

Executive Brief

Public Interest Disclosure (PID) Regime

<p>Key Messages</p>	<ul style="list-style-type: none"> • The appropriate way for a Commonwealth official to raise concerns about wrongdoing and maladministration is the PID regime. • The PID regime enables issues to be raised in a way that does not create risks to national security, operations or human safety. • The Attorney General's Department has primary responsibility for providing policy advice to Government on the PID regime.
<p>Key Facts</p>	<ul style="list-style-type: none"> • The AFP is subject to the <i>Public Interest Disclosure Act 2013</i>. • In 2016, an independent review of the PID regime was conducted by Philip Moss. • AFP made an unclassified submission to the Moss Review in March 2016. • The appropriate way for a Cth official to raise concerns about wrongdoing and maladministration is the PID regime. <ul style="list-style-type: none"> ◦ The PID regime authorises disclosure to the Cth Ombudsman and the IGIS in appropriate circumstances. ◦ Importantly, the PID regime enables issues to be raised in a way that does not create risks to national security, operations or human safety. • Specific questions about PID policy should be referred to AGD.
<p>Background</p>	<p>2016 Moss Review</p> <ul style="list-style-type: none"> • In 2016 an independent review of the PID regime was conducted by Philip Moss AMPMC. • AFP made a public submission suggesting: <ul style="list-style-type: none"> ◦ Tightening the scope of "disclosable conduct", including possibly introducing a "public interest test" or similar, and ◦ Improving the investigative powers available to AFP authorised and investigative officers. • The Moss Report found that: <ul style="list-style-type: none"> ◦ "Few individuals who had made PIDs reported that they felt supported". ◦ "The experience of agencies is that the PID Act has been difficult to apply". ◦ The Report made a number of major recommendations to improve the regime. • In respect of press freedom, the Moss Report stated:

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- *"It is beyond the scope of this Review to consider the impact of national security legislation on journalists."*

AFP submissions to the PJCIS AND SSCEC

- In the AFP's public submission to the PJCIS Press Freedom inquiry, the AFP ask the Committee to consider the effectiveness of the PID regime in terms of its interaction with the issues raised by unauthorised disclosures to the media.
 - The AFP did not include this in the SSCEC submission because *"whistle-blower protection regimes"* was already an explicit term of reference of the SSCEC inquiry.

Evidence and Media Organisations SSCEC

- ABC has claimed that the Commonwealth officials in recent cases all exhausted official avenues before whistle-blowing to the media.
 - For example, Mr Gavin Morris (ABC) at SSCEC hearing: *"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... and we are usually the last resort."*
 - The AFP is unable to confirm this as the investigation relating to the ABC is before the court and the investigation relating to Ms Smethurst is an ongoing investigation.
- Media organisations have called for PID laws to provide protection for whistle-blowers that disclose to the media.

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Ministerial Direction

<p>Key Messages</p>	<ul style="list-style-type: none"> • The AFP welcomes the new Ministerial Direction on press freedom, issued by the Minister for Home Affairs on 8 August 2019 under subsection 37(2) of the AFP Act. • The Ministerial Direction: <ul style="list-style-type: none"> ◦ formalises the public interest considerations that AFP takes into account when assessing whether to commence an investigation and clearly specifies that the importance of a free and open press should be taken into account as well as broader public interest implication; ◦ directs the AFP to exhaust alternative investigative actions prior to considering whether investigative action involving a professional journalist or news media organisation is necessary; and ◦ directs the AFP to strengthen its guidance and processes around unauthorised disclosure referrals.
<p>Key Facts</p>	<ul style="list-style-type: none"> • The AFP is aware of the direction given by the Attorney-General to the Commonwealth Director of Public Prosecutions (CDPP). • The 2019 Ministerial Direction complements (does not revoke) the broader Ministerial Direction issued by the former Minister for Justice, the Hon Michael Keenan MP on 12 May 2014.
<p>Background</p>	<ul style="list-style-type: none"> • The AFP welcomes the new Ministerial Direction on press freedom, issued by the Minister for Home Affairs on 8 August 2019 under subsection 37(2) of the AFP Act. • The Ministerial Direction: <ul style="list-style-type: none"> ◦ formalises the public interest considerations that AFP takes into account when assessing whether to commence an investigation and clearly specifies that the importance of a free and open press should be taken into account as well as broader public interest implication; ◦ directs the AFP to exhaust alternative investigative actions prior to considering whether investigative action involving a professional journalist or news media organisation is necessary; and ◦ directs the AFP to strengthen its guidance and processes around unauthorised disclosure referrals.

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- The 2019 Ministerial Direction complements (does not revoke) the broader Ministerial Direction issued by the former Minister for Justice, the Hon Michael Keenan MP on 12 May 2014.

Has the AFP commenced work on implementing the Direction?

- The AFP National Guideline has been developed on investigations of unauthorised disclosure of material made or obtained by a current or former Commonwealth officer. This National Guideline was published on the AFP's Governance Instrument Framework on 18 September 2019 and gives effect to the Ministerial Direction.

How does the Ministerial Direction and National Guideline impact on the AFP's investigations?

- The AFP has implemented a stronger framework for unauthorised disclosure referrals, including an explicit requirement that referring departments and agencies provide a harms statement.
- The AFP will exhaust all alternative investigative actions before considering investigative action involving a journalist.
- This will give the AFP clarity around the impact of its investigative actions. It will include seeking voluntary assistance from journalists wherever possible.

Will the Direction apply to the ABC and Smethurst investigations?

- Yes – Following the issue of the Direction on 8 August 2019, the AFP reviewed all of the matters currently at hand and sought an additional harm statement from referring parties.

Timeline of AFP consultation on the Ministerial Direction

Under section 37 (2) of the AFP Act, a Ministerial Direction may only be issued after obtaining and considering the advice of the AFP Commissioner:

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Date	Action
17 June 2019	The Department of Home Affairs commenced consultation with AFP on the Direction.
18 June 2019	The Department of Home Affairs held an initial meeting with representatives from AFP and AGD.
10 July 2019	The AFP Commissioner provided formal advice to the Minister on a draft Ministerial Direction.
19 July 2019	The AFP Commissioner provided formal advice to the Minister on a further draft Ministerial Direction.
8 August 2019	Ministerial Direction issued.
9 August 2019	Ministerial Direction uploaded to the AFP website. The 2014 Ministerial Direction was inadvertently removed from the AFP website.
12 August 2019	Administration error resolved and both directions are publicly available on the AFP website.
<p>ATTORNEY-GENERAL DIRECTION TO CDPP ON PRESS FREEDOM</p> <ul style="list-style-type: none"> • The AFP is aware of the direction given by the Attorney-General to the Commonwealth Director of Public Prosecutions (CDPP). • The AFP's role is to collect evidence in support of its investigations. • When the AFP is satisfied sufficient evidence exists to support criminal charges, a brief of evidence, identifying relevant offences is submitted to the CDPP, which undertakes a comprehensive review and determines if the matter should proceed to prosecution. • This direction reaffirms the importance of the AFP conducting exhaustive investigations to ensure the CDPP – and where relevant the Attorney-General – have all relevant evidence to make informed decisions on whether to proceed with a prosecution. 	

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Parliamentary Privilege

<p>Key Messages</p>	<ul style="list-style-type: none"> Recent Senate Privileges Committee inquiries have examined the scope and operation of the AFP National Guideline on the Execution of Search Warrants where Parliamentary Privilege may be involved. These inquiries recommended the AFP National Guideline on search warrants should be updated, and its operation extended to apply to other law enforcement powers. The Government is still finalising a response to the recommendations of both reports, and a revised protocol has not been drafted or agreed. In December 2018 the Senate passed a resolution re-stating its position on the operation of parliamentary privilege. The Senate called on the Attorney General to work with the Presiding Officers to develop a new Protocol covering other law enforcement powers, as a matter of urgency. The Attorney General's Department is to lead any whole of government (WOG) negotiations.
<p>Background</p>	<p>SENATE RESOLUTION ON PARLIAMENTARY PRIVILEGE</p> <ul style="list-style-type: none"> On 6 December 2018 the Senate passed a resolution re-stating its position on the operation of parliamentary privilege with respect to the executive powers of law enforcement agencies. The AFP has consulted with the Attorney General's Department (AGD) and the Department of Home Affairs in respect of the effect of this resolution. <ul style="list-style-type: none"> AGD and AFP have both received legal advice on the legal effect of the resolution. The AFP is currently considering the implications of the resolution, but consistent with the terms of the Attorney General's response to the Senate of 9 April 2019, the AFP has not yet substantially amended its practices with respect to the handling of parliamentary privileged material, which is primarily governed by the terms of the <i>Parliamentary Privileges Act 1987</i>. <p>SENATE RESOLUTION – NEW PROTOCOL FOR LAW ENFORCEMENT POWERS</p> <ul style="list-style-type: none"> The Senate resolution also calls on the Attorney General to work with the Presiding Officers of Parliament to develop a new Protocol covering other law enforcement powers, as a matter of urgency. The AFP understands the Attorney General's Department will lead whole of government (WOG) negotiations on any such instrument with the Presiding Officers

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of Parliament.

SENATE PRIVILEGES COMMITTEE INQUIRIES

- Recent Senate Privileges Committee inquiries have examined the scope and operation of the AFP *National Guideline on the Execution of Search Warrants where Parliamentary Privilege may be involved*. Those inquiries have recommended that the AFP National Guideline should be updated and its operation extended.
- The new protocols recommended by the Senate Committee in the recent Reports have not yet been drafted or agreed. The Government is still finalising a response to the recommendations of both reports.
- The AFP is ready to work with Home Affairs (as the relevant portfolio agency) to implement the Government's position, including finalising the Government response to the Senate Committee Reports and, during negotiations with Parliament on the new Protocol.

164TH AND 168TH REPORT: NBN SEARCH WARRANTS AND USE OF INTRUSIVE POWERS

- In its 164th Report of March 2017, the Senate Committee of Privileges expressed concern about the AFP's compliance with the agreed terms of the National Guideline. The Committee recommended a further inquiry be held to examine its adequacy and coverage.
- In the 168th report of March 2018, the Senate Committee of Privileges inquired into the implications of the use of intrusive powers by law enforcement and intelligence agencies (including telecommunications interception, electronic surveillance and metadata domestic preservation notices) on the privileges and immunities of Members of Parliament.
- The Committee determined that because there was a 'chilling effect' if communications between Members of Parliament and other parties were (even covertly) intercepted by enforcement agencies, the Presiding Officers, in consultation with the Executive, should develop additional protocols that will set out agreed processes to be followed by law enforcement and intelligence agencies when exercising those powers.

172ND AND 174TH REPORT: HOME AFFAIRS E-MAIL LEAK AND SEARCH WARRANTS

- In its 172nd Report of November 2018, the Senate Committee of Privileges examined the AFP's execution of a search warrant in respect of ABF offices in Canberra, during which a claim of Parliamentary Privilege was made by Senator Louise Pratt over material in that office.

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	<ul style="list-style-type: none"> • The Committee applied the test for parliamentary privilege that it had developed in the 164th Inquiry, and on this basis, was satisfied the material was privileged and the claim was upheld. The Committee recommended the seized material be provided to Senator Pratt. • The Committee expressed concern about whether the purposes of the National Guideline were met in the execution of the search warrants. The Committee recommended a further inquiry be held to examine its adequacy and coverage. • In the 174th Report of April 2019, the Senate Committee of Privileges examined the AFP's conduct more closely, and expressed the view that the National Guideline had 'failed in its stated purpose'. The Committee confirmed its view that the National Guideline should be amended, and proposed several changes to its operation, such as having the Commissioner personally approve any search warrant where matters of privilege may be involved.
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Unauthorised Disclosure

Overview	<p>Unauthorised Disclosure</p> <ul style="list-style-type: none"> On 30 December 2018, Schedule 2 of the National Security Legislation (Espionage and Foreign Interference) Act 2018 introduced Part 5.6 into the Criminal Code (Cth). Part 5.6 contains a suite of Commonwealth secrecy offences, which repealed section 70 and section 79 of the Crimes Act 1914 (Cth). These offences include section 122.4 – Unauthorised disclosure of information by current and former Commonwealth officers. <table border="1" data-bbox="331 779 1441 1249"> <tr> <th colspan="2">The AFP currently has 14 unauthorised disclosure matters:</th></tr> <tr> <td>11</td><td>Subject to Section 70 and/or 79 offences under the <i>Crimes Act 1914</i> (Cth) or other Commonwealth legislation</td></tr> <tr> <td>1</td><td>Offences introduced under the <i>Criminal Code Act 1995</i></td></tr> <tr> <td>2</td><td>Captures offences committed under both the new and/or repealed legislation</td></tr> </table>	The AFP currently has 14 unauthorised disclosure matters:		11	Subject to Section 70 and/or 79 offences under the <i>Crimes Act 1914</i> (Cth) or other Commonwealth legislation	1	Offences introduced under the <i>Criminal Code Act 1995</i>	2	Captures offences committed under both the new and/or repealed legislation
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Opening statement

Introduction

- Good afternoon Chair and Committee members. Thank you for the opportunity to make a brief opening statement.
- I have taken up the role of AFP Commissioner during a challenging time for the AFP. There is significant focus on the interactions between police and the media, the relationship between police and Government, and the tension between national security and the public's right to know.
- I am committed to providing this Committee with as much information as possible to enable the Committee to conduct a thorough review of these issues.
 - Obviously, there are some limitations on the information that I can provide due to current and ongoing investigations, including matters that are currently before the courts.
- As I have previously stated in a number of forums, I am focused on ensuring the AFP is the best performing police force we can possibly be.
 - I have commissioned a number of organisational reviews to improve the AFP's operational model and review our response to, and management of, sensitive investigations.

Transparency and accountability

- Chair, as you are aware, I personally wrote to you on 21 October 2019 to share with you the terms of reference of the AFPs review into sensitive investigations.
 - I have commissioned Mr John Lawler, AM APM to review AFP processes around sensitive investigations, including investigations into unauthorised disclosures.
 - The review will take a holistic approach so that I can make an informed decision on what changes may be necessary or useful to ensure the AFP has investigative policy and guidelines in place that are fit for purpose.

- The outcomes of the review will be publically available and I will ensure that we provide a copy to this Committee once finalised.
- During my term as Commissioner, I am committed to improving the transparency of the AFP and to build a positive relationship with media organisations and the press.
 - Yesterday I met with the Managing Director of the ABC, David Anderson, the Executive Chairman of NewsCorp Australasia Michael Millar and the Chief Executive of Nine, Hugh Marks to better understand Press Freedom, and to identify ways that we can work better together.
 - This meeting was positive and reaffirmed that the AFP has held an ongoing, long-term, positive relationship with the media. I recognise that 2019 has seen a regression in this relationship and I am committed to turning this around.
 - During our discussion, my counterparts were forthright in their position that we must work together to reach constructive and flexible models that are fit for purpose and I support this position.
 - I have asked members of my team to consider how we can sit down with journalists to talk through how we operate, where we can improve, how and when we engage, and how best journalists can engage with us.
 - To ensure momentum is not lost, I have also committed to meet with my executive media counterparts again in early 2020 to continue our conversations and I have determined to make this a regular occurrence into the future.
 - On the 22nd of November, I will also meet with a number of members of the Press Gallery to discuss my approach to media engagement with a focus on transparency and accountability. I think it is important that they have an opportunity to speak to me directly about their views.

Independence

- Under section 37(2) of the Australian Federal Police Act 1979, the Minister may obtain any considerations on the advice of the Commissioner and can issue a Ministerial Direction.

- The Minister may also give written directions to the AFP which I am obligated by legislation to comply with.
- As this Committee is aware, on 8 August 2019, the Minister for Home Affairs issued a Ministerial Direction to the AFP specifically on the topic of Press Freedom.
- The Ministerial Direction outlines the Government's expectations for the AFP in relation to investigative action involving a professional journalist or news media organisation in the context of unauthorised disclosure material made or obtained by a current or former Commonwealth officer.
- As outlined in the Ministerial direction, the key function of the AFP is, and must remain, the enforcement of the criminal law, without exception.
- I acknowledge that the Ministerial Direction sets out a clear expectation that the AFP will take into account the importance of free press and broader public interest implications before undertaking any investigative action involving a journalist or media organisation.
- Consistent with operational imperatives, my teams consider all investigation actions available to them, prior to determining if action involving a professional journalist or news media organisation is required.
- Where possible, the AFP will continue to seek voluntary assistance from professional journalists or news media organisations.
- On that basis, the AFP has implemented a stronger framework in support of the Ministerial Direction by finalising an internal National Guideline on investigations of unauthorised disclosure of material made or obtained by a current or former Commonwealth officer.
- The referral process outlined in the National Guideline includes a requirement that the head of the referring department or agency provides a harm statement indicating where the disclosure of the material would be expected to compromise Australia's national security, national interests or cause other significant harm.
- As part of evaluating the referral the evaluation must also take into account the following three matters:

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- firstly, whether, on balance, the public interest in the importance of a free and open press in Australia's democratic society is outweighed by the public interest in the enforcement of the criminal law by the AFP;
 - second, if a criminal investigation was to proceed, the way in which the AFP would seek to proceed with an investigation and the extent to which that investigation would likely involve investigative action involving a professional journalist or news media organisation; and
 - finally, any defences available to any party that may be subject to the investigation.
- I am also aware the Attorney-General has issued a Direction to the Commonwealth Director of Public Prosecutions, requiring his consent before commencing a prosecution for certain offences.
 - This Direction reaffirms the importance of the AFP thoroughly investigating these matters and collecting all relevant information and evidence to ensure the CDPP, and where relevant the Attorney-General, can make a fully informed decision.
 - As police, we target criminality – which is determined by the laws created by Parliament, and based on our investigation to establish facts and evidence.
 - I want to reassure the Committee, media groups and the public that we understand the magnitude and nature of any interaction between police and a journalist. Contrary to some of the commentary, unauthorised disclosure investigations are not taken lightly and involve serious and careful consideration of all of the surrounding circumstances.
 - Powers used to obtain information are controlled by robust legislative schemes, and are subject to regular and independent review and oversight. As I mentioned earlier, Mr John Lawler is looking into our processes and governance around these types of investigations.

Court proceedings

- As this committee is aware, the validity of the warrants in relation to the ABC investigation were recently challenged in the Federal

court on 28 and 29 October 2019. We are still waiting for the findings to be delivered.

- Likewise with the News Corp investigation, this matter was heard before the High Court on 12 and 13 November 2019. As you would be aware, the High Court adjourned the matter and we await further advice.
- I do not want to comment any further on the specifics of these matters before court as I do not want to pre-empt or prejudice any findings.

Conclusion

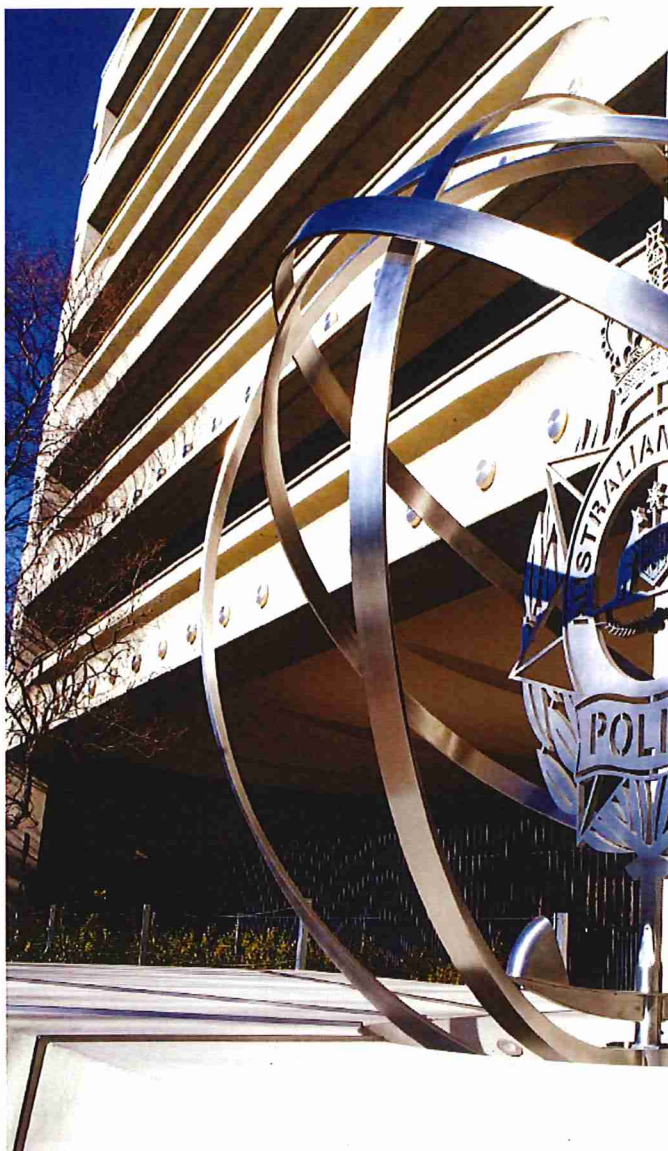
- Chair, I now welcome any questions you may have.

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AFP

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Environment and Communications References Committee

Inquiry into press freedom

August 2019

Submission by the
Australian Federal Police

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Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Environment and Communications References Committee ('the Committee') Inquiry into press freedom. This submission addresses the terms of reference for this Inquiry, which 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.*
2. The AFP is an operational policing agency, and this submission is naturally directed towards providing the Committee with insight into the operational policing considerations that arise from the Committee's terms of reference.

Warrant regimes in relation to journalists and media organisations

TERM OF REFERENCE 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.

The role of a criminal investigation

3. Both police independence and freedom of the press are fundamental pillars of democracy. The operational independence of police is vital to ensuring that no individual member of society and no class of individual is above the law. Freedom of the press plays an important role in keeping the public informed and our democratically elected officials and Government institutions accountable. These concepts are not inherently in conflict.
4. Like all members of the public, companies, government agencies and elected officials, a journalist or media organisation may become of interest in a criminal investigation. The journalist or media organisation may be of interest either as a suspect or as a third party in possession of information relevant to an investigation. These two categories are not mutually exclusive, and persons may be of interest as both a suspect and a holder of information relevant to an investigation. Decisions about who to charge are not made until information has been collected through the investigation process.
5. It is important to draw a distinction between a police investigation and a criminal prosecution. The exercise of investigation powers by police is an information collection process, and not a punitive measure. It is normal for police powers to be exercised at a point in time when the full scope and impact of the criminal offending is unknown. In the example of journalist disclosure of classified information, it is not possible to establish this purely from the contents of the document that has been published. Other facts, including the source of the information, the way it was handled before

publication, and the intentions of the people involved are all relevant. An informed decision about whether to prosecute cannot be made until the facts of a case are known, both inculpatory and exculpatory.

6. The investigation process enables there to be an assessment of the full facts of the unauthorised disclosure, including the intentions of the persons involved, and potential consequences of the use or disclosure as outlined above. Government principles around ownership of documents means that agencies other than police may engage with journalists and/or media organisations where their information has been leaked, to facilitate recovery.
7. Before proceeding with a prosecution, the Commonwealth Director of Public Prosecutions (CDPP) must be satisfied from the facts of the case that the prosecution is in the public interest.¹ For certain offences, the Attorney-General's consent is also required before a prosecution may commence. The policy and legislative frameworks underpinning these decisions require the CDPP and Attorney-General (as relevant) to be informed of the facts revealed through the police investigation.

The legislative framework governing information and evidence collection in an investigation

8. The AFP utilises a range of approaches to collect information **relevant to an investigation**. This may include requesting information from individuals or entities on a voluntary basis. The *Privacy Act 1988* (Cth) includes specific exemptions for law enforcement activity for this purpose. Typical police powers for collecting evidence include search warrants, forensic procedures and electronic surveillance. These powers are not always directed at a suspect, but must still relate to the investigation of an offence. Courts have wide ranging discretion to exclude any evidence in a prosecution that has been improperly or unlawfully obtained.
9. Throughout an investigation, AFP investigators must be satisfied that each investigative decision and use of power is lawful, reasonable, necessary, fair and proportionate.² Public interest is actively considered at all stages of the investigation. One factor that may be applicable to decision making is the intentions of the person whose conduct is under investigation, for example, journalists. This is balanced against other considerations such as the protection of national security and the need to give effect to Parliament's intention in passing legislation regarding criminal offences.
10. Where appropriate, the AFP exercises intrusive powers (for example search warrants under section 3E of the *Crimes Act 1914* (Cth)) in a cooperative manner. This may include negotiating the timing of the warrant with the representatives of the entity. The ability to take a cooperative approach will depend on the nature of the investigation and the extent to which advanced notice of the warrant risks the destruction of evidence or alerting a suspect of investigative activity. Regardless of the approach taken in the lead up to the execution of a section 3E warrant, the search itself must be executed overtly.
11. Powers that involve intrusive collection of information are appropriately governed through legislation. The legislative thresholds, approval processes and safeguards for such powers vary depending on the sensitivity of the information and method of collection. Some of these safeguards are specifically directed towards protecting the public interest in media reporting. For example, police are required to obtain judicial authorisation before obtaining telecommunications data from a carriage service provider for the purpose of identifying a journalist's source. This legislative process involves mandatory public interest considerations and a Public Interest Advocate.³

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¹ Prosecution Policy of the Commonwealth, page 5.

² AFP Investigations Doctrine.

³ *Telecommunications (Interception and Access) Act 1979*, Division 4C.

Furthermore, the AFP is subject to the Commonwealth Ombudsman's oversight of covert and intrusive powers to ensure compliance with the legislation.

12. A number of interested parties, including media organisation, have commented that there should be contested hearings before a warrant relating to a journalist can be issued. Covert warrants are a key aspect of most investigations into serious offences. They enable police to collect information without alerting suspects, risking the destruction of evidence or providing an opportunity to employ counter-surveillance. Any form of contested hearing in relation to covert powers would fundamentally undermine their effectiveness, and the ability of police to conduct an investigation.
13. Search warrants under section 3E of the *Crimes Act 1914* (Cth) are often the first point at which the investigation becomes overt, or public. However, it is often very important to the integrity of an investigation that persons of interest are not made aware of the investigation until such time as the warrant is executed. An opportunity to make representations or submissions at the time of issuance would undermine investigations by alerting suspects and providing opportunities to destroy evidence.
14. There are a number of avenues open to individuals to contest police powers through the Courts after a decision has been made to issue a warrant:
 - During the execution of a search warrant, an affected person may apply for an urgent injunction to halt the warrant activity;
 - Judicial review of the lawfulness of decisions, either at common law or through the process outlined in the *Administrative Decisions (Judicial Review) Act 1977*;
 - Litigation for damages on the basis of tort law, including negligence (which generally requires the conduct to have been unlawful);
 - Claims of parliamentary privilege or legal professional privilege over documents seized at the search warrant;
 - High Court challenges in relation to constitutional validity; and
 - The ability of a Defendant in a criminal prosecution to object to evidence that has been improperly or illegally obtained.
15. Decisions about the legislative procedures and thresholds for the exercise of police powers are ultimately for Parliament to determine. However, prohibitions or restrictions on the use of investigation powers over specific classes of individuals such as journalists may have an operational impact on:
 - The ability of police to ascertain the full facts of a case, including information that may support a journalist defence;
 - The ability of the Attorney-General and CDPP to make informed decisions about the public interest in prosecuting;
 - The ability of police to collect evidence as part of an investigation into Commonwealth officials that may be guilty of the initial unauthorised disclosure; and
 - The ability of police and national security partners to fully assess the consequences of an unauthorised disclosure.

Unauthorised disclosure offences and defences

16. One way to minimise these impacts is to provide protections in the form of offence-specific defences, as achieved through the *National Security Legislation*

Amendment (Espionage and Foreign Interference) Act 2018 (the EFI Act 2018). These defences were drafted specifically with the intention of balancing the need to protect freedom of speech and the importance of ensuring harmful information is not released.⁴ The legislative framework introduced by the EFI Act 2018 is yet to be tested by the courts through a criminal prosecution.

17. Defences to unauthorised disclosure offences need to be carefully framed to ensure there is an appropriate balance between press freedom and other public interest considerations such as national security and human safety.

18. Like many Government agencies, the AFP relies on protection of sensitive information, the release of which could have an adverse impact on the Australian public, Australia's sovereign interests, the interests of Australia's strategic partners, and the personal safety of individuals involved in operations. Compliance with the Protective Security Policy Framework ('PSPF') is paramount to this.

19. Unauthorised use and disclosure of classified information can have adverse, even catastrophic, consequences, including:

- Revealing sensitive capabilities and methodologies relied on by the AFP and its partner agencies, the exposure of which may undermine the effectiveness of operations, and put persons utilising those methodologies at risk;
- Exposing the identity of undercover officers and informants, thereby putting their personal safety at risk; and
- Reducing the willingness of foreign partners to provide Australian agencies with information that may assist them to protect Australia's interests and national security, including preventing terrorist attacks in Australia.

20. The risks of unauthorised disclosure may continue to apply after the conclusion of an operation and may not be evident to journalists or the wider public. A document does not need to be published in full or part for these risks to materialise. Storing classified documents in an unsecure way, contrary to the PSPF, creates a risk of the information being accessed by nefarious third parties, including foreign actors.

Whistleblower protections

TERM OF REFERENCE B: The whistleblower protection regime and protections for public sector employees.

21. If a Commonwealth official is concerned about wrongdoing and maladministration in the Commonwealth public sector there are lawful and secure means of raising those concerns. The Public Interest Disclosure (PID) regime authorises disclosure to the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security in appropriate circumstances. Importantly, disclosure through the PID regime enables the aforementioned risks to national security, operations and human safety to be managed.

22. The AFP is not making a comment on the effectiveness of the PID regime as this is a matter of policy. The Attorney General's Department has primary responsibility for providing policy advice to Government on the PID regime.

THIS DOCUMENT HAS BEEN DECLASSIFIED
AND RELEASED IN ACCORDANCE WITH THE
FREEDOM OF INFORMATION ACT 1982
(COMMONWEALTH)

⁴ *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018*, Revised Explanatory Memorandum, para 11.