Journalism Education and Research Association of Australia

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Endorsed by JERAA executive members:
President: Dr Alexandra Wake, Assoc Prof Colleen Murrell, Dr Kayt Davies, Dr Peter English, Dr Kathryn Bowd, Dr Bridget Backhaus, Jolyon Sykes.

Submission from the Journalism Education & Research Association of Australia (JERAA) to the Parliamentary Joint Committee on Intelligence and Security

Prepared by JERAA life member Prof Mark Pearson of Griffith University, with input from JERAA life member Associate Professor Roger Patching and members of the JERAA executive.
This submission was prepared at the request of the JERAA executive.

The Journalism Education and Research Association of Australia Incorporated (JERAA Inc.) is the peak body of Australian journalism educators and researchers from tertiary education and industry organisations. JERAA's primary aim is to raise the standard of teaching and training in journalism in order to foster excellence and integrity in the future generation of journalism practitioners. JERAA also supports research, with the understanding that research can help communities to identify trends and issues, resolve problems, and promote or celebrate excellence in journalism and journalism education. JERAA runs annual awards and grants for journalism students and journalism researchers to recognise and encourage quality in journalism practice, study and research.
This submission from JERAA addresses the terms of reference that are particularly germane to the Association's work and the interests of its members and their students.

Definitional matters and the need to consider 'public interest journalism', not simply 'journalists'
The terms of reference particularly address the experiences of, and implications for, 'journalists and media organisations', each of which are problematic terms in the digital era. Many publishers and communicators might indeed self-identify as 'journalists' and produce their content for 'media organisations' in their traditional sense, but many produce 'public interest journalism' and might be subject to the national security and others laws that are subject to this inquiry and might not fit neatly into definitions of 'journalist' and not produce their content for traditional media organisations. Some of our members and their students are prime examples of those who are likely deprived of many of the privileges accorded to 'journalists and media organisations' despite producing what most would consider 'public interest journalism'.
Most of our members have worked as full-time journalists in mainstream media organisations and many still self-identify as 'journalists' even though their primary income now comes from universities who pay them for their teaching, research and service. Many still engage in award-winning 'public interest journalism', either as paid or unpaid freelancers and columnists for media organisations, as hosts of their own blogs or podcasts, or as editors or contributors to university-based student media products that often produce more 'public interest journalism' than many under-resourced mainstream media organisations. JERAA

also publishes journalism written by students, on its publication *The Junction,* although it is not primarily a 'media organisation'.
Our journalism education members are also academics who sometimes research topics that require interviews with potential whistleblowers from industry, government or agencies and their work might be published as either academic research or as public interest journalism or commentary. When engaged in such work, journalism educators are bound ethically to keep confidences they enter into with their sources, both via their journalism Code of Ethics (many are also MEAA members) and via their institution's research ethics protocols.
Neither do our journalism students fit comfortably within the notion of 'journalists and media organisations', despite the fact that they often produce award-winning 'public interest journalism' on important topics that might bring them under the scrutiny of agencies over their methods or the identity of their sources. Their journalism might be published in university outlets, private blogs or podcasts, or in mainstream media while undertaking unpaid internships as part of their journalism programs. Most leading journalists in Australia are graduates of our journalism education programs and some started their investigative 'public interest journalism' work while still at university. For example, the ABC's 7.30 reporter Paul Farrell won a Walkley Award for his reporting of the 'Nauru Files' while at *The Guardian,* based upon leaked material. His work on that topic had started when he had was a co-founder of 'Detention Logs' as a UTS journalism student.

We thus submit existing and proposed protections for 'journalists and media organisations' be extended to apply to the research and outputs of journalism educators and their students when they are engaged in 'public interest journalism', whether or not they are paid to work as journalists and whether or not their work is published by a 'media organisation' in its traditional sense.

There are many examples of the types of protections that our members and students might miss out on if the focus is upon the narrower 'journalists and media organisations' rather than the actual 'public interest journalism' they produce. Two protections at Commonwealth level are the journalists' shield law in the *Evidence Act* and the opaque and seemingly ineffective device under the 2015 amendments to the *Telecommunications Interception and Access Act* 1979 to protect journalists under the metadata laws.

Shield law protection: Section 126J of the *Evidence Act* 1995 (Clth) , the shield law protection is available to a '*journalist'* - "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium." *'News medium'* means "any medium for the dissemination to the public or a section of the public of news and observations on news". This Commonwealth wording might well include journalism academics who produce journalism or commentary regularly as part of their work and perhaps even students who produce work regularly for campus or mainstream outlets (but not those who are starting out because they might not yet be 'engaged and active'). However, contrast the Victorian wording of its shield law in its *Evidence Act* 2008, s126J where 'journalist' means a person engaged in the ***profession or occupation of journalism*** in connection with the publication of information, comment, opinion or analysis in a 'news medium' (which is defined in similar terms to the Commonwealth definition above). However, at ss2, the Victorian legislation requires that

For the purpose of the definition of journalist, in determining if a person is engaged in the profession or occupation of journalism regard must be had to the following factors—

(a) whether a significant proportion of the person's professional activity involves—

(i) the practice of collecting and preparing information having the character of news or current affairs; or

(ii) commenting or providing opinion on or analysis of news or current affairs—

for dissemination in a news medium;

(b) whether information, having the character of news or current affairs, collected and prepared by the person is regularly published in a news medium;

(c) whether the person's comments or opinion on or analysis of news or current affairs is regularly published in a news medium;

(d) whether, in respect of the publication of—

(i) any information collected or prepared by the person; or

(ii) any comment or opinion on or analysis of news or current affairs by the person—

the person or the publisher of the information, comment, opinion or analysis is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice.

This effectively rules out all journalism educators, students, freelancers and bloggers who might indeed be producing 'public interest' journalism but do not devote a significant proportion of their professional activity doing so, or who are not members of the journalist's union, the MEAA, or whose media outlets are mainstream broadcasters covered by industry codes of conduct or the Australian Press Council. This contrast between the Commonwealth legislation and the Victorian legislation in the area of shield laws highlights a). the need to focus on the ***journalism*** rather than the ***type of individual*** producing or publishing it; and b). the need to ***harmonise media laws*** across the Commonwealth and Australia's other eight jurisdictions (see below).

Metadata laws: The peculiar device designed to limit government agency access to journalists' metadata is even more problematic for journalism educators, our students and others producing public interest journalism beyond the mainstream media. Under s5 of the *Telecommunications Interception and Access Act* 1979 (as amended in 2015), the 'journalist information warrant' protections apply only to sources providing information "to another person who is working in a professional capacity as a journalist", again excluding those not earning their income through journalism such as many journalism educators, other academics, students and amateur bloggers. This is reinforced at s180G which only activates

special precautionary journalist-source protections if the agency (including the AFP and ASIO) "knows or reasonably believes that particular person to be:

(i) a person who is working in a professional capacity as a journalist; or
(ii) an employer of such a person; and
(b) a purpose of making the authorisation would be to identify another person whom the eligible person knows or reasonably believes to be a source."

This process challenges the fundamental function of public interest journalism in a democracy in a number of ways, including:

a. The oft-cited concern that the process is opaque, with anonymous 'public interest advocates' appointed by the Prime Minister and partaking in confidential processes to make submissions about journalism information warrants under section 180X, without the knowledge of the journalist involved or the public.

b. The secrecy of the process imposes a two-year jail sentence under s182A on anyone who reveals almost anything about a journalist information warrant being in existence, requested, applied for, made or revoked. This prevents public scrutiny of the process by journalists, academics and students - even in historical cases - which we argue is an inappropriate level of censorship in a democracy.

c. The process of identifying whether a journalist-source relationship exists (before an agency is required to seek a journalist information warrant) is itself alarming. At s180H it requires the enforcement agency or the AFP to 'know or reasonably believe' that a particular person be:

"(i) a person who is working in a professional capacity as a journalist; or
(ii) an employer of such a person; and
(b) a purpose of making the authorisation would be to identify another person whom the authorised officer knows or reasonably believes to be a source."

This process necessitates government investigations into individuals as to whether they are journalists prior to the access of their metadata. Even a student or academic freelancer ('working in a professional capacity as a journalist') would likely have their metadata accessed without the journalist information warrant process being triggered because an officer could not be expected to 'know or reasonably believe' such a person was a journalist. It means most public interest journalism conducted by journalism educators and their students would not earn the journalist information warrant metadata protections, at whatever level they actually operate. Short of registering, licensing or creating government lists of journalists – the practices adopted by autocratic regimes – the only solution is for such legislation to focus on the 'public interest' journalism itself, rather than the person or organisation creating it. And, of course, any such process should be transparent, with those subject to such an investigation made aware of the inquiry and given the opportunity to justify it as 'public interest' journalism and to explain that their sources are being compromised by metadata access.

d. Despite the limited and secret protections, the AFP revealed journalists' metadata had been accessed 58 times in just 12 months and that two journalist information warrants had been issued (Doran and Belot, 2019). Further, one unauthorised access of

journalists' phone records by the AFP was revealed, prompting calls for better training of officers (Royes, 2017).

Broader implications for democracy

As academics researching journalism and its education, our members also have considerable expertise regarding the implications of national security laws for Australia as a democracy and the global perception of Australia as a country that upholds international human rights of free expression and a free media. JERAA members were abhorred at the recent raids on journalists and newsrooms by the Australian Federal Police and related AFP requests to fingerprint journalists, effectively criminalising them, and we join with colleagues internationally in the condemnation of such actions and in the call for reform of the laws that facilitate them. Executive members of JERAA were in Paris this month for the 5th World Journalism Education Congress where they signed on to the Paris Declaration on Freedom of Journalism Education which acknowledged that in an age of disinformation, misinformation and threats to press freedom, the role of independent journalism is more important than ever, and included the following key principles:

- We believe that there cannot be an environment of quality information without quality journalism.
- We believe that quality journalism depends greatly on proper journalism education and training.
- We believe that journalism education has a fundamental role to play towards more inclusive societies and the United Nations' 2030 development agenda.

The creep of national security and anti-terror laws (more than 60 at Commonwealth level since 2001, plus many more at state level) has been perplexing and has caused concern amongst journalism educators and students because of its threats to media freedom in a democratic society that lacks any formal constitutional protection for free expression or a free media. Over almost two decades JERAA members have made submissions like this one to numerous parliamentary inquiries, law reform bodies and judicial reviews making similar arguments to those that have prompted your current inquiry. Indicative of the creep of these new laws upon journalists is that JERAA life member, Professor Mark Pearson, made little mention of national security laws in the first edition of his textbook *The Journalist's Guide to Media Law* in 1997, but it now necessitates 18 pages on the topic in the 2019 sixth edition.

Further, the most recent moves towards the criminalisation of public interest journalism - including the fingerprinting of journalists subject to the raids on the ABC offices (Lyons, 2019) and the request to Qantas for the travel details of one of the ABC journalists involved in the Afghan Files investigation – has the potential for dire impacts upon journalism education as they are likely to discourage many young people from entering journalism as a career because of its potential criminality and thus deprive this important democratic enterprise of a vital talent base.

We teach journalism students about the central role of source confidentiality to investigative journalism, about how whistleblowers have historically used the media to make revelations that have ultimately changed our society for the better. Numerous royal commissions and parliamentary inquiries have been triggered by investigative journalism and whistleblowers. A browse through the annual Walkley Award winners' lists reveal 'public interest' journalism as the impetus for major exposés, usually involving the use of confidential sources. Recent examples include the Banking Royal Commission, the Royal Commission into Institutional Responses to Child Sexual Abuse, the Royal Commission into

the Protection and Detention of Children in the Northern Territory (Don Dale royal commission) and the ICAC inquiry into the corrupt actions of former NSW Minister Eddie Obeid.

Of course, the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (Queensland's Fitzgerald Inquiry 1987–1989) resulted from investigative journalism by the ABC and the *Courier-Mail* and revealed a complete breakdown of the separation of powers, resulting in the jailing of the police commissioner and three ministers of the crown along with many others. Crucial to that inquiry – and highly relevant to yours - was the revelation of the politicisation of the Queensland Police Special Bureau which was abolished in 1989 following a recommendation by the Fitzgerald Inquiry (Hurst, 2010).

It would be useful for your committee to take evidence on how many of these important public investigations might now be criminalised by the laws that have been put in place in recent years, to the detriment of the democratic society we know today.

Existing protections for journalists are increasingly seen as virtually null and void. For example, the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ('*TOLAA*') appears to allow the AFP (and others) to bypass all the other restrictions on their investigation into journalists' metadata etc., and force tech companies to allow law enforcement agencies to view the data, even if it is encrypted (Taylor, 2019).

Keeping Australians safe ***also*** involves keeping Australians properly **informed** about government and all its operations which impact on citizens' safety and security in a democratic society. Australians need to be kept safe from terrorists, but also safe from impositions upon our democratic system – safety from attacks on information flows, safety from corruption and wrongdoing, and safety from crackdowns on the citizenry (including journalists and academics) that are the hallmarks of autocratic governments. Legislation giving agencies excessive powers to monitor journalists and whistleblowers can influence and even censor the necessary debate over the national security policies and the powers of those very agencies and their resourcing.

The need for a public interest threshold and to harmonise all media laws across jurisdictions

For a government to succeed in an action for breach of confidence that government must convince a court that such a breach of confidence was contrary to the public interest. As High Court Justice Anthony Mason ruled in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39: "Unless disclosure is likely to injure the public interest, it will not be protected" (at para 28). Ordinary citizens and corporations do not need to meet such a threshold. We suggest that a similar threshold be introduced when a secret or revelation has been made in the course of public interest journalism – that an open court hears evidence to determine whether the greater public interest is served by the legal imposition on the journalist or public interest communicator or by the free flow of information in a democratic society and the preservation of confidences between such communicators and their confidential sources. In a similar vein, a recklessness component was introduced to s35P of the *ASIO Act* 1979 (after media representations) as a mechanism for distinguishing journalists' unauthorised disclosure of information about a special intelligence operation from similar disclosures by agency insiders, or 'trusted persons'. Such a device exists in the various shield laws in operation at Commonwealth and most state and territory jurisdictions, although the variation in their wording is something that must be addressed.

The litany of laws restricting 'public interest' journalism across Australia's nine jurisdictions – including the state/territory versions of the various Commonwealth national security laws -

also needs to be addressed. We urge the amendment of publishing restriction laws across a swathe of areas including sexual and juvenile crimes, mental health cases, prisoner interviews, surveillance and national security laws be addressed by a Commonwealth-led initiative at the Council of Attorneys-General introducing a uniform public interest journalism protection. In the digital era, it is an anachronism and an unnecessary imposition on public interest journalism that the various states and territories and the Commonwealth should have different media laws when all digital publications cross those jurisdictional borders. Attorneys-General have worked towards agreement on harmonising many laws in recent years including evidence, consumer law, workplace health and safety and defamation (Australian Parliamentary Counsels' Committee, 2019). We suggest the Commonwealth take the lead in initiating the harmonisation of media laws to include public interest journalism defences or thresholds, particularly those involving restrictions on publication and powers and warrants allowing the potential compromise of journalist-source confidentiality.
With regard to item d (a) in your terms of reference, this would involve granting standing to any individual or organisation involved in the research or publication of 'public interest' journalism (as distinct from just professional journalists and mainstream media organisations) to contest hearings into restrictions on their behaviour (and the compromising of their confidential sources) along with a higher level of transparency about investigations into their actions or their digital data.

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