BEFORE THE ENVIRONMENT AND COMMUNICATION REFERENCES COMMITTEE

INQUIRY INTO PRESS FREEDOM

SUBMISSION ON BEHALF OF THE ASSOCIATION FOR INTERNATIONAL BROADCASTING (AIB)

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1. INTRODUCTION

1.1 The Association for International Broadcasting ('AIB') is grateful for the opportunity to contribute to this vitally important inquiry. This inquiry overlaps to a certain extent with the inquiry currently underway by the Parliamentary Joint Committee on Intelligence and Security ('PJCIS'), to which the Hon. Christian Porter MP, the Attorney-General, Minister for Industrial Relations and Leader of the House, made a referral pursuant to the *Intelligence Services Act 2001*. Although the two inquiries overlap to an extent, the Environment and Communications Reference Committee ('ECRC') inquiry has broader terms of reference which the AIB welcomes.

1.2 AIB considers it imperative that there is a root and branch review of press freedom in Australia, going beyond the PJCIS terms of reference. AIB urges the ECRC to consider the overlapping issues which both it and the PJCIS inquiry are considering within broader context, and to consider carefully suggestions from AIB and others for far-reaching, fundamental changes to Australia's national security, secrecy and whistleblower laws, and for the protection of fundamental rights at federal level.

Context and recent events

1.3 Both the ECRC and PJCIS inquiries are extremely timely, following the AFP raids on the home of News Corp Australia journalist Annika Smethurst and on the Australian Broadcasting Corporation ('ABC') in early June 2019 – raids which were the subject of widespread condemnation from media organisations, journalists and freedom of expression experts both within Australia and internationally, including many of AIB's members.

1.4 Alarmingly, it has emerged that Home Affairs Secretary Mike Pezzullo complimented the AFP for the raid on Ms Smethurst's home. Newly released documents, obtained under Freedom of Information ('FOI') by South Australian Senator Rex Patrick, reveal that in an email sent to staff on the evening of the raid Mr Gaughan said:

> *"Good work by all involved. I also received a call this evening from the Sec DHA [Mr Pezzullo] who is fully supportive of the actions of the AFP and ask [sic] me to pass on my thanks to the team involved."*[1]

1.5 AIB emphasises that the June 2019 raids were not isolated incidents. It is understood that a number of months previously, on 1 April 2019, the AFP sought fingerprints and palm prints from two senior ABC journalists who two years earlier had produced stories on the activities of Australian special forces soldiers in Afghanistan between 2009 and 2013, a matter of intense public interest.[2] It has also been reported by the *Sydney Morning*

[1] John Lyons, 'Home Affairs Secretary Mike Pezzullo complimented AFP for raid on home of journalist Annika Smethurst' *ABC News* (29 August 2019, available at <https://www.abc.net.au/news/2019-08-29/pezzullo-complimented-afp-on-journalist-raid/11460306?pfmredir=sm>.

[2] John Lyons, 'AFP raid on ABC reveals investigative journalism being put in same category as criminality' *ABC News* (15 July 2019), available at <https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>.

Herald that the AFP requested, and indeed obtained, from Qantas the travel details of one of these journalists. Securing fingerprints and flight details of investigative journalists in this way has understandably raised very grave concerns.

1.6 In January 2019, the Commonwealth Ombudsman published a report concerning its inspection of the AFP under the *Telecommunications (Interception and Access) Act 1979*[3] for compliance with the Journalist Information Warrant ('JIW') mechanism. The report described a breach of the TIA Act which involved access to a journalist's metadata for the purpose of identifying the journalist's source without a JIW.[4]

1.7 A wide range of legislative provisions have been passed in recent years which limit and, in some instances, have the potential to criminalise legitimate journalistic activity, and make it increasingly difficult for journalists to protect their sources – an essential component of press freedom under international law.

1.8 Tensions and concerns such as these are not unique to Australia. Historically, national security and counter-terrorism have frequently been cited by Governments – democratic and otherwise – to justify curtailment of the right to freedom of expression, and other rights such as the right to a fair trial. Careful scrutiny of the extent of the intrusion upon the rights of journalists, media organisations and the public, the justification for that intrusion, and its proportionality is essential. AIB is concerned that Australia, both in its legal framework and in how that legal framework is implemented in practice, fails to strike the right balance between national security and freedom of expression, or, as Mr. Porter MP puts it, "*between a free press and keeping Australians safe.*"[5]

1.9 This is, in any event, often a false dichotomy, where steps taken to undermine freedom of expression may in themselves undermine national security. International law provides that a free media is a safety valve for democracy, and a bulwark against authoritarianism, against tyranny, and against secret – as opposed to transparent – government. The media – both print and electronic, publicly-funded and commercial – has a vital role to play in supporting democracy, rule of law and civil society through the reporting of facts, investigating injustices, and uncovering abuses of power. It has an essential role in holding power to account and reporting events that are in the public interest. Without a strong and free media, abuses of power will remain concealed. AIB's position is that these are important protections for democracy and national security.

1.10 This submission will consider the following terms of reference:

[3] (Cth) (the 'TIA Act').
[4] Commonwealth Ombudsman, 'A report on the Commonwealth Ombudsman's inspection of the Australian Federal Police under the *Telecommunications (Interception and Access) Act 1979*, (January 2019), available at <http://www.ombudsman.gov.au/__data/assets/pdf_file/0034/96748/A-report-on-the-Commonwealth-Ombudsmans-inspection-of-the-Australian-Fe....pdf>.
[5] Letter from Hon Christian Porter MP, Attorney-General, to Chair, Parliamentary Joint Committee on Intelligence and Security, 4 July 2019 <https://www.aph.gov.au/DocumentStore.ashx?id=4ac549d5-117b-46bd-9a8f-011bffb3ddd4>.

(a) disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation;

(b) the whistleblower protection regime and protections for public sector employees; and

….

(f) any related matters.

1.11 In response to terms of reference (a) and (b), AIB's submission evaluates eight pieces of legislation (set out below) against international law standards and offers some comparative examples from other common law jurisdictions.[6] These laws concern:

a) disclosure offences;
b) search warrants and access to metadata; and,
c) whistleblower protection.

1.12 Under *'any related matters',* the AIB will consider:

a) the need for positive freedom of expression guarantees in Australia;
b) the appropriate definition of 'journalism' and 'journalist'; and,
c) the appropriate definition of 'national security'.

1.13 AIB's CEO, Simon Spanswick, is available to give oral evidence if required, and to make further written submissions addressing additional matters arising from other contributors.

The Association for International Broadcasting

1.14 The AIB is the trade association for international, national and regional broadcasters. The AIB was founded in 1993, and supports commercially and publicly-funded members located in countries throughout the world, from New Zealand through to the USA. The AIB Secretariat is located in the United Kingdom, with additional part-time staff based in Geneva and New Delhi. It is estimated that the audience reach of AIB members is around one billion.[7]

1.15 The AIB provides support in a number of ways including, but not limited to:

a) intelligence briefings that examine threats and opportunities that exist in media markets globally;

[6] Because of the piece-meal and knee-jerk passage of legislation that has dominated this area – including the passage of over 75 separate pieces of counter-terrorism legislation in Australia since 2001 – this submission does not cover the entire field.
[7] Combined audience figures for all AIB Members, including estimates where specific measurement is not undertaken.

b) specialised Working Groups that bring AIB members together to share knowledge and exchange best practice in cyber security, sustainability, media freedom and regulatory affairs;
c) advocacy on key issues of interest to Members;
d) promotional work; and,
e) conferences and events on specific subjects.

1.16 In addition, for the past 15 years, the AIB has run an international competition for factual productions across television, radio and online platforms. This annual contest has a global panel of judges and attracts entries from more than 40 countries. The competition enables the AIB to share best practice in factual programme-making amongst broadcasters and production companies globally, helping to increase capacity, particularly in least developed countries.

2. INTERNATIONAL CONCERNS WITH PRESS FREEDOM IN AUSTRALIA

Australia's influence within the Asia-Pacific region

2.1 The AIB submits that it is important that the Committee recalls Australia's important and influential position in the Asia-Pacific region. Australia is the leading democratic nation and has positioned itself over many decades as a role model for societies across the region who look to Australia for moral leadership. At a time when nations across the world are struggling to maintain liberal democratic ideals, Australia must demonstrate and promote its strong commitment to transparent government on the world stage, and the Asia-Pacific region in particular.

2.2 At the same time, other nations that do not share Australia's democratic ideals are seeking to expand their sphere of influence across the Asia-Pacific region through the use of economic and soft power tools. There is a significant danger that nations in the region that have not yet achieved democracy will look to Australian legislation to support their own restrictive regimes. In addition to violating international law freedom of expression guarantees, this could have the effect of slowing the growth of these nations, which in turn could cause challenges for Australia in maintaining the continued prosperity and safety of the region.

2.3 Australia must demonstrate that it respects and encourages media freedom and the ability of journalists to report on their government and its activities, without fear of sanction. The concerns raised above are not only a threat to human rights within Australia but also within the Asia-Pacific region, as Australia's lead may be followed by others. We are currently observing disturbing developments across the region, including in particular in Hong Kong and in West Papua. Australia's regional role is central to this inquiry.

2.4 This point was also made by the then UK Foreign Secretary's Special Envoy on Media Freedom, Amal Clooney. Speaking at the Global Conference on Media Freedom

organised jointly by the UK and Canadian governments, and attended by the Australian Foreign Minister Marise Payne in London on 10 and 11 July 2019, she said:

> *"We have to be vigilant and we also have to know that what happens in a country like Australia or the UK or the US will be looked at by every other leader in the world and potentially used as an excuse to clamp down even further on journalists."*[8]

International reaction to Australia's legislation of concern

2.5 At the time Australia's new security laws were announced in 2014, there was an overwhelmingly negative international reaction to the proposals. Organisations with responsibility for protecting freedom of expression objected to the draft legislation, highlighting the dangers that these potential restrictions pose for accurate, unbiased reporting of stories that were in the public interest in Australia.

2.6 Earlier this year, two United Nations experts expressed concern at Australia rushing through legislation with very serious ramifications for freedom of expression without adequate time for consideration. Professor David Kaye, the United Nations Special Rapporteur on freedom of opinion and expression, said:

> *"Australia has adopted a law that would penalize platforms and their executives for a failure to control what it calls "abhorrent violent material." The law is deeply problematic, as was the extraordinarily compressed timeframe for its adoption (basically two days). The Special Rapporteur on Counter-Terrorism and Human Rights, Professor Fionnuala Ni Aolain, and I had intended to provide comments to the Government as the legislation was being considered — but the Government acted faster than we could."*[9]

2.7 Although the statutory horse had by that time bolted, both Professor Kaye and Professor Ní Aolain published comments, raising serious concerns about Australia's approach, both substantively and procedurally.[10]

2.8 The BBC, the world's largest publicly-funded broadcaster and AIB member, said that it was *"deeply troubling"* for a raid to take place on the ABC and that the raid targeted an organisation *"doing its job of reporting in the public interest"*.[11]

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[8] Amal Clooney, (Speech, Global Conference on Media Freedom, 10-11 July 2019).
[9] Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, OL AUS 5/2019, (4 April 2019), available at <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24533>.
[10] Ibid.
[11] BBC News, 'BBC statement on Australian Broadcasting Corporation (ABC) police raid' (5 June 2019), available at <https://twitter.com/BBCNewsPR/status/1136217979757256705?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1136217979757256705&ref_url=https%3A%2F%2Fwww.bbc.co.uk%2Fnews%2Fworld-australia-48522729>.

2.9 Jennifer McGuire, Editor in Chief of Canada's public broadcaster CBC, said:

> *"CBC News and our colleagues at Radio-Canada are deeply troubled by the news this week that the Australian Federal Police conducted a high-profile raid in the newsroom at the headquarters of the Australian Broadcasting Corporation. A raid of this nature is highly unusual, and for this reason we felt we needed to express our concerns."*[12]

2.10 Radio New Zealand issued the following statement:

> *"RNZ wishes to express its deep concern at the Australian police raid on the ABC. We view its actions as an affront to the vital work being done by our public media counterparts at the ABC. At a time when media freedom is repeatedly under threat across the world, we are dismayed to see this being played out so close to home."*[13]

2.11 Noel Curran, Director General of the European Broadcasting Union, said:

> *"[w]e are extremely alarmed by the police raid on the premises of… ABC. This raises serious concerns about freedom of the press which should be inviolable in any democratic country. We need to ensure journalists can do their job without interference, protect their sources and continue to report in the public interest."*

2.12 Daniel Bastard, the head of Reporters Without Borders's Asia-Pacific desk, said: *"[p]ersecuting a media outlet in this way because of a report that was clearly in the public interest is intolerable."*[14]

2.13 The Media Entertainment and Arts Alliance ('MEAA') observed that *"in Australia, waves of new laws are passed in the name of 'national security' but are really designed to intimidate the media, hunt down whistleblowers, and lock-up information.*"[15]

2.14 The Alliance for Journalists' Freedom has recently published research demonstrating that Australian legislation *"is criminalising what used to be considered legitimate journalistic inquiry into the inner workings of government"* and that "*espionage and data retention laws are exposing whistleblowers to legal sanction at a time when they ought to be protected and honoured."*[16]

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[12] Jennifer McGuire and Luce Julien, 'Editors in Chief concerned by police raid on ABC' *CBC News* (5 June 2019), available at <https://www.cbc.ca/news/editorsblog/editors-in-chief-concerned-by-police-raid-on-abc-1.5163742>.
[13] RNZ, 'Police Raid on the ABC' (6 June 2019), available at <http://www.scoop.co.nz/stories/WO1906/S00037/police-raid-on-the-abc.htm>.
[14] Reporters Without Borders, 'Threat to reporters' source from second Australian police raid in 24 hours' (5 June 2019), available at < https://rsf.org/en/news/threat-reporters-sources-second-australian-police-raid-24-hours>.
[15] MEAA, 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 3.
[16] Alliance for Journalists' Freedom, White Paper, (14 May 2019). available at <https://www.journalistsfreedom.com/ajf-white-paper-plots-law-reform-pathway-for-press-freedom/>.

3. AUSTRALIAN LEGISLATION OF CONCERN

Absence of positive protection of freedom of expression in Australia

3.1 In addition to the eight pieces of legislation identified below, the AIB shares the concern expressed by many academics and media freedom organisations regarding the lack of positive protections for freedom of expression at a federal level in Australian law. There is no equivalent of the First Amendment in the US Constitution, or Article 10 of the European Convention on Human Rights ('ECHR') which is in turn enshrined in the domestic laws of Council of Europe countries (such as, in the UK, by the *Human Rights Act 1998*).

3.2 The Australian Constitution contains no specific protection for freedom of expression. The High Court of Australia has, however, found an implied guarantee of freedom of expression in relation to public and political affairs based on provisions in the Constitution creating a system of representative government (s 7 and s 24 of the Constitution each guarantee that Parliament be '*chosen by the people'*). The right to freedom of political communication, the High Court has determined, is to be implied into the Constitution because free communication on matters of government and politics is an indispensable part of the system of representative government.[17] The limitations of the implied right were highlighted in the recent decision of *Comcare v Banerji* [2019] HCA 23.

3.3 This could be corrected in many ways, including through the adoption of a bill of rights in the Constitution, federal legislation providing for human rights (such as the Human Rights Act in the UK), or a Media Freedom Act such as that proposed by the Alliance for Journalists' Freedom. The AIB does not in these short submissions address the detail of such potential mechanisms, but emphasises the important point of principle: there is a jurisprudential gap in Australian law which must be filled in order to provide meaningful and robust protection for journalists, media organisations, their sources and the wider public.

3.4 The AIB notes that much of the evidence and many of the questions raised in the PJCIS inquiry to date have concerned the issue of how to draft national security definitions, and what exceptions should be carved out for journalists. This approach exemplifies precisely why the absence of positive protection for freedom of expression in Australian federal law is so problematic. Under charters of rights, such as the ECHR or the Canadian Charter of Rights and Freedoms, presumptive weight is given to the right to freedom of expression, with exceptions to that right (including national security) then being narrowly defined.

[17] *Australian Capital Television Pty Ltd & New South Wales v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

3.5 In a human rights based analysis, based on positive human rights protection, presumptive weight is given to the right itself; national security is the exception (as are other potentially limiting factors, such as public safety or protection of the rights of others; see further paragraph 4.5 below). All exceptions must meet the key test of proportionality. National security is a legitimate aim which allows governments to interfere with rights, including the right to freedom of expression, but it must be necessary in a democratic society and proportionate to that legitimate aim – that is, it must be strictly necessary to achieve the national security aim. This is the appropriate approach and the approach mandated under international law. [18] The AIB urges the ECRC to make a recommendation that positive protection for freedom of expression is established at federal level in Australia, and to approach the specific issues identified in its terms of reference against that backdrop.

Australian Security Intelligence Organisation Act 1979 (Cth)

3.6 The *Australian Security Intelligence Organisation Act 1979* (Cth) (the 'ASIO Act') contains disclosure offences that have the potential to criminalise journalism.[19] Under s 35P, a penalty of five years' imprisonment applies where:

a) a person discloses any information relating to a special intelligence operation (SIO); and
b) the disclosure *"will endanger the health or safety of any person or prejudice the effective conduct' of a SIO"*;[20] and
c) the person is *reckless* as to whether the disclosure will cause such harm.[21]

3.7 The penalty increases to 10 years if the person intends or knows that such harm will result.[22]

3.8 The ASIO Act definition of national security includes *"communal"* and *"politically motivated"* violence.[23]

Defence Act 1903 (Cth)

3.9 The *Defence Act 1903* (Cth) creates an offence where a person unlawfully gives information as to defences (s 73A(1)) and where a person unlawfully obtains *"any naval, military or air force information"* (s. 73A(2)). The person may be punished with unlimited imprisonment, an unlimited fine or both.[24]

3.10 This section can be used to criminalise both the source of the information and journalistic activity. Indeed, it was relied on to support the search warrant issued against ABC

[18] See Part 4 below.
[19] ASIO Act, ss 35P, 34ZS.
[20] ASIO Act, s 35P(1).
[21] ASIO Act, s 35P(1B).
[22] Ibid.
[23] ASIO Act, s 4.
[24] *Defence Act 1903* (Cth), s 73A(2).

journalist Daniel Oakes in relation to the series of reports called the "Afghan Files" about the misconduct and unlawful activity of Australian special services in Afghanistan.[25] Legal action to challenge the issue and execution of the search warrant is ongoing.[26]

3.11 The alleged source of the material, David William McBride, had been charged under s 73A(1) of the *Defence Act 1903* (as well as for theft under s 131 of the *Criminal Code Act 1995* and unlawfully disclosing a Commonwealth document contrary to s 70(1) of the *Crimes Act 1914*). The search warrant was issued to search for evidence of the commission of the alleged offences by McBride, but also as to whether Oakes had – in the course of his journalistic work – committed the offence of unlawfully obtaining military information under s 73A(2) (and dishonestly received stolen property contrary to s 132.1, *Criminal Code Act 1995*).

Criminal Code Act 1995 (Cth)

3.12 The *Criminal Code Act 1995* (Cth) ('Criminal Code') creates a range of espionage offences that have the potential to criminalise journalism. A person faces 25 years' imprisonment if they:

a) *"deal"* with *"information"* that *"concerns Australia's national security"*; and,
b) are reckless as to whether they will prejudice national security as a result.[27]

3.13 The definition of *"dealing"* with information includes not only communication or publishing information but also receiving, possessing, copying or making a record of it.[28] *"Information"* is defined as *"information of any kind"* and includes opinions and reports of conversations.[29] 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.[30] *"National security"* includes *anything* relating to Australia's *"political, military or economic relations"* with other countries.[31] There is no defence.

3.14 In addition, two new secrecy offences are available under sections 121 and 122. Section 122 prohibits *"communication"* of or *"dealing with"* information that *"causes harm to Australia's best interests."*[32] This is defined to include matters such as interference with or prejudice to the *"prevention, detection, investigation, prosecution, punishment criminal offences"* and to the operation of the AFP.[33]

3.15 Another of the secrecy offences prohibits *"dealing with ... inherently harmful information",* defined as security classed information, as well as information obtained

[25] *Australian Broadcasting Corporation v Kane* [2019] FCA 1312, [18]. The full case file is accessible at <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files/abc-v-kane>.
[26] Ibid.
[27] Criminal Code, s 91.1(2).
[28] Criminal Code, s 90.1.
[29] Criminal Code, s 90.1(2).
[30] Criminal Code, s 91.2(2).
[31] Criminal Code, s 90.4(1)(e).
[32] Criminal Code s 122.2.
[33] Criminal Code, s 122.1(1)(a)-(g).

by or on behalf of intelligence agencies and information *"relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency"*.[34]

3.16 There is a defence to these offences for *"persons engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media"* and doing so *"with a reasonable belief' it was in the public interest."*[35] The statute does not define engagement *"in the business of reporting news"* or the scope of *"public interest"*.

Crimes Act 1914 (Cth)

3.17 *Crimes Act 1914 (Cth)* ('Crimes Act') provides for the issuance of search warrants following an *ex parte* application, if the issuing authority is satisfied on *"reasonable grounds"* that the premises contains or will contain evidential material.[36] This is essentially a purpose test. There is no public interest test and no safeguards in respect of journalists.

3.18 Section 79 of the Crimes Act (now repealed) prohibited communication of information that may prejudice security or defence. It continues to apply to disclosures that occurred before the section was repealed. The section did not require that the communication caused or was likely to cause harm to national security.[37] It is understood that the raids on the ABC headquarters and the home of Annika Smethurst were executed pursuant to search warrants issued under the Crimes Act and that there is a challenge to the constitutionality of the enabling legislative provisions.[38]

Public Interest Disclosure Act 2013 (Cth)

3.19 The *Public Interest Disclosure Act 2013* (Cth) ('PID Act') creates a whistleblower scheme for public employees. The scheme does not protect disclosures made in the public interest if the information contains *"intelligence information."*[39] *"Intelligence information"* includes *"sensitive law enforcement information."* This means the defence does not apply to the disclosure offence created by s 35P of the ASIO Act.

Telecommunications (Interception and Access) Act 1979 (Cth)

3.20 Under the TIA Act, communications service providers ('CSPs') must retain metadata for two years.[40] While *"metadata"* is not defined, the TIA Act requires CSPs to retain information including the time, date and location of communications passing over their

[34] Criminal Code, s 122.1(1).
[35] Criminal Code, s 122.5(6)
[36] Crimes Act, s 3E(1).
[37] Crimes Act, s 79.
[38] See, eg, *Australian Broadcasting Corporation v Martin Kane & Ors*, 'Applicant's Submissions for Case Management Hearing on 2 August 2019', 30 July 2019 [12].
[39] PID Act, s 26(c).
[40] TIA Act, ss 187A, 187C.

services.[41] It is accepted that this information can expose journalists' sources, including government officials and whistleblowers.[42]

3.21 The TIA Act contains the JIW scheme. Under the JIW scheme, a journalist's metadata may be accessed on application to an *"issuing authority"* – a judicial officer, a member of the Administrative Appeals Tribunal or a lawyer of five years' standing who has been appointed to the role.[43] ASIO, however, may apply directly to the Attorney-General for a JIW[44] and in some circumstances the Director-General of ASIO may issue a JIW directly.[45]

3.22 A JIW is subject to a purpose test and a public interest test. However, where ASIO is the applicant, only the public interest test applies.[46] A JIW can be sought by any organisation declared to be an enforcement agency[47] for any of the normal purposes for accessing metadata. These include to further ASIO's activities, enforce the criminal law, find a missing person, or enforce a law that imposes a pecuniary penalty or protects the public revenue[48] (the purpose test). Under the public interest test, the issuing authority must be satisfied that *"the public interest in issuing the warrant outweighs the public interest in protecting the journalist's sources"*.[49] The issuing authority considers, among other things, privacy interests and whether reasonable attempts have been made to obtain the information otherwise.[50]

3.23 Journalists and the public do not need to be notified of their existence and have no opportunity to contest the warrants. Anonymous 'public interest advocates', appointed by the Prime Minister, make confidential submissions to the issuing authority concerning the public interest test.[51] The public interest advocate represents a range of public interests, including national security. It does not represent the interests of the particular journalist or the media more broadly.

3.24 Further, it is an offence carrying a sentence of up to 2 years' imprisonment to reveal anything about the JIW regime, even in historic cases.[52]

3.25 To instigate the JIW process, the enforcement agency must *"know or reasonably believe"* that a particular person be *"a person who is working in a professional capacity as a journalist"* or an *"employer of such a person"*.[53]

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[41] TIA Act, s 187AA.
[42] Keiran Hardy and George Williams, 'Free Speech and Counter-Terrorism in Australia', in Ian Cram (ed) *Extremism, Free Speech and Counter-Terrorism Law and Policy: International and Comparative Perspectives* (Routledge, 2018).
[43] TIA Act, ss 5(1), 6DB-6DC.
[44] TIA Act, ss 180J-180L.
[45] TIA Act, s 180L(2)(b).
[46] TIA Act, s 180T(2)(a). See also, TIA Act ss 178-180(4).
[47] TIA Act, s 176A.
[48] TIA Act, ss 180L, 180T.
[49] TIA Act, ss 180L, 180T.
[50] TIA Act, s 180T(2)(b).
[51] TIA Act, s 180X.
[52] TIA, s 182A.
[53] TIA Act , s 180H.

Evidence Act 1995 (Cth)

3.26 The *Evidence Act 1995* (Cth) contains a limited journalistic privilege. To compel a journalist to reveal a source, a judge must find that the public interest in the disclosure outweighs the adverse consequences on the source and the public interest in maintaining confidentiality.[54] Relevantly:

a) *"Journalist"* is defined 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"*; and
b) *"News medium"* is defined as *"any medium for the dissemination to the public or a section of the public of news and observations on news"*.[55]

4. INTERNATIONAL STANDARDS

International Covenant on Civil and Political Rights

4.1 Australia is a party to the International Covenant on Civil and Political Rights ('ICCPR'), having ratified in 1980. Article 19, in relevant part, provides:

> *"(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals."*

4.2 The United Nations Human Rights Committee ('HRC') has emphasised that *"free, uncensored and unhindered press"* – that is, the ability of journalists and media organisations to report on matters of public interest without censorship or restraint – is essential for freedom of expression and is *"one of the cornerstones of a democratic society"*.[56] This is because a properly functioning democracy requires the free flow of information between citizens and their elected representatives.[57]

[54] *Evidence Act 1995* (Cth), s 126K.
[55] *Evidence Act 1995* (Cth), s 126J.
[56] UNHRC, General Comment 34, CCPR/C/GC/34 ('GC 34'), at paragraph 45.
[57] GC 34, at paragraphs 13 and 20.

4.3 The HRC has confirmed that nations *"should recognise and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources."*[58] In so doing, General Comment 34 made explicit the international law norm of journalistic privilege as an essential element of freedom of expression.[59] The HRC has since called for greater protection for journalists and their sources and decried the government practice of surveillance of journalists and interception of their communications.[60]

4.4 Importantly, the HRC has recognised that:

> *"Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere."*[61]

4.5 International human rights law establishes that any infringement with freedom of expression will only be lawful where the following tests are satisfied:[62] (a) the limitation is in accordance with law, (b) the limitation protects a legitimate interest, namely in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary, and (c) the limitation is necessary and proportionate in a democratic society.

4.6 Given the fundamental importance of free press to democracy, any measure that seeks to interfere with press freedom must be subject to a particularly strict proportionality test. In particular, the HRC has stressed the *"extreme care"* that States must take when enacting national-security related legislation.[63] The HRC has further cautioned that criminal offences should not unduly restrict the publication of information in the *"legitimate public interest"* [64] and expressly prohibited prosecuting journalists for disclosing information in the public interest that did not harm national security.[65]

4.7 Accordingly, any law criminalising disclosure of information of *"legitimate public interest"* must contain a harm requirement – that is, the disclosure must actually harm or

[58] GC 34, at paragraph 45. See also, UNHRC, *Concluding Observations: Kuwait*, CCPR/CO/69/KWT (2000) and *Philip Afuson Njaru v. Cameroon*, No. 1353/2005, UN Doc. CCPR/C/89/D/1353/2005 (2007), available at <http://hrlibrary.umn.edu/undocs/1353-2005.html>.
[59] See, e.g., *Goodwin v. United Kingdom* 22 EHRR 123 (1996) and *Prosecutor v. Taylor*, Decision on the Defence Motion for the Disclosure of the Identity of a Confidential 'Source' Raised During Cross-Examination of TF1-355, SCSL-03-1-T (Mar. 6, 2009), available at <http://www.worldcourts.com/scsl/eng/decisions/2009.03.06_Prosecutor_v_Taylor.pdf>.
[60] UN Human Rights Council, Resolution 21–22, The Safety of Journalists, A/HRC/Res/21/L.6, Sept. 27, 2012; UN Human Rights Council, Resolution 27–5, The Safety of Journalists, A/HRC/Res/27/5, Sept. 25, 2014.
[61] GC 34, at paragraph 44.
[62] ICCPR, Article 19(3); ECHR, Article 10(2) and American Convention on Human Rights, Article 13(2).
[63] GC 34, at paragraph 30.
[64] Ibid.
[65] Ibid.

be likely to harm national security. Penalisation for holding government accountable is not permitted. [66]

Other international law standards

4.8 Other international standards, developed by international experts, delimit the extent to which *"national security"* can be relied on to derogate from fundamental human rights are also instructive. The AIB cites a few examples here.

4.9 First, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, [67] prohibit blanket disclosure bans of information related to national security. Under the Johannesburg Principles 12 and 15, legislation must contain specific and narrow categories where disclosure is outweighed by the need to prevent actual harm or likely harm.

4.10 Second, under the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, *"national security"* is limited to the *"existence of the nation, its territorial integrity or political independence against force or threat of force."*[68] Similarly, the Johannesburg Principles defines national security by the core aim of protecting "*the country's existence"*.[69]

4.11 Third, BluePrint for Free Speech 'Principles for Whistleblower Protection'[70] sets out 23 fundamental principles that should be included in any whistleblower protection law. The law must include, *inter alia*:

a) coverage of the public sector, the private sector and the 'third-sector', and 'national security and intelligence whistleblowing';
b) broad definitions of 'reportable wrongdoing' and 'whistleblower';
c) a range of internal reporting channels, a range of regulatory reporting channels and a range of 'third-party / media' reporting channels; and,
d) provision and protection for anonymous reporting.[71]

4.12 Fourth, the Global Principles on National Security and the Right to Information clearly and narrowly defines '*information that may legitimately be withheld'* and *'categories of*

[66] GC 34, at paragraph 24.
[67] Johannesburg Principles on National Security, Freedom of Expression and Access to Information, 1 October 1995, available at <https://www.refworld.org/docid/4653fa1f2.html> ('Johannesburg Principles'), Principle 12.
[68] Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR ('Siracusa Principles'), April 1985, available at <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>, Principle 29.
[69] Johannesburg Principles, Principle 2.
[70] BluePrint for Free Speech is an internationally focused, not-for-profit organisation concentrating on research into freedom of speech, transparency, anti-corruption and technology. These principles are based on research by international and regional organisations, academic institutions, civil society organisations, and experts in the areas of freedom of speech and human rights. They are shaped by practical experience in all regions and guided by an evidence-based analytical approach.
[71] BluePrint for Free Speech, 'BluePrint Principles for Whistleblower Protection', available at < https://blueprintforfreespeech.net/wp-content/uploads/2015/10/Blueprint-Principles-for-Whistleblower-Protection4.pdf>, Principles 1, 2, 3, 4, 5, 6, 8 and 18.

information with a high presumption or overriding interest in favour of disclosure'.[72] The categories of information with a high presumption or overriding interest in favour of disclosure include:

a) violations of international human rights law and humanitarian law;
b) safeguards for the right to liberty and security of person, the prevention of torture and other ill-treatment, and the right to life;
c) structures and powers of government;
d) decisions to use military force or acquire weapons of mass destruction;
e) surveillance;
f) financial information;
g) accountability concerning constitutional and statutory violations and other abuses of power; and
h) public health, public safety, or the environment.[73]

Compatibility of Australia's disclosure offences

4.13 The disclosure offences under the ASIO Act, the Defence Act, the Criminal Code and the Crimes Act are incompatible with Article 19, ICCPR because they are disproportionate interferences with the right to freedom of expression. The AIB has grave concerns that these offences can criminalise journalism and will have (and arguably already is) a chilling impact on reporting.

4.14 First, the mere receipt or passive possession of certain types of information under the Defence Act, the Criminal Code, the Intelligence Services Act or the Crimes Act gives rise to disproportionate penalties and imprisonment.

4.15 Second, the categories of information are either:

a) overbroad (for example, *"any military information"* under the Defence Act and the definitions of *"information", "cause harm to Australia's interest", "inherently harmful information*" and *"national security"* under the Criminal Code); or

b) not clearly defined (for example, *"security or defence"* under the Crimes Act; information *"relating"* to *"the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency"* under the Criminal Code Act; information *"relating"* to a *"special intelligence operation"* under the ASIO Act; *"prejudice"* and *"security or defence"* under the Crimes Act).

4.16 The AIB shares the concern of the UN Special Rapporteur on the Situation of Human Rights Defenders, who has observed that the disclosure offences in the ASIO Act may

[72] The Global Principles on National Security and the Right to Information, 12 June 2013, available at < https://www.justiceinitiative.org/uploads/bd50b729-d427-4fbb-8da2-1943ef2a3423/global-principles-national-security-10232013.pdf> ('Tshwane Principles'), Principles 9 and 10.
[73] Ibid, Principle 10.

have a chilling effect, causing Australian journalists to self-censor due to uncertainties regarding whether information *"relates"* to the proscribed categories and in light of potential criminal investigations and prosecution.[74]

4.17 Third, section 79 of the Crimes Act and certain offences in the Criminal Code Act do not require actual or likely harm to national security in breach of international law requirements. While the Criminal Code's definition of *"inherently harmful information"* implies a harm requirement, the offence incoherently applies to mere receipt or possession of information, which in isolation is unable to cause actual harm.

4.18 Fourth, section 79 of the Crimes Act and certain offences in the ASIO Act and the Criminal Code do not require knowledge on the part of the journalists that the information would either prejudice defence or security or cause harm. Prosecution and imprisonment is a disproportionate response, even in response to recklessness.

4.19 Fifth, the offences in the ASIO Act, the Defence Act, the Criminal Code (with the exception of s 122) and the Crimes Act do not contain a public interest exception or defence. While, s 122 of the Criminal Code does contain a limited exception for journalists, the AIB has concerns about the definition (see further below at [4.25]) and the lack of definition of the scope of the public interest is problematic.

Compatibility of Australia's search warrant and metadata access schemes

4.20 The search warrant scheme under the Crimes Act and the JIW scheme under the TIA Act raise significant concerns because of the potential for enforcement agencies to acquire search warrants and access the metadata of journalists which may reveal confidential sources. This in turn produces a chilling effect, discouraging sources and whistleblowers from coming forward and discouraging journalists from engaging in investigative journalism.

4.21 First, journalists are not notified of the warrant and do not have the opportunity to contest them, in violation of international law recognition of journalistic privilege as an essential element of freedom of expression. The limited journalistic privilege recognised in the *Evidence Act 1995*[75] is inadequate if the source is revealed during the execution of a search warrant or a JIW. Journalistic privilege is an essential element of freedom of expression and the UK's procedure, discussed below, has better protection.

4.22 Second, the threshold for enforcement agencies to acquire warrants is gravely low. Under the Crimes Act, no specific safeguards apply to journalists and media organisations. In addition, there is no public interest test – this means the public interest is not articulated as a relevant consideration at any stage in the warrant issuing process. It follows that the issuing authority is not assisted by submissions or arguments concerning the public

[74] UN HRC, Report of the special rapporteur on the situation of human rights defenders on his mission to Australia, 28 February 2018 (A/HRC/37/51/Add.3) 7.
[75] s 126K.

interest in press freedom. In addition, under the JIW mechanism, journalists' metadata can be accessed for a disproportionately wide range of reasons.

Compatibility of Australia's whistleblower protection

4.23 The inadequacies of free speech protection, the gravity of disclosure offences and inadequate protection against search warrants and JIWs must also understood alongside the wholly inadequate whistleblower protection in Australia. The PID Act is the only protection available for whistleblowers and does not comply with international standards because:

a) there is no protection for journalists;
b) there is no mechanism under the PID Act for intelligence whistleblowers if internal mechanisms are inadequate;
c) the PID Act contains an inappropriately wide blanket ban *"intelligence information"* (broadly defined to include information that relates to an intelligence agency or the conduct of an intelligence agency officer).

4.24 Again, these features produce a chilling effect, discouraging sources from coming forward.

Australia's narrow definition of 'journalist' and 'journalism'

4.25 The definitions of 'journalist' or 'journalism' in the Australian legislation of concern is significantly narrower than that set out by the HRC (including *"bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere")*[76] and in other international standards, which protect journalistic activity and the broad range of actors conducting journalism in the digital era.

4.26 This issue arises in respect of:

a) the narrow application of the JIW scheme under the TIA Act to *"professional"* journalists only;
b) the narrow application of the limited journalist defence provided in the Criminal Code to "*persons engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media*"; and,
c) the narrow application of the limited journalistic privilege in the *Evidence Act 1995 (Cth)* to *"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"*.

4.27 It is essential that journalistic activity and material is protected, as opposed to being based on narrow definitions of who is or is not "a journalist" (as defined by government).

[76] GC 34, at paragraph 44.

5. COMPARATIVE EXAMPLES

Disclosure, secrecy and espionage offences

United Kingdom

5.1 The *Official Secrets Act 1989* (UK) creates offences associated with the unauthorised disclosure of information in the following categories: security and intelligence; defence; international relations; crime and special investigation powers; information resulting from authorised disclosures or entrusted in confidence; and, information entrusted in confidence to or by other states or international organisations.

5.2 Importantly, a harm requirement is included in the offence for crown servants and government contractors, who may only be found guilty if the unauthorised disclosure is *"damaging."* Conversely, *any* unauthorised disclosure by members of the security and intelligence services is an offence. The maximum penalty for individuals guilty of an offence under the Act is 2 years' imprisonment or a fine or both.

5.3 A 2017 Law Commission Consultation Paper made a number of provisional recommendations, including, *inter alia*, that:

a) offences are remodelled so that they do not focus on the consequences of unauthorised disclosure, but upon whether the defendant knew or had reasonable cause to believe the disclosure was capable of causing damage;
b) the maximum sentences for the most serious offences contained in the Act, currently two years' imprisonment, do not reflect the harm and culpability that could arise in serious cases of disclosure;
c) the legal safeguards that currently exist – including Director of Public Prosecution guidelines concerning whether to charge a journalist with a criminal offence and safeguards that apply through the criminal law more generally – are sufficient to protect journalistic activity without the need for a statutory public interest defence; and,
d) a 'statutory commissioner model' be implemented to ensure alleged illegality or impropriety can be brought to light by civil servants and members of security and intelligence agencies to an independent Investigatory Powers Commissioner, who would have statutory abilities to conduct an investigation and report.[77]

5.4 The proposals were heavily criticised[78] and attracted a significant number of critical submissions, in particular in respect of the proposal to increase the possible sentences, in respect of the position that existing safeguards are deemed sufficient and in relation

[77] Law Commission, *Protection of Official Data A Consultation Paper*, 2017, available at <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/02/cp230_protection_of_official_data.pdf>.
[78] See, for example, Ian Cobain 'This assault on whistleblowers exceeds even the draconian 1911 act' *The Guardian* (15 February 2017) available at <https://www.theguardian.com/commentisfree/2017/feb/15/whistleblowers-law-commission-official-secrets-act> and Roy Greenslade 'UK's proposed Espionage Act will treat journalists like spies' *Committee to Protect Journalists* (17 March 2017) available at <https://cpj.org/blog/2017/03/uks-proposed-espionage-act-will-treat-journalists-.php>.

to the need for a public interest defence. Editorials from major British newspapers in February 2017 unanimously denounced the proposals as "*a threat to democracy*" (Guardian),[79] "*worthy of the Stasi*" (The Times)[80] and "*outrageous and nothing less than a threat to Britain's free press"* (Sunday Telegraph).[81] As the Times wrote:

> *It suggests broadening the range of suspects who could be jailed for disseminating official material to include journalists, charity workers and elected politicians. It suggests lengthening maximum sentences to 14 years, and it suggests extending the act to cover "information that affects the economic wellbeing of the United Kingdom in so far as it relates to national security".*
>
> *There is no shortage of laws on the statute book with which to punish those who steal or misuse official secrets. But official Britain is already far too fond of secrets and public interest journalism is already under grave legal and commercial threat. The Cabinet Office should thank the Law Commission for its ideas, and reject them.*

5.5 The AIB notes with serious concern that existing Australian legislation and disclosure offences go much further than the Law Commission proposals, including but not limited to the types of information captured by the disclosure offences and the length of potential sentences.

5.6 The Law Commission will report on its final recommendations in 2019.[82]

5.7 The AIB recommends that the ECRC consider:

a) the fault elements of the offence, including an actual harm requirement and a knowledge (as opposed to recklessness) standard in each disclosure offence;
b) a public interest exception or defence to protect journalistic activity;[83]
c) the adoption of Director of Public Prosecution guidelines concerning whether to charge those engaged in journalistic activity with a criminal offence and/or a statutory commissioner model.

United States

5.8 The *Espionage Act 1917* ('Espionage Act') in the US is notorious for concerns with freedom of expression, particularly in light of the recent indictment of Australian citizen and editor of WikiLeaks, Julian Assange. This is the first time in US history that a publisher has been charged under the Espionage Act, creating outrage among free speech

[79] "The Guardian view on official secrets: new proposals threaten democracy", *The Guardian* (12 February 2017), https://www.theguardian.com/commentisfree/2017/feb/12/the-guardian-view-on-official-secrets-new-proposals-threaten-democracy.
[80] "Official nonsense", *The Times* (13 February 2017), https://www.thetimes.co.uk/article/official-nonsense-gqz2t778l
[81] "Law Commission's threat to democracy", *Sunday Telegraph* (12 February 2017).
[82] House of Commons Library, The Official Secrets Acts and Official Secrecy, 2 May 2017.
[83] Examples can be seen in legislation elsewhere, such as in the *Data Protection Act 1998* (UK) which contains a statutory defence if the individual who disclosed the personal data was acting with a view to publishing "*journalistic, literary or artistic material";* and with the reasonable belief that the disclosure, obtaining or procuring was in the public interest

groups and mainstream media outlets alike.[84] For this reason, the MEAA – Australia's journalism union of which Mr. Assange has been a member since 2007 – opposes Mr. Assange's extradition.[85] Earlier, in 1988, Wilkinson J said that the press *"are not being, and **probably** could not be, prosecuted under the espionage statute"* (emphasis added).[86]

5.9 A key problem with the Espionage Act is that there is no special protection for journalistic activity. There is also no public interest defence, which is problematic for whistleblowers, publishers and journalists alike. The seminal scholarly article on the Espionage Act explains that the law, enacted after the US entered World War 1, was *"not drafted to reconcile the competing demands of national security and public debate about matters of prime political importance."* [87] The result is a broad imprecise law under which anyone, anywhere in the world who publishes information that the US government deems *"national defense"* could be prosecuted. *"National defense"* information is *"a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness."*[88] It includes information that is unclassified.[89]

5.10 There is no protection available for truthful information. It is clear that the Espionage Act has the potential to criminalise publication of and public debate about information critical of the government – conduct that is protected by the First Amendment guarantee of freedom of expression. The Espionage Act has been widely criticised on this basis.[90] There are currently proceedings before the United States District Court for the Eastern District of Virginia involving a drone whistleblower which raise whether the Espionage Act unlawfully interferes with the US First Amendment. [91]

Canada

5.11 The disclosure offences in Canada have historically reflected those of the UK. The *Security of Information Act 2001* (Canada) contains a range of disclosure offences.

5.12 Relevantly for this submission is the best practice demonstrated in:

a) the offence of *"wrongful use of protected information"* requiring active communication, use, retention or mismanagement of information (as opposed to passive receipt or possession);

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[84] See for example Julian Borger, 'Indicting a journalist? What the new charges against Julian Assange mean for free speech' *The Guardian* (24 May 2019) available at <https://www.theguardian.com/media/2019/may/23/julian-assange-indicted-what-charges-mean-for-free-speech>; and 'WikiLeaks and the Espionage Act of 1917' *Reporters Committee for Freedom of the Press,* available at <https://www.rcfp.org/journals/wikileaks-and-espionage-act-1917/>.
[85] See 'MEAA opposes US extradition of Assange' (12 April 2019), available at <https://www.meaa.org/news/meaa-opposes-extradition-of-assange/>.
[86] *United States v Morison* (1988) 844 F2d 1057, 1081.
[87] Harold Edgar & Benno C. Schmidt Jr, 'The Espionage Statutes and Publication of Defense Information' (1973) 73 *Columbia Law Review* 929, 934.
[88] *Gorin v United States* (1941) 312 US 19, 28.
[89] *United States v Dedeyan*, (1978) 584 F2d 36, 40.
[90] See, for example, from ACLU https://www.aclu.org/blog/national-security/secrecy/reality-winner-latest-face-prosecution-under-awful-world-war-i?redirect=blog/free-future/reality-winner-latest-face-prosecution-under-awful-world-war-i-espionage-act and EFF https://www.eff.org/deeplinks/2017/08/misused-espionage-act-targets-governnent-whistleblowers.
[91] *United States v Daniel Everette Hale*, No. 1:19-cr-59.

b) the clear and exhaustive list of acts that are regarded as being *"prejudicial to the safety of interests of the State"* (14 acts in total); and
c) the availability of a public interest defence.

5.13 Canada provides a third alternative to the traditional statutory public interest defence model or the statutory commissioner model. Under the *Security of Information Act 2001* an individual who discloses information without lawful authority is only be able to plead that the disclosure was in the public interest if they have exhausted the other mechanisms that were available to bring the wrongdoing to light. Such mechanisms may include reporting the information to a statutory commissioner, as in the statutory commissioner model. The Canadian model therefore represents a combination of the statutory public interest defence and the statutory commissioner model.

New Zealand

5.14 New Zealand's disclosure offences also contain fault elements that are stronger than Australia's. The *Crimes Act 1961* (NZ), the *Summary Offences Act 1981* (NZ) and the *Security Intelligence Service Act 1969* (NZ) contain criminal offences governing the unauthorised disclosure of protected information.

5.15 The two types of espionage offences contained in the *Crimes Act 1961* both contain a harm requirement – the communication or delivery, or intended communication or delivery, must be likely to prejudice the security or defence of New Zealand. Further, both offences contain an intent requirement – the person must have the intention of prejudicing the security or defence of New Zealand.

5.16 The *Crimes Act 1961* also creates three types of offences for wrongful communication, retention or copying of official information, each of which contains harm and intent requirements above Australia:

a) under s 78A(1)(a), the person must have knowingly or recklessly communicated or delivered the information/object; with knowledge that he/she was acting without proper authority; and knowing that such communication or delivery was likely to prejudice the security or defence of New Zealand;
b) under s 78A(1)(b), the person must have the intent to prejudice the security or defence of New Zealand; with knowledge that he/she does not have proper authority to retain or copy the document; and with knowledge that the document relates to the security or defence of New Zealand. In addition, the unauthorised disclosure must be likely to prejudice the security or defence of New Zealand; and,
c) under s 78A(1)(c), the person must have knowingly failed to comply with any direction issued by a lawful authority for the return of an official document which is under his or her possession or control, which would, by its unauthorised disclosure, be likely to prejudice seriously the security or defence of New Zealand.

In order to amount to an offence, the person must know the document relates to security or defence of New Zealand.

5.17 The *Summary Offences Act 1989* creates an offence for unauthorised disclose of certain information. It is an offence to knowingly to communicate official information or deliver an object to any other person. The knowing communication or delivery requires both that the person knows he or she does not have proper authority and that the person knows that the act is likely to endanger the safety of any person; prejudice the maintenance of confidential sources of certain classes of information; prejudice the effectiveness of operational plans for the prevention, investigation, or detection of offences or the maintenance of public order; prejudice the safeguarding of life or property in a disaster or emergency; prejudice the safe custody of offenders or of persons charged with offences; or damage seriously the economy of New Zealand.

5.18 Under the *Security Intelligence Service Act 1969*, it is an offence for a current or former officer or employee of the Security and Intelligence Service to disclose or use any information gained by or conveyed to him or her through his or her connection with the Service. It is also an offence for such a person to disclose the existence of a warrant.

Search warrants and access to metadata

5.19 AIB has particularly serious concerns regarding the fact that Australian law does not provide additional safeguards to protect those engaging in journalistic activity. AIB urges the Committee to closely examine the mechanisms already in place in England and Wales, New Zealand and Canada.

<u>The United Kingdom</u>

5.20 Press freedom is protected in the context of warrant proceedings in the UK by, in particular:[92]

a) the *Police and Criminal Evidence Act 1984* ('PACE');
b) the *Terrorism Act 2000*;
c) Article 10 of the ECHR, which protects journalists' sources; and,
d) the common law.

5.21 PACE recognises that journalistic material is different to other forms of material, and should attract additional safeguards. In order to obtain a search warrant for *"journalistic material"* police must seek a production order *inter partes* from a judge and notify the subject to the order.[93] *"Journalistic material"* means material acquired or created for the purposes of journalism, provided that it is in the possession of a person who acquired or created it for the purposes of journalism.[94] The judge retains an overarching discretion regarding whether to issue the warrant and cannot have regard to evidence adduced by

[92] This is not an exhaustive list. We include here the most relevant provisions.
[93] See PACE, s 9 and Schedule 1.
[94] PACE, s 13.

the applicant which has not been disclosed to the respondent.[95] Production orders may not be sought in respect of journalistic material held in confidence.[96]

5.22 Whilst there are shortcomings to the PACE mechanism, the principle under PACE is clear and should plainly also apply in Australia: *ex parte* hearings to obtain production orders in relation to journalistic material are not appropriate and at such hearings the court should not have regard to evidence adduced by the applicant police force or law enforcement body which has not been disclosed to the respondent.

5.23 The UK Courts recognise that these are *"inherently intrusive orders*"[97] – the direct impact upon media bodies (organisations or individuals) is very serious. The material sought may reveal confidential sources; it may undermine time-sensitive investigative journalism; it is likely to disrupt the work of journalists and media organisations; and it exposes them to the risk of criminality for undertaking legitimate journalistic activities.

5.24 The indirect chilling effect may be even more so and this has been recognised by the Courts. The European Court of Human Rights ('ECtHR') has held that such measures are capable of discouraging the press from conducting their vital role in gathering and disseminating information on matters of legitimate public concern.[98] The UK courts have expressed similar concerns in relation to the impact on journalists responsible for visual news coverage in particular:

> *"if the perception takes hold that such people are working on behalf of the police, or are likely to cooperate with them by supplying such material routinely, life could become very difficult. They might find it more difficult to gain access to areas where demonstrations are taking place or to work in the vicinity of those who are prone to violence... At the moment, to the extent that they are perceived as being separate from the police and relatively neutral... they have more opportunity of carrying out their task and correspondingly the public has a greater opportunity of receiving the coverage they intend to provide."*[99]

5.25 The ECtHR has also acknowledged the potential chilling effect on sources, which may discourage sources and potential sources from cooperating with the media or bringing concerns to their attention.[100]

5.26 The UK's protection under national security legislation is also more robust than that in Australia. Under the *Terrorism Act 2000,* a similar process (albeit weaker than PACE) applies. The issuance of a production order is subject to a public interest threshold (unlike

[95] *R (BSkyB) v. Commissioner of Police for the Metropolis* [2014] UKSC 17.
[96] PACE, s 11(1)(c).
[97] *R (BSkyB and Others) v. Chelmsford Crown Court and Essex Police* [2012] 2 Cr. App. R. 33, [31] (Eady J).
[98] *Bergens Tidende v. Norway* (2001) 31 EHRR 16, [52].
[99] *R (BskyB) v Chelmsford Crown Court* [2012] EWHC 1295 (Admin), [25],
[100] See, e.g., *Financial Times and Others v. UK* (2010) 50 EHRR 46; *Telegraf Media Nederland Landelijke Media BV v. The Netherlands,* App. No. 39315/06, judgment of 22nd November 2012.

in Australia) and is issued by a judge who maintains an overarching discretion.[101] However, unlike PACE, an order may be made over journalistic material whether or not it is held in confidence.[102]

5.27 The legal principles are well established.[103] There are two access conditions. First, the police must establish reasonable grounds for believing the procurement of the material is likely to be of substantial value to the police investigation. Second, the police must establish that there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given. Under *the Terrorism Act 2000*, this is measured by two criteria: i) the benefit likely to accrue to a terrorist investigation if the material is obtained, and ii) the circumstances under which the person concerned has any of the material in his possession.

5.28 The recent decision in *Metropolitan Police Service v Times Newspapers Ltd and Ors*[104] provides a helpful illustration of this process and the balancing act undertaken by the Court. The case concerned applications made on behalf of the Metropolitan Police Service ('Police') for production orders to be granted in respect of material held by *Times Newspapers Ltd., Independent Television News Limited, Sky News UK* and the *BBC.* The four media organisations contested the making of such an order. The applications arose out of a series of broadcast reports of interviews with Shamima Begum in February 2019 whilst she was staying in a refugee camp in Syria. The reports indicated that there were substantial parts of the interviews which had not been broadcast. The Police wished to view the material that had not been broadcast as part of their continuing investigation into Ms Begum and her activities since leaving the UK and travelling to Syria in 2015. In particular, the production orders were sought in relation to an investigation into one offence: membership of a proscribed organisation.[105]

5.29 The first access condition was easily met. The Judge assessed the broadcasts in light of the nature of the alleged offence and held that there was *"ample justification"* for concluding that there were reasonable grounds for believing that the material is likely to be of substantial value. The Court considered that it was *"almost inevitable"* that the material would throw light on the issue of membership.

5.30 However, the police did not satisfy the second access condition – that there are reasonable grounds for believing that it is in the public interest that the material should be produced or that access to it should be given. Importantly, while the *Terrorism Act* sets out criteria to which the Court should have regard, the Court readily acknowledged the *"considerable overlap"* between the statute and the journalists' freedom of expression guaranteed by Article 10 ECHR.

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[101] *Terrorism Act 2000* (UK), Schedule IV, s6(2)-(3).
[102] *Terrorism Act 2000* (UK), Schedule IV,
[103] See, *Malik v Manchester CC* [2008] EMLR 19; *R(BskyB) v Chelmsford* [2012] 2 Cr App R 33; *R v Shayler* [2003] 1 AC 247; *R(Bright) v CCC* [2001] 1 WLR 662; *R v Lewes CC, ex p Hill* (1991) 93 Cr App R 60.
[104] Central Criminal Court, 4 September 2019.
[105] *Terrorism Act 2000*, s 11.

5.31 Judges in the UK are familiar with this balancing act, which considers the *"two powerful public interests at play,"* including the need for society to be protected from terrorism and the need for society to have a free and independent media *"which is able to conduct effective investigations into matters of public interest and concern and to report such matters to the public without fear or interference."*

5.32 A number of factors were particularly relevant to this case:

a) First, there was no suggestion that the granting of a Production Order would breach any confidential relationship or expose a source or place a journalist at risk of harm. This is because Ms Begum was aware that she had been speaking to a journalist and had consented to her interview being published. Because of this, the interference with journalists' Article 10 rights was not as significant as in other cases.
b) Second, (and perhaps determinative) there was no prospect of Ms Begum being subject to arrest in the UK, nor subject to interview or prosecution in the foreseeable future because Ms Begum is in Syria and has had her British citizenship withdrawn. For this reason, the Court was not persuaded that the interference with the journalists' rights was outweighed by the benefit likely to accrue to the Police investigation, and thus the public interest in protection from terrorism.
c) For the Court, in the circumstances of this case, only the concern that the material would be lost over the passage of time would have justified overriding the journalists' Article 10 rights. This was overcome by an undertaking by the news organisations as to the storage and protection of the contested material at the office of a firm of Solicitors.

5.33 The common law concept of procedural fairness is also relevant to the warrant process in relation to journalistic material. The concept of fairness lies at the heart of the judicial function. Certain fundamental features of any adversarial procedure which may result in an order which will affect and bind another have been developed and maintained over the centuries. They include the right to know and effectively challenge the opposing case before any adverse order is made or judicial decision reached, and the right to a fully reasoned decision. These basic, fundamental features have been developed and maintained at common law in order to secure basic rights of fairness, open justice and equality of arms, and to maintain confidence in the integrity of the judicial system.

5.34 Lord Hobhouse expressed the principle concerning the common law right to know and effectively challenge the opposing case in what Lord Kerr has described as *"forthright terms"* (Per Lord Kerr, *Tariq v. Home Office* [2012] 1 AC 452, [104]) in *Pamplin v. Express Newspapers Ltd.* [1985] 1 WLR 689:

> *"The first principle is the principle of natural justice which applies wherever legal proceedings involve more than one person and one party is asking the tribunal for an order which will affect and bind another.*

> *Natural justice requires that each party should have an equivalent right to be heard. This means that if one party wishes to place evidence or persuasive material before the tribunal, the other party or parties must have an opportunity to see that material and, if they wish, to submit counter material and, in any event, to address the tribunal about the material. One party may not make secret communications to the court."*

5.35 The UK Supreme Court explained the importance of, and rationale for, procedural fairness in *Osborn and Booth* [2013] 3 WLR 1020, particularly per Lord Reed at [66]-[71]. He highlighted its importance as being,

> *"not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged... The first was described by Lord Hoffmann... as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken… This point can be illustrated by Byles J's citation in Cooper v Wandsworth Board of Works (1863) 14 CBNS 180 , 195 of a dictum of Fortescue J in Dr Bentley's Case (R v Chancellor of Cambridge, Ex p Bentley (1723) 2 Ld Raym 1334):*
>
> > *"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, on such an occasion, that even God himself did not pass sentence on Adam before he was called on to make his defence."*
>
> *The point of the dictum, as Lord Hoffmann explained in AF (No 3) at para 72, is that Adam was allowed a hearing notwithstanding that God, being omniscient, did not require to hear him in order to improve the quality of His decision-making. As Byles J observed (ibid), the language used by Fortescue J "is somewhat quaint, but ... has been the law from that time to the present".*
>
> *This aspect of fairness in decision-making has practical consequences of the kind to which Lord Hoffmann referred. Courts have recognised what Lord Phillips of Worth Matravers described as "the feelings of resentment that will be aroused if a party to legal proceedings is placed in a position where it is impossible for him to influence the result": Secretary of State for the Home Department v AF (No 3) [2010] 2 AC 269 , para 63....*

The second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions: see eg Fuller, The Morality of Law , revised ed (1969), p 81, and Bingham, The Rule of Law (2010), chapter 6."

The United States

5.36 In the US, journalists' sources are protected by State legislation or common law. Journalists do not have a constitutional right to refuse to disclose the identities of their confidential sources to federal grand juries.[106] However, it is generally accepted that the presence of shield laws in approximately forty states, the common law, and the Department of Justice regulatory guidelines do provide a measure of protection.[107]

Canada

5.37 In Canada, the protection afforded to journalists' and their sources has improved in recent years. While it falls short of constitutional protection, the Canadian Supreme Court has acknowledged the *"special role*" the media played in Canadian society,[108] In addition, journalists have statutory protection. Under the *Journalistic Sources Protection Act 2017*, journalistic documents seized by police are kept in the custody of the court, and journalists may make submissions to have them returned. The court considers whether the public interest in pursuing the investigation outweighs the journalist's right to privacy, and whether the information can be obtained through other means.

5.38 In 2018, the Supreme Court upheld the production order granted against a media house to produce communications between one of its journalists and a suspect in a terrorism investigation. The Supreme Court held that the lower court had correctly balanced the State's interest in investigating and prosecuting crime with the media house's Charter rights,[109] applying a framework set out in an earlier decision (the *Lessard* framework).[110] In brief, the *Lessard* framework requires the Court to consider nine elements:

a) whether the statutory requirements have been met for the issuance of a search warrant;
b) whether all other circumstances had been considered before the judge decided to exercise their discretion to issue a warrant;
c) whether a balance was struck between the State's interest in investigating crime and the media's right to privacy, especially as the media "will generally be an innocent party" and "play a vital role in the functioning of a democratic society";

[106] *Brenzburg v Hayes* 408 US 665 (1972)
[107] See, e.g., RonNell Andersen Jones, 'Rethinking Reporter's Privilege' 111 *Michigan Law Review* 1221 (2013); Paul Marcus, 'The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments' 25 *Arizona Law Review* 815 (1984); Mary-Rose Papandrea, 'Citizen Journalism and the Reporter's Privilege' 91 *Minnesota Law Review 515* (2007); Geoffrey R. Stone, 'Why We Need a Federal Reporter's Privilege' 34 *Hofstra Law Review* 39 (2005).
[108] Ibid, [9].
[109] *R v. Vice Media Canada Inc* [2018] SCC 53.
[110] *Canadian Broadcasting Corp v. Lessard* [1991] 3 SCR 421.

d) whether there was sufficient detail in the affidavit supporting the request for a warrant;
e) whether the affidavit had disclosed whether there were alternative sources from which the requested information could be obtained, and if so, that those sources had been investigated and exhausted;
f) whether the media had disseminated all or part of the information the State seeks;
g) whether there were conditions the judge could impose to limit the warrant's impact on the media's ability to publish the news;
h) whether the police had failed to disclose relevant information when requesting the warrant; and,
i) whether the search was unreasonably conducted.

5.39 The media house argued that the framework should be modified to include, *inter alia,* a *"presumed chilling effect on the media"* whenever the police sought a production order.[111] While the media house were unsuccessful on that argument, the Court did recognise the *"special role*" the media played in Canadian society and recalled the rights to be free from unreasonable search and seizure and the right to freedom of expression.[112] The concurring minority judgement went further, and recognised that the press enjoyed "*distinct and independent constitutional protection."*[113] The Court observed that:

> *"the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible" and that "[t]he media are entitled to this special consideration because of the importance of their role in a democratic society."*[114]

New Zealand

5.40 In New Zealand, journalists are protected at common law and by statute.[115] In *Television New Zealand Ltd v Attorney-General,* the Court of Appeal considered the issue of search warrants against journalists and news media organisations, and held that:

> *"... only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying-up" of confidential sources of information for the media."*[116]

[111] *R v. Vice Media Canada Inc* [2018] SCC 53, [25].
[112] Ibid, [9].
[113] Ibid [123].
[114] Ibid, [14].
[115] *Evidence Act 2006* (NZ), s 68(1).
[116] [1995] 2 NZLR 641, 648.

5.41 In addition, the *Evidence Act 2006* creates a rebuttable presumption in favour of source confidentiality. A Judge of the New Zealand High Court may overturn the presumption if:

> *"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."*[117]

5.42 In applying the *Evidence Act*, the Court has demonstrated a clear acceptance of the significant public interest in the dissemination of information by journalists, and the consequent need to protect the confidentiality of journalists' sources.[118] In *Hager v Attorney General*,[119] the New Zealand High Court considered the relationship between the common law protection, the statutory protection under the *Evidence Act* and the newer *Search and Surveillance Act 2012* (the '2012 Act') (which provides a procedure for handling seized journalistic sources),[120] and held that the 2012 Act overlays, rather than replaces, the existing protections. In that case, the Court held that a police warrant to search a journalist's house was unlawful. The key issue was whether the application for the warrant adequately drew matters of journalistic privilege to the District Court's attention. The Court considered it was for the search warrant applicant to persuade the court that the relevant public interest in disclosure outweighed the public interest in the preservation of confidentiality. Parliament had not intended the enactment of the 2012 Act to replace the existing principles in relation to the protection of the privilege or to obviate the need to notify a judge issuing a search warrant that it may affect journalistic privilege. In relation to news media warrants, judges have to be satisfied that:

a) the police themselves were aware that the privilege might arise;
b) adequate protections were in place to secure any privileged material that was seized; and
c) the warrant was justified regardless of procedures in place under the 2012 Act.[121]

Whistleblower protection

5.43 Every jurisdiction analysed had greater whistleblower protections than Australia. Nevertheless, there is a worrying trend worldwide to criminalise or preclude swathes of disclosures related to national security. The AIB urges Australia to develop a robust whistleblowing regime and recommends the BluePrint recommendations and best practices guide.[122]

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[117] *Evidence Act 2006* (NZ), s 68(2).
[118] *Police v Campbell* [2010] 1 NZLR 483.
[119] [2015] NZHC 3628.
[120] 2012 Act, s 145.
[121] *Hager v Attorney General* [2015] NZHC 3628, [117].
[122] BluePrint for Free Speech, 'BluePrint Principles for Whistleblower Protection', available at < https://blueprintforfreespeech.net/wp-content/uploads/2015/10/Blueprint-Principles-for-Whistleblower-Protection4.pdf>,

United Kingdom

5.44 Protection for whistleblowers in the UK is provided under the *Public Interest Disclosure Act 1998*, which applies to employees in both the public and private sectors. Australia should follow the UK lead by establishing whistleblower protection that applies to all employees. Disclosures are protected where the whistleblower has a reasonable belief that one of the following categories of behaviour has occurred, is occurring or will occur:

a) a criminal offence;
b) a failure to comply with any legal obligation;
c) a miscarriage of justice;
d) the endangerment of an individual's health or safety;
e) environmental damage; or
f) deliberate concealment of information tending to show any matter falling within any of the above categories.

5.45 However, the strength of the *Public Interest Disclosure Act 1998* is limited because it does not apply to unlawful disclosures, and therefore the breadth of the *Official Secrets Act* can become problematic (see above).

5.46 Another strength of the Act is that it provides 'steps' for disclosure. The third step allows for disclosures to be made to the media and members of the public.[123]

United States

5.47 The United States Supreme Court has justified the existence of statutory disclosure offences by reference to *"the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing."*[124] These include the *Whistleblower Protection Act 1989;* the *Intelligence Community Whistleblower Protection Act 1998*, the *Presidential Policy Directive 19* and the *Military Whistleblower Protection Act 1988.* In broad terms, these pieces of legislation provide protection to government employees, intelligence service employees and military employees who make a *"protected disclosure".* Protection disclosure includes any disclosure of information by a covered employee provided that the employee reasonably believes that the information evidences:

a) any violation of any law, rule, or regulation; and,
b) any gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[125]

[123] A Savage, Leaks, Whistleblowing and the Public Interest: The Law on Unauthorised Disclosures (2016), p 141.
[124] *Garcetti v Ceballos* (2006) 126 SC 1951, p 7, (Justice Kennedy). See also *Pickering v Board of Education* (1968) 391 US 563.
[125] 5 *United States Code*, s 2302(b)(8)(A)(i)-(ii).

5.48 This applies, however, only if such disclosure *"is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs."*[126] For the reasons explained above with respect to the breadth of the Espionage Act, this means this would not assist national security whistleblowers.

Canada

5.49 In Canada, two mechanisms exist for protected disclosure of official information – the *Public Servants Disclosure Protection Act 2007* and section 425.1 of the *Canadian Criminal Code.* The *Public Servants Disclosure Protection Act 2007* is structured in a similar manner to the UK and US systems, excluding protection for any information that is "*special operational information"* under the *Security of Information Act 2001*.[127] A strength of the Canadian legislation is that "*special operational information"* is defined with specificity, to include six categories of information.[128]

New Zealand

5.50 The *Protected Disclosure Act 2000* follows the same model. Again, there are separate disclosure procedures for security and intelligence agencies and certain other organisations. The only appropriate authority to whom information may be disclosed, and advice sought from, is the Inspector General of Intelligence and Security.

6. RECOMMENDATIONS

Disclosure offences

6.1 The disclosure and secrecy offences should be amended to:

a) exclude passive receipt from the scope of criminalised conduct;
b) include a journalism and/or public interest exemption;
c) further, or in the alternative, include a journalism and/or public interest defence;
d) define public interest by reference to a non-exhaustive list of criteria, including the public interest in in press freedom;
e) define 'national security' consistently and narrowly;
f) define 'journalism' and 'journalist' consistently and broadly with the emphasis on journalistic material or activity as opposed to professional identity or government definitions of who is or is not a journalist; and
g) ensure that disclosure offences include actual or likely harm requirements and knowledge requirements (as opposed to recklessness).

[126] 5 *United States Code*, s 2302(b)(8)(A)(ii).
[127] *Public Servants Disclosure Protection Act* 2007, s 17.
[128] See *Security of Information Act 2001*, s 8(1).

Search warrants and access to metadata

6.2 The search warrant scheme should be amended to reflect the PACE mechanism and:

a) exclude the availability of a search warrant and/or production order over journalistic material held in confidence;
b) include a contested issuing process for warrants or orders for journalistic material, where the person the subject of the warrant application be notified;
c) determine the issuing of such warrants on the basis of a public interest test, which specifically considers the public interest in press freedom and source confidentiality;
d) contain an overarching judicial discretion;
e) define 'national security' consistently and narrowly; and,
f) define 'journalism' and 'journalist' consistently and broadly with the emphasis on journalistic material or activity as opposed to professional identity.

6.3 The JIW scheme should be amended to reflect the PACE mechanism and:

a) require a contested issuing process, where the person the subject of the warrant application be notified;
b) where a contested issuing process is not possible, replace the public interest advocate with a 'media freedom advocate' or 'journalist's advocate';
c) require all warrants be issued by a judicial authority;
d) require the publication of annual reports by the enforcement agencies, detailing the numbers of JIWs sought and obtained;
e) define 'national security' consistently and narrowly; and,
f) define 'journalism' and 'journalist' consistently and broadly with the emphasis on journalistic material or activity as opposed to professional identity.

Whistleblower protection

6.4 The PID Act should be amended to:

a) remove the broadly defined exception of 'intelligence information' under the Public Interest Disclosure Act; and,
b) increase the disclosures protected under the PID Act to correspond with the Tshwane Principles.

Related matters

6.5 Enact positive protection of freedom of expression in compliance with international human rights law.

7. CONCLUSION

7.1 This Inquiry concerns issues of vital importance for press freedom in Australia, the Asia-Pacific region and internationally. The world's eyes turned to Australia in early June 2019 when the AFP raids took place. It appears the AFP took notice, as it has been reported that planned further raids were halted due to the outcry. This is an opportunity to redress the skewed balance between freedom of expression and national security in Australia's laws and law enforcement practices.

7.2 The Association for International Broadcasting and its Members call upon the Committee to ensure that law enforcement and intelligence powers are not used to stifle reporting of stories that are in the public interest. It is not for the intelligence and security community to decide what is in the public interest – indeed, the very nature of intelligence and security work calls for absolute secrecy. It is therefore essential that the powers vested in the intelligence and security community are not used to supress reporting. This is not in the public interest as Australia's intelligence and security community exists to protect and to serve the nation's citizens and public, not to protect itself.

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