioration in the media-government relationship, as the trust underpinning that relationship has been replaced by an escalating culture of secrecy.[43]

2.51 ARTK representatives stated that there is no reason for a decline in trust and questioned when the media has ever genuinely placed national security at risk. Mr Reid from News Corp Australia said:

> I challenge anybody to actually point to a single example by any mainstream media organisation in Australia, whether you like what they do or not, of a moment of irresponsibility that has put anybody, an individual or a serious police or security operation, at risk. I am sure every single one of us here has examples of contact with intelligence organisations, senior politicians, local police forces where the conversation has been, 'Please don't publish this information, because it will either endanger an investigation or there's a risk.' In a career stretching back to 1976, on no occasion can I remember that relationship ever being treated

[42] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 9.

[43] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 15.

> poorly or where harm has been caused by a journalist or a news organisation doing the wrong thing.[44]

2.52 Mr Moses agreed that most Australian media operators act in a very responsible way to ensure that published information does not prejudice national security. He did not necessarily support a legislated requirement for journalists to make enquiries with an intelligence agency in order to rely upon a statutory defence:

> I'm a bit troubled about necessarily legislating, as the gateway to protection for journalists under the Criminal Code…because there may be reasons in particular circumstances why they didn't do it which may be able to be publicly explained. The halfway home might be that you say something like this in legislation: 'Without reasonable explanation the journalist has not made contact with the relevant government department before publication.' That may provide a degree of protection.[45]

2.53 General Counsel for the ABC, Ms Connie Carnabuci, also did not support making any defence contingent on enquiry with the relevant agency or the production of information under a Notice to Produce (see Chapter 6). She emphasised that Commonwealth law should recognise journalistic privilege, as occurs in other jurisdictions:

> …there is not a single other jurisdiction that we've been able to identify where [such a requirement] is used. Even in Hong Kong, which I have had cause to look at recently, they have contestable warrants and they have in the basic law recognition of journalistic privilege. They have a whole host of problems at the moment, but it's interesting for us to just put a pin in that and note that. I don't understand why we would want to enshrine in Australian law a process that really doesn't seem to have any kind of relationship to other international laws in this area.[46]

2.54 Dr Hardy also expressed reservations about whether such a requirement would be practical in light of the search warrants executed in June 2019:

> …if media organisations alert an agency to the fact that they have information, then we might see…search warrants being executed or attempts to get that information back… I wonder whether, in practice, media organisations would still feel reluctant to convey that. They would be better placed to tell you that, but I think they might feel like they

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[44] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 12. Also see: Mr James Chessell, Group Executive Editor, Nine Network, and Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 18 October 2019, p. 12.

[45] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 5.

[46] Ms Connie Carnabuci, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 7.

> couldn't go to an agency, precisely because they were the agency that was likely to be embarrassed by the information.[47]

Agency response

2.55 Australian Security Intelligence Organisation (ASIO) representative Ms Heather Cook said that the agency has a collaborative and cooperative relationship with the media:

> Certainly on a regular basis journalists are writing, either seeking comment on stories that they're producing or, indeed, reaching out to inquire about the relative sensitivity of something… We're very happy to engage and assist with stories provided, again, we're able to protect those things which we deem sensitive. Certainly, in our experience most journalists have been very prepared to have the conversation and reach out to check whether or not something could be problematic, which we greatly appreciate.[48]

2.56 Highlighting the point made by Mr Reid, Ms Cook was not able to identify a specific example where public interest reporting has demonstrably undermined Australia's national security. She indicated that ASIO's concern is more preventative in nature:

> …our concern would be more with the extent to which that could continue to occur in a way that didn't provide appropriate protections for information going forward, or appropriate judgements to be made about information released.[49]

2.57 The committee notes that the PJCIS has recommended that the Australian Government consider the formulation of a mechanism to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution.[50]

Committee comment

2.58 There will inevitably be tensions between government and media when journalists report on matters of public interest that have the potential to embarrass the government. For example, disclosures of government actions that prejudice national security, reveal an abuse of power, or breach the law. However, embarrassment alone is not a legitimate reason for the criminal investigation of journalists and their confidential sources.

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47 Dr Keiran Hardy, private capacity, *Committee Hansard*, 15 November 2019, p. 13. Also see: p. 15.

48 Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, p. 22.

49 Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, p. 18.

50 Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 8.

2.59 As discussed in Chapter 3, the committee considers that an unauthorised disclosure of government information made in the public interest must result in a level of harm sufficient to warrant criminal investigation and prosecution. Laws that enable such action without the necessary justification are egregious and should be condemned in the strongest of terms.

2.60 Further, as discussed earlier and in Chapter 7, neither national security nor press freedom is absolute and in circumstances where both of these fundamental tenets interact, they must be appropriately balanced against one another.

2.61 The committee notes that, when asked for an example of a journalist's disclosure that has demonstrably harmed Australia's national security, senior ASIO officials could not provide one.

2.62 Although the committee heard of recent trouble in the relationship between the media and government, in the absence of any information from security agencies to the contrary, the committee accepts that journalists and media organisations have over a long period acted in a manner that has not prejudiced national security.

2.63 The committee supports the PJCIS recommendation for the formulation of a mechanism 'to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution'.[51] In this regard, the committee welcomes the Australian Government's acceptance of the PJCIS recommendation.[52]

2.64 However, the committee does not consider that the media should be required to consult intelligence agencies in all circumstances as a pre-condition to accessing legislative protections. The committee acknowledges that the PJCIS recommendation might encourage journalists and media organisations to consult with those agencies on disclosed government information but observes that this protection would not extend to confidential sources of that information (see Chapter 4).

Freedom of Information Act 1982

2.65 Some submitters and witnesses identified the application of freedom of information (FOI) law as one of the factors contributing to the culture of secrecy and the inhibiting of press freedom in Australia.

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[51] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 8.

[52] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, October 2020, p. 7.

2.66 The key legislation is the *Freedom of Information Act 1982* (FOI Act), which aims to give the Australian community access to information held by the Australian Government, including by providing for a right to access certain documents.[53]

2.67 Several inquiry participants questioned whether this objective is being achieved, due to impediments associated with exercising the legislated right. The ABC, for example, submitted:

> …government agencies are routinely criticised for side-stepping the FOI requirements by classifying documents as exempt [from the legislation] and taking a "go-slow" approach to processing applications. Rather than a culture of transparency, we have a culture of secrecy in our government agencies.[54]

Impact of the FOI mechanism on journalism

2.68 Submitters and witnesses indicated that the FOI mechanism can prevent journalists from reporting matters of public interest.

2.69 Dr Ananian-Welsh and her colleagues from the University of Queensland, who described the FOI mechanism as 'dysfunctional', contended that, rather than assisting with access to information, the mechanism actually frustrates the statutory objective:

> Journalists described over-worked staff, and increasingly narrow interpretations of what can be released, at odds with the underlying principles of FOI. For news media, where timeliness is crucial, the months it now regularly takes to process even routine requests under FOI and Right to Information (RTI) legislation can have the same effect as denying the information in the first place.[55]

2.70 ARTK agreed that reporting can be shut down by the FOI process. It provided an example of a partially granted FOI request to the AFP. The example illustrated the extent of redactions in the response to that request (Figure 2.1).

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[53] *Freedom of Information Act 1982*, s. 3 of Part I and Part III.

[54] Australian Broadcasting Corporation, *Submission 41*, p. 6.

[55] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 15. Also see: Support Assange & WikiLeaks Coalition, *Submission 1*, p. 11; Ms Diana Wyndham, *Submission 6*, p. 2; ABC Friends National, *Submission 23*, p. 3; Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 46.

Figure 2.1 Partially granted FOI request to the AFP

[Source: A Probyn(@AndrewProbyn), 'Here is the FoI on NDIS waiting times in all its hideous glory', Tweet, 10 November 2019]

2.71 Speaking to these types of redactions, Mr Uhlmann said:

> …when you get to the actual detail, after they have gone to all this trouble after months to send us the document, lots of the front parts were redacted, and when you get to body of the document pages four to 23 were redacted. The entire report has essentially been redacted. They have given us the information; it is just that they have redacted it beyond any useful purpose.[56]

2.72 Mr Uhlmann said that access to information under the FOI regime has 'gotten worse over time', with the underlying cause being Australia's increasing culture of secrecy. He expressed a view that the requests made to government are reasonably modest compared to other jurisdictions.[57]

2.73 Associate Professor Lidberg highlighted section 7 of the FOI Act, which sets out certain exemptions from the application of the Act, including 'intelligence agency documents' and 'defence intelligence documents'.

2.74 Professor Lidberg argued that these very important exemptions are not present in other mature democratic countries. Further, application of FOI laws in those countries has not affected national security:

> In the vast majority of mature democratic countries where FOI applies to the intelligence community, anarchy does not reign, terrorists are not

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[56] Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 18 October 2019, p. 17. Also see: Australia's Right to Know, 'Australian Federal Police response to Nine Freedom of Information application, dated 19 September 2019', *Tabled Document 2*, received 18 October 2019.

[57] Mr Chris Uhlmann, Political Editor, Nine Network, *Committee Hansard*, 18 October 2019, p. 17 and *Committee Hansard*, 12 August 2020, p. 8.

> winning, and intelligence officers can still do their jobs. Most importantly, journalists are not dependent…only on whistleblowers when holding security agencies to account.[58]

2.75 ARTK proposed that the FOI regime be reformed, including with a requirement for an ongoing audit of the classification practices of government agencies. Its representative, Mr Murphy, added that 'there is a tendency to overclassify documents that really should be available to the public'.[59]

Departmental and agency response

2.76 The Department of Home Affairs (Home Affairs) and AGD submitted that the FOI Act seeks to balance the competing interests of access to information with the need to protect government deliberations and sensitive information.[60]

2.77 The departments noted that there have been a number of significant reviews of the FOI regime in recent years. Their submission further noted a broader review of the intelligence community that was underway and encompassed the FOI arrangements:

> A comprehensive review of the Acts governing Australia's intelligence community is currently being undertaken [the Richardson Review] to ensure agencies operate under a legislative framework which is clear, coherent and contains consistent protections for Australians – this includes under the Freedom of Information Act.
>
> The review will comprehensively examine the effectiveness of the legislative framework governing the National Intelligence Community and prepare findings and recommendations for reforms. The review will prepare a classified report for the Government by the end of 2019, followed by an unclassified version of that report.[61]

2.78 Mr Andrew Walter from AGD said that legislation is only part of the challenge and indicated that a holistic approach is required:

> …there are pressures in the freedom of information system and the law impacts on how those pressures work, but there are also important points within government agencies where there is stress as to the resources they make available in terms of dealing with freedom of information requests. There are obviously stressors that have been spoken about publicly by the Office of the Australian Information Commissioner in their handling of

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58 Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University, *Committee Hansard*, 18 October 2019, p. 61. Also see: p. 63.

59 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 18 October 2019, p. 12. Also see: Australia's Right to Know, *Submission 34*, pp. 7–8; Dr Keiran Hardy, private capacity, *Committee Hansard*, 15 November 2019, p. 10, who agreed that there is greater scope for oversight; Chapter 3.

60 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 7.

61 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 7.

> reviews under the FOI Act. My point is that we need to think of FOI systematically and not just in terms of the legislation.[62]

2.79 Home Affairs Secretary Mr Michael Pezzullo discussed the department's handling of FOI requests in 2018-2019. Although over 50 per cent of requests were not finalised within the 30-day statutory timeframe, Mr Pezzullo maintained that departmental performance in that area was commendable relative to its resourcing levels. He added that he had no intention of requesting or allocating additional resources to that area.[63]

2.80 AFP Commissioner Mr Reece Kershaw stated that the AFP is 'more open and transparent than ever before' and noted that, on a number of occasions, applicants have not been required to submit a FOI request in order to receive government information.[64]

2.81 The committee notes that the Richardson Review has been completed, with an unclassified public version of the report released on 4 December 2020. Although the review recognised that the FOI Act is a key transparency mechanism, it did not support the removal of existing agency exemptions.[65]

2.82 The committee further notes that the PJCIS has recommended that the Australian Government review and prioritise the promotion and training of a uniform FOI culture across departments to ensure that application of the processing requirements and exemptions allowed under the FOI Act is consistently applied.[66]

Committee comment

2.83 The committee heard that government agencies' application of FOI law contributes to an increasing culture of secrecy. The committee was provided

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[62] Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 43.

[63] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, pp. 25–26.

[64] *Journals of the Senate*, No. 68–7 October 2020, p. 2387; Mr Reece Kershaw, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, pp. 13–14. Also see: Australian Federal Police, answers to questions on notice, pp. 5-6 (received 25 September 2020).

[65] Attorney-General for Australia and Minister for Industrial Relations, 'Government response to the Comprehensive Review into Intelligence Legislation ('Richardson Review'), *Media release*, 4 December 2020, www.attorneygeneral.gov.au/media/media-releases/government-response-richardson-review-4-december-2020 (accessed 4 February 2021); Mr Dennis Richardson AC, *Comprehensive Review of the Legal Framework of the National Intelligence Community*, December 2019, Vol. 1, p. 58, www.ag.gov.au/national-security/consultations/comprehensive-review-legal-framework-governing-national-intelligence-community (accessed 4 February 2021).

[66] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 16.

with instances where applications for information were processed well outside of statutory timeframes and redacted beyond all comprehension.

2.84 The committee accepts the media's contention that departmental and agency treatment of FOI applications impede the ability of journalists to report matters of public interest. More broadly, this treatment undermines the primary objective of the FOI Act and its underlying principle of open and transparent government.

2.85 The committee endorses the PJCIS recommendation that seeks to ensure consistency in the application of FOI legislation. Based on information received, the committee considers that a uniform approach is important in addressing concerns about the manner in which departments and agencies process FOI applications.

2.86 However, as highlighted by Mr Pezzullo's cavalier attitude regarding late responses to FOI requests, the committee considers that there are more deeply embedded issues—such as risk aversion—that are creating a culture within the public sector that does not value and is opposed to the release of government information in appropriate (non-exempted) circumstances. Until this culture of secrecy is discredited at all levels, the committee is concerned that the legitimate objectives of the FOI Act will continue to be frustrated.

Recommendation 2

2.87 The committee recommends that the Australian Government work with the Office of the Australian Information Commissioner to identify opportunities to promote a culture of transparency consistent with the objectives of the *Freedom of Information Act 1982* among Ministers, Senior Executive Service and other Freedom of Information decision-makers.

Chapter 3
Sensitive and classified information

Commonwealth law enforcement powers

3.1 Commonwealth law provides for a number of criminal and national security offences that can lead to the exercise of law enforcement powers in relation to journalists and media organisations.

3.2 The Law Council of Australia (Law Council) submitted that the media is disproportionately impacted by these powers due to the political and social purposes with which it is charged. It added that the actions of journalists and legitimate whistleblowers are also increasingly targeted in legislation.[1]

3.3 On the other hand, the Department of Home Affairs (Home Affairs) and the Attorney-General's Department (AGD) argued that 'there are clear rules and protections in place to support freedom of the press, which are subject to ongoing review by relevant policy departments'.[2]

3.4 This chapter discusses Commonwealth offences concerning the disclosure and public reporting of sensitive and classified information, as well as some of the legislative arrangements that protect freedom of the press.[3]

3.5 Topics covered in this chapter include:

- general secrecy offences in the *Criminal Code Act 1995* (Criminal Code);
- other Commonwealth laws;
- the public interest defence in the Criminal Code;
- international comparisons; and
- the Attorney-General's direction.

Secrecy and unauthorised disclosure offences

3.6 There is a multitude of Commonwealth offences relating to secrecy and the unauthorised disclosure of government information. In 2009, the Australian Law Reform Commission (ALRC) identified 506 secrecy provisions in 176 pieces of legislation, including 358 associated criminal offences.[4]

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1 Law Council of Australia, *Submission 10*, pp. 5 and 15. Also see: Chapters 2 and 4.

2 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 7.

3 Chapter 4 discusses the journalists' privilege set out in the *Evidence Act 1995;* Chapter 6 discusses the Journalist Information Warrant regime set out in the *Telecommunications (Interception and Access) Act 1995*.

4 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia,* ALRC Report No. 112, December 2009, p. 22, www.alrc.gov.au/publications/report-112 (accessed 4 February 2021).

3.7 Notwithstanding this volume, submitters and witnesses focussed their comments primarily on the general secrecy offences contained in Division 122 of Part 5.6 of the Criminal Code.[5] They argued that key terms within these offences are defined so broadly that journalists and media organisations can be prosecuted for interacting with information that is harmless from a national security or law enforcement perspective. Further, there is no defence to these charges, even where information has been or is inappropriately classified.

General secrecy offences

3.8 The general secrecy offences contained in Division 122 of Part 5.6 of the Criminal Code include:

- section 122.1—the offences of communicating or dealing with 'inherently harmful information' by current and former Commonwealth officers; and
- section 122.4A—the offences of communicating or dealing with information by non-Commonwealth officers where 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.[6]

Scope of the general secrecy offences

3.9 Submitters and witnesses argued that the general secrecy offences are too broad and capture a range of ordinary journalistic activity, for example, through the legislative definition of 'deal':

> ***deal***: a person ***deals*** with information or an article if the person does any of the following in relation to the information or article:
>
> (a) receives or obtains it;
>
> (b) collects it;
>
> (c) possesses it;
>
> (d) makes a record of it;
>
> (e) copies it;
>
> (f) alters it;

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[5] Note: this Division replaced Parts VI and VII of the *Crimes Act 1914* (the legislation under which media search warrants were issued in June 2019 – see Chapter 1).

[6] *Criminal Code Act 1995*, para. 122.4A(1)(d). Note: section 122.3 sets out an aggravated offence for current and former Commonwealth officers who commit an offence under section 122.1.

(g) conceals it;

(h) communicates it;

(i) publishes it;

(j) makes it available.[7]

3.10 Dr Keiran Hardy expressed concern with the pre-emptive nature of the definition. Similarly, law and media experts from the University of Queensland argued that the definition captures and criminalises conduct, even where the information itself is not capable of causing harm:

> By broadly criminalising all dealings with a broad set of classified and unclassified government information, the General Secrecy Offence places media organisations and journalists at serious risk of prosecution and, moreover, risks law enforcement or intelligence action aimed at the investigation of leaks well-before publication has occurred or is even considered.[8]

Harm requirement

3.11 As indicated above, current and former Commonwealth officers commit an offence if they communicate or deal with 'inherently harmful information'.[9]

3.12 Some submitters remarked that the definition of this term—like the definition of 'deal'—captures a broad range of information:

> ***inherently harmful information*** means information that is any of the following:
>
> (a) security classified information;
>
> (c) information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions;
>
> (e) information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.[10]

3.13 Several submitters and witnesses raised concerns about the level of genuine harm that is required in general secrecy offences. The Castan Centre for Human Rights Law at Monash University (Castan Centre) submitted, for example, that national security law must protect against actual harm, or the

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7 *Criminal Code Act 1995*, ss. 90.1(1).

8 Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 2*, p. 7. Also see: Dr Keiran Hardy, personal capacity, *Committee Hansard*, 15 November 2019, p. 9; Law Council of Australia, *Submission 10*, pp. 21–22.

9 *Criminal Code Act 1995*, s. 122. 1. Note: the penalty for this offence is seven years imprisonment.

10 *Criminal Code Act 1995*, ss. 121.1(1). Also see, for example: Queensland Council of Civil Liberties, *Submission 32*, p. 2.

likelihood of actual harm, to be a legitimate aim consistent with the International Covenant on Civil and Political Rights (ICCPR):

> While some secrecy offences under the Criminal Code contain an express harm requirement, harm is only implied in respect of 'inherently harmful information', including security classified information. Such information may not actually cause harm or be likely to do so and pose the same unjustified restrictions on freedom of expression as the old s 79 of the Crimes Act [relating to 'official secrets' entrusted to Commonwealth officers]. By virtue of the broad definition of 'dealing with'…it seems unlikely that mere receipt or possession of the information would cause actual harm or is likely to do so.[11]

3.14 The Law Council and the Australian Broadcasting Corporation (ABC) agreed that legislation which criminalises the disclosure of classified information must cause real or serious harm to national security, not simply embarrassment to the Australian Government and/or its allies.[12]

3.15 The Law Council reminded the committee that the ALRC has previously recommended the inclusion of an express harm requirement in the general secrecy provisions:

> The [ALRC's] Secrecy Report provided recommendations which would, in the Law Council's view, properly place secrecy provisions in the context of a system of open and accountable government in a manner consistent with the right to freedom of expression. While the general secrecy provisions introduced into the *Criminal Code Act 1995* (Cth) (Criminal Code) in 2018 adopted some of the ALRC's recommendations, namely the differentiation between 'insiders' and 'outsiders', the recommendations of the Secrecy Report relating to the creation of a general secrecy provision that includes an express harm requirement and a public interest exception have not been implemented by the Australian Parliament.[13]

3.16 As noted in Chapter 2, the Law Council highlighted that, by adopting only some of the ALRC's recommendations, an imbalance between press freedom and national security has been created in favour of the latter.[14]

Departmental response

3.17 Home Affairs and the AGD rejected the need for an express harm requirement in relation to general secrecy offences:

> In the majority of circumstances, it is necessary to include an express proof of harm requirement in specific secrecy provisions. However, there are

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[11] Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 10. Also see: Association for International Broadcasting, *Submission 43*, pp. 13–14; Chapter 7.

[12] Australian Broadcasting Corporation, *Submission 41*, p. 3; Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 1. Also see: Chapter 6, which outlines concerns about the threshold for issue of Journalist Information Warrants.

[13] Law Council of Australia, *Submission 10*, p. 6.

[14] Law Council of Australia, *Submission 10*, p. 6.

> some circumstances where the character of the information itself points to the prospect or type of harm that may result from disclosure.[15]

3.18 The committee notes that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) commented on but did not make any recommendations in relation to the inclusion of an express harm element in the general secrecy offences. That committee based its decision on a pending review in which AGD has advised that the matter will be considered.[16]

Committee view

3.19 The committee is firmly of the view that the general secrecy offence provisions in the Criminal Code should include an express harm requirement, as recommended by the ALRC. Without such a requirement, the provisions would be susceptible to overuse, misuse or even abuse. In particular, the absence of an express harm requirement can lead to circumstances where a journalist is prosecuted for a very minor or trivial 'dealing' with classified information.

Recommendation 3

3.20 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine whether the general secrecy of information offences within the *Criminal Code Act 1995*[17] should be amended to include an express harm requirement in line with the recommendation of the Australian Law Reform Commission.

Security classified information

3.21 The general secrecy offence that applies to journalists (and other non-Commonwealth officers) relates to information that has a 'security classification':

> (1) ***Security classification*** means:
>
> (a) a classification of secret or top secret that is applied in accordance with the policy framework developed by the Commonwealth for the purpose…of identifying information:
>
> (i) for a classification of secret—that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals; or

[15] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 8.

[16] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, pp. 106–107.

[17] Division 122 of Part 5.6.

> (ii) for a classification of top secret—that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest; or
>
> (b) any equivalent classification or marking prescribed by the regulations.[18]

3.22 However, submitters and witnesses argued that it is not always clear whether information has a security classification or whether that classification is appropriate.

3.23 Australia's Right to Know (ARTK) highlighted that journalists and media organisations may often be unaware of whether information has a security classification. However, Mr Quentin Dempster from ABC Alumni Limited said that most journalists are aware of the risk in publishing national security related information.[19]

3.24 Legal expert Mr Bret Walker raised a further matter: 'not all material is classified correctly or understandably or reasonably'. Further, he indicated that security classifications can have a natural expiry date:

> I am by and large strongly in favour of complete, thorough and robust enforcement of the secrecy that is imposed internally and externally in relation to the records of [the intelligence community]—that is, it seems to me that the people have appropriately, through their representatives, legislated in the national security area.
>
> But it is notorious that there are some national security matters that (a) cease to have any value of secrecy anymore because too much is already known, including perhaps material that is misleading, and (b) it is not true that national security immunises us against the risk of wrongdoing.[20]

3.25 Mr Walker argued further that 'we should move away from "everything that government does is secret" to "only those things which need to be secret should be kept secret"'.[21]

3.26 Professor Johan Lidberg identified a related problem which he labelled the 'trust us' dilemma:

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[18] *Criminal Code Act 1995*, s. 90.5; Department of Home Affairs and Attorney-General's Department, *Submission* 42, p. 7.

[19] Australia's Right to Know, *Submission 34*, p. 9; Mr Quentin Dempster, Representative, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 42.

[20] Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, p. 5. Also see: Queensland Council for Civil Liberties, *Submission 32*, pp. 1–2; Transparency International Australia, *Submission 26*, p. 4, which argued that flawed decision-making, or matters that policy makers and public servants would prefer were kept secret, should not automatically and conveniently be classed as issues of national security.

[21] Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, p. 7.

> If you go beyond what you need to keep secret, you undermine general trust and you also create this 'trust us' dilemma where you say, 'Trust us to keep you safe, but we're not going to be clear on how we do it'.[22]

3.27 The Queensland Council for Civil Liberties submitted that the motivation for security classifications should be questioned:

> When the government says that something ought to be held secretly it is acting from a position of a potential conflict of interest because it may have an interest in keeping something secret to hide its own malfeasance... Suspicion is warranted when the government seeks to shield information about itself from the public.[23]

3.28 Mr Arthur Moses, President of the Law Council, said that 'there are no real transparent guidelines…that allow the public to be able to have confidence in what is being classified'. He urged:

> …there needs to be a review of how information is classified in order to ensure that what is being classified and redacted before information is released, as an example, is truly information that, if published, would harm the national interest.[24]

Departmental response

3.29 Home Affairs and the AGD submitted that the Criminal Code and the Protective Security Policy Framework, in accordance with which classification decisions are made, clearly define and limit the use of information classifications:

> Under the Protective Security Policy Framework, information is only to be classified secret where the compromise of the information would be expected to cause 'serious damage' to the national interest, organisations or individuals. Information is only to be classified top secret where the compromise of the information would be expected to cause 'exceptionally grave damage' to the national interest, organisations or individuals.[25]

3.30 In the departments' view:

> …the costs of creating an audit mechanism for classification of documents – such as appointing an independent person – are likely to outweigh the

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[22] Associate Professor Johan Lidberg, Member, Journalism Education and Research Association of Australia, *Committee Hansard*, 18 October 2019, p. 63. Also see: Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 4.

[23] Queensland Council for Civil Liberties, *Submission 32*, p. 1.

[24] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 4. Also see: p. 7.

[25] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 14. Also see: p. 7, which noted that the Attorney-General must certify that information has been appropriately classified before consenting to a prosecution.

benefits, particularly as there is no indication that there is a systemic issue with the classification of information.[26]

3.31 The committee notes that the Protective Security Policy Framework was last reviewed by the Australian National Audit Office (ANAO) in 1999, with a potential audit foreshadowed in its 2020-21 annual audit work program.[27] The committee further notes that the PJCIS recommended that the ANAO prioritise its audit.[28]

Committee view

3.32 The committee heard that there are hundreds of Commonwealth offences relating to secrecy and the unauthorised disclosure of government information. The committee also heard that the general secrecy offences in the Criminal Code capture ordinary journalistic activity, even where the information in question has not and could not cause the harm which those offences seek to prevent.

3.33 The classification of government information is a critical component of the general secrecy offences. Although Home Affairs and the AGD endorsed the classification system, the committee accepts Mr Walker's and others view that government information can be incorrectly or unreasonably classified.

3.34 The committee notes that classification decisions are made out of public view based on the existing Protective Security Policy Framework. However, it is important for the Australian community to have confidence in these decisions.

3.35 For this reason, the committee concurs with the PJCIS that it would be beneficial for the ANAO to audit the Protective Security Policy Framework as part of its next work program.

3.36 At the time of writing, the ANAO has not commenced its foreshadowed audit. The committee recognises that the ANAO performs critical audit and assurance work, and its current work program is full. In order to continue its valuable work, and also commence an audit of the Protective Security Policy Framework, the committee considers that the ANAO should be provided with additional resources.

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[26] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 14.

[27] Australian National Audit Office, *Operation of the Classification System for Protecting Sensitive Information* (Audit Report No. 7), 1999–2000; Australian National Audit Office, 'Implementation of the Revised Protective Security Policy Framework', www.anao.gov.au/work/performance-audit/operation-classification-system-protecting-sensitive-information (accessed 4 February 2021).

[28] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 12.

Recommendation 4

3.37 The committee recommends that the Australian Government provide additional resources to the Auditor-General and the Australian National Audit Office to ensure that the potential audit listed in the Australian National Audit Office's *Annual Audit Work Program 2020-21* regarding the implementation of the revised Protective Security Policy Framework can be expedited without undermining or delaying the other important work that is on the Auditor-General's agenda.

3.38 In relation to classification, the committee agrees with ARTK that, in some instances, journalists and media organisations might find it difficult to identify when disclosures relate to classified government information.

3.39 The committee accepts that most journalists would attempt to identify and ameliorate that risk (see Chapter 2). However, identification could be improved if the media had access to comprehensive guidance on compliance with secrecy and unauthorised disclosure provisions, particularly in relation to criminal and national security laws.

Recommendation 5

3.40 The committee recommends that, if not already in place, the Australian Government, in consultation and collaboration with relevant stakeholders, develop guidance material to assist journalists and media organisations to comply with secrecy and unauthorised disclosure provisions in Commonwealth law, including the identification of classified information and information related to Special Intelligence Operations.

Other Commonwealth laws

3.41 Beyond the Criminal Code's general secrecy offences, several submitters and witnesses commented on secrecy and unauthorised disclosure offences in other Commonwealth laws—such as section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).[29]

Special Intelligence Operation scheme

3.42 The ASIO Act sets out the Special Intelligence Operation (SIO) scheme, which enables the Attorney-General to authorise SIO participants to carry out what would otherwise constitute illegal activities during Australian Security Intelligence Organisation (ASIO) undercover operations.[30]

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[29] Note: examples include: unlawfully giving or obtaining information as to defences (section 73A of the *Defence Act 1903*; espionage—dealing with information etc. concerning national security which is or will be communicated or made available to foreign principal (section 91.1 of the *Criminal Code Act 1995*).

[30] *Australian Security Intelligence Organisation Act 1979*, Division 4 of Part III.

3.43 Section 35P of the ASIO Act provides offences for the unauthorised disclosure of information relating to an SIO by entrusted and other persons (for example, journalists or whistleblowers).[31] For persons other than entrusted persons (such as journalists), there are two fault elements: for a basic offence, recklessness, and, for an aggravated offence, the addition of an intention to, or knowledge that a disclosure will, endanger the health or safety of any person or prejudice the effective conduct of an SIO.[32]

3.44 Dr Hardy and Professor George Williams submitted that the key problem with the provision is that it likely has a chilling effect on the media:

> In 2018, the UN Special Rapporteur on the Situation of Human Rights Defenders reported that Australian journalists may engage in self-censorship due to uncertainties over whether information relates to an SIO:
>
> - Given the overall secrecy of intelligence operations and without confirmation from ASIO, it is challenging for journalists to determine if an activity of interest would be a special intelligence operation. Due to high sanctions, the provision may lead to self-censorship by the media, which may take a more cautious approach to reporting on ASIO's activities.[33]

3.45 Additionally, the Law Council noted that there might be occasions where a person may know or be aware of a substantial risk that information relates to an SIO but believes that it is in the public interest to make a disclosure.[34]

3.46 However, the Law Council submitted that there is no public interest defence in the ASIO Act and there should be:

> An additional legislative defence to the SIO offences [to] provide greater protection for those who, in good faith, make public interest disclosures. Such a defence would need to be framed in a manner which provides sufficient clarity, while still ensuring that information which is genuinely likely to result in serious harm to individuals, is not publicly disclosed.[35]

3.47 The Human Rights Law Centre (HRLC) agreed that section 35P should be amended to provide protection for 'public interest disclosures and journalism'. In relation to the fault element, the HRLC submitted that there should be more emphasis on the knowledge element:

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[31] *Australian Security Intelligence Organisation Act 1979*, s. 4 defines 'entrusted person' as an ASIO employee, an ASIO affiliate or a person who has entered into a contract, agreement or arrangement with ASIO (other than an affiliate).

[32] Note: this is an express harm requirement (ss. 35P(2A)).

[33] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, pp. 8–9.

[34] Law Council of Australia, *Submission 10*, p. 24.

[35] Law Council of Australia, *Submission 10*, p. 24.

> Amend section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) so that criminal liability for journalists requires that they know the information published related to a special intelligence operation and further that they knew or were reckless as to the harm that eventuated.[36]

Committee comment

3.48 Similar to the issue of classification, the committee heard that journalists and media organisations can have difficulty determining whether disclosed information relates to SIOs and then evaluating the level of risk involved in publishing that information. Although the media often work co-operatively with intelligence agencies to identify such matters (see Chapter 2), the committee considers that it would be prudent for the Australian Government to provide further guidance in the matter (see Recommendation 5).

3.49 The ASIO Act explicitly recognises—through two fault elements—that the unauthorised disclosure of information relating to SIOs has varying degrees of culpability. The committee agrees with submitters, such as the Law Council, that the Act should provide stronger protection for good faith public interest disclosures by journalists and media organisations.

3.50 As the AGD is currently reviewing the secrecy provisions contained in Commonwealth legislation (see Chapter 2), including in relation to SIOs, the committee considers that the department should specifically consider how section 35P of the ASIO Act could provide this protection, while still ensuring that information which is genuinely likely to result in serious harm is not publicly disclosed.

Recommendation 6

3.51 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine the best way to amend section 35P of the *Australian Security Intelligence Organisation Act 1979*, to protect journalists and media organisations who, in good faith, make public interest disclosures about Special Intelligence Operations. This amendment should ensure that information which is genuinely likely to result in serious harm is not publicly disclosed.

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[36] Human Rights Law Centre, *Submission 12*, p. 10. Also see: Journalism Education and Research Association of Australia, *Submission 21*, pp. 7–8.

Legislative protections

3.52 Overwhelmingly, submitters and witnesses argued that Commonwealth law does not adequately protect press freedom in Australia and is not consistent with the right to freedom of the press, as protected in the ICCPR.[37]

Public interest defence to general secrecy offences

3.53 Section 122.5 of the Criminal Code sets out various defences to prosecutions under Division 122 of Part 5.6. In particular, subsection 122.5(6) provides a defence for people engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media (public interest defence).

3.54 The public interest defence is available provided certain conditions are met. One such condition is a reasonable belief that the alleged conduct was in the public interest, the evidential burden of which is borne by a defendant.

3.55 Several submitters and witnesses had reservations about the public interest defence provided for in the Criminal Code. Mr Moses contended, for example, that rather than protecting press freedom with a defence, a key element of the actual offence should be that the disclosure of classified information was not in the public interest, which must be proved by the prosecution:

> It should not be the journalist's responsibility to show why it was in the public interest. Presently, if charged with a secrecy offence under division 122 of the Criminal Code, a journalist must discharge what is known as an evidential burden of proof. The journalist must provide evidence, possibly in the witness box, that they reasonably believed their story was in the public interest. It is no answer to say, as the government has attempted to do, that the standard of proof a journalist must meet is lower than the standard of proof the prosecution must meet to prove guilt beyond reasonable doubt. It is clearly a burden of proof a journalist should not bear at all for what appears to be a key component of criminal liability.[38]

3.56 Australian Lawyers Alliance observed additionally that the public interest defence has limited application: it does not apply to espionage or foreign interference offences in the Criminal Code, or to people publishing on social media platforms or disclosing what they have seen or heard in their private

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[37] See, for example: Dr Christopher Ambrey, *Submission 3*, p. 2; Australian Lawyers Alliance, *Submission 5*, p. 5; Journalism Education and Research Association of Australia, *Submission 21*, p. 7; Australia's Right to Know, *Submission 34*, p. 8. Also see: Chapters 2 and 7.

[38] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 1. Also see: Australian Broadcasting Corporation, *Submission 41*, pp. 2–3; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 2.

capacity. In its view—and that of other submitters—the defence should apply more broadly to all national security law.[39]

3.57 Beyond the Criminal Code, the Law Council argued specifically that there should be a public interest defence for good faith disclosures made in contravention of section 35P of the ASIO Act. It considered that any such defence should cover both the discloser and publisher of the information:

> The defence would need to…include situations where a person discloses – not only publishes – about a matter of public interest. This would ensure that individuals who make a legitimate public interest disclosure to a media organisation before the organisation publishes a report or commentary about the matter, will be protected in addition to journalists who may publish the matter.[40]

3.58 Dr Hardy and Professor Williams proposed a broader approach to public interest protections whereby unauthorised disclosure offences—such as espionage laws, SIO offences, intelligence disclosure offences, and offences relating to ASIO's special warrant powers and Preventative Detention Orders—could include a limited public interest exemption to protect press freedom:

> This should be achieved by permitting the publication of information in the 'public interest'. It is important that this term be defined both so that the ambit of protection is clear, and so that it does not permit reporting in unacceptable circumstances. The definition should allow the publication of information that discloses serious wrongdoing.[41]

3.59 The committee notes that, for reasons similar to those expressed in paragraphs 3.45 to 3.47, there is scope to expand the legislative protections as suggested by Dr Hardy and Professor Williams.

International comparison

3.60 Some submitters and witnesses referred to international legislative regimes that provide for secrecy, unauthorised disclosure of information, sabotage, espionage and terrorism offences.[42]

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[39] Australian Lawyers Alliance, *Submission 5*, pp. 6–7. Also see, for example: Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 10; Australia's Right to Know, *Submission 34*, p. 8; Association for International Broadcasting, *Submission 43*, p. 19.

[40] Law Council of Australia, *Submission 10*, p. 24. The submission argued that this would permit disclosures in relation to illegal activity, misconduct and corruption that occurs in a Special Intelligence Operation. Also see: Chapters 4 and 6.

[41] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 11. Also see: Australian Lawyers Alliance, *Submission 5*, pp. 6–7; Alliance for Journalists' Freedom, *Submission 13*, p. 3; Dr Keiran Hardy, private capacity, *Committee Hansard*, 15 November 2019, p. 10, who suggested a limited public interest exemption could be achieved by law reform legislation.

[42] See, for example: Association for International Broadcasting, *Submission 43*, pp. 18–22.

3.61 Dr Hardy said that the critical difference between Australia and its Five Eyes intelligence partners is in the provision of clear and enforceable protections for human rights, namely the right to freedom of expression:

> Countries like the United Kingdom [UK], the [United States of America] and Canada often have similar counterterrorism laws and powers, but they also have clear enforceable protections for human rights or the oversight of a human rights court. A recent decision by the High Court in Australia confirmed that our implied freedom of political communication is not the same thing as having a right to freedom of speech. This leads to a very different starting point with regard to press freedom, and there are explicit protections for journalists in these other jurisdictions.[43]

3.62 In the UK, for example, the *Official Secrets Act 1989* provides for offences associated with the unauthorised disclosure of information in various categories (such as security and intelligence). However, a public servant or government contractor is only guilty of an offence if the disclosure is 'damaging':

> …a disclosure is damaging if—
>
> (a) it causes damage to the work of, or of any part of, the security and intelligence services; or
>
> (b) it is of information or a document or other article which is such that its unauthorised disclosure would be likely to cause such damage or which falls within a class or description of information, documents or articles the unauthorised disclosure of which would be likely to have that effect.[44]

3.63 Specifically in relation to the media, Mr Jeremy Dear from the International Federation of Journalists highlighted:

> In many countries there would be an opportunity for a journalist or media to make a public interest argument as to why they should not reveal or hand over journalistic material. In many legislations, journalistic material is defined and in a positive way there is a protection for that kind of material.[45]

Departmental and agency response

3.64 As noted in this chapter, Home Affairs and the AGD considered that Commonwealth law adequately protects press freedom in Australia. AGD representative Mr Andrew Walter said it was appropriate for the

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[43] Dr Keiran Hardy, personal capacity, *Committee Hansard*, 15 November 2019, p. 9. Also see: Chapters 2 and 7.

[44] Official Secrets Act 1989 (UK), s. 1(4). Any unauthorised disclosure by members of the security and intelligence services is an Offence: ss. 1(1). Note: Australia's definition of 'inherently harmful' information differs from the UK definition of 'damaging' information in that the former captures information which might not be prejudicial to intelligence agencies' operational matters or national security interests.

[45] Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, p. 11.

Criminal Code to contain nuanced and tailored defences, rather than a blanket exemption.[46]

3.65 Home Affairs and AGD made the point that, currently:

> The accused must discharge the evidential burden pursuant to section 13.3 of the Criminal Code. This would not change were the provision reframed as an exemption… The journalist defence in Part 5.6 of the Criminal Code only requires that the person raise evidence they 'reasonably believed' that engaging in the conduct was in the public interest, i.e. they already do not need to 'prove' that their conduct was in the public interest.[47]

3.66 Once the person has raised this evidence, it would then be for the prosecution to disprove the matter beyond reasonable doubt. However, Mr Walter explained:

> I think what the proposals are trying to get at—but I'm not sure whether or not they're quite articulating this—is that you're not in the scheme at all or, alternatively, it is a matter for the prosecution to establish the elements of what is currently a defence as an exemption, and that shifts the evidential burden in a particular matter. There are some issues with that, we think, from a practical perspective, including the fact that if you were to replicate the defence as an exemption, there is information that is peculiar to the defendant, including whether or not they believed they were acting in the public interest, which would be exceptionally difficult for the prosecution to establish.[48]

3.67 Mr Campbell Reid from News Corp Australia firmly rejected that the media has asked for a blanket exemption that would place them 'above the law':

> …we've been…verballed on this. We've never proposed that journalism or journalists are above the law. We still now see people describe our position as blanket exemptions for journalism. We just remain of the position that, over the last decade or so, a large body of legislation has been written into Australian law that wrongly provides the opportunity for journalists to go to jail for doing their jobs. We don't say that journalism or journalists are above the law in any way… What we are saying is that the laws of the land should acknowledge and protect the role of journalists to keep the nation informed, when that is appropriate. We have made very specific recommendations about which pieces of legislation should be altered to balance the right of journalists to keep the nation informed and the right of governments to keep the nation safe, and we think that the proposals that

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[46] Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, pp. 45–46.

[47] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 8. Also see: *Criminal Code Act 1995*, s. 13.3.

[48] Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 44.

> we've put are anything but a blanket exemption or putting journalism above the law.[49]

3.68 Ms Connie Carnabuci, General Counsel for the ABC, referred also to the ARTK's specific legislative suggestions that she said are intended to operate in conjunction with a contested search warrants regime:

> We actually are very strongly of the belief that [those amended laws] and a contestable warrants scheme are highly appropriate processes and [the] next steps to be taken in Australian law and that the notice-to-produce scheme is actually very hollow [see Chapter 6], if anyone would try to call it a safeguard, and doesn't come anywhere near the exemptions [suggested by the ARTK].[50]

Committee comment

3.69 The committee heard that Commonwealth law does not adequately recognise and protect press freedom in Australia, unlike other countries where there are explicit constitutional and human rights protections for press freedom.

3.70 The inquiry examined particularly the public interest defence to general secrecy offences in the Criminal Code, which submitters and witnesses criticised for requiring journalists to show that they reasonably believed that an unauthorised disclosure of government information was in the public interest in order to make out the defence.

3.71 The committee agrees with the Law Council, among others, that this arrangement is not appropriate.

3.72 The committee notes that removing the onus that is currently placed on journalist defendant would be consistent with the approach taken by the government in the recent changes contained in the *Criminal Code Amendment (Agricultural Protection) Bill 2019*.[51] The committee notes that the government has not explained adequately why such a change is undesirable.

Recommendation 7

3.73 The committee recommends that the Australian Government gives consideration to amending the *Criminal Code Act 1995*,[52] and other relevant Commonwealth legislation, to remove the evidential onus on journalist

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[49] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 5. Also see: Australia's Right to Know, *Supplementary Submission 34*, pp. 59–99, which presented its detailed suggestions for legislative amendments.

[50] Ms Connie Carnabuci, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 7.

[51] *Criminal Code Amendment (Agricultural Protection) Act 2019*, ss. 474.46–474.47.

[52] *Criminal Code Act 1995*, Division 122.

defendants to establish that an unauthorised disclosure is in the public interest.

3.74 While the evidence presented to the committee tended to focus on the public interest defence in the Criminal Code, the committee notes that, on principle, there is no clear reason why the argument should relate only to that Act and should not extend to other legislation providing for secrecy and unauthorised disclosure offences.

3.75 The committee considers that journalists should be able to undertake public interest journalism without fear of reprisal and the protection afforded to journalists and media organisations by the existing public interest defence for general secrecy offences should be extended to other secrecy and unauthorised disclosure offences in national security law.

3.76 The committee notes that the Australian Government has agreed this extension in its response to the PJCIS inquiry, except that the defence would be modelled on the existing public interest defence for general secrecy offences in the Crimes Act.[53]

Recommendation 8

3.77 The committee recommends that the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, specifically examine whether national security legislation, including the *Australian Security Intelligence Organisation Act 1979*,[54] should require the prosecution to establish that a secrecy or unauthorised disclosure offence, including in relation to a Special Intelligence Operation, is not in the public interest.

Attorney-General's direction

3.78 The Criminal Code provides that prosecutions for secrecy of information offences cannot commence without:

> (a) the written consent of the Attorney-General; and
>
> (b) for proceedings that relate to security classified information—a certification by the Attorney-General that, at the time of the conduct that is alleged to constitute the offence, it was appropriate that the information had a security classification.[55]

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[53] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, October 2020, pp. 6–7.

[54] *Australian Security Intelligence Act 1979*, s. 35P.

[55] *Criminal Code Act 1995*, ss. 123.5(1). The Attorney-General must consider whether the conduct might be authorised in the defence provisions, for example, on the grounds of public interest: ss. 123.5(4).

3.79 In addition, in October 2019 then Attorney-General, the Hon Christian Porter MP, issued a ministerial direction to the Commonwealth Director of Public Prosecutions (CDPP). This direction prevents the CDPP from prosecuting a journalist under certain national security laws without the prior approval of the Attorney-General. The Attorney-General has described the direction as:

> …a separate and additional safeguard…to allow the most detailed and cautious consideration of how an allegation of a serious offence should be balanced with our commitment to freedom of the press.[56]

3.80 Several witnesses considered that the Attorney-General's direction is not an appropriate safeguard for press freedom, as it introduces a significant element of executive or political influence. Mr Moses said, for example:

> …the Attorney-General, a politician, would be placed in the position of authorising prosecutions of journalists who may have written stories critical of his or her government. This will not improve press freedom. It will serve as another potential deterrent to the public interest. There is no doubt the ministerial direction does not intend to stifle journalistic discourse, but the effect is that it would create a culture of apprehension where journalists may be reluctant to report on particular matters lest they get offside with the Attorney-General or the government.[57]

3.81 Ms Lesley Power, General Counsel for the Special Broadcasting Service, added that there is also an issue of certainty or consistency, due to ministerial changes in the portfolio.[58]

3.82 News Corp Australia's Mr Reid said the Attorney-General's direction recognises that there is an issue to be addressed, but emphasised that the critical need is law reform.[59]

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[56] Hon Christian Porter MP, Attorney-General, quoted in B. Worthington, 'Attorney-General orders prosecutors seek his approval before charging ABC, News Corp journalists', *ABC News*, 30 September 2019, www.abc.net.au/news/2019-09-30/attorney-general-grants-journalists-limited-protection/11560888 (accessed 4 February 2021). Also see: www.legislation.gov.au/Details/C2019G00878 (accessed 4 February 2021).

[57] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 2. Mr Moses added that the direction places the Attorney-General in harm's way: p. 4. Also see, for example: Mr Jonathan Holmes, Press Freedom Spokesperson, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 37; Dr Denis Muller, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne, *Committee Hansard*, 18 October 2019, pp. 60–61 and 65.

[58] Ms Lesley Power, General Counsel, Special Broadcasting Service, *Committee Hansard*, 18 October 2019, p. 8.

[59] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 2.

Departmental and agency response

3.83 Turning to the Attorney-General's direction, Mr Walter said that the direction is consistent with the general secrecy provisions in the Criminal Code:

> The matter would only come to the Attorney-General for consideration after law enforcement has investigated the matter and prepared a brief of evidence and the CDPP has independently made a decision to proceed with a prosecution under the Commonwealth prosecution policy.[60]

3.84 Similarly, Mr Reece Kershaw, Commissioner of the AFP, said:

> This direction reaffirms the importance of the AFP thoroughly investigating these matters and collecting all relevant information and evidence to ensure the Commonwealth Director of Public Prosecutions and, where relevant, the Attorney-General, can make a fully informed decision.[61]

Committee comment

3.85 The committee acknowledges the importance of the independent roles of the AFP and the CDPP in the investigation and prosecution of Commonwealth offences (see also Chapter 5). However, the committee heard that, when it comes to prosecutorial decisions, this independence may be compromised, as certain secrecy and unauthorised disclosure of information offences are impacted by the Attorney-General's direction.

3.86 The committee notes especially that the AFP and the CDPP will have determined, in accordance with the law, how to proceed before a matter comes before the Attorney-General. The committee considers it highly inappropriate for a government minister to interfere with this process and consider that the direction is a dangerous precedent which should be immediately discontinued.

Recommendation 9

3.87 The committee recommends that the Attorney-General revoke the Direction issued on 19 September 2019 under subsection 8(1) of the *Director of Public Prosecutions Act 1983*, to respect and support the operational independence of the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

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[60] Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 42.

[61] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 15 November 2019, p. 50.

Chapter 4
Whistleblowers

4.1 There are many Commonwealth laws that criminalise the unauthorised disclosure of sensitive and classified government information, often being information concerning serious criminal activity and national security (see Chapters 3 and 7). These offences relate to the person who makes the disclosure (whistleblowers) as well as the person or organisation who receives the disclosed government information.

4.2 Whistleblowers are integral to public interest journalism. As noted by the Public Interest Journalism Initiative (PIJI):

> Disclosures in the public interest are critical to ensuring the accountability of institutions, the prevention of corruption and the safety of the public. Where disclosures are made to journalists in the public interest those who blow the whistle should be supported in their efforts and protected from retaliation.[1]

4.3 This chapter discusses the legislative protections available to whistleblowers and potential areas of reform for the public interest disclosure (PID) regime in Australia.[2] The chapter covers the following topics:

- the *Public Interest Disclosure Act 2013* (PID Act);
- recent studies and reviews relevant to whistleblower protections; and
- enhancing the whistleblower protection regime.

Public Interest Disclosure Act

4.4 The PID Act creates a legislative scheme for the reporting and investigation of allegations of wrongdoing and maladministration in the Commonwealth public sector.[3]

4.5 A PID can be made internally (to a government or intelligence agency, the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security) or outside of government (externally) in certain circumstances.[4]

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1 Public Interest Journalism Initiative, *Submission 18*, p. 7.

2 Chapter 3 discusses the legislative protection available to journalists and media organisations who receive information which is the subject of an unauthorised disclosure.

3 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 6. Note: each state and territory has similar legislation for public sector employees in its jurisdiction.

4 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 5, which noted that there are different requirements for each option and which are intended to manage potential information sensitivities.

4.6 The PID Act provides protections for public officials who make disclosures in accordance with the Act. These protections include protection from any civil, criminal or administrative liability (including threatened or actual reprisals), as well as protecting the identity of the individual.[5]

4.7 The objects of the PID Act are fourfold:

> (a) to promote the integrity and accountability of the Commonwealth public sector; and
>
> (b) to encourage and facilitate the making of public interest disclosures by public officials; and
>
> (c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
>
> (d) to ensure that disclosures by public officials are properly investigated and dealt with.[6]

Public sector whistleblowers and the media

4.8 Submitters and witnesses acknowledged the objects of the PID Act, with many recognising the pivotal role of public officials who make PIDs. For example, the Human Rights Law Centre (HRLC) submitted:

> Whistleblowers are brave individuals who speak up when they see something wrong, often at great personal cost. In a democratic country, we rely on them to call out behaviour when other reporting and accountability mechanisms fail.[7]

4.9 Notwithstanding this important role, the HRLC argued that whistleblowers are coming under increasing pressure.[8] Submitters and witnesses referred to specific and high-profile individuals—such as Retired Major David McBride, Witness K, and Mr Richard Boyle—who have been, or are being, prosecuted for offences under criminal and national security laws.[9]

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5 *Public Interest Disclosure Act 2013*, Division 1 of Part 2.

6 *Public Interest Disclosure Act 2013*, s. 6.

7 Human Rights Law Centre, *Submission 12*, p. 4. Also see, for example: Australian Signals Directorate, *Submission 25*, p. 2; Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 25; Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 8.

8 Human Rights Law Centre, *Submission 12*, p. 4. Also see: Transparency International Australia, *Submission 26*, p. 1, which submitted that the pressure is being applied 'in the guise of national security'; Whistleblowers Australia, *Submission 30*, p. 14.

9 Mr David McBride was charged in relation to unauthorised disclosures about covert Special Forces operations in Afghanistan; Witness K and his legal representative, Mr Bernard Collaery, were charged over unauthorised disclosures concerning the alleged bugging of a foreign ally in order to obtain economic advantage; Mr Richard Boyle was charged in relation to unauthorised disclosures concerning Centrelink's controversial automated debt recovery program (Robo-Debt).

4.10 Further, some media representatives argued that whistleblowers are now discouraged from making PIDs by the recent execution of search warrants on the media. Mr Gaven Morris from the Australian Broadcasting Corporation (ABC) explained that those activities will impact public interest journalism:

> I do not think our journalists will take a backwards step even though in the back of their minds there is an anxiety that probably was not there before… My worry is that they will not have any sources to talk to… These are citizens who would otherwise, having gone through a process of trying to disclose something through the formal channels that they think is in the public interest, turn to the media as a last resort... Journalists will have a second thought but then get on with their job. A whistleblower will have a second thought and turn the other way.[10]

4.11 Mr Simon Spanswick representing the Association for International Broadcasting, said similarly:

> We've heard a lot from people about the chilling effect of the raids that have taken place on the ABC and on the News Corp journalist. I've been talking to people in media companies in this country who've said to me that there is now a reluctance in two areas. There is a reluctance by some journalists to actually go after stories, because they've seen what's happened to a couple of colleagues and the sword of Damocles that's potentially hanging over them, so they don't want to get involved in deep investigative stories that could create problems for themselves in their own lives. At the same time, I've heard specific cases where stories were being worked on from information that was gathered from people in certain positions who've now turned around and said, 'No, I'm not going to continue this, because I'm worried because I've seen what's happened with the AFP raids of 2019.' So that chilling is happening; there is definitely a cooling of the temperature in terms of the ability of news organisations to carry out certain investigative work.[11]

4.12 In light of recent criminal investigations and prosecutions, many submitters and witnesses questioned whether Australian law adequately protects public officials who appropriately disclose information externally in the public interest.[12] Transparency International Australia (TIA) submitted, for example:

> Instead of celebrating whistleblowers and investigative journalists who expose dirty political secrets and wrongdoing, they are treated as

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[10] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 24. Also see: Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, pp. 12–13; Mr Campbell Reid quoted in A. Tillett, 'Police raid home of senior federal bureaucrat', *Financial Review*, 4 September 2019, www.afr.com/politics/federal/police-raid-home-of-senior-federal-bureaucrat-20190904-p52nx3 (accessed 4 February 2021); Chapter 2.

[11] Mr Simon Spanswick, Chief Executive, Association for International Broadcasting, *Committee Hansard*, 10 February 2020, p. 14.

[12] See, for example: Professor A.J. Brown, Centre for Governance and Public Policy, Griffith University, *Submission 45*, p. 1.

> criminals, charged, and can face lengthy jail terms. The criminalisation of journalism is a worrying trend in Australia.[13]

4.13 Professor A.J. Brown from Griffith University contended that an effective whistleblower protection regime would include a duty to make reasonable PIDs, whereon a discloser is protected:

> The whole purpose of whistleblower protection is to recognise not simply that we need people to speak up through appropriate channels, and if necessary publicly in the public interest, but that we actually place requirements on them to do so. To then not respect the role that they have fulfilled and to protect them and to ensure they do not come off second best or worse is the fundamental objective of an effective whistleblower protection regime.[14]

4.14 Mr Quentin Dempster from ABC Alumni Limited expressed some reservations about the extent to which potential whistleblowers would feel obliged to make a PID:

> …such is realpolitik that people within their organisational hierarchies and the politics within their hierarchies could say, 'If I raise that, I'm contesting the judgement of my superiors.' It is a very brave person who does that.[15]

Construction of the PID Act

4.15 Several submitters and witnesses highlighted two key concerns with the construction of the PID Act: the complexity of the Act and the definition of what constitutes a PID.[16]

Complexity of and confidence in the PID scheme

4.16 Federal Court of Australia Judge the Hon John Griffiths recently described the PID Act as:

> …technical, obtuse and intractable…a statute which is largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy.[17]

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[13] Transparency International Australia, *Submission 26*, p. 1. Also see, for example: Professor A.J. Brown, Centre for Governance and Public Policy, Griffith University, *Submission 45*, p. 1; Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 18 October 2019, pp. 12–11.

[14] Professor A.J. Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 18 October 2019, p. 31. Also see: Transparency International Australia, *Submission 26*, p. 1.

[15] Mr Quentin Dempster, Representative, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 39.

[16] See, for example: Human Rights Law Centre, *Submission 12*, p. 4.

[17] *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 at [17–18], www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca0548 (accessed

4.17 According to PIJI, potential whistleblowers do not understand when their conduct will be protected under the PID Act and they therefore have no confidence in the scheme.[18]

4.18 Professor Brown emphasised the importance of public confidence in public integrity systems. His submission cautioned:

> …unless the [PID] regime is properly calibrated to achieve this result, it will help have the reverse effect — of feeding public concern that current systems for controlling abuses of government power are either missing or ineffective; that those in government cannot be trusted; and that the only way for this to be revealed (but not necessarily resolved) is through the more political act of individual public servants making unauthorised "leaks" to the media.
>
> Public confidence in our entire public integrity system is further eroded if this then prompts a dangerous game of "hide and seek" in which government agencies (including law enforcement) are tasked, or feel bound, to try to enforce criminal penalties against leakers and reporters, which are not informed by logical public interest principles; and in which public confidence in the media is undermined by being forced to either (a) resort to new and different forms of subterfuge to receive and handle public interest information, or (b) cease receiving and reporting on such information altogether, no matter how serious and important.[19]

4.19 Whistleblowers Australia identified another key issue affecting confidence in the PID scheme: the alleged tendency of employers to deny that a termination is related to the making of a PID. Its submission argued that the disclosure of sensitive and classified information increases the strength of this denial:

> …the risk of an employer abusing the legal process rises exponentially, in lock step with the increasing threat of being exposed and held to account.[20]

4.20 The Commonwealth Ombudsman encourages senior public employees to view PIDs as a tool to identify and manage risk. He submitted that 'PID investigations are an opportunity for agencies to generate systems and process improvements, even where the wrongdoing alleged is not substantiated'.[21]

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4 February 2021). Also see, for example: Human Rights Law Centre, *Submission 12*, p. 5; Commonwealth Ombudsman, *Submission 33*, p. 5.

[18] Public Interest Journalism Initiative, *Submission 18*, p. 7. Also see: Queensland Council for Civil Liberties, *Submission 32*, p. 3; Australia's Right to Know, *Submission 34*, p. 5.

[19] Professor A.J. Brown, *Submission 45*, p. 3. Also see: Rule of Law Institute of Australia, *Submission 24*, p. 2; Dr Denis Muller, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne, *Committee Hansard*, 18 October 2019, p. 60, who both commented that there is a general decline in faith and trust in public institutions.

[20] Whistleblowers Australia, *Submission 30*, p. 9.

[21] Commonwealth Ombudsman, *Submission 33*, p. 9.

4.21 In addition to building strong and supportive cultures, the Commonwealth Ombudsman advised that he has drawn on Professor Brown's work (see paragraph 4.52 below) to:

> …encourage the senior leadership to demonstrate their commitment to PID processes and ensure that an agency's PID procedures are properly understood and executed… We emphasise the need for senior leaders to take a positive approach to reports of wrongdoing under the PID Act and recognise the benefits to the organisation that will accrue if a disclosure is handled well, and is seen to be handled well, by those involved.[22]

Committee comment

4.22 The committee acknowledges the importance of the PID scheme as a mechanism for public officials to report and have investigated allegations of wrongdoing and maladministration in the Commonwealth public sector without fear of reprisal.

4.23 The committee accepts however that a combination of factors—including legislative complexity—is eroding trust in the PID scheme, which could have a chilling effect on public interest journalism and/or exacerbate the number of unauthorised disclosures in the Commonwealth public sector. This latter circumstance could result in increased risk to national security interests.

Definition of 'public interest disclosure'

4.24 'Public interest disclosure' is defined in section 26 of the PID Act and specifically excludes 'intelligence information'. 'Intelligence information' is defined in section 41 of the Act and includes, for example, information that has originated with, or has been received from, an intelligence agency.

4.25 The Castan Centre for Human Rights Law at Monash University (Castan Centre) described the exclusion of intelligence information as a key shortcoming of the PID Act. It noted that this exclusion means that the Act cannot be used as a defence to a charge under section 35P of the *Australian Security Intelligence Organisation Act 1979* (unauthorised disclosure of information relating to a 'special intelligence operation').[23]

4.26 Dr Keiran Hardy and Professor George Williams highlighted that intelligence officers have no legal mechanism to make PIDs should internal disclosure processes fail to address wrongdoing and maladministration:

> While the *Public Interest Disclosure Act 2013*…creates a whistleblower scheme for public employees…there are no adequate protections for disclosing intelligence information in the public interest… Intelligence officers who leak information with intent to prejudice Australia's national

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[22] Commonwealth Ombudsman, *Submission 33*, p. 9.

[23] Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 13. Also see: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 10, who made similar comments but in relation to espionage and disclosure offences in the *Intelligence Services Act 2001*.

> security or defence should certainly be punished. However, there is no legal mechanism for an intelligence officer to disclose publicly, for example, that colleagues had tortured a suspect or embezzled money during an undercover operation. Disclosures about misconduct must be made internally to the organisation in the first instance, or to the [Inspector-General of Intelligence and Security (IGIS)]. These mechanisms may be appropriate in many cases, but there is no separate protection for intelligence whistleblowers if these avenues prove inadequate.[24]

4.27 In a published opinion piece, Professor Brown considered that the practical effect of the legislative 'flaw' is to conceal those precise behaviours targeted by the PID Act:

> …fraud, corruption or criminal behaviour in any activity vaguely touched by intelligence agency functions cannot be revealed to the public, even when the same disclosure about any other agency would be protected… It doesn't matter how grievous the wrongdoing was – or even that revealing it would not actually harm any security or intelligence interests. If it is connected in any way to the agency, the whistleblower will still be punished.[25]

4.28 The HRLC submitted that there should not be a 'blanket ban' on intelligence-related PIDs. Instead, PIDs which do not affect national security should be protected:

> It is important to protect against disclosures that would harm national security, but at the same time allow enough disclosure, where appropriate, to fulfil the public's right to know to the greatest extent possible without harming national security.[26]

Departmental and agency response

4.29 The Department of Home Affairs (Home Affairs), the Attorney-General's Department (AGD) and the Australian Federal Police (AFP) submitted that the PID Act provides a number of avenues for the lawful disclosure of sensitive material in certain circumstances.[27]

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[24] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 10. Also see: Human Rights Law Centre, *Submission 12*, p. 6; Transparency International Australia, *Submission 26*, p. 6.

[25] Professor A.J. Brown, 'From Richard Boyle and Witness K to media raids: it's time whistleblowers had better protection', *The Conversation*, 13 August 2019, theconversation.com/from-richard-boyle-and-witness-k-to-media-raids-its-time-whistleblowers-had-better-protection-121555 (accessed 4 February 2021). Also see: Transparency International Australia, *Submission 26*, p. 6.

[26] Human Rights Law Centre, *Submission 12*, p. 6. Also see: Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 14; Australian Broadcasting Corporation, *Submission 41*, p. 4, which submitted that there is a wide category of intelligence-related information that, if disclosed, would not harm the public interest.

[27] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 5; Australian Federal Police, *Submission 40*, p. 6.

4.30 The departments highlighted that the PID Act allows for internal disclosures of 'intelligence information' to either an intelligence agency or the IGIS. In their view, these mechanisms satisfactorily enable the appropriate investigation of alleged Commonwealth wrongdoing.[28]

4.31 Dr Wendy Southern from the Australian Security Intelligence Organisation (ASIO) noted that, since the PID Act commenced, seven disclosures have been made within that agency and were resolved in accordance with the PID Act. None of these disclosures were made public.[29]

4.32 Home Affairs and AGD argued that the IGIS provides an independent mechanism for public officials to make a PID relating to 'intelligence information'. Mr Andrew Walter from AGD described the IGIS as 'a very effective body' for the 'intelligence space' where external disclosure is not desirable:

> …[the internal IGIS] regime is important, because otherwise you can end up in a situation where anyone can release any information, and there are often really sound reasons why we don't want that. Yes, we can look at the Act again and make sure that it's working as intended and it doesn't put unnecessary barriers to people making appropriate disclosures, but the policy principles under it, in our view, remain sound.[30]

4.33 Home Affairs and the AGD added that 'intelligence information' does not attract the same protections provided for non-intelligence related information, due to recognition of 'the risks to national security that can arise from the disclosure of such information, including prejudice to individuals, operations and international relations'.[31]

4.34 In relation to transparency, Home Affairs noted that ASIO is required to report the making of a PID to the IGIS and to report the number of disclosures made each year for inclusion in the Commonwealth Ombudsman's Annual Report. However, there is no annual or ministerial reporting requirement.[32]

4.35 Dr Southern said that, where a disclosure is made directly to the IGIS, there are also accountability mechanisms in the form of reporting obligations to relevant

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28 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 5.

29 Dr Wendy Southern, Deputy Director-General, Enterprise Strategy and Governance, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, pp. 19–20.

30 Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 46.

31 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 6.

32 Department of Home Affairs, answers to questions on notice, p. 11 (received 13 December 2019); Australian Security Intelligence Organisation, answers to questions on notice, pp. 1–2 (received 4 December 2019).

ministers and the Parliamentary Joint Committee on Intelligence and Security.[33]

4.36 The committee recognises the role of the IGIS and its apparent successful use to date in a limited number of matters.

4.37 The committee notes that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) has recommended: tightening the timeframes for referral and investigation of PIDs made by public officials in an intelligence agency; and enhancing reporting requirements to the Parliament. These recommendations aim to improve the timeliness and transparency of reports of disclosable conduct.[34]

Committee comment

4.38 The fundamental aim of the PID Act is to address wrongdoing and maladministration in the Commonwealth public sector. However, the committee heard from multiple submitters and witnesses that not all public officials who, in appropriate circumstances, make external PIDs—for example, to journalists and media organisations—will be protected under the Act.

4.39 In particular, the committee received information that public officials in intelligence agencies have no way in which to disclose those behaviours if internal mechanisms fail: the making of unauthorised PID will render an official liable to criminal investigation and prosecution.

4.40 The committee acknowledges that unauthorised PIDs by public officials in intelligence agencies may occur infrequently. Also, that there are sound reasons why it would be appropriate to sanction whistleblowing in circumstances where it would harm Australia's national security.

4.41 However, in the committee's view, a blanket exclusion for 'intelligence information' precludes the disclosure of matters intended specifically to be covered by the PID Act, which would not necessarily harm national security interests. Further, the maintenance of a blanket exclusion could exacerbate a lack of confidence in the scheme, creating a chilling effect contrary to the objectives of the PID Act and potentially lead to 'leaks'.

4.42 The committee therefore considers that non-security related PIDs by intelligence officers should be covered by the PID Act, as should instances where the disclosure involves intelligence information that would not harm Australia's national security interests. The committee acknowledges that it is likely that the majority of disclosures emanating from our national intelligence

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[33] Dr Wendy Southern, Deputy Director-General, Enterprise Strategy and Governance, Australian Security Intelligence Organisation, *Committee Hansard*, 15 November 2019, p. 21.

[34] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendations 10 and 11, and para 3.259.

agencies would continue to be appropriately dealt with through existing internal mechanisms.

Recent studies and reviews relevant to whistleblower protections

4.43 Several submitters and witnesses referred to recent studies and reviews relevant to whistleblower protections in Australia. For example, in 2017 the Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) made a number of recommendations aimed at establishing a comprehensive whistleblower regime for the corporate, public and not-for-profit sector.[35]

4.44 The Australian Government responded to the PJCCFS, by affirming its commitment to strengthening whistleblower frameworks and noting recent legislative action in relation to the corporate and tax sectors (*Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*).[36]

4.45 Referring to this reform, Professor Brown and TIA commented that there is also a need for public sector reform. TIA argued that 'public sector whistleblower protection needs to, at a minimum, keep pace with the private sector protection developments'.[37]

4.46 However, Professor Brown identified a lag between the public and private regimes, as well as a need to re-design both regimes to ensure that there is greater consistency in their fundamental principles:

> …there are things both do that are similar but inconsistent, which is an enormous complication for everybody and reinforces that, when it comes to the crunch, there is an enormous case for ensuring a more intelligent design that involves greater consistency across those fundamental principles, and that that has to be built into the thinking about what is done next.[38]

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35 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, 13 September 2017, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report (accessed 4 February 2021).

36 Government Response, Parliamentary Joint Committee on Corporations and Financial Services report into whistleblower protections in the corporate, public and not-for-profit sectors, 15 April 2019, p. 2, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Government_Response (accessed 4 February 2021). For example, the *Taxation Administration Act 1953* was amended to introduce a protection regime for whistleblowers who report suspected non-compliance with Australia's taxation laws.

37 Transparency International Australia, *Submission 26*, p. 6.

38 Professor A.J. Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 18 October 2019, p. 31.

4.47 The Australian Government has signalled its intention to undertake future reforms to the PID Act.[39] Professor Brown commented however that 'reform of the Commonwealth's approach to whistleblower protection is not a new issue', with outstanding but still relevant issues dating back to their identification in 2016.[40]

Moss Review

4.48 In 2016, Mr Philip Moss AM reported on an independent statutory review of the effectiveness and operation of the PID Act (Moss Review). Mr Moss found:

> **The experience of whistleblowers** under the PID Act is not a happy one. Few individuals who had made PIDs reported that they felt supported. Some felt that their disclosure had not been adequately investigated or that their agency had not adequately addressed the conduct reported. Many disclosers reported experiencing reprisal as a result of bringing forward their concerns.
>
> **The experience of agencies** is that the PID Act has been difficult to apply. Most agencies noted that the bulk of disclosures related to personal employment-related grievances and were better addressed through other processes. Agencies noted also that the PID Act's procedures and mandatory obligations upon individuals are ill-adapted to addressing such disclosures.[41]

4.49 The Moss Review made 33 recommendations, including to: promote a pro-disclosure culture; increase oversight of the PID Act; focus 'disclosable conduct' on fraud, serious misconduct and corrupt conduct; and make it easier for potential disclosers, witnesses and public officials who administer the Act to get help and support.[42]

4.50 During the committee's inquiry the Australian Government responded to the Moss Review, accepting the majority of its recommendations (wholly, partially or in principle). According to the response, the agreed recommendations will improve the operation of the PID Act.[43]

4.51 The committee welcomes the government's response to the Moss Review but notes that potential reforms identified subsequent to the review, including by

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[39] Government Response, Parliamentary Joint Committee on Corporations and Financial Services report into whistleblower protections in the corporate, public and not-for-profit sectors, 15 April 2019, p. 2. Also see: Australia's Right to Know, *Submission 34*, p. 5, which welcomed this announcement.

[40] Professor A.J. Brown, Centre for Governance and Public Policy, Griffith University, *Submission 45*, p. 3. Also see: Commonwealth Ombudsman, *Submission 33*, p. 4; Name Withheld, *Submission 46*.

[41] P. Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 6 (emphasis in original).

[42] P. Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, p. 7.

[43] Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, Recommendation 20. Also see: p. 3.

the PJCIS, are still under consideration or are in the process of being implemented. For example, restructuring of the PID Act to improve its usability and effectiveness, and to better support public officials who make PIDs.[44]

Clean as a whistle study

4.52 Research recently conducted by Professor Brown found that 'there is hardly a crisis of leaking and external disclosure of information in Australian institutions', including to journalists and media organisations:

> Of the 20% of [whistleblowers] who ever went public [with an external disclosure], 19%…went to a union, professional association or professional industry body. Only 1% of reporters who provided data on this…ever went directly to a journalist, media organisation or public website.[45]

4.53 Professor Brown also found:

> Whistleblowers who reported externally (whether to a regulator, the media or another party) experienced at least a third more repercussions than whistleblowers who remained internal, either because they went external or because they were already experiencing mistreatment, or both.[46]

4.54 Two submitters provided personal accounts of their experience as public sector whistleblowers. Their submissions support Professor Brown and Mr Moss's findings that public officials who make PIDs feel unsupported and victimised by the experience.[47]

Departmental response

4.55 In November 2019, AGD representative Mr Walter acknowledged that the Australian Government has not yet responded to the 2016 Moss Review. He attributed the delay partially to a transfer of portfolio responsibilities and noted that in the intervening years the landscape has also changed: 'we

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[44] Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, pp. 3–5. Also see: Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 9.

[45] Professor A.J. Brown, *Clean as a whistle, a five step guide to better whistleblowing policy and practice in business and government*, August 2019, p. 48, www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf (accessed 4 February 2021). Also see: Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 15, who agreed that the media is not the first port of call for whistleblowers.

[46] Professor A.J. Brown, *Clean as a whistle, a five step guide to better whistleblowing policy and practice in business and government*, August 2019, p. 47. Also see: p. 48.

[47] Name Withheld, *Submission 28*; Name Withheld, *Submission 46*.

continue to consider that report, and the government will make a decision on that in due course'.[48]

4.56 Later in the inquiry, Mr Walter reiterated that work continues on a reform package that has now also been delayed by COVID-19 and the need to take into account recent findings of the PJCIS. However, 'the Attorney-General is very keen to push forward'.[49]

4.57 Notwithstanding this spirit of reform, Mr Walter noted that, in general, Mr Moss had found the PID scheme to be working well:

> With many of the actual recommendations…we're not talking wholesale change here. We're not talking about really big changes that are needed to the Act. Most of it's about making things clearer. There are some important recommendations about providing additional support to people who are making disclosures, and that is very significant, but there are also some recommendations about narrowing the scope of the scheme so that we don't have so many of those personal grievance issues, which were not really what the Act was intended to address… The overall findings of that review were that the scheme's working pretty well but there are some things we can do to make it better.[50]

4.58 The Secretary of Home Affairs, Mr Michael Pezzullo, recollected particularly that Mr Moss had not recommended creating any avenue for a public officer to make classified 'intelligence information' public:

> …it would be my position…that intelligence officers who handle intelligence materials in one of the designated intelligence agencies…should not have an opportunity under any circumstances to tip off or provide that information to the media. But there should be clarity both in management instructions and the organisational culture of those agencies that any suggestion of wrongdoing, misconduct or criminality should be reported to the [IGIS].[51]

Committee comment

4.59 It is clear that the PID Act has not worked as originally intended or as effectively as it should have. The committee notes Professor Brown's evidence that, since at least 2016, the legislated protections have been identified as in need of reform.

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[48] Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 48.

[49] Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 31 August 2020, p. 15.

[50] Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division, Attorney-General's Department, *Committee Hansard*, 31 August 2020, p. 15.

[51] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, p. 30.

4.60 The committee also notes that in 2019 the Australian Government committed to reform of the PID Act and in late 2020 the government affirmed this commitment in its response to the Moss Review. It remains to be seen whether the government's response will be effective, noting that there are a number of significant matters that remain unaddressed.

4.61 In the committee's view, reform of the PID scheme is critical and presentation of a reform package that addresses all concerns identified with the scheme is long overdue. The committee understands that reforms are being progressed and urges the AGD as the lead department to expedite development of the final package.

Recommendation 10

4.62 The committee recommends that the Australian Government expedite long-awaited reforms to the *Public Interest Disclosure Act 2013* to address the recognised deficiencies within the existing legislative protections for disclosers.

Enhancing the whistleblower protection regime

4.63 The United Nations Human Rights Committee (UNHRC) has stated that the International Covenant on Civil and Political Rights (ICCPR) embraces 'a right whereby the media may receive information on the basis of which it can carry out its function' (see Chapter 2). Further:

> States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.[52]

4.64 Several submitters and witnesses highlighted the importance of protecting source confidentiality, particularly for investigative journalism in the public interest. The Castan Centre submitted, for example:

> ...for journalists to conduct their function as public watchdogs, they often rely on information received from whistleblowers that reveal information in the public interest which the journalists may not otherwise have had access to... Protection of the confidentiality of sources is important to encourage whistleblowers to come forward.[53]

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[52] United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedom of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para 45, www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (accessed 4 February 2021). Also see: para 13; *International Covenant on Civil and Political Rights*, art. 19(3) (right to freedom of expression).

[53] Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 12. Also see: Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 20; Journalism Education and Research Association of Australia, *Submission 21*, p. 7; Transparency International Australia, *Submission 26*, p. 4.

Federal shield law

4.65 The *Evidence Act 1995* (Evidence Act) sets out a journalist privilege or shield law: if a journalist has promised an informant not to disclose the informant's identity, then the journalist and their employer cannot be compelled to disclose that person's identity.[54]

4.66 However, the Evidence Act also enables a court to override that shield, if the public interest in identifying the informant outweighs 'any likely adverse effect of the disclosure on the informant or any other person' and 'the public interest in the communication of facts and opinion to the public by the news media'.[55]

Who is a 'journalist'?

4.67 The Evidence Act defines 'journalist' as:

> …a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.[56]

4.68 In this context, and also in commenting on the public interest defence to general secrecy of information offences (see Chapter 3), some submitters and witnesses expressed concerns about the legislative definition of journalist. The Journalism Education and Research Association of Australia argued, for example, that the definition should be expanded to include a more modern and functional concept of 'journalist'.[57]

4.69 Mr Gary Dickson from PIJI explained that the current definition allows 'different types of people [to fall] through the cracks' (academics, students, citizen journalists, bloggers, et cetera) and not receive legislative protection (or the full extent of that protection).[58]

4.70 Associate Professor Johan Lidberg said that Australia needs to recognise more and new journalism in order to maintain media diversity. Without such an

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[54] *Evidence Act 1995*, ss. 126K(1). Most states and territories also have shield laws, the one exception being Queensland.

[55] *Evidence Act 1995*, ss. 126K(2). A similar provision exists in New Zealand law: *Evidence Act 2006* (NZ), s. 68.

[56] *Evidence Act 1995*, ss. 126J(1).

[57] Journalism Education and Research Association of Australia, *Submission 21*, p. 5. Also see: Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 10, which noted that the United Nations Human Rights Committee recognises a function-based definition that includes a wide range of actors across various platforms; United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para 44; Dr Julie Posetti, personal capacity, *Committee Hansard*, 10 February 2020, p. 22.

[58] Mr Gary Dickson, Operations Administrator, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 44.

approach, 'we will have an increasingly shrinking pool. We will end up with a public discourse that is incredibly limited'.[59]

4.71 In contrast, Mr Campbell Reid from News Corp Australia rejected that there is any confusion about who is or is not a journalist:

> There is a manufactured confusion to try to create the impression that it is hard to tell who is a journalist and who is not a journalist. There are several good tests… Firstly, a real journalist is somebody who, with diligence and responsibility, researches and seeks to publish the truth. After they have published the truth, they are in the open and accept responsibility for what they have published. The second part of that equation is that real journalism overwhelmingly is published by real journalism organisations… You are a real journalist if your material is endorsed and published by real journalism organisations, who again live in open society, have a phone number, and take responsibility for the material that they publish… There are exceptionally clear ways of identifying real journalism from fake journalism. To pretend that it is difficult is a nonsense.[60]

4.72 Other witnesses agreed that not everyone who publishes should receive the benefit of legislative protection. For example, Dr Margaret Simons representing PIJI said that 'there is a difference between a citizen who simply publishes without any sort of process or standards and the act of journalism'.[61]

4.73 Dr Simons preferred however to focus on the act of writing or publishing, rather than the person:

> For example, something that a blogger does might, in some cases, fit the definition of journalism… The [Australian Competition and Consumer Commission] considered some of these issues in a different context and described a difference between the mere publication of information which is done with a media release…and the work of journalism, which implies checking, curation and presentation. I have added to that by saying that PIJI supports rights and privileges being given conditional on membership of self-regulation schemes. That implies adherence to certain professional norms and standards. Those are some of the differences.[62]

4.74 Professor Peter Greste from the Alliance for Journalists' Freedom advised that he and colleagues at the University of Queensland are currently working towards a legal definition of 'journalist':

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[59] Associate Professor Johan Lidberg, Member, Journalism Education and Research Association of Australia, *Committee Hansard*, 18 October 2019, p. 67.

[60] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 10.

[61] Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 45. Also see, for example: Mr Chris Flynn, Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 15.

[62] Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 47. Also see: Associate Professor Johan Lidberg, Member, Journalism Education and Research Association of Australia, *Committee Hansard*, 18 October 2019, p. 68.

> …we're halfway through the work. It's turning out to be a much larger project than I originally anticipated. We've had some researchers examining the existing definitions of journalism in Australian law, and we've got a brief memo that's 70 pages long! The problem is that most of the definitions up until now have tended to focus on the individual, on who is a journalist. I think everyone would recognise that, in the current environment, it's very, very difficult to make that consistent and reasonable, when the barriers to working as a journalist have broken down in the digital environment. Instead, the conclusion that we're tending towards is a definition that covers the process of journalism—in other words, anyone who has the capacity to show that they are applying a journalistic approach to the work and upholds journalistic principles and is accountable to those principles in some form, whether it's through an organisation like the Press Council or [Australian Communications and Media Authority] or through a system of public complaints. Either way, there needs to be a system of accountability.[63]

Committee comment

4.75 The Evidence Act provides for a presumption of journalist-source confidentiality. However, the committee is concerned that, as this presumption is rebuttable, it might not afford sufficient protection to freedom of the press and specifically, the protection of whistleblowers' identities.

4.76 If the presumption were rebutted, then a journalist would find themselves unable to maintain source confidentiality, as required by journalists' professional ethical obligation (see Chapter 2), and it would potentially expose the source to investigation and prosecution.

4.77 The link between journalist-source protections and whistleblowers' protections has been long recognised. In 2009, when the privilege was created, Mr Chris Merritt from *The Australian* commented:

> The link between a law aimed at protecting whistleblowers and a law aimed at protecting journalists' sources has a startling consequence: it gives the federal Government a fresh opportunity to catch and prosecute public servants who reveal wrongdoing to the media.[64]

4.78 Based on information received throughout the inquiry—especially in relation to the media and national security environment (see Chapter 2)—the committee suggests that there is a need to strengthen existing shield laws, as part of an overall strategy to better balance protections for press freedom.

4.79 The committee notes that the PJCIS recommended:

> …the Australian Government promote consideration of harmonisation of State and Territory shield laws through National Cabinet, with relevant

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[63] Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 14.

[64] Mr Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, pp. 27–28. Note: this interaction contributes to the 'chilling effect'.

> updates incorporated to expand public interest considerations, and to reflect the shifting digital media landscape.[65]

4.80 The Australian Government has agreed to this recommendation, which will be led by the Attorney-General.[66] The committee supports harmonisation where it genuinely strengthens national shield laws. However, the committee is wary of harmonisation to a minimum standard and emphasises that there should be a strong focus on enhancing and modernising shield laws to better protect whistleblowers.

Recommendation 11

4.81 The committee recommends that the Australian Government formulate options to strengthen and modernise shield provisions in the *Evidence Act 1995*, to set a high standard in relation to the harmonisation of national shield laws.

Multiplicity and complexity of law enforcement and national security laws

4.82 Adding to the limitations presented by the definition of 'journalism', some submitters and witnesses highlighted the increasing multiplicity and complexity of law enforcement and national security laws which frustrate source confidentiality (see Chapters 3, 5 and 7).

4.83 In particular, the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act) and the *Crimes Act 1914* enable law enforcement and intelligence agencies to access telecommunications data and potential source material.[67]

4.84 Referring to the first Act, PIJI highlighted that whistleblowers can no longer be assured that journalists can comply with their professional and ethical obligation not to reveal sources' identities:

> The data retention regime [in the TIA Act] significantly weakens one of the central pillars of journalistic ethics and methods of production: protecting the confidences of sources. It provides police with a path to violate any guarantee given by a journalist to a source and undermines the privilege extended to journalists in the *Evidence Act 1995*.[68]

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[65] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 15.

[66] Australian Government, *Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, October 2020, p. 10.

[67] Note: these Acts are discussed in Chapter 6.

[68] Public Interest Journalism Initiative, *Submission 18*, p. 4.

4.85 Also in relation to the TIA Act, the Commonwealth Ombudsman highlighted that the Journalist Information Warrant scheme does not apply to whistleblowers who are not journalists or non-media organisations:

> Under s 180H of the TIA Act, before an agency can internally issue an authorisation for the disclosure of telecommunications data for the purpose of identifying a journalist's source, it must obtain a 'journalist information warrant'. This requirement under the mandatory data retention scheme is intended to balance the public interest in protecting journalists' sources with the need for agencies to access the investigative tools necessary to protect the community.
>
> However, where an agency seeks to access telecommunications data of a person (the source) but that person is neither a journalist nor a journalist's employer, the agency is not required to obtain a journalist information warrant to identify the person as a journalist's source.
>
> The agency…therefore will not be scrutinised by an external issuing authority or a Public Interest Advocate. This is despite the possibility that agencies have sought access to that telecommunications data for the purposes of confirming whether the person disclosed information to a journalist, and therefore whether they are a journalist's source.[69]

4.86 The Australian Human Rights Commission has described the effect of the TOLA Act, which provides for industry assistance measures, as permitting 'inappropriately intrusive, covert and coercive powers, without effective safeguards to adequately protect the human rights of law enforcement targets and innocent third parties'.[70]

4.87 The ABC pointed to other legislation which potentially targets journalists and whistleblowers, submitting that whistleblowers' conduct is criminalised more often than that of journalists but without the same level of protection, even where a disclosure has no potential to harm the public interest:

> Generally speaking, for each of the "receiving" offences targeted at journalists, there is a "disclosure" offence targeted at whistle blowers. See, for example, section 73A of the Defence Act, and relevant sections of the Criminal Code, Part 5.6. Note also the offence of "theft" and other related property offences under Part 7.2 of the Criminal Code. This is in addition to offences in several other pieces of legislation which penalise whistle blowers but not journalists. Therefore, a whistle blower can be prosecuted even where the disclosure did not have the potential to harm the public interest.[71]

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[69] Commonwealth Ombudsman, *Submission 33*, pp. 8–9.

[70] Australian Human Rights Commission, Submission to the Parliamentary Joint Committee on Intelligence and Security, 'Review of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*', *Submission 56*, p. 1.

[71] Australian Broadcasting Corporation, *Submission 41*, p. 4.

4.88 In contrast, Professor David Flint argued that a distinction in legislative protection would be justifiable, as whistleblowers have obligations as government employees:

> Public service whistleblowers have contractual obligations to the state, journalists do not. Whistleblowers must obviously go through internal processes before they take the risk and go public. What should always be in place is a facility for independent but still internal assessments of their claims. In any prosecution the test to justify their action must obviously be significantly higher than that for journalists.[72]

Reform proposals

4.89 Mr Arthur Moses, President of the Law Council of Australia (Law Council), indicated that Australia's whistleblower protections do not compare well with those in certain comparable countries:

> When compared with partners in the Five Eyes network, Australia's whistleblower protections are inconsistent and in need of strengthening … We have to really take a step back and see what we're doing in this country compared to other Western democracies.[73]

4.90 Mr Moses added that public officials who make external disclosures related to 'intelligence information' should receive legislative protection, subject to their having first followed the 'appropriate framework': 'the interior question is: what is that appropriate framework? We haven't got that right yet'.[74]

4.91 Another legal expert—Dr Lawrence McNamara—remarked that the United Kingdom recently examined its regime for managing internal disclosures. He said that there must be an ultimate safety valve to ensure transparency:

> This is where I think the position of the media is so important. If you have some methods for public interest disclosure to the media—I agree; save exceptional urgent circumstances—I think there is a reason to go through those official, set out processes first…[but] if you don't have an avenue for disclosure to the media, then the alternative might be totally unchecked anonymous disclosure in any event, and that's more likely to be far less well managed and far more damaging, potentially, to national security.[75]

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[72] Professor David Flint, *Submission 4*, p. 3.

[73] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 2. Also see, for example: Association for International Broadcasting, *Submission 43*, p. 29, which provided a brief comparative with four countries; Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University, *Committee Hansard*, 18 October 2019, p. 61, who described Australia's treatment of whistleblowers as 'an embarrassment'.

[74] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 5.

[75] Dr Lawrence McNamara, personal capacity, *Committee Hansard*, 10 February 2020, p. 23. Also see: Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, p. 8; Dr Julie Posetti,

4.92 Professor Brown agreed that there is a need for reform and proposed measures adapted from the Clean as a whistle report specifically to suit Commonwealth public sector employees. His seven-point plan aims to restore public confidence in the Commonwealth whistleblower protection regime and includes:

- a comprehensive overhaul or replacement of the PID Act;
- reform of the criteria for the protection of external disclosures;
- revision of the statutory definitions of 'intelligence information' and 'inherently harmful information' (see Chapter 3);
- strengthening journalism and other third-party shield laws to ensure:
  - source confidentiality and
  - freedom of journalists and other relevant professionals from prosecution for receiving or using PID in the fulfilment of their duties or functions; and
- recognition of the wider validity of PID of official information, by making available a general public interest defence for any citizen charged with offences of unauthorised disclosure or receipt of official information.[76]

4.93 The Alliance for Journalists' Freedom also suggested strengthening whistleblower protections to improve the transparency and accountability of democratic institutions, including:

> …that disclosures made in the public interest by whistle-blowers to journalists are protected, regardless of any steps by the organisation that is the subject of the disclosures to address its misconduct.[77]

Commonwealth Integrity Commission

4.94 In December 2018, the Australian Government announced that it would establish a new Commonwealth Integrity Commission (CIC) to strengthen integrity arrangements across the Commonwealth public sector.[78]

4.95 The AGD concurrently released a consultation paper on a proposed model, with 78 submissions received by the February 2019 closing date.[79]

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personal capacity, *Committee Hansard*, 10 February 2020, p. 24, who agreed that the safety valve ensures that the public right to know is upheld.

[76] Professor A.J. Brown, Centre for Governance and Public Policy, Griffith University, *Submission 45*, p. 4. Also see: Public Interest Journalism Initiative, *Submission 18*, p. 8.

[77] Alliance for Journalists' Freedom, *Submission 13*, p. 4, which also argued that the judicial process should be based on a rebuttable presumption that misconduct should be disclosed.

[78] The Hon Scott Morrison MP, Prime Minister, 'Commonwealth Government to establish new integrity commission', *Media release*, 13 December 2018, www.pm.gov.au/media/commonwealth-government-establish-new-integrity-commission (accessed 4 February 2021).

[79] Attorney-General's Department, 'A Commonwealth Integrity Commission–proposed reforms', December 2018; Attorney-General's Department, 'Commonwealth Integrity Commission',

4.96 In January 2020, the Attorney-General indicated that draft legislation for establishment of the CIC was 'all but complete'. However:

> I have decided to release the full 300-plus pages of the draft early in the new year. The consultation process will be extensive and will take as long as necessary to ensure the model we deliver has the powers and resources it needs to be effective, while also avoiding the pitfalls that have been seen with similar state-based bodies.[80]

4.97 On 2 November 2020, after delays attributed to the COVID-19 pandemic, the Attorney-General released the draft legislation. The government's proposal would grant the CIC investigatory powers, including the ability to:

- compel people to give sworn evidence at hearings, with a maximum penalty of two years imprisonment for not complying;
- compel people to provide information and produce documents (even if the information would incriminate the person), with a maximum penalty of two years imprisonment for not complying;
- search people and their houses, or seize property (under warrant);
- arrest people;
- tap phones and use other surveillance devices to investigate them; and
- confiscate people's passports by court order.[81]

4.98 The Attorney-General highlighted that the release of the draft legislation will be followed by further consultations, which are expected to conclude in March 2021.[82]

4.99 The Australian Government specifically noted that it continues to consider certain issues, including the interaction between the CIC and PID scheme: 'This

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www.ag.gov.au/integrity/consultations/commonwealth-integrity-commission (accessed 4 February 2021).

[80] Note: the proposed two-tiered model has generated widespread concerns, including on the Coalition backbench: see: A. Remeikis, 'Christian Porter admits Coalition missed own deadline on integrity commission legislation', *The Guardian*, 17 January 2020, www.theguardian.com/australia-news/2020/jan/17/christian-porter-admits-coalition-missed-own-deadline-on-integrity-commission-legislation (accessed 4 February 2021).

[81] The Hon Christian Porter MP, Attorney-General, 'Release of CIC consultation draft', *Media release*, 2 November 2020. Also see: C. Knauss, 'Federal integrity commission delayed again amid warnings of coronavirus response corruption risk', *The Guardian*, 22 May 2020, www.theguardian.com/australia-news/2020/may/22/federal-integrity-commission-delayed-again-amid-warnings-of-coronavirus-response-corruption-risk (accessed 4 February 2021).

[82] The Hon Christian Porter MP, Attorney-General, 'Release of CIC consultation draft', *Media release*, 2 November 2020.

will ensure that public officials who disclose corrupt conduct to the CIC are protected from reprisal action'.[83]

4.100 However, while describing the draft legislation as '[an] historic step towards a genuine strengthening of Australia's integrity system', Professor Brown has said that there are still 'big problems' with the CIC's proposed scope and powers:

> …for 80 per cent of the federal government, including politicians, the CIC's strong powers can only be exercised in private, and only where there is a reasonable suspicion of a criminal offence. So the powers may be strong… But there will be little or no jurisdiction to get to the bottom of "grey area" corruption like undisclosed conflicts of interest, unless a criminal offence like fraud, theft or bribery is already obvious.
>
> The scope is also narrow because, while federal agency heads must report suspected corruption offences, this is only if they meet the same threshold. If a public service whistleblower approaches the new commission directly, with reasonable suspicions of corruption breaches but no actual evidence of an offence, they would have to be turned away. Indeed, under clause 70 of the bill they could risk prosecution for making an unwarranted allegation. This is a draconian idea that defies the purpose of federal whistleblowing legislation.[84]

4.101 In evidence, Professor Brown noted that an effective integrity commission still needs to form part of a broader suite of measures:

> …this is a good opportunity to actually make sure that a few cogs of the system are actually working effectively together. It is one reason why the design of a national integrity commission or Commonwealth integrity commission…actually bite the bullet on the need to have a whistleblower protection commissioner to make these protection mechanisms work. Without those resources…we will still be in that situation where we might have laws and protections on paper but they are not actually meaning much in practice. These are really important reasons for this parliament to pursue some of these integrity reforms in a systematic fashion rather than in a piecemeal fashion.[85]

4.102 The committee notes that some witnesses commented adversely on the delay associated with releasing the draft legislation,[86] while Mr Bret Walker

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[83] Attorney-General's Department, 'Commonwealth Integrity Commission Consultation Draft', www.ag.gov.au/integrity/consultations/commonwealth-integrity-commission-consultation-draft (accessed 4 February 2021).

[84] Professor A.J. Brown, 'What is the proposed Commonwealth Integrity Commission?', *Sydney Morning Herald*, 3 November 2020, www.smh.com.au/national/what-is-the-proposed-commonwealth-integrity-commission-20201103-p56b28.html (accessed 4 February 2021).

[85] Professor A.J. Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 18 October 2019, p. 34.

[86] See, for example, Mr James Chessell, Group Executive Editor, Nine Network, *Committee Hansard*, 12 August 2020, p. 10.

supported formal referrals to a body such as ICAC (which allows for public hearings) and the strengthening of protected disclosures.[87]

4.103 The committee also notes that, under the exposure draft legislation, the CIC would have jurisdiction covering law enforcement and public sector agencies with investigative functions, as well as the Commonwealth public and parliamentary sectors, and higher education and research sectors.

4.104 The CIC's jurisdiction would be limited to the investigation of serious criminal conduct amounting to corruption in the public sector. While, there are mandatory reporting obligations for suspected instances of corruption, and capacity for third party referrals:

- the CIC would not be able to instigate its own investigations, meaning that its oversight would be curtailed; and
- individuals who cannot reasonably substantiate a referral could be charged with an offence, which might chill the reporting of suspected cases of public sector corruption.

Committee comment

4.105 International law recognises a limited journalistic privilege not to disclose information sources, as does the Evidence Act in Australia. The committee understands that journalism often relies on information provided by whistleblowers. If this source of information is imperilled due to weak whistleblower protections, it will become increasingly difficult for the media to fulfil its democratic role of holding government to account.

4.106 The committee heard that a multitude of factors are discouraging whistleblowers from disclosing matters in the public interest (see Chapters 2, 3, 5, 6 and 7). Somewhat perversely, the PID Act does not provide a public interest defence specifically for such disclosures. The committee considers that the Australian Government should be considering such a defence as part of its reforms to the PID Act (see Recommendation 10).

4.107 The committee notes that national security laws—such as the TIA Act—do not recognise a journalistic privilege, instead seeking to identify confidential sources through access to journalistic material. This issue is discussed in Chapters 5 and 6.

4.108 The committee further notes that the Australian Government has progressed the creation of a federal body charged with investigating matters of public sector integrity. However, despite recent multiple incidents at the highest levels, the proposed CIC will not allow for public hearings in appropriate circumstances. Furthermore, the committee is concerned at the proposed

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87 Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, p. 9.

thresholds could prevent the CIC from investigating serious and systemic corruption in the public sector.

4.109 The committee agrees with Professor Brown that it is essential to promote and support public confidence throughout public integrity systems. For this singularly important reason, the committee considers that the Australian Government should reconsider the proposed scope and powers of the CIC and address this matter in its draft legislation prior to its introduction into Parliament.

Recommendation 12

4.110 The committee recommends that the Australian Government reconsider the proposed scope and powers of the Commonwealth Integrity Commission. In particular, the government should allow the proposed commission to hold, in appropriate circumstances, public hearings and reconsider the proposed thresholds to ensure that the Commission is not prevented from investigating serious and systemic corruption.

Chapter 5
Australian Federal Police

Independence of the Australian Federal Police

5.1 The *Australian Federal Police Act 1979* (AFP Act) sets out the functions, powers and duties of the Australian Federal Police (AFP).[1] It provides that the Commissioner of Police (Commissioner) has the general administration of, and the control of the operations of, the AFP.[2]

5.2 The AFP Act also provides that the Minister for Home Affairs (Minister) may, after considering the advice of the Commissioner and of the Secretary of the Department of Home Affairs (Home Affairs), give written directions to the Commissioner in relation to the general policy to be pursued in relation to the performance of AFP functions.[3]

5.3 The AFP submitted that its operational independence is vital to ensuring that no individual, or class of individual, is above the law. It emphasised that the agency fulfils its key responsibility—to investigate and prevent Commonwealth offences—with both operational independence and political impartiality at all times:

> …the AFP is not, and cannot legally be, directed by the Government or an individual Minister or Department to exercise, or abstain from exercising, police powers in an individual investigation.[4]

5.4 This chapter discusses the independence of the AFP. Chapter 6 then deals with one of the AFP's key investigatory powers—the issuing of search warrants under section 3E of the *Crimes Act 1914* (Crimes Act).[5]

Politically sensitive matters

5.5 The AFP's *National Guideline on Politically Sensitive Investigations* outlines a framework for managing 'politically sensitive investigations' and 'politically sensitive matters' that have been referred but not yet been accepted for investigation.[6]

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1 Note: Commonwealth laws may confer or impose additional powers and duties.

2 *Australian Federal Police Act 1979*, Part II and ss. 37 (1).

3 *Australian Federal Police Act 1979*, ss. 37(2).

4 Australian Federal Police, *Submission 40*, p. 8. Also see: p. 3.

5 Note: interception, stored communications, computer access and surveillance devices warrants are not discussed in this report.

6 Australian Federal Police, *Submission 40*, Attachment 2, p. 2.

5.6 Under the guideline, where matters are referred directly to the AFP (not via the Minister), it is standard practice to advise the Minister at the earliest opportunity, except when there may be a conflict of interest.[7]

5.7 The AFP added that it also notifies the Minister's office of significant, overt operational activity. However:

> Permission to commence an investigation or undertake operational activity is not sought. Nor does the AFP provide regular updates to the Minister for Home Affairs on operational activity.[8]

5.8 All matters which are considered to be politically sensitive are required to be evaluated, including being prioritised in accordance with the Case Categorisation and Prioritisation Model.[9]

Concerns arising from the execution of search warrants in June 2019

5.9 Media representatives voiced concerns about the independence of the AFP following the execution of search warrants on News Corps Australia journalist Ms Annika Smethurst and the Australian Broadcasting Corporation (ABC) in June 2019 (see Chapter 1).

5.10 The Alliance for Journalists' Freedom (AJF) submitted that these 'raids' were widely interpreted as being politically motivated, with the activities undermining public trust in government, the AFP and the media.[10]

5.11 ABC Alumni Limited focused particularly on an offence specified in one ABC search warrant: the dishonest receipt of stolen property, knowing or believing the property to be stolen.[11] Its submission argued that the AFP relied on this offence because it does not require the consent of the Attorney-General to commence a prosecution, unlike secrecy of information offences in the *Criminal Code Act 1995* (Criminal Code):

> …in this instance the AFP, apparently supported by the Commonwealth Director of Public Prosecutions (CDPP), is attempting to evade the supervisory powers of the responsible minister.[12]

5.12 Mr Jonathan Holmes, Press Freedom Spokesperson for ABC Alumni Limited, contended that important safeguards in the Criminal Code could be circumvented by such choices:

> Those safeguards, limited though they are, would be rendered irrelevant if journalists who deal with leaked Commonwealth information can be

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7 Australian Federal Police, *Submission 40*, Attachment 2, p. 2.

8 Australian Federal Police, *Submission 40*, p. 8.

9 Australian Federal Police, *Submission 40*, Attachment 2, p. 3.

10 Alliance for Journalists' Freedom, *Submission 13*, p. 1.

11 *Criminal Code Act 1995*, s. 132.1.

12 ABC Alumni Limited, *Submission 15*, p. 2. Also see: *Criminal Code Act 1995*, ss. 123.5(1).

> charged with receiving stolen property. The unauthorised receipt by a journalist of any Commonwealth information, whether harmful or innocuous, whether it is subsequently published or spiked, could render them liable to criminal prosecution.[13]

5.13 Ms Connie Carnabuci, General Counsel for the ABC, similarly had not seen the provision used before in relation to an ABC journalist but considered that the AFP might have found themselves in a 'lacuna':

> …they were faced with the fact that the piece of legislation that they had started talking to us about, which was the old section 70 of the Crimes Act, had been repealed. The new legislation, which is section 122, did not apply at the time the stories were written. They had to find something that would fit and, by doing so…they sidestepped oversight by the Attorney-General. The crime of receiving stolen goods is not a crime the Attorney-General needs to have any oversight of before you can prosecute.[14]

5.14 In an address to the National Press Club, the Shadow Attorney-General, the Hon Mark Dreyfus, suggested that the government has disregarded convention not to prosecute journalists for the publication of unauthorised disclosures, by using archaic provisions in Commonwealth legislation:

> I've been a bit concerned about some of the public commentary in this area… Some of it needs to be focused on what you call unwritten law on the exercise of discretions on the conventions which have surrounded the way in which, just to take a simple example, [now repealed] section 70 and 79 of the *Crimes Act 1914*, have been there since the first world war, have manifested. What's happened to them?
>
> On the face of them, they criminalise a lot of journalistic activity. They criminalise the publication when the journalist knows that it is a leak from government. But no journalist has been prosecuted for that in the more than 100 years which have gone past. And you have to ask the question why is that so? It's so because of the way in which governments exercise discretions and apply conventions to make sure that journalists and ordinary media work in this country is protected.[15]

5.15 Mr Jeremy Dear from the International Federation of Journalists agreed that it is not just written law but the way in which those laws are applied that affects press freedom:

> All governments like to think everything they do is in the public interest. Sometimes it is in their own political interest: it is about avoiding

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[13] Mr Jonathan Holmes, Press Freedom Spokesperson, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 36. Mr Holmes added that the threat of prosecution strikes at the very heart of press freedom.

[14] Ms Connie Carnabuci, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 29. Also see: pp. 27–28.

[15] Hon Mark Dreyfus QC MP, Shadow Attorney-General, 'Speech', *National Press Club*, 11 September 2019, www.markdreyfus.com/media/transcripts/national-press-club-q-a-11-september-2019-mark-dreyfus-qc-mp/ (accessed 4 February 2021).

> embarrassment and avoiding political damage, rather than the genuine public interest. You see that with things like classifying documents as 'secret' or 'top secret', so that they don't see the light of day, or the way in which freedom of information legislation is applied in different societies and the way in which there are laws that protect whistleblowers and so on. So, yes, it is often the application of those laws. What's been more worrying is that increasingly in democratic societies they're being applied either in a way that has a chilling effect, so journalists don't pursue certain stories, or in a way that simply undermines the ability of the media to access the information.[16]

Medevac legislation

5.16 Some witnesses contrasted other matters in which the AFP did not investigate a referral. For example, in early 2019 *The Australian* reported on a classified ministerial briefing that warned that Medevac legislation would 'undermine regional processing and compromise Australia's strong border protection regime'.[17]

5.17 AFP Commissioner Mr Reece Kershaw told the committee that this particular matter was not accepted for investigation on referral from Home Affairs.[18] The AFP elaborated that the individual named in the referral did not have access to the disclosed material:

> Only one person from the Department of Home Affairs had contact with [the journalist] Mr Benson. Given the nature of the person's role, contact with journalists is not unexpected. As part of the referral, Department of Home Affairs provided email addresses and mailbox user lists for people that had access to the disclosed information. The person who had direct contact with Mr Benson in the relevant period was not on the list of people who had access to the disclosed information.[19]

5.18 Mr Kershaw added that the information provided by Home Affairs revealed that over 200 people had received the disclosed material:

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[16] Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, p. 12.

[17] S. Benson, 'Phelps medivac bill a national security risk, Home Affairs warns', *The Australian*, 7 February 2019, www.theaustralian.com.au/nation/immigration/phelps-medivac-bill-a-national-security-risk-asio-warns/news-story/87f684a1b3d38b2f08797abb3c47dce2 (accessed 4 February 2021). Also see: Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2019.

[18] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 15 November 2019, pp. 54–55.

[19] Australian Federal Police, answers to questions on notice, pp. 10–11 (received 4 December 2019).

> It was deemed that, due to the significant number of people with access to that information and the limited prospects of identifying anyone, we actually wouldn't commence an investigation at all.[20]

5.19 Home Affairs confirmed that its referral identified only one person who had had contact with the journalist:

> This staff member was not a person of interest and their contact with Mr Benson was consistent with their role. There was no evidence that the email contained any information or material associated with the matter referred to the AFP.[21]

5.20 Dr Denis Muller from the Centre for Advancing Journalism at the University of Melbourne questioned whether there had been political influence in the decision not to investigate that unauthorised disclosure:

> Clearly, there was a political decision made at some place about whether that particular leak should be investigated… [I]t is not possible to know whether the decision was made at the government level in the ministerial office…or by the AFP. The particularly important…underlying point…is that it opens the AFP to the appearances of acting politically.[22]

Independent review and additional guidelines

5.21 In the wake of the issue of the Smethurst and ABC search warrants, in October 2019, Mr Kershaw announced an independent review by Mr John Lawler, former Chief Executive Officer of the Australian Crime Commission, of the handling of sensitive investigations (Lawler Review). The review aimed to ensure:

> …all aspects of their conduct (from point of referral through the authorisation and their ongoing management) are as efficient and effective as possible and to determine whether the existing investigative policy and guidelines are fit for purpose.[23]

5.22 Mr Kershaw noted that the review was not to be 'an audit into the current matters at hand but rather a holistic approach to ensure we have in place investigative policy and guidelines that are fit for purpose'.[24]

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[20] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 15 November 2019, p. 54.

[21] Department of Home Affairs, answers to questions on notice, p. 8 (received 13 December 2019). Also see: Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, p. 29.

[22] Dr Denis Muller, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne, *Committee Hansard*, 18 October 2019, pp. 62–63.

[23] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, Legal and Constitutional Affairs, 2019–20 Supplementary Budget Estimates, Opening Statement, tabled 21 October 2019, p. 1.

[24] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, Legal and Constitutional Affairs, 2019–20 Supplementary Budget Estimates, *Estimates Hansard*, 21 October 2019, p. 10.

5.23 In February 2020, Mr Kershaw released Mr Lawler's *Review into the AFP's Response to and Management of Sensitive Investigations*. Mr Kershaw accepted, in principle, all 24 options presented, which include changes to structure and governance, an enhanced escalation model and an enhanced focus on actual and ongoing harm in the assessment of sensitive investigations.[25]

5.24 The AFP advised that 10 options have been implemented, with a further 13 in progress. Mr Kershaw explained that one of the options already implemented is the creation of a 'sensitive investigations oversight board':

> You will not be able to move…to any kind of overt action against a journalist, for example, if it is placed within the sensitive investigation framework, without a deputy commissioner having oversight of that particular overt activity.[26]

5.25 Deputy Commissioner Investigations Mr Ian McCartney added:

> …rather than sitting on one deputy commissioner's desk to make an important decision like this, it now comes before a board, which includes myself, one of our other deputy commissioners, my chief counsel, and at least three or four assistant commissioners to work through these issues. The guiding point for us in relation to these investigations is the ministerial direction.[27]

Ministerial direction

5.26 In order to mitigate concerns raised by the AFP activities in June 2019, in August 2019, the Minister gave a written direction to the Commissioner, as provided for in section 37 of the AFP Act. The AFP is now directed:

> …to take into account the importance of a free and open press in Australia's democratic society and to consider broader public interest implications before undertaking investigative action involving a professional journalist or news media organisation in relation to an

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[25] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 5. Also see: J.A. Lawler AM APM, *Review into the AFP's Response to and Management of Sensitive Investigations*, 17 January 2020, www.afp.gov.au/sites/default/files/PDF/LawlerReview-17022020.pdf; Australian Federal Police, 'Review into the AFP's Response to and Management of Sensitive Investigations Released', *Media release*, 14 February 2020, www.afp.gov.au/news-media/media-releases/review-afp%E2%80%99s-response-and-management-sensitive-investigations-released (both accessed 4 February 2021).

[26] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 10. Also see: Mr Ian McCartney, Deputy Commissioner Investigations, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 14; Australian Federal Police, answers to questions on notice, p. 7 (received 25 September 2020).

[27] Mr Ian McCartney, Deputy Commissioner Investigations, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 10. The sensitive investigations oversight board had been utilised 30 times since its inception in January and covered a range of complex and sensitive matters: p. 11.

> unauthorised disclosure of material made or obtained by a current or former Commonwealth officer.[28]

5.27 The Minister particularly noted that the AFP is expected to:

> …exhaust alternative investigative actions, including in relation to any other persons that may be involved in the matter, prior to considering whether any investigative action involving a professional journalist or news media organisation is necessary.[29]

5.28 The AFP welcomed the ministerial direction, submitting that it would assist in finding 'the appropriate balance between press freedom and other public interest considerations, including national security and human safety'.[30]

5.29 The AFP has also implemented a stronger framework in support of the ministerial direction—that is, an internal *National guideline on investigations of unauthorised disclosure of material made or obtained by a current or former Commonwealth officer*.[31]

5.30 Mr Kershaw said that the new guideline outlines a referral process, including the mandatory inclusion of a harm statement and evaluation of a referral in accordance with three key considerations:

> As part of evaluating the referral the evaluation must also take into account the following three matters: firstly, whether, on balance, the public interest in the importance of a free and open press in Australia's democratic society is outweighed by the public interest in the enforcement of the criminal law by the AFP; secondly, if a criminal investigation were to proceed, the way in which the AFP would seek to proceed with an investigation and the extent to which that investigation would likely involve investigative action involving a professional journalist or news media organisation; and, finally, any defences available to any party that may be subject to the investigation.[32]

5.31 The ANU Law Reform & Social Justice Research Hub questioned why the two objectives of the ministerial direction (paragraph 5.26) could not be included in the search warrant provisions of the Crimes Act: 'This would allow judicial oversight [of] these factors and ensure consistency between the two warrant

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[28] Hon Peter Dutton MP, Minister for Home Affairs, *Ministerial direction*, 8 August 2019, www.afp.gov.au/sites/default/files/PDF/Ministerial-Direction-signed-2019.pdf (accessed 4 February 2021).

[29] Hon Peter Dutton MP, Minister for Home Affairs, *Ministerial direction*, 8 August 2019.

[30] Australian Federal Police, *Submission 40*, p. 8.

[31] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, Legal and Constitutional Affairs, 2019–20 Supplementary Budget Estimates, *Estimates Hansard*, 21 October 2019, p. 5.

[32] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 15 November 2019, pp. 49–50.

processes [the second being the Journalist Information Warrant scheme, see Chapter 6]'.[33]

Departmental and agency response

5.32 The AFP submitted that 'the [Case Categorisation and Prioritisation Model] has been applied to all referrals of alleged unauthorised disclosures of classified information'. This resulted in some allegations not being investigated.[34]

5.33 The Attorney-General's Department (AGD) advised that 'decisions about the commencement of prosecutions, including the choice of charges, are a matter for the [CDPP] and are taken independently of government, in line with the Prosecution Policy of the Commonwealth'.[35]

5.34 The AFP commented similarly but carefully distinguished an investigation from a prosecution, the latter of which is managed by the CDPP, including decisions on whether it would be in the public interest to lay criminal charges:

> The decision to charge, and what to charge is determined by the CDPP in consultation with the AFP based on the available evidence collected (see CDPP – Steps in Prosecution). Appropriate charges are chosen to adequately reflect the nature and extent of the criminal conduct (disclosed by the evidence) and provide the court with an appropriate basis for sentence.[36]

5.35 The AFP advised that it did not contact or notify any government agency prior to commencing the search warrants on 4 June 2019. Further, the Minister was only notified after execution of a search warrant on 4 June (on Ms Smethurst).[37]

5.36 Department of Home Affairs Secretary Mr Michael Pezzullo confirmed that Home Affairs had no prior knowledge that search warrants were about to be executed on Ms Smethurst or the ABC. His department further noted that it did not have any contact with the Minister or his office during execution of the warrant on Ms Smethurst.[38]

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33 ANU Law Reform & Social Justice Research Hub, *Submission 38*, p. 5.

34 Australian Federal Police, *Submission 40*, p. 7

35 Attorney-General's Department, answers to questions on notice, p. 2 (received 5 December 2019).

36 Australian Federal Police, answers to questions on notice, p. 1 (received 4 December 2019). Also see: Commonwealth Director of Public Prosecutions, 'Prosecution Policy', www.cdpp.gov.au/prosecution-process/prosecution-policy (accessed 4 February 2021). Note: for certain offences, the Attorney-General's consent to a prosecution is also required.

37 Australian Federal Police, answers to questions on notice, pp. 4 and 7–8 (received 4 December 2019); Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 15 November 2019, p. 52.

38 Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, p. 35; Department of Home Affairs, answers to questions on notice, p. 15 (received 13 December 2019).

5.37 Mr Pezzullo made the point:

> …the minister has separate ministerial responsibility and oversight of the AFP, unrelated to my reporting to him. The only time that we are conjoined is in that specific matter of section 37 of the Act, which requires the commissioner and I to jointly give advice to the minister on the issuance of ministerial directions.[39]

Committee comment

5.38 Although the Australian Government has attempted to respond to concerns raised following the 'raids' (see Chapters 1 and 3), the committee has reservations about two aspects of its ministerial direction.

5.39 First, as with the Attorney-General's direction (see Chapter 3), the committee considers the Minister's direction an inappropriate interference with the independence of the AFP, which could result in the targeting of journalists' confidential sources (see Chapter 4).

5.40 Secondly, the committee considers that the safeguards contained in the Minister's direction would have considerably more weight if incorporated into Commonwealth legislation, including the search warrant regime set out in the Crimes Act.

5.41 In the committee's view, the objectives outlined in the ministerial direction—the importance of a free and open press, and consideration of broader public interest considerations—are critical and must be considered before the AFP exercises any coercive power in relation to a journalist or media organisation. Once these objectives are enshrined in legislation, the ministerial direction will no longer be required.

Recommendation 13

5.42 The committee recommends that the Australian Government introduce legislation to amend the *Crimes Act 1914*, and other Commonwealth legislation, to reflect the Direction issued on 8 August 2019 under section 37 of the *Australian Federal Police Act 1979* by the Minister for Home Affairs. In particular, the amendments should ensure that, prior to the use of any intrusive or coercive power in relation to a journalist or media organisation, the importance of a free press in Australia's democratic society and broader public interest factors are taken into account.

5.43 Finally, the committee acknowledges the perception that the AFP does not always act with independence. Although examples of perceived departmental and political interference were noted, the committee did not receive sufficient

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[39] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, p. 37.

evidence to substantiate suggestions of a lack of independence in the investigation of those matters.

Chapter 6
Enhanced media warrant regime

Access to journalistic material

6.1 Submitters and witnesses raised concerns regarding the range of investigative powers that are available to law enforcement and intelligence agencies, including their ability to access journalistic material—particularly under the *Telecommunications (Interception and Access) Act 1979* (TIA Act), the *Telecommunications Act 1979* (Telecommunications Act) and the *Crimes Act 1914* (Crimes Act). This chapter explores those concerns, including:

- Journalist Information Warrants (JIWs);
- search warrants issued under the Crimes Act;
- the Australian Government's proposed Notice to Produce framework; and
- enhanced process for media warrants.

Journalist Information Warrants

6.2 The TIA Act requires communications service providers to retain certain information—such as time, date and location of communications passing over their services (metadata)—for a period of two years. Dr Keiran Hardy and Professor George Williams noted that this metadata can be used by law enforcement and intelligence agencies to identify a journalist's contacts.[1]

6.3 Source confidentiality is vital to investigative journalism (see Chapters 2 and 4) but the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has cautioned that journalists are particularly vulnerable to targeted communications surveillance:

> 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.[2]

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1 *Telecommunications (Interception and Access) Act 1979*, ss. 187A, 187AA and 187C; Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 6.

2 Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and* Expression, 23rd sess, UN Doc A/HRC/23/40 (17 April 2013), p. 14, ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/23/40 (accessed 4 February 2021). Also see, for example: Public Interest Journalism Initiative, *Submission 18*, p. 4; Australian Broadcasting Corporation, *Submission 41*, p. 7.

6.4 The TIA Act provides for the 'authorised officer' of an 'enforcement agency' to authorise access to information in certain circumstances (such as enforcement of the criminal law). However, the Act requires that the agency must first obtain a JIW if the purpose of the authorisation is to identify a journalist's or media organisation's confidential source. This requirement also applies when the Australian Security Intelligence Organisation (ASIO) seeks access to information to identify a confidential source.[3]

6.5 A large number of submitters and witnesses argued that the JIW regime is ineffectual. For example, the Human Rights Law Centre (HRLC) submitted that 'in many cases it will be possible for a law enforcement agency to find a journalist's source by directly targeting a source, without needing to first obtain a [JIW]'.[4]

6.6 Some argued that the JIW regime needs stronger safeguards and accountability measures, commencing with the process for issuing a JIW.[5]

Ex parte applications

6.7 An enforcement agency may apply to an 'issuing authority' for a JIW in relation to a particular person. In considering the application, the issuing authority must be satisfied of certain matters, including that the public interest in issuing the warrant outweighs the public interest in protecting source confidentiality (the public interest test). After consideration, the issuing authority must either issue the JIW or refuse to issue the JIW.[6]

6.8 Submitters and witnesses questioned the ability of enforcement agencies to obtain a JIW without the subject of the warrant being present and having the opportunity to make representations about the issue of the warrant.[7] Dr Hardy pointed out that 'journalists need not [even] be notified of the existence of a warrant'.[8]

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3 *Telecommunications (Interception and Access) Act 1979*, Divisions 4 and 4C of Part 4-1 of Chapter 4. Also see: Law Council of Australia, *Submission 10*, pp. 37–38; Human Rights Law Centre, *Submission 12*, pp. 11–13, who argued that access to metadata should be more restricted.

4 Human Rights Law Centre, *Submission 12*, p. 10.

5 Law Council of Australia, *Submission 10*, p. 37. Also see: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 6; Public Interest Journalism Initiative, *Submission 18*, p. 4.

6 *Telecommunications (Interception and Access) Act 1979*, ss. 180Q and 180T. Note: the Director-General of Security may request the Attorney-General to issue a Journalist Information Warrant on behalf of the Australian Security Intelligence Organisation: s. 180J.

7 This is known as an 'ex parte' application, where only one party is present and contrasts with an 'inter partes' application which would involve both parties.

8 Dr Keiran Hardy, personal capacity, *Committee Hansard*, 15 November 2019, p. 9. Also see: Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, p. 2.

6.9 University of Queensland law and media experts submitted that there should be a contestable process for media warrants to ensure procedural fairness, and to better balance the interests of secrecy and press freedom:

> …the person or organisation against whom the warrant is sought should be notified and given the opportunity to contest the application before a judge. Where this is not appropriate, as is usually the case for intelligence agencies, the issuing authority should be assisted by a Media Freedom Advocate.[9]

Expertise of the issuing authority

6.10 An 'issuing authority' is defined in the TIA Act as a judicial officer or a member of the Administrative Appeals Tribunal who is a lawyer of five years' standing, who has been appointed to the role by the Attorney-General.[10]

6.11 Dr Rebecca Ananian-Welsh and her colleagues argued that the independence and integrity of a warrant process relies on the independence and integrity of the issuing authority:

> A warrant with respect to journalists, their sources, or journalistic material should be subject to robust independent oversight and in-built safeguards at the issuing stage and subsequently. All such warrants should be issued by a serving superior court judge when sought by a law enforcement agency. It would be consistent with existing warrant procedures if Media Warrants with respect to ASIO were issued by the Attorney-General on the request of the Director-General of ASIO, though we acknowledge that issuing by a sitting or retired superior court judge would maintain a higher and more desirable level of independence and integrity.[11]

Consideration of the public interest

6.12 Submitters and witnesses referred to the public interest test required to be undertaken by an 'issuing authority'. Dr Margaret Simons from the Public Interest Journalism Initiative (PIJI) argued that this test is meaningless:

> …the public interest test in the [TIA] Act at the moment is nothing of the sort. It does not give sufficient weight to the public interest in material being made public or indeed the more general public interest in the freedom of the press.[12]

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[9] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 13. Also see: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 7; Human Rights Law Centre, *Submission 12*, p. 11; Public Interest Journalism Initiative, *Submission 18*, p. 6.

[10] *Telecommunications (Interception and Access) Act 1979*, s. 6DC.

[11] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, pp. 12–13.

[12] Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 43. Also see: Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 13; *Telecommunications (Interception and Access) Act 1979*, para. 180L(2)(b) (in

6.13 Similarly, Transparency International Australia expressed a view that claims of national security and the integrity of classifications appear to trump the protections provided by the JIW regime and the public interest defence to general secrecy of information offences:

> …each of these protections relies on a public interest test. When government claims of national security and the integrity of classifications is weighed into this balance, it is difficult to see how other interests might provide an effective counterbalance.[13]

6.14 Several submitters and witnesses queried the meaning of 'public interest'. For example, the Law Council noted that the term is not defined for the purposes of the public interest defence to secrecy of information offences in the *Criminal Code 1995*.[14] Ms Lesley Power from the Special Broadcasting Service said that, although the legal concept has been considered in various forums, it does need to be better articulated.[15]

6.15 Professor A.J. Brown agreed that Parliament is not precluded from articulating clear legislative principles to better inform the judicial process:

> We can do a much better job of constructing a consensus set of public interest principles in legislation—hopefully simple—to help inform the courts. But what we should do is recognise that at the end of the day one of the values of an independent judiciary and legal system is to be able to make that judgement call independently… We are really talking about properly arming independent mechanisms to make those calls in the individual cases, informed by simpler, more coherent, consistent, logical principles that I suspect everybody at the end of the day would probably agree on.[16]

Higher thresholds for issue of a JIW

6.16 The Law Council broadly argued that access to individuals' metadata should be permissible only in relation to 'serious criminal activity':

> …access to telecommunications data, including journalists, must be governed by a robust legislative regime to ensure access is only permitted when the public interest in detecting and addressing serious criminal

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relation to the Attorney-General's consideration of requests from the Australian Security Intelligence Organisation) and para. 180T(2)(b).

13 Transparency International Australia, *Submission 26*, p. 4.

14 See: Chapter 3.

15 Law Council of Australia, *Submission 10*, p. 27; Ms Lesley Power, General Counsel, Special Broadcasting Service, *Committee Hansard*, 18 October 2019, p. 13. Also see: Castan Centre for Human Rights Law, Monash University, *Submission 14*, pp. 10–11.

16 Professor A.J. Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 18 October 2019, p. 34.

> activity outweighs the public interest in ensuring Australians can conduct their lives free from unnecessary intrusion of their privacy by the State.[17]

6.17 Dr Hardy and Professor Williams agreed that JIWs allowing access to metadata should only be available in relation to 'serious crimes'. Their submission cited, as an example, cases where a journalist intends to harm national security by publishing security classified information:

> The laws themselves cannot prevent all human error or misuse, but the terms of the legislation need to be drafted in a way to minimise such possibilities. Currently, journalists' metadata can be accessed for a wide range of reasons, beyond prosecuting serious criminal offences, and by any organisation declared to be an enforcement agency. The fact that journalists are not notified of a JIW means that an investigation with little basis could progress substantially and reveal confidential sources, even if the charges are ultimately dropped.[18]

6.18 According to the Department of Home Affairs (Home Affairs), in 2018-2019, six JIWs were issued to the Australian Federal Police (AFP) under which 20 historical data authorisations were made for criminal law enforcement purposes.[19]

6.19 Mr Paul Murphy, Chief Executive of the Media, Entertainment and Arts Alliance (MEAA), said that next-to-nothing is known about these six JIWs: 'We don't know who and we don't know why'.[20]

Public Interest Advocate

6.20 The TIA Act provides for the appointment of Public Interest Advocates (PIAs) to make submissions to an issuing authority on an application for the issue of a JIW (or in the case of ASIO, a request to the Attorney-General for a JIW).[21]

6.21 Some submitters and witnesses argued that PIAs are not able to sufficiently represent the interests of journalists, their sources or the broader public. For example, PIJI submitted:

> The Public Interest Advocate is not necessarily a journalist, nor are they necessarily familiar with journalistic ethics and news production. They are unable to consult with the subject of the warrant and are therefore unable

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[17] Law Council of Australia, *Submission 10*, pp. 36–37, which also noted that another type of warrant—telecommunications service warrants—can issue in relation to 'serious offences' only, however amendments to the *Surveillance Devices Act 2004* lower this threshold to 'relevant offences' for computer access warrants: pp. 41–42.

[18] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 2. Also see: *Telecommunications (Interception and Access) Act 1979*, ss. 180(2).

[19] Department of Home Affairs, *Telecommunications (Interception and Access) Act 1979, Annual Report 2018–2019*, 2019, pp. 5 and 72.

[20] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 1.

[21] *Telecommunications (Interception and Access) Act 1979*, s. 180X.

> to properly assess the harm that could be done by the issuance of the warrant, or the specific public benefit in the warrant being refused and the source remaining confidential. Harm from the granting of the warrant may include harm to the informant or harm to the journalist themselves. Furthermore, harm to the journalist may not be confined to physical harm or potential harassment: it has been recognised that a journalist whose sources are revealed, even against the journalist's will, may suffer significant detriment to their career as an investigative journalist.[22]

6.22 MEAA's Mr Murphy also did not support the PIA scheme on the basis of a lack of transparency and accountability:

> The public interest advocacy scheme is shrouded in so much secrecy. We don't know who they are… We don't know what they do, and the reporting of their activities has been entirely inadequate.[23]

6.23 His colleague, Mr Matthew Chesher, added that no-one will ever know how well PIAs have advocated in favour of the public interest:

> When you go to court…in a conventional manner, one that's not shrouded in alleged public secrecy, you have an advocate and you have a lawyer. In the PIA system, what we are now led to anticipate is someone of senior counsel or equivalent doing their very best to argue for journalists, but…we'll never quite know how persuasive that person may have been.[24]

6.24 One legal expert, Dr Lawrence McNamara, agreed that 'provisions for reporting to Parliament fall a very long way below that which is appropriate in a modern liberal democracy committed to the rule of law'. He argued that it is vital for Parliament to have the necessary information to enable it to hold the executive to account. He cautioned:

> Where the Executive seeks to act in ways that may have adverse effects on public access to information about the actions of the government and its agencies then the Parliament should be particularly vigilant. Accordingly, when there is a risk of such adverse effects upon media access and reporting of information in the public interest then Parliament should set accountability requirements that minimise that risk.[25]

6.25 Dr McNamara submitted that 'the default position should be that information is made public unless the particular circumstances in any given situation require that information be withheld'. He referred to the TIA Act, describing

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[22] Public Interest Journalism Initiative, *Submission 18*, p. 6. Also see, for example: Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 11.

[23] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 3.

[24] Mr Matthew Chesher, Director, Legal and Policy, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 3.

[25] Dr Lawrence McNamara, answer to question on notice, p. 2 (received 2 March 2020). Also see: p. 1; *Telecommunications and Interception Act 1979*, s. 186.

its blanket approach to secrecy as 'extreme' compared to standards and practices in the UK. Consistent with this view, Dr McNamara urged amendments to the reporting requirements for JIWs.[26]

6.26 The Law Council acknowledged that there have been concerns about transparency and accountability in the appointment and activities of PIAs:

> Recent reports have raised concerns about the secretive, covert nature of the way in which the PIA system operates. It has been said that it 'allow[s] the authorities to fly under the radar'.[27]

6.27 The Law Council suggested that there should be annual reporting to the Parliament that includes the:

- number and identity of PIAs;
- number of cases where a PIA contested a journalist warrant;
- number of cases where a PIA attended the hearing of an application for a journalist warrant; and
- number of journalist warrants that were successfully contested by a PIA.[28]

Departmental and agency response

6.28 Home Affairs submitted that the object of the JIW scheme is to protect the relationship between a journalist and their source, not to protect the identity of that source:

> The policy justification underpinning the current journalist information warrant scheme is to protect the relationship of trust between a journalist and their source. The journalist information warrant scheme is not intended to prevent law enforcement from pursuing other means of identifying a suspect who has leaked classified information without accessing a journalist's data.[29]

6.29 The AFP highlighted that there are however some legislative safeguards:

> Powers that involve intrusive collection of information [such as through search warrants] are appropriately governed through legislation. The legislative thresholds, approval processes and safeguards for such powers vary depending on the sensitivity of the information and method of collection. Some of these safeguards are specifically directed towards protecting the public interest in media reporting. For example, police are required to obtain judicial authorisation before obtaining telecommunications data from a carriage service provider for the purpose

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[26] Dr Lawrence McNamara, answer to question on notice, pp. 2–4 (received 2 March 2020).

[27] Law Council of Australia, *Submission 10*, p. 39.

[28] Law Council of Australia, *Submission 10*, p. 8.

[29] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 11. Also see: p. 10.

> of identifying a journalist's source. This legislative process involves mandatory public interest considerations and a Public Interest Advocate.[30]

6.30 AFP Commissioner Mr Reece Kershaw noted that the AFP briefs the PIAs, who, experience has shown, do seek improved or additional information before an application for a JIW can proceed.[31]

6.31 Mr Kershaw acknowledged that PIAs rely upon the material supplied to them by the AFP and defended the veracity of this information:

> Often what you will find—and this is the same with judges or magistrates or those issuing warrants—is that they often will ask questions about paragraph X and, 'Can you please substantiate that? That doesn't reach the threshold.' So often we will get questions and we have to either clarify that or supply additional material. They take an oath. It's important to understand that too. The officers take an oath to say that what they're saying—and they swear—is the truth and nothing but the truth. That's really important as well. It's an offence for an officer to put material before a legal officer, or a judge or magistrate, that is not true.[32]

6.32 Home Affairs and the Attorney-General's Department (AGD) agreed with the AFP that there are general and specific protections for journalists' and media organisations' telecommunications data in the TIA Act:

> The journalist information warrant framework was introduced by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* as an added protection mechanism to raise the threshold for agencies' access to telecommunications data in specific cases in which agencies seek to access a journalist's telecommunications data for the purposes of identifying a source... Journalist information warrants ensure that press freedom is appropriately considered in the investigation process.[33]

6.33 The departments added that, under the JIW regime, the subject of a warrant is not able to contest the issuing of that warrant. Instead:

> The role of the Public Interest Advocate in the journalist information warrant scheme was specifically designed to account for the public interest while ensuring timely review for investigations into serious crimes that impact national security.[34]

6.34 Home Affairs and AGD submitted that the number and identity of PIAs is a matter of public knowledge. Further, there are reporting mechanisms in place

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30 Australian Federal Police, *Submission 40*, p. 4. Also see: Department of Home Affairs and Attorney-General's Department, *Submission 42*, pp. 9, 12 and 17.

31 Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 11.

32 Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 11. Also see: p. 18 where he argued that there are currently *post facto* avenues to contest the issue of a search warrant.

33 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 9.

34 Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 10.

for both ASIO and other agencies. The departments urged careful consideration of further transparency measures—such as statistical reporting on PIAs' submissions.[35]

6.35 Home Affairs and AGD also did not support extending the JIW scheme to cover confidential sources' telecommunications data. They submitted that legislative protections for sources are contained in other legislation:

> …other Commonwealth legislation contains protections for whistle-blowers who seek to make disclosures which are genuinely in the public interest. External disclosures are subject to different processes. The legislative frameworks that impact upon whistle-blowers and the media remain under review to ensure that they continue to strike the right balance, and that they are reasonable, effective and fit for purpose.[36]

Covert data surveillance

6.36 The Telecommunications Act provides for a series of 'industry assistance measures',[37] which enable ASIO, the Australian Secret Intelligence Service, the Australian Signals Directorate or an 'interception agency' to give a technical assistance request, technical assistance notice or technical capability notice to a designated communications provider, to access and decrypt encrypted data.

6.37 Some submitters and witnesses expressed concern about the breadth of the industry assistance measures, which they argued are intrusive covert powers. For example, the Law Council submitted:

> Law enforcement and intelligence agencies have been granted unprecedented powers to exercise intrusive covert powers, accessing messages sent over encrypted messaging software and intercepting communications.
>
> Secrecy provisions formed part of these reforms, permitting those issued with notices to disclose information about the existence of such a notice or request in a very limited number of circumstances.[38]

6.38 The HRLC highlighted that the scope of the industry assistance measures extends to any warrant or authorisation granted under Australian law:

> The way this works in practice is unclear and overly complex but we think that despite the attempted safeguards it could nonetheless allow

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[35] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 17. Also see: Department of Home Affairs, *Telecommunications (Interception and Access) Act 1979—Annual Report 2018-19*, 2019, p. 5.

[36] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 11. Also see: Chapter 4.

[37] *Telecommunications Act 1997*, Part 15. Note: these amendments were inserted by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, referred to in some submissions and evidence.

[38] Law Council of Australia, *Submission 10*, p. 25.

> warrantless access to information that would otherwise require a warrant, such as a journalist's metadata.[39]

6.39 The Journalism Education and Research Association of Australia agreed that the Telecommunications Act:

> …appears to allow the AFP (and others) to bypass all the other restrictions on their investigation into journalists' metadata etc., and force tech companies to allow law enforcement agencies to view the data, even if it is encrypted.[40]

6.40 The Australian Lawyers Alliance argued that industry assistance measures should be permissible in limited circumstances only, for example, when required to address immediate danger to a person's safety, and where there is no other way to obtain data.[41]

6.41 Dr Ananian-Welsh and colleagues placed the industry assistance measures in the following context:

> Under present laws there is every chance that journalists investigating national security matters, serious crimes, or who interact with government sources who have access to classified information (and who therefore may be subject to an investigation under federal espionage or foreign interference laws), may be subject to surveillance, and may be targeted under the [Telecommunications Act]. Indeed, journalists engaged in this kind of reporting may be subject to: general metadata access, targeted metadata access to identify their sources under a JIW, orders under the [Telecommunications Act] to cause weaknesses to be built into their attempts to encrypt or protect their data, and warrant-based access to their (now decrypted) communications. All of this could take place without the journalist or their employer ever knowing, or the interests of the journalist or the media industry being represented to decision-makers at any stage. In this context of widespread covert data surveillance, slim protections for journalistic confidentiality, far-reaching government powers and an absence of public information or effective oversight, journalists are not in a position to protect source confidentiality.[42]

6.42 Legal expert Dr Julie Posetti said that the digital environment has created significant new risks that undermine more traditional protections and increases the need for parallel whistleblower rights, effective legal protections, and recognition that encryption is a human right:

> The UN special rapporteur Professor David Kaye wrote in a report to the [United Nations] a couple of years ago that those techniques and tools that

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[39] Human Rights Law Centre, *Submission 12*, p. 14.

[40] Journalism Education and Research Association of Australia, *Submission 21*, p. 7. Also see, for example: GetUp, *Submission 36*, p. 2.

[41] Australian Lawyers Alliance, *Submission 5*, p. 8.

[42] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 21. Also see: Australian Lawyers Alliance, *Submission 5*, p. 7.

> journalists rely on to try to increase the security of their information and their sources need to be respected. I think that gives you an idea of the biggest area of risk that's in this digital environment. It's also in parallel with the national security overreach that we're seeing in a post-9/11 environment where understandably there is a desire to balance public safety and security against human rights like freedom of expression, but we're increasingly seeing that overriding right of freedom of expression being undermined because we are not seeing necessary and proportionate reactions to the problems of public security. In other words, we're seeing an overreach become the norm.[43]

Search warrants

6.43 A number of submitters and witnesses focussed on the AFP's investigatory power to obtain search warrants that enable the agency to access journalistic material.[44]

6.44 The *Crimes Act 1914* (Crimes Act) provides that an 'issuing officer' may issue a warrant to search premises if satisfied, by information on oath or affirmation, that there are reasonable grounds to suspect that there is, or there will be within the next 72 hours, any 'evidential material' at the premises.[45]

6.45 The Crimes Act also provides for the things that are authorised by a search warrant. For instance, the 'executing officer' or 'constable assisting' may use a computer or data storage device found during a search to access data to determine whether it is evidential material of the kind specified in the warrant.[46]

6.46 Submitters and witnesses raised concerns that the search warrant regime does not provide adequate safeguards for the media.[47] Two key concerns were identified: the process by which a warrant is issued; and legislative inconsistencies.

Process for issue of search warrants

6.47 Some submitters and witnesses highlighted the ability of the AFP to obtain search warrants where a journalist or subject of the search warrant is not present to contest the warrant. The Castan Centre for Human Rights Law at Monash University (Castan Centre) submitted that search warrants enable the identification of confidential sources without journalists having an opportunity to protect their sources:

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43 Dr Julie Posetti, personal capacity, *Committee Hansard*, 10 February 2020, p. 25.

44 *Crimes Act 1914*, s. 3E.

45 *Crimes Act 1914*, ss. 3E(1).

46 *Crimes Act 1914*, ss. 3F(2A). If necessary, the executing officer or constable assisting can add, copy, delete or alter other data in the computer or device to access the data and determine whether it is covered by the warrant.

47 See, for example: Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 11.

> The nature of the application for search warrants as *ex parte* means that the issue of a warrant is only contestable through a judicial review challenge ex post facto. This is particularly problematic when the search is conducted on members of the press. The search may reveal confidential sources and establishing the source of a leak may often be the purpose of the search… If the confidentiality of a source is revealed during the execution of a search warrant, the damage is already done.[48]

6.48 More broadly, the Law Council argued that the invasion of an individual's privacy merits greater oversight of the issuing process:

> The importance of the 'up front' review process for a warrant request should not be understated and is an essential step in determining whether the proposed intrusion of privacy is lawful, necessary and appropriate… There is a need for greater oversight in this regard, especially independent scrutiny of the sufficiency and proprietary nature of the information provided to support search warrants relating to journalists and media organisations.[49]

6.49 Similarly, the Association for International Broadcasting (AIB) queried the statutory threshold for the issuing of a search warrant:

> …there is no public interest test – this means the public interest is not articulated as a relevant consideration at any stage in the warrant issuing process. It follows that the issuing authority is not assisted by submissions or arguments concerning the public interest in press freedom.[50]

6.50 The Law Council agreed that there should be a public interest requirement with the application heard by a judge of a superior court of record. President Mr Arthur Moses said:

> …search warrants must be issued by judges of a superior court of record, not registrars of a local court. When considering whether to issue a search warrant, judicial officers should apply a statutory public interest test similar to the test that already exists when seeking information warrants or access to journalists' metadata. There should be no reason why there should be a different approach to search warrants as opposed to access to journalists' metadata. Also, creating a public interest advocate or monitor role during this process to act as the contradictor would provide greater transparency and scrutiny of search warrants relating to journalists.[51]

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[48] Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 11. Also see, for example: Association for International Broadcasting, *Submission 43*, p. 16.

[49] Law Council of Australia, *Submission 10*, p. 34.

[50] Association for International Broadcasting, *Submission 43*, pp. 16–17.

[51] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, pp. 1–2.

6.51 In its submission, the Law Council stated that these requirements:

> …would be unlikely to hinder the efficacy of an investigation and serve to strike the appropriate balance between the proper exercise of law enforcement powers and a strong and free press.[52]

Legislative inconsistencies

6.52 Some submitters highlighted legislative inconsistencies between the Crimes Act or the TIA Act and other legislation. For example, the Castan Centre and AIB argued that the search warrant regime contradicts legislative protections for confidential sources (such as in the *Evidence Act 1995* (Evidence Act) and the TIA Act): 'no specific safeguards exist in respect of search warrants against journalists and media organisations'.[53]

6.53 The ANU Law Reform & Social Justice Research Hub questioned whether the inconsistency between the Crimes Act and the TIA Act renders the JIW protections redundant, with agencies able to choose the less protected option available under the Crimes Act.[54]

6.54 The HRLC noted that the TIA Act is also inconsistent with the Telecommunications Act, as amended by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act):

> …the [JIW] regime does not work. The process for obtaining a warrant is itself inadequate: it is conducted in secret, without the journalist or their media organisation knowing or having a chance to contest the warrant. In many cases it will be possible for a law enforcement agency to find a journalist's source by directly targeting a source, without needing to first obtain a warrant.
>
> Further, to a large extent…the TOLA [Act] makes the JIW redundant. Although the TOLA [Act] purports to provide safeguards that uphold the [JIW] regime, deficiencies in the TOLA [Act] in fact undermine [JIWs].
>
> …
>
> The TOLA [Act] sets up a system of notices by which law enforcement and security agencies can request and require designated communications providers to assist in investigations. The extremely broad powers given to agencies under the TOLA [Act] include breaking encryption. In light of these extraordinary powers, the TOLA [Act] does not contain the kinds of

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[52] Law Council of Australia, *Submission 10*, p. 34. Also see: Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 12, which argued that a judge determining the applications could be assisted by a statutory 'list' of public interest factors.

[53] Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 11. Also see: Association for International Broadcasting, *Submission 43*, p. 16. Also see: Chapter 4.

[54] ANU Law Reform & Social Justice Research Hub, *Submission 38*, pp. 4–5. Also see: Chapter 5.

safeguards and oversight mechanisms that would ensure that the powers are not misused.[55]

Police and Criminal Evidence Act 1984 (UK)

6.55 Several submitters and witnesses described search warrant processes for journalists and media organisations internationally, particularly the United Kingdom's Police and Criminal Evidence Act 1984 (UK) (PACE). This Act provides for a Justice of the Peace to issue a warrant authorising a constable to enter and search premises. However, some types of material—such as 'journalistic material'—cannot be searched and seized under warrant.[56]

6.56 Instead, there are separate processes for obtaining non-confidential journalistic material ('special procedure material') under a production order, or confidential journalistic material ('excluded material') under very limited circumstances described below.[57]

6.57 For special procedure material, a 'Judge' may make an order ('production order') requiring the occupier of premises to produce material specified in the order within seven days. If an order is not practicable, the Judge may issue a warrant authorising a constable to enter and search premises.[58]

6.58 An application for a production order must be served on the person who would be the subject of the order, which is then heard *inter partes*.[59]

6.59 'Excluded material' cannot be the subject of a production order, unless the material would have been available under legislation enacted prior to 1984 (such as the Official Secrets Act 1911 (UK)).[60]

PACE safeguards

6.60 The AIB submitted that a critical feature of the UK legislation is its recognition that 'journalistic material is different to other forms of material, and should attract additional safeguards'.[61]

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55 Human Rights Law Centre, *Submission 12*, pp. 10–11 and 13. Also see: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 6; Public Interest Journalism Initiative, *Submission 18*, p. 4.

56 Police and Criminal Evidence Act 1984 (UK), s. 8, www.legislation.gov.uk/ukpga/1984/60/contents (accessed 4 February 2021).

57 Police and Criminal Evidence Act 1984 (UK), Schedule 1. 'Special procedure material' is defined in section 14 of the Act and 'excluded material' is defined in section 11 of the Act.

58 Police and Criminal Evidence Act 1984 (UK), Schedule 1, paras. 2, 4, 12 and 14.

59 Police and Criminal Evidence Act 1984 (UK), s. 13 and Schedule 1, para. 8.

60 Police and Criminal Evidence Act 1984 (UK), ss. 9(2) and Schedule 1, sub-para. 3(b). Also see: Official Secrets Act 1911, s. 9, www.legislation.gov.uk/ukpga/Geo5/1-2/28/contents (accessed 4 February 2021).

61 Association for International Broadcasting, *Submission 43*, pp. 22–23.

6.61 In particular, AIB identified the requirement for production orders for 'journalistic material' to be heard *inter partes* as an essential safeguard:

> …the principle under PACE is clear and should plainly also apply in Australia: *ex parte* hearings to obtain production orders in relation to journalistic material are not appropriate and at such hearings the court should not have regard to evidence adduced by the applicant police force or law enforcement body which has not been disclosed to the respondent.[62]

6.62 Some submitters and witnesses suggested that Australia should implement safeguards similar to those provided for in PACE. For example, legal expert Ms Caoilfhionn Gallagher said that the Crimes Act has no specific safeguards for journalists and media organisations. She argued that this lack of protection, as well as the absence of a public interest test in the search warrant regime, creates a unique and low threshold for the issuing of a warrant:

> …the threshold for enforcement agencies to acquire warrants in Australia under the current system is extremely low, and it is an outlier internationally in terms of the threshold. Under the Crimes Act there are no specific safeguards whatsoever for journalists and media organisations, and there's no public interest test. So there's no process whereby the public interest is articulated as a relevant consideration at any stage in the warrant-issuing process… The counter-arguments that have been made…seem to suggest that the public interest is all one way and the public interest all relates to keeping Australians safe—that's the phrase that's quite often used—and to law enforcement. There isn't a recognition of the fundamental public interest in investigative journalism or the fundamental public interest in the public's right to know.[63]

6.63 Ms Gallagher acknowledged that PACE has some shortcomings but maintained that it is a far better mechanism than that currently operating in Australia:

> My preference would be to craft a new provision which is suitable for an Australian context rather than just import that provision, which is now a number of decades old.[64]

6.64 Dr Ananian-Welsh and the University of Queensland experts agreed that UK warrant processes are 'specifically designed to protect press freedom from

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[62] Association for International Broadcasting, *Submission 43*, p. 23. The submission also identified the requirement for production orders to be issued by a senior judicial officer as a key safeguard.

[63] Ms Caoilfhionn Gallagher QC, personal capacity, *Committee Hansard*, 15 November 2019, p. 61. Also see, for example: Castan Centre for Human Rights Law, Monash University, *Submission 14*, pp. 11–12; Australian Broadcasting Corporation, *Submission 41*, p. 4; Dr Lawrence McNamara, personal capacity, *Committee Hansard*, 10 February 2020, p. 21.

[64] Ms Caoilfhinn Gallagher QC, personal capacity, *Committee Hansard*, 15 November 2019, p. 60.

incursion and should inform the adoption of similar processes across Australian law enforcement and intelligence powers'.[65]

Departmental response

6.65 Home Affairs and the AGD submitted that oversight by the issuing party is a legislative safeguard in the search warrant process.[66] Mr Michael Pezzullo, Secretary of Home Affairs, added that the same sort of factors will be considered by any issuing party in determining whether to grant an application:

> …whatever authorising authority—a magistrate, a judge, a registrar—will have to take into account similar sorts of factors: what's the public interest involved, insofar as has the officer before me set out the elements of the possible offence that has been a committed; whether they have a reasonable suspicion that the person against whom the warrant will be served was associated with those offences; and whether it's the common law tradition of the four of the Five Eyes countries or the American system.[67]

6.66 Home Affairs and the AGD resisted calls to introduce senior judicial oversight of the issuing of warrants, including search warrants for journalists and media organisations. The departments argued that such a proposal would exacerbate current operational difficulties, where the AFP already has trouble with the availability of magistrates:

> The Australian Federal Police has indicated that it currently encounters operational difficulties with the availability of magistrates. For example, in some jurisdictions where there are no on-call magistrates it can be difficult to have applications heard outside of…court hours. If amendments were introduced to increase judicial oversight of the…warrant schemes [including search warrants issued under the Crimes Act], by requiring such warrants to be issued by a Judge in all circumstances, the Australian Federal Police anticipates that these operational difficulties will increase.[68]

6.67 In relation to PACE, Home Affairs and the AGD pointed out that the UK legislation still enables 'journalistic material' to be accessed under search warrants provided for in alternative legislation. For example:

> …a search warrant may be used to obtain confidential and non-confidential journalistic material in circumstances whereby a Government official has provided national security information or

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[65] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 10.

[66] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 17.

[67] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, pp. 31–32. Also see: Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 12; Chapter 5.

[68] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 12.

> classified material to a journalist or media organisation, if the Government official's conduct constitutes an offence under the *Official Secrets Act*.[69]

6.68 Home Affairs and the AGD noted a review by the UK Law Commission (Law Commission) of search warrant laws, which the Law Commission has described as outdated, overly complex and inconsistent. The departments submitted:

> Caution should be exercised in using the United Kingdom's laws as a benchmark or model upon which to base potential reforms to Australia's search warrant schemes until the outcomes of that review are known.[70]

6.69 Home Affairs, the AGD and the AFP added that a contested search warrant process could undermine the investigation of serious criminal offences:

> Implementing a mandatory procedure by which the issuing of a search warrant can be contested before it is exercised has the potential to undermine the efficacy of such a warrant, and the ability of law enforcement or intelligence agencies to effectively investigate criminal activities… It is critical that law enforcement and intelligence agencies can continue to exercise their powers, including through the execution of search warrants, to support investigations into leaks of classified material, which have the potential to cause grave damage to Australia's national interest, organisations or individuals.[71]

6.70 The committee notes that the Law Commission has now completed its review and made 64 recommendations, including to reform the treatment of 'special procedure material' and 'excluded material':

> …confidential journalistic material should remain obtainable under PACE in very limited circumstances. We…recommend that the Government considers whether the law governing access to confidential journalistic material under PACE strikes the right balance between the competing interests at play, and whether the law ought to be reformed… Greater clarity is needed to identify when material constitutes special procedure material…. We recommend that…PACE is revised to provide guidance on when material constitutes special procedure material. [72]

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[69] Department of Home Affairs and Attorney-General's Department, *Submission 42*, Attachment A, p. 21. Also see: Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 15 November 2019, p. 31.

[70] Department of Home Affairs and Attorney-General's Department, *Submission 42*, Attachment A, p. 20. Also see: Law Commission, 'Search warrants reform to help law enforcement investigate crime', 7 October 2020 hwww.lawcom.gov.uk/search-warrants-reform-to-help-law-enforcement-investigate-crime/ (accessed 4 February 2021).

[71] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 16. Also see: Australian Federal Police, *Submission 40*, p. 5.

[72] Law Commission, *Search warrants, Summary of final report*, HC 852, pp. 11–12. Also see: Law Commission, 'Search warrants reform to help law enforcement investigate crime', 7 October 2020. Note: as at the date of writing, the UK Government is yet to respond to the Law Commission.

Notice to Produce framework

6.71 In February 2020, Home Affairs and the AFP suggested to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) that, rather than a contested search warrant process, the Crimes Act could be amended to introduce an additional information gathering power—that is, a Notice to Produce framework.[73]

6.72 According to the department and agency, this additional power would be mutually beneficial:

> Such a framework could offer the opportunity for a media organisation to consider and raise concerns about the production of certain material before it is provided to police. It would be a less intrusive and more collaborative method of evidence collection, while ensuring that law enforcement agencies remain able to obtain a full picture of the facts and make informed decisions about criminal investigations.[74]

6.73 Home Affairs and the AFP noted that other Australian jurisdictions already have Notice to Produce frameworks, and, at the Commonwealth level, there is a limited Notice to Produce power in section 3ZQO of the Crimes Act.[75]

6.74 If introduced, law enforcement agencies would have the option of applying for either a Notice to Produce or a search warrant. Mr Kershaw indicated that, for search warrants involving journalists and media organisations, the former would be the AFP's preferred option, given the existence of collaborative relationships between the police and the media. However, the option of obtaining a search warrant would be available for when prior notification of a warrant would not be appropriate:

> …for example, where there is reason to believe material may be destroyed or concealed, where there is an allegation of serious criminal wrongdoing by an employee, or where there are urgent operational circumstances.[76]

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[73] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', Department of Home Affairs and the Attorney-General's Department, *Supplementary Submission 32.10*, p. 4, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Submissions (accessed 4 February 2021). Note: this document was subsequently provided to the committee as *Submission 48* and is referred to as such for the remainder of this chapter.

[74] Department of Home Affairs and Australian Federal Police, *Submission 48*, Attachment 1, p. 4, which also noted that this approach would be consistent with recent government and agency actions to improve the exercise of information gathering powers in relation to the media.

[75] Department of Home Affairs and Australian Federal Police, *Submission 48*, Attachment 1, p. 5. Note: the cited provision enables the Australian Federal Police to apply to a Judge of the Federal Court of Australia for a Notice to Produce certain documentation (bank account information, travel movement records, etc.) to assist in the investigation of a serious offence.

[76] Department of Home Affairs and Australian Federal Police, *Submission 48*, Attachment 1, p. 5. Also see: Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 19.

6.75 Mr Kershaw indicated that the AFP has a high level of trust in professional media not to destroy evidence or impede a criminal investigation, which was one factor in the making the Notice to Produce proposal.[77]

6.76 Mr Pezzullo said that a contested search warrants process would negatively impact the AFP's 'operational workings'. He urged consideration of alternative models—such as an expanded PIA scheme as favoured by the PJCIS.[78]

6.77 Both Mr Pezzullo and Mr Kershaw considered that there might be scope for a combination of alternative models. However, they did not propose any particular combination, with Mr Pezzullo emphasising: 'you always get back to what is the best model, based on first principles'.[79]

6.78 Mr Pezzullo added that, in his view, 'a Notice to Produce certainly should be in the mix' but ultimately, it will be a decision for government and:

> I don't think that the Commonwealth's position in relation to the disfavour with which it views contested warrants will much change.[80]

Response from media stakeholders

6.79 Media stakeholders did not support the Notice to Produce proposal. Mr Gaven Morris from the Australian Broadcasting Corporation, representing Australia's Right to Know (ARTK), said that the Notice to Produce proposal offers 'little comfort' and that safeguards should instead be included in statutory provisions:

> …the media can contest a notice to produce, but that offers us little comfort as we expect the AFP at its discretion would still take the easier path of obtaining a search warrant, if they thought it would be more successful as a path for it. A year ago, the home affairs minister directed the AFP to take account of the importance of press freedom to society before investigating journalists. If the value of press freedom is important enough for a ministerial direction, then it's important enough to be enshrined in the law—in search warrant laws and in other various laws that can effectively make journalism a crime.[81]

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[77] Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, p. 16.

[78] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 31 August 2020, p. 17. Also see: Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 2.

[79] Mr Michael Pezzullo, Secretary, Department of Home Affairs and Mr Reece Kershaw APM, Commissioner, Australian Federal Police, *Committee Hansard*, 31 August 2020, pp. 8–9 and 17.

[80] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 31 August 2020, p. 17.

[81] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 2.

6.80 ARTK also questioned the proposal on the basis that it would enable 'an unprecedented violation of the right against self-incrimination'. It highlighted a decision in the High Court of Australia that upheld the privilege against self-incrimination, which ARTK submitted would be abrogated or violated by the proposal. ARTK concluded:

> …the proposal could not, credibly, secure a favourable assessment of its compatibility with human rights upon legislation being introduced into Parliament. Nor is it clear that such legislation would survive constitutional challenge.[82]

6.81 News Corp Australia representative Ms Georgia-Kate Schubert added that 'if we were compelled to provide evidence under a so-called voluntary scheme, we may well be self-incriminating under a whole range of provisions in law'.[83]

6.82 Mr Murphy from MEAA added that if would be unethical for journalists and media organisations to comply with a Notice to Produce if it required the surrender of information about confidential sources. He added that, fundamentally, the suggesting of the Notice to Produce proposal indicates that 'law enforcement agencies don't have serious concerns about the prospect of the destruction of evidence' or they would never have made the proposal.[84]

6.83 The committee notes that the Notice to Produce proposal is at an embryonic stage, with its proponents acknowledging that further consideration would be required.[85]

Enhanced process for media warrants

6.84 Throughout the inquiry, submitters and witnesses argued that the execution of search warrants on Ms Annika Smethurst and the Australian Broadcasting Corporation (see Chapter 1) demonstrates that law enforcement and intelligence agencies have the ability to improperly access journalistic material.

Calls for reform of the media warrants process

6.85 As indicated earlier in this chapter, several contributors argued that the search warrants process, as it relates to journalists and media organisations, is in fundamental discord with the common law. The AIB, for example, submitted:

> The concept of fairness lies at the heart of the judicial function. Certain fundamental features of any adversarial procedure which may result in an order which will affect and bind another have been developed and

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82 Australia's Right to Know, *Supplementary Submission 34*, p. 114. Also see: pp. 112–113; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

83 Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 6.

84 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 3.

85 Department of Home Affairs and Australian Federal Police, *Submission 48*, Attachment 1, p. 5.

> maintained over the centuries. They include the right to know and effectively challenge the opposing case before any adverse order is made or judicial decision reached, and the right to a fully reasoned decision. These basic, fundamental features have been developed and maintained at common law in order to secure basic rights of fairness, open justice and equality of arms, and to maintain confidence in the integrity of the judicial system.[86]

6.86 ARTK strenuously maintained that the media should have a right to contest applications for the issue of all warrants and compulsory document production powers. Key features of its proposal included:

- warrant applications must be made to an independent third party, with experience weighing evidence at a senior judicial level (Supreme Court, Federal Court or High Court);
- the journalist or media organisation must be notified of the application;
- the journalist or media organisation must be represented at a hearing and able to present the case for the public's right to know (including the value in source confidentiality and media freedom);
- a warrant can only be authorised if the public interest in accessing metadata and/or the content of a communication outweighs the public interest in not granting access; and
- a presumption against allowing access to confidential source material.[87]

6.87 The Law Council supported ARTK's proposal, which President Mr Arthur Moses described as neither 'unprecedented' nor 'remarkable'. He noted that the JIW regime already incorporates a type of contested process:

> The party who is the subject of the warrant is not notified about the existence of [a JIW] application. That's not remarkable, because there may be apprehension of destruction of material, but the public interest advocate is notified about the application and is given the opportunity to make public interest submissions—in effect, acting as a contradictor.[88]

6.88 Mr Moses supported the introduction of a similar process for all media search warrants:

> What we think could work is that type of a model in the context of search warrants… We recommend that the determination of warrants authorising investigative action of journalists or media organisations, either as the suspect of an offence or as a third party in possession of information relevant to an investigation, would be improved through a three-step approach, which is, firstly, the introduction of a legislative public interest

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[86] Association for International Broadcasting, *Submission 43*, p. 25. Also see, for example: Australian Press Council, *Submission 35*, p. 3.

[87] Australia's Right to Know, *Submission 34*, p. 4.

[88] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, pp. 2–3. Also see: Law Council of Australia, answer to question on notice, pp. 1–3 (received 3 December 2019); Dr Keiran Hardy, private capacity, *Committee Hansard*, 15 November 2019, p. 11.

> test similar to that which occurs under the test provided for in section 180T of the Telecommunications (Interception and Access) Act [the issuing of JIWs to enforcement agencies]; secondly, the requirement that an issuing officer is a judge of a superior court of record rather than that currently provided in section 3C of the Crimes Act [including a magistrate or a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue warrants]; and, thirdly, the adoption of the public interest advocate or public interest monitor regime that includes appropriate transparency and accountability mechanisms, including publication to the Senate as to on how many occasions these applications have been made and the involvement of the public interest advocate or public interest monitor. We support that approach and we think it can be modelled on what we currently have, because a search warrant could just as easily disclose a source as accessing metadata in respect of the journalist's telecommunications.[89]

6.89 Dr Rebecca Ananian-Welsh and her colleagues submitted that an enhanced media warrant process should apply to all warrants sought by law enforcement and intelligence agencies that:

- aim to identify a journalist's confidential source,
- relate to the investigation of conduct undertaken in the course of the practice of journalism, or
- pertain to journalistic material.[90]

6.90 Their submission emphasised that the outcome of an enhanced media warrant process would be a warrant issued by a superior court judge in contested proceedings where a public interest test, including the public interest in press freedom, is expressly considered.[91]

6.91 Dr McNamara and the University of Queensland experts rejected the view that contested processes would undermine and prejudice national security, arguing that that there is no evidence to support such claims.[92]

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[89] Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, 15 November 2019, pp. 2–3. Also see: Law Council of Australia, answer to question on notice, pp. 1–3 (received 3 December 2019).

[90] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 12. Also see: Public Interest Journalism Initiative, *Submission 18*, p. 8.

[91] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 12.

[92] Dr Lawrence McNamara, *Submission 47*, p. 2; Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 12. Also see: Australia's Right to Know, *Submission 34*, p. 4, which did not consider the destruction of evidence an insurmountable concern; Ms Connie Carnabuci, General Counsel, Australian Broadcasting Service, *Committee Hansard*, 18 October 2019, p. 13; Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 14; Chapter 2.

6.92 Similarly, Ms Gallagher did not accept that criminal investigations would be compromised:

> …there is no evidence whatsoever to suggest that having contested warrants under the PACE scheme in England and Wales undermines law enforcement… It's been in place since the early 1980s without those concerns being realised. Australia's stance on this issue is in contrast to other Western democracies, and in none of those countries which have a contested warrant scheme have those concerns been realised.[93]

Committee comment

6.93 The committee heard numerous concerns about law enforcement and intelligence agencies' ability to access journalists' and media organisations' telecommunications data and journalistic material.

6.94 Although there are some statutory protections which partially limit agencies' access, the committee recognises that there are varying degrees of protection across different regimes. This variation can result in agencies' accessing information under one scheme that would not be allowed under another scheme. In addition, the variation means that the public interest in press freedom is not necessarily considered when warrants are issued in relation to journalists and media organisations.

6.95 In the committee's view, the public interest in press freedom should be an express consideration for the issue of a warrant when law enforcement and intelligence agencies apply for warrants concerning journalists and media organisations.

6.96 Further, the committee considers that there are strong and justifiable reasons to provide partial safeguards to journalists and media organisations when warrants are issued: warrants are an exercise of coercive power with meaningful consequences for those on whom warrants are served, and warrants can enable the circumvention or diminution of other protections enacted by the Parliament (such as in the Evidence Act, see Chapter 4), including for the protection of recognised human rights.

6.97 The committee also heard concerns that law enforcement and intelligence agencies can apply for warrants without journalists or media organisations being notified or entitled to make representations about the application.

6.98 Some committee members consider that the public interest in press freedom, and the public's right to know, can be properly considered during the warrant application process through the utilisation of the PIA mechanism without the direct involvement of the media.

6.99 Other members of the committee consider that journalists and media organisations should be afforded the opportunity to contest warrant

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[93] Ms Caoilfhionn Gallagher QC, personal capacity, *Committee Hansard*, 15 November 2019, p. 61.

applications as there are concerns about whether the PIA mechanism can adequately represent the public interest in press freedom.

6.100 The committee recognises that these two positions might be reconciled with improvements to the PIA mechanism, including: mandatory consideration of the public interest in press freedom; requiring independent and senior PIAs and decision-makers in warrant application processes; additional reporting and accountability by PIAs; and a timely review of the operation of the extended PIA mechanism.

6.101 The committee heard that, due to the coercive nature of warrants and the absence of journalists and media organisations during warrant application processes, PIAs and decision-makers must be wholly independent and possess considerable knowledge and experience in order to safeguard the public interest in press freedom and to preserve the integrity of the process.

6.102 The committee considers that the appointment of senior legal practitioners or former senior judicial officers as PIAs and the determination of warrant applications by senior judicial officers will satisfy the requirements for impartiality, knowledge and experience.

6.103 In addition to qualifications, the committee acknowledges concerns that there is insufficient transparency and accountability in the PIA mechanism. In the committee's view, PIAs with statutory responsibilities should be required to report annually to the Parliament on the exercise of their functions, albeit at a high level in order to properly manage the public release of sensitive information that would genuinely prejudice national security.

6.104 The committee notes that all the matters outlined above are comprehensively covered in the PJCIS Recommendations 2–5, which the Australian Government has accepted. In relation to Recommendation 2, the committee further notes that the PJCIS has stipulated a requirement for PIAs to address the public interest in source confidentiality and the public's right to know (see Chapter 4).

Recommendation 14

6.105 The committee recommends that the Australian Government urgently introduce legislation to implement Recommendation 2 (contested warrants) and Recommendations 3 to 5 of the Parliamentary Joint Committee on Intelligence and Security's report into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

6.106 Although not recommended by the PJCIS, the committee suggests that the operation of the extended PIA mechanism should be subject to a timely review.

Recommendation 15

6.107 The committee recommends that the Australian Government, in developing legislation to implement Recommendation 2 of the Parliamentary Joint Committee on Intelligence and Security's report into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, provide for a review of the operation of the new arrangements.

Chapter 7
Press freedom

7.1 This inquiry has examined the complex relationship between law enforcement and national security on the one hand, and the right to a free press and Australians' right to know on the other. The remainder of this report sets out proposed arrangements to strengthen press freedom in Australia.

Press freedom in international law

7.2 In 1980 Australia ratified the *International Covenant on Civil and Political Rights* (ICCPR). As noted in Chapter 2, this treaty protects the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds through any form of media (Article 19(2)).[1]

7.3 The right to freedom of expression is not however absolute and may be subject to certain restrictions as set out in Article 19(3):

> …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.[2]

7.4 The United Nations Human Rights Committee (UNHRC) describes the right to freedom of expression as:

> …the foundation stone for every free and democratic society … a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.[3]

7.5 The UNHRC then comments that laws restricting the right to freedom of expression must comply with the strict requirements of Article 19(3), and must be compatible with the provisions, aims and objectives of the ICCPR.[4]

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1 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed 4 February 2021).

2 *International Covenant on Civil and Political Rights*, art. 19(3).

3 United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), paras. 2–3, www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf (accessed 4 February 2021).

4 United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para. 26.

7.6 Specifically in relation to national security laws, the UNHRC cautions:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [the restraint criteria]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.[5]

7.7 This chapter discusses the right to freedom of expression in Australia and how related legislative protections affect journalists and media organisations. The specific topics covered in this chapter are:

- proportionality and 'national security';
- national human rights framework; and
- stronger protections for press freedom.

Proportionality

7.8 The UNHRC comments that restrictions on the right to freedom of expression cannot be overly broad and must conform to the principle of proportionality:

> Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[6]

7.9 Several submitters and witnesses recognised that Australia's national security law must satisfy the strict test of proportionality to be a legitimate restriction on press freedom, as provided for in international law.[7]

7.10 Dr Keiran Hardy and Professor George Williams submitted, for example:

> The question is not whether national security trumps press freedom, or vice versa. Rather, the question is twofold: (1) **whether specific laws, in their words or effect, burden freedom of expression by media organisations**, and (2) **whether those laws adopt means that are proportionate to achieving the legitimate end of national security**.[8]

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5 United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para. 30.

6 United Nations Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of movement)*, 2 November 1999, (CCPR/C/21/Rev.1/Add.9), para. 14, www.refworld.org/docid/45139c394.html (accessed 4 February 2021). Also see: United Nations Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, 12 September 2011 (CCPR/C/GC/34), para. 34.

7 See, for example: Association for International Broadcasting, *Submission 43*, p. 13.

8 Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 5 (bold in original).

7.11 The Law Council of Australia (Law Council) similarly argued that there must be an appropriate balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure:

> …the powers of Australia's law enforcement and intelligence agencies, enacted in laws such as unauthorised disclosure and secrecy legislation, must appropriately balance the need to protect sensitive information with freedom of the press and protections for those making disclosures in the public interest.
>
> Australia's democratic values and rule of law and human rights considerations require that official secrecy must be tempered by the public's right to accountable government. Therefore, any secrecy should be proportionately confined to information the disclosure of which would undermine national security and endanger citizens.[9]

7.12 The Association for International Broadcasting (AIB) submitted that Australia's legal framework fails to strike the right balance between national security and the right to freedom of expression. Its submission described this as an often false dichotomy 'where steps taken to undermine freedom of expression may in themselves undermine national security'. AIB explained:

> International law provides that a free media is a safety valve for democracy, and a bulwark against authoritarianism, against tyranny, and against secret – as opposed to transparent – government. The media – both print and electronic, publicly-funded and commercial – has a vital role to play in supporting democracy, rule of law and civil society through the reporting of facts, investigating injustices, and uncovering abuses of power. It has an essential role in holding power to account and reporting events that are in the public interest. Without a strong and free media, abuses of power will remain concealed. AIB's position is that these are important protections for democracy and national security.[10]

7.13 The Journalism Education and Research Association of Australia (JERAA) agreed that keeping Australians safe involves keeping Australians properly informed about government and its operations:

> Australians need to be kept safe from terrorists, but also safe from impositions upon our democratic system–safety from attacks on information flows, safety from corruption and wrongdoing, and safety from crackdowns on the citizenry…that are the hallmarks of autocratic governments. Legislation giving agencies excessive powers to monitor journalists and whistleblowers can influence, and even censor, necessary public debate over the national security policies and the powers of those very agencies and their resourcing.[11]

7.14 The Human Rights Law Centre (HRLC) acknowledged the extraordinary and extensive powers granted to law enforcement and intelligence agencies.

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[9] Law Council of Australia, *Submission 10*, p. 9. Also see: pp. 13–14.

[10] Association for International Broadcasting, *Submission 43*, p. 2.

[11] Journalism Education and Research Association of Australia, *Submission 21*, p. 7.

Its submission argued that there are no corresponding safeguards and 'the Government is increasingly secretive, with more and more laws criminalising whistleblowing and journalism'.[12]

'National security'

7.15 The UNHRC identifies the protection of national security as a legitimate ground for restricting the right to freedom of expression (Article 19(3)(b)).

7.16 Some submitters and witnesses queried the definition of 'national security' and referred to two key international instruments that have defined the term:

- the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)—national security is limited to the existence of the nation, its territorial integrity, or political independence against force or threat of force;[13] and
- the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles)—blanket disclosure bans on information related to national security are prohibited.[14]

7.17 Law and media experts based at the University of Queensland highlighted that both the Siracusa Principles and the Johannesburg Principles 'focus their definitions of national security on the core aim of protecting the existence of the state'. This, they submitted, is in contrast to 'merely local or relatively isolated threats to law and order'.[15]

7.18 The Castan Centre for Human Rights at Monash University (Castan Centre) referred to the UNHRC's comment that States should be cautious in using national security as a legitimate ground to restrict the right to freedom of expression. Its submission noted the Siracusa Principles, as did the Law Council, which stated:

> The justifiable restriction on freedom of expression on the ground of national security is narrowly defined: this ground of restriction is invoked

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[12] Human Rights Law Centre, *Submission 12*, pp. 2–3.

[13] United Nations, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, (E/CN.4/1984/4), Principle 29, www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf (accessed 4 February 2021).

[14] United Nations, *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995 (E/CN.4/1996/39), Principle 12, documents-dds-ny.un.org/doc/UNDOC/GEN/G96/118/04/PDF/G9611804.pdf?OpenElement (accessed 4 February 2021).

[15] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, pp. 19–20.

> when the political independence or the territorial integrity of the state is at risk.[16]

7.19 The Castan Centre noted:

> The Human Rights Committee has confirmed that it is incompatible with Article 19(3) [of the ICCPR] to prohibit disclosure of information that is of 'legitimate public interest' without a requirement that such disclosure actually harms or is likely to harm national security and to punish journalists and others (such as whistleblowers) for disclosure in such circumstances.[17]

Sabotage, espionage and foreign interference offences

7.20 The *Criminal Code Act 1995* (Criminal Code) sets out offences relating to sabotage, espionage and foreign interference.[18] These offences rely on a definition of 'national security' that includes 'the country's political, military or economic relations with another country or other countries'.[19]

7.21 Some submitters referred specifically to the definition of 'national security' in the Criminal Code as a complex and overly broad definition. For example, Dr Rebecca Ananian-Welsh and her colleagues argued:

> A complex definition of national security has the potential to create uncertainty as to the scope and potential impact of national security laws, facilitating a chilling effect on public interest journalism. An overly broad definition has a far-reaching impact on the scope of offences and, relevantly, the potential criminalisation of legitimate journalism.[20]

7.22 The Law Council agreed that the definition could capture innocuous conduct undertaken as a matter of course, or in the public interest, by journalists:

> The espionage offences…with the economic and political elements of the definition of national security, would seem to cover the sort of information that well-informed journalists, academics and consultants of all sorts routinely have access to. Whistleblowers or journalists revealing, for example, harmful conditions in detention centres, misconduct or corruption or reporting on politics or economics, could potentially be captured by the espionage offences.[21]

7.23 Dr Hardy and Professor Williams also expressed particular concern with the breadth of the 'national security' definition in Australia's espionage laws:

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16 Law Council of Australia, *Submission 10*, pp. 13–14.

17 Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 7.

18 *Criminal Code Act 1995*, Parts 5.1 and 5.2 of Chapter 5.

19 *Criminal Code Act 1995*, para. 90.4(1)(e).

20 Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 18.

21 Law Council of Australia, *Submission 10*, p. 31. Also see, for example: Human Rights Law Centre, *Submission 12*, p. 7.

> Journalists could be prosecuted under the espionage laws for receiving or possessing information that is broadly relevant to Australia's economic or foreign interests, far beyond matters relating to terrorism, military operations, or similarly serious events.
>
> This is an unacceptable widening of the concept of national security in Australian law. Considerations of economics and foreign affairs can certainly be relevant to national security. However, it does not follow that all matters relating to economics and foreign affairs have national security implications.[22]

7.24 Legal expert Mr Bret Walker similarly commented:

> I completely doubt the cogency of a definition of national security that entails in general terms, without clear indication of particular areas or urgency, relations with foreign nations or our economy… [As an example] both our relations with China and our economy are affected by what people want to know about and talk about in relation to novel coronavirus. I'm not aware of anybody seriously saying, 'Pipe down, that's national security.' That's rubbish…we need to be very careful about this general category of national security: it captures too much.[23]

Departmental response

7.25 The Department of Home Affairs (Home Affairs) and the Attorney-General's Department (AGD) acknowledged that 'any restrictions on press freedom should be reasonable, necessary and proportionate for the pursuit of a legitimate objective', consistent with international human rights law.[24]

7.26 The departments noted the recent use of law enforcement powers to collect information from journalists and media organisations. Their submission stated that the existing balance between investigative powers for serious offending and press freedom is appropriate.[25]

Committee comment

7.27 The committee recognises that the right to freedom of expression is a critical feature of Australia's democracy. Further, in international law, that right can only be restricted on national security grounds in limited circumstances.

7.28 The committee heard that Australia's national security laws do not satisfy the restriction criteria: the restrictions are overly broad and not proportionate to the legitimate end of protecting national security.

7.29 In particular, the committee considers that the definition of the term 'national security' departs from generally accepted interpretations of that term, resulting

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[22] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 12.

[23] Mr Bret Walker SC, personal capacity, *Committee Hansard*, 10 February 2020, pp. 8–9.

[24] Department of Home Affairs and Attorney-General's Department, *Submission 42*, pp. 3–4.

[25] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 4.

in the capture of topics that would otherwise be central to public interest discourse and journalism.

7.30 Further, there is a large amount of national security law which incorporates this broadly defined term and which, experience has shown, could lead to criminal investigation and prosecution, even where there is no actual or likely risk of harm.

7.31 In the committee's view, the definition of 'national security' in Australia's national security legislation should be reviewed, including consideration of how the definition might be amended to conform more closely with international law and jurisprudence (see Recommendation 16).

National human rights framework

7.32 Unlike comparable democratic countries, the Australian Constitution does not expressly protect the right to freedom of expression or freedom of the press. Nor does Commonwealth law, although there have been various attempts to introduce such legislation over the years.[26]

7.33 As noted in Chapter 2, several submitters and witnesses compared this lack of express protection with the protections provided by Australia's Five Eyes intelligence partners.[27] The AIB concluded:

> …there is a jurisprudential gap in Australian law which must be filled in order to provide meaningful and robust protection for journalists, media organisations, their sources and the wider public.[28]

7.34 Dr Hardy and Professor Williams highlighted that the lack of clear and unambiguous protection also fails to provide Parliament with direction when enacting national security and other law that impacts on the right to freedom of expression. They concluded that 'the result has been a disturbing number of laws that are inconsistent with basic democratic values'.[29]

Amount of national security legislation

7.35 Since 2001, Parliament has enacted more than 80 separate pieces of national security and counter-terrorism legislation. In a recent opinion piece, Professor

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[26] For example: the Australian Bill of Rights Bill 2001 and Australian Bill of Rights Bill 2017, both of which made specific provision for 'the freedom of expression, including the freedom of the press and other media of communication'; the Constitution Alteration (Freedom of Expression and Freedom of the Press) Bill 2019; Chapter 2.

[27] For example, in the United States of America, the First Amendment to the Constitution protects the freedom of speech and of the press. In Europe, Article 10 of the European Convention on Human Rights provides for the right to freedom of expression and information.

[28] Association for International Broadcasting, *Submission 43*, p. 7. Also see, for example: Journalism Education and Research Association of Australia, *Submission 21*, p. 6.

[29] Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 5.

Williams commented that this surpasses the actions of the United Kingdom (UK) and the United States of America (United States). He described the Australian laws and their enactment as follows:

> …their impact and scope is shocking in showing how far media freedom has deteriorated. They are the sorts of laws one might expect in a police state rather than a democracy like Australia. We can thank our politicians for these laws. They have used the fear of terrorism and threats to community safety to enact laws that shield government from scrutiny. Our liberties have had too few defenders.[30]

7.36 The International Federation of Journalists (IFJ) suggested that there is a political need 'to be seen to be protecting the nation's national security'. However, IFJ highlighted that journalists and civil society groups have raised concerns about the volume and breadth of national security legislation for some years, particularly the National Security Legislation Amendment Bill (No. 1) (2014), which aimed to modernise and improve the legislative framework governing activities of the Australian Intelligence Community (for example, by expanding ASIO's warrant based intelligence collection powers).[31]

7.37 Media representatives said that policy makers have not heard their concerns. Australia's Right to Know (ARTK) representative Ms Connie Carnabuci contended that now is an opportune time for a holistic review of the national security legislation that has been introduced in a piecemeal fashion:

> …where we are now is at an inflection point where we can actually stand back and look at all of our laws holistically, not just at disparate provisions that are being amended, and say, 'Okay. What is our policy position? What concept should drive the development of our laws?' If we look at the United States, the seminal concept of the Constitution is freedom of speech. If we look at Europe and countries like the UK, it is the human rights convention. We do not have a seminal point that we can graft to to say, 'Okay. What does this mean about what our laws should look like across the board on this point?' I think we have an opportunity now to really do that.[32]

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[30] Professor George Williams AO, 'Australia is a world-beater in the secrecy Olympics', *The Australian*, 10 June 2019. Also see: Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 22*, p. 3, who described the effect of the legislation as creating 'a highly repressive interlocking web of laws'; Mr Jonathan Holmes, Press Freedom Spokesperson, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 38; Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 50.

[31] International Federation of Journalists, *Submission 44*, p. 2. Also see: Association for International Broadcasting, *Submission 43*, p. 5, which noted that, internationally, there was also a negative reaction to the national security laws passed by the Australian Parliament in 2014; Explanatory Memorandum, National Security Legislation Amendment Bill (No. 1) 2014.

[32] Ms Connie Carnabuci, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 7. Also see, for example: Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*,

7.38 Mr Simon Spanswick, Chief Executive of the AIB, similarly said:

> One of the things a number of media companies here have told me is that they are worried about the cumulative effect of many years of legislation. Instead of having one overarching well-thought-through contemporaneous piece of legislation, there's a lot of piecemeal stuff that can be added together and used in all sorts of different ways for which it may not have originally been intended.[33]

7.39 Professor Peter Greste from the Alliance for Journalists' Freedom (AJF) queried whether national security laws will ever be 'rolled back':

> …[a] lot of measures have been taken which have been labelled as emergency measures: measures that are necessary at a time of crisis, with the implication that once the crisis is over those measures would then be rolled back. The problem…is that it is very difficult to see a circumstance in which we can ever declare those crises as over... This is not to suggest that those measures are unnecessary or illegitimate, but we need to be very careful about the way in which these emergency measures become established as permanent features of our society that may undermine the way that our democracy works. I think we have seen that with a lot of national security legislation with regard to the war on terror.[34]

7.40 Media representatives contended that national security laws should recognise the important role of public interest journalism. Ms Lesley Power, General Counsel for the Australian Broadcasting Corporation (ABC), said that the law presently does not balance these competing interests:

> One of the constructs of law is balancing competing interests, and that is a very common exercise, as we all know, that you go through when you are drafting and voting on legislation… The cumulative fragmented effect of a lot of these laws that have been passed, many of them in haste, has led to an imbalance that does not respect or serve the public's right to know.[35]

7.41 Professor Johan Lidberg suggested that the Australian media has not done a good job of explaining to the general public why openness and press freedom is important: 'what we need to explain is that this goes beyond media freedom and actually applies to civil liberty'.[36]

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18 October 2019, p. 5; Mr Kevin McAlinden, Acting Head of Public Affairs, Australian Broadcasting Corporation, letter of correction, dated 19 November 2019.

33 Mr Simon Spanswick, Chief Executive, Association for International Broadcasting, *Committee Hansard*, 10 February 2020, p. 15.

34 Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 14.

35 Ms Lesley Power, General Counsel, Special Broadcasting Service, *Committee Hansard*, 18 October 2019, p. 11. Also see, for example: Ms Sarah Waladan, Head, Legal and Regulatory Affairs, Free TV Australia, *Committee Hansard*, 18 October 2019, p. 11; Dr Keiran Hardy, private capacity, *Committee Hansard*, 15 November 2019, p. 12.

36 Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University, *Committee Hansard*, 18 October 2019, p. 63.

Stronger protection for press freedom

7.42 Throughout the inquiry, submitters and witnesses referred to recent examples where national security laws have been invoked in relation to articles published by the media. Dr Hardy and Professor Williams reminded the committee that former Attorney-General Senator the Hon George Brandis assured that 'there is no possibility…that in our liberal democracy a journalist would ever be prosecuted for doing their job'.[37]

7.43 ARTK argued however that this is precisely what is now occurring:

> The combined effect of almost two decades of laws that individually create a proliferation of ways in which journalists can be exposed to the threat of criminal charges for simply reporting uncomfortable or unpleasant realities is now a matter of serious national concern. For the most part, these laws have very little to do with national security and everything to do with the exercise of power and the desire to avoid scrutiny.[38]

7.44 Many submitters and witnesses argued that Australia needs to introduce stronger protection for freedom of expression and press freedom.[39] The Law Council, for example, supported the development of a comprehensive charter or bill of rights by the Australian Government:

> …the Law Council considers that human rights and fundamental freedoms in Australia should be protected and balanced against other considerations in a coherent legal framework that promotes the understanding that human rights are 'universal, indivisible and interdependent and interrelated', and that any restrictions upon particular rights and freedoms must be in accordance with international human rights jurisprudence. There persists a fundamental disconnect between Australia's obligations at international law, and their translation into Australian domestic legislation. Accordingly, the Law Council continues to advocate for a charter or bill of rights at the federal level.[40]

7.45 The HRLC submitted that a federal charter would help promote a human rights culture across government and agencies as the public sector would be required to consider those rights when making decisions and providing advice or services:

> A Federal Charter of Human Rights and Responsibilities would require laws that infringe on free speech and press freedom to be carefully weighed against the interests of national security, and for any limitations

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37 Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 1. Also see: L. Taylor, 'George Brandis: attorney general must approve prosecution of journalists under security laws', *The Guardian*, 30 October 2014, www.theguardian.com/australia-news/2014/oct/30/george-brandis-attorney-general-approve-prosecution-journalists-security-laws (accessed 4 February 2021).

38 Australia's Right to Know, *Submission 34*, p. 2. Also see: Whistleblowers Australia, *Submission 30*, p. 2.

39 See, for example: Dr Keiran Hardy and Professor George Williams AO, *Submission 2*, p. 2.

40 Law Council of Australia, *Submission 10*, p. 14.

> on rights to be necessary, reasonable and proportionate. It would also require the Department of Home Affairs, AFP and intelligence agencies to apply a similar analysis when enforcing legislation.[41]

7.46 In addition, the AIB submitted that charters that exist in comparable international jurisdictions—such as Europe and Canada—give presumptive weight to the right to freedom of expression, with exceptions—such as national security—being narrowly defined:

> In a human rights-based analysis, based on positive human rights protection, presumptive weight is given to the right itself; national security is the exception… All exceptions must meet the key test of proportionality. National security is a legitimate aim which allows governments to interfere with rights, including the right to freedom of expression, but it must be necessary in a democratic society and proportionate to that legitimate aim – that is, it must be strictly necessary to achieve the national security aim. This is the appropriate approach and the approach mandated under international law.[42]

Media Freedom Act

7.47 Submitters and witnesses proposed that the Australian Government should protect press freedom through law reform legislation.[43] In particular, the AJF suggested a single law reform Act (styled as the Media Freedom Act) that would amend other legislation to positively enshrine press freedom and enhance protections for journalists.

7.48 According to the AJF's White Paper (released just prior to the execution of the search warrants in June 2019), the key measures of a Media Freedom Act would:

- enshrine the principle of freedom of the press in legislation;
- subject to reasonable and proportionate limits, enshrine the right to freedom of opinion and expression contained in Article 19 of the [ICCPR];
- elevate the status of any offence committed against a journalist by reason of the journalist's work to an aggravated offence;
- amend national security legislation to better protect journalists from criminal liability for legitimate journalistic work;
- protect the confidentiality of journalists' notes and source material developed in the course of legitimate journalistic work;

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41 Human Rights Law Centre, *Submission 12*, p. 18. Also see: Australian Lawyers for Human Rights, Submission to the Australian Law Reform Commission report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, 27 February 2015, p. 8, www.alrc.gov.au/inquiry/freedoms-inquiry/submissions-5/ (accessed 4 February 2021).

42 Association for International Broadcasting, *Submission 43*, p. 8. Also see: *Constitution Act 1982*, s. 2.

43 See, for example: Professor David Flint, *Submission 4*, pp. 1–2; Australia's Right to Know, *Submission 34*, pp. 2–3; Australian Press Council, *Submission 35*, p. 3.

- enact shield laws protecting journalists from being forced to reveal their sources by government agencies and in civil and criminal court proceedings where a journalist has engaged in legitimate journalistic work; and
- safeguard journalists and their sources through enhanced whistleblower protections.[44]

7.49 Professor Greste explained how a Media Freedom Act would work:

> It would filter down through the legislative framework, if you like. It would not require specific amendments to each and every situation. What it would do is provide an overarching principle that would need to be applied. We would be in a situation where you do not have to physically tweak each statute, and that we have something, a principle that we establish in law, that would effectively cover everything in a way, and we carve out particular exceptions around national security, secrecy and so on where those issues need to be taken into account.[45]

7.50 Several inquiry participants supported the AJF's proposal. For example, the University of Queensland law and media experts submitted that a Media Freedom Act would:

- recognise and affirm the importance of press freedom in Australia;
- support the development of an appropriate culture of disclosure and open government within the public sector; and
- protect press freedom by ensuring that legitimate public interest journalism was excluded from the scope of criminal offences.[46]

7.51 Representatives from the AJF described how it envisages achieving press freedom in Australia, beginning with the establishment of a task force to 'bring together key players…to get a common accord and a common sense of understanding'.[47]

7.52 Mr Peter Wilkinson, Chair of the AJF, outlined the role of the task force as part of the strategy presented in the AJF's White Paper:

> …our original call was for a media freedom act. But to get to a media freedom act, we needed a couple of things to happen. First, we needed a policy document. We wrote the white paper, which you will have seen,

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44 Alliance for Journalists' Freedom, *Submission 13*, Attachment 1, p. 7.

45 Professor Peter Greste, Spokesman and Founding Director, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 54. Also see: *Committee Hansard*, 12 August 2020, p. 11.

46 Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 22. Also see, for example: Mr Jonathan Holmes, Press Freedom Spokesperson, ABC Alumni Limited, *Committee Hansard*, 18 October 2019, p. 37, who agreed that Australia needs a holistic legislative solution to its 'unique' problem; Dr Julie Posetti, personal capacity, *Committee Hansard*, 10 February 2020, p. 23.

47 Mr Peter Wilkinson, Chair, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 52.

> which had seven recommendations, the first of which was the media freedom act. The following six essentially outlined initiatives that were essential in the media freedom act. But then, to go the next step, we needed to start talking to people so that the barriers could be broken down, and so the purpose of the task force was to break down barriers. We don't think that we are at odds with what the security services want; we all support better security given the current environment that we're living in. But as well as that, we need stronger press freedom. In fact, we see that the security services, in strengthening democracy or protecting democracy, actually need press freedom to help do that, because press freedom is an integral part of it.[48]

7.53 Professor Greste added that the matter of a task force has not yet been formally discussed with government, departments and parliamentarians.[49]

7.54 The committee notes that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) agrees on the 'clear' need for the Australian Government and major media stakeholders to work together 'to identify a common path that can be agreed on, one which ends in meaningful and agreed administrative and legislative change'.[50]

Government's consultations with the media

7.55 Some contributors to the inquiry referred to government consultations with law enforcement and media representatives following the execution of search warrants on Ms Annika Smethurst and the ABC in June 2019.[51]

7.56 Mr Michael Miller, Executive Chairman of News Corp Australia, has indicated that the Australian Government is 'open to some changes'.[52] However, witnesses expressed reservations about the outcome of the consultations. ARTK representative Mr Campbell Reid commented, for example:

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48 Mr Peter Wilkinson, Chair, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 12. Also see: Mr Chris Flynn, Director, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, pp. 12–13.

49 Professor Peter Greste, Spokesman and Founding Director, and Mr Peter Wilkinson, Chair, Alliance for Journalists' Freedom, *Committee Hansard*, 12 August 2020, p. 13.

50 Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, p. 57.

51 See, for example: Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 4.

52 K. Burgess, 'Ministers 'open' to changes to protect press freedom: media bosses', *The Canberra Times*, 14 November 2019, www.canberratimes.com.au/story/6489738/ministers-open-to-changes-to-protect-press-freedom-media-bosses/?cs=14350 (accessed 4 February 2021).

> The actions of the government suggest to us that they are starting to hear our concerns. Are they hearing them strongly enough? We still have some strong doubts that they are.[53]

7.57 Another ARTK representative, Mr Gaven Morris, said:

> …I think the reflexive response…from lawmakers is to put more obstacles in our way to ensure that there are protections, rather than to look at where there can be sensible exemptions and adjustments to current laws to remove some of the obstacles. That is my worry about where this process will land. With all of the mass of new obstacles that have come in our path in recent years, where this process may end up is having more of those, not fewer.[54]

7.58 AJF representatives agreed that the Australian Government appears more interested in 'specific fixes', and that its proposal for overarching principles in federal legislation is at the start of a 'slow burn'.[55]

7.59 Toward the end of the inquiry, Mr Reid provided an update on the ARTK's evidence. He said that, while a lot has happened over the intervening 10 months, 'very little has changed'. He referred specifically to the finding of the High Court of Australia (High Court) in *Smethurst & Anor v Commissioner of Police & Anor* and stated:

> You don't go to the High Court unless something has gone wrong, and the court's findings in that matter I think raised in absolute capital letters what is wrong with the current system of the execution and issuing of warrants to investigate journalists. In light of that, our position is that the things we have been advocating for all along in this process, leading with the right to contest warrants before they are issued to investigate or search journalists' homes, is absolutely paramount, and the High Court supports the contention that there has to be more rigour and more care taken before these warrants are issued.[56]

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[53] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 18 October 2019, p. 18. Also see, for example: Ms Clare Gill, Director of Regulatory Affairs, Nine Network, *Committee Hansard*, 18 October 2019, p. 19.

[54] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 18 October 2019, p. 15.

[55] Professor Peter Greste, Spokesman and Founding Director, and Mr Peter Wilkinson, Chair, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, pp. 54–55.

[56] Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, 12 August 2020, p. 1. Also see: *Smethurst & Anor v Commissioner of Police & Anor* [2020] HCA 14, www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-14-2020-04-15.pdf (accessed 4 February 2021).

Fellow ARTK representative Mr Morris referred specifically to the consultations that took place between the Australian Government, law enforcement and media representatives following the events of June 2019. He said:

> …we've had…not a lot of feedback from the government since those meetings that we had towards the end of last year [2019] in relation to progress on these issues, other than submissions that the government has put into various inquiries.[57]

Government feedback to the media

7.61 As noted in Chapter 1, the PJCIS has reported on its inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, and the Australian Government has responded to that committee's findings and recommendations.[58]

7.62 Mr Paul Murphy, Chief Executive of the Media, Entertainment and Arts Alliance, thanked members of the PJCIS for their engagement but indicated that media concerns had not been fully addressed:

> There are certainly some positive recommendations from that process, but they still fall well short of addressing the serious concerns about a growing culture of secrecy in this country and inadequate regard for the public's right to know.[59]

7.63 Mr Murphy particularly endorsed the PJCIS recommendation to require senior judges to issue certain search warrants, including those issued under the *Crimes Act 1914* (Crimes Act).[60] However:

> We don't agree with the proposed expansion of the role of public interest advocates and remain of the view that it should be the journalist and/or media organisation represented in those proceedings. In fact, our view has always been that the public interest advocate scheme is deeply flawed. It operates in complete secrecy, with totally inadequate reporting requirements, and the regulations do not even specifically require a public interest advocate to argue against the granting of a warrant.[61]

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[57] Mr Gaven Morris, Director, News, Analysis and Investigations, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 4.

[58] Parliament of Australia, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Completed_inquiries (accessed 4 February 2021).

[59] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 1.

[60] *Crimes Act 1914*, s. 3E.

[61] Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 1. Also see: Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', 26 August 2020, Recommendation 2.

7.64 Mr Murphy further noted that 'there is no guarantee the recommendations of [the PJCIS] will be adopted by the government'. He added:

> …it's always been our view that these issues are urgent. They're urgent for our democracy, and, indeed, they're urgent for the security of our country. We would hope that the government would be swift in its response to these recommendations.[62]

7.65 The committee points out that there is a highly personal element to the reforms under discussion, as illustrated by Mr Daniel (Dan) Oakes' recent situation (see Chapter 1), which Mr Murphy described as 'nothing short of disgrace' when all Mr Oakes did was 'tell a truthful story in the public interest'.[63]

7.66 On 19 November 2020, the Chief of the Defence Force, General Angus Campbell, announced the public findings of the Inspector-General of the Australian Defence Force's (IGADF) inquiry into possible breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan, between 2005 and 2016.[64]

7.67 The IGADF found:

> …there is credible information of 23 incidents in which one or more non-combatants or persons *hors-de-combat* [a total of 39 individuals] were unlawfully killed by or at the direction of members of the Special Operations Task Group in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment.[65]

7.68 The committee notes that, in 2017, the ABC published a series of stories concerning the covert operations of Australia's Special Forces in Afghanistan. These stories were based on Department of Defence documents leaked to the ABC's Mr Oakes, and two incidents detailed in those documents, and reported by the ABC, formed part of the IGADF inquiry.[66]

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62 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 2. Also see: p. 1.

63 Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance, *Committee Hansard*, 31 August 2020, p. 4.

64 Department of Defence, 'Inspector-General ADF Afghanistan Inquiry–Public Call for Information', www.defence.gov.au/mjs/igadf-afghanistan-inquiry.asp; S. Maiden, ''Deeply disturbing' war crimes report 39 Afghanis allegedly killed by SAS', *News Corp Limited*, 19 November 2020, www.news.com.au/national/politics/deeply-disturbing-shocking-australian-war-crime-allegations/news-story/7f51b6f0bb000f2e90248948451b5b32 (both accessed 4 February 2021).

65 Inspector-General of the Australian Defence Force, *Afghanistan Inquiry Report*, 2020, pp. 28–29, afghanistaninquiry.defence.gov.au/ (accessed 4 February 2021).

66 ABC News, 'The Afghan Files', 11 July 2017, www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0 (accessed 4 February 2021).

7.69 The committee further notes that the confidential source for Mr Oakes' stories, Retired Major David McBride, is currently being prosecuted for the unauthorised disclosures. In view of the shocking findings of the IGADF inquiry, the committee considers that the prosecution of Mr McBride should be urgently reconsidered on strong public interest grounds (see Recommendation 17).

Departmental and agency response

7.70 Home Affairs and the AGD argued that Australia's common law and legislative frameworks provide 'particularly strong' protections for freedom of speech, and they acknowledged that international human rights law restricts press freedom when the limitations are reasonable, necessary and proportionate to a legitimate objective:

> This needs to be determined on a case-by-case [basis] in the context of particular legislative restrictions. The potential consequential impacts of any immunities or protections for media also need to be taken into account as they could also impede law enforcement's ability to investigate other (non-journalist) persons of interest, and investigate persons who are journalists by occupation in situations that do not relate to public interest reporting.[67]

7.71 AGD representative Mr Andrew Walter, First Assistant Secretary, described Australian Government consultations with law enforcement and media representatives as 'positive' so far:

> I'm not really in a position to say where the government will go… I think that the government and the Attorney are very keen to hear from [the committee] and the [PJCIS], consider all the submissions and then make decisions on the direction they'll go, but I think those broad areas, which, of course, have included public sector whistleblowing and, in the Attorney's portfolio…freedom of information and the role of secrecy provisions, are clearly the areas where the Attorney will have an interest in considering any proposals.[68]

7.72 Mr Micheael Pezzullo, Secretary of Home Affairs, indicated that his department has not yet conducted any work in relation to expanding the PIA scheme—a key recommendation of the PJCIS—but said that the outcome of the two parliamentary inquiries need not be a binary option:

> …these things can potentially be moulded so that there's a suite of options available to balance the importance of press freedom with the ability of the police to do their job in relation to not so much journalism as such but to the disclosure of official secrets and their publication contrary to Part 5.6 of the Criminal Code, for instance. A notice-to-produce scheme might be a

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[67] Department of Home Affairs and Attorney-General's Department, *Submission 42*, p. 15.

[68] Mr Andrew Walter, First Assistant Secretary, Attorney-General's Department, *Committee Hansard*, 15 November 2019, p. 43. Also see: *Committee Hansard*, 31 August 2020, pp. 7–8.

> softer—that's a value laden term—it might be an equivalent measure that the government may see fit to consider.[69]

Committee comment

7.73 The committee heard that, unlike its Five Eyes intelligence partners, Australia does not have explicit and overarching protection for the right to freedom of expression. In the committee's view, this lack of protection is not acceptable. In order to better protect a free press in Australia, the committee considers that federal legislation should be introduced to protect the right to freedom of expression and in so doing also guide Parliament in its consideration of intersecting criminal and national security laws.

7.74 The committee considers that there are also an unnecessarily large number of Commonwealth laws which have the potential to infringe on the right to freedom of expression. This affects not just the media but also each and every Australian.

Recommendation 16

7.75 The committee recommends that the Australian Government initiate an independent review of law enforcement and national security laws, with a view to reducing duplication and inconsistencies, as well as aligning those laws with Australia's international human rights obligations, including the right to freedom of expression. In particular, this review should include express consideration of the definition of 'national security' in national security laws and how the definition might be amended to conform more closely with international law and jurisprudence.

7.76 During the inquiry, the committee heard specific examples of journalists and whistleblowers being deeply affected by Australia's criminal and national security laws. The committee considers that the protracted length of time taken to investigate and prosecute alleged breaches of these laws is not always acceptable. The committee understands that a criminal investigation might take some time but once completed, any decision to prosecute should be made and executed promptly.

7.77 In light of its comments in paragraph 7.69, the committee makes the following recommendation.

Recommendation 17

7.78 The committee recommends that the Commonwealth Director of Public Prosecutions urgently reconsider, on strong public interest grounds, whether the prosecution of Mr David McBride should be continued.

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[69] Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 31 August 2020, p. 8.

Concluding comments

7.79 Throughout this inquiry, the committee heard from numerous law and media experts on the various ways in which Commonwealth law fails to support press freedom, notwithstanding that Australia has ratified the international treaty that specifically protects this human right.

7.80 No doubt the inquiry has merely touched the tip of the iceberg in its examination of criminal and national security laws and their impact on press freedom and the media.

7.81 Regrettably, this impact has attracted considerable adverse comment both nationally and internationally, and this is not an enviable position for Australia, as one of the strongest democracies and leaders in the Asia-Pacific region.

7.82 The committee appreciates that this is a dynamic environment where significant public interests overlap and intertwine. Indeed, the committee heard that there are multiple factors which contribute to an environment where press freedom is undervalued and a pervasive chilling effect significantly undermines public interest disclosures and public interest journalism, with consequent impacts on the role of the media in the Australian democracy.

7.83 Clearly, there is recognition of the need for urgent reform.

7.84 The committee urges the Australian Government and the Parliament to give serious consideration to the issue of press freedom in Australia.

7.85 The committee commends its findings and conclusions to the Senate.

Senator Sarah Hanson-Young
Chair

Dissenting report by Government Senators

1.1 Government Senators are committed to the principle of, and irreplaceable role played by, a free press in a democracy. The time taken by witnesses to present submissions and verbal evidence to both this inquiry and the parallel work of the Parliamentary Joint Committee on Intelligence and Security (PJCIS)—one Government Senator being a member of both committees—is greatly appreciated.

1.2 It is appropriate that in an open, plural, democratic society, different voices are heard as the legislature seeks to find the appropriate balance between freedom of the press and the interests of national security and law enforcement. This was reflected in the Attorney-General's reference for the PJCIS inquiry aiming 'to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats'.[1]

1.3 This intersection between the need for secrecy and transparency is one of the key reasons the PJCIS was established under the *Intelligence Services Act 2001*, with a unique remit as legislators to receive classified evidence from agencies in addition to the voices of civil society. No other committee of the Parliament has the same insight as to where the balance should lie, and why. Notably, despite a range of views on the committee and the occasional additional comment on contentious issues, the PJCIS is characterised by a track record of bi-partisan reports even when considering issues where finding the balance between security and transparency has been complex.

1.4 The PJCIS tabled its Press Freedom report on 26 August 2020, making 16 detailed recommendations.[2] In its December 2020 response, the Government agreed to a range of measures to strengthen protections for journalists and public sector whistle-blowers, which will further enhance the freedom of the press.

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[1] Australian Parliament, Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, 'Terms of Reference', tor (c), www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Terms_of_Reference (accessed 19 May 2021).

[2] Parliamentary Joint Committee on Intelligence and Security, 'Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press', August 2020, www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report (accessed 19 May 2021).

1.5 All of the recommendations directed at the Government by the PJCIS have been accepted, which will:

- ensure that only Supreme or Federal Court judges can issue warrants against journalists for disclosure offences;
- ensure warrants can only be issued against journalists for disclosure offences after a process involving a Public Interest Advocate;
- enhance reporting requirements in relation to warrants exercised against journalists; and
- require the government to consider additional defences for public interest journalism for secrecy offences.

1.6 In dissenting from the majority report, Government Senators note that some of the Senate report's recommendations:

- overlap with the PJCIS report, which generally is more thorough, for example PJCIS Recommendation 8 has a far more extensive approach to engagement by Commonwealth agencies with journalists and media organisations to facilitate informed handling of classified material than Recommendation 5 in this report,
- are internally inconsistent, for example Recommendations 9 and 17 in regards to respecting the operational independence of the Commonwealth Director of Public Prosecutions,
- call for changes to provisions (such as Section 35P of the ASIO Act) that have been considered in detail by the PJCIS in previous inquiries—with the benefit of private briefings by relevant agencies—as part of reaching an informed balance between security and transparency,
- call for actions which are already being undertaken, for example Recommendation 10, when the Government has now responded to the Moss Review, committing to reforming the Public Interest Disclosure Act to ensure it remains robust, effective and fit for purpose.[3]

[3] Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020.

1.7 Government Senators support the comprehensive recommendations of the PJCIS report into media freedoms and believe that when fully implemented, the December 2020 response by Government to that report will provide an appropriate balance between freedom of the press and the interests of national security and law enforcement.

Senator the Hon David Fawcett
Deputy Chair

Senator Sam McMahon
Member

Australian Greens' Additional Comments

1.1 The Australian Greens support the views and recommendations set out in the majority report. In addition, the Greens have further comments and recommendations in relation to media representation during the warrant application process and the introduction of a Media Freedom Act.

1.2 This inquiry was established in response to the raids on the Australian Broadcasting Corporation and the home of a former News Corp journalist, Ms Annika Smethurst, but events since then have shone an even greater spotlight on the importance of press freedom, here and around the world. Globally press freedom continues to decline. Just days ago the Associated Press office in the Gaza Strip was destroyed by missiles, with one hour's notice given to occupants to vacate the building. The Capitol riots in Washington earlier this year saw shocking treatment of reporters. Journalists are being detained, murdered, arrested and censored in other conflict and disaster zones and at increasing rates.

1.3 Covid-19 has shown access to accurate and comprehensive news has never been more important. Yet at the same time, we have also witnessed less information being available to the public under the guise of Covid-19 and national security. Whether that is the government's refusal to hand over information out of National Cabinet, or answering questions about the vaccine rollout and hotel quarantine, or indeed the origins of Covid-19 in the first place.

1.4 The freedom of the press is fundamental to our democracy and human rights across the globe. The Parliament has a duty to protect it and this inquiry has allowed us to lay a path for doing just that.

Media representation

1.5 As discussed in Chapter 6 of the majority report, the committee received submissions and evidence concerning the process by which law enforcement and intelligence agencies can obtain covert warrants in relation to journalists and media organisations.

1.6 In June 2019 two infamous examples of the use of these powers made headlines around the world, when the Australian Federal Police executed search warrants at the home and office of several well-known and widely respected Australian journalists (see Chapter 1).[1]

[1] Australian Federal Police, 'AFP statement on search warrant in Kingston, ACT', *Media release*, 4 June 2019; Australian Federal Police, 'AFP statement on search warrant in Sydney', *Media release*, 5 June 2019.

1.7 The Castan Centre for Human Rights Law at Monash University pointed out that a critical problem with uncontested warrant applications is that agencies can identify confidential sources, without any realistic opportunity for journalists to protect those identities:

> …the issue of a warrant is only contestable through a judicial review challenge ex post facto. This is particularly problematic when the search is conducted on members of the press. The search may reveal confidential sources and establishing the source of a leak may often be the purpose of the search… If the confidentiality of a source is revealed during the execution of a search warrant, the damage is already done.[2]

1.8 This situation directly contradicts journalists' professional obligation not to reveal the identity of confidential sources, as well as undermines explicit protections in Commonwealth legislation aimed at respecting source confidentiality (such as in the *Evidence Act 1995* and the *Telecommunications (Interception and Access) Act 1979*).

1.9 The Australian Greens also note that in the United Kingdom the ability of the police to obtain journalistic material under warrant is broadly curtailed with specific protections set out in the *Police and Criminal Evidence Act 1984*.[3] Mr Jeremy Dear, Deputy General Secretary of the International Federation of Journalists, gave evidence that this is not an uncommon approach elsewhere in the world:

> In many countries there would be an opportunity for a journalist or media to make a public interest argument as to why they should not reveal or hand over journalistic material. In many legislations, journalistic material is defined and in a positive way there is a protection for that kind of material.[4]

1.10 Media organisations said that the existing mechanism designed to protect the public interest in press freedom, which the majority report recommends be improved and expanded, is inadequate.

1.11 In particular, the Public Interest Journalism Initiative (PIJI) pointed out that, quite separate to the issues of qualifications, transparency and accountability, Public Interest Advocates (PIAs) are not necessarily well placed to represent journalists and media organisations in warrant application processes:

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2 Castan Centre for Human Rights Law, Monash University, *Submission 14*, p. 11. Also see: Association for International Broadcasting, *Submission 43*, p. 16.

3 See: Police and Criminal Evidence Act 1984 (UK), Part II – Powers of Entry, Search and Seizure, www.legislation.gov.uk/ukpga/1984/60/part/II/crossheading/search-warrants (accessed 12 May 2021).

4 Mr Jeremy Dear, Deputy General Secretary, International Federation of Journalists, *Committee Hansard*, 10 February 2020, p. 11. Also see: Mrs Connie Carnabuci, General Counsel, Australian Broadcasting Corporation, *Committee Hansard*, 12 August 2020, p. 7, who gave the example of Hong Kong.

> The Public Interest Advocate is not necessarily a journalist, nor are they necessarily familiar with journalistic ethics and news production. They are unable to consult with the subject of the warrant and are therefore unable to properly assess the harm that could be done by the issuance of the warrant, or the specific public benefit in the warrant being refused and the source remaining confidential. Harm from the granting of the warrant may include harm to the informant or harm to the journalist themselves. Furthermore, harm to the journalist may not be confined to physical harm or potential harassment: it has been recognised that a journalist whose sources are revealed, even against the journalist's will, may suffer significant detriment to their career as an investigative journalist.[5]

1.12 Dr Margaret Simons from PIJI added that 'warrants should be ideally contestable by the journalist or their representative'.[6]

1.13 Australia's Right to Know (ARTK) emphatically supported making all warrant applications and compulsory document production powers contestable for journalists and media organisations undertaking professional roles (see paragraph 6.86 of the majority report). ARTK's proposal specifically included media notification and representation requirements.[7]

1.14 As history has shown, the PIA mechanism might not protect source confidentiality or freedom of the press. It is not clear that an expansion of this mechanism will improve the PIAs' ability to represent journalists and media organisations in warrant application processes.

1.15 The Australian Greens would prefer a warrant application process that, where appropriate, allows journalists and media organisations to represent themselves in the process, as suggested by the ARTK. However, if Recommendation 14 of the majority report proceeds, then it should address the need for PIAs to have more media experience and knowledge of how proposed warrants would impact upon the journalists and media organisations who the PIAs represent.

Recommendation 1

1.16 The Australian Greens recommend that:

- **the Australian Government amend all relevant Commonwealth legislation to allow journalists and media organisations to self-represent in warrant application processes**
- **however, if this recommendation does not proceed, and the Australian Government accepts Recommendation 14 of the majority report, then the government also provide for Public Interest Advocates to be appointed in**

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5 Public Interest Journalism Initiative, *Submission 18*, p. 6.

6 Dr Margaret Simons, Chair, Expert Research Panel, Public Interest Journalism Initiative, *Committee Hansard*, 18 October 2019, p. 43.

7 Australia's Right to Know, *Submission 34*, p. 4.

consultation with the media industry and to be able to consult with the subject of a proposed warrant.

Media Freedom Act

1.17 The majority report makes several important recommendations aimed at improving press freedom in Australia. The Australian Greens support additional reforms that fully recognise the importance of press freedom to Australian democracy.

1.18 Several submitters and witnesses expressly supported the introduction of a single law reform Act—the Media Freedom Act—to provide stronger protections for human rights and fundamental freedoms in the media context.[8]

1.19 Several noted the absence of express constitutional or minimal federal protections, notwithstanding the plethora of criminal and national security law under which journalists and media organisations may be prosecuted.

1.20 The Australian Lawyers Alliance pointed out that a Media Freedom Act would help to address the imbalance between Australia's national security framework, and the need to maintain public accountability and government transparency:

> In the absence of a federal legislative human rights charter that enables an appropriate balancing of Australia's national security laws and the essential human rights of freedom of expression (which include the freedom to seek, receive and impart information and ideas of all kinds), there is a need for separate legislation that guarantees media freedom and provides protection for journalists engaged in legitimate journalistic work, and also their sources.[9]

1.21 On this point, legal expert Dr Lawrence McNamara, currently based at the University of York, added:

> The real problem we have is that we do not have constitutional protection for media freedom… It's glaringly obvious that what we thought were normative principles and frameworks in the Australian environment and which meant we didn't necessarily need constitutional protections has been revealed to be an extremely problematic assumption.[10]

1.22 The Alliance for Journalists' Freedom (AJF) emphasised the importance of a Media Freedom Act in supporting democracy in Australia:

> A Media Freedom Act will aid the media's ability to [enable, support and protect democracy], by enshrining press freedom in legislation and more clearly define its democratic role. It would clarify the boundaries between appropriate transparency and necessary secrecy. An Act of this kind will

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8 See, for example: Association for International Broadcasting, *Submission 43*, p. 7; Dr Julie Posetti, private capacity, *Committee Hansard*, 10 February 2020, p. 25.

9 Australian Lawyers Alliance, *Submission 5*, p. 8.

10 Dr Lawrence McNamara, private capacity, *Committee Hansard*, 10 February 2020, p. 23.

> serve as both a restraint on legislative overreach, and a yardstick for the courts in cases involving the media.[11]

1.23 As noted in paragraph 7.49 of the majority report, Professor Peter Greste from AJF highlighted that a Media Freedom Act would establish an overarching principle to be applied throughout Commonwealth legislation:

> We would be in a situation where you do not have to physically tweak each statute, and that we have something, a principle that we establish in law, that would effectively cover everything in a way, and we carve out particular exceptions around national security, secrecy and so on where those issues need to be taken into account.[12]

1.24 Dr Rebecca Ananian-Welsh and her colleagues from the University of Queensland also supported a Media Freedom Act but acknowledged that, even with this legislation, it would still be necessary to comprehensively review Australia's legal frameworks for their impacts on press freedom.[13]

1.25 The Australian Greens note that there is a broad consensus among legal experts who contributed to the inquiry on the essential elements of a Media Freedom Act. These elements have been clearly articulated in the White Paper proposed by the AJF in May 2019:

- enshrine the principle of freedom of the press in legislation;
- subject to reasonable and proportionate limits, enshrine the right to freedom of opinion and expression contained in Article 19 of the International Covenant on Civil and Political Rights;
- elevate the status of any offence committed against a journalist by reason of the journalist's work to an aggravated offence;
- amend national security legislation to better protect journalists from criminal liability for legitimate journalistic work;
- protect the confidentiality of journalists' notes and source material developed in the course of legitimate journalistic work;
- enact shield laws protecting journalists from being forced to reveal their sources by government agencies and in civil and criminal court proceedings where a journalist has engaged in legitimate journalistic work; and
- safeguard journalists and their sources through enhanced whistleblower protections.[14]

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[11] Alliance for Journalists' Freedom, *Submission 13*, p. 6.

[12] Professor Peter Greste, Alliance for Journalists' Freedom, *Committee Hansard*, 18 October 2019, p. 54.

[13] Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 22.

[14] Alliance for Journalists' Freedom, *Submission 13*, Attachment 1, p. 7. Also see: Australian Lawyers Alliance, *Submission 5*, pp. 8–9; Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder, *Submission 20*, p. 22.

1.26 The Australian Greens acknowledges that the majority report attempts to capture the AJF's suggestions for strengthening press freedom in Australia. However, the majority approach does not explicitly recognise the importance of this freedom and its role in a modern democracy. The Australian Greens believe our national legislative framework needs to provide clear protection against criminal prosecution for legitimate public interest journalism, consistent with recognised human rights.

Recommendation 2

1.27 The Australian Greens recommend that the Australian Government introduce or support a Media Freedom Bill that recognises the importance of press freedom to Australian democracy, to give press freedom a clear place in public decision-making, and to exclude legitimate public interest journalism from the scope of criminal offences.

Senator Sarah Hanson-Young
Chair

Appendix 1
Submissions and additional information

1 Support Assange & WikiLeaks Coalition
2 Dr Keiran Hardy and Professor George Williams AO
- Attachment 1
- Attachment 2
- Attachment 3

3 Dr Christopher Ambrey
4 Professor David Flint
5 Australian Lawyers Alliance
6 Ms Diana Wyndham
7 Mr Andrew Fowler
8 ABC Friends Armidale Branch
9 *Name Withheld*
10 Law Council of Australia
11 Mr Greg Bean
12 Human Rights Law Centre
- Attachment 1

13 Alliance for Journalists' Freedom
- Attachment 1

14 Castan Centre for Human Rights Law, Monash University
15 ABC Alumni Limited
16 Mrs Angela Williamson
17 New England Greens Armidale Tamworth
18 Public Interest Journalism Initiative
19 ABC Friends
20 Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber, Professor Peter Greste, Mr Richard Murray and Ms Zoe Winder
21 Journalism Education and Research Association Australia
22 Associate Professor Johan Lidberg and Dr Denis Muller
23 ABC Friends National
- Attachment 1

24 Rule of Law Institute of Australia
25 Australian Signals Directorate
26 Transparency International Australia
27 Mr Eugene White
28 *Name Withheld*
29 A/Professor Gordon Gates
30 Whistleblowers Australia

- Attachment 1

31 Australian Bar Association
32 Queensland Council for Civil Liberties
33 Commonwealth Ombudsman
34 Australia's Right to Know
- 34.1 Supplementary to submission 34
- Attachment 1
- Attachment 2
- Attachment 3
- Attachment 4

35 Australian Press Council
36 GetUp!
37 Mr Kevin Lindeberg
38 ANU Law Reform & Social Justice Research Hub
39 Uniting Church in Australia, Synod of Victoria and Tasmania
40 Australian Federal Police
- Attachment 1
- Attachment 2

41 Australian Broadcasting Corporation
42 Department of Home Affairs and Attorney-General's Department
43 Association for International Broadcasting
44 International Federation of Journalists
45 Professor AJ Brown, Centre for Governance and Public Policy, Griffith University
- Attachment 1

46 *Name Withheld*
47 Dr Lawrence McNamara
48 Department of Home Affairs and Australian Federal Police
- Attachment 1

Additional Information

1 Mr Reece Kershaw, Commissioner, Australian Federal Police – Letter of correction dated 15 September 2020
2 Tenterfield Oration, 'Safeguarding our Democracy' from Professor AJ Brown, 26 October 2019
3 Protecting Journalism Sources in the Digital Age from Dr Julie Posetti, 10 February 2020
4 The Perugia Principles for Journalists Working With Whistleblowers in the Digital Age from Dr Julie Posetti, 10 February 2020
5 'Review into the AFP's Response to and Management of Sensitive Investigations', John Lawler, released 14 February 2020

Answer to Question on Notice

1 ASIO -Answer to question taken on notice, public hearing, Canberra, 15 November 2019 (received 4 December 2019)

2 Law Council of Australia – Answers to questions taken on notice, public hearing, Canberra, 15 November 2019 (received 3 December 2019)

3 Australian Federal Police – Answers to questions taken on notice, public hearing, Canberra, 15 November 2019 (received 4 December 2019)

4 Australian Federal Police – Answers to written questions taken on notice, 25 November 2019 (received 4 December 2019)

5 Attorney-General's Department – Answers to questions taken on notice, public hearing, Canberra, 15 November 2019 (received 5 December 2019)

6 Department of Home Affairs - Answers to questions taken on notice, public hearing, Canberra, 15 November 2019 (received 13 December 2019)

7 Department of Home Affairs - Answers to questions taken on notice, public hearing, Canberra, 15 November 2019 (received 18 December 2019)

8 Dr Lawrence McNamara - Answer to question taken on notice, public hearing, Canberra, 10 February 2020 (received 2 March 2020)

9 Alliance for Journalists' Freedom - Answer to question taken on notice, public hearing, Canberra, 12 August 2020 (received 21 August 2020)

10 Australian Federal Police - Answers to questions taken on notice at public hearing, 31 August 2020 (received 25 September 2020)

Correspondence

1 Letter from the Australian Federal Police Commissioner to the Chair, Senator Hanson-Young, dated 21 October 2019

2 Letter from the Australian Federal Police Commissioner to the Chair, Senator Hanson-Young, dated 13 February 2020

3 Mr Kevin McAlinden, Acting Head of Public Affairs, Australian Broadcasting Corporation – Letter of correction dated 25 October 2019

4 Mr Kevin McAlinden, Acting Head of Public Affairs, Australian Broadcasting Corporation – Letter of clarification dated 19 November 2019

5 Mr Michael Pezzullo, Secretary, Department of Home Affairs – Letter of correction dated 18 November 2019

6 Mr Michael Pezzullo, Secretary, Department of Home Affairs – Letter of correction dated 10 December 2019

7 Mr Reece Kershaw, Commissioner, Australian Federal Police – Letter of correction dated 15 September 2020

Tabled Documents

1 Australia's Right to Know - Australian Federal Police response to Nine Freedom of Information application, dated 16 July 2019 (public hearing, Canberra, 18 October 2019)

2 Australia's Right to Know - Australian Federal Police response to Nine Freedom of Information application, dated 19 September 2019 (public hearing, Canberra, 18 October 2019)

3 Senator Anne Urquhart - Home Affairs supplementary submission to PJCIS inquiry (response to question taken on notice), public hearing, Canberra, 15 November 2019

Appendix 2
Public hearings and witnesses

Friday, 18 October 2019
Committee Room 2S1
Parliament House
Canberra

Australia's Right to Know

- Mr Campbell Reid, Group Executive - Corporate Affairs, Policy and Government Relations, News Corp Australia
- Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance
- Mr Gaven Morris, Director News, Analysis and Investigations, ABC
- Ms Connie Carnabuci, General Counsel, ABC
- Ms Clare Gill, Director of Regulatory Affairs, Nine
- Mr James Chessell, Group Executive Editor, Nine
- Mr Chris Uhlmann, Political Editor, Nine
- Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV Australia

Australian Broadcasting Corporation

- Mr Gaven Morris, Director News, Analysis and Investigations
- Ms Connie Carnabuci, General Counsel

Centre for Governance and Public Policy, Griffith University

- Professor AJ Brown, Program Leader, Public Integrity and Anti-Corruption

ABC Alumni Limited

- Mr Jonathan Holmes, Press Freedom Spokesperson
- Mr Quentin Dempster, Representative

Public Interest Journalism Initiative

- Associate Professor Margaret Simons, Chair, Expert Research Panel
- Mr Gary Dickson, Operations Administrator

Alliance for Journalists' Freedom

- Professor Peter Greste, Spokesman and Founding Director
- Mr Peter Wilkinson, Chair
- Mr Chris Flynn, Director

Associate Professor Johan Lidberg and Dr Denis Muller, personal capacity, Private capacity

- Associate Professor Johan Lidberg, Director, Master of Journalism, School of Media, Film and Journalism, Monash University
- Dr Denis Muller, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne

Journalism Education and Research Association Australia

- Associate Professor Johan Lidberg, Member

Friday, 15 November 2019

Committee Room 2S1
Parliament House
Canberra

Law Council of Australia

- Mr Arthur Moses SC, President

Dr Keiran Hardy, Private capacity

Australian Security Intelligence Organisation

- Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery
- Dr Wendy Southern, Deputy Director-General, Enterprise Strategy and Governance

Department of Home Affairs

- Mr Michael Pezzullo, Secretary

Attorney-General's Department

- Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division
- Ms Elizabeth Brayshaw, Assistant Secretary, Security and Criminal Justice Branch
- Mr Branko Ananijevski, Director, Criminal Law Section

Australian Federal Police

- Commissioner Reece Kershaw

Ms Caoilfhionn Gallagher QC, Barrister, Doughty Street Chambers, Private capacity

Monday, 10 February 2020
Committee Room 2S1
Parliament House
Canberra

Mr Bret Walker SC, Private capacity

International Federation of Journalists

- Mr Jeremy Dear, Deputy General Secretary

Association for International Broadcasting

- Mr Simon Spanswick, Chief Executive

Dr Lawrence McNamara, Private capacity

Dr Julie Posetti, Private capacity

Wednesday, 12 August 2020
Committee Room 2S1
Parliament House
Canberra

Australia's Right to Know

- Mr Campbell Reid, Group Executive - Corporate Affairs, Policy and Government Relations, News Corp Australia
- Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia
- Ms Connie Carnabuci, General Counsel, Australian Broadcasting Corporation
- Mr James Chessell, Group Executive Editor, Nine
- Mr Theo Dorizac, Senior Legal Counsel, Special Broadcasting Service
- Mr Gaven Morris, Director, News Analysis and Investigations, Australian Broadcasting Corporation
- Mr Chris Uhlmann, Nine

Alliance for Journalists' Freedom

- Professor Peter Greste, Spokesman and Founding Director
- Mr Peter Wilkinson, Chair
- Mr Chris Flynn, Director

Monday, 31 August 2020
Committee Room 2S3
Parliament House
Canberra

Media Entertainment and Arts Alliance

- Mr Paul Murphy, Chief Executive Officer
- Mr Matthew Chesher, Director, Legal and Policy

Department of Home Affairs

- Mr Michael Pezzullo, Secretary

Attorney-General's Department

- Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division

Australian Federal Police

- Mr Reece Kershaw, Commissioner
- Mr Ian McCartney, Deputy Commissioner Investigations