



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ENVIRONMENT AND COMMUNICATIONS REFERENCES
COMMITTEE

Press freedom

FRIDAY, 18 OCTOBER 2019

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SENATE

ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE

Friday, 18 October 2019

Members in attendance: Senators Green, Hanson-Young, Lines, McMahon, Marielle Smith, Urquhart.

Terms of Reference for the Inquiry:

To inquire into and report on:

The terms of reference are:

- (a) disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation;
- (b) the whistleblower protection regime and protections for public sector employees;
- (c) the adequacy of referral practices of the Australian Government in relation to leaks of sensitive and classified information;
- (d) appropriate culture, practice and leadership for Government and senior public employees;
- (e) mechanisms to ensure that the Australian Federal Police have sufficient independence to effectively and impartially carry out their investigatory and law enforcement responsibilities in relation to politically sensitive matters; and
- (f) any related matters.

WITNESSES

BROWN, Professor AJ, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University	30
CARNABUCI, Ms Connie, General Counsel, Australian Broadcasting Corporation	1
CARNABUCI, Ms Connie, General Counsel, Australian Broadcasting Corporation	21
CHESELL, Mr James, Group Executive Editor, Nine Network.....	1
DEMPSTER, Mr Quentin, Representative, ABC Alumni Limited.....	36
DICKSON, Mr Gary, Operations Administrator, Public Interest Journalism Initiative	43
FLYNN, Mr Chris, Director, Alliance for Journalists' Freedom	50
GILL, Ms Clare, Director of Regulatory Affairs, Nine Network	1
GRESTE, Professor Peter, Spokesman and Founding Director, Alliance for Journalists' Freedom	50
HOLMES, Mr Jonathan, Press Freedom Spokesperson, ABC Alumni Limited	36
LIDBERG, Associate Professor Johan, Director, Master of Journalism, School of Media, Film and Journalism, Monash University.....	60
LIDBERG, Associate Professor Johan, Member, Journalism Education and Research Association Australia	67
MORRIS, Mr Gaven, Director News, Analysis and Investigations, Australian Broadcasting Corporation	21
MORRIS, Mr Gaven, Director, News, Analysis and Investigations, Australian Broadcasting Corporation	1
MULLER, Dr Denis, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne	60
MURPHY, Mr Paul, Chief Executive, Media Entertainment and Arts Alliance.....	1
REID, Mr Campbell, Group Executive, Corporate Affairs, Policy and Government Relations, News Corp Australia	1
SIMONS, Dr Margaret, Chair, Expert Research Panel, Public Interest Journalism Initiative	43
UHLMANN, Mr Chris, Political Editor, Nine Network.....	1
WALADAN, Ms Sarah, Head, Legal and Regulatory Affairs, Free TV Australia.....	1
WILKINSON, Mr Peter, Chair, Alliance for Journalists' Freedom.....	50

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CHESSELL, Mr James, Group Executive Editor, Nine Network

GILL, Ms Clare, Director of Regulatory Affairs, Nine Network

MORRIS, Mr Gaven, Director, News, Analysis and Investigations, Australian Broadcasting Corporation

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UHLMANN, Mr Chris, Political Editor, Nine Network

WALADAN, Ms Sarah, Head, Legal and Regulatory Affairs, Free TV Australia

Committee met at 09:00

CHAIR (Senator Hanson-Young): I declare open this hearing of the Senate Environment and Communications References Committee inquiry into press freedom. I begin by acknowledging the traditional owners of the land on which we meet and pay our respects to their elders past and present. On behalf of the committee, I would like to welcome everybody here today. This is a public hearing and a *Hansard* transcript of the proceedings is being made. The hearing is also being broadcast via the Australian Parliament House website. Before the committee starts taking evidence, I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. The committee generally prefers evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground on which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, be made at any other time. I would ask all witnesses to remain behind after you have given your evidence so that the secretariat can clarify anything if needed. I remind all people in the hearing room to ensure mobile phones are off or on silent.

I now welcome representatives from Australia's Right to Know. I understand that information on parliamentary privilege and the protection of witnesses has been provided to you.

Senator LINES: If I may, I would like to put on the record that I worked with Mr Paul Murphy many years ago when we both worked at the national office of United Voice.

CHAIR: Apologies. Just before we proceed, there is quite a bit of media interest in the room today. Media reporting on the media—interesting. I want to make sure the committee is all okay with that? No objections? Great. Is there anything any of you would like to add to the capacity in which you appear today?

Mr Chessell: I am the group executive editor for *The Sydney Morning Herald*, *The Age*, *WAtoday* and *Brisbane Times*.

CHAIR: I now invite you to make a short statement. Maybe from this end, or whoever wants to kick off.

Mr Reid: Thank you, firstly, for the opportunity of being here today to confront an issue that we think is extremely pressing. All societies that we measure ourselves against are confronting the harm that is caused by the loss of professional journalism. At a time of fake news and misinformation, the value of real news has never been higher. We are being forcefully reminded every day that now, more than ever, free press is a cornerstone of a good democracy. It is in this environment that we need to find ways to empower journalism and not penalise it. We need to correct the balance back to scrutiny rather than secrecy.

The Right to Know Coalition has asked for six immediate areas to be addressed to correct that balance. We are seeking the right to contest warrants that are sought to search or put journalism under surveillance. We are seeking to be exempted from wrongly crafted or poorly crafted laws that make journalism, in its normal practice, an offence. We are seeking for strength and protection for public sector whistleblowers. We are seeking for a regime change that means more documents are in the open and fewer documents are stamped 'secret'. We are seeking for major reform to the FOI regime so that it works to open the flow of information and not constrict it, and we are participating already in a major review of the nation's defamation laws. The members at the table are happy to discuss all of those issues with you. Thank you again.

CHAIR: Do any of the other organisations have anything to add before we go to questions?

Mr Morris: I have one quick supplementary comment to Mr Reid's. We are all here representing journalism organisations, but I think the Right to Know Coalition, first and foremost, is here to represent the public's right to know. I think too often in this debate we have sometimes been accused of this being about self-interest for journalists. This is about the public's right to know and about the health of our democracy. That is the capacity. We will have our opportunity to speak on behalf of our organisations later, but I think it is really important to stress that up front before this session.

CHAIR: Anybody else? No? Okay. Obviously this committee is running at the same time as there is the House committee, which has caused some angst I understand from comments that are being made public. I would like to know, perhaps Mr Reid or Mr Morris, from the broad breadth of organisations that you have here, how do you see what needs to be done going forward? Do you have a response to the amendments or changes announced by the Attorney-General only a couple of weeks ago in relation to at least charges being laid towards journalists?

Mr Reid: From our point of view, I think the announcements about the directives that the Attorney-General issued are a recognition that there is an issue and that it needs to be addressed. Our concern is that it is yet again an after-the-fact intervention that can be applied and not before-the-fact fundamental change of the type we are asking for. We are also concerned that putting the AG in a position where that person has to then decide whether the law or a prosecution will be applied adds what we think is quite a dangerous position for that person to be in. We would much prefer the bigger piece of work, but the obvious piece of work, to amend the legislation that wrongly criminalises journalists for doing their day-to-day job, and that we change that rather than having a directive. Having said that, I say again that it is welcome that there is recognition that something needs to happen here. Others might have an added view.

Ms Carnabuci: I think we would endorse that view. Our view is that these issues are important questions of law that should come before a judicial adjudicator. However, as Mr Reid says, it does at least recognise that there is an issue.

CHAIR: Yes. The raids, of course, on the ABC and on News Limited journalists undoubtedly have had some type of chilling impact. Could you speak to the impact of that? Also, is it since the raids or has this concern about the safety/protection of the people who work for you, your journalists, been coming for some time?

Mr Uhlmann: I am celebrating my 30th anniversary in journalism. The first time I was visited by the Australian Federal Police was in 1990, the year after I started in journalism. It was over a cabinet leak from the ACT government. The *Canberra Times* was raided, and I was questioned by police at that stage. It goes back I think quite a long time. The argument I would make is that things have always been pretty bad when it comes to having a free flow of information inside a democracy like Australia, much worse than it is in the United States or in the UK, some of our comparable democracies. Information here is much harder to come by and across a whole range of levels.

The second time I was questioned by the Australian Federal Police was in 2008, when I had a cabinet document which talked about the purchase of the Super Hornets. Again, this time I was called by the Australian Federal Police and asked to go and talk to them. I have a good relationship with the police. They were very courteous on that particular occasion. There was no raid of our office. They simply asked me to come and see them and I was happy to go and see them. Of course, they were after the people who gave me the documents, and I was unhappy to give them the documents and that is where the conversation ended.

One of the things I will never forget was being on the Prime Minister's plane on a return trip from APEC in Chile when we landed in Hawaii. One of the journalists was taken off the plane by US border officials. That was Gerard McManus, who is now the media advisor to the agriculture minister. Gerard's crime—and he was a convicted criminal in Australia—was that he had refused to give up his contacts at a court hearing in Victoria the year before. He had been convicted and fined for refusing to give up that information. He has to mark his papers when he travels as being a criminal. He was taken off the Australian Prime Minister's plane and detained apart from the rest of the journalists because of that. If you think that is a good outcome for laws in Australia, I think we have a very different understanding about the way that the free flow of information should happen inside our borders.

There is another thing that bothers me. I can think of one occasion in particular when I wrote a story about the fact there had been an ASIS official in Afghanistan who had had a gun held to her head by the Special Forces soldier who was supposed to be protecting her. That was before the release of the 'Afghan Files'. It was a very difficult story to do. It was denied by government at the time. Someone that I knew as an acquaintance who worked in Defence was hauled in for investigation, because he had admitted on a piece of paper that he knew me.

None of my interventions to the Department of Defence to say, 'I can't tell you who my contact is, but it is not this person' had any effect. He is a decorated colonel who lost his security clearance because of that.

I think the system has been getting steadily worse. It does have a chilling effect. I will give you one last example. I do not think that even my greatest detractors could accuse me of being a bleeding heart. One of the stories we did in 2017 was on Chinese power and influence in Australia. I would say that one of the people you should look at since that program is Huang Xiangmo, one of the two people we talked about in that particular program as being a problem in our democracy. At the end of the program—it was *Four Corners*—I said that the Attorney-General had said they were going to look into foreign interference laws, that there would be a change there and we would watch it with great interest. After that program a lot of people in the intelligence and defence community told me the program had been a seminal moment that had helped to spur their foreign interference laws and the belief they were necessary. One of them was a transparency register, which I see as a good thing. Imagine my surprise at Nine News when I find that one of the first letters that goes out under the transparency register is to Hugh Marks, Chief Executive Officer and Director of Nine Entertainment Corporation, from the Attorney-General's Department, saying that because we broadcast a program that had some footage in it from Al Jazeera we should consider whether or not we had to sign up under a communications activity as being an agent of foreign influence. That is a ludicrous outcome and precisely the sort of thing that I was promised by the defence and intelligence community would not happen. We also had written undertakings that that would not happen.

The thing I think this parliament needs to look into is that some of these laws are absolutely necessary; you can make an argument that some of them are overreach. However, at each step along the way we have become a more closed community.

As to some of the things that were promised that would not happen to journalists, at each step along the way there was a warning issued by organisations like ours that perhaps this was a step too far, that perhaps this was beginning to limit information. That went unheeded. When put to the test and when officials are in charge of administering the law, it is the media that they come after. I do think that the country has a problem.

CHAIR: Mr Uhlmann, you have just cited quite a number of cases of this type of chilling effect and impact on people you know being able to do their job. Do you think it is fair to say that you feel like journalism in Australia is treated as a crime?

Mr Uhlmann: There are elements where now it clearly is, if a communications activity means that a chief executive of an Australian media organisation has to register as an agent of foreign influence because we publish something from a state broadcaster. Let us not forget the BBC is a state broadcaster, a public broadcaster. You could make that argument if we were to rebroadcast something from the BBC that had an effect on the Australian political environment, and sometimes it does. The classic example I can think of is we rebroadcast on the ABC when I worked for it the fact that Ireland was going in for a plastic bag ban. That had an effect on what happened in Australia almost immediately. Within 24 hours of that broadcast I remember people were talking about plastic bag bans inside Australia. You could say that those sorts of broadcasts constantly have an effect on the political environment here.

I know that it is difficult in this environment, particularly with politicians, because there are a lot of atrocities that the media do commit. I admit that. However, the defamation law in Australia is extraordinary. Most people in Australia would find it difficult to believe that you can go into a Federal Court and have your defence of truth removed by a Federal Court judge. As to that same program I worked on, 'Power and Influence'—and I cannot speak to it at great length because it is a matter before the Federal Court at the moment—that is precisely what has happened to us. A defamation case has been running for two years. We no longer have the right to plead truth, that what we said and the way that we said it was actually true, as a defence in a court in Australia. That is a ludicrous circumstance.

Mr Morris: On the chilling effect you referenced, there have been really two things going on here, one of which has escalated dramatically in recent times. The first is, over many years now, the steady degradation of our ability to do our business; there has been a degradation of defamation laws, further restrictions on FOI laws and the implementation of many pieces of new legislation around so-called national security. All of these things become obstacles to journalists being able to do their work and for the public having access to and the right to know what is going on in our democracy. Our journalists are increasingly used to trying to work their way around those things to do their jobs. What really changes, though, in terms of a chilling effect is this. Imagine the impact on journalists sitting at their desks of television pictures of police going into a journalist's home or television pictures of police going into the headquarters of a newsroom and stomping around looking for files and demanding access to our information. Sources will come forward with courage and say to us, 'We have

information that's important to the public.' It is about the ability to say to the sources, 'We will ensure that we'll protect your identity and we'll protect your confidentiality.' When you have police in your newsroom or police in your home, how can you make that promise?

CHAIR: Well, you can't, can you?

Mr Morris: It is increasingly difficult. We spend more and more of our time with our lawyers. We spend more and more of our time working on how we can find secure ways to handle information so that we can attempt to say to our sources, 'Don't worry. That bond that we've always had between journalists and whistleblowers in the interests of the public to tell a story—we will do our best to maintain that.' However, it is very difficult when you have police coming through your newsroom.

CHAIR: I think it is fair to say that the government's response to this thus far has very much been around their arguments for the need of protection in law because of national security. However, I think most people turn on the news, whether it is commercial stations, the ABC or the SBS, to find out what is going on in their community, to find out what is going on in state, local and federal governments. Surely most of the stories this is having an impact on, and the stories that you are able to report on because of whistleblowers, have nothing to do with national security?

Mr Chessell: Sorry to interrupt. I can give you an example of exactly what you are talking about. At about the time that the raids occurred, one of our investigative journalists, Adele Ferguson, was working with a whistleblower on a series of stories about the National Australia Bank's relationship with its auditor, EY. This was an important story because it prosecutes some of the issues that were raised in the royal commission and also shines a bit of a light on the aftermath of the royal commission, which is obviously a very important issue but not one of national security. Adele is fine with my saying this. The whistleblower that she was working with saw the footage of the raids, 'freaked out' and became very reluctant for understandable reasons to deal with her on that story. I think that probably underlines the point you were making.

Mr Morris: It strays a long way from national security. I have an example in our organisation of a potential story about maladministration in a local government, and the source has said, 'I'm no longer willing to do it.' That source may misunderstand where the laws might interact with the information they want to provide, but it does not matter at that point.

CHAIR: Mr Uhlmann referenced the promises that were made, a crackdown on journalists and raids at the national broadcaster or individual journalist's homes, a letter being sent to Hugh Marks because of interactions, and that these were breaches of what had been promised. Have we simply been too naive, and we need protection in legislation; otherwise it does not exist?

Mr Uhlmann: Clearly. Did I believe the people who told me that we would not be wrapped up in this affair? Clearly, I did at the time. Was I naive? From this letter, yes.

Mr Murphy: I would make the point that, personally—and I think it would be the same for a number of people at this table—I have lost count of the number of times I have appeared before committees to talk about these issues. There has been an enormous amount of legislation in recent years. I think Professor George Williams has a figure of 75 pieces of national security legislation in this country since 2001. It is not the case that parliament is uninformed about our concerns. It is not the case that we have not made detailed submissions about exactly what needs to be done to address the situation. The information is there.

Ms Gill: We have made countless submissions. We have prosecuted our case. We have united and we continue to try to unite strongly. I do not think that we have been naive, I just think that we have not been heard.

Mr Chessell: I think the point about the post 9/11 legislation—and some of that is very understandable legislation—is really critical. I think that has led to a hardening of attitudes across all of the laws that we interact with, to the point now that you are seeing just clear cases of overreach. A very obvious example is the whistleblower Richard Boyle, who has exposed some bad practices at the ATO and who is now facing more than 150 years in prison potentially. We see similar examples with FOI. There was a silly one, but I think it is symbolic, involving SBS last week, and it taking 142 hours to find out about a minister's travel records. I could give you endless examples. We had a reporter who wanted to find out about a foreign entity's agricultural land purchases. That was a two-and-a-half-year process. He got 17 pages back at the end of two and half years, and they were so heavily redacted he could not write a story. It has emboldened, I think, officials to a point now. FOI laws, if you read them, seem sensible enough, but the application of the laws is now highly problematic.

CHAIR: One of the things you want us to look at is unblocking this process or a way of dealing with appeals of the FOI system faster? Or is it about who ultimately gets to make the decision? Does anybody want to put some flesh on the bones in terms of that?

Ms Power: I can just add one practical thing about freedom of information. There is the legislation, but there is also the operational capacity of organisations to respond quickly and swiftly. Speaking from an organisation that both uses FOI and is subject to FOI, I appreciate that practical resourcing can have an impact, particularly on the speed of responding to requests. That is not to take anything away from the comments about the culture and view of how to deal with requests.

Ms Carnabuci: We would add a few additional points. One is the introduction of an ongoing audit of the classification practices of government agencies. That is really the seminal point. How are they classifying their documents? If we can audit that and assess whether they are actually classifying them appropriately, that would give us greater confidence. Secondly, I think that we would say that some of the exemptions that are available under the FOI need to be reconsidered. They may be too broad. Thirdly, I think there is the point that Ms Power has just made around the operational issues and around proper resourcing and the timeliness of the process.

Ms Waladan: We would agree with that. I think as we said in our submission, the Hawke review some time ago recommended a comprehensive review of FOI laws, and that has not really occurred. The two key issues that we have come across seem to be the fact that the timeframe for decision-making is often delayed. That is because of resourcing, but also the agencies often rely on the exemption around I think it is section 24AA, which basically says that, if there is significant prejudice or significant implications on the resourcing of the organisation that they cannot comply. That is relied on a lot.

Ms Carnabuci: I would just refer the chair to some really important comments that were made by Bret Walker SC at the recent Press Freedom Summit held in Sydney a few weeks ago, which were around this question of, 'What do we mean by national security?', and let us have a proper conversation on what the perimeter around that should be.

CHAIR: I might hand over to the opposition, then we will go to the government and come back to me.

Senator URQUHART: Mr Uhlmann, if I can go to you first, given that you are a member of the press gallery. Has the press gallery scrutinised the government legislation adequately, in your opinion?

Mr Uhlmann: Each time there is a different one, and 75 seems to be the figure going around. I could not attest to the fact whether it is 75 or not. There have been a lot since 2001. On each occasion there has been this question raised. It does boil down usually to a matter of political debate about the length to which you go about how this has an effect. It has been scrutinised. Has enough scrutiny been applied? That is something that could be said about almost anything. Our resources to scrutinise things over the past 19 years have become ever more difficult, because we have had so many job losses. It used to be that everyone had a defence reporter or a security reporter doing different rounds. I think there are now maybe two defence reporters left in the gallery.

Senator URQUHART: The ability to really scrutinise—

Mr Uhlmann: One of the things is for us the ability to scrutinise has become more of a problem. It has been raised on each occasion. I know this debate has been a long-running one.

Mr Reid: At every occasion, as Paul mentioned, that those of us and many of us at this table have been in those rooms, asked for comment about the legislation, we have provided detailed alternative wording of drafting. While it may not appear in the papers that we represent or on the news, the notion that we did not try hard enough to address these laws as they were put in place is a complete fiction. As others have said, it was not that we were not speaking, it was that we were not being listened to. Through that period there was absolute cause to enshrine laws to keep Australians safe. There is now an opportunity to go back and look at those laws, take a breath, with a fresh set of eyes and say, 'Actually, several of these go too far.' We have provided the amendments that could address that very quickly.

Senator URQUHART: But did you provide those amendments at that time?

Mr Uhlmann: Absolutely at the time.

Senator URQUHART: And they were not—

Mr Uhlmann: And they were not listened to.

Ms Carnabuci: I might just add that in this recent round the ABC provided to Senator Dutton an annotated document we created, which could effectively be instructions to the legislative draftsman to say, 'These are the sections.' It is a 20-page document that extracted the sections.

Senator URQUHART: Were they ignored?

Ms Carnabuci: No, we did have some reaction. We then received the ministerial direction.

CHAIR: Sorry. Could I just ask that that document—

Senator URQUHART: I still have questions. You have had a fair crack.

CHAIR: I am asking whether we can get that document tabled.

Ms Carnabuci: I do not have it with me today.

CHAIR: If you could take that on notice?

Mr Murphy: I think there is an issue for the parliament here as well. Some of this legislation has gone through the parliament with incredible speed and with very little debate. If you compare, for example, the long debate and discussion in the House of Commons over the Regulation of Investigatory Powers Act with the paucity of debate in this parliament over recent years on this legislation, I think there is a very real issue there as well.

Mr Uhlmann: Some of that gets down to the ridiculous. For the security around this building, for example, when they debated about whether a fence should go up or not, there was no debate in the Lower House; it simply went through and then it appeared in the Senate. We were trying to get some idea about what it might look like in terms of, this is the people's house and giving people some idea what a fence around their parliament might look like. We could not get any information on that, because it was a security matter. We did an artist's reproduction of what it might look like and then we were told it was inaccurate, because we could not get the picture from them. Some of this stuff is really at the extreme end, and I would have argued at the time that the Australian people actually should have had a right to have some sort of say in what this building was going to look like, if they were interested in having a say.

Ms Waladan: Part of the problem is that the approach to crafting these laws has been to draft them in such a way that they are broad and go well beyond what is required to address the problem of national security, and the approach is, 'Trust us, and we won't exercise it in a way that encroaches on journalists' ability to do their work.' But what the recent raids have shown is that the cumulative effect of so many of these laws means that this approach is not working. Again, to quote what Bret Walker has said, you should not be giving the people who are asking for the secrecy the decision about whether they get it or not. That does not work.

Senator LINES: Mr Reid, you made comment, as did Ms Carnabuci, that you had made endless submissions on the matters that Senator Urquhart just asked you about. Mr Reid, you said that they did not necessarily appear in your papers. Given that I think the public is very concerned about press freedom, why are they not being percolated through to your newspapers or your media outlets?

Mr Reid: With all due respect to the process, those types of arguments about changes to pieces of legislation are pretty dry material in terms of the coverage of events in society. It is also, frankly, slightly offensive to think that the process cannot actually be taken seriously if it is not on the 6 o'clock news. In all of our fields of endeavour there are things in the background policies, regulations and things that we are trying to change that are not necessarily going to lead the news bulletin. However, we would like to think that our concerns as professional and responsible organisations are taken seriously and that there is a process. As others have said, in the last decade or so we feel that that process has been rushed, with all good intention, and now is the time to address it. I think all of us here have championed our cause of the Australian public's right to know with great vigour over all of our histories.

Senator LINES: I guess what I am hearing is that you still made the point that it was not about being naive, it was about not being heard. You made a similar point, as did others. I guess you can play the insider game for a while, but when do you play the outsider game and actually start to prosecute these issues in a much more public way? I guess that is what I am not understanding.

Mr Uhlmann: Yes, and I think you will find—and I do not have it in front of me, but I can certainly go back and search for it—in most cases where these laws are passed there has been some debate about the breadth of them. I know in particular when it came to ASIO's power to detain people in secret there was a lot of public discussion about that—some more, some less depending on the laws. Certainly with the last one—and I took a particular interest in foreign interference laws—part of the major debate around the laws was that they were too broad in their scope and they would capture the wrong people. It was not just the media saying that, obviously, it was everyone who was likely to be caught up in that net. It depends on each case, but I think you would find that, if you went back and checked the record, there was reporting on this particular aspect of almost all of those laws.

Mr Morris: Slightly more broadly, perhaps this is what is wrong with our political process sometimes at the moment. The construction/application of laws is only important to policy-makers if it is making the front pages. I hope that what we do in this building is think about how laws work and apply them, regardless of whether that's sensational enough to make the top of the news or the front pages. That is kind of your job, not our job. But I

think it is an important point. We have heard a lot, 'If this was such an important issue to you, why did you not say something more about this at the time?'

Senator LINES: Also, because you were at pains to point out to us this morning in your opening statement that this was more about the public's right to know.

Mr Morris: And the ultimate representatives of the public are you.

Senator LINES: Absolutely. But also as someone who supports press freedom you are a pillar of our democracy. You do need to be able to do your jobs in an unfettered way.

Ms Gill: We make lots of submissions and there are lots of legal arguments, et cetera, and we have discussions with the media all the time. I am on the corporate side. I am often briefing the media. It does get covered. But I think it is how this affects people when you see those raids. When you see how it actually affects people, that is when it actually really does cut through. The legislative minutia does not cut through with the public. That is why we should have direct conversations with you. I do not think how much it is in the media should be the arbiter of what is sensible law. If we look at what we are asking for, we are not asking for blanket or carte blanche, we are asking for this to be put through the lens of what is in the public interest.

Senator LINES: I was not meaning that the fact it is or is not in the media was the final piece. You could play an insider game or you could be much more vocal about that game. Putting information out there to the public is a way of being vocal. It is one way. It is not the only way. Sometimes you need to play both games.

Mr Reid: Immediately after those raids all of the country's professional media organisations represented here came together. Our chief executives appeared at the Press Council. There is a real sense of frustration amongst us that, after a long time of playing with the processes we thought it was meant to work; it has not worked and here we are. I do not think you will have any doubt that we have certainly found our voice now.

Ms Carnabuci: I think perhaps in the past it has been a piecemeal discussion about a particular piece of legislation. If we look at the most recent amendments in 2017, which related to section 122 of the Criminal Code, we engaged in extensive discussions with the parliamentary draftsman on the exposure draft, provided language, and we were all involved through the Right to Know. It did get some press. But I think where we are now is at an inflection point where we can actually stand back and look at all of our laws holistically, not just at disparate provisions that are being amended, and say, 'Okay. What is our policy position? What concept should drive the development of our laws?' If we look at the United States, the seminal concept of the Constitution is freedom of speech. If we look at Europe and countries like the UK, it is the human rights convention. We do not have a seminal point that we can graft to to say, 'Okay. What does this mean about what our laws should look like across the board on this point?' I think we have an opportunity now to really do that.

Senator GREEN: Can I ask a follow-up question? I think Senator Urquhart has some more detailed questions. You might not know me. I am a new senator and I live in Cairns, which is really far away from Canberra. The idea of this Canberra bubble is something that resonates with people particularly living in our region. It is my job to explain to people how important press freedom is. It is important for me to participate in that and to fight for that. I think it is important to people living in places that are incredibly remote. How do we explain to mums and dads living in Townsville or places like Western Sydney why press freedom is important to them and why it is not a Canberra bubble issue?

Mr Uhlmann: The web and weave of the things that they do in their everyday life are all connected to this place and to their parliaments around the country through people like you. You are their representative. You get sent here. I have lived in Canberra now for the last 30-odd years. People all say 'you politicians in Canberra'. But you are not politicians from Canberra, you are politicians who represent every part of the country. One of the things I love about this place is that there are now 151 members that have direct contact. Those veins run all the way back to their electorates. I am sure every single one of them would like to think that the things they do in this place have a direct effect on their lives, and they do. One of the things that we do is, first, to amplify what is said in here so that people can hear it and it echoes out beyond what the Prime Minister has called the Canberra bubble. That is so that it does have some resonance and so that people hear about it, know about it and can see how it affects their lives. The most recent thing I can think of is the drought funding, which we are trying to get people to know about. We have done an enormous amount on drought to try to tell those regional communities about what they can have, and to try to tell the rest of the people who live mostly in the metropolitan area and are not yet suffering water restrictions that there is a real problem.

Mr Reid: I can add to your particular Cairns question. I have had the privilege of working briefly in Cairns. I congratulate you on living in paradise. I was speaking yesterday to the editor of the *Cairns Post*. She sent me photographs of an extraordinary act of secrecy by a local council, and you will see that coverage. I think what we

are talking about here is that this place has the role of setting the example for the nation in terms of the right to know. You will see I think in coverage like I was talking to Jennifer Spilsbury about yesterday this culture of secrecy resonates all the way down to directly touching people's lives in small communities. As you say, it is our job to show how that touches them.

Senator GREEN: Is using a term like the 'Canberra bubble' trying to increase that secrecy; that people should not be worried about what goes on down here?

Mr Reid: I think it is interesting that the people who use the term the 'Canberra bubble' are the people who create the Canberra bubble. That is a politician's phrase, not a journalist's phrase.

Senator URQUHART: I will go to a couple of points from the earlier discussion briefly around the ministerial direction to the AFP, which the Minister for Home Affairs made in August. The Law Council of Australia commented on that direction, with the president saying that it creates an apprehension on the part of journalists that they will need to curry favour with the government in order to avoid prosecution. I think Ms Carnabuci talked about the fact that it should be judicial, and not ministers making those sorts of decisions at the end of the day. Before I ask you to comment on that, can I go directly to Mr Reid and perhaps Mr Morris. Can I ask you, Mr Reid, firstly: has News Limited received any notification from the Morrison government or from the AFP that Annika Smethurst will not be prosecuted?

Mr Reid: Unless it has happened in the last 24 hours, no, we have not. We make the point that those raids happened in June, and it is mid-October. Imagine a member of the public whose house is searched for seven hours for all those months later to still not know, 'Are you under investigation? Have you committed an offence?'

Senator URQUHART: This journalist does not know whether she may still go to jail or not?

Mr Reid: That is correct.

Mr Morris: The journalists are now accused of a crime, potentially. Imagine if that story was more than two years old. How long are these processes meant to endure without any clarity or any certainty for those journalists and their families living their lives? Again, in the end the impact of this has been on journalists, but the stories that were told at the beginning of this were in the public interest. The public, we know, are increasingly now tuning into this conversation, because they can see that.

Senator URQUHART: Mr Morris, can I ask you—and I think I know what the answer is going to be—has the ABC received any notification from the Morrison government or the AFP that your journalists Dan Oakes and Sam Clark will not be prosecuted?

Mr Morris: No.

Senator URQUHART: They still have that hanging over their head?

Mr Morris: That is correct.

Senator URQUHART: This direction is a direction that the minister might decide to take if they like the journalists or they write friendly about them?

Mr Morris: I do not know whether I can characterise it like that.

Senator URQUHART: I did. You can deny that.

Mr Morris: I think where our argument goes to is that there needs to be something that is a more comprehensive legislative response to this.

Senator URQUHART: Not left up to the discretion of a minister—

Mr Morris: That is correct.

Senator URQUHART: —who may or may not like the writings of a particular journalist?

Mr Morris: That is right.

Ms Power: It is not just whether a politician likes or dislikes a particular journalist. Also, a new minister might come in who has a completely different attitude and withdraws the direction. There is no certainty to it and there is no guarantee.

Senator URQUHART: Mr Murphy, obviously your members are the people involved in this. Can you talk to me about their feelings? We have heard words like 'chilling' and quite emotive words. Can you tell me about how your members are feeling? How do they feel about stories that they may or may not have that are going to be shut down or whatever? How is that impacting on their being able to do their job?

Mr Murphy: It is impacting in a number of ways. A number of our journalist members have told me since the police raids earlier this year that they have lost sources and that they have lost stories, because they clearly see the

nature of those raids as being government agencies sending a message, not just to journalists but also to whistleblowers. It is critical to remember the role of whistleblowers and the need for improved whistleblower protections. If sources dry up, public interest journalism really struggles.

Senator URQUHART: Is that a message of intimidation that they are getting? What is that message?

Mr Murphy: I think you would have to characterise the actions of government agencies as quite reasonably being seen as intimidating, as sending a message. If you have someone like Richard Boyle, who brought to light important issues in the ATO, facing 66 separate criminal charges, despite the fact that much of the information he brought to light is leading to change, what message does that send? You struggle to think of a single whistleblower whose life has been improved by the experience of being a whistleblower. Whistleblowers come forward because they have concern for their fellow citizens. They have concern when they see misdeeds, possible corruption and maladministration. Much of that would not come to light without the bravery of those people.

Mr Uhlmann: There is another thing that has happened over the past 30 years with the creeping in of this. The Australian Public Service is completely paranoid about what might happen to it. When I first got to the *Canberra Times*, I was given a book called the Commonwealth Government Directory that had in it all of the policy officers who worked for the Australian government and their phone numbers. You could ring up people and talk to them about policy. Usually it was just as a matter of clarification. I cannot think of many in the Public Service now who would welcome a call from the media without being terrified of what the minister might do. Usually they have a reflex action of not wanting to talk about it at all. When you talk about the Canberra bubble, one of the things that has happened is that the sources of information that helped inform the Australian people have dried right up and now all government conversation is carried out through ministerial offices and political minders.

Mr Morris: Another brief point on this—and I will be very brief—is that the hue on this conversation might be very different if any of the stories we are discussing today were wrong. But these stories were all truthful. No-one is denying the facts and no-one is denying the reporting and the journalism was not absolutely accurate and done with integrity. We are debating here about information that was clearly in the public interest, accurate and honest and whether the public should have the right to have it. That has been missed a little in this debate, too. A lot of the conversation has been, 'Can we really trust journalists and media organisations?' Yet in all of the stories that we have talked about today no-one has doubted the facts.

Senator LINES: I have a quick follow-up question. Mr Murphy, you said that whistleblowers are reluctant because of this intimidation coming from government departments. Mr Uhlmann, you said public servants would be reluctant to answer a call from a journalist, because they are afraid of their minister. Where is this intimidation coming from?

Mr Murphy: I think that the tidal wave of legislation that we have seen come through over the past decade or so has also been accompanied by an increasing culture within government agencies of secrecy and a culture of seeking to punish whistleblowers.

Senator LINES: But where does that culture come from? Is it ministerial direction?

Mr Murphy: I would say that it grows out of the legislative base. You look in that legislative base for anywhere a recognition of the vital importance of public interest journalism to our democracy. You will not find it. What you find is an increasing number of potential criminal offences that journalists and whistleblowers face. The only acknowledgements are very limited and weak defences, but they are defences. In other words, the presumption in the legislation is that it is not in the public interest for this information to come forward, and it then falls on to the journalist or the whistleblower to prove why it was in the public interest. It is completely the wrong way around.

Mr Uhlmann: I would argue that we have always been bad, and getting worse. I think Australia has always been worse than the US when it comes to these things. I will give you two examples. Scott Morrison made his career on the back of Labor Party, then government, press releases saying that a boat was arriving. Every time one arrived they put out a press release, followed immediately by Scott Morrison's press release which said it was another disaster for Australia. That information has now been reclassified to be secret and you can be prosecuted. If you are a public servant and you happen to mention in passing to someone in a pub that another boat has arrived, in fact you have breached the law. There are now ludicrous levels of secrecy. Against my own network in some ways, Scott Cam recently has been appointed the National Careers Ambassador for Australia. We asked a question as to how much he was getting paid.

Senator LINES: So have we.

Mr Uhlmann: We have been told it is commercial-in-confidence. That is a literally ludicrous application of that law. By the way, my understanding of it is, under some of our agreements, that if it is more than \$80,000 you might be in breach of the free trade agreement with the United States. That information should be publicly available, because taxpayers need to know how their money is being spent. That is one of the ways it connects them directly to Canberra. This is their money that we are talking about.

Senator LINES: We have asked the question.

Senator MARIELLE SMITH: Mr Murphy, we have heard a lot about this chilling effect having an impact on whistleblowers and drying up sources of information. From your perspective, do you think the level of intimidation and pressure on journalists is enough to stop talented young people from thinking they want to enter the profession of journalism?

Mr Murphy: No, I do not. All of the journalists I know are absolutely passionate about their profession and they are passionate about the role that they play in serving the public and informing their fellow citizens. I think there will always be people coming forward with that passion and that commitment.

Senator McMAHON: Mr Reid, you talked about fake news and the need to empower journalism. Can you detail who and what you believe should be considered a journalist and the practice of journalism?

Mr Reid: There is a manufactured confusion to try to create the impression that it is hard to tell who is a journalist and who is not a journalist. There are several good tests. The people who put forward that argument that it is hard to tell do not have any difficulty identifying real journalists when they want to search their homes. Firstly, a real journalist is somebody who, with diligence and responsibility, researches and seeks to publish the truth. After they have published the truth, they are in the open and accept responsibility for what they have published.

The second part of that equation is that real journalism overwhelmingly is published by real journalism organisations. That is a part of this discussion that is conveniently left out of this manufactured confusion as to who is a real journalist. You are a real journalist if your material is endorsed and published by real journalism organisations, who again live in open society, have a phone number, and take responsibility for the material that they publish. We can see that, while some people fake this confusion, the public does not have any confusion. Our industry has been disrupted from its origins into digital. The most popular and referred to news sources in the digital arena in the world are traditional media companies that have made the transition to new technology. There are exceptionally clear ways of identifying real journalism from fake journalism. To pretend that it is difficult is a nonsense.

Senator McMAHON: You do not believe that sources such as Facebook, WikiLeaks et cetera, are considered by the public to research and publish?

Mr Reid: No, I do not. I think the public access both good and bad information on those platforms, but they have no expectation that those platforms are journalism organisations.

Senator McMAHON: Mr Morris, you talked about the public's right to know as being the paramount reason you are here. Do you believe that Australians deserve to be protected by the law?

Mr Morris: Completely, yes.

Ms Gill: It has to be the right law, though. I do not think we can just say no-one is above the law. We are here saying that the law is wrong and we need to address that law. To say no-one is above the law is too easy. We are here to say that we need to change the law.

Senator McMAHON: There are right and wrong laws; is that what you are saying?

Ms Gill: We are here suggesting changes to the law in the public interest.

Ms Carnabuci: I think there may be some gaps.

Senator McMAHON: Do you believe that the law should be applied equally across all sectors of Australia, including journalism?

Mr Morris: I do not quite understand.

Senator McMAHON: Do you believe that the law should apply equally to everybody, including journalists?

Mr Morris: I think the law is a very nuanced thing. I think it should apply sensibly in every place where the public is protected by the law. I am not sure how to interpret a blanket statement like that.

Mr Reid: The laws are applied to suit the society that they serve. For example, in this building the laws of defamation are suspended. Outside of this building they apply. The relationship between a doctor and their patient

or a lawyer and their client is recognised by law as being a special relationship. That blanket laws are applied equally in all circumstances does not, as Gaven said, recognise the nuances of it.

Mr Morris: I think about it like this. I am an optimist in life. I happen to think that the vast majority of the people who serve in roles like yours are honest people who do their jobs with integrity. But when there are some who do not, who calls that out? How will we know? Who will follow that up? If in the end all laws apply equally to journalists and everybody else without the nuance of accepting that there is a public interest to know information, where the law-makers who make the laws are not always honourable in the way they do their job or the public servants who administer the laws are not always honourable in the way go about administering those laws, you have to have some complexity.

Ms Waladan: Just to be clear, we are not saying that journalists are above the law. What we are saying is that the laws are not crafted in a way that properly balances the important work journalists do in the public interest with national security issues. We have got it wrong. The laws in some respects either have gaps or are way too broadly drafted or are problematic. We have seen the symptoms of that more recently. We need to look at how those laws should be properly crafted. We are not saying for some reason the law should not apply to us. That is not what we are saying.

Ms Power: I think one thing that emphasises that point is that the Law Council itself has critiqued these laws. One of the constructs of law is balancing competing interests, and that is a very common exercise, as we all know, that you go through when you are drafting and voting on legislation. I think we are just saying that the cumulative fragmented effect of a lot of these laws that have been passed, many of them in haste, has led to an imbalance that does not respect or serve the public's right to know.

Ms Gill: Could I draw this committee's attention to the ACC's digital platforms review. The ACCC has looked at news and news journalism for the past 18 months. They have done a very detailed critique on public interest journalism and they have concluded that public interest journalism is a public good. We do need to acknowledge that the ACCC work is very important, because they are distinguishing what our organisations do apart from that of the digital platforms, and why we need to preserve what media does in this country for our democracy and for our society.

Senator McMAHON: The example was brought up about not being able to get details about the fence that was to be erected around this building. That seems like a fair and reasonable and fairly innocuous request. But can you see that requests for details about security could actually be used for other reasons?

Mr Uhlmann: Yes, I think that is a reasonable point. But the point that I would make—and it might seem a trivial one—is that with changes to this building, which is the people's house, the people should be allowed to have some access to the conversation. In fact, it was shut down in the House of Representatives on an agreement between the government and the opposition at the time. It barely got any debate at all. That argument is constantly used. I have had an argument put to me sometimes about filming inside this House that a terrorist organisation could put our footage together and work out the internals of this building and then use it to conduct an attack. In fact, the plans of this building are on the internet. Sometimes the argument is a completely spurious one. The problem is, with respect to the fence, it was never tested. At least test it and have the conversation. You might have struggled, in fact, to get people in Australia interested in a conversation about a fence around Parliament House, but I do think that no attempt was actually ever made. As I say, we were told when we did an artist's impression, 'That's nothing like what our fence looks like.' I said, 'Well, show us the picture of what it might look like.' They said, 'We're not going to.'

Mr Murphy: Just in terms of FOI and this building, there was recently a story published which highlighted the fact that an FOI request for the Parliament House lunch menus was resisted and refused and turned into a lengthy battle. I am not sure what—

Senator MARIELLE SMITH: On what grounds was it refused?

Mr Murphy: I cannot recall.

CHAIR: That is just ridiculous.

Mr Murphy: I think that is an indication of the level that the secrecy obsession is getting to in this country.

Senator McMAHON: I understand; lunch is a very serious business.

Ms Power: The public has a right to know about it!

Senator McMAHON: If the request was instead for the details of the armaments carried by the AFP in this place, can you understand that the person, people or departments processing these requests have rules and guidelines that they apply? It is not necessarily for them to decide what is innocuous and what is important?

Mr Murphy: Everyone understands there is a framework and there is some information that needs to be protected for people's safety. There is no question about that. But the FOI regime, the way that documents are classified in the bureaucracy, is an administrative process, it would appear to me, with very little oversight or review. There is a legitimate concern that there is a tendency to overclassify documents that really should be available to the public.

Mr Chessell: Could I make a point that follows on from your question about what constitutes a media organisation? Proper media organisations are bound by a code of ethics. I think we need to be careful that this is not some request for unfettered information that is then just going to be piped out into the ether. We take questions of national security incredibly seriously, as do all of the other newsrooms represented here. We regularly in my newsrooms have conversations about whether or not we should go to government agencies before publishing sensitive information, and we almost always do. I think it is very hard for proponents of that argument I described before to point to examples where legitimate media organisations have put the national security at risk.

Mr Uhlmann: On two occasions I have been approached, once by the Department of Defence and once by one of our intelligence agencies, specifically requesting that I not proceed with an investigation on the grounds that it would actually be not in the national interest; that it would endanger people's lives. I have asked them to tell me why. When they have told me why, I have agreed not to proceed. You can have a conversation with reasonable people. Obviously not all media is equal. Obviously you can point to many bad examples, but I actually do think that one of the things that our organisations provide is a reasonable filter in an unreasonable world.

Mr Reid: At the risk of starting a little dispute in our coalition here, I challenge anybody to actually point to a single example by any mainstream media organisation in Australia, whether you like what they do or not, of a moment of irresponsibility that has put anybody, an individual or a serious police or security operation, at risk. I am sure every single one of us here has examples of contact with intelligence organisations, senior politicians, local police forces where the conversation has been, 'Please don't publish this information, because it will either endanger an investigation or there's a risk.' In a career stretching back to 1976, on no occasion can I remember that relationship ever being treated poorly or where harm has been caused by a journalist or a news organisation doing the wrong thing. This notion of mistrust, again, is convenient when it suits. The Prime Minister and senior politicians trust us implicitly when they ring and say, 'We're going to make a secret visit to Afghanistan for Anzac Day. You can come, but no-one's allowed to know.' Nobody would ever dream of breaching that confidence. Yet, on the other hand, we are constrained by the notion that we cannot be trusted with information.

Senator McMAHON: I take your point, and I do not have any specific examples at all. I am sure you are all fine, honourable, ethical people. By the same token, we have doctors, lawyers, police and politicians in jail. Can you be 100 per cent sure that every single person working or acting as a journalist is absolutely fine, ethical and honourable and will be at all times?

Ms Power: I would like to jump in to address that point. Journalists acting within the ethical organisations are operating within an editorial framework. It is difficult for any rogue individual. I am sure there are rogue individual journalists and publishers, but within the framework of an organisation that has an ethical code, that abides by the Journalism Code of Ethics and their own public interest in not attracting the ire of the public for publishing damaging information, I think that it goes beyond the individual. The institution of the media organisations, I think, has a tempering effect, and individuals are called to account.

Mr Morris: Again, let us go back to the nuance of what we are saying here. We are not asking to be above the law. We are not saying that journalists should not have the law applied to them like all other citizens. We are saying that some of the laws that we interact with in the course of doing our jobs in the public interest might need refining. That is a big difference from any sort of simple argument that says we want to be above the law.

Senator McMAHON: Thank you. Mr Murphy, you talked about whistleblowers and painted them as brave and noble people. Is it possible, do you think, that some of them have fairly nefarious intentions and that things such as retribution, notoriety and attention could sometimes be their driving purpose?

Mr Murphy: There are laws to deal with bad players in those circumstances. The problem is there are not adequate laws to protect the well-intentioned people. The well-intentioned people are caught up in a web of legislation and regulation that, I don't know, may have been designed on the premise that it is possible that there is a bad player. I go back to Mr Boyle and the ATO case. I cannot for the life of me understand why that man is facing 66 criminal charges. I cannot for the life of me understand why, when I saw him speak at the Melbourne Press Club, he had to go to a magistrate's hearing in Adelaide to get permission to travel interstate in his own country. I cannot for the life of me understand why he would be treated like that.

Ms Carnabuci: The problem is that there is no public interest defence for whistleblowers under the existing PID legislation. There is no public interest defence for them, if they are dealing with certain categories of documents. All of those protections against reprisals will not apply if the public official is dealing with information that is classified as intelligence or sensitive. What we are arguing for is a tempering of that by bringing in this concept of disclosure in the public interest—for the honourable people who are acting because they believe it is important to get the information out into society.

CHAIR: So, you want not only the definition amended but also—listening to you—you then want to be able to contest that?

Ms Carnabuci: That is correct.

CHAIR: It would be actually a two-step process?

Ms Carnabuci: Yes. Firstly, what is the type of information? Perhaps where it is more sensitive we need to be more careful. And then the public interest defence.

Senator McMAHON: Who would determine what actually is public interest and what is not? Bret Walker made some really important comments about this at the Press Freedom Summit a few weeks ago. It is a legal concept, public interest. As to the factors in favour of revelation versus the factors against revelation, there has been very little thinking on this other than by judges who have been asked to adjudicate on it in the context of a trial. I think it is important to understand that it is not a decision that should be made lightly, and it is a decision that needs to have some framework around it, some principles around it, and some visibility about how the decision is ultimately made.

Ms Power: For lawyers advising journalists on publication, the legal concept is that public interest is something that affects society as a whole, that it will impact the wellbeing of the community as a whole, rather than something that is just interesting to the public. I think that notion has been aired in a lot of the forums where we have discussed this. There is a lot of thinking about it. It has been a concept in defamation law, where it has been considered a lot by journalists and their advisers. There is analysis around it. As Ms Carnabuci says, it is good to articulate it.

Mr Morris: There is one really simple way of looking at this. We are in court today arguing post raid about how our information may or may not be accessed and the rules around how that was obtained in the first place. Why could that process not happen preraid? It is as simple as that.

Ms Power: That is one of the concepts that we are advocating for, that there should be consideration of a decision to prosecute or pursue for any of the 75 laws this concept could be introduced to. The public interest and right to know issues should be considered as a threshold before legal action or prosecutions are launched, rather than the media organisations or the individual journalists having to hold it up in a court as a defence as their only hope of escaping liability for their actions.

Senator McMAHON: For example, if that was tested pre-execution of a warrant, how would you stop someone who potentially wanted to get rid of evidence from knowing that the warrant was going to be executed, if that is all playing out pre-execution?

Ms Carnabuci: That is a point that has been raised previously. Based on informal discussions that we have had, there is very little that actually proves that responsible individuals, responsible journalists who are bound by a code of ethics, a code of conduct and the law would actually do that. What we suggest is bringing forward that public interest element to a judge, and if necessary it could be heard in chambers. The first step is bringing the application for a warrant to a judge to consider, and explaining to the judge why it is in the public interest for the warrant to be issued. If there was sensitivity around that, if you were not dealing with a reputable media company and you actually were fearful that they might do something inappropriate and destroy evidence, you could ask for that to be heard in camera. But you would still have the benefit of an independent arbitrator trained in the law to assess the issue of public interest. At the moment, we do not have that.

Mr Morris: You would put those provisions clearly in any legislation that you draft so that that is part of the law and that the process has integrity. That is what the laws are for. Professional media organisations abide by the law.

Ms Carnabuci: Under the current laws of evidence, by the way, let us say it is a contested open hearing and you are going to be asked to come up and defend why it should not be issued. The minute you know that, if you start destroying evidence you are already breaching the Evidence Act.

Ms Power: It is the same with parties in litigation. This is something that happens every day throughout the land.

Ms Carnabuci: Injunctions.

Ms Power: If we serve on a citizen or an organisation, including media organisations, there is an opportunity for everyone to destroy all of the incriminating evidence. We know that is against the law.

Ms Carnabuci: It is illegal.

Ms Power: You do not do that. There is no evidence that media organisations do that in all of the litigation that they face in the courts.

Mr Reid: I make the point also that informally in this country, in respect of the numerous incidents we have spoken about where the police have wanted to search our premises, it is a completely polite process that involved a phone call to our general counsel to say, 'We're coming in.' We say, 'We'll meet you in the boardroom tomorrow. We'll make the journalists available.' The fear of the destruction of evidence isn't borne out by the way both sides of this equation have behaved in the past, and it has often been conducted in a completely organised way with prewarning, 'We're coming in. We need to see your stuff.' Nobody would ever dare—

Mr Morris: So much so that it helpfully allows us to have television cameras ready when they arrive.

CHAIR: We are talking about some of the solutions that could be enacted to deal with this growing problem of secrecy and the lack of ability for whistleblowers to feel secure and for you and your staff to do their jobs. What about international comparisons? Where does Australia sit in relation to how we respond, say, to the US, the UK or Canada?

Ms Carnabuci: We did address that somewhat in our submission to the PJCIS. We have not done a mapping against all of the Five Eyes countries, as I said at the last inquiry, but we did take some time to look at the UK regime. We thought that was probably the most comparable one for us. The key difference was really around raising the bar for the issuance of warrants. That was where they have a degree of judicial oversight that we do not currently have. That would definitely be a very useful exercise to do in terms of formulating a policy for Australia.

CHAIR: Throughout this inquiry we have sought suggestions from international experts as well. We will have some of that to draw on. We have some coming up as witnesses this afternoon.

Ms Carnabuci: That is great.

Ms Power: We see the Police and Criminal Evidence Act in the UK as a very useful model for how to approach that. I commend that to you.

CHAIR: Yes, that would be helpful, if you would like to take that on notice. I think it is really important that we understand that this is not just about the suggestion that there should be exemptions for journalists in this.

Ms Carnabuci: No.

CHAIR: I am particularly worried about whether they are public servants or people who are contractors carrying out various different government programs who simply do not know what their rights are when they have a concern. Mr Murphy, it struck me when you said that it is hard to imagine a whistleblower whose life is better after speaking truth to power. In the conversations that you have been having with government over the years but also recently since all of this has come to light, how much engagement has the government had with your organisations about the need not just to protect journalists but also to ensure that whistleblowers themselves know what the risks are such that, if they do know that something is seriously wrong and feel morally obliged to say something, there is actually a responsibility on their behalf to tell somebody? We have mandatory reporting for a number of different professions. It strikes me that not having some type of mandatory reporting in the Public Service is extraordinary, and protection for that.

Ms Carnabuci: Under the public interest disclosure legislation we do actually have to provide an annual audit as an agency. All agencies do that. Then individual agencies are basically left to do their own training. The ABC this year has implemented fairly comprehensive internal training around public interest disclosure legislation and how it applies to public officials. But in terms of interaction with the government, I am not really aware of anything direct. I do not know, Gaven, whether you are?

Mr Morris: No. We obviously have had advocacy conversations with ministers and things like that. I would also say that, just as I think many of our elected representatives do their jobs with integrity, public servants do also. They know the rules around how they do their jobs. One thing I would say is, in terms of all the conspicuous whistleblower cases I can think of, we were not the first port of call for these public servants stepping forward. On every occasion I can think of they have usually gone through all of the steps that are allowed and afforded them through the professional way that they do their jobs, and we are usually the last resort.

CHAIR: The objective is not to get a headline for themselves?

Mr Morris: That is correct.

Ms Power: One of the frustrations that has been expressed with the Public Interest Disclosure Act is that whistleblowers are prohibited from going outside the reporting mechanisms within their own structure and from going to, for instance, the media except in very narrow circumstances of clear and present danger to public safety and things like that. The legislation that was brought in to protect whistleblowers does not enable, in most instances, reporting to the media, which is often found to be a very effective way of getting action on a point. Just in terms of the ethical response to whistleblowers and how whistleblowers get to know the risks and everything to them, I think Laurie Oakes has spoken very eloquently about his experiences dealing with whistleblowers, where people have come to him with stories to tell. He has described how he has said, 'This is going to bring down a world of sorrow upon your shoulders', and given them time to reflect. Then he has come back a day or a week later in different circumstances to ensure that they are still willing to bring that all upon themselves. I think that also goes to reflect on the ethical approach of media organisations and journalists when dealing with hot topics and recognising the adverse effects both on individuals and sometimes security or the community.

Mr Reid: I would also point out that in the business and corporate arena there are contrasts between how corporations are required by law to treat whistleblowers within their own organisations and how public servant whistleblowers are treated. This is in stark contrast. Again, we have laws to protect whistleblowers in corporate Australia that do not apply to public sector whistleblowers. That is a glaring failing.

CHAIR: Such as information that shareholders would need to be made aware of, for example?

Mr Reid: But also of the care that a corporation must give to a whistleblower with evidence who is coming forward with claims or accusations or concerns about that very organisation. If you mistreat that person, the weight of the law comes down on you very heavily, and so it should.

CHAIR: Yes. You have given a submission to the joint committee. You have obviously been in conversations with government and the different ministers. Are they hearing your concern? Do you believe beyond what has already been tabled by the Attorney-General that the government is listening at all?

Ms Power: I think the new ministerial direction and some of the comments from some prominent ministers show that—cause and effect, who knows?—there has been a sequence of events where there have been some statements or directions issued that recognise the value of the public's right to know and the value of the media in an operating democracy. But I do not think we have had any satisfactory response.

Ms Carnabuci: I guess we are waiting for the report from the PJCIS, to be fair, which I think should be arriving soon.

Mr Reid: Later in the year.

Ms Waladan: I agree; we are at acknowledgement of the problem stage, I think.

Mr Morris: One of the things in the back of my mind I worry a little about, through the tenor of a lot of the questioning and responses we have had through that process, though, is I think the reflexive response, it seems, from lawmakers is to put more obstacles in our way to ensure that there are protections, rather than to look at where there can be sensible exemptions and adjustments to current laws to remove some of the obstacles. That is my worry about where this process will land. With all of the mass of new obstacles that have come in our path in recent years, where this process may end up is having more of those, not fewer.

Senator LINES: I just wanted to return to the discussion we had earlier that the public is not much interested in legislative detail and that this is a role for the parliament, not the media. Thinking about the encryption debate in December—obviously, we are the Labor senators—when Labor was pressing for improvements to protect the media and others, the front page of *The Australian* declared 'Shorten soft on terrorism: Exclusive'. That story said that 'Scott Morrison had accused Bill Shorten of being happy for terrorists to plot attacks on WhatsApp', and that Labor was quite happy for terrorists and organised criminals to chat on WhatsApp, 'leaving our security agencies in the dark, Mr Morrison said'. And that 'there is no excuse for this type of weakness'. My question is: do you think that type of reporting, simply repeating the government's talking points, was helpful for promoting greater scrutiny of legislation that had a potentially significant impact on the work of journalists?

Mr Reid: I should answer that question as a representative of the company that publishes *The Australian*?

Senator LINES: It is an example. I am happy for others to answer it as well.

Mr Reid: We sit here as advocates and proponents of freedom of speech. That is a report of a debate that was happening in the public arena, as it should. If the point is that our reporting is hypocritical or we are shooting ourselves in the foot, it is our job to report the conversations that are going on in society, and those debates are

raucous and discordant, and so they should be. What we are arguing about is the debates we are not allowed to have.

Senator LINES: I guess what I am suggesting is: how does repeating the government's talking points or the government's media add to the scrutiny that was required of that legislation?

Mr Reid: You are asking us to take an ideological position on the reporting of a news event, which is inappropriate.

Senator LINES: No, I am not saying that. I am suggesting that repeating the government's talking points on the matter did not really scrutinise the legislation as it sits.

Mr Reid: Okay.

Senator LINES: That is the point I am making. I am sorry if I was not clear on that.

Mr Reid: Okay. Again, I think all of us here made representations about that legislation.

Senator LINES: I appreciate that and we discussed that. I am talking about what the public reads and what the public hears.

Mr Reid: Again, I think reporting of the conversation and working within the process to change the legislation are two sides of the same coin. I do not think we are denying the public either part of that. I think we are participating in both sides of that debate as strongly as we can.

Senator LINES: Okay. I guess my question is about repeating the government's line hook, line and sinker—that was the point I was making—and whether that adds to the scrutiny of the legislation.

Mr Reid: We report the government when it says something. When the opposition says the opposite, we report that. I do not think we are doing the wrong thing. I am struggling to understand what is wrong here.

Senator LINES: I just wondered where the scrutiny of the legislation was in a headline like that?

Ms Waladan: I have not read that article, but there have been a number of articles. I am thinking back to the FITS example earlier around the changes that we argued for under that scheme, including changes that we achieved that were intended to assist us to be able to report on matters in the public interest. I think both sides are there. I guess it comes back to the point really that we are still here. We are where we are at. I do think there has been some airing of both sides, although I have not seen that particular example.

Mr Uhlmann: My memory is that within the pages of *The Australian* a ferocious debate went on about precisely that. There was one day on it—

Senator LINES: That was the front page.

Mr Uhlmann: —and there were other days and certainly in others parts of the media. We are talking about the debate itself. The debate did rage actually in public.

Senator URQUHART: Can I go back to the ministerial direction about which I asked questions of Mr Reid and Mr Morris before. Mr Morris and Mr Reid, have you asked or have you raised with Mr Porter whether he has intervened or not to halt the prosecution? If he has, why, or if he has not, why not?

Mr Morris: We wrote to the Attorney-General and asked for clarity around the status of our journalists and the investigation in relation to them. As far as I know, we have not had that clarification.

Senator URQUHART: When did you write? It was possibly before that amendment.

Ms Carnabuci: It was before the amendment.

Mr Morris: I am not sure whether we have done it since but the request stands.

Senator URQUHART: The request stands for him to intervene to halt the prosecution?

Mr Morris: For some clarification really around what the status of the investigation is. We are still not clear. I think that investigation is ongoing, but we do not know the status of it. We certainly do not know the status of where our journalists sit within that investigation.

Senator URQUHART: Do you intend to write back now that the ministerial direction is there? Do you intend to write back or are you relying on the letter that you have sent previously?

Mr Reid: We have another scheduled meeting between our organisations and the Attorney-General and I think the Communications Minister. I cannot tell you when it is happening. The date has moved around, but we have a follow-up meeting scheduled.

Senator URQUHART: Will it be on the agenda to get to the bottom of whether with that prosecution there is going to be an intervention by the minister?

Mr Reid: As Mr Morris said, we want to know what the status of it is.

Senator URQUHART: Once that meeting has been held, would you advise this committee of the outcome of that discussion?

Mr Reid: Certainly.

CHAIR: Do you have any other questions?

Senator MARIELLE SMITH: Yes. I just wanted to come back to the question of FOI. We have been hearing some anecdotal reports of requests for FOI over a minister's trip to Europe. The estimated cost of processing it was 142 hours. Can you step us through the problems as you see them within our federal FOI regime? Do you think the way it has been operating over the past few years has worsened?

Mr Uhlmann: I can give you some examples. I have brought a couple today. We have two applications to the Australian Federal Police, one of which was asking for some details about an investigation carried out against a government MP. But when you get to the actual detail, after they have gone to all this trouble after months to send us the document, lots of the front parts were redacted, and when you get to body of the document pages four to 23 were redacted. The entire report has essentially been redacted. They have given us the information; it is just that they have redacted it beyond any useful purpose, under section 47F, for unreasonable provision of personal details of a person who was not the subject of this. You could go through it. At least on that occasion they did not waste public money by printing, as happened to me once, 32 pages which they then blacked out. They have sent one page and said, 'We're not supplying the rest.'

CHAIR: Would you mind tabling that?

Mr Uhlmann: Sure. I have that and then I have two examples here. We have decided to pursue one all the way to the Information Commissioner, with the Information Commissioner then telling us that it will take six—

CHAIR: Thank you. We will use that for our purposes.

Ms Gill: Can I just comment from the corporate side—I work on the corporate side—and from an advocacy point of view? You will have read that journalist/newsrooms have contracted over the years. These laws are also costing us a lot of money. What we want to do in our job is do journalism in the public interest. That costs us a lot of money. Having a defence as opposed to an exemption costs us a lot of money. We want to be investing that money in journalism. Money is going out of the industry to Facebook and to Google. As we said with the ACCC report, they have identified that what we do is in the public interest. We do not want just to be printing ministerial press releases. We need journalism in this country. We need to streamline the process as well. This is about Australia's right to know, but it is also about the resources that Australian media organisations have. We really need to take the foot off and allow us to be able to do our job. At the moment we are spending a lot of money on defamation and just on information requests. Taking two and a half years to get information is pivoting people away from what they should actually be doing. We want to spend less on lawyers—with respect to lawyers—and more on journalism, because that is what we do.

Mr Morris: As a public organisation, I can probably fairly honestly say that the only part of the ABC that is likely to grow in the coming years is the legal department. Increasingly, the drain on the legal department is overwhelming at the moment with all of these things. More taxpayer money will be spent on our legal department and less taxpayer money will be spent on our journalism department.

CHAIR: Reinstate the \$80 million and it will go to the lawyers?

Mr Morris: That would help.

Senator MARIELLE SMITH: I will bring you back to the other part of my question. Has it always been the case with FOI that it is this difficult to extract information or has it worsened over recent years?

Mr Uhlmann: It has gotten worse over time. Essentially the application of the law by the officials has gotten worse over time, such that they take the broadest possible sweep on, for example, what personal details are. There are lots of exemptions in the act. I understand that. But they have become ever more difficult and a waste of time. It was pioneered back in the 1980s, freedom of information. There were some great examples of where it did extract some really good information. It has become less and less a useful tool.

Senator MARIELLE SMITH: What do you think is driving that from the officials? What is underneath it?

Mr Uhlmann: I would say, frankly, in Australia we have always had a culture of secrecy. It is just getting worse.

Senator GREEN: After the police raids occurred on the journalist's home, Mr Morrison responded saying, 'It never troubles me that our laws are being upheld.' Does this suggest to you that the government is showing appropriate leadership on this issue?

Mr Reid: I think that was an on-the-fly response to a question on an unfolding situation. I would hope that in the months since then the Prime Minister might have heard our more nuanced concerns about that.

Senator GREEN: When you say 'on the fly', do you mean the comment was made so close to when the raid was occurring?

Mr Reid: Yes.

Senator GREEN: How close was it?

Mr Reid: I think, from my recollection, the Prime Minister at that time was either en route to or just landing in London for another event. I think he may have been in transit while it was unfolding.

Senator GREEN: Just for the record, I was with Anthony Albanese that day and he was asked the same question. He did not respond in that way. Just being on the fly, I do not think, is an indication of the way someone should respond.

Mr Reid: No, but like Gaven I am an optimist and I hope that he has thought more about it since then.

Senator GREEN: That was my next question. Has he indicated to any of you that he regrets that comment or that it was a bit of an error in judgement; that if he had more time he would have responded differently?

Mr Reid: No, but I am not sure that we have asked him directly.

Senator URQUHART: So, he has not indicated that to you?

Mr Reid: No.

Senator URQUHART: So, he has not given you an indication at all? He either has or he has not, Mr Reid. Has he?

Mr Reid: No, but I am just thinking. I am not in every conversation that the Prime Minister has with people throughout our organisation. I cannot read his mind. The actions of the government suggest to us that they are starting to hear our concerns. Are they hearing them strongly enough? We still have some strong doubts that they are.

Senator URQUHART: If the Prime Minister had recognised that that was an error of judgement, and indicated that to someone, would you not have reported that?

Mr Reid: I guess, yes.

Mr Morris: The Prime Minister has certainly heard directly from us our concerns and been thoughtful in listening to those, as have ministers. The parry and thrust of how sometimes politicians express themselves I do not think always necessarily reflects how thoughtfully they might consider an issue. I would not put too much judgement around a passing judgement.

Senator LINES: You just said then you did not believe your concerns as a group of media outlets were being taken seriously, similar to the comment Ms Gill made earlier.

Ms Gill: Given that we have not actually got anywhere near what we are asking for, you would have to assume so. It is not a new revelation that we are asking for these types of changes.

Senator LINES: No, absolutely not.

Mr Morris: But my point is that our leaders and our Prime Minister have not ignored this issue. They have at least listened to it. We have not seen as much response to that yet, but there is a process that we are going through. That is all I was trying to say.

Senator LINES: As much response as you think is required?

Mr Morris: Pardon?

Senator LINES: As much response as you think is necessary and required?

Mr Morris: No, not yet.

Ms Gill: From Nine's point of view, we would say certainly we have been given the access and given our chance to talk to the leaders and express our concerns.

Senator LINES: But it is a one-way conversation at this point?

Ms Gill: We have seen some indications with the ministerial direction. Clearly, they are hearing something, but we would say we are not heard to the depth of the things that we want. We do not feel that we have actually got a response until we have got something meaningful. We are talking about meaningful change here.

Senator URQUHART: Is that ministerial direction meaningful? I think we heard earlier from Ms Carnabuci that it should not be a ministerial discretion, it should actually be a judicial process.

Ms Gill: That is what we are asking for. But the ministerial direction to some level says, 'We are listening to you.' But as I said at the very start—

Senator URQUHART: Or they can hear you. Whether they are listening or not is a different matter.

Ms Gill: And responding in detail.

Senator LINES: Also, as you have just given in evidence, despite the Attorney-General's intervention in what may or may not be prosecuted, the two matters on foot are not part of that as yet?

Mr Morris: That is correct.

Ms Gill: With respect, we have not asked for ministerial directions.

Senator LINES: No, but when the Attorney-General came out and inserted himself in the middle, if you like.

Ms Gill: But you are asking about the ministerial directions and how far they go. That is not what we asked for.

CHAIR: That is not the reform you are looking for?

Ms Gill: That is not reform.

Senator LINES: We understand that.

CHAIR: Mr Uhlmann, you have outlined quite a few different cases. You are a senior member of the press gallery. There is a sense that we have got through a number of the submissions. Of course, we heard from Mr Murphy and the MEAA significantly about this sense that reporting without fear or favour is becoming harder and harder to do. I understand that you have been for 30 years. You have stared down some powerful people in this place. I am not as interested in your experience, but you are there every day. You see younger journalists coming through the press gallery every day, people who perhaps have not seen this and worked in the industry as these laws have encroached. Do you think there are journalists in this building who think twice before they even ask a question of a minister or send the draft to their editor about, 'Am I going to get myself into trouble here?'

Mr Uhlmann: Journalists by their nature tend to be fairly gutsy. The young generation I see coming through are extraordinary. There are a lot fewer jobs. The people who make it through—and there are a lot of people who want to be in journalism—tend to be the best and the brightest now. I constantly say I would not get a job today if I was applying, because I could not do the things that these young people have to do. They have to do this under increasing pressure all the time. I do not think they would ever back off asking a minister a question. I genuinely do not. If you look at the work of journalists around the world, you can think about the courage of some people. I was talking to Peter Greste yesterday. Journalists are prepared to put themselves absolutely in harm's way. We simply I think are making the case that in a democracy like Australia we are not doing our best job for our best selves and the laws that we now have. We claim to be a fair, open and transparent democracy. We simply are not by comparison with those countries that we compare ourselves with, particularly the United States and the United Kingdom. I do not think the things that are being asked for are enormous asks. I am an optimist like the rest. Sometimes I am a bit of a pessimist, but I hope there is a profession called journalism in 10-15 years time. I hope that major companies are behind it, because if they are not we could not afford to do what we do.

CHAIR: Do you find there is a bit of an irony given the concern—and rightly so in my mind—about what is going on in Hong Kong right now? There are a lot of people in this building involved in the public commentary who are watching what is going on in Hong Kong and saying that these young people in Hong Kong are fighting for free press/democratic rights, and yet back here in Australia you have to wonder whether it is, 'If we just don't talk about it, no-one will notice.'

Mr Uhlmann: The thing is that we are complacent because we think we have it. The thing about the people in Hong Kong which is self-evident to them is that life under the Chinese Communist Party is going to be a whole lot worse than the life they enjoy now. That is a real and present threat. I think the problem is that here it is a creeping thing, because we have pretty easy lives. The things that we argue about usually are not life or death, but they actually do matter and they matter to all of your constituents. The thing that journalism does is try to shine a light on those that wield power. I understand it is uncomfortable sometimes. Sometimes people would argue that it was unfair, but it is an important part of our democratic process that has been recognised as such.

In the Constitution of the United States, when they were having these debates, they recognised it as so important that Congress would not make a law that impinged the right of the free press that it was part of the First Amendment. That is how far back these conversations go. People recognise that public debate through this process actually is genuinely important.

CHAIR: This is my last question and then we will have to wrap it up. A number of submitters to this inquiry have asked us to consider a press freedom act. Does the alliance have a view on this? Do your individual organisations have a view on this? Is this something that we should be considering?

Mr Murphy: I think it is important to recognise that there are six very specific asks that we have put forward in our submission. Of course, constitutional change, an overarching act, would have enormous benefit, but our submission is that at this point there are immediate problems. There are immediate problems that we have brought to the attention of the parliament over and over again. There are some very specific things that could be done to bring immediate improvement to the lives of journalists and whistleblowers.

CHAIR: Consistent.

Ms Gill: Very consistent.

CHAIR: Is there anything that you would like to put on the record before you leave us? No? I thank you all for your time. I know that some of you had to travel here today. We really appreciate it. I know this is not the only inquiry you have had to front. We really do appreciate your coming back out again. This being the Senate, we are obviously dealing with this a little differently. We are happy to take any further submissions as we deliberate. Thank you for your time.

Proceedings suspended from 10:48 to 11:04

CARNABUCI, Ms Connie, General Counsel, Australian Broadcasting Corporation**MORRIS, Mr Gaven, Director News, Analysis and Investigations, Australian Broadcasting Corporation**

CHAIR: I now welcome back to the table representatives of the Australian Broadcasting Corporation. I understand that information on parliamentary privilege has been given to you. You are appearing as the ABC now, as opposed to part of the coalition. Mr Morris, do you have any other opening remarks that you would like to add before we go to questions?

Mr Morris: No, I think we can assume the previous session sets us up nicely for any additional questions relating to the ABC.

CHAIR: Firstly, could you explain this for us, because it is not clear to me? The ABC is in an interesting position particularly in relation to your commercial colleagues. There is an extra level of scrutiny, of course. There is parliamentary scrutiny. We are going to see you here before us at Senate estimates only in a week or in a matter of days. As the national broadcaster, how do these whistleblower elements that cover public servants interact with you and your staff?

Mr Morris: In terms of internal whistleblowing?

CHAIR: Yes. I just want to be clear about that from the beginning.

Mr Morris: I suppose firstly I would set up the ABC as not being any different to the other journalism organisations in our interest in pursuing the public interest. But I do think the ABC holds itself, both because it must but also because it desires to, to a very high standard in terms of the type of journalism that it does. We have certainly amid budget cuts and fewer resources in recent years focused more and more attention on investigative journalism and in original journalism. We see that increasingly as our point of difference. We see that as a crucial service that the ABC should be seeking to provide the public. I think when you look at the resourcing that we invest in investigative and original journalism now, I do not know whether it is unprecedented but I think we are investing more in it than we ever have. We have certainly decided in recent years to place more emphasis on that type of journalism and reporting. I think these issues that we are talking about here—and one of the reasons I think Connie's team is busier than ever—is both because we think there needs to be law reform and because we are doing more of this type of journalism. You put those two things—

CHAIR: It interconnects?

Mr Morris: Exactly. I think our legal team at the moment is the busiest team in the ABC, and partly through our own doing, because we are choosing to do more of this type of journalism. That is, I suppose, a scene-setter for where we see ourselves. As I say, I do not think we are pious in thinking we are more important in doing more public interest journalism than others, but we certainly want to do more of it. Maybe you could be a little more specific in relation to the internal question you are referring to. I know where you are going. I am just interested to know—

CHAIR: Obviously there are requirements under the charter of the ABC to do your job. Part of that, of course, is investigative journalism. I understand the ABC has a commitment to that and funding. I want to come back to that question. I also find it interesting that you are having to deal with this climate that we are in while at the same time your staff and your organisation is a public institution. Therefore, the diminishing aspect of whistleblower protections is something you must have to manage internally in your organisation as well as dealing with other types of whistleblowers?

Mr Morris: Clearly, the public interest disclosure and FOI provisions apply to us in a way that they might not to other newsrooms. We do see it from both sides in that sense. I hope that we act with integrity on both sides of the fence as well. It is something that your teams would see more than mine.

CHAIR: This is not a trick question.

Mr Morris: No, I understand.

CHAIR: I do think you are in a unique position, because you can see both sides.

Mr Morris: That is right.

Ms Carnabuci: It might be helpful just to categorise the different types of FOI things that we have going on. One category is applications received by the ABC from third parties for information either about our operations or matters that we are involved in. The number that we receive has increased dramatically in the two and half years that I have been there as the general counsel. The other interesting thing is that for most government agencies when they receive an FOI application it is an application about information in relation to the individual making the application. Most of the applications for FOI that we receive are not for information about the individual

making the application, they are actually for information about the ABC or the activities the ABC is involved in. That is one category of work. That work is managed within the legal function. Another category of FOI work that we do is where our journalists want to make applications on other government departments for access to their material. That is actually managed by a senior journalist, who is essentially coordinating and supporting other journalists in the process of making those applications. From time to time those processes then go into review, and then there is legal advice provided around the review process. But that has been provided to the ABC in the execution of that application. The third area is our employees as public officials under the FOI Act. As I say, that is an area where, particularly I would say in the last 12 months, we have been doing a lot of work to really help communicate that framework, make sure that as part of induction people understand what that means, their obligations and the protections that are available to them as public officials under that legislation. It is really playing out in three ways.

CHAIR: That is interesting. You obviously heard of the story about the SBS journalist and how many hours it took to make a decision on an FOI. When your organisation receives an FOI from a third party saying they want to know how much Leigh Sales gets paid—

Ms Carnabuci: Or something like that.

CHAIR: Yes. Does it seem out of whack to you that it would take that long to make a decision?

Ms Carnabuci: The answer is, it can take that long. What we try to do in managing those requests, and what we are entitled to do under the legislation, is to try to refine the request with the applicant, to try to narrow it down by subject matter, by time period, et cetera, so that they get what they need. But sometimes people will draft their application very broadly. There is the possibility under the act, if it is going to take an excessive number of hours, to actually charge for doing that work. Because it is a drain on resources. But for policy reasons we have never done that. We have always tried to accommodate requests and provide the information without going into that whole charging regime. Depending on the scope of the request and depending on your ability to refine the request with the applicant, it can take many hours of research. When you think about the proliferation of documentation in the electronic age, this is what also is amplifying the problem. It is no longer just the hard copy file.

CHAIR: There are emails all over the place.

Ms Carnabuci: There are emails and there are WhatsApps. A 'document' as defined under the FOI legislation is not just a piece of paper, it is a broad concept which captures all of those digital creations as well.

Mr Morris: It would be fair to say that the time duration that it takes to work your way through these things is one thing, but a significant majority of FOI requests that our journalists would lodge are rejected. It would certainly be a majority. It is probably a significant majority. Most of them get knocked back.

Ms Carnabuci: This is in the second category.

Mr Morris: Where we are undertaking journalism.

CHAIR: Do you have figures on that, without wanting you to spend too much more of your resources compiling those types of things?

Ms Carnabuci: It is interesting that you should ask that. That is something I am really big on. We are currently putting in place a system where we collect more of that data.

CHAIR: That would be very interesting.

Ms Carnabuci: Historically, we have not been required to. We are required to collect data on applications received, and publish our decisions on applications received on our website under the legislation. We are doing that. But we are not legally required to capture data about applications made. That is only something that we are just starting to do.

CHAIR: Of course. It might be something that we want to ask the FOI commissioner, actually, if they have a spreadsheet themselves of how many requests are received and how many are rejected.

Ms Carnabuci: We can probably give you some information, but it is not comprehensive going back right to the beginning of the legislation.

CHAIR: I am just interested to see what data you have.

Ms Carnabuci: If you like, I can take it on notice.

CHAIR: That would be great. Senator Green, did you have something that you wanted to jump in there on?

Senator GREEN: Maybe you could put in an FOI request for the ABC's FOI requests? I guess that explains the situation that you are in, why it is so unique, and why we are interested in asking you some more questions.

Senator McMAHON: You said the majority of them get knocked back. Is that your FOI requests?

Mr Morris: That is correct. In undertaking our journalism, when we are lodging FOI requests, most of them get knocked back.

Senator GREEN: Do you know why that is?

Mr Morris: Not really. Again, that is probably why we should do some more homework on this particular issue. But sometimes it is the quality of the request and sometimes we would judge it to be for reasons that probably are not about transparency and openness.

CHAIR: Can I change tack and ask about the raids now? Thinking about all of those documents that you would have to compile for an FOI request, if it came in to you, just for the record can you tell us how many documents they gathered and that you are now disputing whether they can be used or not?

Ms Carnabuci: Yes, I think it is on the record. It is about 80 documents.

CHAIR: About 80 documents?

Mr Morris: Yes.

CHAIR: And they were in your offices for, what, seven hours or longer?

Ms Carnabuci: I think it was nine hours.

CHAIR: How many of your staff were involved in that process at the time?

Mr Morris: Not many.

Ms Carnabuci: We had two lawyers and two IT people in the room, and then several of us were helping.

Mr Morris: Mr Lyons invited himself into the room, as is well noted now. But he was not formally working on the process.

Ms Carnabuci: On the day there would have been four ABC representatives actively engaged for the nine hours with the AFP officers.

CHAIR: There had obviously been some communication prior to this. How early on did you know that they were going to come and raid on that day?

Ms Carnabuci: The day before.

Mr Morris: The day before, yes.

CHAIR: Was that before or after news had broken about the News Limited journalist being raided?

Ms Carnabuci: I cannot remember that.

Mr Morris: My recollection is that it was during. It was around the time that that story was unfolding. Do not hold me to that, but that is my impression.

CHAIR: Did that strike you as strange?

Mr Morris: I am doing my very best here not to be a conspiracy theorist in some of this, but I think as to the sequence of those two things, the timing of them, the fact that they were on consecutive days, my interpretation of that is that there was a message intended in the way that whole activity went on. I do not think the message was intended to us necessarily. My perception of it is that there were clearly signals being sent to potential whistleblowers. That had a very potent impact. I am not sure that that was not the intention.

CHAIR: As to the two journalists and staff that you have duty of care for, how have they been able to manage this past few months in relation to getting back to work and getting on with their jobs?

Mr Morris: These are both very experienced journalists. They are very experienced particularly in this type of journalism. I think it is not unfair to say that this was unprecedented pressure on them in relation to worries for them, their families, those sorts of things. I think we went through a process where we were trying to interpret whether their homes would be next and whether their families were going to be in their homes if the police came knocking. I was named in that warrant. People at my school were asking whether they had come to our house, and our children were being asked questions in the playground. This is what happens, I suppose. Those two journalists are tough guys and are great journalists, but I do think this placed a pressure and a burden on them that has not yet been fully relieved. The investigation is ongoing and they do not really know what their status is.

Ms Carnabuci: As the employer with a duty of care, it definitely placed an additional requirement for resources. It is not an occasional conversation, it is a daily phone call by their manager. It is independent legal representation. It is other professional services that they have required.

CHAIR: The taxpayer is paying for that too. What about their ability now? I understand this is hard, because you want them to be as optimistic about their job prospects as possible. Surely something like this, as public as it was, must have an impact regardless of what happens—fingers crossed they do not get charged and have to go to jail. Why would a whistleblower or a source come to them again?

Mr Morris: To any journalist. I have had journalists come to me within the organisation and talk about a heightened level of anxiety. But when I assess that, I think our journalists are resolute people and they do their job passionately. I do not think our journalists will take a backwards step even though in the back of their minds there is an anxiety that probably was not there before. However, my worry is that they will not have any sources to talk to. Citizens are not used to being in a newsroom environment where they understand some of the complexities of what this all means. These are citizens who would otherwise, having gone through a process of trying to disclose something through the formal channels that they think is in the public interest, turn to the media as a last resort. There are going to be few of them coming forward, in my view. I do think that was part of the intention of what went on here, that is, journalists will have a second thought but then get on with their job. A whistleblower will have a second thought and turn the other way. I think that is the real impact this could have, if we do not now look at the way the legal framework works and make some adjustments so that whistleblowers know there are some additional protections for them.

CHAIR: Can I just go back to the comment about cost? Have you had to itemise this yet? Maybe you could take it on notice, and I am sure it will come up at Senate estimates. I am really interested as to how much this is costing the taxpayer in terms of having to go through the legal representation process and the court case you are currently in.

Ms Carnabuci: Yes, I will take that on notice to come back to you. I have actually just prepared these in preparation for Senate estimates. From memory, we are at about the \$205.526.13 mark. That is across preraid, post raid and Federal Court appeal.

CHAIR: At this point, that could all be relieved if the minister were to issue the direction?

Ms Carnabuci: I think there is a point of principle—

CHAIR: Not what was spent?

Ms Carnabuci: There is a point of principle around the validity of the warrant. This litigation, we view it as public interest litigation. There is a point of policy here that has to be determined. Certainly it would take some pressure off those individuals. I am not sure it means we would necessarily withdraw the proceedings.

CHAIR: Yes. Thank you for clarifying that. How long do you expect this process to take?

Ms Carnabuci: The matter is actually set down for hearing in the Federal Court on 28 October for two days of hearing. We just found out this morning that we have been denied leave to appeal to the full Federal Court in relation to Justice Abraham's decision to refuse us access to the affidavit that was relied on by the police in obtaining the warrant from the registrar. With that appeal now out of the way we are set to have the matter heard on 28 October for two days—the substantive matter on whether the warrants should be set aside. What we are seeking is judicial review of the administrative decision to issue the warrants.

Senator URQUHART: Mr Morris, I think you said in an answer to Senator Hanson-Young that it was sending a message to whistleblowers. Do you believe that potential whistleblowers are intimidated or have been intimidated by the government's, what I would call, apparent hunting of them through the police, and disrespect for the need for journalists to protect their sources?

Mr Morris: I am certain of it.

Senator URQUHART: Could you talk about the impact on the ABC of the raids? Does it actually make the ABC less inclined to broadcast stories that could lead to government action against them via the Federal Police?

Mr Morris: No. In fact, hopefully we do the opposite. Certainly what I have said to our journalists, and what I think our journalists will do around this, is rally around and do their jobs harder. They will hopefully create more mischief, research more stories, find out more things.

Senator URQUHART: Yes, except that the stories are going to be harder because there is that intimidation factor.

Mr Morris: Potentially. I am certainly aware of a number of stories that were under investigation where sources have now said, 'Actually we've changed our mind.' There is no doubt about that. Citizens who were speaking out because of a perceived injustice or a perceived maladministration have now decided not to proceed down that path because of these activities in the past few months.

Senator GREEN: What categories do those stories fit into? Obviously you cannot tell us what the stories were, but are they national security? Is it public spending?

Mr Morris: I think this has an effect on all whistleblowers or all citizens who would seek to speak up. I quoted an example before. I am well aware of a case that was a local government story about potential maladministration where the source said, 'Well, I see what happens if you speak up here.' And not necessarily understanding the nuance of whether it is a national security issue or whether it is related to anything that might be covered by a piece of legislation or not. It is simply a reflection from a potential source in a local government who said, 'Sorry. I'm not sure that I want to do this anymore.' I have reflected a lot on the words of Jeff Morris—no relation—who was the chief whistleblower really in relation to the stories that brought about the banking royal commission. He was at an event recently where he said, as a very experienced whistleblower, that not one whistleblower he is aware of ever benefited from speaking out. Their lives were made worse. They were often destroyed by the simple act of speaking up on behalf of the rest of us. Yet they do this because they either have no other option, they have pursued the options available to them, and they feel it their duty as a citizen to speak up. And that there is no benefit in it for them, and fewer of them will do that now. That was his chief fear, and I endorse his view on this. He has more experience than I do.

Ms Carnabuci: Perhaps this is obvious, so forgive me if it is. These stories often take many months of work. It is not something where it is one conversation and off we go. Our journalistic standards are very high. Our news gathering standards are incredibly high. We have to be accurate, impartial, et cetera. Often the journalists will be working with the whistleblower for a very extended period. It is probably worth adding, as was alluded to earlier by Ms Power, that during that whole process we have our editorial teams and our legal teams who work hand in glove with the journalists all the way through to ensure the integrity of the steps being taken in the process.

Senator URQUHART: Mr Morris, can you expand on why the protection of sources is a critical principle and part of the Journalism Code of Ethics? Why is it there? If you could expand on that for me.

Mr Morris: It is the basic tenet of journalism, really. If you tell us something in confidence because it is in the public interest and your other fellow citizens should know about it, we will always ensure that you do that in the confidence that we are not going to reveal who you are or where that information came from. It is the first rule of journalism, really. Well, after the truth. And for all the obvious reasons. If that did not exist, the simple premise of someone telling you something they knew was in the public interest but would damage them personally would discourage almost all of them from doing so. Journalists take it very seriously. This is the biggest thing for me. If we cannot look a source in the eye and say, 'No, no. If you tell us this and we deal with it responsibly and we put it on the public agenda, you can have confidence that you'll be protected and that we will never give up the information that we take with our journalism bond.' It is more difficult to say that now. That is the first time in my career, the first time in the experience of journalism in a democracy that I can think of, where that is more equivocal than it was.

Senator URQUHART: How long has your career been?

Mr Morris: I have been a journalist and then a manager in a journalism organisation for 30 years.

Senator URQUHART: So 30 years-plus?

Mr Morris: Yes.

Senator URQUHART: We are on a slippery slope down?

Mr Morris: That is right.

Senator URQUHART: I will turn to some international comparisons. What types of protections for press freedom do other comparable jurisdictions have that Australia does not?

Ms Carnabuci: That is a very large question.

Senator URQUHART: I know it is a huge question.

Ms Carnabuci: But one that I think is most important and most relevant is the UK and the process in the UK for the issuance of warrants, and the fact that there is judicial oversight of that process.

Senator URQUHART: Rather than ministerial oversight?

Ms Carnabuci: That is right. Or as we have at the moment, where we have registrars issuing warrants. There is then the second question of what should they be considering when they issue that warrant? This is where we would say that you have to go back and look at the offences, because the warrant is there to help provide evidence in respect of an offence. We say that an element of the offence should be whether it was against the public interest. At the moment, that consideration only happens once we are in court being prosecuted and you have the

public interest defence. In terms of using public funds, thinking about that issue at the front when you are issuing a warrant and investigating in order to prosecute makes a lot more sense.

CHAIR: As to the impact on sources coming forward, it strikes me, again, this unique position that the ABC is in, where there is a public expectation that you report the news and you do investigative journalism. That is why we fund you. That is why the taxpayer has faith in the ABC as our national broadcaster. I find it extraordinary that you do your job and the same government that funds you is funding an organisation that makes it harder to deliver what it is that you are meant to do. It is a terrible cycle, in my mind. Last night's story about horses in the racing industry I think never would have been able to be produced—two years I think it took—if the sources talking to your journalists did not have faith that they would be protected. Is that fair?

Mr Morris: Yes.

CHAIR: If you did not have those whistleblowers, if you did not have that footage, could the ABC have run that story?

Mr Morris: No. That is a great example of where very concerned citizens took action. I think it is fair to say that, having pursued other means of making some of that information publicly available, they ended up seeking a media organisation to have their story told.

CHAIR: No-one would argue now, would they, that that is not information that is in the public interest?

Mr Morris: I would not have thought so. People could argue about the scale at which we should be delving into some of those matters, and the essence itself of an industry that has its own rules and regulations that seem to have been, and in our view were, contravened through the activity that you saw in that film.

CHAIR: They are the types of stories we will not be able to access as members of the community or even indeed as politicians. What the ABC did last night in showing that expose was important not just for the community; us politicians did not know that was going on. Now we are forced to act.

Mr Morris: I suppose the legal issues in relation to that story are potentially slightly different from the ones where you have someone within the Public Service or within public administration revealing something. There are other legal constraints you have around telling a story like that. Some of them are fair and reasonable ones. Your broader point around whistleblowers having the courage to come forward and reveal things that others do not want them to reveal is a fair one.

CHAIR: It is that chilling effect?

Mr Morris: That is right.

CHAIR: Whistleblowers see the ABC being raided, and do not necessarily think that that is because the person who gave the information happened to be an intelligence officer.

Mr Morris: If I am being fair in this process, the people behind this story are highly motivated activists and they would probably find a way to do those sorts of stories anyway. Nevertheless, there are many others who would not.

Senator McMAHON: Before the execution of the warrant on the ABC offices, had the AFP at all made any inquiries or approaches to the ABC with regard to any information that was potentially held by the ABC?

Ms Carnabuci: Yes, they had. We had been in very extended and protracted conversations between the ABC legal department and the Australian Federal Police.

Senator McMAHON: Was any information from the ABC presented to the AFP as a result of those discussions?

Ms Carnabuci: We made a number of submissions to them in various letters and other telephone exchanges really questioning the grounds for the investigation and any prosecution of our journalists. We presented certain legal points, and then that did not really result in any resolution of the matter. As Gaven mentioned, we were notified the day before of the raid.

Mr Morris: I think it is worth being transparent about this, though. It was a fairly extraordinary episode where we had a request for our journalists to be fingerprinted voluntarily, which we clearly rejected. Those were the sorts of inquiries we were getting along the way. In the end, we were not forthcoming with the requests, and they chose to issue a warrant.

Ms Carnabuci: The other point is that we were trying to explain to them that the piece of legislation that would have applied, if their points about official secrets being disclosed contrary to the public interest were correct, had actually been repealed. At the time that the conduct occurred, when the stories were written, the legislation was still in place. That legislation required any prosecution to be presented to the Attorney-General

before prosecution was initiated. That was written into the legislation. We were trying to explain how likely are you to get permission to prosecute given that that section of the legislation has been repealed? The legislation which replaced it occurred after the time that the conduct occurred. They were in this lacuna, which then resulted in the warrant being drafted to reflect receipt of military information under the Defence Act causing an offence, the offence being receipt of stolen goods under the Criminal Code. That is a concern for us. That whole construct is a concern for us. That is why we welcome the directive that the Attorney-General has recently published. He is saying, 'If you are going to prosecute a journalist, I need to have visibility of it.'

CHAIR: We have an issue, though; he has not acted on that?

Ms Carnabuci: As I said, there is a meeting coming up, and we had written to him prior to the direction being issued.

Senator McMAHON: Apart from stating your position and your arguments, you did not actually produce any information that they had requested? Is that correct?

Ms Carnabuci: That is correct.

Senator McMAHON: It is my understanding that law enforcement, including the AFP, often use a warrant by appointment when dealing with law firms and other such institutions. Was this option discussed with you or anyone at the ABC in this instance?

Ms Carnabuci: It was not.

Senator McMAHON: Did the AFP request assistance from the ABC to gather any evidence?

Ms Carnabuci: They did write to us seeking documents and we declined to provide them.

Senator McMAHON: Did the AFP attempt to negotiate a mutually beneficial outcome or process to ensure minimal disruption and angst to ABC staff?

Ms Carnabuci: At what point?

Senator McMAHON: At any point prior to the execution of the warrant?

Ms Carnabuci: Not prior to the execution, but I would say that on the day of attendance they were very respectful and we cooperated well and we executed things in an orderly way on that day.

Mr Morris: Obviously, they gave us notice of their intention to issue a warrant.

Senator McMAHON: Given that you had notice and that they had requested prior to the execution of the warrant documentation, is it not the case that it was actually the ABC that chose to cause this stress and angst and sensationalise the story by not cooperating when they had the opportunity to do so?

Ms Carnabuci: I do not think that is an appropriate characterisation of the interactions. We tried very hard to negotiate with the AFP to understand their concerns and to try to prevent exactly what happened. No, I do not think that is an appropriate characterisation, sorry.

Senator McMAHON: But you could have prevented it by providing them the documents; is that the case?

Ms Carnabuci: Individuals have the right to defend themselves. I do not want to characterise things inappropriately, but fishing expeditions are not things that you have to respond to.

Mr Morris: Consider this. The protection of our sources is crucial to us. The integrity of our journalism and the respect that our journalists deserve in being able to do their job means that when the AFP asks us to submit their fingerprints it is not unreasonable to say, 'Thanks, but no thanks.'

Senator McMAHON: Yet you knew a warrant was going to be executed and still, up until that time, you chose not to produce any documents at all?

Ms Carnabuci: So, 24 hours before they arrived?

Senator McMAHON: Yes.

Ms Carnabuci: Less than 24 hours before they arrived.

Senator McMAHON: Yes.

Ms Carnabuci: That is right.

Senator McMAHON: You did have that opportunity and you chose not to?

Mr Morris: It is also fair to say that we did not know what was in the warrant until they arrived.

Ms Carnabuci: That is right.

Mr Morris: What opportunity we would have had to give them the files that they wanted from within our IT servers when none of that had been specified to us before? That would be a difficult thing for us to do even if we had any intention of ever wanting to do it.

Senator McMAHON: Yet you said they did write to you and request specific documentation. You did in fact know what they were requesting?

Ms Carnabuci: I am not sure if it was documentation. I thought it was just a conversation.

Mr Morris: I think they wrote to us saying—

Ms Carnabuci: They wanted to have an interview.

Mr Morris:—that they were undertaking an investigation and, 'We would like to speak to individuals.' We can check.

Ms Carnabuci: Can I please take that on notice? I am now trying to recollect the letter, which was quite a long time ago, and there has been a lot of correspondence in between. It may have been that they just wanted to meet and have an interview. That may have been what was actually requested. I am not sure there were specific documents, but I can check and come back to you on that.

Senator McMAHON: If you could.

Senator GREEN: Following on from the raids and closing this out, I would like to go back to the cost. Is it \$600,000?

Ms Carnabuci: Yes, I am going to confirm that, but roughly that is my memory.

Senator GREEN: I know these are crass questions, but the ABC is incredibly important in regional Queensland. We have had commercial newsrooms close down in regional areas. The ABC sometimes is the only place that people are able to get their local regional news. What is the average salary of a journalist working in a regional newsroom for the ABC?

Mr Morris: I would have to get back to you on the actual cost. But for \$600,000 you could afford a lot of them.

Senator GREEN: How many?

Mr Morris: I do not know. At least 10 of them.

Senator GREEN: So, we could have 10 extra journalists working on local content stories in regional Australia or regional Queensland instead of spending money like this? I know you say there is a public interest in the court case now, but that money could be spent on creating more news stories.

Mr Morris: To put it in another way, every dollar we are spending on defending ourselves in court and funding lawyers and barristers we are not spending on journalism. It is as simple as that.

CHAIR: As to the aspect of the warrant and suggesting that your journalists have been in receipt of stolen goods, have you seen that before? Has that ever been issued to the ABC or any of your journalists before?

Mr Morris: No, not that I know of.

Ms Carnabuci: I have never seen it before.

Mr Morris: It felt like to me, frankly, a device and a tactic. I think that was an avenue that was chosen for obvious legal reasons.

CHAIR: In your conversations with other media organisations—and perhaps it would have been a good question to have asked the rest of the alliance—are you aware of being in receipt of stolen goods as the lever that the government has used before?

Ms Carnabuci: No, I do not know precisely.

Mr Morris: I am not sure it is unprecedented, but it is certainly rare. It is not something where we can instantly remember similar cases.

CHAIR: But to your knowledge, no?

Ms Carnabuci: No.

CHAIR: Not at the ABC?

Ms Carnabuci: I am not sure what the corresponding—

CHAIR: That is all right. I might ask them on notice.

Senator McMAHON: Just going back to your comment that you believe this was a fishing expedition, at no stage did the AFP give you any indication of what they were actually investigating or what documents they

wanted? Is that the case? Is that why you believe it was a fishing expedition? Had they at no stage given you any indication of what they were after?

Ms Carnabuci: I think we would say that they had failed to sufficiently specify for us what the harm was that they were investigating. Remember that all of those conversations were occurring around the legislation that has been repealed, which was a very old piece of legislation enacted post First World War to deal with security issues of the time and that related mainly to foreign spies. We were trying to understand what might be the area of concern and trying to explain that that legislation had been repealed and what was it actually that they were in need of. But we weren't able—

Senator McMAHON: And they gave you no indication what they were after?

Ms Carnabuci: No, they were not able to specify precisely the things they needed.

Senator LINES: I have one quick question and then a follow-up on the issues Senator Hanson-Young was exploring with you. No matter what the AFP ask for, it is your right to refuse?

Ms Carnabuci: Yes.

Senator LINES: As to the issue of the theft, I apologise for having to take a conference call and, if you have answered I will check the *Hansard*. What is your assessment as to why that particular clause was used?

Ms Carnabuci: I guess because they were faced with the fact that the piece of legislation that they had started talking to us about, which was the old section 79 of the Crimes Act, had been repealed. The new legislation, which is section 122, did not apply at the time the stories were written. They had to find something that would fit and, by doing so—and I do not know whether this was by design or by accident—they sidestepped oversight by the Attorney-General. The crime of receiving stolen goods is not a crime the Attorney-General needs to have any oversight of before you can prosecute. That is the best I can make of it.

Senator LINES: Do you have a view as to whether it was deliberate or just a by-product of where they went?

Ms Carnabuci: I really do not know. I really cannot assess what was in their heads. But looking at it as a rational person, definitely I would agree with Gaven that it seems like a construct.

CHAIR: Thank you very much. Some of us will see you in a couple of days at Senate estimates.

BROWN, Professor AJ, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University

[11:50]

CHAIR: Welcome. I understand that information on parliamentary privilege and the protection of witnesses giving evidence has been provided to you, and I also understand that you need to leave by 12.30, on the dot, if not before, so we will keep that in mind. Do you have an opening statement or shall we go straight to questions?

Prof. Brown: My very brief opening statement would really be to say that the importance of this inquiry is very clear, because of the fact that it is explicitly extending beyond simply questions of press freedom especially to whistleblower protection and the larger regimes in the country for the disclosure of official information that might be in the public interest and the protection of those who either disclose it or deal with it in the public interest. There is a submission, a late submission, which I have provided to the committee that refers both to the very extensive research that I have had the privilege to be involved in over many years involving many government, regulatory and integrity agencies across Australia and New Zealand from the public and the private sector on whistleblowing specifically. I have also had the benefit of advising many governments and parliaments and parliamentary committees on law reform in this area previously, and especially had the benefit of being a member of the previous government's expert advisory panel on whistleblowing that was appointed by Minister Kelly O'Dwyer initially to help spearhead the private sector whistleblowing law reforms which commenced this year.

I think what is both the crying need and the very clear opportunity for this government and this parliament in this term is to follow through on a lot of outstanding issues to do with making sure the entire whistleblower protection regime works. I think we can actually thank the Australian Federal Police and the circumstances in which we find ourselves for helping make sure that we do realise the importance of these issues, not simply because these very important issues of press freedom and the position of journalism and the media in our integrity systems have been made so clear and raise such a vital range of issues, including some that are not my specialty, but by making it very clear that really it all starts with the public interest disclosure of information. In fact, whether it is to the media or anybody else it might reasonably be made to in the public interest.

I think the committee is already aware there are many outstanding recommendations, processes and reviews of the public interest disclosure legislation as it applies to the public sector. It is very welcome news, I think, especially due to the level of attention that these issues have been given since May and June, that the government clearly is committed to moving forward in terms of those reforms. The question is what scope and what type of reform, not just on the press freedom side but on the whistleblower protection side. The parliament has previously had high-quality inquiries performed with bipartisan outcomes for recommendations for whistleblower protection, many of which came to fruition in the corporate law whistleblower protection reforms, but not all. Many are still outstanding. But the fact that there is that history of clear pointers to things that can and should be done really means there is an enormous amount ready to be done in the life of this parliament and this government to solve these issues. But it requires a bit of a big-picture approach. It requires simplifying things rather than making them complex. It requires going back to first principles in many ways, most of which are supported right across the political spectrum. Bipartisan outcomes for these types of integrity reforms are the absolute priority for making them stick for the long term.

My submission is actually seven points that are basically the advice I would give the government and the parliament on how to proceed having thought about it for quite a long time and having had the benefit of discussions with Attorneys-General and people within government about juggling all of these issues. I am very glad that the committee's timeline has been extended, because that will give it some more time to help the parliament provide what can be, at least on these issues and maybe not on every issue, a bipartisan outcome and one that should have consensus right across the parliament. Anything I can do to assist the committee as well as the government to that end is what I am here for.

CHAIR: Thank you, Professor. The seven points in your submission are very clear. Thank you for being so constructive in terms of the things that we need to do. So that we can all understand very succinctly, what is the key comparison now? What I have heard from you today and what we heard from the media organisations this morning as well is that with the reforms that have been done for the corporate private whistleblower protections there is now an uneven playing field. Could you highlight for us what those main elements are?

Prof. Brown: Certainly, yes. The whole private sector regime having lagged way behind has now leapfrogged the public sector regime. I think the Right to Know Alliance pointed out protections for whistleblowers, assuming that they are covered, in terms of their scope for seeking remedies and the legal requirements that fall on

employers, companies, public agencies or whatever, to take the internal treatment of disclosure seriously and to protect people are now much more realistic for the private sector. There is recognition of a duty to support and protect whistleblowers. It is a much easier prospect to claim remedies if organisations fail in that duty, because there has been a substantially reversed onus of proof. The categories of detriment that are the examples of detriment for which organisations can be held liable or whistleblowers can seek remedies are much broader, more realistic and appropriate. There is actually a whole litany of things that can be easily summarised for the committee about what has improved. There are things that are good but which are not steps forward because they are inconsistent. When it comes back to the question of media freedom and disclosures to third parties and to the media, the scheme for Commonwealth public servants, contractors, et cetera, is not as narrow as some people describe it as. For example, it requires an additional consideration to ensure that the disclosure is not contrary to the public interest. The private sector regime has an equivalent but different, more complicated set of the same provisions with a different test, where there has to be a reasonable belief that it is in the public interest as opposed to being objectively not contrary to the public interest.

CHAIR: The onus is on the other side?

Prof. Brown: Yes, amongst other things. Part of the problem is not only that the public sector has now very clearly fallen behind the private sector in some respects, but there are things both do that are similar but inconsistent, which is an enormous complication for everybody and reinforces that, when it comes to the crunch, there is an enormous case for ensuring a more intelligent design that involves greater consistency across those fundamental principles, and that that has to be built into the thinking about what is done next.

CHAIR: Do you think that there is a case at all for stricter rules applying to public officials, contractors and officers versus whistleblowers in private industry?

Prof. Brown: If anything, I would say slightly the reverse in that I think people expect that public officials, who are the custodians of official information, if they come across evidence or have concerns about wrongdoing, have an even higher duty to disclose it, and that the thresholds for when that should be regarded as being in the public interest to be revealed should be, if anything, slightly wider. In many ways that is broadly the case with both sets of laws. For example, the public sector provisions currently are too narrow and they do not work well enough. But their design is such that a public servant can make a disclosure internally and be protected. They could make a disclosure to the ombudsman or regulatory agencies and be protected. They can do both and be protected. If they fulfil the rules for going public, they can go public after having made an internal disclosure without having gone to the ombudsman or a regulator. I think that is an adequate principle. In the private sector, it is designed so that the protections for going public for a whistleblower only kick in provided they have at least gone to a regulator. They cannot blow the whistle internally, be dissatisfied with it and then just go public. They have to at least have gone to a regulator. It was a deliberate part of the design of those provisions to recognise that there are differences between the public and the private sectors.

CHAIR: I asked a question of the Right to Know Alliance, and perhaps you are in a better position to answer this. There have been so many reforms in relation to mandatory reporting requirements, and not just of public officials. I am thinking about child sexual abuse and other elements like that. So, not just of public officials but also other professions, doctors, teachers. Is that a helpful analogy as to what you are trying to say here, that is, the onus on public officials is greater. If they see something that is not in the public interest that is not right and they have tried to have it dealt with, surely there is not just a right to tell the truth but a responsibility to tell the truth?

Prof. Brown: Absolutely. I think that is the way that public interest disclosure regimes need to be understood. Where you start to talk about rights to disclose and by the time you get to the public domain, because free speech rights, freedom of political communication—all of those things recognise the value of rights of freedom of speech. But the fundamental starting point right across-the-board is the duty. In the public sector we clearly place both explicit duties on everybody and implied duties on everybody at the same time, and then these specific duties on lots of people to disclose everything. It remains a duty to go public, in circumstances where that is reasonable and in the public interest.

That actually also applies in the private sector. Companies and employers subject their own staff to similar duties and expectations. The whole purpose of whistleblower protection is to recognise not simply that we need people to speak up through appropriate channels, and if necessary publicly in the public interest, but that we actually place requirements on them to do so. To then not respect the role that they have fulfilled and to protect them and to ensure they do not come off second best or worse is the fundamental objective of an effective whistleblower protection regime. The private sector scheme still needs other improvements as well. But the fact that the public sector scheme has fallen so far behind and is not providing that workable system is such a big issue.

The other hugely important factor in all of this is to recognise that the purpose of an effective public interest disclosure regime, whistleblower protection regime or an effect of a well-working scheme will be to minimise the number of things that need to go public. If it works people will disclose, will be supported and protected and better managed internally, including matters flowing through to regulatory agencies and integrity agencies, and getting dealt with, without the need for it to be out there publicly in the first place. Or it will become public later as part of the regulatory regime, the integrity regime or whatever. It is vital not only to protecting whistleblowers in actuality but for them to use the scheme and for it to end up containing the information that needs to be in the public domain, which is in the whistleblower's interest for that not to happen very often; then it has to be a scheme that works effectively internally with regulatory agencies, and then if necessary if people go public. It has to work at all three levels or it is not going to work at all.

I cannot endorse enough Gaven Morris's remarks about the chilling effect of what has happened not simply on whistleblowing in national security matters or other types of matters, but whistleblowing in any matters anywhere, in any institutions, and also internal whistleblowing. It has that effect right throughout the whole system. That is why this is such a key moment for getting the whole system right so that it can be working as it was intended, especially because many of our whistleblower protections, in their design and in their substance, are very world leading. But they still will not work unless the whole system is working.

CHAIR: And unless people have confidence in it?

Prof. Brown: Absolutely.

Senator MARIELLE SMITH: Reporters Without Borders produces a publication called the World Press Freedom Index, which in its 2019 report noted that Australia had slipped down two places when it comes to press freedom. I am interested in your perspective on how we compare internationally on these matters, particularly with concern to whistleblower protection and other issues you might want to comment on with respect to press freedom?

Prof. Brown: Yes, certainly. There are clear reasons why that has occurred. We are suffering similar reputational damage when it comes to Transparency International's Corruption Perceptions Index, because of weaknesses in our corruption and integrity infrastructure, which everybody has now agreed needs to be solved. The question is, how. Similarly with whistleblower protection we actually lead the world in many respects in terms of the effort that has been put in over a long period on managing whistleblowing effectively within institutions. We are a bit more of a mess when it comes to encouraging, supporting and managing whistleblowing effectively when it goes outside to regulatory institutions. This is the history and the saga of ASIC's challenges, which it is now grappling with, with the lack of a national integrity commission or a whistleblower protection authority. On a world scale, we are more or less even with everybody else on that front.

On the question of protections of people when they go public, we are marginally better than a lot of countries, because we do not actually carve national intelligence and Defence right out of the whole system, and many countries do. We, on paper at least, include them slightly in the system, and then in effect the way that the law operates is to carve them out again. But the bigger problem is that the very complicated tests in terms of when whistleblowers can go public in Australia are limited not only because they are complicated, inconsistent and too onerous but also because they are not supported by the general principles of free speech rights, of having a First Amendment and of having a European Convention on Human Rights which supports free speech. These are the backstop things that have helped the courts interpret that right to go public, where it is justified, in a way that it can and does work. In Australia, we do not have the benefit of those principles. Nor do we have the benefit of a surviving common law public interest defence to disclosure of confidential information anymore, as far as anybody can really tell. Unless we have clear statutory defences that substitute for the fact that we do not have free speech rights, then the public disclosure mechanisms in Australia will always have this extra challenge.

Most countries in the world, and especially all of the countries we like to compare ourselves to, have a bill of rights and have that sort of free speech protection. Hence I am very supportive of the need to recognise that in whether it is a press freedom act or whatever the other legislative or constitutional responses are. But at the very least what it means we need to do is make sure that those statutory defences and statutory mechanisms for recognising public interest disclosure to the media and to the wider public are designed to effectively substitute for the fact that we do not have those broader rights protections; otherwise they are not going to work. It is quite realistic for that to be done, and done in this parliament and by this government. I am always optimistic, and the time is definitely now.

Senator MARIELLE SMITH: One of the reasons the report cites for Australia slipping internationally on these matters is the concentration of media ownership. Do you have any perspective on that and how the growing concentration of media ownership in Australia affects press freedom?

Prof. Brown: No.

Senator GREEN: Can I ask you a question about whistleblowers? There has been an infamous whistleblower in the media in America at the moment. Would a disclosure happen the same way it has happened in America, leading to essentially the possible impeachment of President Trump? Would a disclosure like that be able to happen here?

Prof. Brown: No.

Senator GREEN: Why not?

Prof. Brown: Not in a way that is legally recognised and protected under the public interest disclosure or whistleblowing regime. This is point three on the seven-point plan. Putting aside the fact that America has a First Amendment and that this very often kicks in in the way these things work in practice, a national security whistleblower or someone whose disclosure includes intelligence information, which this would have been in this situation in Australia, is eligible to disclose that concern to the Inspector-General of Intelligence and Security and receive the protections. But they could not make an external disclosure. They could not make a disclosure to anybody else other than under parliamentary privilege, possibly. Whereas under the US regime, there is an automatic trigger whereby, if an equivalent person in that position has raised it with the inspector-general, there is a requirement for it to then be raised with the relevant congressional oversight committee, which provides a trigger for it to be taken at least to the Congress and then made public in that respect. So, putting aside the First Amendment rights.

Senator GREEN: When you say they could not make that disclosure, is that because someone in Australia disclosing information that is serious could be threatened with criminal charges?

Prof. Brown: I am just saying, in terms of the law, they would not receive the protections of the legislation. They would remain exposed to section 122 of the Criminal Code and risk prosecution. They would not have the benefit of being able to claim civil remedies for reprisal or detrimental action, et cetera. They just would not get the benefit of all of those things. They could still make the disclosure; it is unauthorised.

Senator GREEN: In Donald Trump's America you have better protections if you are a whistleblower than if you live in Scott Morrison's Australia?

Prof. Brown: Or what would have been Bill Shorten's Australia.

Senator GREEN: He is not the Prime Minister, but Scott Morrison is and he has the power to change these things. Hopefully we can be as optimistic as you are.

Prof. Brown: I will just say that this legislation in this form was introduced in 2013. It was a miracle that it was introduced at all, but it was developed and introduced under the supervision of the then Gillard government—the legislative provisions we are talking about that provide this cap. At the time there were those of us who advised the government that this was too narrow. I think it just emphasises that this has to be treated not as a partisan issue, it has to be treated as an issue where the community will have real confidence that these systems will work whatever government is in power, and that the systems will not, if they are working, then be undermined or changed by a different government if it ends up in power. I cannot stress that highly enough.

Senator McMAHON: Professor, you mentioned that other countries that we like to compare ourselves to have a bill of rights and that this would go some way towards press freedom. In the World Press Freedom Index that was referred to, Australia was No. 21, which is above the US at 48 and the UK at 33. If a bill of rights is so important, how do you explain those results?

Prof. Brown: I probably agree with the presumption underlying your question, which is that you do not necessarily have to have a bill of rights to achieve the outcomes that we are talking about here. I think one of the reasons why some countries do better notwithstanding that they have weaker whistleblowing or public interest disclosure regimes than we do, is because they fall back on bills of rights. I am very sympathetic to seeing some of these rights and principles enshrined at a bill of rights-type level or a press freedom act level, but that is not the only way to achieve these intended outcomes. We already have legislation in terms of the Public Interest Disclosure Act, and for that matter the private sector provisions, which is intended to achieve the outcome of enabling whistleblowers to go public. A lot of that is actually intended to support the role of the media in being able to report on that. It is just simply clear that those provisions are not properly calibrated to achieve the result anymore; otherwise we would not be having this debate. A bill of rights or a constitutional enshrinement of these rights is by no means the only solution. I am very supportive of the idea of a press freedom act, but I do not think it is the only solution either.

Senator McMAHON: Who do you personally think should be the institutions or people responsible that decide what is actually in the public interest or not?

Prof. Brown: At the end of the day under the whistleblower protection regime—and I think to a large degree in terms of the role of journalists or any other person for that matter who has received technically unauthorised official information—the question ultimately needs to be determined by independent courts. That is why we have them. We can do a much better job of constructing a consensus set of public interest principles in legislation—hopefully simple—to help inform the courts. But what we should do is recognise that at the end of the day one of the values of an independent judiciary and legal system is to be able to make that judgement call independently of government, independently of the industry, independently of the public servant concerned, on balance taking into account these agreed principles. Was this disclosure in these circumstances in the public interest or not? I think it is the only way that it can be done. We are really talking about properly arming independent mechanisms to make those calls in the individual cases, informed by simpler, more coherent, consistent, logical principles that I suspect everybody at the end of the day would probably agree on.

Senator LINES: Professor Brown, thank you for coming today. My background was as a former union official. I have acted for people who have disclosed information. Even with the strongest whistleblower laws there is still an ability to get the whistleblower. That is just a fact. I do not know that we could legislate against that. In an ideal world we have strong whistleblower laws. We now have other legislation, particularly in this security area but not only there, which locks away or prohibits information from getting out so the whistleblower is put at risk. We have heard a lot from the panel this morning about our very poor FOI laws. Obviously, as opposition senators we hit the inadequate nature of the FOI laws as well. I am wondering if there is a package of goods, if you like, such that if you had better FOI laws that would then create a bit of a buffer for whistleblowers, because that would mean a lot more information was available. Chris Uhlmann gave evidence this morning. He has just got a report and I think all bar two pages was redacted. What is your view on how those things sit together?

Prof. Brown: I think the role of whistleblowing becomes more and more significant and important, and is also more widely recognised, the more that other systems and processes do not work or are cut back even for financial reasons. I think it is one of the reasons there is an increasing level of public recognition and official recognition of the importance of whistleblowing. It so often clearly ends up being either the way that we found out about it first or the only way that we found out about it, because other systems and processes are not working.

Transparency International has what is called a national integrity system approach, and we are bringing out recommendations from an assessment of that. That is partly why the Commonwealth needs an effective integrity commission and effective FOI laws, et cetera. The principles will then more easily kick in. People will know, if they have a concern they can raise it with somebody, and actually there is a chance it will be dealt with. It never needs to turn into higher risk or external whistleblowing.

Senator LINES: You need a suite of effective measures?

Prof. Brown: Absolutely. It is all part of the one system. I think the government knows that, but I think this is a good opportunity to actually make sure that a few cogs of the system are actually working effectively together. It is one reason why the design of a national integrity commission or Commonwealth integrity commission, from some designs I have had the privilege of having some influence on, actually bite the bullet on the need to have a whistleblower protection commissioner to make these protection mechanisms work. Without those resources, for a lot of the reasons that are covered by a lot of submissions, then we will still be in that situation where we might have laws and protections on paper but they are not actually meaning much in practice. These are really important reasons for this parliament to pursue some of these integrity reforms in a systematic fashion rather than in a piecemeal fashion.

Senator LINES: I guess one of the things we were reflecting on before was that so often information that has come into the public arena has come via a whistleblower and then the public broadcaster, and then it is in the public arena. If we had a suite of measures—an integrity commission, stronger FOI laws and strong whistleblower protection—it still takes a brave individual to put up their hand, even with all of that protection. I am just wondering whether there are ways that we can really safeguard how information gets out? It is putting a lot of onus on the individual to be the person who speaks out.

Prof. Brown: To use the Trump example again, one suspects that those CIA officers who were the note takers in the Situation Room would probably have felt less of an obligation to raise the concern if it were not for the fact that they were aware that the records of these particular conversations were being treated differently than they should have been; that they were being put on Secret Service and whatever in order to be hidden, et cetera. If they were going through the right channels, I suspect it would have been a different sort of story. I think a factor in

why they basically chose to express their concerns as whistleblowers and treat those protections is that sense that the other parts of the system are breaking down or being subverted.

CHAIR: Does anybody else have anything? No? We have got you out of here on time.

Prof. Brown: I am so grateful. Thank you very much. I would love to stay, talk at length and answer all of your questions.

CHAIR: Thank you very much for your submission. I think it has some really helpful recommendations.

DEMPSTER, Mr Quentin, Representative, ABC Alumni Limited

HOLMES, Mr Jonathan, Press Freedom Spokesperson, ABC Alumni Limited

[12:23]

CHAIR: I understand information on parliamentary privilege and protection of witnesses and evidence has been provided to you. Do either of you have an opening statement? Then we will go to questions.

Mr Holmes: I do, yes. Thank you for inviting me and Quentin to give evidence on behalf of ABC Alumni. ABC Alumni Limited supports most of the concerns and many of the recommendations that you have heard or will hear expressed by news organisations, media academics and journalists at today's hearings. But in our submission we focus on one particular issue which few others have done more than touch upon. In fact, the chair brought it up briefly at the end of the ABC's hearing just now, and that is the prosecution of a whistleblower and the threatened prosecution of an ABC reporter under a law which, on its face, has nothing whatsoever to do with the publication of secret information. This inquiry and the parallel inquiry by the Joint Parliamentary Committee on Security and Intelligence, were both instituted following the execution by the AFP of search warrants on the home of Ms Annika Smethurst, of News, and the Sydney headquarters of the ABC on 5 and 6 June. Despite the protestations at the time by the Attorney-General, both warrants made clear that journalists as well as their sources are suspected of committing criminal offences. What especially alarms us at ABC Alumni is the fact that one of the offences of which ABC reporter Daniel Oakes is suspected, according to the ABC search warrant, is that of unlawfully receiving stolen Commonwealth property contrary to section 132 of the Criminal Code.

The Australian Law Reform Commission in its excellent 2009 report on secrecy laws identified 506 secrecy provisions in 176 pieces of Commonwealth legislation, and of course there have been plenty added since then. The receipt of stolen property was not on the ALRC's list simply one suspects because it never occurred to the Law Reform Commission that the revelation or disclosure of information could be classified as theft. Dan Oakes and his producer, Sam Clark, were engaged in bona fide public interest reporting. It would be hard to argue that it is not in the public interest to inform Australians that members of Australia's Special Forces are being investigated for committing war crimes in Afghanistan. That such a reporter could be charged with the unlawful receipt of stolen property, presumably documents or perhaps electronic files, is you might think a laughable proposition, but it is no joke because one of the alleged sources of Oakes's information has already been committed for trial in the ACT Supreme Court for various offences, including theft of Commonwealth property, contrary to section 131 of the Criminal Code. This means that both the Commonwealth Director of Public Prosecutions and the magistrate who committed him think there is a reasonable prospect of conviction. Neither Daniel Oakes nor the ABC, of course, have made any admission that Major David McBride was the source of the documents that they relied on in compiling the 'Afghan Files'. But, if McBride is convicted of theft, it is a very short step to prosecuting Mr Oakes for receiving. Even the threat that receiving a Commonwealth document—not publishing it, mark you, but just receiving it—could lay a journalist open to criminal prosecution strikes at the very heart of press freedom.

Last year, after extended scrutiny by the PJCIS, the parliament passed an act repealing the old secrecy laws in parts 6 and 7 of the Crimes Act and replacing them with a new division of the Criminal Code. In many ways, the new secrecy laws are more draconian than the old, but they do contain some important new safeguards. The prosecution must prove that information communicated is harmful or inherently harmful to Australia's national interests. The prosecution requires the written approval of the Attorney-General. There is a specific defence available to professional journalists who reasonably believe that they are acting in the public interest. Those safeguards, limited though they are, would be rendered irrelevant if journalists who deal with leaked Commonwealth information can be charged with receiving stolen property. The unauthorised receipt by a journalist of any Commonwealth information, whether harmful or innocuous, whether it is subsequently published or spiked, could render them liable to criminal prosecution.

We made these points in our submission to the PJCIS inquiry. Unfortunately, at subsequent hearings no committee member asked the Federal Police why it decided to use this piece of legislation to pursue McBride and Oakes. I made some of the same points in an op-ed article in *The Sydney Morning Herald* on 27 August and in the submission we made to this inquiry. Less than a month later, by coincidence or otherwise, the Attorney-General issued a directive to the CDPP. It directs that prosecution of journalists for a number of offences will now require his written approval. Among them are both the offences of which Oakes is suspected, according to the AFP warrant, receiving stolen goods and receiving military information contrary to section 73A of the Defence Act 1903. That has given no doubt substantial comfort to Dan Oakes and to the ABC. For that reason, ABC Alumni welcomed Mr Porter's directive. But we are not alone in pointing out that a nation that purports to be a democracy

with a free press should not leave it to the unfettered discretion of a politician, a government minister, to decide whether or not journalists should be prosecuted for doing their jobs.

The Home Affairs Minister, in another welcome recent directive, told the AFP that he expects it 'to take into account the importance of a free and open press in Australia's democratic society'. Many other politicians, senior bureaucrats and policemen have made similar protestations in recent weeks. But if the parliament genuinely values a free press, it should support words with action or, more precisely, with an act. We have recommended in our submission that sections 131 and 132 of the Criminal Code be amended to prevent their use to scare whistleblowers and threaten journalists with criminal prosecution. But to amend each and every one of the hundreds of secrecy provisions on the statute book to provide, for example, a defence for public interest journalism would be all but impossible. ABC Alumni, like others, urges the committee to recommend that the parliament give statutory force to the commitment to free speech and a free press that Australia has already made by ratifying the International Covenant on Civil and Political Rights.

Australia is alone among likeminded English speaking democracies in not having any such statutory or constitutional provision. Many non-English speaking democracies give much greater protection to journalists and their sources. Maybe we should steal some of those ideas. After all, they are not Commonwealth property. There is no danger of parliamentarians breaching either section 131 or 132 of the Criminal Code. Mr Dempster and I will be happy to answer any questions as best we can.

CHAIR: Thank you very much, Mr Holmes. I appreciate the suggested questions to the AFP. When we get them in front of us we will put them to good use. I think you were here when I was asking some questions of the ABC specifically. It must be heartbreaking, in a way, to see a situation where the national broadcaster, whose job it is to inform the public, be under such pressure because whistleblower protections are not there or, indeed, as you have extensively pointed out, this section of the Criminal Code being used not just to get at whistleblowers but to put the fear of god into individual journalists. Otherwise what is the point? Either the government wants the journalists charged and convicted on those points or it was designed to be a message. How do the parliament, the government and the ABC balance the objectives of the ABC to report the news, do proper public interest journalism, as they are paid to do, but also abide by the current regime? Is it even possible?

Mr Dempster: It is frightening to be subjected to the possibility of a criminal conviction for anybody, let alone a journalist, particularly when the journalist thinks he or she is doing their job. We are comforted. You have heard from the ABC and News Corporation that they have taken legal actions questioning the validity of the search warrant raids on Annika Smethurst and the ABC offices. That is playing out. They have taken those legal actions on technical and constitutional grounds. This is before the Federal Court and it is going up to the High Court. That will play out over the next weeks and months. In the meantime, I think it is fair to say that all journalists of Australia are comforted by Attorney-General Porter's directive to the Commonwealth Director of Public Prosecutions that his consent has to be sought before there are any charges, any prosecutions. Mr Holmes has pointed out both the receiving and communicating charges that are potentially available to the Director of Public Prosecutions, and we are comforted that the directive is all encompassing. Aren't we?

Mr Holmes: The directive is applied to very particular pieces of legislation, amongst which happen to be the ones named in the warrant against Dan Oakes. Another one, for example, is section 35P of the ASIO Act, which has been very controversial. There are hundreds of secrecy laws available to the AFP if it really wants to go after journalists or whistleblowers. As I said, is Mr Porter going to issue directives about every single one of them? Yes, it is a great comfort; I agree with Quentin, but it is kind of like sticking your thumb in the dyke, it seems to me.

Mr Dempster: It raises the prospect that this may not be the end of the matter, that search warrant raids could occur. If you are in an agency, in particular a national security agency, you are duty-bound to call in the AFP when somebody has leaked confidential information. They have an obligation under their own act to say, 'Hey! There's been a breach of secrecy. We've got to take this up. We've got to call in the AFP.' I think all of us are looking for a long-term resolution to this, not just leaving it to the discretion of the Attorney-General, whomever he or she may be at the time.

CHAIR: And whatever side of politics.

Mr Dempster: I am sure they would make a decision based on the merits.

Mr Holmes: Mr Pezzullo, the Secretary of the Department of Home Affairs, in his evidence to the other inquiry, talked rather nostalgically about the good old days when journalists would come to officials and say, 'I've got this document; I don't want to give away secrets,' and it would be an arrangement. I was talking to a senior ABC journalist last week who said, 'Yes, it's true; there used to be an understanding with the AFP, for example,

that you could go to them and have a chat or they would come to you saying, "We need to pursue this source," but the understanding was they were not going to pursue journalists.' Although the ABC is never going to really cooperate with a hunt for a source—that is against their reason for existence, really—the knowledge that their journalists were not in the firing line gave some area for informal discussion that has now gone. This senior journalist said to me, 'If they're going to pursue our journalists for receiving stolen information or some ancient bloody law about not giving away the location of aerodromes', which is what section 73A is about—'All bets are off; we're not going to discuss anything with the AFP.' It is actually counterproductive.

CHAIR: So we are at a stalemate, in a way?

Mr Holmes: We are in a hostile environment.

Mr Dempster: There are no search warrant raids of American journalists. They have the protections of the first amendment. You have the benefit of the six points raised by the Right to Know Coalition. We would like this committee to go further, and that is to put in a statutory protection for journalists that would be something along the lines of a media freedom act, and to put this country in a comparative position of protecting journalists. You raised the ordeal of the people of Hong Kong trying to stand up for their democratic rights in relation to China. If ever there was an example of the Australian people standing up for theirs, this is part of it. I want to say something about whistleblower protection as well. This not just about the protection of journalists. It is also about the protection of whistleblowers.

CHAIR: Let us go to that. Beyond just the legal ramifications of journalists having their work considered to be criminal or whistleblowers, even those within the Public Service who are not properly protected now as we have discovered through all of this process, and even those blowing the whistle and in the private and corporate sense—this chilling effect has an impact across the whole thing. No-one is a professional whistleblower. If you are willing to put up your head and say, 'There is something that's gone wrong in this place,' and if you have not been able to get attention internally and you end up speaking to a journalist, I do not think for a second we can expect that people understand. Frankly, it is such a grave concern to them whether they are going to be hung out to dry because they work for the Public Service but if they work for BHP it's going to be fine.

Mr Holmes: In fact, it is not, as we know. We have just seen the example of a whistleblower. He's not even a whistleblower but somebody who had the temerity to speak to *Four Corners* about his concerns about the ability to teach a degree course in Murdoch University being sued for millions of dollars by Murdoch University because of the economic damage that it had caused to suggest that taking too many Chinese students might be a bad idea. I think it was Indian students in this case. There is a general atmosphere that applies right across-the-board. Clearly in terms of Commonwealth whistleblowers there is this entire raft of legislation. As Quentin says, the police have no discretion. They have some discretion, but many times they feel obliged to pursue those cases. But, again, it used to be that they would approach journalists, for example, in a pro forma way and say, 'You're not going to tell me anything, are you?' And the journalist says, 'No', and they go, 'Thanks very much.' That was the way it used to go.

Mr Dempster: I think after 9/11 there is paranoia, particularly with the pressure on security agencies trying to keep Australians safe. If you look at what Duncan Lewis, the outgoing Director-General of ASIO, has said, it is almost impossible now to guarantee; with random acts of terror, copycat terror, they are trying to get across all sorts of threats to the Australian community. With invasion and hacking of Australian systems, the Australian security agencies have got all their antenna up saying, 'What can we do?' They have to I think prove to the rest of the world that they can keep their secrets.

Mr Holmes: I think this is the problem. Counterterrorism is used as an excuse. Let me give you just two examples.

CHAIR: National security is not the reason that Richard Boyle is in the situation he is in.

Mr Holmes: It is not the reason even with Witness K. They would say that it compromises national security because secrets got out, even though the secrets were the unconscionable behaviour of ASIS in East Timor. But we need to remember that it is this Attorney-General who authorised the prosecution of Witness K after apparently two or three previous Attorneys-General did not authorise it. That is something to bear in mind when you consider that it is up to him apparently whether journalists get prosecuted or not. The atmosphere for whistleblowers I think is worse than it has ever been. Quentin is right; it is because of the sense of threat from counterterrorism, which is fomented in many cases by the government.

CHAIR: Can I ask you to reflect on a question I put to the previous witness. There is clearly a bad culture. Everyone has talked about this encroaching sense of shut down information, whether it is through whistleblower protections, the clogged system of the FOI or releasing information when pages and pages have been redacted.

There is that cultural issue. But is there also an element missing, that doing the right thing is a responsibility and not just the right of a whistleblower? Actually, if you work for the Public Service and you know something that is in the public interest, do you not have a responsibility to report it?

Mr Dempster: I think you are going to the mandatory element of it. Yes, of course you do. But such is realpolitik that people within their organisational hierarchies and the politics within their hierarchies could say, 'If I raise that, I'm contesting the judgement of my superiors.' It is a very brave person who does that. In national security agencies you can go to the Inspector-General of Intelligence and Security. They have a very good website. It is all reassuring. There will be no reprisals against you. You can speak in confidence. They will even take anonymous information from security cleared employees of the six agencies that are managed by the Inspector-General of Intelligence and Security. I think Professor Brown was making the point that, if people did raise their concerns within those internal structures, there is nothing to protect them if they go outside them and go to the media, as a redeeming defence that they raise things in the public interest.

Mr Holmes: That is the trouble. The internal procedures are almost always secret. There is never any light cast.

CHAIR: You are damned if you do and damned if you don't.

Mr Holmes: What works in terms of correcting problems within bureaucracies is sunlight.

Senator LINES: Not only secret; they are often one way and information does not come back. It only goes up or out.

Mr Holmes: Yes.

Mr Dempster: You can talk to Whistleblowers Australia. They will try to get rid of the whistleblower. They move you outside the workplace. Suddenly you get counselling and some people are psychologically incapacitated.

CHAIR: So, you already start to get punished?

Mr Dempster: If you are moved out you are alienated.

Mr Holmes: Look at the Commonwealth Bank situation. They complained to ASIC years before they went to Adele, and nothing happened. No, absolutely nothing happened until it was on the front page of the *Sydney Morning Herald*. That is the way bureaucracies work. They defend themselves. It is natural. Without the media helping that process, we will sink into deeper and deeper tendencies towards one form or another of corruption, it seems to me, like every other society does.

Senator LINES: I am sorry you did not get your AFP question answered, but I suspect you have points of view around them. In relation to the first one, there is a question that I have pondered. Who suggested to the AFP that it was appropriate to charge McBride with theft in the first instance? Where do you think this is emanating from? Do you think it is because we are in this context of paranoia? What is it?

Mr Holmes: The MPs at the other inquiry have actually asked some fairly pointed questions of the AFP about what communication, if any, they had with the Home Affairs department. The answers that they have received on notice are basically uniformly saying: 'None. We didn't have any communication. We're an independent agency.' I guess one has to take them on trust on that. My original suspicion was that this idea of using the theft offence might have come from one department that is to some degree at war with another. But that was pure speculation, and we have been told that that is not the case. It is up to you, not us, I think to take that further.

Senator LINES: I think you heard the ABC's evidence before you about why the theft aspect was used, and they do not think it is a coincidence.

Mr Holmes: Yes. The idea that it was a good idea to find an offence that did not require the Attorney-General's approval for prosecution—where did that come from? I would love somebody to ask the AFP that question, not that I suspect they will get a particularly revealing answer.

Senator LINES: What are you suggesting, though, as to where it came from?

Mr Holmes: I do not think I can—

Mr Dempster: Verbal them.

Mr Holmes: As I say, to the extent that I have any suspicions, the answer that the AFP has already given to the other inquiry is basically a denial. I think one has to accept that. I do not know whether you guys accept it. I do not think it would be right of me to voice any further suspicions. I have no evidence at all.

Senator LINES: That is fair.

Mr Dempster: The only other thing was the acting commissioner I think at his press conference indicated that with the ABC raids not only had the documents or the information been inappropriately taken but it had appeared elsewhere. You heard Connie Carnabuci, the general counsel for the ABC, saying they are trying to establish what the justification was for the AFP seeking that element of the search warrant.

Senator LINES: Do you think they are likely to get to that justification point?

Mr Dempster: They have just been rejected by the court this morning.

Mr Holmes: One useful piece of information that did come out of the AFP's answers on notice to Mark Dreyfus is that he asked, really in the context of the au pair emails, about whether the AFP would regard the disclosure of unauthorised information as theft, and in what circumstances? And was there any precedent for that? In their answer they state, 'There is a precedent. We've charged David McBride with theft', which implies that that is the first time this particular provision has been used in those circumstances. That would certainly accord with our suspicion. But again to comb through the last 100 years would be difficult.

Mr Dempster: That is why we say that the longer term solution to this will be a shield law for journalists, a media freedom act or something along those lines.

Senator GREEN: Can I ask you some questions about the ministerial direction, which now essentially may seek to respond to that issue around the charge being a theft charge and that now all charges have to go to the Attorney-General?

Mr Holmes: It is not all charges, it is seven very specific offences that happened to include that one.

Senator GREEN: That is my question. There are very specific charges.

Mr Dempster: There it is. They are all listed there.

Mr Holmes: The first one, section 35P of the ASIO Act, is about Specialist Intelligence Operations, which has caused a great deal of angst in the media. Of course, you do not know when you are reporting whether you are reporting on an SIO or not. That has always been a bone of contention. Then there is a bunch of provisions that essentially seem to be about breaching interception warrants and those kinds of things. And section 70 of the Crimes Act, which is one of the offences that David McBride has been prosecuted for, but it actually does not have a provision in section 70 that says it is a crime to receive information. It is all about Commonwealth officers disclosing. It is not really a section that you would expect to see used against journalists. Section 79, which does have that clause in it, already by law required the Attorney-General's approval. But then the last three, 131 and 132 of the Criminal Code—which we just talked about, theft and receipt—and section 73A of the Defence Act, which is this very old law which says you cannot reveal the location of aerodromes, gun emplacements, battlements in castles and various other things like that. Right at the end it says 'all other naval and military information'. That is the one they were trying to get McBride with and threatened Dan Oakes with as well. It is a crime to receive that information as well as to disclose it. That is the last one that the Attorney-General has said. I do not know why he chose those particular offences and not others. Certainly, it is welcome because they are the ones that Oakes was threatened with.

Senator GREEN: You said that the ministerial direction provides some comfort.

Mr Holmes: Yes.

Senator GREEN: You have used that word a few times. I am trying to understand this. Maybe it provides single journalists a bit of comfort now that that change has been made, but from the public point of view there is now a system where the Attorney-General, who does have an esteemed position in our constitutional parliament but who is also a politician at the end of the day, walks the halls and sees journalists at the coffee shop and that sort of thing, is going to ultimately make the final decision about whether a raid of that type would have occurred. Do you think that means journalists would be less likely to report on issues that the Attorney-General is responsible for, even things that he might be personally pushing through the parliament?

Mr Holmes: Before I answer that, can I make it clear that it does not prevent search warrants.

Mr Dempster: Or raids.

Mr Holmes: What this is saying is that, if you want to prosecute, which is when it gets to the stage of going from the police to the Commonwealth Director of Public Prosecutions, it is an instruction to the CDPP, not to the AFP; the Attorney-General has no authority anymore over the AFP. Mr Dutton's directive was to the AFP to say, 'Remember there is a free press in this country', which was great. They might have forgotten. But Porter's directive is to the CDPP to say that, before you prosecute, you have to get my permission.' That does not stop anyone doing search warrants. But, sorry, to come back to your question.

Senator GREEN: Is that not even more concerning? The damage is done by the time of the raid.

Mr Holmes: Absolutely. I agree. For someone like Dan Oakes, who I understand has found this incredibly stressful, that can still all happen. You are right.

Senator GREEN: When I say 'damage', there is obviously personal damage those journalists have had to endure. They must be under intense stress. But in terms of the public display of having journalists raided on every TV network that night and every single person thinking about possibly speaking to a journalist about a story they might have, the damage has already been done by the time the raid has been conducted. I am just trying to understand why that ministerial direction is giving maybe a sliver of comfort, but for me it does not seem to fix this.

Mr Dempster: It is a comfort for Dan Oakes that the Attorney-General has intervened and has said publicly that he is disinclined to consent to any prosecution of a journalist.

Mr Holmes: He said that within two weeks of the raids.

Senator GREEN: But they still do not know whether those charges—

Mr Holmes: It would be extraordinary, frankly, given what Mr Porter said on 16 June, which was that he would be seriously disinclined to authorise the prosecution of a journalist who was doing their job, if he now turned around and gave permission to prosecute Dan Oakes on those offences. That is why it gives some comfort.

Mr Dempster: But there may still be a prosecution. There is highly likely to be a prosecution to whomever the Australian Federal Police is gathering evidence on as the informant to Annika Smethurst. There is still highly likely to be a prosecution. Jonathan has outlined the prosecution against McBride. There is another prosecution coming. This is not going to go away, because there is the trial of Witness K and Bernard Collaery. There is Richard Boyle, the ATO whistleblower.

Mr Holmes: The directive has nothing to do with whistleblowers. It is very specifically where the person is a journalist. It is only about whether or not to prosecute journalists. There is absolutely no restriction on prosecuting whistleblowers.

Mr Dempster: We feel very strongly about the informants of journalists. And to your point about the chilling impact that all of this has had on people who want to, with all integrity, raise issues that the public ought to know about.

Senator LINES: Can I go back to a question that I asked the panel earlier. Both of you are well known and esteemed journalists and I would like your view on this. The point that I put to them is that during the debates or during the legislation we have had, in particular the encryption legislation, our media in Australia did not sufficiently protest that issue of media freedom. I gave some examples of headlines that were around at the time. I asked them whether parts of the media too eagerly swallowed the government's talking points. I would not mind your views on that.

Mr Dempster: Yes, it is inevitably true that the media did not put it on the front page to say this is an overreach or goes too far. At least now you have had all of these—

Senator LINES: Yes. We have joined them up.

Mr Dempster: You have had all of these media people in front of you all singing off the same song sheet but saying it is the public's right to know, and we are a free media within a democracy. You have had them at last standing up—

Senator LINES: I think there has been a lesson learnt.

Mr Dempster: bravely for media freedom. You are quite right. It was not emphasised enough.

Mr Holmes: Some of this legislation was very hastily, in some cases, passed through the processes in parliament. There were a few. Bernard Keane was very good on Crikey.

Mr Dempster: He was.

Mr Holmes: Paul Farrell was very good in *The Guardian*. I wrote a couple of columns for *The Sydney Morning Herald* and *The Age*, but on the whole the mainstream media did not say a dicky bird, and they should have.

Mr Dempster: The opposition let it through because it did not want to get wedged—you know the politics of this place—on any national security issue before the 2019 election.

Senator McMAHON: Would you be able to talk me through the process, training and that sort of thing that the ABC does or did provide to journalists so that they are aware of how they should treat national security law enforcement and sensitive information?

Mr Dempster: The ABC editorial department, the director of editorial policies, the ABC legal department, which was there to support journalists and make sure they do not cost the taxpayer any money by taking unjustified risks in publication. There is an ongoing process, an ongoing newsletter process and regular broadsheets, if you like, to all the staff of the ABC, particularly the investigative staff, looking at the change of legislation. They would all get a memo from the legal department or from the director of news saying, 'You should be aware that this legislation has come in. This will have an impact on our journalism.' But more specifically, when a journalist is going about the job of getting material that is in the national security or intelligence area, before publication you involve the ABC's legal department. Likewise, I am sure it happens with News, Nine, Seven—everybody else in mainstream media—about to tread on powerful toes. You get the lawyers in, sometimes right at the get-go, or particularly just before publication, before you post the material online or you go to air with it. They are the steps that all responsible journalists within media organisations have to go through, including ABC.

Mr Holmes: I left the ABC five years ago. It is certainly true that up to that point I am not aware that there were specific training courses for investigative journalists about how you deal with national security issues. I think it is one of those things that you learn as you go along to some extent. You do have an editorial chain of command. Before any story like that goes to air, it is going to be looked at by a very senior editor. Those people, one would hope, have a pretty good grasp. There are always going to be judgements that could differ from one editor to another. For example, I have heard some very senior investigative journalists saying about the 'Afghan Files' story, 'When you actually say that this story is based on secret documents that have been leaked to us' it is saying, 'Come and get us.' And that 'you could have told those stories without being so specific'.

That is an argument. I do not know who authorised that particular line. It sounds sexier, frankly, if you are telling a story to say, 'We've got these secret documents.' But it is also issuing a challenge really to the authorities. Maybe there is another way of doing it. These things are not black and white. They are grey. I spent five years clobbering the media for various things. I am not saying they are perfect. They are not at all. But it should not be a criminal offence.

Senator McMAHON: You detailed some of the backup and support that would be available within the ABC. Do you know if other journalists, particularly from smaller organisations, would have access to that same level of support? It would be very hard, wouldn't it, Quentin?

Mr Dempster: Michael West is an investigative journalist in corporate affairs and finance in Australia and internationally. He would have his own legal advice. But any small operator, of course, would be in great difficulty. Most of the media organisations, even in an era of digital disruption with Google and Facebook taking a lot of the revenue from commercial media, still have their legal departments. You heard from other witnesses this morning about the high cost that all of this incurs for even the big media outfits. There is a sensitivity to it before publication. We could have another seminar on defamation. That is another issue of great risk and cost for media organisations and journalists.

Senator McMAHON: Do you think it would be fair to say that it is possible that some journalists may not understand the full national security implications of disclosure of some information they may come across?

Mr Dempster: I think most people dealing in that area now are fully aware of the dangers in publication. Jonathan raised the tactical question, do you really need to put a red rag, as it were, to the security agencies by boasting about the fact that you have got a document, for example? A lot of journalists fall into that trap of big-noting themselves. I acknowledge that. There has to be some editorial control, particularly with the promotion of the material, so that we are saying, 'What are we saying here that's in the public interest, rather than blowing our own trumpet?' If the journalists learn anything from this, it is that there is no need to provoke. Hopefully, the facts will speak for themselves, and we will raise the public interest issues on the basis of the facts that we have. I think there will be some sobering effect. All of this has had a sobering effect on journalists already in terms of what is the legitimacy of the journalism we are about to publish. You have to think very seriously about that. It is overarching now. That is the big problem with what has occurred with the raids—I call them 'raids'—or the search warrant activities. That has really caused a great deal of distress for Australian journalists.

CHAIR: Are there any other questions? Thank you, both, for giving us your submission and fronting us today. We really appreciate it. As I said, the questions to the AFP will be very helpful. Thank you.

Mr Holmes: Good luck getting answers on those.

Proceedings suspended from 13:08 to 13:47

DICKSON, Mr Gary, Operations Administrator, Public Interest Journalism Initiative**SIMONS, Dr Margaret, Chair, Expert Research Panel, Public Interest Journalism Initiative**

CHAIR: We will now recommence the hearing. I welcome the Public Interest Journalism Initiative. I understand information has been given to you in relation to parliamentary privilege and the protection of witnesses. Do you have an opening statement that you would like to give?

Dr Simons: Yes, a little bit more by way of introduction. As well as being a board member of the Public Interest Journalism Initiative, I am also an Associate Professor of Journalism at Monash University and a journalist coming up to 38 years experience. Gary Dickson, on my left, is a research officer for PIJI and also the principal author of our submission.

PIJI is an NGO which was founded quite recently, just last year, to address what we believe is a crisis in public interest journalism, with multiple causes but focusing largely on the collapse of the business model that has resulted in the provision of most journalism historically. Our mission is to conduct research, raise public awareness and advocate policy options for addressing this crisis. So far, we have been an important part of the ACCC's processes in arriving at its digital platforms inquiry report. We have also made submissions to Treasury regarding the ACCC report. We have conducted research about the deficit in local journalism in particular in partnership with the Australian Local Government Association. We currently have research under way on a tax rebate for investment in public interest journalism, how one would design such a policy, and also on the public willingness to pay for journalism through government support.

I am not going to recap the whole of the submission, which of course we have in front of us, but I will just emphasise a few points. Firstly, what is public interest journalism? That is a question I understand you have raised various times this morning. We were very gratified when the ACCC adopted a definition with minor modifications that PIJI first suggested to them. That is on the first page of our submission. Journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government. I particularly like this definition because it encapsulates investigative journalism, which is the primary topic of your inquiry today, but also the often unsung simple process of recording events—covering parliament, courts and local governments, for example—which is an equally important part of a journalist's function.

In terms of the points in our submission I would like to draw your attention to, the first is the definition of a journalist. What type of person should be subjected to the various special protections, rights and privileges that you are hearing about today? We advocate making the definition in the Commonwealth Evidence Act uniform and broadening it—making it uniform across the different jurisdictions in Australia and also across the different relevant parts of legislation—and broadening it to cover not only journalists but also other media personnel.

In the modern media environment, which continues to be fast-changing, it is outdated to define a journalist by their employer or by the nature of the media outlet they are working for. Journalism is done in many places and by many people. The definition in the Evidence Act, which we have reproduced on page 3 of our submission, is a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium. We think that needs to be in all of the relevant legislation in different jurisdictions. We also think it needs to be broadened, because significantly it leaves out production people. For example, a camera operator working for *Four Corners* may well know the identity of a confidential source who is presented on camera as obscured. At the moment that person is not covered by any protection in any laws.

The other point we would like to draw your attention to in particular is data retention—something which has not been mentioned much this morning, I understand. Looking at whistleblowers in isolation from data retention and access is to defeat the purpose of the whistleblower or shield laws. It is very important that these two different areas of legislation be integrated and harmonised. One of the ways in which that can be done is to turn to the definition of a journalist, which I referred to earlier. We also propose that there should be a system of contestable warrants when it comes to data retention. They should be contestable ideally by the journalist themselves or their representative, not only by a public interest advocate-type regime.

Also, we would say that the public interest test in the Telecommunications Act at the moment is nothing of the sort. It does not give sufficient weight to the public interest in material being made public or indeed the more general public interest in the freedom of the press.

Turning to the contestability of warrants, I have already said that we think that warrants should be ideally contestable by the journalist or their representative, which might be a union, for example, or it might be a human rights NGO or some other body representing the journalist. If the public interest advocate model is retained, that

person's identity should be public, they should be appointed in consultation with the media industry, and they should have to consult with the journalist who is the subject of any warrant or the media organisation that is the subject of any warrant in conducting their advocacy.

Those are the some of the main points. We also would support many, if not most, of the points you have heard from others before us today. In particular, I would like to draw your attention briefly to the final page of our submission. The media warrant proposal was raised by others before the PJCIS inquiry, which is broader than only the effect on data retention. If such a system had been in place already, many of the legal issues that are currently before the courts relating to the raids on journalists in recent times would of course have been resolved in all likelihood before those raids took place rather than afterwards and after the chilling effect.

CHAIR: Mr Dickson, do you have anything to add?

Mr Dickson: No.

CHAIR: I might go to the opposition first.

Senator MARIELLE SMITH: I just want to come back to your comments regarding the definition of a journalist. You gave the example of a camera operator not being included in that definition and therefore not being protected. Could you draw out some other examples like that of people who are currently falling through the cracks of existing definitions and where that is presenting a problem for the protection of people working in this space?

Dr Simons: Certainly I can give a few examples of that. One is academics such as myself. I am a professional journalist. I continue to practise as a freelance journalist, but currently my main salary is drawn from a university. I think it is highly dubious as to whether I would actually be covered by the legislation at the moment even though I am still actively engaged in journalism. Virtually all journalism courses at universities at the moment maintain publications in which they encourage their students to publish. It is one of the best forms of teaching the realities of publication. One of those publications I used to preside over when I was at Melbourne University has published material that brought us under legal threats of different sorts, and yet those students would not currently be protected. There are also citizen journalists, bloggers and the like. In our submission we draw the committee's attention to the New Zealand High Court's finding on when a blogger is and is not a journalist. Those were just some examples.

Mr Dickson: I think it is worth noting specifically on this question that we are talking about two different definitions, both the Commonwealth definition, which was the one that Associate Professor Simons read out earlier, but also the state definition. Different types of people are falling through the cracks on both of those. Both of those definitions are not exactly what we would want them to be. As to the example of an academic—they are much less likely to be protected by the state definitions at the moment, which has a consideration of the professional kind of occupation that a person takes. Hence, if someone is mostly employed by a university they are unlikely to qualify under the state definition for the shield law. However, in that example someone like the camera person might be. The federal definition, in the federal Evidence Act, is the one where the camera person, not being someone who receives information from an informant with the expectation that it would be published—someone like that or a producer down the line somewhere or someone working in another part of news production—may not be covered even though their materials could very well reveal the identity of a person.

Senator MARIELLE SMITH: We know there are some instances of, say, websites set up purely with the intention to defame individuals. We all know of those websites. I am not going to name them specifically. Do you see any risk in broadening this definition as you have proposed such that it might capture and provide protection for people who really should not be protected by these provisions?

Dr Simons: Rights and privileges always bring responsibilities with them. The Public Interest Journalism Initiative believes that responsible self-regulation is the only form of journalistic regulation that is consistent with media freedom. But we do support self-regulation that does what it claims to do on the packet. Exactly what that means is obviously a topic outside the realm of this inquiry. The ACCC digital platforms inquiry also addressed this question in a different context. They are proposing making various privileges, including tax deductibility of donations to not-for-profit journalism enterprises, access to systems of grants and so on, contingent on membership of a self-regulation scheme that meets certain standards. That is something that PIJI would support.

Senator MARIELLE SMITH: It has been argued by some that it is just too hard to define a journalist and therefore there is no need to engage in this space. What I am understanding from you is that you do believe it is possible to put some reasonable and fair definitions around this that will provide better protections for individuals; is that the case?

Dr Simons: It has grown more complicated. The reality is that the technology of our times, the first time in human history when anyone can publish, has made it harder. We think it is more sensible to focus on the function or what the person does. For example, in my normal working day I might teach, conduct academic research and do some journalism. Nobody is suggesting that all of those activities should be subjected to particular protections. It is important to focus on what is done, the act of journalism, rather than necessarily on whether any individual is a journalist.

Mr Dickson: Some part of the response to that is that the law has already recognised that it is possible to create something like a functional definition of what journalism is as a method of production. That is what is in the Evidence Act, right? Someone who receives news with the expectation that that news would then be published to a wider audience is something like a functional definition of journalism. As to the sort of quality questions around people who may be trying to abuse that system in order to pursue a political end or to defame others—I do not think anyone would consider that to be news, frankly. I think it is already possible. I think it has already been done. It just needs to be broadened out and harmonised.

Dr Simons: There are certainly models to look at in other jurisdictions. I agree with you; just because it is difficult and has changed and may change further does not mean that we should give up the ghost. There is a difference between a citizen who simply publishes without any sort of process or standards and the act of journalism, I would say.

Senator MARIELLE SMITH: Just on the issue about international comparisons, you said there are other jurisdictions doing it well. Would you be able to just, for the purposes of our evidence, expand on that further?

Dr Simons: Do you want to talk to that one? No?

Mr Dickson: No.

Dr Simons: I know that you are going to be hearing later from Professor Lidberg, a colleague of mine, who would be better qualified than I am to discuss that. I did draw your attention to the High Court finding, which is the main one of which I am aware and which again is a functional definition that focuses on what is done rather than who is doing it.

Senator MARIELLE SMITH: Just picking up the international theme further—and do let me know if you are not comfortable answering these—Reporters Without Borders publishes the World Press Freedom Index. That showed in 2019 that Australia had declined two places. There are a number of reasons why this could be the case. Do you have a perspective on why Australia might be going backwards in terms of press freedom?

Mr Dickson: RSF, the Committee to Protect Journalists and other organisations like that always highlight the terror legislation, or the national security legislation, situation in Australia when they review us. They also specifically highlighted defamation law in Australia as well as a concern. It is probably worth noting that the most recent Reporters Without Borders barometer, as they call it, was released in January, before the media raids and a lot of other things that have brought press freedom to public attention again in Australia. I would expect that we are probably going to decline further in the next edition in recognition of that.

Senator MARIELLE SMITH: In recognition of recent events regarding the raids?

Mr Dickson: Exactly. Those are their main concerns usually.

Senator MARIELLE SMITH: One of the things the report cites is the growing concentration of media ownership in Australia and its impact. Do you have any comments on that topic?

Dr Simons: Yes, I will comment on that. This is more in a personal capacity than for PIJI. I think the very high level of concentration of media ownership, depending a little bit on how you count it—it is the highest in the Western World or one of the highest—is a factor in just about everything that touches upon media in Australia. In terms of national and international outlets, it has been ameliorated to some extent by the entrance of new players, such as *The Guardian*, *The Daily Mail*, BuzzFeed and so on. But when it comes to local news, particularly state news and local news, it has made virtually no impact whatsoever, and we still have extreme concentration. This has been increased in recent times, of course, by the amalgamation of what was Fairfax with Nine, and there is talk of Seven also conducting amalgamation or takeover conversations. I think it impacts on just about everything to do with media, and this area is no exception to that. A healthy media landscape is an ecosystem that includes plenty of diversity. We are perhaps a little better off than we were on that, but not much at most areas of journalism that directly touch people's lives.

Mr Dickson: I think that is a really key point. Big international media companies are able to come in and be represented at the federal level often and talk about national issues, but there is very little evidence that they are

present in, say, the local court in Newcastle or wherever it happens to be. It is at that day-to-day grind level that it is still just a couple of media companies that are still doing that work, yes.

Senator MARIELLE SMITH: Indeed, PIJI's other research on the growing deficit in local journalism, also highlighted by the ACCC as an area of concern, indicates that this is in fact what we have already lost. We have not yet lost investigative journalism, but we have already lost an awful lot of local journalism, with local courts and local governments not being covered not only in rural and regional areas, although that is an intense concern, but also in the outer suburbs of our cities. This has already gone. It is not that it is in crisis; we have already lost it.

Senator LINES: Just on that point, I am a Western Australian senator, and there are some rumours about Kerry Stokes selling out. If he sold out to Murdoch, what impact would that then have on the Western Australian landscape, which is already a contracted media environment?

Dr Simons: I am not going to surprise you by saying, a massive effect. When the ACCC considered the merger between Nine and Fairfax, it said that it probably would be against the public interest, but that on their relevant legislation they could not prevent it or would not prevent it. Couldn't/wouldn't; it probably would have been appealed if they had tried. I would have thought that would be even more the case for a Seven-News merger, which I have heard rumoured. I have no special information on that. Of course, in Western Australia it would wipe the landscape really.

Senator LINES: You said in your opening statement that PIJI really came out of a crisis, and mainly because of what we have just been talking about, economic realities and so on. What else was part of that crisis that formed your organisation?

Dr Simons: I think it is fair to say that our focus, and most of our activity, has been around the crisis in business models and the fact there is simply less revenue for the doing of journalism. As I emphasised in the opening statement, not only investigation but also that daily grind, which is at least as important cumulatively, has been our main focus. But certainly these issues of media freedom, as you have heard from many presenters today, have also put journalism, particularly investigative journalism, into a situation of crisis.

Senator LINES: Does that failure of the business model then affect press freedom?

Dr Simons: Yes, absolutely. If you have fewer journalists doing journalism, it is much less likely that the media will be able to hold power to account and fulfil the traditional functions of the press. As I say, we have been focusing very largely on national affairs here today and national security, but perhaps that hits even harder at the level of local government.

Senator LINES: Do you think there is such a concept as press freedom in Australia?

Dr Simons: Yes. I have done substantial research on journalism in China.

Senator LINES: But in similar democratic countries?

Dr Simons: Yes, in similar democratic countries. We have qualified press freedom, but it is heavily qualified and growing more so.

Senator LINES: That was my next question. Given your very long experience as a journalist, do you think that press freedom has been eroded over time and is under threat?

Dr Simons: Yes, I do.

Senator LINES: What is under threat?

Dr Simons: Firstly, the gradual—and I might turn to Gary for some of the detail of this—ramping up of national security legislation over a decade now, I guess.

Mr Dickson: Two, nearly.

Dr Simons: Two decades. That has been a cumulative process. Also, there has been some discussion of freedom of information legislation. I am old enough to remember when the FOI Act was first introduced in 1982. I was interested in the discussion earlier today about whether more effective FOI laws would lessen some of the concern about whistleblowing. Certainly, when those laws were first introduced it was fairly common practice for a journalist—and I have done this myself—to say to a whistleblower, 'You don't have to blow the whistle. Just tell me what the name of the document is or what sort of document I should be applying for', and really the way in which the FOI Act is working now it is incredibly difficult. I have just myself come out the end of an FOI request that was eventually successful after an appeal to the Information Commissioner. It was more than two years from go to whoa.

Senator LINES: Yes, we heard that this morning. Then you get redacted documents and so on.

Dr Simons: It would take the whole of our time for me to recount the entire process, but let us say it was tortuous.

Senator LINES: You have talked about the laws that have passed in recent years. Do you think the recent raids by the AFP have had a chilling effect on reporting?

Dr Simons: I think they have had a chilling effect on whistleblowers, certainly. In my own recent journalistic practice, it has been specifically nominated to me by people who might otherwise have told me something.

Senator LINES: So you have experienced firsthand—

Dr Simons: Inevitably it has also had a chilling effect on the journalists. Do you want to add to anything I have said in the last couple of answers?

Mr Dickson: I just wanted to come back to the question of press freedom in Australia. I think that we often approach press freedom as though it is exclusively a question about legislation, about the laws in place to protect, which obviously makes sense in this particular environment as well. It is also a culture. It is also a set of social norms that are afforded to journalists, rights to access places that otherwise people do not always have and rights to ask tough questions. Social affordances like that—all of those I would say we still have in a fairly robust way. It is specifically the legal question.

Senator McMAHON: I just wanted to touch a little bit more on questions from my colleague regarding the definition of a 'journalist'. It seems that the definition that we have is extremely broad, and you are proposing that we should broaden it even further. I think you also touched on the fact that there needs to be differences between just an average citizen and an actual journalist. But to me this definition does cover Bill the blogger, Owen on Facebook and anyone else that wants to receive and publish information on whatever forum they so choose. There are increasingly more and more forums on which they can do that, including websites such as WikiLeaks, Wikipedia and a million others. How would you propose not protecting Owen on Facebook who wants to publish something absolutely untrue and outrageous against me because he just does not like my politics versus protecting a journalist who has investigated and written something based on fact?

Dr Simons: You are referring to the one in the Commonwealth Evidence Act as the one that you are saying is so broad?

Senator McMAHON: Yes.

Dr Simons: As we have said, we think it is important to focus on what is done rather than the person, necessarily. For example, something that a blogger does might, in some cases, fit the definition of journalism. Again, the ACCC considers some of these issues in a different context and described a difference between the mere publication of information which is done with a media release, for example, by politicians or by many others, and the work of journalism, which implies checking, curation and presentation. I have added to that by saying that PIJI supports rights and privileges being given conditional on membership of self-regulation schemes. That implies adherence to certain professional norms and standards. Those are some of the differences. I am not a legal draftsman, so I am not going to try to draft a provision. Those are the sorts of things that should be reflected in it.

Senator McMAHON: We would have to be careful, therefore, I would think in extending a whole pile of exemptions to journalists per se without having something that can distinguish the action that they have undertaken, rather than just saying, 'Journalists are all exempt from anything'?

Dr Simons: The focus should be on the activity rather than the person. If you ask who is qualified as a journalist, almost anything you do is going to be obnoxious to freedom of speech. The ordinary citizen has a right to publish, whether or not they see themselves as a journalist. It should be to focus on the activity. I think that is caught in the Commonwealth definition, and I have suggested the ways in which it could be further improved. Did you want to add to that?

Mr Dickson: No. That sounds good.

CHAIR: Could I just take you to your list of recommendations on the final page. You have got here 'general recommendations', and you talk about enshrining a positive protection for freedom of speech and freedom for the press in law. Are you specifically advocating for a media freedom act or a bill of rights? How do you envisage that?

Mr Dickson: I think we are not specifically advocating there. The language there is such that a positive protection for freedom of the press in law could take a number of forms.

CHAIR: You do not have a preferred one? Or do you have an opinion about a media freedom act?

Mr Dickson: I have a personal opinion that I would quite like a media freedom act, yes, absolutely. I would also quite like a bill of rights and other things as well.

CHAIR: Anything else for Christmas?

Mr Dickson: I have got a list.

Dr Simons: Again, if we could distinguish between personal opinion and PIJJ's policy, that is PIJJ's recommendation and it is non-specific as to how that is achieved. As to a personal opinion, I think it would depend very much on how such an act was drafted, how it interacted with laws in other jurisdictions as well as the Commonwealth jurisdiction. But most of all—and I was saying this to colleagues over lunch—we need something and we need it quickly. We are in crisis. There is a certain element of the politically achievable that comes into this as well. If a media freedom act is not politically achievable, but some of the other measures we have suggested are, we would count that as a win perhaps.

CHAIR: Politics being the art of the possible.

Dr Simons: Yes.

CHAIR: In relation to the harmonisation of shield laws, I guess in a way if there were a media freedom act that would be part of the harmonisation process. In the absence of that, who should lead that? Is that something you are suggesting should be led by an independent commissioner? Is this something that should be done through COAG? Beyond a federal piece of legislation, have you thought any more about how that would actually be achieved?

Dr Simons: Again, I am not a lawyer. COAG is one possible forum, certainly. It tends not to be a fast forum, but it is one possible forum. There is also, of course, the capacity of federal law to overrule state laws, particularly on areas where it reflects international agreements and conventions, including those on human rights. Those would be two possible ways.

CHAIR: Yes, okay.

Mr Dickson: The development of a model law, I think, in the realm of the defamation law, and the review that is currently under way in New South Wales on that particular matter, I think, would be a potential model for harmonising some law here, too.

CHAIR: My concern sometimes—I have seen it happen in this place more than once—is that you go down the harmonisation aspect and end up with the lowest common denominator, which in this particular issue is not going to progress protection for whistleblowers or for journalists. I would want to make sure there was a very clear understanding of what the objective was. It is not just harmonising.

Mr Dickson: No. It is certainly harmonising to the standard that we think could be achieved with the Commonwealth definition there.

Dr Simons: To the existing standard in the Commonwealth Evidence Act; that is the minimum we would ask for.

CHAIR: Yes, it is important to be clear about that. Is there anything specific you would like to comment on in relation to public sector whistleblowers? I know you have talked more broadly, but a lot of our time, of course, today already and throughout this inquiry has been on the difference between the protections of public officers versus those who now have perhaps better protections, say, if you work for BHP?

Dr Simons: We support very much Professor Brown's report on those matters and the regime that he outlines. Did you want to add to that at all?

Mr Dickson: No. I was very impressed by Professor Brown.

CHAIR: Are there any other questions?

Senator GREEN: You gave your submission to this committee on roughly 30 August. Since then, the Attorney-General has released a ministerial direction to the DPP about the way that journalists can and will be charged; that it needs to go through the Attorney-General, essentially. Do you have any views on that process that you would add to your submission?

Dr Simons: We are glad that he did it, but it is a long way short of what is required. It is not any kind of answer to the issues that are raised here. For example, as I think Quentin Dempster said, it would not have prevented the raids or warrants. It would not have prevented any of that. They have had this significant chilling effect. They are what will affect our international reputation, and rightly so. A deeper point is that this should not be the type of decision that is made by any serving minister in a government, any government. This is not a reflection on the Attorney-General necessarily. We have the separation of powers in our system for a good reason.

Senator McMahon asked one of the earlier presenters who should be making these decisions. That is what the courts are for. That is a fundamental democratic principle that we have, the separation of powers.

Senator GREEN: You said that you are glad that he did it. I am trying to understand what would be the better of the two situations?

Dr Simons: As a journalist concerned for my colleagues, I am hoping it means that they are less likely to be prosecuted.

Senator GREEN: For those individuals. I completely understand that. The Commonwealth DPP has a role to play and has functions in legislation about making decisions. In terms of currying favour with politicians from whatever party, journalists are not necessarily going to be writing stories on a day-to-day basis about individuals in the judiciary or the DPP. Is it just that in this individual case there is a relief that this might not be pursued? Is that the best way for us to go about it on a long-term basis?

Dr Simons: I am relieved because of the cases of individual colleagues who are concerned. That is the extent of my relief on that. It is a long way short of what is required. In terms of currying favour, I am not quite sure I understand your question, but thankfully in this country there is no suggestion that judges might be influenced by the currying of favour. Frankly, politicians are all the time, and those sorts of deals are made. While the Attorney-General is a particular sort of minister, he or she is still a politician within a government, still sits in cabinet, and is still part of the political push and pull. As I say, I am not reflecting on any individual Attorney-General here. A free media is one of the fundamental building blocks of the democratic system and it will always be in tension with government. It is simply wrong for those decisions to rest in the hands of the executive.

CHAIR: Thank you very much for your submission and for coming to speak to us today. If there is anything else you would like to add or any questions you took on notice, be in touch with the secretariat. Thank you.

FLYNN, Mr Chris, Director, Alliance for Journalists' Freedom

GRESTE, Professor Peter, Spokesman and Founding Director, Alliance for Journalists' Freedom

WILKINSON, Mr Peter, Chair, Alliance for Journalists' Freedom

[14:22]

CHAIR: Welcome, gentlemen. I understand that information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. Thank you for your submission and for giving us your time today. Do you have an opening statement you would like to give us first?

Prof. Greste: I do. Thank you very much. Thank you for giving us the opportunity to address the committee today on an issue that we believe cuts to the core of the health of our democracy. We hold that a democracy is meaningless without informed public debate, and a free press capable of holding the powerful to account is essential to that. As we have just heard, my two colleagues Chris Flynn and Peter Wilkinson both were founding directors of the Alliance for Journalists' Freedom, and both were also crucial to the campaign to get me out of Egypt. While I was in Egypt I came to see both the extraordinary value of democracies as well as their fragility at a very personal and visceral level. Once I returned to Australia we started to consider the wider implications of what had happened to me and my Al Jazeera colleagues. We saw the way in which the Egyptian government had used terrorism as an opportunity to pass loosely framed national security legislation that they then used to shut down uncomfortable journalism and imprison reporters.

While we are not suggesting that Australia is about to become Egypt any time soon, we believe our country is vulnerable to the same political pressures—the threat of terrorism driving national security legislation that is often drafted in haste without considering its impact on press freedom, one of the key pillars of our democracy. It has created an environment where journalism that would once have been considered legitimate becomes criminalised, where it is impossible for journalists to protect sources, where journalists' data becomes vulnerable to overbearing police information, where whistleblowers become intimidated and the vital investigative work that keeps government honest gets chilled out of existence. We were so concerned by what we saw that in May this year we published a white paper on press freedom in Australia. We have included that document as an appendix to our submission to the inquiry. In that document and in our submission we make a number of recommendations for legislative reform, starting with a media freedom act. We regard that as essential to establishing the principle of press freedom and accountability in law, with narrowly focused exceptions for national security and privacy carved out. We acknowledge that there may be more that could be done, but we also believe those recommendations go a long way towards addressing the issues that we and so many of our colleagues have articulated in the submissions now before the inquiry.

Three weeks after we released the white paper, the now infamous AFP raids confirmed almost everything that we set out there and dramatically brought the issue to public attention. I will not go into our recommendations in detail, but we are happy to take questions about them. There are a couple of points that I would further like to make here. Firstly, the AJF acknowledges the vital importance of giving security services the tools they need to keep Australians safe. We recognise that we live in a world where the threat of terrorism is a clear and present danger, and that governments must have the capacity to keep some things secret.

Secondly, we contend that one of the reasons Australia is one of the safest, most prosperous and successful nations on Earth is because we have a robust system of democracy that includes a lively, independent and at times rabid free press that is capable of holding powerful to account. If in the process of protecting our physical safety we undermine the very foundations of our political system, we believe that national security is not served. We are not advocating for completely unfettered media freedom or radical transparency, but we do believe there is a better way of protecting our security that also respects the role of the media in keeping our democracy strong and healthy.

Thirdly, while we welcome this inquiry as well as the work of the PJCIS, we believe that the best way forward is through a task force. One of the problems that lies at the heart of the current crisis is a lack of trust among security agencies, the news media, government and the civil service. A task force that brings all the parties together in a collaborative way is not only more likely to come up with solutions that everyone is happy with, but would also go a long way towards restoring the trust that appears to have broken down in recent years.

Finally, we believe that the work of this committee matters beyond our borders. The submission by the Association of International Broadcasters articulates the international alarm at what the AFP raids revealed. It goes on to talk about the importance of Australia setting an example and having the moral authority to influence less stable democracies in our own neighbourhood. Australia would view similar legislation with alarm if our

neighbours were to introduce it. Setting the standards for liberal democracy by protecting press freedom and encouraging regional stability must also count as ensuring Australia's national security. Thank you.

CHAIR: Would either of you like to add anything before we go to questions? No? You did mention this in your opening statement. Just to be clear, you have included the white paper in your submission, which is very thorough. Thank you for that. You put in all of this effort, you worked on all of this, and this was all before the raids had occurred?

Prof. Greste: That is correct.

CHAIR: So there have been warning signs of this for quite some time, then?

Prof. Greste: Yes, as I mentioned in my opening remarks, we have been discussing and thinking about this for a while. We met almost exactly one year ago, in fact. In my capacity as a professor at the University of Queensland, I hosted a roundtable that brought together some of the leading figures from industry and academia. At the time, we recognised the issues that we have just been discussing. We came to two conclusions. The first is that we needed to draft a white paper, and the second is that we needed a media freedom act. We felt the warning signs were there. As I said, we published this three weeks before. At the university I began a research program that looks at a number of these issues. It looks at unpacking all of the legislative framework that exists when it comes to press freedom and also looking at the lived experience of those laws on journalists. We laid out the conclusions in the white paper. As far as we were concerned, it was obvious for anybody who took the trouble to look. In a way, I do not think any of us here took any comfort from the AFP raids, but they did confirm what we articulated in the white paper.

CHAIR: We heard earlier this morning that there have been 75 pieces of legislation since 2001 that have encroached either on the rights of whistleblowers and/or journalists trying to report what whistleblowers are saying.

Prof. Greste: Just to correct that, that refers to Professor George Williams's count. In fact, that number is old. I think the number is now up to 82, but those were pieces of national security legislation introduced at the Commonwealth level. Some to a greater or lesser extent intrude on press freedom and civil liberties, though obviously not all of them to the same extent.

CHAIR: Yes, that is a fair point.

Mr Wilkinson: The issues are decades old to do with defamation, suppression orders, whistleblower protections and so on. Besides this legislation that has encroached on those areas it has been really impacted by the atomisation of journalism. Not so many years ago there were five publishers in the country. Now there are so many publishers and everybody's a citizen blogger, and many of them boasting to be a journalist. The problem has become exacerbated for those two reasons. When we three sat down after Peter got out of jail, that was what we were talking about. How do we get on top of this? We are on a slippery slide downhill of ever-reducing press freedom.

Mr Flynn: I think that is right. As to the context I think in which to put the 75, 82 or perhaps more when you include some of the broader changes or pieces of legislation that have been passed in this place perhaps since 9/11, we assume that no parliamentarian in this parliament would have said, 'Great. That's fantastic. Here's an incremental piece of law with which we're going to carve away something as fundamental as press freedom.' We are sure that that has not occurred. It is this cumulative effect that has occurred over time when the intentions of parliament may have been, in a rapidly changing and dynamic time, to deal with other issues. There is a cumulative effect, though, on press freedom, for example, or elsewhere, transparency and accountability through the judiciary and the courts, for example. When you get all these pieces of legislation together, you see the situation we have today, which was the conclusion, as you heard, that we came to a year ago at the University of Queensland and that made us drive that white paper of Gilbert and Tobin with the AJF. We released that in May I think three or four weeks before the raids.

Prof. Greste: It was three weeks before the raids.

Mr Flynn: It is that impact. The difference between Australia and some of our allies would be that in those allies, particularly those Five Eyes powers, there were already pre-existing protections in place in most cases—in Canada with a bill of rights, in the United Kingdom particularly with European Union law but also some common law positions and other statutory law positions in the United Kingdom, the First Amendment in the United States, and other laws in New Zealand. But in Australia we followed the same trajectory with respect to national security as our Five Eyes allies—

CHAIR: Without the insurance.

Mr Flynn: Without the insurance and without the backup. Here we are today having this conversation with you. That is the context in which our recommendation for a media freedom act arose.

CHAIR: So, it is the situation of the frog in the pot, so to speak? You mentioned the role and the impact of this slow erosion of journalists' protection, freedom of press and often protection of sources. Journalists cannot do their job unless they get information. You said the impact of this is damaging to a robust democracy. You have released this white paper and you have been out talking. Professor Greste, you are probably the most publicly known example of a journalist who has had to pay a price in Australia at the moment for travelling around and talking about it. Do you get a sense that the community is worried about this? Do they understand that their right to know, their ability simply to trust that what is going on in government agencies is all tickety-boo and, if it was not, someone would say something? Where do you think the community is at?

Prof. Greste: I accept that we are probably way out in front of where the community is at and we need clearly to make the case more powerfully. I acknowledge there is a degree of cynicism about the press. One of the points we have been continually making—and I have found that when we make this point people start to understand—is that we are not trying to advocate for journalists per se. We are not suggesting that journalists are a special class of people that deserve special attention or special privilege. What we are protecting is the job that journalists do in keeping government to account. If we took away a free press, all we would be left with are the Facebook posts and Twitter feeds of our politicians and senior civil servants for our information about what takes place in government.

CHAIR: Civil servants are not allowed to tweet, anyway.

Prof. Greste: Yes, forgive me. Or the press releases. The point is that I do not think anybody feels that that is a great way of running a democracy. Really what we are talking about here is not protecting a particular class of individuals. We are protecting a function that the press plays—the recognised, well established function that the press plays—in a democracy. When we explain that it is the function that is important and the importance of that function to public understanding of what takes place in government and the issue of accountability and transparency, then people get it.

Mr Wilkinson: It depends on the question you ask the public. If you say to the public, 'What do you think of journos?', they say, 'Pack of ratbags. Can't trust 'em.' But if you say, 'What did you think of that story on exposing racehorse cruelty last night?' or 'What do you think about exposing the Afghan Files?' or 'What do you think every time somebody in Rugby League is outed for sex abuse?' They say, 'Go, journos. Expose this. This is really important.' It really depends on the question.

CHAIR: That is a good point. Can I unpack this task force proposal a bit more? Are you suggesting that this would be an accord in some respects between the press class, which we often hold up as the fourth pillar of democracy, with government and the legal system? Is that what you are suggesting? Or is it simply that we need some wise heads in a room to say what a press freedom bill would look like?

Prof. Greste: I will refer this to my colleague here, who has done some more work on this.

Mr Wilkinson: I was a journo for 30 years and then I have run a consultancy working with companies for 17. The big problem in the commercial sector is business people hate journalists, because they interfere. There is a lack of trust everywhere, and the lack of trust was exacerbated by the AFP raids. The idea of the task force was an extension of the idea of a media freedom act, both of which were designed to build trust in journalism. The task force, in our mind, is to bring together key players—security forces, politicians, maybe business, certainly journalists and certainly publishers—to get a common accord and a common sense of understanding. The best way to get people to understand each other is to lock them in a room for a couple of hours so they are talking about issues that they have opposing views on, as you know. Right now, while the PJCIS inquiry and this inquiry are terrific, and really important, what we notice with the PJCIS inquiry is that it actually exacerbated division. It did not do anything to unite. It pushed people into corners, and exacerbated, funnily enough, by the media and the broadcasting of what happened. What we want to do is bring people together so that we actually get to understand what is inside the heads of the people who make strange decisions that we simply do not understand. I am sure there was a logic behind the AFP raids, but I absolutely do not get it and nor do the commercial people I work with. That is the logic of the task force. It is not an instant fix. It does not mean suddenly everybody is going to have trust in the security forces, trust in politicians and trust in journalism, but it is going to go some of the way.

I will just make one other point as quickly as I can. When I was working in the United States, I did not realise it at the time, but now looking back I think the First Amendment, one of the pillars being free press, had a really important effect on journalism. People became journalists because they understood the role journalism played in a democracy, because the First Amendment had been hammered home at school. They really got it and they

understood their role in a democracy. On the other side, looking back, I think the reason we were able to so easily get Americans to appear on television when they should not have appeared, when it was not in their best interests, is that they had also had the First Amendment hammered into them and they genuinely believed that, while it was not in their comfort zone, it was their public responsibility to front up to the media. We do not have that in Australia. We have got a trust deficit that is not in existence in the United States, I personally believe.

CHAIR: Obviously, the trust deficit is rife at the moment. The trust in public institutions is much less than it has previously been. The trust in politics is pretty thin right now. I find it hard to see, from the government's perspective, how they would respond to an inquiry like this and the public campaign that has happened around the need for and support of journalism and the public right to know, and not think, 'Actually it's in our interests to look like we're not trying to hide things', at a time when public trust is so low in government.

Mr Wilkinson: That is the difficult starting point, isn't it? I am sure your media trainers would have counselled you on telling the truth and transparency and the value of it. I am not looking at you, Senator. I am talking to the room.

CHAIR: I am looking at my press secretary. She knows that she has no ability to keep me in line.

Mr Wilkinson: I am talking to the room. Trust is not at the end of a light switch. It is a slowly evolving thing. When I talk to people who are in trouble in the corporate sector, I say, 'It is going to take you five years to scramble out of this one and in that five years you mustn't say anything that is either dishonest or wrong. You've got to be conforming to the community's expectations and that is how you will build trust.' It is the same in this kind of situation. I do not think anybody thinks that journalists are without wrong at all, but nor do I think the security services are lily-white either. I believe they will both be better, in relation to the problem we are looking at immediately, by sitting down together so that they have a better understanding and the public will benefit from it.

CHAIR: We heard this morning from some of the media organisations directly that in fact they had felt they had been promised by government and public officials that as these pieces of legislation were rolled out, passed and voted on in the parliament that exactly what you predicted in your white paper but then also what happened would never occur in Australia; that this just would never happen. 'Trust us' is actually what their response was. 'It's okay. We're not interested in the journalists. We're just interested in making sure that people in Home Affairs keep their mouth shut.' Maybe that is a bit naive, but it feels as though that is what has happened.

Mr Flynn: It would be ironic if the laws that were meant to defend us actually eroded one of the very things we intend to defend in these challenging times. I think that the task force goes to trying to make sure that that does not occur, to the extent that we possibly can. I do not think it does that in a way that would affect in any measure the accountability of people here, hopefully the professionalism of the journalists that would take part in it or the role that the law might play in determining either. It is a very important thing.

You hear and read a lot about some of the challenges, to the extent that they are publicly known or publicly disclosed, we are increasingly facing. I think we all know that the world is changing very quickly. In that place, there needs to be a bit of coherence, not coordination, between government and civil society, business and in particular in journalism around what those fundamental values and principles are. That goes to trust. That is what the task force tries to do. That is what the media freedom act tries to make sure we defend and protect. In a nutshell, that would be our submission.

CHAIR: Agreeing on the red lines, effectively?

Mr Flynn: Quite.

Senator LINES: I have some quick questions to begin with and then I will ask you some other questions. Post the AFP raid, would you change anything in your white paper and, if so, what?

Mr Flynn: That is a very good question. Actually I do not think so. I suspect the question may be better able to be answered once we know the outcome of the investigations and whether any journalists are going to be prosecuted, and once we see the decision of the relevant court. It is premature, in a way, but I think that the calculus around the raids may have been different if one of our recommendations was in place, and that is an exception against prosecution from certain offences where the accused was involved in legitimate journalistic work as a journalist. That calculus would be very different, because in that case the authority or the prosecution would need to show that the exception does not apply. In the case as it stands, to the extent that it is available, the accused may or may not have a defence that is available to them. That defence involves incurring tremendous amounts of expenditure, time and stress to take advantage of the defence that might be available to them. In that case, the advantage, if you like, on the fundamental principle of press freedom is with the prosecution. It will be

that recommendation in particular—the tension there—that I think we would stand behind in the context of the rights.

Mr Wilkinson: We did not recommend a task force in the white paper.

Senator LINES: So, has that evolved since the raids?

Mr Wilkinson: That came after. There was the MFA, the media freedom act, proposal that came out of the University of Queensland, and the subsequent work that Gilbert and Tobin did for us. Then there were the raids and then the task force. We thought, 'Wow! The gap between the conversations here is that big.'

Senator LINES: Mr Wilkinson, you said, which follows on logically from that last comment, that there is a logic to the AFP raids, but no-one knows what it is. Surely if there was a logic someone might have told us about that or written an article about it? There has been nothing.

Mr Wilkinson: So, the imperfect English language. I am sure there was a logic. It is just that I could not see it. Somebody must have been able to explain it to somebody.

Senator LINES: But no-one is able to.

Prof. Greste: I think maybe Peter is being a bit generous to say that someone has made a decision for those reasons and it is just that no-one has been able to articulate those. We are being kind in assuming that there is a logic in there.

Senator LINES: We have asked people today to try to explain that to us.

Prof. Greste: I would be interested to read your report.

Senator LINES: They were not, either. They did not want to present stuff that did not have evidence and so on.

Prof. Greste: It was probably under the blanket of security.

Mr Flynn: One of the perverse things about answering the question may be that, to broaden this out a little bit, if that question were able to be asked in court, if that was something that came up in the prosecutions, for example, or the investigation, if those proceedings were governed by something called the National Security Information (Criminal and Civil Proceedings) Act, ironically it may or may not be the case that that answer would only be able to be given in closed court or in what we would call, in our practice, a superclosed court where not even the defendant was able to hear the answer. We are in this situation where journalistic activity is being dampened, on the one hand, and then there is an accountability deficit also potentially, on the other hand, in the other place where you check and account for that sort of decision. There is a lot going on here.

Prof. Greste: There is one other point that I want to make about this, and this is with regard to the way in which a media freedom act would work. I know some of the previous submissions have pointed out that one of the ABC journalists is currently facing charges of receiving stolen goods under the Defence Act. The idea of a media freedom act is that it would deal with all of these types of loopholes. It would filter down through the legislative framework, if you like. It would not require specific amendments to each and every situation. What it would do is provide an overarching principle that would need to be applied. We would be in a situation where you do not have to physically tweak each statute, and that we have something, a principle that we establish in law, that would effectively cover everything in a way, and we carve out particular exceptions around national security, secrecy and so on where those issues need to be taken into account.

Mr Flynn: That is an important point. Going to your point, Senator Hanson-Young, of politics being the art of the possible, we acknowledge that as well. Also, we acknowledge that there are certain types of in particular Commonwealth but also other government officials who serve us well and put themselves at risk for us. There are certain activities also that need to be protected. Identities and activities of certain types need to be protected. We understand that. It is a matter of getting that balance correct or right, and not allowing the protection of one to become a cover for maladministration or illegal conduct on the other. But we always bear in mind that there are people that put themselves, their families and their own lives at risk in service of us all. That is an important consideration. We are very sympathetic and sensitive to it.

Senator LINES: I think we are as a committee sensitive to that. With respect to this concept of a media freedom act and however else it has been described, how close do you think we are to achieving that with the current government?

Prof. Greste: In the communications that we have had so far—and it has been relatively limited with government—we get the impression that the government is more interested in specific fixes. As to the Attorney General's comments and the directive, I know this has been discussed several times today. While we welcome the directive insofar as it clearly acknowledges a problem, and the Attorney-General would not have issued the

directive if everything was fine and dandy and if there was no need to address the question of the way in which journalists are prosecuted, we do not think that is an appropriate solution. We think there needs to be a legislative principle in place and the decision-making left in the hands of the Director of Public Prosecutions. If that is the approach the government insists on taking, we would be very concerned. Again, that is also why we go back to the idea of a media freedom act, which would not necessarily solve all of the problems on their own. There would still need to be legislative fixes in other parts of the statutes. But it would at least establish that overarching principle. What it would do is restrain legislators or compel legislators to take media freedom into account when you are passing future laws. That would avoid the type of situation we now find ourselves in.

Mr Wilkinson: We think it is a slow burn, anyway. We always thought it was a slow burn.

Senator LINES: Which bit is a slow burn?

Mr Wilkinson: The MFA, the media freedom act. Partly because of the AFP raids it has gained currency that we did not expect. We only proposed it in May and since then it has gained a lot of currency. We are starting a conversation now about how to actually write the media freedom act, and we would expect—

Senator LINES: But who is that conversation with?

Prof. Greste: We are doing some legislative research at the moment through the law—

Senator LINES: But not with government?

Prof. Greste: Not yet. Not at this point, no. We are planning on having some discussions. In fact, next week I am hosting a roundtable of academics, lawyers and industry representatives to try and get a grip on ideas around how we define journalism and journalists to give some sort of clarity that we can perhaps offer also to this committee and to various other—

Senator LINES: We would welcome it, I think.

Mr Wilkinson: We are planning to have something preliminary drafted—not as in legislative drafting, but a preliminary document—by the middle of next year.

CHAIR: A drafting brief?

Mr Wilkinson: A drafting brief.

Prof. Greste: A brief, yes. That is right.

Senator LINES: A number of our witnesses today have talked about the summit you held in Sydney on 29 August, and a lot of them have spoken about the comments made by Bret Walker SC. I know that you had Ita Buttrose there, Michael Shoebridge, a number of Australia's most senior journalists, and Mark Dreyfus, our Labor shadow, was there. Which senior minister attended that conference from the Morrison government?

Prof. Greste: None. We extended invitations—

Senator LINES: You extended invitations?

Prof. Greste: Absolutely. Countless times, both through their ministerial offices but also through the Prime Minister's office. We worked enormously to try to get if not the minister themselves then a representative from the minister to attend, both as I said from the Attorney-General's office, from the Minister for Communications and the Arts, and we were unable. I just want to emphasise that we recognised that we were in danger of looking to be a partisan meeting, and we went out of our way to try to get someone from the government to attend to make sure that we were demonstrating—

Senator LINES: That you had the balance?

Prof. Greste: That we had the balance and we were non-partisan; that this was not an attempt to criticise the government per se or to shut them out of the conversation.

Senator LINES: Did any backbenchers attend?

Prof. Greste: No, and we did extend the invitation very broadly.

Senator LINES: Did you give a lot of notice?

Prof. Greste: Yes.

Senator LINES: So, this was over a period of a month or so?

Prof. Greste: Yes.

Mr Wilkinson: The same notice everybody else got. We made up a list and it included the who's who of decision-makers.

Senator LINES: Yes, it was a very impressive group.

CHAIR: I should just probably put on the record that I was there.

Senator LINES: I am not asking about the Greens, Senator Hanson-Young.

CHAIR: No, but it is important, I think, as the chair of this committee.

Senator LINES: Did you know that on that day Mr Porter was in Sydney?

Prof. Greste: Sorry?

Senator LINES: Did you know that on the day of your summit Mr Porter was in Sydney, 15 minutes away?

Mr Flynn: We subsequently learnt later in the day.

Mr Wilkinson: I think we either knew or knew after.

Mr Flynn: Just after, because there was an important announcement from the Attorney-General that day.

Senator LINES: So, he could have attended; he was not that far away. What do you think the failure of the Morrison government to send anyone at all to the summit—and this summit was about press freedom—despite its notice and your best intentions, says about its attitude to the Australian public's right to know?

Prof. Greste: I would prefer you direct that question to the government. I cannot make assumptions. In the communications we had back the government insisted that it was too busy; that no-one was available. I cannot ascribe any motive to them.

Mr Flynn: It is worth stating that as an organisation we, in our constituent documents and in our policies, are openly and quite stridently non-partisan because of what we are trying to achieve. That is an important point to make.

Senator LINES: Obviously, the alliance was disappointed?

Mr Flynn: Yes.

Senator LINES: It is a lost opportunity, I guess.

Prof. Greste: Again, we reached out because we did not wish either to be seen to be partisan or to create a situation in which the government had no say or had no capacity to be involved in the conversations or answer any criticisms. We wanted to be engaged.

Mr Wilkinson: It was the same for the security services. Michael Shoebridge came along. But we tried pretty hard with the AFP et cetera.

Senator MARIELLE SMITH: I have one brief question in relation to your opening comments. I am just taking you to a different topic. You referenced the AFP raids earlier this year causing alarm not just in Australia but overseas and in our region. I just want to clarify what you mean by that. Are you saying the chilling effect we have seen locally in Australia on whistleblowing, journalism and reporting is not just an issue here; because Australia is a leader in our region, that chilling effect extends to the other nations who look to us for leadership in this area?

Prof. Greste: Absolutely. Australia is broadly seen as a champion of liberal democratic principles. When those principles are violated so explicitly it gives licence to other countries to use our example as an opportunity to impose restrictions themselves. I spoke to the Association of International Broadcasters in London and met their officials. I asked them to make a submission, because I felt that it was important that they gave an external view both on the way in which other countries view the AFP raids and the legislation that we have in place, the influence that Australia has, the impact of those raids, and the current legislation on regional leadership. Also, I asked that they provide some insight into the way that other countries frame their legislation.

Mr Flynn: Perhaps I could answer that quickly with a question. As you heard earlier, I ran the international legal team that assisted with Peter's freedom from incarceration and worked closely with then Foreign Minister Bishop's office and the Department of Foreign Affairs and Trade in that effort. I wonder how much leverage Australia may have lost in the representations that it made to Egypt in the course of the process that we engaged in had these raids occurred prior to Peter's incarceration in Egypt? I just leave that question with you.

Senator McMAHON: We have heard that perceptions of trust in the AFP and the government have been undermined following the execution of the warrant on the ABC. Would you include the media in this assertion and suggest that the media might also have been undermined in the public's eye?

Prof. Greste: In this particular instance, broadly speaking, the public perception appears to have been that the media was the one that was targeted wrongly. That is not to suggest that we do not think the media has a trust problem. We certainly do. But I would submit that in this particular instance, while there may have been some

scepticism, particularly amongst some quarters of the public who are particularly sceptical and who may have felt, 'Look, the journalists had it coming,' broadly speaking I think it was the AFP that came off the worst.

Senator McMAHON: I note that it has been alleged that there was a dialogue spanning some months between the AFP and the ABC preceding the execution of the warrant, yet this aspect was not widely reported in the media. Would you agree that this apparent selective reporting contributes to an element of distrust in the media?

Prof. Greste: You can make those criticisms. I am not suggesting in any respect that the media is blameless or faultless in any of this or that there are not issues of trust. As I have said, we acknowledge very clearly that there is a question of trust with the media. However, what we are arguing for is the principles at stake here and the impact that this has. Regardless of whether or not there were discussions that were not reported, the fact that the raids have happened has had a chilling effect on other whistleblowers, on other sources within government. It has undermined trust within the AFP. It has challenged Australia's position and reputation when it comes to press freedom.

Mr Flynn: As a legal point I would just say that the engagement by an agency with someone being investigated by them prior to either the issue of a warrant or a raid does not change the basis as to whether that raid or that warrant was the right thing to do as a matter of principle. There may have been engagement. Without seeing the correspondence, we do not know. There may have been engagement between the Australian Federal Police, any other agency and the ABC or a particular journalist. That does not change whether the conduct in and of itself was correct.

Mr Wilkinson: I think it is the AFP's fault. If I was back at *60 Minutes* or *Four Corners*, I would have rung the AFP and said, 'Why did you do it? What happened? What happened? What preceded it? What happened afterwards?' In this case we got one very poor press conference, where a guy did not do the AFP any favours.

Senator McMAHON: Professor, you have stated that there is a clear and present danger of terrorism in this modern world and that governments do need to keep some things secret. The need to protect freedom of the press is obviously an incredibly important pillar of our society. There is also a need to protect our national security, which gives rise to our civil liberties, which gives us freedom of the press. How do you draw a line to balance those two aspects?

Prof. Greste: A media freedom act would do it. We are not suggesting that journalists have unfettered access or should be completely immune from prosecution. What we are suggesting is that there be far greater clarity with a tendency towards transparency and accountability, with exceptions in cases where there is a risk of exposing national security information. We think that those exceptions can be very clearly and narrowly defined. We also believe in the idea of exceptions that compel the authorities to show why the public interest defence would not apply before executing a warrant and before being granted a warrant. That is a really important principle and we think it would have dealt with the AFP raids very clearly. We think there would have been no demonstrable risk to national security, and there is a clear public interest in those stories being exposed/aired. We also think that if there were circumstances in which there was a genuine risk of classified documents being released a judge would be very happy to issue a warrant. We are not suggesting that there be a blanket exclusion for journalists under any circumstances.

Mr Flynn: When we think about national security, it is often very broadly defined in the relevant pieces of legislation. Somewhat unhelpfully, it is defined differently in different pieces of legislation. When we think of it as citizens, what is it that we are trying to protect? As you point out, Senator—and I think you are right—this is certainly one of those things that makes us different in the world and certainly in our region. I was listening to the Prime Minister speak at the Lowy Institute a few weeks ago about the challenges that Australia faces, which effectively you allude to in your question. They are important challenges. We have our work cut out for us here over the next 50 to 100 years. There is no doubt about that. It would be a great shame, as I said, if in seeking to protect ourselves or ensure that we are best placed to weather those forces over that time we actually eroded the very things we sought to defend. That is the balance. As Peter said, the MFA would not throw a blanket over national security. That is not the intention. We are sympathetic to it. In particular, when it comes down to the identities of certain types of officers and certain types of conduct, activities or operations. However, that should not be allowed in the way that the legislation has changed, particularly in the last 18 years, to provide a place where the normal traditional accountability that we get in a parliamentary system like this is not preserved. That is what we seek to do.

Senator LINES: Is it fair to say, too, in terms of any contraction in media freedoms here, delicate stuff could easily be published in another country?

Mr Flynn: Certainly, that occurs.

Senator LINES: Yes.

Mr Flynn: That is right. There is a real difficulty with the way that sensitive information may be protected when it is already publicly available elsewhere.

Senator LINES: The Pell case—

Mr Wilkinson: The George Pell suppression order was a classic example. It made a bit of a farce of the suppression order.

Senator McMAHON: Finally, you have stated that you are aware that the Attorney-General was in Sydney during the summit. Are you aware of his detailed obligations and movements on that day?

Prof. Greste: No, we are not. As I said, we extended the invitation principally to the Attorney-General himself, because obviously we would have preferred to have him there, but also to any other representative he would care to nominate.

Senator McMAHON: Would you agree that it would be grossly inaccurate and unfair to state that he could have attended on that day, as my colleague did?

Prof. Greste: As I said, we did not make that claim. I simply said that we had nobody from the government, whether it is the Attorney-General's office or any other department or backbencher.

Senator VAN: Professor, I do not want to put words in your mouth, but I feel it is safe to say you were stating before you think the AFP has a role to play in national security?

Prof. Greste: Yes, absolutely.

Senator VAN: It would be fair to say that?

Prof. Greste: Yes.

Senator VAN: Do you also think it is then fair to say that they should be stopped from performing that role at any point in time?

Prof. Greste: Only to the extent to which it does not intrude on other civil liberties and rights. The AFP has to respect those restrictions.

Senator VAN: How would you set the priorities?

Prof. Greste: I am not quite sure I understand the question.

Senator VAN: Are individual liberties higher than national security or is national security higher than individual liberties?

Prof. Greste: I am going to refer you to my lawyer.

Mr Flynn: I think I gave you the context or the colour of our position when I answered your colleague Senator McMahon's question. I am not sure that it needs to be as binary as that, firstly. Secondly, I am not sure that it is up to the AFP itself to make that determination. Although it is obviously an independent agency, it is not up to it to make that determination, it is up to all of you.

Senator VAN: Surely you would agree it is better them making it than having politicians driving that?

Mr Flynn: I understand that. But the framework within which they work, which we propose should be amended by a media freedom act, is something that is for our elected parliamentarians to put in place, hopefully, and then the AFP will work within that framework, as they always do.

Prof. Greste: There is also a role for the judiciary to play in this in determining when a warrant is appropriate or not. What we are arguing for is a set of conditions and circumstances to measure when it is appropriate to issue a warrant and when it is not. Again, we are not suggesting that journalists be completely exempted from prosecution or investigation. What we are saying is that there are certain principles that ought to apply when considering whether or not to investigate and prosecute.

Mr Flynn: In that position the AFP would, in determining whether there was a reasonable likelihood of successful prosecution, need to determine whether the exception applied or not before they undertook that activity.

Senator VAN: This is my perception, and you may have a different one. It has really only been since these raids that media freedom has come on to the radar. I am just stating my perception. I am not asking for a response to that. Do you think it is fair to give the government time to review this area and consider responses, take evidence, and give a wholesome considered view of whether legislation is necessary and then what that legislation should look like?

Prof. Greste: I am happy to give the government time. We addressed this earlier, and I think you were out of the room at the time. We released the white paper which articulated/explained that national security legislation criminalised a lot of otherwise legitimate journalism. The white paper said that it was almost impossible for journalists to protect sources. The white paper said journalists' data was vulnerable to unnecessary and overbearing investigation. We published the white paper three weeks before the raids. That was because we recognised that there was a problem. As far as we were concerned, the problem existed. It was clear to anybody who cared to look that there was a problem. We started talking about this more than a year ago. We produced the white paper precisely because we felt that there was an issue that needed to be addressed. The raids simply confirmed everything that we had said previously.

Mr Flynn: We will never know how many stories were not published before the raids because lawyers in editorial rooms said, 'You can't do that because you may end up with a very serious or significant custodial sentence, and you are on your own if you want to defend it.' We will never know. It may or may not be the case. We will not know one way or the other.

Senator GREEN: Or how many stories are sitting on tables right now.

Senator VAN: Just to finish off, you do agree the government is deserving of time to consider this?

Prof. Greste: I do agree, but what I am suggesting to you, though, is that it is a new problem only because people have become aware of it from the way that the raids have elevated it. We could see the problem.

Senator VAN: I understand your point.

Prof. Greste: I am very happy to give the government time. We are not saying it has to be done tomorrow, but there is a degree of urgency around this as well.

Mr Flynn: It bears making the statement that the many, many laws that have delivered us to the place we are at now have been passed by parliaments of both persuasions.

Senator VAN: Of course. That is understood. But the point about timing was what I wanted to establish.

Mr Wilkinson: The difficulty with the Attorney-General's direction—

CHAIR: We might finish here. If there is anything that you took on notice or need correcting, please let the secretariat know. We appreciate your submission and your constructive suggestions. We will consider them with other witnesses as well. Thank you.

LIDBERG, Associate Professor Johan, Director, Master of Journalism, School of Media, Film and Journalism, Monash University

MULLER, Dr Denis, Senior Research Fellow, Centre for Advancing Journalism, University of Melbourne

[15:19]

CHAIR: We will bring forward to the table Professor Johan Lidberg and Dr Denis Muller. I understand information on parliamentary privilege and the protection of witnesses has been provided to you. Dr Muller, I remember studying your textbooks at university.

Dr Muller: Thank you.

CHAIR: Do both of you have opening statements?

Dr Muller: Yes, we do. We thought I would go first. I would like to begin by thanking the committee for the invitation to attend. I do genuinely regard it as a privilege to be here. We have set out in our submission what we see as essential to redress the trumping—shocking word—of press freedom by considerations characterised as concerning national security. I emphasise 'characterised'. I am not going to rehearse those arguments here, but I want to state some basic principles which I argue should guide you in arriving at your recommendations. John Locke, in his *Second Treatise of Government*, wrote of political power being held in trust on behalf of what he called the sovereign people. This concept of trusteeship is central to democratic arrangements. The sovereign people are to be the judges of whether the trustees, which are the parliament and the executive branch of government, act well or act badly. They cannot do this unless they are properly informed about what the trustees are doing. In today's democracies, it is the press that informs them.

This is a democratic institutional function recognised since at least 1795, when Edmund Burke, the great Irish conservative, stood up in the House of Commons and referred to the press as the Fourth Estate of the realm. But in order to perform that democratic institutional function, the press must be free of oppressive constraints. Freedom of the press has two dimensions, freedom to gather information and freedom to publish it. If either is missing, freedom of the press cannot exist.

The PJCIS inquiry heard statements to the effect that, while freedom of the press is acknowledged, people who supply government information to the press without authorisation should be jailed. Those statements reveal a convenient misunderstanding of what the term 'press freedom' means and ought to be disregarded by you for that reason. At the same time, I acknowledge that press freedom is not absolute. It is rightly constrained by John Stuart Mill's harm principle. But given the essentialness of free press to democratic life, the harms that justify constraints on press freedom should be correspondingly serious. Harms such as a clear and present danger to national security or public health and safety, for example. Even here it is necessary to apply a public interest test. Our submission addresses these concerns in some detail and offers what we regard as some reasonable definitions of the terms 'national security' and 'public interest'.

Democracies are living through a crisis. Part of this is the crisis in the media, both the financial stability of the media, and also in our context freedom of the media, and partly a general crisis in public trust in institutions. The English philosopher AC Grayling has written a book called *Democracy and its Crisis*. He says that crisis has many causes, but one of them is this: the failure of those in government and politics to maintain the transparency, communication and explanation that the task of leadership imposes.

Two American political scientists, Steven Levitski and Daniel Ziblatt, in their book *How Democracies Die*, focus on the polarising effects of social media, but also on the breakdown of what they call institutional forbearance. In that context, they write this:

Institutional forbearance can be thought of as avoiding actions that, while respecting the letter of the law, obviously violate its spirit. Where norms of forbearance are strong, politicians do not use their institutional prerogatives to the hilt, even if it is technically legal to do so, for such action imperils the existing system.

We say successive Australian governments have, since the attacks of September 11, 2001, incrementally weakened their institutional forbearance in respect of the press's role in the Australian democracy. The evidence for this is to be found not only in the laws now under review, but in the bureaucracy's culture of punitive oppression towards the press already revealed in the PJCIS inquiry's hearings.

A couple of weeks ago this bad situation was made worse by the government's proposal to politicise decisions about whether to prosecute journalists for publishing government leaks by giving the Attorney-General the power to decide such matters. This means that a government already aggrieved by an alleged breach of its secrecy now has the power to decide whether a prosecution for that alleged breach should proceed. This is an assault on the independence of the legal process and for that reason is seriously antidemocratic.

A thoroughgoing review of this interlocking web of laws, by which I mean the national security laws, the secrecy of information laws, the metadata laws and the public interest disclosure whistleblower laws, is indispensable towards remedying the position in which the freedom of the press to report on matters of public interest is in peril. Thank you.

Prof. Lidberg: I too would like to thank you for the opportunity to appear today. It is always a privilege, as Denis pointed out. I appear before you today with a bit of a mixed background, as I set out in our submission. Part of that mixed background is that I am Australian-Swedish. I worked for 10 years as a journalist for various Swedish media before migrating to Australia. I have that mixed background, and it is that that I focus on today and bring to you, hoping that we may possibly also lift the gaze beyond the English-language world. There is a lot more out there, as I am sure you are aware.

My opening statement will focus on the international context. I should also point out that I am one of the rapporteurs to the Press Freedom Index. I will be putting my thoughts forward on that too. I can only agree with what was said before. I anticipate Australia will fall a number of positions on that index next year, if not only for the international feedback I am getting. There was a lot of collective headshaking around the globe. I must have given close to 20 interviews after the AFP raids, and probably six of them were international outlets.

As you would have seen in our submission, we point out that Australia stands out severely not only compared to the Five Eyes intelligence sharing group but also compared to all mature liberal democratic systems in the world on the following points. Point No. 1—and this has been covered in some depth today—the number of international security and anti-terror laws, new or amended, passed since September 11, 2001, on last count, 82. That is more than any other liberal democracy by far. At its peak between 2001 and 2007, the Australian Federal Parliament passed or amended national security laws every six weeks, according to University of New South Wales law professor George Williamson. In 2011, University of Toronto law professor Kent Roach characterised Australia's response in the decade following September 11 as being one of hyperlegislation. This makes reporting on national security a legal minefield in Australia, limiting journalists' role as agents of accountability. We also predicted this in our book that was published last year, but this is not new. This has gone on for the past 20 years. To ask for more time I find a bit hard to understand; we know this has gone on for a long time.

Point No. 2 is whistleblower protection or lack thereof. This has been covered also in depth today. I want to set out the international continuum. You can see one exists, and in our book we identify Australia as being at one end of this continuum, where whistleblowers are pursued, at times even hunted, by government agencies instead of being thanked for doing their civic duty. On the other end of the continuum, which can be represented by for instance Sweden, whistleblowers enjoy very strong protection. It is in fact illegal for government agencies in Sweden to investigate the identity of any whistleblowers. That is the absolute opposite to the situation that we have in Australia.

I just want to point out here that, again, Australia stands out, and we should ask ourselves why. Places around the globe with strong whistleblower protections are not anarchic entities falling apart. They are functioning very well, thank you very much. The current list of legally hunted whistleblowers is long and goes beyond national security. This is really important. We are watching a creep here. An example is set by how we treat whistleblowers in national security. That spills over, as I am sure Professor Brown pointed out this morning.

Just to mention a few, we have had Witness K and his/her lawyer, we have David McBride, the whistleblower in the Department of Defence, and outside national security we have the former ATO staffer whistleblower Richard Boyle, who was here this morning, who faces a long potential jail term. Also—and this is extremely chilling—we see Murdoch University going after Professor Gerd Schroder-Turk for speaking truth to power in that case. I am happy to talk more about that in detail if you want.

It is important to make the point that it goes beyond national security. From an international perspective, our treatment of whistleblowers is an embarrassment. It really is. When you compare how it could be done, we do not come across well. If the current situation continues, whistleblowers will become increasingly hesitant to come forward—and not only to speak to journalists, which is usually, as we have said today, the last resort; they may not even want to speak to their superiors, because they are too scared. That has serious implications for our democratic health.

Point No. 3 is access to freedom of information. Of our Five Eyes colleagues, the US, Canada, the UK and New Zealand, only Australia and the UK exempt their intelligence and security agencies from freedom of information. That is a very important exception. In the vast majority of mature democratic countries where FOI applies to the intelligence community, anarchy does not reign, terrorists are not winning, and intelligence officers can still do their jobs. Most importantly, journalists are not dependent, as was pointed out before, only on whistleblowers when holding security agencies to account. There is a whole chapter in our book, chapter 6, on

this which does an international comparison. We need to reflect on and reassess why we have made the security and intelligence agencies exempt from FOI in Australia.

The fourth point is a bill/charter of rights and a media freedom act. There is a common conclusion that there is a hole in our legal and democratic system, when you put this into an international context. That is how serious this is. I have done research in the area for more than 20 years now. I look at what my colleagues do both in Australia and internationally. We come back to the same conclusion time and time again. If we had a bill or a charter of rights in the Australian Constitution we would not be where we are now. Such an instrument is important because it acts as a check on bills and legal amendments proposed. The lack of such an instrument, in my assessment, is most likely the strongest contributing factor to why Australia resorted to hyperlegislation after September 11, 2001.

In conclusion, I would like to mention the Tshwane principles we refer to in our book. I will supply the committee with a soft copy of this. The principles were researched and negotiated over a number of years by 22 organisations and academic centres in consultation with more than 500 experts from 70 countries. The 50 principles were agreed upon and launched in the South African city of Tshwane in 2013. The main aim of the principles is stated as:

The global principles of national security and the right to information were developed in order to provide guidance to those engaged in drafting, revising or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information.

I am hoping they will be a good instrument for you. It continues:

They are based on international, including regional and national law standards, good practices and the writing of experts.

I do not have time to go into the principles here, but I am happy to do so during questions if you want to. It suffices to point out what we say in our book:

The most important part of the principles is that they reverse the onus of proof as to why information should be released or withheld. Currently the journalists or whoever requests the information have to prove why it should be released. The Tshwane principles argue that the opposite should apply.

Considering and applying these principles in combination with a possible bill or charter of rights or a media freedom and civil liberties act would go a long way towards improving the current imbalance that we are seeing between national security and governance on one side of the seesaw and transparency, accountability and civil liberties on the other side.

Finally, this goes beyond media freedom. We have heard a lot about journalism and media today. I view that as the litmus test, as the forerunner. If we allow that to erode, we will see other civil liberties eroded, too. Lately some ministers have suggested that the rights to demonstration and protest should be curtailed. I see this as much wider than media freedom. I see it as the start of something much more serious. Thank you.

Senator GREEN: It is not often we have a witness start with a John Locke quote. Thank you, Dr Muller. There is another quote, which I think is Lord Acton, quote about power corrupting but absolute power corrupting absolutely. That is something I think about when we talk about the balance between safety and the right to know. I think it is really interesting that you have raised that today. I just wanted to bring you to something you mentioned in your submission. I am just keeping track of where we are at. We have been talking about two separate cases today quite a lot around the raids that occurred. You also mention another story that came out around the same time. I will just refer everyone to that. It is the third case which arose from a leak of information concerning security implications arising from the passage of what has become known as the medevac legislation. You go on to state:

... coincidentally the *Australian* newspaper published a substantial leak about stated security implications of medevac laws. The leak was of such magnitude that Duncan Lewis, the Director-General of ASIO, made a public statement strongly protesting against it, because as reported it represents a serious damaging breach of security.

You state this case because it is, as you say, evidence that secrecy laws are hostage to political considerations. Can you elaborate on that and why you felt it was important to include that case in your submission?

Dr Muller: I think you have raised in that question a very important point. When I referred to 'political considerations', it is not possible to know from outside. It clearly is political, because that was the one of the big three cases where the AFP did not investigate. It was a leak to *The Australian*. It played into the Prime Minister's strategies at the time to raise the tocs in about the medevac legislation. He went to Christmas Island, reopened it for 24 hours and so on. Clearly, there was a political decision made at some place about whether that particular leak should be investigated. Even in the face of Duncan Lewis's remarks, it is not possible to know whether the decision was made at the government level in the ministerial office, which I rather suspect it was, or by the AFP.

The particularly important, I think, underlying point in your question is that it opens the AFP to the appearances of acting politically. I think that is probably very unfair on the AFP, to be honest. You can see how when there is an apparent inconsistency in the way the law is applied that it opens up the possibility that the AFP is acting politically. I suspect, in fact, there was no reference to the AFP by the government and so the decision not to proceed with an investigation was made in either the minister's office or the Department of Home Affairs. But the underlying point is a very important one.

Senator GREEN: This feeds into public trust—not just trust in institutions and politicians but trust in the media as well.

Dr Muller: Yes, trust in the police.

Prof. Lidberg: In our book we actually call this the 'trust us' dilemma. I am the first to acknowledge that for governments to run properly in certain aspects of national security issues they do need to keep certain things secret. But you should only keep things secret that you have to keep secret. That is the main point. Think carefully about what you keep secret. If you go beyond what you need to keep secret, you undermine general trust and you also create this 'trust us' dilemma where you say, 'Trust us to keep you safe, but we're not going to be clear on how we do it.' How are we supposed to trust you if you do not know how you are going to do it? That is the 'trust us' dilemma. It is almost a paradox.

Senator GREEN: I think my colleagues have questions about the interviews you did internationally and the reputation of Australia. I will let them cover those. Can you comment on the difference between, as you referred to in your submission, American laws around disclosure of information and how they apply to security agencies? I know you spoke about that in your opening statement. Can you speak to that a bit more?

Prof. Lidberg: The base here really is how the access to information system applies. As I said, I have done research on this for 20 years and I still cannot understand this. Even in reading the early works of the first freedom of information laws in 1982 and the Commonwealth and Victorian ones, it is still unclear to me why Australia decided to exempt national security and anti-terror intelligence agencies. That is unclear to me. As I said, in the vast majority of other liberal democracies they apply, and not in a completely open way, but Australian journalists or anyone from the Australian public can use the US Freedom of Information Act. You can FOI the CIA, for instance. It will take time; lots will be redacted. There has been a number of cases where some really important information came out of that. That sends a message of openness rather than secrecy. Having these blanket exemptions of agencies in several of our acts around the country sends a message about secrecy and also about trust. I understand, again, that you cannot get everything, but it looks really strange from an international best practice perspective that we have those. This is not the first time that we have raided media organisations in this country. It goes back to the 1990s. I am sure we remember that we jailed a number of journalists and then we got rulings in the High Court that semi-protected it. But this case was so flagrant because, firstly, the topics reported on were so clearly in the public interest. Secondly, it was very hard to see how national security was harmed. The international reaction was a collective shaking of the head. In a way, it was interesting because it was the first time in a long time that it generated so much international interest and it has led us really to discuss it more seriously here, I think.

Senator GREEN: Do you think the Australian public would find that quite shocking, that the sense of openness is different in America than it is here?

Prof. Lidberg: The sense of openness is different in most countries apart from the United Kingdom, which we share this culture of secrecy with partly via the Official Secrets Act. We do not have that here, but we have remnants of it in legislation. The Australian public? Maybe, but I honestly do not think Australian media have done a particularly good job of explaining to the general public why this is important. As to how this is about protecting media and journalism, if you listen to talkback you hear people calling in saying, 'Why should journalists be protected specially?' I do not think it is about that. To answer your question, I am not sure that the Australian public, as Peter Grete was saying before, care that deeply. However, what we need to explain is that this goes beyond media freedom and actually applies to civil liberty.

Dr Muller: There was some research on this issue a couple of years ago. This was in 2014, after another raft of security legislation had gone through. It showed that the general public do not care much about journalists or cannot see how any of this impinges upon them until there are questions that raise in their mind the possibility that they themselves might get tangled up in the machinery. When that happens they get alarmed quite quickly. If they can see a possibility that they might get caught, then they are concerned; otherwise they think that, if you have nothing to hide you have nothing to fear.

Senator GREEN: As you were giving your opening statements, I was thinking that we have been talking a lot about national security laws and how they affect press freedom. I was just wondering about the culture of government as well or the culture of our political society and the way that we talk about journalism. It is sort of what you are touching on here in terms of the Australian public's perception of how important press freedom is. When we use terms like—and we spoke about this this morning—'Canberra bubble' or we dismiss things as gossip or as fake news, I consider that that erodes the public's trust in what the media is reporting or even the questions they are asking. You are academics in this area. Have you done any research into the culture of press freedom on top of the laws that we already have?

Prof. Lidberg: We can point to what has been done in the UK and the report that came out on the impact of Facebook, Cambridge Analytica and so on in the last few elections there. What that concluded actually led to—and the UK parliament as you know, I am sure, is having other issues now.

Senator GREEN: Just a few!

Prof. Lidberg: What that led to was actually that there was a completely bipartisan agreement in the UK Parliament to stop in the chamber using the term 'fake news'. It is not used anymore, simply because of the reason that it pollutes public discourse. To answer your question, fake news is nothing new, as I am sure you are aware. Misinformation/disinformation goes back at least hundreds, possibly even thousands, of years. It is just that the 'fake news' term is semi-new and sort of attached to it. So, yes, there has been research done. There has not been a lot done in Australia, as far as I am aware.

Senator GREEN: Isn't the difference that that term is now being used to describe actual genuine news?

Prof. Lidberg: Yes, that is a huge issue.

Dr Muller: It has been commonised by President Trump.

Senator GREEN: Donald Trump does it a lot.

Dr Muller: I did some work for the Finkelstein inquiry in 2011. I looked back over 50 years of public opinion polls on this question. What I found was that trust in media has always been at a relatively low level, with trust in newspapers at the lowest and trust in the ABC at the highest. It is kind of a continuum over 50 years that trust in the media is not high. I was a practising journalist for 27 years at *The Sydney Morning Herald* and *The Age*. That is to a large extent down to the media playing fast and loose with public trust over a long period. There are many factors at play here.

Senator VAN: I am glad that you have pointed out over that 50 years that trust has been at an all-time low in the media, and I think that continues. You made the point that the public are only going to get interested in this topic if they see it may affect them. Professor Lidberg pointed out that the media is going, 'Well, it's not affecting them.' Going back to your original question, Senator Green—forgive me, it's gone!

CHAIR: Let us know if it comes back!

Senator VAN: Sorry, I have to leave to go to something else.

Prof. Lidberg: Just very quickly on the trust in the media, I am not saying that it should have low trust, but it is partly in media's role, and we may talk about the possible task force later. The media should not be allies with anyone. You should not wear poor trust as a badge of honour, but I do not think an effective media can ever have super-high trust. Sorry.

Senator LINES: You have been sitting in the public area for quite some time. I have asked a couple of our witnesses about this issue of the AFP raids and why they occurred. I think you go to it in your submission at page 15. You are quite open that you think there is a political nature to the raids?

Dr Muller: Yes.

Senator LINES: I am happy for you to expand on that, but why do you think there has been reluctance from other witnesses? I agree with you; it seems to me to be political. I am an opposition Labor senator, but it does not seem to be rocket science to me. I am just wondering two things. Why do you arrive at that conclusion? Secondly, why do you think others in the room today have been reluctant to put that proposition?

Dr Muller: I cannot answer for others.

Senator LINES: No, I just want you to speculate on that, if you would.

Dr Muller: Our assessment of the political nature of the AFP raids rests on looking at the range of cases where the AFP either has or has not conducted raids. It comes back to the issue that Senator Green raised at the start.

Senator LINES: Yes.

Dr Muller: When you have a case where the head of ASIO says this is a serious breach of national security and no AFP investigation into it ensues and, on the other hand, you have a disclosure two years ago about possible war crimes by Australian forces in Afghanistan, with a matter of the highest public interest becoming the subject of prosecutions, what conclusion could you come to other than that there has been a political calculus made about this? And similarly with the Smethurst story. Again, it is a bit over a year since the story appeared. Any alleged harm to national security must surely have occurred in the one or two years since those stories were published. It is impossible to see what other explanation there is.

Prof. Lidberg: There is also an indirect political connection here. This goes to all sides of politics, by the way. As we have heard throughout the day here and as we point out in our book, we have seen what we call a web of laws that has been created since September 11, 2001. You cannot just say that the AFP operates completely independently. It does on a sort of day-to-day basis, but they operate within this legal framework that has been created over 20 years. Only every now and then—and not very seriously, I would submit—have we stopped to really question: is this necessary now? Do we need to have this level? That is why it is intrinsically political. Even though the AFP is every day apolitical, they operate on parameters set by the lawmakers.

Senator LINES: The other point that you made, Dr Muller, was talking about more recently, after the raids, that the Attorney-General has inserted himself in the middle and he is going to decide on some, although very limited, matters. On the day he made that announcement I tweeted to say I thought that was a pretty outrageous proposition, that a politician would be the decider of whether someone is prosecuted or not. You actually made the comment in your opening statement that you thought it was made worse by his intervention. Again, I contrast what we have heard from media representatives today, 'Well, it's an acknowledgement by him that something is wrong.' You have just dismissed that in a sense and gone to, 'It's made worse.' Can you expand on that?

Dr Muller: I think my friend and colleague Associate Professor Simons was speaking more or less in hope more than anything else.

Senator LINES: I do not want to single anyone out. That comment was made a number of times.

Dr Muller: Was it? I think it is made in hope that the Attorney-General will make a decision not to prosecute. I think it was Professor Greste who said—and he is right—that this is a matter of principle. Whether in this particular case he makes a right decision is not to the point. The point is that it is not a function of a politician to make what is a legal decision, even if he is the Attorney General. That is for the independent prosecutor's office and the courts. I do not know that you can actually make it out as a breach of the separation of powers. Nonetheless, the principle is that a politician should not do it, particularly when the politician is an aggrieved party in the matter.

Prof. Lidberg: On any side of politics. It is an exceptionally bad idea regardless of who is actually the AG at the moment. That does not matter. It is a really bad idea.

Senator LINES: The whole principle?

Prof. Lidberg: Yes.

Senator LINES: From the perspective of the media organisations in the room, do you think they are perhaps a bit naive to see it as a ray of hope that the AG has at least acknowledged there is an overreach or that something needs to change?

Prof. Lidberg: They are pushed. They are clearly really pushed at the moment, and are in a situation where they are haggling, actually.

Senator LINES: What do you mean by that?

Prof. Lidberg: We have three journalists who potentially could be charged here. They have a responsibility. They have a duty of care, actually, over those three journalists.

Senator LINES: Are you suggesting the government does?

Prof. Lidberg: No, their employers. I cannot believe that we are sitting here talking about the fact that three journalists, for doing their job, for reporting in the public interest, still have not been cleared over this. It is completely outrageous.

Senator LINES: Thank you. I do not have any further questions.

Senator McMAHON: Dr Muller, you have stated that the decision by the AFP not to investigate the medevac leak is a political decision and that there can be no other explanation. I put it to you that it was assessed and the decision not to proceed was due to the sheer number of people that had access to that information, and there being limited prospects of identifying a suspect. Why can you not see that as being a valid explanation?

Dr Muller: I think the number was 200. So, 200 people have been in on the emails. Given that the head of ASIO had said it was a very serious breach, I would have thought that was not an insuperable barrier to the AFP's investigating. As for the assertion that there were limited prospects of success, that would depend entirely on the willingness of those in government to come forward as witnesses. Unless there has been a reference from in this case the Home Affairs Department to the AFP to investigate the thing, the AFP is entitled to conclude that there will not be any witnesses coming forward, and therefore the chances of a successful prosecution are very small. But it does not get around the fact that the underlying factors, the failure to send a reference to the AFP, was not a political decision. I do not think it gets us out of the politicisation of the decision making, even though I accept that the AFP did at least say that, yes, there are 200 people in on the emails and it would take a lot of resources. So what?

Senator McMAHON: What actually is an acceptable number of people to investigate?

Dr Muller: Whatever it takes to prosecute what the head of ASIO says was a very serious leak. I do not know. There might not be a ceiling on the number. I would not have thought that a list of 200 emails would be an insuperable barrier to a police force, myself.

Senator McMAHON: I would suggest to you that if you do not know what that number is you cannot possibly know that 200 is reasonable?

Dr Muller: It is just not a very high number, that is all, when you consider what police investigations often involve.

Senator McMAHON: You have stated that the involvement of the Attorney-General is undemocratic, and that you find it quite unusual for the Attorney-General to consent to prosecution. Why is it that you find that so unusual, when that is the case for a number of offences that do require the Attorney-General to consent for it to go to prosecution?

Dr Muller: I am not aware of the range of matters that the Attorney-General is empowered to make final decisions upon, but we do know that this area of national security is one of them. It just seemed to me that, as a matter of principle, certainly where prosecutions of the media are concerned, and in particular where the government is an aggrieved party, it is a conflict of interest, apart from everything else, as well as being antidemocratic in principle, that the Attorney-General, a politician, should have the power to make a decision on this, when in fact, up till the other day when he made this declaration, that decision was left in the hands of the Office of Public Prosecutions, which in my view is where it should rest. I do not think the fact that the Attorney-General has this power in other areas makes it right that he should have the power in this area.

Prof. Lidberg: That brings us back again to the media freedom. I would like to call it a media freedom and civil liberties act, rather than just media freedom. Again, if we end up calling it media freedom, it is going to become hard to explain to the public yet again. That brings us back to that. If we had such an act or a bill of rights, that never would have happened. It would have been a breach, more than likely, of such an act or such a bill of rights. You can see how we come back to this time and time again. We probably would not have had this hearing had we had a bill of rights or a media freedom and civil liberties act.

CHAIR: I thank both of you. We have your submissions, and it has been a good conversation. If there is anything that you want to add—I am not sure that you took anything on notice?

Prof. Lidberg: It was just the Tshwane principles that I sent in. I will put on the record that if there is a need especially to make an assessment of what is available internationally—there is no point in reinventing the wheel—I am very happy to work with you if that is needed.

CHAIR: That might be helpful. We will have a conversation about that. Thank you very much.

LIDBERG, Associate Professor Johan, Member, Journalism Education and Research Association Australia

[16:15]

CHAIR: Do you have an opening statement?

Prof. Lidberg: Yes, I do. I will skip through some of it because I do not want to rehash things that we have been through all day here.

CHAIR: You can table it as well.

Prof. Lidberg: There are just a few things.

CHAIR: Let me be clear. Reference what you want to now, but you can table the whole thing.

Prof. Lidberg: Okay. Good. Thank you on behalf of the Journalism Education and Research Association Australia, from now on referred to as JERAA, because it is a very long thing to say, for inviting us to give evidence before this committee. I would like to start by acknowledging our colleague Professor Mike Pearson, who is a life member of JERAA and who led the writing of the submission but could not appear before the committee for family reasons today.

It is timely that this follows on from my and Dr Muller's submission just now. At the core of this submission it connects back to what Associate Professor Simons was talking about before: who is a journalist and who does journalism? There are two issues that I would like to draw your attention to. The first one is the fact there are differing definitions of journalists in different laws. In our submission, we compare how the Commonwealth shield law applies to journalists—it is legally the Evidence Act, of course—and its Victorian counterpart that differs greatly in defining who is a journalist. As was pointed out before, this is problematic in terms of who actually enjoys protection or some level of protection in different laws. This, in turn, is connected closely to media diversity, and this is probably the main thing that I want to bring forward here. The thing is that, with our increasing media concentration/ownership that is happening in Australia, mainly because of the changes to media ownership rules that have gone through parliament in the last few years, if we do not come up with a way to acknowledge more and new journalism we will have an increasingly shrinking pool. We will end up with a public discourse that is incredibly limited. If it is true that Murdoch is moving into Western Australia, we are not far off having three main legacy media owners in Australia, which is frankly a horrible situation.

CHAIR: Three being?

Prof. Lidberg: You have ABC, Nine or the commercial networks, but I am really talking about the ABC, Nine and then the Murdoch sphere.

CHAIR: I wanted to be clear that we were saying three with the ABC?

Prof. Lidberg: Yes. We are not there yet, but it is on the cards and it would surprise me greatly if that is not where it is moving. My point is that we should support new and emerging voices and journalists—for instance, as we point out in our submission here, journalism academics. I consider myself both a journalist and a journalism scholar. As was pointed out before in the previous submissions, there are quite a few new and rising publications. At Monash University, for instance, we have a publication called *Mojo News*, which is getting real traction in terms of adding diversity to reporting. We need to find a way to make sure that we support that, too, not only financially but also when it comes to the rights and protection of journalists.

I would put forward that the harmonisation of journalism shield laws that was raised before across all jurisdictions in Australia is really important. This is not rocket science. We have done it before. When we harmonised the defamation laws in 2006 we made that work reasonably well. This should be able to be done as well now. Also—and this is probably the most important part of this submission—we proposed the introduction of a uniform public interest journalism threshold that applies across all laws that are relevant to the practice of journalism and publication in Australia. It is an instrument that we can go back to when we assess what should and should not be published in terms of the legal issues. I would have thought here that the media freedom and civil liberties act would go a long way to that, provided that we get it right.

Finally, let me mention briefly the Italian political philosopher Giorgio Agamben, whose work in an overarching way applies to how we deal with national security and anti-terror systems. In 2005 he published a seminal book *State of Exception*. In it he charts how city and nation states have for thousand of years—and he traces this all back to Roman times—used the paradigm of fear to gain domestic political advantages. In 1930s Europe it was the irrational and constructed fear of Jews that drove Nazi Germany to commit the worst genocide to date. Now the fear of Jews has been replaced by the fear of Islam in Europe and around the world. This is fuelled by the scourge of the myth of the other and the poison of nationalism that generates nothing but conflicts

and human misery. History is full of many more examples. Agamben identifies strongman leaders, disregard for the independence of the judiciary, contempt for the role of independent media and journalism, and dislike for the rights of minorities as common denominators and indicators of when the paradigm of fear is at its strongest. You do not have to look far to see a lot of examples of this around the globe and in Australia currently. Trump in the US, Viktor Orban in Hungary and Jair Bolsonaro in Brazil, to mention a few. The point is that if we do not continuously and critically reassess the threat levels internally and externally we start from a higher level of fear when the next peak comes, and we are in a self-fulfilling, ever-escalating state of exception eroding our civil liberties to the point where we do the work for the terrorists, limiting our civil liberties and democratic freedoms, handing the terrorists their victory on a silver platter.

CHAIR: Can I just pick up the first point you were making around media diversity, the concentration element and the need for investment in public interest journalism? Have you had a good look at the ACCC report recommendations?

Prof. Lidberg: Yes.

CHAIR: Are you able to reflect on some of those for us?

Prof. Lidberg: I do not diverge much at all from Associate Professor Simons's assessment. There is a lot of work with in there. It is a strong piece of work. Provided that we make it flow through in actual funding and actions, I think a lot can be done. I think the ACCC report and inquiry is a step in the right direction. That is the funding part. We really need to look at this issue, as Margaret Simons was pointing out before, that we should not identify individuals as journalists anymore. There is no need for that. Everyone is a publisher today. I teach law and journalism ethics. I say to my students that every time you hold your thumb over that thing you are actually publishing. Everyone should do that course, actually, because everyone is a publisher.

The issue is, though, as you were pointing out before, Senator McMahon, how do we make sure that not everyone can say anything at all times? I agree; even though I would love to come up with some other way of regulating rather than self-regulation, we probably cannot. In order to enjoy the protections and be defined as someone practising journalism, you will have to sign up to a self-regulation body. By doing that you then say, 'I'm going to adhere to these standards' and by so doing you will enjoy protection, I would have thought. It has been a long day.

CHAIR: It has been a long day. It has been a really good day, though. I guess this comes back to trust as well, from my perspective. I know in your last submission you talked a lot about that, as did Dr Muller. It seems to me that it is in the government's interests and politicians' interests to be ensuring there is media diversity and to be investing in public interest journalism. While people may say that the public does not trust journalists, they do not trust politicians very much either at the moment.

Prof. Lidberg: For sure not.

CHAIR: If we were to change the culture from one of secrecy, as you were talking about, to one more of transparency and openness, that is not to say that everything is on the table—

Prof. Lidberg: No, absolutely not. There is actually a win/win here that we are missing at the moment. If you look at some international access to international systems that are more extensive than ours, it becomes a trust-building exercise. By a government trusting its citizens to have independent access to as unspun information as possible, the citizens feel empowered and thus participate more in the political process. So, you build trust. There is actually a win/win in having a more open system. One of the main problems here is—and I have certainly seen this in my research over 20 years—it is really easy to say in opposition that 'I want to have openness and transparency'. The best example is the Barack Obama administration, who said in their first campaign, 'We're going to transform the White House into an open place.' That is really good when you are outside the White House. When you are inside, transparency stings. The Obama Administration ended up being one of the most secretive in a long time. It is easy to say, 'We're going to do it', but then you go into government and it is very hard.

Senator GREEN: On media diversity and density, if we are reduced to three media outlets, does not the role of the ABC and the SBS become even more important in that environment?

Prof. Lidberg: It is totally crucial. It is important also to consider it is not only in Australia that we have a responsibility around this. You cannot really claim that the slack in diversity will be picked up by bloggers, citizen journalists and so on, because they do not have the resources. They have day jobs. They do other things and then they comment on what the legacy media publishes. That will not pick up the slack. The ABC and the SBS become completely crucial repositories for the other stuff that may be lost when the others go. Furthermore, we are lucky in Australia to have a sort of properly funded public broadcaster. If you look globally, depending on

how you define 'properly', there are between 12 and 15 globally that are properly funded. To undercut a public broadcaster is not only an Australian issue, it is a global issue.

Senator GREEN: Budget cuts to the ABC and the SBS are always controversial, but in this context that we are talking about now in terms of press freedom, is there not an imperative of government to lift their investment into the ABC and the SBS? And not just for the work that they are doing right now to continue? You are representing educators. It is also about training the next generation of journalists as well. Where do you get your start if there are three outlets?

Prof. Lidberg: It is an interesting point in time for media, journalism and publishers, I suppose. When I graduated, in the last millennium, there was no internet. We had more owners, but to work as a journalist or to be published you had to essentially suck up to the owners. There was no other way to be published. Our graduates can—and some of them have—set up their own publication ventures. That is all good. It is challenging, but it is an opportunity. The problem is, though, it will take a long time for a start-up to get to that level of gravity. As we have heard today, in order to publish meaningful public interest and investigative journalism you need a legal team. Start-ups cannot afford that. That is the main problem for me with media ownership.

Senator GREEN: There is the legitimacy as well in terms of the old media or even with the ABC. We have heard government ministers sitting in chairs like that dismiss news outlets like *Buzzfeed* and so on. We need to make sure that those institutions, particularly like the ABC, retain that legitimacy.

Prof. Lidberg: The more concentrated the commercial ownership sector in Australia becomes the more important the ABC and the SBS become. There is no question at all. One would have thought that, in the current climate, we should at least re-fund the ABC to where it was five years ago, I think.

CHAIR: Are there any other questions? No? Thank you for sticking around. Could you please table your opening statement so that we have that?

Prof. Lidberg: Yes, I have it here. Thank you very much.

CHAIR: That concludes today's hearing. I thank everybody who participated, and those who were listening in online. Thank you for sticking with us.

Committee adjourned at 16:17