

From:
To: [Committee, EC \(SEN\);](#)
Subject: ARTK submissions re: press freedom
Date: Friday, 24 July 2020

Dear Senate Committee,

Australia's Right to Know coalition of media organisations will be giving evidence at an upcoming hearing regarding the Committee's inquiry into press freedom.

Ahead of that hearing we thought it would be useful to share with the Committee submissions we have made to the PJCIS since our original submission to the Senate Committee regarding similar issues.

Specifically, ARTK made three detailed supplementary submissions to the PJCIS inquiry into the impact of the exercise of law enforcement and intelligence powers on freedom of the press - and attached here - regarding:

1. Supplementary submission dated 21 October 2020 ([submission 23.2](#)) - responding to other submissions to the PJCIS
2. Supplementary submission dated 10 December 2019 (submission 23.3)
 - (i) Contestable warrants - we proposed a uniform amendment to standardise and enhance existing Commonwealth legislation concerns the issue of search warrants and similar coercive instruments as they relate to journalists and media organisations in their professional capacity; and
 - (ii) Exemption from laws that currently have the capacity to criminalise journalists from doing their jobs - we proposed a uniform journalist protection where there is a risk of prosecution for or investigation pursuant to such offence provisions. This moves the burden and onus of proof from the defendant to the prosecution for specific provisions. Contrary to what some claim, it is not give 'broad immunity' from those laws
3. Supplementary submission dated 9 March 2020 (submission 23.4) - response to the Dept of Home Affairs & AFP submission (submission 32.10). The submission specifically responds to the Home Affairs/AFP proposed additional notice to produce powers.

If appropriate, the Senate Committee may wish to consider accepting these as additional submissions from ARTK for consideration in the inquiry into press freedom.

Kind regards
Georgia-Kate

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**SUPPLEMENTARY SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND
SECURITY INQUIRY INTO THE IMPACT OF THE EXERCISE OF LAW ENFORCEMENT AND INTELLIGENCE
POWERS ON FREEDOM OF THE PRESS**

20 OCTOBER 2019

Australia's Right to Know (**ARTK**) coalition of media organisations thanks the Parliamentary Joint Committee on Intelligence and Security (**the PJCIS**) for the opportunity to make a supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

This submission supplements ARTK's submission to the PJCIS dated 31 July 2019, and should be read in conjunction with previous ARTK submissions to the PJCIS on legislative developments relevant to Australia's journalists. All of those submissions are unified in their purpose: to arrest the diminution of media freedoms in Australia and ensure that journalists and news media organisations can continue to perform their vital role in Australia's democracy, including holding governments to account.

This supplementary submission expands upon the points made in Sections 1 and 5 of our 31 July 2019 submission, namely our law reform proposals relating to:

- The requirement for contestable warrants to a high authority when warrants are sought for a range of matters relating to journalists and media organisations operating in those roles; and
- The requirement for amendments to offences in order to exempt journalists and media organisations from offences that would put them in jail for doing their jobs.

This submission responds to many of the issues raised in the submissions and supplementary submissions of the Department of Home Affairs and the Attorney-General's Department, the Australian Federal Police (**AFP**) and the Australian Security and Intelligence Organisation (**ASIO**).

1. THE PROBLEM WITH A GRACE AND FAVOUR APPROACH

At the outset we note that many of the representations and submissions made by the Department of Home Affairs/Attorney-General's Department, the AFP and ASIO misunderstand the object of the rule of law and democratic rights. The submissions amount to a litany of matters of convenience to the agency rather than an examination of substantive rights. Many of the submissions assume that the protection of

government secrecy is an end in itself. That assumption is not only flawed but constitutionally illegitimate. ARTK accepts that the effective functioning of governments, including those of representative democracies, in relation to national security requires some information to be kept secret from the public (at least for some period). This is an exception rather than the rule. However as Bret Walker, SC, the former Independent National Security Legislation Monitor, recently noted: there is now a *"mass of octopus-like various laws around national security"*¹ that need addressing. Those laws must be addressed urgently.

It is apparent in the Department of Home Affairs/Attorney-General's Department, the AFP and ASIO submissions that the agencies eschew legal theory in favour of administrative convenience. Many of the solutions proposed, including the recent Ministerial Directions by the Attorney-General to the Commonwealth Director of Public Prosecutions² and the Minister for Home Affairs to the AFP³ are more reminiscent of the historic and arbitrary monarchical power of grace and favour than substantive law reform. In particular, the very width of the Attorney-General's discretion to or not to proceed with the prosecution of a journalist, and the inevitably selective way in which that is to be exercised, should give rise to considerable unease within the community.

The directions also suffer from the issues identified in the ALRC's Report on Government Secrecy in 2010⁴ in relation to consent requirements including:

"The Attorney-General, as a political figure, might be perceived to agree more readily to the prosecution of certain individuals such as those who criticise government policy or are unpopular with the electorate."

The undue focus in the submissions and answers to the Committee's questions on administrative and investigative restrictions which may arise from any reform is simply unhelpful to robust law reform to protect journalists, media organisations and the public's right to know. Many of the propositions put, apart from being legally doubtful, beg the question whether the investigative or administrative power sought to be exercised is appropriate to justify a restraint on the liberties and rights of the public and individuals. An object of protecting the secrecy of government information as an end in itself, subject only to the will of the Executive, is simply not compatible with the maintenance of Australia's constitutionally prescribed system of representative and responsible government.

The more appropriate approach is to consider and give primacy to the many rights affected by the operation of the exorbitant and exceptional powers exercised in aid of "security". TRS Allen in *Constitutional Justice* (Oxford 2001) stated:

"Now, the exercise by ministers of unfettered power in their relations with the private citizen is radically inconsistent with constitutional principle: the notion of a purely administrative or discretionary act that determines a citizen's fate, without recourse to legal safeguards, is a flagrant contradiction of the rule of law.....No one, even if convicted of serious crimes, should in any circumstances be subject to the unfettered discretion of a public official, or be dependent on grace or favour, bestowed on idiosyncratic grounds, and vulnerable to personal antagonism or caprice."

¹ Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review*, 29 August 2019, accessed at <https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-media-freedom-says-dreyfus-20190829-p52m0d>.

² Direction made by the Honourable Christian Porter MP, Attorney-General, *Ministerial Direction (Commonwealth Director of Public Prosecutions)*, 19 September 2019.

³ Direction made by the Honourable Peter Dutton MP, Minister for Home Affairs, *Ministerial Direction to the Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer*, 8 August 2019.

⁴ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report 112), 11 March 2010.

The prerogative of mercy is wrongly so called: there is only prerogative of justice, exercised by, or under the close supervision of, the Queen's courts."

It is not a stretch to propose a system which is devised and expressed in the form of judicial adjudication involving an agency providing sworn evidence and which is contested to justify a warrant against a journalist or media organisation. That is exactly what confident democracies enact, such as Canada in its *Journalist Sources Protection Act* (S.C. 2017, c. 22) and the UK in its *Police and Criminal Evidence Act 1984* (UK). As Bret Walker SC has stated: *"We don't give to the people who want secrecy the final word on whether they'll have it."*⁵ And, yet, in modern day Australia that is precisely what we have done.

2. OUR NATIONAL SECURITY DEPENDS ON MEDIA FREEDOM

The national security of this country is dependent on the freedom of the media, for without it the light of truth would seldom shine on abuses of power that put us all at risk and deprive the public of the opportunity to truly hold our elected representatives to account.

The law reform proposals made in this a submission are underpinned by three fundamental principles, which highlight the interrelationship between Australia's national security laws and freedom of the media. Those fundamental principles are:

- an informed Australia is a safer Australia;
- the public interest is served by the free media; and
- the law must balance national security and the public's right to know.

It is our view that the legal framework that is the subject of this inquiry is not in accordance with these principles. Instead the laws applying to Australian journalists, and secrecy more generally, are capricious, ambiguous and excessive. Unless they are changed (including to resolve legal uncertainty), they will continue to have a significant chilling effect on journalism in this country and undermine the strength of our democracy.

2.1 An informed Australia is a safer Australia

The Australian media plays a vital role in holding the government to account and maintaining transparency. The principles of a representative government demand that the public is well-informed and can freely discuss and criticise their government, as recognised by the Constitution's implied freedom of political communication. The importance of freedom of speech and freedom of the media in preserving human rights and democracy is acknowledged in international treaties, under which Australia has obligations (e.g. the International Covenant on Civil and Political Rights) (see, e.g., Article 19).

Greater transparency means Australians can be made aware of abuses of power, and hold the relevant authorities and elected representatives to account. An informed Australian can feel safe in the knowledge that they know what its Government is doing, and that the Government is not hiding things from them – whether it be mishandling funds or sending our troops into battle.

Individuals who are better informed about the threats to Australia can better protect themselves, and, in some instances, promote the safety of others by reporting potential threats to the relevant bodies. Media freedom also assists national security bodies: to effectively perform their function, national security

⁵ Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review*, 29 August 2019, accessed at <https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-media-freedom-says-dreyfus-20190829-p52m0d>.

bodies require the trust and confidence of the Australian people. Australians need to have a foundation to believe that these bodies are acting appropriately, and reporting of their activities assists in this. Without insight into and oversight of what national security bodies do, trust in them decreases.

2.2 The public interest is served by media freedom

A free media serves the public interest. Whether stories reflect positively or negatively on the government should have no bearing: the Australian public has a right to know about the decisions and actions of its government, and make their decisions accordingly. Freedom of the media means that journalists are able to receive information and investigate and report stories without fear of repercussions. The public interest is strongly in favour of journalists being put in a position to provide information to the Australian people.

Often sources who come to journalists with an issue about governments, a government body, a government official or a government policy (for example, a complaint about misconduct), have already tried all official pathways to raise their complaint. Coming to a journalist is often a last resort to bring the issue to the attention of the Australian people, and their government, and have the issue resolved. This function of the media in raising important issues that have not received the attention they should have is vital.

Journalists have repeatedly reported stories that raise significant issues of interest to all Australians. These stories draw the attention of the Australian public and their governments, and effect changes at various levels, including at a national level. Recent examples include the reporting that led to the Royal Commission into the Home Insulation Program, the Banking Royal Commission, and the current Royal Commission into Aged Care.

In performing their functions, journalists need to feel confident they will not be punished for doing their jobs. This importantly includes the protection of sources. Journalists should not have to fear a sudden raid on their home or the use of their metadata to identify their sources, which may jeopardise multiple stories on which they are working. Nor should they be forced to wait in a form of purgatory while they await police and prosecutors to tell them if they are going to be prosecuted and potentially jailed for an offence, as ABC journalists Dan Oakes and Sam Clark and News Corp Australia's Annika Smethurst have done since early June this year – for stories broadcast and published over a year before. This is not a state of affairs that is becoming of a sophisticated western democracy and its place in the world.

Submissions by the AFP assert that the exercise of investigation powers by police is an information collection process and not a punitive measure, however it should be acknowledged that the risk of such investigations is a significant deterrent to the execution of news reporting. The relatively easy availability of search warrants and the threat of prosecution intimidates journalists and media organisations and discourages them from performing their function. The possibility of repercussions for following the "wrong" story or accepting information from the "wrong" source is a gamble for journalists, who, as discussed below, may have no awareness that they are at risk of violating the law. Intimidated journalists cannot reasonably be expected to play their role in ensuring accountability within Australian society, including holding government to account.

2.3 The law must strike the right balance

As we have expressed on many occasions, we acknowledge the importance of protecting national security, and recognises the role that all Australians, including journalists, play in guaranteeing the safety of this nation.

However, the law must strike an appropriate balance between secrecy and the Australian public's right to know. The balance between national security and the public interest, as it stands, is heavily weighted in favour of national security – and prioritises secrecy – at the expense of the public interest.

Currently the public has next to no visibility over any process that relates to taking action against journalists or media organisations, despite the great public interest in and importance of the freedom of the media, as discussed above.

The current approach is backwards. It is a case of 'act first, ask questions later'. Issue a warrant now, if there are problems the subject of the warrant can seek a review after the fact. Prosecute now, *if* there is a defence available it will be dealt with later.

The time for consideration of the public interest in lifting the shroud of secrecy needs to be brought forward to make sure it is a key priority, not a belated afterthought.

Adding a public interest test as a requirement for the issuing of search warrants against journalists would ensure this issue is carefully considered before investigative bodies apply for a warrant. Introducing an exemption to relevant national security offences for public interest journalism would also ensure the public interest is considered early in investigations (as a threshold matter), not just after prosecution is underway and raised in defence at the hearing. Taking these actions would go some way to reinstating the balance between the public interest and national security.

The importance of media freedom and the role of the fourth estate in maintaining accountability in Australian society does not mean journalists should be given carte blanche. However it does mean that actively considering the public interest in not keeping the public in the dark as opposed to keeping the public in the dark must be up-front in our laws.

3. WARRANT ROULETTE – THE GOVERNMENT'S GAMBLE WITH PUBLIC CONFIDENCE

As explained in the submissions of the Department of Home Affairs and Attorney-General's Department,⁶ there are currently multiple legal avenues through which a warrant can be issued against journalists and media organisations. Each regime survives within its own legislative framework, has its own statutory test, and designates different sets of possible decision makers.

Type of Warrant	Provision	Issuing Officer
Search warrant	Section 3E, <i>Crimes Act 1914</i>	<ul style="list-style-type: none"> Magistrate Justice of the Peace Other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest
Interception warrant	Sections 9, 9A, 10, 46 and 46A, <i>Telecommunications (Interception and Access) Act 1979</i>	<ul style="list-style-type: none"> Eligible Judge Nominated Administrative Appeals Tribunal member

⁶ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

Type of Warrant	Provision	Issuing Officer
Stored communication warrant	Section 116, <i>Telecommunications (Interception and Access) Act 1979</i>	<ul style="list-style-type: none"> Appointed Magistrate (except for interception warrants) <i>For certain warrants issued to ASIO</i>
Journalist information warrant	Sections 180L, 180M and 180T, <i>Telecommunications (Interception and Access) Act 1979</i>	<ul style="list-style-type: none"> Attorney-General Director-General of Security (for warrants issued in an emergency)
Computer access warrant	Section 27C, <i>Surveillance Devices Act 2004</i>	<ul style="list-style-type: none"> Eligible Judge Nominated Administrative Appeals Tribunal member
Surveillance devices warrant	Section 16, <i>Surveillance Devices Act 2004</i>	

Given the disparate regimes, one key question goes unanswered in the Attorney-General's Department and Department of Home Affairs' submissions: how is it that law enforcement and intelligence agencies can assure Australian journalists that they will have equal standing before the law and not be the subject of capricious and arbitrary decision making regarding the issuance of warrant that is obscured from the public gaze?

In our view, it is obvious that no such assurance can be given. Only a single unified approach to issuing any and all warrants pertaining to journalists, journalists' materials and media organisations can begin to address the deficiencies in the system. Such a system must extend to access to information associated with journalists undertaking their job, for example travel records. It should also include content and material collected and created in the news reporting process, for example material that was not published or broadcast but may have been obtained and/or created in the news reporting process such as broadcast footage that was recorded but not broadcast.

The overarching issue with the current warrant frameworks, and the submissions by the various government entities, is that they rely on the paternalistic and circular argument that the Australian public should trust that every step of the process taken to obtain a warrant – of any type – has been undertaken in accordance with the law (and without an arbitrary exercise of discretion), because the public should have faith in the entities involved in the process.

The recent breach of the Journalist Information Warrant scheme (**JIW Scheme**) by the AFP is evidence that such assurances cannot be relied upon. We also note here that when the metadata laws were being implemented – before the JIW Scheme was conceived – we were repeatedly told by the most senior members of law enforcement that there were already sufficient 'safe guards' in place to ensure issuing of warrants would meet the letter of the law. The AFP breaches of the JIW Scheme showed they could not have met the original attestations as it was against the so-called safeguard of the JIW Scheme that the breach occurred.

The reliance on trust is the antithesis of the underlying right of the public to know. If there is a matter journalists believe the public have a right to know about, and the government contests this view, Australians have an expectation that such matters will be dealt with in a way that aligns with Australian values – in a forum with objective and experienced decision makers where all relevant parties have a

chance to make their arguments for and against. However the reality of the existing processes for the issuing of all warrants – uncontested – does not match this expectation.

Journalists and/or media organisations must instead submit to search warrants in relative silence, forced to assume that the process of applying for the warrant has been validly completed, as they have no recourse to challenge the warrant until after it has been executed. The recourse the journalist and/or media organisation has is then limited to there being some error in either the legislative provision or in the warrant or warrant application itself, rather than in a failure in the basis of the warrant. This is not how matters work in other sophisticated western democracies, and it is unexplained why they are suited to the Australian democracy.

4. ARTK'S PROPOSAL FOR WARRANTS ISSUED AGAINST JOURNALISTS AND THE MEDIA

We set out in our original submission a detailed proposal for how warrants should be issued in circumstances where they relate to journalists, material held by a journalists and media organisations. As stated above, uniformity needs to be introduced into the various warrant schemes, with adequate protections in place for journalists, including requiring applications be made to judges of superior courts and having a contested hearing at which both sides make submissions on their own behalf.

Importantly, we reinforce that the elements of the contestable warrant scheme to a higher authority detailed in previous submissions and again here by ARTK are required in aggregate. We do not support the adoption of the elements in a piecemeal manner.

Lastly, in this section we also respond to positions and issues raised in other submissions.

4.1 Proposition 1: The application for a warrant should be made to a judge of a superior court, and they should apply the relevant tests

Depending on the scheme, current warrant applications are made to a wide variety of different offices and officers (see previous table). We recommend that in all cases – including those not currently covered by warrant scheme such as those articulated in Section 4 of this submission – applications should be required to be made to judges of superior courts, being the Supreme Courts, the Federal Court and the High Court.

4.1.1 *The Department of Home Affairs and the Attorney-General's Department say that it is not uncommon for officers other than judicial officers to be authorised to issue search warrants.*⁷

While this is correct, search warrants to be executed on journalists and media organisations are not a normal element of criminal procedure. Such search warrants infringe/encroach/impinge on fundamental rights, and the circumstances in which such an infringement should be granted require careful consideration.

The High Court has emphasised the need to remember the seriousness of search warrants and their exceptional nature in our legal system:

"...it needs to be kept in mind that they [statutes authorising search warrants] authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of

⁷ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

*conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests."*⁸

Despite this, search warrants executed against journalists seem to be easier to obtain than an Anton Piller order or an injunction in civil proceedings. The lack of a requirement to consider the public interest in NOT issuing the warrant demonstrates that the legislature – and the Government that makes legislative decisions – is not sufficiently concerned to consider these interests in the usual lawful manner.

The closest analogous situations to search warrants are injunctions and Anton Piller orders. Injunctions and Anton Piller orders, like search warrants, involve a serious intrusion on an individual or organisation's rights. Injunctions and Anton Piller orders both have very high thresholds that must be met before any application will be granted. They require the utmost candour by an applicant including disclosing any adverse matters and the giving of undertakings as to damages.

Due to their serious nature and invasiveness, both injunctions and Anton Piller orders traditionally have not been issued by inferior courts, who tend not to be granted the jurisdiction required to issue orders of that type. The jurisdiction to make such orders is exercised with restraint.

Anton Piller orders have been recognised by Justice Lee in the Federal Court of Australia as a "*peremptory and severe interference with the ordinary rights of a party*", where "*care must be taken to see that the order is only granted in appropriate cases and with due safeguards*".⁹ Justice Lee also stated that courts must "*be careful to avoid the extraordinary jurisdiction of the court to make an Anton Piller order from being subverted to a mere investigatory tool for applicants*".¹⁰

Judges have noted there must be exceptional circumstances for an Anton Piller order: "*some substantial ground for expecting that there will be extraordinary behaviour... some ground going beyond the indications of dishonesty... a ground which would show that active concealment or measures which are criminal or in the nature of criminal conduct should reasonably be feared*".¹¹

Similar considerations should apply to ALL warrants issued against journalists and/or media organisations. Only judges have the necessary experience to weigh all the relevant considerations, including the extreme nature of the action, and determine whether it is necessary and in the best interests of the public to make such an order.

- 4.1.2 *The Department of Home Affairs and the Attorney-General's Department submitted that it should not matter who is issuing the warrant: the test to be met does not change just because the officer is not a judge.*¹²

While the test to be met may not change, the experience of the officer implementing the test will vary significantly between a judicial officer in a Local Court and a Federal Court judge. For example, a judicial

⁸ *George v Rockett* (1990) 170 CLR 104 at 110-111 (per the Full Court).

⁹ *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38.

¹⁰ *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38.

¹¹ *EFG Australia Ltd and Anor v Kennedy* (2 August 1996, unreported, Bryson J) at 6.

¹² Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

officer in a Local Court may not feel they have the requisite experience to refuse ASIO an application. The perceived legitimacy of the decision in these cases is important and thus some consideration of and deference to the field in which the decision maker normally operates will be important. A person with experience in judicial method as distinct from administrative or investigative method is important in this context.

Issuing officers outside the superior courts are unlikely to be able to bring the kind of rigour to the decision making and inquiry process that a judge would bring. We are of the view that a Registrar of the High Court, or a Senior Registrar of the Federal Court, will not have the relevant experience. The decision to be made is quintessentially judicial requiring an understanding of the difficulties associated with making such decisions, as distinguished from registrars of Local or District Courts whose experience can more fairly be described as administrative.

Superior courts more regularly see cases in which they have to adjudicate on administrative decisions which have been misapplied, so judges in these courts have the relevant experience to understand how to make a correct decision.

Additionally, given the role of the fourth estate in democracies like Australia – including holding governments to account and the importance the Australian public places on this role – there is a reasonable public expectation that any proposed action by government bodies in relation to the media will be dealt with at the highest levels, and in as public forum as possible.

- 4.1.3 *The Department of Home Affairs and the Attorney-General's Department note that the journalist information warrant framework requires the warrant to be issued by a judge, magistrate or senior Administrative Appeals Tribunal member.*¹³

We note at the outset the considerable short-comings of the JIW Scheme. We refer the PJCIS to our original submission to this inquiry and particularly the detailed analysis of those short-comings. Having read that material members of the PJCIS will be aware that this is but one of a number of significant issues ARTK has with the JIW Scheme.

Notwithstanding the breadth and depth of our concerns, regarding this assertion by the submitters referenced, we restate that for the reasons discussed previously in this submission, a judge of a superior court should be hearing the case for and against, and deciding on the issuing – or not – of all journalist information warrants. In fact it is our position this should be the case for the issuing of all warrants associated with journalists and media companies operating in their professional capacity. Therefore, it follows that we do not support JIWs – nor any warrant – being issued by a magistrate or senior Administrative Appeals Tribunal member.

- 4.1.4 *The Department of Home Affairs and the Attorney-General's Department state that the AFP says that it already faces difficulties with the availability of magistrates to issue warrants, and that this difficulty would be compounded by requiring warrants to be issued by a judge in all circumstances.*¹⁴

With the greatest respect, this is nonsense, both in relation to the difficulty of finding magistrates, and in relation to the idea that requiring judges to issue warrants would cause additional difficulties or delays.

¹³ Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32, page 7.

¹⁴ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 11.

Any experienced litigator knows that the superior courts make their judges available at all hours and at short notice.

In relation to the Annika Smethurst warrant, by way of example, the AFP were able to contact a magistrate and have a warrant reissued within four hours, when it was realised there was a mistake in the initial warrant.

The duty judge system ensures that a judge is always on call and available to deal with any urgent applications. There are typically no issues with quickly accessing a duty judge.

There would be no greater burden to the judicial system in putting an extra judge on duty (if this became necessary) than there would be from adding a magistrate.

- 4.1.5 *The Department of Home Affairs and the Attorney-General's Department state that, for journalist information warrants, ASIO must apply to the Attorney-General.¹⁵ ASIO suggests that approval by the Attorney-General is the appropriate level of approval.¹⁶*

We acknowledge the current arrangement for the issuing of journalist information warrants, ASIO must seek the approval of the Attorney-General. However, this is not the standard that applies more generally – it is only for this specific category of warrant. Regarding the current process for ASIO to obtain a JIW we are of the view that, it will generally be difficult for the Attorney-General to refuse ASIO when it approaches him, given the political issues associated with security applications. We also note that the Attorney-General is not required by law to ‘weigh-up’ the public interest in not issuing the warrant with the public interest in issuing it.

Additionally, there is no transparency to this even if it was a requirement by law. The Attorney-General’s decision is not made in open court – or even closed court. We also add that we query the likelihood to refuse to issuing of a warrant if there is any adverse political element to the request. However, a judge from a superior court will be able to more objectively review the application and consider whether it is appropriate or necessary for a warrant to be issued. In such a circumstance, in open court, there will be a record. Even closed court would provide a level of transparency currently denied under the JIW Scheme and the issuing of all other warrants not just to ASIO but all law enforcement agencies. We make this comment particularly in relation to the issuing of warrants relating to journalists and media organisations.

4.2 Proposition 2: Public interest should be a component of the statutory test for the issuing of a warrant pertaining to material held by a journalist.

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

- 4.2.1 *The Department of Home Affairs and the Attorney-General's Department noted that the current search warrant legislative framework includes subjective or objective tests (depending on the legislation) for each warrant which must be met prior to issuing a warrant. The requirement that these tests are met is intended to provide assurance that the issue of the warrant is appropriate.¹⁷*

¹⁵ Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32, page 7.

¹⁶ Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, page 5.

¹⁷ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 5.

These tests do not incorporate a test for the issuing of a warrant that requires the public interest in issuing the warrant outweighs the public interest in not granting access, including the public interest in the public's right to know, and the protection of sources.

4.2.2 *The Department of Home Affairs and the Attorney-General's Department say that, due to the operation of the Ministerial Direction to the Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer¹⁸ (the **AFP Direction**), the AFP are already required to consider the importance of a free and open media and broader public interest implications before undertaking investigative action involving journalists.¹⁹ The Department of Home Affairs and the Attorney-General's Department submit that the AFP Direction, in conjunction with the existing tests, are sufficient to ensure that the public interest is a key consideration in issuing search warrants in relation to journalists and/or media organisations.²⁰*

First, the misplaced notion of a purely administrative or discretionary act that determines an individual's or the public's rights, without recourse to any legal safeguard, is as stated above a flagrant contradiction of the rule of law. The elements of the justiciability of every act of the executive, and its agencies, affecting persons is an important concept and restraint on investigators which is a way of ensuring equality, predictability, rationality and fairness of the process.

Second, the Direction does not contain a requirement to take into consideration the importance of a free media in making a warrant application or issuing a warrant. It contains an expectation that the AFP will consider the importance of a free and open media *in its investigation*.

Third, it does not place the importance of a free media front and centre early in the administrative decision-making process.

A threshold public interest test which is a precursor to issuing a warrant, applied by a judge with rigour, requires that a standard is met before a warrant will be issued.

The current direction merely introduces a relevant consideration for the AFP in their investigation. If they do not consider that, and the complainant can demonstrate the lack of such consideration, which is unlikely in itself, this only opens an avenue for judicial review after the warrant has already been issued. That reconsideration does not require a judge to have weighed all the relevant evidence and submissions before making the warrant. Providing a possibility of a judicial review after the fact is not a good enough protection against misuse or overuse of the warrants system. Additionally, there is no clear or accessible means by which any person potentially affected can test or assess compliance with the Directive in the circumstances of any particular investigation.

Given this is an existing consideration implemented by the AFP Direction, ARTK can see no reason why a test considering whether the public interest in obtaining the information outweighs the public interest in

¹⁸ Direction made by the Honourable Peter Dutton MP, Minister for Home Affairs, on 8 August 2019.

¹⁹ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 11; Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.1.

²⁰ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 11.

not obtaining it in this way should not be incorporated into legislation as a requirement before a warrant can be issued or any other step taken.

- 4.2.3 *The Department of Home Affairs and the Attorney-General's Department state that, for journalist information warrants, the Attorney-General must take into account whether the issuing of the warrant outweighs the public interest in protecting the confidentiality of sources.*²¹

While this inclusion is a step in the right direction, it only considers one aspect of public interest, and only in one category of warrant. We also note our long-held concern that JIW's only apply when the information being sought is related to the identity of a source.

However, it does indicate that it is possible to include a public interest test in legislative provisions regarding warrants, and that including such a test does not pose an insurmountable practical barrier for investigative bodies to try and meet.

Furthermore, we query when the specific objective of a journalist information warrants is to identify a journalist's source, how it could be the case that any issuing officer – including the Attorney-General in the case of ASIO – would not prove the issuing of the warrant when that is the specific purpose of the warrant is to identify sources. Furthermore, if the objective of the warrant to access a journalist's metadata is NOT for the purpose of identifying sources, then a JIW is unnecessary and a warrant to access the metadata for any individual for any relevant purpose would be obtained – negating any requirement to have any consideration, no matter how useful or not that consideration would in fact be. Furthermore, once you have access to a journalist's metadata it is possible that sources will be identified – regardless of the type of metadata access warrant issued.

- 4.2.4 *At the Public Hearing,²² it was suggested that media organisations would be concerned that adding the public interest test before a warrant is issued will give investigative agencies a lot of power to guide journalism, instead of this guidance being given at the end.*

It gives investigative agencies no additional powers, it merely adds a step before they can exercise their existing powers. As discussed above, including a public interest test will ensure that all investigative agencies are obliged by law to keep the public interest front of mind when considering their investigative strategy, and will then ensure that the search warrant powers cannot be exercised without public interest being duly considered by a judicial officer.

4.3 Proposition 3: The application for the warrant should be the subject of a contested hearing

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

- 4.3.1 *An alternative proposal made in some other submissions was to have a Public Interest Advocate regime for all search warrants against journalist and media organisations, as opposed to the journalist and/or media organisation being notified and having the opportunity to respond themselves.*

In short, ARTK does not support this proposition as sufficient to deal with the issues raised by warrants relating to journalists and media organisations.

²¹ Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, pages 7 and 8.

²² Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Tim Wilson).

- 4.3.2 *Currently Public Interest Advocates are part of the journalist information warrant scheme under the Telecommunications Interception and Access Act 1979 (Cth). In respect of the journalist information warrant scheme, the Department of Home Affairs and the Attorney-General's Department suggest that the requirement of a Public Interest Advocate is sufficient to protect the public interest.²³ The Department of Home Affairs and the Attorney-General's Department suggested that implementing a Public Interest Advocate regime more generally could cause delays to investigations, which would be problematic where the investigation needs to progress quickly due to ongoing harm or risk of imminent harm.²⁴*

It is correct that the current JIW Scheme includes a Public Interest Advocate (PIA). ARTK's detailed submission about this Scheme details our significant issues with this, including that the PIA does not have to advocate for the public interest in NOT issuing the warrant. Even if this was rectified, ARTK is strongly of the view this would be an inadequate response and the JIW Scheme would remain significantly flawed.

Further, the presence of a PIA cannot be considered to be equivalent to the subject of the warrant being present and able to make submissions on their own behalf in open court to a higher authority. Only the journalist or news organisation the subject of the warrant will have the relevant understanding of the matter they were investigating, and be able to articulate with the relevant background why it is in the public interest that the warrant not be issued.

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

- 4.3.3 *The Department of Home Affairs and the Attorney-General's Department, in the context of issues if a Public Interest Advocate regime was brought in more widely and caused delays, offered that where an investigation needs to progress quickly due to ongoing harm or the risk of imminent harm, and there is not time to find a Public Interest Advocate and/or hold a hearing, this could be carved out as a specific exemption to any scheme, decreasing or eliminating any notice period required.*

It is worth noting here that in most cases which involve the media, particularly where the information sought relates to the source of material, there is no suggestion of ongoing or imminent harm. In fact, despite media representatives calling for the relevant agencies making submissions to the Inquiry to provide examples of a responsible news organisation having done the wrong thing or risked a national security operation or put a soldier or a policeman's life in danger, no agency has provided any such example.²⁵

In the most recent cases concerning the AFP and News Corp Australia and the ABC, the relevant matters were 12 to 18 months old at the time of execution. There was no apparent urgency in the execution of these warrants, and nor was there any suggesting that there was a risk of ongoing or imminent harm.

²³ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 8.

²⁴ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

²⁵ Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Campbell Reid).

4.3.4 *The Department of Home Affairs and the Attorney-General's Department suggest the current safeguards in place in relation to warrants (particularly those issued under section 3E of the Crimes Act), including having an independent issuing officer, a detailed warrant, and the provision of the warrant to the occupier at the time of searching, are sufficient.*²⁶

The so-called “safeguards” provide no avenues for a journalist or media organisation when an investigating body shows up on their doorstep with a search warrant already made and ready for execution. Simply having a copy of a detailed warrant provides no way for a journalist or media organisation to refute the grounds for the warrant before it happens. While the warrant itself may contain errors that can be used to form the basis of a review after the warrant has been executed, this is an unsatisfactory procedure for the reasons set out below.

The Attorney-General's Department says that it would not be appropriate for the validity of a security classification to be assessed at the time a warrant application is made. The Department argues that it is difficult to have sufficient information to assess an element of the offence before all evidence relevant to the investigation of an offence is gathered, and that in order to consider the security classification, the judicial officer may need access to other classified information, that may not be able to be presented to the contesting party.²⁷

This argument is fundamentally flawed. No additional evidence from the investigation would be necessary to consider the validity of the classification as material relevant to that would be within the referring agencies control. Indeed, it would be a preliminary matter that under the Case Categorisation and Prioritisation Model (**CCPM**) should have been considered in evaluating the referral from the agency to the AFP. If the document had been misclassified then the prospects of a successful investigation would be low and the referral should be rejected.

No valid reason has been provided as to why it would not be appropriate for a judge to assess whether a matter has been given the correct security validity when considering a warrant application. The judge can and should be provided with all the information they need to consider the security risk of the matter when they are considering the warrant.

If the warrant involves a classified document, the applicant should be able to describe why it fits into a relevant security classification, for example because it meets the criteria of this category. The application for a warrant should not proceed under a potentially flawed assumption which goes to the very heart of the matter.

If describing why something has a certain security classification requires the provision of other classified information, a) other submissions note that judicial officers don't need security clearance to access security classified information, and b) this information does not necessarily have to be provided to the subject party – it can be provided solely to the judge to assist them in making their determination. Not being able to provide every document to a contesting party is common in many court proceedings. For example, the *Crimes and Corruption Act 2001* (Qld) enables the provision of evidence to the judge in closed court in the absence of the other party to protect the information.²⁸

²⁶ Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 6.

²⁷ Attorney-General's Department, *Answers to questions at hearing on 14 August 2019*, Submission 32.2, page 1.

²⁸ Sections 332 and 334.

The statement that it is "difficult to have sufficient information to assess" the offence before all the evidence has been gathered would suggest warrants are fishing expeditions, and they should not be allowed on this basis. There should be a clear understanding of what information the applicant is expecting to find, and why, and this understanding should have to meet a threshold, before a warrant is granted.

4.4 Proposition 4: It is inappropriate to limit the role of judges to that of a judicial review or other action relating to a decision regarding a warrant taken by the relevant person

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

4.4.1 *The Department of Home Affairs and the Attorney-General's Department say that the actions brought by the ABC and News Corp Australia demonstrate that journalists and media organisations already have access to legal recourse through which the validity of a warrant may be challenged.*²⁹

While there is legal recourse it is very limited. The recourse relies on some error being made in the application for the warrant or the warrant having a fault within it. The review does not consider whether a warrant should have been issued in the first place. In fact, the legal contestability is severely constrained and not as expansive as may be suggested by the AFP.

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

The current proceedings brought by the ABC and News Corp Australia are brought on the basis that there are constitutional issues present (which of itself depends on "error" in the drafting of the legislation), and that there are fundamental issues within the warrants themselves. The proceedings have not been brought in relation to the basis on which the decisions to apply for and issue the warrants were made.

4.4.2 *The AFP, the Department of Home Affairs and the Attorney-General's Department submit that there are a number of methods for issues to be heard by the courts in a contested hearing after the warrant has been issued, including.*³⁰

- *applying for an urgent injunction to halt the warrant;*
- *judicial review of the lawfulness of decisions;*
- *constitutional challenge through the High Court;*
- *suuing for damages for torts;*
- *claims of legal professional or parliamentary privilege over documents seized; and*

²⁹ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4

³⁰ Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 7; Australian Federal Police, *Submission by the Australian Federal Police*, Submission 21, page 8.

- *the ability of a defendant in a criminal prosecution to object to evidence that has been improperly or illegally obtained.*

None of the above are appropriate or provide efficient legal recourse, for the reasons that follow.

(a) Urgent injunction

While it is possible for an urgent injunction to be sought to halt a warrant, applying for such an injunction requires that the subject of the warrant believes the warrant to be invalid, which would make entry via the search warrant subject to a claim in trespass.³¹ However, this ground requires there to be some error in the warrant itself, rather than a failure to consider all relevant elements in determining whether it should be issued. Generally, the recipient of a warrant will not be able to show the later unless it is evident on the warrant itself or by virtue of a fact already known to the recipient.

Injunctions are more typically sought to try and restrain access to or the inspection of documents after they have already been seized, or to compel the return of items seized.

(b) Judicial review

In order for there to be judicial review of the administrative action in issuing the warrant, there must have been some reviewable error in the administrative action, as discussed above.

As with all of the "options" put forward by the AFP, Department of Home Affairs and Attorney-General's Department, with the exception of seeking an injunction, this method for having issues reviewed does not prevent the decision maker making a potential decision, nor does it prevent an improper search warrant being executed. It only provides a method for challenging the decision after the fact, when the damage has already been done.

(c) Constitutional challenge

A challenge on a constitutional basis will only be available in very limited circumstances, and relies on there being a flaw in the legislation (i.e. not taking into account the implied freedom of political communication, or striking an appropriate balance). It is likely that in the majority of pieces of legislation, there is no such flaw in the legislation, and therefore no opportunity for constitutional challenge.

To present this as a reasonable method of challenge generally available to the subjects of warrants is absurd.

(d) Damages in torts

Making a claim for damages in torts requires some additional error to have taken place that results in harm.

An action in trespass, detainment or conversion would require there to be an error invalidating the warrant. The torts of detainment and conversion also require some deprivation on the part of the plaintiff, which would be difficult, if not impossible, if all that is seized is copies of electronic files, as is increasingly likely to be the case. An action in negligence would require some damage to have

³¹ See, e.g. *Trimboli v Onley (No. 1)* (1981) 56 FLR 304.

occurred in the process of executing the warrant, and additionally the plaintiff to be able to show the government body had some sort of duty of care.

The only claim in tort which may go to the validity or necessity of the warrant, rather than an error in the drafting or the execution of the warrant, is a claim of misfeasance in office, but this is extremely difficult to prove and would require the subject of the warrant to prove *mala fides* on the part of the person issuing the warrant.

(e) Claims of privilege

Claiming privilege over documents, whether it be legal professional privilege or parliamentary privilege, do not provide a basis on which to challenge the validity or making of the warrant itself – they simply add in a procedural step before those documents can be used. Claims for privilege will not prevent those documents being seized.

Additionally, legal professional privilege and parliamentary privilege will not cover the vast majority of documents held by a journalist, though they may be confidential for other reasons.

(f) Objections to evidence

This "option" is even less effective than the claims of privilege option. Using this method, the investigating body would be able to seize the evidence, look at the evidence, act on the evidence, then, only once they are trying to tender the particular evidence in court would they be told if it is valid or invalid. It doesn't stop the collection of the information – it only stops it being deployed at the very final step.

4.5 Proposition 6: The journalist and/or media organisation should be notified, to allow time for the journalist and/or media organisation to find representation

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

4.5.1 *The Department of Home Affairs and the Attorney-General's Department state that notifying journalists and/or media organisations for the purpose of contesting their warrants would undermine the effectiveness of the investigation, as it may result in them destroying or relocating evidence.³² The AFP echoes this in their submissions, saying that it is important that persons of interest not be made aware of the investigation until the warrant is executed, as it provides the opportunity to destroy evidence.³³*

The idea that a professional journalist or a media organisation would destroy or relocate evidence is fanciful at best. There is no evidence to suggest that journalists or media organisations destroy or relocate evidence. Indeed, as noted above in the civil context before such orders are made it must be shown that there is some substantial ground for expecting that there will be extraordinary behaviour, some ground going beyond the indications of dishonesty. The agencies making these serious allegations against

³² Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 7; Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

³³ Australian Federal Police, *Submission by the Australian Federal Police*, Submission 21, pages 7-8.

professional journalists have not offered a scintilla of evidence to show that active concealment or measures which are criminal or in the nature of criminal conduct are reasonably feared. To the contrary, they are aware it would be difficult to swear an affidavit that made such an allegation as the investigator would have to have some positive basis for the suggestion or at least some historical evidence of the risk. None is proffered. If the agencies seriously advance this proposition it should be done in the conventional way of providing evidence.

In the most recent cases, the ABC knew several months in advance what information and material the AFP was seeking, and there is no suggestion that they destroyed or moved documents with the benefit of this advance notification.

In relation to the raid on Annika Smethurst, the AFP were going to execute a further warrant at the News Corp Australia headquarters in Sydney. While ultimately the AFP decided not to execute this warrant, News Corp Australia was provided with advance notice about this warrant. There was no concern expressed that News Corp Australia would relocate or destroy the evidence prior to the AFP executing the warrant. No undertaking was sought from News Corp Australia, simply because it was unnecessary and nor was there any basis for responsibly making the assertion.

There is no evidence that the UK's introduction of contested applications for search warrants in relation to journalists, discussed below, has resulted in any destruction of material.

There is simply no basis for any suggestion that there would be any destruction or relocation of evidence in the context of professional journalism. The media are routinely subjected to subpoena processes both in civil and criminal cases and subject to proper legal objections they comply. These processes are invariably supervised by in house lawyers who are also aware of their professional obligations.

Further, materials sought through search warrants are increasingly digital, rather than physical. Modern technology means that, even if the subject of a search warrant did attempt to move or delete files, a digital trail would exist which would make it obvious that such an attempt had been made. Additionally, it is very difficult to irreversibly delete an electronic file. Even if an attempt is made to delete a file, it is likely that the file will be recoverable. In this digital era, concerns that material will be destroyed are overblown. In any event, as ARTK has proposed, the issue can be dealt with by a specific provision prohibiting destruction of documents upon the receipt of the application of the warrant.

Finally, mechanisms can be put in place to prevent disclosure of information, if it is believed that providing such information will impact the investigative body's investigation or prosecution. One such mechanism is allowing the judge to hear part of a party's submissions or receive part of a party's evidence in the absence of the other party. For example, the *Crimes and Corruption Act 2001* (Qld) allows for sensitive information to be heard in the absence of a party or the party's lawyer where necessary (sections 332(2), 334(3)).

4.6 Relationship with intelligence community

- 4.6.1 *In response to a question about the fact no one seems too concerned about the fact other Five Eyes' partners have journalist protections, the Office of National Intelligence stated that Five Eyes partners would be concerned about changes to Australian law resulting in more permissive environment for unauthorised disclosure.³⁴ It was suggested that changes which would increase protections for journalists may affect information sharing with Australia's intelligence partners.*

³⁴ Office of National Intelligence, *Question on Notice - 64*, Submission 35.1.

Perhaps the most frequently used, and weakest, justification for conducting investigations into leaks from Government is that our failure to do so will affect our Five Eyes' relationships.

Implementing increased protections for journalists would in fact bring Australia into closer alignment with its Five Eyes co-members. Canada, for example, recently enacted the *Journalist Source Protection Act 2017*, which requires police to notify the journalist and relevant media organisation of their intention to examine the document the subject of the warrant, and affords an opportunity for the journalist to contest the application. The US, UK and Canadian positions are discussed in more detail below.

The Office of National Intelligence notes that it is not aware of an Australian agency threatening to withhold intelligence information solely because the UK has a public interest test for some warrants, nor is it aware of any intelligence being withheld from the US because of their freedom of speech protections. This begs the question as to why it would be the case that the UK or the US, or any other Five Eyes member for that matter, would refuse to share intelligence with Australia if it implemented similar protections.

There is simply no evidence that increasing protections for journalists would damage Australia's relationships with its intelligence partners, or affect the flow of information.

4.6.2 *The Canadian Position*

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

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

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

- (a) there is no other way by which the information can reasonably be obtained; and
- (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.

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

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

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

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

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

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

- (a) the information or document cannot be produced in evidence by any other reasonable means; and
- (b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things:
- (c) the importance of the information or document to a central issue in the proceeding,
- (d) the freedom of the media; and
- (e) the impact of disclosure on the journalistic source and the journalist.

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

4.6.3 *The UK Position*

The position in the UK also provides a useful model for the system that ARTK proposes.

The *Police and Criminal Evidence Act 1984* (UK) (**PACE Act**) makes special provision for search warrants for "journalistic material", defined as material acquired or created for the purposes of journalism.³⁵

Search warrants in the UK are typically issued by a Justice of the Peace.³⁶ However, journalistic material held in confidence is classified as "excluded material" (e.g. information about protected sources)³⁷, and journalistic material which is not held in confidence is classified as "special procedure material".³⁸ A Justice of the Peace cannot issue a warrant in respect of excluded material or special procedure material.³⁹

Seeking access to journalistic material considered "special procedure material" requires the police to seek a production order from a judge.⁴⁰ The subject party must be notified of the application for the production order.⁴¹ Before issuing the order, the judge must be satisfied that other methods of obtaining the material have been tried without success or, if not tried, were bound to fail.⁴² The judge must also be

³⁵ PACE Act s 13.

³⁶ PACE Act s 8.

³⁷ UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 32.

³⁸ PACE Act s 14.

³⁹ PACE Act s 8(1)(d).

⁴⁰ PACE Act s 9(1).

⁴¹ PACE Act Schedule 1 paragraph 7.

⁴² PACE Act Schedule 1 paragraph 2(b).

satisfied that the making of the order is in the public interest, having regard to the benefit accrued in obtaining the material, and the circumstances in which the person in possession of the material holds it.⁴³

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

The PACE Act also includes a mechanism to protect material from destruction after the journalist is notified that an application will be made: they cannot conceal, destroy, alter or dispose of the material without leave until the application is dismissed or the order has been complied with.⁴⁴

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

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

A recent example of how requests for production orders are dealt with in the UK was in *Metropolitan Police Service (D.I. Collinson) v Times Newspapers Limited & Ors*⁴⁵. The police made applications seeking Production Orders to be granted in relation to special procedure material held by Times Newspapers Ltd, Independent Television News Limited, Sky News UK and the BBC. Each of the media organisations contested the application, and made submissions in person or in writing at the hearing. Each of the media organisations undertook to store the material with a firm of solicitors if the production order was not granted, until further order.

The material requested was footage recorded by each of the media organisations of interviews with Sbamima Begum, a UK national who had travelled to Syria in 2015 to live in the Islamic State caliphate, and now wished to return to the UK. The police wanted the unedited footage, as distinct from that which was broadcast.

In determining not to grant the police's application, the judge considered the test set out above. While he did consider there was material that would likely be of substantial value to the terrorist organisation, the public interest against interfering in journalist's rights outweighed the value of the material to the investigation. He held there was no pressing need in the circumstances of the investigation to override the rights of the journalists. A copy of the decision is attached to this submission as **Annexure A**.

4.6.3.1 *The Department of Home Affairs and the Attorney-General's Department submitted that caution should be exercised in looking at the UK position as a basis for reform, as the relevant laws are currently under review by the United Kingdom Law Commission.*⁴⁶

Again, this assertion is flawed and misleading.

The basis for the review is not that contested warrants are causing problems in the investigation of issues relating to national security. One of the stated goals of the review is to extend protections, make

⁴³ PACE Act Schedule 1 paragraph 2(c).

⁴⁴ PACE Act Schedule 1 paragraph 11.

⁴⁵ Unreported, Central Criminal Court, 4 September 2019.

⁴⁶ Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

it easier to challenge search warrants, and make the law more transparent.⁴⁷

The review is that the current provisions governing search warrants as a whole are too complex, and therefore give rise to a high number of challenges. The review is also looking at whether the provisions require updating due to the technological advances since the introduction of the PACE Act.

One of the proposals by the Commission is that the exclusion of journalistic materials be extended to search and seizure in all cases, to increase consistency.⁴⁸ Any provisions relating to search and seizure of confidential journalistic material that are less onerous than are set out in the PACE Act are proposed to be raised to the standard of the PACE Act, so disclosure is exempt in all circumstances.⁴⁹

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

4.6.4 *The US Position*

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

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

The only situations where a search warrant can be executed on a journalist is where there is probable cause to believe the person who possesses the material has committed the offence to which the materials relate, the seizure of the material is necessary to prevent the death of or serious injury to a human being, there is reason to believe that providing notice via a subpoena would result in the destruction or concealment of the materials, or the materials have not been produced in response to the issued subpoena.⁵⁰

4.7 **Other**

ARTK further proposes the implementation of a transparency and reporting regime for application of and decisions regarding issuing and authorisation of warrants.

The Department of Home Affairs stated that it would be difficult to prepare a report on search warrants, as there is no central register of search warrants, and any such list may not be accurate due to the multiple jurisdictions involved.⁵¹ The Department also stated that preparing such a list would be an "unreasonable diversion of resources".

⁴⁷ UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 11.

⁴⁸ UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 17.

⁴⁹ UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, pages 194 and 196.

⁵⁰ Privacy Protection Act s 2000aa.

⁵¹ Department of Home Affairs, *Responses to Parliamentary Inquiry Question Taken on Notice*, Submission 32.6, 28 August 2019.

However, the Department also states it can be assumed that there are only a very small number of search warrants executed against journalists or media organisations. If this in fact the case, the list should not require an "unreasonable" amount of resources to put together. Additionally, it is reasonable to assume that each agency does keep some form of record of the search warrants applied for and obtained, and that it should therefore not be difficult to request each agency to submit records for the preparation of a report.

Any effort expended in preparing this report would be worthwhile for the increased transparency it would afford.

5. EXEMPTIONS

As described in ARTK's submission, many of the national security laws enacted over the last couple of decades, and particularly the last seven years have impacted on the media's ability to perform its functions.

National security laws increasingly protect the government from scrutiny and embarrassment, rather than being focused on protecting the safety of the nation.

We recognise that the effective functioning of national governments, including those of representative democracies, in relation to national security requires some information to be kept secret from the public, at least for some period. However, even if a law whose purpose is to enable information to be kept secret from the public for one or other of these reasons pursues a legitimate purpose, the provisions in place go beyond that purpose.

The offences that criminalise the disclosure or dealing with information are not limited to public servants.

5.1 Differences between defences and exemptions

5.1.1 *The Attorney-General's Department states that there is no difference in the legal effect whether a protection for journalists is classed as a defence or an exemption. They state that the same evidential burden needs to be discharged, and there is no procedural difference.*⁵²

This is not strictly correct. Not only are they legally distinct, the manner in which legislation is cast can have a significant effect on those potentially affected by the provision and those investigating it.

Broadly speaking, a matter which excuses or excludes liability for an offence can fall into three main categories:

- (a) where a matter is cast as an element of an offence.
- (b) where a matter is cast as an offence-specific 'exemption' or an 'exception'; and
- (c) where a matter is cast as an offence-specific 'defence'.

⁵² Attorney-General's Department, *Answers to questions at hearing on 14 August 2019*, Submission 32.2, pages 3-4.

It can often be unclear from the face of the offence which of the above scenario applies. In *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited*,⁵³ McHugh J said at 119 (emphasis added):

When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso depends on whether it is part of the total statement of the obligation. If it is, the onus rests on the party alleging a breach of the obligation...Whatever form the statute takes, the question has to be determined as one of substance: ...

There is an important difference between an 'exemption' and a 'defence' (categories (b) and (c) respectively, as set out above). The Australian Law Reform Commission has stated that an exemption limits the scope of conduct prohibited by an offence whereas a defence may be relied on to excuse conduct that is prohibited by an offence.⁵⁴ However, 'exemption' and 'defence' are often referred to interchangeably in statute and case law. For example, in the case of *R v Khazaal* (2012) 246 CLR 601, certain justices of the High Court referred to subsection 101.5(5) of the Criminal Code as an 'exception' whereas Justice French referred to it as a 'defence'.

Nevertheless, it is important to maintain the distinction.

When considering whether to investigate and prosecute an offence, investigators and prosecutors will consider whether the defendant's conduct falls within any exemptions. They will not typically consider whether any defence is available before determining whether to proceed.

If the prosecution does decide to bring the charge, the defendant will bear the evidential burden in relation to both exemptions or defences.⁵⁵ This is also an issue.

However, setting out the circumstances in which there will not be liability as an exemption, rather than a defence, ensures that the investigators and prosecutors consider these circumstances earlier, rather than the defendant having to wait until the hearing for these matters to be raised.

An exemption for journalists would ensure that the fact that they are a journalist will be considered early in the investigation and prosecution processes, avoiding costly and lengthy proceedings. If the prosecution does proceed, journalists will still have the opportunity to rely on the exemption, as they would a defence, but earlier consideration of the relevant issues may obviate any need for proceedings.

As the provisions currently exist, they start on the premise that a crime has been committed, and the accused is only given an opportunity after they have been charged and a hearing has begun to force any consideration that they may be excluded or excused from liability. Defending such a charge will be not only costly and time consuming, but also extremely stressful. An exemption places some onus on investigators and prosecutors to consider that before bringing proceedings.

The existence of an exemption also gives assurances to journalists that they will not be prosecuted for doing their jobs and they can pursue stories and news reporting without fear.

⁵³ (1990) 171 CLR 88.

⁵⁴ ALRC (2010), *Secrecy Laws and Open Government in Australia (Report 112)*, 'General Secrecy Offence: Exceptions and Penalties'.

⁵⁵ Criminal Code s 13.3(3).

- 5.1.2 *The Attorney-General's Department says that it would add significant additional complexity and reduce the efficacy of offences to require the prosecution to demonstrate that disclosure was not in the public interest.*⁵⁶

This does not appear to be an issue in other jurisdictions, where government bodies are regularly required to demonstrate public interest (see examples above).

- 5.1.3 *The Attorney-General's Department says that reporters will be able to "easily point to evidence that he or she was engaged in reporting news and reasonably believed that engaging in the conduct was in the public interest" in deploying the defence under section 122.5(6) of the Criminal Code.*⁵⁷

The Attorney-General's Department provides no reason why that burden should rest on the journalist, and why prosecutors should not be required to prove that the conduct was not related to the reporting of news or in the public interest to make out the offence. After all, the prosecution, with the assistance of the relevant government entities, will have access to all of the relevant information.

It was suggested at the Public Hearing that journalists were seeking to be treated as a special class in having an applicable exemption.⁵⁸ As stated by Hugh Marks, CEO, Nine Entertainment,⁵⁹ journalists are seeking to be recognised for their legitimate and important role in society. Journalists do constitute an important class because of the valuable role they play in maintaining the integrity of Australia's democracy, including ensuring accountability of a range of private and public organisations and institutions, including governments.

5.2 Difficulties for journalists in assessing information

There are no rules as to what the government can class as secret or classified information. What could appear to be a legitimate story to a journalist about, for example, an error made by a government officer, may be determined by the government as secret or classified, and the journalist could have no way of knowing that it had been classified as such, or why. Without clear guidance as to what will be classed as secret or classified information, journalists will have difficulty anticipating what information will bring them afoul of national security provisions.

National security itself is defined broadly and can include not only the defence of Australia, but also its political and economic relationships with other countries, greatly widening the scope of what could bring journalists into conflict with legislation.

- 5.2.1 *Identifying what is secret information can be a complete mystery, even to security organisations. Questions have been raised about how journalists will be aware of the full implications of the information they possess, before they publish.*⁶⁰

There are two points to be made in response to this.

⁵⁶ Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 10.

⁵⁷ Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 7.

⁵⁸ Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Tim Wilson).

⁵⁹ Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Hugh Marks).

⁶⁰ E.g. Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Julian Leeser).

Firstly, journalists do not receive a piece of information or document and move straight to publishing it. They will talk to other sources, and where appropriate work with the relevant agencies to make sure that what is published does not put national security at risk. Journalists will seek advice from their editors and legal advisers. What is published will be put in context.

Journalists also consider the impact of what they are going to publish before publication: if they have any idea that the publication of information will endanger a life, this will be a significant force against publication.⁶¹

It is not a case of publish first, ask questions later. A significant amount of investigation and consideration will be undertaken before a journalist decides to publish potentially or allegedly sensitive information. Journalists take care to ensure they are not threatening national security, or endangering anyone's life.

Second, it is clear from the submissions of others that it is not even always clear to security or investigative bodies what is a sensitive piece of information: ASIO states in its submission, by way of example, that it is sometimes unclear even to ASIO itself if information will compromise a source, for example if that information was only provided to a small group of people.⁶² If this is the case, it is unreasonable to think that journalists should be able to identify whether pieces of information provided to them without that context are sensitive, and therefore unfair to criminalise their action in publishing that information.

Traditionally, journalists have taken a communicative approach with relevant agencies. By way of example, when the ABC found a cabinet of documents relevant to national security, they discussed this with the relevant agencies and largely returned the documents.⁶³

As many of the relevant offences are currently constituted, it is an offence to even receive documents, even if there is no intention to publicise the contents. Getting in touch with agencies to find out more about the document, even if just to determine whether it is a classified document, would identify a journalist as having committed an offence. Such offences decrease the likelihood of journalists and media organisations working with investigative agencies.

5.2.2 *The Department of Home Affairs submitted that even an exemption to allow journalists to disclose where they consider that conduct is being engaged in which is illegal, amounts to misconduct or corruption would not appropriate, as individuals may not understand or appreciate the impact of releasing that information.*⁶⁴

This argument flies in the face of the role of the media in keeping the government and others in positions of authority accountable for their actions. The media has a vital role to play in exposing abuses of power. Suggesting that reporting on such stories should be criminal conduct because the media "may not understand" is ridiculous.

ARTK does not consider the suggestion made – and immediately discounted – above as worthy of consideration. In fact, it seems to merely serve as a rhetorical device.

⁶¹ Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Campbell Reid).

⁶² Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, page 4.

⁶³ Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 8 (Bridget Fair and David Anderson).

⁶⁴ Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

5.3 Recklessness Element

- 5.3.1 *The Attorney-General's Department and Department of Home Affairs suggest that the fact that the offences require reckless or intentional behaviour is sufficient to protect journalists who may not be aware of the broader security implications of their information.*⁶⁵

Recklessness is not a straightforward concept in the criminal law. First, it is acknowledged to be of less culpability than intention or knowledge. This is reflected in the differing penalties for section 35P(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (reckless) and section 35P(2A) (intentional). However, section 5.4 of the *Criminal Code* sets out the definition of recklessness:

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

As can be seen above, it is not merely that the person is aware of a substantial risk that the circumstance exists and the result will occur, it includes that in the circumstances known to the person it is unjustified to take the risk. The latter element in section 5.4(3) is made a question of fact.

However, in section 35P(2)(b), whether the information relates to a Special Intelligence Operation (**SIO**), is a circumstance then it may be argued or at least reliance may be placed on section 5.4(4) such that recklessness could be proved by knowledge of the risk.

Accordingly, the answer given by the Department of Home Affairs to questions from the Committee to the effect that:

*For example, a disclosure concerning potentially illegal conduct by staff of Australian Security Intelligence Organisation would not be an offence where the person making the disclosure is unaware of a substantial risk that the information relates to a Special Intelligence Operation.*⁶⁶

does not reflect the ambiguity in the legislation. It would be at least arguable that knowledge of the risk of an SIO will be sufficient to establish an offence.

⁶⁵ Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 4; Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

⁶⁶ Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

In any event given the severe penal consequences this will have a pronounced effect on any person considering disclosing potentially illegal conduct by ASIO staff.

The element of recklessness is problematic when the scope of what is considered to be related to "national security" is considered. As discussed above, "national security" extends beyond the defence of Australia to Australia's reputation and relationship with other nations. Any negative reporting on the actions of Australia's government or government bodies could be considered reckless in regard to Australia's relationship with other nations: journalists would be considered to know how negative reporting would negatively affect Australia's relationships.

While the element of recklessness does add some qualification to the offences, it is not sufficient. The offences do not generally consider where it is in the public interest to disclose something, even where the reporter is aware of a substantial risk. Sometimes a journalist will weigh the risk against the public interest, and find that the public interest is greater. The legislation needs to account for this scenario.

If it is not clear to the security agencies what information is sensitive, it is difficult for it to be clear when journalists are being reckless.

The uncertainty harms relationships between journalists and agencies, decreasing the probability of collaboration or cooperation, if by even revealing they have these documents they may be considered to be being reckless.

5.4 Existing Defences

The defences and exemptions which do exist to the relevant offences and schemes do not generally contemplate the public interest in journalists and media organisations not being prosecuted for making their reports.

The current defences and exemptions available to journalists and/or media organisations in relation to the relevant provisions are set out below:

Relevant Provision		Defences or Exemptions Available to Journalists and/or Media Organisations
<i>Australian Security Intelligence Organisation Act 1979 (Cth) (ASIO Act)</i>		
Section 35P: Unauthorised disclosure of information		While section 35P contains a number of exceptions in relation to the offences, none of the exceptions are relevant to journalists or media organisations, unless the information they have accessed or disclosed has previously been made public and they have a reasonable belief that disclosure will not endanger the health or safety of any person and will not prejudice the effective conduct of a special intelligence operation.
<i>Telecommunications Interception and Access Act 1979 (Cth)</i>		
Division 4C: Journalist		There is no exemption for journalists engaged in public interest reporting.

Relevant Provision	Defences or Exemptions Available to Journalists and/or Media Organisations
Information Warrants	
<i>Criminal Code Act 1995 (Cth) (Criminal Code)</i>	
Part 5.2: Espionage and related offences	<p>Under section 91.4, it is a defence to prosecution under section 91.1, 91.2 and 91.3 that the information had already been communicated or made available to the public with the authority of the Commonwealth. The same defence exists under section 91.9(3) for prosecution under section 91.8.</p> <p>Otherwise the only defence potentially available is that the conduct was done in accordance with a law of the Commonwealth.</p>
Part 5.6: Secrecy of Information	<p>Section 122.5(6) provides a defence for public interest reporting where the person "engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media", and that at that time the person reasonably believed engaging in that conduct was in the public interest. Section 122.5(6) extends to instances where the person was a member of an administrative staff who acted under the direction of a journalist, editor or lawyer of that same entity who reasonably believed that engaging in that conduct was in the public interest.</p> <p>Section 122.5(2) provides that it is a defence to a prosecution where the relevant information has already been communicated or made public with the authority of the tribunal.</p>
Section 119.7: Foreign incursions and recruitment	<p>Section 119.7 does not apply where a declaration has been made by the AFP Minister under s 119.8(2) that the Minister is satisfied that it is in the interests of defence or international relations of Australia to permit the recruitment in a specified armed force in a foreign country.</p>
Section 80.2C: Advocating terrorism	<p>Section 80.3 provides a defence for a person who tries in good faith:</p> <ul style="list-style-type: none"> • to show that listed persons are mistaken in their counsels, policies or actions; • to point out errors or defects in the government, the Constitution, legislation or the administration of justice; • to urge another person to lawfully procure a change to any matter established by law, policy or practice; • to point out any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; • to do anything in connection with an industrial dispute or an industrial matter; or

Relevant Provision	Defences or Exemptions Available to Journalists and/or Media Organisations
	<ul style="list-style-type: none"> to publish a report or commentary about a matter of public interest.
Crimes Act 1914 (Cth) (Crimes Act)	
Section 3ZZHA: Unauthorised disclosure of information	There are no exceptions or defences available to journalists or media organisations, unless the disclosure is made after a warrant premises occupier's notice or an adjoining premises occupier's notice has been given in relation to the warrant
Section 15HK: Unauthorised disclosure of information	Section 15HK contains a number of exceptions, but the only one potentially relevant to journalists and/or media organisations is subsection (4) which contains an exception for previously published information where the information has been published prior and will not endanger the health or safety of any person or the conduct of a controlled operation.

Only two offences have defences that contemplate news reporting or the public interest.

Enacting provisions excluding journalists and media organisations from the relevant offences would not only provide greater certainty for journalists doing their jobs, but would also provide clarity to investigating and prosecuting bodies, as discussed above. Increasing consistency across the variety of security offences would be a further benefit.

5.4.1 *The Attorney-General's Department suggests the existing defence for persons engaged in the business of reporting news in section 122.5 the Criminal Code is sufficient.*⁶⁷

This defence provides a good example of what should be included in a public interest exemption for journalists and media organisations.

5.5 "Exploitation" of legislative exemptions

5.5.1 *ASIO suggests that hostile actors will exploit legislative exemptions for journalists by using journalism as a cover, or, alternatively, target journalists with the knowledge that they have legislative exemptions available to them.*⁶⁸

Looking at the oft-repeated by ASIO example of Angus Grigg, it does not appear that ASIO is as concerned by this risk as they make out in their submissions. Despite Mr Grigg publishing an article in 2017 about how he was approached to provide information to a Chinese agency, Mr Grigg was never contacted by ASIO to ask about the incident.⁶⁹ Mr Grigg contacted ASIO himself after the incident was mentioned by Duncan Lewis, and received a generic response with no follow up.

⁶⁷ Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 7.

⁶⁸ Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, pages 3-4.

⁶⁹ Angus Grigg, 'Hey ASIO stop using me to target journalists', *Australian Financial Review*, 16 August 2019, accessed via <https://www.afr.com/policy/foreign-affairs/hey-asio-stop-using-me-to-target-journalists-20190816-p52hor>.

ASIO has not provided any additional examples of approaches to journalists, and in its actions seems very unconcerned about the one confirmed approach.

ASIO also does not address the fact that other groups of individuals, for example politicians and those involved in business arrangements with the government, are equally or more likely to be targeted by hostile actors. There is no evidence to suggest that journalists are any more susceptible to approaches than anyone else. In fact, journalists have the professional training and instincts to make them suspicious of the motives of anyone who comes to them seeking their assistance, and do due diligence as a result.

6. MINISTERIAL DIRECTIONS

6.1 Direction by the Attorney-General to the Commonwealth Director of Public Prosecutions

On 19 September 2019, the Honourable Christian Porter MP, Attorney-General, issued a direction under the *Director of Public Prosecutions Act 1983* (Cth) (the **AG Direction**). The direction requires the Commonwealth Director of Public Prosecutions to obtain the written consent of the Attorney-General before prosecuting a journalist for an offence relevant to their work as a journalist under any of the following sections:

- (a) section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth);
- (b) sections 3ZZHA, 15HK, 15HL and 70 of the *Crimes Act 1914* (Cth);
- (c) sections 131.1 and 132.1 of the *Criminal Code* (Cth); and
- (d) section 73A of the *Defence Act 1903* (Cth).

This direction provides no guidance as to what the Attorney-General will consider before providing his written consent. There is no pathway to review the decision by the Attorney-General to issue his written consent, given there are no requirements on the Attorney-General to consider or review any material before providing the consent. The Attorney-General does not even appear to be required to consider the public interest in the relevant investigation by the journalist.

Given the Attorney-General's role as an elected government official, there are inherent conflicts in the Attorney-General being given the task of determining whether journalists should be prosecuted for their actions.

It is difficult to imagine the Attorney-General refusing to provide his consent where the Commonwealth Director of Public Prosecutions approaches him requesting to prosecute an offence in relation to national security, given the Attorney-General's role also involves oversight of national security. Requiring the Attorney-General to act as gatekeeper is inconsistent with his other roles and political position.

6.2 Direction by Minister for Home Affairs to the AFP

The AFP Direction contains two relevant directives:

- (a) an expectation that the AFP will "take into account the importance of a free and open press in Australia's democratic society and to consider broader public interest implications before undertaking investigative action involving professional journalist or news media organisation in relation to an unauthorised disclosure of material made or obtained by a current or former Commonwealth officers"; and

- (b) an expectation that the AFP will, where consistent with operational imperatives, "exhaust alternative investigative actions, including in relation to any other persons that may be involved in the matter, prior to considering whether any investigative action involving a professional journalist or news media organisation is necessary."

There are several problems with the suggestion by the relevant government bodies that the AFP Direction is sufficient to rectify the issues raised by media organisations.

First, the AFP Direction does not clearly specify any test or standard for the AFP to comply with. Merely "taking into account" the importance of a free media could be a brief mention in a conversation, rather than carefully considered in the context of making decisions about an investigation. This consideration could happen at any point in the investigation, not even necessarily in respect of a decision about a warrant, as discussed above. A requirement for the public interest to be considered in issuing any warrant would ensure that this was a relevant consideration throughout the investigation, as well as acting as a threshold test.

Second, the direction to exhaust alternative investigative actions, where consistent with operational imperatives, is similarly imprecise. It seems to only require alternative investigative actions be considered where convenient.

Third, the AFP Direction only applies to the AFP: it does not apply to any other investigative agency (e.g. ASIO).

Fourth, there is no clear or accessible means by which any person potentially affected can test or assess compliance with the directives in the circumstances of any particular investigation. They cannot find out if all other investigative avenues were exhausted, nor can they find out if a consideration of the importance of a free media was raised at any point.

7. CONCLUSION

Public interest considerations need to be brought to the forefront in any matter in which journalists are involved, and major reform is necessary to make the public interest a priority.

In the interests of freedom of the media, freedom of speech, and the preservation of Australia's democratic system, the public's right to know must be protected. Protection of this right to know requires greater legislative consideration of the role of journalists and the public interest in their job.

ARTK maintains and emphasises the need for the following reform:

- the right to contest the application for warrants by journalists and media organisations;
- exemptions for journalists from laws that would put them in jail for doing their jobs; and
- the adequate protection of public sector whistle-blowers;
- the introduction of a regime that limits which documents can be stamped secret; and
- defamation law reform.

In the Central Criminal Court

Metropolitan Police Service
(D.I. Collinson)

v

Times Newspapers Limited
Independent Television News Limited
Sky UK Limited
BBC

Applications for Production Orders under the Terrorism Act 2000

Ruling and Reasons

1. Introduction

- 1.1 Applications have been made by D.I. Collinson on behalf of the Metropolitan Police Service for Production Orders to be granted in respect of special procedure material held by Times Newspapers Ltd. (TN), Independent Television News Limited (ITN), Sky News UK (Sky) and the BBC. The four media organisations had given notice that the grounds for the making of any such order were contested and that in the circumstances of this matter the said material would not be provided without a Court order;
- 1.2 On 7th August 2019 Counsel appeared on behalf of the Applicant and on behalf of three of the Respondents, namely TN, ITN and Sky. Detailed skeleton arguments were submitted in advance by the Applicant and these three Respondents. The BBC confirmed in writing that they wished to be associated with the submissions made on behalf of the other three Respondents. The hearing occupied two full days during which D.I. Collinson was examined on oath and legal submissions were addressed to the Court. A witness statement was tendered by the Deputy Foreign Editor of the Times with submissions as to the importance of the journalism in this matter and the risks taken by investigative journalists in such regions. At the conclusion of the hearing the matter was adjourned until 4th September 2019 so that I could take the opportunity to reflect on the evidence and material that had been presented and the submissions that had been made before making a final ruling in respect of each application;
- 1.3 On 22nd & 28th August 2019, following a written request for information from the Court, it was confirmed on behalf of all four Respondents that, in the event of an

application for a Production Order not being granted, an undertaking would be given in respect of the special procedure material sought that it would be retained by a firm of Solicitors until further order of the Court.

2. Basis for Applications

- 2.1 Each application has been made under *Paragraph 5 of Schedule 5 of the Terrorism Act 2000* thereby engaging the criteria set out in *Paragraph 6 of the Schedule*;
- 2.2 The applications arise out of a series of broadcast reports of interviews with Shamima Begum in February 2019 whilst she was staying at a refugee camp in Syria. The broadcast reports appeared to indicate that in each case there were edited parts of the interviews which had not been broadcast. The Metropolitan Police Service (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 United Kingdom and travelling to Syria in 2015. The Police made requests to each Respondent soon after each broadcast but were informed that the provision of such journalistic material would require a Court order;
- 2.3 The Applicant has confirmed that the Production Orders are sought in relation to a terrorist investigation into one alleged offence only, namely membership of a proscribed organisation *contrary to Section 11 of the Terrorism Act 2000* - the proscribed organisation being variously known as Islamic State of Iraq and al-Sham (ISIS) and the Islamic State of Iraq and the Levant and also *DAISH*;
- 2.4 During the course of the hearing the nature and extent of the material sought by the Applicant was re-considered and each draft Order re-worded as follows:
 - TN:
A copy of the full edited and unedited recording(s) of the interview(s) between Anthony Lloyd and Shamima Begum at a refugee camp in Northern Syria that resulted in the publication of the related articles in the Times on 13.2.19 and 14.2.19.
All interview notes which record what was said by Ms Begum and Mr Lloyd generated during or after the above meeting(s) with Ms Begum.
 - ITN:
A copy of the full edited and unedited video recording(s) of the interview(s) between Rohit Kachroo and any other interviewer and Shamima Begum at a refugee camp in Northern Syria that resulted in the ITV news items on 18.2.19 and 20.2.19.
All interview notes which record what was said by Ms Begum and Rohit Kachroo and any other interviewer generated during or after the above meeting(s) with Ms Begum.

- Sky:
A copy of the broadcast recording of the interview between Sky correspondent John Sparks and any other interviewer and Shamima Begum at a refugee camp in Northern Syria that resulted in the Sky news items on 18.2.19 and 20.2.19.
- BBC:
A copy on disc (only) of the approximately 39 minutes of unedited and unbroadcast video footage of the interview of Shamima Begum answering questions from the BBC Middle East correspondent, Quentin Sommerville which took place on and was broadcast by the BBC on 18.2.19;

A copy on disc (only) of the approximately 17 minutes of unedited and unbroadcast video footage of the interview of Shamima Begum answering questions from the BBC Middle East correspondent, Quentin Sommerville which took place on and was broadcast by the BBC on 20.2.19;

3. Factual background

- 3.1 In February 2015 Ms Begum (then aged 15 years) left the United Kingdom and travelled with two school friends to Syria in order to live in the *Islamic State* caliphate that had been declared a few months earlier in 2014. This departure was the subject of considerable media coverage and continued public interest. It became known that Ms Begum had settled in Raqqa which had become a stronghold for *ISIS* and the *Islamic State*. It also became known that she had married a Dutch *IS* fighter. It was also reported that she had been sent to an *IS* training camp following her arrival in Raqqa;
- 3.2 The rise and fall of *IS* in that region between 2014 and 2019 has been the subject of extensive worldwide reporting. The activities and whereabouts of Ms Begum during that prolonged period were not widely known, if at all;
- 3.3 In February 2019 an investigative journalist from the Times newspaper came across Ms Begum in a refugee camp in Northern Syria where she had sought refuge following the retreat of the remaining *IS* forces in the Syrian region. She was pregnant and the birth was imminent. The whereabouts of her husband were unknown;
- 3.4 Video recorded interviews were conducted with Ms Begum by the Times journalist. It would appear that she gave unconditional consent to such interviews and was well aware that her comments would be published thereafter. She was now expressing the wish to return to the United Kingdom. Over the following seven days further interviews were carried at the refugee camp by journalists on behalf of ITN, Sky and the BBC. The inevitable editing process for presentational purposes meant that (with the exception of Sky) not all the questioning of Ms Begum was broadcast or otherwise published. It is this material that the Police seek to review as part of their continuing

investigation. The Respondents would appear to have no objection to providing copies of the broadcast material but do object to the provision of the material that was not broadcast or otherwise published.

4. Legal principles

- 4.1 There has been no dispute as to the legal principles to be applied in this matter. Counsel for the Applicant and Respondents have provided clear and detailed skeleton arguments setting out the correct approach to be taken in respect of these applications;
- 4.2 Attention has been focused on the following authorities in particular:
- *Malik v Manchester CC* [2008] EMLR 19
 - *R(BskyB) v Chelmsford CC* [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

I have also had regard to the views expressed by the C/A in *R v Ahmed* [2011] EWCA Crim 184 with respect to the meaning of membership for the purposes of *Section 11 of the Terrorism Act 2000*.

5. Submissions

- 5.1 Detailed arguments have been advanced in the skeleton arguments and further amplified in oral submissions with regard to the application of the agreed legal framework to the facts and circumstances of this matter, bearing in mind that each application has to be considered on its own merits;
- 5.2 The core of the Applicant's argument is as follows:
- It is the duty of the Police in any investigation to pursue all reasonable lines of enquiry and to do so expeditiously;
 - A reasonable line of enquiry may result in obtaining evidence that can implicate a suspect in relation to the offence under investigation or it might help to absolve the suspect from any further investigation or any criminal proceedings;
 - The Police are in the best position to evaluate evidence obtained from an interview as they are able to assess such material in the light of other evidence that the Police have already obtained in the course of an investigation;
 - A proper and reliable evaluation of the answers given by a suspect in an interview can only be safely made if the complete interview is studied and all questions and answers are read and considered in their proper context;

- An incomplete record of questions and answers in an interview session would place the Police and their investigation at a significant disadvantage when it came to preparing for their own interview of a suspect following eventual arrest or in the decision making process with regard to either charging a suspect or discontinuing an investigation;
- While there is no reason to doubt that Ms Begum travelled to Syria in 2015 having made her own free choice to go and live within the *IS* caliphate and thereafter remained there until making her way with others to the refugee camp in early 2019, there is now a live issue as to whether the circumstances of her time in the caliphate and her activities during that time reflect membership of *ISIS* such that an offence has been committed contrary to *Section 11 of the Terrorism Act 2000* or whether her position was or may have been one of desiring to live in such a caliphate but without seeking to join others in *ISIS* for the purposes of furthering the aims of that organisation. A comprehensive account of all her interviews with the Respondents would be invaluable in helping to determine that issue;
- It is accepted that there is no certainty as to when, if at all, Ms Begum would be subject to arrest and interview back in this country. At present the Police are in no position to interview her in Syria and Ms Begum has had her British citizenship withdrawn and is therefore in no position to return to this country. The decision of the Home Secretary to withdraw her British citizenship is to be the subject of an appeal process through the Courts, however there is no certainty as to how long that process will take nor its likely result. The longer the delay that occurs then the greater the likelihood of the journalist's material being lost or mislaid and the more difficult it would be to follow up lines of enquiry that might be raised by a review of the full material;
- The interference with the journalist's Article 10 rights under the *European Convention on Human Rights* is not as significant as in many cases owing to the fact that the journalists in each case have already broadcast or otherwise published parts of their interviews and did so without breaching any confidentiality and notwithstanding any purported risk to themselves from such exposure.
- The gravity of Ms Begum's activity is high when placed in the wider context of the global terrorist threat that has been demonstrated by *ISIS/IS* over the past five years or so and which relies in part on recruiting males and females to join the organisation and to further its aims whether by active participation or by encouragement and support.

5.3 The core of the Respondents' argument is as follows:

- The Applicant has failed to demonstrate on cogent evidence that there are reasonable grounds for believing that within the material that has not been published and/or the notes of the journalist who conducted the interview there is probably material which would add value to the Police investigation over

and above the value that has already been obtained from the broadcast material;

- There are no reasonable grounds to believe that the requested and unreleased material would probably contain admissions by Ms Begum to having taken part in the activities of *ISIS*;
- It is unrealistic to suppose that a responsible journalist or media organisation might have chosen not to include in any broadcast or other publication answers from Ms Begum that tended to demonstrate that she had been actively participating in terrorist activity or otherwise encouraging or supporting others to carry out terrorist acts in furtherance of the aims of *ISIS*. Furthermore there is no reason to conclude that any responsible media organisation such as each Respondent would disregard or otherwise overlook the reporting duty and/or criminal liability that arises pursuant to the provisions of *Sections 19, 38B & 39 of the Terrorism Act 2000*;
- The Orders sought are in effect speculative “fishing expeditions” for which such applications should not be made;
- The Police have more than sufficient material from the combined broadcast material with which to conduct proper interviews with Ms Begum in the event of her arrest at some stage in the future;
- The gravity of the activity of Ms. Begum’s that is under investigation is not high. If she can be shown to have become a member of *ISIS* then it could only have been at a low level of engagement offering support or encouragement as a wife of an *ISIS* fighter but not as a leader or as an active participant in terrorist acts;
- The Orders sought would represent a significant interference with the journalistic freedom protected by Article 10 of the Convention. Such orders have an inhibiting effect on the press in part because of the loss of trust in journalists that would occur if their neutrality or the perception of their neutrality was undermined by a willingness to pass over journalistic material or a routine compelling of journalists to do so by the granting of such orders, in part by the consequential withdrawing of co-operation from those from whom the journalists wish to speak and gather material, and in part by journalists thereby being discouraged from disseminating information which otherwise would be in the public interest to learn and would be part of a legitimate public debate on important issues or concerns;
- There is no clear and compelling case for over-riding or otherwise interfering with the Article 10 rights of journalists carrying out high value public interest news reporting in accordance with their duties;
- The need for the Courts to assist with the protection of journalists and their Article 10 rights is all the greater where investigative journalists are engaged in dangerous conflict zones where organisations such as *ISIS* are hostile to journalists and will readily accuse journalists of spying or otherwise being engaged on behalf of state law enforcement agencies to whom they would readily pass on information;

- At this stage there is no pressing social need to make the Orders sought by the Applicant, particularly as there is no prospect of Ms Begum's imminent return to this country nor of any criminal proceedings being instigated against her in respect to an offence under *Section 11 of the Terrorism Act* possibly for years, if ever. Furthermore any concerns about any subsequent loss of any requested material would be answered by the Respondent's providing an undertaking to retain such material in a secure environment until further notice. The applications are in effect premature.

6. Ruling and Reasons

First access condition

- 6.1 During the course of the hearing the Applicant accepted an assurance given on behalf of Sky that all but a few sentences of their interview recording had been broadcast and that the omitted part was in effect superfluous to any report and lasted but seconds. In those circumstances the Applicant has not pursued the application for any Sky extract that has not been broadcast or otherwise published;
- 6.2 It also became apparent at an early stage of the hearing that there was no reason to think that there would be any difficulty at this stage in the provision by any Respondent of copies of the previously broadcast or published material for the evidential gathering purposes of the Police investigation. It was the material that had been edited out and not broadcast or otherwise published, together with any notes of interview comments that had not been broadcast or published, that were at issue;
- 6.3 In respect of TN, ITN and the BBC there are significant periods of time in their respective interviews which did not feature in any broad cast recording:
- The journalist for TN interviewed Ms. Begum over the course of 1 ½ hours however the extracts in the broadcast recording in total only last just over 17 minutes;
 - The ITN broadcast edited out some 18 minutes of recorded interview;
 - The two BBC interviews lasted a total of 56 minutes but only 4 minutes was broadcast.
- 6.4 In my view there are reasonable grounds in each case for believing that the material that has not been broadcast or otherwise published is likely to be of substantial value to the terrorist investigation being conducted by the Police. Furthermore the substantial value to the Police investigation is likely to be re-enforced by the Police being able to aggregate the material thereby obtained from each Respondent as a result of the three discrete applications;
- 6.5 In each case it is inevitable that the approach and focus of the Respondents and the Police with regard to the interviews of Ms. Begum would be very different. The

Police would be approaching the interview on the basis of an investigation into an alleged criminal offence and would be focusing on answers which would have an evidential impact (one way or another) on the question whether Ms. Begum had *belonged or professed to belong* to *ISIS* and therefore committed an offence contrary to *Section 11 of the Terrorism Act 2000*. As the case of *R v Ahmed* demonstrates the absence of any definition of "*belong*" or "*membership*" may cause difficulties of interpretation in many cases. Establishing such membership may well depend on the inferences to be drawn from circumstantial evidence and the assessment of multiple pieces of evidence. Much of that evidence would be of no interest to a journalist who was not seeking to investigate whether Ms. Begum had become a member of *ISIS* and therefore committed an offence contrary to the *Terrorism Act 2000* but was focused on another aspect of her situation. In each case the material broadcast or published reveals a very different approach and focus. The material within the news reports appears to approach Ms. Begum on the basis that it is assumed that she was a member of *ISIS* albeit perhaps not as an active participant and that the focus of interest for the public is her personal predicament having been drawn to *ISIS* as an impressionable teenager and wanting to live in the caliphate yet by 2019 finding herself in a refugee camp with *ISIS* and the caliphate in collapse in that region. The focus of the TN broadcast was on the significant human interest story of her departure from this country, what became of her two companions and her adjustment to living in an area of such conflict and then her personal loss and plight by the time of her arrival in the refugee camp. The focus of the broadcast reporting thereafter was upon Ms. Begum's wish to return to this country and developments with regard to the withdrawal of her British citizenship. It is almost inevitable that during the interviews conducted by the Respondent's journalists questions would have been asked or comments made by Ms. Begum which would throw a light on the issue of membership but which would have taken second place to the principal human interest story. It is those answers and comments that would have value to the Police investigation. By way of example, the BBC reports include in precise or summary form the following script: '*...she told the BBC she would have let her late son become an IS fighter...*', '*(re the Manchester attack) it was "kind of retaliation" for attacks on IS*', '*Our correspondent said that "throughout the interview Shamima Begum continued to espouse Islamic State philosophy"*', '*The 19 year old told BBC News she hoped the UK would understand she made a "very big mistake" by joining IS*'. Likewise script in the ITN reports: '*...(she) has spoken of her regret at joining the jihadi fighters in Syria*', '*He [Home Secretary] has no proof that I'm a threat other than I was in ISIS but that's it.*', '*In a series of interviews Ms Begum had initially said that she had "no regrets" in going to Syria to join so-called IS*', '*She stated she ignored the pleas (of her family) "because I thought I was doing the right thing by being part of Islamic state...."*' Such short extracts alone provide ample justification for concluding that there are reasonable grounds for believing that there is further detail and information in the material that has not been broadcast or otherwise published which is likely to be of substantial value to the terrorist investigation. Those extracts are from two of the Respondents. The length of the TN interview with Ms. Begum was such that there is every reason to

believe that there would be similar unused comments by Ms. Begum during that interview.

- 6.6 Accordingly I am satisfied that the first condition as set out in *Paragraph 6(2) of Schedule 5* has been satisfied.

Second access condition & Article 10 rights

- 6.7 There is a considerable overlap in this matter between the criteria in the second condition as set out in *Paragraph 6(3) of Schedule 5* and the Article 10 right to freedom of speech that underpins the work of journalists;
- 6.8 There are two powerful public interests in play in this matter, Firstly the need for society to be protected from the horrors of terrorism and from the actions of those who would encourage or support terrorist activity and for the Police to be enabled to take steps to prevent and detect such activity and to carry out effective terrorist investigations. Secondly, there is 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. The rights of a journalist are not however absolute and the two public interests may on occasion come into conflict, as in this matter. Where they do, it will be necessary to examine the competing circumstances with care. It will be necessary for a balance to be struck between these two interests having considered the nature of the purported interference with the journalist's rights and the nature of the terrorist investigation that is underway;
- 6.9 There is no doubt that the initial TN report was a commendable piece of investigative journalism and represents a significant public interest story which has opened up a important issue for public debate. Such journalistic investigation is to be encouraged, however the work of investigative journalists in particular does rely upon trust, confidentiality, protection of journalistic material and sources, their perceived neutrality, and the co-operation of people who are prepared to place their trust in the journalist. It is true that in this matter there is no suggestion that the granting of a Production Order in any case would breach any confidential relationship or expose a source or place a journalist in any greater risk of harm than he would have been placed by the original broadcasting or publishing of his reports. To that extent the purported interference with the journalists rights in this matter does not have the same direct adverse impact as would, for instance, the revealing of a source or breaching of a confidential relationship. Ms. Begum would have been well aware that she was speaking to a journalist in each case and that the journalist would broadcast or otherwise publish his account of her interview, indeed given some of her responses it would appear that she may have welcomed the opportunity to have such publicity. Nevertheless the purported interference remains and has a wider potential impact for

journalists and cannot simply be discounted in the face of the competing public interest in pursuing the Police investigation;

- 6.10 I have endeavoured to balance the nature and extent of the purported interference of journalists rights against the benefit likely to accrue to the Police investigation if the Orders were made and also against the nature of the offending that is the subject of the investigation and which, although very serious, is on the known facts not at the highest level for such offending. One highly relevant consideration is the fact that at this stage there is no prospect of Ms. Begum being subject to an arrest in this country nor subject to interview or prosecution in the foreseeable future. Equally there would not appear to be any real likelihood of an active line of enquiry being opened up for the Police should the requested material be produced at this stage;
- 6.11 In my view there is one factor which would serve to justify the conclusion that there was a pressing social need at this stage to over-ride the Article 10 rights of the journalists in each case and to justify the conclusion that there were reasonable grounds for believing that in each case it was in the public interest for the material sought to be produced and that is the real risk that such material may be lost in whole or part over the passage of time. It was for that reason that I sought confirmation on behalf of the Respondents that they remained prepared to provide undertakings as to the storage and protection of the contested material;
- 6.12 It has been confirmed on behalf of all four Respondents that, in the event of the Production Orders not being granted, an undertaking will be given that copies of the material sought by the Applicant will be passed to the same named firm of Solicitors and will be preserved by that firm until any further order of the Court;
- 6.13 In the light of that proposed undertaking, it is my view that there would no longer remain any significant risk that such material would be lost hereafter and therefore, given Ms. Begum's current status and situation, there would be no pressing social need established at this stage that would justify the making of any of the Orders sought at this time. If Ms. Begum's circumstances were to change in the future then fresh applications could then be considered.
- 6.14 Accordingly I do not grant the Production Orders that have been sought by the Applicant.

HH Judge Mark Dennis QC

4th September 2019



10 December 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary,

Further Submission to the Inquiry into the impact of the exercise of law Enforcement and intelligence powers on the freedom of the press

1. We refer to the above inquiry, and our submission dated 31 July 2019 and supplementary submission dated 20 October 2019 to the Joint Committee on Intelligence and Security (the **Committee**).
2. We thank the Committee for the opportunity to provide this further supplementary submission.
3. ARTK is encouraged by the AFP's recently reported commitment to work with Government, the Committee and media organisations to identify and implement more cooperative and less intrusive mechanisms to support the collection of evidence in the course of unauthorised disclosure investigations.
4. We particularly note, and are encouraged by, AFP Commissioner Kershaw's recent comments and evidence to the Senate Environment and Communications Committee inquiry into press freedom outlining the AFP's commitment to giving effect to the recent requirements under the recent Ministerial Direction to the AFP. This includes a clear expectation that the AFP will take into account the importance of free press and broader public interest implications before undertaking any investigative action involving a journalist or media organisation.

5. To that end Commissioner Kershaw outlined an internal national guideline on investigations of the unauthorised disclosure of material made or obtained by a current or former Commonwealth officer, including a requirement that the head of the referring department or agency provide a harm statement indicating where the disclosure of the material would be expected to compromise Australia's national security or national interests or to cause other significant harm.
6. The Commissioner also articulated that the AFP, *"as part of evaluating the referral the evaluation must also take into account the following three matters: firstly, whether, on balance, the public interest in the importance of a free and open press in Australia's democratic society is outweighed by the public interest in the enforcement of the criminal law by the AFP; secondly, if a criminal investigation were to proceed, the way in which the AFP would seek to proceed with an investigation and the extent to which that investigation would likely involve investigative action involving a professional journalist or news media organisation; and, finally, any defences available to any party that may be subject to the investigation."*¹
7. In the spirit of giving effect to these through the adoption of concrete legislative proposals, ARTK puts forward in this submission proposed legislative drafting for two of its existing proposals, being:
 - (a) Journalist "exemption" to criminal liability in relation to bone fide reporting activity; and
 - (b) Contestable journalist warrants.
8. We are firmly of the view that a robust legislative framework that includes these important elements is essential to ensure that the key functions of the AFP – the enforcement of the criminal law – and the media are both done and seen to be done.
9. ARTK welcomes the Committee's ongoing engagement with these important public policy issues, and would be pleased to assist further.

JOURNALIST EXEMPTIONS FROM CRIMINAL LIABILITY

10. Further to our submissions on the need for an exemption for journalists from national security laws that threaten to jail journalists for doing their jobs, ARTK has prepared a proposed "pro forma" or uniform provision to amend specific offence provisions for the Committee's consideration.
11. The suggested uniform provision takes the following form:

(X) [Current operative offence provision]

(Y) Subsection (X) does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media, and:

(a) at that time, the person believed that engaging in that conduct was in the public interest; or

(b) the person:

¹ Hansard [transcript](#) of Senate Committee Hearing, p49-50

- (i) *was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media; and*
- (ii) *acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.*

(Z) In a prosecution for an offence against subsection (X), the defendant does not bear an evidential burden in relation to the matters in subsection (Y) despite subsection 13.3(3) of the Criminal Code

12. We provide in **Annexure A** of this letter a comprehensive list of provisions with suggested amendments based on the "uniform" provision designed to afford legal protection for persons engaged in bona fide reporting in the public interest. Some amendments depart in certain aspects from the proposed "uniform" provision having regard to the specific nature of the offence in question.
13. The proposed amendments are to:
 - (a) section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth);
 - (b) sections 80.3, 91.4, 91.6, 91.9, 91.13, 92.5, 92A.1, 119.7, 122.5, 131.1, 132.1 and 474.47 of the *Criminal Code Act 1995* (Cth);
 - (c) sections 3ZZHA, 15HK, 70 and 79 of the *Crimes Act 1914* (Cth);
 - (d) section 73A of the *Defence Act 1903* (Cth); and
 - (e) section 40 of the *Intelligence Services Act 2001* (Cth).
14. The key features of the proposed amendments are:
 - (a) The amendments proceed on the bases that the public interest is best served by formulating a principled approach and applying it consistently across all relevant Commonwealth offences, justifying a uniform journalist protection that will operate in respect to various specific offences.
 - (b) The proposed amendments to the specific offences identified in Annexure A are not to be taken as an acknowledgment by ARTK that such specific offences apply to the legitimate journalism of its current members. Rather, ARTK's concern is that there is a risk of both prosecution for or investigation pursuant to such offence provisions – some of which have in fact been relied on in relation to current and previous investigations. It is that risk of investigation (including its attendant "warrant related activities"), as well as prosecution, that creates the "chilling effect" that inhibits public interest journalism.
 - (c) The pro-forma journalist protection amendment has been modelled on the existing s 122.5(6) of the Criminal Code.

- (d) The Committee will see that ARTK's proposed amendments generally express the protection as an "exception", however ARTK has sought to address the one key matter where the characterisation of the protection as either a component of the primary offence, or as a "defence", exception" etc, may have significant practical or legal relevance – namely, on the issue of burden and onus of proof.
- (e) On the issue of burden and onus of proof:
- (i) It is important for law enforcement to be under a practical obligation to gather evidence, and form opinions, as to whether the protection applies from the *outset* of an investigation that is consistent with the Attorney-General's directive. If such matters are not taken into account at that formative stage of an investigation, then criminal investigations into journalists for breaches of the criminal law will continue for several years, at a cost of many hundreds of thousands of dollars in legal costs.
 - (ii) Where a defendant bears an evidential onus in relation to establishing the existence of a journalist protection, any *practical* obligation on law enforcement to investigate, and discount, the existence of a journalist protection is lessened, potentially significantly. The issue becomes a matter *for the defendant* to raise in due course.
 - (iii) The recent removal of any evidential onus on a journalist defendant in relation to the recent agricultural encroachment offences (an approach adopted by ARTK's proposed amendments) means our proposal is in the nature of harmonising and modernising the statute book in light of this welcome recent policy advance. The effect is that legislative amendments which cast both the legal and evidential onus on the prosecution to establish, beyond a reasonable doubt, both the elements of the substantive offence and also the non-applicability of the proposed journalist protection are consistent with recent directives and legislation.
 - (iv) We believe that the legislative model to achieve this policy outcome is in the form now found in s 474.47(2A) of the Criminal Code (see, relevantly, *Supplementary Explanatory Memorandum. Criminal Code (Agricultural Protection) Bill 2019* (Cth) paras [5] – [10]). The proposed amendments have been drafted accordingly. However, if the Committee does not consider this policy object is achieved by this drafting, we would happily propose alternative wording if required.
- (f) The policy intention is for the journalist protections to apply to both primary offences (where the physical element of an offence is satisfied by a relevant act of receiving material or disseminating material by a journalist),² and also to accessorial offences (where the physical element of the offence is satisfied by the conduct of another person – such as a "source" in government – disclosing material – and where a journalist's involvement in that conduct may give rise to accessorial liability under Criminal Code ss 11.1 - 11.5).³ Any protection applying to journalists in their own right would be meaningless if they could still be charged and prosecuted as accessories to offences committed by others within Government.

² For example, see proposed s 35P(3B) of the *Australian Security Intelligence Act 1997* (Cth) (**ASIO Act**), in its application to an offence under s 35(2A).

³ For example, proposed s 35P(3B) of the ASIO Act in its application to s 35P(1) of the ASIO Act.

- (g) ARTK considers that the proposed uniform (or pro forma) drafting gives effect to this intention: relevantly, the drafting provides that a relevant offence section "does not apply" to an individual if the protection is available. The drafting, for these purposes, assumes that a journalist may be the subject of an offence:
- (i) where the journalist personally contravenes an offence provision;
 - (ii) where the journalist is not capable of themselves contravening the offence (for example, because the offence applies only to current or former Commonwealth officers), but where the journalist aids, abets, counsels or procures contravention by another person of the offence provision,⁴ engages in a joint criminal commission,⁵ or engages in the commission of the offence by proxy⁶ - where the Criminal Code appears to treat such conduct as an "extension" of the primary offence;⁷ and
 - (iii) where the journalist instead incites the commission of the offence by another person,⁸ or conspires with that other person⁹ - where the Criminal Code, prima facie, deems the reference to a primary offence to include an offence by a person engaged in incitement or conspiracy, unless a contrary intention appears – see Criminal Code s 11.6(2).
- (h) This is, of course, a technical matter of drafting and ARTK would welcome engaging with the Committee on revised wording if needed.
- (i) The amendments need to be "retrospective" in the sense that they should apply to now repealed offences in the former s 70 and 79 of the *Crimes Act 1914* (Cth) (**Crimes Act**). ARTK considers that this is appropriate for several reasons:
- (i) No policy purpose is served having a statute book which is inconsistent in its treatment of public interest journalism having regard to the date of alleged offending. Continuing criminal investigations into conduct which, if engaged in now, would clearly engage a journalist protection simply brings the administration of justice into disrepute. The case for modification of the now repealed s 79 of the Crimes Act is, in particular, stark – in that instance, there is already a journalist protection in place in relation to the cognate successor offence now found in s 122.4A of the Criminal Code.
 - (ii) In light of the position adopted by the Commonwealth and Australian Federal Police in the ongoing High Court proceedings *Smethurst v Commissioner of Police* S196/2019, it appears accepted that at least Crimes Act s 79 (and by implication, other repealed offences) must be given significantly more limited constructions than suggested by their literal terms to ensure their constitutionality. The current proposed reforms would be an opportunity for the Parliament, in respect of the repealed Crimes Act offences more generally, to adopt a standardised approach that effects a reasonable balancing of the competing public interests.

⁴ Criminal Code s 11.2.
⁵ Criminal Code s 11.2A.
⁶ Criminal Code 11.3.
⁷ Note to s 11.6 of the Criminal Code.
⁸ Criminal Code s 11.4.
⁹ Criminal Code s 11.5.

- (j) We consider the proposed drafting in Annexure A is an appropriate legislative response. As a matter of principle, there is no question that the Commonwealth Parliament may pass laws to, in substance, reframe past offences, both in the manner we have suggested, and generally.

CONTESTABLE JOURNALIST WARRANTS

15. ARTK welcomes further engagement by the AFP on this issue – noting that the issue of search warrants and journalist "raids" is a central issue when it comes to striking a balance being the public interest in a free media and the legitimate interests of law enforcement. In particular, ARTK hopes that the AFP's recently reported commitment to implementing "more cooperative and less intrusive mechanisms to support the collection of evidence in the course of unauthorised disclosure obligations" will lead to a reassessment by the AFP of its past opposition to contestability of warrants.
16. In the meantime, and in the interests of furthering a constructive policy dialogue on this issue, ARTK puts forward "minimalist" intervention across the Commonwealth statute book with the following key features:
- (a) Primary decision-makers currently authorised to issue warrants (or make related forms of coercive order) (together, "**warrant instruments**") will remain primary decision-makers, and subject to one key change, will remain authorised to issue warrant instruments on the same terms, and having regard to the same sets of statutory considerations, as now.
 - (b) The only proposed limitation on primary decision-makers will be that, in clearly defined circumstances, a "journalist access authorisation" will need to be first obtained by the applicant for the warrant instrument in order for any warrant instrument to validly authorise the collection of "journalism material". Further, any warrant instrument issued will need to conform to any limitations or restrictions imposed by the "journalist access authorisation".
 - (c) The proposal for a "journalist access authorisation" is informed by three key principles:
 - (i) The first principle is contestability – a journalist access authorisation should only issue following a contested application at which the journalist or media organisation affected has a right to participate and present evidence or make submissions. In due recognition of the legitimate interests of law enforcement, ARTK has sought, in its proposed draft provisions, to ensure that appropriate orders in respect of the confidentiality of investigatory materials can be made.
 - (ii) The second principle is the need for a public interest test – access to journalism materials should only be authorised when it is in the public interest to do so, having regard to factors that highlight the importance of public interest journalism but which also balance the legitimate interests of law enforcement. The proposed test is based on the existing test set out in section 180L(2) of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Telco Interception Act**).
 - (iii) The third principle is that senior judicial decision-makers (judges of the Federal Court and judges of the State and Territory Supreme Courts) should make determinations in relation to access of "journalist materials". The exercise of functions by senior junior

officers acting independently of government has advantages for both law enforcement and for person's affected: it means that senior decision-makers within government authorised to issue warrant instruments will be permitted to do so without having to engage in a contested inquiry, from which judicial review applications may ultimately lie.

17. Current arrangements concerning warrant instruments are ad hoc and inconsistent, and the absence of specific journalist protections, and their existence (in particular, under the "journalist warrant" regime under the Telco Interception Act) is explained only by history and not public policy considerations.
18. The proposal addresses this problem by inserting a new, standalone division of the *Crimes Act 1914* (Cth) (**Crimes Act**) dealing with the issue of "journalist access authorisations", which is based (with proposed enhancements) on the current regime for the issue of "journalist warrants" under the Telco Interception Act. The proposal is for other substantive provisions on the Commonwealth statute book dealing with the issue of warrant instruments to be amended as per a uniform provision to make the issue of a journalist access authorisation (and compliance with its terms) a condition for issuing a substantive warrant.
19. The proposal, importantly, allows for a judge who is separately authorised to issue a warrant instrument to also issue the related journalist access authorisation at the same time.
20. A flow chart of the proposed process is set out in **Annexure B**.
21. ARTK's proposed drafting of the standalone "model" provisions is set out below. For these purposes, a range of specific Commonwealth legislative amendments dealing with the issue of warrants which themselves (potentially with related provisions) will require amendment, are set out in **Annexure C**.
22. This list is necessarily provisional given that there is multiple, potentially hundreds, of pieces of Commonwealth legislation that allow the issuing of warrants (e.g. *Fisheries Management Act 1991* (Cth) s 85, *Gene Technology Act 2000* (Cth) ss 172-173, *Human Services (Medicare) Act 1973* (Cth) s 8Y, *Biosecurity Act 2015* s 488 (Cth), *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (Cth) ss 49, 50). In progressing this proposal, we would look forward to engaging with the Committee further on an appropriate list of further provisions that would require amendment.
23. The proposed amendments are as follows. Notes to the text follow from paragraph 22 onward.

Amendments to s 3 of the Crimes Act:

Journalist access authorisation means an authorisation in force issued under [New Division of Crimes Act, as set out in paragraph 5 of this letter].

Journalism material means material that is acquired, held or created by a person in that person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media.

New Division of the Crimes Act 1914:

1 Definitions

In this Division:

Affected person means:

- (a) *In relation to a proposed relevant warrant instrument which is in the nature of an authority to seize, locate or record documents, articles, electronic records, and similar items – any person reasonably believed by the applicant for a journalist access application to be:*
 - (i) *in possession of journalism material, or to enter into possession of such material, in that person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media; or*
 - (ii) *not in possession of the journalism material that is the subject of the relevant journalist access authorisation – where the person has provided, or will provide, journalism material in connection with that person's activities as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media to a third party;*

where that journalism material is reasonably believed by the applicant to be the subject of a journalist access authorisation sought under this Division.

Note:

Subsection (a)(ii) of the definition would include circumstances where a warrant is directed to an off-site server, data centre operator, telecommunications carrier, or similar third party who holds electronic records generated by, and maintained on behalf of, a journalist. In such circumstances the journalist on whose behalf electronic records are held is an "affected person". [Comment One]

- (b) *In relation to a proposed relevant warrant instrument which is in the nature of an authority to authorise the interception of communications or the recording of communications on an ongoing basis – any person:*
 - (i) *reasonably believed by the applicant for a journalist access application to be person acquiring, generating or imparting journalist material in connection with that person's activities as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media to a third party; and*
 - (ii) *where such communications are reasonably believed by the applicant for a journalist access authorisation to be the subject of a journalist access authorisation sought under this Division.*
- (c) *Any entity who employs or engages a person referred to in (a) or (b) above in connection to that person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news or documentary media.*

Eligible Judge means a judge of the Federal Court, or a judge of a Supreme Court of a State or Territory.

Legal practitioner means:

- (a) a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of the High Court or of a Supreme Court of a State or Territory; or
- (b) a person entitled to engage in legal practice under an Act.

Relevant Act means an Act authorising the issue of a relevant warrant instrument.

Relevant warrant instrument means a warrant issued under s 3E(1), [Parliamentary Counsel will be required to insert a full list of the provisions in the Crimes Act and other pieces of Commonwealth legislation that will be amended as per proposed cl 1 of the "uniform" amendments proposed below]

2 Applying for a journalist access authorisation

(1) A person authorised to apply for a relevant warrant instrument under a relevant Act may apply to an eligible Judge for the issue of a journalist access authorisation in connection with a proposed relevant warrant instrument proposed to be issued under a relevant Act.

(2) The application must:

- (a) specify the facts and other grounds relied on in support of the application;
- (b) specify the journalism material that is the subject of the application;
- (c) be accompanied by a statement by the applicant that sets out short particulars of the applicant's knowledge and belief concerning:
 - (i) whether there is, or will be in the next 72 hours journalist material that is the subject of the proposed warrant instrument; and
 - (ii) whether, in the preceding six months prior to the making of an application, the applicant is aware of any application that has been made under this Division in relation to any journalism material that is the subject of the application, and the outcome of any such application.

(3) Subject to any contrary direction of the eligible Judge made under subsection (4), the applicant must serve the application for a journalist access authorisation:

- (a) on any affected person; and
- (b) on any other person directed by the eligible Judge to be served as a proper party to the application.

(4) Upon application by a person applying for a journalist access authorisation, or on his or her own motion, an eligible Judge considering the application may make directions as to the manner of service or the content of any material to be served. For the avoidance of doubt, a direction under this subsection must not derogate from the right of an affected person to a fair hearing under subsection (3)(1).

(5) Subject to subsection (6), a person served with an application under subsection (3) and (4) must not intentionally conceal, destroy alter or dispose of any journalism material which is the subject of that application prior to the determination of that application under section 3(1).

Penalty: 476 penalty units **[Comment Two]**

(6) An eligible Judge who is separately authorised to issue a relevant warrant instrument under a relevant Act may concurrently consider and determine any related journalist access application under this Division.

3 Issuing journalist access authorisations

(1) An eligible judge, upon hearing from the applicant and any person served with notice of the application under section 2 (3),(4), must either:

- (a) issue an journalist access authorisation, authorising access to identified journalism material;*
- (b) refuse to issue an journalist access application;*

(2) An eligible judge must not issue a journalist access authorisation unless satisfied that the issue of the authorisation is in the public interest having regard to:

- (a) the public interest in preserving the confidentiality of journalist sources;*
- (b) the public interest in facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest;*
- (c) the gravity of the matter in relation to which the journalist access application is sought;*
- (d) the extent to which the information that is sought pursuant to the journalist access application is likely to assist a current investigation under an Act;*
- (e) whether reasonable attempts have been made to obtain the information sought by the journalist access application by other means;*
- (f) the nature and extent of any conditions or restrictions proposed by the eligible Judge to be imposed any journalist access authorisation under subsection (2); and*
- (g) any other relevant matter.*

(3) A journalist access authorisation issued under this section may specify conditions or restrictions concerning the manner in which journalism material may be accessed, retrieved, or otherwise dealt with by persons authorised by a relevant Act to conduct activities in connection with a relevant warrant instrument.

Note:

*In performing a function under this Division, or in exercising a power, an eligible Judge performs those functions, or exercises such powers (as the case may be) subject to the limits specified in s 4AAA. **[Comment Three]***

(4) In any application for a journalist access application, the applicant and any person served under section 2(3) and (4) may be represented by a legal practitioner.

4 Terms duration and revocation of journalist access authorisation

(1) A journalist access authorisation issued under this Division must state:

- (a) the journalist material to which it relates;*
- (b) any conditions or restrictions specified under section 3(3);*
- (c) the time at which the authorisation comes into force*
- (d) the time at which the authorisation ceases to have effect;*

(2) A journalist access authorisation:

- (a) comes into force at the time issued, unless the eligible Judge specifies a later time;*
- (b) unless revoked under subsection (3):*

(i) ceases to have effect at a time determined by the eligible Judge, being a time no later than the end of the period of 60 days beginning at the time that the authorisation comes into force; or

(ii) if no determination is made under subsection (a)(i), at the end of the 60 days beginning at the time that the authorisation comes into force.

(3) A journalist access authorisation may be revoked by the eligible Judge or, if unavailable, another eligible Judge, where the eligible Judge in question:

- (a) is satisfied that the grounds on which the journalist access authorisation issued have ceased to exist; or*
- (b) is otherwise satisfied that it is no longer appropriate for the journalist access authorisation to remain in force.*

5 Subsequent applications in relation to existing journalist access authorisation

(1) A person with a sufficient interest may apply to the eligible Judge who has issued a journalist access authorisation, or if he or she is unavailable, to another eligible Judge, in relation to matters concerning an issued journalist access authorisation.

(2) Without limitation, an application under subsection (1) may concern:

(a) the modification of conditions or restrictions imposed under section 3(3);

(b) the imposition of further restrictions or conditions concerning the manner in which journalism material may be accessed, retrieved, or otherwise dealt with by persons authorised by a relevant Act to conduct activities in connection with a relevant warrant instrument, including restrictions or conditions concerning material that has already been seized or accessed under a relevant warrant instrument; or

(c) the revocation of the journalist access authorisation.

(3) Upon hearing from the applicant, any person previously served with notice under section 2(3), and any other affected party, the eligible Judge hearing the application may make such orders as he or she considers appropriate.

[Comment Four]

"Uniform" amendments proposed to miscellaneous provisions governing the issue of warrant instruments:

Amended definitions:

Journalist access authorisation has the meaning given in s 3 of the Crimes Act 1914 [For insertion in Acts other than the Crimes Act]

Journalism material has the meaning given in s 3 of the Crimes Act 1914 [For insertion in Acts other than the Crimes Act]

Operative amendments:

(1) Subject to sub-sections (2) and (3), [this amendment is to be made to the existing statutory provision dealing with the grant of the warrant instrument in question – the intention is to leave, subject to the specific amendments proposed below, the substantive powers of existing decision-makers (and the identity of those decision-makers) unchanged].

(2) A [existing decision-maker under sub-section (1)] must not issue a [instrument] under [sub-section (1)] where the [decision-maker in sub-section (1)] knows, or reasonably believes, that there is or, within the next 72 hours, will be, journalism material at [the premises/relevant location] to which the [application for an instrument in sub-section(1)] relates, unless a journalist access authorisation is in force in relation to [the premises/thing]. **[Comment Five]**

(3) Where a journalist access authorisation is in force in relation to [the premises/thing – drafting to be finalised], the [officer issuing the instrument under sub-section (1)]:

- (a) may, upon satisfaction of the matters specified in [sub-section (1)], issue [an instrument under sub-section (1)] authorising seizure of any material that is not journalism material; and
- (b) may, upon satisfaction of the matters specified in [sub-section (1)], issue [an instrument under sub-(1)] authorising seizure of journalism material, provided that:
 - (i) the relevant journalist access authorisation authorises the seizure of that material; and
 - (ii) the terms of the [instrument under sub-section (1)] incorporate any conditions or restrictions concerning the manner in which journalism material may be accessed, retrieved, or otherwise dealt with imposed under [proposed s 3(3) of the .

Note: An [instrument under sub-section (1)] may potentially be issued by the same [description of the authorised person] who issues an access authorisation under [proposed s 2(6) of the new Division of the Crimes Act outlined above]

(4) An application for a [instrument under sub-section (1)] must be accompanied by a statement by the [applicant for a sub-section (1) warrant] that sets out short particulars of the applicant's knowledge and belief concerning whether there is, or will be in the next 72 hours, journalist material [at the premises / on the thing].

(5) *Subject to sub-section (6), [this amendment is to be made to any existing provision – if any – dealing with the authorisation by executing officers to seize material in the context of a raid authorised by a warrant or related order, such as s 3F of the Crimes Act]*

(6) *The [seizure] of journalism material is not authorised unless:*

(a) *an [instrument issued under sub-(1)] has been issued under subsection (3)(b); and*

(b) *the seizure of relevant journalism material is authorised by [the instrument] issued under subsection 3(b).*

24. **Comment One:** The policy intention behind the proposed definition is set out in the proposed drafter's note. If the Committee wish to propose alternate drafting to give effect to that policy intention, we would welcome the opportunity to discuss refinements
25. **Comment Two:** A penalty unit is currently \$210 – see s 4AA *Crimes Act*. The proposed penalty is therefore approximately \$100,000.
26. **Comment Three:** If there is any doubt that s 4AAA of the *Crimes Act* does not apply in connection with the performance of functions by an eligible Judge under the proposed new division, then that section would require specific amendment to extend its application.
27. **Comment Four:** There is a need for consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to ensure that s 13 of that Act applies in relation to decisions of an eligible Judge made under the proposed new division.
28. **Comment Five:** Some refinement of the text in square brackets may be warranted depending on the specific warrant context in question. The policy intention is that the primary decision-maker's attention be directed to the premises, area or other thing that will be the subject of compulsive access under the warrant instrument in question, with a view to that decision-maker evaluating whether "journalist material" may be located through that form of access. The appropriate wording to give effect to that intention will differ depending on the type and nature of compulsive access that is authorised by the instrument in question.

Other matters

29. The Committee will note that this model does not include a public interest advocate regime such as that which presently exists for Journalist Information Warrants under Division 4C of the *Telco Interception Act*. ARTK does not believe that this model is appropriate, for the following key reasons:
- (a) Firstly, the current model does not explicitly provide that the public interest advocate's role is not to advocate on behalf of the journalist or media organisation who is to be the subject of the warrant: reg 14(2) of the *Telecommunication (Interception and Access) Regulations 2017* (Cth) provides for the current public interest advocate to put forward submissions "relevant" to the decision to issue a journalist warrant, "including" (but not limited to) facts and circumstances which support the conclusion that the warrant should not issue.
- (b) That is inconsistent with the fact that an applicant is in a position to present a partisan position. If a process is to involve adversarial elements it requires, as a recognised incident

of a fair hearing, that there be "equality of arms" – that all affected parties with conflicting interests be able to put forward competing sides of an argument. Almost all judicial and administrative frameworks proceed on this basis, based on the recognition that this is the framework best suited to generating sound and defensible decisions which command the acceptance of those who are subject to decisions.

- (c) Secondly, public interest advocates do not have all the necessary information available to properly appraise a decision-maker of the factual matters necessary to make the public interest assessment which is at the heart of the (current) journalist warrant framework, and nor would they under the modified test proposed above. A public interest advocate – particularly one who cannot take instructions from media entities or persons affected – cannot take instructions on factual matters such as the nature of the journalistic investigation in question, the potential "sources" whose identities may be disclosed, etc. A public interest test is meaningless if a complete and full factual picture cannot be presented to the decision-maker.
- (d) Thirdly, concerns about disclosure of sensitive investigatory material can be dealt with, as per the proposal set out above, by a combination of:
 - (i) The eligible Judge conducting the hearing, and structuring its processes, to protect such material when doing so is consistent with the legal requirement to conduct a fair hearing; and
 - (ii) Specific penalties applying for destruction of evidence and other obstruction offences committed by those served with notice of an application – noting that, under the terms of the current Ministerial Direction, it is now incumbent on law enforcement to, where possible, seek "voluntary assistance" from media organisations before seeking and executing warrants. In circumstances where a media organisation will be expressly put on notice of a current police investigation, concerns about providing media with a right to be involved in the issue of a warrant "tipping off" the subject of an investigation, and triggering obstruction of justice offenses, are overstated.

NEXT STEPS

- 30. ARTK welcomes further engagement on these issues, including making representatives available to discuss these proposals in person at the Committee's convenience.

Kind regards

Georgia-Kate Schubert

On behalf of Australia's Right to Know coalition of media companies

ANNEXURE A

Amended Legislative Provisions

Section	Current Provision	Redrafted Provision with Exception
Australian Security Intelligence Organisation Act 1979 (Cth)		
Section 35P: Unauthorised disclosure of information	<p>Disclosures by entrusted persons</p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a special intelligence operation. <p>Penalty: Imprisonment for 5 years.</p> <p>Note: Recklessness is the fault element for paragraphs (1)(b) and (d)—see section 5.6 of the Criminal Code.</p> <p>(1A) Strict liability applies to paragraph (1)(a).</p> <p>Note: For strict liability, see section 6.1 of the Criminal Code.</p> <p>(1B) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a special intelligence operation; and (e) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; (ii) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation. <p>Penalty: Imprisonment for 10 years.</p> <p>Note: Recklessness is the fault element for paragraphs (1B)(b) and (d) and subparagraph (1B)(e)(ii)—see section 5.6 of the Criminal Code.</p> <p>(1C) Strict liability applies to paragraph (1B)(a).</p> <p>Note: For strict liability, see section 6.1 of the Criminal Code.</p> <p><i>Other disclosures</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a special intelligence operation; and (c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation. <p>Penalty: Imprisonment for 5 years.</p> <p>Note: Recklessness is the fault element for paragraphs (2)(b) and (c)—see section 5.6 of the Criminal Code.</p> <p>(2A) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a special intelligence operation; and (c) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective 	<p>Disclosures by entrusted persons</p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a special intelligence operation. <p>Penalty: Imprisonment for 5 years.</p> <p>Note: Recklessness is the fault element for paragraphs (1)(b) and (d)—see section 5.6 of the Criminal Code.</p> <p>(1A) Strict liability applies to paragraph (1)(a).</p> <p>Note: For strict liability, see section 6.1 of the Criminal Code.</p> <p>(1B) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a special intelligence operation; and (e) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation; (ii) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation. <p>Penalty: Imprisonment for 10 years.</p> <p>Note: Recklessness is the fault element for paragraphs (1B)(b) and (d) and subparagraph (1B)(e)(ii)—see section 5.6 of the Criminal Code.</p> <p>(1C) Strict liability applies to paragraph (1B)(a).</p> <p>Note: For strict liability, see section 6.1 of the Criminal Code.</p> <p><i>Other disclosures</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a special intelligence operation; and (c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation. <p>Penalty: Imprisonment for 5 years.</p> <p>Note: Recklessness is the fault element for paragraphs (2)(b) and (c)—see section 5.6 of the Criminal Code.</p> <p>(2A) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a special intelligence operation; and (c) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective

Section	Current Provision	Redrafted Provision with Exception
	<p>conduct of a special intelligence operation;</p> <p>(ii) the person knows that the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>Note: Recklessness is the fault element for paragraph (2A)(b)—see section 5.6 of the Criminal Code.</p> <p><i>Exceptions</i></p> <p>(3) Subsections (1) to (2A) do not apply if the disclosure was:</p> <ul style="list-style-type: none"> (a) in connection with the administration or execution of this Division; or (b) for the purposes of any legal proceedings arising out of or otherwise related to this Division or of any report of any such proceedings; or (c) in accordance with any requirement imposed by law; or (d) in connection with the performance of functions or duties, or the exercise of powers, of the Organisation; or (e) for the purpose of obtaining legal advice in relation to the special intelligence operation; or (f) to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising powers, or performing functions or duties, under the Inspector-General of Intelligence and Security Act 1986; or (g) by an IGIS official in connection with the IGIS official exercising powers, or performing functions or duties, under that Act. <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.</p> <p>(3A) Subsections (2) and (2A) do not apply to a person disclosing information if:</p> <ul style="list-style-type: none"> (a) the information has already been communicated, or made available, to the public (the prior publication); and (b) the person was not involved in the prior publication (whether directly or indirectly); and (c) at the time of the disclosure, the person believes that the disclosure: <ul style="list-style-type: none"> (i) will not endanger the health or safety of any person; and (ii) will not prejudice the effective conduct of a special intelligence operation; and (d) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief. <p>Note: A defendant bears an evidential burden in relation to the matters in subsection (3A)—see subsection 13.3(3) of the Criminal Code.</p> <p><i>Extended geographical jurisdiction</i></p> <p>(4) Section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against subsection (1), (1B), (2) or (2A).</p> <p>(5) Subsection (4) does not, by implication, affect the interpretation of any other provision of this Act.</p>	<p>conduct of a special intelligence operation;</p> <p>(ii) the person knows that the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>Note: Recklessness is the fault element for paragraph (2A)(b)—see section 5.6 of the Criminal Code.</p> <p><i>Exceptions</i></p> <p>(3) Subsections (1) to (2A) do not apply if the disclosure was:</p> <ul style="list-style-type: none"> (a) in connection with the administration or execution of this Division; or (b) for the purposes of any legal proceedings arising out of or otherwise related to this Division or of any report of any such proceedings; or (c) in accordance with any requirement imposed by law; or (d) in connection with the performance of functions or duties, or the exercise of powers, of the Organisation; or (e) for the purpose of obtaining legal advice in relation to the special intelligence operation; or (f) to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising powers, or performing functions or duties, under the Inspector-General of Intelligence and Security Act 1986; or (g) by an IGIS official in connection with the IGIS official exercising powers, or performing functions or duties, under that Act. <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the Criminal Code.</p> <p>(3A) Subsections (2) and (2A) do not apply to a person disclosing information if:</p> <ul style="list-style-type: none"> (a) the information has already been communicated, or made available, to the public (the prior publication); and (b) the person was not involved in the prior publication (whether directly or indirectly); and (c) at the time of the disclosure, the person believes that the disclosure: <ul style="list-style-type: none"> (i) will not endanger the health or safety of any person; and (ii) will not prejudice the effective conduct of a special intelligence operation; and (d) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief. <p>Note: A defendant bears an evidential burden in relation to the matters in subsection (3A)—see subsection 13.3(3) of the Criminal Code.</p> <p><u>(3B) Subsections (1), (1B), (2) and (2A) do not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u> (ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u> <p><u>(3C) In a prosecution for an offence against subsections (1) to (2A), the defendant does not bear an evidential burden in relation to the matters in subsection (3B), despite subsection 13.3(3) of the Criminal Code.</u></p> <p><i>Extended geographical jurisdiction</i></p> <p>(4) Section 15.4 of the Criminal Code (extended geographical jurisdiction—category D) applies to an offence against subsection (1), (1B), (2) or (2A).</p>

Section	Current Provision	Redrafted Provision with Exception
		(5) Subsection (4) does not, by implication, affect the interpretation of any other provision of this Act.
Criminal Code Act 1995 (Cth)		
Part 5.2: Espionage and related offences		
Division 90—Preliminary		
Section 90.1: Definitions	<p>(1) In this Part:</p> <p>advantage: conduct will not advantage the national security of a foreign country if the conduct will advantage Australia's national security to an equivalent extent.</p> <p>article includes any thing, substance or material.</p> <p>concerns: information or an article concerns Australia's national security if the information or article relates to, or is connected with, or is of interest or importance to, or affects, Australia's national security.</p> <p>deal: a person deals with information or an article if the person does any of the following in relation to the information or article:</p> <ul style="list-style-type: none"> (a) receives or obtains it; (b) collects it; (c) possesses it; (d) makes a record of it; (e) copies it; (f) alters it; (g) conceals it; (h) communicates it; (i) publishes it; (j) makes it available. <p>Note: See also the definition of make available in this subsection and subsection (2).</p> <p>foreign government principal has the meaning given by section 90.3.</p> <p>foreign political organisation includes:</p> <ul style="list-style-type: none"> (a) a foreign political party; and (b) a foreign organisation that exists primarily to pursue political objectives; and (c) a foreign organisation that exists to pursue militant, extremist or revolutionary objectives. <p>foreign principal has the meaning given by section 90.2.</p> <p>information means information of any kind, whether true or false and whether in a material form or not, and includes:</p> <ul style="list-style-type: none"> (a) an opinion; and (b) a report of a conversation. <p>make available information or an article includes:</p> <ul style="list-style-type: none"> (a) place it somewhere it can be accessed by another person; and (b) give it to an intermediary to give to the intended recipient; and (c) describe how to obtain access to it, or describe methods that are likely to facilitate access to it (for example, set out the name of a website, an IP address, a URL, a password, or the name of a newsgroup). <p>national security has the meaning given by section 90.4.</p> <p>prejudice: embarrassment alone is not sufficient to prejudice Australia's national security.</p> <p>record, in relation to information, means a record of information in any form, including but not limited to, a</p>	<p>No amendment.</p>

Section	Current Provision	Redrafted Provision with Exception
	<p>document, paper, database, software system or other article or system containing information or from which information can be derived.</p> <p>security classification has the meaning given by section 90.5.</p> <p>sketch includes a representation of a place or thing.</p> <p>(2) In this Part, dealing with information or an article includes:</p> <ul style="list-style-type: none"> (a) dealing with all or part of the information or article; and (b) dealing only with the substance, effect or description of the information or article. <p>[NB: There is no subsection (3)]</p> <p>(4) This Part applies to and in relation to a document or article regardless of who made it and what information it contains.</p>	
Section 90.2: Definition of foreign principal	<p>Each of the following is a foreign principal:</p> <ul style="list-style-type: none"> (a) a foreign government principal; (aa) a foreign political organisation; (b) a public international organisation within the meaning of Division 70 (see section 70.1); (c) a terrorist organisation within the meaning of Division 102 (see section 102.1); (d) an entity or organisation owned, directed or controlled by a foreign principal within the meaning of paragraph (aa), (b) or (c); (e) an entity or organisation owned, directed or controlled by 2 or more foreign principals within the meaning of paragraph (a), (aa), (b) or (c). 	No amendment.
Section 90.3: Definition of foreign government principal	<p>Each of the following is a foreign government principal:</p> <ul style="list-style-type: none"> (a) the government of a foreign country or of part of a foreign country; (b) an authority of the government of a foreign country; (c) an authority of the government of part of a foreign country; (d) a foreign local government body or foreign regional government body; (e) a company to which any of the subparagraphs of paragraph (a) of the definition of foreign public enterprise in section 70.1 applies; (f) a body or association to which either of the subparagraphs of paragraph (b) of the definition of foreign public enterprise in section 70.1 applies; <p>[NB: There is no subsection (g)]</p> <ul style="list-style-type: none"> (h) an entity or organisation owned, directed or controlled: <ul style="list-style-type: none"> (i) by a foreign government principal within the meaning of any other paragraph of this definition; or (ii) by 2 or more such foreign government principals that are foreign government principals in relation to the same foreign country. 	No amendment.
Section 90.4: Definition of national security	<p>(1) The national security of Australia or a foreign country means any of the following:</p> <ul style="list-style-type: none"> (a) the defence of the country; (b) the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2); (c) the protection of the integrity of the country's territory and borders from serious threats; (d) the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2); (e) the country's political, military or economic relations with another country or other countries. <p>(2) For the purposes of subsection (1), this subsection covers the following activities relating to a country, whether or not directed from, or committed within, the country:</p>	No amendment.

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	<ul style="list-style-type: none"> (a) espionage; (b) sabotage; (c) terrorism; (d) political violence; (e) activities intended and likely to obstruct, hinder or interfere with the performance by the country's defence force of its functions or with the carrying out of other activities by or for the country for the purposes of its defence or safety; (f) foreign interference. 	
Section 90.5: Definition of security classification	<p>(1) Security classification means:</p> <ul style="list-style-type: none"> (a) a classification of secret or top secret that is applied in accordance with the policy framework developed by the Commonwealth for the purpose (or for purposes that include the purpose) of identifying information: <ul style="list-style-type: none"> (i) for a classification of secret—that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals; or (ii) for a classification of top secret—that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest; or (b) any equivalent classification or marking prescribed by the regulations. <p>(1A) For the purposes of a reference, in an element of an offence in this Part, to security classification, strict liability applies to the element that:</p> <ul style="list-style-type: none"> (a) a classification is applied in accordance with the policy framework developed by the Commonwealth for the purpose (or for purposes that include the purpose) of identifying the information mentioned in subparagraph (1)(a)(i) or (ii); or (b) a classification or marking is prescribed by the regulations as mentioned in paragraph (1)(b). <p>(2) Before the Governor-General makes regulations for the purposes of subsection (1), the Minister must be satisfied that the regulations are not inconsistent with the policy framework mentioned in paragraph (1)(a).</p> <p>(3) Despite subsection 14(2) of the Legislation Act 2003, regulations made for the purposes of subsection (1) of this section may prescribe a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time, if the instrument or other writing is publicly available.</p>	No amendment.
Section 90.6: Expressions also used in the Australian Security Intelligence Organisation Act 1979	The meaning of an expression in this Part does not affect the meaning of that expression in the <i>Australian Security Intelligence Organisation Act 1979</i> , unless that Act expressly provides otherwise.	No amendment.
Division 91—Espionage		
Subdivision A—Espionage		
Section 91.1: Espionage—dealing with information etc. concerning national security which is or will be communicated or made available to foreign principal	<p><i>Intention as to national security</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information or an article; and (b) the information or article: <ul style="list-style-type: none"> (i) has a security classification; or (ii) concerns Australia's national security; and (c) the person intends that the person's conduct will: <ul style="list-style-type: none"> (i) prejudice Australia's national security; or 	No amendment.

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	<p>(ii) advantage the national security of a foreign country; and</p> <p>(d) the conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal.</p> <p>Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).</p> <p>Penalty: Imprisonment for life.</p> <p><i>Reckless as to national security</i></p> <p>(2) A person commits an offence if:</p> <p>(a) the person deals with information or an article; and</p> <p>(b) the information or article:</p> <p>(i) has a security classification; or</p> <p>(ii) concerns Australia's national security; and</p> <p>(c) the person is reckless as to whether the person's conduct will:</p> <p>(i) prejudice Australia's national security; or</p> <p>(ii) advantage the national security of a foreign country; and</p> <p>(d) the conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal.</p> <p>Penalty: Imprisonment for 25 years.</p> <p><i>Other matters</i></p> <p>(4) For the purposes of subparagraphs (1)(c)(ii) and (2)(c)(ii), the person:</p> <p>(a) does not need to have in mind a particular foreign country; and</p> <p>(b) may have in mind more than one foreign country.</p> <p>(5) For the purposes of paragraphs (1)(d) and (2)(d), the person:</p> <p>(a) does not need to have in mind a particular foreign principal; and</p> <p>(b) may have in mind more than one foreign principal.</p>	
<p>Section 91.2: Espionage—dealing with information etc. which is or will be communicated or made available to foreign principal</p>	<p><i>Intention as to national security</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person deals with information or an article; and</p> <p>(b) the person intends that the person's conduct will prejudice Australia's national security; and</p> <p>(c) the conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal.</p> <p>Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).</p> <p>Penalty: Imprisonment for 25 years.</p> <p><i>Reckless as to national security</i></p> <p>(2) A person commits an offence if:</p> <p>(a) the person deals with information or an article; and</p> <p>(b) the person is reckless as to whether the person's conduct will prejudice Australia's national security; and</p> <p>(c) the conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal.</p> <p>Penalty: Imprisonment for 20 years.</p> <p><i>Other matters</i></p> <p>(3) For the purposes of paragraphs (1)(c) and (2)(c):</p> <p>(a) the person does not need to have in mind a particular foreign principal; and</p>	<p>No amendment.</p>

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	(b) the person may have in mind more than one foreign principal.	
Section 91.3: Espionage—security classified information etc.	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information or an article; and (aa) the person deals with the information or article for the primary purpose of communicating the information or article, or making it available, to a foreign principal or a person acting on behalf of a foreign principal; and (b) the person's conduct results or will result in the information or article being communicated or made available to a foreign principal or a person acting on behalf of a foreign principal; and (c) the information or article has a security classification. <p>Penalty: Imprisonment for 20 years.</p> <p>(2) For the purposes of paragraphs (1)(aa) and (b):</p> <ul style="list-style-type: none"> (a) the person does not need to have in mind a particular foreign principal; and (b) the person may have in mind more than one foreign principal. <p>(3) Strict liability applies to paragraph (1)(aa).</p>	No amendment.
Section 91.4: Defences	<p>(1) It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3)).</p> <p>(2) It is a defence to a prosecution for an offence by a person against this Subdivision that the information or article the person deals with is information or an article that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(3) It is a defence to a prosecution for an offence by a person against section 91.1, in which the prosecution relies on subparagraph 91.1(1)(c)(ii) or (2)(c)(ii), or against section 91.3, if:</p> <ul style="list-style-type: none"> (a) the person did not make or obtain the information or article by reason of any of the following: <ul style="list-style-type: none"> (i) the person being, or having been, a Commonwealth officer (within the meaning of Part 5.6); (ii) the person being otherwise engaged to perform work for a Commonwealth entity; (iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and (b) the information or article has already been communicated, or made available, to the public (the prior publication); and (c) the person was not involved in the prior publication (whether directly or indirectly); and (d) at the time the person deals with the information or article, the person believes that doing so will not prejudice Australia's national security; and (e) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief. <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p>	<p>Defences <u>and Exception</u></p> <p>(1) It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3)).</p> <p>(2) It is a defence to a prosecution for an offence by a person against this Subdivision that the information or article the person deals with is information or an article that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(3) It is a defence to a prosecution for an offence by a person against section 91.1, in which the prosecution relies on subparagraph 91.1(1)(c)(ii) or (2)(c)(ii), or against section 91.3, if:</p> <ul style="list-style-type: none"> (a) the person did not make or obtain the information or article by reason of any of the following: <ul style="list-style-type: none"> (i) the person being, or having been, a Commonwealth officer (within the meaning of Part 5.6); (ii) the person being otherwise engaged to perform work for a Commonwealth entity; (iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and (b) the information or article has already been communicated, or made available, to the public (the prior publication); and (c) the person was not involved in the prior publication (whether directly or indirectly); and (d) at the time the person deals with the information or article, the person believes that doing so will not prejudice Australia's national security; and (e) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief. <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><u>(4) Subsections 91.1, 91.2, and 91.3 do not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u>

Section	Current Provision	Redrafted Provision with Exception
		<p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(5) In a prosecution for an offence against subsections 91.1, 91.2, and 91.3, the defendant does not bear an evidential burden in relation to the matters in subsection (4), despite subsection 13.3(3) of the Criminal Code.</u></p>
Section 91.5: Matters affecting sentencing for offence against subsection 91.1(1)	<p>(1) In determining the sentence to be passed in respect of a person for an offence against subsection 91.1(1) (punishable by life imprisonment), the court must take into account any circumstances set out in paragraph 91.6(1)(b) that exist in relation to the commission of the offence.</p> <p>(2) However, the court need only take the circumstances into account so far as the circumstances are known to the court and relevant.</p> <p>(3) The circumstances are in addition to any other matters the court must take into account (for example, the matters mentioned in section 16A of the Crimes Act 1914).</p>	No amendment.
Section 91.6: Aggravated espionage offence	<p>(1) A person commits an offence against this section if:</p> <p>(a) the person commits an offence against section 91.1 (other than subsection 91.1(1)), 91.2 or 91.3 (the underlying offence); and</p> <p>(b) any of the following circumstances exist in relation to the commission of the underlying offence:</p> <p>[NB: There is no subsection (1)(i)]</p> <p>(ii) the person dealt with information or an article from a foreign intelligence agency;</p> <p>(iii) the person dealt with 5 or more records or articles each of which has a security classification;</p> <p>(iv) the person altered a record or article to remove or conceal its security classification;</p> <p>(v) at the time the person dealt with the information or article, the person held an Australian Government security clearance allowing access to information that has, or articles that have, a security classification of at least secret.</p> <p>Penalty:</p> <p>(a) if the penalty for the underlying offence is imprisonment for 25 years—imprisonment for life; or</p> <p>(b) if the penalty for the underlying offence is imprisonment for 20 years—imprisonment for 25 years.</p> <p>(2) There is no fault element for the physical element in paragraph (1)(a) other than the fault elements (however described), if any, for the underlying offence.</p> <p>[NB: There is no subsection (3)]</p> <p>(4) To avoid doubt, a person does not commit an underlying offence for the purposes of paragraph (1)(a) if the person has a defence to the underlying offence.</p> <p>(5) To avoid doubt, the person may be convicted of an offence against this section even if the person has not been convicted of the underlying offence.</p> <p>Note: An alternative verdict may be available for an offence against this section (see section 93.5).</p>	<p>(1) A person commits an offence against this section if:</p> <p>(a) the person commits an offence against section 91.1 (other than subsection 91.1(1)), 91.2 or 91.3 (the underlying offence); and</p> <p>(b) any of the following circumstances exist in relation to the commission of the underlying offence:</p> <p>[NB: There is no subsection (1)(i)]</p> <p>(ii) the person dealt with information or an article from a foreign intelligence agency;</p> <p>(iii) the person dealt with 5 or more records or articles each of which has a security classification;</p> <p>(iv) the person altered a record or article to remove or conceal its security classification;</p> <p>(v) at the time the person dealt with the information or article, the person held an Australian Government security clearance allowing access to information that has, or articles that have, a security classification of at least secret.</p> <p>Penalty:</p> <p>(a) if the penalty for the underlying offence is imprisonment for 25 years—imprisonment for life; or</p> <p>(b) if the penalty for the underlying offence is imprisonment for 20 years—imprisonment for 25 years.</p> <p>(2) There is no fault element for the physical element in paragraph (1)(a) other than the fault elements (however described), if any, for the underlying offence.</p> <p>[NB: There is no subsection (3)]</p> <p>(4) To avoid doubt, a person does not commit an underlying offence for the purposes of paragraph (1)(a) if the person has a defence to the underlying offence <u>or is a person referred to in paragraph (4) of section 91.4.</u></p> <p>(5) To avoid doubt, the person may be convicted of an offence against this section even if the person has not been convicted of the underlying offence.</p> <p>Note: An alternative verdict may be available for an offence against this section (see section 93.5).</p>
Section 91.7: Geographical jurisdiction	Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Subdivision.	No amendment.
Subdivision B—Espionage on behalf of foreign principal		
Section 91.8: Espionage on behalf of foreign principal	<p><i>Intention as to national security</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person deals with information or an article; and</p>	No amendment.

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	<p>(b) the person intends that the person's conduct will:</p> <ul style="list-style-type: none"> (i) prejudice Australia's national security; or (ii) advantage the national security of a foreign country; and <p>(c) the person is reckless as to whether the conduct involves the commission, by the person or any other person, of an offence against Subdivision A (espionage); and</p> <p>(d) any of the following circumstances exists:</p> <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal; (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal. <p>Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).</p> <p>Penalty: Imprisonment for 25 years.</p> <p><i>Reckless as to national security</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information or an article; and (b) the person is reckless as to whether the person's conduct will: <ul style="list-style-type: none"> (i) prejudice Australia's national security; or (ii) advantage the national security of a foreign country; and (c) the person is reckless as to whether the conduct involves the commission, by the person or any other person, of an offence against Subdivision A (espionage); and (d) any of the following circumstances exists: <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal; (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal. <p>Penalty: Imprisonment for 20 years.</p> <p><i>Conduct on behalf of foreign principal</i></p> <p>(3) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information or an article; and (b) the person is reckless as to whether the person's conduct involves the commission, by the person or any other person, of an offence against Subdivision A (espionage); and (c) any of the following circumstances exists: <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal; (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal. <p>Penalty: Imprisonment for 15 years.</p> <p><i>Other matters</i></p> <p>(4) For the purposes of subparagraphs (1)(b)(ii) and (2)(b)(ii), the person:</p> <ul style="list-style-type: none"> (a) does not need to have in mind a particular foreign country; and (b) may have in mind more than one foreign country. <p>(5) For the purposes of paragraphs (1)(d), (2)(d) and (3)(c), the person:</p> <ul style="list-style-type: none"> (a) does not need to have in mind a particular foreign principal; and (b) may have in mind more than one foreign principal. 	

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Section 91.9: Defences	<p>(1) It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3)).</p> <p>(2) It is a defence to a prosecution for an offence by a person against this Subdivision that the information or article the person deals with is information or an article that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p>	<p>Defences <u>and Exception</u></p> <p>(1) It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3)).</p> <p>(2) It is a defence to a prosecution for an offence by a person against this Subdivision that the information or article the person deals with is information or an article that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><u>(3) Subsections 91.8(1), (2) and (3) do not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u> (ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u> <p><u>(4) In a prosecution for an offence against subsection 91.8, the defendant does not bear an evidential burden in relation to the matters in subsection (3), despite subsection 13.3(3) of the Criminal Code.</u></p>
Section 91.10: Geographical jurisdiction	<p>Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Subdivision.</p>	<p>No amendment.</p>
Section 91.12: Offence of preparing for an espionage offence	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person engages in conduct; and (b) the person does so with the intention of preparing for, or planning, an offence against Subdivision A (espionage) or B (espionage on behalf of foreign principal). <p>Penalty: Imprisonment for 15 years.</p> <p>(2) Section 11.1 (attempt) does not apply to an offence against subsection (1).</p> <p>(3) Subsection (1) applies:</p> <ul style="list-style-type: none"> (a) whether or not an offence against Subdivision A or B is committed; and (b) whether or not the person engages in the conduct in preparation for, or planning, a specific offence against a provision of Subdivision A or B; and (c) whether or not the person engages in the conduct in preparation for, or planning, more than one offence against Subdivision A or B. 	<p>No amendment.</p>
Section 91.13: Defences	<p>It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or (c) in the person's capacity as a public official. 	<p>Defences <u>and Exception</u></p> <p><u>(1)</u> It is a defence to a prosecution for an offence by a person against this Subdivision that the person dealt with the information or article:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party and which allows for the exchange of information or articles; or

Section	Current Provision	Redrafted Provision with Exception
	Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).	<p>(c) in the person's capacity as a public official.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).</p> <p><u>(2) This subdivision does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(3) In a prosecution for an offence against subsection 91.12, the defendant does not bear an evidential burden in relation to the matters in subsection (2), despite subsection 13.3(3) of the Criminal Code.</u></p>
Section 91.14: Geographical jurisdiction	Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Subdivision.	No amendment.
Division 92—Foreign interference		
Subdivision A—Preliminary		
Section 92.1: Definitions	<p>In this Division:</p> <p>deception means an intentional or reckless deception, whether by words or other conduct, and whether as to fact or as to law, and includes:</p> <p>(a) a deception as to the intentions of the person using the deception or any other person; and</p> <p>(b) conduct by a person that causes a computer, a machine or an electronic device to make a response that the person is not authorised to cause it to do.</p> <p>menaces has the same meaning as in Part 7.5 (see section 138.2).</p>	No amendment.
Subdivision B—Foreign interference		
Section 92.2: Offence of intentional foreign interference	<p><i>Interference generally</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person engages in conduct; and</p> <p>(b) any of the following circumstances exists:</p> <p>(i) the person engages in the conduct on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;</p> <p>(ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and</p> <p>(c) the person intends that the conduct will:</p> <p>(i) influence a political or governmental process of the Commonwealth or a State or Territory; or</p> <p>(ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or</p> <p>(iii) support intelligence activities of a foreign principal; or</p> <p>(iv) prejudice Australia's national security; and</p> <p>(d) any part of the conduct:</p> <p>(i) is covert or involves deception; or</p>	No amendment.

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	<p>(ii) involves the person making a threat to cause serious harm, whether to the person to whom the threat is made or any other person; or</p> <p>(iii) involves the person making a demand with menaces.</p> <p>Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).</p> <p>Penalty: Imprisonment for 20 years.</p> <p><i>Interference involving targeted person</i></p> <p>(2) A person commits an offence if:</p> <p>(a) the person engages in conduct; and</p> <p>(b) any of the following circumstances exists:</p> <p>(i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;</p> <p>(ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and</p> <p>(c) the person intends that the conduct will influence another person (the target):</p> <p>(i) in relation to a political or governmental process of the Commonwealth or a State or Territory; or</p> <p>(ii) in the target's exercise (whether or not in Australia) of any Australian democratic or political right or duty; and</p> <p>(d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b).</p> <p>Note: An alternative verdict may be available for an offence against this subsection (see section 93.5).</p> <p>Penalty: Imprisonment for 20 years.</p> <p><i>Other matters</i></p> <p>(3) For the purposes of paragraphs (1)(b) and (2)(b):</p> <p>(a) the person does not need to have in mind a particular foreign principal; and</p> <p>(b) the person may have in mind more than one foreign principal.</p>	
<p>Section 92.3: Offence of reckless foreign interference</p>	<p>Interference generally</p> <p>(1) A person commits an offence if:</p> <p>(a) the person engages in conduct; and</p> <p>(b) any of the following circumstances exists:</p> <p>(i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal;</p> <p>(ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and</p> <p>(c) the person is reckless as to whether the conduct will:</p> <p>(i) influence a political or governmental process of the Commonwealth or a State or Territory; or</p> <p>(ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or</p> <p>(iii) support intelligence activities of a foreign principal; or</p> <p>(iv) prejudice Australia's national security; and</p> <p>(d) any part of the conduct:</p> <p>(i) is covert or involves deception; or</p> <p>(ii) involves the person making a threat to cause serious harm, whether to the person to whom the threat is made or any other person; or</p>	<p>No amendment.</p>

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	<p>(iii) involves the person making a demand with menaces.</p> <p>Penalty: Imprisonment for 15 years.</p> <p><i>Interference involving targeted person</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person engages in conduct; and (b) any of the following circumstances exists: <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal; (ii) the conduct is directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; and (c) the person is reckless as to whether the conduct will influence another person (the target): <ul style="list-style-type: none"> (i) in relation to a political or governmental process of the Commonwealth or a State or Territory; or (ii) in the target's exercise (whether or not in Australia) of any Australian democratic or political right or duty; and (d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b). <p>Penalty: Imprisonment for 15 years.</p> <p><i>Other matters</i></p> <p>(3) For the purposes of paragraphs (1)(b) and (2)(b):</p> <ul style="list-style-type: none"> (a) the person does not need to have in mind a particular foreign principal; and (a) the person may have in mind more than one foreign principal. 	
<p>Section 92.4: Offence of preparing for a foreign interference offence</p>	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person engages in conduct; and (b) the person does so with the intention of preparing for, or planning, an offence against another provision of this Subdivision (foreign interference). <p>Penalty: Imprisonment for 10 years.</p> <p>(2) Section 11.1 (attempt) does not apply to an offence against subsection (1).</p> <p>(3) Subsection (1) applies:</p> <ul style="list-style-type: none"> (a) whether or not an offence against this Subdivision is committed; and (b) whether or not the person engages in the conduct in preparation for, or planning, a specific offence against a provision of this Subdivision; and (c) whether or not the person engages in the conduct in preparation for, or planning, more than one offence against this Subdivision. 	<p>No amendment.</p>
<p>Section 92.5: Defence</p>	<p>It is a defence to a prosecution for an offence by a person against this Subdivision that the person engaged in the conduct:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).</p>	<p>Defence and Exception</p> <p><u>(1)</u> It is a defence to a prosecution for an offence by a person against this Subdivision that the person engaged in the conduct:</p> <ul style="list-style-type: none"> (a) in accordance with a law of the Commonwealth; or (b) in accordance with an arrangement or agreement to which the Commonwealth is party; or (c) in the person's capacity as a public official. <p>Note: A defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3)).</p> <p><u>(2) This Subdivision does not apply to a person who engages in conduct in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and</u></p>

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		<p><u>documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(3) In a prosecution for an offence against this Subdivision, the defendant does not bear an evidential burden in relation to the matters in subsection (2), despite subsection 13.3(3) of the Criminal Code.</u></p>
Section 92.6: Geographical jurisdiction	Section 15.2 (extended geographical jurisdiction—category B) applies to an offence against this Subdivision.	No amendment.
Subdivision C—Foreign interference involving foreign intelligence agencies		
Section 92.7: Knowingly supporting foreign intelligence agency	<p>A person commits an offence if:</p> <p>(a) the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and</p> <p>(b) the person knows that the organisation is a foreign intelligence agency.</p> <p>Note: An alternative verdict may be available for an offence against this section (see section 93.5).</p> <p>Penalty: Imprisonment for 15 years.</p>	No amendment.
Section 92.8: Recklessly supporting foreign intelligence agency	<p>A person commits an offence if:</p> <p>(a) the person provides resources, or material support, to an organisation or a person acting on behalf of an organisation; and</p> <p>(b) the organisation is a foreign intelligence agency.</p> <p>Penalty: Imprisonment for 10 years.</p>	No amendment.
Section 92.9: Knowingly funding or being funded by foreign intelligence agency	<p>A person commits an offence if:</p> <p>(a) the person:</p> <p>(i) directly or indirectly receives or obtains funds from, or directly or indirectly makes funds available to, an organisation or a person acting on behalf of an organisation; or</p> <p>(ii) directly or indirectly collects funds for or on behalf of an organisation or a person acting on behalf of an organisation; and</p> <p>(b) the person knows that the organisation is a foreign intelligence agency.</p> <p>Note: An alternative verdict may be available for an offence against this section (see section 93.5).</p> <p>Penalty: Imprisonment for 15 years</p>	No amendment.
Section 92.10: Recklessly funding or being funded by foreign intelligence agency	<p>A person commits an offence if:</p> <p>(a) the person:</p> <p>(i) directly or indirectly receives or obtains funds from, or directly or indirectly makes funds available to, an organisation or a person acting on behalf of an organisation; or</p> <p>(ii) directly or indirectly collects funds for or on behalf of an organisation or a person acting on behalf of an organisation; and</p> <p>(b) the organisation is a foreign intelligence agency.</p> <p>Penalty: Imprisonment for 10 years.</p>	No amendment.
Division 92A—Theft of trade secrets involving foreign government principal		

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Section 92A.1: Theft of trade secrets involving foreign government principal	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person dishonestly receives, obtains, takes, copies or duplicates, sells, buys or discloses information; and (b) all of the following circumstances exist: <ul style="list-style-type: none"> (i) the information is not generally known in trade or business, or in the particular trade or business concerned; (ii) the information has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were communicated; (iii) the owner of the information has made reasonable efforts in the circumstances to prevent the information becoming generally known; and (c) any of the following circumstances exists: <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign government principal or a person acting on behalf of a foreign government principal; (ii) the conduct is directed, funded or supervised by a foreign government principal or a person acting on behalf of a foreign government principal. <p>Penalty: Imprisonment for 15 years.</p> <p>(2) For the purposes of paragraph (1)(a), dishonest means: dishonest according to the standards of ordinary people; and known by the defendant to be dishonest according to the standards of ordinary people.</p> <p>(3) In a prosecution for an offence against this section, the determination of dishonesty is a matter for the trier of fact.</p> <p>(4) For the purposes of paragraph (1)(c):</p> <ul style="list-style-type: none"> (a) the person does not need to have in mind a particular foreign government principal; and (b) the person may have in mind more than one foreign government principal. 	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person dishonestly receives, obtains, takes, copies or duplicates, sells, buys or discloses information; and (b) all of the following circumstances exist: <ul style="list-style-type: none"> (i) the information is not generally known in trade or business, or in the particular trade or business concerned; (ii) the information has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were communicated; (iii) the owner of the information has made reasonable efforts in the circumstances to prevent the information becoming generally known; and (c) any of the following circumstances exists: <ul style="list-style-type: none"> (i) the conduct is engaged in on behalf of, or in collaboration with, a foreign government principal or a person acting on behalf of a foreign government principal; (ii) the conduct is directed, funded or supervised by a foreign government principal or a person acting on behalf of a foreign government principal. <p>Penalty: Imprisonment for 15 years.</p> <p>(2) For the purposes of paragraph (1)(a), dishonest means: dishonest according to the standards of ordinary people; and known by the defendant to be dishonest according to the standards of ordinary people.</p> <p>(3) In a prosecution for an offence against this section, the determination of dishonesty is a matter for the trier of fact.</p> <p>(4) For the purposes of paragraph (1)(c):</p> <ul style="list-style-type: none"> (a) the person does not need to have in mind a particular foreign government principal; and (b) the person may have in mind more than one foreign government principal. <p><u>(5) Subsection 92A.1(1) does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u> (ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u> <p><u>(6) In a prosecution for an offence against subsection 92A.1(1), the defendant does not bear an evidential burden in relation to the matters in subsection (5), despite subsection 13.3(3) of the Criminal Code.</u></p>
Section 92A.2: Geographical jurisdiction	<p>(1) Section 15.2 (extended geographical jurisdiction—category B) applies to an offence against section 92A.1.</p> <p>(2) However, subsections 15.2(2) and 15.2(4) (defences for primary and ancillary offences) do not apply.</p>	No amendment.
Division 93—Prosecutions and hearings		
Section 93.1: Consent of Attorney-General required for prosecutions	<p>(1) Proceedings for the commitment of a person for trial for an offence against this Part must not be instituted without:</p> <ul style="list-style-type: none"> (a) the written consent of the Attorney-General; and (b) for proceedings that relate to information or an article that has a security classification—a certification by the Attorney-General that, at the time of the conduct that is alleged to constitute the offence, it was appropriate that the information or article had a security classification. 	No amendment.

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	<p>(2) However, the following steps may be taken (but no further steps in proceedings may be taken) without consent or certification having been obtained:</p> <ul style="list-style-type: none"> (a) a person may be arrested for the offence and a warrant for such an arrest may be issued and executed; (b) a person may be charged with the offence; (c) a person so charged may be remanded in custody or on bail. <p>(3) Nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.</p> <p>(4) In deciding whether to consent, the Attorney-General must consider whether the conduct might be authorised:</p> <ul style="list-style-type: none"> (a) for an offence against Subdivision A of Division 91 (espionage)—in a way mentioned in section 91.4; and (b) for an offence against Subdivision B of Division 91 (espionage on behalf of foreign principal)—in a way mentioned in section 91.9; and (c) for an offence against Subdivision B of Division 92 (foreign interference)—in a way mentioned in section 92.5; and (d) for an offence against Subdivision C of Division 92 (foreign interference involving foreign intelligence agencies)—in a way mentioned in section 92.11. 										
Section 93.2: Hearing in camera etc.	<p>(1) This section applies to a hearing of an application or other proceedings before a federal court, a court exercising federal jurisdiction or a court of a Territory, whether under this Act or otherwise.</p> <p>(2) At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interests of Australia's national security:</p> <ul style="list-style-type: none"> (a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or (b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or (c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court. <p>(3) A person commits an offence if the person contravenes an order made or direction given under this section.</p> <p>Penalty: Imprisonment for 5 years.</p>	No amendment.									
Section 93.4: Fault elements for attempted espionage offences	<p>Despite subsection 11.1(3), the fault element, in relation to each physical element of an offence of attempting to commit an offence against a provision of:</p> <ul style="list-style-type: none"> (a) Subdivision A of Division 91 (espionage); or (b) Subdivision B of Division 91 (espionage on behalf of foreign principal); <p>is the fault element in relation to that physical element of the offence against the provision of Subdivision A or B of Division 91.</p>	No amendment.									
Section 93.5: Alternative verdicts	<p>(1) If, on a trial of a person for an offence specified in column 1 of an item in the following table, the trier of fact:</p> <ul style="list-style-type: none"> (a) is not satisfied that the person is guilty of that offence; and (b) is satisfied beyond reasonable doubt that the person is guilty of an offence against a provision specified in column 2 of that item; <p>it may find the person not guilty of the offence specified in column 1 but guilty of the offence specified in column 2.</p> <table border="1"> <thead> <tr> <th colspan="3">Alternative verdicts</th></tr> <tr> <th>Item</th><th>Column 1 For an offence against:</th><th>Column 2 The alternative verdict is an offence against:</th></tr> </thead> <tbody> <tr> <td>1</td><td>subsection 91.1(1)</td><td>subsection 91.1(2)</td></tr> </tbody> </table>	Alternative verdicts			Item	Column 1 For an offence against:	Column 2 The alternative verdict is an offence against:	1	subsection 91.1(1)	subsection 91.1(2)	No amendment.
Alternative verdicts											
Item	Column 1 For an offence against:	Column 2 The alternative verdict is an offence against:									
1	subsection 91.1(1)	subsection 91.1(2)									

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	<table border="1"> <tr> <td>2</td><td>subsection 91.2(1)</td><td>subsection 91.2(2)</td></tr> <tr> <td>3</td><td>subsection 91.6(1)</td><td>the underlying offence mentioned in paragraph 91.6(1)(a)</td></tr> <tr> <td>4</td><td>subsection 91.8(1)</td><td>subsection 91.8(2)</td></tr> <tr> <td>5</td><td>subsection 92.2(1)</td><td>subsection 92.3(1)</td></tr> <tr> <td>6</td><td>subsection 92.2(2)</td><td>subsection 92.3(2)</td></tr> <tr> <td>7</td><td>section 92.7</td><td>section 92.8</td></tr> <tr> <td>8</td><td>section 92.9</td><td>section 92.10</td></tr> </table> <p>(2) Subsection (1) only applies if the person has been accorded procedural fairness in relation to the finding of guilt for the offence specified in column 2.</p>	2	subsection 91.2(1)	subsection 91.2(2)	3	subsection 91.6(1)	the underlying offence mentioned in paragraph 91.6(1)(a)	4	subsection 91.8(1)	subsection 91.8(2)	5	subsection 92.2(1)	subsection 92.3(1)	6	subsection 92.2(2)	subsection 92.3(2)	7	section 92.7	section 92.8	8	section 92.9	section 92.10	
2	subsection 91.2(1)	subsection 91.2(2)																					
3	subsection 91.6(1)	the underlying offence mentioned in paragraph 91.6(1)(a)																					
4	subsection 91.8(1)	subsection 91.8(2)																					
5	subsection 92.2(1)	subsection 92.3(1)																					
6	subsection 92.2(2)	subsection 92.3(2)																					
7	section 92.7	section 92.8																					
8	section 92.9	section 92.10																					
Division 94—Forfeiture																							
Section 94.1: Forfeiture of articles etc.	A sketch, article, record or document which is dealt with in contravention of this Part is forfeited to the Commonwealth.	No amendment.																					
Part 5.6: Secrecy of Information																							
Division 121: Preliminary																							
Section 121.1: Definitions	<p>(1) In this Part:</p> <p>cause harm to Australia's interests means to:</p> <ul style="list-style-type: none"> (a) interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or (a) interfere with or prejudice the performance of functions of the Australian Federal Police under: <ul style="list-style-type: none"> (i) paragraph 8(1)(be) of the <i>Australian Federal Police Act 1979</i> (protective and custodial functions); or (ii) the <i>Proceeds of Crime Act 2002</i>; or (b) harm or prejudice Australia's international relations in relation to information that was communicated in confidence: <ul style="list-style-type: none"> (i) by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and (ii) to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or (f) harm or prejudice the health or safety of the Australian public or a section of the Australian public; or (g) harm or prejudice the security or defence of Australia. <p>Commonwealth officer means any of the following:</p> <ul style="list-style-type: none"> (a) an APS employee; (b) an individual appointed or employed by the Commonwealth otherwise than under the <i>Public Service Act 1999</i>; (c) a member of the Australian Defence Force; (d) a member or special member of the Australian Federal Police; (e) an officer or employee of a Commonwealth authority; (f) an individual who is a contracted service provider for a Commonwealth contract; (g) an individual who is an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract; 	No amendment.																					

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	<p>but does not include an officer or employee of, or a person engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.</p> <p>deal has the same meaning as in Part 5.2.</p> <p>Note: For the meaning of deal in that Part, see subsections 90.1(1) and (2).</p> <p>domestic intelligence agency means:</p> <ul style="list-style-type: none"> (a) the Australian Secret Intelligence Service; or (b) the Australian Security Intelligence Organisation; or (c) the Australian Geospatial-Intelligence Organisation; or (d) the Defence Intelligence Organisation; or (e) the Australian Signals Directorate; or (f) the Office of National Intelligence. <p>foreign military organisation means:</p> <ul style="list-style-type: none"> (a) the armed forces of the government of a foreign country; or (b) the civilian component of: <ul style="list-style-type: none"> (i) the Department of State of a foreign country; or (ii) a government agency in a foreign country; <p>that is responsible for the defence of the country.</p> <p>information has the meaning given by section 90.1.</p> <p>inherently harmful information means information that is any of the following:</p> <ul style="list-style-type: none"> (a) security classified information; (b) information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions; (e) information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency. <p>international relations has the meaning given by section 10 of the <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i>.</p> <p>proper place of custody has the meaning given by section 121.2.</p> <p>Regulatory Powers Act means the <i>Regulatory Powers (Standard Provisions) Act 2014</i>.</p> <p>security classification has the meaning given by section 90.5.</p> <p>security classified information means information that has a security classification.</p> <p>security or defence of Australia includes the operations, capabilities or technologies of, or methods or sources used by, domestic intelligence agencies or foreign intelligence agencies.</p> <p>(2) To avoid doubt, communicate includes publish and make available.</p> <p>(3) For the purposes of a reference, in an element of an offence in this Part, to security classified information or security classification, strict liability applies to the element that:</p> <ul style="list-style-type: none"> (a) a classification is applied in accordance with the policy framework developed by the Commonwealth for the purpose (or for purposes that include the purpose) of identifying the information mentioned in subparagraph 90.5(1)(a)(i) or (ii); or (b) a classification or marking is prescribed by the regulations as mentioned in paragraph 90.5(1)(b). <p>Note: See the definitions of security classified information in subsection (1) and security classification in section 90.5.</p>	
<p>Section 121.2: Definitions of proper place of custody</p>	<p>(1) Proper place of custody has the meaning prescribed by the regulations.</p> <p>(2) Despite subsection 14(2) of the <i>Legislation Act 2003</i>, regulations made for the purposes of subsection (1) of this section may prescribe a matter by applying, adopting or incorporating any matter contained in an instrument or other</p>	<p>No amendment.</p>

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	writing as in force or existing from time to time, if the instrument or other writing is publicly available.	
Division 122: Secrecy of information		
Section 122.1: Communication and other dealings with inherently harmful information by current and former Commonwealth officers etc.	<p><i>Communication of inherently harmful information</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates information; and (b) the information is inherently harmful information; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Note 1: For exceptions to the offences in this section, see section 122.5.</p> <p>Note 2: The fault elements for this offence are intention for paragraph (1)(a) and recklessness for paragraphs (1)(b) and (c) (see section 5.6).</p> <p>Penalty: Imprisonment for 7 years.</p> <p><i>Other dealings with inherently harmful information</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information (other than by communicating it); and (b) the information is inherently harmful information; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Note: The fault elements for this offence are intention for paragraph (2)(a) and recklessness for paragraphs (2)(b) and (c) (see section 5.6).</p> <p>Penalty: Imprisonment for 3 years.</p> <p><i>Information removed from, or held outside, proper place of custody</i></p> <p>(3) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person: <ul style="list-style-type: none"> (i) removes information from a proper place of custody for the information; or (ii) holds information outside a proper place of custody for the information; and (b) the information is inherently harmful information; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Note: The fault elements for this offence are intention for paragraph (3)(a) and recklessness for paragraphs (3)(b) and (c) (see section 5.6).</p> <p>Penalty: Imprisonment for 3 years.</p> <p><i>Failure to comply with direction regarding information</i></p> <p>(4) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is given a direction; and (b) the direction is a lawful direction regarding the retention, use or disposal of information; and (c) the person fails to comply with the direction; and (ca) the failure to comply with the direction results in a risk to the security of the information; and (d) the information is inherently harmful information; and (e) the information was made or obtained by that person by reason of his or her being, or having been, 	<p>No amendment.</p>

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	<p>a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.</p> <p>Note: The fault elements for this offence are intention for paragraph (4)(c) and recklessness for paragraphs (4)(a), (b), (ca), (d) and (e) (see section 5.6).</p> <p>Penalty: Imprisonment for 3 years.</p>	
<p>Section 122.2: Conduct by current and former Commonwealth officers etc. causing harm to Australia's interests</p>	<p><i>Communication causing harm to Australia's interests</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates information; and (b) either: <ul style="list-style-type: none"> (i) the communication causes harm to Australia's interests; or (ii) the communication will or is likely to cause harm to Australia's interests; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Note 1: For the definition of cause harm to Australia's interests, see section 121.1.</p> <p>Note 2: For exceptions to the offences in this section, see section 122.5.</p> <p>Penalty: Imprisonment for 7 years.</p> <p><i>Other conduct causing harm to Australia's interests</i></p> <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person deals with information (other than by communicating it); and (b) either: <ul style="list-style-type: none"> (i) the dealing causes harm to Australia's interests; or (ii) the dealing will or is likely to cause harm to Australia's interests; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Penalty: Imprisonment for 3 years.</p> <p><i>Information removed from, or held outside, proper place of custody</i></p> <p>(3) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person: <ul style="list-style-type: none"> (i) removes information from a proper place of custody for the information; or (ii) holds information outside a proper place of custody for the information; and (b) either: <ul style="list-style-type: none"> (i) the removal or holding causes harm to Australia's interests; or (ii) the removal or holding will or is likely to cause harm to Australia's interests; and (c) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. <p>Penalty: Imprisonment for 3 years.</p> <p><i>Failure to comply with direction regarding information</i></p> <p>(4) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is given a direction; and (b) the direction is a lawful direction regarding the retention, use or disposal of information; and (c) the person fails to comply with the direction; and 	<p>No amendment.</p>

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	<p>(d) either:</p> <p>(i) the failure to comply causes harm to Australia's interests; or</p> <p>(ii) the failure to comply will or is likely to cause harm to Australia's interests; and</p> <p>(e) the information was made or obtained by that person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.</p> <p>Penalty: Imprisonment for 3 years.</p>	
<p>Section 122.3: Aggravated offence</p>	<p>(1) A person commits an offence against this section if:</p> <p>(a) the person commits an offence against section 122.1 or 122.2 (the <i>underlying offence</i>); and</p> <p>(b) any of the following circumstances exist in relation to the commission of the underlying offence:</p> <p>(ii) if the commission of the underlying offence involves a record—the record is marked with a code word, “for Australian eyes only” or as prescribed by the regulations for the purposes of this subparagraph;</p> <p>(iii) the commission of the underlying offence involves 5 or more records each of which has a security classification;</p> <p>(iv) the commission of the underlying offence involves the person altering a record to remove or conceal its security classification;</p> <p>(v) at the time the person committed the underlying offence, the person held an Australian Government security clearance allowing the person to access information that has a security classification of at least secret.</p> <p>Penalty:</p> <p>(a) if the penalty for the underlying offence is imprisonment for 7 years—imprisonment for 10 years; or</p> <p>(b) if the penalty for the underlying offence is imprisonment for 3 years—imprisonment for 5 years.</p> <p>(2) There is no fault element for the physical element in paragraph (1)(a) other than the fault elements (however described), if any, for the underlying offence.</p> <p>(4) To avoid doubt:</p> <p>(a) a person does not commit an underlying offence for the purposes of paragraph (1)(a) if the person has a defence to the underlying offence; and</p> <p>(b) a person may be convicted of an offence against this section even if the person has not been convicted of the underlying offence.</p>	<p>No amendment.</p>
<p>Section 122.4: Unauthorised disclosure of information by current and former Commonwealth officers etc.</p>	<p>(1) A person commits an offence if:</p> <p>(a) the person communicates information; and</p> <p>(b) the person made or obtained the information by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and</p> <p>(c) the person is under a duty not to disclose the information; and</p> <p>(d) the duty arises under a law of the Commonwealth.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(2) Absolute liability applies in relation to paragraph (1)(d).</p> <p><i>Sunset provision</i></p> <p>(3) This section does not apply in relation to any communication of information that occurs after the end of 5 years after this section commences.</p>	<p>No amendment.</p>
<p>Section 122.4A: Communicating and dealing with information by non-</p>	<p><i>Communication of information</i></p> <p>(1) A person commits an offence if:</p> <p>(a) the person communicates information; and</p> <p>(b) the information was not made or obtained by the person by reason of the person being, or having</p>	<p>No amendment.</p>

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<p>Commonwealth officers etc.</p>	<p>been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and</p> <p>(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and</p> <p>(d) any one or more of the following applies:</p> <p>(i) the information has a security classification of secret or top secret;</p> <p>(ii) the communication of the information damages the security or defence of Australia;</p> <p>(iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;</p> <p>(iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.</p> <p>Note 1: For exceptions to the offences in this section, see section 122.5.</p> <p>Note 2: The fault elements for this offence are intention for paragraph (1)(a) and recklessness for paragraphs (1)(b) to (d) (see section 5.6).</p> <p>Penalty: Imprisonment for 5 years.</p> <p><i>Other dealings with information</i></p> <p>(2) A person commits an offence if:</p> <p>(a) the person deals with information (other than by communicating it); and</p> <p>(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and</p> <p>(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and</p> <p>(d) any one or more of the following applies:</p> <p>(i) the information has a security classification of secret or top secret;</p> <p>(ii) the dealing with the information damages the security or defence of Australia;</p> <p>(iii) the dealing with the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;</p> <p>(iv) the dealing with the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.</p> <p>Note: The fault elements for this offence are intention for paragraph (2)(a) and recklessness for paragraphs (2)(b) to (d) (see section 5.6).</p> <p>Penalty: Imprisonment for 2 years.</p> <p><i>Proof of identity not required</i></p> <p>(3) In proceedings for an offence against this section, the prosecution is not required to prove the identity of the other person referred to in paragraph (1)(c) or (2)(c).</p>	
<p>Section 122.5: Defences</p>	<p><i>Powers, functions and duties in a person's capacity as a public official etc. or under arrangement</i></p> <p>(1) It is a defence to a prosecution for an offence by a person against this Division that:</p> <p>(a) the person was exercising a power, or performing a function or duty, in the person's capacity as a public official or a person who is otherwise engaged to perform work for a Commonwealth entity; or</p> <p>(b) the person communicated, removed, held or otherwise dealt with the information in accordance with an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and</p>	<p>Defences and Exceptions</p> <p><i>Powers, functions and duties in a person's capacity as a public official etc. or under arrangement</i></p> <p>(1) It is a defence to a prosecution for an offence by a person against this Division that:</p> <p>(a) the person was exercising a power, or performing a function or duty, in the person's capacity as a public official or a person who is otherwise engaged to perform work for a Commonwealth entity; or</p>

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	<p>which allows for the exchange of information.</p> <p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information that is already public</i></p> <p>(2) It is a defence to a prosecution for an offence by a person against this Division that the relevant information has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. to integrity agency</i></p> <p>(3) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it:</p> <ul style="list-style-type: none"> (a) to any of the following: <ul style="list-style-type: none"> (i) the Inspector-General of Intelligence and Security, or a person engaged or employed to assist the Inspector-General as described in subsection 32(1) of the <i>Inspector-General of Intelligence and Security Act 1986</i>; (ii) the Commonwealth Ombudsman, or another officer within the meaning of subsection 35(1) of the <i>Ombudsman Act 1976</i>; (iia) the Australian Information Commissioner, a member of the staff of the Office of the Australian Information Commissioner, or a consultant engaged under the <i>Australian Information Commissioner Act 2010</i>; (iii) the Law Enforcement Integrity Commissioner, a staff member of ACLEI, or a consultant to, or a person made available to, the Integrity Commissioner under the <i>Law Enforcement Integrity Commissioner Act 2006</i>; and (b) for the purpose of the Inspector-General, the Ombudsman, the Australian Information Commissioner or the Law Enforcement Integrity Commissioner (as the case requires) exercising a power, or performing a function or duty. <p>Note: A person mentioned in paragraph (3)(a) does not bear an evidential burden in relation to the matters in this subsection (see subsection (12)).</p> <p><i>Information communicated etc. in accordance with the Public Interest Disclosure Act 2013 or the Freedom of Information Act 1982</i></p> <p>(4) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it, in accordance with:</p> <ul style="list-style-type: none"> (a) the <i>Public Interest Disclosure Act 2013</i>; or (b) the <i>Freedom of Information Act 1982</i>. <p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information communicated etc. for the purpose of reporting offences and maladministration</i></p> <p>(4A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of reporting, to an appropriate agency of the Commonwealth, a State or a Territory:</p> <ul style="list-style-type: none"> (a) a criminal offence, or alleged criminal offence, against a law of the Commonwealth; or (b) maladministration relating to the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or (c) maladministration relating to the performance of functions of the Australian Federal Police under: <ul style="list-style-type: none"> (i) the <i>Australian Federal Police Act 1979</i>; or (ii) the <i>Proceeds of Crime Act 2002</i>. 	<ul style="list-style-type: none"> (b) the person communicated, removed, held or otherwise dealt with the information in accordance with an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information. <p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information that is already public</i></p> <p>(2) It is a defence to a prosecution for an offence by a person against this Division that the relevant information has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. to integrity agency</i></p> <p>(3) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it:</p> <ul style="list-style-type: none"> (a) to any of the following: <ul style="list-style-type: none"> (i) the Inspector-General of Intelligence and Security, or a person engaged or employed to assist the Inspector-General as described in subsection 32(1) of the <i>Inspector-General of Intelligence and Security Act 1986</i>; (ii) the Commonwealth Ombudsman, or another officer within the meaning of subsection 35(1) of the <i>Ombudsman Act 1976</i>; (iia) the Australian Information Commissioner, a member of the staff of the Office of the Australian Information Commissioner, or a consultant engaged under the <i>Australian Information Commissioner Act 2010</i>; (iii) the Law Enforcement Integrity Commissioner, a staff member of ACLEI, or a consultant to, or a person made available to, the Integrity Commissioner under the <i>Law Enforcement Integrity Commissioner Act 2006</i>; and (b) for the purpose of the Inspector-General, the Ombudsman, the Australian Information Commissioner or the Law Enforcement Integrity Commissioner (as the case requires) exercising a power, or performing a function or duty. <p>Note: A person mentioned in paragraph (3)(a) does not bear an evidential burden in relation to the matters in this subsection (see subsection (12)).</p> <p><i>Information communicated etc. in accordance with the Public Interest Disclosure Act 2013 or the Freedom of Information Act 1982</i></p> <p>(4) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it, in accordance with:</p> <ul style="list-style-type: none"> (a) the <i>Public Interest Disclosure Act 2013</i>; or (b) the <i>Freedom of Information Act 1982</i>. <p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information communicated etc. for the purpose of reporting offences and maladministration</i></p> <p>(4A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of reporting, to an appropriate agency of the Commonwealth, a State or a Territory:</p> <ul style="list-style-type: none"> (a) a criminal offence, or alleged criminal offence, against a law of the Commonwealth; or (b) maladministration relating to the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or (c) maladministration relating to the performance of functions of the Australian Federal Police under:

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	<p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information communicated etc. to a court or tribunal</i></p> <p>(5) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it, to a court or tribunal (whether or not as a result of a requirement).</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. for the purposes of obtaining or providing legal advice</i></p> <p>(5A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of obtaining or providing, in good faith, legal advice in relation to:</p> <ul style="list-style-type: none"> (a) an offence against this Part; or (b) the application of any right, privilege, immunity or defence (whether or not in this Part) in relation to such an offence; <p>whether that advice was obtained or provided before or after the person engaged in the conduct constituting the offence.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. by persons engaged in business of reporting news etc.</i></p> <p>(6) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media, and:</p> <ul style="list-style-type: none"> (a) at that time, the person reasonably believed that engaging in that conduct was in the public interest (see subsection (7)); or (b) the person: <ul style="list-style-type: none"> (i) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media; and (ii) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who reasonably believed that engaging in that conduct was in the public interest (see subsection (7)). <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(7) Without limiting paragraph (6)(a) or (b), a person may not reasonably believe that communicating, removing, holding or otherwise dealing with information is in the public interest if:</p> <ul style="list-style-type: none"> (a) engaging in that conduct would be an offence under section 92 of the <i>Australian Security Intelligence Organisation Act 1979</i> (publication of identity of ASIO employee or ASIO affiliate); or (b) engaging in that conduct would be an offence under section 41 of the <i>Intelligence Services Act 2001</i> (publication of identity of staff); or (c) engaging in that conduct would be an offence under section 22, 22A or 22B of the <i>Witness Protection Act 1994</i> (offences relating to Commonwealth, Territory, State participants or information about the national witness protection program); or (d) that conduct was engaged in for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation. <p><i>Information that has been previously communicated</i></p> <p>(8) It is a defence to a prosecution for an offence by a person against this Division if:</p> <ul style="list-style-type: none"> (a) the person did not make or obtain the relevant information by reason of any of the following: <ul style="list-style-type: none"> (i) his or her being, or having been, a Commonwealth officer; (ii) his or her being otherwise engaged to perform work for a Commonwealth entity; 	<ul style="list-style-type: none"> (i) the <i>Australian Federal Police Act 1979</i>; or (ii) the <i>Proceeds of Crime Act 2002</i>. <p>Note: A defendant may bear an evidential burden in relation to the matters in this subsection (see subsection (12) of this section and subsection 13.3(3)).</p> <p><i>Information communicated etc. to a court or tribunal</i></p> <p>(5) It is a defence to a prosecution for an offence by a person against this Division that the person communicated the relevant information, or removed, held or otherwise dealt with the relevant information for the purpose of communicating it, to a court or tribunal (whether or not as a result of a requirement).</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. for the purposes of obtaining or providing legal advice</i></p> <p>(5A) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with the relevant information for the primary purpose of obtaining or providing, in good faith, legal advice in relation to:</p> <ul style="list-style-type: none"> (a) an offence against this Part; or (b) the application of any right, privilege, immunity or defence (whether or not in this Part) in relation to such an offence; <p>whether that advice was obtained or provided before or after the person engaged in the conduct constituting the offence.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information communicated etc. by persons engaged in business of reporting news etc.</i></p> <p>(6) It is a defence to a prosecution for an offence by a person against this Division that the person communicated, removed, held or otherwise dealt with This Division does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</p> <ul style="list-style-type: none"> (a) at that time, the person reasonably believed that engaging in that conduct was in the public interest (see subsection (7)); or (b) the person: <ul style="list-style-type: none"> (i) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and (ii) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who reasonably believed that engaging in that conduct was in the public interest (see subsection (7)). <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(7) Without limiting paragraph (6)(a) or (b), a person may not reasonably believe that communicating, removing, holding or otherwise dealing with information is in the public interest if:</p> <ul style="list-style-type: none"> (a) engaging in that conduct would be an offence under section 92 of the Australian Security Intelligence Organisation Act 1979 (publication of identity of ASIO employee or ASIO affiliate); or (b) engaging in that conduct would be an offence under section 41 of the Intelligence Services Act 2001 (publication of identity of staff); or (c) engaging in that conduct would be an offence under section 22, 22A or 22B of the Witness Protection Act 1994 (offences relating to Commonwealth, Territory, State participants or information about the national witness protection program); or (d) that conduct was engaged in for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation. <p>(7A) In a prosecution for an offence under this Division, the defendant does not bear an evidential burden in relation to the matters in subsection (6), despite subsection 13.3(3) of the Criminal Code.</p>

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	<p>(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and</p> <p>(b) the information has already been communicated, or made available, to the public (the prior publication); and</p> <p>(c) the person was not involved in the prior publication (whether directly or indirectly); and</p> <p>(d) at the time of the communication, removal, holding or dealing, the person believes that engaging in that conduct will not cause harm to Australia's interests or the security or defence of Australia; and</p> <p>(e) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information relating to a person etc.</i></p> <p>(9) It is a defence to a prosecution for an offence by a person against this Division if:</p> <p>(a) the person did not make or obtain the relevant information by reason of any of the following:</p> <p>(i) his or her being, or having been, a Commonwealth officer;</p> <p>(ii) his or her being otherwise engaged to perform work for a Commonwealth entity;</p> <p>(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and</p> <p>(b) at the time of the communication, removal, holding or dealing, the person believes that the making or obtaining of the information by the person was required or authorised by law; and</p> <p>(c) having regard to the circumstances of the making or obtaining of the information, the person has reasonable grounds for that belief; and</p> <p>(d) any of the following apply:</p> <p>(i) the person communicates the information to the person to whom the information relates;</p> <p>(ii) the person is the person to whom the information relates;</p> <p>(iii) the communication, removal, holding or dealing is in accordance with the express or implied consent of the person to whom the information relates.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(10) To avoid doubt, a defence to an offence may constitute an authorisation for the purposes of paragraph (9)(b).</p> <p><i>Removing, holding or otherwise dealing with information for the purposes of communicating information</i></p> <p>(11) For the purposes of subsection (3), (4), (5) or (5A), it is not necessary to prove that information, that was removed, held or otherwise dealt with for the purposes of communicating it, was actually communicated.</p> <p><i>Burden of proof for integrity agency officials</i></p> <p>(12) Despite subsection 13.3(3), in a prosecution for an offence against this Division, a person mentioned in subparagraph (3)(a)(i), (ii), (iia) or (iii) does not bear an evidential burden in relation to the matter in:</p> <p>(a) subsection (1), (4) or (4A); or</p> <p>(b) either of the following:</p> <p>(i) subparagraph (3)(a)(i), (ii), (iia) or (iii);</p> <p>(ii) paragraph (3)(b), to the extent that that paragraph relates to the Inspector-General of Intelligence and Security, the Ombudsman, the Australian Information Commissioner or the Law Enforcement Integrity Commissioner.</p> <p><i>Defences do not limit each other</i></p> <p>(13) No defence in this section limits the operation of any other defence in this section.</p>	<p><i>Information that has been previously communicated</i></p> <p>(8) It is a defence to a prosecution for an offence by a person against this Division if:</p> <p>(a) the person did not make or obtain the relevant information by reason of any of the following:</p> <p>(i) his or her being, or having been, a Commonwealth officer;</p> <p>(ii) his or her being otherwise engaged to perform work for a Commonwealth entity;</p> <p>(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and</p> <p>(b) the information has already been communicated, or made available, to the public (the prior publication); and</p> <p>(c) the person was not involved in the prior publication (whether directly or indirectly); and</p> <p>(d) at the time of the communication, removal, holding or dealing, the person believes that engaging in that conduct will not cause harm to Australia's interests or the security or defence of Australia; and</p> <p>(e) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p><i>Information relating to a person etc.</i></p> <p>(9) It is a defence to a prosecution for an offence by a person against this Division if:</p> <p>(a) the person did not make or obtain the relevant information by reason of any of the following:</p> <p>(i) his or her being, or having been, a Commonwealth officer;</p> <p>(ii) his or her being otherwise engaged to perform work for a Commonwealth entity;</p> <p>(iii) an arrangement or agreement to which the Commonwealth or a Commonwealth entity is party and which allows for the exchange of information; and</p> <p>(b) at the time of the communication, removal, holding or dealing, the person believes that the making or obtaining of the information by the person was required or authorised by law; and</p> <p>(c) having regard to the circumstances of the making or obtaining of the information, the person has reasonable grounds for that belief; and</p> <p>(d) any of the following apply:</p> <p>(i) the person communicates the information to the person to whom the information relates;</p> <p>(ii) the person is the person to whom the information relates;</p> <p>(iii) the communication, removal, holding or dealing is in accordance with the express or implied consent of the person to whom the information relates.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(10) To avoid doubt, a defence to an offence may constitute an authorisation for the purposes of paragraph (9)(b).</p> <p><i>Removing, holding or otherwise dealing with information for the purposes of communicating information</i></p> <p>(11) For the purposes of subsection (3), (4), (5) or (5A), it is not necessary to prove that information, that was removed, held or otherwise dealt with for the purposes of communicating it, was actually communicated.</p> <p><i>Burden of proof for integrity agency officials</i></p> <p>(12) Despite subsection 13.3(3), in a prosecution for an offence against this Division, a person mentioned in subparagraph (3)(a)(i), (ii), (iia) or (iii) does not bear an evidential burden in relation to the matter in:</p> <p>(a) subsection (1), (4) or (4A); or</p> <p>(b) either of the following:</p> <p>(i) subparagraph (3)(a)(i), (ii), (iia) or (iii);</p> <p>(ii) paragraph (3)(b), to the extent that that paragraph relates to the Inspector-General of Intelligence and Security, the Ombudsman, the Australian Information Commissioner or the</p>

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		<p>Law Enforcement Integrity Commissioner.</p> <p><i>Defences do not limit each other</i></p> <p>(13) No defence in this section limits the operation of any other defence in this section.</p>
Division 123: Miscellaneous		
Section 123.1: Injunctions	<p><i>Enforceable provisions</i></p> <p>(1) The provisions of Division 122 are enforceable under Part 7 of the Regulatory Powers Act.</p> <p>Note: Part 7 of the Regulatory Powers Act creates a framework for using injunctions to enforce provisions.</p> <p><i>Authorised person and relevant court</i></p> <p>(2) For the purposes of Part 7 of the Regulatory Powers Act, as that Part applies to the provisions of Division 122 of this Act:</p> <ul style="list-style-type: none"> (a) the Minister is an authorised person; and (b) each of the following is a relevant court: <ul style="list-style-type: none"> (i) the Federal Court of Australia; (ii) the Federal Circuit Court of Australia; (iii) a court of a State or Territory that has jurisdiction in relation to matters arising under this Act. <p><i>Extension to external Territories</i></p> <p>(3) Part 7 of the Regulatory Powers Act, as that Part applies to the provisions of Division 122 of this Act, extends to every external Territory.</p>	<p>No amendment.</p>
Section 123.2: Forfeiture of articles etc.	<p>(1) A sketch, article, record or document which is made, obtained, recorded, retained, possessed or otherwise dealt with in contravention of this Part is forfeited to the Commonwealth.</p> <p>(2) In subsection (1), <i>sketch</i>, <i>article</i> and <i>record</i> have the same respective meanings as in Part 5.2.</p>	<p>No amendment.</p>
Section 123.3: Extended geographical jurisdiction—category D	<p>Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Part.</p>	<p>No amendment.</p>
Section 123.4: Effect of this Part on other rights, privileges, immunities or defences	<p>Nothing in this Part limits or affects any other right, privilege, immunity or defence existing apart from this Part.</p>	<p>No amendment.</p>
Section 123.5: Requirements before proceedings can be initiated	<p>(1) Proceedings for the commitment of a person for trial for an offence against this Part must not be instituted without:</p> <ul style="list-style-type: none"> (a) the written consent of the Attorney-General; and (b) for proceedings that relate to security classified information—a certification by the Attorney-General that, at the time of the conduct that is alleged to constitute the offence, it was appropriate that the information had a security classification. <p>(2) However, the following steps may be taken (but no further steps in proceedings may be taken) without consent or certification having been obtained:</p> <ul style="list-style-type: none"> (a) a person may be arrested for the offence and a warrant for such an arrest may be issued and executed; (b) a person may be charged with the offence; 	<p>No amendment.</p>

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	<p>(c) a person so charged may be remanded in custody or on bail.</p> <p>(3) Nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.</p> <p>(4) In deciding whether to consent, the Attorney-General must consider whether the conduct might be authorised in a way mentioned in section 122.5.</p>	
Part 7.2: Theft and other property offences		
Division 131—Theft		
Section 131.1 Theft	<p>(1) A person commits an offence if:</p> <p>(a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property; and</p> <p>(b) the property belongs to a Commonwealth entity.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of theft.</p> <p>(3) Absolute liability applies to the paragraph (1)(b) element of the offence of theft.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p> <p>Note: For alternative verdicts, see sections 132.1 and 134.1.</p>	<p>(1) A person commits an offence if:</p> <p>(a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property; and</p> <p>(b) the property belongs to a Commonwealth entity.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of theft.</p> <p>(3) Absolute liability applies to the paragraph (1)(b) element of the offence of theft.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p> <p>Note: For alternative verdicts, see sections 132.1 and 134.1.</p> <p><u>(5) Subsection (1) does not apply to a person who deals with relevant property in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(6) In a prosecution for an offence against subsection (1), the defendant does not bear an evidential burden in relation to the matters in subsection (5), despite subsection 13.3(3) of the Criminal Code.</u></p>
Division 132-Other property offences		
Section 132.1: Receiving	<p>(1) A person commits an offence if the person dishonestly receives stolen property, knowing or believing the property to be stolen.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of receiving.</p> <p>(2A) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew or believed that the property belonged to a Commonwealth entity.</p> <p><i>Stolen property</i></p> <p>(3) For the purposes of this section, property is stolen property if, and only if:</p> <p>(a) it is original stolen property (as defined by subsection (5)); or</p> <p>(aa) it is previously received property (as defined by subsection (5A)); or</p> <p>(b) it is tainted property (as defined by subsection (7)).</p> <p>This subsection has effect subject to subsections (4) and (6).</p> <p>(4) For the purposes of this section, stolen property does not include land obtained in the course of an offence against section 134.1.</p>	<p>(1) A person commits an offence if the person dishonestly receives stolen property, knowing or believing the property to be stolen.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of receiving.</p> <p>(2A) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew or believed that the property belonged to a Commonwealth entity.</p> <p><i>Stolen property</i></p> <p>(3) For the purposes of this section, property is stolen property if, and only if:</p> <p>(a) it is original stolen property (as defined by subsection (5)); or</p> <p>(aa) it is previously received property (as defined by subsection (5A)); or</p> <p>(b) it is tainted property (as defined by subsection (7)).</p> <p>This subsection has effect subject to subsections (4) and (6).</p> <p>(4) For the purposes of this section, stolen property does not include land obtained in the course of an offence against section 134.1.</p>

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	<p><i>Original stolen property</i></p> <p>(5) For the purposes of this section, original stolen property is:</p> <ul style="list-style-type: none"> (a) property, or a part of property, that: <ul style="list-style-type: none"> (i) was appropriated in the course of theft (whether or not the property, or the part of the property, is in the state it was in when it was so appropriated); and (ii) is in the possession or custody of the person who so appropriated the property; or (b) property, or a part of property, that: <ul style="list-style-type: none"> (i) was obtained in the course of an offence against section 134.1 (whether or not the property, or the part of the property, is in the state it was in when it was so obtained); and (ii) is in the possession or custody of the person who so obtained the property or the person for whom the property was so obtained. <p><i>Previously received property</i></p> <p>(5A) For the purposes of this section, previously received property is property that:</p> <ul style="list-style-type: none"> (a) was received in the course of an offence against subsection (1); and (b) is in the possession or custody of the person who received the property in the course of that offence. <p>(6) For the purposes of this section, property ceases to be original stolen property or previously received property:</p> <ul style="list-style-type: none"> (a) after the property is restored: <ul style="list-style-type: none"> (i) to the person from whom it was appropriated or obtained; or (ii) to other lawful possession or custody; or (b) after: <ul style="list-style-type: none"> (i) the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property; or (ii) a person claiming through the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property. <p><i>Tainted property</i></p> <p>(7) For the purposes of this section, tainted property is property that:</p> <ul style="list-style-type: none"> (a) is (in whole or in part) the proceeds of sale of, or property exchanged for: <ul style="list-style-type: none"> (i) original stolen property; or (ii) previously received property; and (b) if subparagraph (a)(i) applies—is in the possession or custody of: <ul style="list-style-type: none"> (i) if the original stolen property was appropriated in the course of theft—the person who so appropriated the original stolen property; or (ii) if the original stolen property was obtained in the course of an offence against section 134.1—the person who so obtained the property or the person for whom the property was so obtained; and (c) if subparagraph (a)(ii) applies—is in the possession or custody of the person who received the previously received property in the course of an offence against subsection (1). <p><i>Money transfers</i></p> <p>(8) For the purposes of this section, if, as a result of the application of subsection 134.1(9) or (10), an amount credited to an account held by a person is property obtained in the course of an offence against section 134.1:</p> <ul style="list-style-type: none"> (a) while the whole or any part of the amount remains credited to the account, the property is taken to be in the possession of the person; and (b) if the person fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled—the person is taken to have received the property; and 	<p><i>Original stolen property</i></p> <p>(5) For the purposes of this section, original stolen property is:</p> <ul style="list-style-type: none"> (a) property, or a part of property, that: <ul style="list-style-type: none"> (i) was appropriated in the course of theft (whether or not the property, or the part of the property, is in the state it was in when it was so appropriated); and (ii) is in the possession or custody of the person who so appropriated the property; or (b) property, or a part of property, that: <ul style="list-style-type: none"> (i) was obtained in the course of an offence against section 134.1 (whether or not the property, or the part of the property, is in the state it was in when it was so obtained); and (ii) is in the possession or custody of the person who so obtained the property or the person for whom the property was so obtained. <p><i>Previously received property</i></p> <p>(5A) For the purposes of this section, previously received property is property that:</p> <ul style="list-style-type: none"> (a) was received in the course of an offence against subsection (1); and (b) is in the possession or custody of the person who received the property in the course of that offence. <p>(6) For the purposes of this section, property ceases to be original stolen property or previously received property:</p> <ul style="list-style-type: none"> (a) after the property is restored: <ul style="list-style-type: none"> (i) to the person from whom it was appropriated or obtained; or (ii) to other lawful possession or custody; or (b) after: <ul style="list-style-type: none"> (i) the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property; or (ii) a person claiming through the person from whom the property was appropriated or obtained ceases to have any right to restitution in respect of the property. <p><i>Tainted property</i></p> <p>(7) For the purposes of this section, tainted property is property that:</p> <ul style="list-style-type: none"> (a) is (in whole or in part) the proceeds of sale of, or property exchanged for: <ul style="list-style-type: none"> (i) original stolen property; or (ii) previously received property; and (b) if subparagraph (a)(i) applies—is in the possession or custody of: <ul style="list-style-type: none"> (i) if the original stolen property was appropriated in the course of theft—the person who so appropriated the original stolen property; or (ii) if the original stolen property was obtained in the course of an offence against section 134.1—the person who so obtained the property or the person for whom the property was so obtained; and (c) if subparagraph (a)(ii) applies—is in the possession or custody of the person who received the previously received property in the course of an offence against subsection (1). <p><i>Money transfers</i></p> <p>(8) For the purposes of this section, if, as a result of the application of subsection 134.1(9) or (10), an amount credited to an account held by a person is property obtained in the course of an offence against section 134.1:</p> <ul style="list-style-type: none"> (a) while the whole or any part of the amount remains credited to the account, the property is taken to be in the possession of the person; and (b) if the person fails to take such steps as are reasonable in the circumstances to secure that the credit is cancelled—the person is taken to have received the property; and

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	<p>(c) subsection (6) of this section does not apply to the property.</p> <p>Note: Subsections 134.1(9) and (10) deal with money transfers.</p> <p><i>Alternative verdicts</i></p> <p>(9) If, in a prosecution for an offence of theft or an offence against section 134.1, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence of receiving, the trier of fact may find the defendant not guilty of the offence of theft or the section 134.1 offence but guilty of the offence of receiving, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p> <p>(10) If, in a prosecution for an offence of receiving, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence of theft or an offence against section 134.1, the trier of fact may find the defendant not guilty of the offence of receiving but guilty of the offence of theft or the section 134.1 offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p> <p><i>Receiving property stolen before commencement</i></p> <p>(11) For the purposes of this section:</p> <p>(a) it is to be assumed that sections 131.1 and 134.1 had been in force at all times before the commencement of this section; and</p> <p>(b) property that was appropriated or obtained at a time before the commencement of this section does not become original stolen property unless the property was appropriated or obtained in circumstances that (apart from paragraph (a)) amounted to an offence against a law of the Commonwealth in force at that time.</p> <p><i>Obtaining</i></p> <p>(12) The definition of obtaining in section 130.1 does not apply to this section.</p> <p>Note: See subsection 134.1(3).</p> <p><i>Definition</i></p> <p>(13) In this section:</p> <p>account has the same meaning as in section 133.1.</p>	<p>(c) subsection (6) of this section does not apply to the property.</p> <p>Note: Subsections 134.1(9) and (10) deal with money transfers.</p> <p><i>Alternative verdicts</i></p> <p>(9) If, in a prosecution for an offence of theft or an offence against section 134.1, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence of receiving, the trier of fact may find the defendant not guilty of the offence of theft or the section 134.1 offence but guilty of the offence of receiving, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p> <p>(10) If, in a prosecution for an offence of receiving, the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence of theft or an offence against section 134.1, the trier of fact may find the defendant not guilty of the offence of receiving but guilty of the offence of theft or the section 134.1 offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.</p> <p><i>Receiving property stolen before commencement</i></p> <p>(11) For the purposes of this section:</p> <p>(a) it is to be assumed that sections 131.1 and 134.1 had been in force at all times before the commencement of this section; and</p> <p>(b) property that was appropriated or obtained at a time before the commencement of this section does not become original stolen property unless the property was appropriated or obtained in circumstances that (apart from paragraph (a)) amounted to an offence against a law of the Commonwealth in force at that time.</p> <p><i>Obtaining</i></p> <p>(12) The definition of obtaining in section 130.1 does not apply to this section.</p> <p>Note: See subsection 134.1(3).</p> <p><u><i>Exception</i></u></p> <p><u>(12A) Subsection (1) does not apply to a person who deals with relevant property in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(12B) In a prosecution for an offence against subsection (1), the defendant does not bear an evidential burden in relation to the matters in subsection (12A), despite subsection 13.3(3) of the Criminal Code.</u></p> <p><i>Definition</i></p> <p>(13) In this section:</p> <p>account has the same meaning as in section 133.1.</p>
Other sections		
<p>Section 119.7: Recruiting persons to serve in or with an armed force in a foreign country</p>	<p><i>Recruiting others to serve with foreign armed forces</i></p> <p>(1) A person commits an offence if the person recruits, in Australia, another person to serve in any capacity in or with an armed force in a foreign country.</p> <p>Penalty: Imprisonment for 10 years.</p> <p><i>Publishing recruitment advertisements</i></p>	<p><i>Recruiting others to serve with foreign armed forces</i></p> <p>(1) A person commits an offence if the person recruits, in Australia, another person to serve in any capacity in or with an armed force in a foreign country.</p> <p>Penalty: Imprisonment for 10 years.</p> <p><i>Publishing recruitment advertisements</i></p>

Section	Current Provision	Redrafted Provision with Exception
	<p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person publishes in Australia: <ul style="list-style-type: none"> (i) an advertisement; or (ii) an item of news that was procured by the provision or promise of money or any other consideration; and (b) the person is reckless as to the fact that the publication of the advertisement or item of news is for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p>(3) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person publishes in Australia: <ul style="list-style-type: none"> (i) an advertisement; or (ii) an item of news that was procured by the provision or promise of money or any other consideration; and (b) the advertisement or item of news contains information: <ul style="list-style-type: none"> (i) relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with an armed force in a foreign country; or (ii) relating to the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Facilitating recruitment</i></p> <p>(4) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person engages in conduct in Australia; and (b) the person engages in the conduct intending to facilitate or promote the recruitment of persons to serve in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exception</i></p> <p>(5) This section does not apply in relation to service of a person in or with an armed force in circumstances if a declaration under subsection 119.8(2) covers the person and the circumstances of the person's service in or with the armed force.</p> <p>Note 1: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3).</p> <p>Note 2: For conduct for the defence or international relations of Australia, see section 119.9.</p> <p><i>Armed forces that are not part of the government of a foreign country</i></p> <p>(6) A reference in this section to an armed force in a foreign country includes any armed force in a foreign country, whether or not the armed force forms part of the armed forces of the government of that foreign country.</p> <p>(7) Without limiting this section, a person recruits another person to serve in or with an armed force in a foreign country if the other person enters a commitment or engagement to serve in any capacity in or with an armed force, whether or not the commitment or engagement is legally enforceable or constitutes legal or formal enlistment in that force.</p>	<p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person publishes in Australia: <ul style="list-style-type: none"> (i) an advertisement; or (ii) an item of news that was procured by the provision or promise of money or any other consideration; and (b) the person is reckless as to the fact that the publication of the advertisement or item of news is for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p>(3) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person publishes in Australia: <ul style="list-style-type: none"> (i) an advertisement; or (ii) an item of news that was procured by the provision or promise of money or any other consideration; and (b) the advertisement or item of news contains information: <ul style="list-style-type: none"> (i) relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with an armed force in a foreign country; or (ii) relating to the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Facilitating recruitment</i></p> <p>(4) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person engages in conduct in Australia; and (b) the person engages in the conduct intending to facilitate or promote the recruitment of persons to serve in any capacity in or with an armed force in a foreign country. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exceptions</i></p> <p>(5) This section does not apply in relation to service of a person in or with an armed force in circumstances if a declaration under subsection 119.8(2) covers the person and the circumstances of the person's service in or with the armed force.</p> <p>Note 1: A defendant bears an evidential burden in relation to the matter in subsection (5): see subsection 13.3(3).</p> <p>Note 2: For conduct for the defence or international relations of Australia, see section 119.9.</p> <p><u>(5A) Section 119.7 does not apply to a person who engages in conduct in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u> (ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u> <p><u>(5B) In a prosecution for an offence under this Division, the defendant does not bear an evidential burden in relation to the matters in subsection (5A), despite subsection 13.3(3) of the Criminal Code.</u></p>

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		<p><i>Armed forces that are not part of the government of a foreign country</i></p> <p>(6) A reference in this section to an armed force in a foreign country includes any armed force in a foreign country, whether or not the armed force forms part of the armed forces of the government of that foreign country.</p> <p>(7) Without limiting this section, a person recruits another person to serve in or with an armed force in a foreign country if the other person enters a commitment or engagement to serve in any capacity in or with an armed force, whether or not the commitment or engagement is legally enforceable or constitutes legal or formal enlistment in that force.</p>
Section 80.2C: Advocating terrorism	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person advocates: <ul style="list-style-type: none"> (i) the doing of a terrorist act; or (ii) the commission of a terrorism offence referred to in subsection (2); and (b) the person engages in that conduct reckless as to whether another person will: <ul style="list-style-type: none"> (i) engage in a terrorist act; or (ii) commit a terrorism offence referred to in subsection (2). <p>Note: There is a defence in section 80.3 for acts done in good faith.</p> <p>Penalty: Imprisonment for 5 years.</p> <p>(2) A terrorism offence is referred to in this subsection if:</p> <ul style="list-style-type: none"> (a) the offence is punishable on conviction by imprisonment for 5 years or more; and (b) the offence is not: <ul style="list-style-type: none"> (i) an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) to the extent that it relates to a terrorism offence; or (ii) a terrorism offence that a person is taken to have committed because of section 11.2 (complicity and common purpose), 11.2A (joint commission) or 11.3 (commission by proxy). <p><i>Definitions</i></p> <p>(3) In this section:</p> <p>advocates: a person advocates the doing of a terrorist act or the commission of a terrorism offence if the person counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence.</p> <p>terrorism offence has the same meaning as in subsection 3(1) of the <i>Crimes Act 1914</i>.</p> <p>terrorist act has the same meaning as in section 100.1.</p> <p>(4) A reference in this section to advocating the doing of a terrorist act or the commission of a terrorism offence includes a reference to:</p> <ul style="list-style-type: none"> (a) advocating the doing of a terrorist act or the commission of a terrorism offence, even if a terrorist act or terrorism offence does not occur; and (b) advocating the doing of a specific terrorist act or the commission of a specific terrorism offence; and (c) advocating the doing of more than one terrorist act or the commission of more than one terrorism offence. 	<p>No amendment.</p>
Section 80.3: Acts done in good faith	<p>(1) Subdivisions B and C, and sections 83.1 and 83.4, do not apply to a person who:</p> <ul style="list-style-type: none"> (a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions: <ul style="list-style-type: none"> (iii) the Sovereign; (iv) the Governor-General; (v) the Governor of a State; (vi) the Administrator of a Territory; 	<p>(1) Subdivisions B and C, and sections 83.1 and 83.4, do not apply to a person who:</p> <ul style="list-style-type: none"> (a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions: <ul style="list-style-type: none"> (i) the Sovereign; (ii) the Governor-General; (iii) the Governor of a State; (iv) the Administrator of a Territory;

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	<p>(vii) an adviser of any of the above;</p> <p>(viii) a person responsible for the government of another country; or</p> <p>(b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:</p> <p>(i) the Government of the Commonwealth, a State or a Territory;</p> <p>(ii) the Constitution;</p> <p>(iii) legislation of the Commonwealth, a State, a Territory or another country;</p> <p>(iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or</p> <p>(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or</p> <p>(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or</p> <p>(e) does anything in good faith in connection with an industrial dispute or an industrial matter; or</p> <p>(f) publishes in good faith a report or commentary about a matter of public interest.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).</p> <p>(2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:</p> <p>(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or</p> <p>(b) with the intention of assisting a party:</p> <p>(i) engaged in armed conflict involving the Commonwealth or the Australian Defence Force; and</p> <p>(ii) declared in a Proclamation made under section 80.1AB to be an enemy engaged in armed conflict involving the Commonwealth or the Australian Defence Force; or</p> <p>(f) with the intention of causing violence or creating public disorder or a public disturbance.</p> <p>(3) Without limiting subsection (2), in considering a defence under subsection (1) in respect of an offence against Subdivision C, the Court may have regard to any relevant matter, including whether the acts were done:</p> <p>(a) in the development, performance, exhibition or distribution of an artistic work; or</p> <p>(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or</p> <p>(c) in the dissemination of news or current affairs.</p>	<p>(v) an adviser of any of the above;</p> <p>(vi) a person responsible for the government of another country; or</p> <p>(b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:</p> <p>(i) the Government of the Commonwealth, a State or a Territory;</p> <p>(ii) the Constitution;</p> <p>(iii) legislation of the Commonwealth, a State, a Territory or another country;</p> <p>(iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or</p> <p>(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or</p> <p>(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or</p> <p>(e) does anything in good faith in connection with an industrial dispute or an industrial matter; or</p> <p>(f) publishes in good faith a report or commentary about a matter of public interest.</p> <p>(g)</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (1)(e). See subsection 13.3(3).</p> <p><u>(1A) In a prosecution for an offence against subdivisions B and C, and sections 83.1 and 83.4, the defendant does not bear an evidential burden in relation to the matters in subsection 80.3(a), (b), (c), (d) or (f), despite subsection 13.3 of the Criminal Code.</u></p> <p>(2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:</p> <p>(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or</p> <p>(b) with the intention of assisting a party:</p> <p>(i) engaged in armed conflict involving the Commonwealth or the Australian Defence Force; and</p> <p>(ii) declared in a Proclamation made under section 80.1AB to be an enemy engaged in armed conflict involving the Commonwealth or the Australian Defence Force; or</p> <p>(c) with the intention of causing violence or creating public disorder or a public disturbance.</p> <p>(3) Without limiting subsection (2), in considering a defence under subsection (1) in respect of an offence against Subdivision C, the Court may have regard to any relevant matter, including whether the acts were done:</p> <p>(a) in the development, performance, exhibition or distribution of an artistic work; or</p> <p>(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or</p> <p>in the dissemination of news or current affairs.</p>
Section 474.47: Using a carriage service for inciting property damage, or theft, on agricultural land	<p>(1) A person (the offender) commits an offence if:</p> <p>(a) the offender transmits, makes available, publishes or otherwise distributes material; and</p> <p>(b) the offender does so using a carriage service; and</p> <p>(c) the offender does so with the intention of inciting another person to:</p> <p>(i) unlawfully damage property on agricultural land; or</p> <p>(ii) unlawfully destroy property on agricultural land; or</p> <p>(iii) commit theft of property on agricultural land.</p> <p>Penalty: Imprisonment for 5 years.</p> <p>(2) Subsection (1) does not apply to material if the material relates to a news report, or a current affairs report,</p>	<p>(1) A person (the offender) commits an offence if:</p> <p>(a) the offender transmits, makes available, publishes or otherwise distributes material; and</p> <p>(b) the offender does so using a carriage service; and</p> <p>(c) the offender does so with the intention of inciting another person to:</p> <p>(i) unlawfully damage property on agricultural land; or</p> <p>(ii) unlawfully destroy property on agricultural land; or</p> <p>(iii) commit theft of property on agricultural land.</p> <p>Penalty: Imprisonment for 5 years.</p> <p>(2) Subsection (1) does not apply to material if the material relates to a news report, or a current affairs report,</p>

Section	Current Provision	Redrafted Provision with Exception
	<p>that:</p> <p>(d) is in the public interest; and</p> <p>(e) is made by a person working in a professional capacity as a journalist.</p> <p>(2A) In a prosecution for an offence against subsection (1), the defendant does not bear an evidential burden in relation to the matters in subsection (2), despite subsection 13.3(3).</p> <p>(3) Subsection (1) does not apply to conduct engaged in by a person if, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to any civil or criminal liability for the conduct.</p> <p>Note 1: The Public Interest Disclosure Act 2013 provides that an individual is not subject to any civil or criminal liability for making a public interest disclosure.</p> <p>Note 2: Section 1317AB of the Corporations Act 2001 provides that a person who makes a disclosure that qualifies for protection under Part 9.4AAA of that Act is not subject to any civil or criminal liability for making the disclosure.</p> <p>Note 3: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(4) Subsection (3) does not limit section 10.5 (lawful authority).</p> <p>When a person commits theft</p> <p>(5) For the purposes of this section, a person commits theft of property if:</p> <p>(a) the property belongs to another person; and</p> <p>(b) the person dishonestly appropriates the property with the intention of permanently depriving the other person of the property.</p> <p>(6) An expression used in subsection (5) and in Chapter 7 has the same meaning in that subsection as it has in that Chapter.</p> <p>(7) In a prosecution for an offence against this section, the determination of dishonesty is a matter for the trier of fact.</p> <p>(8) Sections 131.2 to 131.11 apply (with appropriate modifications) in determining whether a person commits theft of property (within the meaning of this section).</p>	<p>that:</p> <p>(d) is in the public interest; and</p> <p>(e) is made by a person working in a professional capacity as a journalist.</p> <p><u>to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p>(2A) In a prosecution for an offence against subsection (1), the defendant does not bear an evidential burden in relation to the matters in subsection (2), despite subsection 13.3(3).</p> <p>(3) Subsection (1) does not apply to conduct engaged in by a person if, as a result of the operation of a law of the Commonwealth, a State or a Territory, the person is not subject to any civil or criminal liability for the conduct.</p> <p>Note 1: The Public Interest Disclosure Act 2013 provides that an individual is not subject to any civil or criminal liability for making a public interest disclosure.</p> <p>Note 2: Section 1317AB of the Corporations Act 2001 provides that a person who makes a disclosure that qualifies for protection under Part 9.4AAA of that Act is not subject to any civil or criminal liability for making the disclosure.</p> <p>Note 3: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).</p> <p>(4) Subsection (3) does not limit section 10.5 (lawful authority).</p> <p>When a person commits theft</p> <p>(5) For the purposes of this section, a person commits theft of property if:</p> <p>(a) the property belongs to another person; and</p> <p>(b) the person dishonestly appropriates the property with the intention of permanently depriving the other person of the property.</p> <p>(6) An expression used in subsection (5) and in Chapter 7 has the same meaning in that subsection as it has in that Chapter.</p> <p>(7) In a prosecution for an offence against this section, the determination of dishonesty is a matter for the trier of fact.</p> <p>(8) Sections 131.2 to 131.11 apply (with appropriate modifications) in determining whether a person commits theft of property (within the meaning of this section).</p>
Crimes Act 1914 (Cth)		
Section 3ZZHA: Unauthorised disclosure of information	<p>(1) A person commits an offence if:</p> <p>(a) the person discloses information; and</p> <p>(b) the information relates to:</p> <p>(i) an application for a delayed notification search warrant; or</p> <p>(ii) the execution of a delayed notification search warrant; or</p> <p>(iii) a report under section 3ZZFA in relation to a delayed notification search warrant; or</p> <p>(iv) a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in</p>	<p>(1) A person commits an offence if:</p> <p>(a) the person discloses information; and</p> <p>(b) the information relates to:</p> <p>(i) an application for a delayed notification search warrant; or</p> <p>(ii) the execution of a delayed notification search warrant; or</p> <p>(iii) a report under section 3ZZFA in relation to a delayed notification search warrant; or</p> <p>(iv) a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in</p>

Section	Current Provision	Redrafted Provision with Exception
	<p>relation to a delayed notification search warrant.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(2) Each of the following is an exception to the offence created by subsection (1):</p> <ul style="list-style-type: none"> (a) the disclosure is in connection with the administration or execution of this Part; (aa) the disclosure is for the purposes of obtaining or providing legal advice related to this Part; (b) the disclosure is for the purposes of any legal proceeding arising out of or otherwise related to this Part or of any report of any such proceedings; (c) the disclosure is in accordance with any requirement imposed by law; (d) the disclosure is for the purposes of: <ul style="list-style-type: none"> (i) the performance of duties or functions or the exercise of powers under or in relation to this Part; or (ii) the performance of duties or functions or the exercise of powers by a law enforcement officer, an officer of the Australian Security Intelligence Organisation, a staff member of the Australian Secret Intelligence Service or a person seconded to either of those bodies; (da) the disclosure is made by anyone to the Ombudsman, a Deputy Commonwealth Ombudsman or a member of the Ombudsman's staff (whether in connection with the exercise of powers or performance of functions under Division 7, in connection with a complaint made to the Ombudsman or in any other circumstances); (e) the disclosure is made after a warrant premises occupier's notice or an adjoining premises occupier's notice has been given in relation to the warrant; (f) the disclosure is made after a direction has been given under subsection 3ZZDA(4) or 3ZZDB(4) in relation to the warrant. <p>Note: A defendant bears an evidential burden in relation to a matter in subsection (2)—see subsection 13.3(3) of the <i>Criminal Code</i>.</p>	<p>relation to a delayed notification search warrant.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(2) Each of the following is an exception to the offence created by subsection (1):</p> <ul style="list-style-type: none"> (a) the disclosure is in connection with the administration or execution of this Part; (aa) the disclosure is for the purposes of obtaining or providing legal advice related to this Part; (b) the disclosure is for the purposes of any legal proceeding arising out of or otherwise related to this Part or of any report of any such proceedings; (c) the disclosure is in accordance with any requirement imposed by law; (d) the disclosure is for the purposes of: <ul style="list-style-type: none"> (i) the performance of duties or functions or the exercise of powers under or in relation to this Part; or (ii) the performance of duties or functions or the exercise of powers by a law enforcement officer, an officer of the Australian Security Intelligence Organisation, a staff member of the Australian Secret Intelligence Service or a person seconded to either of those bodies; (da) the disclosure is made by anyone to the Ombudsman, a Deputy Commonwealth Ombudsman or a member of the Ombudsman's staff (whether in connection with the exercise of powers or performance of functions under Division 7, in connection with a complaint made to the Ombudsman or in any other circumstances); (e) the disclosure is made after a warrant premises occupier's notice or an adjoining premises occupier's notice has been given in relation to the warrant; (f) the disclosure is made after a direction has been given under subsection 3ZZDA(4) or 3ZZDB(4) in relation to the warrant-z; (g) <u>subsection 3ZZHA(1) does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u> <ul style="list-style-type: none"> (i) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (ii) <u>the person:</u> <ul style="list-style-type: none"> (A) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u> (B) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u> (h) <u>in a prosecution for an offence under subsection 3ZZHA(1), the defendant does not bear an evidential burden in relation to the matters in subsection (g), despite subsection 13.3(3) of the Criminal Code.</u> <p>Note: A defendant bears an evidential burden in relation to a <u>the matters</u> in subsection (2)(a) – (f)—see subsection 13.3(3) of the <i>Criminal Code</i>.</p>
<p>Section 15HK: Unauthorised disclosure of information</p>	<p><i>Disclosures by entrusted persons</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1)(b) and (d)—see section 5.6 of the <i>Criminal Code</i>.</p>	<p><i>Disclosures by entrusted persons</i></p> <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1)(b) and (d)—see section 5.6 of the <i>Criminal Code</i>.</p>

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	<p>Penalty: Imprisonment for 2 years.</p> <p>(1A) Strict liability applies to paragraph (1)(a).</p> <p>Note: For strict liability, see section 6.1 of the <i>Criminal Code</i>.</p> <p>(1B) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a controlled operation; and (e) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; (ii) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1B)(b) and (d) and subparagraph (1B)(e)(ii)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(1C) Strict liability applies to paragraph (1B)(a).</p> <p>Note: For strict liability, see section 6.1 of the <i>Criminal Code</i>.</p> <p><i>Other disclosures</i></p> <p>(1D) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a controlled operation; and (c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1D)(b) and (c)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(1E) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a controlled operation; and (c) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (i) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; (ii) the person knows that the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraph (1E)(b)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exceptions—general</i></p> <p>(2) Subsections (1) to (1E) do not apply if the disclosure was:</p> <ul style="list-style-type: none"> (a) in connection with the administration or execution of this Part; or (b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or 	<p>Penalty: Imprisonment for 2 years.</p> <p>(1A) Strict liability applies to paragraph (1)(a).</p> <p>Note: For strict liability, see section 6.1 of the <i>Criminal Code</i>.</p> <p>(1B) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person is, or has been, an entrusted person; and (b) information came to the knowledge or into the possession of the person in the person's capacity as an entrusted person; and (c) the person discloses the information; and (d) the information relates to a controlled operation; and (e) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (v) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; (vi) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1B)(b) and (d) and subparagraph (1B)(e)(ii)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 10 years.</p> <p>(1C) Strict liability applies to paragraph (1B)(a).</p> <p>Note: For strict liability, see section 6.1 of the <i>Criminal Code</i>.</p> <p><i>Other disclosures</i></p> <p>(1D) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a controlled operation; and (c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraphs (1D)(b) and (c)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(1E) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person discloses information; and (b) the information relates to a controlled operation; and (c) either or both of the following subparagraphs apply: <ul style="list-style-type: none"> (vii) the person intends to endanger the health or safety of any person or prejudice the effective conduct of a controlled operation; (viii) the person knows that the disclosure will endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. <p>Note: Recklessness is the fault element for paragraph (1E)(b)—see section 5.6 of the <i>Criminal Code</i>.</p> <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exceptions—general</i></p> <p>(2) Subsections (1) to (1E) do not apply if the disclosure was:</p> <ul style="list-style-type: none"> (a) in connection with the administration or execution of this Part; or (b) for the purposes of any legal proceedings arising out of or otherwise related to this Part or of any report of any such proceedings; or

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	<p>(c) for the purposes of obtaining legal advice in relation to the controlled operation; or</p> <p>(d) in accordance with any requirement imposed by law; or</p> <p>(e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exceptions—integrity testing controlled operation authority</i></p> <p>(2A) Subsections (1) to (1E) do not apply, in the case of a controlled operation authorised by an integrity testing controlled operation authority (granted on the basis that an integrity testing authority is in effect), if the disclosure was:</p> <p>(a) in any of the circumstances mentioned in paragraphs (2)(a) to (e); or</p> <p>(b) in connection with the administration or execution of Part IABA, or the <i>Law Enforcement Integrity Commissioner Act 2006</i>, in relation to the integrity testing authority; or</p> <p>(c) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, the controlled operation; or</p> <p>(d) in relation to the integrity testing authority:</p> <p>(i) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, an integrity testing operation authorised by the authority; or</p> <p>(ii) to an authority of the Commonwealth, a State or a Territory, if the disclosure relates to the misconduct of an employee or officer of the authority.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exception—misconduct</i></p> <p>(3) Subsections (1) to (1E) do not apply if:</p> <p>(a) the person (the discloser) discloses the information to the Ombudsman or the Integrity Commissioner; and</p> <p>(b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and</p> <p>(c) the information concerns:</p> <p>(i) a corruption issue within the meaning of the <i>Law Enforcement Integrity Commissioner Act 2006</i> (see section 7 of that Act) in relation to a controlled operation; or</p> <p>(ii) misconduct in relation to a controlled operation; and</p> <p>(d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and</p> <p>(e) the discloser makes the disclosure in good faith.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exception—previously published information</i></p> <p>(4) Subsections (1D) and (1E) do not apply to a person disclosing information if:</p> <p>(a) the information has already been communicated, or made available, to the public (the prior publication); and</p> <p>(b) the person was not involved in the prior publication (whether directly or indirectly); and</p> <p>(c) at the time of the disclosure, the person believes that the disclosure:</p> <p>(i) will not endanger the health or safety of any person; and</p>	<p>(c) for the purposes of obtaining legal advice in relation to the controlled operation; or</p> <p>(d) in accordance with any requirement imposed by law; or</p> <p>(e) in connection with the performance of functions or duties, or the exercise of powers, of a law enforcement agency.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exceptions—integrity testing controlled operation authority</i></p> <p>(2A) Subsections (1) to (1E) do not apply, in the case of a controlled operation authorised by an integrity testing controlled operation authority (granted on the basis that an integrity testing authority is in effect), if the disclosure was:</p> <p>(a) in any of the circumstances mentioned in paragraphs (2)(a) to (e); or</p> <p>(c) in connection with the administration or execution of Part IABA, or the <i>Law Enforcement Integrity Commissioner Act 2006</i>, in relation to the integrity testing authority; or</p> <p>(d) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, the controlled operation; or</p> <p>(e) in relation to the integrity testing authority:</p> <p>(i) for the purposes of any disciplinary or legal action in relation to a staff member of a target agency, if arising out of, or otherwise related to, an integrity testing operation authorised by the authority; or</p> <p>(ii) to an authority of the Commonwealth, a State or a Territory, if the disclosure relates to the misconduct of an employee or officer of the authority.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exception—misconduct</i></p> <p>(3) Subsections (1) to (1E) do not apply if:</p> <p>(a) the person (the discloser) discloses the information to the Ombudsman or the Integrity Commissioner; and</p> <p>(b) the discloser informs the person to whom the disclosure is made of the discloser's identity before making the disclosure; and</p> <p>(c) the information concerns:</p> <p>(iii) a corruption issue within the meaning of the <i>Law Enforcement Integrity Commissioner Act 2006</i> (see section 7 of that Act) in relation to a controlled operation; or</p> <p>(iv) misconduct in relation to a controlled operation; and</p> <p>(d) the discloser considers that the information may assist a person referred to in paragraph (a) to perform the person's functions or duties; and</p> <p>(e) the discloser makes the disclosure in good faith.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in this subsection—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><i>Exception—previously published information</i></p> <p>(4) Subsections (1D) and (1E) do not apply to a person disclosing information if:</p> <p>(a) the information has already been communicated, or made available, to the public (the prior publication); and</p> <p>(b) the person was not involved in the prior publication (whether directly or indirectly); and</p> <p>(c) at the time of the disclosure, the person believes that the disclosure:</p> <p>(v) will not endanger the health or safety of any person; and</p>

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	<p>(ii) will not prejudice the effective conduct of a controlled operation; and</p> <p>(d) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in subsection (4)—see subsection 13.3(3) of the <i>Criminal Code</i>.</p>	<p>(vi) will not prejudice the effective conduct of a controlled operation; and</p> <p>(d) having regard to the nature, extent and place of the prior publication, the person has reasonable grounds for that belief.</p> <p>Note: A defendant bears an evidential burden in relation to the matters in subsection (4)—see subsection 13.3(3) of the <i>Criminal Code</i>.</p> <p><u>Exception—information communicated by persons in the business of reporting news etc</u></p> <p><u>(5) Subsections (1) to (1E) do not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(6) In a prosecution for an offence under subsections (1) to (1E), the defendant does not bear an evidential burden in relation to the matters in subsection (5), despite subsection 13.3(3) of the Criminal Code.</u></p>
<p>Section 70: Disclosure of information by Commonwealth officers</p> <p>NOTE: This section was repealed by the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Cth)</p>	<p>(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and which it is his or her duty not to disclose, commits an offence.</p> <p>(2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose, commits an offence.</p> <p>Penalty: Imprisonment for 2 years.</p>	<p>Section [XX] of Crimes Act: Exemption for repealed section 70</p> <p><u>(1) Notwithstanding the repeal of section 70 by s 3 of the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018, the repealed section 70 does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(2) In a prosecution for an offence against subsection (2) of the repealed section 70, the defendant does not bear an evidential burden in relation to the matters in subsection (1), despite subsection 13.3(3) of the Criminal Code.</u></p> <p>Note:</p> <p><u>Subsection (2) of the repealed section 70 may apply to a person by reason of sections 11.2, 11.2A, 11.3, 11.4, 11.5 of the Criminal Code.</u></p> <p><u>(3) This section applies to conduct engaged in prior to the commencement of the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.</u></p>
<p>Section 79: Official secrets</p> <p>NOTE: This section was repealed by the National Security Legislation Amendment (Espionage and Foreign Interference) Act</p>	<p>(1) For the purposes of this section, a sketch, plan, photograph, model, cipher, note, document, or article is a prescribed sketch, plan, photograph, model, cipher, note, document or article in relation to a person, and information is prescribed information in relation to a person, if the person has it in his or her possession or control and:</p> <p>(a) it has been made or obtained in contravention of this Part or in contravention of section 91.1 of the Criminal Code;</p> <p>(b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he or she has made or obtained it owing to his or her position as a person:</p> <p>(i) who is or has been a Commonwealth officer;</p> <p>(ii) who holds or has held office under the Queen;</p>	<p>Section [XXX] of the Crimes Act: Exemption for repealed section 79</p> <p><u>(1) Notwithstanding the repeal of section 79 by s 3 the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018, the repealed section 79 does not apply to a person who communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <p>(a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u></p> <p>(b) <u>the person:</u></p> <p>(i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content</u></p>

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2018 (Cth)	<p>(iii) who holds or has held a contract made on behalf of the Queen or the Commonwealth;</p> <p>(iv) who is or has been employed by or under a person to whom a preceding subparagraph applies; or</p> <p>(v) acting with the permission of a Minister;</p> <p>and, by reason of its nature or the circumstances under which it was entrusted to him or her or it was made or obtained by him or her or for any other reason, it is his or her duty to treat it as secret; or</p> <p>(c) it relates to a prohibited place or anything in a prohibited place and:</p> <p>(i) he or she knows; or</p> <p>(ii) by reason of its nature or the circumstances under which it came into his or her possession or control or for any other reason, he or she ought to know;</p> <p>that it should not be communicated to a person not authorized to receive it.</p> <p>(2) If a person with the intention of prejudicing the security or defence of the Commonwealth or a part of the Queen's dominions:</p> <p>(a) communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than:</p> <p>(i) a person to whom he or she is authorized to communicate it; or</p> <p>(ii) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it;</p> <p>or permits a person, other than a person referred to in subparagraph (i) or (ii), to have access to it;</p> <p>(b) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his or her possession or control when he or she has no right to retain it or when it is contrary to his or her duty to retain it; or</p> <p>(c) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article;</p> <p>he or she commits an indictable offence.</p> <p>Penalty: Imprisonment for 7 years.</p> <p>(3) If a person communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than:</p> <p>(a) a person to whom he or she is authorized to communicate it; or</p> <p>(b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it;</p> <p>or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he or she commits an offence.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(4) If a person:</p> <p>(a) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his or her possession or control when he or she has no right to retain it or when it is contrary to his or her duty to retain it;</p> <p>(b) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article; or</p> <p>(c) fails to take reasonable care of a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, or to ensure that it is not communicated to a person not authorized to receive it or so conducts himself or herself as to endanger its safety;</p> <p>he or she commits an offence.</p> <p>Penalty: Imprisonment for 6 months.</p> <p>(5) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing</p>	<p><u>in news and documentary media; and</u></p> <p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(2) In a prosecution for an offence against subsections (2) to (6) of the repealed section 79, the defendant does not bear an evidential burden in relation to the matters in subsection (1), despite subsection 13.3(3) of the Criminal Code.</u></p> <p><u>(3) This section applies to conduct engaged in prior to the commencement of the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018.</u></p>

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	<p>or having reasonable ground to believe, at the time when he or she receives it, that it is communicated to him or her in contravention of section 91.1 of the Criminal Code or subsection (2) of this section, he or she commits an indictable offence unless he or she proves that the communication was contrary to his or her desire.</p> <p>Penalty: Imprisonment for 7 years.</p> <p>(6) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing, or having reasonable ground to believe, at the time when he or she receives it, that it is communicated to him or her in contravention of subsection (3), he or she commits an offence unless he or she proves that the communication was contrary to his or her desire.</p> <p>Penalty: Imprisonment for 2 years.</p> <p>(7) On a prosecution under subsection (2) it is not necessary to show that the accused person was guilty of a particular act tending to show an intention to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions and, notwithstanding that such an act is not proved against him or her, he or she may be convicted if, from the circumstances of the case, from his or her conduct or from his or her known character as proved, it appears that his or her intention was to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions.</p> <p>(8) On a prosecution under this section, evidence is not admissible by virtue of subsection (7) if the magistrate exercising jurisdiction with respect to the examination and commitment for trial of the defendant, or the judge presiding at the trial, as the case may be, is of the opinion that that evidence, if admitted:</p> <ul style="list-style-type: none"> (a) would not tend to show that the defendant intended to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions; or (b) would, having regard to all the circumstances of the case and notwithstanding subsection (9), prejudice the fair trial of the defendant. <p>(9) If evidence referred to in subsection (8) is admitted at the trial, the judge shall direct the jury that the evidence may be taken into account by the jury only on the question whether the defendant intended to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions and must be disregarded by the jury in relation to any other question.</p> <p>(10) A person charged with an offence against subsection (2) may be found guilty of an offence against subsection (3) or (4) and a person charged with an offence against subsection (5) may be found guilty of an offence against subsection (6).</p>	
Defence Act 1903 (Cth)		
<p>Section 73A: Unlawfully giving or obtaining information as to defences</p>	<p>(1) A person who is a member of the Defence Force or a person appointed or engaged under the <i>Public Service Act 1999</i> commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates to any other person any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information; and (b) the communication is not in the course of the first-mentioned person's official duty. <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person obtains any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or air force aerodrome or establishment, or to any of the defences of the Commonwealth or any other naval, military or air force information; and (b) that conduct is unlawful. 	<p>(1) A person who is a member of the Defence Force or a person appointed or engaged under the <i>Public Service Act 1999</i> commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates to any other person any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment or any other naval, military or air force information; and (b) the communication is not in the course of the first-mentioned person's official duty. <p>(2) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person obtains any plan, document, or information relating to any fort, battery, field work, fortification, or defence work, or air force aerodrome or establishment, or to any of the defences of the Commonwealth or any other naval, military or air force information; and (b) that conduct is unlawful. <p><u>(3) Subsection (2) does not apply to a person who obtains, communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u>

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		<p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(4) In a prosecution for an offence against subsection (2), the defendant does not bear an evidential burden in relation to the matters in subsection (3), despite subsection 13.3(3) of the Criminal Code.</u></p> <p>Note:</p> <p><u>Section 73A may apply to a person by reason of sections 11.2, 11.2A, 11.3, 11.4, 11.5 of the Criminal Code.</u></p>
Intelligence Services Act 2001 (Cth)		
<p>Section 40: Communication of certain information—ASD</p>	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates any information or matter that was acquired or prepared by or on behalf of ASD in connection with its functions or relates to the performance by ASD of its functions; and (b) the information or matter has come to the knowledge or into the possession of the person by reason of: <ul style="list-style-type: none"> (i) his or her being, or having been, a staff member of ASD; or (ii) his or her having entered into any contract, agreement or arrangement with ASD; or (iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with ASD; and (c) the communication was not made: <ul style="list-style-type: none"> (i) to the Director-General of ASD or a staff member by the person in the course of the person's duties as a staff member; or (ii) to the Director-General of ASD or a staff member by the person in accordance with a contract, agreement or arrangement; or (iii) by the person in the course of the person's duties as a staff member, within the limits of authority conferred on the person by the Director-General of ASD; or (iv) with the approval of the Director-General of ASD or of a staff member having the authority of the Director-General of ASD to give such an approval. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exception—information or matter lawfully available</i></p> <p>(2) Subsection (1) does not apply to information or matter that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the Criminal Code.</p> <p><i>Exception—communication to the Inspector-General of Intelligence and Security</i></p> <p>(3) Subsection (1) does not apply if the person communicates the information or matter to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising a power, or performing a function or duty, under the Inspector-General of Intelligence and Security Act 1986.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.</p>	<p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person communicates any information or matter that was acquired or prepared by or on behalf of ASD in connection with its functions or relates to the performance by ASD of its functions; and (b) the information or matter has come to the knowledge or into the possession of the person by reason of: <ul style="list-style-type: none"> (i) his or her being, or having been, a staff member of ASD; or (ii) his or her having entered into any contract, agreement or arrangement with ASD; or (iii) his or her having been an employee or agent of a person who has entered into a contract, agreement or arrangement with ASD; and (c) the communication was not made: <ul style="list-style-type: none"> (i) to the Director-General of ASD or a staff member by the person in the course of the person's duties as a staff member; or (ii) to the Director-General of ASD or a staff member by the person in accordance with a contract, agreement or arrangement; or (iii) by the person in the course of the person's duties as a staff member, within the limits of authority conferred on the person by the Director-General of ASD; or (iv) with the approval of the Director-General of ASD or of a staff member having the authority of the Director-General of ASD to give such an approval. <p>Penalty: Imprisonment for 10 years.</p> <p><i>Exception—information or matter lawfully available</i></p> <p>(2) Subsection (1) does not apply to information or matter that has already been communicated or made available to the public with the authority of the Commonwealth.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the Criminal Code.</p> <p><i>Exception—communication to the Inspector-General of Intelligence and Security</i></p> <p>(3) Subsection (1) does not apply if the person communicates the information or matter to an IGIS official for the purpose of the Inspector-General of Intelligence and Security exercising a power, or performing a function or duty, under the Inspector-General of Intelligence and Security Act 1986.</p> <p>Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.</p> <p><i>Exception—reporting news</i></p> <p><u>(4) Subsection (1) does not apply to a person who obtains, communicates, removes, holds or otherwise deals with relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media, and:</u></p> <ul style="list-style-type: none"> (a) <u>at that time, the person believed that engaging in that conduct was in the public interest; or</u> (b) <u>the person:</u> <ul style="list-style-type: none"> (i) <u>was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news and documentary media; and</u>

Section	Current Provision	Redrafted Provision with Exception
		<p>(ii) <u>acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who believed that engaging in that conduct was in the public interest.</u></p> <p><u>(5) In a prosecution for an offence against subsection (1), the defendant does not bear an evidential burden in relation to the matters in subsection (4), despite subsection 13.3(3) of the Criminal Code.</u></p>

Annexure B

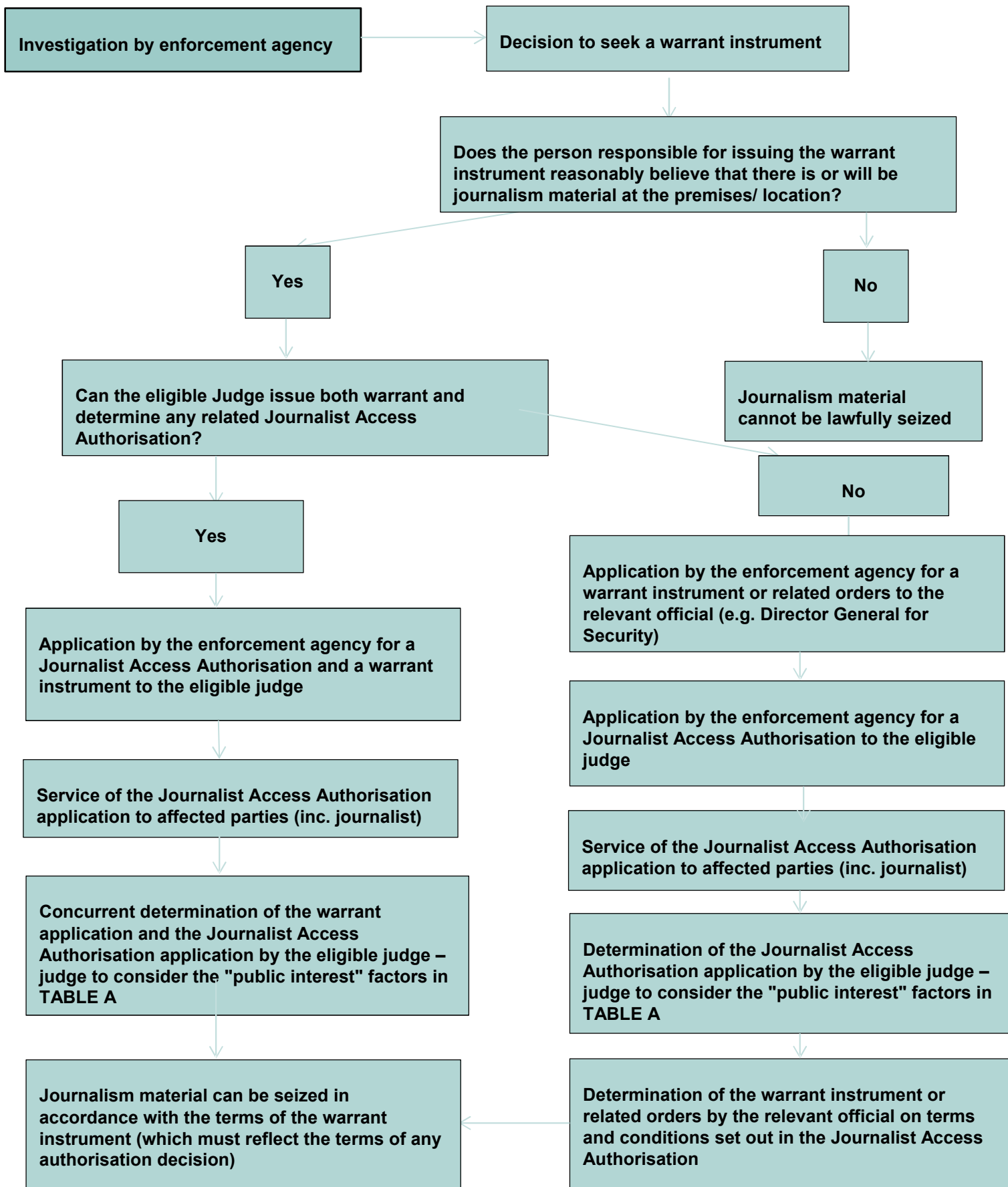


Table A
Public Interest Factors

- (a) Importance of preserving confidentiality of sources**
- (b) Importance of facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest**
- (c) gravity of the matter**
- (d) the extent to which the information that is sought is likely to assist a current investigation**
- (e) whether reasonable attempts have been made to obtain the information sought by other means;**
- (f) the nature and extent of any conditions or restrictions proposed by the eligible judge**
- (g) any other relevant matter.**

ANNEXURE C

List of Warrants and Authorisations Provisions

Note: The table below is a non-exhaustive list of provisions under which search/interception/seizure orders and other authorisations can be granted. There are dozens, if not hundreds, of pieces of legislation that allow the issuing of warrants and authorisations (e.g. *Fisheries Management Act 1991* s 85, *Gene Technology Act 2000* ss 172-173, *Human Services (Medicare) Act 1973* s 8Y, *Biosecurity Act 2015* s 488, *Hazardous Waste (Regulation of Exports and Imports) Act 1989* ss 49, 50).

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
<i>Telecommunications (Interception and Access) Act 1979</i>	Telecommunications service warrant	Sections 9, 10, 46	<ul style="list-style-type: none"> Attorney-General, or the Director-General of Security in an emergency (ss 9, 10) Eligible Judge or nominated AAT member (s 46)
	Telecommunications service warrant for collection of foreign intelligence	Section 11A	<ul style="list-style-type: none"> Attorney-General
	Telecommunications service warrant authorising entry on premises	Section 48	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Named person warrant	Sections 9A, 10, 46A	<ul style="list-style-type: none"> Attorney-General, or the Director-General of Security in an emergency (ss 9A, 10) Eligible Judge or nominated AAT member (s 46A)
	Named person warrant for collection of foreign intelligence	Section 11B	<ul style="list-style-type: none"> Attorney-General
	Foreign communications warrant for collection of foreign intelligence	Section 11C	<ul style="list-style-type: none"> Attorney-General
	Stored communications warrant	Section 116	<ul style="list-style-type: none"> Eligible Judge Nominated AAT Member

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
			<ul style="list-style-type: none"> Appointed Magistrate
	Journalist information warrant	Sections 170L, 180M and 180T	<ul style="list-style-type: none"> Attorney-General Director-General of Security (in an emergency)
	Authorisation for developing and testing interception capabilities	Section 31A	<ul style="list-style-type: none"> Attorney-General
	Authorisation for access to existing information or documents	Section 175	<ul style="list-style-type: none"> Director-General of Security Deputy Director-General of Security ASIO employee or ASIO affiliate covered by an approval
	Authorisation for access to prospective information or documents	Section 176	<ul style="list-style-type: none"> Director-General of Security Deputy Director-General of Security ASIO employee or ASIO affiliate who holds, or is acting in, a position that is equivalent to, or that is higher than, an SES Band 2 position
	Authorisations for access to existing information or documents – enforcement of the criminal law, locating missing persons, enforcement of a law imposing a pecuniary penalty or protection of the public revenue	Sections 178, 178A, 179	<ul style="list-style-type: none"> Authorised officer of an enforcement agency
	Authorisation for access to prospective information or documents	Section 180	<ul style="list-style-type: none"> Authorised officer of a criminal law enforcement agency
	Authorisations for access to existing information or documents – enforcing foreign or international laws	Section 180A	<ul style="list-style-type: none"> Authorised offer of the AFP

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
	Authorisations for access to prospective information or documents – enforcing international laws	Section 180B	<ul style="list-style-type: none"> Authorised officer of the AFP
	Authorisations to disclose information or documents – enforcing foreign or international laws, enforcement of the criminal law	Sections 180C and 180D	<ul style="list-style-type: none"> Authorised officer of the AFP
<i>Surveillance Devices Act 2004</i>	Surveillance device warrant	Section 16	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Retrieval warrant	Section 24	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Computer access warrant	Section 27C	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Emergency authorisation for use of a surveillance devices	Section 35	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Emergency authorisation for access to data held in a computer	Section 35A	<ul style="list-style-type: none"> Eligible Judge Nominated AAT member
	Use and retrieval of tracking devices without warrant	Section 39	<ul style="list-style-type: none"> Appropriate authorising officer
<i>Crimes Act 1914</i>	Search warrants	Section 3E	<ul style="list-style-type: none"> Magistrate Justice of the Peace Other person employed in a court of a State or Territory

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
			who is authorised to issue search warrants
	Delayed notification search warrants	Section 3ZZBD	<ul style="list-style-type: none"> Judge of the Federal Court of Australia Judge of the Supreme Court of a State or Territory Nominated AAT member
	Power to request information or documents about terrorist acts from operators of aircraft or ships	Section 3ZQM	<ul style="list-style-type: none"> Commissioner of the AFP Deputy Commissioner of the AFP Senior executive AFP employee with authorisation
	Power to obtain documents relating to serious terrorism offences	Section 3ZQN	<ul style="list-style-type: none"> Commissioner of the AFP Deputy Commissioner of the AFP Senior executive AFP employee with authorisation
	Power to obtain documents relating to serious offences	Section 3ZQO	<ul style="list-style-type: none"> Commissioner of the AFP Deputy Commissioner of the AFP Senior executive AFP employee with authorisation
<i>Radiocommunications Act 1992</i>	Search warrants	Section 269	<ul style="list-style-type: none"> Magistrate
<i>Australian Security Intelligence Organisation Act 1979</i>	Search warrants	Sections 25, 29	<ul style="list-style-type: none"> Attorney-General Director-General (in an emergency)
	Computer access warrants	Sections 25A, 29	<ul style="list-style-type: none"> Attorney-General

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
			<ul style="list-style-type: none"> Director-General (in an emergency)
	Surveillance device warrants	Sections 26, 29	<ul style="list-style-type: none"> Attorney-General Director-General (in an emergency)
	Inspection of postal and other articles	Sections 27, 27AA, 29	<ul style="list-style-type: none"> Attorney-General Director-General (in an emergency)
	Foreign intelligence warrants	Section 27A	<ul style="list-style-type: none"> Attorney-General
	Identified person warrants	Section 27C	<ul style="list-style-type: none"> Attorney-General
	Computer access authority under identified person warrant	Section 27E	<ul style="list-style-type: none"> Attorney-General Director-General
	Surveillance devices authority under identified person warrant	Section 27F	<ul style="list-style-type: none"> Attorney-General Director-General
	Inspection of postal articles authority under identified person warrant	Section 27G	<ul style="list-style-type: none"> Attorney-General Director-General
	Inspection of delivery articles authority under identified person warrant	Section 27H	<ul style="list-style-type: none"> Attorney-General Director-General
	Power to remove, retain and copy materials	Section 34ZD	<ul style="list-style-type: none"> Appointed Judge or former Judge

Legislation	Warrant/Authorisation Type	Issuing Provision(s)	Issuing Officer
<i>Proceeds of Crime Act 2002</i>	Production orders	Section 202	• Magistrate
	Search warrants	Sections 225, 230	• Magistrate
	Searches without warrants	Section 251	• Officer



9 March 2020

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary,

Additional Further Submission to the Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press

1. The ARTK seeks to briefly respond to the recent joint supplementary submission made by the Department of Home Affairs and the Australian Federal Police to the Committee in February 2020 (**Joint Supplementary Submission**).
2. By way of overview:
 - (a) ARTK has proposed, and continues to propose, simple legislative drafting in relation to proposed journalist exemptions that do not amount to any general immunity from the criminal law. The Joint Supplementary Submission fails to engage with this proposal.
 - (b) The Joint Supplementary Submission concedes that contestability and a public interest test should at least be part of any model implemented, but do not coherently articulate how that might operate under their model.
 - (c) The notice to produce proposal set out in the Joint Supplementary Submission appears to abrogate basic human rights by requiring journalists to assist police in proving offences against themselves.
 - (d) ARTK's model for contestable warrants simply adapts the existing warrant arrangements and adds a further safeguard. It is clearly preferable.

ARTK RECOMMENDATIONS – EXEMPTIONS AND CONTESTED WARRANTS

3. The Joint Supplementary Submission asserts that ARTK seeks a "broad immunity for journalists from then application of certain Australian laws" which is characterised as ARTK seeking a "general immunity or exclusion from criminal offending."
4. That is rejected and the assertion should be withdrawn.
5. ARTK has instead sought, most relevantly:
 - (a) Limited amendments to certain specific criminal offence provisions which have the capacity to criminalise journalists from engaging in bone fide public interest journalism (principally to ensure consistency across the Commonwealth statute book – where such protections do currently exist, but apply in a haphazard and inconsistent manner); and
 - (b) Further protections built into the current legislation dealing with the issue of search warrants to ensure that there is a proper balancing of relevant public interests.
6. For the reasons explained in previous correspondence with the Committee (and expanded on in this letter), our proposals seek to fairly balance a range of competing public interests – and suggestions to the contrary are not constructive.

ANALYSIS OF THE PROPOSED NOTICE TO PRODUCE POWERS

7. The Joint Supplementary Submission proposes additional notice to produce powers. It appears that this contemplates retaining all existing warrant related powers without any limitations (although the Joint Supplementary Submissions is vague in this key respect). Somewhat perversely, the Joint Supplementary Submission accordingly suggests as a solution to a clear example of past police overreach even further police powers.
8. The suggested approach could not work, for three key reasons.

Why would the AFP ever choose to apply for a notice to produce when existing warrant powers remain available?

9. The Joint Supplementary Submission appears to contemplate two regimes operating concurrently, relevantly:
 - (a) The issue of warrants under existing legislation, for example under section 3E of the *Crimes Act 1914* (Cth) (**Crimes Act**) – where the issue of the warrant is non-contested, where the relevant considerations for the issue of the warrant do not require any consideration of the public interest in a free media, and where no protections apply in respect to the collection and subsequent use of material identifying confidential journalist sources;¹ and
 - (b) The issue of a notice to produce – which at least to some degree is to involve an element of "contestability" and a public interest assessment. Importantly, however, we note that the details of which are not articulated in the Joint Supplementary Submission.
10. If that reading of the proposal is correct, why, in those circumstances, would the AFP or any other relevant law enforcement agency ever employ the proposed notice to produce powers when, for example, an existing Crimes Act section 3E warrant could be obtained under a far simpler and (from law enforcement's perspective) far more certain procedure – a procedure where none of the suggested so-called safeguards associated with issuing a notice to produce would need to be

¹ Noting in this respect that, under s 126K of the Evidence Act 1995 (Cth) (**Evidence Act**) that such protections would apply if the evidence was sought in later stages of a criminal or civil proceeding, such as when evidence is sought to be adduced orally.

observed. Even amongst the suite of existing warrant powers, law enforcement would have the choice of pursuing the least onerous options.

11. The presumed answer is likely to be said to be section 37(2) of the *Australian Federal Police Act 1979* (Cth) (**AFP Act**) and the recent [Ministerial Direction of 8 August 2019](#) (**Ministerial Direction**), the latter of which relevantly provides:

" [The Minister for Home Affairs] expects the AFP to take into account the importance of a free and open press in Australia's democratic society ... [and] [i]n particular, where consistent with operational imperatives, I expect the AFP to exhaust alternative investigative actions prior to considering whether any investigative action involving a professional journalist or news media organisation is necessary."

12. The Ministerial Direction in no way ensures that the proposed notice to produce powers (as an "alternative investigative action", presumably) would in fact be used in any cases, now or in the future:
- (a) The Ministerial Direction covers only the AFP – there are a range of other law enforcement organisations that may seek warrants under a range of Commonwealth legislation, where this apparent duty would have no relevance or application.²
 - (b) The Ministerial Direction can change from time to time, without notice, without public consultation, and without any form of direct Parliamentary oversight.³
 - (c) The Ministerial Direction is so vague that it sets no meaningful limitations on the actions of the AFP – it states that the "exhaustion" of other investigatory methods is only to take place where "consistent with operational imperatives" – wording so open to interpretation as to be meaningless, and so open as to justify, after the fact, any investigatory action in fact taken.
 - (d) The AFP would likely assert, in any judicial review or criminal proceedings that even established non-compliance with the Ministerial Direction could not invalidate any warrant subsequently obtained, or lead to the exclusion of evidence obtained under such a warrant under s 138 of the Evidence Act.⁴ As such, from a practical legal standpoint, the duty in question is practically unenforceable and creates no meaningful sanction for non-compliance.
13. As such, neither the Committee nor the media could have any comfort that a notice to produce regime that operates concurrently with the existing warrant powers would ever be deployed in practice even under the Ministerial Direction as it stands. Nor is the policy apparently reflected in the Ministerial Direction requiring all existing available avenues be exhausted before a warrant issues entrenched in the legislation. As such, the "chilling effect" on public interest journalism remains – namely, the continued use of existing warrant powers would discourage both sources coming forward to journalists, and journalists undertaking public interest reporting, because of the risk of warrant related activities directed to securing material with a view to prosecuting a journalist or a source.

² For example, ASIO has the power to seek a telecommunications service warrant under section 9 of the *Telecommunications (Interception and Access) Act 1979* (Cth).

³ A written direction under s 37(2) of the AFP (including a subsequent written direction which revokes the Ministerial Direction) is not a "legislative instrument" and so is neither subject to the requirement it be tabled in Parliament, nor is it subject to disallowance - see *Legislation Act 2003* (Cth) ss 11 (in particular, 11(4)), 15G(1), 38 and 42.

⁴ Which provides, relevantly, that the court has a discretion to exclude evidence obtained improperly or in contravention of a law unless the desirability of admitting the evidence outweighs the undesirability of the method by which the evidence was obtained..

14. For completeness, the ARTK notes that the Joint Supplementary Submission refers to "New National Guidelines" to implement the Ministerial Direction. This documentation has not been cited by ARTK and we therefore cannot comment on those guidelines.

The reasons for retaining existing warrant powers – and not accepting contested warrants – are unpersuasive

15. The Joint Supplementary Submission emphasises three matters said to justify the retention of existing warrant powers, apparently to be retained in all circumstances. Those reasons are unpersuasive as detailed below.
16. Firstly, reference is made to the risk of media organisations and journalists destroying or concealing evidence if given advance notice of a contested warrant application.
17. Yet no evidence has been put forward to suggest that document concealment or destruction by journalists or media companies is a genuine risk recognised either in the course of current or former investigations. Indeed, the AFP's dealings with the ABC and News Corp Australia prior to actual or proposed raids in the course of 2019 suggest evidence concealment was never apprehended as a serious risk – as advance notice was given of proposed raids in both investigations.
18. Further, this submission ignores a key aspect of ARTK's proposal – which, based on the UK "contestable warrants" legislation, proposes serious criminal penalties for the destruction or concealment of evidence by a person served with notice of a contestable warrant application.⁵ That penalty operates in addition to other, existing criminal prohibitions on the destruction of potential evidence once a person is made aware of their potential use in a criminal prosecution.⁶
19. As to the second matter said to justify the continued exercise of existing warrant powers, reference is made to the need for warrants in cases of "serious criminal wrongdoing by an employee".
20. Yet the fact that the matter concerns "serious criminal wrongdoing by an employee" alone has no rational bearing on whether a warrant under existing legislation should be available. Just because an allegation is "serious" does not mean all investigatory action taken in relation to it should be undertaken through a non-contestable warrant which issues without any consideration of public interest factors relevant to the maintenance of a free and independent media – particularly in circumstances where there is no concern about the possible destruction of evidence, and no circumstances of urgency.
21. In any event, in light of public statements made by the AFP in connection with its current investigations into the ABC and News Corp Australia, would the AFP itself ever seek to characterise a disclosure of sensitive, newsworthy government information as anything other than a "serious" breach of the criminal law? The answer is self-evidently no. So to assert that warrants should be available for the investigation of "serious" offences (as characterised by the AFP or other law enforcement agency) is simply to assert that they should be available in effectively all circumstances – reinforcing the point made above that, from every practical perspective, the new notice to produce regime would never be used, and existing warrant powers used instead.
22. As to the third matter said to justify the continued exercise of existing warrant powers, reference is made to "urgent operational circumstances". In the absence of even a basic description of the proposed notice to produce arrangements, it is impossible to assess whether, in fact, the existing warrant regime would lead to speedier and more expeditious outcomes than the proposed notice to produce regime. So assessing whether the existing warrants regime, vs the notice to produce

⁵ *Police and Criminal Evidence Act 1984* (UK) Schedule 1 item 11.

⁶ E.g. *Crimes Act 1914* (Cth) s 39.

regime, would be more appropriate for use in circumstances of "urgency" cannot be tested at the most basic of levels.

23. Nor is it clear what those "urgent operational circumstances would be" – for example, if simple negligence or failure to properly prosecute an investigation would lead to a circumstance of eventual "urgency", is it seriously suggested that this should be a basis for a warrant to issue – with no journalism protections in place? That would simply create a perverse incentive that would reward incompetence by law enforcement.
24. In any event, a more fundamental point is clear.
25. If the proposal is, in fact, that all existing warrant powers must remain available in all circumstances because of certain asserted risks associated with contestability in some circumstances, then the proposal is flawed for this reason: it simply does not limit existing warrant powers to the circumstances that the Supplementary Joint Submission says justify the application of existing warrant powers. Axiomatically, the proposed "solution" is disproportional and clear overreach.
26. In any case, none of the reasons put forward justify the retention, in their current form, of existing warrant powers.

The proposed notice to produce regime is an unprecedented violation of the right against self-incrimination and raises serious separation of powers concerns

27. The Joint Supplementary Submission proposes a notice to produce regime apply in those cases where law enforcement elects – in its own unfettered discretion – not to employ existing warrant powers.
28. A notice to produce imposes a duty on the recipient of the notice to identify and select documents said to be responsive – documents which, in many if not all cases, will render the journalist or media organisation liable to a criminal penalty. While the Joint Supplementary Submission does not say in terms that the privilege against self-incrimination would be abrogated, the proposal would seem to have no workable application without such an abrogation.
29. The legal position on this is clear.
30. In *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (**Caltex Refining**), the High Court said:

It had been settled as early as the eighteenth century that the courts would not make an order requiring an accused person to produce documents which would or might tend to incriminate him or her of the offence charged ... In conformity with that principle, the privilege against self-incrimination protects an accused person who is required by process of law to produce documents which tend to implicate that person in the commission of the offence charged. The privilege likewise protects a person from producing in other proceedings, including civil proceedings, documents which might tend to incriminate that person. In its application to the production of documents, the operation of the privilege is more far reaching in the protection which it gives than in its application to oral evidence. It is one thing to protect a person from testifying to guilt; it is quite another thing to protect a person from the production of documents already in existence which constitute evidence of guilt, especially documents which are in the nature of real evidence.⁷

⁷ At 501-502 per Mason CJ and Toohey J.

31. The Federal Court has expanded on the point, stating in *Griffin v Pantzer (as trustee of the bankrupt estate of Griffin)* (2004) 137 FCR 209 (**Griffin**) that:
- The privilege not to answer questions or produce documents which have a tendency to expose the person to a criminal charge, or a penalty or to forfeiture has been recognised by the High Court as deeply rooted in the general law: R v Associated Northern Collieries at 748; Sorby v Commonwealth (1983) 152 CLR 281 at 294, 309... which can now be expressed also in terms of a human right.*
- The consequence of the recognition by the High Court that the privilege is one deeply rooted in the law as a fundamental right is that it is not merely a rule of evidence available in judicial proceedings, it is available generally, even in a non-curial context, as the foundation of an entitlement not to answer a question or produce a document.⁸*
32. As a consequence, to the extent that a notice to produce is served on a journalist, and production risks generating documents that may tend to incriminate the journalist, the right – recognised by the High Court as a "fundamental right" – is violated.
33. That risk is of course exacerbated by a range of current Commonwealth offences that criminalise journalists for undertaking bone fide, public interest reporting and investigation – a matter of separate concern articulated by ARTK, and proposed recommendations put to the Committee in the supplementary submission of 10 December 2019.⁹
34. In any case, even in the rare case where production by the journalist did not abrogate, in the circumstances, his or her own right against self-incrimination (or alternatively, if the legislation did in fact seek to retain the journalist's right against self-incrimination), the proposal remains flawed. This is because any legal requirement on a journalist to identify and produce documents that may incriminate and identify a journalist's source is so destructive of the relationship of trust and confidence necessary for such relationships that news reporting could be so undermined it may effectively come to an end. Irrespective of any ultimate "public interest test" (as yet unspecified) that may, in limited circumstances, qualify the obligation of a journalist in this respect, it is objectionable for a journalist to be compelled to "turn in" a source in this way.
35. Nor, in cases where the notice to produce is served not on a journalist but on his or her corporate employer, is the position from a human rights or public policy position any different – that news or media organisation would be put in the invidious and highly compromising position of having to assist law enforcement in the investigation and, ultimately, prosecution, of its own journalists or their sources. The prospect of that occurring would fundamentally destroy the relationship between a journalist and their employer, and would prevent individual journalists from fully and effectively engaging with their employers on matters such as editorial guidance, fact checking, intra-journalist collaboration, and the like. It would deny journalists the ability to use corporate computers, servers, and work telephones – i.e. do their jobs. As such, even if a journalist's right against self-incrimination was retained under the proposal, service of the notice on their employer would in all cases be an effective "back door" to the abrogation of that privilege, and would otherwise fundamentally compromise the practice of news reporting.
36. It could not seriously be suggested that any of these outcomes could ever be acceptable from a public policy standpoint.

⁸ At [43]-[44] per Allsop J (Ryan J and Heerey J agreeing). In addition to those cases cited by Allsop J, this principle has also been stated in *Rochfort v Trade Practices Commission* (1982) 153 CLR 134 at 145 per Mason J and 150 per Murphy J and *Reid v Howard* (1995) 184 CLR 1 at 5 and 7-8 per Deane J, at 12 and 17 per Toohey, Gaudron, McHugh and Gummow JJ. It has also been applied in many cases, including for example *Auscity Enterprises Pty Ltd v Kismet Ventures Pty Ltd* (2015) 110 ACSR 119 and *Griffin v Sogelease Australia Ltd* (2003) 57 NSWLR 257.

⁹ A list of relevant provisions is set out in ARTK's submission of 10 December 2019 at [10] – [15].

37. Given that the right against self-incrimination is violated under the proposal, and a range of obvious and more proportional mechanisms are clearly available in its place (for example, a modified warrants regime – which does not compromise the right against self-incrimination because it does not rely on an investigated party being forced to select and provide incriminating documents to assist law enforcement),¹⁰ the proposal could not, credibly, secure a favourable assessment of its compatibility with human rights upon legislation being introduced into Parliament.¹¹
38. Nor is it clear that such legislation would survive constitutional challenge.
39. In this respect, the proposal does not make clear who would issue the notice to produce; and who, subsequent to its issue, would make an assessment of the any "public interest" test in setting that notice aside. It is assumed, for present purposes, that either the initial issue of the notice to produce, and/or its subsequent "setting aside", would involve a judge of a federal court acting in their personal capacity – else the scheme would lack all credibility whatsoever.¹²
40. Yet that federal judge would be required by such legislation, in their personal capacity, to compel the production of documents in a manner that abrogates the fundamental rights of the accused so as to assist law enforcement prosecute that person – in effect, the judge would be asked to constitute their own "star chamber" empowered to force a person to incriminate themselves. This is in complete contrast to the position of a judicial officer issuing a warrant under existing legislation – where the judicial officer in question is in no way drawn into a process that involves the abrogating of fundamental human rights, because under a standard warrant, it is law enforcement which is empowered to search for evidence, not an occupant who is required to undertake a search on law enforcement's behalf to assist their own investigation and prosecution.
41. It is unclear how such a function could be said to be compatible – as is necessary to satisfy constitutional requirements – with the performance of the relevant federal judge with their role as a judge of a federal court, something requiring functional "independence" from government amongst other requirements.¹³ The fact that no equivalent provisions currently exist on the Commonwealth statute book means that the effective co-option of members of the federal judiciary into such an investigatory scheme has not yet been tested. But the risk that such a scheme would fail on constitutional grounds is clear.
42. It is through this broader prism of the right against self-incrimination that the various legislative provisions identified in the Joint Supplementary Submission – and certain provisions which have, tellingly, not been referenced, need to be considered.
43. The Joint Supplementary Submission refers explicitly to section 3ZQO of the Crimes Act – a provision that confers a power to obtain a limited class of information (see section 3ZQP), in relation to specified persons, concerning their finances, travel, utilities, assets, telephone account and residence. These are matters which, by their nature, almost invariably require the notice to be served on a third party and not the suspect. In the unusual (and potentially unauthorised) circumstance of such a notice actually being issued against a suspect personally, section 3ZQO does not abrogate that person's right against self-incrimination (see section 3ZQS).
44. The provision also referred to (section 53 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)) applies only to financial institutions – again, a context where self-incrimination can never arise, because the notice must necessarily be served on a third party other than the suspect.

¹⁰ *Controlled Consultants Pty Ltd v Cmr for Corporate Affairs* (1984) 156 CLR 385 at 393 per Gibbs CJ, Mason and Dawson JJ; referred to in *Griffin* at [39] per Allsop J.

¹¹ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8(2) and ICCPR Article 14(3)(g).

¹² As per the position with warrants, see s 4AAA of the Crimes Act.

¹³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at [16] per Brennan CJ, Dawson, Toohey, McHugh, and Gummow JJ.

Indeed, section 53(1) expressly provides that the offending must relate to someone *other than the financial institution itself*.

45. Neither provision is a meaningful model because neither provision imposes an obligation on a criminal suspect to have to produce records in breach of the right against self-incrimination. Nor, in seeking information from third parties like banks, utilities and airlines, do any of the concerns expressed above arise – public interest journalism (or indeed, the industry in question, such as banking) are simply not compromised by the use or threatened use of such powers in the same way that journalism is under the current proposal.
46. In terms of the current proposal:
- (a) either the intention is to abrogate the right against self-incrimination and for any and all documents obtained to be used to prosecute the persons served with a notice – contrary to basic principles of the criminal law, the "fundamental rights" of journalists, and existing statutory frameworks such as section 202(1) of the *Proceeds of Crime Act*; or
 - (b) the proposal is not to abrogate the right against self-incrimination, such that:
 - (i) it is difficult to see, particularly in light of the broad range of offences that criminalise legitimate journalism, how a notice to produce served on a journalist would ever effectively generate documents of use to a criminal investigation – meaning that, from a practical standpoint, the existing and highly problematic warrant powers would remain the preferred tool of law enforcement (which does not advance matters from the current status quo); and
 - (ii) the right would be undermined in practice through service of notices to produce on the journalist's employer, resulting in the range of adverse consequences on the practice of journalism outlined above.
47. For completeness, we briefly address two further matters concerning the international legislation referred to in the Joint Supplementary Submissions.
48. Contrary to what is suggested, the position in the United Kingdom is that three forms of order may be applied for:
- (a) a "standard" warrant, which cannot authorise the collection of:
 - (i) "excluded material", which includes certain forms of "journalistic material" (i.e. journalist materials that are held in confidence, including material concerning the identity of sources); and¹⁴
 - (ii) "special procedure material" which includes other forms of "journalistic material" (i.e. material acquired or created for the purposes of journalism).¹⁵
 - (b) a "special procedure order" which authorises the collection of "journalistic material" that is not defined as excluded material (i.e. any journalism materials other than confidential materials concerning the identity of sources), following a contested hearing where a public interest and probative value test is applied.¹⁶ A "special procedure order" gives the issuing judge, following a contested hearing, the discretion to order a party served with the notice

¹⁴ *Police and Criminal Evidence Act 1984* (UK) (**PACE Act**), ss 8(1)(d), 11(1)(c), 13.

¹⁵ PACE Act ss 8(1)(d), 13, 14(1)(b).

¹⁶ PACE Act s 9(1), schedule 1, paras 1, 2, 7, 8 and 9.

to produce materials to law enforcement (the other option being to order a person simply "give access" to that material);¹⁷

- (c) a "special procedure warrant", which authorises the collection of the same material, which is issued ex parte, but still following the application of a public interest and probative value test by a judge, which may be issued in limited circumstances (such as where it is not practicable to communicate with a person who would otherwise be served notice with an application for a special procedure order).¹⁸

49. Three salient points emerge:

- (a) Contrary to the position in the Joint Supplementary Submissions, in all cases involving access to journalist materials, a public interest and probative value test is employed under the United Kingdom legislation.¹⁹
- (b) An order in the nature of a criminal notice to produce may issue, following a contested hearing (which of course would may be directed, in part, to the terms of the eventual order and not just to whether it should issue) – but the judge in question might, alternatively, issue a warrant (depending on the circumstances), or fashion the terms of a "special procedure order" such as to be effectively in the terms of a warrant.
- (c) Critically, United Kingdom legislation can countenance the issue of an instrument in the nature of a criminal notice to produce because it has adopted a radically different approach to the privilege against self-incrimination. In the United Kingdom, the privilege does not apply when a person is compelled to produce existing documents that have a tendency to incriminate them²⁰ – a position informed by the European human rights position and the exact opposite of the position adopted by the High Court of Australia in *Caltex Refining*. As such, in the United Kingdom criminal notices to produce are not characterised as abrogating the "fundamental right" relevantly engaged by the current proposal. They are simply not an apt approach to adopt in an Australian context.

50. Similarly, in respect of the United States position:

- (a) There is a general prohibition on the execution of warrants (or the use of subpoena) in connection with the investigation of criminal offences where the material concerned is a "work product material" (a journalist's own materials, including materials provided to a journalist), or a non-work product material (materials to be provided to a journalist), relating to the publication of newspaper, books, broadcast, or similar forms of public communication.²¹
- (b) That general prohibition is subject to various exceptions.²² Where those exceptions apply, the prohibition ceases to apply – i.e. a warrant (or, if otherwise available, a subpoena) may authorise the collection of work product or non-work product materials.

¹⁷ PACE Act s 9(1), Sched 1 paras 4, 5. For these purposes, there is one additional bases on which a "special procedure order" may issue, based on the terms of legislation that remains in force but commenced prior to the commencement of the PACE Act – see PACE Act s 9(1), Sched 1 paras 1, 3. ARTK is not presently aware of any such legislation and so does not consider this matter further.

¹⁸ PACE Act s 9(1), Sched 1 paras 12 – 14. For these purposes, there is one additional bases on which a "special procedure warrant" may issue, based on the terms of legislation that remains in force but commenced prior to the commencement of the PACE Act – see PACE Act s 9(1), Sched 1 paras 3, 12(b). ARTK is not presently aware of any such legislation and so does not consider this matter further.

¹⁹ Subject to the possible exceptions canvassed in footnotes 17 and 18.

²⁰ *Saunders v United Kingdom* (1996) 23 EHRR 313 at [68], [69]; *Attorney General's Reference (No 7 of 2000)* [2001] Cr App R 19 at [57] – [62]; *C plc v P (Secretary of State for the Home Office and another intervening)* [2007] EWCA Civ 493.

²¹ Privacy Protection Act 42 USC (PPA) §2000aa.

²² Relevantly, in respect of work product materials, these exemptions include (a) there being probable cause to believe that the journalist has committed or is committing the offense to which the documents relate, or (b) there being a reason to believe that

51. These provisions do not authorise the issue of a subpoena – at their highest, they recognise that under other legislation, such a subpoena may be available – but no detail has been given in Joint Supplementary Submission about the terms of issue of such criminal subpoena, let alone whether such instruments would be in any way be consistent with Australian criminal law concepts. The reference simply gives no support to the proposal in question.

The media is not a "fifth column" through which "hostile actors" operate – nor do ARTK's proposed reforms in any way risk that occurring

52. The Supplementary Joint Submissions suggest that the proposed "immunities" or "protections" for the media "increase the risk of journalists being targeted by foreign actors seeking to exploit their protected status to advance hostile agendas."
53. The persistent use of language such as this is disappointing.
54. For the record, on the one reported occasion where an agent of foreign influence attempted to approach a journalist (the case of Mr Angus Grigg), that approach was reported to ASIO and no further action was taken.²³ While of course ARTK welcomes government's increased concern in relation to any ongoing attempts by foreign powers to target members of the news media (members of the profession being, of course, the victim of those approaches, which could conceivably extend to blackmail and extortion), ARTK suggests that the more effective means to address this concern would be ongoing investigatory action by security agencies, facilitated by enhanced cooperation and confidence building measures between the media and security organisations. That cooperation and confidence building is hardly fostered by police raids, the threat of prosecutions being made against journalists, and opposition to sensible law reform.
55. The proposals canvassed by ARTK do not, in any event, give "cover" to foreign actors.
56. The proposals in relation to reform of criminal offences to standardise the position on journalism "defences" or "exceptions" do not prevent the investigation of journalists as criminal offenders in their own right – rather, they simply require that law enforcement, in deciding to prosecute, make a detailed and thorough examination of the circumstances of the alleged offending to exclude, from prosecution, cases involving bone fide public interest reporting. As the proposed reforms are deliberately designed to encourage more rigorous investigation of the circumstances surrounding alleged offending by a journalist and greater scrutiny, the effect must be to discourage the involvement of foreign intelligence organisations, not its encouragement.
57. Similarly, in relation to the proposal for contested warrants, the circumstances of alleged offending would need to be considered by both law enforcement and also an independent judicial officer. Is it to be credibly suggested, in light of that degree and nature of oversight, that foreign intelligence agents would feel greater confidence in using journalists as agents of influence or proxies?

Next Steps

58. ARTK welcomes further engagement on these issues, including making representatives available to discuss these proposals in person at the Committee's convenience.

²³

immediate seizure is necessary to prevent death or serious bodily injury (PPA §2000aa(a)). In respect of non-work product materials, additional exemptions are the fact the materials have not been produced in response to a court order, or there is reason to believe the giving of notice under a subpoena would result in the destruction of the material (PPA §2000aa(b)). Angus Grigg, 'Hey ASIO stop using me to target journalists', *Australian Financial Review*, 16 August 2019, accessed via <https://www.afr.com/policy/foreign-affairs/hey-asio-stop-using-me-to-target-journalists-20190816-p52hor>.