ABC ALUMNI LIMITED SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY:

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

12 August 2019

INTRODUCTORY STATEMENT

ABC Alumni Limited represents a community of nearly 300 former staff and supporters of the Australian Broadcasting Corporation – many of them experienced reporters, editors, and senior news managers. We support fully funded, high quality, independent, ethical and free public media in Australia. Our objectives are to promote excellence across all media platforms through advocacy, education, mentoring, public forums and scholarships.

ABC Alumni thanks the Committee for accepting this late submission. The delay was caused by the absence overseas of some of our most experienced members, whose input we considered essential. However, it has had the virtue of allowing us to read many of the submissions already posted. Some of these are, in our opinion, of high quality – in particular, those from Australia's Right to Know Coalition (ARKC), from the ABC, from the Alliance for Journalists' Freedom (AJF), from Dr Ananian-Welsh and others from the University of Queensland (UQ), and from Dr Kieran Hardy and Prof George Williams (KH&GW). In this submission we have attempted not to go over the same ground as those submissions, but to make a few points that they have not covered, or have given little space to.

EXECUTIVE SUMMARY

Terms of reference (a) and (b):

The submission discusses briefly the importance of maintaining robust and independent news media.

We consider the impact on public interest journalism of recent legislation concerning security, espionage and law-enforcement: we touch on the *Telecommunications (Interception and Access) Act* as amended, and the new sections of the *Criminal Code Act 1995* dealing with espionage and secrecy.

We then make the point that new interpretations of old laws are if anything more concerning than the new legislation that other submissions have tended to focus on.

We consider in some detail two search warrants granted recently to the Australian Federal Police, both of which claimed that the recipients of unauthorized information (one a political aide, one an ABC journalist), as well as the leaker (or "whistleblower"), were suspected of criminal conduct, in each case by the breach of laws that are more than a hundred years old.

The AFP's interpretation of these laws, we submit, is new and profoundly concerning.

Term of reference (c)

The submission makes two recommendations to counter the threat to a free press.

1. That all applications for warrants to search media organisations' offices or journalists' homes, travel records and metadata should be transparent and contestable, rather than secret.

2. That the federal parliament give statutory force to Article 19 of the International Covenant on Civil and Political Rights by passing a law that specifically protects free speech and freedom of the press.

SUBMISSION

1. Terms of reference a) and b):

THE IMPORTANCE OF A FREE PRESS

The test of a person's support for free speech is whether they support speech with which they disagree.

The test of a society's support for a free press is whether its laws and its government support the right of journalists to research and publish stories that are true, but unwelcome and embarrassing to those in power.

The kind of journalism that media organisations are fighting to protect is, by its nature, controversial. It's possible to argue that it was harmful, not helpful, to Australia's national interest that the Australian – and Indonesian – publics came to know that ASIS had been able to monitor the metadata of President Yudhoyono's mobile telephone; or that at the behest of its political masters, ASIS secretly bugged the room where Timor Leste's negotiators discussed their strategies; or that the government has recently debated extending the Australian Signals Directorate's remit to allow it to monitor the private communications of Australian citizens; or that members of Australia's special forces are being investigated for alleged war crimes in Afghanistan.

We would argue that the publication of all these stories was in the public interest; but in any case, we trust that Committee members agree that, whether or not they consider any particular story responsible and justified, a robust and free press, able to hold even secret agencies to some kind of account, is an essential element of a healthy democracy

Some secrecy, of course, is essential to aspects of intelligence work, of law enforcement, of counter-terrorism, of diplomacy, and of government in general. Too much secrecy is dangerous. One of this Committee's tasks is to oversee the operations of Australia's increasingly powerful intelligence and security community – but that is a difficult task for outsiders to perform. We believe that the majority of whistleblowers – however unwelcome they may be to the organisations for whom they work – are motivated by conscience rather than a desire for notoriety; and, along with a free press able and willing to investigate, verify and publish what they bring to light, are essential curbs on secret power.

What is certain (as Australia's foremost constitutional lawyer, UNSW's Professor George Williams, has repeatedly pointed out) is that Australia has more draconian counter-terrorism and security legislation, and fewer safeguards for either whistleblowers or journalists acting in good faith, than any comparable OECD country – and certainly fewer than other countries with an English common law background.

THE IMPACT OF NEW LAWS

Many of the submissions received by this inquiry go into detail about the extent to which journalists – particularly investigative journalists attempting to report, in the public interest, on matters concerning national security, terrorism, Australia's intelligence agencies and the ADF, and their operations here and overseas – have been affected by a raft of new laws, and amendments to old laws, passed since 11 September 2001. According to KH&GW (submission 11 page 1), 75 separate pieces of counter-terrorism legislation have been passed since 2001. "A disturbing number of these", they say, "have the potential to affect press freedom". We agree.

To take just one example, many of the submissions consider the implications of the 2015 amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) (TIA Act), which oblige telecom companies and ISPs to preserve metadata for two years. They argue that applications for Journalists' Information Warrants, which are currently shrouded in secrecy, should be open and contestable. We agree.

Another cause for great concern is the amendments to the espionage and secrecy laws. Under the notorious section 70 of the Crimes Act, a Commonwealth public servant convicted of communicating to an unauthorized person ANY information which he or she had acquired in the course of performing their duties could be sentenced to two years imprisonment. The Australian Law Reform Commission long ago urged that this provision be repealed. Now it has been. Instead, under section 122.1 of the Criminal Code Act, a Commonwealth officer who communicates "inherently harmful" information is liable to seven years' imprisonment – and (S122.4A) a journalist who communicates any information that he or she has obtained from a Commonwealth officer and that has a security classification of "secret", or that "damages the security or defence of Australia", can be imprisoned for 5 years.

And for good measure, under S122.4, the provisions of S70 of the old Crimes Act still apply for a further five years.

The chilling effect that these provisions pose for journalists covering terrorism, defence, foreign relations or national security, and especially for their confidential sources, is obvious – and probably deliberate.

In the United States, the Constitution protects media companies that publish information, even if it was obtained illegally. Thus, although Edward Snowden would undoubtedly face prosecution and many years in prison if he returned to the United States, the organisations which published stories based on the information he acquired in his capacity as a consultant to the NSA – notably the *Washington Post* and *The Guardian* – cannot be prosecuted.

Under one of the new provisions of our own Criminal Code, (S122.3) Snowden, if he were a consultant to an Australian intelligence agency, would be liable to imprisonment for ten years, and (S122.4A) any journalist who "dealt with" information he supplied – whether or not they published it – would be liable to five years.

NEW INTERPRETATIONS OF OLD LAWS

This Committee has considered, and in many cases suggested helpful amendments to, most of this recent legislation

But ironically, ABC Alumni's concerns – and, we suggest, the concerns of most practising journalists – are at least as much with the way old laws are being put to new uses, as with the chilling effect of new legislation. If those old laws have the meaning that the Australian Federal Police apparently thinks they do – and though its interpretations have not so far been tested in a court of law, it has on at least two occasions been able to secure search warrants based on those interpretations – then the ordinary practice of journalism in this country will have been effectively criminalised.

The AFP has for decades been tasked by politicians and senior public servants with investigating the source of leaks to the press. The unattributable distribution of information to favoured journalists by politicians and their advisors has always been a standard tool of political news management, by governments and others. But ministers and department heads are nevertheless determined to discourage embarrassing and unauthorized leaks by public service insiders.

The AFP has traditionally undertaken this task without much enthusiasm, and has accepted that journalists are duty bound not to reveal their sources. Occasionally, nevertheless, an AFP investigation has identified particular 'Commonwealth officers'

as leakers. They have been disciplined, occasionally dismissed and still more rarely prosecuted. But until recent years it has never been suggested that the recipient of an unauthorized leak of information might be a criminal too.

That changed on the 18th May 2016, when a Victorian magistrate signed a search warrant authorising the AFP to search the office of a sitting federal senator, Stephen Conroy, and the home of one of his political advisors.

The federal police were in pursuit of someone who had leaked information that had been published in *The Australian*, the *Sydney Morning Herald*, and on the ABC. It did not relate to national security, or intelligence, or defence, or terrorism. The information concerned the costings and projected spending of the NBN Co as it rolled out its controversial national broadband network. The suspected leaker was an employee of NBN Co, a government-owned enterprise.

According to the search warrant, however, that suspect was a "Commonwealth officer", and he was suspected of breaching section 70 of the Crimes Act.

Even more worryingly, the search warrant named Senator Conroy's aide, and declared that there were "reasonable grounds for suspecting that … [he] did receive documents knowing at the time he was not authorised to receive the documents, contrary to section 79(6) of the Crimes Act 1914."

S79 of the Crimes Act 1914 (since repealed, to be replaced by the more draconian provisions in the amended Criminal Code, as outlined earlier) was originally headed "official secrets" and clearly was intended to criminalise the unauthorised disclosure of defence and intelligence-related information. However, like S70, its wording made it applicable to any and all information acquired by a Commonwealth officer in the course of his or her duty, and subsection (6) went on to criminalise the receipt of that information, if the recipient knew it to be "secret".

The AFP successfully applied for a search warrant on the grounds that NBN's accounts were official secrets, and that a political aide to a former Minister for Communications was guilty of a criminal offence in receiving them from the leaker.

It is extremely doubtful that the DPP would have agreed to prosecute on these grounds, and almost certain that the courts would have thrown the charge out if he had. Nevertheless, there should have been an outcry in the media when the warrant was made public, because it made clear that in the AFP's eyes, anyone – be they a foreign agent, a political aide or a journalist – who knowingly received unauthorised information from a Commonwealth whistleblower might be guilty of a crime, regardless of whether or not they communicated it to others.

There should have been an outcry, but there wasn't. And though the AFP's recent raid on the ABC has caused an outcry, there has been little focus on the even more bizarre grounds on which that search warrant was obtained.

The AFP already knew who had leaked information about alleged war crimes committed by Australian special forces in Afghanistan: military lawyer David McBride – he's named in the warrant.

The AFP also knew to whom it thought McBride had leaked: ABC reporter Dan Oakes – he's named in the warrant, too.

The warrant states that McBride is suspected of giving to Oakes "military information, contrary to section 73A(1) of the Defence Act 1903".

The section does mention "military…information", at the end of a long list of more definite forbidden topics: "information relating to any fort, battery, field work, fortification, or defence work, or to any defences of the Commonwealth, or to any factory, or air force aerodrome or establishment…" comes first. There's no mention of information relating to war crimes investigations.

As for Oakes, the AFP suspects that he "obtained military information, contrary to 73A(2) of the Defence Act." All he has to do to break this ancient law is to "unlawfully … obtain" information about said "fort, battery, field work [etc etc] or any other military…information."

He doesn't have to publish it, or communicate it to anyone else. To obtain it is to break the law.

The penalty for conviction of either crime is unlimited.

There's no suggestion in the warrant that the information obtained is harmful to Australia's interests or security, as there would have to have been if the AFP had attempted to use the new provisions of the Criminal Code. (To be fair, those provisions were not in force at the time the alleged offences were committed.)

Yet the AFP does refer to the Criminal Code. Not to any of its sections that deal with unauthorised disclosure of information, or betrayal of secrets. No, the warrant goes on to state that McBride is suspected of the *theft of Commonwealth property* "contrary to the section 131.1(1) of the Criminal Code Act 1995."

Theft, says the Act, takes place when "(a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property; and (b) the property belongs to a Commonwealth entity."

To describe the leaking of information about alleged war crimes as “theft” smacks of desperation. Even more disturbingly, according to the warrant, the AFP suspect that Dan Oakes “dishonestly received stolen property…contrary to section 132.1 of the Criminal Code Act 1995”.

In other words, the AFP thinks that Daniel Oakes, reputable ABC investigative reporter, is not a journalist. He’s a receiver of stolen goods – a fence.

This document, which strikes us at ABC Alumni as absurd, was dutifully signed by a registrar of the local court at Queanbeyan in New South Wales. We would hope that a more senior federal judge would have thrown it out.

The fact that these search warrants were obtained on these spurious interpretations of ancient legislation illustrates, we submit, that the current threat to the freedom of the press will not be solved by tinkering with this or that piece of recent legislation – however welcome and necessary such tinkering may be.

What both warrants demonstrate is that the AFP (with or without the approval of its political masters) has sought out those laws that criminalise the mere receipt of unauthorised information, rather than its publication, and applied them, not to suspected spies, but to professionals engaged in the normal and necessary tasks of political opposition (in the first instance) and investigative journalism (in the second). This is to strike at the heart of our democratic process.

Reacting to the furore created by its raids on the ABC and on Annika Smethurst, the Minister for Home Affairs has told the AFP that he expects it to “take into account the importance of a free and open press in Australia's democratic society”, and the AFP has stated that it “supports press freedom as a cornerstone of a democracy."

Yet those search warrants belie the AFP’s claim – and the Minister at first supported its searches. The ABC is challenging the validity of the second warrant, but its task is made harder by the fact that Australia, uniquely among those countries with which we like to compare ourselves, has no constitutional or legal provision that protects press freedom.

2. <u>Term of reference (c)</u>

ABC Alumni make two recommendations, both of which are supported by other well-qualified submissions.

1. That ALL warrants authorising a search of a journalist's home or metadata, or a media organisation's offices, whose aim is to identify the source of leaks, or to find evidence to support the prosecution of whistleblowers and/or journalists, should be contestable. Judges, magistrates and registrars should be given the opportunity to hear well-briefed counsel arguing in favour of journalists' right to protect their sources, and for the public interest inherent in any particular story.

   We do not accept the AFP's argument that giving media organisations prior warning of searches will make them ineffective. As UQ point out in their submission, contestable media warrants have been established in the UK, for example, and work well.

   The same openness and contestability should apply to Journalist Information Warrants that seek to identify sources through metadata. The secretive role of the Public Interest Advocate, who cannot under present legislation consult with or be briefed by the journalist or organisation that is to be the subject of the search, is ineffective and inappropriate.

   We support the recommendation of UQ's submission that there should be a system of transparent, contestable Media Warrants.

2. ABC Alumni support the recommendation of Dr Hardy and Professor Williams that the federal parliament give statutory force to Article 19 of the International Covenant on Civil and Political Rights (to which Australia has been a signatory for more than fifty years) by passing a law that specifically protects free speech and freedom of the press. Such a law would be an invaluable aide to those contesting the validity of laws, warrants and court judgments that tend to limit or chill fair and honest reporting in the public interest.

   One consequence of the passage of such a law, it is to be hoped, would be to make unfeasible the prosecution of any professional journalist merely for receiving, as opposed to publishing, official information.

This concludes our written submission. Although we appreciate this is an 11th hour submission, ABC Alumni would be happy for its representatives to appear in person

at one of the Inquiry hearings – preferably in Sydney, though Canberra would be possible too.

Submitted on behalf of ABC Alumni by:
Jonathan Holmes (former executive producer, *Four Corners* and *7.30 Report,* former presenter, *Media Watch*) and
Matt Peacock (former ABC investigative reporter, former staff-elected director of the ABC, author of *Killer* Company)
Authorised by:
Matt Peacock and Helen Grasswill, Directors, ABC Alumni Limited [ACN 628 088 371]
Contacts:
Matt Peacock email: matthewjpeacock@hotmail.com Mob: 0408 168 479
Jonathan Holmes email: Jonaholmes112@gmail.com Mob: 0417 280 038
ABC Alumni email: ABCAlumniAustralia@gmail.com