



## Environment and Communications References Committee

Inquiry into press freedom

August 2019

Submission by the  
Australian Federal Police

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## Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Environment and Communications References Committee ('the Committee') Inquiry into press freedom. This submission addresses the terms of reference for this Inquiry, which are:

- 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.*
2. The AFP is an operational policing agency, and this submission is naturally directed towards providing the Committee with insight into the operational policing considerations that arise from the Committee's terms of reference.

## Warrant regimes in relation to journalists and media organisations

***TERM OF REFERENCE 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.***

### The role of a criminal investigation

3. Both police independence and freedom of the press are fundamental pillars of democracy. The operational independence of police is vital to ensuring that no individual member of society and no class of individual is above the law. Freedom of the press plays an important role in keeping the public informed and our democratically elected officials and Government institutions accountable. These concepts are not inherently in conflict.
4. Like all members of the public, companies, government agencies and elected officials, a journalist or media organisation may become of interest in a criminal investigation. The journalist or media organisation may be of interest either as a suspect or as a third party in possession of information relevant to an investigation. These two categories are not mutually exclusive, and persons may be of interest as both a suspect and a holder of information relevant to an investigation. Decisions about who to charge are not made until information has been collected through the investigation process.
5. It is important to draw a distinction between a police investigation and a criminal prosecution. The exercise of investigation powers by police is an information collection process, and not a punitive measure. It is normal for police powers to be exercised at a point in time when the full scope and impact of the criminal offending is unknown. In the example of journalist disclosure of classified information, it is not possible to establish this purely from the contents of the document that has been published. Other facts, including the source of the information, the way it was handled before

publication, and the intentions of the people involved are all relevant. An informed decision about whether to prosecute cannot be made until the facts of a case are known, both inculpatory and exculpatory.

6. The investigation process enables there to be an assessment of the full facts of the unauthorised disclosure, including the intentions of the persons involved, and potential consequences of the use or disclosure as outlined above. Government principles around ownership of documents means that agencies other than police may engage with journalists and/or media organisations where their information has been leaked, to facilitate recovery.
7. Before proceeding with a prosecution, the Commonwealth Director of Public Prosecutions (CDPP) must be satisfied from the facts of the case that the prosecution is in the public interest.<sup>1</sup> For certain offences, the Attorney-General's consent is also required before a prosecution may commence. The policy and legislative frameworks underpinning these decisions require the CDPP and Attorney-General (as relevant) to be informed of the facts revealed through the police investigation.

#### The legislative framework governing information and evidence collection in an investigation

8. The AFP utilises a range of approaches to collect information relevant to an investigation. This may include requesting information from individuals or entities on a voluntary basis. The *Privacy Act 1988* (Cth) includes specific exemptions for law enforcement activity for this purpose. Typical police powers for collecting evidence include search warrants, forensic procedures and electronic surveillance. These powers are not always directed at a suspect, but must still relate to the investigation of an offence. Courts have wide ranging discretion to exclude any evidence in a prosecution that has been improperly or unlawfully obtained.
9. Throughout an investigation, AFP investigators must be satisfied that each investigative decision and use of power is lawful, reasonable, necessary, fair and proportionate.<sup>2</sup> Public interest is actively considered at all stages of the investigation. One factor that may be applicable to decision making is the intentions of the person whose conduct is under investigation, for example, journalists. This is balanced against other considerations such as the protection of national security and the need to give effect to Parliament's intention in passing legislation regarding criminal offences.
10. Where appropriate, the AFP exercises intrusive powers (for example search warrants under section 3E of the *Crimes Act 1914* (Cth)) in a cooperative manner. This may include negotiating the timing of the warrant with the representatives of the entity. The ability to take a cooperative approach will depend on the nature of the investigation and the extent to which advanced notice of the warrant risks the destruction of evidence or alerting a suspect of investigative activity. Regardless of the approach taken in the lead up to the execution of a section 3E warrant, the search itself must be executed overtly.
11. Powers that involve intrusive collection of information 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 of identifying a journalist's source. This legislative process involves mandatory public interest considerations and a Public Interest Advocate.<sup>3</sup>

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<sup>1</sup> Prosecution Policy of the Commonwealth, page 5.

<sup>2</sup> AFP Investigations Doctrine.

<sup>3</sup> *Telecommunications (Interception and Access) Act 1979*, Division 4C.

Furthermore, the AFP is subject to the Commonwealth Ombudsman's oversight of covert and intrusive powers to ensure compliance with the legislation.

12. A number of interested parties, including media organisation, have commented that there should be contested hearings before a warrant relating to a journalist can be issued. Covert warrants are a key aspect of most investigations into serious offences. They enable police to collect information without alerting suspects, risking the destruction of evidence or providing an opportunity to employ counter-surveillance. Any form of contested hearing in relation to covert powers would fundamentally undermine their effectiveness, and the ability of police to conduct an investigation.
13. Search warrants under section 3E of the *Crimes Act 1914* (Cth) are often the first point at which the investigation becomes overt, or public. However, it is often very important to the integrity of an investigation that persons of interest are not made aware of the investigation until such time as the warrant is executed. An opportunity to make representations or submissions at the time of issuance would undermine investigations by alerting suspects and providing opportunities to destroy evidence.
14. There are a number of avenues open to individuals to contest police powers through the Courts after a decision has been made to issue a warrant:
  - During the execution of a search warrant, an affected person may apply for an urgent injunction to halt the warrant activity;
  - Judicial review of the lawfulness of decisions, either at common law or through the process outlined in the *Administrative Decisions (Judicial Review) Act 1977*;
  - Litigation for damages on the basis of tort law, including negligence (which generally requires the conduct to have been unlawful);
  - Claims of parliamentary privilege or legal professional privilege over documents seized at the search warrant;
  - High Court challenges in relation to constitutional validity; and
  - The ability of a Defendant in a criminal prosecution to object to evidence that has been improperly or illegally obtained.
15. Decisions about the legislative procedures and thresholds for the exercise of police powers are ultimately for Parliament to determine. However, prohibitions or restrictions on the use of investigation powers over specific classes of individuals such as journalists may have an operational impact on:
  - The ability of police to ascertain the full facts of a case, including information that may support a journalist defence;
  - The ability of the Attorney-General and CDPP to make informed decisions about the public interest in prosecuting;
  - The ability of police to collect evidence as part of an investigation into Commonwealth officials that may be guilty of the initial unauthorised disclosure; and
  - The ability of police and national security partners to fully assess the consequences of an unauthorised disclosure.

#### Unauthorised disclosure offences and defences

16. One way to minimise these impacts is to provide protections in the form of offence-specific defences, as achieved through the *National Security Legislation*

*Amendment (Espionage and Foreign Interference) Act 2018* (the EFI Act 2018). These defences were drafted specifically with the intention of balancing the need to protect freedom of speech and the importance of ensuring harmful information is not released.<sup>4</sup> The legislative framework introduced by the EFI Act 2018 is yet to be tested by the courts through a criminal prosecution.

17. Defences to unauthorised disclosure offences need to be carefully framed to ensure there is an appropriate balance between press freedom and other public interest considerations such as national security and human safety.
18. Like many Government agencies, the AFP relies on protection of sensitive information, the release of which could have an adverse impact on the Australian public, Australia's sovereign interests, the interests of Australia's strategic partners, and the personal safety of individuals involved in operations. Compliance with the Protective Security Policy Framework ('PSPF') is paramount to this.
19. Unauthorised use and disclosure of classified information can have adverse, even catastrophic, consequences, including:
  - Revealing sensitive capabilities and methodologies relied on by the AFP and its partner agencies, the exposure of which may undermine the effectiveness of operations, and put persons utilising those methodologies at risk;
  - Exposing the identity of undercover officers and informants, thereby putting their personal safety at risk; and
  - Reducing the willingness of foreign partners to provide Australian agencies with information that may assist them to protect Australia's interests and national security, including preventing terrorist attacks in Australia.
20. The risks of unauthorised disclosure may continue to apply after the conclusion of an operation and may not be evident to journalists or the wider public. A document does not need to be published in full or part for these risks to materialise. Storing classified documents in an unsecure way, contrary to the PSPF, creates a risk of the information being accessed by nefarious third parties, including foreign actors.

## Whistleblower protections

### ***TERM OF REFERENCE B: The whistleblower protection regime and protections for public sector employees.***

21. If a Commonwealth official is concerned about wrongdoing and maladministration in the Commonwealth public sector there are lawful and secure means of raising those concerns. The Public Interest Disclosure (PID) regime authorises disclosure to the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security in appropriate circumstances. Importantly, disclosure through the PID regime enables the aforementioned risks to national security, operations and human safety to be managed.
22. The AFP is not making a comment on the effectiveness of the PID regime as this is a matter of policy. The Attorney General's Department has primary responsibility for providing policy advice to Government on the PID regime.

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<sup>4</sup> *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, Revised Explanatory Memorandum, para 11.

## Referral practices

### ***TERM OF REFERENCE C: The adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information.***

23. The AFP evaluates and prioritises all allegations of criminal wrongdoing objectively at the organisational level and in accordance with a clear organisational policy called the Case Categorisation and Prioritisation Model (CCPM). Some of the factors that are taken into account through the CCPM include:
- The impact of the alleged offending on Australian society;
  - The likelihood of success in an investigation; and
  - Whether an alternative to criminal investigation is appropriate.
24. These are all applied as objective measures. The CCPM has been applied to all referrals of alleged unauthorised disclosures of classified information. In some instances, application of the CCPM has resulted in a decision not to investigate allegations of unauthorised disclosures in the media.

## Integrity framework

### ***TERM OF REFERENCE D: Appropriate culture, practice and leadership for Government and senior public employees***

25. The AFP has a strong professional standards and values framework, which must be complied with by all AFP appointees.
26. Part V of the *Australian Federal Police Act 1979* (Cth) (AFP Act) establishes the AFP's Professional Standards regime and provides a strong foundation for the AFP's corruption resilience. The AFP's Professional Standards (PRS) unit has responsibility for the development and maintenance of the AFP's integrity framework.
27. The AFP Commissioner's Order on Professional Standards (CO2) gives effect to the relevant provisions of Part V of the AFP Act by:
- Setting the professional standards of the AFP to maintain the good order and discipline of the organisation
  - Outlining the AFP complaint management methodology and processes in accordance with Part V of the Act, including the roles of AFP appointees, PRS and the Professional Standards Panel.
28. Upholding the AFP's professional standards, including the Core Values and Code of Conduct is the responsibility of every AFP appointee. This includes the requirement to comply with AFP governance mandatory compliance requirements within AFP governance instruments.
29. In addition, the AFP is subject to the oversight of a number of key bodies, including the Australian Commission for Law Enforcement Integrity, the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. This complements the scrutiny of parliamentary oversight bodies.
30. We welcome the scrutiny of these bodies, while also working with government to ensure that these various oversight mechanisms remain complementary, rather than duplicative.

## Independence of police

***TERM OF REFERENCE 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.***

31. As the Commonwealth's primary law enforcement agency, the AFP is responsible for the investigation and prevention of Commonwealth offences, as passed by Parliament. The AFP fulfils this responsibility with operational independence and political impartiality at all times.
32. The Minister for Home Affairs is lawfully permitted to provide written directions to the AFP in terms of the 'general policy to be pursued' in fulfilling its functions.<sup>5</sup> However, 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. On 8 August 2018, the Minister for Home Affairs issued a ministerial direction in relation to press freedom (**attachment A**). The AFP welcomes the new ministerial direction, which will assist the AFP to find the appropriate balance between press freedom and other public interest considerations, including national security and human safety.
33. The AFP's standard practice is to notify the Minister for Home Affairs when politically sensitive matters are referred to the AFP unless there is a conflict of interest or potential for perceived conflict of interest. This is done in accordance with the AFP National Guideline on Politically Sensitive Investigations (**attachment B**). The AFP also notifies the Minister for Home Affairs' Office of significant, overt operational activity. 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.
34. As stated above, the AFP evaluates and prioritises all referrals independently of Government and in accordance with a clear organisational policy called the Case Categorisation and Prioritisation Model (CCPM).
35. The AFP is one of the most thoroughly oversighted agencies in the Commonwealth including by the:
  - The Commonwealth Ombudsman;
  - The Australian Commission for Law Enforcement Integrity;
  - The Parliamentary Joint Committee on Intelligence and Security;
  - The Parliamentary Joint Committee on Law Enforcement;
  - The Senate Standing Committees on Legal and Constitutional Affairs; and
  - The AFP's internal Professional Standards Unit.

Most significantly, the AFP's use of powers is tested whenever evidence derived from those powers is adduced in court.

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<sup>5</sup> *Australian Federal Police Act 1979* (Cth), section 37(2).