



Australian Government

Australian Government response to the
Parliamentary Joint Committee on Intelligence and Security
report:

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

OCTOBER 2020

Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report

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

The Government thanks the Committee for its work on these complex and important issues.

The Government provides the following responses to the Committee's recommendations.

Recommendation 1

The Committee recommends that the Australian Federal Police and other Commonwealth law enforcement agencies with investigatory powers amend their operating procedures or practices to advise journalists or media organisations when they are no longer persons of interest in an investigation in circumstances where doing so would not jeopardise the future of the investigation.

The Government agrees to this recommendation.

The Australian Federal Police and other Commonwealth law enforcement agencies will amend their operating procedures or practices as soon as practicable.

The Government notes that in some circumstances, a journalist or media organisation may cease to be a person of interest in an investigation, but have this status reinstated at a later point.

Recommendation 2

The Committee recommends that the current role of the Public Interest Advocate, as provided for under the *Telecommunications (Interception and Access) Act 1979* (TIA Act), for the purposes of Journalist Information Warrants (JIW) sought under Chapter 4, Part 4-1, Division 4C of that Act, be amended and expanded to apply in the following circumstances:

- That warrant-related provisions of the *Crimes Act 1914*, the *Surveillance Devices Act 2004*, the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* (as set out in paragraph 3.122 of the Committee's report) be amended to include mandatory consideration of warrant applications by Public Interest Advocates (PIAs) to cover all overt and covert warrants that relate to a person working in a professional capacity as a journalist or a media organisation, where the warrant is related to the investigation of an unauthorised disclosure of government information, including national security information, or Commonwealth secrecy offence.

- All such warrants are to continue to be issued without notice to the journalist or media organisation, however the PIA is required to make a submission to the issuing authority, addressing the following:
 - the current requirements of section 180T(b)(i)–(vi) of the TIA Act and section 14(2) of the Telecommunications (Interception and Access) Regulations 2017;
 - the public interest in preserving the confidentiality of journalist sources; and
 - the public interest in facilitating the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest.

- The PIA must represent the interests of the principles of public interest journalism, and be authorised to request information to clarify elements of the warrant application provided by ASIO or an enforcement agency to enable the case to be built in their submission.

- All PIAs must:
 - be Queen’s Counsel or Senior Counsel; or
 - have served as a judge of the High Court, a court that is or was created by the Parliament under Chapter III of the Constitution or the Supreme Court of a State or Territory; and
 - be appointed for a minimum term of 5 years.
These requirements should be set out in primary legislation.

- All such warrants sought by an enforcement agency related to a person working in a professional capacity as a journalist or a media organisation, be required to be considered, authorised and issued by:
 - a judge of a superior court of record in the jurisdiction of issue for relevant *Crimes Act 1914* warrants; and
 - a nominated Federal Court judge for relevant *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979* warrants.

- The issuing authority must consider both the application from the agency seeking the warrant, as well as the submission from the PIA.

- Individual PIAs are to be informed of the outcome of the consideration of warrants for which they were responsible for making submissions.

- Journalist information warrants under Chapter 4, Part 4-1, Division 4C of the *Telecommunications (Interception and Access) Act 1979* should only be available in relation to the investigation of (i) a serious offence or (ii) an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for at least 3 years.

The Government agrees to this recommendation.

The Government agrees to the expanded role of Public Interest Advocates in relation to overt and covert warrants, when the warrant is sought for a journalist or media organisation, and where the warrant is related to the investigation of an offence in relation to an unauthorised disclosure of Commonwealth government information or contravention of a Commonwealth secrecy offence.

The Government will also consider how to ensure investigative agencies are able to effectively exercise powers in urgent or emergency situations. As judicial officers undertake warrant authorisation functions in their personal capacity and in addition to their judicial workload, the Government will also consider arrangements to ensure that the workload arising from warrant authorisation is appropriately balanced against other judicial obligations.

The Minister for Home Affairs and the Department of Home Affairs will lead the development of legislation to implement this recommendation in consultation with relevant departments and agencies.

Recommendation 3

The Committee recommends that the *Telecommunications (Interception and Access) Act 1979* be amended to include additional record-keeping and reporting requirements in respect of the role of the Public Interest Advocate in relation to journalist information warrants. At a minimum, the following additional information should be collected and included in the Minister's annual report on the use of the *Telecommunications (Interception and Access) Act 1979*:

- The number of serving Public Interest Advocates and which State or Territory they operate in;
- The qualifications of each Public Interest Advocate (i.e. whether the Advocate is a Queen's Counsel or Senior Counsel, a retired judge or both);
- The number of cases where a Public Interest Advocate contested a warrant application;
- The number of cases where a Public Interest Advocate attended the hearing of a verbal application for a warrant; and
- the number of cases where a warrant was not issued after being contested by a Public Interest Advocate.

The Government agrees to this recommendation.

Consistent with current practices for reporting, careful consideration will be required to ensure that sensitive law enforcement or security investigations and capabilities are not compromised or revealed.

The Government notes that Public Interest Advocates will consider and make submissions on warrant applications. Reporting could be provided on the number of cases in which a Public Interest Advocate did not support the issuing of a warrant.

The Minister for Home Affairs and the Department of Home Affairs will lead the development of legislation to implement this recommendation.

Recommendation 4

In respect of the expanded role of Public Interest Advocates (following implementation of Recommendation 2), the Committee recommends that the *Crimes Act 1914*, the *Surveillance Act 2004* and the *Telecommunications (Interception and Access) Act 1979* be amended to include (at a minimum):

- Similar recordkeeping and annual reporting requirements to those that already exist in relation to journalist information warrants under the *Telecommunications (Interception and Access) Act 1979*; and
- The additional requirements outlined by the Committee in Recommendation 3.

The Government agrees to this recommendation.

Consistent with agencies' current practices for reporting, this reporting will need to ensure that sensitive law enforcement or security investigations and capabilities are not compromised or revealed, and may require the maintenance of the distinction between reporting for law enforcement agencies and reporting for intelligence agencies.

The Minister for Home Affairs and the Department of Home Affairs will lead the development of legislation to implement this recommendation.

Recommendation 5

The Committee recommends that the *Crimes Act 1914*, the *Surveillance Devices Act 2004*, the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979* be amended to include the following additional recordkeeping and reporting requirements:

- On an annual basis, the Attorney-General or the Minister of Home Affairs should provide information to the public about:
 - The number of covert and overt warrants that were obtained by enforcement agencies under Commonwealth legislation in relation to journalists or media organisations; and
 - The specific offences to which each warrant related.
- In addition to ASIO's existing reporting requirements, ASIO should be required to:
 - Provide a report to the Attorney-General on each journalist information warrant that is issued, consistent with other types of warrants issued under the *Telecommunications (Interception and Access) Act 1979* and the *Australian Security Intelligence Organisation Act 1979*; and

- Include, in its annual report, the number of times ASIO applied for a warrant in relation to a media organisation or a person working in a professional capacity as a journalist (including, but not limited to, the number of applications for a journalist information warrant).

The Government agrees to this recommendation.

The Government will implement this recommendation to include additional recordkeeping and reporting requirements in relation to warrants obtained in relation to a journalist or media organisation, in investigations of an unauthorised disclosure of government information, including national security information, or Commonwealth secrecy offence.

It is a long-standing principle that reporting on the number of warrants issued each year is provided to Government in a way that avoids prejudice to sensitive law enforcement and national security investigations and capabilities. In some cases, statistics are provided in a classified addendum to an annual report. Implementation of this recommendation will be guided by this long-standing principle.

The Australian Security Intelligence Organisation (ASIO) currently provides reports to the Attorney-General on warrants issued under the Telecommunications (Interception and Access) Act and ASIO Act, and includes in its annual report certain details on the use of its powers, in accordance with section 94 of the ASIO Act. The Government will take a similar approach for the recommended reporting requirement in relation to media organisations and journalists.

The Minister for Home Affairs and the Department of Home Affairs will lead the development of legislation to implement this recommendation.

Recommendation 6

The Committee recommends that, as part of its upcoming review of all secrecy provisions in Commonwealth legislation (in accordance with the recommendation of this Committee in its *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*) the Attorney-General's Department specifically consider whether the relevant legislation adequately protects public interest journalism. The Committee also recommends that this ongoing review be prioritised for finalisation and report by June 2021.

The Government agrees to this recommendation.

The Attorney-General and the Attorney-General's Department will lead implementation of this recommendation in consultation with relevant Commonwealth departments and agencies.

Recommendation 7

The Committee recommends the Government give consideration to whether defences for public interest journalism should be applied to other secrecy offences within relevant

Commonwealth legislation. Any additional defences should be based on the defence provided by section 122.5(6) of the *Criminal Code Act 1995*.

The Government agrees to this recommendation.

The Attorney-General and the Attorney-General's Department will lead implementation of this recommendation as part of the review of secrecy offences under Recommendation 6.

Recommendation 8

The Committee recommends that the Australian Government give consideration to the formulation of a mechanism to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution.

Additionally, the Committee recommends that all intelligence and law enforcement agencies prioritise the creation of a media disclosure liaison unit to facilitate this formal consultation.

The Government agrees to this recommendation.

The Government supports ongoing and positive collaboration with journalists and media organisations, and welcomes the Committee's recommendation in this regard.

The Government will carefully consider an appropriate mechanism for consultation with the originating agency of national security classified information. Consideration will be required as to how the release of information would impact domestic agencies and relationships with international partners, and to prevent the exploitation of the scheme by hostile actors. It would also not be appropriate for originating agencies to give legal advice to journalists and media organisations.

The Minister for Home Affairs and the Department of Home Affairs will lead implementation of this recommendation in consultation with journalists and media organisations.

Recommendation 9

The Committee recommends that the Government formally responds to the recommendations of the *Review of the Public Interest Disclosure Act 2013: An independent statutory review* conducted by Mr Philip Moss AM before the completion of the Senate Environment and Communications References Committee's inquiry into press freedom.

The response should include consideration of:

- Amending the *Public Interest Disclosure Act 2013* (PID Act) to make it easier to understand for both disclosers and agencies;

- Simplifying the public interest test in the PID Act;
- Strengthening the reprisal protection provisions in the PID Act; and
- Improving alignment between public and private sector whistleblower regimes.

Recommendation 10

The Committee recommends that the *Public Interest Disclosure Act 2013* be amended to require the following occur when a Public Interest Disclosure is made by an official connected to an intelligence agency regarding the actions of that agency:

- the originating agency report a Public Interest Disclosure to the Inspector General of Intelligence and Security within 24 hours if it is indicated as urgent by the discloser, or as soon as possible after the disclosure is made, but within the current 14 day required timeframe; and
- the originating agency maintain contact and notification with the Inspector General of Intelligence and Security during the 90 day investigation window to outline investigation progress and potential outcome timelines, including possible extensions.

Recommendation 11

The Committee recommends that the Australian Government provide for the mandatory reporting of aggregated statistics, related to numbers and timeframes of all Public Interest Disclosures, to be made to the Parliament every six months by the Attorney-General.

The Government agrees to recommendations 9 – 11.

The Attorney-General and the Attorney-General's Department will lead consideration and implementation of these recommendations, in consultation with relevant stakeholders, including the Office of the Inspector-General of Intelligence and Security and the Office of the Commonwealth Ombudsman.

The Government will release its response to the *Review of the Public Interest Disclosure Act 2013* conducted by Mr Philip Moss AM (Moss Review) before the completion of the Senate Environment and Communications References Committee's inquiry into Press Freedom in 2021.

Recommendation 12

The Committee recommends that the Auditor-General prioritise the adoption of the identified 2019-2020 potential audit Implementation of the revised Protective Security Policy Framework.

The Australian National Audit Office (ANAO) will respond directly to the Committee on this recommendation.

The Government respects the independence of the Auditor-General as an officer of the Australian Parliament. It notes that in exercising their functions or powers, the Auditor-General is not subject to direction, including in relation to whether a particular audit is to be conducted. As an independent officer of the Parliament, Auditor-General responses to Committee inquiry report recommendations are provided directly to the Committee and do not form part of the Government response.

Recommendation 13

The Committee recommends that training on the application of the Protective Security Policy Framework requirements for sensitive and classified information be made compulsory for all relevant Commonwealth officers and employees.

The Government agrees to this recommendation.

The Protective Security Policy Framework currently mandates that all relevant Commonwealth ‘entities must provide all personnel, including contractors, with security awareness training at engagement and annually thereafter’. Security awareness training includes the application of security markings and classifications, along with other information control measures.

The Attorney-General and the Attorney-General's Department are responsible for the Protective Security Policy Framework.

Recommendation 14

The Committee recommends that the Inspector-General of Intelligence and Security (IGIS), conduct a preliminary inquiry into the application of national security classifications in intelligence agencies, where such an inquiry may include:

- Examination of a sample of classified material in relation to the appropriateness of the classification; and
- Reviewing the classification procedures of intelligence agencies.

The IGIS should advise the Committee of the outcome of any preliminary inquiry into the application of national security classifications, and to the extent possible, provide information to the public on the outcome of an inquiry. Information made available to the public may include analysis of apparent trends or culture within intelligence agencies in relation to applying national security classifications, or commentary on statistical trends and outcomes, as appropriate.

Additionally, any recommendations made by the IGIS to alter or improve internal practices should be prioritised by the relevant agency and reported to the Committee as part of its annual Administration and Expenditure Review.

The Government agrees to this recommendation in principle.

The Government notes that any decision to initiate a preliminary inquiry is a matter for the independent Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*.

Recommendation 15

The Committee recommends that the Australian Government promote consideration of harmonisation of State and Territory shield laws through National Cabinet, with relevant updates incorporated to expand public interest considerations, and to reflect the shifting digital media landscape.

The Government agrees to this recommendation.

The Attorney-General and the Attorney-General's Department will lead implementation of this recommendation in consultation with states and territories through the appropriate Ministerial forum.

Recommendation 16

The Committee recommends that the Australian Government review and prioritise the promotion and training of a uniform Freedom of Information culture across departments, to ensure that application of the processing requirements and exemptions allowed under the *Freedom of Information Act 1982* are consistently applied.

The Government agrees to this recommendation.

The Office of the Australian Information Commissioner (OAIC) is responsible for raising awareness of Freedom of Information (FOI) and educating Australians and agencies about their rights and obligations under the *Freedom of Information Act 1982*. The OAIC will provide guidance and advice to FOI practitioners through new and updated FOI Guidelines, promoted in Information Contact Officers Network newsletters which are released by the OAIC at least quarterly, and further promotion of its new 'FOI Essentials toolkit for Australian Government agencies and ministers' (<https://www.oaic.gov.au/s/foi-essentials/>), a new resource for FOI practitioners. This resource steps FOI practitioners through the key elements of the FOI Act, and provides 'tips and tools' for managing FOI requests. The Australian Government Solicitor provides a comprehensive program of legal training courses for both lawyers and non-lawyers from across government, including on FOI decision-making and processes.

The Attorney-General and the Attorney-General's Department will identify additional opportunities to promote this material and training across departments.