



## **Australian Broadcasting Corporation submission to the Parliamentary inquiry into the impact of the exercise of law enforcement and intelligence powers on freedom of the press**

1. This Inquiry concerns a subject that is important to all Australians. Freedom of the press is fundamental to our democracy and the cornerstone of transparency in government. A properly functioning democracy requires that all Australians are reliably informed of the workings of our government. Every Australian has a right to know what their government is doing and what decisions their government is making on their behalf. Without this knowledge, Australians are unable to properly exercise their democratic right to decide who should be in government and who should not be. But Australians rely on the media to provide them with this information. The ABC, along with other news media organisations, has a duty to inform Australians of government and political matters, including by exposing government abuses of power and allegations of wrongdoing. The ABC cannot adequately fulfil this role when government agencies exercise powers which curtail media freedom.
2. Implicit in the subject matter of this Inquiry – the impact of law enforcement and intelligence powers on freedom of the press – is an acknowledgement that the law as it currently stands curtails media freedom. The recent raids by the Australian Federal Police (AFP) on the ABC's headquarters and on the private residence of a NewsCorp journalist, Annika Smethurst, are evidence of this. The Australian Constitution does not protect freedom of the press. In the absence of this, Australians must rely on their elected parliamentary representatives to ensure that legislation passed by them protects media freedom. They rely on their parliamentarians to not erode their right to know. It is plain from the recent media raids that this reliance has been misplaced.
3. The Australia's Right to Know coalition (ARTK) has made a submission to this Inquiry to which the ABC is a signatory. Given the importance of this Inquiry's subject matter both to the Australian public and to the ABC as a recent recipient of an AFP search warrant, the ABC takes this opportunity to reinforce the media's position by way of this submission.

### **The ABC exercises its duty to inform the public responsibly**

4. The ABC has a statutory obligation to deliver an independent news service to Australians. It exercises that obligation with great care and responsibility. Our journalistic work is defined by integrity and truth. This is reflected in our Editorial Policies which give prominence to the principles of independence, integrity and responsibility.
5. Whistle blowers are integral to our journalism. Their credibility and reliability are paramount. Our journalists independently assess the information provided by whistle blowers prior to publishing. Our journalists are required by the ABC's Editorial Policies to consider the potential consequences of publishing that information, including any harm which may be caused to the public if the information is released.

6. Law enforcement and intelligence agencies contend that the laws which criminalise journalism and empower them to execute search warrants protect Australians by protecting the secrecy of national security information and reassuring Australia's overseas intelligence partners. These two contentions were undermined this year when those powers were twice used to raid journalists in relation to stories which were published more than one year earlier. In respect of Annika Smethurst's article published by News Corp Australia, it was nearly 13 months after publication that her home was raided by the AFP. In respect of the ABC's Afghan Files stories, it was nearly two years between publication and the raid on the ABC headquarters. These delays indicate that the two contentions advanced by law enforcement agencies in support of the laws are not the reason they will be exercised.
7. In making this submission the ABC is not proposing that journalists be allowed to publish material with impunity. It is also not proposing that journalists be above the law. Rather, the ABC is proposing that the law is in need of reform because it does not recognise the public value in media freedom. The law currently impedes journalists' ability to inform the public about government activities and decision-making and their ability to meet the public's right to know.

### **The impact the powers of law enforcement and intelligence agencies have on the work of journalists**

8. The Committee has sought submissions on the experiences of journalists and media organisations that have been, or could become, subject to the powers of law enforcement or intelligence agencies performing their functions, and the impact of the exercise of those powers on journalists' work, including informing the public.
9. The ABC has a long tradition of exposing government maladministration and corruption to Australian audiences. In 1987, *Four Corners* published the "Moonlight State", a story by investigative journalist Chris Masters on corruption in the Queensland police force. The program led to the Fitzgerald Inquiry and eventually the resignation and criminal trial of Queensland's then premier. The jailing of three ministers and the police commissioner followed. Following the broadcast of "Moonlight State", Masters learned of a failed police plan to set him up for a crime. They wanted to stop him from reporting on their corrupt activities.
10. But the ABC does not need to look back as far as 1987 to see the impact law enforcement powers can have on its journalists. In 2017, Dan Oakes and Sam Clark published a series of stories concerning allegations of unlawful killings and misconduct by Australian special forces in Afghanistan. The stories were known as *The Afghan Files*. At the time of writing this submission, both Oakes and Clark are the subject of an AFP investigation for that work. In April 2019, the police requested their fingerprints. Two months later, in June 2019, the police executed a search warrant at the ABC's headquarters.
11. Unfortunately, Oakes and Clark are not the only ABC journalists to be affected by the exercise of law enforcement powers. The following accounts from ABC journalists demonstrate the regularity with which those powers are exercised.

#### **Paul Farrell – 7.30 reporter**

*"In August 2016, I led the Guardian's [Nauru files](#) reporting team. Within days of the publication of these documents the Department of Home Affairs [met with a senior Australian Federal Police officer](#) to discuss the potential prosecution of confidential sources they believed were linked to the publication*

*under a number of different secrecy offences. This has become a frequent occurrence in relation to investigative reporting that relies on confidential whistle blowers who speak out about matters relating to government.*

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

*I doubt I am alone in expressing the view that the threat of police action against journalists and sources has a heavy personal toll. The fear of sources being jailed for high risk stories keeps me up at night. The prospect of my front door being banged down by police keeps me up at night. That personal toll pales of course in comparison to the level of risk that is assumed by whistle blowers, who are generally far more likely to face potential prosecution than journalists.*

*The exercise of the powers of police and other agencies is discretionary. Recent events indicate that discretion may be shifting towards a more aggressive use of those powers, against both whistle blowers and journalists. If that is the case then greater legislative protections must be introduced to protect journalists and whistle blowers."*

**Jo Puccini – Editor, Investigations Team**

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

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

**Michael Brissenden – political journalist and foreign correspondent**

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

**Linton Besser – investigative journalist and foreign correspondent**

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

### **Mark Willacy – investigative reporter**

*"In 2017, I was leaked Queensland Cabinet documents from the time of the Newman Government. The documents outlined the thinking and decision-making behind deep cuts to the budget of the environment department. The documents led to stories on how the government had used a "pain threshold ranking" to describe the depth of the cuts. The documents also led to two other stories covering how the government sold off a profitable climate change agency and how oversight of the coal seam gas industry was repeatedly cut.*

*In response to the stories, the Queensland Police State Crime Command was called in to investigate the source of the leak. A search warrant was executed on the offices of the ABC in Brisbane and the Cabinet documents seized. The warrant was authorised by a Justice of the Peace. A number of ministerial officials and bureaucrats were interviewed, as was the then environment minister. While the whistle blower was never identified, the investigation had the effect of intimidating people into not providing material to the ABC.*

*In 2018 another search warrant was executed on the ABC Brisbane offices by the Crime and Corruption Commission in response to stories by me and Alexandra Blucher. The CCC suspected that "evidence of corruption...perjury...and misconduct in relation to public office" was at ABC Brisbane. The stories concerned suspected corruption at the Logan City Council in Queensland. We had been researching the stories for more than 12 months. The CCC wanted to seize footage of the Mayor of Logan City Council and footage used in an ABC story. The sources who had legitimately helped the ABC expose alleged corruption (which did later lead to corruption, misconduct and perjury charges by the CCC) were extremely concerned that they would be targeted.*

*In 2015 the ABC published a story about a massive environmental contamination in Queensland. The story was based on a leaked Cabinet document. The Queensland government initiated an investigation into the source of the leak. The source was never found and I refused to participate in the investigation. However, I later used Queensland's right to information laws to obtain copies of documents that revealed that a departmental officer, who I had never spoken to or met, was suspected of being the leak and that disciplinary action was being planned against him. In the end, this was never pursued. But it revealed how scapegoating can occur with leak investigations."*

12. While Mark Willacy's experiences concern powers exercised by Queensland authorities which are not the subject of this Inquiry, they demonstrate the true extent of the problem in Australia. Journalists and whistle blowers are impacted by law enforcement powers at both the state and federal level. A real understanding of this impact requires an appreciation of the cumulative effect of these powers.

### **Gaven Morris – ABC Director News, Analysis and Investigations**

*"Independent and courageous journalism carried out in the public interest is essential to an engaged and aware citizenry, and therefore fundamental to a healthy democratic society. Journalism plays a vital role in keeping us informed about our community, society, government and world – quite simply, it lets us know what's going on.*

*It is implicitly recognised in the ABC Charter, which includes as one of the ABC's core functions a responsibility to inform the Australian community. Every journalist, content creator and program maker across ABC News considers their first and primary mission to be serving the Australian public. More than ever, we all need fearless journalists who can discover and verify information that is important to how we live our lives."*

## What changes could be made to the procedures and thresholds for the exercise of law enforcement and intelligence powers?

13. The Committee has sought submissions on the procedures and thresholds which could be changed for the exercise of law enforcement and intelligence powers.
14. The current law does not provide cohesive protections for journalists and whistle blowers. This in turn limits media freedom while public interest journalism is impeded by hesitation and fear. The limited protections foster a culture in which a journalists' decision-making is guided not only by their mission to inform but also by the level of risk journalists and whistle blowers take if a story is published. And that risk is serious– it is the risk of being imprisoned.
15. Changes should be made to amend the current laws. Those changes can be grouped under four broad headings:
  - A. De-criminalise journalism;
  - B. De-criminalise public interest whistle blowers;
  - C. Raise the bar for search warrants and compulsory production powers while protecting confidential sources; and
  - D. Break the culture of secrecy.

The current legislation which is specific to these headings is addressed in further detail below. In addition, the ABC calls for the enactment of legislation which provides a general protection for the freedom of the press. That legislation ought to require that all laws be drafted, interpreted and applied in a way that does not curtail that freedom.

16. The legislation referred to below is not exhaustive. They are examples of the provisions which require change.

### A. De-criminalise journalism

#### **Current law**

17. A number of Commonwealth laws purport to criminalise journalism by making it an offence to receive, communicate or deal with certain types of information. A journalist does not need to publish the information in order to commit the crime, merely receiving it will suffice. Our law enforcement agencies currently use these offences to carry out criminal investigations into journalists. This is a significant concern. As a threshold requirement, offences of this type should embed a public interest element so that journalists are not at risk of being prosecuted for work which is carried out in the public interest.
18. Examples of these laws include:
  - Part 5.6 of the Criminal Code (being the Code appearing at the Schedule to the *Criminal Code Act 1995* (Cth)) (**Criminal Code**) – concerning secret information;<sup>1</sup>
  - The *Defence Act 1903* (Cth)<sup>2</sup> (**Defence Act**) – concerning defence information;

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<sup>1</sup> See Part 5.6 – Secrecy of Information

- The Criminal Code – concerning the receipt of 'stolen property'.<sup>3</sup>
19. For the first category of Criminal Code offences above, journalists have a public interest defence<sup>4</sup>. As a defence rather than an element of the offence, it purportedly allows the AFP to investigate journalists regardless of the intention or effect of the publication because the AFP does not consider possible defences at the investigation stage. This means the consideration of public interest is deferred until the matter is before the Commonwealth Director of Public Prosecution for charges. By this time, a journalist has already endured an AFP investigation, a search warrant, and so on.

### ***Reform needed***

20. The legislation should be amended by introducing a public interest element to each relevant offence so that the onus rests on the prosecution to disprove the relevant conduct was carried out in the public interest. Without these changes to the Defence Act, the Criminal Code and other legislation which criminalises the use or disclosure of information by journalists, the AFP can prosecute and courts can convict even where the public interest was advanced by the journalism. Without this change, journalists will continue to bear the burden of criminal investigations for publishing information which the public has a right to know.
21. The legislation should also be amended so that it captures only publications which have genuinely caused serious harm to the Australian public rather than mere embarrassment to the government or its allies.
22. A public interest defence for journalists should be added to the offences similar to the defence in Part 5.6 of the Criminal Code. This defence should be added into Defence Act and other Criminal Code offences identified above.
23. Apart from the insertion of appropriate thresholds within the offences themselves, and appropriate defences to those offences, there ought to be procedural thresholds that operate as a prerequisite to the prosecution of journalists. Section 123.5 of the Criminal Code expressly requires the written consent of the Attorney-General before proceedings can be commenced for the commitment of a person to stand trial for an offence against Part 5.6 (which includes the offences in the first category of Criminal Code offences identified above). In respect of proceedings relating to security classified information, the Attorney-General must also certify that, at the time of the relevant alleged conduct, it was appropriate that the information had a security classification.
24. Importantly, in deciding whether or not to consent under section 123.5, the Attorney-General must consider whether the conduct might be authorised in a way mentioned in the various defences applicable to Part 5.6 offences (which include the public interest defence for journalists cited above).
25. The requirement for Attorney-General consent should apply in respect of all offences that may be used to prosecute journalists, including the Defence Act and Criminal Code offences identified above.

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<sup>2</sup> Section 73A

<sup>3</sup> Section 132.1

<sup>4</sup> Section 122.5 (Introduced in 2018).



26. The purpose of the changes outlined above is not to exempt journalists from laws which apply to other Australians. The purpose is to protect media freedom in Australia, being a protection that benefits all Australians.

## **B. De-criminalise public interest whistle blowers**

27. The threat of being prosecuted has a chilling effect on the Australian public's right to know because it deters whistle blowers from revealing important truths about the workings of our governments.

### ***Current law***

28. At the Commonwealth level, the *Public Interest Disclosure Act 2013* (Cth) (**PIDA**) is intended to protect whistle blowers from reprisals such as a criminal prosecution. The protections are limited however as they do not cover disclosures of intelligence information or sensitive law enforcement information.
29. Generally speaking, for each of the "receiving" offences targeted at journalists, there is a "disclosure" offence targeted at whistle blowers. See, for example, section 73A of the Defence Act, and relevant sections of the Criminal Code, Part 5.6. Note also the offence of "theft" and other related property offences under Part 7.2 of the Criminal Code.
30. This is in addition to offences in several other pieces of legislation<sup>5</sup> which penalise whistle blowers but not journalists. Therefore, a whistle bower can be prosecuted even where the disclosure did not have the potential to harm the public interest.

### ***Reform needed***

31. The Public Interest Disclosure Act requires amendment to protect whistle blowers who disclose all categories of information, including intelligence and sensitive law enforcement information. There is a wide category of intelligence and law enforcement information which will not harm the public interest if disclosed. The public has a right to know this information and a whistle bower should not risk imprisonment for speaking out.
32. In addition, the same public interest and serious harm elements should be inserted into laws which criminalise the disclosure and/or obtaining of whistle bower information as those proposed in respect of journalists above.

## **C. Raise the bar for search warrants and other compulsory powers and protect confidential sources**

### ***Current law – compulsory production powers***

33. Australia is alone among the "Five Eyes" nations for not having additional restrictions on the issuance of search warrants against journalists. Those restrictions reflect the importance given to media freedom in those other nations which is not shown in Australia.
34. For example, in the United Kingdom the law requires police to apply to a judge for permission to access journalistic material.<sup>6</sup> Journalists and media organisations are given notice of

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<sup>5</sup> See, for example, *ASIO Act 1979* - section 35P; *Australian Border Force Act 2015* – section 42; *Intelligence Services Act 2001*– sections 39 to 40M, *Defence Force Discipline Act 1982* (Cth) section 58 and Part III, Div 5A.

<sup>6</sup> *Police and Criminal Evidence Act 1984*.

applications and importantly, the legislation recognises the importance of protecting confidential source material.

35. The compulsory production powers of police are not limited to search warrants. For example, section 3ZQO of the *Crimes Act 1914* (Cth) empowers the AFP to apply to a Federal Circuit Court judge for a notice requiring the production of travel information among other documents. This covers a journalist's flight information. A person, including an airline, cannot refuse to produce the travel information even when they consider it contrary to the public interest to do so: s 3ZQR.
36. In addition, both the AFP and other Australian government agencies have the power to obtain journalists' and whistle blowers' telecommunications metadata directly from Telcos.<sup>7</sup> In respect of journalists, a warrant is only required where the journalist is being investigated by the agency. A warrant is not required where the whistle blower is being investigated. This means the power can be used by the government to identify a journalist's confidential sources. Regardless, the government agency and the police are not required to notify the journalist that their metadata has been sought, even where a warrant to access that data is required.
37. The media has long been opposed to the metadata access power, referring to the scope for the power to be abused and their extraordinary invasion of an individual's privacy. On 22 July 2019, the Commonwealth Ombudsman's report on the use of the powers by government agencies was tabled in Parliament. The report has vindicated the media's concerns. It reveals numerous instances of non-compliance with the legislation by law enforcement agencies in Australia, including when accessing journalists' metadata. The report demonstrates the urgency for reform in this area.

### ***Current law – protection of confidential sources***

38. The Commonwealth law provides an evidentiary privilege to journalists, which if it applies, allows a journalist to refuse to disclose the identity of a confidential source<sup>8</sup>. In practice, the privilege is limited due to the wording of the provisions and the limited circumstances in which it applies.

### ***Reform needed***

39. Legislation should be amended to require agencies wishing to access journalistic information to apply to a judge (not a registrar); journalists must have a right to contest that application in open court and the judge must consider the public interest in media freedom; and confidential source material must be excluded.
40. Concerns that contested hearings will provide journalists with the opportunity to destroy evidence should not be entertained. This concern was met in the United Kingdom by a provision which prohibits the disposal of the material sought by police. Regardless, existing laws criminalise the destruction of evidence. Also, those concerns are not supported by past behaviour - historically, the AFP has notified media organisations in advance of search warrants.
41. This is not the first time the media has called for the AFP's search and production powers to be limited. Following the execution of unlawful search warrants on offices of Channel 7 and its

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<sup>7</sup> *Telecommunications (Interception and Access) Act 1979*, section 180Q.

<sup>8</sup> Section 126K of the *Evidence Act 1995*.



lawyers in February 2014, the Legal and Constitutional Affairs References Committee conducted an inquiry. In May 2014 the Committee published its recommendations which included Recommendation 7 – “that the Commonwealth government develops and introduces legally enforceable protocols governing the procurement of information or records from media organisations during investigations by the Australian Federal Police.” Had that recommendation been implemented, the present inquiry may not be taking place.

42. The journalists’ confidential source privilege must be strengthened. The wording of the definitions and provisions in the *Evidence Act 1995* (Cth) should be re-visited. As currently worded, the legislation falls short of its intended purpose – protecting media freedom by protecting journalists and their sources. Also, the privilege should extend to all compulsory disclosure powers, including search warrants, the powers of statutory bodies and Royal Commissions.

#### **D. Break the culture of secrecy**

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

#### ***Current law***

44. The Commonwealth Freedom of Information laws provide a right of access to documents held by Australian Government ministers and most agencies. However, government agencies are routinely criticised for side-stepping the FOI requirements by classifying documents as exempt and taking a “go-slow” approach to processing applications. Rather than a culture of transparency, we have a culture of secrecy in our government agencies.

#### ***Reform needed***

The following changes are needed:

45. Introduce an ongoing audit of the document classification practices of government agencies.
46. Review the scope of the exemptions given to agencies to limit those to only information which, if disclosed, would substantially harm the public.
47. Improve the FOI processes in terms of time and costs involved, including by adequately resourcing the external review process.

#### ***Closing comments***

48. This Committee finds itself in a unique position at a crucial time for Australian democracy. Over recent years, there has been an element of trench warfare to the engagement between authorities and the media over the balance between secrecy and the public’s right to know. The engagement has been restricted to specific pieces of legislation and has occurred under often hurried deadlines and without regard to broader democratic issues. It is paramount that the result of this inquiry process must be to the advantage of the public.
49. The Government maintains it is committed to a free media and to accountability and transparency. The ABC submits that in its response to this inquiry, the Committee must

demonstrate that this is more than rhetoric. Immediate and tangible reforms to legislation that inhibits the ABC's ability to do its job for the people of Australia are required.