SUBMISSION TO JOINT SELECT COMMITTEE ON NATIONAL ANTI-CORRUPTION COMMISSION LEGISLATION

14 OCTOBER 2022

Australia's Right to Know coalition of media organisations (**ARTK**) appreciates the opportunity to make this submission to the Joint Select Committee on National Anti-Corruption legislation (the **Committee**) in relation to the proposed *National Anti-Corruption Commission Bill 2022* (Cth) (**NACC Bill**).

Australians have a right to know about allegations of corruption in their public service and in the highest levels of government. Access to such information is fundamental to a modern democratic society in which the government is accountable to its people.

Journalism as the fourth estate and the Australian media play a vital role in holding the government to account and maintaining transparency. The principles of a representative government demand that the public is well-informed and can freely discuss and criticise their government. Public integrity and accountability depend on media freedom.

It is vital that the drafting of the NACC Bill supports transparency by providing appropriate and sufficient protections for journalists and media organisations and ensuring the ability to report proceedings.

The NACC bill contains some promising recognition of the important role of journalism and the media, particularly in s 31. However, this is not matched by the warrant provisions and other secrecy provisions in the NACC Bill, and other existing legislative provisions (outside of the NACC Bill) that interact with the NACC Bill and NACC processes.

Regarding the warrant provisions in the NACC Bill, in effect the warrant provisions prefer administrative convenience over robust source protection. As set out below, other democracies have enacted legislation that provides greater protections for journalists and sources including warrant provisions that provide for judicial adjudication.

Further, due to the interaction between the NACC Bill and other existing legislation, the NACC Bill should not be viewed in isolation. To that end this submission addresses both the NACC Bill and related issues arising in existing legislation, outside of the NACC Bill, which may neutralise the effectiveness of any protections for journalist sources.

Journalists and their sources should feel confident rather than intimidated (or punished) when playing their role in assuring government accountability.

It is an ethical requirement, acknowledged the world over, that journalists can never reveal the identity of a confidential source. Whistleblowers trust and rely on journalists maintaining this obligation. In Australia, journalists have been jailed for upholding this ethical requirement

After two decades campaigning, every Australian legal jurisdiction now recognises journalist privilege through their introduction of "shield laws" to offer protection for journalists who are required to uphold their ethical obligations in all circumstances. It is important the journalist shield extends to anti-corruption bodies in all jurisdictions.

1. PART ONE – ISSUES IN THE NACC BILL

1.1 Overarching Purpose

ARTK welcomes the acknowledgement in the NACC Bill of the importance of the role of journalists in supporting the overarching purpose of the proposed National Anti-Corruption Commission (**NACC**) in transparently exposing and dealing with corruption, and the inclusion of a provision directed, in part, at addressing that role.

However, the current drafting of the NACC Bill does not yet fully achieve that objective. The provisions which are directed at acknowledging and supporting journalists should be strengthened through some specific amendments in other areas of the NACC Bill and other legislation.

While there are positive indications that some consideration has been made as to the role journalists have in exposing corruption, the protection afforded to journalists and their sources should be strengthened.

In general, a much higher threshold should be met before any powers can be executed in relation to journalists and media organisations engaged in journalism.

While the NACC Bill demonstrates good intentions, amendments are required to provide sufficient protections for journalists and their sources. Without additional protections the NACC Bill risks a significant chilling effect on sources' willingness to expose such corruption and on journalists' willingness to investigate corruption in the Commonwealth public service.

1.2 Journalists' Sources – Section 31

ARTK welcomes the inclusion of section 31, the protection of the identity of journalists' informants. However, the application of the protection should be broadened, and measures introduced to prevent circumvention of the protection provided by using warrants under the legislation.

ARTK's principal concern is that section 31(4) does not extend to the issuing or execution of search warrants (and, as discussed below, other forms of warrant). If a journalist refuses to answer questions or produce documents which would identify their source relying on section 31, or the NACC suspects that the journalist will respond as such, they can simply seek and execute a warrant, obtaining copies of materials identifying the informant. Under the current form of the NACC Bill, the journalist cannot prevent the NACC from taking or utilising such information.

In these circumstances, why would the NACC investigators issue a notice to produce or summons on the journalist, when they can obtain the information they seek through a warrant. Obtaining a warrant would be a far simpler and (from the NACC's perspective) more certain way of obtaining the information sought.

The recently introduced shield laws in Queensland[1] recognise that even in the execution of a warrant a journalist should be entitled to claim protection over documents which may identify a journalists' source: it is not clear why similar protections have not been included in the NACC Bill.

By way of example, nothing in section 31 would have prevented the action taken by the AFP in *Smethurst v Commissioner of Police.*[2] The legislation would not prevent a similar raid taking place on a journalist, as discussed further below.

There are a number of other issues in relation to section 31 we wish to see addressed.

- First, under section 31, the protection only applies to the journalist to whom the information is imparted and their employer. It does not extend to those in the editorial chain, or other participants in the publishing process. As currently drafted, the protection under section 31 can be circumvented by asking one of these other individuals (e.g. an editor or an assistant to the journalist) about the identity of the source, who will be compelled to answer as they are not able to rely on the protection. If they refuse, they will be caught by the contempt provisions.[3]
- Second, under section 31(2) the protection only relates to the informant's identity, it does not protect any other information. A journalist can still be asked to disclose any other information about their source, including the information the source provided them. This is more stark given the NACC Bill does not enable a person to rely on a "public interest" exception to the provision of information in answering questions (section 114).
- Third, the protection does not protect the informant themselves. The informant can be asked if they spoke to the journalist and will have no protection to rely on in refusing to answer the question: they are not protected by section 31 (despite the sections title), nor can they rely on refusing to answer on the basis of self-incrimination or the public interest under sections 113 and 114 of the NACC Bill.

It is vital that there be protections for journalists' informants and journalists under the NACC Bill. However, any such protections need to be robust, and not easily circumvented.

1.3 Warrants

Section 31(4) states that the protections under section 31 do not prevent an authorised officer doing anything they would otherwise be able to do in exercising warrants powers under Part 1AA of the *Crimes Act 1914* (Cth) for the purposes of the NACC Bill.

[1] Introduced to the *Evidence Act 1977* (Qld) by the *Evidence and Other Legislation Amendment Act 2022* (Qld).
[2] [2020] HCA 14.
[3] In relation to SBS and the ABC, s31(3) clarifies that a reference to journalist and employer in section 31 is to be taken to include a reference to a journalist and the head of the agency. The same issue applies here, as affording protection solely to the journalist and agency head would mean no protections are afforded the rest of the editorial chain.

Section 124 allows a warrant to be issued if there are reasonable grounds for suspecting the person has evidential material and that that evidence may be concealed, lost, mutilated or destroyed if a notice to produce was issued. If the recipient of the warrant is a journalist, the public interest in issuing the warrant must be considered if the evidential material relates to an alleged offence against a secrecy provision.

As noted above, the warrant provision allows the NACC to easily circumvent the protection afforded under section 31. Section 31 is in effect negated when the NACC can obtain the relevant information through warrants.

As set out in ARTK's previous submissions to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) in relation to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, there are five key principles for how warrants relating to journalists should be issued:

1. The application for a warrant should be made to a judge of a superior court, and they should apply the relevant tests.
2. Public interest should be a component of the statutory test for the issuing of a warrant pertaining to material held by a journalist.
3. The application for the warrant should be the subject of a contested hearing.
4. The role of judges should not be limited to that of a judicial review or other action relating to a decision regarding a warrant taken by the relevant person.
5. The journalist and/or media organisation should be notified, to allow time for the journalist and/or media organisation to find representation.

These principles are not a "wish list" or "nice to have": they are necessary. These principles continue to be relevant in relation to the issuing of warrants in relation to journalists, and have been largely overlooked in the NACC Bill, with the effect that section 31 in practice may be avoided. As the considerations under section 124 for the issue of a warrant will be considered on unilateral evidence from the NACC, and not in a contested application, it is more likely that a magistrate will be satisfied and issue the warrant.

Currently, as the NACC Bill and other warrants provisions stand, journalists and/or media organisations must submit to search warrants in relative silence, forced to assume that the process of applying for the warrant has been validly completed, as they have no recourse to challenge the warrant until after it has been executed. The recourse the journalist and/or media organisation has is then limited to there being some error in either the legislative provision or in the warrant, warrant application, or the exercise of the warrant itself, rather than in a failure in the basis of the warrant, or a genuine contest on the risk of destruction and/or the relevant public interest

Key to all of the principles espoused above is the need to be able to contest warrants issued to journalists or media organisations in an appropriate forum. If requested, we can provide proposed drafting which gives effect to these principles. The current drafting of section 124 does not include any right to challenge the warrant at any stage, nor does it provide any direction to recognise the protection in section 31, and this must be rectified.

Judge of Superior Court

Under section 3E of the *Crimes Act 1914* (Cth), which section 124 of the NACC Bill utilises, warrants can be issued by magistrates, justices of the peace or other persons employed in a court of a State or Territory authorised to issue search warrants or warrants for arrest.

Particularly in the case of warrants issued to journalists or media organisations, this is not appropriate for an action against a journalist, which should be considered exceptional in its nature. Applications should be required to be made of judges of superior courts, being the Supreme Courts, the Federal Court and the High Court.

In *George v Rockett*,[4] the High Court recognised the seriousness of search warrants and their exceptional nature:

> *"…it needs to be kept in mind that they [statutes authorising search warrants] authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests."*

It should not be easier to obtain a search warrant against a journalist than an Anton Piller order or an injunction in civil proceedings. The NACC Bill does not effectively address this issue. Anton Piller orders and injunctions both have very high thresholds that must be met before any application will be granted, and have traditionally not been issued by inferior courts.

Justice Lee in the Federal court stated that courts "must be careful to avoid the extraordinary jurisdiction of the court to make an Anton Piller order from being subverted to a mere investigatory tool for applicants",[5] and the same must be true for search warrants issued against journalists and/or media organisations.

Experienced judges of superior courts are the only ones truly capable of weighing all the relevant considerations and applying the necessary rigour to determine whether it is necessary and in the best interests of the public to make such an order.

Given the role of the fourth estate in democracies like Australia, there is a reasonable public expectation that any proposed action by government bodies like the NACC in relation to journalists and the media will be dealt with at the highest levels, and in as public a forum as possible.

Public Interest Test

An element of the statutory test for the issuing of a warrant in relation to a journalist or media organisation should be a requirement that the public interest in issuing the warrant outweighs the public interest in not granting access to the material.

We welcome the introduction into section 3E of a public interest consideration in respect of applications for warrants on journalists by section 124, but note the public interest consideration is only that: a consideration. It is not a necessary element of a test to be passed before a warrant can be issued. While important, it is an insufficient protection against the issue of warrants against journalists.

In our view, determining whether the public interest in protecting journalists and their sources is outweighed by the public interest in granting the search warrant must be part of the test for issuing a

[4] (1990) 170 CLR 104 at 110-111.
[5] *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38.

warrant. This should also include as part of the test that other avenues to obtain the material have been exhausted.

As the warrant provision is currently drafted, we are concerned that insufficient consideration will be given to the public interest consideration, especially given the treatment of public interest consideration elements in relation to evidence elsewhere in the NACC Bill.

We also note that the public interest consideration currently only applies where the relevant evidential material relates to an alleged offence against a secrecy provision by a person other than the journalist (though we note that various secrecy provisions apply to almost every member of the public service under the *Public Service Act* and related instruments)[6]. A public interest test should be a prerequisite in relation to any warrant sought to be executed on a journalist or media organisation.

Any such test should require the decision maker to weigh the following public interest factors:

a. the importance of preserving the confidentiality of sources;

b. the importance of facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest;

c. the gravity of the matter;

d. the extent to which the information that is being sought is likely to assist a current investigation;

e. whether reasonable attempts have been made to obtain the information sought by other means;

f. the nature and extent of any conditions or restrictions proposed by the eligible judge; and

g. any other relevant matter.

Contested Hearing

Arguments for and against the application, and evidence in relation to the application, should be presented at a hearing at which both parties are present. If possible, this hearing should also be open to the public.

One argument often made against introducing a requirement for a contested hearing is that decisions about warrants often need to be made quickly due to ongoing harm or the risk of ongoing harm. In relation to media cases, this argument is demonstrably specious. In cases which involve the media, particularly where the information sought relates to the source of material, there is almost invariably no suggestion of ongoing or imminent harm. Journalists and media organisations uniformly have acted properly in responding to warrants including in relation to the preservation of disputed material, however allegations to the contrary are often made by or used as a justification by investigators for the purposes of obtaining warrants.

Particularly in relation to the investigations proposed to be conducted by the NACC, it is unlikely there will be any threat of serious injury or death to any individual if the issuing and execution of a warrant is delayed. Investigations will typically relate to past acts, where there will be no apparent urgency in the execution of the warrant.

Journalists and media organisations must have the opportunity to present their arguments before the relevant decision maker, particularly in relation to the public interest, as the journalists and media

[6] E.g. regulation 21 of the *Public Service Regulations 1999* (Cth).

organisations will have the relevant information as to the context and the nature of the information in question, and why it is in the public interest that their source be protected.

Review of Decisions

It is inappropriate to confine the legal redress available to a journalist or media organisation to a period after the decision to issue the warrant has been made. Challenges to warrants that have been issued and/or executed are extremely difficult to prosecute. In practice, once a warrant is issued it is too little, too late for the media organisation or journalist. The scope of a post-fact review is very limited.

As the provisions currently stand, there is no opportunity for a journalist or media organisation to challenge a warrant before its execution, or to challenge it on its merits at any time. Recourse for the journalist and media organisation currently relies on some error being made in the application for the warrant, or the warrant having a fault within it. The review does not consider whether a warrant should have been issued in its first place.

If the warrant or the application does contain an error, the error can be fixed and then the warrant will be reissued. The reissued warrant is then not contestable, as it has no errors, even if the basis for the warrant is not valid or does not appropriately consider the public interest.

Warrants need to be contestable on their merits prior to their issue and execution, especially if section 31 is considered an important inclusion in the NACC Bill.

Notification

When an application for a warrant against a journalist and/or media organisation has been made, the journalist and/or media organisation should be notified. This notification would enable the subject of the warrant to engage legal representation and prepare submissions to the Court as to why the application should not be permitted, giving effect to the submissions above.

The primary argument against notification is that it affords the subject of the warrant an opportunity to destroy or relocate evidence. However, there is no evidence to suggest that journalists or media organisations destroy or relocate evidence, and it is farfetched to suggest that they would do so. In the case of the warrant executed against the ABC in June 2019 in relation to the "Afghan Files", the ABC was aware of what information the AFP sought months in advance of the warrant being issued, and there was no suggestion that they moved or destroyed documents with the benefit of this advance notice.

In the civil context, before Anton Piller orders can be made, it must be shown that there is some substantial ground for expecting that there will be extraordinary behaviour, going well beyond the indications of dishonesty. Such evidence should also be required in the issuing of a warrant for the NACC.

The media are routinely subjected to subpoena processes both in civil and criminal cases and, subject to proper legal objections, they comply. These processes are invariably supervised by in-house lawyers who are also aware of their professional and legal obligations.

The UK has introduced contested applications for search warrants in relation to journalists, and there is no evidence that it has resulted in the destruction or relocation of material.

PJCIS Recommendations

We note that the Explanatory Memorandum to the NACC Bill states at [7.480] that the warrant provisions in the NACC Bill are "consistent with recommendations for additional protections" in the PJCIS report.

This is not correct.

In relation to search warrants, the PJCIS recommended that:

a. the role of Public Interest Advocates (**PIAs**) be expanded to all warrant-related provisions;

b. PIAs must represent the interests of public interest journalism;

c. PIAs must be Queen's Counsel or Senior Counsel or have served as a judge of a superior court; and

d. there be increased record keeping requirements in relation to warrants issued on journalists.

These recommendations are not reflected in the drafting of the NACC Bill. The NACC Bill does not contain these additional protections against the use of warrants.

While the ARTK has significant reservations about the role of PIAs (discussed further below), it is concerning that, at a minimum, these recommendations have not been given effect in the NACC Bill, especially given they were additionally supported by the Senate Standing Committee on Environment and Communications.

AFP Raids

Being able to knock on journalists' doors with a warrant to search their home has a chilling effect on reporting. Many felt the AFP raids on Annika Smethurst and the ABC, and the response to those raids, were intimidatory: designed to quiet journalists conducting investigations.

It is of particular concern that journalists have essentially no recourse in relation to such warrants: as we noted above, currently any recourse is predicated on the existence of an administrative error.[7]

The provisions of the NACC Bill do not provide any protection against such raids happening again.

1.4 Non-Disclosure Notations – Suppression/Secrecy Orders

"Non-disclosure notations" are effectively secrecy and suppression orders. They should not be generally available against journalists.

The Commissioner has broad powers under the NACC Bill to make secret the fact someone has been called to give evidence or been given a notice to produce through the use of non-disclosure notifications. This power should not exist in relation to journalists or media organisations, or at least have very limited application.

In addition, the Commissioner is required to make non-disclosure notifications where to not do so would cause prejudice to someone's reputation. Given the nature of the NACC and what it will investigate, it seems likely that this would apply to most, if not all, of the summons and notices to produce issued by the Commissioner, meaning that in effect, these summons and notices to produce will be secret.

Any provision which has an object of protecting the secrecy of government information as an end in itself is not compatible with the maintenance of Australia's constitutionally prescribed system of representative and responsible government.

ARTK considers that this Division 4 of the NACC Bill requires significant amendment, such that the inclusion of a non-disclosure notation is the exception, rather than the norm, particularly in circumstances where the penalty for disclosure is so severe.

[7] The analysis by the Federal Court in Australian Broadcasting Corporation v Kane & Ors (No 2) [2020] FCA 133 evidences the significant procedural hurdles that the media face in challenging search warrants.

The list of individuals to whom a person who has received a summons or notice to produce with a non-disclosure notification is extremely limited. A journalist would not be allowed to disclose the fact that they have received, for example, a notice to produce to their editor. This creates an unworkable situation for journalists.

This promulgation of the culture of secrecy around the operations of government and allegations of corruption therein unnecessarily restricts the Australian public's right to know.

1.5 Whistleblowers

We welcome increased protections for public sector whistleblowers. However, we are concerned that the protection of disclosers under the NACC Bill is overly narrow. Disclosers are only protected to the extent they fall within the limited regime under the NACC Bill: i.e. provided they make the correct report to the correct people. If the discloser makes their disclosure to a journalist, they do not obtain any protections (save for the limited and easily circumventable protection afforded to the identities of informants, discussed above).

Disclosers should be able to have confidence in bringing allegations of corruption to the attention of journalists, without being concerned that their documents or identity will be revealed, and with protection from reprisal.

Public service whistleblowing should be encouraged not subjected to risk. Some disclosers will not be aware of who the "appropriate" person is to contact under the NACC Bill, and others will feel more comfortable discussing their allegations with journalists (at least in the first instance). It is important that such disclosers do not have to fear the journalists to whom they make their disclosure will be required to reveal their identity and expose them to reprisals or prosecution.

Often sources who come to journalists with an issue about governments, a government body, a government official or a government policy (for example, a complaint about misconduct), have already tried all official pathways to raise their complaint. Disclosing to a journalist is often a last resort to bring the issue to the attention of the Australian people, and their government, to have the issue resolved. This function of the media in raising important public interest issues that have not received the attention they should have is vital. A discloser who has tried to raise an issue with the NACC and feels they have not been properly heard should be entitled to bring their concerns to the media.

1.6 Other Concerns

Private Hearings

Section 73 of the NACC Bill states that hearings conducted by the NACC are to be held in "private", except in "exceptional circumstances". It is our view that this provision should be reversed: that NACC hearings should be heard in public, particularly insofar as journalists are required to give evidence, unless exceptional circumstances dictate otherwise. This reversal would better support the goals of the NACC Bill in exposing and preventing corruption and educating the public about corruption.

Section 74 intensifies the issue, stating that evidence given before the NACC must be given in private if the evidence would breach a secrecy provision. Given that various secrecy provisions apply to almost every

member of the public service,[8] this would mean most evidence, including evidence given by journalists, would be required to be given in private, especially when read in combination with section 73.

Like in other proceedings, journalists and members of the public should be able to view and report on hearings before the NACC, including the evidence given, unless there are extraordinary circumstances (e.g. imminent threats), and journalists should not be called to give evidence in secret.

Further, we note that as drafted, one of the considerations in determining whether a hearing should or should not be made public is whether it would cause "unfair prejudice" to a person's reputation. In our view, this is not a reasonable consideration. Such a concept is foreign in our system of justice, as open justice not only protects faith in the system, but it also fundamentally serves to protect an individual accused of wrongdoing. It is also an important factor in restraining those conducting the investigations and hearings.

The same privilege against potential embarrassment is not afforded to individuals involved in other proceedings and should not be afforded to individuals involved in NACC proceedings. If it transpires that allegations made are false, or that there was some justification to the individual's actions, the NACC's investigation and report will bear this out and the individual's reputation will not be damaged. If the allegations are correct, any reputational damage will not be unwarranted.

At a minimum, hearings in which journalists are called to give evidence should be public and reportable.

Suppression of Investigation Material

Section 100 of the Bill provides that the Commissioner may direct that “investigation material” not be used or disclosed or may only be used by, or disclosed to, specified persons in specified ways or on specified conditions. Section 101 of Bill creates the offence using or disclosing investigation material in contravention of a section 100 direction where the use or disclosure is not otherwise authorised by the act. The two sections raise some practical issues of concern:

- As stated above, the NACC Bill currently requires hearings to be held in private except in “exceptional circumstances”. If that is the Commissioners starting point as provided by legislation ARTK does not understand why “the fact that a hearing has been, or may be, held in private” should fall within the section 99 definition of “investigation material”. ARTK submits that the fact a private hearing is to occur should only constitute “investigation material” if such a hearing is the exception rather than the norm.

- The directions authorised by section 100 are akin to non-publication orders but are made subject to an unlimited discretionary power. ARTK submits that a necessity test should apply to the making of a direction in the same way that it does in relation to non-publication/suppression orders made under the common law, the *Courts Suppression and Non-Publication Orders Act 2010* (NSW) section 8 and the *Open Courts Act 2013* (Vic) section 18.

- The section 101 offence carries a two year jail term as its maximum penalty. However, there is no requirement that the Commissioner notify the media – or anyone else – of the existence of a direction to ensure that it is complied with. Nor is there an exemption or defence to the offence for

[8] See e.g. section 13 of the *Public Service Act 1999* (Cth).The Secrecy Laws and Open Government in Australia report published by the ALRC in 2010 identified 506 secrecy provisions in 176 pieces of legislation: https://www.alrc.gov.au/publication/secrecy-laws-and-open-government-in-australia-alrc-report-112/3-overview-of-current-secrecy-laws/specific-statutory-secrecy-provisions/.

the use or disclosure of investigation material in circumstances where the user/discloser was not aware that a direction was in place.

A real risk exists that a journalist could be given information, a document or a thing provided by a person to the NACC subject to a notice produce, information given by a person at a hearing or a document or thing produced by a person at a hearing in the course of conducting independent research. If the relevant material had not already been "lawfully made available to the public" pursuant to section 229(6) and was subsequently published by the journalist in contravention of a direction, the section 101 would likely be made out. Journalists should never be put in a position where they run the risk of being imprisoned merely for doing their job. An exemption or defence for such public interest journalism should be introduced.

Investigative Reports – Sensitive Information Suppression

Section 151 of the NACC Bill states that the Commissioner must exclude sensitive information from reports. Sensitive information has a broad definition, including anything that could endanger a person's safety or prejudice a fair trial. Given the breadth of this definition, ARTK is concerned that this provision could be used to suppress information that is perceived by the Commissioner to be damaging or potentially embarrassing: any negative finding published in a report could prejudice a trial or cause an individual's safety to be put at risk by another individual who was affected by their conduct.

2. PART TWO – ISSUES IN INTERACTIONS WITH OTHER LEGISLATION

2.1 In General

Even if the NACC Bill is amended to give proper effect to its intentions to protect journalists and their informants, warrant provisions in other legislation will still allow authorities to circumvent these provisions. As ARTK submitted to the PJCIS, comprehensive law reform in relation to the existing warrants provisions is necessary and urgent.

There are currently multiple legal avenues through which a warrant can be issued against journalists and under media organisations, including:

Type of Warrant	Provision	Issuing Officer
Search warrant	Section 3E of the *Crimes Act 1914* (Cth) (**Crimes Act**)	> Magistrate > Justice of the Peace > Other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest
Interception warrant	Sections 9, 9A, 10, 46 and 46A of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**)	> Eligible Judge > Nominated Administrative Appeals Tribunal member

Type of Warrant	Provision	Issuing Officer
Stored communication warrant	Section 116 of the TIA Act	> Appointed Magistrate (except for interception warrants) *For certain warrants issued to ASIO:* > Attorney-General > Director-General of Security (for warrants issued in an emergency)
Journalist information warrant (JIW)	Sections 180L, 180M and 180T of the TIA Act	
Computer access warrant	Section 27C of the *Surveillance Devices Act 2004* (Cth) (**Surveillance Devices Act**)	> Eligible Judge > Nominated Administrative Appeals Tribunal member
Surveillance devices warrant	Section 16 of the Surveillance Devices Act	

There must be fulsome amendments to all warrant provisions to ensure the treatment of journalists is consistent and recognises the important role of journalists, and the key part the protection of informants plays in that role.

The current warrant regimes are disparate. Only a single unified approach to issuing any and all warrants pertaining to journalists, journalists' materials and media organisations can begin to address the deficiencies in the system.

As discussed above, the use of powers to issue warrants in relation to journalists should be subject to much higher standards than they are at present. Journalists should not have to fear a sudden raid on their home or the use of their metadata to identify their sources, which may jeopardise multiple stories on which they are working. This fear is a significant deterrent to public interest reporting.

Journalists should also not have to fear these processes being undertaken in secret, relying on the paternalistic belief that the process of issuing and executing the warrant has been undertaken in accordance with the law.

The role of journalists must be respected and warrant powers must not be able to be used as a method to suppress criticism.

Other jurisdictions recognise this and incorporate protections for journalists and their sources into warrants legislation.

United Kingdom

The *Police and Criminal Evidence Act 1984* (UK) (**PACE Act**) makes special provision for search warrants for "journalistic material", defined as material acquired or created for the purposes of journalism.[9]

Search warrants in the UK are typically issued by a Justice of the Peace.[10] However, journalistic material held in confidence is classified as "excluded material" (e.g. information about protected sources),[11] and journalistic material which is not held in confidence is classified as "special procedure material".[12] A Justice of the Peace cannot issue a warrant in respect of excluded material or special procedure material.[13]

Seeking access to journalistic material considered "special procedure material" requires the police to seek a production order from a judge.[14] The subject party must be notified of the application for the production order.[15] Before issuing the order, the judge must be satisfied that other methods of obtaining the material have been tried without success or, if not tried, were bound to fail.[16] The judge must also be satisfied that the making of the order is in the public interest, having regard to the benefit accrued in obtaining the material, and the circumstances in which the person in possession of the material holds it.[17]

Confidential journalistic material (excluded material) can only be searched for in extremely limited circumstances, for example if they would have been available under a statute enacted before 1984.

The PACE Act also includes a mechanism to protect material from destruction after the journalist is notified that an application will be made: they cannot conceal, destroy, alter or dispose of the material without leave until the application is dismissed or the order has been complied with.[18]

Implementing a similar system to the system set out in the PACE Act would ensure that the public interest is protected and journalist's confidential sources are protected, while still providing a mechanism for investigative agencies to seek information, and preserving information while the process is undertaken.

The UK also enshrines the freedom of expression in its *Human Rights Act 1998* (UK).

Canada

The *Journalist Sources Protection Act* (S.C. 2017, c. 22) (the **JSP Act**) was enacted to amend the *Canada Evidence Act* (R.S.C., 1985, c. C-5) and the *Criminal Code* (R.S.C., 1986, c. C-46) in order to protect journalists from disclosing their sources or being subject to search warrants.

The JSP Act amended the Criminal Code. The Criminal Code now requires that an applicant for a warrant, search warrant, authorisation or order under the Criminal Code, where the applicant knows that the application relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist, the application must be made to a superior court of criminal jurisdiction.

The judge may then only issue the warrant, authorisation or order if satisfied that:

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[9] PACE Act, s 13.
[10] PACE Act, s 8.
[11] UK Law Reform Commission, *Consultation Paper No 235: Search Warrants,* 5 June 2018, page 32.
[12] PAC ACT, s 14.
[13] PACE Act s 8(1)(d).
[14] PACE Act, s 9(1).
[15] PACE Act, Schedule 1 paragraph 7.
[16] PACE Act, Schedule 1 paragraph 2(b).
[17] PACE Act, Schedule 1 paragraph 2(c).
[18] PACE Act, Schedule 1 paragraph 11.

a. there is no other way by which the information can reasonably be obtained; and

b. the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

The judge may request that a special advocate present observations in the interests of freedom of the media.

If the judge decides to issue the warrant, they can include any conditions considered appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.

If a journalist is suspected of committing an offence, the judge may place the relevant documents with the court so that no public access is possible. Police can view the documents once the journalist or media organisation is provided with notice of that intention. The journalist or media organisation may then apply to a judge to prevent disclosure on the grounds that the documents reveal a journalistic source. The judge will apply the public interest test set out below.

The JSP Act also modified the Canada Evidence Act, allowing journalists to object to the disclosure of any documents or information before a court, person or body with the authority to compel the disclosure on the grounds that the information or document identifies or is likely to identify a source.

Once such an objection has been raised, the court, person or body must give the parties and any other interested parties a reasonable opportunity to present argument on the disclosure.

The onus is on the party requesting disclosure to satisfy the adjudicator that:

a. the information or document cannot be produced in evidence by any other reasonable means; and

b. the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things:

    i. the importance of the information or document to a central issue in the proceeding,

    ii. the freedom of the media; and

    iii. the impact of disclosure on the journalistic source and the journalist.

The freedom of the media is also specifically enshrined in the Canadian Charter of Rights and Freedoms.

USA

Most states have enacted shield laws which protect journalist's privilege. While these laws vary in their scope between states, they generally prevent journalists from being required to reveal their confidential sources or being compelled to produce materials. In California, for example, legislation expressly forbids the execution of search warrants on journalists.

Federally, the *Privacy Protection Act 1980* (42 USC) (the **Privacy Protection Act**) requires law enforcement officers to seek materials from a journalist through subpoena, rather than via executing a search warrant. The subpoena application process provides journalists with an opportunity to respond.

The only situations where a search warrant can be executed on a journalist is where there is probable cause to believe the person who possess the material has committed the offence to which the materials relate, the seizure of the material is necessary to prevent the death of or serious injury to a human being, there is

reason believe that providing notice via a subpoena would result in the destruction or concealment of the materials, or the materials have not been produced in response to the issued subpoena.[19]

2.2 Search Warrants

As noted above, despite the provisions of the NACC Bill, other forms of warrant will also enable the NACC to obtain information about journalists' sources.

We reiterate our concerns and recommendations set out at 1.3 above, and as set out in our previous submissions to the PJCIS. Reform is urgently needed.

2.3 Other Warrants

The provisions under the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022* (Cth) amend the TIA Act such that the NACC is a Commonwealth agency[20] and a criminal law-enforcement agency,[21] making the NACC an agency with the power to apply for warrants under the TIA Act and/or receive information obtained from warrants under the TIA Act.

This gives the NACC far reaching powers to apply for the preservation of stored communications, access stored communications, and apply to intercept telecommunications and access telecommunications records. ARTK is very concerned that such powers could be used to obtain information about journalists' sources.

The *Consequential and Transitional Provisions Bill* also amends the *Surveillance Devices Act* such that the NACC would be able to obtain warrants under that legislation as well.

These additional powers again serve to render the section 31 protection under the NACC Bill nugatory, and make the additional test under section 124 for search warrants irrelevant, as the NACC will simply be able to obtain other warrants to obtain the relevant information.

Journalist Information Warrants

As noted in our submissions to the PJCIS in 2019, the Journalist Information Warrant scheme (the **JIW Scheme**) requires immediate and significant amendment. As with section 31 of the NACC Bill, the introduction of the JIW Scheme appears to have been well meaning, but is poorly drafted, cloaked in secrecy and does not address concerns relating to identification of journalists' sources.

In general, we recommend that accessing the metadata and/or content of journalists' communications for any reason or purpose associated with undertaking professional journalistic activity should not be the subject of any authorisation for disclosure, including any warrant issued, under the *Telecommunications (Interception and Access) Act* 1979 (**TIA Act**). That is, we believe that journalists who are reporting in the public interest should be exempt from the operation of this legislation.

However, if this recommendation continues to be unacceptable, then we contend that the JIW Scheme must be amended as follows:

[19] *Privacy Protection Act,* s 2000aa.
[20] Provision 211.
[21] Provision 251

1. a JIW should be required for **all** warrants sought under the TIA Act when the subject of the warrant is a journalist, media organisation or similar;

2. an application for a JIW **must** be contestable and authorised only if the public interest in accessing the metadata and/or content of a journalists' communication outweighs the public interest in not granting access;

3. the JIW Scheme must apply consistently to ASIO and enforcement agencies; and

4. transparency across all elements of the JIW Scheme is required.

Exemption for Public Interest Reporting

We are aware of no evidence to suggest that the accessing of journalists' information to identify confidential sources of news reports plays a sufficiently useful role in the performance of the proper functions of Australia's enforcement agencies that it would outweigh the importance of the public interest in protecting the identity of confidential sources to the media. To the contrary, the continued existence of legislative power which allows such access is likely to have a serious chilling effect on public interest reporting in Australia, and is extremely vulnerable to circumvention. Sources of important public interest information are unlikely to make any contact with the media if they fear that those communications can be traced. Similarly, journalists are likely to be wary of publishing reports which expose Government corruption for fear of being the subject of intrusive search powers, including of their metadata records – for any purpose, not just to identify sources – as a result.

It is vital that secretive and extensive disclosure powers are not then used, and do not appear to be used, to prevent and punish the publication of stories which are merely embarrassing or potentially embarrassing for the Government.

Overhaul of the JIW Scheme

If the above change cannot be made, then the JIW Scheme must be overhauled.

Presently, a JIW is only required in relation to accessing the metadata relating to a particular person if the relevant authorising person "knows or reasonably believes that particular person to be a journalist or an employee of a journalist and the purpose of the authorisation is to identify another person believed to be a source":

a. it does not apply to other information and data accessible by warrants (e.g. intercepted telecommunications); and

b. it is only required where the purpose is to identify a source.

This is far too narrow. A JIW should be required regardless of the type of information sought or the purpose of the warrant.

The JIW Scheme currently varies based on which agency is seeking the warrant. We recommend the JIW be applied consistently and require that:

a. ASIO and other agencies (including the NACC or any agency acting on its behalf) apply first to the Attorney-General for initial approval to make the application, and then to an independent third party issuing authority (i.e. a superior court) for adjudication;

b. the issuing authority should be a judge of a superior court (i.e. High Court, Federal Court, State or Territory Supreme Court); and

c. the issuing authority must not issue a JIW unless satisfied, following a contested application, that it is reasonably necessary to do so.

As discussed above in respect of warrants issued under the NACC Bill, any application for a JIW should be contestable, with a hearing before a judge of a superior court at which the journalist or media organisation is properly represented.

While the present JIW Scheme does include a PIA, we have (and have previously articulated our) significant issues with this, including that the PIA does not have to advocate for the public interest in NOT issuing the warrant. Even if this was rectified, ARTK is strongly of the view this would be an inadequate response and the JIW Scheme would remain significantly flawed. Further, the presence of a PIA cannot be considered to be equivalent to the subject of the warrant being present and able to make submissions on their own behalf in open court to a higher authority. Only the journalist or news organisation the subject of the warrant will have the relevant understanding of the matter they were investigating, and be able to articulate with the relevant background why it is in the public interest that the warrant not be issued.

A PIA will not have the full picture. Information provided to the PIA is provided by the investigating body and may be missing relevant information that the journalist and/or media organisation has. We emphasise that we will never know what is put before the PIA because there is no transparency of the process and JIW Scheme. We also emphasise that the PIAs do not represent the interests of the media and the counter-argument against the issuing of the warrant. The PIA also has no relationship with the subject of the warrant and there is no public oversight of the PIAs, and the submissions they make.

There must be transparency across all elements of the JIW Scheme, including providing the journalist and/or media organisation notification of the application for the JIW and making records of relevant hearings publicly available. There should also be meaningful annual reporting requirements for the JIW Scheme (and similar schemes).