Blueprint for Free Speech

Submission to:

The Senate Legal and Constitutional Affairs References Committee inquiry into the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters.

2 April 2014

Submission to the Senate Legal and Constitutional Affairs References Committee (the Committee) inquiry into the current investigative processes and powers of the Australian Federal Police (AFP) in relation to non-criminal matters (the Inquiry).

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1 Introduction

Thank you for the opportunity to provide comments to the Committee in respect of the Inquiry.

Blueprint for Free Speech (**Blueprint**) is an Australian based, internationally focused not-for-profit concentrating on research into 'freedoms' law. Our areas of research include public interest disclosure (whistleblowing), freedom of speech, defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of more than 20 countries' whistleblowing laws, protections and gaps.

We are encouraged that the Federal Parliament wishes to consult with the community in respect of the current investigative processes and powers of the Australian Federal Police in relation to non-criminal matters. This investigation is an important one that covers a number of issues. Due to the wide-ranging nature of the investigation, we preface our submission by saying that we will only focus on a few select issues.

For convenience, we have replicated each of the points for which you seek feedback:

> *"(a) thresholds, including evidentiary thresholds, relating to the obtaining of production orders and search warrants, and in particular whether these reflect the rules applicable to civil litigation discovery rather than coercive search;*
>
> *(b) procedures preparatory to seeking production orders and search warrants, including taking into account the conduct of the recipient of such orders;*
>
> *(c) procedures for executing search warrants;*
>
> *(d) safeguards relating to the curtailment of freedom of speech, particularly in relation to literary proceeds matters;*
>
> *(e) safeguards for ensuring the protection of confidential information, including journalists' sources, obtained under search warrants, and particularly where that information does not relate to the search warrant;*
>
> *(f) the powers available to the Australian Federal Police to intercept telecommunications in circumstances where the matter being investigated does not involve criminal conduct;*

(g) the priorities of the Serious and Organised Crime Division, and the circumstances under which they should appropriately be deployed in relation to non-criminal matters; and

(h) any related matters."

Our concerns unsurprisingly will focus on the impact of such legislation and the framework's impact on freedom of speech.

2 Executive Summary & Recommendations

Before we discuss each of the points in further detail, we have included an executive summary with our recommendations for your convenience:

a) In civil proceedings, no governmental body (including the AFP) should be handed greater powers than the party against whom they are bringing a claim. This applies to pre-trial information gathering (including discovery) and other investigatory processes.

b) Investigatory tools and powers reserved for the AFP in criminal proceedings (especially coercive powers) are not appropriate for import to a civil context, especially without the necessary and long protected safeguards.

c) An increase in the powers of the AFP in respect of civil (non-criminal) matters has the potential to allow for 'backdoor' criminal proceedings using evidence gathering and pre-trial procedures with lower thresholds. This has the potential to drastically affect the rights of a person in a later criminal investigation.

d) The ban on literary proceeds should be lifted as it has a disproportionate and unfair 'chilling' effect on freedom of speech. The policy arguments in favour of the ban on literary proceeds are tenuous at best, and it only serves to deprive the community of fair opinion and perspective, whilst denying an individual from 'telling their story'. It is an absurd situation where a media commentator can make comment on an accused's case or personal history and the person about whom that comment is made cannot answer that commentary on equal terms.

e) The AFP should not be granted further ability to undermine the relationship of confidentiality between a journalist and its source, and powers should not be granted to otherwise undermine existing shield laws.

f) The AFP's ability to intercept communications in a civil context should be treated with extreme caution, considering the general public sentiment weighing against greater governmental intrusion into individual privacy.

3 Evidentiary thresholds and procedures

Evidentiary Thresholds

> *"(a) thresholds, including evidentiary thresholds, relating to the obtaining of production orders and search warrants, and in particular whether these reflect the rules applicable to civil litigation discovery rather than coercive search;*

Point (a) invites a comparison of civil procedure discovery process and a 'coercive search'. Before any more formal analysis is taken of legislation in particular, it should be said at the outset that there should be no distinction between the threshold for obtaining a production order or search warrant in a civil process than in a criminal process. There are two reasons for this.

First, the coercive nature of a search warrant or production order has potentially the same impact on the person(s) who is subject to that warrant, irrespective of the resulting charge or claim. The end result of the investigation (i.e. whether it results in civil or criminal claims) is irrelevant in this sense to the process, if the impact of the warrant on the civil liberty of the defendant (or accused) is impacted in the same manner.

Second, evidence obtained via a search warrant or production order might inadvertently form part of a later criminal investigation, or it might in fact give rise to a criminal investigation. It would be inappropriate if there was an easier avenue to obtain such evidence, circumventing the long held traditions at criminal law that protect the rights of an accused. At its worst case, the AFP could use the civil claim to seek warrants or production orders with lower thresholds as a 'back door' where the threshold of the criminal warrants are unobtainable.

Consider for example the recent case *of Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263 where Jagot J of the Federal Court found that several warrants issued by the AFP (in a literary proceeds matter relating to Schapelle Corby) were to be quashed on the basis that they conflated both the AFP's criminal and civil roles. The Court was critical of the AFP's conduct in this matter.[1] At paragraph 75, the Court noted that despite the AFP's insistence that the mistakes in the warrants were of a clinical nature, the issuing of a criminal warrant is a grave and serious act:

"The issue of a search warrant and a s 246 order are solemn acts issued under the hand of the individual magistrate. They authorise actions which would otherwise constitute trespass and, insofar as searches of the person are concerned, an assault. They represent serious intrusions into private and property rights of which the common law "has long been jealous" (George v Rockett (1990) 170 CLR 104 at 110). Accordingly, the orders and warrants would not have been issued lightly by the second and third respondents."

Preparatory Procedures

> *(b) procedures preparatory to seeking production orders and search warrants, including taking into account the conduct of the recipient of such orders;*
>
> *(c) procedures for executing search warrants;*

Preparatory procedures for obtaining (and executing) these warrants and production orders are also important, for the same reasons outlined above. The conduct of the recipient of such orders is relevant insofar as they comply with the form of the order. However, it should be avoided at all costs that a difficult recipient, or a recipient that does not comply with a civil warrant, would justify granting

[1] http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2014/2014fca0263

the AFP more coercive powers to enforce a civil warrant. Criminal penalties and methods should not be used to enforce orders in a civil jurisdiction.

It would be dangerous if the inference from this discussion point were that where a recipient of a civil warrant or production order was not in compliance should be held to the same standard as another who is accused of committing a crime. Simply put, this is not a case of the end justifying the means; the process is important and just because the AFP has coercive powers elsewhere in its own criminal jurisdiction and the operational capability to enforce its more coercive powers, such powers should not automatically be available for use.

4 Literary proceeds matters

Literary proceeds matters involve, generally, a person convicted of a crime profiting from the committal of that crime by publishing an account or appearing in an account of their life or conduct such that is has a close connection with the crime committed.

It is an express limitation on the right to freedom of expression – a prisoner for example is not allowed to accept money for a television interview and speak freely about their criminal conduct. They may either be prevented from doing this, or have all proceeds returned to the government. This is a policy decision broadly designed to avoid the publicity or glorification of crime as well as a deterrent to those who might commit crimes in order to profit from same.

Blueprint is opposed to this sort of limitation on freedom of speech, and in most circumstances it will lead to double or triple punishment for an offence. First, whilst from a policy perspective it is clearly borne of a wish not to normalise and popularise crime, it is doubtful that in most cases a publishing of an account of that crime will encourage others to do the same. Second, it is inconceivable that a person would commit a crime for the sole reason that later they wish to publish an account afterwards in order to profit financially from that crime. The embargo on literary proceeds seeks therefore only to further punish the person who committed the crime, and it is a punishment that falls outside of sentencing principles normally imposed by a Court following conviction. In fact, the benefit or restriction from access such proceeds are not even a normal consideration of a Court in the imposition of a sentence.

This is not designed to be an examination of sentencing principles generally, and as a result we will not analyse the minutiae of these principles. However, three of the guiding principles of sentencing at common law and in most state and federal legislation are offended when literary proceeds are confiscated. The first is the avoiding of ‘double punishment’, where a convicted person should not be punished financially or incarcerated twice for the committing of the same offence. The second principle offended is the goal is parsimony, the idea that a Court in most circumstances should impose the least harsh sentence possible for the committed crime, of course taking into consideration the circumstances of the offender. Third, the idea of rehabilitation is undermined if a person cannot earn money to assist with their re-entry into the wider community. Financial considerations are of course important in mitigating against re-offending.

The ban on access to literary proceeds is antiquated and represents bad policy considering the modern and holistic approach taken to sentencing in 2014. Such limitations should be removed.

5 Dealing with confidential information

(e) safeguards for ensuring the protection of confidential information, including journalists' sources, obtained under search warrants, and particularly where that information does not relate to the search warrant;

There are two issues with this sub-point. The first is that the right of journalists to protect their sources should be paramount and the further support of journalist shield laws should be protected. In cases where journalists do not have permission to disclose the identity of their sources, they should not be compelled to do so. In cases where they are compelled, and the journalist refuses to comply, they should not be subject to criminal charges resulting from being in contempt of court. That is the most important safeguard to ensure the protection of confidential information.

The second issue is that confidential information obtained through a search warrant for one purpose, or provided (with consent) by the source of a journalist should only be capable of use for the purpose upon which it was sought. This issue is similar to the evidentiary steps point made above, in that these processes should not be used as a 'back door' to lead to other civil or criminal charges. Without safeguards, there is a danger that the application for these warrants or production orders on one issue could be used as a fishing exercise on the part of the AFP or a prosecutor to make a case in another area. As mentioned above, this is dangerous because in a civil context not only is this information easier to obtain, the person divulging the information might not be aware of the danger of releasing the information and therefore might neglect to protect themselves appropriately.

Blueprint has published extensively on the need to protect journalists' sources, and the need to keep information confidential where a source does not give permission for its release. The Committee should be mindful of this in a criminal context, and especially so in a civil context devoid of the same protections, but ultimately leading to the consequence of a criminal proceeding.

6 Interception of communications

(f) the powers available to the Australian Federal Police to intercept telecommunications in circumstances where the matter being investigated does not involve criminal conduct;

The public resistance to the interception of communications has come to a critical point in 2014. High profile disclosures and the resulting media attention have demonstrated the public has become increasingly wary about government surveillance of their private lives. This resistance, it should be noted, has come about in the face of the most clear-cut case for government surveillance (protection of national security and the fight against terrorism). Considering this, in the context of surveillance for civil offences is even more difficult to justify.

Further, it again raises the issue from the 'dealing of confidential information' and 'evidentiary processes' point that the interception of communications justified on the basis of a civil investigation could be used later as a 'back door' to the bringing of a criminal charge.

The AFP's ability to intercept telecommunications where the matter involved does not involve criminal conduct should be extremely limited, if non-existent. It is difficult to envisage a situation where this might be justified, especially in the context of an almost universal public backlash against the imposition of a surveillance state.

7 Conclusion

The AFP serves an important function in our community and their role is normally exercised with integrity and professionalism. However, this does not mean that unnecessary powers and the support of a dangerous unrestricted ability to undermine the liberty of its citizens should be given to them. Critically, in a civil context (which should rightly be properly delineated from its criminal investigatory powers), the AFP should not be able to use its criminal investigatory tools, methods or powers. Indeed, those powers must not be used in a civil context in order to build a criminal case against an individual. This would be the case if most of the above measures would be introduced.

We must be ever vigilant against an increase in the powers of a police force such that whenever this occurs there is a consequent and equally opposite force that suppresses the liberty that country's citizens. Where the powers encroach in a civil context, they become both dangerous but ultimately unnecessary to achieve their stated purpose. They must be characterised as either overkill or an underhand manner to achieve other outcomes through unrelated purposes. In either case, this should not be allowed.

Blueprint would like to take the opportunity again to thank the committee for its time in considering our submission and reiterate its enthusiasm in assisting the committee further in whatever way it might deem us to be helpful.

Please contact us about this submission or any other matter.

Blueprint for Free Speech
2 April 2014