

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

Parliamentary Joint Committee on Intelligence and Security

August 2020
CANBERRA

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Members

Chair

Mr Andrew Hastie MP

Deputy Chair

Hon Anthony Byrne MP

Members

Hon Mark Dreyfus QC, MP

Hon Dr Mike Kelly AM, MP (until 30/04/2020)

Mr Julian Leeser MP

Mr Tim Wilson MP

Senator Amanda Stoker

Senator the Hon Eric Abetz

Senator Jenny McAllister

Senator the Hon David Fawcett

Senator the Hon Kristina Keneally

Terms of Reference

The inquiry was referred on 4 July 2019 by the Attorney-General to report back to both Houses of Parliament on the following matters:

- 1 The experiences of journalists and media organisations that have, or could become, subject to the powers of law enforcement or intelligence agencies performing their functions, and the impact of the exercise of those powers on journalists' work, including informing the public.
- 2 The reasons for which journalists and media organisations have, or could become, subject to those powers in the performance of the functions of law enforcement or intelligence agencies.
- 3 Whether any and if so, what changes could be made to procedures and thresholds for the exercise of those powers in relation to journalists and media organisations to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats.
- 4 Without limiting the other matters that the Committee may consider, two issues for specific inquiry are:
 - a. whether and in what circumstances there could be contested hearings in relation to warrants authorising investigative action in relation to journalists and media organisations.
 - b. the appropriateness of current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists and media organisations.

Abbreviations

AAT	Administrative Appeals Tribunal
ABC	Australian Broadcasting Corporation
ADF	Australian Defence Force
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
ALA	Australian Lawyers Alliance
ALRC	Australian Law Reform Commission
ASD	Australian Signals Directorate
ARTK	Australia's Right to Know (ARTK) Coalition of media companies
ASIO	Australian Security Intelligence Organisation
ASIO Act	<i>Australian Security Intelligence Organisation Act 1979</i>
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
EFI Act	<i>National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018</i>
EFI Bill	National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018
FOI	Freedom of Information
FOI Act	Freedom of Information Act 1982
HRLC	Human Rights Law Centre
IGADF	Inspector-General of the Australian Defence Force

IGIS	Inspector-General of Intelligence and Security
INSLM	Independent National Security Legislation Monitor
IPCO	Investigative Powers Commissioner's Office
JERAA	Journalism Education and Research Association of Australia
JIW	Journalist Information Warrant
MEAA	Media, Entertainment and Arts Alliance
NIC	National Intelligence Community
ONI	Office of National Intelligence
PACE Act	<i>Police and Criminal Evidence Act 1984</i> (United Kingdom)
PIA	Public Interest Advocate
PID	Public Interest Disclosure
PID Act	<i>Public Interest Disclosure Act 2013</i>
PIM	Public Interest Monitor
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PSPF	Protective Security Policy Framework
RSF	Reporters Without Borders
TIA Act	<i>Telecommunications (Interception and Access) Act 1979</i>
TOLA Act	<i>Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018</i>
TOLA Bill	Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018
UK	United Kingdom
US/USA	United States of America

List of Recommendations

Recommendation 1

- 2.95 The Committee recommends that the Australian Federal Police and other Commonwealth law enforcement agencies with investigatory powers amend their operating procedures or practices to advise journalists or media organisations when they are no longer persons of interest in an investigation in circumstances where doing so would not jeopardise the future of the investigation.

Recommendation 2

- 3.139 The Committee recommends that the current role of the Public Interest Advocate, as provided for under the Telecommunications (Interception and Access) Act 1979 (TIA Act), for the purposes of Journalist Information Warrants (JIW) sought under Chapter 4, Part 4-1, Division 4C of that Act, be amended and expanded to apply in the following circumstances:
- That warrant-related provisions of the Crimes Act 1914, the Surveillance Devices Act 2004, the Telecommunications (Interception and Access) Act 1979 and the Australian Security Intelligence Organisation Act 1979 (as set out in paragraph 3.122 of the Committee's report) be amended to include mandatory consideration of warrant applications by Public Interest Advocates (PIAs) to cover all overt and covert warrants that relate to a person working in a professional capacity as a journalist or a media organisation, where the warrant is related to the investigation of an unauthorised disclosure of government information, including national security information, or Commonwealth secrecy offence.

- All such warrants are to continue to be issued without notice to the journalist or media organisation, however the PIA is required to make a submission to the issuing authority, addressing the following:
 - the current requirements of section 180T(b)(i)–(vi) of the TIA Act and section 14(2) of the *Telecommunications (Interception and Access) Regulations 2017*;
 - the public interest in preserving the confidentiality of journalist sources; and
 - the public interest in facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest.
- The PIA must represent the interests of the principles of public interest journalism, and be authorised to request information to clarify elements of the warrant application provided by ASIO or an enforcement agency to enable the case to be built in their submission.
- All PIAs must:
 - be Queen’s Counsel or Senior Counsel; or
 - have served as a judge of the High Court, a court that is or was created by the Parliament under Chapter III of the Constitution or the Supreme Court of a State or Territory; and
 - be appointed for a minimum term of 5 years.

These requirements should be set out in primary legislation.

- All such warrants sought by an enforcement agency related to a person working in a professional capacity as a journalist or a media organisation, be required to be considered, authorised and issued by:
 - a judge of a superior court of record in the jurisdiction of issue for relevant *Crimes Act 1914* warrants; and
 - a nominated Federal Court judge for relevant *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979* warrants.
- The issuing authority must consider both the application from the agency seeking the warrant, as well as the submission from the PIA.

- Individual PIAs are to be informed of the outcome of the consideration of warrants for which they were responsible for making submissions.
- Journalist information warrants under Chapter 4, Part 4-1, Division 4C of the *Telecommunications (Interception and Access) Act 1979* should only be available in relation to the investigation of (i) a serious offence or (ii) an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for at least 3 years.

Recommendation 3

3.144 The Committee recommends that the *Telecommunications (Interception and Access) Act 1979* be amended to include additional record-keeping and reporting requirements in respect of the role of the Public Interest Advocate in relation to journalist information warrants. At a minimum, the following additional information should be collected and included in the Minister's annual report on the use of the *Telecommunications (Interception and Access) Act 1979*:

- The number of serving Public Interest Advocates and which State or Territory they operate in;
- The qualifications of each Public Interest Advocate (i.e. whether the Advocate is a Queen's Counsel or Senior Counsel, a retired judge or both);
- The number of cases where a Public Interest Advocate contested a warrant application;
- The number of cases where a Public Interest Advocate attended the hearing of a verbal application for a warrant; and
- The number of cases where a warrant was not issued after being contested by a Public Interest Advocate.

Recommendation 4

3.146 In respect of the expanded role of Public Interest Advocates (following implementation of Recommendation 2), the Committee recommends that the *Crimes Act 1914*, the *Surveillance Act 2004* and the *Telecommunications (Interception and Access) Act 1979* be amended to include (at a minimum):

- Similar recordkeeping and annual reporting requirements to those that already exist in relation to journalist information warrants under the *Telecommunications (Interception and Access) Act 1979*; and
 - The additional requirements outlined by the Committee in Recommendation 3.
-

Recommendation 5

3.154 The Committee recommends that the *Crimes Act 1914*, the *Surveillance Devices Act 2004*, the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* be amended to include the following additional recordkeeping and reporting requirements:

- On an annual basis, the Attorney-General of the Minister of Home Affairs should provide information to the public about:
 - The number of covert and overt warrants that were obtained by enforcement agencies under Commonwealth legislation in relation to journalists or media organisations; and
 - The specific offences to which each warrant related.
- In addition to ASIO's existing reporting requirements, ASIO should be required to:
 - Provide a report to the Attorney-General on each journalist information warrant that is issued, consistent with other types of warrants issued under the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979*; and
 - Include, in its annual report, the number of times ASIO applied for a warrant in relation to a media organisation or a person working in a professional capacity as a journalist (including, but not limited to, the number of applications for a journalist information warrant).

Recommendation 6

3.194 The Committee recommends that, as part of its upcoming review of all secrecy provisions in Commonwealth legislation (in accordance with the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*) the Attorney-General's Department specifically consider whether the relevant legislation adequately protects public interest journalism.

The Committee also recommends that this ongoing review be prioritised for finalisation and report by June 2021.

Recommendation 7

- 3.198 The Committee recommends the Government give consideration to whether defences for public interest journalism should be applied to other secrecy offences within relevant Commonwealth legislation. Any additional defences should be based on the defence provided by section 122.5(6) of the Criminal Code Act 1995.

Recommendation 8

- 3.211 The Committee recommends that the Australian Government give consideration to the formulation of a mechanism to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution.

Additionally, the Committee recommends that all intelligence and law enforcement agencies prioritise the creation of a media disclosure liaison unit to facilitate this formal consultation.

Recommendation 9

- 3.257 The Committee recommends that the Government formally responds to the recommendations of the *Review of the Public Interest Disclosure Act 2013: An independent statutory review conducted by Mr Philip Moss AM* before the completion of the Senate Environment and Communications References Committee's inquiry into press freedom.

The response should include consideration of:

- Amending the *Public Interest Disclosure Act 2013* (PID Act) to make it easier to understand for both disclosers and agencies;
 - Simplifying the public interest test in the PID Act;
 - Strengthening the reprisal protection provisions in the PID Act; and
 - Improving alignment between public and private sector whistleblower regimes.
-

Recommendation 10

3.263 The Committee recommends that the *Public Interest Disclosure Act 2013* be amended to require the following occur when a Public Interest Disclosure is made by an official connected to an intelligence agency regarding the actions of that agency:

- the originating agency report a Public Interest Disclosure to the Inspector General of Intelligence and Security within 24 hours if it is indicated as urgent by the discloser, or as soon as possible after the disclosure is made, but within the current 14 day required timeframe; and
- the originating agency maintain contact and notification with the Inspector General of Intelligence and Security during the 90 day investigation window to outline investigation progress and potential outcome timelines, including possible extensions.

Recommendation 11

3.267 The Committee recommends that the Australian Government provide for the mandatory reporting of aggregated statistics, related to numbers and timeframes of all Public Interest Disclosures, to be made to the Parliament every six months by the Attorney-General.

Recommendation 12

3.292 The Committee recommends that the Auditor-General prioritise the adoption of the identified 2019-2020 potential audit *Implementation of the revised Protective Security Policy Framework*.

Recommendation 13

3.293 The Committee recommends that training on the application of the Protective Security Policy Framework requirements for sensitive and classified information be made compulsory for all relevant Commonwealth officers and employees.

Recommendation 14

3.298 The Committee recommends that the Inspector-General of Intelligence and Security (IGIS), conduct a preliminary inquiry into the application of national security classifications in intelligence agencies, where such an inquiry may include:

- Examination of a sample of classified material in relation to the appropriateness of the classification; and
- Reviewing the classification procedures of intelligence agencies.

The IGIS should advise the Committee of the outcome of any preliminary inquiry into the application of national security classifications, and to the extent possible, provide information to the public on the outcome of an inquiry. Information made available to the public may include analysis of apparent trends or culture within intelligence agencies in relation to applying national security classifications, or commentary on statistical trends and outcomes, as appropriate.

Additionally, any recommendations made by the IGIS to alter or improve internal practices should be prioritised by the relevant agency and reported to the Committee as part of its annual Administration and Expenditure Review.

Recommendation 15

3.313 The Committee recommends that the Australian Government promote consideration of harmonisation of State and Territory shield laws through National Cabinet, with relevant updates incorporated to expand public interest considerations, and to reflect the shifting digital media landscape.

Recommendation 16

3.336 The Committee recommends that the Australian Government review and prioritise the promotion and training of a uniform Freedom of Information culture across departments, to ensure that application of the processing requirements and exemptions allowed under the *Freedom of Information Act 1982* are consistently applied.

1. Introduction

- 1.1 The Attorney-General of Australia, The Hon Christian Porter MP, referred a general inquiry to the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) on 4 July 2019. That inquiry was referred pursuant to subparagraph 29(1)(b)(ia) of the *Intelligence Services Act 2001*.¹
- 1.2 The reference was to inquire and report on the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. The specific terms of reference for the inquiry are outlined in the preliminary pages of this report, however the inquiry has evolved as the Committee has undertaken evidence-gathering and consideration of the issues involved.
- 1.3 Due to the interrelated nature of the issues that have been raised in evidence to the inquiry, and the potential impacts of events and government decisions and administrative responses since the referral and review outcomes, the scope of the report and the limitation of consideration of issues is expanded on briefly below.

Scope of this report and conduct of the inquiry

- 1.4 The inquiry was referred by the Attorney-General following the public execution of search warrants on the residence of a News Corporation journalist and the Australian Broadcasting Corporation's (ABC) Ultimo headquarters in June of 2019.
- 1.5 These search warrants were executed as part of ongoing Australian Federal Police (AFP) investigations into unauthorised disclosures of classified

¹ Subparagraph 29(1)(b)(ia) of the *Intelligence Services Act 2001* empowers the Attorney-General to refer any matter for review to the Committee in relation to the major oversight functions of the Committee in relation to intelligence and law enforcement agencies.

material. These disclosures resulted in reporting in the *Sunday Telegraph* of classified information regarding proposals for legislative reform of the Australian Signals Directorate (ASD) mandate², and the reporting by the ABC of classified material regarding alleged misconduct and potential war crimes in Afghanistan by Australian Defence Force (ADF) personnel in the early 2000s, referred to as the 'Afghan Files'.³

- 1.6 These media items were based on the unauthorised disclosure of internal classified material between the Department of Defence and ASD and the Department of Home Affairs, as well as classified Department of Defence reports and records regarding ADF operations in Afghanistan.
- 1.7 Further information regarding the events leading up to the referral of this inquiry is outlined in Chapter 2, however the brief outline above provides context to the referral from the Attorney-General for this inquiry to investigate the impacts of law enforcement and intelligence agency powers on the ability of the media in Australia to inform the public.
- 1.8 The letter from the Attorney-General referring the inquiry, which was made available on the inquiry website, stated:

The Government is committed to ensuring our democracy strikes the right balance between a free press and keeping Australians safe - two fundamental tenets of our democracy.

As such, the Government will consider proposals that aim to ensure that balance. This includes carefully reviewing all materials and proposals that media organisations and interested bodies provide to the Government.⁴

- 1.9 The evidence and proposals provided to the Committee have been wide-ranging and relate to decades of national security legislation.
- 1.10 The Chair of the Committee, Mr Andrew Hastie MP, announced the commencement of the inquiry by media release on 5 July 2019 and invited

² The *Sunday Telegraph* article can be accessed at https://parlinfo.aph.gov.au/parlInfo/download/media/pressclp/5933424/upload_binary/5933424.pdf;fileType=application/pdf#search=%22Annika%20Smethurst%20spy%22

³ The 'Afghan Files' reports can be accessed at <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642>

⁴ Correspondence from The Hon Christian Porter MP, Attorney-General, referring the inquiry, 4 July 2019, available at <https://www.aph.gov.au/DocumentStore.ashx?id=4ac549d5-117b-46bd-9a8f-011bffb3ddd4>

written submissions from the media, government agencies and other interested stakeholders.

- 1.11 The Committee received 61 submissions, with an additional 41 supplementary submissions (incorporating substantive supplementary submissions and answers to Questions on Notice). These submissions included classified submissions received from government, as well as a small number of confidential submissions from private submitters. A list of all submissions received by the Committee is included at Appendix A.
- 1.12 The Committee also received one exhibit at a public hearing for the purposes of the inquiry. Details of this exhibit received are included also at Appendix A.
- 1.13 The Committee held a public hearing in Sydney on 13 August 2019 and public hearings in Canberra on 14 August 2019 and on 19 and 20 September 2019. A list of hearings and witnesses who appeared before the Committee is included at Appendix B.
- 1.14 Copies of all public submissions and transcripts of public hearings are available on the Committee's website.⁵

Committee comment

- 1.15 The subject matter of this inquiry, as well as the initial timeline for its conduct, necessitated a large amount of information to be presented to the Committee in short initial timeframes, which placed a significant time and resource burden on submitters, witnesses, and the Committee itself. The Committee is conscious of the considerable effort made, and professionalism shown, by the many contributors to this inquiry and expresses its profound gratitude.
- 1.16 The Committee was also challenged in being able to come to a consensus position at the end of 2019, due to the receipt of detailed supplementary submissions from stakeholders, presenting further detail on earlier proposed positions, or outlining completely new proposals that had not been presented before. The receipt of the later of these submissions unfortunately coincided with the outbreak of the COVID-19 pandemic, which then reduced the Committee's ability to fully engage with these new proposals in a meaningful way, within a reasonable timeframe, as outlined below.

⁵ www.aph.gov.au/pjcis

- 1.17 The Committee's desire was to conduct the majority of this inquiry in public and to that end did not receive any private briefings or conduct any private or classified hearings related only to this inquiry. The Committee would like to thank all witnesses for their willingness to engage with the Committee on this topic within the public domain. The Committee also acknowledges that some material was required to be provided in a classified format, but this was limited to classified operational and legal material, as necessitated by the relevant legislation or policy of the originating agency.

Extension of reporting timeline and COVID-19 impacts

- 1.18 As the inquiry progressed the Committee became increasingly cognisant of the fact that the originally requested reporting timeline from the Attorney-General of 17 October 2019 would not provide enough time to pursue the relevant lines of inquiry, or consider the considerable evidence it had received with the appropriate level of granularity.
- 1.19 Accordingly, the Chair of the Committee wrote to the Attorney-General on 20 August 2019 requesting an extended reporting deadline of 28 November 2019. This extension was agreed to by the Attorney-General.
- 1.20 As the Committee continued to consider the issues raised by submitters, it became apparent that a further extension of the reporting deadline was warranted. The Chair and Deputy Chair issued a joint media release on 21 November 2019 indicating that this report would be delivered by the end of 2019, but once detailed further submissions were received in late 2019 and a government submission was expected to be received in early 2020, the Committee issued a further release on 13 December 2019 outlining a 2020 reporting aim. This was then further impacted by the COVID-19 pandemic.

Subjects covered in this report

- 1.21 The Committee recognises that the subject matter of this inquiry, while limited somewhat by the terms of reference, is still significantly broad and some issues raised by submitters and witnesses may not be reflected in the evidence, commentary and recommendations of this report.
- 1.22 This omission is in no way a diminution of the importance of those issues, or a rejection of the issue raised. Rather, the Committee felt that it was necessary to focus on reaching bipartisan agreement on a set of achievable and concrete recommendations in the time available.
- 1.23 Additionally, a number of submitters made comprehensive recommendations to this inquiry for reforms that may not be discussed in

detail (or, in some instances, at all). Those recommendations were nonetheless valuable to this inquiry and helped to inform the Committee's deliberations.

Report structure

1.24 This report consists of three chapters:

- This chapter briefly describes the genesis and conduct of the inquiry, as well as the considerable amount of review and reporting that has been undertaken regarding the subject matter (or related issues) of this inquiry in recent years;
- Chapter 2 briefly explores the background to the inquiry, as well as providing an overview of the current law enforcement and intelligence legislative frameworks that have been called into question, their associated impacts, and outlines some of the evidence provided to the Committee regarding the interaction between the media and law enforcement and intelligence agencies;
- Chapter 3 delivers the Committee's targeted summary of evidence and recommendations related to:
 - the opposing fundamental positions of the media and government on the way forward and the need for collaboration;
 - the law enforcement and intelligence powers in question, the warrants authorising investigation and public interest considerations;
 - offences and defences related to unauthorised disclosure of national security material;
 - the Public Interest Advocate Regime and potential enhancements to the scheme
 - current and potential Public Interest Disclosure mechanisms;
 - security classification of material;
 - protection of journalistic sources; and
 - Freedom of Information and defamation.

Related current or recent inquiries and reports

1.25 There have been a number of reviews and reports conducted, both contemporary to this inquiry, or in the recent past that have analysed many of the issues considered in this report.

1.26 Some of these inquiries and reviews are outlined briefly below.

Senate Environment and Communications References Committee's inquiry into Press Freedom

1.27 On 23 July 2019 the Senate referred an inquiry into press freedom to the Environment and Communications References Committee. This inquiry is still ongoing and while encompassing some of the same issues as this inquiry, has much wider-ranging terms of reference:

- disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation;
- the whistleblower protection regime and protections for public sector employees;
- the adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information;
- appropriate culture, practice and leadership for Government and senior public employees;
- mechanisms to ensure that the AFP have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters; and
- any related matters.⁶

1.28 The Senate inquiry was initially to report in December 2019, but has now extended reporting until at least 2021.

Richardson Review of the legal framework governing the National Intelligence Community

1.29 On 30 May 2018, the Attorney-General announced that a comprehensive review of the legal framework governing the National Intelligence Community (NIC) would be undertaken by Mr Dennis Richardson AO. The review was instigated as the implementation of a recommendation of the 2017 Independent Intelligence Review that recommended:

A comprehensive review of the Acts governing Australia's intelligence community be undertaken to ensure agencies operate under a legislative

⁶ Senate Standing Environment and Communications References Committee, *Terms of Reference*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Terms_of_Reference, viewed 1 October 2019.

framework which is clear, coherent and contains consistent protections for Australians.⁷

1.30 Mr Richardson provided a classified report to the government at the end of 2019, and provided an unclassified public version in mid-2020. The unclassified review report had not been released at the time of finalising this report.

1.31 While the review was looking at the overall operation of the national security legislative framework, elements of the terms of reference have potential impacts on the issues being considered by this inquiry. Most notably:

...improvements that could be made to ensure that the legislative framework for the NIC...provides for accountability and oversight that is transparent and as consistent across the NIC agencies as is practicably feasible.

...

- legislation containing NIC agency investigative powers, such as the Surveillance Devices Act 2004 and Telecommunications (Interception and Access) Act 1979;
- the adequacy of national security information handling provisions under the National Security Information Act 2004, including the protection of information relating to counter terrorism and foreign interference prosecutions;
- oversight-related legislation, such as the Inspector-General of Intelligence and Security Act 1986 and Independent National Security Legislation Monitor Act 2010.⁸

1.32 Both the Department of Home Affairs and the Attorney-General's Department have identified that a number of issues raised by submitters are being considered as part of the Richardson Review, while not being directly referred to in its terms of reference.

⁷ Commonwealth of Australia, Department of the Prime Minister and Cabinet, 2017 *Independent Intelligence Review*, Recommendation 15, p. 92.

⁸ The full terms of reference for the review can be accessed on its website at: <https://www.ag.gov.au/NationalSecurity/Pages/Comprehensive-review-of-the-legal-framework-governing-the-national-intelligence-community.aspx>

Committee comment

- 1.33 As the outcome of the Richardson Review or the scope of its recommendations is unknown, the Committee is mindful that it is currently reviewing the impact of legislation that may very well be fundamentally altered as a result of any foundational legislative framework shifts that may result from the Richardson Review.
- 1.34 Where possible, this has been acknowledged at the relevant topic in this report.

Senate Select Committee on the Future of Public Interest Journalism

- 1.35 In May 2017 the Senate established a Select Committee on the Future of Public Interest Journalism. While this Committee was mainly established to inquire on the future of public interest journalism in an age of increasing data manipulation, social media, fake news, and cultural diversity, one of its terms of reference was analogous to this Committee's inquiry, being:

...the current state of public interest journalism in Australia and around the world, including the role of government in ensuring a viable, independent and diverse service.⁹

- 1.36 In its report, the Senate Committee identified concerns from submitters to that inquiry that national security legislation was restricting the freedom of the press in recent years and contributing to a chilling effect.¹⁰
- 1.37 The concept of this perceived 'chilling effect' is covered in Chapter 2 of this report.

Australian Law Reform Commission's report into Traditional Rights and Freedoms—Encroachments by Commonwealth Laws

- 1.38 In December 2015, the Australian Law Reform Commission (ALRC) delivered a report to the then Attorney-General entitled *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws - FINAL REPORT*.
- 1.39 This report analysed the impacts of Commonwealth laws and argued that a number of counter-terrorism and national security laws interfere with

⁹ Senate Select Committee on the Future of Public Interest Journalism, *Terms of Reference*, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Future_of_Public_Interest_Journalism/PublicInterestJournalism/Terms_of_Reference

¹⁰ Senate Select Committee on the Future of Public Interest Journalism, *Report*, February 2018, p. 136.

traditional rights and freedoms, including freedom of speech, freedom of association and assembly and freedom of movement, and imposed strict or absolute liability offences and introduced changes to fair trial procedures.¹¹

- 1.40 The commentary in this report highlighted a number of the concerns that submitters have made to this inquiry, with the added linkages of impact on other basic rights for consideration when analysing media freedom.

Australian Law Reform Commission's report into secrecy and open government

- 1.41 The 2010 ALRC report, *Secrecy Laws and Open Government in Australia* introduced a number of the issues considered in the later rights and freedoms report (secrecy laws interfering with the right to freedom of expression), however it principally analysed the construct for a framework of Commonwealth secrecy provisions that could both safeguard sensitive information and enable open government and accountability.

- 1.42 The ALRC proposed a framework for balancing national security and open and accountable government (often utilising the media):

The management of information can be conceived of as a spectrum, with openness of information and protection of information as opposite ends of that spectrum. Secrecy provisions are situated at different points in the spectrum—at times emphasising protection; at times facilitating information handling, sharing and disclosure.¹²

- 1.43 Some of the recommendations put forward by the ALRC, such as reform of secrecy offences in the *Crimes Act 1914* were realised, in part, with amendments made by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, and were discussed by the Bill Advisory Report from this Committee's predecessor.¹³
- 1.44 Elements of the ALRC's proposed framework, including those related to the establishment of harm to public interest through a disclosure, have been

¹¹ Commonwealth of Australia, Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws FINAL REPORT*, ALRC Report 129, December 2015, p. 22.

¹² Commonwealth of Australia, ALRC, *Secrecy Laws and Open Government in Australia*, ALRC Report 112, December 2009, p. 22.

¹³ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, p. 154.

criticised by stakeholders as not having gone far enough. This is discussed in Chapter 3.

Other reports not directly related to the inquiry's terms of reference

Review of the Public Interest Disclosure Act 2013 (2016)

- 1.45 Mr Philip Moss AM undertook an independent statutory review of the operation of the *Public Interest Disclosure Act 2013* (PID Act) two years after its commencement. Mr Moss presented his report to the Government in July 2016.
- 1.46 While the operation of the PID Act is not directly covered by the terms of reference of this inquiry, its intent to allow for a formal and legitimate mechanism for individuals to make disclosures regarding wrongdoing and maladministration in the Commonwealth is relevant to some circumstances regarding unauthorised disclosures that have been made to the media.
- 1.47 The Moss Review was critical of the PID Act and the experience of users, but cited that the relative newness of the scheme may have contributed to this criticism. The report proposed improvements to the scheme.¹⁴ There has been no formal response or direct legislative change created as a result of these recommendations.
- 1.48 The PID Act and disclosures are discussed in Chapter 3.

Parliamentary Joint Committee on Corporations and Financial Services report into Whistleblower Protections

- 1.49 The Parliamentary Joint Committee on Corporations and Financial Services conducted an inquiry into whistleblower protections during late 2016 and 2017 and reported in September 2017.¹⁵
- 1.50 The inquiry looked at whistleblower protections in a wider context than is relevant to this inquiry, but the general concept of whistleblower motivations and protection for information released in the public interest has some crossover.

¹⁴ Commonwealth of Australia, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 7-8.

¹⁵ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017.

Committee comment regarding statutory reviews undertaken by this Committee

- 1.51 The Committee notes that it is currently undertaking, or has recently finalised, statutory reviews of both the amendments made to Commonwealth legislation by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, as required by section 187N of the TIA Act, and the mandatory data retention regime required by Part 5-1A of the *Telecommunications (Interception and Access) Act 1979* (TIA Act).
- 1.52 Both of these reviews concern powers, data access and investigatory authorisations that may extend to the conduct of a journalist or a media organisation, or their information.

2. Background and interactions between media, law enforcement, and intelligence agencies

- 2.1 The breadth of issues raised in submissions and the differing approaches to addressing the terms of reference has challenged a number of the contentions that have been put before the inquiry.
- 2.2 Additionally, attempting to find a balance between the free operation of the media and national security priorities, distilled into the concepts of transparency versus secrecy, will only eventuate if affected parties are willing to collaborate.
- 2.3 This Chapter provides a brief summary of the concepts considered by submitters as being at the heart of the inquiry, events that led up to this inquiry, as well as identification of the key themes of evidence received regarding national security legislation frameworks, the importance of national security, law enforcement and intelligence capabilities, as well as some key examples of the interactions between the media and law enforcement, intelligence agencies and the identified perceived ‘chilling effect’ that this may cause.

Background and events leading up to the inquiry

- 2.4 Australian democracy is built upon a set of fundamental principles and traditions, including a tradition of limited government, the rule of law and the idea of a democratic social contract. Stated concisely, many of these principles are set out in the 1971 Declaration of Commonwealth Principles,

issued at the Commonwealth Heads of Government Meeting in Singapore in 1971:

We believe in the liberty of the individual, in equal rights for all citizens regardless of race, colour, creed or political belief, and in their inalienable right to participate by means of free and democratic political processes in framing the society in which they live. We therefore strive to promote in each of our countries those representative institutions and guarantees for personal freedom under the law that are our common heritage.¹

- 2.5 Complementing these principles is the Westminster system of responsible government, where ministers of the Crown are members of, and accountable to, the Parliament which is made up of elected representatives.
- 2.6 Regular, free and fair elections are fundamental to Australia's parliamentary democracy. Underpinning the concept of a free and fair election is access to information – including information from and about the government of the day. That is one of a number of reasons why schemes, such as the Public Interest Disclosure (PID) and the Freedom of Information (FOI) schemes exist. The media also plays a critical role in informing the electorate and – in some instances – in providing an outlet for public servants and politicians to reveal issues of concern.
- 2.7 The Alliance for Journalists' Freedom outlined this role further:

A free, independent media is essential to a functioning democracy. In a democracy like Australia, the media provides important transparency, keeping track of those in power, for the public. Although, for the most part, government and the civil service behave with professionalism and integrity, an independent media outside the traditional three pillars of government (executive, legislature and judiciary), helps to keep the system honest. A free press also acts as a whistle-of-last-resort for people exposing abuses of power, corruption and mismanagement.²
- 2.8 The importance of the role that a free media plays in Australia's democracy has been acknowledged by the government in the referral from the Attorney-General, as well as by nearly all of the Australian Government agencies that have contributed to this inquiry.³

¹ The Commonwealth, *Declaration of Commonwealth Principles*, Singapore, 1971, available at <https://thecommonwealth.org/declaration-commonwealth-principles>

² Alliance for Journalists' Freedom, *Submission 13*, p. [1].

³ Australian Human Rights Commission, *Submission 8*, p. 1; Australian Signals Directorate (ASD), *Submission 16*, p. 1; Australian Federal Police (AFP), *Submission 21*, p. 3; Australian Security

- 2.9 The Australian Security Intelligence Organisation (ASIO), for example, submitted:

It is important to note that this submission is made on the basis of ASIO's long-held respect for the essential role a free and independent press plays in Australia's democracy. ASIO considers any arbitrary interference with the pursuit of journalism as fundamentally counter to the law, the public interest and ASIO's values.⁴

- 2.10 By way of another example, the submission from the Department of Home Affairs and the Attorney-General's Department stated:

Press freedom is one of the fundamental pillars of Australia's democracy, and the Australian Government is committed to a free press. Press freedom plays an important role in keeping the public informed and our democratically elected officials and Government institutions accountable. However, press freedom is not absolute. Journalists, just like all Australians, are subject to the law. The freedom to publish has always been subject to other considerations such as laws concerning defamation, criminal offences, the right to a fair trial, and national security.⁵

- 2.11 One of the primary objectives of this inquiry has been to strike a sensible balance between ensuring that the media can keep Australians informed and governments accountable, on the one hand, and the interests of national security, on the other.
- 2.12 National security has been a priority of all Australian Governments.
- 2.13 Dr Keiran Hardy and Professor George Williams identified that since 2001, the federal Parliament had enacted 75 pieces of counter-terrorism legislation (at the time of their submission), with a large number of these statutes, especially those enacted since 2014, having the potential to affect press freedom.⁶
- 2.14 In the 45th Parliament alone (2016-2019) this Committee analysed and provided advisory reports on 17 bills related to intelligence and security

Intelligence Organisation (ASIO), *Submission 22.1*, p. 2; Department of Home Affairs and Attorney-General's Department, *Submission 32*, p. 3; Office of National Intelligence, *Submission 35*, p. 1.

⁴ ASIO, *Submission 22.1*, p. 2

⁵ Department of Home Affairs and Attorney-General's Department, *Submission 32*, p. 3.

⁶ Dr Keiran Hardy and Professor George Williams, *Submission 11*. p. [1].

matters. Also, not all bills related to national security matters are referred to this Committee.

- 2.15 Australia's Right to Know (ARTK) coalition and an number of other submitters expressed concern that the cumulative effect of many of these new laws has been to place undue restrictions on the ability of media organisations and journalists to provide information to the Australian public.⁷
- 2.16 Mr Mark Maley from the Australian Broadcasting Corporation (ABC) suggested this cumulative effect has made the landscape in which the media needs to operate very uncertain:

Over the last two to three years, the atmosphere amongst journalists has changed enormously on, if you like, the newsroom floor — literally on the newsroom floor when you, as I do, walk around the newsroom floor and talk about these issues with working reporters who, for the first time in their lives, feel as though they are potentially under surveillance and potentially committing criminal acts when they believe themselves to be law-abiding citizens working in the public interest. They are proud of what they do, and the thought that, in the context of genuinely ethical public interest journalism, people feel as though they're being surveilled and are at risk of criminal sanctions and having to defend criminal actions is genuinely chilling and distressing for people who see themselves as ordinary reporters and feel as though they're doing good daily work. It has an effect. It is something which is brought up and discussed on the newsroom floor in a very negative way.⁸

- 2.17 Repeat commentary to this inquiry and in the public discourse around this issue has labelled this feeling as a 'chilling effect'. The concept of a chilling effect has developed in law and communication, including from a United States (US) perspective regarding violations of the US Constitutional First Amendment right to freedom of expression. Witnesses also applied this to the concept of speech or conduct being restricted or suppressed by the fear of penalty or prosecution.
- 2.18 Similarly, the fear of prosecution or penalty extends to whistleblowers (or people who would disclose information) to reveal instances of misconduct or disclosable conduct.⁹

⁷ Australia's Right to Know coalition of media companies (ARTK), *Submission 23*, p. 18.

⁸ Mr Mark Maley, Manager Editorial Policies, ABC News, Australian Broadcasting Corporation, *Committee Hansard*, Canberra, 20 September 2019, pp. 60-61.

⁹ Australian Broadcasting Corporation (ABC), *Submission 38*, p. 7.

- 2.19 In summary, submitters reported that there has been a shift in recent years regarding the willingness for the media to report on matters that have been disclosed to them and which are considered to be in the public interest to report on.

Recent events

- 2.20 During the course of this inquiry, and in the recent past, journalists have found themselves within the investigative scope of the Australian Federal Police (AFP), ranging from the execution of search warrants on members of media organisations,¹⁰ to seeking fingerprints of journalists or tracking flight details.¹¹
- 2.21 However, submissions described two incidents which prompted the referral of this inquiry – the execution of search warrants on members of the press in June 2019.
- 2.22 In the first of these incidents, the AFP executed a search warrant on the home of a News Corp Australia journalist as part of an investigation into unauthorised disclosure of national security material. The material was related to the government's reported consideration of a potential expansion to the legislative powers of the Australian Signals Directorate (ASD), which carried a national security classification above secret.¹²
- 2.23 The execution of the search warrant was the culmination of 14 months of investigation by the AFP following referral of the matter by the Department of Defence in April 2018¹³ – shortly after the publication of the news report in *The Sunday Telegraph*.¹⁴
- 2.24 The execution of this warrant was challenged by News Corp in the High Court and was quashed in a unanimous decision handed down on

¹⁰ ABC, *Submission 38*, pp. 2–5; Associate Professor Joseph Fernandez, *Submission 19*, p. 3. See also, The Walkley Foundation, *Submission 12*, pp. 4–11; ABC Alumni, *Submission 41*, pp. 6–7.

¹¹ Association for International Broadcasting, *Submission 20*, pp. 1–2.

¹² Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, Canberra, 14 August 2019, p. 19.

¹³ Mr Neil Gaughan, Deputy Commissioner Operations, AFP, *Committee Hansard*, Canberra, 14 August 2019, p. 10.

¹⁴ Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, Canberra, 14 August 2019, p. 27.

15 April 2020.¹⁵ Additionally, the AFP announced on 27 May 2020 that the investigation was being finalised without any further action.¹⁶

- 2.25 The second incident related to the execution of a search warrant on the headquarters of the ABC in Sydney following its publication of a series of articles described as 'The Afghan Files'.
- 2.26 The ABC articles detailed matters under ongoing internal Defence investigation, by the Inspector-General of the Australian Defence Force (IGADF). The IGADF is conducting an Inquiry into rumours of possible breaches of the Laws of Armed Conflict by members of the Australian Defence Force (ADF) in Afghanistan, between 2005 and 2016.¹⁷ This inquiry commenced in 2016 and is yet to report.
- 2.27 The documents taken by the AFP during the ABC warrant execution were subject to an injunction filed by the ABC after the warrant was executed claiming that the warrant was invalid, arguing it was "legally unreasonable" and included search terms which failed to create any meaningful limitation on the scope.¹⁸ However, this claim was rejected by the Federal Court on 7 February 2020.¹⁹ The AFP investigation related to this warrant is still ongoing, however media reporting in early July 2020 identified that a brief of evidence had been produced for the consideration of prosecutors.²⁰
- 2.28 The execution of these warrants within two days of each other, and the rumour of a third unexecuted warrant,²¹ raised concerns about the status of

¹⁵ *Smethurst v Commissioner of Police* [2020] HCA 14 (14 April 2020)

¹⁶ Australian Federal Police, 'AFP statement on the finalisation of the News Corp investigation', <https://www.afp.gov.au/news-media/media-releases/afp-statement-finalisation-news-corp-investigation>, accessed 2 June 2020.

¹⁷ Department of Defence, 'IGADF Afghanistan Inquiry', <https://www.defence.gov.au/mjs/igadf-afghanistan-inquiry.asp>, accessed 8 October 2019.

¹⁸ ABC News, *AFP Warrants used to raid ABC valid, Federal Court rules*, <https://www.abc.net.au/news/2020-02-17/afp-warrants-used-to-raids-abc-valid-court-rules/11971018>, accessed 3 March 2020.

¹⁹ *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 (17 February 2020)

²⁰ ABC News, 'Investigation into Afghan Files that sparked ABC raids enters next phase with brief of evidence sent to prosecutors', 2 July 2020, <https://www.abc.net.au/news/2020-07-02/federal-police-seek-charges-abc-investigation-afghan-files-dpp/12415930>

²¹ Mr David Anderson, Managing Director, ABC, *Committee Hansard*, Sydney, 13 August 2019, p. 20.

press freedom in Australia,²² and the ability for the media to operate in the public interest without fear of prosecution or penalty.

- 2.29 These are not isolated incidents; search warrants have been executed on the media previously²³, though rarely. However, these search warrants and their execution are the direct catalyst for the establishment of this inquiry.

Developments since the commencement of the inquiry

- 2.30 Following the commencement of this inquiry, there was extensive media interest, coverage and commentary regarding the terms of reference, the events leading up to the inquiry, and the already established position of major media outlets, expressed through a joint panel at the National Press Club on 26 June 2019.²⁴
- 2.31 As is usual practice with a parliamentary inquiry, public submissions were invited and sought from key stakeholders and initial public hearings were arranged for 13 and 14 August 2019.
- 2.32 The week before those first hearings, on 8 August 2019 the Hon. Peter Dutton MP, Minister for Home Affairs, issued a direction to the AFP to outline expectations in relation to investigative action that involves a professional journalist or news media organisation when in receipt of national security classified information.
- 2.33 In summary, under the Ministerial Direction, the AFP is expected to exhaust alternative investigative actions, to seek voluntary assistance wherever possible, and to include a harm statement to articulate the extent to which the disclosure of material would compromise Australia's national security.²⁵
- 2.34 This Ministerial Direction was issued under the authority of subsection 37(2) of the *Australian Federal Police Act 1979* and is intended to provide policy direction to the AFP in the performance of its functions. The Minister for Home Affairs, being the responsible Minister for the AFP, may not order the

²² Some examples of reactions to the execution of search warrants are provided in Association for International Broadcasting, *Submission 20*, p. 7.

²³ Associate Professor Joseph M Fernandez, *Submission 19*, p. 3.

²⁴ National Press Club, 'Press Freedom: On the line', <https://www.npc.org.au/speakers/david-anderson-hugh-marks-michael-miller/>, accessed 9 October 2019.

²⁵ The Hon. Peter Dutton MP, Minister for Home Affairs, *Ministerial Direction to Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth Officer*, 8 August 2019, pp. 1–2.

AFP to undertake any actions, as the AFP is an independent statutory authority under the control of the AFP Commissioner. However, these ministerial directions may outline the Australian Government's expectations for investigative action in certain circumstances.

- 2.35 While this direction is a statement of the Government's intentions for the investigation of the media in unauthorised disclosure cases, many of the submitters and commentators to this inquiry do not believe that anything less than legislative amendment will ensure the appropriate level of freedom and consideration for the media to operate in this space. This contention is discussed later in this chapter and in Chapter 3.
- 2.36 In addition, the Hon. Christian Porter, Attorney-General, issued a direction on 19 September 2019 via the Commonwealth Gazette (of 30 September 2019) to the Commonwealth Director of Public Prosecutions to require written consent from the Attorney-General to prosecute offences relating to unauthorised disclosure where the alleged offence relates to work of a person in a professional capacity as a journalist.²⁶
- 2.37 This Ministerial Direction was made under subsection 8(1) of the *Director of Public Prosecutions Act 1983*, replacing and expanding a similar direction from the previous Attorney-General made in October 2014.
- 2.38 This direction relates to the following offences:
- section 35 P of the *Australian Intelligence Organisation Act 1979*;
 - sections 3ZZHA, 15HK, 15HL and 70 of the *Crimes Act 1914*;
 - sections 131.1 and 132.1 of the *Criminal Code Act 1995*; and
 - section 73A of the *Defence Act 1903*.
- 2.39 The AFP has also internally reviewed their processes since the commencement of this inquiry.
- 2.40 Mr Reece Kershaw, the newly appointed AFP Commissioner wrote to the Chair of the Committee on 21 October 2019 to identify that Mr John Lawler AM, APM had been engaged to conduct a review into the conduct of sensitive investigations in the AFP, to be completed no later than 20 January 2020. This correspondence outlined the terms of reference for the inquiry, encompassing:

...a process review into the handling of sensitive investigations with a view to ensuring all aspects of their conduct (from point of referral through the

²⁶ The Hon. Christian Porter, Attorney-General, *Ministerial Direction (Commonwealth Director of Public Prosecutions)*, 19 September 2019, p. [1].

authorisation and their ongoing management) are as efficient and effective as possible and to determine whether the existing investigative policy and guidelines are fit for purpose.²⁷

- 2.41 This review was completed and publically released on 14 February 2020, making 24 recommendations including creating a definition of 'sensitive investigation' and a key structural and governance change creating an escalation model for the AFP to better manage sensitive investigations. The Commissioner accepted all of the recommendations in-principle²⁸ and the Committee has not yet been advised of any further outcomes.
- 2.42 Additionally, the AFP Commissioner outlined on 1 November 2019 a desired reform agenda in the media since his appointment:
- a 100-day restructure of the AFP;
 - a higher threshold for search warrant execution on journalists;
 - a greater onus on agencies engaging their own criminal lawyers to assess the likelihood of conviction before referring alleged disclosure crimes to the AFP;
 - a commitment to release information previously only accessible by freedom-of-information requests; and
 - more transparent communication with journalists and to meet with media organisations to repair relationships.²⁹

Committee comment

- 2.43 The Committee acknowledges the events leading up to the referral of this inquiry and the subsequent steps that Ministers and agencies have taken to address concerns expressed by media organisations, journalists and civil society organisations about press freedom in Australia.
- 2.44 The Ministerial Direction from the Minister for Home Affairs to the AFP states the expectations of government regarding the potential investigation of journalists in relation to unauthorised disclosures, and is an initial step to improving confidence and consistency in processes. The Committee

²⁷ AFP, *Submission 21.7*, p. [2].

²⁸ AFP website, 'Review into the AFP's Response to and Management of Sensitive Investigations Released', <https://www.afp.gov.au/news-media/media-releases/review-afp%E2%80%99s-response-and-management-sensitive-investigations-released>, accessed 18 February 2020.

²⁹ *The Age*, 'A new paradigm: Australia's new top cop promises era of transparency', 1 November 2019, <https://www.theage.com.au/national/a-new-paradigm-australia-s-new-top-cop-promises-era-of-transparency-20191031-p535zy.html>, accessed 1 November 2019.

welcomes the acceptance of the recommendations of its internal review by the AFP and the further process improvement commitments announced by the AFP Commissioner.

- 2.45 Additionally, the update of the Ministerial Direction from the Attorney-General to the CDPP has provided a further opportunity – at least in the short term – for the public interest to be considered prior to any journalist being prosecuted for an alleged breach of a Commonwealth secrecy offence.
- 2.46 The Committee believes that the AFP and CDPP Ministerial Directions were welcome initial steps in response to the concerns raised by many following execution of the two search warrants in June 2019.
- 2.47 However, in order to fully restore confidence in the processes that underpin these law enforcement and intelligence agency powers, there are further reforms that the Committee outlines in Chapter 3 that will help to address the concerns that have been relayed to this inquiry.

Legislative frameworks and their complexity

- 2.48 As outlined above, since 2001, the Federal Parliament has enacted over 75 pieces of legislation relating to counter-terrorism.³⁰ This legislative agenda has been assessed as appropriate at the time by both the Parliament as the legislature and this Committee, if referred. However, submitters questioned the pace and collective impact, with developments in recent years and the nature of potential offences that can face individuals.
- 2.49 Though national security legislation is scrutinised by the Independent National Security Legislation Monitor (INSLM) as well as the Committee,³¹ submitters noted that there is difficulty identified in interpreting and applying various provisions of acts that relate to the secrecy and confidentiality of information.³² Dr Hardy highlighted:

I think the complexity of those powers is a really important point. This idea was brought up before. It has been said a few times that these laws have a cumulative effect and we have ended up in this position not necessarily intentionally. We have the encryption powers and journalist information warrants. From hearing from the media organisations today, I think it's often

³⁰ Dr Keiran Hardy and Professor George Williams, *Submission 11*, p. [1].

³¹ Ms Jacinta Carroll, *Submission 24*, pp. 8–9.

³² Journalism Education and Research Association, *Submission 6*, p. 5; See also Mr Santow, *Committee Hansard*, Sydney, 13 August 2019, p. 69;

the lack of certainty around the law that creates that chilling effect rather than there necessarily even being an offence that would directly apply. And I think that's what we're seeing: the nature of that chilling effect is that they perceive that they will be subject to criminal penalty, and their behaviour changes as a result of that.³³

- 2.50 ARTK submitted that the increasing number of laws were a threat to the operation of the media and had contributed to a 'culture of secrecy'. ARTK have engaged with the Parliament and this Committee as a number of the identified pieces of legislation were introduced and considered, and described the perceived effect as follows:

The culture of secrecy arising from these legal provisions that unnecessarily restrict Australia's right to know has permeated attitudes and processes more broadly. We have tackled some of these issues on a legislative amendment by legislative amendment basis. But with each of these laws the tide of secrecy rises. This is deeply disturbing in a modern and robust democracy.³⁴

Development of elements of national security offences and legislation

- 2.51 As identified above, the volume of statute encompassing national security offences and related offences causes concern for stakeholders. Evidence was also received that the development of the national security legislative framework has caused inconsistencies in the application or definitional constructs for offences and other powers available to law enforcement and intelligence agencies.
- 2.52 The Law Council of Australia submitted that a number of recent amendments to secrecy and unauthorised disclosure provisions, some as a consequence of partial implementation of the Australian Law Reform Commission's (ALRC) *Secrecy Report*, have created an inconsistent construct for differentiating between internal and external disclosers, as well as retaining now repealed offences for disclosures occurring before December 2018.³⁵
- 2.53 The Law Council noted that the amendments made to the general secrecy provisions in the *Criminal Code Act 1995* (the Criminal Code) by the *National*

³³ Dr Keiran Hardy, Griffith Criminology Unit, appearing in a private capacity, *Committee Hansard*, Sydney, 13 August 2019, p. 62.

³⁴ ARTK, *Submission 23*, p. 2.

³⁵ Law Council of Australia, *Submission 40*, pp. 14-18.

Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (EFI Act) did not incorporate all of the principles suggested by the ALRC, namely the inclusion of an express harm requirement and a public interest exception.³⁶ This comment was also made by the Law Council of Australia in their submission to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018* (EFI Bill) at the time it was being considered by this Committee.

- 2.54 The requirement for an express harm element to offences has been identified by a number of reviews regarding secrecy offences – most notably the previously mentioned ALRC *Secrecy Report*, but also the INSLM’s 2015 *Report on the impact on journalists of section 35P of the ASIO Act*.³⁷
- 2.55 The separation between internal and external disclosers and the express harm element of offences is discussed in Chapter 3 of this report.

National security and intelligence capability security

- 2.56 A critical element of consideration in this inquiry is the concept of national security and how intelligence capability and security can be ensured or protected. Information regarding defence, domestic and foreign intelligence and security must, out of necessity, often be covert in order for a nation and its government to ensure its sovereignty and security of information.
- 2.57 However, submitters to the inquiry have contended that the broad nature of the definition of national security, especially as it has evolved in relation to recent espionage and foreign interference legislation, has potentially blurred the boundaries on what the media and individuals can inquire into and communicate about.
- 2.58 Dr Keiran Hardy and Professor George Williams contended an evolution of broadening of the concept of national security and its potential consequence:

The longstanding definition of ‘security’ in the ASIO Act is already very broad in extending beyond defence, border protection and national security matters to ‘communal’ and ‘politically motivated’ violence. Conduct satisfies that definition even if it does not relate to terrorism or otherwise have country-wide implications.

³⁶ Law Council of Australia, *Submission 40*, p. 17.

³⁷ Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Report on the impact on journalists of section 35P of the ASIO Act*, 2015, p. 24 and throughout the report.

Under the new espionage and foreign interference laws, national security is defined even more broadly to include anything relating to Australia's 'political, military or economic relations' with other countries. A like approach can be seen in the recently enacted encryption laws.

This confirms that journalists could be prosecuted under the espionage laws for receiving or possessing information that is broadly relevant to Australia's economic or foreign interests, far beyond matters relating to terrorism, military operations, or similarly serious events.³⁸

- 2.59 Prior to the amendment and introduction of a broader definition, the Criminal Code relied on a definition from the *National Security Information (Criminal and Civil Proceedings) Act 2004* that was bound to a more general concept of 'Australia's defence, security, international relations or law enforcement interests'.³⁹ The meanings of security, international relations and law enforcement interests are then expanded on in sections 9-11 of that Act.
- 2.60 The specific and much broader definition introduced with the EFI Act is contained in section 90.4 of the Criminal Code:
- (1) The national security of Australia or a foreign country means any of the following:
 - (a) the defence of the country;
 - (b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2);
 - (c) the protection of the integrity of the country's territory and borders from serious threats;
 - (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);
 - (e) the country's political, military or economic relations with another country or other countries.
 - (2) For the purposes of subsection (1), this subsection covers the following activities relating to a country, whether or not directed from, or committed within, the country:

³⁸ Dr Keiran Hardy and Professor George Williams, *Submission 11*, pp. [11-12].

³⁹ *National Security Information (Criminal and Civil Proceedings) Act 2004*, s. 8.

- (a) espionage;
- (b) sabotage;
- (c) terrorism;
- (d) political violence;
- (e) activities intended and likely to obstruct, hinder or interfere with the performance by the country's defence force of its functions or with the carrying out of other activities by or for the country for the purposes of its defence or safety;
- (f) foreign interference.⁴⁰

- 2.61 Significant commentary was received and considered regarding this definitional change when this Committee's predecessor considered the EFI Bill.⁴¹
- 2.62 The scope of the definition was commented on by a number of submitters to this inquiry, most identifying that political, economic and military relations should be excluded.⁴²
- 2.63 When questioned regarding concerns about the scope of this definition and its relation to the current national security legislation framework the Department of Home Affairs responded:

The Department considers the existing definition of 'national security' and the current framework ... under the *Criminal Code Act 1995* is sufficient and adequately balances the rule of law, press freedoms and the protection of Australia's national security. As with any prosecution in relation to a criminal offence, the rule of law is upheld under this framework as prosecutors are required to prove beyond reasonable doubt that the defendant is guilty. This is further present in the existence of defences that are available in relation to the offences.

Supported by the definition of national security, these offences exist to protect Australia's national security interests. The definition of national security of Australia or a foreign country in the *Criminal Code Act 1995* was enacted to

⁴⁰ *Criminal Code Act 1995*, s. 90.4.

⁴¹ Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the National Security Legislation Amendment (Espionage and Foreign Interference Bill 2017)*, pp. 27-37.

⁴² Dr Keiran Hardy and Professor George Williams, *Submission 11*; Human Rights Watch, *Submission 30*; ABC, *Submission 38*; Law Council of Australia, *Submission 40*.

more comprehensively cover the matters relevant to the security of a country. The definition covers a broad range of possible prejudice to Australia's national security, such as damage to Australia's international relations, economic wellbeing and Australia's political process and system that requires protection from the threat of espionage, sabotage and foreign interference from foreign countries.⁴³

Committee comment

- 2.64 The argument regarding the suitability, proportionality or appropriateness of this definition of national security and its application to consideration of offences or disclosure is a central contributing factor to this inquiry. Those seeking to disclose material and those that would report it will almost always clash with those seeking to conceal that information.
- 2.65 One of the critical questions before this Committee is whether the current framework is appropriately balanced between freedom of the press and the interests of national security and law enforcement. This was reflected in the Attorney-General's reference for the inquiry aiming 'to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats'.

The importance of national security vs transparency

- 2.66 The sovereign right of a nation to secure its citizens and its society is underpinned by its ability to defend itself, secure its information and enforce its laws. However, it is important for this to be balanced with principles of openness and accountability.
- 2.67 Mr Michael Shoebridge, Director of Defence, Strategy and National Security at the Australian Strategic Policy Institute summarised the balance succinctly:

Done well, national security enables democracy as it protects our people and our democratic institutions from coercion and allows us to operate a free and open society, governed by parliament and law, in an environment of healthy, open debate. The purpose is to have a free and open society, though, not to have national security for itself. Too little disclosure damages public trust

⁴³ Department of Home Affairs, *Submission 32.5*, p. 16.

in institutions, and too much undercuts important capabilities that keep Australians safe.⁴⁴

- 2.68 The ability for a government to secure its information is vital to national security, but transparency and accountability are crucial to building trust in institutions, and that is especially crucial in relation to intelligence agencies, whose work is covert and secretive by its very nature, as identified by ASD:

ASD is committed to being more open and transparent, but some information must remain protected. The national intelligence community will not be able to effectively defend Australia from global threats if our capabilities are known to those who would do us harm. ASD relies on sources of intelligence and methods of access many would assume to be improbable or even impossible. This is the edge that needs to be protected to ensure that Australia's intelligence agencies can continue to guard and advance the national interest.⁴⁵

- 2.69 Another element to maintaining a healthy national security dialogue was outlined by Mr Shoebridge:

Parliamentary statements on national security matters are a primary way of demonstrating healthy disclosure and so building public trust. There seems to be an idea that national security matters are difficult to be transparent about, because of the intermingling of classified and unclassified information about them. But there is a strong precedent for showing that very sensitive national security activities replete with highly classified activities and information have been the subject of very healthy levels of public disclosure right here in the parliament. I'm talking about the detailed parliamentary statements about military operations that were a feature of both Stephen Smith's and David Johnston's times as Minister for Defence. Transparency and openness around the operations served two purposes: they shored up parliamentary and public support, and so perhaps avoided any Iraq [Weapons of Mass Destruction]-type backlash; and sharing the story of Australia's commitment to Afghanistan with the public helped them better understand why Australia was there and what was being done. This shows what is possible. There were huge amounts of detail—for example, on detainee policy and interrogation capabilities being deployed by the Australian military. There's a need to reinvigorate a healthy disclosure culture within government agencies so that the spirit of frameworks

⁴⁴ Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 11.

⁴⁵ Lieutenant General John Frewen DSC AM, Acting Director-General, ASD, *Committee Hansard*, Canberra, 20 September 2019, p. 46

like the FOI Act is delivered on by their operation. Such a reinvigoration needs to be led by ministers and by the secretaries and senior leadership of the government agencies themselves.⁴⁶

- 2.70 Others suggested that there is a perception that openness and transparency in statements on defence and intelligence capabilities, and the general tone the parliament has taken towards national security has eroded in recent years. Mr James Chessell from Australian Metro Publishing (appearing as ARTK) identified the hardening attitude set by the parliament:

I would make a more general point about parliament, and that is that the parliament is meant to set the tone. I think Mr Williams is referring to the 75 security and antiterrorism laws that have been passed since September 11. At the same time, journalists in my newsrooms and journalists in other newsrooms around the country have encountered a hardening of attitudes among judges, among freedom of information officers at government departments and among participants in the ever-growing defamation industry—and I don't think this is a coincidence. Those laws foster a culture of secrecy and a belief that you can't run an effective government while being open. Even when we see laws that on the face of them appear reasonable—and you could argue the FOI laws aren't completely broken—you get an overzealous application of those laws by the people involved, and so it permeates through the system. I think parliament has to set the tone in this regard.⁴⁷

Committee comment

- 2.71 There are numerous recent examples of intelligence services responding positively to calls for greater openness, such as the example of the then Director-General of ASD disclosing in a public forum the reasoning behind decisions to restrict providers involved with building Australia's 5G mobile network.⁴⁸
- 2.72 The interplay between a robust community dialogue on national security and the realities of the secrets required to maintain security can be facilitated by the media, as many submitters and witnesses have attested.

⁴⁶ Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 12.

⁴⁷ Mr James Chessell, Group Executive Editor, Australian Metro Publishing, *Committee Hansard*, Sydney, 13 August 2019, p. 6.

⁴⁸ Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 12.

- 2.73 However, the Committee notes that the prevailing argument to this inquiry from non-government stakeholders is that the balance in legislation and culture within the Australian Government has tipped away from transparency and engagement to excessive and unnecessary secrecy. The media provided submissions outlining some instances that support this contention, some of which are briefly outlined below.

The experience of journalists and media organisations with law enforcement and intelligence agencies and their impacts

- 2.74 Journalists and media organisations submitted that the execution of search warrants on the ABC and a News Corp journalist had flow-on effects for journalists who were concerned about the scope of investigative action that could be taken against them for public interest journalism. Mr Nick McKenzie from *The Age* detailed his immediate reaction to the execution of the search warrants against the ABC, and his previous interactions with law enforcement:

I did an immediate stocktake of what was at my desk because I thought Jesus, am I going to be next? It was in some respects surprising and deeply concerning.

Given that we do exist in this strange place where our job is to find secret information, sometimes classified information, and to carefully and responsibly tell it to the public, I do understand that there will be this tension between the public interest in my job and the desire of agencies like the AFP and the defence department to stop these sorts of leaks.

I have been raided by police, I've been the subject of phone tapping interception, I've been hit with summonses from various powerful bodies. I have been in a coercive hearing and I was warned when I wouldn't reveal a source that I would be prosecuted. Even when pressed, I didn't reveal any sources.⁴⁹

- 2.75 Several submissions detailed experiences where news reporting resulted in investigation by law enforcement, even where the reporting did not involve national security classified information. Mr Linton Besser described an investigative journalism piece into a Commonwealth jobs scheme that led to

⁴⁹ The Walkley Foundation, *Submission 12*, p. 6.

search warrants being executed against two of the sources for the broadcast item:

In 2015 I worked on a Four Corners investigation into a Commonwealth jobs scheme. The story uncovered a system which was open to abuse and in which Australia's unemployed were treated as a commodity. We uncovered fraud, manipulation and falsified paperwork. Following the broadcast of the program, the AFP commenced an investigation into allegations that Commonwealth information had been leaked to Four Corners. They advised us that they intended to issue a search warrant at the ABC. That never transpired however two of my sources for the program were very publicly raided by the AFP. They had not broken the law and so the AFP did not take any action against them. But the word got out.⁵⁰

- 2.76 Mr Paul Farrell asserted that a range of investigatory tools were used in an investigation as a result of a news story published by the ABC:

... a story about Australia's incursions into Indonesian waters triggered an Australian Federal Police investigation, a corruption inquiry by the Australian Commission and Law Enforcement Integrity and an Australian Customs and Border Protection internal probe. During the police investigation my phone records were accessed, and officers took a range of other steps to obtain information about my location and interview people they believed may have knowledge of the publication. These organisations all wield vast and extraordinary powers. When used against the sources of journalists - or the journalists themselves - they serve as a significant deterrent to public interest journalism.⁵¹

- 2.77 In their submission, the AFP outlined the importance of covert warrant powers to enable information to be collected without alerting the subject of the warrant.⁵² However, some journalists suggested that these covert powers create concerns about how much of their information is being accessed without their knowledge to identify sources. Jo Puccini from the ABC identified:

In my experience, since the AFP raids in June this year journalists have become increasingly concerned by the power of law enforcement and intelligence agencies to compromise a journalist's commitment to protect their sources. My team has heard from a number of whistle blowers and sources who have said they are now more reluctant to deal with journalists.

⁵⁰ ABC, *Submission 38*, p. [2].

⁵¹ ABC, *Submission 38*, p. [3].

⁵² Australian Federal Police (AFP), *Submission 21*, p. 7.

Journalists are fearful that their metadata has been obtained without their knowledge and some journalists fear that their phones and movements may be actively monitored. And because they don't know whether this is the case or not, that fear is with them all the time.⁵³

- 2.78 The Association for International Broadcasting expressed that they are not confident that these powers are exercised appropriately given that the Office of the Commonwealth Ombudsman reported that the AFP had breached the *Telecommunications (Interception and Access) Act 1979* (TIA Act):

In January 2019 the Commonwealth Ombudsman published a report concerning its inspection of the AFP under the *Telecommunications (Interception and Access) Act 1979* for compliance with Journalist Information Warrant provisions. The report described an AFP breach of the 1979 Act which involved access to the metadata of a journalist for the purpose of identifying the journalist's source without a Journalist Information Warrant, and subsequent inspections.⁵⁴

- 2.79 The ABC pointed out that even where journalists are subject to legitimate investigation processes, and become aware that they are being investigated, they are not advised when their status as a person of interest has ended:

In 2013, the ABC published a story by Michael Brissenden concerning allegations of misconduct against the Australian Special Forces in Afghanistan. Following the story, the AFP contacted Brissenden to advise him they were investigating the source of his story. This caused great concern to Brissenden and Puccini, not least because the AFP never tell journalists whether their investigation has concluded.⁵⁵

- 2.80 In addition to the direct impact on journalists from engaging in public interest journalism, some journalists reported the impact on the whistleblowers who often provide material to media organisations that allow public interest reports to occur. Ms Anne Davies, a reporter for *The Guardian*, highlighted the challenges to journalism as a result of recent action against whistleblowers:

... I've noticed that people who do want to expose something are extremely wary about even reaching out. Often they try to do it through intermediaries. Likewise, when we want to speak to someone we're very reluctant to even call them or email them. The whole business of journalism has changed

⁵³ ABC, *Submission 38*, p. [3].

⁵⁴ Association for International Broadcasting, *Submission 20*, p. 2.

⁵⁵ ABC, *Submission 38*, p. 3.

dramatically. There's this great nervousness, even if it's a call that doesn't involve leaking confidential information — there's just this incredible anxiety about having any trace of a conversation with journalists.

The raids have really crystallised for us that, while we've always been aware that receiving a document is risky, we've now realised it is actually a real risk. There have been times when people have published documents to support their story; they'll now think very carefully about doing that because you're basically publishing evidence that you've committed a crime.⁵⁶

- 2.81 Mr Dylan Welch from the ABC pointed out that since the AFP executed the search warrants in June 2019 a number of sources have decided not to continue providing information to the ABC:

In the weeks since those raids I'm aware of numerous ABC sources that have pulled out of stories because they think they are at risk because of those raids. It has also caused increased risk to the journalists who now or in the future work with whistleblowers to further the public interest. The Government's apparently growing appetite—especially in the area of national security—to prosecute whistleblowers and journalists is of major concern.⁵⁷

- 2.82 Additionally, a number of submissions identified that the capabilities for technical access and interception of encrypted communications enabled by the amendments made by the *Telecommunications and Other Legislations Amendment (Assistance and Access) Act 2018* (TOLA Act) have removed any certainty that a journalist can give a source that encrypted communications are secure after the introduction of metadata retention and access provisions.⁵⁸

- 2.83 Submitters to the inquiry claimed that the growing reluctance of sources to come forward to inform public interest journalism is contributing to the phenomenon of the 'chilling effect' which is discussed below.

⁵⁶ The Walkley Foundation, *Submission 12*, pp. 6–7.

⁵⁷ The Walkley Foundation, *Submission 12*, p. 11.

⁵⁸ Australian Lawyers Alliance, *Submission 5*, p. 7; JERAA, *Submission 6*, p. 6; Alliance for Journalists' Freedom, *Submission 13*, p. [4]; Association for International Broadcasting, *Submission 20*, p. 11; Human Rights Law Centre, *Submission 25*, p. 5; Law Council of Australia, *Submission 40*, p. 40; Blueprint for Free Speech and Digital Rights Watch, *Submission 44*, p. 4.

International assessment of press freedom in Australia

- 2.84 Human Rights Watch posited that authoritarian governments use national security laws to the detriment of free press.⁵⁹ While not suggesting that Australia is in the same position as such countries, it was noted that representatives of the United Nations have expressed concerns in the past about the impact of Australia's national security laws on freedom of expression.⁶⁰
- 2.85 The organisation Reporters Without Borders/ Reporters sans frontières (RSF) ranked Australia as number 21 in its World Press Freedom Index in 2019, down from number 19 in the year before. In 2020, Australia's ranking dropped another five places to 26, citing the warrants identified in this report, as well the centralised nature of media ownership in the country.⁶¹
- 2.86 RSF compiles the index of 180 countries annually, based on answers to a questionnaire.⁶² Of interest is that Australia's ranking had improved since 2013 (26), up from a low of 28 in 2014, but the 2020 ranking returned it to the same lower position.
- 2.87 The seven data categories captured from the questionnaire included media independence, legislative framework and transparency. The contributions of these factors to Australia's low score are expressed in the RSF overview for Australia from 2019:
- The space left for demanding investigative journalism has also been reduced by the fact that independent investigative reporters and whistleblowers face draconian legislation. Australia adopted one of the toughest defamation laws of the world's liberal democracies in 2018, while its laws on terrorism and national security make covering these issues almost impossible.⁶³
- 2.88 The overall assessments of international performance of assessed countries are indicative of the data categories applied, but are of interest due to the fact that the two jurisdictions identified by many civil society submitters as having codified press freedom, that Australia should look to for guidance

⁵⁹ Human Rights Watch, *Submission 30*, p. 1.

⁶⁰ Australian Lawyers Alliance, *Submission 5*, p. 5.

⁶¹ Reporters Without Borders, 'Australia', <https://rsf.org/en/australia>, accessed 24 April 2020.

⁶² Reporters Without Borders, 'Detailed methodology', <https://rsf.org/en/detailed-methodology>, accessed 18 October 2019.

⁶³ Reporters Without Borders, 'Australia', <https://rsf.org/en/australia>, accessed 18 October 2019.

(the United Kingdom and the United States of America), rank 35th and 45th respectively.⁶⁴

Committee comment

- 2.89 The Committee acknowledges the events highlighted to it by journalists and the concerns that either particular interactions with law enforcement, or the perceived threat of investigation or data access, will have on a journalist's willingness to pursue investigations.
- 2.90 More consideration of ways to ameliorate these impacts and reinstate a culture of trust and cooperation between the media and law enforcement and intelligence agencies is outlined in Chapter 3.
- 2.91 The Committee also notes that even though the focus of submitters and this inquiry is squarely on Australia and the way in which internal stakeholders view their freedoms, as highlighted by the RSF Press Freedom Index, Australia actually ranks higher than most other comparable Westminster-style democracies that Australia is often compared to. Of the Five Eyes countries, New Zealand ranks highest at ninth, with Canada at 16th.⁶⁵
- 2.92 The Committee notes the concerns raised above that once a journalist becomes aware of a preliminary or ongoing investigation where they are a person of interest, and their involvement concludes with a decision not to charge them in respect of disclosure offences, they are not advised of this decision.
- 2.93 This unknown status of investigations must cause stress to journalists, both in regards to the investigation underway and also their willingness to pursue any other stories of significance.
- 2.94 Accordingly, the Committee recommends that the AFP and other law enforcement agencies change their operating procedures to notify journalists when they are no longer being investigated, or are persons of interest, when an investigation involves overt notification that they are being investigated, but only once that notification will not jeopardise the finalisation of any such investigation.

⁶⁴ Reporters Without Borders, 'Ranking', <https://rsf.org/en/ranking>, accessed 24 April 2020.

⁶⁵ Reporters Without Borders, 'Ranking', <https://rsf.org/en/ranking>, accessed 24 April 2020

Recommendation 1

- 2.95 The Committee recommends that the Australian Federal Police and other Commonwealth law enforcement agencies with investigatory powers amend their operating procedures or practices to advise journalists or media organisations when they are no longer persons of interest in an investigation in circumstances where doing so would not jeopardise the future of the investigation.**

Examples of cooperation between the media and intelligence and law enforcement agencies

- 2.96 Although law enforcement and intelligence agencies can come into conflict with journalists and media organisations when national security information is published, submitters outlined that there can be occasions where cooperation can occur between the parties.
- 2.97 Mr Michael Miller conveyed that the concept of tension between media freedom and national security is a myth:

I think the myth is that we don't take national security as being important in our coverage. That's where the reference comes from. I think the relationship between the media organisations and national security, Defence and police is a very productive one. We have an active role to play in ensuring that our country and our communities remain safe. To suggest that we don't take that responsibility seriously, I think, is the myth that we refer to.⁶⁶

- 2.98 Media organisations provided an example of cooperation related to material obtained from a locked filing cabinet purchased second hand and then given to the ABC. As Mr Anderson related:

Someone had bought a cabinet at a swap meet or some sort of garage sale and then provided that information to the ABC. We ran a series of stories and then, for the rest of the information, we handed that back to the relevant agency. We are not seeking permission to publish those stories. What we are doing is seeking to ensure that we are not actually threatening national security, or threatening or endangering anyone's life, by revealing information that

⁶⁶ Mr Michael Miller, Executive Chairman, News Corp Australasia, *Committee Hansard*, Sydney, 13 August 2019, p. 4.

otherwise might; what we are doing is delivering public interest journalism to the community.⁶⁷

- 2.99 Mr Greg Moriarty, Secretary of the Department of Defence, provided an example where *The Canberra Times* cooperated with the Department of Defence on national security classified material:

In February 2018, The Canberra Times came into possession of a notebook, which was the property of one of our staff members, [which] contained some national security information. The Canberra Times made contact with the department and allowed a departmental officer to secure the notebook and the passes that were associated with it. The Canberra Times discussed with us what could or could not be published without harm, and agreed not to publish certain information that we advised would have harmed national security. They did publish a number of stories in relation to that matter, but the notebook and the other material were returned.

The story was embarrassing to the department, but the publication of the information which we were able to discuss with them did not harm national security. For the committee, I'd like to commend the approach that *The Canberra Times* took on that occasion to reach out to us and help us manage what was a difficult and challenging issue.⁶⁸

Committee comment

- 2.100 Media organisations have indicated to the Committee that their preference is to negotiate and cooperate. The Committee notes the positive examples of cooperation provided to it and the desired expression from the media to cooperate and collaborate in the best ways possible.
- 2.101 However, concerns were also raised about the operation of espionage laws that criminalise dealing with national security information, either deliberately or incidentally. The nature of this liability is discussed further below as a contributing factor to the perceived 'chilling effect'. However, the potential invocation of criminal liability for cooperating with law enforcement or national security agencies in relation to classified information is a natural inhibiting barrier to cooperation between parties.

⁶⁷ Mr David Anderson, Managing Director, ABC, *Committee Hansard*, Sydney, 13 August 2019, p. 8.

⁶⁸ Mr Greg Moriarty, Secretary, Department of Defence, *Committee Hansard*, Canberra, 20 September 2019, p. 49.

What is the chilling effect? – secrecy vs public interest

2.102 The ‘chilling effect’ referred to by many submitters broadly refers to the perceived effect of various laws on the ability or willingness of journalists to report on matters of public interest.

2.103 In the context of this inquiry, a number of submissions referred to the enactment of various pieces of national security legislation over time which discourage journalists and media organisations from publishing public interest news stories due to the threat of prosecution, incarceration or prohibitive legal costs. Mr Linton Besser from the ABC submitted:

The suite of national security legislation enacted over the past decade makes the core task of investigative journalists—gathering information which is not otherwise publicly available—increasingly difficult. While perhaps not the intent, the effect of these restrictions has been to effectively criminalise public interest reporting; the complexity involved in maintaining relationships with those in positions of direct knowledge of matters of public interest, and the risks posed to both sources and reporters, creates hurdles which are almost impossible to vault.⁶⁹

2.104 Several submissions to the inquiry detailed that potential confidential sources withdrew from assisting media organisations following the execution of the search warrants on the ABC and News Corp Australia. In addition to the experiences related earlier in this chapter, Mr Dylan Welch related that sources have withdrawn and the increased pressure on journalists from investigatory processes.

In the weeks since those raids I’m aware of numerous ABC sources that have pulled out of stories because they think they are at risk because of those raids. It has also caused increased risk to the journalists who now or in the future work with whistleblowers to further the public interest. The Government’s apparently growing appetite—especially in the area of national security—to prosecute whistleblowers and journalists is of major concern.

In my career I’ve never seen the kind of pressure on journalists than we’ve witnessed recently. For me over 15 years, while the legislative expansion is concerning, it is the growing appetite among the agencies and government generally to use their powers to investigate and prosecute sources and journalists that is most concerning.⁷⁰

⁶⁹ The Walkley Foundation, *Submission 12*, p. 8.

⁷⁰ The Walkley Foundation, *Submission 12*, p. 11.

- 2.105 The Human Rights Law Centre (HRLC) indicated that the operation of the TOLA Act could be used to identify journalistic sources, contending that journalists cannot guarantee protection to their sources:

Data breaches and cyber insecurity are of specific concern to journalists who are duty bound to protect the confidentiality of their sources. The uncertainty around the kind of weaknesses that can be created in various technologies may have a detrimental impact on the ability of journalists to protect their sources or on the willingness of sources to come forward, therefore having a chilling effect on public interest reporting.⁷¹

- 2.106 These statements were supported by experiences related by journalists to the inquiry. Mr Ross Coulthart, investigative reporter, detailed his experience in the Walkley Foundation submission:

I had a bloke ring me some time back who worked in an immigration detention centre. He had a harrowing documented story he wanted to leak to me ... I felt ethically obliged to warn him that no matter what I did to protect him, the record of his call to me would now be stored on a database and lead Government investigators back to him. He chose not to go public. I can't blame him—and that's why metadata [retention] is killing investigative journalism.⁷²

- 2.107 More generally, Mr Maley indicated that the atmosphere of journalism has changed as a result of operation of national security laws:

I was just going to add that, from a practical point of view for journalists, it has a genuinely chilling effect. Over the last two to three years, the atmosphere amongst journalists has changed enormously on, if you like, the newsroom floor—literally on the newsroom floor when you, as I do, walk around the newsroom floor and talk about these issues with working reporters who, for the first time in their lives, feel as though they are potentially under surveillance and potentially committing criminal acts when they believe themselves to be law-abiding citizens working in the public interest. They are proud of what they do, and the thought that, in the context of genuinely ethical public interest journalism, people feel as though they're being surveilled and are at risk of criminal sanctions and having to defend criminal actions is genuinely chilling and distressing for people who see themselves as ordinary reporters and feel as though they're doing good daily work. It has an effect. It is something which is brought up and discussed on the newsroom floor in a very negative way. I could go on, but it's just one of the chilling effects of the recent round of legislation, the raids and the revelations about

⁷¹ Human Rights Law Centre, *Submission 25*, p. 17.

⁷² The Walkley Foundation, *Submission 12*, p. 9.

warrants that obviously we don't know about. We don't know about these warrants. We don't know who's being surveilled. We don't know why they're being surveilled. It is personally distressing for journalists who are not used to dealing with this sort of material.⁷³

- 2.108 Ms Georgia-Kate Schubert, News Corp Australia, considered that the atmosphere described could be attributed to the wording of the revised Criminal Code provision that makes it an offence to deal with national security information, not just to disclose it:

It is also worth noting that the espionage and foreign interference bill passed last year, which updated sections 70 and 79 of the Crimes Act, now provides a defence at section 122.5(6) of the Criminal Code Act. But that defence also needs to be used if you deal with the document. The definition of dealing with a document is very broad, so if you know something you can't unknow it. So it actually is a criminal offence to even make exploratory investigations with agencies to potentially write a story to try and find out whether or not you may well put someone's life at risk. So this creeping level of secrecy at that end ends up where you just don't publish any story because to actually try and check it would identify the fact that you actually hold some material – you might know something – which you may have accidentally come across as opposed to being deliberately given.⁷⁴

- 2.109 Professor Rory Medcalf noted that uncertainty and discouragement of public interest reporting, dissuaded by threats, real or perceived, could affect the future of public interest journalism:

I think in many ways the risk is not so much from the stories the media is telling but from the stories that are left untold if the chilling effect takes hold on media, and national security simply becomes too tough a beat for a skilled, intelligent or self-preserving journalist. I think the stories that are left untold are a cost that we would pay over time.⁷⁵

- 2.110 The Journalism Education and Research Association of Australia (JERAA) proposed that the perceived effect of the chilling of public interest reporting does not only impact those currently working in the profession of journalism, but could potentially deter future journalists from being engaged in the profession:

⁷³ Mr Mark Maley, Manager Editorial Policies, ABC News, ABC, *Committee Hansard*, Canberra, 20 September 2019, p. 60.

⁷⁴ Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 8.

⁷⁵ Professor Rory Medcalf, private capacity, *Committee Hansard*, Canberra, 19 September 2019, p. 5

Our members are concerned about the creep of national security and antiterrorism laws. Not only are these impinging on press freedom but the recent raids on journalists have the impact of discouraging bright young people from entering our profession, a profession that is still a cornerstone of democracy.⁷⁶

Committee comment

- 2.111 The Committee notes that the chilling effect is difficult to quantify.
- 2.112 The Committee notes evidence received that this chilling effect has been perceived by some internationally, where commentary regarding the secrecy of Australian Government business and the impact of national security legislation is using increasingly heavier and, arguably, overblown language.
- 2.113 Perceived impacts on press freedom could affect the perception of Australia as a suitable trading partner, human rights compliant country, or even encouraging other countries and their leaders to consider restricting media freedom and operation in their own nations.⁷⁷
- 2.114 In response to the observation that the perception of Australia as a free and democratic society is changing, after reporting in the *New York Times* stated that Australia may be one of the world's most secretive democracies⁷⁸, the Committee notes that it agrees with the observation of Ms Katherine Mansted:

I don't think that that particular report in the *New York Times* has suddenly caused great damage to Australia, but I think, over time, it can become a death-by-a-thousand-cuts situation. Certainly you can lose these types of things—like trust and credibility.⁷⁹

⁷⁶ Dr Alexandra Wake, President, JERAA, *Committee Hansard*, Sydney, 13 August 2019, p. 43.

⁷⁷ Sydney Morning Herald, 'Be better than North Korea': Amal Clooney warns Australia on press freedom, 11 July 2019, <https://www.smh.com.au/world/europe/be-better-than-north-korea-amal-clooney-warns-australia-on-press-freedom-20190711-p5264e.html>, accessed 24 October 2019.

⁷⁸ New York Times, *Australia May Well Be the World's Most Secretive Democracy*, 5 June 2019, <https://www.nytimes.com/2019/06/05/world/australia/journalist-raids.html>, accessed 24 October 2019.

⁷⁹ Ms Katherine Mansted, private capacity, *Committee Hansard*, Canberra, 19 September 2019, p. 10.

Can a chilled media and public discourse make foreign interference easier?

- 2.115 As stated on numerous previous occasions, and in public forums, ASIO is forthcoming with its assessment that ‘Australia is facing an unprecedented threat from both terrorism and foreign interference’.⁸⁰
- 2.116 In response to questions from the Committee on the nature of the threat of, and Australia’s response to, foreign interference, the Department of Home Affairs outlined:

Foreign actors including foreign intelligence services are creating and pursuing opportunities to interfere with Australian decision makers at all levels of government and across a range of sectors.

Protecting Australia’s sovereignty, values and national interests from foreign interference is the aim of Australia’s Counter Foreign Interference Strategy. The goal is to increase the cost and reduce the benefit of conducting foreign interference in Australia. The five pillars of Australia’s Counter Foreign Interference Strategy are:

- enhance capability to meet current and future needs,
- engage at-risk sectors to raise awareness and develop mitigation strategies,
- deter the perpetrators by building resilience in Australian society,
- defend directly against foreign interference activity through a coordinated government response, and
- enforce our Counter Foreign Interference laws, by investigating and prosecuting breaches.

The Counter Foreign Interference Strategy seeks to apply ‘sunlight’ on foreign interference, by raising awareness of the threat among the Australian public and engaging with at-risk sectors. The media plays a key role in applying ‘sunlight’ on foreign interference through their public reporting and detailed investigation of alleged foreign interference activities in Australia and overseas.⁸¹

- 2.117 Submitters contend that this acknowledged role of the media in applying this ‘sunlight’ and creating a public discourse and increasing knowledge of foreign interference is at threat if the media is afraid to engage with

⁸⁰ ASD, *Submission 22.1*, p. 6.

⁸¹ Department of Home Affairs, *Submission 32.5*, p. [10].

investigations and reporting on such issues. Professor Rory Medcalf and Ms Katherine Mansted expanded on this:

In particular, an independent and free media is one of a democracy's most important bulwarks against malign foreign interference.

...

One of four pillars of Australia's counter foreign interference strategy is to shine 'sunlight' on corruption, interference and coercion. However, it is neither feasible nor appropriate for security agencies to monitor, identify and publicly expose all instances of malign foreign interference. In many cases, the media will be a more responsive and credible agent for exposing this behaviour.⁸²

2.118 During the inquiry, the Committee heard that hostile foreign actors can use the cover of journalism to obtain national security information that is detrimental to Australia's interests. This issue is discussed further in Chapter 3, but was summarised by Ms Carroll:

We have seen in Australia and in countries overseas—and these are generic instances but I'm basing them on examples that I have seen—instances of foreign intelligence officials working in other countries under the cover of being press and seeking to gain access to officials or those who have privileged access to information in order to access security-classified information to pass on to their government. The other example I would give that I have seen some attempts to do in other countries—and this is relevant to the suggestion in some submissions to this inquiry that there be protections for media accessing information—is that there is the potential for foreign actors to work with legitimate journalists or portray themselves as legitimate journalists in order to use this protection to gain access to classified information.⁸³

2.119 However, Mr Michael Shoebridge identified that a healthy attitude to disclosure assists in minimising the threat of foreign interference:

On foreign interference, for example, there is a whole lot of focus on stopping, preventing, minimising and exposing foreign interference that seeks to distort policymaking, decision-making and the public debate. But a healthy disclosure culture that has more credible information from government and is reported by trusted content providers, like quality media organisations, is a great inoculation against attempts to distort and manipulate decision-making

⁸² Professor Rory Medcalf and Ms Katherine Mansted, *Submission 9*, p. 9.

⁸³ Ms Jacinta Carroll, private capacity, *Committee Hansard*, Canberra, 19 September 2019, p.5

and debate in Australia, because it's much harder to distort a healthy, diverse public debate than a narrow, constrained one.⁸⁴

- 2.120 Professor Medcalf emphasised the work of the ABC and Fairfax in reporting on foreign interference activities in Australia as making a positive contribution to countering foreign interference and progressing soft power in the Five Eyes Intelligence Relationship:

...we pride ourselves, as we should, on the Five Eyes intelligence relationship. That's an extraordinary force multiplier for Australia. Intelligence is a damn sight cheaper than defence, in that regard. But I would, in some ways, look at the media in an analogous way, particularly in a globalised world, where everything that is reported in the Australian media is almost immediately reported in the international media. In fact, where we are in our time zone in the Indo-Pacific gives the Australian media a first-mover advantage in reporting on and analysing developments in the region of the world that is the global centre of gravity. For example, if you look at the work that the ABC and then Fairfax did several years ago on power and influence, on Chinese influence and interference activities in this country, don't underestimate—that reporting and other reporting at the time by other organisations was a global trendsetter among democratic powers seeking to identify and push back against risks to their sovereignty. That is an Australian contribution to allies and partners, just as the work of our intelligence agencies is an Australian contribution to allies and partners. In fact, in some ways, that contribution is perhaps more appreciated by allies and partners than it is right across Australian society.⁸⁵

- 2.121 Moreover, Supporters of Australian Broadcasting in Asia and the Pacific identified that the actions taken by law enforcement and intelligence agencies can have a direct impact on our partners in the Pacific:

Within two days of the raid on the ABC, that action had unintended consequences on PNG's island of Bougainville which was the site of a decade-long civil war and is due to undertake a long-awaited but sensitive referendum on independence before the end of 2019. Former combatant and now chairman of the Bougainville Hardliners' group, James Onartoo, issued a media release saying "If AFP can raid ABC office in Australia itself then they are capable of anything, including maybe gathering intelligence on ground for

⁸⁴ Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 13.

⁸⁵ Professor Rory Medcalf, private capacity, *Committee Hansard*, Canberra, 19 September 2019, p. 9.

the purpose of regaining control of Panguna and restarting the mine with use of force".⁸⁶

- 2.122 Professor Medcalf supported the notion that Australia's relationships with foreign partners and protecting the sovereignty of democracy is critically important, and a media that is free to pursue, and perceives that it is free to pursue, matters of public interest is of ongoing importance to Australia's national security:

I would really take exception to the view that there is somehow a fundamental clash between a free and independent media and Australia's national security interests. In fact, the tenor of our submission is very much to say that a free and independent media and a quality media with investigative powers and investigative courage is essential to Australia's security going forward. You could actually say that it is a magic weapon for democracies, and it is a magic weapon that it will be very easy for us to lose and very difficult for us to get back—and you may have heard about other magic weapons in the global geopolitical debate of late. So if Australia is to present its own agile, democratic version of the United Front in dealing with geopolitical and foreign interference challenges, I think we need to do what we can to maintain and build and, if necessary, rebuild trust between the national security community and the fourth estate.⁸⁷

Committee comment

- 2.123 Many of the instances of disclosure outlined to the Committee did not relate to national security disclosures, but to whistleblower sources disclosing misconduct in the banking and healthcare sectors or general public service corruption allegations and investigations. However, the Committee accepts the position that the lack of confidence in source protections and assurances of anonymity has affected the media's ability to obtain relevant information to expose all areas of concern, including national security disclosures.
- 2.124 The remaining evidence received by the Committee in relation to the experiences of journalists affected by the functions of law enforcement and intelligence agencies was a narrative on the perceived and actual impact of national security legislative changes over the last two decades.
- 2.125 The Committee notes the indicators of the perceived 'chilling effect' that journalists have identified, both in their willingness to pursue and publish

⁸⁶ Supporters of Australian Broadcasting in Asia and the Pacific, *Submission 51*, p. 5.

⁸⁷ Professor Rory Medcalf, private capacity, *Committee Hansard*, Canberra, 19 September 2019, p. 2.

stories in the public interest due to the unknown threat of surveillance, investigation, defamation and prosecution, as well as the increasing unwillingness of sources to approach the media to utilise them as the 'whistle of last resort'.⁸⁸

- 2.126 With the goal of achieving better access and protection for the role of the media, the Committee analyses in more depth in Chapter 3 the elements of the legislative and administrative framework that could be considered to address concerns, while ensuring the security of both classified information and the Australian community.

⁸⁸ Alliance for Journalists' Freedom, *Submission 13*, p. [1].

3. Balancing national security and public accountability while rebuilding trust

- 3.1 This chapter outlines the primary issues raised with the Committee during this inquiry, the evidence received regarding these issues, and the Committee's recommendations to achieve contemporary, meaningful change to help re-establish a balance between national security and the public accountability achieved through the free operation of the media.

Proposals for consultation and consolidated legislation

- 3.2 As highlighted in Chapter 2, there was a common opinion amongst many submitters to the inquiry that the cumulative effect of national security legislation changes in recent years has affected the ability of the media to fulfil its role in Australia's democracy.
- 3.3 As a result of this perception, a large number of submitters supported, in some form or another, a review of national security legislation, with a specific focus to ensure that its cumulative effect does not unnecessarily impinge on the freedom of the press.¹

¹ Mr Peter Jardine, *Submission 2*; Mr John Pass, *Submission 4*; Australian Lawyers Alliance, *Submission 5*; Wikileaks and the Australia Assange Campaign, *Submission 7*; Australian Human Rights Commission, *Submission 8*; Professor Rory Medcalf and Ms Katherine Mansted, *Submission 9*; Associate Professor Joseph Fernandez, *Submission 19*; Australia's Right to Know (ARTK) coalition of media companies, *Submission 23*; Human Rights Law Centre, *Submission 25*; Ms Elicia O'Reilly, *Submission 26*; The Stay Human Project, *Submission 27*; Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 29*; Human Rights Watch, *Submission 30*; Centre

- 3.4 Additionally, the Alliance for Journalists' Freedom asserted that the issues identified by submitters, as reflected in the previous Chapter, require ongoing cooperation:

A Taskforce, implemented as an ongoing action-group post the inquiry, would rebuild both the cohesiveness of these institutions and the public's trust in them. This enables people with opposing views to understand others' views and search for mutually acceptable solutions.

In a time of changing roles and responsibilities, and increasing global and regional instability, finding the right balance and ensuring its longevity will take time and ongoing collaboration, not just a single inquiry.²

- 3.5 This call for a taskforce is a suggestion related to the ability for government to directly engage with the media to re-establish trust and work out mutually agreeable solutions. This issue of trust and agreement was brought to light with the later submissions received by the Committee and is discussed below.

Counterpoint arguments and proposals

Australia's Right to Know proposals

- 3.6 Towards the end of 2019, the inquiry had progressed to a point where the Committee had established a preliminary position on a way forward with the terms of reference of the inquiry, that could be achieved given the remit of the Committee under the *Intelligence Services Act 2001* and the information that had been presented to it.
- 3.7 However, upon receipt of submission 23.3 from the Australia's Right to Know (ARTK) coalition of media companies on 10 December 2019, the certainty of the Committee's ability to address the concerns expressed by that peak media representative became unclear.
- 3.8 The ARTK submission provided detailed proposals on two principle areas of legislative reform, that had been raised in a general way in previous submissions:

for Media Transition, *Submission 31*; Whistleblowers Australia, *Submission 33*; Electronic Frontiers Australia, *Submission 36*; Australian Press Council, *Submission 37*; Public Interest Journalism Foundation, *Submission 39*; Law Council of Australia, *Submission 40*; Ms Lynley Coen, *Submission 47*; Support Assange Wikileaks Coalition, *Submission 52*.

² Alliance for Journalists' Freedom, *Submission 13*, p. [7].

- an exemption for ‘criminal’ liability in relation to secrecy offences, or other Commonwealth offences that may be committed by the handling of, or reporting of material from an unauthorised disclosure or related to national security classified information; and
- a process for a contestable warrant framework when a journalist or media organisation is the subject of investigation.³

3.9 These proposals had been raised in previous ARTK submissions and at public hearing appearances, but had not been presented with specific legislative amendment suggestions prior to this December submission. The proposed contested warrant process directly relates to a primary consideration before the Committee as referred by the Attorney-General.

Proposed exemption for criminal liability

3.10 The main points regarding the proposed exemption are summarised as:

- Essentially, a journalist could not be convicted of a relevant offence if the journalist engaged in relevant conduct, in good faith, in the belief that the journalist was engaging in the conduct in the public interest, at the time the conduct was undertaken.
- The second category of person covered under the exemption (administrative staff) would have to be acting under the direction of a journalist, but could also be acting under the direction of an editor or a lawyer, who must believe the conduct is in the public interest.
- The proposed exemption includes an element of an exclusion from an evidential burden and onus of proof, if a prosecution were to be sought. This is modelled on the successful amendment made to the Criminal Code Amendment (Agricultural Protection) Bill 2019, related to news or current affairs coverage of trespass onto agricultural land for the purposes of damaging or destroying property.
 - ARTK raise a number of arguments for the exemption and the exemption from an evidential burden and onus of proof.⁴

3.11 ARTK suggested that one recent amendment to the *Criminal Code* from the Criminal Code Amendment (Agricultural Protection) Bill 2019 (s. 474.47(2A)) gives weight to the inclusion of a similar exemption across other Commonwealth legislation (arguing that it will harmonise law).⁵

³ ARTK, *Submission 23.3*.

⁴ ARTK, *Submission 23.3*, pp. 2-6.

⁵ ARTK, *Submission 23.3*, p. 4.

- 3.12 This exemption was introduced to that Bill to ensure that media were not caught up with prosecutions of individuals trespassing and damaging agricultural land and assets, not receipt of classified material. ARTK suggested that a similar amendment would harmonise Commonwealth law. It is of note that the exemption suggested is in relation to trespass and criminal damage, rather than national security unauthorised disclosures, which attract multiple offences across legislation.
- 3.13 ARTK proposed retrospectivity, which has not been the case with previous amendments or changes to relevant offence provisions (sections 70 and 79 of the *Crimes Act*).

Proposed contested warrant process

- 3.14 ARTK proposed a 'minimalist' intervention for warrant processes across Commonwealth legislation that encapsulates the concepts put forward by both ARTK and other submitters regarding an *inter partes* process (where all parties can appear before consideration/court processes) for warrant execution approvals and consideration.
- 3.15 This process proposes introducing an extra step (journalist access authorisation) to gather any form of 'journalism material' (not just classified material disclosed in an unauthorised manner). The proposed process is outlined at Attachment B to submission 23.3, but is informed by principles and amendments⁶ outlined below:
- The proposed process includes the foundation elements of a contested process in court/tribunal including a public interest test (similar to that for the current Journalist Information Warrant process) and the involvement of senior judicial decision makers.
 - The proposed process is to be contained in a new division of the *Crimes Act* to cover all warrants that may affect a journalist. The submission does not seem to suggest that this process will only apply to warrants applicable to unauthorised disclosures (the main subject of this inquiry), but all warrants, citing multiple Acts that are considered as requiring amendment.⁷
 - The proposed definition of 'journalism material' is not bound to particular offences or material that is related to unauthorised disclosures.

⁶ ARTK, *Submission 23.3*, pp. 6-13.

⁷ ARTK, *Submission 23.3*, p. 7.

- There is no role for a Public Interest Advocate in the proposed process. Rather, the journalist or media organisation that is the subject of the warrant would be notified of, and given the opportunity to contest, the warrant application.⁸

3.16 Detailed drafting amendments to give effect to these proposals were suggested by the ARTK.⁹

3.17 Commentary on these proposals is provided later in Committee comment.

Department of Home Affairs and Australian Federal Police proposals

3.18 After the ARTK submission was received, the Committee was informed that a joint submission from the Department of Home Affairs and the Australian Federal Police (AFP) was forthcoming. Accordingly, the Committee delayed any finalisation of the inquiry or public analysis of the ARTK proposals.

3.19 Once the joint submission was received on 27 February 2020, the Committee notes that the submission rejected the proposals put forward by the ARTK, restating that while the government support for press freedom as a fundamental pillar of Australia's democracy is intact, press freedom is not absolute,¹⁰ and an exemption and the contested warrant process put forward would pose too great a risk to the government's ability to secure information and provide assurances to international partners about the integrity of law enforcement and intelligence agency operations.¹¹

3.20 The joint submission restated the positions put forward in earlier submissions, that:

- the current warrant processes in question are appropriate;
- the ability for an affected party to seek judicial review, with any relevant injunctions placed on evidence, is an appropriate control;
- any change to warrant processes, including a contested process, would threaten the efficient work of law enforcement and intelligence agencies, as well as undermining the ability to collect untampered evidence and delaying processes;

⁸ ARTK, *Submission 23.3*, pp. 13-14.

⁹ ARTK, *Submission 23.3*, p. 5.

¹⁰ Department of Home Affairs and AFP, *Submission 32.10*, p. 3.

¹¹ Department of Home Affairs and AFP, *Submission 32.10*, p. 3.

- the Ministerial Direction to the AFP and the Attorney-General's direction to the Commonwealth Director of Public Prosecutions (CDPP) are appropriate responses to guarantee press freedom;
- more comprehensive assessments by the AFP and the early consideration of prosecution success, along with encouragement of internal investigation and remediation measures within agencies will help address concerns. Additional measure include:
 - Seeking voluntary assistance from journalists, where possible and appropriate; and
 - Continual improvement of policies and procedures, as highlighted by the changes made and suggested by the Lawler review.¹²

3.21 Rather than amending current warrant provisions or defences to secrecy provisions, or introducing contested warrants, the joint submission suggested an alternative mechanism of a 'Notice to Produce Framework', which had not been raised in previous submissions.

Notice to Produce Framework

3.22 The proposed framework was outlined in a general, principles-based manner:

Consideration could be given to amending the Crimes Act to establish a Commonwealth Notice to Produce framework as an additional information gathering method for law enforcement agencies undertaking investigative action in relation to a professional journalist or media organisation in the context of the unauthorised disclosure of material made or obtained by a current or former Commonwealth officer. This would offer an alternative to executing a search warrant in person, give parties more flexibility to serve and produce material (such as electronically where appropriate), and provide an opportunity for professional journalists and media organisations to put forward any strong, countervailing arguments to not produce material pursuant to such an Notice.¹³

3.23 The proposal did not include detail of aspects of the suggested framework, however referred to current frameworks across other jurisdictions (summarised below), as well as the current provision in section 3ZQO of the *Crimes Act* that enables the AFP to apply to a Judge of the Federal Court of Australia for a notice to produce certain limited documentation (bank

¹² Department of Home Affairs and AFP, *Submission 32.10*, pp. 3 – 5.

¹³ Department of Home Affairs and AFP, *Submission 32.10*, p. 5.

account information, travel movement records, etc.) to assist the investigation of a serious offence.¹⁴

- 3.24 The proposal put forward does not include detail regarding public interest considerations or appeal processes, acknowledging that this would require consideration:

Further consideration would need to be given to the means by which a Notice to Produce framework would take into account public interest considerations. This could include introducing a ground for challenging the production of documents in response to a Notice, or other mechanisms providing an independent and impartial public interest assessment on the release of material to law enforcement.¹⁵

- 3.25 The submission specifically mentions the provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('the Act') which relate to NSW police issuing a notice to produce to an 'authorised deposit-taking institution' for an investigatory process under Part 5, Division 3 of the Act.¹⁶

- 3.26 An application under the Act requires approval from a:

- Magistrate;
- Registrar; or
- Nominated employee of the Attorney-General's Department.

- 3.27 The material may be subject to a claim of privilege. Where privilege is claimed, the police officer must apply to a magistrate for an access order. Once the notice has been executed, the requester needs to report details to the authorising officer – as with other search warrant requirements under s74 of the Act.¹⁷

- 3.28 There are similar mechanisms in Queensland, Western Australia and South Australia; however, like the NSW provisions identified, they normally relate to investigation of financial records related to organised crime, where the notice is served on a third-party. This point was identified by ARTK in identifying their concerns with the proposed framework and its potential

¹⁴ Department of Home Affairs and AFP, *Submission 32.10*, p. 5.

¹⁵ Department of Home Affairs and AFP, *Submission 32.10*, p. 5.

¹⁶ Department of Home Affairs and AFP, *Submission 32.10*, p. 6.

¹⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

unconstitutionality and violation of the right against self-incrimination¹⁸, as discussed below.

- 3.29 The submission identified the United Kingdom and the United States as jurisdictions with similar processes.¹⁹ Elements of these suggestions are discussed later in this chapter.

ARTK, Alliance for Journalists' Freedom and Law Council of Australia responses

- 3.30 In response to the further submission from the Department of Home Affairs and the AFP, ARTK and Alliance for Journalists' Freedom (AJF) provided further submissions, with the Law Council of Australia providing analysis of the proposal put forward from a general legal perspective.
- 3.31 In its response submission, ARTK maintained that the government submission fails to engage with any of their detailed proposals.²⁰
- 3.32 ARTK maintained that there is a lack of coherence and articulation of consistent concept in the joint submission, that the submission does not provide any detail of alternatives, and that there is no new reasoning for rejection of the model put forward by ARTK.
- 3.33 ARTK asserted that the Notice to Produce Framework proposed by the joint submission may abrogate human rights and could be deemed unconstitutional.²¹
- 3.34 In essence, ARTK rejected the position put forward in the joint submission and further state their aim of adoption of their proposals.
- 3.35 The ARTK raised the following summarised points and objections in relation to the proposed Notice to Produce framework:
- If the current uncontested warrant regime continues alongside the Notice to Produce Framework, then law enforcement and intelligence agencies would not be required to use the latter;
 - The argument that law enforcement would invariably (or almost invariably) use the framework due to the expectation raised in the Ministerial Direction was contested due to:

¹⁸ ARTK, *Submission 23.4*, pp. 5-10.

¹⁹ Department of Home Affairs and AFP, *Submission 32.10*, p. 6.

²⁰ ARTK, *Submission 23.4*, p. 1.

²¹ ARTK, *Submission 23.4*, p. 5.

- it only applying to the AFP;
 - the fact that the Direction can be changed at any time, without review; and
 - the fact that the Direction only applies in circumstances where the alternative to a warrant is ‘consistent with operational imperatives’ and, in any event, the Direction is not legally binding.
- The proposed framework violates the right against self-incrimination and raises constitutional concerns that the ARTK submission outlines at length.
 - ARTK does not believe that the assertion that the media is used by hostile actors is true, or that any changes to ensure press freedom would increase this risk.²²

3.36 The AJF, while broadly agreeing with the ARTK, outlined some alternative points including:

- The AJF restated its support for independent judicial oversight over the issue of warrants, which would require rapid and responsive mechanisms. Further, the AJF noted that the proposed Notice to Produce Framework suggests judicial oversight, but does not go far enough.
- AJF reinforced that the Ministerial Directions issued by the Minister for Home Affairs and the Attorney-General raise potential issues regarding integrity of decisions and directions made regarding journalists that may be reporting on those Ministers.
- A separate Media Freedom Act with a clear definition of journalism would guarantee codification of rights and responsibilities of all parties, as well as enabling the media to take a key role in the nation’s security by enhancing cooperation between the press and law enforcement and intelligence agencies.
- The AJF restated their call for a taskforce to be established to enable media and the government and agencies rebuild trust and come to collaborative solutions.²³

3.37 The Law Council of Australia’s further supplementary submission responded to the proposal for a Notice to Produce Framework. The summary principal points being:

²² ARTK, *Submission* 23.4.

²³ Alliance for Journalists’ Freedom, *Submission* 13.2.

- The Law Council maintains its position that an appropriate approval and authorisation process for warrants is preferable to maintaining the status quo or introducing the framework with no changes to the current warrant process. Accordingly, the Law Council continues to advocate for expanded public interest considerations at warrant issue and an expanded role for public interest advocates or monitors (as per their earlier submissions).
- Whilst the Law Council does not object to a Notice to Produce Framework, they do not believe enough detail exists regarding how one would work, and would require critical evaluation to ensure that such a system did not just add further doubt and pressure on the journalist/source relationship. The Law Council also notes that the argument put forth by the government that contested warrant processes would be complex and risk operations are just as salient for the proposed framework, with no detail being put forward by the joint submission.
 - The Law Council suggests that for certainty of application that any Notice to Produce Framework should be mandated to be used exclusively unless a warrant is immediately required for very specific reasons – imminent destruction of material, risk of death etc.
 - Any framework must ensure claims for privilege relating to the identity of an informant be maintained (as per current shield laws).
 - The same proposed seniority of issuing officers for warrants should be applied to any Notices to Produce, as well as public interest considerations and public interest advocates etc.
- The Law Council notes that the comparable *Crimes Act* scheme referenced in the joint submission is for terrorism and serious non-terrorism offences and has certain elements of operation that are problematic:
 - Notices are not reviewable or contestable;
 - There are no shield law privilege protections or public interest considerations;
 - Offences exist under that scheme for failure to comply with a notice and disclosure that a notice even exists; and
 - That the scheme reference is for evidence held by third parties, not a primary party, which a journalist would be considered as.

- The Law Council does not suggest that a scheme would abrogate human rights, or be unconstitutional, but it does suggest that these rules and rights would need to be carefully considered.²⁴

Committee comment

- 3.38 As identified in earlier chapters of this report, the complexity and breadth of the subject matter before the Committee regarding this inquiry has challenged the Committee's ability to provide a comprehensive response, on both the terms of reference and the additional issues raised by submitters. The late submissions covered above are further evidence of this complexity.
- 3.39 The PJCIS is not a general purpose policy committee of the Australian Parliament, nor is it a legislation drafting body. It has a very specific legislated role set out under the *Intelligence Services Act 2001*.
- 3.40 The Committee enters into further commentary and analysis of identified areas for reform later in this chapter, including in relation to warrant processes; however these reforms are based on identified improvements to, or expansions of, existing mechanisms that can deliver process improvements to the current system in question.
- 3.41 The Committee agrees with submitters that Australia's national security legislation is often complex, with many interrelated elements. Moreover, there are numerous current and past review and reform processes already being considered by government to alter the landscape that is currently being presented in this inquiry for reform. Analysis of any meaningful reform in this space requires collaboration, not the staged proposal and counter-proposal process of a parliamentary inquiry.
- 3.42 As a general comment, the Committee considers that there is a clear need for the government and major media stakeholders to work together to identify a common path that can be agreed on, one which ends in meaningful and agreed administrative and legislative change.
- 3.43 The Committee is not minded to make a specific recommendation regarding the mechanism by which this collaboration can take place, more that the positions stated in the supplementary submissions discussed above demonstrate that cooperation and collaboration must take place.

²⁴ Law Council of Australia, *Submission 40.3*.

- 3.44 That being said, the Committee has identified the below areas for improvement regarding the issues referred by the Attorney-General and that have been raised with it throughout the course of the inquiry.

Law enforcement and intelligence agency powers and warrants

- 3.45 The following analysis and recommendations are aimed at delivering meaningful improvements to the current regime that the government can implement in the shorter term.

Current review mechanisms for warrant applications

- 3.46 Investigative action related to journalists or media organisations requires a warrant to obtain information, overtly or covertly, regarding the crime alleged to have been committed. The effect of warrants related to the unauthorised disclosure of information, or an offence related to the secrecy provisions within Commonwealth legislation, is one variable of consideration for this inquiry. The ability to review or contest a warrant requested or issued is an issue for particular inquiry in the terms of reference from the Attorney-General.
- 3.47 In order to access warrants to search persons of interest or premises in an investigation, the relevant authority must consider the rationale put forward and the justification for seeking the warrant. This is explained in Department of Home Affairs' supplementary submission:

Each warrant type also has specific requirements and thresholds that must be met prior to issuing a warrant. On each occasion, the issuing officer must ensure that the relevant subjective and/or objective tests set out in the legislation are met prior to issuing a warrant.

For example, section 3E of the Crimes Act requires the issuing officer to be satisfied on information provided on oath or affirmation that there are reasonable grounds for suspecting that there is, or will be within the next 72 hours, evidential material at a premises, prior to issuing a search warrant. The requisite level of satisfaction that the issuing officer must reach to issue a search warrant does not vary or lessen simply because the officer holds a position other than that of a Judge.²⁵

²⁵ Department of Home Affairs, *Supplementary Submission* 32.3, p. 10.

3.48 Generally, a person of interest is not advised when a warrant application has been made – or if it is subsequently issued – due to the risk of an investigation being hindered by the person of interest.²⁶

3.49 Therefore, the AFP indicated in its principal submission that most review mechanisms are enacted after a warrant has been issued and executed:

There are a number of avenues open to individuals to contest police powers through the Courts after a decision has been made to issue a warrant:

- During the execution of a search warrant, an affected person may apply for an urgent injunction to halt the warrant activity;
- Judicial review of the lawfulness of decisions, either at common law or through the process outlined in the *Administrative Decisions (Judicial Review) Act 1977*;
- Litigation for damages on the basis of tort law, including negligence (which generally requires the conduct to have been unlawful);
- Claims of parliamentary privilege or legal professional privilege over documents seized at the search warrant;
- High Court challenges in relation to constitutional validity; and
- The ability of a Defendant in a criminal prosecution to object to evidence that has been improperly or illegally obtained.²⁷

3.50 ARTK acknowledged these mechanisms outlined by the AFP, however they dispute their adequacy, indicating that '[n]one of the above are appropriate or provide efficient legal recourse',²⁸ citing numerous reasons including:

- the onerous requirement of proving a warrant is invalid through an error of issue or reviewable error in the administrative action of issuing the warrant;
- making a claim for damages in torts requires additional error resulting in harm, possibly to prove misfeasance in office; and
- privilege claims and objections to evidence do not cease a warrant being exercised.²⁹

²⁶ Australian Federal Police (AFP), *Submission 21*, p. 7.

²⁷ AFP, *Submission 21*, p. 8.

²⁸ ARTK, *Submission 23.2*, p. 16.

²⁹ ARTK, *Submission 23.2*, pp. 16-17.

- 3.51 Noting that there are limitations to the existing legal challenge of a warrant, potential change to the issuing mechanism to include contestation, or at least consideration of the public interest, is discussed below.

Contested hearings in relation to warrants

- 3.52 Submissions by media organisations and other non-governmental stakeholders to the inquiry have generally considered the ability to contest a warrant post-execution to be inadequate in balancing the protection of national security information and public accountability, and – in line with the terms of reference for the inquiry – have suggested that a contested warrants process is an appropriate means of achieving balance. ARTK suggested in its earlier principal submission that the scheme could operate as follows:

Applications for the issue of all warrants and compulsory document production powers associated with journalists and media organisations undertaking their professional roles must be contestable. This requires:

- Applications for all warrants must be made to an independent third party with experience in weighing evidence at the level of a judge of the Supreme Court, Federal Court or High Court. The best outcome is for this to occur in open court in the Supreme Court, Federal Court or High Court.
- The journalist/media organisation being notified of the application for a warrant.
- The journalist/media organisation being represented at a hearing, presenting the case for the Australian public's right to know including the intrinsic value in confidentiality of journalists' sources and media freedom.
- The independent third party deciding whether to authorise the issuing of a warrant – or not – having considered the positions put by both parties.
- That a warrant can only be authorised if it is necessary for its stated statutory purpose and the material sought cannot be obtained via other means.
- That a warrant can only be authorised if the public interest in accessing the metadata and/or content of a journalist's communication outweighs the public interest in NOT granting access, including, without limitation, the public interest in the public's right to know, the protection of sources including public sector whistle-blowers and media freedom.

- That there be a presumption against allowing access to confidential source material.³⁰

3.53 A number of submissions supported the process as described by ARTK.³¹

3.54 Additionally, ARTK provided further rationale for their proposals in supplementary submissions, as well as discussion countering the positions of the Department of Home Affairs and Attorney-General's Department regarding elements of their proposed reforms or the current process.³²

3.55 As part of the initial suggested reforms ARTK proposed that the journalist or media organisation be provided a window following the issue of a warrant, but prior to its execution, to allow persons of interest to seek appropriate legal recourse.³³

3.56 The Department of Home Affairs and the Attorney-General's Department were critical of such an approach indicating:

Search warrants are an essential power in the investigation of criminal activity by law enforcement and intelligence agencies, and contested hearings for warrants may undermine the efficacy of these powers. Requiring subjects of search warrants to be provided with advance notice of the warrants' execution may lead to situations in which essential evidential material is destroyed or transferred to a different location, creating major impediments for the investigation and prosecution of serious criminal offending.³⁴

3.57 In addition, the AFP indicated that covert warrants are a key aspect of investigating serious offences:

They enable police to collect information without alerting suspects, risking the destruction of evidence or providing an opportunity to employ counter-surveillance. Any form of contested hearing in relation to covert powers would fundamentally undermine their effectiveness, and the ability of police to conduct an investigation.³⁵

³⁰ ARTK, *Submission 23*, p. 5.

³¹ See The Walkley Foundation, *Submission 12*, p. 12; Human Rights Law Centre, *Submission 25*, p. 10; Australian Press Council, *Submission 37*, p. 6.

³² ARTK, *Submission 23.2*, pp. 7-18.

³³ ARTK, *Submission 23*, p. 5.

³⁴ Department of Home Affairs and Attorney-General's Department, *Submission 32*, p. 7.

³⁵ AFP, *Submission 21*, p. 7.

3.58 The AFP also suggested that warrants are executed cooperatively whenever operationally possible:

... AFP investigators work cooperatively with organisations that are the subject of a search warrant. This may include arranging for a warrant to be executed at a time and in a manner agreeable to all parties, as we did with the ABC, and as we were doing with News Corp. We do this all the time with cooperative third parties, including banks and large corporations, and we very rarely have complaints about that process. That is not always possible. As you know, we do also execute search warrants without notice. There is nothing unusual about that process. We do that to ensure that evidence is not destroyed, which can be a real risk if suspects or other relevant parties have notice of a warrant before it is executed.³⁶

3.59 Mr Campbell Reid of News Corp Australia contended that the existing cooperative process negates concerns about destruction of evidence:

We think that, if a story that's being written gets to the point where the police want to have a warrant issued to raid a journalist, we should have a right to have a debate with that agency as to whether or not that warrant is necessarily in the public interest. That immediately raises the response, 'Yes, but if you get alerted first you'll destroy the evidence, and the element of surprise goes away,' to which the response is, 'The destruction of evidence is a criminal offence.' A contested warrant regime exists in Britain, and we don't see any evidence that their society is more in danger or out of control than ours.

... I would say one more thing on the contested warrants—it is from our lived experience and is in the ABC's submission. It seems strange to us that often in the past when the police have seen the need to raid or execute a search warrant they have politely and cooperatively given us a telephone call beforehand and said, 'Hey, listen; we're going to come in and seek some information,' and we've said, 'Okay, what about 10 o'clock?' We've done it completely politely and no evidence has ever been destroyed. So to then turn around and say, 'No, you can't have that regime,' when in practical terms it exists already, is bemusing to say the least.³⁷

3.60 However, the AFP suggested that the cooperative process does not fully deal with the risk of destruction of evidence.

I've heard comments about, 'We have said that we are worried about the destruction of evidence,' and I have heard comments like, 'Well, there are laws

³⁶ Mr Andrew Colvin, Commissioner, AFP, *Committee Hansard*, Canberra, 14 August 2019, p. 1.

³⁷ Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 6.

against the destruction of evidence.' That's correct; there are. We need to know the evidence existed and was destroyed for us to use that law. These are real considerations for a police investigation.³⁸

- 3.61 A number of other submitters to the inquiry supported the introduction of a contested hearing process, without giving substantive extra detail.³⁹
- 3.62 The Law Council of Australia did not directly support the introduction of the contesting of warrants by journalists or media organisations, instead suggesting improvement in the issuing process, specifically in relation to the consideration of the public interest, reform to the nature of the 'issuing officer', and expanding or introducing a role for a public interest advocate/monitor.⁴⁰ This position was reflected in its later submission in response to the joint submission from the Department of Home Affairs and the AFP.⁴¹

Public Interest Advocates

- 3.63 In relation to Journalist Information Warrants in Chapter 4, Part 4-1, Division 4C of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) the current role of a PIA is to prepare a submission related to the issuing of a Journalist Information Warrant (JIW), when a law enforcement agency or the Australian Security Intelligence Organisation (ASIO) wishes to access telecommunications data of a journalist (or their employer) in order to identify a journalist's source.
- 3.64 The Department of Home Affairs and the Attorney-General's Department stated:
- Journalist information warrants must not be issued to law enforcement agencies unless the issuing authority is satisfied that the warrant is reasonably necessary for the specified purpose and that the public interest in issuing the

³⁸ Mr Andrew Colvin, Commissioner, AFP, *Committee Hansard*, Canberra, 14 August 2019, p. 4.

³⁹ Wikileaks and Australian Assange Campaign, *Submission 7*, p. 2; The Walkley Foundation, *Submission 12*, p. 12; Dr Rebecca Ananian-Welsh, Rose Cronin, Professor Kath Gelber, Professor Peter Greste and Richard Murray, *Submission 17*, p. 11; Association for International Broadcasting, *Submission 20*, pp. 8-9; Human Rights Law Centre, *Submission 25*, p. 10; ABC, *Submission 38*, p. 8; Journalism Education and Research Association of Australia, *Submission 6*, p. 7; Dr Keiran Hardy and Professor George Williams, *Submission 11*, pp. 3, 7; Whistleblowers Australia, *Submission 33*, p. [6]; Electronic Frontiers Australia, *Submission 36*, p. [2]; Ms Lynley Coen, *Submission 47*, p. [1]; Centre for Media Transition, *Submission 31*, p. 3.

⁴⁰ Law Council of Australia, *Submission 40*, pp. 32-35.

⁴¹ Law Council of Australia, *Submission 40.3*.

warrant outweighs the public interest in protecting the confidentiality of the identity of the source.

The journalist information warrant framework also allows a Public Interest Advocate to make a submission to the issuing authority of the warrant as to the propriety of the enforcement agencies application. Public Interest Advocates are declared by the Prime Minister and must be given a copy of the journalist information warrant application before the application is made.⁴²

3.65 The Law Council of Australia identified concerns with the operation of the PIA system:

Recent reports have raised concerns about the secretive, covert nature of the way in which the PIA system operates. It has been said that it 'allow[s] the authorities to fly under the radar'. The Law Council notes that at no point is the PIA required to inform the journalist to which the warrant relates, or their media employer.⁴³

3.66 ARTK was particularly critical of the PIA scheme and made detailed submissions to past inquiries of this Committee, as well as the current statutory review of the mandatory data retention scheme.⁴⁴ Similar criticisms were included in their later submission to this inquiry.⁴⁵

3.67 AJF stated that the introduction of the PIA system as a mechanism, was an indication that the public interest considerations and impact on the media of warrant processes should be reviewed:

The journalist information warrant system with public interest advocates is, I think, the first acknowledgement of a contestable warrant that we have. We think that's deeply flawed, but it is a legal acknowledgement of a contested process.⁴⁶

3.68 A number of criticisms of the current PIA regime centred on a lack of transparency. ABC Alumni identified:

⁴² Department of Home Affairs and Attorney-General's Department, *Submission 32*, p. 8.

⁴³ Law Council of Australia, *Submission 40*, p. 39.

⁴⁴ ARTK, *Submission 23*, pp. 18-24.

⁴⁵ ARTK, *Submission 23.3*, pp. 13-14.

⁴⁶ Professor Peter Greste, Director and Spokesperson, Alliance for Journalists' Freedom, *Committee Hansard*, Sydney, 13 August 2019, p. 38.

The secretive role of the Public Interest Advocate, who cannot under present legislation consult with or be briefed by the journalist or organisation that is to be the subject of the search, is ineffective and inappropriate.⁴⁷

- 3.69 Mr Arthur Moses SC, then President of the Law Council of Australia, advocated for more transparency when questioned about operation of the PIAs:

...the powers that are exercised by these agencies are ultimately in the name of the people, so the people of this country deserve to know the number of warrant applications being made and the number of approvals and refusals by certain agencies. They're entitled to that information. It's not confidential or secret. It's not going to harm national security. So, if they're being deployed, the public has a right to know.⁴⁸

- 3.70 The Department of Home Affairs and the Attorney-General's Department counter-contend that a degree of transparency already exists surrounding the operation of the PIA scheme:

Submissions to the press freedoms inquiry have suggested the introduction of annual reporting requirements regarding the number and identity of Public Interest Advocates and the number of cases where a Public Interest Advocate either successfully or unsuccessfully opposed a journalist information warrant. The number and identity of Public Interest Advocates has been tabled in Parliament, and is publicly available.

However, the proposal for additional transparency measures in relation to Public Interest Advocates should be carefully considered, including in light of any benefits or risks associated with a former judicial officer being publicly identified as a Public Interest Advocate and disclosure of their actions in the course of their duty – either in general or in relation to a particular journalist information warrant.⁴⁹

- 3.71 As mentioned above, the Department of Home Affairs and the Attorney-General's Department indicated that the identities of the PIAs were tabled in

⁴⁷ ABC Alumni, *Submission 41*, p. 9.

⁴⁸ Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, Canberra, 20 September 2019, p. 70.

⁴⁹ Department of Home Affairs and Attorney-General's Department, *Supplementary Submission 32.3*, p. 8.

response to a written Question on Notice taken in 2016 at Additional Estimates, and publicly available in October 2017.⁵⁰

- 3.72 The identities of the PIAs were tabled as part of a response to a Question on Notice regarding board appointments made since former Prime Minister Turnbull took office, and not in relation to any question regarding the operation of the PIA scheme.
- 3.73 In a supplementary submission responding to written Questions on Notice for this inquiry requesting further information regarding PIAs and reporting of the operation of the current scheme, the Department of Home Affairs outlined:

Since the journalist information warrant scheme came into effect in 2016, eight Public Interest Advocates have been appointed. Five of those appointed are still serving, with their current appointments due to expire in October 2020. Two of the advocates are based in Queensland and there is one in each of New South Wales, South Australia and Tasmania.

The Public Interest Advocates who are still serving have been identified in media reporting. They are; the Hon Peter Evans, the Hon Ian Callinan AC QC, the Hon Peter Jacobson QC, the Hon Richard Chesterman AO RFD QC, and the Hon David Bleby QC.

The Department is not aware of any reporting requirement, legislative or otherwise, in relation to submissions made or hearings attended by Public Interest Advocates. The Department is also not aware of any records maintained on Public Interest Advocates contesting the issuing or the substance in a warrant. However, the use of journalist information warrants by law enforcement agencies is reported publicly in the *Telecommunications (Interception and Access) Act 1979* Annual Report.⁵¹

- 3.74 The Department restated its concern regarding any expansion of the transparency around the PIA scheme as part of this answer.⁵²
- 3.75 From a general transparency standpoint, the Law Council of Australia has specifically recommended additional reporting requirements for the Public Interest Advocate scheme:
- number and identity of Public Interest Advocates (PIA);

⁵⁰ Attorney-General's Department, *Question on Notice (AE16/099): Senate Standing Committee on Legal and Constitutional Affairs*, 9 February 2016, pp. 5–6.

⁵¹ Department of Home Affairs, *Supplementary Submission 32.5*, p. [6].

⁵² Department of Home Affairs, *Supplementary Submission 32.5*, p. [6].

- number of cases where a PIA contested a journalist warrant;
- number of cases where a PIA attended the hearing of an application for a journalist warrant; and
- number of journalist warrants that were successfully contested by a PIA.⁵³

Potential expansion of Public Interest Advocates to other warrant types

3.76 Some submitters have also suggested that the PIA regime should be expanded to cover all warrant types that could affect a journalist or a media organisation, not just JIW's granted under the TIA Act. The Law Council of Australia outlined:

It is submitted that the introduction of a PIA or Public Interest Monitor (PIM) regime could serve to promote an adversarial process in a manner similar to what occurs under the TIA Act for journalists in terms of mandatory data retention. Such an approach could be valuable where it assists the decision maker to review the information contained in warrant application more thoroughly and from more than one perspective.⁵⁴

3.77 In making this recommendation, the Law Council of Australia noted that the current system is limited, and that any amendment to the PIA process should not detract from the overall consideration process:

The Law Council notes however, that there is little value in introducing a PIA or PIM into the warrant application process if the result, in practice, is simply the transfer of responsibility for reviewing and interrogating the warrant application from the ultimate issuer of the warrant to the PIA or PIM. The decision maker must still scrutinise the information at hand. Similarly, it is important that the role of the PIA or PIM carries proper weight and does not become a 'rubber stamp' process.⁵⁵

3.78 In receiving suggestions that the role of a PIA be expanded to other warrant types that may affect journalists, some submitters identified other jurisdictions that have established models for public interest advocacy and protection.

⁵³ Law Council of Australia, *Submission 40*, p. 39.

⁵⁴ Law Council of Australia, *Submission 40*, p. 34.

⁵⁵ Law Council of Australia, *Submission 40*, p. 34.

*Existing Australian public interest mechanisms**Victoria*

- 3.79 Victoria introduced a Public Interest Monitor (PIM) scheme in 2011, with the commencement of the *Public Interest Monitor Act 2011* (Vic) and accompanying regulations, appointing a Principal and Deputy PIM to ‘represent the public interest and provide greater accountability in the collection of evidence from warrants and orders that intrude on the privacy and civil liberties of Victorian citizens’.⁵⁶
- 3.80 The PIM in Victoria is required to be notified by relevant law enforcement agencies of an application for a warrant or coercive power order under certain intrusive legislative powers, and is then entitled to appear at a hearing for relevant applications ‘to test the content and sufficiency of the information relied on and the circumstances of the application’.⁵⁷
- 3.81 In identifying the Victorian PIM scheme to this inquiry, the Law Council of Australia noted:
- ...that while neither the PIM Act nor PIM Regulations include an express public interest assessment provision, the PIM serves an important public interest function and acts as a strong accountability measure on the use and exercise of investigatory powers.⁵⁸
- 3.82 Additionally, the Victorian PIM is required to make an annual report that outlines many of the same statistics that are recommended be adopted for Commonwealth PIAs above.⁵⁹

Queensland

- 3.83 Queensland has had a comparable PIM scheme in operation for two decades that serves a similar purpose in testing the validity and appropriateness of granting a warrant or order application, with the similar exception of a direct public interest assessment.⁶⁰

⁵⁶ Office of the Public Interest Monitor (Vic), *Annual Report 2017-2018*, p. 4.

⁵⁷ Law Council of Australia, *Submission 40.1*, p. 10.

⁵⁸ Law Council of Australia, *Submission 40.1*, p. 10.

⁵⁹ See example annual report for 2017-18 at https://www.parliament.vic.gov.au/file_uploads/PIM_Annual_Report_2017-18_2KcDxr2c.pdf

⁶⁰ Law Council of Australia, *Submission 40.1*, p. 12.

- 3.84 The Queensland scheme extends to control orders under the *Criminal Code Act 1995* (Criminal Code) and preventative detention orders under the *Terrorism (Preventative Detention) Act 2005* (Qld), and requires monitoring and reporting on statistics similar, but more expansively, to the Victorian PIM.⁶¹
- 3.85 Both domestic PIM schemes allow for accountability and appropriateness testing of warrant and order applications, however neither have a specific public interest consideration relevant to the circumstances of, or the impact on, a journalist or media organisation operating freely in the reporting of matters of public interest.

Comparable international models

United Kingdom

- 3.86 Several submitters referred to the operation of the *Police and Criminal Evidence Act 1984* (PACE Act) in the United Kingdom (UK) which provides some protection to journalists, their material, and their sources in its operation.⁶²
- 3.87 It has been suggested by many of the same submitters that such a model could be implemented in Australia as a 'contested warrants' process. Dr Keiran Hardy and Professor George Williams summarised the UK model as follows:

The *Police and Criminal Evidence Act 1984* (UK) (PACE) sets out a scheme by which journalistic material is protected under the exercise of search warrants by police. Section 13 of PACE defines journalistic material broadly as any 'material acquired or created for the purposes of journalism', provided that material is 'in the possession of a person who acquired or created it for the purposes of journalism'.

Journalistic material is considered 'excluded material', meaning that it cannot be seized under the ordinary search warrant process. Instead, a special procedure found in Schedule 1 must be followed. The special procedure involves applying to a judge for an order that the journalistic material must be produced within 7 days. Notice must be given to the journalist(s) or relevant media organisation, and the application must be heard *inter partes* (i.e. the

⁶¹ Law Council of Australia, *Submission 40.1*, pp. 12-14.

⁶² See Dr Rebecca Ananian-Welsh, *Submission 17*, p. 12; Association for International Broadcasting, *Submission 20*, pp. 9-10; Centre for Media Transition, *Supplementary Submission 31.1*, pp. [1]-[2]; Australian Broadcasting Corporation (ABC), *Submission 38*, p. 7-8

journalists must be given an opportunity to make submissions). The journalistic material must not be destroyed unless and until the application has been complied with or dismissed. The relevant test used by the judge is twofold: (1) whether other possible methods of obtaining the material have been tried without success, and (2) it is in the public interest that the material should be produced or access granted. What constitutes the ‘public interest’ is undefined, although the judge is to consider ‘the benefit likely to accrue to the investigation’ and the circumstances in which the person possesses it.⁶³

- 3.88 The operation of the contested aspect of the scheme relates to issuing production orders – an order requiring a journalist or media organisation to provide material relevant to an investigation to law enforcement authorities – not the specific execution of search warrants.⁶⁴
- 3.89 A warrant relating to ‘special procedure’ journalistic material is required to take the form of a production order unless it is in response to an arrest, or if issuing a production order is not practical in the circumstances.⁶⁵ If the investigation which the warrant is being applied for relates to the seizure of journalistic material, or journalistic material is found during a search, then a production order must be made, which can then be contested.
- 3.90 Some submitters to the inquiry suggested that all search warrants executed against a journalist or a media organisation are contestable under the PACE Act, but contested processes do not apply to all circumstances.
- 3.91 Certain journalistic material is considered ‘excluded material’ and cannot be acquired under a production order. However, a search warrant can be executed on such material following an arrest, or in circumstances where the material could have been acquired under a search warrant issued under legislation that came into effect prior to the PACE Act. Relevantly, this means that where national security classified information has been obtained by a journalist or media organisation, a search warrant could be issued under the *Official Secrets Act 1911* (UK) without requiring a contested hearing,⁶⁶ as this Act allows for search warrants to be issued when an offence

⁶³ Dr Keiran Hardy and Professor George Williams, *Submission 11*, pp. [1–2].

⁶⁴ Department of Home Affairs and Attorney-General’s Department, *Submission 32.3*, pp. 17–18.

⁶⁵ Department of Home Affairs and Attorney-General’s Department, *Submission 32.3*, pp. 17–18; see also *Police and Criminal Evidence Act 1984* (UK), Sch. 1.

⁶⁶ Department of Home Affairs and Attorney-General’s Department, *Submission 32.3*, pp. 17–18; see also *Police and Criminal Evidence Act 1984* (UK) Sch. 1 and *Official Secrets Act 1911* (UK) subsection 9(1).

under that Act has been suspected of having been committed (such as an unauthorised disclosure).

- 3.92 Intelligence agencies in the UK are not required to follow the procedures under Schedule 1 of the PACE Act,⁶⁷ with the ability to exercise independent search warrants.
- 3.93 The Department of Home Affairs and the Attorney-General's Department noted that it could be possible to obtain 'special procedure material' as well as 'excluded material' under the *Official Secrets Act 1911* (UK):

Pursuant to subsection 9(1) of the Official Secrets Act, a search warrant may be issued if there are reasonable grounds to suspect that an offence has been, or is about to be, committed under the Official Secrets Act. Despite the restrictions on obtaining 'special procedure material' and 'excluded material', Schedule 1 of the PACE Act provides that a search warrant may be issued to obtain these types of material if the search of a premises for such material could have been authorised under another law. It is an offence against the Official Secrets Act to communicate documents or information that might be directly or indirectly useful to an enemy, if the person making the communication is acting for any purpose prejudicial to the interests or safety of the State. As such, a search warrant may be used to obtain confidential and non-confidential journalistic material in circumstances whereby a Government official has provided national security information or classified material to a journalist or media organisation, if the Government official's conduct constitutes an offence under the Official Secrets Act.⁶⁸

- 3.94 The Department of Home Affairs and Attorney-General's Department provided further evidence in a supplementary submission that the UK Law Commission is currently undertaking a review in relation to search warrant processes:

The United Kingdom Law Commission is currently reviewing the laws governing search warrants, with the aim of clarifying and rationalising the United Kingdom's search warrant laws. At present, the Law Commission has described the current search warrant laws as outdated, overly complex and inconsistent, particularly in the application of safeguards aimed at protection certain material, such as privileged information. The United Kingdom has 176

⁶⁷ See, for example, access to telecommunications data for security intelligence under *Regulation of Investigatory Powers Act 2000* (UK), Ch. II. Intelligence agencies also have the power to execute search warrants under *Intelligence Services Act 1994* (UK) ss. 5 and 6, which is not subject to the conditions under Schedule 1 of the *Police and Criminal Evidence Act 1984* (UK).

⁶⁸ Department of Home Affairs and Attorney General's Department, *Submission 32.3*, p. 8.

search warrant provisions, excluding warrants to enter premises and warrants to enter and inspect premises.

Caution should be exercised in using the United Kingdom's laws as a benchmark or model upon which to base potential reforms to Australia's search warrant schemes until the outcomes of that review are known.⁶⁹

3.95 ARTK rejected the Departments' caution regarding this review, noting:

The basis for the review is not that contested warrants are causing problems in the investigation of issues relating to national security. One of the stated goals of the review is to extend protections, make it easier to challenge search warrants, and make the law more transparent.

...

One of the proposals by the Commission is that the exclusion of journalistic materials be extended to search and seizure in all cases, to increase consistency. Any provisions relating to search and seizure of confidential journalistic material that are less onerous than are set out in the PACE Act are proposed to be raised to the standard of the PACE Act, so disclosure is exempt in all circumstances.

Nowhere has the Commission stated that it intends to recommend the removal of the additional protections afforded to journalistic materials, or that it intends to recommend the removal of the requirement that warrants in respect of journalistic material be contestable.⁷⁰

3.96 That review is still ongoing at the time that this report was finalised, though there were indications the UK Law Commission would be reporting with recommendations by the UK Autumn of 2020⁷¹, though this has been likely delayed by the COVID-19 pandemic.

Role of the Investigatory Powers Commissioner's Office (IPCO)

3.97 The *Investigatory Powers Act 2016* (UK) was passed in the UK in 2016 as a means of consolidating and updating the legislative framework related to obtaining and investigating communications and communications data. The

⁶⁹ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 17.

⁷⁰ ARTK, *Submission 23.2*, pp. 21-22.

⁷¹ United Kingdom Law Commission, 'Search Warrants', <https://www.lawcom.gov.uk/project/search-warrants/>, accessed 16 July 2020.

Act also established and provides for the Investigatory Powers Commissioner's Office (IPCO).

3.98 The stated aim of the Act was to:

...provide consistent statutory safeguards and will clarify which powers different public authorities can use and for what purposes. It sets out the statutory tests that must be met before a power may be used and the authorisation regime for each investigative tool, including a new requirement for Judicial Commissioners to approve the issuing of warrants for the most sensitive and intrusive powers. The Bill will also create a new Investigatory Powers Commissioner to oversee the use of these powers. Finally, the Bill will provide a new power, requiring communications services providers to retain internet connection records when given a notice by the Secretary of State.⁷²

3.99 The introduction of this Act and the establishment of the IPCO was in response to similar concerns to those expressed to this inquiry regarding the impact of investigatory powers, but also in part due to the complexity and number of warrants available to UK law enforcement and intelligence agencies, and concerns regarding consistent application and execution.

3.100 The IPCO operates similarly to Australia's oversight agencies – the Office of the Commonwealth Ombudsman and the Office of the IGIS – but in addition to compliance related activities, has additional roles:

- Carriage of the Judicial Commissioner process whereby the validity of a warrant – including matters of law and matters of public interest – are assessed prior to the issue of a warrant;⁷³ and
- Establishment and maintenance of a Technology Advisory Panel whose role is to advise the Investigatory Powers Commissioner if technology being used to collect evidence unnecessarily impinges on privacy.⁷⁴

3.101 Dr Keiran Hardy and Professor George Williams summarised the role of Judicial Commissioners as follows:

...unless there is an 'imminent threat to life', access to a journalist's metadata must be authorised by a judicial commissioner, who must consider the public interest with regard to protecting journalistic sources. This is broadly similar

⁷² Investigatory Powers Bill (UK), *Explanatory Notes*, p. 7, available at <https://publications.parliament.uk/pa/bills/cbill/2015-2016/0143/en/16143en.pdf>

⁷³ Investigatory Powers Commissioner's Office, *Annual Report 2017*, p. 37.

⁷⁴ Investigatory Powers Commissioner's Office, *Technology Advisory Panel Working Protocol*, March 2019, p. 1.

to the journalist warrant information scheme in Australia's metadata regime, as notice need not be given to the journalist(s) or media organisations.⁷⁵

3.102 This role for the Judicial Commissioners is, as noted, very similar to that of current PIAs in Australia, reviewing a warrant designed to enable the collection of telecommunications data,⁷⁶ prior to its issue, except in an emergency. Where a warrant is issued in an emergency situation without prior review, Judicial Commissioners retain the right to review or revoke after the fact.⁷⁷

3.103 However, Dr Hardy and Professor Williams outlined evidence that there are key differences in the application of the UK scheme compared to the PIA scheme in Australia, noting that the UK has much wider applications:

First, this process applies not only to law enforcement but also to MI5, the UK's domestic security service. By contrast, the Director-General of Security need only apply to the Attorney-General (not a judge) for a journalist information warrant under the Australian legislation. Second, judicial commissioners are former or serving High Court judges, not magistrates, district court judges or tribunal members.⁷⁸ Third, judicial commissioners are members of the Investigatory Powers Commission, a standing commission which has 70 full-time staff as well as legal and technical support. This provides standing judicial oversight and auditing of the investigatory powers regime, in addition to the authorisation role. Finally, the UK's metadata scheme is different in that metadata retention can be authorised only by judicial commissioners for 12-month periods. It is not mandatory for all providers for 2 years.⁷⁹

3.104 In the Independent National Security Legislation Monitor's (INSLM) recently completed report into the provisions of the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (TOLA Act), the INSLM had the opportunity to consider the operation of the IPCO and has

⁷⁵ Dr Keiran Hardy and Professor George Williams, *Submission 11.1*, p. [2].

⁷⁶ Described in legislation as a targeted interception warrant, targeted examination warrant or a mutual assistance warrant. See *Investigatory Powers Act 2016* (UK), s. 15.

⁷⁷ *Investigatory Powers Act 2016* (UK), ss. 109–110.

⁷⁸ Appointment to the role of Judicial Commissioner requires that the person has been a judge in the Supreme Court, the Court of Appeal, the High Court or the Court of Session prior to appointment so is not strictly limited to High Court judges. See *Constitutional Reform Act 2005* (UK), s. 60.

⁷⁹ Dr Keiran Hardy and Professor George Williams, *Submission 11.1*, pp. [2–3].

recommended that Australia adopt a similar model.⁸⁰ The recommended model would vest the powers of an Investigatory Powers Division in the Administrative Appeals Tribunal (AAT) and would comprise an Investigatory Powers Commissioner, and 'other eminent lawyers and technical experts as needed'⁸¹

Canada

3.105 The right of a Canadian journalist to protect a confidential source in the public interest is supported by the *Journalistic Sources Protection Act 2017* (Canada). This legislation was introduced in response to revelations that Canadian police were using telecommunications interception to identify journalists' sources.⁸²

3.106 In response, the statute provides that in certain circumstances:

... [Journalists] are allowed to not disclose information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.⁸³

3.107 When these conditions are satisfied, a warrant will be issued by a judge of a superior court unless the judge requests that a special advocate should present observations in the interest of freedom of the press concerning the conditions set out in the issue of warrant authorisation or order.⁸⁴ This process is still undertaken *ex parte* (without the affected party present), however the appointment of a special advocate means that a party is involved in presenting observations in the interest of freedom of the press.

3.108 Journalistic material can be sealed under orders by a judge, and the journalist or relevant media organisation is given 10 days from when

⁸⁰ Independent National Security Legislation Monitor (INSLM), *Trust But Verify: A report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, Report, 2020, p. 42.

⁸¹ INSLM, *Trust But Verify: A report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, Report, 2020, p. 42

⁸² Law Council of Australia, *Submission 40.1*, p. 16.

⁸³ Law Council of Australia, *Submission 40.1*, p. 14. See also Dr Keiran Hardy and Professor George Williams, *Submission 11.1*, p. [3].

⁸⁴ Law Council of Australia, *Submission 40.1*, p. 14.

notified that law enforcement intends to review sealed material to apply to a judge to exclude material obtained by law enforcement.⁸⁵

3.109 Where a warrant is issued in respect of a journalist suspected of committing an offence, the above protections do not automatically apply. However, a judge may order that documents should be dealt with in line with the provisions described above to protect journalistic sources.⁸⁶

3.110 The Department of Home Affairs and Attorney-General's Department highlighted the definitional nuances of the Canadian scheme:

For these purposes of these provisions, a journalist is defined as a person whose main occupation is to contribute directly to the collection, writing or production of information for dissemination by the media, or any person who assists such a person. A journalistic source is defined as a source who confidentially provides information to a journalist on the basis of an undertaking by the journalist not to divulge the source's identity, and whose anonymity is essential to the relationship between the journalist and the source.⁸⁷

3.111 Given that the legislation is relatively new the provisions have not been widely tested. The Law Council of Australia identified that the provisions of the *Journalistic Sources Protection Act 2017* (Canada) were being tested in the Supreme Court of Canada.⁸⁸ However, since that submission was made, the decision in the case of *Denis v Côté* was handed down⁸⁹, with the decision not providing any real precedent or clarity, with a direction for the Court of Quebec to hear the matter again, in light of new material provided by the Crown during the appeal. However, the Court does appear to support the intention of the legislation, in that it is 'in the public interest to provide robust statutory protection to such confidential sources'.⁹⁰

Authorisation of warrants

3.112 A number of submitters to this inquiry pointed out or criticised the seniority of the issuing officer for the *Crimes Act* search warrant executed on the

⁸⁵ Law Council of Australia, *Submission 40.1*, p. 15.

⁸⁶ Law Council of Australia, *Submission 40.1*, pp. 15–16.

⁸⁷ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 16.

⁸⁸ Law Council of Australia, *Submission 40.1*, p. 16.

⁸⁹ *Denis v Côté*, 2019 SCC 44, Supreme Court of Canada, decision can be accessed at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/17946/1/document.do>

⁹⁰ *Denis v Côté*, 2019 SCC 44, paragraph 47.

Australian Broadcasting Corporation (ABC), as that particular warrant was authorised by a Registrar of the New South Wales Local Court in Queanbeyan.⁹¹ However, this use of a registrar for authorisation was in line with the law at the time it was sought, and was found to be valid by the subsequent decision of the Federal Court.⁹² The differing level of superiority of authorising officers for warrant types was identified as a cause for concern to a number of media and other non-government submitters.

3.113 Many of those same submitters and others have suggested that authorisation for warrants that may affect journalists or media organisations should be elevated to being authorised by the judge of a superior court.⁹³

3.114 Concerns raised regarding registrars authorising *Crimes Act* warrants were put to the AFP and whether requiring authorising officers to be at a superior level would hinder their effective operation, or require undue consideration for the warrant submission, then Commissioner, Andrew Colvin replied:

No. The submission would make no difference, because the submission is determined by what we have to produce under law to get that search warrant and the thresholds we have to meet. The only difference it would make is that, across the country, across the different jurisdictions, there are different rules imposed and different guidelines for where we can go, in terms of rosters of available magistrates and available judges. The local courts would determine that and, so, who we would go and see. It wouldn't change our affidavit unless the legislation changed the thresholds.⁹⁴

3.115 When asked about the Law Council of Australia's position that the warrants at issue for this inquiry be authorised by superior court judges, Mr Arthur Moses, then President, replied:

It's no disrespect to the individuals who hold those very important offices, but, as Chief Justice Bathurst said when he implemented a regime under the New South Wales Criminal Assets Recovery Act that it had to be

⁹¹ Associate Professor Johan Lindberg and Dr Dennis Muller, *Submission 29*, p. 9; Centre for Media Transition, *Submission 31*, p. 7; Law Council of Australia, *Submission 40*, p. 33; ABC Alumni, *Submission 41*, p. 8.

⁹² *Australian Broadcasting Corporation v Kane* (No 2) [2020] FCA 133

⁹³ Law Council of Australia, *Submission 40*, pp. 7, 34–35; Australia's Right to Know coalition of media companies, *Submission 23.2*, pp. 7–9; Centre for Media Transition, *Submission 31*, p. 3; Associate Professor Johan Lindberg and Dr Denis Muller, *Submission 29*, p. 12; Australian Press Council, *Submission 37*, p. 3.

⁹⁴ Mr Andrew Colvin, Commissioner, Australian Federal Police, *Committee Hansard*, Canberra, 14 August 2019, p. 3.

a Supreme Court judge making orders in relation to those matters rather than registrars, these are important, invasive steps that are being taken, which impact upon the rights of the community, and it should be that a superior court judge with the experience and the lateral thinking is there to deal with these matters, rather than registrars or members of the AAT, who would not have subject matter expertise in relation to these matters. If I were the judicial officer and I were being asked to issue a warrant that would have somebody go into a person's home and search it, I would want to be very careful in reviewing that material. Registrars and members of the AAT can be very busy at times, and these things may slip off their desk in terms of their dealing with them in a very quick fashion.⁹⁵

- 3.116 The Department of Home Affairs and the Attorney-General's Department outlined the relevant levels of authorising officers for applicable warrants in a supplementary submission.⁹⁶ The point was also made in this submission that 'the requisite level of satisfaction that the issuing officer must reach to issue a search warrant does not vary or lessen simply because the officer holds a position other than that of a Judge'.⁹⁷
- 3.117 Additionally, it was outlined by those Departments that the AFP currently encounters difficulties in finding available magistrates for warrant authorisations,⁹⁸ a point made by the AFP as well (as above), highlighting that availability of higher-level authorisers is more of an administrative issue than a legislative one.

Committee Comment

- 3.118 The Committee acknowledges the arguments made by submitters in relation to contested hearings for warrants to apply to those carrying out professional obligations as a journalist. However, the Committee cannot ignore the concerns raised by law enforcement that the establishment of a contested warrants process along the lines suggested by the ARTK, despite the culture of cooperation in some instances between law enforcement and media organisations, may carry significant risks in relation to the outcome of an investigation or prosecution.

⁹⁵ Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, Canberra, 20 September 2019, p. 70.

⁹⁶ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 10.

⁹⁷ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 10.

⁹⁸ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 11.

- 3.119 The Committee notes with interest the evidence received from submitters related to the Public Interest Advocate regime, including evidence on domestic and international models that have sought to incorporate public interest considerations, advocacy, and protections into the expanding suite of warrants affecting telecommunications, metadata and personal information.
- 3.120 In consideration of the international models presented, and the PIM schemes in Victoria and Queensland, the Committee considers there is an opportunity to expand the role of PIAs at the Commonwealth level.
- 3.121 Providing additional profile and scope to the role of PIAs, to include applications for any warrants that may affect a journalist in relation to unauthorised disclosures or Commonwealth secrecy offences, will aid in building confidence in a system that is designed to protect the national interest, without threatening media freedom.
- 3.122 The Committee therefore recommends that a PIA be required to consider an application made by law enforcement or ASIO when seeking an overt or covert warrant that relates to a person working in a professional capacity as a journalist or media organisation when the warrant is related to the investigation of an unauthorised disclosure of government information. Warrants subject to such consideration should include those made under the following legislative provisions, and other warrants not listed as appropriate:
- Section 3E of the *Crimes Act 1914*;
 - Sections 14-16, 27A-27C of the *Surveillance Devices Act 2004*;
 - Sections 9-10, 39, 46-48, 110 and 116 of the *Telecommunications (Interception and Access) Act 1979*; and
 - Sections 25, 25A, 26B and 27 of the *Australian Security Intelligence Organisation Act 1979*.
- 3.123 The Committee considers that the issue of these warrants should continue to be issued without notice to the relevant journalist or media organisation, but recommends that the PIA's role should be to represent the principles of public interest journalism in making its submission to the issuing authority on a warrant request related to a journalist or media organisation.
- 3.124 In order to have the appropriate information to make a submission, the Committee further recommends that PIAs have the ability to request information or clarify elements of the application. In order to allow PIAs to build up a body of expertise in relation to submissions, the Committee

recommends that PIAs should be informed of the outcomes of the consideration of warrants processes to which they provide input.

- 3.125 Historically, PIAs have not been required to make a submission, and the Committee recommends that the relevant provisions be amended to require a submission by a PIA where the requirements above are met.
- 3.126 The relevant JIW provisions of the TIA Act require an issuing authority to consider the input of a PIA, and the Committee considers this aspect should be expanded to cover all warrants on which a PIA would have input.
- 3.127 The Committee notes the significant role that PIAs will play in ensuring the interests of the principles of public interest journalism are upheld. The Committee therefore recommends that, in order to be appointed, PIAs must have held the role of Queen's Counsel or Senior Counsel, or have served a judge in a superior court, and be appointed for a period of 5 years. To provide additional assurances of the seniority of appointment, the Committee recommends that this requirement be recorded in primary legislation rather than in instruments such as the *Telecommunications (Interception and Access) Regulations 2017*.
- 3.128 In addition, The Committee notes the concerns expressed by submitters regarding the seniority of authorising/issuing officers in some cases of warrants affecting journalists or media organisations.
- 3.129 While the argument that regardless of the level of the authoriser the level of satisfaction to be met by the submission made does not change is a valid one, the Committee is inclined to agree with the Law Council of Australia and other submitters that powers such as these need careful consideration by a senior lawyer or judicial officer, especially when they potentially affect the free operation of the media.
- 3.130 This would require that a special authorising issuing officer (being the relevant Supreme Court in each State or Territory) be created for section 3E Crimes Act warrants that affect journalists or media organisations, but only for the investigation of unauthorised disclosures or Commonwealth secrecy offences.
- 3.131 Additionally, the requirements for an issuing officer for all other law enforcement warrants, should be retained at the level of an eligible judge, as defined in section 6D of the TIA Act and section 12 of the Surveillance Devices Act 2004, except where those warrants relate to the investigation of an unauthorised disclosure or Commonwealth secrecy offence. In this

instance the issuing officer should be restricted to only that of a nominated Federal Court judge.

- 3.132 The Committee does not believe that any change is required to the authorisation required by the Attorney-General for relevant warrants sought by ASIO.
- 3.133 The Committee notes the reforms undertaken in the UK over the past four years, to establish the IPCO, have been aimed at streamlining and improving the processes around similar warrants and investigatory powers to those being considered in this report.
- 3.134 While the Committee is attracted to the centralisation of the authorisation and consideration of relevant powers into one body, it does not believe that any such reform is required in Australia at this time. This is especially relevant regarding the uncertain future of some of the powers and offences under examination, and whether they will be significantly altered by the outcomes of the Richardson Review.
- 3.135 The Committee also notes the INSLM's recommendation to establish an Investigatory Powers Division within the AAT, as recently set out in the report into the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018*, and considers that the Committee's upcoming review of the Act will provide an opportunity to consider this recommendation more fully.
- 3.136 Further, the Committee recognises that the issuance of a JIW under the TIA Act is relatively rare, and will likely to continue to be accessed infrequently in the future. However, the Committee also notes the concerns raised by submitters in relation to the circumstances in which a JIW might be issued, and therefore recommends that the relevant provisions under Division 4C of the TIA Act should be amended to clarify the offences for which a JIW may be sought.
- 3.137 The Committee notes that the TIA Act includes a definition of what constitutes a serious offence in section 5D, and the Committee therefore recommends that the relevant provisions in Division 4C of the TIA Act be amended to provide that a JIW may only be sought in circumstances that accord with the definition of serious offence provided by the TIA Act. Without intending to limit the legitimate circumstances in which a JIW may be sought, the Committee further recommends that a JIW may be sought for an offence against the law of the Commonwealth, a State or a Territory that carries a penalty of imprisonment for at least 3 years.

- 3.138 Such an inclusion would not be intended to provide for an exception or exemption for journalists and media organisations, as offences under Division 122 of the *Criminal Code 1995* are considered a serious offence for the purpose of section 5D of the TIA Act, but recognises that investigative processes that necessarily intrude on the telecommunications data of journalists, their sources, and media organisations should be commensurate with the seriousness of the offence under investigation.

Recommendation 2

- 3.139 The Committee recommends that the current role of the Public Interest Advocate, as provided for under the Telecommunications (Interception and Access) Act 1979 (TIA Act), for the purposes of Journalist Information Warrants (JIW) sought under Chapter 4, Part 4-1, Division 4C of that Act, be amended and expanded to apply in the following circumstances:

- That warrant-related provisions of the Crimes Act 1914, the Surveillance Devices Act 2004, the Telecommunications (Interception and Access) Act 1979 and the Australian Security Intelligence Organisation Act 1979 (as set out in paragraph 3.122 of the Committee's report) be amended to include mandatory consideration of warrant applications by Public Interest Advocates (PIAs) to cover all overt and covert warrants that relate to a person working in a professional capacity as a journalist or a media organisation, where the warrant is related to the investigation of an unauthorised disclosure of government information, including national security information, or Commonwealth secrecy offence.
- All such warrants are to continue to be issued without notice to the journalist or media organisation, however the PIA is required to make a submission to the issuing authority, addressing the following:
 - the current requirements of section 180T(b)(i)–(vi) of the TIA Act and section 14(2) of the *Telecommunications (Interception and Access) Regulations 2017*;
 - the public interest in preserving the confidentiality of journalist sources; and
 - the public interest in facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest.

- **The PIA must represent the interests of the principles of public interest journalism, and be authorised to request information to clarify elements of the warrant application provided by ASIO or an enforcement agency to enable the case to be built in their submission.**
- **All PIAs must:**
 - be Queen’s Counsel or Senior Counsel; or
 - have served as a judge of the High Court, a court that is or was created by the Parliament under Chapter III of the Constitution or the Supreme Court of a State or Territory; and
 - be appointed for a minimum term of 5 years.

These requirements should be set out in primary legislation.

- **All such warrants sought by an enforcement agency related to a person working in a professional capacity as a journalist or a media organisation, be required to be considered, authorised and issued by:**
 - a judge of a superior court of record in the jurisdiction of issue for relevant *Crimes Act 1914* warrants; and
 - a nominated Federal Court judge for relevant *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979* warrants.
- **The issuing authority must consider both the application from the agency seeking the warrant, as well as the submission from the PIA.**
- **Individual PIAs are to be informed of the outcome of the consideration of warrants for which they were responsible for making submissions.**
- **Journalist information warrants under Chapter 4, Part 4-1, Division 4C of the *Telecommunications (Interception and Access) Act 1979* should only be available in relation to the investigation of (i) a serious offence or (ii) an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for at least 3 years.**

3.140 The Committee notes concerns raised by submitters in relation to the transparency of the existing PIA regime, and notes the concerns raised by

the Department of Home Affairs regarding the potential expansion of reporting on the identity or activities of PIAs.

- 3.141 On balance, the Committee believes that for the added benefit of confidence in the existing PIA scheme's operation, independent of any further change resulting from other recommendations in this report, the risk of identifying the activity of PIAs does not outweigh the benefit of accountability and transparency that would come from public reporting of certain aspects of the current scheme.
- 3.142 The Committee notes that the Inspector-General of Intelligence and Security (IGIS) suggests that additional transparency and public reporting in relation to the operation of the PIA scheme might assist in providing assurance that the public interest was being appropriately considered in such circumstances.⁹⁹
- 3.143 It is with this balance in mind that the Committee recommends that an annual reporting mechanism be implemented to require the Attorney-General to report to Parliament in relation to the activities of PIAs in relation to JIWs sought by ASIO, and on behalf of the Minister for Home Affairs in relation to enforcement agencies, to the extent contained in the recommendations.

⁹⁹ See Inspector-General of Intelligence and Security, *Submission 28*, pp. 8–9.

Recommendation 3

3.144 The Committee recommends that the *Telecommunications (Interception and Access) Act 1979* be amended to include additional record-keeping and reporting requirements in respect of the role of the Public Interest Advocate in relation to journalist information warrants. At a minimum, the following additional information should be collected and included in the Minister's annual report on the use of the *Telecommunications (Interception and Access) Act 1979*:

- The number of serving Public Interest Advocates and which State or Territory they operate in;
- The qualifications of each Public Interest Advocate (i.e. whether the Advocate is a Queen's Counsel or Senior Counsel, a retired judge or both);
- The number of cases where a Public Interest Advocate contested a warrant application;
- The number of cases where a Public Interest Advocate attended the hearing of a verbal application for a warrant; and
- The number of cases where a warrant was not issued after being contested by a Public Interest Advocate.

3.145 In recognition of the Committee's Recommendation 2 (expanding the role of PIAs) the Committee recommends reporting requirements should be extended to all other warrants obtained by enforcement agencies and ASIO that relate to journalists and media organisations.

Recommendation 4

3.146 In respect of the expanded role of Public Interest Advocates (following implementation of Recommendation 2), the Committee recommends that the *Crimes Act 1914*, the *Surveillance Act 2004* and the *Telecommunications (Interception and Access) Act 1979* be amended to include (at a minimum):

- **Similar recordkeeping and annual reporting requirements to those that already exist in relation to journalist information warrants under the *Telecommunications (Interception and Access) Act 1979*; and**
- **The additional requirements outlined by the Committee in Recommendation 3.**

Publication of warrant data

3.147 In extension of his advocacy for increased reporting and transparency (as referenced in Chapter 4), Mr Arthur Moses SC, then President of the Law Council of Australia, highlighted that until reporting of warrant information is mandated, it will not be voluntarily utilised to build trust:

There has to be, ultimately, a legislative provision that would warrant that information being published and made available. At the moment there is nothing that mandates that the government do that, so it's really up to the parliament—without being critical of the government. If this parliament determines that that is information that ought be out there, it should legislate. It is often very hard for government to publish material if there is no legislative mandate to do it, and you'll always have public officials in the back room asking you, 'Why should we do it if the law doesn't require it?' So I think, rather than me being critical of the government, I would rather have the parliament legislate provisions that would force the publication of that material, and that will have to be a parliamentary decision, because public officials in the background will always ask their minister, 'Why should we do this when the legislation doesn't require it?'¹⁰⁰

3.148 When questioned about whether this could be achieved as a standing instruction in the *Freedom of Information Act 1982* for departments to make as much information available as possible, Mr Moses replied:

There is, but if you don't have the legislative mandate concerning a specific area, especially in areas that relate to national security, I can well understand

¹⁰⁰ Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, Canberra, 20 September 2019, p. 71.

that behind closed doors public officials would use that as a shield in relation to publishing material. So, rather than have a general provision, now that we're alert to this issue I think it should be made specific as a code so that it is published, which would enhance journalism and freedom of journalism in this country.¹⁰¹

Committee comment

- 3.149 While the majority of evidence to this inquiry was aimed at addressing specific concerns regarding the impact of powers, generally authorised by warrant, there was only minimal commentary on public visibility of the exercise of these powers, outside what the media does now or is available through current annual reporting or freedom of information.
- 3.150 The Committee has recommended an expansion to the public reporting related to the role of PIAs earlier in this chapter. However, as highlighted by the comments regarding that scheme, when a law enforcement or intelligence agency uses an intrusive power for the purposes of law and order or national security, the public should be informed about how often those powers are being used and – within reason – how those powers are being used.
- 3.151 The Committee believes that additional regular reporting of aggregated statistics would help to build public knowledge of the operation of these powers, as well as to help stimulate the public discourse identified throughout this report as being crucial to an informed society.
- 3.152 These additional reporting requirements could take the form of annual reporting similar to the current annex to the AFP's annual report for delayed notification search warrants, annual reports such as those made by the PIMs, or could take an aggregated quarterly form similar to that the UK Home Office uses for reporting counter-terrorism statistics related to the operation of police powers under the *Terrorism Act 2000* (UK).¹⁰²
- 3.153 The Committee therefore recommends that the Australian Government provide for such reporting.

¹⁰¹ Mr Arthur Moses SC, President, Law Council of Australia, *Committee Hansard*, Canberra, 20 September 2019, p. 71.

¹⁰² For examples of these reports see: <https://www.gov.uk/government/collections/counter-terrorism-statistics>.

Recommendation 5

3.154 The Committee recommends that the *Crimes Act 1914*, the *Surveillance Devices Act 2004*, the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* be amended to include the following additional recordkeeping and reporting requirements:

- On an annual basis, the Attorney-General of the Minister of Home Affairs should provide information to the public about:
 - The number of covert and overt warrants that were obtained by enforcement agencies under Commonwealth legislation in relation to journalists or media organisations; and
 - The specific offences to which each warrant related.
- In addition to ASIO's existing reporting requirements, ASIO should be required to:
 - Provide a report to the Attorney-General on each journalist information warrant that is issued, consistent with other types of warrants issued under the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979*; and
 - Include, in its annual report, the number of times ASIO applied for a warrant in relation to a media organisation or a person working in a professional capacity as a journalist (including, but not limited to, the number of applications for a journalist information warrant).

Commonwealth secrecy offences and related defences

3.155 For the purposes of considering the adequacy of secrecy-related offences and defences, there is a distinction to be made between the initial unauthorised disclosure by a Commonwealth officer and the subsequent reporting of the disclosure by journalists and media organisations.

Offences that apply to unauthorised disclosure of information by Commonwealth officers

3.156 Submissions to this inquiry highlighted the breadth of disclosure offences that apply to information that is not necessarily bound to national security classified information.¹⁰³ Such offences include those outlined in the following pieces of legislation:

- Section 35P of the *Australian Security Intelligence Organisation Act 1979*;
- Sections 80.3, 91.4, 91.6, 91.9, 91.13, 92.5, 92A.1, 119.7, 122.5, 131.1, 132.1 and 474.47 of the *Criminal Code 1995*;
- Sections 3ZZHA and 15HK of the *Crimes Act 1914*;
- Section 73A of the *Defence Act 1903*;
- Part 6, Division 1 of the *Intelligence Services Act 2001*; and
- Sections 42 and 45 of the *Office of National Intelligence Act 2018*.

3.157 Submissions refer to both public servants¹⁰⁴ and Commonwealth officers¹⁰⁵ but the terms are not mutually exclusive. Public servants are generally considered to be those employed under the *Public Service Act 1999*. However, the offences listed under the Criminal Code for unauthorised disclosure of information – for example – refers to Commonwealth officers and covers a broader range of people:

Commonwealth officer means any of the following:

- a. an APS employee;
- b. an individual appointed or employed by the Commonwealth otherwise than under the Public Service Act 1999;
- c. a member of the Australian Defence Force;
- d. a member or special member of the Australian Federal Police;
- e. an officer or employee of a Commonwealth authority;

¹⁰³ See Dr Keiran Hardy and Professor George Williams, *Submission 11*, p. 9; Alliance for Journalists' Freedom, *Submission 13*, p. 4; Human Rights Law Centre, *Submission 25*, pp. 22-26. For a historical discussion of the breadth of various secrecy provisions that can and have applied in the past, and some of which do still apply, see Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112 <<https://www.alrc.gov.au/publication/secrecy-laws-and-open-government-in-australia-alrc-report-112/>> accessed on 26 November 2019.

¹⁰⁴ See, for example, Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 29*, p. 4; ABC Alumni, *Submission 41*, p. 4.

¹⁰⁵ See Dr Keiran Hardy and Professor George Williams, *Submission 11*,

- f. an individual who is a contracted service provider for a Commonwealth contract;
- g. an individual who is an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract;

but does not include an officer or employee of, or a person engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.¹⁰⁶

- 3.158 In addition, offences for unauthorised disclosure of intelligence information by employees and contractors of most intelligence agencies are contained in the *Intelligence Services Act 2001*. These offences relate to the communication of information acquired or prepared on behalf of the agency where an exception does not apply.¹⁰⁷
- 3.159 If a person communicates information where not authorised to do so and the information contains a security classification, is intelligence information, or relates to operations, capabilities, technologies or methods of law enforcement it will constitute an offence under the Criminal Code.¹⁰⁸ If the material is subject to additional conditions – such as being marked as ‘for Australian eyes only’ or is the disclosure of five or more records – it is considered an aggravated offence and carries additional penalties.¹⁰⁹
- 3.160 The communication of information by Commonwealth officers constituted as an offence under the Criminal Code attracts a different penalty to communication by journalists. This is not replicated in other legislation where the penalty for communication of national security information has the same penalty for both the initial discloser and any subsequent communication by journalists and media organisations.¹¹⁰
- 3.161 Unauthorised disclosure is a criminal offence, and once a relevant organisation suspects or becomes aware that such a disclosure has occurred, the matter can be referred to the AFP. The AFP may determine it is

¹⁰⁶ *Criminal Code Act 1995*, s 121.1(1).

¹⁰⁷ *Intelligence Services Act 2001*, Part 6, Div. 1.

¹⁰⁸ *Criminal Code Act 1995*, s 122.1; See also ABC Alumni, *Submission 41*, p. 4.

¹⁰⁹ *Criminal Code Act 1995*, s 122.3.

¹¹⁰ Law Council of Australia, *Submission 40*, pp. 5–6.

appropriate to commence an investigation, or may conclude that an investigation is not warranted:

The AFP evaluates and prioritises all allegations of criminal wrongdoing objectively at the organisational level and in accordance with a clear organisational policy called the Case Categorisation and Prioritisation Model (CCPM). Some of the factors that are taken into account through the CCPM include:

- The impact of the alleged offending on Australian society;
- The likelihood of success in an investigation; and
- Whether an alternative to criminal investigation is appropriate.¹¹¹

3.162 If the factors outlined in the CCPM are satisfied, the AFP will commence an investigation into the allegations of criminal activity which may result in the decision to prosecute one or more parties involved in the conduct:

[AFP's] investigations are directed at collecting information and evidence. That means determining the facts of a case and gathering all relevant evidence so that there can be an informed decision about prosecution by the Commonwealth Director of Public Prosecutions (CDPP) and, where relevant, the Attorney-General. Being on the receiving end of police information-gathering powers does not necessarily make someone a suspect and it does not mean that the CDPP will be prosecuting. In some instances, police powers may identify exculpatory evidence about a person.¹¹²

3.163 The investigation of a purported offence by a Commonwealth officer may, through passive receipt of information or by their actions, bring journalists into the scope of an investigatory process related to unauthorised disclosure as discussed above.¹¹³

Offences that relate to dealing with information by journalists

3.164 Submissions contend that the offences that apply to Commonwealth officers can also apply to journalists. Dr Keiran Hardy and Professor George Williams provide an example in their submission:

Under section 91.1(2) of the Criminal Code, a person faces 25 years imprisonment if they 'deal' with information that 'concerns Australia's national security' and they are reckless as to whether they will prejudice

¹¹¹ AFP, *Submission 21*, p. 4.

¹¹² Mr Andrew Colvin, Commissioner, AFP, *Committee Hansard*, Canberra, 14 August 2019, p. 2.

¹¹³ Department of Home Affairs and Attorney-General's Department, *Submission 32*, pp. 4–5.

national security as a result. The definition of ‘dealing’ with information includes not only communicating or publishing information but also receiving, possessing, copying, or making a record of it. A penalty of up to 20 years’ imprisonment is available even if the information itself does not have a security classification or relate to national security.

Under these laws, journalists and other people are subject to criminal penalty for merely receiving or possessing sensitive information (not necessarily relating to national security), even before they decide to publish it.¹¹⁴

3.165 However, the Department of Home Affairs clarified that those offences:

...apply where a person intended to prejudice Australia’s national security, intended to advantage the national security of a foreign country or, in relation to offences of introducing a vulnerability, intended or was reckless as to harming or prejudicing Australia’s economic interests, disrupting the function of government or damaging public infrastructure...It is also noted that, for offences with an applicable fault element of recklessness, an individual’s genuine good faith would be likely to preclude recklessness being made out.¹¹⁵

3.166 As indicated above, limited protections for journalists apply in relation to the secrecy provisions of the Criminal Code which takes the form of a defence to prosecution for those involved in reporting in the public interest. This defence was introduced as part of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*.

3.167 Additionally, the Attorney-General’s Department reiterated that a review of all secrecy provisions in Commonwealth legislation will soon be undertaken by the Attorney-General’s Department,¹¹⁶ as a result of the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*.

Definition of journalist

3.168 While some submissions to the inquiry have criticised the legal definition of journalist as not being broad enough, others contend that a more narrow definition of journalist is suitable for the purposes of providing adequate protection to those engaged in journalism and public interest journalism.

¹¹⁴ Dr Keiran Hardy and Professor George Williams, *Submission 11*, p. 9.

¹¹⁵ Department of Home Affairs, *Submission 32.5*, p. [18].

¹¹⁶ Department of Home Affairs and Attorney-General’s Department, *Submission 32.3*, p. 6.

3.169 The current legislative provisions at the Commonwealth-level seek to define a journalist as a person who is working in the capacity of a professional journalist¹¹⁷ as well as:

...a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media.¹¹⁸

3.170 Further, for the purposes of defining when privilege applies, a journalist is also defined by Commonwealth legislation in the *Evidence Act 1995* as:

... a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.¹¹⁹

3.171 Members of ARTK emphasise that journalism is a profession that invokes certain obligations. Mr David Anderson, Managing Director of the ABC outlined:

The craft of journalism, through a registered and credible media organisation, is something a journalist is undertaking to inform the public of what's important to them... A journalist is trained, a journalist is skilled, a journalist abides by a code and abides by the obligations of a high journalistic standard... A journalist is there to inform the public about what's important to them and a journalist exercises due diligence in the way that they go about doing it. There is assessment in the effect that might have, but there's also assessment with regard to what is important for a fully functioning democracy... And a journalist operates to a standard of objective journalism, and a journalist is also trained in how to exercise their obligations as a journalist.¹²⁰

3.172 Mr Campbell Reid from News Corp Australia expanded further:

A crucial thing, too, is that journalists individually and through the companies that they work for, and the organisations represented here, accept responsibility for what they do—a crucial difference to people who are operating in social media, seeking to avoid responsibility. The authority comes from the fact that, even in the social and digital era, the primary news sources that serve our country are those that have evolved out of legacy media into digital spaces. All of us are very successful publishers in the digital space and,

¹¹⁷ *Telecommunications (Interception and Access) Act 1979*, s 180G(1)(a)(i).

¹¹⁸ *Criminal Code Act 1995*, s 122.5(6).

¹¹⁹ *Evidence Act 1995*, s 126J(1).

¹²⁰ Mr David Anderson, Managing Director, Australian Broadcasting Corporation (ABC), *Committee Hansard*, Sydney, 13 August 2019, p. 3.

when we moved into the digital space, all of our acceptance of responsibility and legal requirements went with us, unquestioningly. So we don't think that it's confusing in the modern era to differentiate between real journalism and fake or fraudulent or uncaring things pretending to be journalism. We are who we are. We've gone from legacy to digital and we think, as we take our responsibility with us, we should also take our freedoms with us.¹²¹

- 3.173 ARTK suggested that an accurate definition of journalism should preclude those who directly communicate unauthorised material. When asked about the direct disclosure of material obtained by WikiLeaks without redaction, Mr Campbell Reid from News Corp Australia distinguished between the craft of journalism and direct bulk disclosure:

We take responsibility for what we publish. In hindsight, a lot of people who were involved in the Julian Assange matter painted him as a hero of journalism. That's far from the case. If you're going to just dump documents into the world and go, 'Oh well, I'm conducting some kind of public duty,' and people's lives are in danger because of that, that's not journalism; that's irresponsibility. And that's what we're arguing about.¹²²

- 3.174 ARTK considered that direct bulk disclosure to be in contravention of the code that professional journalists abide by:

We talked about a guiding code. We talked about being sourced, being researched, being edited, being checked, being legalised — and that's the process that our journalists and editors and the support teams around them go through.¹²³

Public interest defence vs exemption

- 3.175 Submissions to the inquiry have called for an exemption rather than a defence for reporting in the public interest to negate the requirement to defend prosecution.¹²⁴ The substance of this position was stated by the Human Rights Law Centre (HRLC):

¹²¹ Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 3.

¹²² Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 13.

¹²³ Mr Michael Miller, Executive Chairman, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 13.

¹²⁴ Dr Keiran Hardy and Professor George Williams, *Submission 11*, pp. [10-11]; The Walkley Foundation, *Submission 12*, p. 2; Alliance for Journalists' Freedom, *Submission 13*, p. [5]; ARTK, *Submission 23*, pp. 9-12; Centre for Media Transition, *Submission 31.1*, p. [2].

It is vital that journalists are provided protection from criminal liability. There is a defence that covers journalists engaged in the business of reporting news (section 122.5(6)), however operating as a defence, it still allows a journalist to be charged and places the burden on journalists to prove the defence, and bear the cost and stress of court proceedings. The June 2019 media raids showed how damaging the mere conduct of raids can be in terms of creating a broader chilling effect.

Instead of defences, there should be exemptions to secrecy offences for journalists.¹²⁵

- 3.176 ARTK has stated their position for the introduction of exemptions from certain offences¹²⁶ and has referred the Committee to its submissions to previous bill inquiries on those offences, but that they do not all uniformly call for exemptions.
- 3.177 The Institute of Public Affairs raised a counter-argument, noting that an exemption granted to journalists, as a subset of the population, creates a special free speech privilege to those covered by the exemption, something which should be afforded to all.¹²⁷ A limited number of other submitters did not support an exemption in any form.¹²⁸
- 3.178 Mr Hugh Marks, CEO of Nine Entertainment, contended that the defences that are currently available imply that journalists and media organisations are criminals:

The legislative framework that is set around the media's ability to report sets the tone of the role we're able to play in our society, and critical to that tone in our society is whether a piece of legislation has an exemption for legitimate media activity, or a defence. A defence starts with the premise that we could be criminals. An exemption is a mark of respect that truth and the right to be informed are equally as important as safety.

... This comes down to defences versus exemptions. At the moment, you start off with the premise that something that we've done may be a criminal act, and then we have to defend ourselves, whereas if there's a recognition through legislation that the media has a legitimate role to perform, that should be

¹²⁵ Human Rights Law Centre, *Submission 25*, p. 26.

¹²⁶ ARTK, *Submission 23*, pp. 9-12 and *Submission 23.3* pp. 2-6.

¹²⁷ Institute of Public Affairs, *Submission 10*, p. [2].

¹²⁸ Mr Peter Jardine, *Submission 2*, p. [1]; Mr Ross Drynan, *Submission 43*, p. [2].

exempted from certain provisions. There's an allegation, and the legal action might be that we didn't operate within the exemption.¹²⁹

3.179 Aside from prosecutorial considerations for a defence, some submitters suggested that requiring the defendant to make out the elements of the defence is an inappropriate reversal of the burden of proof:

... section 122.5(6) is framed in such a way as to provide a defence for journalists prosecuted under Division 122 of the Criminal Code, which may place the burden on journalists to prove the elements of the section 122.5(6) defence beyond reasonable doubt. Whereas, if Division 122 contained a specific exemption of public interest reporting by the press, the burden would fall on the prosecution to establish that the exception does not apply in a particular case.

The Law Council notes that it is ordinarily the role of the prosecution to prove the elements of an offence. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

While in this provision the defendant bears an evidential burden rather than a legal burden, the Law Council is of the view that it is inappropriate to place the burden of proof on the defendant and rather this should remain the responsibility of the prosecution.¹³⁰

3.180 In response, the Attorney-General's Department outlined:

Regardless of whether the provision is framed as an exemption or defence, the accused must discharge the evidential burden pursuant to section 13.3 of the Criminal Code. There is no difference in the legal effect.

An evidential burden only requires the defendant to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. If the defendant discharges an evidential burden, the prosecution must disprove those matters beyond reasonable doubt.

Whether framed as an exemption or defence, an accused may discharge an evidential burden by relying on matters that form part of the prosecution case or seeking to lead evidence as part of the defence case. The question of whether the evidential burden has been satisfied is a question of law, to be decided by a judge. If discharged, the question of whether the prosecution has

¹²⁹ Mr Hugh Marks, Chief Executive Officer, Nine Entertainment, *Committee Hansard*, Sydney, 13 August 2019, pp. 2–4.

¹³⁰ Law Council of Australia, *Submission 40*, p. 29.

disproven the defence/exemption beyond reasonable doubt is put to a trier of fact (either judge or jury).

There is no procedural difference between the application of a defence or exemption. An accused person may, for forensic reasons, wait until the defence case is called before revealing evidence to justify his or her conduct, but they do not have to take that course. An accused person may, and sometimes will, act proactively to advance evidence of a defence or exemption in a record of interview, by way of a statement or by supplying evidence to the prosecution in advance of a trial or a prosecution being initiated. This observation applies equally whether the provision is framed as an exemption or defence.

Further, as per the Prosecution Policy of the Commonwealth, the prosecution will also consider whether there is a reasonable prospect of a conviction being secured prior to proceeding with a prosecution, including consideration of any lines of defence that are open to the defendant. This would include consideration of both defences and exemptions alike.¹³¹

- 3.181 The requirement identified above, under the CDDP prosecution policy for any possible defences and exemptions to be considered when determining whether there are reasonable prospects of success when determining whether to prosecute, was supplemented by the identification by the Attorney-General's Department, in answers to questions from the Committee, that '[t]he prosecution will also consider whether a prosecution would be in the public interest before proceeding'.¹³²

Defences, exemptions and increased espionage risk

- 3.182 ASIO argued that any exemption created for journalists could encourage hostile foreign actors to exploit potential vulnerabilities in the legal system:

ASIO does not support broad exemptions for particular classes of people, industries or professions. ASIO considers exemptions applied in this way could undermine the effectiveness of Australian laws by encouraging hostile actors to structure their activities to exploit any potential vulnerabilities in Australia's legislation.

... ASIO can foresee a circumstance in which making a distinction in the application of exemptions between 'legitimate' journalism that is conducted in the public interest, and conduct by hostile actors under the guise of

¹³¹ Attorney-General's Department, *Submission 32.2*, pp. 2–3.

¹³² Attorney-General's Department, *Submission 32.4*, p. 11.

journalistic cover could endanger sensitive sources, methods and intelligence-sharing relationships. If an exemption were to be introduced, the prevalence of journalistic cover being used to mask activities harmful to Australia's interests by hostile actors may well increase. ASIO has also noted in its submission that this could have the unintended consequence of increasing the intelligence threat to journalists, as journalists may be targeted to access information from sensitive sources on behalf of a foreign intelligence organisation.¹³³

- 3.183 In response, ARTK suggested that legitimate journalists 'have the professional training and instincts to make them suspicious of the motives of anyone who comes to them seeking their assistance, and do due diligence as a result'.¹³⁴

Committee Comment

- 3.184 The Committee notes the evidence provided for both the retention of a defence and the establishment of an exemption – or element – for reporting in the public interest by a journalist or media organisation.
- 3.185 Firstly, the Committee notes the evidence provided by submitters that the definition of a 'journalist', 'public interest journalism' and 'journalistic material' varies in Commonwealth legislation. The Committee notes that a consistent definition of what constitutes journalism was not settled among submitters, and whilst acknowledging the need for consistency, the Committee considers that it has received insufficient evidence regarding an appropriate definition to set out in a recommendation as part of this report.
- 3.186 However, the Committee acknowledges the desirability of consistency across legislation in relation to these key definitional matters, and agrees that consistency in this area provides assurance to those engaged in the professional act of journalism regarding their rights and responsibilities.
- 3.187 Secondly, existing defences have been introduced in recognition of the potential for journalists undertaking legitimate journalistic activity being captured in relation to secrecy offences introduced into the Criminal Code. However, as outlined above, media and other stakeholders have argued that a defence, which carries with it an onus of proof to disprove one or more evidentiary elements of the offence, is not reflective of a system that balances freedom of the press, especially when acting in the public interest.

¹³³ Australian Security Intelligence Organisation (ASIO), *Submission 22.2*, p. 2.

¹³⁴ ARTK, *Submission 23.2*, p. 31.

- 3.188 The Committee notes that the establishment of an outright exemption designed to preclude investigatory processes could have unintended consequences if the limits were to be tested in court.
- 3.189 The Committee also notes the consistent view provided by ASIO that an exemption for journalists would incentivise the use of media credentials as cover for hostile foreign actors to utilise. This position has been stated in very certain terms by the Director-General of Security on multiple occasions, and as such cannot be ignored.
- 3.190 The argument from ARTK only addresses half of the point put forward by ASIO, that hostile foreign actors may seek to target and influence journalists, rather than posing as journalists in order for any possible exemption to apply to their activity. This cover as a journalist is a legitimate concern, both as a means to access information and influence people under the guise of a journalist, as well as attempts that may be made by these actors to ‘shape the media in Australia’.¹³⁵
- 3.191 As indicated above, the Committee notes that secrecy offences form part of a number of pieces of legislation and may include:
- Section 35P of the *Australian Security Intelligence Organisation Act 1979*;
 - Sections 80.3, 91.4, 91.6, 91.9, 91.13, 92.5, 92A.1, 119.7, 122.5, 131.1, 132.1 and 474.47 of the *Criminal Code 1995*;
 - Sections 3ZZHA and 15HK of the *Crimes Act 1914*;
 - Section 73A of the *Defence Act 1903*;
 - Part 6, Division 1 of the *Intelligence Services Act 2001*; and
 - Sections 42 and 45 of the *Office of National Intelligence Act 2018*.
- 3.192 Accordingly, the Committee recognises that a review is timely, and recommends that the upcoming review of all secrecy provisions in Commonwealth legislation to be undertaken by the Attorney-General’s Department¹³⁶ – as a result of the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* – should consider whether public interest journalism is adequately protected.
- 3.193 This review by the Attorney-General’s Department should be prioritised for finalisation and report by June 2021.

¹³⁵ Ms Jacinta Carroll, *Committee Hansard*, Canberra, 19 September 2019, p. 2.

¹³⁶ Department of Home Affairs and Attorney-General’s Department, *Submission 32.3*, p. 6.

Recommendation 6

- 3.194 The Committee recommends that, as part of its upcoming review of all secrecy provisions in Commonwealth legislation (in accordance with the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*) the Attorney-General's Department specifically consider whether the relevant legislation adequately protects public interest journalism.**

The Committee also recommends that this ongoing review be prioritised for finalisation and report by June 2021.

- 3.195 In addition to the considerations from the recommendation above, the Committee acknowledges the fundamental disparity in the position of many submitters in relation to whether public interest journalism should be considered an exception or remain a defence under subsection 122.5(6) of the *Criminal Code 1995*.
- 3.196 Some members of the Committee considered that the subsection 122.5(6) of the *Criminal Code 1995* should remain a defence and not an exemption (or exception) for public interest journalism. Other members of the Committee disagreed, and considered that the provision should be re-drafted to provide for an exception along similar lines to amendment made to the Criminal Code Amendment (Agricultural Protection) Bill 2019.
- 3.197 However, following consideration, the Committee has concluded to recommend that the Government give consideration to whether the defence provided for in subsection 122.5(6) of the *Criminal Code* should be applied to other secrecy offences in relevant Commonwealth legislation.

Recommendation 7

- 3.198 The Committee recommends the Government give consideration to whether defences for public interest journalism should be applied to other secrecy offences within relevant Commonwealth legislation. Any additional defences should be based on the defence provided by section 122.5(6) of the Criminal Code Act 1995.**

Avenues for further cooperation between media and intelligence and law enforcement

- 3.199 Mr James Chessell from Australian Metro Publishing of the ARTK indicated that it is the preference of journalists and media organisations to cooperate

with departments and agencies in determining harms that can result from the publication of information contained within a document with a national security classification:

Our preference is to work when appropriate with the agencies to make sure what we intend to publish does not put national security at risk. It's a duty we take very seriously. We seek outside advice, we seek legal advice and we draw on the experience of a newsroom to make sure that we approach it in a responsible way. I think one of the dangers of the conversation recently has been that proper newsrooms have been portrayed as places where some of this stuff goes through unfiltered. It is quite the opposite.¹³⁷

3.200 The Committee received similar evidence from Mr Michael Pezzullo, Secretary of the Department of Home Affairs, stating that departments and agencies will cooperate with journalists and media organisations:

In my experience—and this is based on live examples which have resulted in stories that subsequently have been produced—there's always scope to negotiate. In a sense, you don't really need to talk about the detail of that weapons system or the capabilities of our submarines or how ASIS goes about its business, but you've got the document. I might not like the fact that you've got the document, and that goes to the separate question of who the primary discloser is. How is it that the document came to be in the possession of the reporter or the person involved in the news business otherwise? But I accept, in a country with a free press, they're going to publish. So how is it that you can steer, assist and work with that journalist to ensure that lives are not put at risk, that sources and methods are not compromised? It might be that the point of the story they're trying to get at is human rights abuses or maladministration or other facets that are in the public interest, where the capabilities themselves or the systems that we rely upon to keep our country safe don't gratuitously need to be retailed.

... The question then of how you handle the engagement with the media is always, in my experience, a case-by-case matter. Some are willing to be very cooperative and they actually don't want to gratuitously put unnecessary amounts of sensitive information out there; others don't bother to check; and there's a wide spectrum in between.

3.201 Mr Campbell Reid from News Corp Australia acknowledged additional considerations taken regarding the impacts of publication:

¹³⁷ Mr James Chessell, Group Executive Editor, Australian Metro Publishing, *Committee Hansard*, Sydney, 13 August 2019, p. 7.

There's another important factor in all of this: the readers and the people who consume our news. Can you imagine the level of outcry that would come from ordinary Australians if we published something that put lives of security operators or policemen or armed forces at risk? So, as well as balancing your theoretical and technical responsibility, as an editor you're sitting there thinking, 'Well, if I publish this, and a family of Australians suffers a loss of a loved one because of me being cavalier because "Yay, I've got a document that I'm going to publish"' — there's a huge modifying force, which goes right back to our opening contention, that we are members of this society and we accept our responsibility to behave properly. This creeping legislation over the last 10 years assumes that our starting point is that we are cavalier.¹³⁸

3.202 The nature of potential offences that may have been committed under current legislation by receiving information and approaching an agency with that information may impact on the desire for cooperation between journalists and media organisations and national security agencies.

3.203 As indicated above, in deciding whether to commence an investigation or prosecution, the AFP considers a variety of factors. The AFP Commissioner provided evidence that attempts to check information with departments and agencies would be considered in any future prosecutorial action:

... I would say this. Ultimately we're looking at unauthorised disclosure offences, so that still focuses our attention on the person who has released this in the first place. Where what you're describing comes into our mind is, if a journalist or a media organisation is attempting to engage with the department or whoever the agency is that has that information, then it clearly goes to their intent and their state of mind in publishing that information. That's a relevant factor in a criminal process. We have to prove intent, and the state of mind of somebody is very important in terms of us proceeding with a criminal prosecution. That's a very relevant factor. We would always say — and I'm sure every department would say the same thing — if a media organisation is in possession of information, 'Come forward and work with us,' as many journalists do when they understand that they have information that is sensitive and may have unintended consequences if it's published. Work with us on that. My experience has been, when journalists have done that, it's led to a much better outcome for both the agency that's lost information and the media organisation.¹³⁹

¹³⁸ Mr Campbell Reid, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia, *Committee Hansard*, Sydney, 13 August 2019, p. 7.

¹³⁹ Mr Andrew Colvin, Commissioner, AFP, *Committee Hansard*, Canberra, 14 August 2019, p. 11.

3.204 This statement is supported by evidence provided by Mr Greg Moriarty, Secretary of the Department of Defence, where *The Canberra Times* cooperated with the Department of Defence on national security classified material as discussed in Chapter 2.

3.205 The ABC highlighted the importance of transparency to a free and democratic society:

Transparency in government is integral to a healthy democracy. It is not only the media which is obliged to inform the public; the government itself is required to disclose government information to the public.¹⁴⁰

3.206 The Office of National Intelligence (ONI) acknowledged the importance of transparency, but noted it must be balanced with the protection of national security:

... decisions about the disclosure of intelligence information require complex and careful consideration about the harm that could result from such a disclosure. While transparency is important, it is not the only public interest, and the Australian government, supported by advice from intelligence agencies and policy Departments, bears a heavy burden in balancing transparency with its responsibility to protect the wider Australian national interest in protecting Australia's national security.¹⁴¹

Committee comment

3.207 The Committee notes with interest the evidence received from media organisations and individual journalists regarding the desire to work cooperatively with the government in ensuring that publication of disclosed material will not unduly affect national security or the safety of individuals.

3.208 The assurances provided are a welcome statement from media that they are willing to liaise and cooperate with agencies regarding the information and its potential publication.

3.209 Accordingly, the Committee recognises that positive outcomes could arise from cooperation between journalists or media organisations and departments when material is received that is not authorised for disclosure, and where formal liaison regarding impact, scope of reporting and follow-up cooperation could be discussed.

¹⁴⁰ ABC, *Submission 38*, p. 9.

¹⁴¹ ONI, *Submission 35*, p. 4.

- 3.210 The Committee therefore recommends that establishment of a formal mechanism for consultation be considered, where media can liaise with agencies regarding national security classified information, without the fear of investigation or prosecution. Additionally the Committee recommends that those agencies prioritise the creation of a media liaison unit to create this mechanism.

Recommendation 8

- 3.211 The Committee recommends that the Australian Government give consideration to the formulation of a mechanism to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution.**

Additionally, the Committee recommends that all intelligence and law enforcement agencies prioritise the creation of a media disclosure liaison unit to facilitate this formal consultation.

Disclosure offences and intention to create harm

- 3.212 The AJF raised the contention that secrecy provisions hinder journalists reporting on public interest matters:

While the security agencies' work in relation to matters of national security needs specific protection, the law unnecessarily extends to matters not related to issues of national security. For example, journalists reporting on corruption or sexual misconduct in the security agencies would be just as vulnerable to prosecution as those covering security issues. This unnecessarily hinders the work of journalists in keeping all sectors of government accountable.¹⁴²

- 3.213 HRLC provided analysis of some Commonwealth secrecy offences in its submission to the inquiry, noting that the recurring element across the general offences analysed was the lack of an element of express harm to an essential public interest, such as protecting national security and law enforcement.¹⁴³
- 3.214 The Law Council of Australia expanded on this, identifying that the current scope of general secrecy offences in the Criminal Code that are bound to information 'deemed to 'cause harm to Australia's interests' and consisting

¹⁴² Alliance for Journalists' Freedom, *Submission 13*, p. 4.

¹⁴³ Human Rights Law Centre, *Submission 25*, pp. 22-26.

of ‘inherently harmful information’¹⁴⁴ are too broad and may capture all manner of communications.

- 3.215 In alignment with the HRLC, the Law Council of Australia identified the need for an element of express harm to an identified essential public interest. Expressing further:

Such an element would address concerns about the broad scope of criminal secrecy provisions, which may capture disclosures of information that are innocuous. Where no harm is likely, the ALRC considered that other responses to unauthorised disclosure of Commonwealth information are appropriate, including the imposition of administrative sanctions or the pursuit of contractual or general law remedies.¹⁴⁵

- 3.216 The lack of express harm elements in secrecy offences was a concern raised by a number of other submitters to this inquiry, and had been raised with this Committee’s predecessor during the 45th Parliament in relation to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill).

- 3.217 In its advisory report on that Bill, the Committee’s recommendation 24 stated:

The Committee recommends that, following the passage of the general secrecy offences in Schedule 2 to the Bill, the Attorney-General initiate a review of existing secrecy offences contained in other legislation, taking into account the set of principles contained in the Australia Law Reform Commission’s report, *Secrecy Laws and Open Government in Australia*.¹⁴⁶

- 3.218 This recommendation was acknowledged by the Department of Home Affairs in response to questioning regarding offences relevant to this inquiry:

The Attorney-General’s Department is responsible for coordinating a review of existing secrecy offences. Consistent with the recommendation of the Parliamentary Joint Committee on Intelligence Security’s advisory report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, the review will take into account the principles set out

¹⁴⁴ Law Council of Australia, *Submission 40*, p. 20

¹⁴⁵ Law Council of Australia, *Submission 40*, p. 20

¹⁴⁶ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, Recommendation 24, p. 154.

by the Australian Law Reform Commission in its report, *Secrecy Laws and Open Government in Australia*.¹⁴⁷

- 3.219 The Australian Law Reform Commission's (ALRC) report, that forms the basis of the issue identified by the HRLC and the Law Council of Australia, is being considered as part of the review of existing secrecy offences, incorporated recommendations and the principle 'to narrow the scope of secrecy provisions, including, in most circumstances, linking them to an express harm requirement'.¹⁴⁸

Committee comment

- 3.220 The Committee notes the concerns raised by media organisations and other stakeholders about the breadth of the application of national security offences.
- 3.221 Changes to general secrecy provisions in Division 122 of the Criminal Code introduced by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* have addressed some concerns regarding disclosure; however the recommendation by the ALRC for an express harm element to the offences has not been implemented in a complete manner.
- 3.222 The Committee notes the evidence from the Attorney-General's Department that a review of all secrecy provisions in Commonwealth legislation is currently being undertaken by the Attorney-General's Department, as a result of the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*.¹⁴⁹
- 3.223 Additionally, the Committee notes that the Department of Home Affairs further submitted that the ALRC's recommendations regarding express harm elements for offences is being considered as part of that review.¹⁵⁰
- 3.224 Accordingly, as the recommendations of the ALRC regarding secrecy offences – reiterated by the Law Council of Australia – are currently being considered by a review underway as a result of a recommendation of this

¹⁴⁷ Department of Home Affairs, *Submission 32.5*, p. [16].

¹⁴⁸ Commonwealth of Australia, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC Report 112, December 2009, p. 130

¹⁴⁹ Department of Home Affairs and Attorney-General's Department, *Submission 32.3*, p. 6.

¹⁵⁰ Department of Home Affairs, *Submission 32.5*, p. [16].

Committee in a previous Advisory Report, the Committee is not recommending any further review or change at this time.

Public Interest Disclosure

- 3.225 Due to the nature of unauthorised disclosures and the circumstances that release of government information might occur under, the inquiry received an amount of evidence about whistleblower protections and the Public Interest Disclosure (PID) scheme.
- 3.226 The PID scheme is enabled by the *Public Interest Disclosure Act 2013* (PID Act), which allows for disclosures in the public interest to Authorised Officers—internal staff members of relevant agencies with training on how to handle public interest matters—as well as the Commonwealth Ombudsman, and the Inspector-General of Intelligence and Security for intelligence-related matters.
- 3.227 External disclosure is authorised in very narrow circumstances, and usually only after an internal disclosure has been made.¹⁵¹
- 3.228 Once a disclosure has been made it is assessed by the Authorised Officer to ensure that it fits the relevant statutory criteria; including whether the disclosure fits the criteria of disclosable conduct contained within s 29(1). An Authorised Officer must make a determination within 14 days about whether the matter should be referred for investigation, unless additional time is sought and granted.¹⁵²
- 3.229 Where a matter meets the relevant criteria and is determined to be a PID, the Authorised Officer must allocate the PID,¹⁵³ notify the discloser (where practicable),¹⁵⁴ notify the principal officer,¹⁵⁵ and notify the Ombudsman¹⁵⁶ or IGIS (as appropriate).

¹⁵¹ Mr Philip Moss, *Review of the Public Interest Disclosure Act 2013* (Moss Review), p. 38.

¹⁵² *Public Interest Disclosure Act 2013*, s 43(5).

¹⁵³ *Public Interest Disclosure Act 2013*, s 43(1).

¹⁵⁴ *Public Interest Disclosure Act 2013*, s 44.

¹⁵⁵ *Public Interest Disclosure Act 2013*, s 44(1).

¹⁵⁶ *Public Interest Disclosure Act 2013*, s 44(1A).

3.230 Once the matter has been referred for investigation, the investigation is required to be completed within 90 days,¹⁵⁷ however the responsible department or agency can seek an extension if required.¹⁵⁸

3.231 The legislation came into effect in early-2014, and was subject to a review two years following commencement.

What constitutes a disclosure in the public interest?

3.232 Complaints must relate to disclosable conduct which is defined in s 29(1) of the PID Act and includes conduct that:

- contravenes a Commonwealth, state or territory law
- occurred in a foreign country and contravenes a foreign law that applies to the agency, official or service provider
- perverts the course of justice
- is corrupt
- constitutes maladministration, including conduct that is based on improper motives or is unreasonable, unjust, oppressive or negligent
- is an abuse of public trust
- involves fabrication, falsification, plagiarism or deception relating to scientific research, or other misconduct in relation to scientific research, analysis or advice
- results in wastage of public money or public property
- unreasonably endangers health and safety
- endangers the environment.
- is prescribed by the PID rules (s 29(1), however no PID rules have been made at the time of publication).
- Disclosable conduct also includes conduct by a public official that:
- involves or is engaged in for the purposes of abusing their position as a public official, or
- could give reasonable grounds for disciplinary action against the public official (s 29(2)).¹⁵⁹

¹⁵⁷ *Public Interest Disclosure Act 2013*, s 52(1).

¹⁵⁸ *Public Interest Disclosure Act 2013*, s 52(3).

¹⁵⁹ Office of the Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*, p. 7.

3.233 The Office of the Commonwealth Ombudsman sets out what does not constitute disclosable conduct under the PID Act:

It is not disclosable conduct just because a person disagrees with:

- a government policy or proposed policy
- action or proposed action by a minister, the Speaker of the House of Representatives or the President of the Senate
- expenditure or proposed expenditure related to such policy or action (s 31).

Disclosable conduct also does not include the proper performance of the functions and proper exercise of the powers of an intelligence agency or its officials (s 33).¹⁶⁰

3.234 In addition to the disclosable conduct provisions under the PID Act, an employee of an intelligence agency, or members of the public, can make a complaint to the IGIS about the actions of an intelligence agency.¹⁶¹ In giving evidence to the Committee, ASIO indicated that in their view the scheme was operating effectively:

My view would be that the Inspector-General of Intelligence and Security has a wide remit across the activities of ASIO and the operations of ASIO and is able to inquire very, very broadly when matters are brought to her attention or, indeed, should the Inspector-General wish to do something on her own motion. It is a scheme that's been in operation now for a few years. It has been used on a small number of occasions and has seemed to meet the needs of those who have wished to bring those sorts of issues to attention.

Separately, if a member of the public observes something or wishes to make a complaint in relation to the activities of our agency that go to those issues under the Public Interest Disclosure scheme, they can separately go directly to the Inspector-General of Intelligence and Security, and, again, the office can investigate those matters separately and has wide powers to do so.¹⁶²

3.235 Only current and former public officials may be afforded protection under the PID Act when they make complaints regarding conduct that is contained in the 'disclosable conduct' provisions of the PID Act, which can include fraud, serious misconduct and corrupt conduct, as well as minor

¹⁶⁰ Office of the Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act* 2013, p. 8.

¹⁶¹ See *Inspector-General of Intelligence and Security Act 1986*, s 11.

¹⁶² Dr Wendy Southern, Deputy Director-General, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 14 August 2019, p. 49.

wrongdoing.¹⁶³ Once an eligible person makes a disclosure to a proper authority, they are provided with legal protection from reprisals that result from disclosure.¹⁶⁴

The operation of the PID scheme

3.236 A number of submissions drew upon the experience of whistleblowers to highlight their concerns regarding government maladministration, or about the chilling effect that is being experienced on sources that are willing to come forward with information.¹⁶⁵ However, the objectives of the PID Act are to foster an environment where officials are encouraged to raise circumstances of wrongdoing:

6 Objects

The objects of this Act are:

- (a) to promote the integrity and accountability of the Commonwealth public sector; and
- (b) to encourage and facilitate the making of public interest disclosures by public officials; and
- (c) to ensure that public officials who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures; and
- (d) to ensure that disclosures by public officials are properly investigated and dealt with.¹⁶⁶

3.237 Once an eligible person makes a valid disclosure to a proper authority, it is intended that they are provided with legal protection from reprisals that result from disclosure.¹⁶⁷

¹⁶³ Moss Review, p. 36

¹⁶⁴ The Hon. Margaret Stone AO, Inspector-General of Intelligence and Security, *Committee Hansard*, Canberra, 14 August 2019, p. 52.

¹⁶⁵ The Walkley Foundation, *Submission 12*, pp. 5–8, 11; Australian Broadcasting Corporation, *Submission 38*, pp. 2–4; Whistleblowers Australia, *Submission 33*, pp. 2–5; Mr Jordan Brown, *Submission 34*, pp. 1–3; Support Assange & WikiLeaks Coalition, *Submission 52*, pp. [1]–[2]; Dr Chris Ambrey, *Submission 49*, pp. 1–2; Mr John Wilson, *Submission 45*, pp. 2–6; ABC Alumni, *Submission 41*, pp. 5–8.

¹⁶⁶ *Public Interest Disclosure Act 2013*, s 6.

- 3.238 As mentioned above, government departments and agencies must report the receipt of a PID that tends to show, or the discloser reasonably believes that the disclosure tends to show, disclosable conduct under the PID scheme to the Commonwealth Ombudsman or the IGIS once a decision has been made by an Authorised Officer to refer a PID for investigation. This notification may comprise limited details and a short synopsis of the issue¹⁶⁸ and could occur at any time within 14 days following receipt of the PID. The Commonwealth Ombudsman or the IGIS are subsequently updated when a decision has been made that finalises the investigation.¹⁶⁹
- 3.239 Each year, the Commonwealth Ombudsman prepares a report to parliament on the operation of the PID Act which includes:
- the number of public interest disclosures received by authorised officers of the agency
 - the kinds of disclosable conduct to which those disclosures relate
 - the number of disclosure investigations the agency conducted
 - the actions that the agency has taken in response to recommendations in reports relating to those disclosure investigations
 - the number and nature of the complaints made to the Ombudsman about the conduct of agencies in relation to public interest disclosures
 - information about the Ombudsman's performance of its functions under s 62 and the IGIS's performance of its functions under s 63.¹⁷⁰
- 3.240 Government stakeholders who provided submissions to the inquiry believed that complaints mechanisms for allegations of wrongdoing were generally appropriate.¹⁷¹
- 3.241 The Department of Defence considered that their systems were adequately robust to deal with allegations of wrongdoing:
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¹⁶⁷ The Hon. Margaret Stone AO, Inspector-General of Intelligence and Security, *Committee Hansard*, Canberra, 14 August 2019, p. 52.

¹⁶⁸ Office of the Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act* 2013, p. 33.

¹⁶⁹ Office of the Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act* 2013, p. 43.

¹⁷⁰ Office of the Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act* 2013, p. 79.

¹⁷¹ Australian Signals Directorate, *Submission 16*, p. 2; Australian Signals Directorate, *Submission 16.1*, p. 2; Australian Security Intelligence Organisation, *Submission 22.2*, p. 1; The Department of Home Affairs, *Submission 32.3*, pp. [4-5]; Attorney-General's Department, *Submission 32.4*, p. 12.

I think it's worthwhile making the point that, within Defence, as with other Commonwealth agencies, that is not the only way in which people who had some sort of concern could raise issues. We have a strong security reporting framework, so people may raise security matters and, indeed, are expected to raise security matters. We have fraud reporting; some of that comes out through the PID scheme. We have the public interest disclosure scheme; that is well embedded in the Defence department. If you'd like, I can go to some statistics around that. People are also able to make complaints directly to the Commonwealth Ombudsman. We would expect people to use their chain of command. They can go to the Inspector-General of the Australian Defence Force. ADF members can go to the Joint Military Police Unit or the Defence Force Ombudsman. Then there are other ways of making complaints, including, for example, the Inspector-General of Intelligence and Security. So there are a range of mechanisms through which people with concerns could bring those forward in a way separate from a public disclosure, through providing it to someone outside of that chain who is authorised to deal with it.¹⁷²

- 3.242 However, many non-government stakeholders were critical of the scheme or the limitations of protections to internal disclosures by government officials.¹⁷³
- 3.243 Additionally, in April of this year the Federal Court made comment on current operation of the PID scheme as 'technical, obtuse and intractable'.¹⁷⁴
- 3.244 Media organisations see a role for themselves in public interest disclosure as a fail-safe for when other systems are inadequate. In reference to the unauthorised disclosure of Australian Signals Directorate (ASD) material, despite the internal processes for addressing complaints, Mr Mark Maley from the ABC indicated that those complaints processes would not be effective all of the time:

But the more general point which you're getting at is that of course it's a good thing that there are systems. I think it's probably fair to say there wouldn't be these comprehensive systems in the public sector if it hadn't been for media

¹⁷² Ms Rebecca Skinner, Associate Secretary, Department of Defence, *Committee Hansard*, Canberra, 20 September 2019, p. 47.

¹⁷³ Australian Lawyers Alliance, *Submission 5*, p. 8; Dr Keiran Hardy and Professor George Williams, *Submission 11*, p. [10]; Alliance for Journalists' Freedom, *Submission 13.1*, p. 7; Australia's Right to Know, *Submission 23*, pp. 6-7; Human Rights Law Centre, *Submission 25*, pp. 31-33; Associate Professor Johan Lindberg and Dr Denis Muller, *Submission 29*, pp. 16-18; Australian Broadcasting Corporation, *Submission 38*, p. 7.

¹⁷⁴ Applicant ACD13/2019 v Stefanic [2019] FCA 548 at [17].

pressure and media exposures over the years. They are a response, to a large degree, to the media revealing that adequate systems of that sort weren't in place. So we're all in favour of good systems that protect internal whistleblowers, but, to be honest, the media is ultimately about dysfunction, when things don't work. Those systems will not work in all cases, and there are examples within the Department of Defence, for instance, where those sorts of processes haven't worked and people have complained to the media to good effect. That's the point of free media—we are here when the other systems fail to work. We are the ultimate backstop. Without being too pompous about it, we represent the population outside of government and parliament. That's who we represent. We represent the audience and the ordinary people when those systems fail them. It is great to hear that the Department of Defence has set up comprehensive and effective systems, but it's naive to think they'll work in 100 per cent of cases.¹⁷⁵

- 3.245 The concept of whistleblowers and their protection from reprisal or prosecution outside of government were raised in general to the Committee, especially in relation to the role that corporate whistleblowers may have played in public interest reporting. Adele Ferguson outlined that when whistleblowers (most non-government) approach the media they can suffer significant consequences:

Most whistleblowers I have dealt with have made huge sacrifices. CBA whistleblower Jeff Morris has not been able to get a job. His marriage broke down, he suffered a breakdown and received death threats from a co-worker. CommInsure whistleblower Dr Ben Koh had to leave the industry and battled the bank in legal action before settling. ATO whistleblower Richard Boyle is facing 66 charges that, if found guilty, total 161 years of jail.¹⁷⁶

- 3.246 Other submitters also noted the potentially dire personal consequences that whistleblowers have historically faced.¹⁷⁷

¹⁷⁵ Mr Mark Maley, Manager Editorial Policies, ABC News, ABC, *Committee Hansard*, Canberra, 19 September 2019, p. 65.

¹⁷⁶ The Walkley Foundation, *Submission 12*, pp. 4–5.

¹⁷⁷ Al McKay, *Submission 1*, p. 1; Australian Lawyers Alliance, *Submission 5*, p. 8; Alliance for Journalists' Freedom, *Submission 13*, pp. 5–6; Australia's Right to Know, *Submission 23*, pp. 6–7; Human Rights Law Centre, *Submission 25*, pp. 2–3; Stay Human Project Adelaide, *Submission 27*, pp. 2–3; Associate Professor Johan Lindberg and Dr Denis Muller, *Submission 29*, pp. 17–18; Australian Broadcasting Corporation, *Submission 38*, p. 7.

The Review of the Public Interest Disclosure Act 2013

3.247 *The Review of the Public Interest Disclosure Act 2013*, undertaken by Philip Moss AM (Moss Review) on the second anniversary of its commencement, considered the operation of the PID Act and current PID regime. The Moss Review made 33 recommendations that were intended to encourage and instil a pro-disclosure culture. The review concluded that:

When disclosures are made, a strong capacity for investigation is needed. The proposed additional investigative agencies will use their specialist expertise and suite of powers to scrutinise issues within their remit based on PID information, and to support better practice by those agencies. Focussing away from personal employment-related grievances towards serious wrongdoing will help to restore the reputation of the PID Act in the Commonwealth public sector and encourage agencies to regard the PID Act framework in the integrity and anti-corruption context. Simpler legislative procedures, coupled with scrutiny by the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, and the proposed additional investigative agencies, will improve the PID Act framework and assist the Commonwealth public sector to achieve the purposes of the legislation.¹⁷⁸

3.248 The focus on stricter oversight and simplified legislation, as well as balancing transparency, confidentiality and procedural fairness to help to achieve an equitable upgrade to the PID scheme was supported by some submitters.¹⁷⁹

3.249 As part of the consideration of stronger oversight, the review recommended (at recommendations 3 and 4) that:

- ...the PID Act be amended to require a Principal Officer to provide the Commonwealth Ombudsman or the IGIS with a copy of the investigation report within a reasonable period of time; and
- the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.¹⁸⁰

3.250 While noting its general support for the PID Act, the Attorney-General's Department did note that the government is currently considering the Moss Review's recommendations and did note that there are opportunities to improve the current regime:

¹⁷⁸ Moss Review, p. 69.

¹⁷⁹ Australia's Right to Know, *Submission 23*, p. 6; Human Rights Law Centre, *Submission 25*, p. 32.

¹⁸⁰ Moss Review, p. 29.

While the broad policy settings of the Public Interest Disclosure Act are appropriate, there are opportunities to strengthen its practical operation and clarity. The independent 'Review of the Public Interest Disclosure Act 2013' undertaken by Mr Philip Moss AM (Moss Review) in 2016 made 33 recommendations to improve the Public Interest Disclosure Act but made no recommendation relating to the establishment of a Whistleblower Protection Authority. The Government is currently considering the recommendations made by the Moss Review.¹⁸¹

Committee Comment

- 3.251 The Committee notes the important role a robust whistleblowing regime has in ensuring the Commonwealth officials have an avenue available to expose wrongdoing in a form that does not jeopardise effective government, or Australia's national security interests.
- 3.252 The Committee supports the principles behind the PID Act and also the improvements identified in the Moss Review to make the scheme more sustainable and transparent. A clear and effective PID scheme will build trust in a government whistleblower's ability utilise the scheme and receive its protections.
- 3.253 The Committee notes that no official Government response to the Moss Review has been tabled. The concession by the Attorney-General's Department that the Government is still considering the recommendations of the review is assuring that the recommendations made have not been dismissed, however the Committee believes that a public response is warranted, given it has been more than three years since the report was handed down.
- 3.254 As part of any response to the Moss Review, the Committee believes that the Government should focus on a number of key issues, either raised in the original review report or that have been highlighted by submitters to this inquiry:
- Amending the PID Act to make it easier to understand for both disclosers and agencies;
 - Simplifying the public interest test in the PID Act;
 - Strengthening the reprisal protection provisions in the PID Act; and
 - Improving alignment between public and private sector whistleblower regimes.

¹⁸¹ Attorney-General's Department, *Supplementary Submission 32.4*, p. 12.

- 3.255 The Committee also notes that the Senate Environment and Communications References Committee's press freedom inquiry has an express term of reference into 'the whistleblower protection regime and protections for public sector employees'.¹⁸²
- 3.256 It is the Committee's view that a formal response to the Moss Review, incorporating the improvements above, is warranted as a matter of urgency, preferably before the completion of the inquiry into press freedom that is currently being undertaken by the Senate Environment and Communications References Committee. That committee's report, at the time of this report's writing, is due to report by the second sitting Wednesday of 2021.

Recommendation 9

- 3.257 The Committee recommends that the Government formally responds to the recommendations of the *Review of the Public Interest Disclosure Act 2013: An independent statutory review conducted by Mr Philip Moss AM* before the completion of the Senate Environment and Communications References Committee's inquiry into press freedom.**

The response should include consideration of:

- **Amending the *Public Interest Disclosure Act 2013* (PID Act) to make it easier to understand for both disclosers and agencies;**
- **Simplifying the public interest test in the PID Act;**
- **Strengthening the reprisal protection provisions in the PID Act; and**
- **Improving alignment between public and private sector whistleblower regimes.**

- 3.258 The Committee recognises that the PID scheme is intentionally limited to instances of legitimate wrongdoing, and recognises that disagreement over policy decisions would not meet the objectives of the PID Act, nor should any consideration be given to affording the scheme's protections to an

¹⁸² Senate Environment and Communications References Committee, *Press Freedom, Terms of Reference*,

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Terms_of_Reference, accessed 30 October 2019.

individual that wishes to make a disclosure on the grounds of a personal rejection of proposed or existing policy proposals, or for the purposes of concealing misconduct by the discloser.

- 3.259 Given the strict process that applies to national security classified information, the Committee considers that there are opportunities to improve the timeliness and transparency of reports of disclosable conduct.
- 3.260 The Committee notes that intelligence agencies are currently required to report to the IGIS within 14 days regarding the receipt of a PID. The Committee considers that there would be benefit in intelligence agencies reporting each PID received prior to the determination of tendency (decision to refer investigation of disclosure within the current 14 day requirement) towards disclosable conduct.
- 3.261 As external disclosure provisions do not exist for intelligence-related disclosures, intelligence agencies should be required to consult with the IGIS within the 90-day investigation window to discuss the investigation outcome and whether a just and timely outcome is likely to be achieved. Ongoing consultation should occur with the IGIS should the circumstances warrant an extension to the investigation timeframe.
- 3.262 Where a public official indicates that their intelligence-related disclosure is urgent, the relevant agency should engage with the IGIS within 24-hours to ensure that the matter is treated with the appropriate level of urgency.

Recommendation 10

3.263 The Committee recommends that the *Public Interest Disclosure Act 2013* be amended to require the following occur when a Public Interest Disclosure is made by an official connected to an intelligence agency regarding the actions of that agency:

- **the originating agency report a Public Interest Disclosure to the Inspector General of Intelligence and Security within 24 hours if it is indicated as urgent by the discloser, or as soon as possible after the disclosure is made, but within the current 14 day required timeframe; and**
- **the originating agency maintain contact and notification with the Inspector General of Intelligence and Security during the 90 day investigation window to outline investigation progress and potential outcome timelines, including possible extensions.**

3.264 Continued public confidence in the proper operation of government departments and agencies requires appropriate openness and transparency. The Committee considers that more frequent reporting on PID-related issues could assist in building confidence in this area.

3.265 To this end, the Committee recommends that the Australian Government provide for a mechanism for aggregated statistics related to PIDs received by all agencies to be reported to the Parliament every six months. Such statistics should outline the number of PIDS received, numbers allocated for investigation, as well as the time taken to investigate and determine the investigation of the outcome. Such reporting will supplement the statistical reporting currently undertaken by the Office of the Commonwealth Ombudsman and reported in its Annual Report.

3.266 As the Attorney-General's Department has policy responsibility for the PID scheme, the Committee believes that the Attorney-General is best placed to provide these reports to the Parliament.

Recommendation 11

- 3.267 The Committee recommends that the Australian Government provide for the mandatory reporting of aggregated statistics, related to numbers and timeframes of all Public Interest Disclosures, to be made to the Parliament every six months by the Attorney-General.**
- 3.268 The Committee also welcomes the Attorney-General's Department's advice that the recommendations of the Moss Review are under consideration and considers that the implementation of the reforms recommendation in the Review will go some way to improving the public's confidence in the PID process.

Classification of documents

- 3.269 Central to the events that led to the referral of this inquiry, and the nature of the offences being considered related to unauthorised disclosure of classified material, is the assumption that the government appropriately classifies documents or information according to the risk posed if that information were to be disclosed publicly.
- 3.270 The classification of information is controlled by the originator of information and must comply with the core requirement for sensitive and classified information under the Protective Security Policy Framework (PSPF), as well as the eight supporting requirements for identifying, assessing and controlling that information.¹⁸³
- 3.271 The consideration of which level to classify information must 'assess the value, importance or sensitivity of official information by considering the potential damage to the national interest, organisations or individuals, that would arise if the information's confidentiality was compromised'.¹⁸⁴ This assessment is expected to then set the classification at the lowest reasonable level, in accordance with the table below.

¹⁸³ Protective Security Policy Framework, 8 *Sensitive and classified information*, <https://www.protectivesecurity.gov.au/information/sensitive-classified-information/Pages/default.aspx>, accessed 22 October 2019.

¹⁸⁴ Protective Security Policy Framework, 8 *Sensitive and classified information*, <https://www.protectivesecurity.gov.au/information/sensitive-classified-information/Pages/default.aspx>, accessed 22 October 2019.

Table 3.1 Protective Security Policy Framework - classification assessment matrix

Protective marking	Business impact level	Compromise of information confidentiality would be expected to cause:
UNOFFICIAL	No business impact	Not applicable This information does not form part of official duty
OFFICIAL	1 Low business impact	Not applicable This is the majority of routine information created or processed by the public sector
OFFICIAL: Sensitive	2 Low to medium business impact	Limited damage to an individual, organisation or government generally if compromised
PROTECTED	3 High business impact	Damage to the national interest, organisations or individuals
SECRET	4 Extreme business impact	Serious damage to the national interest, organisations or individuals
TOP SECRET	5 Catastrophic business impact	Exceptionally grave damage to the national interest, organisations or individuals

Source: Protective Security Policy Framework, 8 - Sensitive and classified information

3.272 Mr Michael Pezzullo, Secretary of the Department of Home Affairs provided that in addition to these national security classifications, information can be further limited by attaching a code word:

Information can be classified with its stem, if you like, classification: secret or top secret. It can have a code word attached to it, which I won't further describe, but it relates to particular types of information and particular

methodologies that have been used or particular categories of information that are otherwise especially protected.¹⁸⁵

Oversight and compliance mechanisms

3.273 Material with a national security classification can be generated by an expansive range of parties including Commonwealth entities subject to the *Public Governance, Performance and Accountability Act 2013*, as well as State and Territory authorities and non-Government organisations as required by deed or agreement.¹⁸⁶

3.274 In line with the PSPF, when a Commonwealth officer makes a determination of the harm that would be caused by the release of information and assigns a security classification, that classification – along with any limits on dissemination or code words – must appear on the document.

3.275 The Attorney-General's Department indicated that the appropriateness of the classification is only formally considered when a matter related to an unauthorised disclosure is heard in court:

It would not be appropriate for the validity of a security classification to be assessed and determined at the time a warrant application is made. The appropriateness of the security classification is itself an element of the general secrecy offences in the Criminal Code. It can be contested at a trial and, as an element of the offence, it is properly determined by a court at a trial rather than at the evidence gathering stage.¹⁸⁷

3.276 At present, the assessment on the harm of disclosure made by the Commonwealth officer on classified information is not formalised when a document is created or authorised for dissemination. Mr Pezzullo indicated that assigning a security classification requires experience but is largely instinctual for experienced staff members:

Once you're experienced – an analyst who's had two or three or four years experience, someone who's working in the intelligence community, someone who's working in one of my divisions – it becomes an almost intuitive or instinctive sense of: 'This is clearly going to be secret, so I'll use "secret"'. This is

¹⁸⁵ Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, Canberra, 14 August 2019, p. 21.

¹⁸⁶ Attorney-General's Department, 'Application of the Protective Security Policy Framework', <<https://www.protectivesecurity.gov.au/about/Pages/application-protective-security-policy-framework.aspx>> viewed on 25 November 2019.

¹⁸⁷ Attorney-General's Department, *Submission 32.2*, p. 1.

clearly going to be top secret. Why? Because, in the documents that I'm using, the highest classification is "top secret". It becomes an intuitive mastery of your subject field.¹⁸⁸

3.277 Mr Pezzullo also provided an example of a contested consultative process that may occur when assigning a classification:

In some cases an intelligence report might be written by an APS4 or APS5 officer. They will have a supervisor who will assist them, mentor them and guide them. There is no rank classification. I know for a fact that graduates, for instance, in our system can author documents. They will author a brief to me...and it is the document originator who says, 'This probably will involve briefing the secretary at the secret level; so I will pull down a template for secret and start populating the text'...The supervisor might say, 'You're right,' or 'We don't need to tell him all that; so we will knock it down to protected'.¹⁸⁹

3.278 The person responsible for generating documents with a national security classification retains responsibility for assigning and reviewing its classification,¹⁹⁰ in recognition of the consideration they have undertaken in assigning a classification. This was articulated by ONI in their response to a Question on Notice:

In all intelligence exchanges it is essential that the originator of the material is satisfied with how it is handled and disseminated. Only the originator can fully understand the sensitives around the sourcing of the material, and the potential for the sources, techniques and capabilities to be compromised by unauthorised disclosures.¹⁹¹

3.279 Ms Jacinta Carroll indicated that the existing classification of a document is a factor that must be considered when determining whether the document should remain at the classification or would be suitable for reclassification:

While the overall classification of a document or asset is determined through assessing the likely harm of releasing the information, additional factors that must be taken into consideration include classification and protective

¹⁸⁸ Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, 14 August 2019, p. 21.

¹⁸⁹ Mr Michael Pezzullo, Secretary, Department of Home Affairs, *Committee Hansard*, Canberra, 14 August 2019, p. 30.

¹⁹⁰ Attorney-General's Department, '8 Sensitive and classified information', *Protective Security Policy Framework*, <<https://www.protectivesecurity.gov.au/information/sensitive-classified-information/Pages/default.aspx>> viewed on 26 November 2019.

¹⁹¹ ONI, *Submission 35.1*, p. [1].

markings already assigned by originators of information included in the document.¹⁹²

3.280 The originator should undertake consideration in line with the processes set out in the relevant guiding document, cognisant of the objectives of classifying information and the intrinsic risks associated with over-classification:

Appropriately limiting the quantity, scope or timeframe of sensitive and security classified information:

- promotes an open and transparent democratic government
- provides for accountability in government policies and practices that may be subject to inappropriate or over-classification
- allows external oversight of government operations and programs
- promotes efficiency and economy in managing information across government.

Over-classification of information can result in:

- access to official information being unnecessarily limited or delayed
- onerous administration and procedural overheads that add to costs
- classifications being devalued or ignored by personnel and receiving parties.

It is not consistent with this policy to apply a security classification to information in order to:

- restrain competition
- hide violations of law, inefficiency, or administrative error to prevent embarrassment to an individual, organisation or entity
- prevent or delay the release of information that does not need protection.¹⁹³

3.281 Mr Dylan Welch of the ABC, submitted, as part of the Walkley Foundation's submission, that there is a perception that documents are overclassified in contravention of these principles:

I believe there is a very real concern that the government and its agencies may be seeking to undermine the role of public interest journalism for reasons that

¹⁹² Ms Jacinta Carroll, *Submission 24*, p. 7.

¹⁹³ Attorney-General's Department, '8 Sensitive and classified information', *Protective Security Policy Framework*, <https://www.protectivesecurity.gov.au/information/sensitive-classified-information/Pages/default.aspx>, accessed 26 November 2019.

relate only to embarrassment. It's hard to see how the Oakes/Clarke reports regarding incidents from five to ten years ago dealing with a war in which we are no longer involved truly undermine Australia's national security – it's my view that they instead are merely a source of keen embarrassment to the Government and Defence.¹⁹⁴

Review of classification application

3.282 Some submitters suggested that an audit or review into the appropriateness of assigning a national security classification is required.¹⁹⁵

3.283 The last audit into the application of national security classifications, as part of the then broader Protective Security Manual (PSM) implementation audit, was conducted by the Australian National Audit Office (ANAO) in 1999.¹⁹⁶ The audit discovered instances of incorrect classification of documents, and determined that the most common form of incorrect classification was over-classification.¹⁹⁷ The report also recommended that a formal staff training program be implemented to address the appropriate use of the classification system.¹⁹⁸

3.284 The 2019-2020 Audit Program for the ANAO flagged a potential audit of the implementation of the revised PSPF:

This audit would assess the effectiveness of the Attorney-General's Department (AGD) in promoting the revised Protective Security Policy Framework (PSPF) and the extent to which selected entities are meeting the framework's core requirements.¹⁹⁹

3.285 The Committee received evidence of training that occurs to inform staff of their rights and obligations under the PID scheme, but did not receive

¹⁹⁴ The Walkley Foundation, *Submission 12*, p. 11.

¹⁹⁵ Wikileaks and the Australian Assange Campaign, *Submission 7*; The Walkley Foundation, *Submission 12*; ARTK, *Submission 23*; ABC, *Submission 38*; Blueprint for Free Speech and Digital Rights Watch, *Submission 44*; Mr Michael Shoebridge, *Submission 54*.

¹⁹⁶ See Australian National Audit Office (ANAO), *Operation of the Classification System for Protecting Sensitive Information*, (Audit Report No. 7, 1999-2000)

¹⁹⁷ Australian National Audit Office (ANAO), *Operation of the Classification System for Protecting Sensitive Information*, (Audit Report No. 7, 1999-2000), p. 15.

¹⁹⁸ Australian National Audit Office (ANAO), *Operation of the Classification System for Protecting Sensitive Information*, (Audit Report No. 7, 1999-2000), p. 19.

¹⁹⁹ ANAO, 'Implementation of the revised Protective Security Policy Framework', <https://www.anao.gov.au/work/performance-audit/implementation-the-revised-protective-security-policy-framework>, accessed 25 November 2019.

evidence of training that occurs to appropriately apply a national security classification to a document.

- 3.286 In relation to the informal nature of assigning a national security classification, Mr Shoebridge expressed that requiring agencies to document the rationale behind assigning a national security classification could decrease the risk of over-classification.

I would say, having looked at [the classification matrix] before — back to this looking at how it's being applied — that there's just applying the matrix and saying, 'Yes, I assess there's a high level of harm; this would cause grave or catastrophic damage to Australian national security interest,' but the bit that needs to happen is what you are taught in debating: you can make an assertion there will be harm but you have to say why. So you have to give an example of why that would be the case.

... the person who's classifying it needs to bring their own reasoning to specifically why in that case the harm would be catastrophic.²⁰⁰

- 3.287 A process whereby the reasoning behind assigning a security classification could be documented and contestable would allow for improved judgment and appropriate oversight. The Inspector-General of Intelligence and Security could provide valuable oversight of compliance in this area:

A significant proportion of the resources of the Office are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action.²⁰¹

Committee Comment

- 3.288 The Committee recognises that the disclosure of classified information can significantly impact Australia's ability to protect its people, operations, capabilities and relationships with foreign partners.
- 3.289 Though the PSPF exists to control and limit the amount of information that should have a national security classification applied, it appears from the evidence received that there is a perception that information is classified when it would not prejudice Australia's national interests if released, or may

²⁰⁰ Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 13.

²⁰¹ Inspector-General of Intelligence and Security, *Submission 28*, p. 11.

be overclassified as to the real harm to Australia's interests that the information presents.

- 3.290 Therefore, the Committee welcomes the potential ANAO audit into the PSPF as a timely means to create a baseline for the approach by departments and agencies in assigning national security classifications, and recommends that the audit be adopted and prioritised. It is unclear at the time of this report whether the audit may occur due to the impacts of COVID-19, but the Committee would welcome its priority upon the resumption of normal audit activity or in future audit programs.
- 3.291 Additionally, in order to ensure public confidence – including the confidence of journalists and media organisations – in the process of assigning a national security classification, training programs should be compulsory for staff members.

Recommendation 12

- 3.292 The Committee recommends that the Auditor-General prioritise the adoption of the identified 2019-2020 potential audit *Implementation of the revised Protective Security Policy Framework*.**

Recommendation 13

- 3.293 The Committee recommends that training on the application of the Protective Security Policy Framework requirements for sensitive and classified information be made compulsory for all relevant Commonwealth officers and employees.**
- 3.294 The Committee notes that, unsurprisingly, intelligence agencies contribute a large proportion of information generated with a national security classification, and that the Inspector-General of Intelligence and Security is empowered to examine matters of legality and propriety in respect of each of the intelligence agencies that fall within its jurisdiction.
- 3.295 Therefore, the Committee believes the IGIS would be best placed to conduct a preliminary inquiry under the provisions of the *Inspector-General of Intelligence and Security Act 1986*, which may include examining samples of reports and classified documents and reviewing the classification procedures used by the intelligence agencies. The Committee anticipates that in the event that significant issues are identified, the IGIS would be open to commence a formal inquiry, or incorporate the review of the

appropriateness of the classification of materials into its regular inspection program.

- 3.296 The Committee recommends that the IGIS report to the Committee with the outcome of any preliminary investigation, as well as any subsequent inquiry or inspection process, and suggests that the IGIS should provide information to the public on the outcome of an inquiry insofar as the information would not impinge on legislated secrecy obligations.
- 3.297 In addition, the Committee expects any recommendations made to the intelligence agencies over which the IGIS has jurisdiction would be prioritised by the relevant agency, and progress on implementation of the recommendations would be reported to the Committee as part of its annual Administration and Expenditure Review obligations.

Recommendation 14

- 3.298 **The Committee recommends that the Inspector-General of Intelligence and Security (IGIS), conduct a preliminary inquiry into the application of national security classifications in intelligence agencies, where such an inquiry may include:**

- **Examination of a sample of classified material in relation to the appropriateness of the classification; and**
- **Reviewing the classification procedures of intelligence agencies.**

The IGIS should advise the Committee of the outcome of any preliminary inquiry into the application of national security classifications, and to the extent possible, provide information to the public on the outcome of an inquiry. Information made available to the public may include analysis of apparent trends or culture within intelligence agencies in relation to applying national security classifications, or commentary on statistical trends and outcomes, as appropriate.

Additionally, any recommendations made by the IGIS to alter or improve internal practices should be prioritised by the relevant agency and reported to the Committee as part of its annual Administration and Expenditure Review.

Source Protection

- 3.299 Submissions to the inquiry outlined that professional journalists in Australia abide by a code of ethics that requires them to protect confidential sources:

The protection of confidential sources is fundamental to Australian journalism. It is formulated in article 3 the MEAA (Media, Entertainment & Arts Alliance) Code of Ethics:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.²⁰²

- 3.300 Compliance with this code of ethics could result in increased interaction between intelligence agencies, law enforcement and media organisations, especially in relation to unauthorised disclosures of classified material. The Centre for Media Transition pointed to the potential of fines and jail sentences for journalists who refused to reveal sources:

As a result, from time to time, individual journalists have come into direct conflict with the courts when they have abided by the code of ethics in the face of a court order that they reveal their source. For example, in 1989 Tony Barrass, a journalist on The Sunday Times in Western Australia, was sentenced to seven days' jail by a Perth magistrate for refusing to reveal who had given him two tax files in a case against a tax clerk accused of leaking information. He served that time and was then fined \$10,000 for maintaining his refusal when the case reached the District Court. (The tax clerk was convicted even without Tony Barrass's evidence. His penalty: a fine of \$6,000).²⁰³

- 3.301 To address the expectation that exists for journalists to be able to protect confidential sources, the *Evidence Act 1995* (Cth) provides that a judge – upon hearing evidence – may grant a journalist's claim for privilege to protect a confidential source.²⁰⁴

- 3.302 This protection, along with relevant similar State and Territory statutes are known as 'shield laws'.

²⁰² Centre for Media Transition, *Submission 31*, p. 6.

²⁰³ Centre for Media Transition, *Submission 31*, p. 6.

²⁰⁴ *Evidence Act 1995*, s 126K.

3.303 At the Commonwealth and State and Territory levels, submitters have been critical that the claim for privilege is not absolute and that shield laws are inconsistent or not complete.²⁰⁵

3.304 Section 126K of the Commonwealth *Evidence Act 1995* provides:

(1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

(2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

(3) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.

3.305 The effect of subsections (2) and (3) allow for the protection of the claim of privilege to be cast aside if the contention that the public interest in the identification of the source outweighs their anonymity. This discretion of the court, and its flexibility, should be considered in light of the lack of a definition of 'public interest' in Commonwealth law.

3.306 Submissions also contend that the 2018 amendments to the TIA Act, and the introduction of JIW in 2015, erodes the limited protections in place for confidential sources:

While the intention of JIW Scheme may have been well-meaning, as it currently stands it does little to meaningfully deliver its stated aims. The JIW Scheme is poorly drafted, cloaked in secrecy and does nothing to address concerns relating to identification of journalists' sources. In our view the JIW Scheme and related legislation relating to access to journalists' records more broadly require fundamental reconsideration and immediate amendments.

²⁰⁵ Journalism Education and Research Association of Australia (JERAA), *Submission 6*, pp. 2-3; Alliance for Journalists' Freedom, *Submission 13*, p. [6]; Associate Professor Joseph M Fernandez, *Submission 19*, p. 1; Centre for Media Transition, *Submission 31*, p. 6.

The current investigations and associated AFP raids into reporting by News Corp's Annika Smethurst and the ABC have shone a spotlight on the erosion of fundamental press freedoms that is the cumulative effect of multiple pieces of legislation, including this one. It is critical that any law in this area is proportionate to the concerns the law is seeking to address.

In our view, the JIW Scheme and the Mandatory Data Retention regime do not pass this test.²⁰⁶

- 3.307 The Committee also received evidence that shield laws may not cover the full range of people involved in journalistic activities and who form relationships with confidential sources.²⁰⁷ The evolving nature of the media environment in Australia (as well as globally) challenges the static notion of who is a journalist, so any legal protection or privilege locked to a definition of who a journalist or media organisation is may not cover all parties that could be affected by a prosecution or offence.
- 3.308 The Centre for Media Transition also contended that defamation laws may have an impact on the operation of shield laws.²⁰⁸

Committee comment

- 3.309 The Committee notes with interest the relatively low concern expressed in principal submissions regarding shield laws and existing source protection provisions within Commonwealth and state and territory law. However, the concerns expressed to the Committee are valid, especially in relation to a journalist's ability to guarantee a source's anonymity in the instances of an unauthorised disclosure, and consideration is warranted.
- 3.310 In addition, the Committee notes concerns about journalistic source protection under the TIA Act, but considers that the recommendation earlier in this chapter to expand the PIA regime will go some way to ensure that the public interest in identifying confidential sources is evenly weighed against national security.
- 3.311 For immediate consideration though, the Committee is of the mind that harmonised shield laws to unify and clarify such laws could mitigate the chilling effect described by submitters to the inquiry.²⁰⁹

²⁰⁶ ARTK, *Submission 23*, p. 18.

²⁰⁷ JERAA, *Submission 6*, pp. 2–3.

²⁰⁸ Centre for Media Transition, *Submission 31*, p. 6.

²⁰⁹ See the discussion on the 'chilling effect' in Chapter 2 for further information.

- 3.312 Accordingly, the Committee is recommending that the National Cabinet, as the body identified to replace the Council of Australian Governments,²¹⁰ should investigate harmonisation of shield laws, with any relevant incorporation of expanded public interest considerations. Any such consideration should also take into account the concerns expressed by submitters regarding the full scope of what any such laws may consider as a journalist and a source in a shifting digital media environment.

Recommendation 15

- 3.313 The Committee recommends that the Australian Government promote consideration of harmonisation of State and Territory shield laws through National Cabinet, with relevant updates incorporated to expand public interest considerations, and to reflect the shifting digital media landscape.**

Defamation law and Freedom of Information

Defamation law in Australia

- 3.314 Some submitters to the inquiry raised the intersection of Australia's current defamation laws in terms regarding the restrictions on press freedom, or at least the willingness for the media to report on issues that may result in defamation proceedings.
- 3.315 While this issue does not fall within the Committee's terms of reference, it is an element of consideration in relation to the ability of the media to expose elements of society that may point to wrongdoing or even foreign interference.
- 3.316 In its consideration of this issue, the Council of Attorneys-General has noted that Australia's current regime of defamation laws has not adequately evolved with the rapid development of media communications over the last few decades:

Since the Model Defamation Provisions were developed, the manner in which information is published and transmitted has changed significantly, particularly with the exponential growth in reliance on digital publications and communications, interactive online forums and blogs. Information flows

²¹⁰ Department of the Prime Minister and Cabinet, *COAG becomes National Cabinet*, Media Release, <https://www.pmc.gov.au/news-centre/government/coag-becomes-national-cabinet> accessed 18 August 2020

are even less bound by territorial borders than they were when the Model Defamation Provisions were adopted.²¹¹

3.317 In its meeting on 27 July 2020, the Council of Attorneys-General approved amendments to the Model Defamation Provisions adopted in 2004 and the State and Territory legislation enacted to implement them (known as the National Uniform Defamation Law) which marked the conclusion of an 18-month process. The key changes agreed included:

- Introduction of a single publication rule in each jurisdiction's limitation laws.
- Introduction of a serious harm threshold for defamation claims, to be determined by the judicial officer as soon as practicable before the trial.
- Clarification of the concerns notice procedure and procedure for offers to make amends, including requiring that concerns notices must be served with sufficient time for a response to be provided before proceedings can be commenced.
- Introduction of a new public interest defence modelled on section 4 of the UK *Defamation Act 2013*.
- Clarification of the operation of the cap on non-economic damages.²¹²

3.318 Submitters also raised this concern, especially with regard to the new ubiquity of social media, a scenario that would have been unimaginable at the time the existing laws were conceived.²¹³

3.319 ARTK outlined its recommendations for defamation law reform that it has put to the Council. However, ARTK added that it has concerns regarding the ability for defamation proceedings to be commenced in the Federal Court, in order for the avoidance of a jury 'presumably...on the basis that plaintiffs perceive their prospects of success as being greater before a judge sitting alone'.²¹⁴ Currently juries are inconsistently required in defamation cases across Australian jurisdictions.

²¹¹ Council of Attorneys-General, *Review of Model Defamation Provisions Discussion Paper*, p. 10.

²¹² Council of Attorneys-General, *Communique*, 27 July 2020, <https://www.ag.gov.au/sites/default/files/2020-07/Council%20of%20Attorneys-General%20communique%C3%A9%20%E2%80%93%20July%202020.pdf> accessed 18 August 2020

²¹³ Australia's Right to Know, *Submission 23*, pp. 15-17; Dr Dennis Muller, *Submission 29.1*, pp. 1-3;

²¹⁴ Australia's Right to Know, *Submission 23*, p. 16.

- 3.320 The Committee also received a number of confidential submissions from journalists that provided insight into how the current defamation regime could have substantial legal and personal consequences for journalists, publishers and media organisations more generally.
- 3.321 Some of these examples were more general, others extended to the media's role in shedding light on potential foreign interference. The potential impact on the role that the media can play in exposing foreign interference is significant and was highlighted in these confidential submissions. If journalists are unwilling or unable to pursue leads relating to instances of foreign nationals seeking to influence national policy, commerce or discourse, then this impact was argued to be equal to the potential impacts of national security legislation.
- 3.322 In this area Mr Shoebridge noted that national security interests would be better served if 'truth based on reasonable evidence' operated as a complete, rather than partial, defence in defamation proceedings:

In particular, where the issues being discussed relate to national security or foreign interference, truth based on reasonable evidence should be a complete and not partial defence, and the public interest in having issues raised in association with named individuals should carry considerable weight in protecting public statements from defamation litigation by these individuals.

The threat to freedom of speech particularly in foreign interference areas from potential defamation litigation is high, and individual journalists and even larger media organisations can be dissuaded from producing well-evidenced investigative reporting that is in the public interest under the current laws.²¹⁵

- 3.323 In advising the outcome of the Model Defamation Provisions, the Council of Attorneys-General has advised that additional defamation law reform proposals related to online content and defamatory comments will be considered in the future.²¹⁶

²¹⁵ Michael Shoebridge, *Submission 54*, p. 9.

²¹⁶ Council of Attorneys-General, *Communique*, 27 July 2020, <https://www.ag.gov.au/sites/default/files/2020-07/Council%20of%20Attorneys-General%20communiqu%C3%A9%20%E2%80%93%20July%202020.pdf> accessed 18 August 2020

Committee comment

- 3.324 The Committee is conscious that inconsistency of defamation law and unknown potential defamation outcomes for reports regarding national security and foreign interference is of concern to the media. If the media is unable to pursue legitimate leads in the national interest due to the threat of defamation proceedings, the impact on civil society's ability to regulate its own activities is significantly hindered.
- 3.325 Noting the desirability identified by stakeholders for greater national consistency, the Committee notes the significant progress that the Council is making on these issues and is of the opinion that the outcomes from this process will adequately address these concerns.

Freedom of information

- 3.326 Under the current freedom of information (FOI) regime in Australia, section 11 of the *Freedom of Information Act 1982* (the FOI Act) gives members of the public a general right of access to documents of an agency or official documents of a Minister, provided that the documents are not exempt or conditionally exempt.
- 3.327 Subsection 11A(5) of the FOI Act provides that an agency or a minister is not required to provide access to a conditionally exempt document unless giving access to the document at that time would, on balance, be contrary to the public interest. Section 11B sets out factors that must, and must not be, be taken into account when deciding whether giving access to a conditionally exempt document would, on balance, be contrary to the public interest.²¹⁷
- 3.328 Statistics on requests received, response times, outcomes and charges notified and collected are provided to the Office of the Australian Information Commissioner, which publishes this information in its annual report.²¹⁸

²¹⁷ See Office of the Australian Information Commissioner, *Submission 50: Attachment A* for a detailed description of the operation of the provisions.

²¹⁸ For an example of an OAIC Annual Report see <https://oaic.gov.au/updates/news-and-media/privacy-complaints-foi-reviews-on-rise-in-2018-19/>

3.329 Several submitters raised issues regarding the current functioning of the FOI regime.²¹⁹ ARTK summarised these views, and urged the Government to undertake a comprehensive review of the FOI Act as a matter of urgency:

- Journalists continue to encounter barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making;
- Review processes are inadequate and alternative means of review at an early stage must be available (for example, Administrative Appeals Tribunal);
- Exemptions should not be expanded or 'reformulated' (eg, the provision of frank and fearless advice);
- The cost of applications is often a disincentive to seek information; and
- Processing time assessments and limits are tools to defeat FOI applications.²²⁰

3.330 The ABC characterised the combined impact of these factors as a 'culture of secrecy':

The Commonwealth Freedom of Information laws provide a right of access to documents held by Australian Government ministers and most agencies. However, government agencies are routinely criticised for side-stepping the FOI requirements by classifying documents as exempt and taking a "go-slow" approach to processing applications. Rather than a culture of transparency, we have a culture of secrecy in our government agencies.²²¹

3.331 Mr Shoebridge also suggested that FOI exemptions could be used through risk-adverse redaction of information that may otherwise be accessed publically:

As an example, the Australian Defence organisation has struck this balance differently at different times over its history. But since the *First principles review* in 2016, the organisation, in my view, has come to view disclosure of information about its operations, policies and projects as 'just creating risk', and so it is reluctant to release anything not required by law. A high-point example of this is a recent quarterly performance report of Defence's

²¹⁹ WikiLeaks and the Australian Assange Campaign, *Submission 7*, p. 13; Dr Keiran Hardy and Professor George Williams, *Submission 11*, pp. [3-5]; Australia's Right to Know, *Submission 23*, pp. 8-9; The Stay Human Project, *Submission 27*, p. 2; Associate Professor Johan Lidberg and Dr Denis Muller, *Submission 29*, pp. 3-4; Chris Ambrey, *Submission 49*, p. 5.

²²⁰ ARTK, *Submission 23*, p. 8.

²²¹ Australian Broadcasting Corporation, *Submission 38*, p. 9.

acquisition organisation. It is about 70 pages long, and it uses so much black ink to censor the text that a toner warning and a reorder form should accompany the link to the document. Much of the inked-out material on project implementation, challenges and issues would be provided publicly in answers by Defence officials to senators' questions at any estimates committee hearing. But it seems none of this can be provided to the public through an FOI process, which is an odd and telling indicator of the risk-averse mindset now governing Defence's public engagement.²²²

- 3.332 However, the Department of Home Affairs noted that any reduction of the FOI exemptions provided to Government departments could have unintended consequences that would not be in the public interest:

Any proposal to limit the scope of the Freedom of Information exemptions to only information which would substantially harm the public if disclosed may cause potential harm and risk to information affecting other interests such as documents subject to legal professional privilege, documents disclosing trade secrets or commercially valuable information and documents containing material obtained in confidence.²²³

- 3.333 The Office of the Australian Information Commissioner (OAIC) provided information to the Committee on the number of FOI requests received in recent years, with a total of 38 879 received in 2018-19. The OAIC also submitted information on the timeframes for decisions, with around 83 per cent determined within the statutory time.²²⁴

Committee comment

- 3.334 The Committee notes the concerns raised by submitters regarding FOI requests and the challenges faced by Government departments in balancing transparency with factors that would make the release of information contrary to the public interest.
- 3.335 In light of these considerations, the Committee considers there would be a tangible benefit in the prioritisation of training and promotion of a uniform Freedom of Information culture across departments, to ensure the application of the processing requirements and exemptions allowed under the FOI Act are consistently applied.

²²² Mr Michael Shoebridge, Director, Defence, Strategy and National Security, Australian Strategic Policy Institute, *Committee Hansard*, Canberra, 19 September 2019, p. 12.

²²³ Department of Home Affairs, *Submission* 32.3, p. [15].

²²⁴ Office of the Australian Information Commissioner, *Submission* 50, pp. 2-3.

Recommendation 16

- 3.336** The Committee recommends that the Australian Government review and prioritise the promotion and training of a uniform Freedom of Information culture across departments, to ensure that application of the processing requirements and exemptions allowed under the *Freedom of Information Act 1982* are consistently applied.

Mr Andrew Hastie MP
Chair

21 August 2020

A. List of submissions and exhibits

Submissions

- 1 GPCAPT Al McKay (retired)
- 2 Mr Peter Jardine
- 3 Mr Robert Kennedy
- 4 Mr John Pass
- 5 Australian Lawyers Alliance
 - 5.1 Supplementary to submission 5
- 6 Journalism Education and Research Association of Australia
- 7 WikiLeaks and Australian Assange Campaign
- 8 Australian Human Rights Commission
- 9 Professor Rory Medcalf and Ms Katherine Mansted
- 10 Institute of Public Affairs
 - Attachment 1
- 11 Dr Keiran Hardy and Professor George Williams
 - 11.1 Supplementary to submission 11
- 12 The Walkley Foundation
- 13 Alliance for Journalists' Freedom
 - 13.1 Supplementary to submission 13
 - Attachment 1
 - 13.2 Supplementary to Submission 13
- 14 Commonwealth Ombudsman

- 14.1 Supplementary to submission 14
- 15 GetUp Limited
- 16 The Australian Signals Directorate
 - 16.1 Supplementary to submission 16
- 17 Dr Rebecca Ananian-Welsh, Ms Rose Cronin, Professor Kath Gelber,
Professor Peter Greste and Mr Richard Murray
- 18 Associate Professor Gordon Gates
- 19 Associate Professor Joseph M Fernandez
- 20 Association for International Broadcasting
- 21 Australian Federal Police
 - 21.1 Supplementary to submission 21
 - 21.2 Supplementary to submission 21
 - 21.3 Supplementary to submission 21
 - 21.4 Supplementary to submission 21
 - 21.5 Supplementary to submission 21
 - 21.6 Supplementary to submission 21
 - 21.7 Supplementary to submission 21
- 22 Australian Security Intelligence Organisation
 - 22.1 Supplementary to submission 22
 - 22.2 Supplementary to submission 22
 - 22.3 Supplementary to submission 22
 - 22.4 Supplementary to submission 22
- 23 Australia's Right to Know
 - 23.1 Supplementary to submission 23
 - 23.2 Supplementary to submission 23
 - 23.3 Supplementary to submission 23
 - 23.4 Supplementary to submission 23
- 24 Ms Jacinta Carroll
- 25 Human Rights Law Centre
 - 25.1 Supplementary to submission 25
- 26 Ms Elicia O'Reilly
- 27 The Stay Human Project - Adelaide
- 28 Inspector-General of Intelligence and Security

- 28.1 Supplementary to submission 28
- 29 Associate Professor Johan Lidberg and Dr Denis Muller
 - 29.1 Supplementary to submission 29
- 30 Human Rights Watch
- 31 Centre for Media Transition
 - 31.1 Supplementary to submission 31
- 32 Department of Home Affairs and Attorney-General's Department
 - 32.1 Supplementary to submission 32
 - 32.2 Supplementary to submission 32
 - 32.3 Supplementary to submission 32
 - 32.4 Supplementary to submission 32
 - 32.5 Supplementary to submission 32
 - 32.6 Supplementary to submission 32
 - 32.7 Supplementary to submission 32
 - 32.8 Supplementary to submission 32
 - 32.9 Supplementary to submission 32
 - 32.10 Supplementary to submission 32
- 33 Whistleblowers Australia
- 34 Mr Jordan Brown
- 35 Office of National Intelligence
 - 35.1 Supplementary to submission 35
- 36 Electronic Frontiers Australia
- 37 Australian Press Council
- 38 Australian Broadcasting Corporation
 - 38.1 Supplementary to submission 38
- 39 Public Interest Journalism Foundation
- 40 Law Council of Australia
 - 40.1 Supplementary to submission 40
 - 40.2 Supplementary to submission 40
 - 40.3 Supplementary to submission 40
- 41 ABC Alumni
- 42 Mr Paul Myers

- 43 Mr Ross Drynan
- 44 Blueprint for Free Speech and Digital Rights Watch
- 45 Mr John Wilson
 - Attachment 1
 - Attachment 2
- 46 Mr Bruce White
- 47 Ms Lynley Coen
- 48 Media Entertainment & Arts Alliance
- 49 Dr Christopher Ambrey
- 50 Office of the Australian Information Commissioner
 - 50.1 Supplementary to submission 50
- 51 Supporters of Australian Broadcasting in Asia and the Pacific
- 52 Support Assange & WikiLeaks Coalition
- 53 *Confidential*
- 54 Mr Michael Shoebridge, Director Defence, Strategy and National Security,
Australian Strategic Policy Institute
- 55 *Confidential*
- 56 *Confidential*
- 57 *Confidential*
- 58 Mr Patrick George, Kennedys (Australasia) Pty Ltd
- 59 Mr Tom Gordon
- 60 Mr William Peter Tait
- 61 Department of Defence
 - Attachment 1

Exhibit

- 1 Correspondence from Attorney-General's Department to Nine Network,
dated May 2019

B. Witnesses appearing at public hearings

Tuesday, 13 August 2019

Castlereagh Boutique Hotel and NSW Masonic Club

Conference Centre Level 3

169 Castlereagh Street

Sydney

Australia's Right to Know coalition of media companies

- Mr David Anderson, Managing Director, Australian Broadcasting Corporation
- Mr Hugh Marks, Chief Executive Officer, Nine Entertainment
- Ms Clare Gill, Director of Regulatory Affairs and Spectrum Strategy, Nine Entertainment
- Mr James Chessell, Group Executive Editor, Australian Metro Publishing
- Ms Bridget Fair, Chief Executive Officer, Free TV Australia
- Ms Sarah Waladan, Head of Legal and Regulatory Affairs, FreeTV Australia
- Mr Michael Miller, Executive Chairman, News Corp Australasia
- Mr Campbell Reid, Group Director, Corporate Affairs, Policy and Government Relations, News Corp Australia
- Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia
- Mr Paul Murphy, Chief Executive, Media, Entertainment & Arts Alliance

- Ms Sarah Kruger, Head of Legal and Regulatory Affairs, Commercial Radio Australia

Australian Broadcasting Corporation

- Mr Gaven Morris, Director News, Analysis and Investigations
- Ms Connie Carnabuci, General Counsel
- Mr David Anderson, Managing Director

Media, Entertainment and Arts Alliance

- Mr Paul Murphy, Chief Executive
- Mr Matthew Chesher, Director, Legal and Policy

Centre for Media Transition, University of Technology Sydney

- Mr Richard Coleman, *private capacity*
- Professor Derek Wilding, Co-Director
- Professor Peter Fray, Co-Director

Alliance for Journalists' Freedom

- Mr Peter Wilkinson, Chair
- Mr Peter Greste, Director and Spokesperson
- Mr Chris Flynn, Director

Journalism Education and Research Association of Australia

- Dr Alexandra Wake, President
- Dr Andrew Dodd, Director, Centre for Advancing Journalism, University of Melbourne

Office of the Australian Information Commissioner

- Ms Angelene Falk, Australian Information Commissioner and Privacy Commissioner
- Ms Elizabeth Hampton, Deputy Commissioner
- Ms Rocelle Ago, Principal Director, Freedom of Information

Human Rights Law Centre

- Ms Alice Drury, Lawyer
- Ms Emily Howie, Legal Director

Dr Keiran Hardy and Professor George John Williams, Private capacity

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner

- Mr Matthew Nelson, Policy and Research Officer, Human Rights & Scrutiny

Wednesday, 14 August 2019

Committee Room 2R1

Parliament House

Canberra

Australian Federal Police

- Mr Andrew Colvin, Commissioner
- Mr Neil Gaughan, Deputy Commissioner Operations
- Mr Stefan Jerga, Chief Counsel

Department of Home Affairs

- Mr Michael Pezzullo, Secretary
- Mr Marc Ablong, Deputy Secretary, Policy Group
- Mr Hamish Hansford, First Assistant Secretary, National Security & Law Enforcement Policy Division

Attorney-Generals' Department

- Ms Sarah Chidgey, Deputy Secretary, Integrity and International Group
- Mr Andrew Walter, First Assistant Secretary, Integrity and Security Division

Australian Security Intelligence Organisation

- Ms Heather Cook, Deputy Director-General, Operations & Assessments Group
- Ms Wendy Southern, Deputy Director-General, Strategic Enterprise Management Group

Office of the Inspector-General of Intelligence and Security

- The Hon. Margaret Stone, AO, FAAL, Inspector-General of Intelligence and Security
- Mr Stephen McFarlane, Assistant Inspector-General

Office of the Commonwealth Ombudsman

- Mr Michael Manthorpe, Commonwealth Ombudsman
- Ms Jaala Hinchcliffe, Deputy Ombudsman

- Ms Emma Cotterill, Acting Senior Assistant Ombudsman, Assurance Branch

Law Council of Australia

- Dr Natasha Molt, Director of Policy, Policy Division
- Mr Stephen Odgers, Member, National Criminal Law Committee
- Ms Pauline Wright, Treasurer

Thursday, 19 September 2019

Committee Room 2R1

Parliament House

Canberra

Professor Rory Medcalf, Ms Katherine Mansted and Ms Jacinta Carroll, Private capacity

Evidence from Ms Carroll was taken via teleconference

Australian Strategic Policy Institute

- Mr Michael Shoebridge, Director, Defence Strategy and National Security

Friday, 20 September 2019

Committee Room 2R1

Parliament House

Canberra

Australian Federal Police

- Mr Karl Kent, Acting Commissioner
- Mr Neil Gaughan, Deputy Commissioner Operations
- Mr Stefan Jerga, Acting Chief Counsel

Australian Lawyers Alliance

- Mr Greg Barns, National Spokesman

Department of Home Affairs

- Mr Michael Pezzullo, Secretary
- Mr Hamish Hansford, First Assistant Secretary, National Security and Law Enforcement Policy Division

- Mr Andrew Warnes, Assistant Secretary, National Security Policy Branch

Department of Defence and the Australian Signals Directorate

- Mr Greg Moriarty, Secretary
- Ms Rebecca Skinner, Associate Secretary
- LTGEN John Frewen, Acting Director-General
- Ms Kylie Scholten, First Assistant Secretary, Security & Vetting Service
- Mr Adrian D'Amico, Head of Defence Legal

Australia's Right to Know Coalition

- Mr Paul Murphy, Chief Executive, Media, Entertainment & Arts Alliance
- Mr Mark Willacy, Investigative Journalist, Australian Broadcasting Corporation
- Mr Mark Maley, Manager Editorial Policies, ABC News, Australian Broadcasting Corporation
- Ms Bridget Fair, Chief Executive Officer, Free TV Australia
- Mr Campbell Reid, Group Executive - Corporate Affairs, Policy and Government Relations, News Corp Australia
- Ms Clare Gill, Group Director, Regulatory Affairs & Spectrum Strategy, Nine Entertainment
- Mr Chris Janz, Managing Director, Publishing, Nine Entertainment

Law Council of Australia

- Mr Arthur Moses SC, President

Additional Comments

We wish to acknowledge the hard work of colleagues in negotiating what has been an unusual report for this committee.

While not dissenting from the recommendations in this report, we are providing these additional comments because we think the Public Interest Advocate (PIA) regime should operate in more limited circumstances than envisaged in chapter three of this report.

Before discussing the PIA we wanted to make some observations about issuing of warrants

General observations on issuing of warrants.

An issue of increasingly frequent controversy before this committee is the question of the appropriate issuing authority for warrants. There are a wide range of agencies and circumstances which seek warrants to search, seize, watch, listen, copy, intercept, access, detain or arrest.

There is a growing view in some circles that an increasing number of warrants should be issued by superior court judges. There is also some interest from academic, media and legal circles in the very different regime now in operation in Britain.

While not expressing a concluded view on this issue, given that this report endorses the issuing of warrants by superior court judges, we do not wish this to be taken as necessarily endorsing this growing trend to more warrants being issued by serving judicial officers rather than other actors.

We think it is important that government develop a principled basis for the choice of issuing authorities in different circumstances.

As the combined submission from the Department of Home Affairs and Attorney-General's Department noted "the requisite level of satisfaction that the issuing officer must reach to issue a search warrant does not vary or lessen simply because the officer holds a position other than that of a Judge."

That statement is true but the mere fact that so many submissions supported the issuing of warrants by judicial officers suggests that that in some circles there is a view that the way the powers are exercised by judges will be substantially different and will ultimately lead to fewer warrants being issued.

The issuance of warrants is an exercise of executive power not judicial power.

Judges who are engaged in issuing warrants do so in their personal capacity not as part of their judicial role.

The increasing judicialisation of the warrant process may have a range of consequences.

There may be a loss of knowledge and experience especially in lower courts and the AAT where experience in the application of specific criteria to comparative factual circumstances builds up such that court officers and tribunal members become experts. Culture, discernment, knowledge and tradition may be lost in the transfer.

The balance may shift away from agencies towards those who are the subject of warrants, thereby weakening our security.

If overtime all warrants were to be issued by superior court judges then this may have consequences for the administration of justice, judicial work load and the ultimate constitutionality of the *persona designata* doctrine.

On the other hand the warrant process may become more legalistic and less familiar but may engender more public confidence.

Issuing Warrants, the media and the PIA

This inquiry, correctly in our view, makes a concession to media organisations and journalists recommending that warrants sought by law enforcement agencies, issued in matters relating to journalists and media organisations, should be issued by superior court judges.

This is a very significant safeguard for journalists and media organisations.

However, given the experience, standing and seniority of superior court judges (who are proposed to deal with warrants under the *Crimes Act* and *Surveillance Devices Act* and relevant provision of the *Telecommunications (Interception and Access) Act*) augmenting such a process with the views of a second retired judicial

officer or senior barrister acting as PIA may not be necessary. It may amount to the over judicialisation of such a process.

The situation is different where the issuing authority is the Attorney-General.

In Chapter 4, Part 4-1, Division 4C of the *Telecommunications (Interception and Access) Act 1979* (TIA), the PIA plays a useful role in providing a submission to assist the Attorney-General in making a decision about whether to issue a Journalists Information Warrant (JIW). Just as the PIA assists the Attorney-General as issuing authority with JIW, so to the PIA can assist the Attorney-General as issuing authority in making a decision about whether to issue a warrant under the *Telecommunications (Interception and Access) Act 1979* (sections 9-10) and under the *Australian Security and Intelligence Organisation Act 1979* (sections 25, 25A, 26B and 27).

At present, there is potentially a major political sanction against an Attorney-General issuing a warrant under those provisions. That sanction is that any Attorney-General who issues such a warrant, if it is discovered, runs the risk that the media will apply an unprecedented level of criticism to them. The Attorney-General is also accountable to Parliament and risks parliamentary sanction.

Having a PIA produce a submission for the Attorney-General provides the public, the media and the Attorney-General with a level of comfort that matters have been properly considered before issuing a warrant involving journalists or media organisations.

Mr Julian Leeser MP

Mr Tim Wilson MP

Senator the Hon Eric Abetz

Additional Comments by Labor members

A robust, free press, with its capacity to fulfil its vital functions protected by law, makes our democracy stronger and so our nation more secure.

It is therefore deeply concerning that, as the Committee's report makes clear, the law in Australia does not adequately protect freedom of the press or the public's right to know.

Labor members believe that the recommendations in the Committee's report would, if implemented, result in meaningful improvements to the law of Australia, including improved legal protections for journalists who are doing their jobs.

However, Labor members also believe the recommendations in the report do not go far enough. For that reason, the Morrison Government should regard the Committee's recommendations as a bare minimum – a starting point – for reform.

Broader reforms to protect press freedom and the public's right to know are clearly needed, though Labor members recognise that reasonable minds may differ about precisely what those broader reforms should look like. To cite two examples canvassed in the Committee's report:

- 1 The Committee has not endorsed the proposal by (among others) Australia's Right to Know coalition to remove the evidential onus on journalist defendants in relation to a range of secrecy and unauthorised disclosure offences. Instead, the Committee has recommended that the Government consider whether defences for public interest journalism should be applied to other secrecy offences (Recommendation 7).

In our view, the proposal by Australia's Right to Know coalition has considerable merit. Far from being radical, we note that such a change to

the law would be consistent with the approach taken by the current government as recently as last year in the Criminal Code Amendment (Agriculture Protection) Bill 2019.

- 2 Labor members also believe that Recommendation 2 in the Committee's report – though generally very positive – could be improved in several respects. For example, we are not fully convinced that Recommendation 2 should be linked to specific offences (e.g. "unauthorised disclosure offences").

Looking beyond this inquiry, it is also important to recognise that the challenges to public interest journalism are much broader than those within the purview of this Committee.

This Committee is constituted under the Intelligence Services Act 2001, and accordingly its focus is national security, laws in relation to national security, and the agencies which constitute the "National Intelligence Community".

Labor members are conscious that the breadth of the issues raised in the submissions to, and the public discussion around, this inquiry extends well beyond that provided for in either the Intelligence Services Act or the terms of reference in the Attorney General's referral to this Committee.

Even before the Attorney-General's referral, Labor did not believe that this Committee was the best forum for conducting a comprehensive inquiry into freedom of the press and the public's right to know. While the Committee's report will make a valuable contribution to the public debate, and implementation of the Committee's recommendations will result in meaningful improvements to the law, Labor members remain of that view.

We would like to thank Liberal members of the Committee, and particularly the Chair, for the constructive way in which they have engaged with Labor members over the course of this inquiry.

Labor members would also like to take this opportunity to thank everyone who participated in this inquiry for their considered contributions.

Hon Anthony Byrne MP
Deputy Chair

Hon Mark Dreyfus QC MP

Senator Jenny McAllister

Senator the Hon Kristina Keneally