Castan Centre for Human Rights Law
Monash University
Melbourne

Submission to the Senate Environment and Communications References Committee

Inquiry into Press Freedom

Prepared by Karin Frodé

August 2019

The Castan Centre for Human Rights Law is grateful to the Senate Environment and Communications References Committee (the Committee) for the invitation to make this submission in respect of its inquiry into press freedom.

We note the similar and ongoing inquiry by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) regarding the impact of the exercise of law enforcement and intelligence powers on press freedom in response to recent search warrants issued and executed against journalists and media organisations.

Maintenance of the confidentiality of sources is an important protection for effective investigative journalism. The Castan Centre welcomes the broad terms of reference under the Committee's inquiry which include a review of the whistleblower protection regime, in addition to the adequacy of the legal framework concerning disclosure of sensitive and classified information and search warrants against members of the press.

We also welcome the inclusion in the Committee's inquiry of 'any related matters'. In our view, a closely related matter is the lack of an Australian charter or bill of rights and its impact on press freedom and rights protection more broadly. While not addressed in this submission, we note and welcome the ongoing review of Australia's model defamation provisions by the Council of Attorneys-General and emphasise the connection between the two inquiries. Defamation laws, like secrecy laws, must be designed in a manner which does not pose an unjustifiable restriction on freedom of expression.

We underline the importance of the reference to 'appropriate [government] culture' in the context of an inquiry into press freedom. The vast number of laws enacted since 9/11 which enable encroachments on press freedom demonstrate the growing culture of secrecy in relation to government affairs.

1. Executive Summary

The Castan Centre's submission addresses the following matters within the 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;*
>
> *(b) the whistleblower protection regime for public sector employees; and*
>
> […]
>
> *(f) any related matters* [specifically, the lack of a national charter or bill of rights].

Our submission covers the above points in the context of recent encroachments on press freedom in Australia, notably the search of the Sydney headquarters of the Australian Broadcasting Corporation (**ABC**) and the ACT home of The Sunday Telegraph's Annika Smethurst in June 2019.

In the absence of an Australian charter or bill of rights, we consider these events and underlying legislation in the context of Australia's international human rights obligations. We conclude that the existing legal framework does not meet standards set out in the International Covenant on Civil and Political Rights (**ICCPR**). We also note the potential constitutional challenge by members of the press in response to the June raids and the compatibility with the implied freedom of political communication.

Based on this analysis, we make the following recommendations:

- Repeal secrecy provisions which are incompatible with Article 19 of the ICCPR;
- To the extent possible, bring provisions which restrict freedom of expression in line with the strict criteria under Article 19(3) of the ICCPR;
- De-criminalise conduct that does not involve publication or disclosure of prohibited information but merely receipt of information;
- Ensure that secrecy provisions require: (i) that disclosure causes actual harm or is likely to do so; and (ii) knowledge on part of the person making the disclosure that it was obtained contrary to secrecy provisions;
- Introduce a public interest defence for journalists and others (such as human rights defenders) disclosing information in the public interest, including alleged human rights violations. Such defence should be available in respect of any disclosure offences;
- Amend existing legislation to give notice to potential subjects of a search warrant in cases involving journalistic material and information to allow such warrant application to be challenged inter partes before a judge;
- Introduce clear criteria, including consistency with the ICCPR, to which a judge must have regard when determining whether to issue a search warrant in cases involving media organisations and journalists;
- Improve the protection for public sector whistleblowers by removing the broadly defined exception of 'intelligence information' under the *Public Interest Disclosure Act 2013* (Cth);

- Recognise the disclosure of alleged human rights violations as a public interest disclosure protected under the *Public Interest Disclosure Act 2013* (Cth).

Ultimately, we submit that existing gaps in rights protection and encroachments on press freedom places the protection of fundamental rights at risk. In addition to the specific recommendations set out above, this threat could be met by the adoption of an Australian charter or bill of rights.

2. Background

2.1 Press freedom as a cornerstone of democracy

Press freedom is an essential element of any healthy democracy. It reinforces principles of open and transparent government. Without the right of the media and journalists[1] to receive and impart information in the public interest, the public is not informed of matters necessary to hold government to account.

Criminal investigations of journalists and their sources and attempts to reveal the identity of journalists' sources put this freedom at risk. Regardless of whether action is taken, the mere existence of vague and overbroad provisions regulating disclosure may have a chilling effect on members of the press and whistleblowers who may resort to self-censorship to avoid potential adverse consequences. This in turn supports a culture of secrecy in favour of non-disclosure of matters which may otherwise be in the public interest.

2.2 Recent encroachments on press freedom

This year alone has seen a number of actions against members of the press:

Suppression orders and contempt charges

February 2019 **Pell trial contempt charges**: Victorian prosecutors issued contempt of court charges against dozens of journalists and media organisations for breaching suppression orders by aiding and abetting overseas media to report on the Cardinal Pell trial.[2]

Criminal investigations and search warrants

June 2019 **Annika Smethurst raid**: The Australian Federal Police (**AFP**) raided the ACT home of The Sunday Telegraph journalist Annika Smethurst.[3] The raid took place with a warrant to investigate an allegation of disclosure of an official secret after Smethurst published a story disclosing correspondence between government officials considering extension of surveillance powers of the intelligence agencies.[4] Legal action to challenge the legality of the issue and execution of the warrant has been reported, including a challenge to the constitutionality of the relevant criminal provisions.[5]

Ben Fordham investigation: Shortly after the raid of Annika Smethurst's home, Sky News presenter Ben Fordham revealed that he was contacted by

[1] Journalism is recognised as a 'function shared by a wide range of actors', going beyond the traditional notion of a professional journalist to include actors such as bloggers. See UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34, [44] ('*General Comment No 34'*).
[2] See, eg, Amanda Meade, 'Up to 100 journalists accused of breaking Pell suppression order face possible jail terms', *The Guardian* (online, 26 February 2019) <https://www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breaking-pell-trial-suppression-order-face-possible-jail-terms>.
[3] See, eg, Amy Remeikis, 'Police raid on Annika Smethurst shows surveillance exposé hit a nerve', *The Guardian* (online, 5 June 2019) <https://www.theguardian.com/australia-news/2019/jun/05/police-raid-on-annika-smethurst-shows-surveillance-expose-hit-a-nerve>.
[4] Ibid.
[5] See, eg, *Australian Broadcasting Corporation v Martin Kane & Ors*, 'Applicant's Submissions for Case Management Hearing on 2 August 2019', 30 July 2019 [12].

the Department of Home Affairs following the presentation of a story of asylum-seekers en route to Australia from Sri Lanka and was asked for assistance in respect of the disclosure of this information.[6]

ABC raid: The ABC headquarters in Sydney were raided in connection with the publication in 2017 of 'The Afghan Files' alleging war crimes on the part of Australian soldiers against civilians in Afghanistan.[7] The raid sought to search for evidence against David McBride who disclosed the information, as well as journalist Daniel Oakes for obtaining the information from McBride.[8] Legal action to challenge the legality of the issue and execution of the warrant is pending before the Federal Court, also questioning the constitutionality of the relevant criminal provisions.[9] In connection with the ABC investigation, it was revealed that the AFP had requested Qantas to release the travel records of journalist Daniel Oakes in connection with the criminal investigations which led to the June 2019 raids of the ABC headquarters noted above.[10]

Arrest of journalists

July 2019 **Arrest of French filmmakers**: A group of five French filmmakers were arrested on trespass charges when documenting an environmental protest against the Adani mine in Queensland as part of a documentary on climate change. All charges against the journalists were withdrawn a few days later.[11]

These incidents have generated backlash from Australian and international media, including speculation from the New York Times that Australia "may well be the world's most secretive democracy"[12] and a prediction from Reporters Sans Frontiers (**RSF**) that Australia may fall "several places" on the RSF next Press Freedom Index unless the situation for investigative journalists improves.[13] Australia is currently in 21st place, two places lower than in 2018.[14]

Against this background, this inquiry provides a timely reflection into the state of press freedom in Australia and an opportunity for intervention by Parliament to ensure adequate protection of our system of representative and responsible government.

3. Relevant International Standards

3.1 The right to freedom of expression

The rationale for protecting freedom of expression includes facilitating individual human development, and promoting the accountability of government by ensuring that the public receives the information necessary to make informed decisions in elections and participate in public affairs.[15] Freedom of

[6] See, eg, 'Ben Fordham faces AFP raids after source reveals confidential information', *2GB* (online, 4 June 2019) <https://www.2gb.com/ben-fordham-faces-police-raids-after-source-reveals-confidential-government-information/>.

[7] *Australian Broadcasting Corporation v Kane* [2019] FCA 1312, [18] ('*Australian Broadcasting Corporation'*).
[8] Ibid [26].
[9] Ibid Annexure A.
[10] See, eg, Stephanie Borys, 'Reports AFP asked Qantas for ABC journalist's travel details', *ABC* (online, 8 July 2019) <https://www.abc.net.au/radio/programs/am/reports-afp-asked-qantas-for-abc-journalists-travel-details/11287074>.
[11] See, eg, Ben Smee, 'Queensland police drop charges against French journalist arrested at Adani protest', *The Guardian* (online, 25 July 2019) <https://www.theguardian.com/business/2019/jul/25/queensland-police-drop-charges-against-french-journalist-arrested-at-adani-protest>.
[12] Damien Cave, 'Australia May Well Be the World's Most Secretive Democracy', *The New York Times*, (online, 5 July 2019) <https://www.nytimes.com/2019/06/05/world/australia/journalist-raids.html>.
[13] 'French TV crew arrested while covering environmental protest in Australia', *Reporters Sans Frontiers*, (online, 22 July 2019) <https://rsf.org/en/news/french-tv-crew-arrested-while-covering-environmental-protest-australia>.
[14] 'Threat to reporters' sources from second Australian police raid in 24 hours', *Reporters Sans Frontiers* (online, 5 June 2019) < https://rsf.org/en/news/threat-reporters-sources-second-australian-police-raid-24-hours#targetText=Australia%20is%20ranked%2021st%20out,Index%2C%20after%20falling%20two%20places>.
[15] See, eg, Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2005) 13.

expression is not merely a right in itself, but is necessary for the meaningful exercise of other rights, such as the right to vote and the right to freedom of association and assembly.[16] In this regard, the media and journalists play a key role as public watchdogs to ensure transparency and accountability.

The right to freedom of expression includes the right 'to seek, receive and impart information' and is enshrined in Article 19(2) of the ICCPR to which Australia is a State party. To ensure that journalists can carry out their function as public watchdogs, the right includes limited journalist privilege not to compel journalists to reveal their sources and thereby encourage sources to come forward with the information required to hold the government to account which may otherwise be kept confidential.[17]

3.2 Restrictions on freedom of expression

The right to freedom of expression is not absolute.[18] Nonetheless, given that 'any restriction on freedom of expression constitutes a serious curtailment of human rights',[19] such restrictions must meet the strict criteria in Article 19(3):[20]

- **Provided for by law**: Restrictions on freedom of expression must be accessible and framed in a clear and precise manner which enables specific and targeted regulation of conduct.[21] Without these qualities, regulation may fail to provide guidance to rights-holders and duty-bearers as to what expression is and is not protected.[22]

- **Legitimate aim**: Only restrictions in the pursuit of a legitimate aim fall within Article 19(3). Of relevance for the purposes of this inquiry, this includes restrictions for the protection of national security. Nonetheless, the United Nations Human Rights Committee overseeing the implementation of the Covenant has underlined the 'extreme care' with which States parties must approach enactment of national security-related legislation, such as secrecy laws.[23] The Human Rights Committee has confirmed that it is incompatible with Article 19(3) to prohibit disclosure of information that is of 'legitimate public interest' without a requirement that such disclosure actually harms or is likely to harm national security and to punish journalists and others (such as whistleblowers) for disclosure in such circumstances.[24] The *Siracusa Principles* on the limitation of rights in the Covenant further underlines that national security should be limited to protection of the 'existence of the nation, its territorial integrity or political independence against force or threat of force'.[25]

- **Necessary and proportionate**: Measures must be proportionate and not extend beyond what is necessary to achieve legitimate aims.[26] The Human Rights Committee has specifically noted that the penalisation of members of the press for simply carrying out legitimate activities, such as holding government accountable, is not necessary.[27] Overbroad legislative provisions restrict freedom of expression beyond what is necessary and constitute a disproportionate

[16] See, eg, Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) [2.1] quoting Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.
[17] *General Comment No 34* (n 1) [45]. See also *The Tshwane Principles on National Security and the Right to Information*, 12 June 2013, principle 18 ('*Tshwane Principles*').
[18] This contrasts with the right to hold opinions without interference under Article 19(1) of the ICCPR.
[19] *General Comment No 34* (n 1) [24].
[20] See also Article 5(1) of the ICCPR which prohibits measures that aim to destroy the right to freedom of expression and any other rights protected under the ICCPR.
[21] *General Comment No 34* (n 1) [25]. See also *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4, principle 17 ('*Siracusa Principles'*).
[22] Ibid.
[23] *General Comment No 34* (n 1) [30].
[24] Ibid. See also *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, 1 October 1995, principle 12 ('*Johannesburg Principles'*).
[25] *Siracusa Principles* (n 21) principle 29.
[26] *General Comment No 34* (n 1) [34].
[27] Ibid [46].

interference with freedom of expression.[28] To comply with Article 19(3), such provisions must be clearly defined and specific.[29]

The *Johannesburg Principles* on national security and freedom of expression emphasise that legislation must not contain a blanket ban on disclosure of information related to national security but be limited to specific and narrow categories where disclosure is outweighed by the need to prevent actual harm or likely harm.[30] The importance of public interest disclosure should be a primary consideration in enacting legislation, suggesting the need for exceptions or defences in respect of disclosures by journalists and their sources of information in the public interest.[31] One example of such information recognised at the international level is the disclosure of alleged human rights violations.[32]

The existence of overbroad and vague regulations may have a chilling effect on members of the press who may not know whether or not they would be subject to civil, criminal or disciplinary sanctions for disclosing certain information. For example, secrecy provisions may result in self-censorship by investigative journalists to avoid potential civil, criminal or disciplinary sanctions. They may also discourage whistleblowers from coming forward for fear of having their identity revealed and face punishment.

4. Analysis of the National Legal Framework

The Castan Centre submits that a number of reforms are necessary to bring Australia's legal system in line with the above standards.

4.1 Journalists' disclosure of sensitive and classified information

4.1.1 Vague and overbroad secrecy offences

A common feature of legislation regulating disclosure of sensitive and classified information is the presence of vague and overbroad offences contrary to Article 19(3) of the ICCPR.

For example:

- **Section 73A, *Defence Act 1903* (Cth)**: Section 73A(2) of the *Defence Act 1903* (Cth) makes it an offence to unlawfully obtain, amongst other things, 'any naval, military or air force information' which may result in unlimited imprisonment or an unlimited fine (or both). This section was relied upon to support the search warrant issued against ABC journalist Daniel Oakes.[33] The section is problematic as merely obtaining such information (in circumstances where 'that conduct is unlawful') may result in a journalist's imprisonment. It is not necessary to publish or communicate the information. The type of information prohibited to obtain under s 73A(2) is also broad and includes 'any military information'. The broad nature of this offence and the ongoing investigation of the ABC journalist is likely to have a chilling effect on investigative journalists who may prefer to self-censor rather than risk criminal investigations. We note the potential challenge to the constitutionality of this provision.[34]

- **Part 7, *Crimes Act 1914* (Cth) (now repealed)**: Section 79 of the *Crimes Act 1914* (Cth) prohibited communication of information that may prejudice security or defence. It has since been repealed but continues to apply in connection with disclosures that occurred before the repeal. The provision did not require actual or likely harm to national security. As noted above, the lack of such requirement is incompatible with Article 19(3).[35] Further, 'prejudice' and

[28] Ibid.
[29] Ibid.
[30] *Johannesburg Principles* (n 24) principles 12, 15.
[31] Ibid principle 13.
[32] *Tshwane Principles* (n 17) principle 30.
[33] *Australian Broadcasting Corporation* (n 7) [26].
[34] Ibid Annexure A.
[35] See, eg, *General Comment No 34* (n 1) [30]; *Johannesburg Principles* (n 24) principle 12.

'security or defence' were not defined to provide any guidance to rights-holders and duty-bearers. Punishment in such circumstances would appear highly disproportionate and unnecessary. We note reports of the potential challenge to the constitutionality of legislative provisions connected to the investigation and raid of Annika Smethurst.[36]

- **Divisions 91, 121 and 122, *Criminal Code Act 1995* (Cth)**: The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) repealed secrecy provisions in the *Crimes Act 1914* (Cth) and introduced a new provision on espionage (Division 91) and two new types of secrecy offences (Divisions 121 and 122) into the *Criminal Code Act 1995* (Cth). These offences may place journalists at risk of criminal investigations akin to those experienced by the ABC, Annika Smethurst and Ben Fordham. Rather than providing more specific restrictions on freedom of expression, these offences have been criticised by UN experts as exceeding what is permissible under Article 19(3).[37] Concepts forming part of these offences are vague and overbroad. For example:

    - 'Deal with': Similar to s 73A of the *Defence Act*, journalists may face criminal charges without actually publishing the information. Under these divisions, it is enough for journalists to 'deal with' prohibited information, which includes publishing but also extends to obtaining, receiving, collecting, possessing, recording, copying, altering, concealing, communicating, and making available the prohibited information.[38]

    - 'Cause harm to Australia's interests': One of the new secrecy offences prohibits dealing with information that 'cause harm to Australia's interests'.[39] This concept is defined very broadly and includes matters such as interference with or prejudice to the 'prevention, detection, investigation, prosecution, punishment criminal offences' and to the operation of the AFP.[40]

    - 'Information': The definition of information remains unchanged from the old secrecy provisions under the *Crimes Act*, broadly defined as 'information of any kind', including opinions and reports of conversations.[41]

    - 'Inherently harmful information': One of the new secrecy offences prohibits dealing with 'inherently harmful information'.[42] Such information is broadly defined as security classed information, as well as information obtained not just by or on behalf of intelligence agencies but extending to information '*relating to* the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency' (emphasis added).[43] What would 'relate to' such concepts is not defined, providing journalists and enforcement bodies with no guidance as to what information is prohibited.

[36] See, eg, *Australian Broadcasting Corporation v Martin Kane & Ors*, 'Applicant's Submissions for Case Management Hearing on 2 August 2019', 30 July 2019 [12].
[37] Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; and the Special Rapporteur on the situation of human rights defenders, *Submission to the Parliamentary Joint Committee on Intelligence and Security regarding the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, 14 February 2018 <https://www.aph.gov.au/DocumentStore.ashx?id=11baa08b-7997-47cd-acd5-43de6c7c064a&subId=563605>.
[38] *Criminal Code Act 1995* (Cth) pt 5.2 div 90 s 90.1(1).
[39] Ibid pt 5.6 div 122 s 122.2.
[40] Ibid pt 5.6 div 121 ss 121.1(1)(a)-(g).
[41] Ibid pt 5.2 div 90 s 90.1(1).
[42] Ibid pt 5.6 div 122 s 122.1.
[43] Ibid pt 5.6 div 121 s 121.1(1).

- 'National security': The offence of espionage prohibits any person from dealing with information 'concerning national security'.[44] Such information is not limited to information concerning the protecting the country from serious threats but extends to 'the country's political, military or economic relations with another country or other countries'.[45]

4.1.2 Lack of knowledge and harm requirements

The old secrecy provisions under ss 70 and 79 of the *Crimes Act* did not require actual harm or likelihood of actual harm from disclosure of prohibited information. It was sufficient that communication 'may prejudice' defence or security. As noted above, the UN Human Rights Committee has confirmed that national security legislation which goes beyond protection against actual harm or likelihood of actual harm is not pursuing a legitimate aim in line with Article 19(3).[46] The need for reform of secrecy provisions to include a harm requirement was recommended a decade ago by the Australian Law Reform Committee (**ALRC**) in its review of the old secrecy provisions.[47]

Further, the old secrecy provisions did not require knowledge on part of the journalist that the information prejudice defence or security. Prosecution which may result in imprisonment is a disproportionate response in such instances, particularly if disclosure also does not result in actual or likely harm. As noted above, the constitutionality of some of the old secrecy provisions has been challenged.[48]

While some secrecy offences under the *Criminal Code* contain an express harm requirement,[49] harm is only implied in respect of 'inherently harmful information', including security classified information.[50] Such information may not actually cause harm or be likely to do so and pose the same unjustified restrictions on freedom of expression as the old s 79 of the *Crimes Act*.[51] By virtue of the broad definition of 'dealing with' discussed above, it seems unlikely that mere receipt or possession of the information would cause actual harm or is likely to do so.

4.1.3 Lack of a public interest defence

Section 122.5(6) introduces a defence against the secrecy offences in Division 122 for 'persons engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media' and doing so 'with a reasonable belief' it was in the public interest.[52] While we welcome the inclusion of specific protection for journalists, we express the following concerns:

- **Personal scope**: The current wording of the defence does not clarify what it means to engage in the conduct of 'reporting news' etc. Under international law, a journalist is not merely a full-time professional but include a diverse range of actors, such as bloggers and self-published writers.[53] This is particularly important with the development of technology and the way in which journalism, including investigative journalism, is conducted in the online space. The scope does not extend to others reporting on matters in the public interest, such as human rights defenders or non-profit organisations.

- **Public interest**: While s 122.5(7) gives examples of what is *not* in the public interest, it does not define what falls within the scope of public interest for the purpose of triggering the defence

[44] Ibid pt 5.2 div 90 sub-div A ss 91.1, 91.2, 91.3.
[45] Ibid pt 5.2 div 90 s 90.4(1)(e).
[46] See, eg, *General Comment No 34* (n 1) [30]; *Johannesburg Principles* (n 24) principle 12.
[47] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009).
[48] *Australian Broadcasting Corporation v Martin Kane & Ors*, 'Applicant's Submissions for Case Management Hearing on 2 August 2019', 30 July 2019 [12].
[49] See, eg, *Criminal Code Act 1995* (Cth) pt 5.6 div 122 s 122.2(1)(b).
[50] Ibid pt 5.6 div 122 s 122.1.
[51] See similarly the now repealed s 70 of the *Crimes Act 1914* (Cth) applicable to whistleblowers.
[52] *Criminal Code Act 1995* (Cth) pt 5.6 div 122 s 122.5(6)(a), (b).
[53] *General Comment No 34* (n 1) [44].

under s 122.5(6). This may result in lack of clarity for investigative journalists and others seeking to rely on the defence. As mentioned above, this ought to include disclosures of alleged human rights violations.

- **Inherent inconsistency**: Other offences under the *Criminal Code* lack specific protection for journalists and media organisations reporting on matters in the public interest. For example, a journalist facing an espionage charge under Division 91 would not have a defence from prosecution.

4.1.4 Recommendations

- Repeal secrecy provisions which are incompatible with Article 19 of the ICCPR;
- To the extent possible, bring provisions which restrict freedom of expression in line with the strict criteria under Article 19(3) of the ICCPR;
- De-criminalise conduct that does not involve publication or disclosure of prohibited information but merely receipt of information;
- Ensure that secrecy provisions require: (i) that disclosure causes actual harm or is likely to do so; and (ii) knowledge on part of the person making the disclosure that it was obtained contrary to secrecy provisions; and
- Introduce a public interest defence for journalists and others (such as human rights defenders) disclosing information in the public interest, including alleged human rights violations. Such defence should be available in respect of any disclosure offences.

4.2 Search warrants

The Castan Centre submits that the existing search warrant regime provides inadequate safeguards in respect of journalists and media organisations.

The raids on the ABC headquarters and the home of Annika Smethurst were executed pursuant to search warrants. Under s 3E of the *Crimes Act 1914* (Cth), search warrants may be issued following an ex parte application if the issuing authority is satisfied on 'reasonable grounds' that the premises contain or will contain evidential material.[54]

The nature of the application for search warrants as ex parte means that the issue of a warrant is only contestable through a judicial review challenge ex post facto. This is particularly problematic when the search is conducted on members of the press. The search may reveal confidential sources and establishing the source of a leak may often be the purpose of the search. The importance of maintaining confidentiality of sources is demonstrated through the existence of limited journalist privilege whereby journalists are generally not compellable to reveal their sources. As noted above, the UN Human Rights Committee recognises this as an essential part of freedom of expression.[55] Limited journalist privilege is also recognised in s 126K of the *Evidence Act 1995* (Cth). While ultimately left to the judge's discretion, to compel a journalist to reveal a source requires an application that persuades the judge that the public interest in disclosure outweighs the adverse consequences on the source and the public interest in maintaining confidentiality.[56] If the confidentiality of a source is revealed during the execution of a search warrant, the damage is already done.

No specific safeguards exist in respect of search warrants against journalists and media organisations. In contrast, applications for search warrants in the United Kingdom require notice to be given to the subject of the proposed warrant if the search concerns or includes 'journalistic material'.[57] This allows

[54] *Crimes Act 1914* (Cth) s 3E(1). See similarly *Telecommunications (Interception and Access) Act) 1979* (Cth) div 4C 'Journalist Information Warrant Scheme'.
[55] *General Comment No 34* (n 1) [45].
[56] *Evidence Act 1995* (Cth) s 126K(2).
[57] *Police and Criminal Evidence Act 1984* (UK) s 13 sch 1.

the subject of the warrant to challenge its validity before it is executed. Search warrants are not allowed in instances where they relate to journalistic material received in confidence.[58] In contrast, the ABC and Annika Smethurst were unable to contest the validity of the search warrant before the search took place and materials were seized.

We note and support submissions to the PJCIS inquiry in favour of added safeguards, such as contestable hearings, notably by the Right To Know Coalition.[59] The chilling effect which the current regime may have on press freedom is two-fold. First, it may discourage sources, such as whistleblowers, to come forward due to the possibility that the office or home of the journalist they have been communicating with could be searched. Second, it may discourage journalists from engaging in investigative journalism due to the possibility of their office, and even their home, being subject to a search which may seek to find evidence both against the source and the journalist in the context of criminal investigations.

A significant argument for the importance of adequate safeguards in the search warrant process is that illegally or improperly obtained evidence may still be admitted as evidence.[60] In determining the admissibility of such evidence, a judge must have regard to a range of factors, including whether the impropriety or contravention was contrary to the ICCPR which will be balanced against other factors, such as the probative value of the evidence.[61] In this regard, including a list of public interest factors which a judge must have regard to when deciding whether or not to issue a search warrant would be useful. Like s 138(3) of the *Evidence Act 1995* (Cth), such list of factors ought to reference the extent to which the search warrant poses a restriction on rights under the ICCPR.

4.2.1 Recommendations

- Amend existing legislation to give notice to potential subjects of a search warrant in cases involving journalistic material and information to allow such warrant application to be challenged inter partes before a judge; and

- Introduce clear criteria, including consistency with the ICCPR, to which a judge must have regard when determining whether to issue a search warrant in cases involving media organisations and journalists.

4.3 Whistleblower protection

In order for journalists to conduct their function as public watchdogs, they often rely on information received from whistleblowers that reveal information in the public interest which the journalists may not otherwise have had access to.

As noted above, protection of the confidentiality of sources is important to encourage whistleblowers to come forward. Such protection requires the existence of effective whistleblower protection. The *Public Interest Disclosure Act 2013* (Cth) remains the main legislation protecting whistleblowers in the public sector from punishment for disclosure in the public interest. Disclosure in accordance with the *Public Interest Disclosure Act* is for example mentioned as a specific defence to the secrecy offences under Division 122 of the *Criminal Code*.[62]

A key shortcoming of the *Public Interest Disclosure Act* is that it does not protect public interest disclosures if the information contains 'intelligence information'.[63] Intelligence information is defined

[58] Ibid s 11(1)(c).
[59] Australia's Right to Know coalition, *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*, 31 July 2019 <https://www.aph.gov.au/DocumentStore.ashx?id=827fa2a6-ab85-4792-be5d-534dd3527658&subId=668376>.
[60] *Evidence Act 1995* (Cth) s 138.
[61] Ibid s 138(3)(f).
[62] *Criminal Code Act 1995* (Cth) s 122.5(4).
[63] *Public Interest Disclosure Act 2013* (Cth) s 26(c).

broadly and extends to 'sensitive law enforcement information'.[64] As noted in section 4.1.1 of our submission, vague and overbroad definitions fail to provide adequate guidance to rights-holders and duty-bearers as to the applicability of legislative provisions. When such provisions are used to restrict freedom of expression, the restriction fails to meet the strict criteria in Article 19(3) of the ICCPR. Vague provisions may in turn result in self-censorship by a whistleblower who does not know whether or not disclosures are protected. The lack of protection in respect of the disclosure of intelligence information means that the Act does not apply as a defence to s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) which prohibits disclosure of information relating to a 'special intelligence operations'.[65] Whistleblowers may be at risk of prosecution under s 35P for information that merely 'relates' to such operations and the extensive nature of the provision may discourage whistleblowers to come forward for fear of prosecution.

In line with international standards, the public interest in disclosure should be a primary consideration when enacting legislation.[66] For avoidance of doubt, disclosure of alleged human rights violations ought to be expressly protected as a category of public interest disclosure.

4.3.1 Recommendations

- Improve the protection for public sector whistleblowers by removing the broadly defined exception of 'intelligence information' under the *Public Interest Disclosure Act;*
- Recognise the disclosure of alleged human rights violations as a public interest disclosure protected under the *Public Interest Disclosure Act;*
- Repeal secrecy provisions applicable to whistleblowers which are incompatible with Article 19 of the ICCPR; and
- To the extent possible, bring provisions which restrict freedom of expression in line with the strict criteria under Article 19(3) of the ICCPR.

4.4 The lack of a charter or bill of rights

Outside Australia, the right to freedom of expression is commonly protected in a bill of rights or a comprehensive human rights act.[67]

We note the challenge by the media to the constitutionality of certain secrecy provisions discussed in this submission in response to recent AFP raids. Nonetheless, we underline that the implied freedom of political communication under the *Australian Constitution* is not an individual right to freedom of expression and does not form part of a comprehensive charter or bill of rights. We refer the Committee to our previous submissions on this topic where we note the existing gaps in human rights protection in the absence of such comprehensive protection of human rights.[68] In this regard, we join the campaign by the Human Rights Law Centre to call for the adoption of a national charter or bill of rights.[69]

4.4.1 Recommendation

- Adopt a national charter or bill of rights to provide for comprehensive protection of fundamental rights, including the right to freedom of expression, recognised under international human rights law.

---

[64] Ibid s 41.
[65] *Australian Security Intelligence Organisation Act 1979* (Cth) ss 35P(1), (1B), (2), (2A).
[66] See, eg, *Johannesburg Principles* (n 24) principles 12, 15.
[67] See, eg. *The First Amendment* in the United States and the *Human Rights Act 1998* in the United Kingdom.
[68] See, eg, Adam Fletcher and Sarah Joseph, *Submission to Legal Affairs and Community Safety Committee, Queensland Parliament*, Human Rights Enquiry, April 2016 <https://www.monash.edu/__data/assets/pdf_file/0004/596056/Qld-Rights-Charter-Inquiry-Sub-Apr-2016.pdf>.
[69] Human Rights Law Centre, *Charter of Rights* (Web page) <https://charterofrights.org.au/>.