

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

6 September 2019

Press Freedom Inquiry

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Environment and Communications References Committee ('the Committee'), responding to terms of reference (a) and (b) of the inquiry into press freedom.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

Summary of Recommendations:

Term of Reference (a): Justification for Special Protections

1. Amend the *Crimes Act 1914* (Cth) to include factors outlined in Home Affairs Minister Peter Dutton's direction to the Australian Federal Police (August 2019), regarding the importance of a free and open press in Australia's democratic society, exhausting alternative investigative options and considering broader public interest implications before undertaking investigative action involving journalists and news media organisations.
2. Amend the *Crimes Act 1914* (Cth) to include factors considered in Section 180T(2) of the *Telecommunications (Interceptions and Access) Act 1979* (Cth).

Term of Reference (b): Whistleblower Protection Scheme

1. Introduce similar provisions into the *Public Interest Disclosures Act 2013* (Cth) ('*Public Interest Disclosures Act*'), to those enacted in the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, to establish greater protection of public sector whistleblowers.
2. Exclude personal employment grievances from conduct that may be disclosed under the *Public Interest Disclosures Act*.
3. Amend the *Public Interest Disclosures Act* to enable public employees to report on occupational misconduct.
4. Review the operation of, and interaction between, various public service Acts, Codes of Conduct and the *Public Interest Disclosures Act* to identify how they work together and how they might conflict with each other.

5. Provide better support for disclosers, and potential disclosers, by enabling them to get help and advice from lawyers and other professional support services.
6. Include a proactive obligation on Principal Officers and public officials with a supervisory role to support disclosers and other public officials in performing a function under the *Public Interest Disclosures Act*.

If further information is required, please contact us at anulrsjresearchhub@gmail.com.

On behalf of the ANU LRSJ Research Hub,

Authors:

- Justification for Special Protections: *Bridie Adams and Andrew Ray*
- Whistleblower Protection Scheme: *Mara Burslem and Holly Ashburner*

Editors: *Jessica Hodgson and Saye Kaeo Saylan*

Under the supervision of: *Jelena Gligorijević, Lecturer, ANU College of Law*

Term of Reference (a): Justification for Special Protections

Term 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.

Journalists and media organisations have regularly been described as the fourth limb of government, and accordingly require special protections at law to be able to perform their functions properly. The press plays a crucial role in ensuring free and fair elections, by communicating and critiquing government policy and actions, political parties and candidates.¹ This analysis is supported by Australian judicial decisions supporting the establishment and continued support of the implied freedom of political communication ('IFPC') which is tied closely to the concept of free and fair elections.

The IFPC is a limit on federal and state legislative and executive power (not a personal right) that was derived from the *Australian Constitution* by the High Court in *Australian Capital Television Pty Ltd v Commonwealth*.² In deriving the IFPC, the High Court considered sections of the *Constitution* that relate to elections, effectively reasoning that for Australian citizens to make an *informed* choice when casting a ballot, they must be free to discuss political matters. This distinction is important when considering the current formulation of the *McCloy* test (as it is commonly referred to by the High Court), which is used to assess whether a law or action has breached the IFPC:

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If "yes" ... is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If "yes" ... is the law reasonably appropriate and adapted to advance that legitimate objective ...?³

The IFPC is relevant in considering whether current protections offered to journalists and media organisations in the Commonwealth warrant regimes are appropriate, as the IFPC may inform judicial decisions concerning the validity of acts governing the regimes or, more likely, of individual decisions made under those acts to grant a warrant. This is because executive decisions in breach of the IFPC will fall outside government power and therefore be invalid. Similar arguments form part of the Australian Broadcasting Corporation's ('ABC') challenge of the recent 'Afghan Warrant' on multiple grounds, including that the decision-maker did not consider the IFPC.⁴

¹ See, eg, Ben Doherty and Australian Associated Press, 'Icac finds that Eddie Obeid, Joe Tripodi and Tony Kelly engaged in corrupt conduct', *The Guardian* (online, 3 August 2017) <https://www.theguardian.com/australia-news/2017/aug/03/icac-finds-that-eddie-obeid-joe-tripodi-and-tony-kelly-engaged-in-corrupt-conduct?fbclid=IwAR1AcG6U0vxcbzjmwQJ8JQIv_Iztlep35ZXkt2BMwBU0LyxfaQGzD1fKwbk>; RMIT ABC Fact Check, 'Fact checking key claims of the 2019 federal election leaders' debate', *ABC News* (online, 14 June 2019) <https://www.abc.net.au/news/2019-04-29/fact-check-perth-leaders-debate/11056388?fbclid=IwAR0VtPMsTGjzIXwzuLGkkJhyCEhTbQVnq6YzATeeJ4sD3PF_Y-r2booNQkc>.

² (1992) 177 CLR 106. For academic commentary, see, eg, Leanne Griffiths, 'The Implied Freedom of Political Communication: The State of the Law Post *Coleman* and *Mulholland* (2005) 12 *James Cook University Law Review* 93, 94. For application to a state legislature, see, eg, *McCloy v NSW* (2015) 257 CLR 178 ('*McCloy*').

³ *Clubb v Edwards & Anor; Preston v Avery & Anor* [2019] HCA 11 [5] (Kiefel CJ, Bell and Keane JJ).

⁴ See the interlocutory decision *Australian Broadcasting Corporation v Kane* [2019] FCA 1312.

The existence of the IFPC also suggests journalists should be afforded special protection from government interference given the role they play in reporting on government policy and action, and the importance of this in ensuring that Australians can make informed decisions at the polling booth.

Case Study: Current Protections Afforded to Journalists

The special role of the press justifies the conferral of special privileges and immunities from unrestricted governmental action. This has been recognised in Commonwealth legislation, including the *Telecommunications (Interceptions and Access) Act 1979* (Cth) (*‘Telecommunications Act’*). The *Telecommunications Act*, among other things, governs the interception of, and access to, communications and metadata of Australian citizens.⁵ At the time of enactment of the metadata retention scheme, special protections were afforded to the collection and use of journalist information. These protections are contained within section 180T of the *Telecommunications Act*.

Section 180T(2) states that an issuing authority must not issue a journalist information warrant unless the issuing authority is satisfied that the warrant is ‘reasonably necessary’ for the purposes of: the enforcement of criminal law, finding a missing person, imposing a pecuniary penalty or protection of public revenue, or the investigation of a serious offence or an offence punishable by at least 3 years’ imprisonment.⁶ Additionally, section 180T(2) requires a decision-maker to consider whether the public interest in issuing the warrant outweighs the interest in protecting the confidentiality of the identity of the source, having regard to: the privacy of the people interfered with, gravity of the subject matter, the extent to which information would assist investigation, whether reasonable attempts have been made to obtain the information by other means, any submissions made by a Public Interest Advocate, and any other matters which the issuing authority considers relevant.⁷ In this way, section 180T imposes additional requirements and sets a higher threshold for obtaining a journalist information warrant than for accessing similar information from an individual. This higher threshold, in turn, protects journalists and the freedom of the press.

Recommended Changes to the *Crimes Act 1914*

The recent warrants utilised to search the ABC offices and the home of journalist Annika Smethurst were not authorised under Division 4C of the *Telecommunications Act*, but, rather, under section 3 of the *Crimes Act 1914* (Cth) (*‘Crimes Act’*).⁸ The *Crimes Act* contains no such protection provisions for journalist and media organisations. Significantly, recent changes to section 3F of the *Crimes Act*, which include the power

⁵ This scheme has been criticised by academics, see, eg, Nicolas Suzor et al, ‘The passage of Australia’s data retention regime: national security, human rights and media scrutiny’ (2017) 6(1) *Internet Policy Review* 1.

⁶ *Telecommunications (Interceptions and Access) Act 1979* (Cth) s 180T(2).

⁷ Ibid.

⁸ Josh Taylor, ‘Australia’s anti-encryption laws being used to bypass journalist protections, expert says’, *The Guardian*, published 8 July 2019, viewed on 20 August 2019, <https://www.theguardian.com/australia-news/2019/jul/08/australias-anti-encryption-laws-being-used-to-bypass-journalist-protections-expert-says>.

to ‘add, copy, delete or alter ... data’ when exercising a search warrant under section 3 of the *Crimes Act* may make the protections included in section 180T of the *Telecommunications Act* redundant, as investigating agencies may prefer to seek a warrant under the *Crimes Act* rather than under the *Telecommunications Act*.

Home Affairs Minister Peter Dutton recently gave a ministerial direction to the Australian Federal Police to ‘take into account the importance of a free and open press in Australia’s democratic society,’⁹ to ‘exhaust alternative investigative options,’¹⁰ and ‘to consider broader public interest implications before undertaking investigative action involving a professional journalist or news media organisation.’¹¹ This recent direction includes some of the protections legislated in section 180T(2) of the *Telecommunications Act*. Subsequently, it would be beneficial to amend the *Crimes Act* to include both of the factors outlined in Minister Dutton’s direction and the additional considerations in section 180T(2). This would allow judicial oversight over these factors and ensure consistency between the two warrant processes.

Allowing a judge to exercise discretion over the warrant application through codified journalist protections, as opposed to ministerial discretion, better protects the separation of powers doctrine in the *Australian Constitution*. The weighing up of journalist protections against the “reasonably necessary” and national security requirements should be part of the courts’ role in providing oversight over state actions, as this aids transparency and accountability within the executive branch of government. Furthermore, judicial discretion and codified protections ensure the continuity and stability of the strength and content of the protections. In its current form, the executive order can be overridden or replaced with another, and that could remove protections from journalists. Therefore, it would be beneficial for the *Crimes Act* to be updated to reflect the protections in section 180T and the recent ministerial direction, thus preventing the *Crimes Act* from being a potential loophole to execute a warrant against unprotected journalists and media organisations.

⁹ Jade Macmillan, ‘Peter Dutton orders AFP to consider importance of press freedom before investigating reporters’, *ABC News* (online, 9 August 2019) <<https://www.abc.net.au/news/2019-08-09/peter-dutton-orders-afp-press-freedom-investigating-journalists/11401108>>.

¹⁰ Ibid.

¹¹ Ibid.

Term of Reference (b): Whistleblower Protection Regime

Term of reference (b): the whistleblower protection regime and protections for public sector employees.

The protection of whistleblowers, in both the private and public sectors, is imperative to ensuring continued protection of press freedoms. The special normative relationship between a member of the press and a whistleblower is intrinsically linked to broader notions of justice, and is comparable to the special relationship between a legal practitioner and their client. It follows that whistleblowers should be awarded similar protections in order to best achieve transparency and accountability.

We welcome the legislative protection for private sector whistleblowers with the introduction of the Corporate Sector Whistleblower Protection Regime and enactment of the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.¹² This Act alters existing legislation in the *Corporations Act 2001* (Cth) and the *Taxation Administration Act 1953* (Cth), awarding protection to corporate whistleblowers, provided a number of requirements are fulfilled.¹³ This includes initial disclosure of any information to the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA) prior to reporting to the press. Although these enactments are specifically targeted at corporate employees, raising the standard of protection for any employment sector in Australia serves to legitimise and ensure proper protection of all whistleblowers.

The new legislation includes a provision that all companies must introduce a ‘Whistleblower Protection Policy’ and provide relevant staff training from 2020 onwards, establishing standards by which both public and private businesses can be assessed and penalised for failing to carry out proper process.¹⁴ We recommend that a similar provision be introduced into the *Public Interest Disclosures Act 2013* (Cth) (*‘Public Interest Disclosures Act’*) to ensure that public sector employees do not experience a hostile work environment or negative repercussions for disclosing information in the public interest.

We further recommend that the *Public Interest Disclosures Act* be amended to exclude personal employment grievances from conduct that may be disclosed to ensure that ASIC and APRA are focusing resources on issues of higher importance.

The *Public Interest Disclosures Act* does not extend protection to all public employees, and excludes parliamentarians and their staff. We recommend that an independent review be conducted as to whether enabling parliamentary employees to report on occupational misconduct would interfere with the parliamentary privilege of exclusive cognisance. We consider that the current policy of internally addressing alleged wrongdoings in Parliament is circular and not in the broader interest of justice.

The *Public Interest Disclosures Act* should be aligned with the recent private sector legislation, and establish clear and transparent structures to enforce the protection of whistleblowers and ensure that their concerns are appropriately escalated in a timely manner. More specifically, ambiguities with conflicting

¹² Australia Securities and Investments Commission, ‘Protections for corporate sector whistleblowers’ (Media Release, 1 July 2019).

¹³ *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth) sch 1 pt 1 s 2.

¹⁴ *Ibid* sch 1 pt 1 s 9(1317AI).

regulation and legislation should be clarified to overcome potential unauthorised disclosures. For example, under Public Service Regulation 2.1, public service employees have a duty not to disclose information obtained in the course of their duties.¹⁵ However, this may be overcome if an employee discloses within the constraints of the *Public Service Act*. It is unclear how the various public service Acts and Codes of Conduct interact with the *Public Interest Disclosures Act*. Therefore, we recommend a general review of the operation of these Acts and how they work together.

Finally, we endorse the recommendations outlined in the ‘Review of the Public Interest Disclosure Act 2013’:

To provide better support for disclosers, or potential disclosers, by enabling them to get help and advice from lawyers, and other professional support services such as unions, Employee Assistance Programmes, and professional associations, as well as include a proactive obligation on Principal Officers and any public official with a supervisory role to support disclosers and other public officials within their agency in performing a function or role under the PID Act.¹⁶

¹⁵ *Public Service Regulations 1999* (Cth) reg 2.1.

¹⁶ Philip Moss, *Review of the Public Interest Disclosure Act 2013* (Independent Review, 15 July 2016).