SUPPLEMENTARY SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY INQUIRY INTO THE IMPACT OF THE EXERCISE OF LAW ENFORCEMENT AND INTELLIGENCE POWERS ON FREEDOM OF THE PRESS

20 OCTOBER 2019

Australia's Right to Know (**ARTK**) coalition of media organisations thanks the Parliamentary Joint Committee on Intelligence and Security (**the PJCIS**) for the opportunity to make a supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press.

This submission supplements ARTK's submission to the PJCIS dated 31 July 2019, and should be read in conjunction with previous ARTK submissions to the PJCIS on legislative developments relevant to Australia's journalists. All of those submissions are unified in their purpose: to arrest the diminution of media freedoms in Australia and ensure that journalists and news media organisations can continue to perform their vital role in Australia's democracy, including holding governments to account.

This supplementary submission expands upon the points made in Sections 1 and 5 of our 31 July 2019 submission, namely our law reform proposals relating to:

- The requirement for contestable warrants to a high authority when warrants are sought for a range of matters relating to journalists and media organisations operating in those roles; and
- The requirement for amendments to offences in order to exempt journalists and media organisations from offences that would put them in jail for doing their jobs.

This submission responds to many of the issues raised in the submissions and supplementary submissions of the Department of Home Affairs and the Attorney-General's Department, the Australian Federal Police (**AFP**) and the Australian Security and Intelligence Organisation (**ASIO**).

1. THE PROBLEM WITH A GRACE AND FAVOUR APPROACH

At the outset we note that many of the representations and submissions made by the Department of Home Affairs/Attorney-General's Department, the AFP and ASIO misunderstand the object of the rule of law and democratic rights. The submissions amount to a litany of matters of convenience to the agency rather than an examination of substantive rights. Many of the submissions assume that the protection of

government secrecy is an end in itself. That assumption is not only flawed but constitutionally illegitimate. ARTK accepts that the effective functioning of governments, including those of representative democracies, in relation to national security requires some information to be kept secret from the public (at least for some period). This is an exception rather than the rule. However as Bret Walker, SC, the former Independent National Security Legislation Monitor, recently noted: there is now a *"mass of octopus-like various laws around national security"*[1] that need addressing. Those laws must be addressed urgently.

It is apparent in the Department of Home Affairs/Attorney-General's Department, the AFP and ASIO submissions that the agencies eschew legal theory in favour of administrative convenience. Many of the solutions proposed, including the recent Ministerial Directions by the Attorney-General to the Commonwealth Director of Public Prosecutions[2] and the Minister for Home Affairs to the AFP[3] are more reminiscent of the historic and arbitrary monarchical power of grace and favour than substantive law reform. In particular, the very width of the Attorney-General's discretion to or not to proceed with the prosecution of a journalist, and the inevitably selective way in which that is to be exercised, should give rise to considerable unease within the community.

The directions also suffer from the issues identified in the ALRC's Report on Government Secrecy in 2010[4] in relation to consent requirements including:

> *"The Attorney-General, as a political figure, might be perceived to agree more readily to the prosecution of certain individuals such as those who criticise government policy or are unpopular with the electorate."*

The undue focus in the submissions and answers to the Committee's questions on administrative and investigative restrictions which may arise from any reform is simply unhelpful to robust law reform to protect journalists, media organisations and the public's right to know. Many of the propositions put, apart from being legally doubtful, beg the question whether the investigative or administrative power sought to be exercised is appropriate to justify a restraint on the liberties and rights of the public and individuals. An object of protecting the secrecy of government information as an end in itself, subject only to the will of the Executive, is simply not compatible with the maintenance of Australia's constitutionally prescribed system of representative and responsible government.

The more appropriate approach is to consider and give primacy to the many rights affected by the operation of the exorbitant and exceptional powers exercised in aid of "security". TRS Allen in *Constitutional Justice* (Oxford 2001) stated:

> *"Now, the exercise by ministers of unfettered power in their relations with the private citizen is radically inconsistent with constitutional principle: the notion of a purely administrative or discretionary act that determines a citizen's fate, without recourse to legal safeguards, is a flagrant contradiction of the rule of law…..No one, even if convicted of serious crimes, should in any circumstances be subject to the unfettered discretion of a public official, or be dependent on grace or favour, bestowed on idiosyncratic grounds, and vulnerable to personal antagonism or caprice.*

[1] Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review,* 29 August 2019, accessed at https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-media-freedom-says-dreyfus-20190829-p52m0d.
[2] Direction made by the Honourable Christian Porter MP, Attorney-General, *Ministerial Direction (Commonwealth Director of Public Prosecutions)*,19 September 2019.
[3] Direction made by the Honourable Peter Dutton MP, Minister for Home Affairs, *Ministerial Direction to the Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer*, 8 August 2019
[4] Australian Law Reform Commission, Secrecy Laws and Open Government in Australia (ALRC Report 112), 11 March 2010.

The prerogative of mercy is wrongly so called: there is only prerogative of justice, exercised by, or under the close supervision of, the Queen's courts."

It is not a stretch to propose a system which is devised and expressed in the form of judicial adjudication involving an agency providing sworn evidence and which is contested to justify a warrant against a journalist or media organisation. That is exactly what confident democracies enact, such as Canada in its *Journalist Sources Protection Act* (S.C. 2017, c. 22) and the UK in its *Police and Criminal Evidence Act 1984* (UK). As Bret Walker SC has stated: *"We don't give to the people who want secrecy the final word on whether they'll have it."*[5] And, yet, in modern day Australia that is precisely what we have done.

2. OUR NATIONAL SECURITY DEPENDS ON MEDIA FREEDOM

The national security of this country is dependent on the freedom of the media, for without it the light of truth would seldom shine on abuses of power that put us all at risk and deprive the public of the opportunity to truly hold our elected representatives to account.

The law reform proposals made in this a submission are underpinned by three fundamental principles, which highlight the interrelationship between Australia's national security laws and freedom of the media. Those fundamental principles are:

- an informed Australia is a safer Australia;
- the public interest is served by the free media; and
- the law must balance national security and the public's right to know.

It is our view that the legal framework that is the subject of this inquiry is not in accordance with these principles. Instead the laws applying to Australian journalists, and secrecy more generally, are capricious, ambiguous and excessive. Unless they are changed (including to resolve legal uncertainty), they will continue to have a significant chilling effect on journalism in this country and undermine the strength of our democracy.

2.1 An informed Australia is a safer Australia

The Australian media plays a vital role in holding the government to account and maintaining transparency. The principles of a representative government demand that the public is well-informed and can freely discuss and criticise their government, as recognised by the Constitution's implied freedom of political communication. The importance of freedom of speech and freedom of the media in preserving human rights and democracy is acknowledged in international treaties, under which Australia has obligations (e.g. the International Covenant on Civil and Political Rights) (see, e.g., Article 19).

Greater transparency means Australians can be made aware of abuses of power, and hold the relevant authorities and elected representatives to account. An informed Australian can feel safe in the knowledge that they know what its Government is doing, and that the Government is not hiding things from them – whether it be mishandling funds or sending our troops into battle.

Individuals who are better informed about the threats to Australia can better protect themselves, and, in some instances, promote the safety of others by reporting potential threats to the relevant bodies. Media freedom also assists national security bodies: to effectively perform their function, national security

[5] Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review,* 29 August 2019, accessed at https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-media-freedom-says-dreyfus-20190829-p52m0d.

bodies require the trust and confidence of the Australian people. Australians need to have a foundation to believe that these bodies are acting appropriately, and reporting of their activities assists in this. Without insight into and oversight of what national security bodies do, trust in them decreases.

2.2 The public interest is served by media freedom

A free media serves the public interest. Whether stories reflect positively or negatively on the government should have no bearing: the Australian public has a right to know about the decisions and actions of its government, and make their decisions accordingly. Freedom of the media means that journalists are able to receive information and investigate and report stories without fear of repercussions. The public interest is strongly in favour of journalists being put in a position to provide information to the Australian people.

Often sources who come to journalists with an issue about governments, a government body, a government official or a government policy (for example, a complaint about misconduct), have already tried all official pathways to raise their complaint. Coming to a journalist is often a last resort to bring the issue to the attention of the Australian people, and their government, and have the issue resolved. This function of the media in raising important issues that have not received the attention they should have is vital.

Journalists have repeatedly reported stories that raise significant issues of interest to all Australians. These stories draw the attention of the Australian public and their governments, and effect changes at various levels, including at a national level. Recent examples include the reporting that led to the Royal Commission into the Home Insulation Program, the Banking Royal Commission, and the current Royal Commission into Aged Care.

In performing their functions, journalists need to feel confident they will not be punished for doing their jobs. This importantly includes the protection of sources. Journalists should not have to fear a sudden raid on their home or the use of their metadata to identify their sources, which may jeopardise multiple stories on which they are working. Nor should they be forced to wait in a form of purgatory while they await police and prosecutors to tell them if they are going to be prosecuted and potentially jailed for an offence, as ABC journalists Dan Oakes and Sam Clark and News Corp Australia's Annika Smethurst have done since early June this year – for stories broadcast and published over a year before. This is not a state of affairs that is becoming of a sophisticated western democracy and its place in the world.

Submissions by the AFP assert that the exercise of investigation powers by police is an information collection process and not a punitive measure, however it should be acknowledged that the risk of such investigations is a significant deterrent to the execution of news reporting. The relatively easy availability of search warrants and the threat of prosecution intimidates journalists and media organisations and discourages them from performing their function. The possibility of repercussions for following the "wrong" story or accepting information from the "wrong" source is a gamble for journalists, who, as discussed below, may have no awareness that they are at risk of violating the law. Intimidated journalists cannot reasonably be expected to play their role in ensuring accountability within Australian society, including holding government to account.

2.3 The law must strike the right balance

As we have expressed on many occasions, we acknowledge the importance of protecting national security, and recognises the role that all Australians, including journalists, play in guaranteeing the safety of this nation.

However, the law must strike an appropriate balance between secrecy and the Australian public's right to know. The balance between national security and the public interest, as it stands, is heavily weighted in favour of national security – and prioritises secrecy – at the expense of the public interest.

Currently the public has next to no visibility over any process that relates to taking action against journalists or media organisations, despite the great public interest in and importance of the freedom of the media, as discussed above.

The current approach is backwards. It is a case of 'act first, ask questions later'. Issue a warrant now, if there are problems the subject of the warrant can seek a review after the fact. Prosecute now, *if* there is a defence available it will be dealt with later.

The time for consideration of the public interest in lifting the shroud of secrecy needs to be brought forward to make sure it is a key priority, not a belated afterthought.

Adding a public interest test as a requirement for the issuing of search warrants against journalists would ensure this issue is carefully considered before investigative bodies apply for a warrant. Introducing an exemption to relevant national security offences for public interest journalism would also ensure the public interest is considered early in investigations (as a threshold matter), not just after prosecution is underway and raised in defence at the hearing. Taking these actions would go some way to reinstating the balance between the public interest and national security.

The importance of media freedom and the role of the fourth estate in maintaining accountability in Australian society does not mean journalists should be given carte blanche. However it does mean that actively considering the public interest in not keeping the public in the dark as opposed to keeping the public in the dark must be up-front in our laws.

3. WARRANT ROULETTE – THE GOVERNMENT'S GAMBLE WITH PUBLIC CONFIDENCE

As explained in the submissions of the Department of Home Affairs and Attorney-General's Department,[6] there are currently multiple legal avenues through which a warrant can be issued against journalists and media organisations. Each regime survives within its own legislative framework, has its own statutory test, and designates different sets of possible decision makers.

Type of Warrant	Provision	Issuing Officer
Search warrant	Section 3E, *Crimes Act 1914*	● Magistrate ● Justice of the Peace ● Other person employed in a court of a State or Territory who is authorised to issue search warrants or warrants for arrest
Interception warrant	Sections 9, 9A, 10, 46 and 46A, *Telecommunications (Interception and Access) Act 1979*	● Eligible Judge ● Nominated Administrative Appeals Tribunal member

[6] Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

Type of Warrant	Provision	Issuing Officer
Stored communication warrant	Section 116, *Telecommunications (Interception and Access) Act 1979*	● Appointed Magistrate (except for interception warrants) *For certain warrants issued to ASIO* ● Attorney-General ● Director-General of Security (for warrants issued in an emergency)
Journalist information warrant	Sections 180L, 180M and 180T, *Telecommunications (Interception and Access) Act 1979*	
Computer access warrant	Section 27C, *Surveillance Devices Act 2004*	● Eligible Judge ● Nominated Administrative Appeals Tribunal member
Surveillance devices warrant	Section 16, *Surveillance Devices Act 2004*	

Given the disparate regimes, one key question goes unanswered in the Attorney-General's Department and Department of Home Affair's submissions: how is it that law enforcement and intelligence agencies can assure Australian journalists that they will have equal standing before the law and not be the subject of capricious and arbitrary decision making regarding the issuance of warrant that is obscured from the public gaze?

In our view, it is obvious that no such assurance can be given. Only a single unified approach to issuing any and all warrants pertaining to journalists, journalists' materials and media organisations can begin to address the deficiencies in the system. Such a system must extend to access to information associated with journalists undertaking their job, for example travel records. It should also include content and material collected and created in the news reporting process, for example material that was not published or broadcast but may have been obtained and/or created in the news reporting process such as broadcast footage that was recorded but not broadcast.

The overarching issue with the current warrant frameworks, and the submissions by the various government entities, is that they rely on the paternalistic and circular argument that the Australian public should trust that every step of the process taken to obtain a warrant – of any type – has been undertaken in accordance with the law (and without an arbitrary exercise of discretion), because the public should have faith in the entities involved in the process.

The recent breach of the Journalist Information Warrant scheme (**JIW Scheme**) by the AFP is evidence that such assurances cannot be relied upon. We also note here that when the metadata laws were being implemented – before the JIW Scheme was conceived – we were repeatedly told by the most senior members of law enforcement that there were already sufficient 'safe guards' in place to ensure issuing of warrants would meet the letter of the law. The AFP breaches of the JIW Scheme showed they could not have met the original attestations as it was against the so-called safeguard of the JIW Scheme that the breach occurred.

The reliance on trust is the antithesis of the underlying right of the public to know. If there is a matter journalists believe the public have a right to know about, and the government contests this view, Australians have an expectation that such matters will be dealt with in a way that aligns with Australian values – in a forum with objective and experienced decision makers where all relevant parties have a

chance to make their arguments for and against. However the reality of the existing processes for the issuing of all warrants – uncontested – does not match this expectation.

Journalists and/or media organisations must instead submit to search warrants in relative silence, forced to assume that the process of applying for the warrant has been validly completed, as they have no recourse to challenge the warrant until after it has been executed. The recourse the journalist and/or media organisation has is then limited to there being some error in either the legislative provision or in the warrant or warrant application itself, rather than in a failure in the basis of the warrant. This is not how matters work in other sophisticated western democracies, and it is unexplained why they are suited to the Australian democracy.

4. ARTK'S PROPOSAL FOR WARRANTS ISSUED AGAINST JOURNALISTS AND THE MEDIA

We set out in our original submission a detailed proposal for how warrants should be issued in circumstances where they relate to journalists, material held by a journalists and media organisations. As stated above, uniformity needs to be introduced into the various warrant schemes, with adequate protections in place for journalists, including requiring applications be made to judges of superior courts and having a contested hearing at which both sides make submissions on their own behalf.

Importantly, we reinforce that the elements of the contestable warrant scheme to a higher authority detailed in previous submissions and again here by ARTK are required in aggregate. We do not support the adoption of the elements in a piecemeal manner.

Lastly, in this section we also respond to positions and issues raised in other submissions.

4.1 Proposition 1: The application for a warrant should be made to a judge of a superior court, and they should apply the relevant tests

Depending on the scheme, current warrant applications are made to a wide variety of different offices and officers (see previous table). We recommend that in all cases – including those not currently covered by warrant scheme such as those articulated in Section 4 of this submission – applications should be required to be made to judges of superior courts, being the Supreme Courts, the Federal Court and the High Court.

4.1.1 *The Department of Home Affairs and the Attorney-General's Department say that it is not uncommon for officers other than judicial officers to be authorised to issue search warrants.*[7]

While this is correct, search warrants to be executed on journalists and media organisations are not a normal element of criminal procedure. Such search warrants infringe/encroach/impinge on fundamental rights, and the circumstances in which such an infringement should be granted require careful consideration.

The High Court has emphasised the need to remember the seriousness of search warrants and their exceptional nature in our legal system:

> *"…it needs to be kept in mind that they [statutes authorising search warrants] authorise the invasion of interests which the common law has always valued highly and which, through the writ of trespass, it went to great lengths to protect. Against that background, the enactment of*

[7] Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection to these interests."[8]

Despite this, search warrants executed against journalists seem to be easier to obtain than an Anton Piller order or an injunction in civil proceedings. The lack of a requirement to consider the public interest in NOT issuing the warrant demonstrates that the legislature – and the Government that makes legislative decisions – is not sufficiently concerned to consider these interests in the usual lawful manner.

The closest analogous situations to search warrants are injunctions and Anton Piller orders. Injunctions and Anton Piller orders, like search warrants, involve a serious intrusion on an individual or organisation's rights. Injunctions and Anton Piller orders both have very high thresholds that must be met before any application will be granted. They require the utmost candour by an applicant including disclosing any adverse matters and the giving of undertakings as to damages.

Due to their serious nature and invasiveness, both injunctions and Anton Piller orders traditionally have not been issued by inferior courts, who tend not to be granted the jurisdiction required to issue orders of that type. The jurisdiction to make such orders is exercised with restraint.

Anton Piller orders have been recognised by Justice Lee in the Federal Court of Australia as a *"peremptory and severe interference with the ordinary rights of a party"*, where *"care must be taken to see that the order is only granted in appropriate cases and with due safeguards"*.[9] Justice Lee also stated that courts must *"be careful to avoid the extraordinary jurisdiction of the court to make an Anton Piller order from being subverted to a mere investigatory tool for applicants".*[10]

Judges have noted there must be exceptional circumstances for an Anton Piller order: *"some substantial ground for expecting that there will be extraordinary behaviour… some ground going beyond the indications of dishonesty… a ground which would show that active concealment or measures which are criminal or in the nature of criminal conduct should reasonably be feared."*[11]

Similar considerations should apply to ALL warrants issued against journalists and/or media organisations. Only judges have the necessary experience to weigh all the relevant considerations, including the extreme nature of the action, and determine whether it is necessary and in the best interests of the public to make such an order.

4.1.2 *The Department of Home Affairs and the Attorney-General's Department submitted that it should not matter who is issuing the warrant: the test to be met does not change just because the officer is not a judge.*[12]

While the test to be met may not change, the experience of the officer implementing the test will vary significantly between a judicial officer in a Local Court and a Federal Court judge. For example, a judicial

8 George v Rockett (1990) 170 CLR 104 at 110-111 (per the Full Court).

9 *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38.

10 *Television Broadcasts Ltd v Nguyen* (1988) 21 FCR 34 at 38.

11 *EFG Australia Ltd and Anor v Kennedy* (2 August 1996, unreported, Bryson J) at 6.

12 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 10.

officer in a Local Court may not feel they have the requisite experience to refuse ASIO an application. The perceived legitimacy of the decision in these cases is important and thus some consideration of and deference to the field in which the decision maker normally operates will be important. A person with experience in judicial method as distinct from administrative or investigative method is important in this context.

Issuing officers outside the superior courts are unlikely to be able to bring the kind of rigour to the decision making and inquiry process that a judge would bring. We are of the view that a Registrar of the High Court, or a Senior Registrar of the Federal Court, will not have the relevant experience. The decision to be made is quintessentially judicial requiring an understanding of the difficulties associated with making such decisions, as distinguished from registrars of Local or District Courts whose experience can more fairly be described as administrative.

Superior courts more regularly see cases in which they have to adjudicate on administrative decisions which have been misapplied, so judges in these courts have the relevant experience to understand how to make a correct decision.

Additionally, given the role of the fourth estate in democracies like Australia – including holding governments to account and the importance the Australian public places on this role – there is a reasonable public expectation that any proposed action by government bodies in relation to the media will be dealt with at the highest levels, and in as public forum as possible.

4.1.3 *The Department of Home Affairs and the Attorney-General's Department note that the journalist information warrant framework requires the warrant to be issued by a judge, magistrate or senior Administrative Appeals Tribunal member.*[13]

We note at the outset the considerable short-comings of the JIW Scheme. We refer the PJCIS to our original submission to this inquiry and particularly the detailed analysis of those short-comings. Having read that material members of the PJCIS will be aware that this is but one of a number of significant issues ARTK has with the JIW Scheme.

Notwithstanding the breadth and depth of our concerns, regarding this assertion by the submitters referenced, we restate that for the reasons discussed previously in this submission, a judge of a superior court should be hearing the case for and against, and deciding on the issuing – or not – of all journalist information warrants. In fact it is our position this should be the case for the issuing of all warrants associated with journalists and media companies operating in their professional capacity. Therefore, it follows that we do not support JIWs – nor any warrant – being issued by a magistrate or senior Administrative Appeals Tribunal member.

4.1.4 *The Department of Home Affairs and the Attorney-General's Department state that the AFP says that it already faces difficulties with the availability of magistrates to issue warrants, and that this difficulty would be compounded by requiring warrants to be issued by a judge in all circumstances.*[14]

With the greatest respect, this is nonsense, both in relation to the difficulty of finding magistrates, and in relation to the idea that requiring judges to issue warrants would cause additional difficulties or delays.

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13 Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32, page 7.

14 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32.3, page 11.

Any experienced litigator knows that the superior courts make their judges available at all hours and at short notice.

In relation to the Annika Smethurst warrant, by way of example, the AFP were able to contact a magistrate and have a warrant reissued within four hours, when it was realised there was a mistake in the initial warrant.

The duty judge system ensures that a judge is always on call and available to deal with any urgent applications. There are typically no issues with quickly accessing a duty judge.

There would be no greater burden to the judicial system in putting an extra judge on duty (if this became necessary) than there would be from adding a magistrate.

4.1.5 *The Department of Home Affairs and the Attorney-General's Department state that, for journalist information warrants, ASIO must apply to the Attorney-General.*[15] *ASIO suggests that approval by the Attorney-General is the appropriate level of approval.*[16]

We acknowledge the current arrangement for the issuing of journalist information warrants, ASIO must seek the approval of the Attorney-General. However, this is not the standard that applies more generally – it is only for this specific category of warrant. Regarding the current process for ASIO to obtain a JIW we are of the view that, it will generally be difficult for the Attorney-General to refuse ASIO when it approaches him, given the political issues associated with security applications. We also note that the Attorney-General is not required by law to 'weigh-up' the public interest in not issuing the warrant with the public interest in issuing it.

Additionally, there is no transparency to this even if it was a requirement by law. The Attorney-General's decision is not made in open court – or even closed court. We also add that we query the likelihood to refuse to issuing of a warrant if there is any adverse political element to the request. However, a judge from a superior court will be able to more objectively review the application and consider whether it is appropriate or necessary for a warrant to be issued. In such a circumstance, in open court, there will be a record. Even closed court would provide a level of transparency currently denied under the JIW Scheme and the issuing of all other warrants not just to ASIO but all law enforcement agencies. We make this comment particularly in relation to the issuing of warrants relating to journalists and media organisations.

4.2 Proposition 2: Public interest should be a component of the statutory test for the issuing of a warrant pertaining to material held by a journalist.

An element of the statutory test for the issuing of a warrant in relation to a journalist or media organisation should be a requirement that the public interest in issuing the warrant outweighs the public interest in not granting access to the material.

4.2.1 *The Department of Home Affairs and the Attorney-General's Department noted that the current search warrant legislative framework includes subjective or objective tests (depending on the legislation) for each warrant which must be met prior to issuing a warrant. The requirement that these tests are met is intended to provide assurance that the issue of the warrant is appropriate.*[17]

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15 Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the media*, Submission 32, page 7.

16 Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, page 5.

17 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 5.

These tests do not incorporate a test for the issuing of a warrant that requires the public interest in issuing the warrant outweighs the public interest in not granting access, including the public interest in the public's right to know, and the protection of sources.

4.2.2 *The Department of Home Affairs and the Attorney-General's Department say that, due to the operation of the* Ministerial Direction to the Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer[18] *(the **AFP Direction**), the AFP are already required to consider the importance of a free and open media and broader public interest implications before undertaking investigative action involving journalists.[19] The Department of Home Affairs and the Attorney-General's Department submit that the AFP Direction, in conjunction with the existing tests, are sufficient to ensure that the public interest is a key consideration in issuing search warrants in relation to journalists and/or media organisations.*[20]

First, the misplaced notion of a purely administrative or discretionary act that determines an individual's or the public's rights, without recourse to any legal safeguard, is as stated above a flagrant contradiction of the rule of law. The elements of the justiciability of every act of the executive, and its agencies, affecting persons is an important concept and restraint on investigators which is a way of ensuring equality, predictability, rationality and fairness of the process.

Second, the Direction does not contain a requirement to take into consideration the importance of a free media in making a warrant application or issuing a warrant. It contains an expectation that the AFP will consider the importance of a free and open media *in its investigation*.

Third, it does not place the importance of a free media front and centre early in the administrative decision-making process.

A threshold public interest test which is a precursor to issuing a warrant, applied by a judge with rigour, requires that a standard is met before a warrant will be issued.

The current direction merely introduces a relevant consideration for the AFP in their investigation. If they do not consider that, and the complainant can demonstrate the lack of such consideration, which is unlikely in itself, this only opens an avenue for judicial review after the warrant has already been issued. That reconsideration does not require a judge to have weighed all the relevant evidence and submissions before making the warrant. Providing a possibility of a judicial review after the fact is not a good enough protection against misuse or overuse of the warrants system. Additionally, there is no clear or accessible means by which any person potentially affected can test or assess compliance with the Directive in the circumstances of any particular investigation.

Given this is an existing consideration implemented by the AFP Direction, ARTK can see no reason why a test considering whether the public interest in obtaining the information outweighs the public interest in

18 Direction made by the Honourable Peter Dutton MP, Minister for Home Affairs, on 8 August 2019.

19 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 11; Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.1.

20 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 11.

not obtaining it in this way should not be incorporated into legislation as a requirement before a warrant can be issued or any other step taken.

4.2.3 *The Department of Home Affairs and the Attorney-General's Department state that, for journalist information warrants, the Attorney-General must take into account whether the issuing of the warrant outweighs the public interest in protecting the confidentiality of sources*.[21]

While this inclusion is a step in the right direction, it only considers one aspect of public interest, and only in one category of warrant. We also note our long-held concern that JIWs only apply when the information being sought is related to the identity of a source.

However, it does indicate that it is possible to include a public interest test in legislative provisions regarding warrants, and that including such a test does not pose an insurmountable practical barrier for investigative bodies to try and meet.

Furthermore, we query when the specific objective of a journalist information warrants is to identify a journalist's source, how it could be the case that any issuing officer – including the Attorney-General in the case of ASIO – would not prove the issuing of the warrant when that is the specific purpose of the warrant is to identify sources. Furthermore, if the objective of the warrant to access a journalist's metadata is NOT for the purpose of identifying sources, then a JIW is unnecessary and a warrant to access the metadata for any individual for any relevant purpose would be obtained – negating any requirement to have any consideration, no matter how useful or not that consideration would in fact be. Furthermore, once you have access to a journalist's metadata it is possible that sources will be identified – regardless of the type of metadata access warrant issued.

4.2.4 *At the Public Hearing,[22] it was suggested that media organisations would be concerned that adding the public interest test before a warrant is issued will give investigative agencies a lot of power to guide journalism, instead of this guidance being given at the end.*

It gives investigative agencies no additional powers, it merely adds a step before they can exercise their existing powers. As discussed above, including a public interest test will ensure that all investigative agencies are obliged by law to keep the public interest front of mind when considering their investigative strategy, and will then ensure that the search warrant powers cannot be exercised without public interest being duly considered by a judicial officer.

4.3 Proposition 3: The application for the warrant should be the subject of a contested hearing

Arguments for and against the application, and evidence in relation to the application, should be presented at a hearing at which both parties are present. If possible, this hearing should also be open to the public.

4.3.1 *An alternative proposal made in some other submissions was to have a Public Interest Advocate regime for all search warrants against journalist and media organisations, as opposed to the journalist and/or media organisation being notified and having the opportunity to respond themselves.*
In short, ARTK does not support this proposition as sufficient to deal with the issues raised by warrants relating to journalists and media organisations.

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21 Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, pages 7 and 8.

22 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Tim Wilson).

4.3.2 *Currently Public Interest Advocates are part of the journalist information warrant scheme under the* Telecommunications Interception and Access Act 1979 *(Cth). In respect of the journalist information warrant scheme, the Department of Home Affairs and the Attorney-General's Department suggest that the requirement of a Public Interest Advocate is sufficient to protect the public interest.*[23] *The Department of Home Affairs and the Attorney-General's Department suggested that implementing a Public Interest Advocate regime more generally could cause delays to investigations, which would be problematic where the investigation needs to progress quickly due to ongoing harm or risk of imminent harm.*[24]

It is correct that the current JIW Scheme includes a Public Interest Advocate (**PIA**). ARTK's detailed submission about this Scheme details our significant issues with this, including that the PIA does not have to advocate for the public interest in NOT issuing the warrant. Even if this was rectified, ARTK is strongly of the view this would be an inadequate response and the JIW Scheme would remain significantly flawed.

Further, the presence of a PIA cannot be considered to be equivalent to the subject of the warrant being present and able to make submissions on their own behalf in open court to a higher authority. Only the journalist or news organisation the subject of the warrant will have the relevant understanding of the matter they were investigating, and be able to articulate with the relevant background why it is in the public interest that the warrant not be issued.

A PIA will not have the full picture. Information provided to the PIA will be provided by the investigating body – as it is currently under the JIW Scheme – and may be missing relevant information that the journalist and/or media organisation has. The point we would like to emphasise here is we will never know what is put before the PIA because there is no transparency of the process and JIW Scheme. We also emphasise that the PIAs do not represent the interests of the media and the counter-argument. The Advocate also has no relationship with the subject of the warrant. There is also no public oversight of the PIAs, and the submissions they make.

4.3.3 *The Department of Home Affairs and the Attorney-General's Department, in the context of issues if a Public Interest Advocate regime was brought in more widely and caused delays, offered that where an investigation needs to progress quickly due to ongoing harm or the risk of imminent harm, and there is not time to find a Public Interest Advocate and/or hold a hearing, this could be carved out as a specific exemption to any scheme, decreasing or eliminating any notice period required.*

It is worth noting here that in most cases which involve the media, particularly where the information sought relates to the source of material, there is no suggestion of ongoing or imminent harm. In fact, despite media representatives calling for the relevant agencies making submissions to the Inquiry to provide examples of a responsible news organisation having done the wrong thing or risked a national security operation or put a soldier or a policeman's life in danger, no agency has provided any such example.[25]

In the most recent cases concerning the AFP and News Corp Australia and the ABC, the relevant matters were 12 to 18 months old at the time of execution. There was no apparent urgency in the execution of these warrants, and nor was there any suggesting that there was a risk of ongoing or imminent harm.

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23 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 8.

24 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

25 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Campbell Reid).

4.3.4 *The Department of Home Affairs and the Attorney-General's Department suggest the current safeguards in place in relation to warrants (particularly those issued under section 3E of the Crimes Act), including having an independent issuing officer, a detailed warrant, and the provision of the warrant to the occupier at the time of searching, are sufficient.*[26]

The so-called "safeguards" provide no avenues for a journalist or media organisation when an investigating body shows up on their doorstep with a search warrant already made and ready for execution. Simply having a copy of a detailed warrant provides no way for a journalist or media organisation to refute the grounds for the warrant before it happens. While the warrant itself may contain errors that can be used to form the basis of a review after the warrant has been executed, this is an unsatisfactory procedure for the reasons set out below.

The Attorney-General's Department says that it would not be appropriate for the validity of a security classification to be assessed at the time a warrant application is made. The Department argues that it is difficult to have sufficient information to assess an element of the offence before all evidence relevant to the investigation of an offence is gathered, and that in order to consider the security classification, the judicial officer may need access to other classified information, that may not be able to be presented to the contesting party.[27]

This argument is fundamentally flawed. No additional evidence from the investigation would be necessary to consider the validity of the classification as material relevant to that would be within the referring agencies control. Indeed, it would be a preliminary matter that under the Case Categorisation and Prioritisation Model (**CCPM**) should have been considered in evaluating the referral from the agency to the AFP. If the document had been misclassified then the prospects of a successful investigation would be low and the referral should be rejected.

No valid reason has been provided as to why it would not be appropriate for a judge to assess whether a matter has been given the correct security validity when considering a warrant application. The judge can and should be provided with all the information they need to consider the security risk of the matter when they are considering the warrant.

If the warrant involves a classified document, the applicant should be able to describe why it fits into a relevant security classification, for example because it meets the criteria of this category. The application for a warrant should not proceed under a potentially flawed assumption which goes to the very heart of the matter.

If describing why something has a certain security classification requires the provision of other classified information, a) other submissions note that judicial officers don't need security clearance to access security classified information, and b) this information does not necessarily have to be provided to the subject party – it can be provided solely to the judge to assist them in making their determination. Not being able to provide every document to a contesting party is common in many court proceedings. For example, the *Crimes and Corruption Act 2001* (Qld) enables the provision of evidence to the judge in closed court in the absence of the other party to protect the information.[28]

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[26] Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 6.

[27] Attorney-General's Department, *Answers to questions at hearing on 14 August 2019*, Submission 32.2, page 1.

[28] Sections 332 and 334.

The statement that it is "difficult to have sufficient information to assess" the offence before all the evidence has been gathered would suggest warrants are fishing expeditions, and they should not be allowed on this basis. There should be a clear understanding of what information the applicant is expecting to find, and why, and this understanding should have to meet a threshold, before a warrant is granted.

4.4 Proposition 4: It is inappropriate to limit the role of judges to that of a judicial review or other action relating to a decision regarding a warrant taken by the relevant person

It is inappropriate to confine the legal redress available to a journalist or media organisation to a period after the decision to issue the warrant has been made. Challenges to warrants that have been executed are extremely difficult to prosecute. In practice, once a decision is made it is too little, too late for the media organisation or journalist. The scope of a post-fact review is very limited.

4.4.1 *The Department of Home Affairs and the Attorney-General's Department say that the actions brought by the ABC and News Corp Australia demonstrate that journalists and media organisations already have access to legal recourse through which the validity of a warrant may be challenged.*[29]

While there is legal recourse it is very limited. The recourse relies on some error being made in the application for the warrant or the warrant having a fault within it. The review does not consider whether a warrant should have been issued in the first place. In fact, the legal contestability is severely constrained and not as expansive as may be suggested by the AFP.

If the warrant or the application does contain an error, the error can be fixed and then the warrant will be reissued. The reissued warrant is then not contestable, as it has no errors, even if the basis for the warrant is not valid or does not appropriately consider the public interest.

The current proceedings brought by the ABC and News Corp Australia are brought on the basis that there are constitutional issues present (which of itself depends on "error" in the drafting of the legislation), and that there are fundamental issues within the warrants themselves. The proceedings have not been brought in relation to the basis on which the decisions to apply for and issue the warrants were made.

4.4.2 *The AFP, the Department of Home Affairs and the Attorney-General's Department submit that there are a number of methods for issues to be heard by the courts in a contested hearing after the warrant has been issued, including:*[30]

- *applying for an urgent injunction to halt the warrant;*
- *judicial review of the lawfulness of decisions;*
- *constitutional challenge through the High Court;*
- *suing for damages for torts;*
- *claims of legal professional or parliamentary privilege over documents seized; and*

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29 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4

30 Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 7; Australian Federal Police, *Submission by the Australian Federal Police*, Submission 21, page 8.

- *the ability of a defendant in a criminal prosecution to object to evidence that has been improperly or illegally obtained.*

None of the above are appropriate or provide efficient legal recourse, for the reasons that follow.

(a) Urgent injunction

While it is possible for an urgent injunction to be sought to halt a warrant, applying for such an injunction requires that the subject of the warrant believes the warrant to be invalid, which would make entry via the search warrant subject to a claim in trespass.[31] However, this ground requires there to be some error in the warrant itself, rather than a failure to consider all relevant elements in determining whether it should be issued. Generally, the recipient of a warrant will not be able to show the later unless it is evident on the warrant itself or by virtue of a fact already know to the recipient.

Injunctions are more typically sought to try and restrain access to or the inspection of documents after they have already been seized, or to compel the return of items seized.

(b) Judicial review

In order for there to be judicial review of the administrative action in issuing the warrant, there must have been some reviewable error in the administrative action, as discussed above.

As with all of the "options" put forward by the AFP, Department of Home Affairs and Attorney-General's Department, with the exception of seeking an injunction, this method for having issues reviewed does not prevent the decision maker making a potential decision, nor does it prevent an improper search warrant being executed. It only provides a method for challenging the decision after the fact, when the damage has already been done.

(c) Constitutional challenge

A challenge on a constitutional basis will only be available in very limited circumstances, and relies on there being a flaw in the legislation (i.e. not taking into account the implied freedom of political communication, or striking an appropriate balance). It is likely that in the majority of pieces of legislation, there is no such flaw in the legislation, and therefore no opportunity for constitutional challenge.

To present this as a reasonable method of challenge generally available to the subjects of warrants is absurd.

(d) Damages in torts

Making a claim for damages in torts requires some additional error to have taken place that results in harm.

An action in trespass, detinue or conversion would require there to be an error invalidating the warrant. The torts of detinue and conversion also require some deprivation on the part of the plaintiff, which would be difficult, if not impossible, if all that is seized is copies of electronic files, as is increasingly likely to be the case. An action in negligence would require some damage to have

[31] See, e.g. *Trimboli v Onley (No. 1)* (1981) 56 FLR 304.

occurred in the process of executing the warrant, and additionally the plaintiff to be able to show the government body had some sort of duty of care.

The only claim in tort which may go to the validity or necessity of the warrant, rather than an error in the drafting or the execution of the warrant, is a claim of misfeasance in office, but this is extremely difficult to prove and would require the subject of the warrant to prove mala fides on the part of the person issuing the warrant.

(e) Claims of privilege

Claiming privilege over documents, whether it be legal professional privilege or parliamentary privilege, do not provide a basis on which to challenge the validity or making of the warrant itself – they simply add in a procedural step before those documents can be used. Claims for privilege will not prevent those documents being seized.

Additionally, legal professional privilege and parliamentary privilege will not cover the vast majority of documents held by a journalist, though they may be confidential for other reasons.

(f) Objections to evidence

This "option" is even less effective than the claims of privilege option. Using this method, the investigating body would be able to seize the evidence, look at the evidence, act on the evidence, then, only once they are trying to tender the particular evidence in court would they be told if it is valid or invalid. It doesn't stop the collection of the information – it only stops it being deployed at the very final step.

4.5 Proposition 6: The journalist and/or media organisation should be notified, to allow time for the journalist and/or media organisation to find representation

When an application for a warrant against a journalist and/or media organisation has been made, the journalist and/or media organisation should be notified. This notification would enable the subject of the warrant to engage legal representation and prepare submissions to the Court as to why the application should not be permitted.

4.5.1 *The Department of Home Affairs and the Attorney-General's Department state that notifying journalists and/or media organisations for the purpose of contesting their warrants would undermine the effectiveness of the investigation, as it may result in them destroying or relocating evidence.*[32] *The AFP echoes this in their submissions, saying that it is important that persons of interest not be made aware of the investigation until the warrant is executed, as it provides the opportunity to destroy evidence.*[33]

The idea that a professional journalist or a media organisation would destroy or relocate evidence is fanciful at best. There is no evidence to suggest that journalists or media organisations destroy or relocate evidence. Indeed, as noted above in the civil context before such orders are made it must be shown that there is some substantial ground for expecting that there will be extraordinary behaviour, some ground going beyond the indications of dishonesty. The agencies making these serious allegations against

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32 Department of Home Affairs and Attorney-General's Department, *Submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32, page 7; Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

33 Australian Federal Police, *Submission by the Australian Federal Police*, Submission 21, pages 7-8.

professional journalists have not offered a scintilla of evidence to show that active concealment or measures which are criminal or in the nature of criminal conduct are reasonably feared. To the contrary, they are aware it would be difficult to swear an affidavit that made such an allegation as the investigator would have to have some positive basis for the suggestion or at least some historical evidence of the risk. None is proffered. If the agencies seriously advance this proposition it should be done in the conventional way of providing evidence.

In the most recent cases, the ABC knew several months in advance what information and material the AFP was seeking, and there is no suggestion that they destroyed or moved documents with the benefit of this advance notification.

In relation to the raid on Annika Smethurst, the AFP were going to execute a further warrant at the News Corp Australia headquarters in Sydney. While ultimately the AFP decided not to execute this arrant, News Corp Australia was provided with advance notice about this warrant. There was no concern expressed that News Corp Australia would relocate or destroy the evidence prior to the AFP executing the warrant. No undertaking was sought from News Corp Australia, simply because it was unnecessary and nor was there any basis for responsibly making the assertion.

There is no evidence that the UK's introduction of contested applications for search warrants in relation to journalists, discussed below, has resulted in any destruction of material.

There is simply no basis for any suggestion that there would be any destruction or relocation of evidence in the context of professional journalism. The media are routinely subjected to subpoena processes both in civil and criminal cases and subject to proper legal objections they comply. These processes are invariably supervised by in house lawyers who are also aware of their professional obligations.

Further, materials sought through search warrants are increasingly digital, rather than physical. Modern technology means that, even if the subject of a search warrant did attempt to move or delete files, a digital trail would exist which would make it obvious that such an attempt had been made. Additionally, it is very difficult to irreversibly delete an electronic file. Even if an attempt is made to delete a file, it is likely that the file will be recoverable. In this digital era, concerns that material will be destroyed are overblown. In any event, as ARTK has proposed, the issue can be dealt with by a specific provision prohibiting destruction of documents upon the receipt of the application of the warrant.

Finally, mechanisms can be put in place to prevent disclosure of information, if it is believed that providing such information will impact the investigative body's investigation or prosecution. One such mechanism is allowing the judge to hear part of a party's submissions or receive part of a party's evidence in the absence of the other party. For example, the *Crimes and Corruption Act 2001* (Qld) allows for sensitive information to be heard in the absence of a party or the party's lawyer where necessary (sections 332(2), 334(3)).

4.6 Relationship with intelligence community

4.6.1 *In response to a question about the fact no one seems too concerned about the fact other Five Eyes' partners have journalist protections, the Office of National Intelligence stated that Five Eyes partners would be concerned about changes to Australian law resulting in more permissive environment for unauthorised disclosure.*[34] *It was suggested that changes which would increase protections for journalists may affect information sharing with Australia's intelligence partners.*

34 Office of National Intelligence, *Question on Notice - 64,* Submission 35.1.

Perhaps the most frequently used, and weakest, justification for conducting investigations into leaks from Government is that our failure to do so will affect our Five Eyes' relationships.

Implementing increased protections for journalists would in fact bring Australia into closer alignment with its Five Eyes co-members. Canada, for example, recently enacted the *Journalist Source Protection Act 2017*, which requires police to notify the journalist and relevant media organisation of their intention to examine the document the subject of the warrant, and affords an opportunity for the journalist to contest the application. The US, UK and Canadian positions are discussed in more detail below.

The Office of National Intelligence notes that it is not aware of an Australian agency threatening to withhold intelligence information solely because the UK has a public interest test for some warrants, nor is it aware of any intelligence being withheld from the US because of their freedom of speech protections. This begs the question as to why it would be the case that the UK or the US, or any other Five Eyes member for that matter, would refuse to share intelligence with Australia if it implemented similar protections.

There is simply no evidence that increasing protections for journalists would damage Australia's relationships with its intelligence partners, or affect the flow of information.

4.6.2 *The Canadian Position*

The *Journalist Sources Protection Act* (S.C. 2017, c. 22) (the JSP Act) was enacted to amend the *Canada Evidence Act* (R.S.C., 1985, c. C-5) and the *Criminal Code* (R.S.C., 1986, c. C-46) in order to protect journalists from disclosing their sources or being subject to search warrants.

The JSP Act amended the Criminal Code. The Criminal Code now requires that an applicant for a warrant, search warrant, authorisation or order under the Criminal Code, where the applicant knows that the application relates to a journalist's communications or an object, document or data relating to or in the possession of a journalist, the application must be made to a superior court of criminal jurisdiction.

The judge may then only issue the warrant, authorisation or order if satisfied that:

(a) there is no other way by which the information can reasonably be obtained; and

(b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in gathering and disseminating information.

The judge may request that a special advocate present observations in the interests of freedom of the media.

If the judge decides to issue the warrant, they can include any conditions considered appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.

If a journalist is suspected of committing an offence, the judge may place the relevant documents with the court so that no public access is possible. Police can view the documents once the journalist or media organisation is provided with notice of that intention. The journalist or media organisation may then apply to a judge to prevent disclosure on the grounds that the documents reveal a journalistic source. The judge will apply the public interest test set out below.

The JSP Act also modified the Canada Evidence Act, allowing journalists to object to the disclosure of any documents or information before a court, person or body with the authority to compel the disclosure on the grounds that the information or document identifies or is likely to identify a source.

Once such an objection has been raised, the court, person or body must give the parties and any other interested parties a reasonable opportunity to present argument on the disclosure.

The onus is on the party requesting disclosure to satisfy the adjudicator that:

(a) the information or document cannot be produced in evidence by any other reasonable means; and

(b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things:

(c) the importance of the information or document to a central issue in the proceeding,

(d) the freedom of the media; and

(e) the impact of disclosure on the journalistic source and the journalist.

The freedom of the media is also specifically enshrined in the Canadian Charter of Rights and Freedoms.

4.6.3 *The UK Position*

The position in the UK also provides a useful model for the system that ARTK proposes.

The *Police and Criminal Evidence Act 1984* (UK) (**PACE Act**) makes special provision for search warrants for "journalistic material", defined as material acquired or created for the purposes of journalism.[35]

Search warrants in the UK are typically issued by a Justice of the Peace.[36] However, journalistic material held in confidence is classified as "excluded material" (e.g. information about protected sources)[37], and journalistic material which is not held in confidence is classified as "special procedure material".[38] A Justice of the Peace cannot issue a warrant in respect of excluded material or special procedure material.[39]

Seeking access to journalistic material considered "special procedure material" requires the police to seek a production order from a judge.[40] The subject party must be notified of the application for the production order.[41] Before issuing the order, the judge must be satisfied that other methods of obtaining the material have been tried without success or, if not tried, were bound to fail.[42] The judge must also be

35 PACE Act s 13.

36 PACE Act s 8.

37 UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 32.

38 PACE Act s 14.

39 PACE Act s 8(1)(d).

40 PACE Act s 9(1).

41 PACE Act Schedule 1 paragraph 7.

42 PACE Act Schedule 1 paragraph 2(b).

satisfied that the making of the order is in the public interest, having regard to the benefit accrued in obtaining the material, and the circumstances in which the person in possession of the material holds it.[43]

Confidential journalistic material (excluded material) can only be searched for in extremely limited circumstances, for example if they would have been available under a statute enacted before 1984.

The PACE Act also includes a mechanism to protect material from destruction after the journalist is notified that an application will be made: they cannot conceal, destroy, alter or dispose of the material without leave until the application is dismissed or the order has been complied with.[44]

Implementing a similar system to the system set out in the PACE Act would ensure that the public interest is protected and journalist's confidential sources are protected, while still providing a mechanism for investigative agencies to seek information, and preserving information while the process is undertaken.

The UK also enshrines the freedom of expression in its *Human Rights Act 1998* (UK).

A recent example of how requests for production orders are dealt with in the UK was in *Metropolitan Police Service (D.I. Collinson) v Times Newspapers Limited & Ors*[45]. The police made applications seeking Production Orders to be granted in relation to special procedure material held by Times Newspapers Ltd, Independent Television News Limited, Sky News UK and the BBC. Each of the media organisations contested the application, and made submissions in person or in writing at the hearing. Each of the media organisations undertook to store the material with a firm of solicitors if the production order was not granted, until further order.

The material requested was footage recorded by each of the media organisations of interviews with Sbamima Begum, a UK national who had travelled to Syria in 2015 to live in the Islamic State caliphate, and now wished to return to the UK. The police wanted the unedited footage, as distinct from that which was broadcast.

In determining not to grant the police's application, the judge considered the test set out above. While he did consider there was material that would likely be of substantial value to the terrorist organisation, the public interest against interfering in journalist's rights outweighed the value of the material to the investigation. He held there was no pressing need in the circumstances of the investigation to override the rights of the journalists. A copy of the decision is attached to this submission as **Annexure A**.

4.6.3.1 *The Department of Home Affairs and the Attorney-General's Department submitted that caution should be exercised in looking at the UK position as a basis for reform, as the relevant laws are currently under review by the United Kingdom Law Commission.*[46]

Again, this assertion is flawed and misleading.

The basis for the review is not that contested warrants are causing problems in the investigation of issues relating to national security. One of the stated goals of the review is to extend protections, make

43 PACE Act Schedule 1 paragraph 2(c).

44 PACE Act Schedule 1 paragraph 11.

45 Unreported, Central Criminal Court, 4 September 2019.

46 Department of Home Affairs and Attorney-General's Department, *Supplementary submission to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, Submission 32.3, page 4.

it easier to challenge search warrants, and make the law more transparent.[47]

The review is that the current provisions governing search warrants as a whole are too complex, and therefore give rise to a high number of challenges. The review is also looking at whether the provisions require updating due to the technological advances since the introduction of the PACE Act.

One of the proposals by the Commission is that the exclusion of journalistic materials be extended to search and seizure in all cases, to increase consistency.[48] Any provisions relating to search and seizure of confidential journalistic material that are less onerous that are set out in the PACE Act are proposed to be raised to the standard of the PACE Act, so disclosure is exempt in all circumstances.[49]

Nowhere has the Commission stated that it intends to recommend the removal of the additional protections afforded to journalistic materials, or that it intends to recommend the removal of the requirement that warrants in respect of journalistic material be contestable.

4.6.4 *The US Position*

Most states have enacted shield laws which protect journalist's privilege. While these laws vary in their scope between states, they generally prevent journalists from being required to reveal their confidential sources or being compelled to produce materials. In California, for example, legislation expressly forbids the execution of search warrants on journalists.

Federally, the *Privacy Protection Act 1980* (42 USC) (the **Privacy Protection Act**) requires law enforcement officers to seek materials from a journalist through subpoena, rather than via executing a search warrant. The subpoena application process provides journalists with an opportunity to respond.

The only situations where a search warrant can be executed on a journalist is where there is probable cause to believe the person who possess the material has committed the offence to which the materials relate, the seizure of the material is necessary to prevent the death of or serious injury to a human being, there is reason believe that providing notice via a subpoena would result in the destruction or concealment of the materials, or the materials have not been produced in response to the issued subpoena.[50]

4.7 Other

ARTK further proposes the implementation of a transparency and reporting regime for application of and decisions regarding issuing and authorisation of warrants.

The Department of Home Affairs stated that it would be difficult to prepare a report on search warrants, as there is no central register of search warrants, and any such list may not be accurate due to the multiple jurisdictions involved.[51] The Department also stated that preparing such a list would be an "unreasonable diversion of resources".

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47 UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 11.

48 UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, page 17.

49 UK Law Commission, *Consultation Paper No 235: Search Warrants*, 5 June 2018, pages 194 and 196.

50 Privacy Protection Act s 2000aa.

51 Department of Home Affairs, *Responses to Parliamentary Inquiry Question Taken on Notice*, Submission 32.6, 28 August 2019.

However, the Department also states it can be assumed that there are only a very small number of search warrants executed against journalists or media organisations. If this in fact the case, the list should not require an "unreasonable" amount of resources to put together. Additionally, it is reasonable to assume that each agency does keep some form of record of the search warrants applied for and obtained, and that it should therefore not be difficult to request each agency to submit records for the preparation of a report.

Any effort expended in preparing this report would be worthwhile for the increased transparency it would afford.

5. EXEMPTIONS

As described in ARTK's submission, many of the national security laws enacted over the last couple of decades, and particularly the last seven years have impacted on the media's ability to perform its functions.

National security laws increasingly protect the government from scrutiny and embarrassment, rather than being focused on protecting the safety of the nation.

We recognise that the effective functioning of national governments, including those of representative democracies, in relation to national security requires some information to be kept secret from the public, at least for some period. However, even if a law whose purpose is to enable information to be kept secret from the public for one or other of these reasons pursues a legitimate purpose, the provisions in place go beyond that purpose.

The offences that criminalise the disclosure or dealing with information are not limited to public servants.

5.1 Differences between defences and exemptions

5.1.1 *The Attorney-General's Department states that there is no difference in the legal effect whether a protection for journalists is classed as a defence or an exemption. They state that the same evidential burden needs to be discharged, and there is no procedural difference.*[52]

This is not strictly correct. Not only are they legally distinct, the manner in which legislation is cast can have a significant effect on those potentially affected by the provision and those investigating it.

Broadly speaking, a matter which excuses or excludes liability for an offence can fall into three main categories:

(a) where a matter is cast as an element of an offence.

(b) where a matter is cast as an offence-specific 'exemption' or an 'exception'; and

(c) where a matter is cast as an offence-specific 'defence'.

52 Attorney-General's Department, *Answers to questions at hearing on 14 August 2019*, Submission 32.2, pages 3-4.

It can often be unclear from the face of the offence which of the above scenario applies. In *Avel Proprietary Limited v Multicoin Amusements Proprietary Limited,*[53] McHugh J said at 119 (emphasis added):

> *When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso depends on whether it is part of the total statement of the obligation. If it is, the onus rests on the party alleging a breach of the obligation…Whatever form the statute takes, the question has to be determined as one of substance: …*

There is an important difference between an 'exemption' and a 'defence' (categories (b) and (c) respectively, as set out above). The Australian Law Reform Commission has stated that an exemption limits the scope of conduct prohibited by an offence whereas a defence may be relied on to excuse conduct that is prohibited by an offence.[54] However, 'exemption' and 'defence' are often referred to interchangeably in statute and case law. For example, in the case of *R v Khazaal* (2012) 246 CLR 601, certain justices of the High Court referred to subsection 101.5(5) of the Criminal Code as an 'exception' whereas Justice French referred to it as a 'defence'.

Nevertheless, it is important to maintain the distinction.

When considering whether to investigate and prosecute an offence, investigators and prosecutors will consider whether the defendant's conduct falls within any exemptions. They will not typically consider whether any defence is available before determining whether to proceed.

If the prosecution does decide to bring the charge, the defendant will bear the evidential burden in relation to both exemptions or defences.[55] This is also an issue.

However, setting out the circumstances in which there will not be liability as an exemption, rather than a defence, ensures that the investigators and prosecutors consider these circumstances earlier, rather than the defendant having to wait until the hearing for these matters to be raised.

An exemption for journalists would ensure that the fact that they are a journalist will be considered early in the investigation and prosecution processes, avoiding costly and lengthy proceedings. If the prosecution does proceed, journalists will still have the opportunity to rely on the exemption, as they would a defence, but earlier consideration of the relevant issues may obviate any need for proceedings.

As the provisions currently exist, they start on the premise that a crime has been committed, and the accused is only given an opportunity after they have been charged and a hearing has begun to force any consideration that they may be excluded or excused from liability. Defending such a charge will be not only costly and time consuming, but also extremely stressful. An exemption places some onus on investigators and prosecutors to consider that before bringing proceedings.

The existence of an exemption also gives assurances to journalists that they will not be prosecuted for doing their jobs and they can pursue stories and news reporting without fear.

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53 (1990) 171 CLR 88.

54 ALRC (2010), *Secrecy Laws and Open Government in Australia (Report 112)*, 'General Secrecy Offence: Exceptions and Penalties'.

55 Criminal Code s 13.3(3).

5.1.2 *The Attorney-General's Department says that it would add significant additional complexity and reduce the efficacy of offences to require the prosecution to demonstrate that disclosure was not in the public interest.*[56]

This does not appear to be an issue in other jurisdictions, where government bodies are regularly required to demonstrate public interest (see examples above).

5.1.3 *The Attorney-General's Department says that reporters will be able to "easily point to evidence that he or she was engaged in reporting news and reasonably believed that engaging in the conduct was in the public interest" in deploying the defence under section 122.5(6) of the Criminal Code.*[57]

The Attorney-General's Department provides no reason why that burden should rest on the journalist, and why prosecutors should not be required to prove that the conduct was not related to the reporting of news or in the public interest to make out the offence. After all, the prosecution, with the assistance of the relevant government entities, will have access to all of the relevant information.

It was suggested at the Public Hearing that journalists were seeking to be treated as a special class in having an applicable exemption.[58] As stated by Hugh Marks, CEO, Nine Entertainment,[59] journalists are seeking to be recognised for their legitimate and important role in society. Journalists do constitute an important class because of the valuable role they play in maintaining the integrity of Australia's democracy, including ensuring accountability of a range of private and public organisations and institutions, including governments.

5.2 Difficulties for journalists in assessing information

There are no rules as to what the government can class as secret or classified information. What could appear to be a legitimate story to a journalist about, for example, an error made by a government officer, may be determined by the government as secret or classified, and the journalist could have no way of knowing that it had been classified as such, or why. Without clear guidance as to what will be classed as secret or classified information, journalists will have difficulty anticipating what information will bring them afoul of national security provisions.

National security itself is defined broadly and can include not only the defence of Australia, but also its political and economic relationships with other countries, greatly widening the scope of what could bring journalists into conflict with legislation.

5.2.1 *Identifying what is secret information can be a complete mystery, even to security organisations. Questions have been raised about how journalists will be aware of the full implications of the information they possess, before they publish.*[60]

There are two points to be made in response to this.

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56 Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 10.

57 Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 7.

58 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Tim Wilson).

59 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 4 (Hugh Marks).

60 E.g. Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Julian Leeser).

Firstly, journalists do not receive a piece of information or document and move straight to publishing it. They will talk to other sources, and where appropriate work with the relevant agencies to make sure that what is published does not put national security at risk. Journalists will seek advice from their editors and legal advisers. What is published will be put in context.

Journalists also consider the impact of what they are going to publish before publication: if they have any idea that the publication of information will endanger a life, this will be a significant force against publication.[61]

It is not a case of publish first, ask questions later. A significant amount of investigation and consideration will be undertaken before a journalist decides to publish potentially or allegedly sensitive information. Journalists take care to ensure they are not threatening national security, or endangering anyone's life.

Second, it is clear from the submissions of others that it is not even always clear to security or investigative bodies what is a sensitive piece of information: ASIO states in its submission, by way of example, that it is sometimes unclear even to ASIO itself if information will compromise a source, for example if that information was only provided to a small group of people.[62] If this is the case, it is unreasonable to think that journalists should be able to identify whether pieces of information provided to them without that context are sensitive, and therefore unfair to criminalise their action in publishing that information.

Traditionally, journalists have taken a communicative approach with relevant agencies. By way of example, when the ABC found a cabinet of documents relevant to national security, they discussed this with the relevant agencies and largely returned the documents.[63]

As many of the relevant offences are currently constituted, it is an offence to even receive documents, even if there is no intention to publicise the contents. Getting in touch with agencies to find out more about the document, even if just to determine whether it is a classified document, would identify a journalist as having committed an offence. Such offences decrease the likelihood of journalists and media organisations working with investigative agencies.

5.2.2 *The Department of Home Affairs submitted that even an exemption to allow journalists to disclose where they consider that conduct is being engaged in which is illegal, amounts to misconduct or corruption would not appropriate, as individuals may not understand or appreciate the impact of releasing that information.*[64]

This argument flies in the face of the role of the media in keeping the government and others in positions of authority accountable for their actions. The media has a vital role to play in exposing abuses of power. Suggesting that reporting on such stories should be criminal conduct because the media "may not understand" is ridiculous.

ARTK does not consider the suggestion made – and immediately discounted – above as worthy of consideration. In fact, it seems to merely serve as a rhetorical device.

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61 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 7 (Campbell Reid).

62 Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, page 4.

63 Evidence to Parliamentary Joint Committee on Intelligence and Security, House of Representatives, Sydney, 13 August 2019, page 8 (Bridget Fair and David Anderson).

64 Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

5.3 Recklessness Element

5.3.1 *The Attorney-General's Department and Department of Home Affairs suggest that the fact that the offences require reckless or intentional behaviour is sufficient to protect journalists who may not be aware of the broader security implications of their information.*[65]

Recklessness is not a straightforward concept in the criminal law. First, it is acknowledged to be of less culpability than intention or knowledge. This is reflected in the differing penalties for section 35P(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (reckless) and section 35P(2A) (intentional). However, section 5.4 of the *Criminal Code* sets out the definition of recklessness:

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

As can be seen above, it is not merely that the person is aware of a substantial risk that he circumstance exists and the result will occur, it includes that in the circumstances known to the person it is unjustified to take the risk. The latter element in section 5.4(3) is made a question of fact.

However, in section 35P(2)(b), whether the information relates to a Special Intelligence Operation (**SIO**), is a circumstance then it may be argued or at least reliance may be placed on section 5.4(4) such that recklessness could be proved by knowledge of the risk.

Accordingly, the answer given by the Department of Home Affairs to questions from the Committee to the effect that:

> *For example, a disclosure concerning potentially illegal conduct by staff of Australian Security Intelligence Organisation would not be an offence where the person making the disclosure is unaware of a substantial risk that the information relates to a Special Intelligence Operation.*[66]

does not reflect the ambiguity in the legislation. It would be at least arguable that knowledge of the risk of an SIO will be sufficient to establish an offence.

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65 Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 4; Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

66 Department of Home Affairs, *Department of Home Affairs responses to written Questions on Notice*, Submission 32.5.

In any event given the severe penal consequences this will have a pronounced effect on any person considering disclosing potentially illegal conduct by ASIO staff.

The element of recklessness is problematic when the scope of what is considered to be related to "national security" is considered. As discussed above, "national security" extends beyond the defence of Australia to Australia's reputation and relationship with other nations. Any negative reporting on the actions of Australia's government or government bodies could be considered reckless in regard to Australia's relationship with other nations: journalists would be considered to know how negative reporting would negatively affect Australia's relationships.

While the element of recklessness does add some qualification to the offences, it is not sufficient. The offences do not generally consider where it is in the public interest to disclose something, even where the reporter is aware of a substantial risk. Sometimes a journalist will weigh the risk against the public interest, and find that the public interest is greater. The legislation needs to account for this scenario.

If it is not clear to the security agencies what information is sensitive, it is difficult for it to be clear when journalists are being reckless.

The uncertainty harms relationships between journalists and agencies, decreasing the probability of collaboration or cooperation, if by even revealing they have these documents they may be considered to be being reckless.

5.4 Existing Defences

The defences and exemptions which do exist to the relevant offences and schemes do not generally contemplate the public interest in journalists and media organisations not being prosecuted for making their reports.

The current defences and exemptions available to journalists and/or media organisations in relation to the relevant provisions are set out below:

Relevant Provision	**Defences or Exemptions Available to Journalists and/or Media Organisations**
Australian Security Intelligence Organisation Act 1979 **(Cth) (ASIO Act)**	
Section 35P: Unauthorised disclosure of information	While section 35P contains a number of exceptions in relation to the offences, none of the exceptions are relevant to journalists or media organisations, unless the information they have accessed or disclosed has previously been made public and they have a reasonable belief that disclosure will not endanger the health or safety of any person and will not prejudice the effective conduct of a special intelligence operation.
Telecommunications Interception and Access Act 1979 **(Cth)**	
Division 4C: Journalist	There is no exemption for journalists engaged in public interest reporting.

Relevant Provision	Defences or Exemptions Available to Journalists and/or Media Organisations
Information Warrants	
***Criminal Code Act 1995* (Cth) (Criminal Code)**	
Part 5.2: Espionage and related offences	Under section 91.4, it is a defence to prosecution under section 91.1, 91.2 and 91.3 that the information had already been communicated or made available to the public with the authority of the Commonwealth. The same defence exists under section 91.9(3) for prosecution under section 91.8. Otherwise the only defence potentially available is that the conduct was done in accordance with a law of the Commonwealth.
Part 5.6: Secrecy of Information	Section 122.5(6) provides a defence for public interest reporting where the person "engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media", and that at that time the person reasonably believed engaging in that conduct was in the public interest. Section 122.5(6) extends to instances where the persona was a member of an administrative staff who acted under the direction of a journalist, editor or lawyer of that same entity who reasonably believed that engaging in that conduct was in the public interest. Section 122.5(2) provides that it is a defence to a prosecution where the relevant information has already been communicated or made public with the authority of the tribunal.
Section 119.7: Foreign incursions and recruitment	Section 119.7 does not apply where a declaration has been made by the AFP Minister under s 119.8(2) that the Minister is satisfied that it is in the interests of defence or international relations of Australia to permit the recruitment in a specified armed force in a foreign country.
Section 80.2C: Advocating terrorism	Section 80.3 provides a defence for a person who tries in good faith: • to show that listed persons are mistaken in their counsels, policies or actions; • to point out errors or defects in the government, the Constitution, legislation or the administration of justice; • to urge another person to lawfully procure a change to any matter established by law, policy or practice; • to point out any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; • to do anything in connection with an industrial dispute or an industrial matter; or

Relevant Provision	Defences or Exemptions Available to Journalists and/or Media Organisations
	• to publish a report or commentary about a matter of public interest.
***Crimes Act 1914* (Cth) (Crimes Act)**	
Section 3ZZHA: Unauthorised disclosure of information	There are no exceptions or defences available to journalists or media organisations, unless the disclosure is made after a warrant premises occupier's notice or an adjoining premises occupier's notice has been given in relation to the warrant
Section 15HK: Unauthorised disclosure of information	Section 15HK contains a number of exceptions, but the only one potentially relevant to journalists and/or media organisations is subsection (4) which contains an exception for previously published information where the information has been published prior and will not endanger the health or safety of any person or the conduct of a controlled operation.

Only two offences have defences that contemplate news reporting or the public interest.

Enacting provisions excluding journalists and media organisations from the relevant offences would not only provide greater certainty for journalists doing their jobs, but would also provide clarity to investigating and prosecuting bodies, as discussed above. Increasing consistency across the variety of security offences would be a further benefit.

5.4.1 *The Attorney-General's Department suggests the existing defence for persons engaged in the business of reporting news in section 122.5 the Criminal Code is sufficient.*[67]

This defence provides a good example of what should be included in a public interest exemption for journalists and media organisations.

5.5 "Exploitation" of legislative exemptions

5.5.1 *ASIO suggests that hostile actors will exploit legislative exemptions for journalists by using journalism as a cover, or, alternatively, target journalists with the knowledge that they have legislative exemptions available to them.*[68]

Looking at the oft-repeated by ASIO example of Angus Grigg, it does not appear that ASIO is as concerned by this risk as they make out in their submissions. Despite Mr Grigg publishing an article in 2017 about how he was approached to provide information to a Chinese agency, Mr Grigg was never contacted by ASIO to ask about the incident.[69] Mr Grigg contacted ASIO himself after the incident was mentioned by Duncan Lewis, and received a generic response with no follow up.

67 Attorney-General's Department, *Responses to Questions on Notice*, Submission 32.4, page 7.

68 Australian Security Intelligence Organisation, *ASIO submission to the Parliamentary Joint Committee on Intelligence and Security*, Submission 22.1, pages 3-4.

69 Angus Grigg, 'Hey ASIO stop using me to target journalists', *Australian Financial Review*, 16 August 2019, accessed via https://www.afr.com/policy/foreign-affairs/hey-asio-stop-using-me-to-target-journalists-20190816-p52hor.

ASIO has not provided any additional examples of approaches to journalists, and in its actions seems very unconcerned about the one confirmed approach.

ASIO also does not address the fact that other groups of individuals, for example politicians and those involved in business arrangements with the government, are equally or more likely to be targeted by hostile actors. There is no evidence to suggest that journalists are any more susceptible to approaches than anyone else. In fact, journalists have the professional training and instincts to make them suspicious of the motives of anyone who comes to them seeking their assistance, and do due diligence as a result.

6. MINISTERIAL DIRECTIONS

6.1 Direction by the Attorney-General to the Commonwealth Director of Public Prosecutions

On 19 September 2019, the Honourable Christian Porter MP, Attorney-General, issued a direction under the *Director of Public Prosecutions Act 1983* (Cth) (the **AG Direction**). The direction requires the Commonwealth Director of Public Prosecutions to obtain the written consent of the Attorney-General before prosecuting a journalist for an offence relevant to their work as a journalist under any of the following sections:

(a) section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth);

(b) sections 3ZZHA, 15HK, 15HL and 70 of the *Crimes Act 1914* (Cth);

(c) sections 131.1 and 132.1 of the *Criminal Code* (Cth); and

(d) section 73A of the *Defence Act 1903* (Cth).

This direction provides no guidance as to what the Attorney-General will consider before providing his written consent. There is no pathway to review the decision by the Attorney-General to issue his written consent, given there are no requirements on the Attorney-General to consider or review any material before providing the consent. The Attorney-General does not even appear to be required to consider the public interest in the relevant investigation by the journalist.

Given the Attorney-General's role as an elected government official, there are inherent conflicts in the Attorney-General being given the task of determining whether journalists should be prosecuted for their actions.

It is difficult to imagine the Attorney-General refusing to provide his consent where the Commonwealth Director of Public Prosecutions approaches him requesting to prosecute an offence in relation to national security, given the Attorney-General's role also involves oversight of national security. Requiring the Attorney-General to act as gatekeeper is inconsistent with his other roles and political position.

6.2 Direction by Minister for Home Affairs to the AFP

The AFP Direction contains two relevant directives:

(a) an expectation that the AFP will "take into account the importance of a free and open press in Australia's democratic society and to consider broader public interest implications before undertaking investigative action involving professional journalist or news media organisation in relation to an unauthorised disclosure of material made or obtained by a current or former Commonwealth officers"; and

(b) an expectation that the AFP will, where consistent with operational imperatives, "exhaust alternative investigative actions, including in relation to any other persons that may be involved in the matter, prior to considering whether any investigative action involving a professional journalist or news media organisation is necessary."

There are several problems with the suggestion by the relevant government bodies that the AFP Direction is sufficient to rectify the issues raised by media organisations.

First, the AFP Direction does not clearly specify any test or standard for the AFP to comply with. Merely "taking into account" the importance of a free media could be a brief mention in a conversation, rather than carefully considered in the context of making decisions about an investigation. This consideration could happen at any point in the investigation, not even necessarily in respect of a decision about a warrant, as discussed above. A requirement for the public interest to be considered in issuing any warrant would ensure that this was a relevant consideration throughout the investigation, as well as acting as a threshold test.

Second, the direction to exhaust alternative investigative actions, where consistent with operational imperatives, is similarly imprecise. It seems to only require alternative investigative actions be considered where convenient.

Third, the AFP Direction only applies to the AFP: it does not apply to any other investigative agency (e.g. ASIO).

Fourth, there is no clear or accessible means by which any person potentially affected can test or assess compliance with the directives in the circumstances of any particular investigation. They cannot find out if all other investigative avenues were exhausted, nor can they find out if a consideration of the importance of a free media was raised at any point.

7. CONCLUSION

Public interest considerations need to be brought to the forefront in any matter in which journalists are involved, and major reform is necessary to make the public interest a priority.

In the interests of freedom of the media, freedom of speech, and the preservation of Australia's democratic system, the public's right to know must be protected. Protection of this right to know requires greater legislative consideration of the role of journalists and the public interest in their job.

ARTK maintains and emphasises the need for the following reform:

- the right to contest the application for warrants by journalists and media organisations;
- exemptions for journalists from laws that would put them in jail for doing their jobs; and
- the adequate protection of public sector whistle-blowers;
- the introduction of a regime that limits which documents can be stamped secret; and
- defamation law reform.

In the Central Criminal Court

Metropolitan Police Service
(D.I.Collinson)

v

Times Newspapers Limited

Independent Television News Limited

Sky UK Limited

BBC

Applications for Production Orders under the Terrorism Act 2000

Ruling and Reasons

1. Introduction

1.1 Applications have been made by D.I.Collinson on behalf of the Metropolitan Police Service for Production Orders to be granted in respect of special procedure material held by Times Newspapers Ltd. (TN), Independent Television News Limited (ITN), Sky News UK (Sky) and the BBC. The four media organisations had given notice that the grounds for the making of any such order were contested and that in the circumstances of this matter the said material would not be provided without a Court order;

1.2 On 7th August 2019 Counsel appeared on behalf of the Applicant and on behalf of three of the Respondents, namely TN, ITN and Sky. Detailed skeleton arguments were submitted in advance by the Applicant and these three Respondents. The BBC confirmed in writing that they wished to be associated with the submissions made on behalf of the other three Respondents. The hearing occupied two full days during which D.I. Collinson was examined on oath and legal submissions were addressed to the Court. A witness statement was tendered by the Deputy Foreign Editor of the Times with submissions as to the importance of the journalism in this matter and the risks taken by investigative journalists in such regions.At the conclusion of the hearing the matter was adjourned until 4th September 2019 so that I could take the opportunity to reflect on the evidence and material that had been presented and the submissions that had been made before making a final ruling in respect of each application;

1.3 On 22nd & 28th August 2019, following a written request for information from the Court, it was confirmed on behalf of all four Respondents that, in the event of an

application for a Production Order not being granted, an undertaking would be given in respect of the special procedure material sought that it would be retained by a firm of Solicitors until further order of the Court.

2. Basis for Applications

2.1 Each application has been made under *Paragraph 5 of Schedule 5 of the Terrorism Act 2000* thereby engaging the criteria set out in *Paragraph 6* of the Schedule;

2.2 The applications arise out of a series of broadcast reports of interviews with Shamima Begum in February 2019 whilst she was staying at a refugee camp in Syria. The broadcast reports appeared to indicate that in each case there were edited parts of the interviews which had not been broadcast. The Metropolitan Police Service (Police) wished to view the material that had not been broadcast as part of their continuing investigation into Ms Begum and her activities since leaving the United Kingdom and travelling to Syria in 2015. The Police made requests to each Respondent soon after each broadcast but were informed that the provision of such journalistic material would require a Court order;

2.3 The Applicant has confirmed that the Production Orders are sought in relation to a terrorist investigation into one alleged offence only, namely membership of a proscribed organisation *contrary* to *Section 11 of the Terrorism Act 2000* - the proscribed organisation being variously known as Islamic State of Iraq and al-Sham (ISIS) and the Islamic State of Iraq and the Levant and also *DAISh;*

2.4 During the course of the hearing the nature and extent of the material sought by the Applicant was re-considered and each draft Order re-worded as follows:

- TN:
  A copy of the full edited and unedited recording(s) of the interview(s) between Anthony Lloyd and Shamima Begum at a refugee camp in Northern Syria that resulted in the publication of the related articles in the Times on 13.2.19 and 14.2.19.
  All interview notes which record what was said by Ms Begum and Mr Lloyd generated during or after the above meeting(s) with Ms Begum.

- ITN:
  A copy of the full edited and unedited video recording(s) of the interview(s) between Rohit Kachroo and any other interviewer and Shamina Begum at a refugee camp in Northern Syria that resulted in the ITV news items on 18.2.19 and 20.2.19.
  All interview notes which record what was said by Ms Begum and Rohit Kachroo and any other interviewer generated during or after the above meeting(s) with Ms Begum.

- Sky:
  A copy of the broadcast recording of the interview between Sky correspondent John Sparks and any other interviewer and Shamima Begum at a refugee camp in Northern Syria that resulted in the Sky news items on 18.2.19 and 20.2.19.

- BBC:
  A copy on disc (only) of the approximately 39 minutes of unedited and unbroadcast video footage of the interview of Shamima Begum answering questions from the BBC Middle East correspondent, Quentin Sommerville which took place on and was broadcast by the BBC on 18.2.19;

  A copy on disc (only) of the approximately 17 minutes of unedited and unbroadcast video footage of the interview of Shamima Begum answering questions from the BBC Middle East correspondent, Quentin Sommerville which took place on and was broadcast by the BBC on 20.2.19;

3. Factual background

3.1 In February 2015 Ms Begum (then aged 15 years) left the United Kingdom and travelled with two school friends to Syria in order to live in the *Islamic State* caliphate that had been declared a few months earlier in 2014. This departure was the subject of considerable media coverage and continued public interest. It became known that Ms Begum had settled in Raqqa which had become a stronghold for *ISIS* and the *Islamic State*. It also became known that she had married a Dutch *IS* fighter. It was also reported that she had been sent to an *IS* training camp following her arrival in Raqqa;

3.2 The rise and fall of *IS* in that region between 2014 and 2019 has been the subject of extensive worldwide reporting. The activities and whereabouts of Ms Begum during that prolonged period were not widely known, if at all;

3.3 In February 2019 an investigative journalist from the Times newspaper came across Ms Begum in a refugee camp in Northern Syria where she had sought refuge following the retreat of the remaining *IS* forces in the Syrian region. She was pregnant and the birth was imminent. The whereabouts of her husband were unknown;

3.4 Video recorded interviews were conducted with Ms Begum by the Times journalist. It would appear that she gave unconditional consent to such interviews and was well aware that her comments would be published thereafter. She was now expressing the wish to return to the United Kingdom. Over the following seven days further interviews were carried at the refugee camp by journalists on behalf of ITN, Sky and the BBC. The inevitable editing process for presentational purposes meant that (with the exception of Sky) not all the questioning of Ms Begum was broadcast or otherwise published. It is this material that the Police seek to review as part of their continuing

investigation. The Respondents would appear to have no objection to providing copies of the broadcast material but do object to the provision of the material that was not broadcast or otherwise published.

4. Legal principles

4.1 There has been no dispute as to the legal principles to be applied in this matter. Counsel for the Applicant and Respondents have provided clear and detailed skeleton arguments setting out the correct approach to be taken in respect of these applications;

4.2 Attention has been focused on the following authorities in particular:

- *Malik v Manchester CC [2008] EMLR 19*
- *R(BskyB) v Chelmsford CC [2012] 2 Cr. App. R. 33*
- *R v Shayler [2003]1 AC 247*
- *R(Bright) v CCC [2001]1WLR 662*
- *R v Lewes CC, ex p Hill (1991) 93 Cr. App. R. 60*

I have also had regard to the views expressed by the C/A in *R v Ahmed [2011] EWCA Crim 184* with respect to the meaning of membership for the purposes of *Section 11 of the Terrorism Act 2000.*

5. Submissions

5.1 Detailed arguments have been advanced in the skeleton arguments and further amplified in oral submissions with regard to the application of the agreed legal framework to the facts and circumstances of this matter, bearing in mind that each application has to be considered on its own merits;

5.2 The core of the Applicant's argument is as follows:

- It is the duty of the Police in any investigation to pursue all reasonable lines of enquiry and to do so expeditiously;
- A reasonable line of enquiry may result in obtaining evidence that can implicate a suspect in relation to the offence under investigation or it might help to absolve the suspect from any further investigation or any criminal proceedings;
- The Police are in the best position to evaluate evidence obtained from an interview as they are able to assess such material in the light of other evidence that the Police have already obtained in the course of an investigation;
- A proper and reliable evaluation of the answers given by a suspect in an interview can only be safely made if the complete interview is studied and all questions and answers are read and considered in their proper context;

- An incomplete record of questions and answers in an interview session would place the Police and their investigation at a significant disadvantage when it came to preparing for their own interview of a suspect following eventual arrest or in the decision making process with regard to either charging a suspect or discontinuing an investigation;
- While there is no reason to doubt that Ms Begum travelled to Syria in 2015 having made her own free choice to go and live within the *IS* caliphate and thereafter remained there until making her way with others to the refugee camp in early 2019, there is now a live issue as to whether the circumstances of her time in the caliphate and her activities during that time reflect membership of *ISIS* such that an offence has been committed contrary to *Section 11 of the Terrorism Act 2000* or whether her position was or may have been one of desiring to live in such a caliphate but without seeking to join others in *ISIS* for the purposes of furthering the aims of that organisation. A comprehensive account of all her interviews with the Respondents would be invaluable in helping to determine that issue;
- It is accepted that there is no certainty as to when, if at all, Ms Begum would be subject to arrest and interview back in this country. At present the Police are in no position to interview her in Syria and Ms Begum has had her British citizenship withdrawn and is therefore in no position to return to this country. The decision of the Home Secretary to withdraw her British citizenship is to be the subject of an appeal process through the Courts, however there is no certainty as to how long that process will take nor its likely result. The longer the delay that occurs then the greater the likelihood of the journalist's material being lost or mislaid and the more difficult it would be to follow up lines of enquiry that might be raised by a review of the full material;
- The interference with the journalist's Article 10 rights under the *European Convention on Human Rights* is not as significant as in many cases owing to the fact that the journalists in each case have already broadcast or otherwise published parts of their interviews and did so without breaching any confidentiality and notwithstanding any purported risk to themselves from such exposure.
- The gravity of Ms Begum's activity is high when placed in the wider context of the global terrorist threat that has been demonstrated by *ISIS/IS* over the past five years or so and which relies in part on recruiting males and females to join the organisation and to further its aims whether by active participation or by encouragement and support.

5.3 The core of the Respondents' argument is as follows:

- The Applicant has failed to demonstrate on cogent evidence that there are reasonable grounds for believing that within the material that has not been published and/or the notes of the journalist who conducted the interview there is probably material which would add value to the Police investigation over

and above the value that has already been obtained from the broadcast material;

- There are no reasonable grounds to believe that the requested and unreleased material would probably contain admissions by Ms Begum to having taken part in the activities of *ISIS*;
- It is unrealistic to suppose that a responsible journalist or media organisation might have chosen not to include in any broadcast or other publication answers from Ms Begum that tended to demonstrate that she had been actively participating in terrorist activity or otherwise encouraging or supporting others to carry out terrorist acts in furtherance of the aims of *ISIS*. Furthermore there is no reason to conclude that any responsible media organisation such as each Respondent would disregard or otherwise overlook the reporting duty and/or criminal liability that arises pursuant to the provisions of *Sections 19, 38B & 39 of the Terrorism Act 2000;*
- The Orders sought are in effect speculative "fishing expeditions" for which such applications should not be made;
- The Police have more than sufficient material from the combined broadcast material with which to conduct proper interviews with Ms Begum in the event of her arrest at some stage in the future;
- The gravity of the activity of Ms. Begum's that is under investigation is not high. If she can be shown to have become a member of *ISIS* then it could only have been at a low level of engagement offering support or encouragement as a wife of an *ISIS* fighter but not as a leader or as an active participant in terrorist acts;
- The Orders sought would represent a significant interference with the journalistic freedom protected by Article 10 of the Convention. Such orders have an inhibiting effect on the press in part because of the loss of trust in journalists that would occur if their neutrality or the perception of their neutrality was undermined by a willingness to pass over journalistic material or a routine compelling of journalists to do so by the granting of such orders, in part by the consequential withdrawing of co-operation from those from whom the journalists wish to speak and gather material, and in part by journalists thereby being discouraged from disseminating information which otherwise would be in the public interest to learn and would be part of a legitimate public debate on important issues or concerns;
- There is no clear and compelling case for over-riding or otherwise interfering with the Article 10 rights of journalists carrying out high value public interest news reporting in accordance with their duties;
- The need for the Courts to assist with the protection of journalists and their Article 10 rights is all the greater where investigative journalists are engaged in dangerous conflict zones where organisations such as *ISIS* are hostile to journalists and will readily accuse journalists of spying or otherwise being engaged on behalf of state law enforcement agencies to whom they would readily pass on information;

- At this stage there is no pressing social need to make the Orders sought by the Applicant, particularly as there is no prospect of Ms Begum's imminent return to this country nor of any criminal proceedings being instigated against her in respect to an offence under *Section 11 of the Terrorism Act* possibly for years, if ever. Furthermore any concerns about any subsequent loss of any requested material would be answered by the Respondent's providing an undertaking to retain such material in a secure environment until further notice. The applications are in effect premature.

6. Ruling and Reasons

First access condition

6.1 During the course of the hearing the Applicant accepted an assurance given on behalf of Sky that all but a few sentences of their interview recording had been broadcast and that the omitted part was in effect superfluous to any report and lasted but seconds. In those circumstances the Applicant has not pursued the application for any Sky extract that has not been broadcast or otherwise published;

6.2 It also became apparent at an early stage of the hearing that there was no reason to think that there would be any difficulty at this stage in the provision by any Respondent of copies of the previously broadcast or published material for the evidential gathering purposes of the Police investigation. It was the material that had been edited out and not broadcast or otherwise published, together with any notes of interview comments that had not been broadcast or published, that were at issue;

6.3 In respect of TN, ITN and the BBC there are significant periods of time in their respective interviews which did not feature in any broad cast recording:

- The journalist for TN interviewed Ms. Begum over the course of 1 ½ hours however the extracts in the broadcast recording in total only last just over 17 minutes;
- The ITN broadcast edited out some 18 minutes of recorded interview;
- The two BBC interviews lasted a total of 56 minutes but only 4 minutes was broadcast.

6.4 In my view there are reasonable grounds in each case for believing that the material that has not been broadcast or otherwise published is likely to be of substantial value to the terrorist investigation being conducted by the Police. Furthermore the substantial value to the Police investigation is likely to be re-enforced by the Police being able to aggregate the material thereby obtained from each Respondent as a result of the three discrete applications;

6.5 In each case it is inevitable that the approach and focus of the Respondents and the Police with regard to the interviews of Ms. Begum would be very different. The

Police would be approaching the interview on the basis of an investigation into an alleged criminal offence and would be focusing on answers which would have an evidential impact (one way or another) on the question whether Ms. Begum had *belonged or professed to belong* to *ISIS* and therefore committed an offence contrary to *Section 11 of the Terrorism Act 2000.* As the case of *R v Ahmed* demonstrates the absence of any definition of *"belong"* or *"membership"* may cause difficulties of interpretation in many cases. Establishing such membership may well depend on the inferences to be drawn from circumstantial evidence and the assessment of multiple pieces of evidence. Much of that evidence would be of no interest to a journalist who was not seeking to investigate whether Ms. Begum had become a member of *ISIS* and therefore committed an offence contrary to the *Terrorism Act 2000* but was focused on another aspect of her situation. In each case the material broadcast or published reveals a very different approach and focus. The material within the news reports appears to approach Ms. Begum on the basis that it is assumed that she was a member of *ISIS* albeit perhaps not as an active participant and that the focus of interest for the public is her personal predicament having been drawn to *ISIS* as an impressionable teenager and wanting to live in the caliphate yet by 2019 finding herself in a refugee camp with *ISIS* and the caliphate in collapse in that region. The focus of the TN broadcast was on the significant human interest story of her departure from this country, what became of her two companions and her adjustment to living in an area of such conflict and then her personal loss and plight by the time of her arrival in the refugee camp. The focus of the broadcast reporting thereafter was upon Ms. Begum's wish to return to this country and developments with regard to the withdrawal of her British citizenship. It is almost inevitable that during the interviews conducted by the Respondent's journalists questions would have been asked or comments made by Ms. Begum which would throw a light on the issue of membership but which would have taken second place to the principal human interest story. It is those answers and comments that would have value to the Police investigation. By way of example, the BBC reports include in precise or summary form the following script: *'...she told the BBC she would have let her late son become an IS fighter... ', '(re the Manchester attack) it was "kind of retaliation" for attacks on IS', 'Our correspondent said that "throughout the interview Shamima Begum continued to espouse Islamic State philosophy', 'The 19 year old told BBC News she hoped the UK would understand she made a "very big mistake" by joining IS'.* Likewise script in the ITN reports: *'...(she) has spoken of her regret at joining the jihadi fighters in Syria', "He [Home Secretary] has no proof that I'm a threat other than I was in ISIS but that's it.", 'In a series of interviews Ms Begum had initially said that she had "no regrets" in going to Syria to join so-called IS', 'She stated she ignored the pleas (of her family) "because I thought I was doing the right thing by being part of Islamic state.... "* Such short extracts alone provide ample justification for concluding that there are reasonable grounds for believing that there is further detail and information in the material that has not been broadcast or otherwise published which is likely to be of substantial value to the terrorist investigation. Those extracts are from two of the Respondents. The length of the TN interview with Ms. Begum was such that there is every reason to

believe that there would be similar unused comments by Ms. Begum during that interview.

6.6 Accordingly I am satisfied that the first condition as set out in *Paragraph 6(2) of Schedule 5* has been satisfied.

Second access condition & Article 10 rights

6.7 There is a considerable overlap in this matter between the criteria in the second condition as set out in *Paragraph 6(3) of Schedule 5* and the Article 10 right to freedom of speech that underpins the work of journalists;

6.8 There are two powerful public interests in play in this matter, Firstly the need for society to be protected from the horrors of terrorism and from the actions of those who would encourage or support terrorist activity and for the Police to be enabled to take steps to prevent and detect such activity and to carry out effective terrorist investigations. Secondly, there is the need for society to have a free and independent media which is able to conduct effective investigations into matters of public interest and concern and to report such matters to the public without fear or interference. The rights of a journalist are not however absolute and the two public interests may on occasion come into conflict, as in this matter. Where they do, it will be necessary to examine the competing circumstances with care. It will be necessary for a balance to be struck between these two interests having considered the nature of the purported interference with the journalist's rights and the nature of the terrorist investigation that is underway;

6.9 There is no doubt that the initial TN report was a commendable piece of investigative journalism and represents a significant public interest story which has opened up a important issue for public debate. Such journalistic investigation is to be encouraged, however the work of investigative journalists in particular does rely upon trust, confidentiality, protection of journalistic material and sources, their perceived neutrality, and the co-operation of people who are prepared to place their trust in the journalist. It is true that in this matter there is no suggestion that the granting of a Production Order in any case would breach any confidential relationship or expose a source or place a journalist in any greater risk of harm than he would have been placed by the original broadcasting or publishing of his reports. To that extent the purported interference with the journalists rights in this matter does not have the same direct adverse impact as would, for instance, the revealing of a source or breaching of a confidential relationship. Ms. Begum would have been well aware that she was speaking to a journalist in each case and that the journalist would broadcast or otherwise publish his account of her interview, indeed given some of her responses it would appear that she may have welcomed the opportunity to have such publicity. Nevertheless the purported interference remains and has a wider potential impact for

journalists and cannot simply be discounted in the face of the competing public interest in pursuing the Police investigation;

6.10 I have endeavoured to balance the nature and extent of the purported interference of journalists rights against the benefit likely to accrue to the Police investigation if the Orders were made and also against the nature of the offending that is the subject of the investigation and which, although very serious, is on the known facts not at the highest level for such offending. One highly relevant consideration is the fact that at this stage there is no prospect of Ms. Begum being subject to an arrest in this country nor subject to interview or prosecution in the foreseeable future. Equally there would not appear to be any real likelihood of an active line of enquiry being opened up for the Police should the requested material be produced at this stage;

6.11 In my view there is one factor which would serve to justify the conclusion that there was a pressing social need at this stage to over-ride the Article 10 rights of the journalists in each case and to justify the conclusion that there were reasonable grounds for believing that in each case it was in the public interest for the material sought to be produced and that is the real risk that such material may be lost in whole or part over the passage of time. It was for that reason that I sought confirmation on behalf of the Respondents that they remained prepared to provide undertakings as to the storage and protection of the contested material;

6.12 It has been confirmed on behalf of all four Respondents that, in the event of the Production Orders not being granted, an undertaking will be given that copies of the material sought by the Applicant will be passed to the same named firm of Solicitors and will be preserved by that firm until any further order of the Court;

6.13 In the light of that proposed undertaking, it is my view that there would no longer remain any significant risk that such material would be lost hereafter and therefore, given Ms. Begum's current status and situation, there would be no pressing social need established at this stage that would justify the making of any of the Orders sought at this time. If Ms. Begum's circumstances were to change in the future then fresh applications could then be considered.

6.14 Accordingly I do not grant the Production Orders that have been sought by the Applicant.

HH Judge Mark Dennis QC

4th September 2019