

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

Terms of Reference: b,c,d

1. I write this submission as an Australian citizen deeply concerned about the growth and implementation of 'security' legislation which is supposed to be looking after 'the public interest'<sup>1</sup> when clearly it is not<sup>2</sup>. Rather, it is being used to induce a 'chilling effect'<sup>3</sup> on the Fourth Estate and those willing to come forward to disclose wrongdoing such as whistleblowers. The recent oppressive, coincidental Australian Federal Police raids on the ABC<sup>4</sup> and a journalist<sup>5</sup> from a private sector media organisation, the suppression order on Witness K and Bernard Collaery<sup>6</sup> preventing public disclosure of a non-security matter regarding public interests, private companies, and embarrassing government involvement which should be in the public view<sup>7</sup>, and the Richard Boyle ATO case<sup>8</sup> are but a few examples of the intimidatory effect of exercise of the current security legislation regime.
2. There has been a short time for public submission on the *impact of the exercise of law enforcement and intelligence powers on freedom of the press*, and for a report on what is a very complex issue involving *inter alia* many pieces of pertinent legislation, The Fourth Estate, government departments, public and private organisations, and legal cases, some of them in the public view and others hidden from public view by proscriptive legislation and government decision making. In my view there is not sufficient time given to address this critical issue thoroughly, to give it the attention it deserves. It might easily be concluded that this Inquiry is nothing more than a sop to the public to give impression of doing something while in reality nothing will be done except tightening the grip of a security agenda for political control by an incumbent government.
3. I note that nowhere in the *Terms of Reference* is mention made of matters relating to whistleblowers who play a crucial role in bringing matters to public attention frequently via the press because safeguarding/reporting mechanisms enshrined in legislation<sup>9</sup>/regulation/policy/mechanisms to deal with government 'misbehaviour' have failed or are weak or too proscriptive, and the agencies themselves charged with public oversight and investigation have also failed [for reasons not elaborated here]. Frequently, whistleblowers are the 'canaries-in-the-mine' which tell us that the current system is not working.
4. Whistleblowers and the Fourth Estate play a critical role in a healthy democracy and their capacity to function must be protected and not impaired by inappropriate law, political or

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<sup>1</sup> <https://www.alrc.gov.au/publications/8-balancing-privacy-other-interests/meaning-public-interest>

<sup>2</sup> <https://mumbrella.com.au/four-laws-that-need-urgent-reform-to-protect-both-national-security-and-press-freedom-584900>

<sup>3</sup> <https://definitions.uslegal.com/c/chilling-effect/>

<sup>4</sup> <https://www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>

<sup>5</sup> <https://www.sbs.com.au/news/world-media-condemns-australian-federal-police-raids-targeting-journalists>

<sup>6</sup> <http://ilareporter.org.au/2018/08/the-prosecution-of-bernard-collaery-and-witness-k-international-and-regional-implications/>

<sup>7</sup> McGrath, K. (2017). *Crossing the line. Australia's secret history in the Timor Sea*. Redback.

<https://www.blackincbooks.com.au/books/crossing-line>

<sup>8</sup> <https://www.abc.net.au/news/2019-06-03/ato-whistleblower-facing-prison-says-he-almost-died-from-stress/11167954>

<sup>9</sup> *Public Interest Disclosure Act 2013 (PID Act)*.

administrative process<sup>10</sup>. Any inquiry must also include consideration of the role of the whistleblower-press nexus and current inadequate protections for whistleblowers notwithstanding recent changes to corporate whistleblower protections<sup>11</sup>.

5. The current Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press should be referred to a Royal Commission for investigation and report because the current Committee has a 'conflict of interest' notwithstanding its remit under Part 4 section 29 (1)(b)(ia) of the *Intelligence Services Act 2001* to review any matter in relation to ASIO, ASIS, AGO, DIO, ASD or ONA referred to the Committee by the Attorney-General...".

The conflict of interest relates to the fact that the membership of the Committee consists only of representatives of the Coalition government and the Labor Party. Schedule 1 Part 3 Administration Section 14 (5) of the *Intelligence Services Act 2001* states that "In nominating the members [of the Committee], the Prime Minister and the Leader of the Government in the Senate **must have regard** [emphasis mine] to the desirability of ensuring that the composition of the Committee reflects the representation of recognised political parties." In my view the Prime Minister and Leader of the Government in the Senate have **failed** to appoint a 'representative' Committee. As it presently stands the Committee is made up of members of an incumbent government and Opposition, both responsible for the current oppressive legislation; they have a vested interest in the legislation. From a public perspective this is equivalent to asking the fox and his mates to review rules regarding henhouse security, which begs the question whose interests are being served and does it include the public interest?

The public perspective is critical to trust in government<sup>12</sup>. As it presently stands it looks as if political self-interest is central to this Inquiry: The government was forced to put in place some form of mechanism to diffuse the public clamour about the coincidental AFP raids described earlier, and so chose a mechanism which could be controlled easily through majority membership on the Inquiry Committee defined by legislation<sup>13</sup>, and minority 'me-too' Labor who could easily be 'wedged' politically because of prior legislative history and risk of being defined as 'soft on security' should they oppose the majority. Nowhere is there representation from other officially- recognised political parties. In effect the current Inquiry is a populist offering for a closed political system with the major political parties the beneficiaries. While the government admitted that they 'got the balance wrong' between the press and security in their *Terms of Reference* for the Inquiry (it's always good to have a public *mea culpa* to take the sting out of the adverse publicity) it made a choice here to stack the Committee in their favour when it could have chosen more wisely to deal with the public perception and to engage in a genuine investigation. The *mea culpa* is a distraction. There is nothing in the current Inquiry which gives comfort to the notion of a genuine process with the Public Interest being served. This is a bipartisan inquiry of necessity to save political skin and normalise the ascendancy of fear and control as an essential part of the incumbent government's view of democracy, a place it does not deserve.

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<sup>10</sup> Martin, B. (15 July, 2019). *Government betrays much needed whistleblowers*. The Australian.

<sup>11</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-164mr-new-regime-for-corporate-whistleblower-protections-commences-today/>

<sup>12</sup> Smith, K. (2018). *Ken Smith: how to restore public trust in government*. The Mandarin, <https://www.themandarin.com.au/91350-restoring-public-trust-in-government/>

<sup>13</sup> Committee on Intelligence Part 4 section 28(3) "A majority of the Committee's members must be Government members".

6. Transparency and accountability and trust at all levels of government, and appropriate law and contingent regulation protecting The Public Interest, are essential to a robust, healthy democracy.
7. The Fourth Estate plays a critical role in a healthy democracy and its capacity to function must be protected and not impaired by inappropriate law, political or administrative process notwithstanding the fact that the 'human nature' also colours the actions and purposes and performance of the Fourth Estate. Like the rest of all human endeavour it is not perfect.
8. Legislation, policy and administrative processes are also not perfect and may be devised and/or captured for purposes other than the public interest and to the detriment of society, and that includes institutional safeguards. In all institutions, including government, there is always a tension between human nature as it ought to be and human nature as it so often is<sup>14</sup>. It requires ongoing review and amendment and adjustment. Such is the case with the matters being considered in the current Inquiry.
9. Legislation, policy and administrative processes would be better informed by critical reference to empirical evidence from the Sciences including the Behaviour Sciences which deal with the vagaries of the 'human condition' which can be complex and unpredictable<sup>15</sup>. Indeed, outgoing Prime Minister's departmental secretary Martin Parkinson encouraged his staff to "... be resolutely committed to advocating for truly evidence-based policy"<sup>16</sup>. However, there is no evidence that the current Inquiry will examine how human nature, or the human condition informs the current debate over Freedom of the Press and Law Enforcement and with the recent changes in the bureaucracy there is no guarantee that any attention will be given to evidence-based policy whatsoever<sup>17</sup>. In my view only a Royal Commission and concomitant *Amicus Curiae* on human behaviour as it relates to mechanisms for protecting the public interest beyond legal prescription is critical to an effective and robust public interest outcome.  
In view of the increasing politicisation of the bureaucracy, the *Amicus Curiae* should include review of current opaque senior public servant appointment processes and contractual arrangements to assure the public that there is a genuine arms-length appointments process and that the senior public service is arms-length and independent in its provision of advice and action to the political arm of government. The AFP raids on the Press and responses to public criticism by both the AFP and their political masters and that it was somehow an independent process, was unconvincing and requires further scrutiny at both an informal and contractual level. Such scrutiny must be through the lens of the Behavioural Sciences which bring some discipline to understanding and mechanism.

### Concluding Remarks

The current Inquiry into the exercise of law enforcement and intelligence powers on freedom of the press is not independent with the majority of Committee members coming from the incumbent government, and Labor party representation making up the rest. Both parties have vested political interests in the current matter. Because of this conflict of interest and complexity of the issues involved, the matter should be referred to an independent Royal Commission for further investigation with the findings of that Commission to be informed by

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<sup>14</sup> Trigg, R. (2005). *Morality Matters*. Blackwell, Carlton,

<sup>15</sup> Gates, G.R. & Cooksey, R.W. (1996). *Karpin and Hilmer: classic cases of 'It seemed like a good idea at the time'*. Journal Small Enterprise Research, Vol. 4.

<sup>16</sup> Grattan, M. (25 July, 2019). *Grattan on Friday: Morrison finds some cats defy herding*. The Conversation.

<sup>17</sup> <https://theconversation.com/morrison-brings-his-own-man-in-to-head-the-prime-ministers-department-120973>

an *Amicus Curiae* into the human factors which are at play in such a complex environment. Democracy is dependent on a Free Press and protection of those who speak truth to power such as whistleblowers. This critical issue deserves better attention than the standard 'Hallmark' short Inquiry with a short reporting time frame run by politicians with a clear conflict of interest and political agenda.

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