

# Joint Submission from Support Assange & WikiLeaks Coalition

## Australian Senate Inquiry into Press Freedom

### Introduction and Summary

1. We welcome the opportunity afforded by the Senate Committee on Environment and Communications ('the Committee') to provide a submission on the critical issues concerning press freedom in our democracy.
2. Australia is one of the world's most successful democracies, with a strong commitment to core values of freedom of speech, association, and the press. It is a country with a strong reputation in the world as an exemplar of these values, and our success sends important messages both in our immediate neighbourhood and globally.
3. Simply put, the eyes of the world are upon us as we tackle the balance of freedom of the press, and national security. However, it is clear from the disproportionate number of security laws which have been hurriedly passed by the Australian legislature since 9/11 - in our view without building in sufficient safeguards or effective and prompt review mechanisms - that Australia's reputation as a model democracy is now at risk and subject to heavy criticism by international leaders.
4. These criticisms also extend to Australia's failure to effectively assist one of its most prominent members of its journalistic and press entourage, Mr Julian Assange, while he battles against far-reaching charges laid against him by the US. The Australian Government can not keep ignoring Nils Melzer's Un Report.
5. The Committee would agree that *for a free an open society to function, all forms of Government need to be transparent. We are living in a time where those with vested interests in propping up the standard assets of the fossil fuel industries and those working on behalf of the war profiteering oligarchs can lobby and cajole Parliamentarians to act against the best interests of society in general.*
6. *Most achievements in our society took place because ordinary Australians stood up and protested, whether it be ending child labour, a 40-hour working week or votes for women and so on. To be able to do this, whistleblowers were required. If our society doesn't make room for dissent it will perish, and not progress.*
7. Our legislature now has the opportunity to strike the right balance between press freedom and the protection of *strictly sensitive and classified information* (as distinct from information which should be open to the community and is marked as sensitive and/or classified information to avoid scrutiny), *and* to provide a model for other democracies across the globe.
8. It is evident that over the years since 2001 many security laws have been passed - at the federal level over 70 pieces of legislation - and we have an obligation to examine their combined impacts on civil society, including on freedom of the press.
9. Often such measures were passed with insufficient robust debate around consequences for the health of our democracy, so this Inquiry clearly provides an overdue review.

10. Senate Inquiry, we assume the Committee holds public hearings and the publication of all submissions. As the idea of an inquiry on press freedom being held *in camera* is clearly a contradiction in terms.
11. The transparency of this process will be critical to enhancing public confidence and trust - which is increasingly under duress, at significant cost to our democratic system.
12. The intervention of substantive judicial processes, including requiring warrants to be issued by a senior judicial officer following contested hearings which include the media, with the capacity to rebut, is a fundamental and crucial reform to add critical checks and balances to an otherwise opaque and unaccountable system.
13. The Attorney General should report to Parliament each quarter on the number of warrants issued, and this basic information should not, in and of itself, impinge on national security.
14. Without substantial reforms, the case of Mr Julian Assange which is outlined in this submission as the most manifest example of arbitrary detention and arrest of a publisher and editor, is the future, if not the present reality, facing Australian journalists, editors and publishers.

## **Our key recommendations are**

15. Urgent and effective intervention in relation to the case of Mr Julian Assange, including notification by the Australian government to the UK and US governments that Australia extends full diplomatic protection to Mr Assange;
16. The Australian government must substantially strengthen *Public Interest Disclosures Act* and other legislation protecting whistleblowers, journalists, publishers and media organisations which publish material *in the public interest*; specifically, evidence of war crimes, corruption and human rights violations;
17. National security laws must be amended to decriminalise regular journalistic activity (for instance but not limited to 35P of the *ASIO Act*, Division 4C of the *Telecommunications Interception and Access Act*; *Criminal Code Act*, Part 5.2: Espionage and related offences; Part 5.6: Secrecy of information, section 119.7: Foreign incursions and recruitment; s 80.2C : Advocating terrorism; *Crimes Act*: s15HK and s15HL: Controlled operations, unauthorised disclosure of information
18. Applications for, and the circumstances of the execution of warrants must be contestable and independently monitored; *Crimes Act* s. 3ZZHA: Delayed notification search warrants, unauthorised disclosure of information;
19. Classification of documents and the FOI system must be overhauled;
20. A federal bill of rights be enacted by parliament in order to protect freedom of speech in Australia;
21. Hearings and submissions made to this inquiry must be public and accessible;

22. The Committee should bear in mind the key words of international renowned figures and spoke-persons from various walks of life, for example Human Rights expert Ms Amal Clooney, United Nations Special Rapporteur on Torture, Nils Melzer, The United Nations 2015-6 Human Rights Report on the “cruel and unusual treatment of Julian Assange and UK Prime Minister Mr Boris Johnson, regarding freedom of the press and the revengeful actions of the US against acclaimed Australian journalist and publisher, Mr Julian Assange:

Julian Assange arbitrarily detained by Sweden and the UK, UN expert panel finds

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17013>

UN expert says "collective persecution" of Julian Assange must end now

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665&LangID=E>

23. *The indictment against Julian Assange has alarmed journalists and newspapers around the world...because it criminalises common practices in journalism that have long served the public interest (Amal Clooney, UK Special Envoy on Media Freedom)*

*“Media organisations should feel free to bring important facts into the public domain...There can be no conceivable case in my view for prosecuting newspapers or media organisations for publishing stuff like this, where there plainly isn’t any risk to national security...A prosecution on this basis would amount to an infringement on press freedom and have a chilling effect on public debate.*

*(Prime Minister of the UK Boris Johnson discussing the Darroch cables; 13 July 2019)*

1 From 29:32 <https://www.pscp.tv/w/>

[b\\_Z2IDFKUkttWXpvR2V2S1B8MXZBR1JXV2JkT2FKbFDFMQSHUM3tsUkPewbmmDU-Ppq1TCH5dgVIAKnx2HFa?t=31m11s](https://www.pscp.tv/w/b_Z2IDFKUkttWXpvR2V2S1B8MXZBR1JXV2JkT2FKbFDFMQSHUM3tsUkPewbmmDU-Ppq1TCH5dgVIAKnx2HFa?t=31m11s)

24. Australia’s government and legislature must not remain complacent in light of this unwarranted and egregious extradition request for Mr Assange. In effect, the US is seeking to silence and imprison a stalwart of Australian press freedom. As such, this extradition request is an attack on Australia’s sovereignty and an example of extra-territorial reach on the part of the US.

## Submissions on specific Terms 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***

25. **Warrants:** We strongly believe that there should be contested hearings where it is reasonable to assume warrants may place sources in jeopardy, particularly when matters involve unlawful activity of the government or its agents. **These hearings should be allowed to be accessed by the journalist or media organisations prior to the warrant being issued, and adjudicated by Federal Court of Federal Circuit Court judges.**

26. The right to a strong free press can be protected whilst avoiding the disclosure of effectively secret and intelligence material by obtaining written undertakings by media organisations and individual journalists and publishers not to publish whilst the proceedings to obtain orders are outstanding. This is a

common standard practice in court proceedings which has worked very well for Australia.

27. There should be real-time reporting of these hearings and reporting to parliament.

28. Closed court hearings and suppression orders must be the exception, and only permitted to the extent that any erosion of the principle of open courts is limited.

29. Referred to above, matters involving unlawful activity and by this we mean those involving SIOs and any war crimes or human rights violations carried out in Australia or abroad. Whistleblowers must be protected, and those who report serious human rights violations must not be prosecuted for informing the public. We live in a liberal democracy, and journalists have an obligation to inform the public and keep the checks and balances in place in a way that does not place national security at risk.

[http://www.defence.gov.au/foi/docs/disclosures/321\\_1112\\_IR\\_Document\\_1.pdf](http://www.defence.gov.au/foi/docs/disclosures/321_1112_IR_Document_1.pdf)

30. There must be protections for journalists and publishing organisations. There should be a mechanism for appeal the decision of a judge and the warrants should not be issued without the ability for the journalist or media organisation to appeal the warrant on public interest grounds, and be represented during the hearing.

31. **Accessing electronic data:** Accessing electronic data of journalists and publishing organisations who investigate government malfeasance is inappropriate and completely unacceptable in a democracy: It has a chilling effect on the quality and nature of journalism in Australia. This is particularly the case in relation to private communications and private dwellings of journalists. This does not suggest that ordinary law enforcement should not occur when situations arise which include the perpetration of criminal activity, but there must be a threshold to protect the right to privacy of journalists and their sources, especially when investigating human rights abuses or government malpractice. Importantly, the nature of the investigations must not be politically based. To address this, any investigation must be confined to the realm of non-political offences.

32. The scope of this legislation (or security/intelligence laws in general?) is overly broad and subjective, and therefore would target the activity of legitimate whistleblowers and/or publishers, Mr Julian Assange, Mr Edward Snowden and the work of WikiLeaks.

33. The classification of an SIO is also problematic, due to the fact that ASIO can designate SIOs in secret.<sup>19</sup> SIOs are fraught with covertness, and because of the nature of these activities, and the immunity the legislation provides to individuals undertaking SIOs, it is possible that they could inadvertently hide commission of offences that there is a public interest in disclosing. In addition, given the historical involvement of Australian military and intelligence in US led operations that have resulted in crimes against humanity, the public interest should be paramount.<sup>20</sup> This legislation also impacts on the ability of human rights organisations and publishers to expose crimes such as torture, cruel, inhuman and degrading treatment or punishment, due to fear of prosecution. The effect of this legislation can therefore only be described as political and punitive, and an attempt to prevent information from being disclosed that would expose government malfeasance.

34. Journalism that exposes government malpractice and military involvement in war crimes should not be regarded as a national security threat. The conflation of reporting human right violations which expose alleged or actual crimes involving Australian or US military abroad, with aiding and abetting terrorism, is a serious error at law and of policy, which must be addressed. This has occurred in relation to the work of Mr Assange and WikiLeaks and has a trickle-down effect in relation to the broader nature of journalism in Australia. The prosecution of Australian military official David McBride, and investigation of the ABC journalists who published the Afghan files exemplifies this error on the part of the Australian government and its agencies.

35. The situation of Mr Assange and the recent raids on the ABC and Annika Smethurst, place Australia's international standing as a liberal democratic state which respects human rights and freedom of the press under threat globally, and particularly in the Asia-Pacific region. The persecution of journalists who expose material deemed contrary to government interests presents a wide opening for repressive regimes elsewhere to use the 'national security threat' mantra to curtail free speech. This supports the rise of authoritarianism.

36. **Any threat to media freedom means risking a closed state that does not submit itself to the scrutiny of the public; this cannot and must not happen.**

<https://www.theguardian.com/world/2014/jul/16/journalists-face-jail-leaks-security-laws>

Section 35 (B) 1 provides that "the Director-General, a senior position-holder or an ASIO employee may apply to the Attorney-General for an authority to conduct a special intelligence operation on behalf of the Organisation."

For example, Australia is one of the 54 countries which were involved in the CIA extraordinary rendition programme. This operation would most likely have been classed as an SIO if it were occurring today. [https://www.washingtonpost.com/news/worldviews/wp/2013/02/05/a-staggering-map-of-the-54-countries-that-reportedly-participated-in-the-cias-rendition-program/?noredirect=on&utm\\_term=.4ea46748d4c5](https://www.washingtonpost.com/news/worldviews/wp/2013/02/05/a-staggering-map-of-the-54-countries-that-reportedly-participated-in-the-cias-rendition-program/?noredirect=on&utm_term=.4ea46748d4c5)

37. This issue was raised by the UK Special Envoy on Media Freedom, Ms Amal Clooney, in the recent Defend Media Freedom conference held in the UK. Ms Clooney stated

*"What happens in a country like Australia, or the UK or the US will be looked at by every other leader in the world and potentially used as an excuse to clamp down even further on journalists...I think journalists all over the world are less safe if the rhetoric or even policies or laws in states that are supposed to be free are actually a threat to journalism in that country."*

38. These questions are at the heart of this enquiry for Australia. At present, Australia retains a seat on the UN Human Rights Council, yet a federally enshrined bill of rights is nationally absent. The lack of freedom of speech protections also has a negative impact on the practice of journalism and therefore on informing the public. It is only appropriate that steps are taken to ensure that freedom of speech and the press is protected through nationally enshrined legislative protections, if

Australia is to be an example to our Asia Pacific neighbours, and not be used as a catalyst by repressive regimes to carry out war crimes and corruption in secret.

**(b): The whistleblower protection regime**

39. The experience of WikiLeaks as a publishing organisation and its Australian founder and former Editor-in-Chief, Mr Julian Assange, provides a profound example of Australia's failure to protect whistleblowers, thus negatively impacting freedom of the press.
40. As an award-winning publishing organisation, WikiLeaks provides a means for individuals and organisations to anonymously provide information for publication in the public interest. WikiLeaks has published comprehensive and uncontested accounts of serious human rights violations and revealed state involvement and/or complicity in war crimes and interference in the domestic affairs of other States, perpetrated by governments across the globe, including Australia. <https://defend.wikileaks.org/wikileaks/>
41. In 2010, WikiLeaks, jointly with several large and reputable media organisations, released an extensive cache of documents by Chelsea Manning, a former United States (US) Army intelligence analyst. These disclosures detailed war crimes and human rights abuses committed by the US government and their agents, including, the ground-breaking Collateral murder video, Iraq War Logs, Afghan War Diaries, Cablegate, and the Guantanamo Bay Detainee Manuals, published in 2010 and 2011. <https://wikileaks.org/+WarMilitary+html>
42. These releases and concurrent stories published in newspapers such as the *New York Times*, *The Guardian*, and *The Sydney Morning Herald*, have provided invaluable insights into the inner workings of government, the intelligence community and the military. Their publication is the quintessential example of journalism in the public interest, and exemplifies the role a free press has in informing our democracy, demanding accountability and ensuring compliance with the rule of law.
43. WikiLeaks and Mr Julian Assange published those documents in agreement with The Guardian and The New York Times. Sadly, the ensuing US's wrath has been concentrated on the individual journalist and publisher, Mr Assange, and the media organisations which worked with him in this courageous act of informing the public, have remained unscathed.
44. The protection of whistleblowers at the Commonwealth, and indeed the State and Territory levels, is deficient and up hazard, and the broad overreach of law enforcement and the intelligence community in Australia and abroad means that sources are placed at risk.
45. It is evident that whistleblower protections are insufficient in Australia. The means of surveillance and the collection of personal data places all sources at risk. The effect of this is a heightened sense of danger in revealing misconduct or even activities as serious as war crimes and human rights violations. This presents another barrier to a robust democracy and the protection of the public's right to know and be informed.

<https://www.smh.com.au/world/europe/be-better-than-north-korea-amal-clooney-warns-australia-on-press-freedom-20190711-p5264e.html>

**(c) The adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information**

46. It should be uncontroversial that a robust democracy hinges on an informed, functioning, fearless and effective media, and on the freedom of information and freedom of the press.

47. In response to the Chelsea Manning disclosures, the US government has charged WikiLeaks' publisher Mr Julian Assange with seventeen counts under the Espionage Act,<sup>5</sup> and one charge of conspiracy to commit unauthorised access to a government computer, a violation of the *US Computer Fraud and Abuse Act* (CFAA), which is classed as a terrorism offence.<sup>6</sup> The US currently seeks his extradition from the UK. This prosecution criminalises journalistic activity and is strenuously opposed by major media outlets and human rights organisations in part, and among other reasons, because of the extraterritorial effect of the Espionage Act and CFAA charge.<sup>7</sup>

48. ***The persecution of WikiLeaks founder Mr Julian Assange is central to the experience of journalists in Australia for the following reasons:***

- a. Mr Julian Assange is currently facing 175 years of imprisonment in the United States (life in prison) for carrying out routine journalistic and investigative journalistic activities, and these charges are being applied **extraterritorially**;
- b. The charges Mr Assange faces relate to **actions undertaken by journalists on a daily basis**, including providing ways for sources to protect their identities and procuring information.<sup>8</sup>
- c. Recent legislation in Australia also criminalises some journalistic practices, such as receiving information that may or may not be classified, but which is wrongly and/or arbitrarily identified as classified as a subterfuge used by government and/or governmental agencies to avoid accountability and to avoid their duty of transparency.<sup>9</sup>
- d. The prosecution of Mr Assange lends to the likelihood that other Australian journalists and media outlets could be prosecuted extraterritorially under any US legislation, due to its jurisdictional overreach, as well as here in Australia. This provides a chilling reality for all Australian journalists, and a damning indictment of the Australian government's combative attitude towards media freedom which, in our view, must be remedied forthwith. This Senate Inquiry is in a position and has the duty to recommend much needed changes which will protect freedom of the press.
- e. More importantly, because the Australian government is taking an 'active bystander' approach, it appears to be complicit with US authorities in dealing with Mr Assange and this attitude sends a strong message to other journalists and publishers that they could potentially be targeted if they publish material that is seen as embarrassing, or viewed by Australian government officials as contrary to Australian and/or US government interests. This is particularly the

case in relation to military related activity that may include evidence of torture and other crimes against humanity, and the involvement of the US military or intelligence.

- f. The Australian government has taken the US lead in passing legislation to prevent and/or block activities which would fall within the scope of regular journalistic activity. The US and Australia have a 'special relationship' and form part of the Five Eyes intelligence sharing operations. In essence, the US and Australia are enmeshed, which provides for a potentially dangerous situation for journalists who wish to report human rights violations, or anything related to the expansion of intelligence operations which curtail human rights and freedom of the press
- g. The experience thus far of Julian Assange and WikiLeaks, and more recently Annika Smethurst for reporting on the Australian Government for overreach and spying on the general citizenry and the raid on the ABC Offices, demonstrates that Australian journalists too can be targeted by intelligence and law enforcement.
- h. Recently, the experience of Australian Broadcasting Authority (ABC) journalist Dan Oakes who was researching material in relation to the 'Afghan files' which detailed allegations of war crimes carried out by Australian Special Forces, demonstrated that metadata was accessed, and his private travel itineraries were obtained by the Australian Federal Police (AFP), thereby placing his sources at risk.<sup>12</sup>
- i. The raids of both the ABC studios and the private home of News Ltd. journalist Annika Smethurst, also demonstrate the draconian responses from law enforcement bodies which are targeting journalists who publish material the government would prefer remained out of the public realm.<sup>13</sup> These responses from intelligence and law enforcement can be viewed as illegitimate, harsh and punitive, particularly if charges result from these raids.<sup>14</sup>
- j.
- k. Current far-reaching legislation and intelligence operations mean that journalists are potentially under surveillance for carrying out **regular journalistic activity**, and are subsequently under threat of prosecution, with some in fact being prosecuted for fulfilling their role and obeying the law, which requires individuals to report crimes. This has a clear chilling effect in relation to the nature of the stories journalists are willing to research and media organisations are willing to publish. The broad metadata legislation, for example, provides a means for authorities to track websites accessed by individual journalists.<sup>10</sup> Recently passed encryption laws allow for the Australian government to compel Telcos or wi-fi providers to surveil and monitor users.<sup>11</sup> This places sources at risk.
- l. The law enforcement and intelligence operations targeting journalists appear to be deployed in a quixotic and egregious manner, for example when material has leaked that is seen as helpful to Australian government interests (Medevac legislation), no prosecution ensues. This can only undermine public confidence on the government and our parliamentarians, who may be seen by the wider community as acting in a disingenuous manner and in furtherance of illegitimate purposes.<sup>15</sup>

- m. The political nature of the charges against Mr Assange were highlighted by the UN Special Rapporteur on Torture, and he called on the collective persecution of Mr Assange to end.<sup>16</sup>
- n. Punitive responses to the publishing of material challenging government malpractice or state overreach provide a further chilling effect in relation to the activities of journalists and publishing organisations.
- o. Furthermore, Australian legislation under the *Australian Security Intelligence Organisation Act 1979*, contains clauses that criminalise the disclosure of material classed as a 'special intelligence operation' (SIO),<sup>17</sup> and "disclosures by any person, including participants in an SIO, other persons to whom information about an SIO has been communicated in an official capacity, and persons who are the recipients of an unauthorised disclosure of information, should they engage in any subsequent disclosure"
- p. The metadata was not limited to the workplace, but also included home internet and telecommunications devices: <https://www.theage.com.au/national/federal-police-forced-qantas-to-hand-over-the-private-travel-records-of-an-abc-journalist-20190707-p524xu.html>

5 [https://file.wikileaks.org/file/Assange\\_Indictment.pdf](https://file.wikileaks.org/file/Assange_Indictment.pdf)

6 Following the US PATRIOT Act, the CFAA charge is classed as a terrorism offence.

7 Including, Amnesty, Human Rights Watch, RSF, MEAA, IFJ.

8 Prosecutors assert Assange "aided, abetted, counselled, induced, procured, and wilfully caused [Chelsea] Manning, who had lawful possession of, access to, and control over documents relating to the national defense" to "communicate, deliver, and transmit the documents" to WikiLeaks. <https://defend.wikileaks.org/2019/05/23/julian-assange-charged-under-espionage-act-in-unprecedented-attack-on-first-amendment/>

9 [www.legislation.gov.au/Details/C2019C00024](http://www.legislation.gov.au/Details/C2019C00024)

10 <https://www.abc.net.au/news/2019-07-09/afp-access-journalist-metadata-60-times-in-12-months/11290888>

11 <https://www.smh.com.au/national/australia-leads-the-western-world-on-media-restrictions-un-rapporteur-20190712-p526ko.html>

13 Annika Smethurst published an article examining potential new powers for ASIO to spy on the public: <https://www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corp-journalist-annika-smethurst>

14 They also equate to human rights violations in relation to the privacy of the journalists involved.

15 <https://thenewdaily.com.au/news/national/2019/06/08/medevac-leak/>

16 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665&LangID=E>

17 This legislation provides immunity from prosecution for ASIO but prevents the reporting of anything classed as a Special intelligence operation under section 35 P. <https://www.legislation.gov.au/Details/C2019C00024>; <https://www.theguardian.com/world/2014/jul/16/journalists-face-jail-leaks-security-laws>

## **The personal impact of these laws and Australia's complacency on journalist and publisher, Mr Julian Assange, as an example for other Australian journalists:**

49. The personal experience of Mr Assange is important to understand the impact of law enforcement and intelligence powers on freedom of the press, not only in the Australian context, but also internationally.

50. Because of Mr Assange's journalistic activities,<sup>22</sup> he is regarded as a 'targeted person' by intelligence agencies, including ASIO.<sup>23</sup>

51. On 19 June 2012, Mr Assange was forced to seek and was subsequently granted asylum in the Ecuadorean embassy. One of the grounds for asylum was the fact that the Australian government would not protect Mr Assange from extradition to the US should he return to Australia; that he was targeted by intelligence agencies because of his work,<sup>24</sup> and he had a well-founded fear of persecution. The extradition request by the US has confirmed those fears were well founded.

52. A UN Working group on Arbitrary Detention ruled that Mr Assange was being held arbitrarily in the Ecuadorean embassy.<sup>25</sup> Mr Assange has lived with threats to his person and his family, including calls for his assassination. (CITATION) **Mr Assange now faces the rest of his life in prison for essentially carrying out journalism and exposing war crimes and human rights violations in the public interest.** This personal cost to Mr Assange and his family is immense, and the collective persecution of the several governments involved is unequivocally designed to send a clear message to journalists all over the world that if you publish embarrassing and illegal government activity, you will be prosecuted and persecuted. This should not become the norm in a democracy such as Australia.

53. In short, the Australian government and Australian legislators should be deeply concerned about the attempt by the United States to prosecute an Australian citizen, in circumstances where that citizen faces 173 years imprisonment for revealing serious war crimes.

22 Whether it is accepted Mr Assange is a journalist is irrelevant as he is being prosecuted for undertaking activities that journalists carry out as part of their work.

23 <https://www.sbs.com.au/news/why-the-trump-administration-stepped-up-pursuit-of-julian-assange>; <https://www.smh.com.au/national/asio-eye-on-wikileaks-20110522-1eyyt.html>

24 Mr Assange is classed as a national security threat due to his journalistic work.<sup>25</sup>  
[https://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%2054\\_Sweden\\_UK\\_Assange\\_AUV.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions2015AUV/Opinion%202015%2054_Sweden_UK_Assange_AUV.pdf)

## **(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**

54. It is our view that law enforcement agencies are compromised when required to carry out investigatory and law enforcement responsibilities in relation to *politically sensitive matters*. The community's right to a free press requires that all *political* factors be taken out of this balancing act.

55. We agree that the government must balance likely security threats with press freedoms; but not politically sensitive matters with press freedoms. The role of law enforcement and intelligence agencies is to investigate *serious offending and obtain intelligence on security threats*; not on politically sensitive issues, and to utilise those law enforcement agencies for political witch hunt is improper.

56. There are serious issues around the independence of the AFP. There is a conflation of the political mechanisms of the State and its law enforcement bodies. The recent case of the AFP raids on the ABC highlight the political nature of the AFP insofar as Home Affairs Minister Hon Peter Dutton's involvement in enacting the initial investigation into the AFP journalists. In effect, the way the legislation is being utilised means that if a politician or Australian government official is embarrassed by a leak, or is pressured by a foreign entity to investigate a leak, they send in the AFP to surveil and then prosecute a journalist. In our view, it is problematic that the AFP and intelligence agencies have these broad powers considering the political enmeshment. As parliamentarians, you must remember that the AFP is not an impartial fact-finding body.

57. One cannot separate the provision of the current legislation with the political climate in which it was enacted. This is especially true given the nature of the material exposed by the Australian journalists in question and the timing of the legislation given the WikiLeaks releases and the legislative reforms undertaken in the US, such as the amendment to the *Patriot Act* which designates a charge of *conspiracy to commit unauthorised access to a government computer*, a violation of the US Computer Fraud and Abuse Act (CFAA), **a terrorism offence**.

58. It must also be remembered that it is not necessary to actively encourage unauthorised access to a government computer for a publisher to be now prosecuted for publishing information which is provided by a source. The act of publishing that information which is in the public interest is said to be a terrorism offence: Journalism does not equate to terrorism, and publishing material which exposes government corruption and criminal activity should not be regarded as 'aiding the enemy'. This rhetoric is extremely dangerous and must not go unchecked.

59. The number of documents unnecessarily classified as 'secret' also plays a role in this. As a consequence of the heightened sense of fear post-9/11, the number of documents labelled as secret, or top secret also increased. The risk over over-classifying is highly problematic on several levels, as it curtails public debate, increases secrecy and paves the way for a lack of scrutiny.

60. Obtaining material under existing Freedom of Information legislation is difficult and fraught with bureaucratic complications, given the extent of redactions on national security grounds and the ability for bureaucrats to issue a certificate at any time, preventing access to the material. This is exemplified by the publication by WikiLeaks and the Guardian and the New York Times of material confirming war crimes and human rights abuses, such as torture. Vast amounts of WikiLeaks releases demonstrated that many of the documents classified as 'secret' rather than 'top-secret' were actually classified in that manner to prevent public scrutiny or embarrassing material from being released, rather than a genuine need to protect the information from reaching those who may have malicious intentions. In effect,

the broad utilisation of classifying material as *secret* or *sensitive* curtails public scrutiny, rather than actually performing the task of protecting national security.

61. When thresholds of secrecy heighten, it limits the ability for the public to partake in rational and robust political debate.

62. It should be emphasised that investigations undertaken by the Australian Defence Force found that the WikiLeaks releases have not placed any Australian interests or personnel at risk. Despite this, Mr Assange was accused of conducting illegal activities by a former Prime Minister, and was therefore significantly and improperly prejudiced in Australia and before the Australian community. Whilst protecting Australia from 'security threats' remains an ongoing issue in the current political climate, the evidence gathered by reputable agencies, strongly suggests that the current statutory powers are being used to target journalists who are exposing crimes, government misconduct, or material that is potentially embarrassing to authorities. This is an improper use of the legislation. This also impedes the ability of journalists to carry out their work in a fearless manner if they are working under surveillance, and subsequently under the likely threat of prosecution.

63. History tells us that repressive regimes use the excuse of protecting national security in order to prevent details of crimes, corruption and malfeasance from coming to light in the public realm. Australian bodies representing the legal community have noted time and time again that Australia already had strong and sound penal legislation in place to curtail threats to national security, and that those then existing laws (e.g. Crimes Act ...), did not impede the ability of journalists and media outlets to report human rights abuses. This has changed over the past decade.

64. For example, during the AFP raids on the ABC earlier this year, the legislation enshrined under the *Telecommunications and Other Legislation Amendment (Assistance and Access) ACTI 2018*, allowed for the AFP to "add, copy, delete or alter" material on the ABC's computers. This presents a dangerous situation not only for sources and whistleblowers, but also clearly impinges on the right to know. The general view of the law is that to tamper with evidence is a serious breach of the criminal process and can amount to a crime and a contempt of court application. Our parliament must not allow such violation of the law to occur.

65. These powers are broad in nature and impinge on the ability of journalists to inform the public. **In our view, Australian Government agents such as the AFP should not have the power to delete or alter material from the computers and servers of journalists or media organisations at all. An application to do so should be subject to the scrutiny of Courts and the media organisations should be able to strongly defend such application if the material sought to be deleted or altered is in the public interest. It is sufficient to obtain an injunction or an undertaking from media organisations not to alter that material whilst a Court is dealing with the AFP's or government's request.**

66. The power to 'alter' material also calls into question the nature and purpose of the powers. The power to alter weakens the strength of the legislation to tackle serious and credible security threats due to the inevitable conclusion that the

powers may be used to remove or alter evidence to the detriment of the individual being investigated, and instead used as a means of targeting whistleblowers and preventing important information regarding abuse of power from reaching the public realm. Indeed, the mere existence of the legislation presents a chilling effect and self-censorship of journalists and media organisations.

67. These powers represent many of the core problems enshrined under current Australian intelligence legislation and the overt powers of law enforcement and intelligence organisations.

<https://www.legislation.gov.au/Details/C2018B00180>

68. It is consequently fundamental that more stringent oversight of investigative bodies is undertaken in order to ensure that these investigations and the monitoring of journalists is not undertaken for purely political purposes or to target whistleblowers. Journalistic activity should not be criminalised.

69. The threat to freedom of the press and the values we hold dear as a liberal democracy have never been more at risk. Journalists and media outlets are under increased surveillance and under the threat of prosecution for carrying out basic journalism across the globe. More than 70 journalists have been killed around the world for carrying out journalistic work, particularly investigative journalism to inform communities.

70. The work of WikiLeaks and the experience of Mr Julian Assange should come as a warning to all who care about democracy. Without publishing organisations like WikiLeaks, and robust and fearless journalism, we risk sliding into a tumultuous paradigm of authoritarianism.

71. We have an opportunity here in Australia. We live in a democracy - with a highly successful multicultural society, respect for the rule of law and basic freedoms - to create a global, best practice model for us and other western democracies. We can stand at the forefront for other states to emphasise the benefits of democracy in regions where it is challenged, so this is an opportunity our elected representatives should grasp.

*“Freedom of the Press, if it means anything at all, means the freedom to criticise and oppose” (George Orwell).*

## Recommendations:

1. Urgent and meaningful intervention by the Australian government and its agencies overseas in relation to the case of Mr Julian Assange, to ensure that he is freed from gaol and safely returned to Australia, rather than extradited to the US;
2. The Australian government strengthen *Public Interest Disclosures Act* and other legislation protecting whistleblowers, journalists and media organisations that publish material *in the public interest*; specifically, evidence of war crimes, corruption and human rights violations
3. That the Australian Government (as a UN signatory) recognise and abide by the afore mentioned UN findings related to Julian Assange.  
Julian Assange arbitrarily detained by Sweden and the UK, UN expert panel finds

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17013>

UN expert says "collective persecution" of Julian Assange must end now

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24665&LangID=E>

4. National security legislation must be amended forthwith to decriminalise regular journalistic activity (35P of the *ASIO Act*, Division 4C of the *Telecommunications Interception and Access Act*; *Criminal Code Act*, Part 5.2: Espionage and related offences; Part 5.6: Secrecy of information, section 119.7: Foreign incursions and recruitment; s 80.2C : Advocating terrorism; *Crimes Act*: s15HK and s15HL: Controlled operations, unauthorised disclosure of information
5. Warrants must be contestable and independently monitored; *Crimes Act* s. 3ZZHA: Delayed notification search warrants, unauthorised disclosure of information;
6. The classification of documents and the FOI system must be overhauled;
7. A federal bill of rights be enacted by parliament in order to protect freedom of speech in Australia;
8. Hearings and submissions made to this inquiry are public and accessible.

Ian Rose on behalf of  
Support Assange & WikiLeaks Coalition