



**ABC ALUMNI LIMITED SUBMISSION TO SENATE
STANDING COMMITTEE ON ENVIRONMENT AND
COMMUNICATIONS' REFERENCES COMMITTEE:**

**Inquiry into the adequacy of
Commonwealth laws and frameworks
covering the disclosure and reporting of
sensitive and classified information**

29 August 2019

INTRODUCTORY STATEMENT

ABC Alumni Limited represents a community of nearly 300 former staff and supporters of the Australian Broadcasting Corporation – many of them experienced reporters, editors, and senior news managers. We support fully funded, high quality, independent, ethical and free public media in Australia. Our objectives are to promote excellence across all media platforms through advocacy, education, mentoring, public forums and scholarships.

On 12 August 2019, ABC Alumni made a submission to the inquiry into press freedom being conducted by the Joint Parliamentary Committee on Intelligence and Security. That submission attempted not to go over the same ground as other substantial submissions from media organisations, academics, and legal experts, many of whose concerns we share. This submission, similarly, does not attempt to cover all of the terms of reference of this inquiry, but to focus on a particular matter that has received too little attention – the use of a law that was never intended, in our contention, to be applied to the leaking of secret information but which gravely threatens the media's ability to hold government to account.

EXECUTIVE SUMMARY

This submission relates to two of the inquiry's terms of reference.

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

ABC Alumni is deeply concerned that in the search warrant that the Australian Federal Police (AFP) obtained on 3 June 2019, the AFP stated that it suspected an ABC reporter of "dishonestly receiving stolen property", contrary to s132.1 of the *Criminal Code*.

It notes that Major David McBride has been committed for trial on a charge, among others, of theft of Commonwealth property under s131.1 of the *Criminal Code*.

This part of the *Criminal Code* has, to our knowledge, never previously been used in relation to leaked Commonwealth information. Section 132.1 concerns the receipt of stolen property, not the disclosure of secrets; it does not relate to publication, but merely to receipt; it contains no public interest defence for journalists; and it does not require the consent of the Attorney-General.

If it were successfully used to prosecute an ABC reporter it would imperil a wide range of public interest journalism that seeks to hold governments to account.

(e) mechanisms to ensure that the Australian Federal Police have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters.

The chronology of events that we outline in the first part of our submission suggests the possibility that, so far from having insufficient independence, the AFP has resorted to the "theft" and "receiving" offences in the *Criminal Code* precisely because a prosecution under those sections does not require the consent of the Attorney-General, unlike the secrecy laws that were available to the AFP.

We fear that in this instance the AFP, apparently supported by the Commonwealth Director of Public Prosecutions (CDPP), is attempting to evade the supervisory powers of the responsible minister.

SUBMISSION

1. For full understanding of this submission, it is important to be aware of the following chronology:

CHRONOLOGY OF EVENTS RELATING TO THE ABC'S 'AFGHAN FILES'

2. In July 2017, the ABC published a series of stories online, and aired a report on 7.30, concerning the activities of Australian special forces during the Afghanistan conflict. It reported that the stories were based on “hundreds of pages of secret defence force documents leaked to the ABC”. Most of the events described had occurred five years earlier.

3. Within days, the Secretary of the Department of Defence and the Chief of the Defence Force referred the leaking of those secret documents to the Australian Federal Police.

4. In February 2018, the AFP searched the home of a military lawyer, Major David McBride.

5. In 5 September 2018, Major McBride was charged with the theft of Commonwealth property, contrary to section 131.1 of the *Criminal Code*. It is understood that McBride did not deny that he was the person who had leaked the documents to the ABC.

6. On 13 September 2018, the AFP requested that three ABC employees participate in interviews or assist with the AFP investigation. They refused on 4 October.

7. On 29 January 2019, the AFP again contacted the ABC, seeking their agreement to a search of ABC premises in relation to the investigation.

8. On 28 February 2019, McBride was arrested at Sydney airport as he was about to depart for Europe.

9. On 7 March 2019, McBride was charged with additional offences: unlawfully communicating military information contrary to s73A(1) of the *Defence Act 1903*, and unlawfully disclosing a Commonwealth document contrary to s70(1) of the *Crimes Act 1914*.

10. On 1 April 2019, the AFP emailed two employees of the ABC, reporter Dan Oakes and producer Sam Clark, asking that they provide finger and palm prints. According to published reports by their ABC manager, John Lyons, the emails stated that the two were suspected of three offences, the “mirrors” of those with which Major McBride had already been charged: “dishonestly receiving stolen property” contrary to s132.1 of the *Criminal Code*; “unlawfully obtaining military information” under s73A(2) of the *Defence Act 1903*; and the receipt of prescribed information under s79(6) of the *Crimes Act 1914*. They declined to provide their fingerprints.

11. On 30 May 2019 McBride pleaded not guilty to all the offences with which he has been charged, and was committed for trial in the ACT Supreme Court. It is understood that he will defend himself on the grounds that he was acting in the public interest.

12. On 3 June 2019, the AFP obtained a warrant from a registrar of the NSW Local Court in Queanbeyan authorizing it to search the ABC's headquarters in Ultimo, Sydney, for a very wide range of documents. The warrant stated that the AFP was seeking evidence that McBride had committed all three of the offences with which he had been charged; but it named only one of the two ABC personnel whose fingerprints had been sought on 1 April, namely reporter Dan Oakes; and, **significantly, it said he was suspected of committing only two of the offences contained in the email he had received on 1 April: the offence under s79(6) of the *Crimes Act* was not mentioned in the warrant.**

13. On 5 June 2019, a team of AFP officers executed the search warrant on the ABC's premises. The search lasted some 8 hours, and the AFP seized some hundreds of documents, which, however, will not be available to the AFP's investigators unless a legal challenge by the ABC regarding the legality of the search warrant fails.

14. On the same day, 5 June, an AFP statement claimed that the search of the ABC, and a search a day earlier of News Corp reporter Annika Smethurst's home, "relate to separate allegations of publishing classified material contrary to provisions of the *Crimes Act 1914*, which is an extremely serious matter ... The search warrants related to secrecy offences in Parts 6 and 7 of the *Crimes Act 1914*."

[Comment: ABC Alumni have been unable to sight the Smethurst search warrant, but so far as the ABC search warrant is concerned **this statement is plainly untrue**. No allegation that the ABC's reporter had breached the *Crimes Act* was named in the warrant, and no reference was made in the warrant to the publishing of any material at all. The offences allegedly committed by Dan Oakes and cited in the warrant relate to receiving, not publishing, information.]

15. On 19 June 2019, Attorney-General Christian Porter publicly stated, apparently in ignorance of the terms of the search warrant, that "there is absolutely no suggestion that any journalist is the subject of these investigations". He said that any prosecution of journalists under the relevant legislation would require his consent, and that "I would be seriously disinclined to approve prosecutions [of journalists] except in the most exceptional circumstances".

16. On 4 July 2019, the Morrison government announced that it had asked the Joint Parliamentary Committee on Intelligence and Security (PJCIS) to hold an inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

17. On 12 July 2019, Home Affairs Minister Peter Dutton publicly defended the AFP searches and rejected calls for the police to drop action against journalists. “If you've got top secret documents and they've been leaked, it is an offence under the law and police have an obligation to investigate a matter referred to them ... and they'll do that.” Note that Mr Dutton did not refer to publishing secret documents.

18. On 8 August 2019, in an apparent U-turn, Mr Dutton issued a Direction to the AFP which stated, in part, that “I expect the AFP to take into account the importance of a free and open press in Australia’s democratic society and to consider broader public interest implications before taking investigative action involving a professional journalist or news media organisation”. The Directive said nothing about whether or in what circumstances journalists might be charged with criminal offences.

19. On 14 August 2019 the AFP, along with other law enforcement and security agencies and government departments, appeared at a hearing in Canberra of the PJCIS press freedom inquiry. The AFP was not asked any questions about the specific offences named in the ABC search warrant, or indeed about whether any ABC journalists were likely to be charged. Asked about whether Ms Annika Smethurst might be charged, Commissioner Colvin stated that “the investigation is ongoing. So I’m not drawing anyone in or out ... who we may determine has committed a crime.” The AFP made it clear that the investigation was in temporary abeyance while the legality of both search warrants was determined in separate court actions.

[END OF CHRONOLOGY]

20. In relation to the chronology cited above, ABC Alumni would make the following points:

NEW AND OLD SECRECY OFFENCES

21. Prior to the passage of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, which came into force in December 2018, the main legislation relating to the leaking of secret information by Commonwealth officers was contained in Parts 6 and 7 of the *Crimes Act 1914*: specifically, s70, which criminalises the unauthorised disclosure to a third party of ANY information which Commonwealth officers acquire in the course of their duties and which it is their duty not to disclose; and s79, headed “official secrets”, and relating to information that it is an officer’s “duty to keep as secret”. Subsection 79(6) makes it an offence, punishable by 2 years imprisonment, for a person to receive such information from a Commonwealth officer, knowing it to be secret. It is not necessary for the person to publish or communicate the information further for the offence to have been committed.

22. Section 85 of the Act specified that any prosecution under s79 could proceed only with the consent of the Attorney-General.

23. Parts 6 and 7 of the *Crimes Act*, which contained these sections, were repealed by the *National Security Legislation Amendment Act* and, broadly speaking, replaced by s122 of the *Criminal Code*, headed “secrecy of information”.

24. As the Committee will be aware, the new legislation specifies that for an offence to be committed, the information disclosed by a Commonwealth officer must be shown to be “inherently harmful” or “harmful” to “Australia’s interests.” Those interests are defined very broadly, but they do put some limit on what information can incur criminal penalties. However, the penalties for breaching s122 are more severe than those in the old *Crimes Act*: up to 7 years imprisonment, or 10 years for an “aggravated offence”.

25. Section 122.4A makes it an offence for a third party to “deal with” information that came from a Commonwealth officer and that is secret, top secret or harmful in other specified ways. There is a more severe penalty (up to 5 years imprisonment) for “communicating” such information.

26. However, under s122.5(6), there is a specific defence available for a professional journalist who deals with or communicates such information and who “reasonably believed that engaging in that conduct was in the public interest”.

27. Under s123.5, any prosecution for offences under s122 needs the written consent of the Attorney-General.

28: COMMENT: As many submissions to the PJCIS inquiry made clear, media organisations and many others consider the defence under s122.5(6) inadequate, and are seeking an exemption for bona fide journalism, rather than a defence. But in any case, as the AFP has stated on numerous occasions, the new legislation does not apply to the *Afghan Files* case, because the alleged offences occurred before it came into force. Our concern is that too much of the discussion following the ABC raid has ignored the fact that the AFP and the CDPP appear to be intent on using another part of the *Criminal Code*, **to which no public interest defences apply, no consent by the Attorney-General is required, and which would potentially criminalise ANY journalism that involved leaked government documents.**

THE ‘THEFT’ OFFENCE

29: In addition to offences under the old s70 of the *Crimes Act* and the *Defence Act 1903*, David McBride has been charged with stealing Commonwealth property under s131.1 of the *Criminal Code*. Indeed, that was the first offence he was charged with, months before he was charged with the additional “secrecy” offences.

30. The subsection is headed “Theft” and says that a person commits an offence if:

- (a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property; and
- (b) the property belongs to a Commonwealth entity.

31. Any normal reading of this section would convey the meaning that it applies to real property – land, or money, or a government-owned laptop - not to documents (presumably copies, rather than originals), which after all contain information that the Commonwealth still retains.

32. Section 70 of the *Crimes Act* is much more obviously relevant to the activity of which McBride is accused. So why did the AFP choose to charge McBride initially solely with “theft”?

33. We note that, without charging McBride with theft, it would not be possible to threaten to charge the ABC’s reporter with the offence of “dishonestly receiving stolen property” under s132.2 of the *Criminal Code*, which is precisely what the AFP’s search warrant, and its email of 1 April, both do.

34. The threatened use of this “receiving” offence against a journalist is deeply alarming because:

- **It applies to the act of receiving “stolen property” (presumably, in this case, documents and/or information), not publishing it.**
- **It would apply to the receipt of ANY “stolen” Commonwealth document or information, regardless of whether it is classified as secret, or its disclosure harmful in any way to Australia’s interests.**
- **Prosecution under this section does not need the consent of the Attorney-General.**
- **There is no public interest or journalism defence.**
- **The maximum penalty for an offence under s132.1 is ten years imprisonment – as much as the most severe sentence in s124.**

35. It is particularly alarming that David McBride has not merely been charged with “theft”, but committed for trial on that charge – in other words, that the CDPP, and the magistrate who committed him for trial, clearly think that conviction is a real possibility. If he were convicted for “theft”, it would make the prosecution of Dan Oakes for “receiving” all the more possible.

36. Even if, following the Minister’s Direction (see paragraph 18), the AFP and/or the CDPP decide not to charge or prosecute Oakes for “receiving”, **the mere threat that such an offence could apply to a normal journalistic endeavour would have a dramatically chilling effect on a wide range of public interest journalism.**

QUESTIONS:

37. We urge the committee to ask the AFP the following questions:

38. Question 1: Who suggested to the AFP that it was appropriate to charge David McBride with “theft” in the first instance, rather than with releasing confidential information? Why did the AFP do so? Was it because that offence carries with it a “mirror” offence that could be applied to the ABC journalists, that of “receiving”?

39. Question 2: Why did its Commissioner and Deputy Commissioner claim, on the days following the ABC and Smethurst “raids”, that they were pursuing offences under Parts 6 and 7 of the Crimes Act, while avoiding any mention of the “theft” offence?

40. Question 3: Why, having indicated on 1 April that they suspected Oakes and Clark of breaching s79(6) of the Crimes Act, was that offence not mentioned in the search warrant obtained on 3 June?

41. Question 4: Was it because, between 1 April and 3 June 2019, the AFP or the CDPD sounded out the Attorney-General’s office about the likelihood of receiving consent to a prosecution of the ABC journalists under s79, and received an answer similar to that which Mr Porter gave publicly on 19 June, that he would be “seriously disinclined” to consent to such a prosecution?

42. Question 5: In the light of Mr Dutton’s Direction that it should “take into account the importance of a free and open press in Australia’s democratic society”, does the AFP still consider that the prosecution of Dan Oakes, or any other journalist, for “receiving stolen property” would be an action that falls within the broader public interest?

CONCLUSION

43. ABC Alumni shares the concerns of media organisations and others about the scope of the counter-terrorism and secrecy legislation passed by the Federal parliament since September 2001.

44. ABC Alumni also believes that there is a strong case for more protection for whistleblowers, particularly if they consider that the issues that concern them have not been dealt with adequately by internal regulators.

45. But the AFP’s use, in relation to the *Afghan Files*, of s131 and s132 of the *Criminal Code*, which have nothing to do, on their face, with terrorism, or national security, or the preservation of Commonwealth secrets, appears to have “snuck under the radar” of even the most vigilant guardians of our civil liberties. We believe it has the potential to have as chilling an effect on the media’s ability to hold government to account as any of the security legislation much more commonly cited as posing such a threat.

46. We believe that the chronology we have outlined raises the possibility that, by making inappropriate use of the “theft” offence, the AFP is attempting to avoid the need to gain the Attorney-General’s consent to prosecution of a journalist.

47. ABC Alumni recommends that s131 and s132 of the *Criminal Code* should be amended in such a way that they cannot be used to prosecute any offence that is covered by s122, with the safeguards for public interest journalism that that section includes.

ABC Alumni representatives are available to appear at the Senate inquiry hearings, preferably in Sydney.

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