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Submission to Senate Standing Committees on Environment and Communications:

Press Freedom Inquiry

Summary

1. This submission is written by an Australian academic who has been based in the UK since 2007. It addresses Terms of Reference (a) and (e).

2. It makes points about four main matters:

   (a) **Articulating the public interest that underpins press protections.** It may be stated this way:

   There are public interests in:

   - knowing what threats and challenges face the nation and its communities, and
   - knowing what the agencies of the state are doing to combat those threats.

   This extends to a public interest in knowing that the state and its agencies are acting in compliance with the rule of law.

   (b) **In obtaining journalistic material, the balancing of the public interests is best served by processes that provides:**

   - notice to the media when an application is made and a right to be heard; and
   - an independent judicial decision-maker, with discretion, making the determination; and
   - the protection of material held in confidence other than when there is a pressing social need. Such a need should only be viewed as present if there is a genuine,

demonstrable need for the protection of safety and security that cannot be met through any other method except disclosure.

On these standards the UK provides a more appropriate model for access by enforcement agencies and access by intelligence agencies. In particular:

(i) **JIWs (TIA Division 4C, Subdivision B) and search warrants (Crimes Act 1914)**: the UK approach to warrants and production orders under PACE 1984 and the Terrorism Act 2000 is to be preferred in both substance and procedure.

(ii) **JIWs – ASIO – TIA Division 4C, Subdivision A:** the UK approach to obtaining journalistic material for intelligence purposes under the Investigatory Powers Act 2016 is to be preferred in both substance and procedure.

As I understand it, in the Inquiry so far the latter has received less attention than the former.

(c) **The evidence base**: insofar as the laws might be underpinned by an assumption that journalists and media organisations would intentionally or recklessly place at risk national security or the safety of individuals, the evidence in the UK does not support any such assumption. On the contrary, all the indications are that the media would ensure that the relevant authorities would be made aware of information that might affect those matters.

(d) **The relationship between specific laws and the wider landscape of secrecy, security and public trust**.

About the author

3. I am an Australian academic, based in the UK since 2007 (and now dual British/Australian).

4. I am a Reader in Law at the University of York, in York, where I have worked since 2017.

5. From 2013 - 2019 I was a Senior Research Fellow and (from 2013-17) Deputy Director of the Bingham Centre for the Rule of Law in London. The Bingham Centre is part of the British Institute of International and Comparative Law (BIICL), a registered charity. I remain an honorary Fellow at Bingham Centre. Prior to this I held academic posts in the UK (2007-2013) and Australia (1997 – 2007).

6. I have been researching on issues relating to security and terrorism for more than a decade, both in Australia and the UK. My research includes empirical work examining how counter-terrorism laws have affected the media in Australia and in the UK. I also work on issues of executive accountability to the courts and parliament. I have given written and oral evidence to UK select committees. My work has been cited in UK parliamentary reports and debates, especially in relation to the Justice and Security Act 2013.

The terms of reference addressed in this submission

7. This submission addresses two of the terms of reference:

    - **ToR (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.

    - **ToR (e)** any related matters

8. My comments will mainly be made on the basis of the UK laws and the experience here with a view to how that might inform reflections on and reform of the position in Australia.

Articulating public interests

9. It is common ground that in considering protections for journalism there is a balancing of public interests involved. What is the public interest that underlies protections for journalism?

10. In a consideration of whether and how press freedom is to be protected, it is common to use shorthand that focuses on the protection for journalists, or perhaps protection for journalists' sources. That shorthand is accurate insofar as it indicates where protections – or the absence of them – will bite. But it is less useful because it does not articulate the underlying public interest. That is, it does not say anything about *why* journalists and their sources warrant protection. Those protections are warranted because the public have, it is said, 'a right to know'. In turn, that needs to have some substance if it is to be useful in the law.

11. In the context of this inquiry and much of the controversy that has preceded it, and indeed in the UK context, there could be any number of ways to formulate it. However, whatever the formulation, it needs some substance. I will express it in these terms:

    > There are public interests in:
    >
    > - knowing what threats and challenges face the nation and its communities, and
    > - knowing what the agencies of the state are doing to combat those threats.
    >
    > This extends to a public interest in knowing that the state and its agencies are acting in compliance with the rule of law.

    Knowledge of this kind is crucial in and for a democracy. It informs deliberations about the governments we elect and it is the basis for transparent, credible, democratic accountability.

12. By 'the state' and its 'agencies', I mean all iterations of the state including the arms and extensions of the executive, the legislature and the judiciary. This would encompass a right to know about acts of non-state bodies that are engaged in delivering services or acting on behalf of the state.[1]

[1] There would also be public interests in knowing about all manner of other activities and bodies that affect our democracies but it is the activities of the state that have been at the heart of matters here.

13. Thus, the protection of journalists and their sources is a means to an end. Protections are not important because they are journalists, or because they are sources. Protections are important because the work of a free media plays a vital role in protecting the public interests set out above.

14. The articulation of other public interests, such as the public interest in national security, may also need to be done with some specificity and with regard to the facts. In *Secretary of State for Defence v Guardian Newspapers* the House of Lords made it clear that it was not enough to show that national security is in issue; rather, the Crown must show exactly how national security is at risk if it is to obtain a disclosure order: [1985] AC 339 at 355, 370-371, 372-373.

Recommendation 1:

The Committee should in its report articulate the public interests that underpin the protection of journalists and their sources, doing so in a way that captures:

* the public interest in knowing about threats to the nation and its communities,

* the public interest in knowing about what the agencies of the state are doing to combat those threats, and

* the public interest in knowing that the agencies of the state are acting in a manner that is compliant with the rule of law.

Standards

15. The jurisprudence on press freedom is well stated in other submissions to this Inquiry, including Submission 43 from the Association for International Broadcasting.[2] What emerges from it is that if the public interest set out above are to be protected then they require:

- notice to the media when an application is made and a right to be heard; and
- an independent judicial decision-maker, with discretion, making the determination; and
- the protection of material held in confidence other than when there is a pressing social need. Such a need should only be viewed as present if there is a genuine, demonstrable need for the protection of safety and security that cannot be met through any other method except disclosure.

16. UK laws go a considerable way towards meeting these standards where warrants are sought by enforcement and intelligence agencies.

[2] I have discussed it in L McNamara & S McIntosh, 'Confidential Sources and the Legal Rights of Journalists: Re-thinking Australian Approaches to Law Reform' *Australian journalism Review*, 2010, Vol 32(1), pp 81-96, esp pp 86-87,90-91.

Recommendation 2:

The Committee should in its report should state and apply the following standards in its consideration of Australian laws. The public interests set out above will be best protected when:

* the journalist and/or their organisation has notice of an application to seek a warrant or production order, and has a right to be heard,

* an independent judicial decision-maker, with discretion, is making the determination; and

* the protection of material held in confidence other than when there is a pressing social need. Such a need should only be viewed as present if there is a genuine, demonstrable need for the protection of safety and security that cannot be met through any other method except disclosure

General provisions: warrants and production orders under PACE

17. The Police and Criminal Evidence Act 1984 sets down procedures for obtaining journalistic material.

Under PACE, where journalistic material is not in issue, police apply to a magistrate for a search warrant where there are reasonable grounds for believing there is material, on specified premises, which is likely to be of substantial value to the investigation of an indictable offence.[3]

However, where journalists' work is in issue there are special protections and a warrant cannot be issued for:

- "excluded material" (which includes "journalistic material" held in confidence)
- "special procedure material" (which includes "journalistic material" not held in confidence, such as photographs taken at public events or a letter to the editor)[4]

Instead of a warrant, police must seek a production order from a judge and notify the person who will be subject to the order.[5]

Only where a production order is not complied with, or where there is good reason to think it would not be effective, then a search warrant may be sought.[6]

18. It is immediately clear that UK journalists are better protected than their Australian counterparts. The procedural bar is higher than for ordinary warrants: the application must go to a judge

[3] PACE s 8(1)

[4] PACE 1984, ss 8(1)(d), 11, 14

[5] PACE 1984, s 9(1)

[6] PACE 1984, Sch 1 [12]-[14]

rather than a magistrate.[7] The notice requirement means the application can be contested and, even if granted, a production order does not allow police to enter and search premises.[8]

19. The primary method for obtaining a production order is under Schedule 1[2] of PACE.

This allows access only to special procedure material and not to excluded material.

- First, the standard conditions for a search warrant must be satisfied (i.e., reasonable grounds to believe there is material that is likely to assist in the investigation of an indictable offence).
- Second, unless futile, other methods of obtaining the material must have been tried unsuccessfully.
- Finally, if specific public interest criteria are met, then a judge *may* grant an order if it is "in the public interest having regard: (i) to the benefit likely to accrue to the investigation if the material is obtained; and (ii) to the circumstances under which the person in possession of the material holds it".[9]

Terrorism provisions: warrants and production orders under the Terrorism Act 2000

20. The Terrorism Act 2000 (TA 2000) basically adopts the PACE Schedule 1 provisions above, but applies to both categories of journalistic material, and police are not required to notify the person against whom they are seeking the order.10

21. There are two access conditions which must be satisfied before an order will be granted.

- First, the order must relate to a terrorist investigation and there must be reasonable grounds for believing the material is likely to be of substantial value to that investigation.[11]
- Second, there must be reasonable grounds for believing it is in the public interest that the material should be procured, having regard to the likely benefit to the investigation and the circumstances under which the person concerned possesses the material.[12]

If these conditions are met, then the judge *may* grant an order.[13]

22. This **residual discretion** has been **important**.[14]

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[7] PACE 1984, s 9(1)

[8] PACE 1984, Sch 1 [4]

[9] PACE 1984, Sch 1 [2]-[3]

[10] TA 2000, s 37 & Sched 5

[11] TA 2000, Sch 5 [6](2)

[12] TA 2000, Sch 5 [6](3)

[13] TA 2000, Sch 5 [6](1)

[14]

Why discretion is important

23. In Bright[15], the High Court of England & Wales explained that the residual discretion was "the final safeguard against any oppressive order", providing the judge "with the opportunity to reflect on and take account of matters which are not expressly referred to in the relevant set of access conditions and, where they arise, to reflect on all the circumstances, including where appropriate, what can, without exaggeration, be described as fundamental principles".[16]

24. These principles included a deeper consideration of the importance of press freedom. A production order should only be made if "in the particular circumstances it is indeed appropriate", and that will require balancing the public interest in the investigation of crime and the public interest in free speech:

> "When a genuine investigation into possible corrupt or reprehensible activities by a public authority is being investigated by the media, compelling evidence is normally needed to demonstrate that the public interest would be served by [proceedings directed towards the seizure of journalistic material]. Otherwise, to the public disadvantage, legitimate enquiry and discussion, and the "safety valve of effective investigative journalism" … would be discouraged, perhaps stifled."[17]

Notifying the media of an application

25. The case is weak for having a general rule that applications should be ex parte and without notice. There should be an onus on the applicant to establish why notice cannot be provided and why (whether or not notice is provided) an application should be ex parte.

26. At the very least, notice should be given to the lawyer for a media organisation where the interests of such an organisation are engaged. Lawyers are officers of the court. As an Australian media lawyer said to me in a research interview:

> "[We] are officers of the court, we understand our obligations to the court, we are bound by them. The chances of us saying - 'We understand what the judge has said, we understand what the Act says, but we're just going to do the opposite'— that's just not likely."[18]

27. Notification does not necessarily replace a public interest advocate. It could well be that a public interest advocate might articulate arguments in ways that go more substantially to the public interests that underpin press protections, and may also (I presume) have access to security-sensitive information that the press may not have.

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[15] *R v Central Criminal Court; Ex Parte Bright* [2000] EWHC 560 (QB)

[16] *Bright at* [84], [80]-[85], Judge LJ; see also [160] Maurice Kay J, [182], [188]; Gibbs J

[17] *Bright* at [97]-[98] Judge LJ, references omitted

[18] L McNamara, 'Closure, Caution and the Question of Chilling: How have Australian counter-terrorism laws affected the media?' *Media and Arts Law Review*, 2009, vol 14, pp 1-30, 14.

Press protections serve the public interest in national security

28. The case for press protections serving the public interests outlined above is nmot the only reason for press protections. As Legal Director of the Guardian, Gill Phillips, has noted, "If public interest journalism is made harder or even criminalised, there is a real risk that whistleblowers will bypass responsible journalists altogether, and simply anonymously self-publish data leaks online, without any accountability."[19]

How do the Australian laws compare?

29. **Enforcement agencies - JIWs (TIA Division 4C, Subdivision B):** these require a judicial decision-maker. It appears that they have a discretion based on the balancing of interests. However, media organisations are not required to be given notice. The standards of balancing do not exclude material held in confidence.

Enforcement agencies - search warrants (Crimes Act 1914, s 3E) These contain no journalistic protections.

Recommendation 3:

The UK models under PACE and TA 2000 offer more appropriate protections. The Australian laws should incorporate at least the standards that they are based on.

30. **Intelligence agencies - JIWs (TIA Division 4C, Subdivision A):** these appear to be done solely on Ministerial authorisation.

31. This is **remarkably at odds with the approach in the UK**. The Investigatory Powers Act 2016 was enacted following extensive reviewing of previous laws and major consultation on draft proposals. It includes a regime where:
    - there are specific protections for journalistic material and
    - where there is oversight by 'judicial commissioners'.

32. In this submission I am unable to go into detail but can give an outline in any oral evidence and would be willing to provide supplementary written evidence should it assist.

Recommendation 4:

The UK protections under the Investigatory Powers Act should be considered in examining the TIA Division 4C, Subdivision A provisions.

[19] Kieran Pender, '"Creeping Stalinism": secrecy law could imprison whistleblowers and journalists', The Guardian, 10 Jan 2018, https://www.theguardian.com/australia-news/2018/jan/11/creeping-stalinism-secrecy-law-could-imprison-whistleblowers-and-journalists.

The evidence base

33. It is not clear from a distance exactly what motivation or assumptions underpins the aspects or deployment of Australian laws under consideration. However, insofar as the laws might be underpinned by an assumption that journalists and media organisations would intentionally or recklessly place at risk national security or the safety of individuals, the following findings from my research may be of interest to the Committee:

> "Are journalists reckless about managing information relating to terrorism and security? The answer is, resoundingly, 'no'. Do journalists view their roles uncritically? Again, clearly, 'no'. An accountable and responsible state should not fear the media where national security … [is] at issue.
>
> "In the practice of journalism, as it emerged in the research interviews, the public interest in openness and open justice is of vital importance, but it is ultimately secondary and will yield to primary priorities of natural justice and the public interest in national security.
>
> "However, state controls over information currently make the gulf between these primary and secondary commitments unacceptably and unhealthily wide."[20]

Are protections really necessary? Protecting against state failures

34. There is no question that secrecy is required at times. In much of national security it is essential that some things are kept away from the public eye and, at times, closely held within state agencies.

    However, those are the very characteristics that pose a risk of state failures, both in behaviour and in the failure of internal processes to identify and remedy them.

35. And the state can fail badly. In 2018 the UK government apologised for its part in the abduction, detention and rendition to Libya of two people, acknowledging the "harrowing" mistreatment

> "The UK Government's actions contributed to your detention, rendition and suffering. The UK Government shared information about you with its international partners. We should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part.
>
> "Later, during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened.
>
> "On behalf of Her Majesty's Government, I apologise unreservedly. We are profoundly sorry for the ordeal that you both suffered and our role in it."[21]

[20] L McNamara, 'Secrecy, the Media and the State: Controlling and Managing Information about Terrorism and Security' in G Martin, R Scott-Bray & M Kumar (eds), *Secrecy, Security and Society*, 2015, Routledge, pp 139-157.

[21] The Attorney-General Jeremy Wright), HC Hansard, 10 May 2018, Vol 640, Col 927

36. Media protections are not a panacea for that, but they are one important avenue that allows for the possibility of protecting against those failures.

The cumulative landscape

37. One of the main problems in national security legislation and in its reform and review is that the focus tends, often for practical reasons, to be on the specific matters at hand. What is neglected is the fact that provisions sit within a wider landscape of national security laws that, in combination, have vast and cumulative effects. Compromises on accountability and scrutiny should not be seen in isolation, because they are not experienced in isolation. In the UK there are challenges and limits around processes of reporting to parliament, there has been extensive secrecy in proceedings in at least one criminal case relating to terrorism, there are major laws that allow for closed material procedures in all civil matters, and suggestions from the Law Commission of England & Wales that such procedures might be adopted in parts of the criminal law.

38. The Committee's inquiry into press freedom is to be welcomed because it gives room to take account of the cumulative effects. There is much in the UK experience to suggest it should do and it may well be that there is much in the Australian experience that also suggests it.

39. I hope the above comparative comments are helpful to the Committee in its Inquiry.

Dr Lawrence McNamara

University of York, 10 February 2020