



Australian Government

Department of Home Affairs | Attorney-General's Department

Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

Parliamentary Joint Committee on Intelligence and
Security

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

Introduction

The Department of Home Affairs and the Attorney-General's Department thank the Parliamentary Joint Committee on Intelligence and Security for the opportunity to make a joint submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

This submission provides:

- a summary of historical approaches to engagement between government and the media on press freedom in the context of the appropriate balance between reporting on matters of public interest and protecting Australia's national security
- an overview of the circumstances in which journalists and media organisations could become subject to the powers of law enforcement and intelligence agencies
- an overview of the current procedures and thresholds which apply to the exercise of the powers of law enforcement and intelligence agencies performing their functions, and
- a discussion of the matters identified for specific inquiry, including the viability of implementing contested hearings in relation to warrants, and the appropriateness of current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists and media organisations.

Importance of press freedom

Australia is founded on the rule of law and has a strong tradition of respect for the rights and freedoms of every individual. The Australian Government is committed to protecting and promoting traditional rights and freedoms, including freedom of speech and opinion. These rights and freedoms are protected by the common law principle that legislation should not infringe fundamental rights and freedoms unless the legislation expresses a clear intention to do so.

The Australian common law provides particularly strong protections for freedom of speech related to public affairs and political matters. The courts have also recognised an implied constitutional freedom of political communication. Laws which restrict communication about government or politics are invalid if they impermissibly infringe the implied freedom. The Australian Government believes these rights and freedoms underpin Australia's democracy, and has taken some key steps to ensure that these rights and freedoms are protected and promoted.

Press freedom is one of the fundamental pillars of Australia's democracy, and the Australian Government is committed to a free press. Press freedom plays an important role in keeping the public informed and our democratically elected officials and Government institutions accountable. However, press freedom is not absolute. Journalists, just like all Australians, are subject to the law. The freedom to publish has always been subject to other considerations such as laws concerning defamation, criminal offences, the right to a fair trial, and national security.

The recent use of law enforcement powers to collect information in relation to journalists and media organisations has resulted in public discussion regarding the appropriate balance between preserving press freedom and the imperative for law enforcement and intelligence agencies to investigate serious offending, including where media may hold evidence relevant to investigations of criminal conduct.

This submission seeks to demonstrate the appropriateness of the existing balance by providing further context around the historical approach to engagement between government and the media on matters reporting on national security, relevant legislative frameworks setting out the powers available to law enforcement and intelligence agencies in the context of investigations involving journalists or news media

organisations. These investigations may not be directed at the journalist but related to the unlawful disclosure of information or other Commonwealth offences (for example, theft of Commonwealth property).

Historical perspective

The underlying tension between freedom of the press and the need to safeguard national security information is not new and many governments have considered the appropriate balance.

This issue has been considered in a range of contexts including the Gibbs Review of Commonwealth Criminal Law in 1991, the Samuels and Codd Commission of Inquiry into the Australian Secret Intelligence Service in 1995, the establishment of the Commonwealth Public Interest Disclosure regime in 2013, and recent reforms to Commonwealth secrecy offences in the *Criminal Code Act 1995* (Criminal Code).

Australian governments have also, from time to time, undertaken engagement with the media on press freedom in the context of the appropriate balance between reporting on matters of public interest and protecting Australia's national security. Discussions of press freedom in Australia with media organisations has been occurring in various forms for many years.

For example, between 1952 and 1982, the Defence, Press and Broadcasting Committee operated the Defence Notice (D-Notice) system in Australia. The Committee, which consisted of politicians, representatives from Defence and the media, met to discuss matters of national security.

A D-Notice outlined subjects relevant to significant matters of defence or national security, and requested editors to refrain from publishing certain information about those subjects. For example, matters relating to signals intelligence and communications security and capabilities of the Australian Defence Force. The D-Notice system was voluntary and non-observance of a request carried no penalties, and it was left to an editor to decide whether to publish certain information, having regard to national security requirements.

On 26 November 2010, the then Commonwealth Attorney-General, the Hon Robert McClelland MP, wrote to heads of Australian media organisations and policing agencies proposing the development of a formal, mutually agreed arrangement relating to the handling and publication of sensitive national security and law enforcement information.

At a round table convened by the former Attorney-General in April 2011, media and law enforcement representatives developed the following overarching principles regarding the publication of sensitive national security and law enforcement information:

- the overriding importance of preventing harm to the public and operational security and law enforcement personnel
- the preservation of freedom of speech and editorial independence
- the requirement for the protection of sensitive security and law enforcement information, in order for security and law enforcement agencies to effectively conduct their operation, and
- the inherent public interest in news relating to security matters

More recently, on 3 July 2019, the Attorney-General, the Hon Christian Porter MP, and the Communications Minister, the Hon Paul Fletcher MP, met with representatives from the ABC, Nine, News Corp, Free TV, SBS and Seven West Media to discuss the recent execution of search warrants by the Australian Federal Police. Attendees discussed matters relating to press freedom, including media organisations' suggestions for reform, and agreed that they would meet again in three months' time.

Circumstances in which media could become subject to the exercise of powers

Journalists and media organisations have, or could become, subject to the powers of law enforcement or intelligence agencies in the performance of their functions in a range of circumstances. This includes circumstances where journalists may hold evidence relevant to an investigation into alleged criminal conduct generally, where either journalists themselves or third parties are suspected of criminal conduct. Journalists and media organisations may also be subject to the powers of law enforcement or intelligence agencies in circumstances where their activities have the potential to significantly compromise Australia's national

security and constitute a criminal offence. This may include national security interests such as law enforcement activities, intelligence and defence activities. In these circumstances, agencies such as the Australian Federal Police need to balance the public interest of press freedom with the public interest in investigating criminal offending in accordance with their statutory functions.

Unauthorised disclosures

Information security is critical to national security. One circumstance under which the activities of media organisations could become subject to the exercise of the powers of law enforcement or intelligence agencies is the unauthorised disclosure or publication of information that is made or obtained in a person's capacity as a Commonwealth officer. Part 5.6 of the Criminal Code contains secrecy offences that criminalise unauthorised disclosures of information that, if disclosed, is inherently harmful or would otherwise cause harm to Australia's interests, while also protecting press freedom by including a defence for those engaged in reporting matters of public interest.

In some cases, the unauthorised disclosure or publication of information could have grave consequences for national security and the safety of Australians. This could include, but is not limited to, circumstances where information reveals sensitive Australian Defence Force operations and plans; certain Government capabilities, methodologies and sources; and the identity and whereabouts of personnel in sensitive positions. Further to national security consequences, the compromise of certain kinds of information could result in immediate threat to life, including those of Australian personnel. As such, unauthorised disclosures of such information must be treated with the utmost seriousness in balancing the public interest of press freedom with that of protecting information to prevent grave consequences to our national security and safety of Australians.

A key function of the Australian Federal Police is, and must remain, the enforcement of the criminal law. The Australian Federal Police has a statutory function to act independently from Government when conducting investigations into breaches of Commonwealth. This includes investigating all forms of criminal conduct including investigations into the possible commission of offences relating to the unauthorised disclosure of information. The Australian Federal Police cannot legally be directed by the Government, an individual Minister, or a Department to exercise, or abstain from exercising, police powers in an individual investigation. The Minister for Home Affairs can, however, give written directions, such as a written direction to the Commissioner of the Australian Federal Police in relation to the general policy to be pursued in relation to the performance of the Australian Federal Police under s37(2) of the *Australian Federal Police Act 1979*.

Procedures and thresholds for the exercise of law enforcement powers

Existing legislative frameworks

There are clear rules and protections in place to support freedom of the press, which are subject to ongoing review by relevant policy departments. This section provides an overview of the legislative frameworks relevant to this inquiry, and the powers available to law enforcement and intelligence agencies in the investigation of possible commission of offences.

There are a number of offences across Commonwealth criminal law that could potentially give rise to the exercise of law enforcement powers in the context of the activities of journalists and media organisations. These include refused classification offences, abhorrent violent material offences, as well as offences relating to unauthorised disclosure of material. Where relevant, some offences already include a specific defence for journalists, including the secrecy offences in Part 5.6 of the Criminal Code.

Powers available to agencies

There are a range of relevant powers available to law enforcement and intelligence agencies in the investigation of the commission of possible criminal offences and for national security purposes. Such powers include, but are not limited to, those contained in the following Acts:

- *Crimes Act 1914* (Cth)

- *Telecommunications (Interception and Access) Act 1979* (Cth) (Telecommunications Interception and Access Act)
- *Surveillance Devices Act 2004* (Cth) (Surveillance Devices Act)

The use of these powers continues to be an infrequent occurrence.

Crimes Act 1914

Under section 3E of the Crimes Act, an issuing officer may issue a warrant to search premises if the officer is satisfied, by information on oath or affirmation, that there are reasonable grounds for suspecting that there is, or there will be within the next 72 hours, any evidential material at the premises.

The occupier or the premises concerned in the warrant need not be the subject of the investigation. For the purposes of these provisions, evidential material means a thing relevant to an indictable or summary offence, including such a thing in electronic form. Also for these purposes, the issuing officer may be a magistrate, or a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest.

The warrant must state:

- the offence to which the warrant relates; and
- a description of the premises to which the warrant relates or the name or description of the person to whom it relates; and
- the kinds of evidential material that are to be searched for under the warrant; and
- the name of the constable who, unless he or she inserts the name of another constable in the warrant, is to be responsible for executing the warrant; and
- the time at which the warrant expires; and
- whether the warrant may be executed at any time or only during particular hours.

If a warrant in relation to premises is being executed and the occupier of the premises or another person who apparently represents the occupier is present at the premises, the executing officer or a constable assisting must make available to that person a copy of the warrant. The executing officer must also identify themselves to the person at the premises being searched. Warrants issued under section 3E of the Crimes Act are subject to a range of safeguards, including the requirements for the independent issuing officer, the detail that must be stated in the warrant and the requirement that details of the warrant be given to the occupier.

Telecommunications (Interception and Access Act) 1979

The Telecommunications Interception and Access Act provides for the issuing of warrants to eligible law enforcement and intelligence agencies to intercept communications, access stored communications, or authorise the disclosure of data.

Chapter 4 of the Telecommunications Interception and Access Act enables designated criminal law enforcement agencies and the Australian Security Intelligence Organisation to authorise a carrier to disclose telecommunications data for certain defined purposes such as enforcing the criminal law or for the performance of the Australian Security Intelligence Organisation's functions.

These provisions do not allow for the disclosure of the content of a communication, and only permit such disclosure for a narrow range of purposes. Further, the Telecommunications Interception and Access Act contains reporting and record-keeping obligations.

The journalist information warrant framework was introduced by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* as an added protection mechanism to raise the threshold for agencies' access to telecommunications data in specific cases in which agencies seek to access a journalist's telecommunications data for the purposes of identifying a source. The framework requires

criminal law enforcement agencies to obtain a warrant issued by a judge, magistrate, or senior Administrative Appeals Tribunal member (see 'Thresholds for the access of electronic data' below for further information).

Appropriateness of current laws

The current legislative frameworks appropriately balance the importance of press freedom with the imperative to protect national security.

Legislative frameworks already contain a suite of protections, including appropriately high thresholds and safeguards in the framing of relevant powers, requirements to seek warrants from appropriate issuing authorities and a discrete framework for journalist information warrants under the Telecommunications Interception and Access Act to enable the protection of confidential sources.

These legislative frameworks have also been developed to maintain consistency with Australia's international human rights obligations, as elaborated in successive Explanatory Memoranda. Australia's legislative frameworks reflect, in line with these obligations, that any limitations on rights and freedoms are reasonable, necessary and proportionate for the pursuit of a legitimate objective.

The Government is open to considering suggestions to ensure the appropriate balance is maintained, if there is evidence or analysis that reveals a need for further improvement. However, any changes to legislation should not restrict the ability of law enforcement agencies to obtain a full picture of the facts and make informed decisions about charging. It could also impede the ability to investigate other (non-journalist) persons of interest, and otherwise to investigate persons who are journalists by occupation in situations that do not relate to public interest reporting.

Matters for specific inquiry

Viability of contested hearings for warrants

The current processes for issuing warrants in relation to journalists and news media organisations are appropriate (see 'Appropriateness of current laws' above). The existing legal framework provides a number of ways to have issues heard by the courts in a contested hearing after the warrant has been issued. These include judicial review, constitutional challenge, torts, and claims of legal professional or parliamentary privilege over documents seized.

We do not consider that contested hearings for warrants would be an appropriate area for reform. Search warrants are an essential power in the investigation of criminal activity by law enforcement and intelligence agencies, and contested hearings for warrants may undermine the efficacy of these powers. Requiring subjects of search warrants to be provided with advance notice of the warrants' execution may lead to situations in which essential evidential material is destroyed or transferred to a different location, creating major impediments for the investigation and prosecution of serious criminal offending.

Thresholds for the access of electronic data

The current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists or the media are appropriate. As outlined above, the powers available to designated criminal law enforcement agencies and the Australian Security Intelligence Organisation under the Telecommunications Interception and Access Act limit the ability of carriers to disclose telecommunications data for certain defined purposes such as enforcing the criminal law or for the performance of the Australian Security Intelligence Organisation's functions. These provisions do not authorise access of the content of a communication. The journalist information warrant framework also further raises the threshold for agencies' access to telecommunications data in specific cases in which agencies are seeking to identify a source. As noted, the framework requires criminal law enforcement agencies to obtain a warrant issued by a Judge, Magistrate, or senior Administrative Appeals Tribunal member.

An agency can only request access to the telecommunications data of a journalist in order to identify a source once a warrant has been granted. The Australian Security Intelligence Organisation must apply to the Attorney-General for a journalist information warrant. In considering whether to grant the warrant, the Attorney-General must take into account whether the issuing of the warrant outweighs the public interest in protecting the confidentiality of the source. This consideration must include the extent of the interference in

the journalist's privacy; the seriousness of the matter for which the warrant is sought; the potential significance of the telecommunications data to the investigation; and whether the information could be obtained through other means.

Journalist information warrants must not be issued to law enforcement agencies unless the issuing authority is satisfied that the warrant is reasonably necessary for the specified purpose and that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.

The journalist information warrant framework also allows a Public Interest Advocate to make a submission to the issuing authority of the warrant as to the propriety of the enforcement agencies application. Public Interest Advocates are declared by the Prime Minister and must be given a copy of the journalist information warrant application before the application is made.

The Telecommunications Interception and Access Act also gives law enforcement agencies and the Australian Security Intelligence Organisation the ability to apply for a warrant to intercept communications or access stored communications. These warrants are only issued to law enforcement agencies for the investigation of serious offences generally carrying at least a maximum seven year term of imprisonment (interception), or serious contraventions generally carrying at least a maximum 3 year term of imprisonment (stored communications).

For the Australian Security Intelligence Organisation, the Attorney-General can only issue a warrant if the Attorney-General is satisfied the service is likely to be used by a person engaged in activities prejudicial to security and the interception is likely to assist the Australian Security Intelligence Organisation in carrying out its functions of obtaining intelligence relating to security. The Surveillance Devices Act enables law enforcement agencies to apply for warrants for the use of surveillance devices and access to data held in a computer. These warrants are only issued for the investigation of offences generally carrying at least a maximum term of imprisonment of three years.