SUBMISSION TO SENATE ENVIRONMENT AND COMMUNICATIONS COMMITTEE INQUIRY INTO PRESS FREEDOM

3 SEPTEMBER 2019

Australia's Right to Know coalition of media companies appreciates the opportunity to make this submission to the Senate Environment and Communications Committee (the Committee) inquiry press freedom (the Inquiry).

As the Committee is aware, ARTK has also made a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the impact of the exercise of law enforcement and intelligence powers on freedom of the press.

A free media is of utmost public importance

We believe a key issue to explore is the importance of a free media to ensure that the public's right to be informed of the actions taken by Government in their name is sufficiently protected. It is important to recognise the breadth of this issue, that it is not limited to 'national security' matters.

The rising tide of secrecy

In recent years many legal provisions that undermine and threaten the Australian public's right to know have been passed by the Federal Parliament under the guise of various national security concerns and national security legislation.

The culture of secrecy arising from these legal provisions that unnecessarily restrict Australia's right to know has permeated attitudes and processes more broadly. We have tackled some of these issues on a legislative amendment by legislative amendment basis and provided submissions and evidence to Parliamentary inquiries, particularly the PJCIS. But with each of these laws the tide of secrecy rises. This is deeply disturbing in a modern and robust democracy.

The tool that is used – laws that are designed to put journalists in jail for doing their jobs – has a chilling effect on reporting. It is not far-fetched to conclude the impact of the AFP raids, and the approach the Government has taken to the fate of the journalists that are the subject of those search warrants, is intimidatory.

The stories at risk of not being told, of us all not being informed about, rarely involve matters of national security. The stories at risk of not being told, of us all not being informed about, concern things that affect

ordinary Australians every day like the quality of aged care and how our tax dollars are being spent. Think kerosene baths and pink batts.

As is clear from this submission and the many other submissions we have made to Federal, state and territory jurisdictions over the past decade and even earlier, that laws which place restrictions on what the public cannot know are not limited to national security and counter-terrorism. There are a multitude of laws that need attention due to their intended and unintended restrictions that impact the Australian public's right to know.

It is a fact that there is a significant number of existing laws that require reform. The challenge for this Committee is to tackle what is undoubtedly a wide ranging and complex undertaking to ensure that actions live up to the rhetoric around supporting a free media.

The myth of 'balancing' media freedom and national security

The right to free speech, a free media and access to information – in service of the public's right to know – are fundamental to Australia's modern democratic society: a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no national laws enshrining these rights. In the US the right to freedom of communication and freedom of the press are enshrined in the First and Fourth Amendments of the Constitution and enacted by state and federal laws. In the United Kingdom, freedom of expression is protected under section 12 of the *Human Rights Act 1998* subject to appropriate restrictions to protect other rights that are considered necessary in a democratic society.

The absence of such an explicit right in Australia means that every law that restricts the public's right to know challenges the fundamental principles that are the foundation of a modern, liberal democratic society.

We note here that both the US and United Kingdom are members of the Five Eyes alliance, along with Australia, Canada and New Zealand. It has been put in a number of forums that unauthorised public disclosure of materials strains, and may even jeopardise, relationships with partners such as members of the Five Eyes alliance. However, given that the US (in particular) begins at a very different point in framing the values that nation believes are worth having—values which emphasise freedom of expression and reporting—we encourage the Committee to be open to considering our specific areas of law reform in an effort to ensure that Australia will not be out of kilter with its key alliance partners.

ARTK proposal for law reform – putting the balance in balancing-act

As we have expressed in various forums, law reform is necessary and urgent. The combined effect of almost two decades of laws that individually create a proliferation of ways in which journalists can be exposed to the threat of criminal charges for simply reporting uncomfortable or unpleasant realities is now a matter of serious national concern. For the most part, these laws have very little to do with national security and everything to do with the exercise of power and the desire to avoid scrutiny. We have proposed legislative reforms that directly address the main issues. This is not a menu or a wish list. These are reforms that can and should be implemented immediately and that will go some way to providing the 'better balance' that the public demands.

As it stands, the current so-called balancing act between the public's right to know and the objective of controlling Government information is not a balance at all.

The objective of our law reform proposal is to bring the public's right to know up-front, as an active consideration – the balance in the balancing act – at the beginning of the process.

Conclusion: our proposal for law reform is to introduce

- The right to contest the application for warrants for journalists and media organisations;
- Public sector whistle-blowers must be adequately protected – the current law needs to change;
- A new regime that limits which documents can be stamped secret;
- A properly functioning freedom of information (FOI) regime;
- Exemptions for journalists from laws that would put them in jail for doing their jobs, including security laws enacted over the last seven years; and
- Defamation law reform.

Details of those reforms follow.

1. THE RIGHT TO CONTEST THE APPLICATION FOR WARRANTS FOR JOURNALISTS AND MEDIA ORGANISATIONS

- Applications for the issue of all warrants and compulsory document production powers[1] associated with journalists and media organisations undertaking their professional roles must be contestable. This requires:
    - Applications for all warrants must be made to an independent third party with experience in weighing evidence at the level of a judge of the Supreme Court, Federal Court or High Court. The best outcome is for this to occur in open court in the Supreme Court, Federal Court or High Court.
    - The journalist/media organisation being notified of the application for a warrant
    - The journalist/media organisation being represented at a hearing, presenting the case for the Australian public's right to know including the intrinsic value in confidentiality of journalists' sources and media freedom
    - The independent third party deciding whether to authorise the issuing of a warrant – or not – having considered the positions put by both parties
    - That a warrant can only be authorised if it is necessary for its stated statutory purpose and the material sought cannot be obtained via other means
    - That a warrant can only be authorised if the public interest in accessing the metadata and/or content of a journalist's communication outweighs the public interest in NOT granting access, including, without limitation, the public interest in the public's right to know, the protection of sources including public sector whistle-blowers and media freedom
    - That there be a presumption against allowing access to confidential source material
- The journalist/media organisation has a reasonable period after the warrant is authorised to seek legal recourse including injunctions and judicial review
- A transparency and reporting regime for application of and decisions regarding issuing and authorisation of warrants.

Some may say that a contestable regime for warrants would take the element of 'surprise' out of the equation, and as a result evidence would be destroyed. This is not insurmountable. We recommend that legislative provisions be drafted that prohibit anyone destroying evidence upon receipt of the notification of the application for a warrant. Such an offence would be over and above the fact that once notified of a warrant application, anyone who went about destroying documents would likely be in contempt of court.

We note the Terms of Reference for the Inquiry include examining an appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation.

The *Telecommunications Interception and Access Act 1979* (the TIA Act) and the mandatory data retention regime, that contains the Journalist Information Warrant Scheme (JIW Scheme) to which the above term of reference relates.

ARTK made a submission to the Parliamentary Joint Committee on Intelligence and Security's review of the mandatory data regime in July. That submission has been published on that Inquiry webpage (submission 14) and is attached at **Attachment A** to this submission.

2. PUBLIC SECTOR WHISTLE-BLOWERS MUST BE ADEQUATELY PROTECTED – THE CURRENT LAW NEEDS TO CHANGE

Public Interest Disclosures

[1] For example, section 3ZQO of the *Crimes Act 1914* (Cth) empowers the AFP to apply to a Federal Circuit Court judge for a notice requiring the production of travel information, among other documents. This covers a journalist's flight information.

The *Public Interest Disclosure Act* purports to provide protections for public sector whistle-blowers. It falls a long way short of this. Changes required include:

- 'Protections' in all cases require review, public service whistle-blowing should be encouraged and adequate protections must be provided including protections for external public disclosure
- Protection for intelligence agency personnel and staff of Members of Parliament
- Expand the public interest test to remove bias against external disclosure
- Presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of news gathering
- The ability for identifying sources via journalists' communications and metadata (Journalist Information Warrant Scheme) makes a mockery of the shield law that protects the identity of journalists' sources once proceedings have commenced (ARTK submission to be made to PJCIS)

We note comments by Attorney-General Christian Porter regarding an intention to review the so-called public-sector whistle-blower protections in the *Public Interest Disclosure Act* (Cth) on the basis of a recent judgment by Federal Court Justice John Griffiths. In that judgment[2], Justice Griffiths described the Commonwealth whistle-blower laws as 'technical, obtuse and intractable.'[3]

Justice Griffiths goes on to opine why this may be the case. However, he concludes that it is law-makers – the Parliament – who should address the current state of affairs. Specifically, Justice Griffiths says: *'It is acknowledged that reconciling these competing objects is not an easy exercise and is one for the Parliament. But the outcome is a statute which is largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy'.*[4]

We welcome the Attorney-General's commitment to overhauling the relevant Commonwealth law that purports to provide protections for public sector whistle-blowers.[5]

We also note the Report of the Review of the PID Act (the Moss Review Report)[6] and the importance it places on the objectives of the PID Act. Most significantly we note that the Moss Review Report's recommendations as intended to '*encourage and instil a pro-disclosure culture'*.[7]

This reflects a keystone of our concerns and demonstrates why all elements of our law reform proposal should be considered in aggregate – to reverse the secrecy culture and ensure the public's right to know is an active first order consideration.

The value of corporate whistle-blowing and reporting corporate missteps, wrong-doings and corruption has never been more valued in Australian society than it is now. There are increased protections for corporate whistle-blowers and improved grievance processes as a result. In contrast, however, public sector whistle-blower laws are deficient and require updating.

We look forward to understanding the time frame for the open and accountable review and overhaul of the Commonwealth's whistle-blower laws to deliver the aim of encouraging and instilling a pro-disclosure culture.

Proposed Commonwealth Integrity Commission

[2] https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2019/2019fca0548
[3] Ibid. at [17]
[4] Ibid, at [18]
[5] https://www.theaustralian.com.au/business/legal-affairs/porter-flags-plan-to-protect-sources-behind-public-service-leaks/news-story/ebf86d51ecd912dedd8628e6a0382e02
[6] https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf
[7] Ibid, at [180]

Robust regulatory and law enforcement frameworks to deal with corrupt and criminal behaviour should be complemented by news reporting which shines a light on conduct of this nature. Hearings on public sector corruption should be public so that media companies can report on them.

The framework for the proposed Commonwealth Integrity Commission (CIC) should safeguard public broadcasters' role as a provider of public interest journalism. It should ensure confidential sources continue to have confidence to bring allegations of corruption in public service agencies to the attention of public service broadcasters' journalists, without fearing that their documents and/or identity will be revealed, and without public broadcasters' journalists being at risk of being called before a hearing to reveal their sources.

The CIC scheme could have a chilling effect on journalism if it:

- required public broadcasters to provide information and documents obtained in the course of journalism that are not about the public broadcaster itself, but that relate to allegations of corruption at another agency;
- allowed the CIC to inspect and seize documents without a court order; and/or
- penalised journalists/public broadcasters for failing to provide information which may reveal confidential sources.

Legislation establishing a CIC should, among other things:

- clarify that the scheme applies only to the agency being investigated and not require the heads of the public broadcasters to provide material obtained in the course of journalism to the relevant commissioner;
- if information or documents are required to be provided, require a court order before that material is seized or requested by the CIC, and provide clear grounds for public broadcasters to challenge such orders to protect sources;
- acknowledge the ethical obligations on journalists to protect confidential sources; and
- adopt a broad definition of journalism.

Lastly, but importantly, we note the importance of the application of the Commonwealth shield law regarding the operation of the Commonwealth Integrity Commission. Specifically, the *Evidence Act 1995* (sections 126G and 126H) must apply to the activities of the CIC so that journalists cannot be compelled to answer any question or produce any document that would disclose the identity or enable that identity of a confidential source to be ascertained.

Public broadcasters have made detailed submissions to Government setting out specific proposals relating to these amendments. Through the consultation process, both the ABC and SBS have raised concerns about the proposed legislation and its potential to cause unintended consequences by impinging public interest journalism.

3. A NEW REGIME THAT LIMITS WHICH DOCUMENTS CAN BE STAMPED SECRET

Legal experts such as Bret Walker SC, who previously held the Commonwealth role of Independent National Security Legislation Monitor (INSLM), have recommended 'new overarching legislation that defines in a restrictive fashion what information must be kept secret'.

Conversely, and importantly, that will also define what information will not be kept secret.

We support this. Any new framework must include a public transparency requirement via auditing and reporting requirements. Auditing and reporting should consist of two elements: regularly scheduled audits (for example annual) and random audits.

All audits must include a public report, to be published publicly within (say) 30 days of the completion of the audit. The necessity for timely reporting as a transparency and accountability measure cannot be undervalued. This would also ensure this reporting does not replicate the unnecessary delays of reporting currently evidenced under the TIA Act.

4. A PROPERLY FUNCTIONING FREEDOM OF INFORMATION REGIME

The Government can also shut down reporting through the FOI process. FOI laws require meaningful attention and improvement in all aspects. A review of FOI laws must include a panel of FOI 'user' experts and this must include specialist journalist representatives.

The last attention given to the Commonwealth FOI process was the Hawke Review in 2012. We made a detailed submission to that review.[8] The issues we raised in 2012 remain in 2019 including, but not limited to:

- Journalists continue to encounter barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making;
- Review processes are inadequate and alternative means of review at an early stage must be available (for example, Administrative Appeals Tribunal);
- Exemptions should not be expanded or 'reformulated' (eg, the provision of frank and fearless advice);
- The cost of applications is often a disincentive to seek information; and
- Processing time assessments and limits are tools to defeat FOI applications.

The 2013 Final Report of the Hawke Review[9] recommended that a comprehensive review of the FOI Act be undertaken[10]. This has not occurred.

Further, we made a submission to the Senate Legal and Constitutional Affairs Committee regarding the *Freedom of Information Amendment (New Arrangements) Bill 2014.*

We raised then that the Government was yet to provide a response to the Hawke Report into Commonwealth FOI laws. We also noted that while we did not support many recommendations from the Hawke Report, we strongly supported the proposal for a comprehensive review of the FOI Act and its operations. We also recommended such a review should be conducted by a broadly-based expert panel, including media representatives, and should be announced in early 2015. We suggested that the Senate Legal and Constitutional Affairs Committee support this recommendation as there were, and continue to be, a number of problems with the current FOI regime. For example:

- In some instances, there were regularly delays past the 30 day timeframe for decision making on requests from media organisations, making it difficult for the media to use FOI to report on government in a timely fashion;
- Some agencies often advised journalists that an FOI request has been refused in accordance with section 24AA because the work would involve a substantial and unreasonable diversion of agency resources. Agencies should be properly resources to respond to FOI requests. This aspect of the FOI Act needs urgent reform as agencies appear to be failing to consider the importance of the public interest and the real value to efficient government from early exposure of policy and program failures through FOI compared to the administrative cost of processing requests; and
- The use of disclosure logs is a significant deterrent to media organisations investing in FOI investigations, to the detriment of an informed public and open and transparent government.

As we said above, these issues remain today as they did in 2014 and in 2012.

[8] https://www.ag.gov.au/Consultations/Pages/ReviewofFOIlaws.aspx
[9] https://www.ag.gov.au/Consultations/Documents/ReviewofFOIlaws/FOI%20report.pdf
[10] Ibid. Recommendation 1, p4

We urge the Government to undertake a comprehensive review of the FOI Act as a matter of urgency.

We also recommend transparency measures – including auditing and reporting – are elements of a reviewed Commonwealth FOI regime.

5. JOURNALISTS MUST BE EXEMPTED FROM NATIONAL SECURITY LAWS ENACTED OVER THE LAST SEVEN YEARS THAT WOULD PUT THEM IN JAIL FOR DOING THEIR JOBS

We have provided detailed analysis to the PJCIS on previous occasions regarding the following, including that exemptions for public interest reporting are essential for:

- Section 35P of the *ASIO Act*;
- Journalist Information Warrant Scheme at Division 4C of the *Telecommunications Interception and Access Act*;
- *Criminal Code Act, Part 5.2 – Espionage and related offences; Part 5.6 – Secrecy of information,* section 119.7 – Foreign incursions and recruitment; section 80.2C – Advocating terrorism; and
- *Crimes Act* – sections 15HK (controlled operations, unauthorised disclosure of information) and section 3ZZHA (delayed notification search warrants, unauthorised disclosure of information).

ARTK has made submissions to PJCIS inquiries regarding these provisions when they were introduced as enacting legislation. In each submission we recommended an exemption apply to public interest news reporting.

- **Section 35P of the *ASIO Act*** was enacted by the *National Security Amendment Bill (No.1) 2014*. ARTK made a submission to the PJCIS inquiry into that Bill. It should also be noted we made submissions and gave evidence to the INSLM review of section 35P of the *ASIO Act*.

  In our submission of 6 August 2014 we clearly articulated that we do not seek to undermine Australia's national security, nor the safety of the men and women involved in intelligence and national security operations.

  Further, over many years there has been useful dialogue between security officials and producers and editors of media organisations that has led to considered outcomes. Journalists and editors have demonstrated over time that such matters can be approached in a reasoned and responsible manner. We hold that this approach should continue to be preferred over attempts to codify news reporting and criminalise journalists for doing their jobs.

  While section 35P was amended following review by the INSLM, we remain dissatisfied with the provision and the way in which it undermines reporting. This is particularly so when Special Intelligence Operations (SIOs) by their very nature will be undisclosed. This uncertainty will expose journalists to an unacceptable level of risk and consequentially have a chilling effect on the reportage of all intelligence and national security material. A journalist or editor will simply have no way of knowing whether the matter they are reporting may or may not be related to an SIO. We express this as information that 'may or may not be' related to an SIO because:

  - It may or may not be known if the information is related to intelligence operations, and whether or not that intelligence operation is an SIO;
  - *'relates to'* is not defined and therefore the breadth of relevance is unknowable;
  - It is unclear whether SIO status can be conferred on an operation retrospectively – i.e. if information has been 'disclosed,' whether any operation that it may be associated with or related to can be retrospectively allocated SIO status; and
  - It is likely that clarity about any of these aspects would only come to light <u>after</u> information is disclosed – particularly in the case of reporting in the public interest.

To illustrate, the discloser may not be aware that the information relates to an SIO, nor whether the information is core/key/central to an SIO, and even less aware as to where the boundaries may lie for information that may or may not 'relate to' an SIO.

So the discloser – who may be a journalist, doing what they are legitimately entitled to do as part of their job – could be jailed for disclosing information that is related to an SIO, even if they were not aware of it at the time, or it was not an SIO at the time of the report.

This uncertainty is intensified as the proposed criminal offence is based on the disclosure of information that relates to an SIO – regardless of to whom the disclosure was made. For example, a journalist who checks with his/her editor or producer regarding the information and/or the story could be jailed for responsibly doing their job, even if the information is not ultimately broadcast or published.

To illustrate this further, if the producer or editor disclosed the information to anyone in the course of making an editorial decision, then the source, the journalist and the editor could all be jailed. The conversations that are currently able to be had as media outlets make responsible decisions about disclosure in the public interest, would be denied under the legislation, because any disclosure by anyone – to anyone – would be a criminal offence.

It is also observed that it is the intelligence agency that determines an intelligence operation as an SIO, and would also determine the 'related' nature of the information to the SIO.

We reflect also on the Forward of the Committee's *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*[11]*particularly the references to the Boston bombings and the murder of a British Soldier on the streets of London. These incidents are indeed concerning. If these incidents, or incidents such as these, were or became the subject to an SIO, then under the proposed amendments, journalists may be unable to report – including on incidents that may have been witnessed by a small or large number of members of the public, for fear of being charged with a criminal offence.*

*We also notes that s*ection 35P to the ASIO Act also entrenches the currently inadequate protections for whistle-blowers regarding intelligence information. As a foundation of freedom of communication, we draw attention to this matter and highlight that it further erodes freedom of speech and freedom of the media in Australia. Specifically, proposed section 35P makes it a criminal offence punishable by jail, for anyone, including a whistle-blower, to disclose information that relates to an SIO.

We made further submissions to the INSLM review of 35P. We include here two (2) scenarios that were put forward then to illustrate how section 35P may be engaged.

Scenario 1 – Melbourne terror raids – scenario based on actual events

In the days following anti-terror raids conducted throughout Melbourne in September 2012, a report was published in *The Australian*[12] (see **Attachment B**) which described the immediate impetus for the raids – an ASIO informer embedded within a group with terrorist links left his mobile phone behind and his messages with his ASIO contact were discovered by the group and published by them.

It is conceivable that this operation would have been conducted as an SIO were it taking place today, for example if the ASIO informer were in fact an ASIO agent and required authorisation under the auspices of an SIO for his contact with the terrorist group. If that were the case:

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11 http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/nsl2012/report.htm at *vii*

12 http://www.theaustralian.com.au/news/nation/how-informers-fears-triggered-terror-raids/story-e6frg6nf-1226474501095

a) The reporter involved might suspect that the operation was an SIO. At that point, the reporter faces the decision whether to proceed with investigating a story, the publication of which may prove to be illegal;
b) In any event, the reporter has no way of knowing with certainty whether the operation was an SIO since no source would be likely to provide such information given they would be breaching the law by disclosing its existence;
c) It is likely in those circumstances that the reporter would at best receive a 'cannot confirm or deny' response from official sources without the means to make further inquiries or to know whether the SIO was ongoing;
d) The reporter, editor and ultimately the publisher are left with a choice either to self-censor and drop the story or run the risk of breaching section 35P(1) or (2) if they publish.

Scenario 2 – Hypothetical scenario

A situation could conceivably arise whereby two ASIO agents are involved in the covert penetration of a suspected terror cell of young men with histories of drug trafficking, but who have recently been seduced by ISIS and who are believed to be considering a terrorist attack.

Both ASIO agents effectively work undercover in trying to win the trust of the group to learn of their plans. It is likely in these circumstances that the operation may be authorised as an SIO.

In the course of their work, one of the ASIO agents realises that his partner is becoming too close to the group, and suspects that he is actually involved in the unauthorised trafficking of drugs, lining his own pocket outside the terms of the SIO. He suspects his partner is playing down the terror threat that this group poses in order to protect his own racket. In frustration the 'good' ASIO agent goes to his superiors but they ignore him, as does the Inspector General of Intelligence and Security, telling him that his partner is authorised to dabble in drugs with the group in order to win their trust and that there is no evidence that he has gone to the 'dark side'.

The ASIO agent believes that his partner has gone rogue and wants to expose it. He provides information to a journalist who prepares a major report on the rogue ASIO agent. The journalist approaches the Government for comment, but the spokesperson asserts only that it would be illegal to publish any such story. The journalist has a reasonable basis to believe the operation has been conducted as an SIO, and therefore would be subject, together with the editorial chain, to five (5) or 10 years jail if the story were published.

In those circumstances, it can be assumed that the story is never written. The ASIO agent goes unpunished for two years until he is finally caught by ASIO's internal investigators and his employment quietly terminated. No-one knows anything publicly and they never will. And dangerous or illegal activity engaged in by the ASIO agent whilst trafficking on his own account, including activity that might pose a serious threat to Australia's national security interests, would remain permanently secret.

The lack of public scrutiny effectively means that ASIO and the Government are unlikely to be under any pressure to take firm measures to ensure that similar events do not occur again.

- **Journalist Information Warrant Scheme** at Division 4C of the *Telecommunications Interception and Access Act* was enacted by in the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (mandatory data retention regime) and the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* and consequent regulations. ARTK made a submission to the PJCIS inquiry into this matter and engaged with the then Attorney-General , the Minister for Communications, the Shadow Attorney-General , the Shadow Minister for Communications and the Attorney-General's Department over the course of this legislative/regulatory process.

See Attachment A for ARTK's 4 July 2019 submission to the PJCIS regarding the Scheme.

- ***Criminal Code Act, Part 5.2 – Espionage and related offences; Part 5.6 – Secrecy of information*** were introduced in the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (the Bill). ARTK made several submissions to the PJCIS inquiry into that Bill.

- **Section 119.7 of the *Criminal Code Act*** (foreign incursions and recruitment) was enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.* ARTK made a submission to the PJCIS inquiry into that Bill.

  In our submission of 3 October 2014, we explained that Proposed section 119.7 deals with the recruitment of persons to serve in or with an armed force in a foreign country; and proposed subsections 119.7(2) and 119.7(3) address *'publishing recruitment advertisements'*[13] which include news items that may relate to such matters.

  Lack of clarity about the 'news items' that are the source of recruitment or information about serving in or with an armed force in a foreign country

  There is a lack of clarity regarding 'what' it is – particularly at 119.7(3), and particularly as it relates to a news item – that is being targeted.

  Lack of clarity regarding who the offence is targeting

  There is also lack of clarity regarding 'who' the person is, or who is the target of the offence, that is committing the crime by 'publishing' the advertisement or news item.

  It could be envisaged that 119.7(2) and 119.7(3) may apply to – and not be limited to – the following separately, or a combination of any or all:
  - Persons associated with a media company's advertising arm or agency, including people responsible for advertisement bookings; and/or
  - Persons associated with a media company's newsroom or production; and/or
  - A director of a company; and/or
  - Editors, producers, journalists; and/or
  - Other persons that may be a party to any of the publishing/broadcast functions associated with (i) and (ii) of 119.7(2) and 119.7(3) and the above.

  Serious risk to innocent publication of advertisements and news items

  We have grave concerns regarding 119.7(3) and the implications for publication of legitimate advertisements and news.

  This is particularly the case when the advertisements or news items may, on face value, be benign and indeed legitimate, and also lack 'reckless' conduct in their publishing.

  Further, the relevant information (such as location or travel information) or purpose (such as recruitment) of such advertisements or news items may only be known after the fact – and possibly still not known by the advertiser, or the person taking the ad booking, or the journalist or the editor. That is, it may only be known some time afterwards that the purpose of, or information contained in the ad or news item, or the location or place indicated in the ad or news item, or the travel information in an ad

[13] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s976_first-senate/toc_pdf/1420720.pdf;fileType=application%2Fpdf, p91

or news item, was instructive about or related to, serving in any capacity in or with an armed force in a foreign country.

To illustrate, if a broadcaster or publisher was to run an advertisement or a news item about a prayer meeting or a picnic, and it comes to pass that the event – which may or may not have been central to the advertisement or story – was used as cover for a recruitment drive or to disseminate information about, or direct people to another source of information about possible opportunities to serve in armed forces in foreign countries, then it is possible that any or all people involved in broadcasting or publishing the advertisement or story would be imprisoned for 10 years. This would be the case even if the conduct was not 'reckless.'

Such measures will almost certainly impact on the free flow of information in society – especially when the parties to the advertisements and news items are acting in good faith and communicating in the public interest. The serious implications of such a broad provision for news gathering and reporting, and also for legitimate business interests, cannot be overstated.

We note our concerns with subsection (3), which does not require the conduct to be *'reckless'* are heightened when there is no defence available to 'publishing recruitment advertisements' at subsections (2) and (3).

Low threshold of subsection 119.7(2)

We are concerned with the low threshold of subsection 119.7(2), in that it would only need to be proved that a person – including but not limited to a director of a company, an editor, a journalist, a person responsible for advertisement bookings, a combination of any or all of these people, and possibly additional persons that may be a party to an advertisement or a news item; where 'consideration' was provided – was 'reckless' as to the purpose of the advertisement or news item (that being to recruit persons to serve in any capacity in or with an armed force in a foreign country).

The breadth of 'procured by' and 'or any other consideration' infringes on legitimate news gathering

Both 119.7(2)(a)(ii) and 119.7(3)(a)(ii) stipulate that an element of the offence is that the person publishes in Australia *'an item of news that was procured by the provision or promise of money or any other consideration.'*

It is unclear from whom the promise of money or any other consideration needs to come from. For example, a news item that is licensed or purchased by a media organisation from a news agency and subsequently broadcast could be captured by this provision.

'Any other consideration' could be satisfied by buying a source, confidential or otherwise, a cup of coffee, or paying a taxi fare or train ticket – all of which are legitimate aspects of news gathering.

Also, and similar to comments made above, it is unclear what behaviour this qualification is targeting.

In the absence of clarity, combined with the breadth of the element and the fact that it would apply to legitimate news gathering, in our view the proposed element overreaches and infringes on legitimate news gathering processes.

- **Section 80.2C of the *Criminal Code Act*** (advocating terrorism) was enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.* ARTK made a submission to the PJCIS inquiry into that Bill.

In our submission of 3 October 2014 we highlighted the issues that arise from the term 'advocates' as defined as 'counsels, promotes, encourages or urges'. Further, the element of 'recklessness' and the ambiguity with the definition of 'advocates' has the potential to limit discussion, debate and exploration of terrorism in news and current affairs reporting

As ARTK-member MEAA noted in its submission: 'The definition of "advocacy" could now be used to constrain free speech. For journalists, it could also capture reporting of legitimate news stories that reported on banned advocacy…" That is the very offence that Australian journalist Peter Greste was charged with when tried and imprisoned by Egyptian authorities.

In today's news terms, if a journalist interviews the Australian widow of an ISIS fighter in a Syrian refugee camp, and what that person says is reported which may include something like 'the Caliphate is not over', the journalist could be guilty of the offence and charged. Similar examples could include an Australian soldier fighting with Kurdish forces.

Also, 'under the new offence of "advocating" terrorism, journalists could also be caught for counselling, promoting, encouraging or urging a whistle-blower to leak a document. Indeed, the provision is drawn so widely, that urging leaking of documents in general terms may fall within this clause,' the submission concluded.

The submission went on to note that: '"promotion" would criminalise generally accepted definitions of freedom of expression. And because the "terrorism" definition extends to actions against foreign governments, it would capture advocates of even legitimate actions against foreign oppressive regimes. This offence could also capture journalists reporting on foreign powers using documents that have been leaked to them.'

- **Section 3ZZHA of the *Crimes Act*** (delayed notification search warrants, unauthorised disclosure of information) was enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.* ARTK made a submission to the PJCIS inquiry into that Bill; and
- **Sections 15HK of the *Crimes Act*** (controlled operations, unauthorised disclosure of information) formed the basis[14] for section 3ZZHA of the *Crimes Act*.

In our submission of 3 October 2014, we said the insertion of section 3ZZHA to the *Crimes Act 1914* (the Crimes Act) would see journalists jailed for undertaking and discharging their legitimate role in our modern democratic society – reporting in the public interest. Such an approach is untenable. We recommend that this provision not be included in the legislation.

If, however, the Government is not minded to remove the provision, we request that a public interest exception be included at proposed section 3ZZHA(2).

Given that the Explanatory Memorandum of the Bill states that this '*mirrors a similar offence for disclosing information relating to the controlled operation (section 15HK of the Crimes Act)'*[15] we request that Bill be amended to incorporate a similar change to section 15HK of the *Crimes Act 1914*.

- **Conclusion**

These provisions are the tip of the iceberg regarding criminalising public interest reporting.

[14] The Explanatory memorandum of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* states the (then) proposed section 3HHZA of the Crimes Act '*mirrors a similar offence for disclosing information relating to the controlled operation (section 15HK of the Crimes Act)'*

[15] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_d5aff32a-9c65-43b1-a13e-8ffd4c023831/upload_pdf/79502em.pdf;fileType=application%2Fpdf at [643]

In addition to laws which criminalise journalists for doing their jobs, the Parliament has also recently passed the *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* which gives the relevant Minister the power to prevent a person aged 14 years or over from coming back to Australia for up to two years at a time on a number of grounds, including that the person has been assessed by ASIO to be 'directly or indirectly a risk to security for reasons related to politically motivated violence'.[16] We are extremely concerned that the scope of this provision as drafted may capture journalists or whistle-blowers who publish information about misconduct or national security matters, allowing the Minister to issue an order preventing those individuals from entering Australia. Laws such as these further contribute to deterring journalists from reporting on matters in the public interest, and whistle-blowers from coming forward.

As Professor George Williams AO has written on many occasions (see **Attachment C**)[17], there have been more than 75 laws passed since 11 September 2001 for national security and counter-terrorism purposes. Professor Williams recently said that *'this far exceeds the number of similar laws passed by Britain and the US. Our laws also differ because they go further in heightening government secrecy. They represent an assault on freedom of the press unique to Australia.'*[18]

ARTK has expressed our support for the Government's focus on safety for the Australian public in relation to these threats. However, what we do not agree with are the restrictions many of these laws, separately and in aggregate, put on informing Australians about matters of public interest.

Note – the legislative provisions relating to the above (excluding the JIW Scheme) are at **Attachment D.**

6. DEFAMATION LAW REFORM

We are actively involved in the current Council of Attorney's General review of the unified defamation law.

We note that the ARTK has made a submission[19] to the COAG Discussion Paper regarding the review of the model defamation provisions. We have also made a supplementary submission[20] to the Discussion Paper. Lastly, we have also expressed our significant concerns regarding the recent decision in the NSW Supreme Court[21] found that media companies are liable in defamation matters as publishers of comments posted on their Facebook pages by third party users.

In summary, we are seeking the following:

- Update the law to be fit-for-purpose for digital news reporting;
- Fix the aspects of the law which do not operate as intended; and
- Ensure the Commonwealth is a signatory to the Intergovernmental Agreement (and consequential amendments to the *Federal Court Act*) so that defamation law and procedure is aligned across all jurisdictions, including in the Federal Court.

Given there is an existing process for review of these laws we will refrain from unnecessarily taking the Committee's time on this issue.

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[16] Clause 10(2)(b)
[17] For example, 10 June 2019, *Australia is a world-beater in the secrecy Olympics*, *The Australian* (in full at Attachment B)
[18] Ibid
[19] https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-aust-right-to-know.pdf
[20] https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-aust-right-to-know-supplementary.pdf
[21] Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd [2019] NSWSC 766, at https://www.caselaw.nsw.gov.au/decision/5d0c5f4be4b08c5b85d8a60d

However, we will take the opportunity to focus on the issues arising in the Discussion Paper regarding the jurisdiction and issues in the Federal Court, particularly the roles of juries.

Question 8 of the COAG Discussion Paper asks: *Should the Federal Court of Australia Act 1976 (Cth) be amended to provide for jury trials in the Federal Court in defamation actions unless that court dispenses with a jury for the reasons set out in clause 21(3) of the Model Defamation Provisions – depending on the answer to question 7 – on an application by the opposing party or on its own motion?*

In response ARTK has put the following:

ARTK has serious concerns about jurisdictional inconsistency of the provisions and procedures regarding juries in defamation cases.

As the Discussion Paper states, juries continue to have no role in any ACT, South Australia or Northern Territory defamation cases. There is also a presumption that juries will not play a role in defamation cases heard in the Federal Court.

While both of these scenarios are concerning, the inconsistency is most glaring between the Federal Court and the Model Defamation Provisions (MDP).

As the Discussion Paper details, in *Wing v Fairfax Media Publications Pty Limited* the Full Federal Court held that since there is direct inconsistency between sections 39 and 40 of the *Federal Court of Australia Act 1979* (Cth) (which provide for a presumption that civil trials are to be by a judge without a jury) and sections 21 and 22 of the MDP (under which any party in defamation proceedings may elect for the proceedings to be tried by a jury), the NSW provisions cannot be binding on the Federal Court by reason of that inconsistency and are not relevant to the exercise of the discretion in section 40 to order a jury.

This situation leads to forum shopping, as can be seen from the number of recent high profile cases being commenced in the Federal Court, presumably to avoid a jury on the basis that plaintiffs perceive their prospects of success as being greater before a judge sitting alone.

ARTK considers that juries are best placed to act as the "ordinary reasonable reader" in defamation cases and to apply community standards appropriately and conscientiously.

Accordingly, ARTK recommends that:

- The Federal Government must become a signatory to the Intergovernmental Agreement for the MDP; and
- The Federal Government must amend the *Federal Court of Australia Act 1976* (Cth) to incorporate sections 21 and 22 of the MDP. This is a more specific recommendation than that proposed in the Discussion Paper. We believe this is necessary because it is important that the provisions and procedures be precisely the same across jurisdictions; and

Such changes would ensure consistency across jurisdictions and extinguish any incentive/s for forum shopping. It would also meet the object of the MDP to promote uniform laws throughout Australia.

An effective summary dismissal procedure

ARTK recommends that a summary dismissal procedure for defamation be legislated, including the ability for defendants to raise strike out arguments and capacity arguments in relation to the imputations pleaded by a plaintiff at an early stage in proceedings, rather than being matters deferred to trial. This will require changes to the docket process of certain courts, including the Federal Court, such that the summary dismissal process is not 'kicked down the road' but rather should be at the start – before significant costs and resources of all parties and the court have been allocated and/or expended.

We agree that defamation claims are capable of being misused in circumstances mounting to abuse of process, and an effective summary dismissal procedure to prevent those claims going to full hearing is an essential part of the law. However some Australian courts are reluctant to accept or apply the principles of proportionality at first instance and appellate levels.

Lastly, we note for the Committee that ARTK has engaged with the Federal Court regarding the drafting of a Practice Note for defamation cases. We are hopeful this will align the Federal Court with other states, for example NSW where the vast majority of defamation cases are brought, to assist with the 'uniformity' of the law and processes.