

## CHAPTER 4

### Literary proceeds matters and safeguards for freedom of speech and of the press

4.1 A prominent issue raised during the inquiry, particularly in relation to literary proceeds investigations under the POC Act, was how such investigations could be undertaken without inappropriately curtailing freedom of speech and the freedom of the press.

4.2 The lack of any clearly stated protocols around the protection of journalists' confidential sources during such investigations was a key concern raised by media organisations and other submitters to the inquiry.

#### Literary proceeds matters and freedom of speech

4.3 The AFP noted that the Australian Law Reform Commission, in its 1999 review of proceeds of crime legislation, recommended the introduction of a Commonwealth literary proceeds regime, and held that confiscation of literary proceeds should not be viewed as an unreasonable inhibition on freedom of speech, as it is not speech itself that is sought to be controlled through such orders, but rather the profit generated from that speech.<sup>1</sup> The AFP argued:

Literary proceeds action does not prevent a person from telling his or her story to the media. The purpose of literary proceeds provisions is to prevent a person from deriving a financial benefit from criminal activity.<sup>2</sup>

4.4 Two submitters to the inquiry contended that literary proceeds matters do impede free speech. Blueprint for Free Speech argued that literary proceeds orders represent an express limitation on the right to freedom of expression and can unfairly punish offenders:

It is an absurd situation where a media commentator can make comment on an accused's case or personal history and the person about whom that comment is made cannot answer that commentary on equal terms...

[W]hilst from a policy perspective [the literary proceeds regime] is clearly borne of a wish not to normalise and popularise crime, it is doubtful that in most cases a publishing of an account of that crime will encourage others to do the same...The embargo on literary proceeds seeks therefore only to further punish the person who committed the crime, and it is a punishment that falls outside of sentencing principles normally imposed by a Court following conviction.<sup>3</sup>

---

1 *Submission 6*, p. 12.

2 *Submission 6*, p. 12.

3 *Submission 7*, p. 5.

4.5 Mr Bruce Arnold, Assistant Professor at the University of Canberra Law School, argued that offenders should not be the subject of literary proceeds orders if they have already been convicted and punished for an offence committed:

It is appropriate for courts to order seizure of assets gained in the course of crime. Once people have been duly convicted for breaking the law and paid the penalty, in particular through time in prison, their punishment in principle should be complete...[W]e should not seize wealth that is created *post*-conviction on the basis of notoriety.<sup>4</sup>

***Discretion of the courts in literary proceeds matters***

4.6 The AFP emphasised that a court has a wider discretion in deciding whether to make a literary proceeds order than for other orders under the POC Act, allowing various factors and individual circumstances to be taken into account. The factors a court may take into account are: the nature and purpose of the product or activity; whether supplying the product or carrying out the activity was in the public interest; the social, cultural or educational value of the product or activity; the seriousness of the offence; how long ago the offence was committed; and any other matter the court thinks fit.<sup>5</sup>

4.7 Seven West noted that while a court may take into account public interest and related matters when determining whether to make a literary proceeds orders, there is currently no similar consideration required before applications for production orders or search warrants are made under the POC Act. It argued that this 'is likely to result in a chilling effect upon freedom of speech as media organisations are less likely to enter into agreements to interview persons convicted of crimes and report on those stories'.<sup>6</sup> Seven West argued that public interest factors, such as those in section 154 of the POC Act, should be taken into account before a production order or search warrant is granted in relation to a literary proceeds investigation.<sup>7</sup>

4.8 The AFP argued that public interest factors should be taken into account in determining final literary proceeds orders, as is currently the case, rather than earlier in the investigative process:

The focus for the magistrate at the investigative stage should be on whether the threshold for the use of information gathering powers has been met, not whether the ultimate literary proceeds action should be determined in a particular way. At the time of making the production order or issuing a search warrant, many of the public interest factors present in section 154 would not be known as the publication or interview may not have been produced.<sup>8</sup>

---

4 *Submission 2*, p. 4.

5 *Submission 6*, p. 12. The list of factors to be taken into account by a court when deciding whether to make a literary proceeds order are found in section 154 of the POC Act.

6 *Submission 4*, p. 16.

7 *Submission 4*, p. 16.

8 *Submission 6.1*, p. 8.

## Protocols for AFP investigations involving media organisations

4.9 In addition to the question of whether literary proceeds investigation inherently represent a limitation on free speech, submitters and witnesses discussed in some detail how the AFP interacts with media organisations during investigations, what protocols (if any) govern such interactions, and whether incidents like the recent Seven West matter have the effect of limiting press freedoms by inappropriately exposing confidential information including journalists' sources.

### *Existing conventions between the AFP and media organisations*

4.10 Representatives from the ABC noted that, in their experience, most requests for information made by the AFP are made on an informal basis, and there are no express protocols for dealing with media organisations when subpoenas or other investigative powers are used:

[T]he ABC's dealings with the AFP have been quite cooperative over the years. We acknowledge that there has usually been an understanding of the ABC's position in relation to confidential sources by the AFP—and other police forces, for that matter—and a willingness to demonstrate flexibility in finding a balance between our ethical obligations and their own investigations. That said, this flexibility is at the moment solely dependent on informal engagement by individuals case by case. Should a more heavy-handed approach ever be taken...the issue of due consideration for the protection of sources has no formal status whatsoever in investigative processes of this kind[.]<sup>9</sup>

4.11 Representatives from Seven West also stated that their relationship with the AFP in general terms had been cooperative and productive, and that informal arrangements are often made with the AFP in relation to information.<sup>10</sup> Mr Ross Coulthart highlighted that the recent execution of search warrants at Seven West premises by the AFP was conducted in stark contrast to this approach, and argued that this episode has had a 'chilling effect' on journalists both within and outside Seven West:

[A]ll of us are just taken aback at the fact that the premier law enforcement agency in the country decided to raid a media organisation in order to find out information that they could have found out by other means, in a more gentle way. I do not think anybody is seriously proposing, now that the dust has settled, that we would have in any way tried to evade answering their questions. We have a very good working relationship with the Federal Police, often on very sensitive issues. There are things that we routinely decide not to publish, because we do not want to jeopardise ongoing investigations that we know the feds are involved in. So, yes, it has had a deadening effect for a lot of journalists[.]<sup>11</sup>

---

9 Mr Alan Sunderland, ABC, *Committee Hansard*, 7 April 2014, p. 58.

10 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, pp 48 and 55; Mr Bruce McWilliam, Seven West Media, *Committee Hansard*, 7 April 2014, p. 51.

11 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, p. 55.

4.12 The ABC agreed that the use of investigative powers can have a deleterious effect on press freedoms if not managed carefully:

[T]he exercise of search warrants and other investigative powers (such as interception of telecommunications) against media organisations, and even the risk and fear that a search warrant may be exercised, has the potential of adversely affecting freedom of speech and the freedom of the media... strong protections for confidential sources are vital to ensuring that media organisations can publish stories that are in the public interest that would otherwise never be published.<sup>12</sup>

*Seizure or exposure of material unrelated to an investigation*

4.13 Seven West expressed concern that confidential material unrelated to the terms of a search warrant could be located by the AFP during the execution of a warrant, and that this had occurred during the recent incident involving warrants being executed in relation to Seven West:

Whilst on Seven West's premises, the AFP had access to and were able to observe a range of documents and email communication relating to past, current and future news and current affairs stories unrelated to Schapelle Corby or the Corby family, some of which involve confidential information and confidential sources.<sup>13</sup>

4.14 Mr Ross Coulthart from Seven West noted that this concern is particularly acute in relation to the retrieval of digital information under a search warrant:

With technology these days it is now possible to copy entire databases. So, on the day [the warrants were executed], we had computer forensics people coming into the building with computer forensics equipment which allowed them to copy entire computer databases. Indeed, a hard drive was copied, scanned and gone through. At any one time in that office there are numerous confidential sources. The particular hard drive that was copied, of the executive producer of the program, is very much the mother lode of all story ideas for potential programming. It is a huge concern for us that there needs to be some kind of assurance...that there will not be a scatter-gun approach to accessing data when Federal Police raid a journalist's office.<sup>14</sup>

4.15 Seven West stated that while the AFP had informed it that all documents seized during the recent execution of search warrants had been returned, Seven West 'has no knowledge of whether any confidential material has been accessed or copied prior to being returned'.<sup>15</sup> It argued for the establishment of a protocol concerning how documents obtained through a search warrant are stored and accessed in cases where a

---

12 *Submission 3*, pp 2-3.

13 *Submission 4*, p. 7.

14 Mr Ross Coulthart, Seven West Media, *Committee Hansard*, 7 April 2014, p. 48.

15 *Submission 4*, p. 9.

---

party claims that documents are of a confidential or sensitive nature and are unrelated to the subject matter of the search.<sup>16</sup>

4.16 The AFP submitted that there are clear legislative rules governing what materials can be seized under a search warrant, and that the AFP 'is very limited as to what it can do' with information obtained under a warrant that is not relevant to the warrant (for example, unrelated information contained on a computer that was seized under a warrant).<sup>17</sup> The AFP noted that Division 3 of Part 3-5 of the POC Act governs how material seized under a search warrant must be dealt with, and includes requirements that things seized under a warrant must be returned where the reason for the thing's seizure no longer exists or the thing is not going to be used in evidence. Further, section 266A of the POC Act specifies the circumstances in which the AFP may disclose information obtained under a search warrant to other authorities.<sup>18</sup>

4.17 Representatives from the AFP also noted that under section 126H of the *Evidence Act 1995* (Cth) (Evidence Act), journalists are not compelled in any court proceedings to disclose the identity of confidential informants, and that the AFP works with this in mind when exercising investigative powers.<sup>19</sup>

4.18 Seven West noted, however, that this does not prevent the disclosure of confidential information to the AFP itself, notwithstanding the inability of such information to be used in later court proceedings:

[T]he mere existence of section 126H of the Evidence Act is not an answer to the concerns raised by Seven West Media and others in their submissions to the Inquiry. This is because the existence of that section does not act as a basis for refusing to provide documents in response to a section 202 Production Order or a section 225 search warrant, nor is it a basis to object to the AFP reading such material once it has been seized.

Had confidential source material been read or seized by the AFP from Seven West Media, there is nothing which could have protected the disclosure of those documents to the AFP apart from a claim for legal professional privilege.<sup>20</sup>

#### *Protection of legally privileged information*

4.19 Submitters noted that there is a clear protocol in place to deal with material identified during the execution of a search warrant by the AFP over which legal professional privilege is claimed. This protocol was agreed to by the AFP and the Law Council of Australia in a set of guidelines dealing with the execution of

---

16 *Submission 4*, p. 16.

17 *Submission 6*, p. 13.

18 *Submission 6*, p. 13.

19 Assistant Commissioner Ramzi Jabbour, AFP, *Committee Hansard*, 7 April 2014, p. 19.

20 *Supplementary Submission 4.1*, p. 6.

search warrants on lawyers' premises, law societies and like institutions in circumstances where a claim of legal professional privilege is made.<sup>21</sup>

4.20 The effect of these guidelines is that where the lawyer or Law Society is prepared to co-operate with the AFP, no member of the police team executing a warrant will inspect any document identified as potentially within the warrant until the lawyer or Law Society has been given the opportunity to claim legal professional privilege in respect of any of the documents identified. Where a claim is made, no member of the police search team will inspect any document that is the subject of the claim until the claim is either abandoned or dismissed by a court.<sup>22</sup> The guidelines set out detailed procedures for how this process is managed to ensure the confidentiality of such documents until a determination is made.

4.21 The AFP noted that there are clear procedures followed in cases where legal professional privilege is claimed:

Section 264 of [the POC Act] specifically provides that the provisions in Part 3.5 (information gathering powers) do not affect the law relating to legal professional privilege. The AFP follows the guidelines contained in the CDPP Manual where search warrants are being executed at premises occupied by a lawyer, law society or similar body, or at other premises where it is likely that there will be documents covered by legal professional privilege.<sup>23</sup>

### ***Options for strengthening protocols between the AFP and media organisations***

4.22 There was consensus among stakeholders that better protocols could be developed to deal with AFP investigations involving media organisations and journalists.

#### *General guidelines for investigations involving media organisations*

4.23 The ABC argued that the AFP's current investigative processes and powers should be revised so as to ensure that 'they do not interfere with the newsgathering, current affairs and investigative operations of media organisations' and that investigative powers including search warrants 'are rarely (if ever) exercised in order

---

21 Law Council of Australia, *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, p. 2, <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines> (accessed 17 April 2014).

22 Law Council of Australia, *General Guidelines between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances where a Claim of Legal Professional Privilege is Made*, p. 2, <http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines> (accessed 17 April 2014).

23 *Submission 6*, p. 14.

---

to force a journalist or his or her media employer to breach their ethical obligations'.<sup>24</sup> Further:

[T]he ABC supports the introduction of a higher evidentiary threshold which must be overcome before the AFP can exercise its investigative powers against a media organisation, and believes that this threshold should be particularly stringent in situations where the AFP might require a media organisation to disclose, against its will, information identifying a confidential source.<sup>25</sup>

4.24 The ABC referred to regulatory requirements recently introduced in the United States in circumstances where law enforcement agencies seek to obtain information or records from members of the news media as a potential model to consider in the Australian context.<sup>26</sup> ABC representatives noted that these requirements include:

- that there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to the successful completion of investigation or litigation;
- that subpoenas not be used to obtain peripheral, non-essential, cumulative or speculative information;
- that the authorities should first have made all reasonable attempts to obtain the information from alternative sources; and
- that there should have been negotiations pursued with the affected member of the news media unless there is a compelling and significant reason to do otherwise.<sup>27</sup>

*Specific protections for confidential journalists' sources under the POC Act*

4.25 Seven West argued that, in relation to proceedings under the POC Act, there is a clear imperative for building some protection of journalists' sources into the legislation. It submitted that this could be accomplished by subjecting the obligation to produce documents in response to a production order, or the powers of the AFP to seize documents pursuant to a search warrant, to the provisions of section 126H of the Evidence Act:

The onus would then shift, appropriately, to the AFP to demonstrate that the public interest in the disclosure of evidence of the identity of an informant outweighs any likely adverse effect on the disclosure of the informant.

---

24 *Submission 3*, p. 3.

25 *Submission 3*, p. 3.

26 *Submission 3*, p. 3. See: Federal Register, §50.10 'Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media', 79 FR 10989, <https://federalregister.gov/a/2014-04239> (accessed 22 April 2014).

27 Mr Alan Sunderland, ABC, *Committee Hansard*, 7 April 2014, p. 58.

Such a change would give appropriate priority to the public interest in the communication of facts and opinions to the public by the news media. Such a procedure would also allow a media organisation to make a claim over any documents and not produce those documents and would prevent any inadvertent or accidental disclosure of journalists' sources in circumstances where material produced by a media organisation comes into the possession of the AFP or other third parties.<sup>28</sup>

*Guidelines to be observed during the execution of search warrants*

4.26 It was suggested during the inquiry that protocols for dealing with the execution of search warrants where journalists' privilege is claimed over material could be developed in similar terms to the current agreement between the AFP and the Law Council of Australia in relation to material subject to a claim of legal professional privilege (LPP).

4.27 Representatives from the AFP indicated that it would be willing to explore options for creating guidelines to deal with this issue, possibly along similar lines to the existing LPP Guideline.<sup>29</sup> In a supplementary submission it made several points in relation to the possible development of such guidelines, including that the journalists' source to be protected under any guidelines must be distinct from the subject of the investigation.<sup>30</sup> The AFP considered that it would not be possible to simply replicate the existing LPP Guideline in relation to journalists' privilege:

[This] would give journalists the right to claim a privilege over information that they do not currently have and which is not currently recognised by law (or the courts). Legal professional privilege can be distinguished from journalists' privilege, as the latter has not been recognised at common law. Section 126H of the *Evidence Act 1995 (Cth)* (Evidence Act) gives legislative effect to journalists' privilege, but only in relation to giving evidence or producing documents; it does not cover the seizure of documents. The privilege in section 126H requires the journalist to have promised to keep the identity of the informant confidential and the court determines whether the privilege applies after taking into account public interest grounds.<sup>31</sup>

4.28 The AFP also noted that while the LPP Guideline was negotiated with the Law Council of Australia, there is 'no peak representative body that independently represents all media organisations and publishing companies that the AFP could negotiate an agreement with'.<sup>32</sup>

---

28 *Submission 4*, p. 16.

29 Mr Jabbour, *Committee Hansard*, 7 April 2014, pp 39 and 40.

30 *Submission 6.1*, p. 10.

31 *Submission 6.1*, p. 10.

32 *Submission 6.1*, p. 10.

---

4.29 The AFP indicated, however, that it was willing to consider a basic set of principles to be observed during the execution of search warrants in literary proceeds investigations at premises where journalists' sources may be held, covering:

- taking a cooperative approach in relation to the search, in the context of literary proceeds matters, where journalists' source information may be held at premises at which a section 225 search warrant is being executed;
- keeping search team member numbers to the lowest number possible; and
- sealing the premises until an appropriate representative is present (for example, a person who can advise of any potential sensitive journalists' sources considered irrelevant to the investigation into the literary proceeds matter).<sup>33</sup>

4.30 The AFP stated that beyond this, 'any further protection, such as preventing enforcement agencies from even seeing such information when executing their lawful powers, is a policy matter for government'.<sup>34</sup>

---

33 *Submission 6.1*, pp 10-11.

34 *Submission 6.1*, p. 11.

