

26 July 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

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

Thank you for the opportunity to make a submission to this Inquiry.

This is a joint submission from academics at the University of Queensland based on multidisciplinary research concerning press freedom and national security. We make this submission in a personal capacity and are solely responsible for the views and content contained herein.

We welcome this Inquiry's focus on the protection of press freedom. The importance of a free press cannot be overstated. However, it has often been overlooked in the development and expansion of Australian security laws. As the United Nations Human Rights Committee recognised in respect of the International Covenant on Civil and Political Rights:

A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.¹

¹ Human Rights Committee, *General Comment No 34: Article 19, Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [13].

Press freedom thus extends not only to the protection of journalists and media organisations in the conduct of their work, but to the protection of confidential sources and the public's right to know.

We recognise that law enforcement and intelligence agencies require significant powers to undertake overt and covert investigations and thereby protect our safety and security. The fundamental concern underlying this Inquiry is the maintenance of the compelling community interests in press freedom and security. It is both necessary and possible to protect these vital public concerns. However, our existing legal frameworks significantly and unnecessarily undercut press freedom in the name of security.

Our submission has 2 parts.

Part 1 draws upon interviews conducted with newsroom professionals, demonstrating that press freedom is being eroded and 'chilled' by security laws. Police and intelligence powers contribute to that dynamic.

Part 2 proposes specific amendments to better protect press freedom in the context of law enforcement and intelligence powers. Specifically, we **recommend** the introduction of a consistent, contested issuing process for warrants that:

- Aim to identify a journalist's confidential source, or
- Relate to the investigation of conduct undertaken in the course of the practice of journalism, or
- Pertain to journalistic material.

Many law enforcement and intelligence powers impact on rights and liberties. For instance, warrantless access to retained metadata impacts on the freedom and privacy of all Australians, including journalists. Likewise, expansive and complex definitions of security and national security give some warrant powers uncertain scope and risk overreach.² These important issues

² For example, the definition of 'activities prejudicial to national security' is central to the grounds of issue for a number of surveillance and interception warrants, including under: *Australian Security Intelligence Organisation Act 1979* (Cth) s 26(3)(a)(i); *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9(1)(a)(i), 9A(1). 'Activities prejudicial to national security' is defined by reference to 'security'. 'Security' is defined by reference to 'politically motivated violence' and the 'promotion of communal violence', as well as acts of sabotage and espionage. The offence of espionage, for instance, concerns dealing with national security or security classified information: *Criminal Code* s 91.1(1). 'National security' is defined broadly to include the 'carrying out of the country's responsibilities to any other country' and the country's 'political, military or economic relations with another country': *Criminal Code* s 90.4(1)(d) and (e).

For academic attention and critique, see eg: Keiran Hardy and George Williams, 'Terrorist, traitor, or whistleblower? Offences and protections in Australia for disclosing national security information' (2014) 37(2) *University of New South Wales Law Journal* 784, 787-788; David Brooks, Jeffery Corkill, and Michael Coole, 'The Australian Security Continuum: National and Corporate Security Gaps

deserve attention. However, in the context of the present Inquiry and its limited timeframes we have focussed our submission on what the experiences of journalists reveal about the impact of security laws on press freedom, and the improvement of warrant issuing processes to better protect journalists and their sources.

If you have any questions about this submission please do not hesitate to contact Dr Rebecca Ananian-Welsh by email at rebecca.aw@law.uq.edu.au or on +61 404 818 411.

1. Journalists' experiences and the impact of security powers

The story of journalism in the last decade is a story of change. Change in the industry has been driven by shifting business models in conjunction with new technologies. This has resulted in journalists having to do more with less and weakened the capacity of the media industry to fulfil its role as the fourth estate.

Whilst law enforcement and intelligence powers play an important role in the experiences of journalists and the impact of security laws on press freedom, it must be recognised that these powers are one facet of a much broader picture.

Within this context, rapidly expanding security frameworks have undermined the free and effective practice of journalism in four related ways. First, it is increasingly difficult for journalists to ensure source confidentiality. Second, journalism is more readily captured by broadly framed security offences so that journalists face a real risk of being targeted in criminal investigations. Third, the expansion of complex security legislation has resource implications across the media industry, particularly in staff training and legal budgets. Finally, these factors combine to have a general chilling effect on public interest journalism in Australia. Sources are increasingly reluctant to come forward and journalists are self-censoring, including by killing important public interest stories.

The scope of law enforcement and intelligence powers is determined by the scope of security law generally. The introduction of expanded secrecy and espionage offences and of data access, decryption and surveillance powers, for example, in addition to the scope of whistleblower protections all directly impact on the capabilities of police and intelligence agencies. Thus,

from a Surveillance Language Perspective' in Randy K. Lippert, Kevin Walby, Ian Warren and Darren Palmer (eds), *National Security, Surveillance and Terror: Canada and Australia in Comparative Perspective* (Springer International Publishing, 2016), 133-134; Kevin Walby, Randy K. Lippert, Ian Warren and Darren Palmer, 'Interrogating National Security, Surveillance, and Terror in Canada and Australia' in Randy K. Lippert, Kevin Walby, Ian Warren and Darren Palmer (eds), *National Security, Surveillance and Terror: Canada and Australia in Comparative Perspective* (Springer International Publishing, 2016), 7; Rebecca Ananian-Welsh and Nicola McGarrity-White, 'National Security: A Hegemonic Constitutional Value' in 'Australian Constitutional Values' (Rosalind Dixon ed), (2018, Hart-Bloomsbury) 267, 267-271.

whilst law enforcement and intelligence powers play an important role in the experiences of journalists and the impact of security laws on press freedom, it must be recognised that these powers are one facet of a much broader picture.

1.1. Source Vulnerability

Source confidentiality is one of journalists' most central ethical considerations. It has also been widely recognised by the courts as a core element of the right to freedom of expression and essential to the media's watchdog role.

The key element to emerge in our research on the impacts of security laws on press freedom has been source protection and vulnerability. Concerns arising from the scope and uncertainty of security law frameworks often result in sources, and therefore stories, being silenced. Christopher Knaus, a journalist at The Guardian Australia, said killing off significant parts of stories out of fear of source identification is now commonplace. Highlighting the particular impact of uncertainty around metadata retention laws, Knaus said:

Metadata laws break up all of the avenues you have to communicate with sources and puts them in jeopardy. Sources don't have a detailed complex knowledge about how metadata laws work and how journalist information warrants might work and some of the protections or lack of protections or whatever. They're not fully across it but they have this general sense that their communications with journalists are subject to warrantless monitoring. It just puts everything into this state of uncertainty and jeopardy in which you have to be so careful around every little communication you have with a source. They know that. It puts them off. As soon as there's some sort of hiccup in terms of your communication going through an unencrypted channel, they freak out, get cold feet, get nervous, and routinely pull out of stories.

Recognising journalists' ethical obligation to protect sources, Knaus said the onus is on journalists to ensure source confidentiality but that fulfilling this obligation is made more difficult by data-retention laws. This brings a layer of complexity to doing the kinds of journalism that until recently have been considered pedestrian, and calls for a high level of technological competency on the part of both journalists and their sources. Knaus said:

There is definitely a trend that people who come forward seem to be only doing so if they are aware of the ways to safely communicate. The onus is on the journalist to understand their source's level of savviness with encrypted communications. If you don't understand the laws and the tech, you're putting your source in danger because sources often have no understanding of the laws. You need to understand the laws to be able to protect your sources. That is one thing that has happened as a result of all the legislation that's coming through. I have to ask everyone who comes forward, 'Can you download this? Can you download Signal? Can you put everything in an encrypted email? Can you use secure drop to transfer files instead of just sending them to me?' You have to actively go through those procedures.

Telling someone something like that heightens the danger or risk associated with what they are doing, which, of course, you have a duty to tell them as a journalist. It makes it much more real for sources, and it can be very discouraging.

Our research has revealed the extensive use of encryption technologies in protecting sources. It follows that the introduction of the complex industry assistance scheme and decryption laws in 2018 added further layers of uncertainty, complexity and risk to the journalist-source relationship.

Jo Puccini, Editor of ABC Investigations, reinforced Christopher Knaus's point. She said:

Part of our obligation is to educate our sources on how to communicate with us. A lot of people don't understand this stuff. People will say, 'I'll email you a document', and you have to say, 'Don't do that. Stop. What's the document? How many people have this document? Is it just you? Is it five people? Where is it sitting right now? Is it on a computer?', 'Oh, I can print it off and send it to you', 'You know that will be recorded. Let's talk about another way of doing that. Why don't you turn off your cloud service on your phone and take pictures of it, and then let's think about how you then get it to us'. And, so, that's part of the training as well because it's our responsibility to protect them. Our responsibility is also to educate them.

By undermining journalists' capacity to ensure source confidentiality the current security landscape is recalibrating and hampering interactions between journalists and their sources. In particular, the vast, complex, covert and intimidating data access and surveillance powers available to law enforcement and intelligence agencies deter sources from coming forward and place considerable pressure on journalists attempting to protect their sources. For those sources who do approach a journalist, their communications are fraught with risk to the point that the journalist may be the one to kill the story or refuse a source whose identity may be discoverable through, for example, metadata access.

It is worth noting that this is true even of stories that might not directly relate to security issues. The confusion over what can and can't be legally investigated makes all such journalism vulnerable.

1.2. Criminalising Journalism

Australia's rapidly expanding security law frameworks have the capacity to capture journalists and their sources in variety of ways. For instance, 2018 legislation introduced a suite of new espionage and secrecy offences that criminalise a wide array of conduct relating to the handling and communication of government information.³ In the intelligence sphere, the *Australian Security Intelligence Organisation Act 1979* (Cth) criminalises the communication of

³ See amendments to the *Criminal Code Act 1995* (Cth) introduced by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).

intelligence information,⁴ unauthorised dealing with records,⁵ unauthorised recording of information,⁶ publication of the identity of ASIO employees or affiliates⁷ and the unauthorised disclosure of ‘special intelligence operations’ by ASIO.⁸

Our work has revealed that journalists are keenly aware of the broad scope of these laws and are concerned about the criminalisation of their work. As Mark Maley, Manager of Editorial Policy for the ABC, explained, the 2018 espionage and secrecy laws have sparked particular anxiety by creating “a situation where activities which were never criminalised in the past have now become criminal activities and they are activities which journalists and publishers have routinely done”. These laws have had a significant impact on journalists despite the inclusion of journalism-based defences. Maley said:

The classic example of that is the espionage law. It was clearly designed to prevent the public service and people in the defence and security forces from leaking information. It was clearly targeted at them rather than at the media, but the media has been captured in it ... activity which was once normal journalism and perfectly legal in any circumstances - research, receiving documents, talking to sources - the research end of journalism, if you like, can now become a criminal act. That sort of activity is now potentially criminalised. There’s a journalism defence in it, as there is in the legislation which was passed this year in the Abhorrent Materials Bill.

In relation to the Espionage Bill, we are potentially facing criminal charges over researching the story and broadcasting material - visual, electronic material, videos, audio - which was routine in the past. In the past, there has been freedom around those sorts of activities. It has now been criminalised. Although it’s yet to happen in relation to either of those bills, the potential clearly exists for a government to criminalise journalism because a media organisation has gone too far or the government is vindictive or excessively authoritarian and secretive. I’m not saying that’s the government that we have, I don’t think it is. I don’t think that’s the intention of this government. But, nonetheless, the powers in the Espionage Bill and in the Abhorrent Materials Bill have the potential for journalists to be charged with criminal offences which we would then have to go to court to defend.

The movement of everyday journalism into the criminal realm has had a huge impact. It ups the ante enormously.

Maley said the risk of falling foul of the laws and facing criminal prosecution is sufficient to deter journalists from their work:

⁴ *Australian Security Intelligence Organisation Act 1979* (Cth) s 18(2).

⁵ *Ibid* s 18A(1).

⁶ *Ibid* s 18B(1).

⁷ *Ibid* s 92(1).

⁸ *Ibid* s 35P. For critique see: Keiran Hardy and George Williams, ‘Special Intelligence Operations and Freedom of the Press’ (2016) 41 *Alternative Law Journal* 160.

Even if you think you've got a good defence, you might have to put somebody through a criminal trial. There have been instances within the last couple of years, where journalists have been the target of criminal investigations and been interviewed by the police. There has been the prospect of serious criminal charges, and it freaks people out. I mean, being interviewed by the Federal Police because you're being investigated for a serious criminal offence which occurred in the normal act of journalism is unsettling to say the least.

1.3. Resource Implications

In the present climate of heightened risk to journalists and their sources, more newsroom resources are being diverted to legal advice and staff training to attempt to ensure that journalists meet their legal and ethical obligations.

Maley and Puccini, as well as ABC National News Director, Gaven Morris, and Editor of The Guardian, Lenore Taylor, all highlighted the extra burden placed on their legal budgets by new and expanding security laws. In-house counsel are being stretched to breaking point while the fees associated with gaining external legal advice have placed a further burden on already stretched budgets.

Within media organisations the focus has turned to training journalists to adopt practices that avoid the risk of legal action and the likelihood of seeking potentially expensive legal advice. As Puccini said, "We're trying to really teach journalists a bit more hygiene before it gets to the lawyers."

We are giving our journalists some really practical tips on how to communicate with sources, particularly at really crucial times. First contact is a really important one. How to then receive documents safely. How to publish them. We're reminding our people now that not only can your phone be accessed, all correspondence you can imagine can be accessed, too. Yes, meet someone face to face, but our cities are increasingly full of CCTV cameras. You'll find you can be pinged going to a meeting and tracked with the two phones meeting at the same place.

It's a very practical course. Our legal team is also taking them through the different scenarios where you might be called upon to give up a source.

Taylor made the same point, although she has been able draw on training resources at The Guardian in London to equip her staff for the rigors of doing journalism in Australia. Taylor said that without that broader institutional support the cost of training staff to keep up with the changes in Australian security law would be difficult to absorb.

These comments suggest that the impact of security frameworks on press freedom are likely to be more acutely felt by small and regional media organisations as well as emerging and non-traditional journalists and outlets.

Recognising the important relationship between press freedom and media diversity in Australia, Morris said:

I think the other thing to bear in mind is the health of the diversity of media in Australia is probably also further along a point of crises than many other Western democracies. If you've got a smaller, less robust, less diverse ecosystem of media companies all competing in a single space. If you've then got a more restrictive, more obstructive legal framework around that, those two things together are concerning.

1.4. A Chilling Effect

Recent changes to Australian security law have sent shivers through the media industry. The experiences of journalists reveal that the ultimate impact of security frameworks is a chilling effect on journalism, particularly public interest journalism. Maley said:

It's a real problem, and I don't think there's any doubt that there's been stories which could have been told or should have been told which haven't been told because of a combination of the ASIO Act, the Espionage Bill and metadata laws. That's the chilling effect in practice. The chilling effect is a real thing. There are real stories that don't get told because the risks are just too high, particularly for the sources, and because we take our responsibility to protect our sources very seriously, it effectively kills stories and they are stories within the public interest ... we're not talking about trivial stories, we're talking about the important stories.

Morris said this chilling effect is heightened by the insecurity journalists experience associated with the ever-changing national security landscape. This, combined with the rate of change and the complexity of the legal frameworks, leaves journalists who report in the public interest over-exposed. He said:

You take the old laws being applied in news ways and then you take the new laws being applied in ways we don't fully understand yet, you put all of those things together and you've got a perfect storm.

2. A Contested Media Warrant Process

The exercise of powers by law enforcement and intelligence agencies is usually premised on the agency's capacity to obtain a warrant. There are a wide range of warrants available under Commonwealth law, including but not limited to:

- Surveillance device warrants;⁹
- Search warrants;¹⁰
- Warrants to inspect postal articles;¹¹
- Computer access warrants;¹²
- Telecommunications interception warrants;¹³
- Stored communications warrants;¹⁴ and
- Arrest warrants.¹⁵

Generally speaking, warrants are issued in respect of ASIO by the Attorney-General on request of the Director-General of ASIO. Warrants are issued to law enforcement agencies variously under different provisions by senior officers, eligible judges, Magistrates or other legally qualified issuing authorities. The grounds of issue tend to focus on the necessity of the warrant in furthering an investigation.¹⁶

Present warrant processes risk press freedom in three respects. First, the public interest – and particularly the public interest in press freedom – is not articulated as a relevant consideration in the warrant issuing process. Second, the issuing authority may not be sufficiently independent or qualified to appropriately consider and give weight to the public interest in press

⁹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 26; *Surveillance Devices Act 2004* (Cth) s 14.

¹⁰ *Australian Security Intelligence Organisation Act 1979* (Cth) s 25; *Crimes Act 1914* (Cth) s 3E.

¹¹ *Australian Security Intelligence Organisation Act 1979* (Cth) s 27.

¹² *Ibid* s 25A; *Surveillance Devices Act 2004* (Cth) s 27A.

¹³ *Telecommunications (Interception and Access) Act 1979* (Cth) s 9 (telecommunications service warrant – ASIO), s 9A (named person warrant – ASIO), s 46 (telecommunications service warrant – agencies), s 46A (named person warrant – agencies).

¹⁴ *Ibid* s 109 (stored communications warrant – ASIO), s 110 (stored communications warrant – criminal law-enforcement agencies).

¹⁵ *Crimes Act 1914* (Cth) s 3ZA.

¹⁶ See eg: *Australian Security Intelligence Organisation Act 1979* (Cth) s 25(1) (search warrant), s 25A(1) (computer access warrant), s 26(3)(a)(ii) and (b)(ii) (surveillance device warrant); *Surveillance Devices Act 2004* (Cth) s14(1) (surveillance device warrant), s 27A(1)(c) (computer access warrant); *Crimes Act 1914* (Cth) s 3E (search warrants), ss 3F-3K; *Telecommunications (Interception and Access) Act 1979* (Cth) s 110 (stored communications warrant), s 116.

freedom when deciding whether to issue the warrant. Third, the issuing authority is not assisted by submissions or arguments concerning to the public interest in press freedom, which seriously hampers the role that this factor can play in the issuing authority's determination.

We draw the Committee's attention to Australia's Journalist Information Warrant ('JIW') scheme and UK contested warrant processes. These warrant schemes are specifically designed to protect press freedom from incursion and should inform the adoption of similar processes across Australian law enforcement and intelligence powers.

2.1. The Journalist Information Warrant Model

One warrant exists under Australian law which is designed to balance investigative powers against press freedom. A JIW is required for an agency to gain access to a journalist or their employers' retained metadata for the purpose of identifying a confidential source.¹⁷ Otherwise, retained metadata may be accessed by a wide range of government agencies without a warrant and, therefore, with scant oversight.

The introduction of a JIW was a positive recognition of the threat these laws pose to press freedom and, specifically, source confidentiality. The JIW uniquely represents an existing warrant process specifically designed to protect press freedom in the Australian law enforcement and intelligence context.

Some disturbing weaknesses in this warrant process were demonstrated in the recently tabled Report of the Commonwealth Ombudsman which reported widespread misconduct. This included one instance of a police officer accessing a journalist's metadata without a JIW and two further instances of police officers applying for and obtaining a JIW from a person not authorised to provide it.¹⁸ Thus whilst we submit that the JIW process provides a model for a broader Media Warrant scheme, it requires clear improvements.

Agencies may seek a JIW from an 'issuing authority': a judicial officer, member of the Administrative Appeals Tribunal or a lawyer of five years' standing who has been consensually appointed to the role by the Attorney-General.¹⁹ ASIO may apply directly to the Attorney-

¹⁷ Bendetta Brevini 'Metadata Laws, Journalism and Resistance in Australia' (2017) 5(1) *Media and Communication* 76, 78.

¹⁸ Commonwealth Ombudsman, Parliament of Australia, *A report on the Commonwealth Ombudsman's monitoring of agency access to stored communications and telecommunications data under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979 for the period 1 July 2016 to 30 June 2017* (2018); Paul Karp and Josh Taylor, 'Police made illegal metadata searches and obtained invalid warrants targeting journalists', *The Guardian* (online at 23 July 2019) <https://www.theguardian.com/australia-news/2019/jul/23/police-made-illegal-metadata-searches-and-obtained-invalid-warrants-targeting-journalists?CMP=Share_iOSApp_Other>.

¹⁹ *Telecommunications (Interception and Access) Act 1979* (Cth) s 5(1) (definition of 'issuing authority'), ss 6DB-6DC.

General for a JIW,²⁰ although in some circumstances the Director-General of ASIO may issue a JIW directly.²¹

A JIW is subject to both purpose and public interest tests (though where ASIO has applied for a JIW, only the public interest test, not the purpose test, applies).²² Applying the purpose test, the issuing authority must only issue a JIW if satisfied that it is reasonably necessary for either: (a) the enforcement of the criminal law, finding a missing person or enforcing laws that impose financial penalties or protect the public revenue, or (b) the investigation of a serious offence punishable by imprisonment for at least three years.²³

The issuing authority in respect of a JIW must also be satisfied that issuing the warrant is in the public interest, specifically that: “the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.”²⁴ In weighing these competing interests, the issuing authority will have regard to matters such as privacy and whether reasonable attempts have been made to obtain the information otherwise.²⁵

The issuing authority in respect of a JIW is assisted by submissions made by the ‘Public Interest Advocate.’²⁶ This security-cleared lawyer who has been appointed to the position by the Prime Minister²⁷ makes submissions to assist the application of the public interest test. The presence of the Public Interest Advocate reflects the need for a contested warrant process to protect press freedom. In the absence of this Advocate, the issuing authority only receives submissions from the relevant government agency and is unassisted in their consideration of countervailing public interest factors which may be beyond their expertise. However, the position of Public Interest Advocate has attracted criticism for being insufficiently directed towards the protection of press freedom as opposed to other public interests, such as national security. Specifically, the Public Interest Advocate does not stand in the shoes of the journalist or their employer; nor do they represent the interests of media or open justice more broadly; nor does the Advocate liaise with the potential subject of the warrant. Writing in 2017, Sal Humphreys and Melissa de Zwart reported that two former judges had been appointed to the role of Public Interest Advocate, and that these advocates were ‘under no obligation to champion the journalist’s position and may never take the point of view of the journalist or advocate on their behalf.’²⁸

²⁰ Ibid ss 180J-180L.

²¹ Ibid s 180M.

²² Ibid s 180L(2)(b).

²³ Ibid s 180T(2)(a), referring to ss 178-180(4).

²⁴ Ibid s 180T(2)(b).

²⁵ Ibid s 180T(2)(b).

²⁶ Ibid s 180T(2)(b)(v).

²⁷ Ibid s 180X(1).

²⁸ Sal Humphreys and Melissa de Zwart, ‘Data Retention, Journalist Freedoms and Whistleblowers’ (2017) 165 *Media International Australia* 103, 106.

2.2. The UK Model

Press freedom enjoys significantly greater protection in the context of warrant proceedings in the UK.

Under the *Police and Criminal Evidence Act 1984* (UK) ('PACE'), a search warrant cannot be issued for 'excluded material' or 'special procedure material', which includes journalistic material.²⁹ In order to obtain a search warrant with respect to journalistic material that is not held in confidence, police must seek a production order from a judge and notify the person who would be subject to the order, paving the way for a fully contested warrant proceeding before the judge.³⁰ In issuing the warrant, the judge will have regard to the standard conditions for issuing the warrant, whether other methods of obtaining the information have been tried, and whether certain public interest criteria are met.³¹ The judge retains an overarching discretion whether to issue the warrant, which case analysis by Lawrence McNamara and Sam McIntosh revealed to be an important inclusion.³² Production orders may not be sought in respect of journalistic material held in confidence.³³ Regular search warrants may be sought in respect of journalistic material that is not held in confidence only where a production order has not been complied with or where there is good reason to think it would not be effective.³⁴

Even in terrorism investigations a similar process applies. However, the scheme under the *Terrorism Act 2000* (UK) applies to all journalistic material whether or not it is held in confidence, and police are not required to notify the person that they are seeking an order against them.³⁵ The issuing of an access order under the *Terrorism Act* also includes a public interest threshold: there must be reasonable grounds for believing the procurement of the material is in the public interest, having regard to the likely benefit to the investigation and the circumstances under which the person concerned possesses the material.³⁶ Again, these orders are issued by a judge who maintains an important overarching discretion.

The more recent *Investigatory Powers Act 2016* (UK) provides for a wide suite of investigatory powers including the interception of communications. Even within that framework there are substantive and procedural protections where journalistic materials are concerned. These kinds

²⁹ *Police and Criminal Evidence Act 1984* (UK) ss 8(1)(d), 11 (meaning of 'excluded material'), s 13 (meaning of 'journalistic material'), s 14 (meaning of 'special procedure materials').

³⁰ *Ibid* s 9, Sch 1 [8].

³¹ *Ibid* Sch 1 [2](b).

³² Lawrence McNamara and Sam McIntosh, 'Confidential Sources and the Legal Rights of Journalists: Rethinking Australian Approaches to Law Reform' (2010) 32(1) *Australian Journalism Review* 81.

³³ *Police and Criminal Evidence Act 1984* (UK) s 11(2)-(3) (meaning of 'excluded material').

³⁴ *Ibid* Sch 1 [12]-[14].

³⁵ McNamara and McIntosh (n 33) 89.

³⁶ *Terrorism Act 2000* (UK) Sch 5 [6](3).

of protections have heightened importance in Australia where, unlike the UK, intercepted communications may be adduced as evidence in a criminal prosecution.

As McNamara and McIntosh argued, “It is immediately clear that UK journalists are better protected than their Australian counterparts”³⁷ and “Remarkably, there are arguably greater media protections in UK terrorism investigations than there are in investigations into ordinary offences in Australia”.³⁸

Aspects of the UK system remain controversial. For example, during the passage of the Investigatory Powers Bill there was (and remains) considerable debate in the UK about the adequacy of these protections. However, the three schemes outlined above provide an important point of reference against which the Australian Parliament might consider the laws in this country.

2.3. Recommendation: Media Warrants

Recognising the clear threat that police and intelligence powers pose to the preservation of source confidentiality and press freedom more broadly, we recommend that all law enforcement and intelligence warrants be subject to an enhanced, contested issuing process where they:

- Aim to identify a journalist’s confidential source, or
- Relate to the investigation of conduct undertaken in the course of the practice of journalism, or
- Pertain to journalistic material.

The introduction of Media Warrants may also be appropriate in some contexts in which law enforcement and intelligence agencies exercise powers in the absence of a warrant. For instance, the JIW serves an important role within the context of a broader scheme that provides for warrantless access to retained metadata.³⁹ We submit that an added layer of protection should also exist to preserve press freedom and source confidentiality in respect of, at least: optical surveillance and the use of tracking devices by ASIO⁴⁰ and warrantless powers to obtain documents related to serious offences and serious terrorism offences by the AFP.⁴¹

In the Media Warrant context, ‘source’, ‘journalism’ and ‘journalist’ should be broadly defined. As the United Nations Human Rights Committee has recognised: “Journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well

³⁷ McNamara and McIntosh (n 33) 89.

³⁸ Ibid 90.

³⁹ *Telecommunications (Interception and Access) Act 1979* (Cth) s 175 (ASIO telecommunications data access), s 178 (Enforcement agency access to telecommunications data).

⁴⁰ *Australian Security Intelligence Organisation Act 1979* (Cth) ss 26D, 26E.

⁴¹ *Crimes Act 1914* (Cth) ss 3ZQN, 3ZQO.

as bloggers and others who engage in forms of self- publication in print, on the internet or elsewhere”.⁴² The narrow application of Media Warrant processes to ‘professional’ journalists and their sources would fail to reflect the reality of contemporary journalism and undercut the process’s potential to adequately protect press freedom in modern Australia.⁴³

The misconduct revealed in the Commonwealth Ombudsman’s Report reinforces the importance of effective independent oversight of warrant processes and powers. A warrant with respect to journalists or their sources should be subject to robust independent oversight and in-built safeguards at the issuing stage and subsequently. All such Media Warrants should be issued by a serving judge when sought by a law enforcement agency. It would be consistent with existing warrant procedures if Media Warrants with respect to ASIO were issued by the Attorney-General on the request of the Director-General of ASIO. Annual Reports of the relevant agencies should detail the numbers of Media Warrants sought and obtained.

In addition to existing legislative considerations and thresholds, a Media Warrant should be issued on the basis of a public interest test. Specifically, the issuing authority must consider the impact of the Media Warrant on press freedom and source confidentiality, and should only issue the Warrant if its investigative value substantially outweighs those impacts. In this context the issuing authority may also have regard to other matters, including the impact of the warrant on privacy and the availability of less intrusive alternative methods of investigation, and must retain an overarching discretion whether or not to issue the warrant.

Media Warrant proceedings should be contested. Wherever possible and appropriate (including in the context of search warrants as in the UK) the person or organisation against whom the warrant is sought should be notified and given an opportunity to contest the application before a judge. Where this is not appropriate, the judge should be assisted by a Media Freedom Advocate whose role is to represent the interests of the media and press freedom. The independence of the Media Freedom Advocate is of fundamental importance, as is their suitability and qualification for the position. Media Freedom Advocates should be appointed in consultation not only with peak legal bodies but also with key representatives from the media industry.

Finally, consideration should be given to adopting the position reflected under PACE (UK), whereby journalistic materials held in confidence may not be subject to certain warrants, including search warrants and data access powers.

⁴² Human Rights Committee (n 1) [44].

⁴³ Edward L. Carter, ‘Not to Disclose Information Sources’: Journalistic Privilege Under Article 19 of ICCPR (2017) 22(4) *Communication Law and Policy* 399, 423; Jan Oster, ‘Theory and doctrine of media freedom as legal concept’ (2013) 5(1) *Journal of Media Law* 57, 58.

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