



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND  
SECURITY

**Impact of the exercise of law enforcement and intelligence powers on press  
freedom**

FRIDAY, 20 SEPTEMBER 2019

CANBERRA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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## PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Friday, 20 September 2019

**Members in attendance:** Senators Abetz, Fawcett, Keneally, McAllister and Mr Byrne, Mr Dreyfus, Mr Hastie, Dr Mike Kelly.

### **Terms of Reference for the Inquiry:**

The Attorney-General requested that the Committee inquire and report back to both Houses of Parliament on the following matters:

a) The experiences of journalists and media organisations that have, or could become, subject to the powers of law enforcement or intelligence agencies performing their functions, and the impact of the exercise of those powers on journalists' work, including informing the public.

b) The reasons for which journalists and media organisations have, or could become, subject to those powers in the performance of the functions of law enforcement or intelligence agencies.

c) Whether any, and if so what, changes could be made to procedures and thresholds for the exercise of those powers in relation to journalists and media organisations to better balance the need for press freedom with the need for law enforcement and intelligence agencies to investigate serious offending and obtain intelligence on security threats.

d) Without limiting the other matters that the Committee may consider, two issues for specific inquiry are:

a. whether and in what circumstances there could be contested hearings in relation to warrants authorising investigative action in relation to journalists and media organisations.

b. the appropriateness of current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists and media organisations.

The Committee is to report back to both Houses of Parliament by 17 October 2019.

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**GAUGHAN, Mr Neil, Deputy Commissioner Operations, Australian Federal Police**

**JERGA, Mr Stefan, Acting Chief Counsel, Australian Federal Police**

**KENT, Mr Karl, Acting Commissioner, Australian Federal Police**

**Committee met at 08:36**

**CHAIR (Mr Hastie):** I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security for its inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. 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 a 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 a committee. In accordance with the committee's resolutions of 4 July 2019, this hearing will be broadcast on the parliament's website and the proof and official transcripts of proceedings will be published on the parliament's website.

I now welcome representatives of the Australian Federal Police to give evidence. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings. Do you have a statement to open with?

**Mr Kent:** Yes, I have a short statement, if that is helpful to the committee.

**CHAIR:** Please go ahead.

**Mr Kent:** First of all, I thank the committee for the opportunity for the AFP to appear here again today. As Commissioner Colvin mentioned in his previous opening statement, we believe very firmly that the oversight of policing and police organisations is extremely important, and we will answer the committee's questions in the course of the inquiry.

In relation to the execution of the search warrants which brought about this inquiry, these warrants were drafted, issued, authorised and executed in accordance with the provisions of part 1AA of the Crimes Act 1914. This is a robust and comprehensive regime governing the obtaining and executing of search warrants, including very specific provisions on conducting a search warrant, examining and seizing material under a warrant and using, sharing and disclosing material that is obtained under warrant. Ordinarily, the AFP would not comment on ongoing investigations or persons of interest, particularly where the investigation or criminal proceedings are ongoing. The AFP is currently responding to litigation challenging the validity of these warrants, which has restricted the AFP's access to seized material. Without access to this material, the AFP is not in a position to fully consider the impact of ministerial direction on these two matters that are currently under investigation. Further, in relation to one of these matters, there are current related criminal proceedings. However, noting the significant public interest in an accurate account of events in relation to the execution of search warrants, the AFP will provide frank responses, noting that some may of course be limited by law. We've also answered questions on notice from the previous hearing in as much detail as possible. With questions that have involved sensitive information we have provided a classified response.

First and foremost, I would like to say again that the AFP absolutely respects press freedoms as a key pillar of our democracy. As a police service, we have an important and independent function, which is the investigation of alleged breaches of the criminal law, and this has been passed by the parliament. The criminal justice system is itself a pillar of our democracy. The AFP performs its investigative role within the context of the broader criminal justice system, which contains checks and balances at each point. Collectively, these checks and balances seek to ensure that Australia's criminal law operates effectively and in accordance with Australia's democratic principles. Whilst police discretion is an important element of policing independence, it is not appropriate for police to second-guess decisions of parliament to criminalise certain conduct. It is also not possible for police to deal with every matter simultaneously, so the AFP must make decisions around how we prioritise our investigations, and this is conducted through a clear process. The AFP has a clear and publicly available policy that is applied to each referral we receive, including unauthorised disclosure investigations. This policy has now been supplemented by the terms of a ministerial direction that requires the AFP to give particular attention to press freedom in the

context of unauthorised disclosure investigations. The ministerial direction which was issued on 8 August 2019 clearly outlines the minister's expectations in terms of taking into account the importance of a free and open press in Australia's democratic society. It also directs the AFP to exhaust alternative investigative actions prior to considering whether investigative action involving a professional journalist or a news media organisation is necessary.

Finally, the ministerial direction directs the AFP to strengthen its guidance and processes around unauthorised disclosure referrals, in particular as it relates to harm statements by referring agencies. In support of the ministerial direction, the AFP has finalised an internal national guideline on investigations of the unauthorised disclosure of material made or obtained by a current or former Commonwealth officer. This national guideline can be made available to the committee. The powers the AFP uses to investigate these offences are also legislated by the parliament. The AFP is careful to comply as fully as possible with those powers and is subject to a range of oversight mechanisms in doing so.

Whilst there are perceptions that the AFP actions may be political, this is not accurate. But misconceptions are not something that the AFP itself can easily control. Perceptions of political bias are very different to acting politically, and the AFP does not and should not ever act in a political manner. We are an independent statutory agency and a police service, and we have responsibilities to all members of the Australian community. Neither the government nor our minister can direct the AFP to commence or discontinue an investigation, which is the cornerstone of being an independent police service.

There is a very real and appropriate principle of press freedom. However, like many of our investigations in the real world, this has to be balanced against a range of other factors, including national security and community safety. You will see the balancing exercises reflected through our laws passed by parliament, and this includes broadcast laws, defamation laws and court non-disclosure orders. The balance can also be seen in the Criminal Code offences relating to unauthorised disclosure, which contain exceptions for journalists acting in the public interest. The AFP is accountable to a variety of different bodies which collectively ensure that agencies are consistent with government and community expectations.

In conclusion, as police we do not target specific sectors of the community such as media. We do target criminality, and this is determined by the laws created by parliament and based on our investigations to establish facts and evidence. The AFP retains records in the terms required by law, which do not include the person's occupation. Accordingly, the AFP does not keep specific records of an occupation of a person in relation to search warrants.

I do want to reassure the committee, media groups and the public that we do understand the magnitude and the nature of any interaction between police and a journalist. The powers used to obtain information are controlled by robust legislative schemes and subject to regular, independent review and oversight. We welcome this review and oversight where it may improve existing processes. Unauthorised disclosure investigations themselves are not taken lightly and involve serious and careful consideration relating to all the surrounding circumstances. The answers we offer today and my comments now are obviously general in nature but are designed to assist the committee with its work. They should not be taken as being a comment on any particular matter, including those matters currently before the courts. Thank you.

**CHAIR:** Thank you very much, Mr Kent, Mr Gaughan and Mr Jerga, for coming back to the committee for your answers to questions on notice. It's important we exhaust all lines of inquiry, so we're grateful for your time this morning. With that, I hand the call to Mr Dreyfus.

**Mr DREYFUS:** Just to clear a few preliminary matters out of the way, does it remain the case that Annika Smethurst could be charged in relation to the publication in *The Sunday Telegraph* in relation to the ASD matter?

**Mr Gaughan:** Thanks for your question. I think, as we said at our last appearance, that matter is ongoing. Realistically, as the acting commissioner has just alluded to, until such time as we've had access, if the court allows us to do so, to the material that's currently before it in relation to the search warrants we conducted in relation to this matter, we're not in a position to rule anything in or out.

**Mr DREYFUS:** Does it remain the case that Dan Oakes could be charged in relation to the Afghan files matter?

**Mr Gaughan:** I think that the answer I've just given in relation to Ms Smethurst is applicable to Mr Oakes.

**Mr DREYFUS:** Does it remain the case that Sam Clark could be charged in relation to the Afghan files matter? He's the other journalist at the ABC.

**Mr Gaughan:** Yes, I'm aware of that, but I'm just, in my own mind, trying to determine where that one is. I think the safest answer would be at this stage to provide the same answer in relation to that gentleman as I have in relation to the other two journalists.

**Mr DREYFUS:** What about any other journalists? Is it still possible that other journalists could be charged in relation to either the ASD matter or the Afghan files matter?

**Mr Gaughan:** Well, Mr Dreyfus, as I'm sure you and the rest of the committee are well aware, until such time as we've had the opportunity to examine the material that was seized during the execution of those search warrants, it's not possible for us to determine one way or the other who is going to be the subject of further investigation and who is not. But I am reasonably confident that those named are probably the totality of those particular investigations.

**Mr DREYFUS:** I just want to go to something that was mentioned by Acting Commissioner Kent in the opening statement referring to related current criminal proceedings. I take that to be a reference to the current prosecution of Major David McBride, which is before the court.

**Mr Gaughan:** That's correct.

**Mr DREYFUS:** For the assistance of other members of the committee, what's the status of that? As I understand it from public reporting, he has been charged in relation to the handling of documents connected to the Afghan files story on the ABC. He's appeared once before the court. What's the next step in that proceeding?

**Mr Gaughan:** The matter's currently before the ACT Magistrates Court, as I'm sure you and other members of the committee are aware. The next step, realistically, is a matter for the court to determine.

**Mr DREYFUS:** When's the next court date?

**Mr Gaughan:** I'll have to take that on notice. I don't have that information.

**Mr DREYFUS:** Just in relevance to the further responses that the Australian Federal Police have provided to the committee since you were last here—and I do thank you for coming back again—did the Department of Home Affairs review the Australian Federal Police responses to the various questions on notice before the AFP provided them to the committee?

**Mr Kent:** I don't believe so. To the best of my knowledge, a copy of the questions on notice was provided to the department, but that was done, as I understand it, simultaneously with the response to the minister. I might ask Stefan Jerga to clarify that.

**Mr Jerga:** Thank you. Certainly our responses went through the minister in the usual course, consistent with how we interpret our obligations—

**Mr DREYFUS:** My question was as to whether or not the Department of Home Affairs had reviewed the Australian Federal Police responses before those responses were provided to the committee.

**Mr Kent:** No. Those responses were prepared by the AFP and submitted to our minister's office. They were not reviewed by the department. A copy of them was made available to the department—that's my understanding—but they were our responses, the AFP's responses, to those questions.

**Mr DREYFUS:** After they'd been provided to the committee? My question is directed as to whether or not the department looked at them before they were provided to the committee.

**Senator McALLISTER:** Not to the minister.

**Mr Jerga:** I see. Sorry.

**Mr Gaughan:** We may have to take it on notice but we're advised they were provided to the department after they were provided to the committee.

**Mr DREYFUS:** And then I go to Mr Jerga's answer, which was about communications with the minister.

**Senator KENEALLY:** Can we clear that up? You just said that you'd provided them to the minister and simultaneously to the department and then they were provided to the committee. And now you've just said they were provided to the committee then they were provided to the department. So that's what we're trying to understand. Which is it?

**Mr Kent:** Perhaps we can take that question on notice and come back with some detailed information.

**Senator McALLISTER:** I wonder if that's something that could be sorted out in the period while you're at the table because I'm sure someone in the office can tell you.

**Mr Kent:** Yes. We'll absolutely clarify that for you. Yes.

**Mr DREYFUS:** Thank you. So if I can go to another matter, according to the further information that you provided since you were last here, in relation to the au pair emails, about which you were asked quite a number of questions, the AFP determined that the value of the investigation into the unauthorised disclosure of information regarding Peter Dutton's intervention to grant tourist visas to au pairs was 'high', that the impact of the alleged offending on Australian society was 'high' and that the investigation was 'essential'. Have I got that right? I'm looking at the response to question on notice 56.

**Mr Gaughan:** That's correct—CCPM.

**Mr DREYFUS:** Apart from embarrassing the minister and revealing that he had, in quite an extraordinary fashion, personally intervened to issue visas to au pairs—

**Senator ABETZ:** Well, that is not the evidence—

**Mr DREYFUS:** what impact did the alleged offending have on Australian society? I think Senator Abetz will get a turn later, but I'll repeat that question. Apart from embarrassing the minister—

**Senator ABETZ:** Repeating falsehoods doesn't make them correct.

**Mr DREYFUS:** and revealing that he had, in quite an extraordinary fashion, personally intervened to issue visas to au pairs, what impact did the alleged offending have on Australian society? Why was it assessed as 'high'?

**Mr Gaughan:** The CCPM—as I think is in our answer—is not a static way we investigate and determine whether or not a matter is to have action taken on it. I think the way that these matters are currently being dealt with—and this one in particular does cause us some concerns to answer, based on the fact that the Privileges Committee 172nd report limits what we can say—

**Mr DREYFUS:** The investigation is over, Mr Gaughan.

**Mr Gaughan:** Indeed it is.

**Mr DREYFUS:** And it won't be recommenced, will it?

**Mr Gaughan:** Absolutely not.

**Mr DREYFUS:** So why should there be a limit on what you can say?

**Mr Gaughan:** The limit is based on the decision by the Privileges Committee in relation to the evidence we gave in camera to that committee.

**Mr DREYFUS:** I'll ask another question. Why was the value of the investigation considered 'high'?

**Mr Gaughan:** We'll have to take that on notice. We're not trying to avoid the question but the fact is that determination is not made by any member sitting at the table nor any member sitting behind us.

**Mr DREYFUS:** Okay. Take it on notice. How could it possibly be that the investigation was considered 'essential'?

**Mr Gaughan:** Again, we'll have to take that on notice.

**Senator KENEALLY:** Could we ask: who does make those determinations, if it's not anyone at the table or anyone sitting behind you?

**Mr Gaughan:** It's undertaken by a committee that sits within that investigation team.

**Senator McALLISTER:** Is that a standing committee or is it formed in an irregular way for particular investigations?

**Mr Gaughan:** It's a standing committee.

**Senator McALLISTER:** So it's a standing committee within each investigative team?

**Mr Gaughan:** No. The way the AFP operates its structure is that some of those committees that determine the operational decision to take a matter on or not sit within our state offices. This team sits within the headquarters environment. It is in a more siloed, if you like, framework, based on the fact that these sorts of matters in particular are dealt with—as I have given evidence previously to this committee—within a very small team of about a handful of people that make the decisions about whether or not a matter's taken for an investigation or not. It is oversighted by a commander, who ultimately would be the person that would determine whether or not the matter is accepted for investigation or otherwise.

**Senator McALLISTER:** What's the name of that committee?

**Mr Gaughan:** It's the offshore and sensitive investigation team. The committee in the state offices is known as a ROC, a regional assessment committee, operations committee. In the Canberra office it's the same thing, so it's known as the ROC.

**Senator McALLISTER:** Just for clarity, I think your earlier evidence suggests that it's a police commander?

**Mr Gaughan:** Ultimately the decision-maker.

**Senator McALLISTER:** Do they chair the committee?

**Mr Gaughan:** Yes.

**Senator McALLISTER:** Does it meet in a formal sense and have meetings and minutes?

**Mr Gaughan:** Certainly the ROCs in the regional offices meet formally, and my understanding is that the ROCs in the functional areas also meet physically.

**Senator McALLISTER:** Thank you. Thank you, Mr Dreyfus. Sorry to interrupt.

**Mr Kent:** In terms of the previous question, relating to the provision of our responses to the questions on notice, I'm advised they were provided to the minister's office two days prior to going to the committee. The department were given a final copy after they went to the committee.

**Mr DREYFUS:** So, after they were sent to the minister, did the Minister for Home Affairs or his office ask you to change anything in the two days between you sending them to the minister's office and you sending them to the committee?

**Mr Gaughan:** No.

**Mr Kent:** No.

**Senator KENEALLY:** You just used the words 'final copy'. Was a draft copy provided? Did the department request that you make any changes to that draft?

**Mr Kent:** No. There was no draft copy provided to the department, and they did not request any changes.

**Senator KENEALLY:** Thank you.

**Mr DREYFUS:** What was the purpose of giving them to the minister's office two days ahead of providing the information to the committee?

**Mr Kent:** I'll refer that to Stefan Jerga.

**Mr Jerga:** Consistent with how we interpret our obligations under the government guidelines for official witnesses before parliamentary committees, we also consider questions on notice to fall within the parameters of submissions for the purposes of the official witnesses guidelines, so 'section 2.4 Clearance of submissions by a minister'—that's a pretty standard practice for us.

**Senator ABETZ:** That's the normal process for Senate estimates and other such inquiries by parliamentary committees?

**Mr Jerga:** That's correct.

**Senator ABETZ:** Nothing different with this?

**Mr Jerga:** No.

**Mr DREYFUS:** Aren't you an independent statutory agency? The acting commissioner was at pains to stress that in his opening statement.

**Mr Kent:** Our process, though, is to ensure that the minister is informed in the event of matters. It doesn't change our position or our actions, but a minister would typically be informed of a matter of this nature. I can quote the dates where those—

**Mr DREYFUS:** No. The document is sufficient. Thank you.

**Senator ABETZ:** These answers to questions on notice go through the minister for communications. It's a standard procedure for independent statutory authorities for this to happen.

**Mr DREYFUS:** Mr Gaughan, is every unauthorised disclosure of Commonwealth information classified by the AFP as 'corruption'?

**Mr Gaughan:** Yes.

**Mr DREYFUS:** Yes?

**Mr Gaughan:** My understanding is yes but, for clarity, we'll take it on notice.

**Mr DREYFUS:** You were here, I think, on 14 August, and you've been asked these questions on notice already. Why was the disclosure of the au pair emails classified as corruption?

**Mr Gaughan:** I think that any time that there's a possibility of a leak of sensitive information by a member of the Public Service we deem it to be corruption.

**Mr DREYFUS:** Corruption?

**Mr Gaughan:** Correct.

**Mr DREYFUS:** That's the term that you use?

**Mr Gaughan:** Yes.

**Mr DREYFUS:** No matter what the motive, no matter what the circumstances, no matter whether money has changed hands, no matter whether there's a public interest disclosure, it is always corruption?

**Senator ABETZ:** That's the process.

**Mr Gaughan:** Mr Dreyfus, your point around the reasons and the rationale is a very valid one, and, until such time as we've been able to determine why someone has acted with the behaviour they have, we do deem it to be corruption. The CCPM, which is utilised to determine where these matters sit, is a fluid instrument. These things change. Whilst we may initially determine that something is corruption in order for us to commence the investigation, there is the possibility—and, indeed, the likelihood—that that will change during the course of the investigation. But, initially, as I've said, based on the fact that in our view if we have a public official who is illegally providing information to a third party outside of their duties, it's corruption.

**Senator ABETZ:** It corrupts the process.

**Mr DREYFUS:** The secretary of the Department of Home Affairs has argued before this committee that disclosure of these au pair emails caused harm to 'confidence in public administration'. Do you agree with him?

**Mr Kent:** As a harm statement, these matters have to be considered in the sense that harm is done to the concept of sound administrative practice by the Public Service. The leaking of information to a third party outside existing PID measures, where protections to whistleblowers are provided, would be considered a significant professional departure and, indeed, potentially a corrupt activity. It is then appropriate to consider that as harm to the reputation of the Public Service on the whole.

**Mr DREYFUS:** Do you think it was the unauthorised disclosure of the emails about the au pairs or the extraordinary personal intervention by Mr Dutton to issue visas to the au pairs that harmed confidence in government administration?

**Senator ABETZ:** For the record, Mr Dutton intervened on departmental advice, and that was the finding of the—

**Mr DREYFUS:** Chair, do we now have Senator Abetz giving evidence before the committee?

**Senator ABETZ:** No, no, false—

**Mr DREYFUS:** Perhaps he would like to go on the other side of the table?

**Senator ABETZ:** The man who wants to be the alternative Attorney-General of this country cannot put falsehoods onto the *Hansard*.

**Mr DREYFUS:** This is outrageous, Chair. Senator Abetz has repeated form for interfering with questions by other committee members, and I ask you to direct him to stop.

**CHAIR:** Senator Abetz, let's leave it there. You'll get a chance once Mr Dreyfus has finished his line of questioning. Mr Dreyfus has the call.

**Mr DREYFUS:** Do you think it was the unauthorised disclosure or the extraordinary personal intervention by Mr Dutton to issue visas to au pairs that harmed confidence in government administration?

**Mr Kent:** We do not believe that this is question that the AFP is best placed to respond to. We think that is a question, potentially, for the PIM.

**Mr DREYFUS:** Thanks very much. In discussing the au pair emails, the secretary of the Department of Home Affairs told this committee at the last public hearing that officers are 'not at liberty to steal information from government servers and transmit it to certain locations'. Does the Australian Federal Police regard an unauthorised disclosure of Commonwealth information as theft for the purposes of the criminal law, and, if you do, what's the legal basis for that view? Can you point me to any case law or authority for that?

**Mr Kent:** I think we would take that question on notice. There are certain circumstances—each case is quite different—where material obtained of that nature could be considered theft. However, this is very dependent upon

the circumstances of each individual matter. So we would like to take that on notice and come back with some specific advice for the purposes of the committee.

**Mr DREYFUS:** If you do regard an authorised disclosure of Commonwealth information as theft, what's preventing the Australian Federal Police from investigating every journalist who receives leaked information, no matter how innocuous it is?

**Mr Kent:** This is where we would seek guidance through the harm statement, as provided for in the new direction, which we have received and have instigated a national guideline in relation to. It strengthens our processes as it relates to harm caused by these particular matters.

**Mr DREYFUS:** You've provided the committee with a classified copy of the referral to the AFP about the au pair emails. Why did you refuse to provide the committee with an unclassified copy, despite the fact that the investigation is concluded and also did not involve the leaking of highly sensitive information? The secretary told us that at the last hearing.

**Mr Gaughan:** I'm advised that the reason for that is that there were some points in that referral that went to methodology, but we're happy to, if you wish, have a look at that referral and, potentially, redact some of that, if the committee thinks it would be in the interests of this hearing to have a redacted version in an unclassified state.

**Mr DREYFUS:** I invite you to reconsider that.

**Mr Gaughan:** We will do so.

**Mr DREYFUS:** Did the Australian Federal Police consult with the Department of Home Affairs or with the Minister for Home Affairs in relation to the committee's request for a copy of the au pairs email referral?

**Mr Kent:** I don't know. We would need to take that on notice.

**Mr DREYFUS:** The AFP has now told the committee that it contacted Mr Dutton's office on three separate occasions in advance of the search warrant activity that was undertaken in relation to the au pairs email matter. I'm referring there to your response to question 60(a), just for your convenience. The AFP, apparently, did not contact the Minister for Home Affairs or his office, or any other minister at all, in advance of the raids on the ABC or Annika Smethurst's home. Is that right?

**Mr Gaughan:** In advance—that is correct.

**Mr DREYFUS:** You've told the committee that the notification of the execution of the search warrants in relation to the au pair emails was appropriate due to the level of public attention the search warrants were expected to receive. But the raids on the ABC and on Annika Smethurst's home were always going to attract a lot of public attention, weren't they?

**Mr Gaughan:** Indeed.

**Mr DREYFUS:** So why not notify Mr Dutton or the Minister for Defence about those raids?

**Mr Gaughan:** I think the circumstances in relation to the two matters were slightly different. A determination was taken at the time—in relation to the way, if you like, the au pair matter was handled by the Privileges Committee—that we would do things slightly differently in relation to further matters.

**Mr DREYFUS:** I'm just a bit puzzled. Why would you contact the minister's office on three occasions in advance of a raid in relation to investigation of a leak of embarrassing emails but not at all in advance of raids on the national broadcaster and a senior journalist's home?

**Mr Gaughan:** I think, with due respect, that I've answered that. In relation to the way we were questioned, asked and probed by the Privileges Committee about the au pair matter, we've subsequently made a determination that, in relation to these types of matters, we will do things differently.

**Mr DREYFUS:** Thank you. So it's a change of procedure that's occurred because of or after the Privileges Committee's questioning of the AFP?

**Mr Gaughan:** Yes.

**CHAIR:** Mr Gaughan, just to be clear: it's a judgement call—is that right?

**Mr Gaughan:** That's correct. There's nothing in writing or in procedures, but it was a judgement call based on—if you like, Chair, and Mr Dreyfus knows, the concern that was shown by the Privileges Committee about the way the procedures and processes were followed in relation to the au pair matter has made us, I think rightly, consider how we undertake these matters going forward. The determination we've had is that now there'll be notification at the time or very, very shortly before or very, very shortly after. It won't be the same process that we followed with this one. As the Chair has rightly pointed out, we've changed our practices, and I think rightly, based on consideration and questioning by committee processes such as this.

**Senator McALLISTER:** Just on that matter, I think you indicated at the very outset of your statement, Mr Gaughan, that you've developed a new national guideline—

**Mr Gaughan:** That's correct.

**Senator McALLISTER:** and you've indicated you'd be willing to provide it to the committee.

**Mr Gaughan:** Yes.

**Senator McALLISTER:** I would appreciate it if that could happen.

**Mr Gaughan:** Yes.

**Senator McALLISTER:** Is that able to be tabled today?

**Mr Gaughan:** Yes.

**Senator McALLISTER:** Terrific. Thank you.

**Mr DREYFUS:** In the AFP's initial submission to this inquiry, it wrote:

The AFP's standard practice is to notify the Minister for Home Affairs when politically sensitive matters are referred to the AFP unless there is a conflict of interest or potential for perceived conflict of interest.

You've told the committee—this is your response to question on notice 58b—that you:

... did not consider advising the Minister's Office the execution of search warrants ... gave rise to a conflict of interest.

Given that the leaked emails, the au pair emails, directly concerned the Minister for Home Affairs, how can that be? I'm really having difficulty following that.

**Mr Jerga:** I appreciate your question in terms of the perception of conflict, but in reality the timing of things is such that nothing's going to change our course of action. So, yes, the practical realities are that the intended investigative action through our independence lens would have continued, but, again, I think in terms of the deputy's answer around our practices and the lens with which we're looking through these investigations more recently, that would be something we'd consider again.

**Mr DREYFUS:** But you did at least acknowledge that there's potential for a perceived conflict of interest?

**Mr Jerga:** On the face of it, I don't think that's questionable. That's right: real or perceived in its broad parameters, yes. Also, though, the leak does go to the minister's remit within his portfolio.

**Mr DREYFUS:** You've told the committee that the notification of the execution of the search warrants in relation to the au pair emails was appropriate, that it didn't involve seeking a decision from the minister. I'm interested in the text exchange between Mr Gaughan and the minister's chief of staff. This is the response to question on notice 60a. Mr Gaughan, you texted the chief of staff at 11.52 am on 10 October 2018 to say:

That warrant activity will now be first thing tomorrow morning—Neil

**Mr Gaughan:** Yes.

**Mr DREYFUS:** The response from the minister's chief of staff was almost immediate, and says:

Thanks mate—this arvo also fine

Is it appropriate for the minister's chief of staff to say, 'This arvo also fine'?

**Mr Gaughan:** It's a matter for him. I can assure the committee that I did not take advice or direction from the chief of staff in relation to the execution of the search warrants. As to why he said 'This arvo also fine' is really a matter for him.

**Mr DREYFUS:** Isn't he expressing a view as the minister's representative about how police operations ought to be conducted?

**Senator ABETZ:** Point of order, Chair.

**CHAIR:** Yes.

**Senator ABETZ:** This is requiring the witness to express an opinion on what somebody else has written. This is not within the witness's purview, to be able to answer that which was in somebody else's mind.

**Mr Kent:** I do think, though, that the answer reflects that the warrant activity was going to take place. It was not a request at any stage for permission from the minister's office for such activity. It was advice that it was going to occur.

**Mr DREYFUS:** What if the minister's chief of staff had said, 'This arvo would be better', or 'Tomorrow morning is not fine'?

**Mr Kent:** Then we would have ignored such comment.

**Mr DREYFUS:** You've told the committee that Assistant Commissioner Debbie Platz had a telephone call with Mr Dutton's chief of staff at 5.51 pm on 10 October 2018 to inform him of impending search warrant activity. Why was that call necessary, given that Mr Gaughan had already sent the text message earlier that day?

**Mr Gaughan:** It was just a reconfirmation of the action, Mr Dreyfus. There's nothing to be read into that.

**Mr Jerga:** We can take this on notice, Mr Dreyfus. As I recall it, that conversation at the time was actually about numerous matters in terms of a general catch-up that you would have between the advisor and Assistant Commissioner Platz. That just happened to be one of the brief things mentioned in that discussion.

**Mr DREYFUS:** What exactly was said in that telephone call?

**Mr Jerga:** I'm not sure, Mr Dreyfus. We'll take that on notice.

**Mr Kent:** We'd need to take that on notice.

**Mr DREYFUS:** If I can I'll turn to the other leak about which you've provided answers, which is the so-called medevac leak. That's in relation to the unauthorised disclosure of ASIO advice forming part of a ministerial brief in relation to the medevac bill. You've told the committee that you received the referral on 7 February 2019 and that you made a decision not to commence an investigation on 20 March 2019 because:

... the likelihood the AFP could undertake a successful investigation in these circumstances was extremely low.  
Have I got that right?

**Mr Jerga:** Yes.

**Mr DREYFUS:** You've given us information about the Smethurst matter, 'The Afghan Files' matter and the au pair matter and how long it took to act following a referral. They were all somewhere between a day and a week for those ones. But in relation to this one, the advice on the medevac bill, the referral was made on 7 February and the decision against commencing an investigation was almost six weeks later. Why did it take so long to make a decision? Can you just outline what you did during the six weeks?

**Mr Gaughan:** I think I've said to this committee before—if not to this committee, I apologise; I've certainly said it to other committees in relation to the work undertaken by this particular area—it's a very small group, it's a handful of people, who have on their plate some very serious investigations that are undertaken. We have to prioritise things, Mr Dreyfus. Why this one took six weeks and the other one took four or five days, or two days, I really don't have that answer in front of me. Again, that is something we can get on notice and we can provide you with some more fullness in our response. But I will say that during that investigation, and obviously we require—one of the challenges we have with these investigations from the outset is that we're basically relying on information to be provided to us from other agencies. Sometimes that information is slow to get because they obviously have other priorities; sometimes the information needs to come from a number of different agencies and, therefore, we have to collate all that before we can take any action. So the thing that we need to take into consideration is the fact that we are looking at that type of information that needs to come through. We got the referral, as you said, on the 15th. On the 18th we received a checklist from Home Affairs, where they provided some supporting documentation. On 28 March—

**Mr DREYFUS:** I think you received the referral on 7 February, the same day as Mr Benson's article.

**Mr Jerga:** And on 18 March, Mr Dreyfus, we received the referral checklist. So, even though, on 28 March, we advised the department that the matter would not be accepted and would be finalised, it was actually only 10 days before that date that we received some further information from the department. So it wasn't just six weeks, 7 February, and then six weeks later we were still, just 10 days before, not proceeding with the matter.

**Mr DREYFUS:** I want to assure you: I'm not seeking to attribute blame; I'm just trying to find out what happened in the six weeks.

**Mr Kent:** Mr Dreyfus, we can provide a detailed list to the committee of the actions that occurred over that intervening period. We can take that on notice and provide it very quickly, if that assists.

**Senator KENEALLY:** Chair, if I may follow on, I have some specific questions about the investigation, and I appreciate very much, Mr Kent, the offer that you've just made—

**CHAIR:** Senator Keneally, just so you're aware of time, it's 9.20, so I will give you another five minutes and then I'll give coalition members the opportunity.

**Senator KENEALLY:** I'll be very quick, Chair. Thank you for that. The Minister for Home Affairs has said: ... if you've got top secret documents and they've been leaked, it is an offence under the law and police have an obligation to investigate a matter referred to them and they'll do that.

Did you speak to the journalist at *The Australian* who was given the classified ASIO advice?

**Mr Gaughan:** We'll take that on notice.

**Senator KENEALLY:** You don't have an answer to that question? It's a pretty straightforward question.

**Mr Gaughan:** It's a very direct question; a very specific question. We have a general chronology, if you like, in relation to the steps we took prior to saying the matter wouldn't be accepted, but we don't have that level of detail in relation to the specific question you've asked, but we think we'll be able to get the response very quickly.

**Senator KENEALLY:** That's quite extraordinary. Given that your minister has said, 'If you've got top secret documents and they've been leaked, it is an offence and police have an obligation to investigate,' I would have thought that, if you are investigating, you would have spoken to the journalist who received the information.

**Mr Gaughan:** As we've said previously, our primary focus in these investigations is the person who leaked the matter. I'll also say that this matter was not accepted for investigation. It was considered as a referral and it was rejected. The reason for it being rejected was the fact that, during the assessment process taking place, it became clear to us that over 200 people were identified as having received either the final version of the email or a number of different versions that were in relation to that email, and the information that was in the papers could have come from either the draft or the actual document that was finalised. So we never accepted the matter for investigation. I'll be very clear on that.

**Senator KENEALLY:** I want to be very clear that I'm not suggesting that you should have contacted Mr Benson, but, as many public commentators have observed, there appears to be a double standard here. Ms Smethurst wrote a story based on leaked information that the government did not like and her home was raided by the AFP. Mr Benson wrote a story based on leaked information that was helpful to the government and he did not even receive a phone call. You cannot confirm here today that you even asked him how he came to be in receipt of that information. That's despite the fact that the leak that Mr Benson received was described by the head of ASIO as 'seriously damaging and undermining all that ASIO stands for', but the AFP can't even say that they contacted Mr Benson. You can't give us, today, the basic inquiries that you undertook. Can you understand, in the context of a debate about media freedom and the necessity of it in our democratic system, why members of the public may be concerned about this apparent double standard?

**Mr Kent:** Each case is unique in its own right and there are complexities and differences with each matter. To assume that each matter would be approached in an identical fashion is not how we would progress. There is an investigative process, which is consistent, but the manner in which it would be conducted as information is revealed would differ based on the circumstances. I agree that we need to demonstrate that we are conducting these investigations in an appropriate manner. We will take on notice your question and come back to you, very quickly, on whether that particular approach was adopted for this matter.

**Senator KENEALLY:** May I add to that: could you also provide to this committee the extent to which you considered the harm that has been caused by the leak in your decision to investigate it? In the case of the medevac leak, we have the head of ASIO on the public record stating that it caused significant harm.

**Mr Gaughan:** The issue of harm is now very clear in the ministerial direction. It is something that we take extremely seriously. The type of information we're now receiving from government departments is voluminous in relation to that issue of harm. I think you make an extremely valid point: the issue of harm needs to be paramount in our decision-making. I can assure you that, as a result of the new ministerial direction and the national guideline, which we'll provide to the committee shortly, that is something we are taking extremely seriously and it's front and centre in relation to our thinking.

**Mr Kent:** Outside of the harm component, though, there is an assessment that's required in relation to whether there is a likelihood of successfully concluding an investigation. In this matter, during the assessment of the referral, over 200 people were identified as having received either of the documents relating to the final versions.

**Senator KENEALLY:** Two hundred people is a finite number, though. We're not talking about 2,000. In the context of what caused this inquiry to come into being, the AFP raided the home of a journalist to investigate a leak that was embarrassing to the government but has not even bothered, it would appear, to pick up the phone and call the journalist who had a leak that was beneficial to the government. That is where, rightly, the questions of a double standard come in. Particularly in the context of harm, we have on the public record the ASIO chief saying that the medevac leak caused harm. I appreciate that you've taken that on notice, but I do make the point that 200 people is a finite number. Surely there could have been some investigation similar to and along the lines of the robust investigation that went into the Smethurst matter.

**Mr Kent:** There are very similar matters that the AFP has rejected in very similar circumstances. I can refer the committee to at least four matters since 2014 and can provide information on the same. There were referrals from the Australian Customs and Border Protection Service on 14 February and 14 May 2014: two separate

matters to the AFP concerning the unauthorised disclosure of Operation Sovereign Borders information to a Western Australian newspaper, up to secret classification. The matter was rejected for investigation for many reasons, but one was that more than 300 people had access to that information. It comes down to the finite resources of the organisation, particularly in this area of investigative effort. And there are other matters. I won't go through them in detail, but we can provide them to the committee for the purposes of context.

**Senator KENEALLY:** That would be useful. Chair, before I hand back, I would like to make clear again on the record that I am not suggesting that Mr Benson's home should have been raided. I am merely using it as an example to point out what appears to be a double standard. Thank you.

**Mr Kent:** Chair, can I make one point: the AFP does not raid homes; the AFP executes search warrants, as I emphasised in our opening address, in accordance with law. A raid is something we are not authorised to conduct and my officers do not undertake that effort.

**Senator KENEALLY:** That's a fair comment, but I think Ms Smethurst might have a different interpretation.

**Mr BYRNE:** With respect to that particular journalist, the classification of that document was changed, was it not?

**Mr Gaughan:** I believe that's right, but that's really a matter for the person who declassified that document.

**Mr BYRNE:** I know, but it affects your investigation. Hang on a second. I'm just intrigued as to why that wasn't raised in your evidence. I know the classification was changed, and, if the classification of the document changes, it then lessens the impetus for you to investigate it. So I'd like to know, if the document was declassified—because my understanding was the classification was changed—when you were told that the document was declassified. I would also like to know if that affected your investigation. I'm perturbed and disturbed that you haven't raised it in the evidence, and yet that would have been a primary consideration. My understanding was that that would have had a significant bearing on whether or not you would have pursued this investigation. I'd like some answers to that, please.

**Mr Gaughan:** It does go to the issue of harm, so we'll take that on notice.

**Mr BYRNE:** Sorry, I'm quite surprised and concerned that you haven't raised this. You've been fulsome in your evidence, but I don't understand why you haven't raised this; it's quite critical. You've spoken previously about 'harm' harm. It's clear that at some stage the director of ASIO said he was very upset about this. Senator Keneally mentioned this just a moment ago on the public record, and yet you've said nothing about the classification of that document being changed—but that is critical to investigate. So I want to understand when you were told this document was declassified and if it had an impact on whether or not you would pursue the investigation, because it is my understanding that it did. I'd like some answers, please.

**Mr Kent:** We'll take that question on notice and provide that information.

**Senator ABETZ:** I just have a few clarifying questions. Firstly, in relation to the provision of answers to committees of the parliament, the normal process is that they go through the relevant minister's office. Is that correct?

**Mr Kent:** That's correct.

**Senator ABETZ:** To your knowledge, has the AFP ever provided answers without first submitting them to the minister's office—under either a Labor government or a coalition government?

**Mr Kent:** It is my understanding that that is the normal process.

**Senator ABETZ:** Under both sides of politics?

**Mr Kent:** Irrespective of that, correct.

**Senator ABETZ:** You used the word 'corruption' earlier on in an answer. Was the term 'corruption' used in the context of money changing hands, favours being extended or the process of the Public Service being corrupted by the leaking of information?

**Mr Gaughan:** It can be all three of those things. One thing I did say is that it's a classification at a point in time and that it may change once we actually conduct the investigation.

**Senator ABETZ:** Thirdly, I assume you don't read the papers and see what may or may not have been leaked on a daily basis and then make your own determination of whether to investigate leaks. The leaks that you investigate or decide to take on board are as a result of referrals by relevant departments.

**Mr Gaughan:** The vast majority are referrals. However, I think, for clarity, there will be some that are so significantly of harm in nature that we will commence an investigation before we receive a referral, but that would be very, very seldom.

**Senator ABETZ:** I hope I'm not being too picky, but I'll take you to question 70 of the questions on notice and the answers provided: 70a, 70b, 70c, 70d, 70e and 70f. As I read those questions, they are basically identical from 70b through to 70f, asking, 'Did the AFP interview or otherwise speak to anyone?', and then we have different categories of people. The answers we are provided are: 70b, you didn't commence an investigation; 70c, there were no communications; and, 70e, the AFP did not speak. Why do we have these different categories of answers to what are identical questions? The answer to 70b, that the AFP did not commence an investigation into this matter, begs the question: but did you speak to potential suspects? With others, like 70e, you say, 'The AFP did not speak to the Secretary of the Department of Home Affairs.' I'm just wondering why we've got different answers if you didn't start an investigation. Just for those of us that like to get and drill into the detail, I'm just wondering: is there a material difference in the provision of those answers or just different wording to express the same thing?

**Mr Kent:** Perhaps I can assist. In terms of question 70b:

Did the AFP interview – or otherwise speak to – any suspects or potential suspects about the medevac matter?

The reason our response to that question was:

The AFP did not commence an investigation into this matter.

is that if we did not commence an investigation we would not have spoken to suspects or potential suspects about the medevac matter, because on triage, at evaluation, we did not commence an investigation.

**Senator ABETZ:** Yes, but when you're asked a specific question, wouldn't the answer be no—that you didn't interview or speak to them?

**Mr Kent:** I take your point. That explains why—

**Senator ABETZ:** I don't want to labour the point, but, just in the provision of answers, it would help. If I can quickly backtrack—time is getting on—to question 63 as well:

Mr Gaughan said at the public hearing on 14 August 2019 that "...we don't accept just a referral. We ask 'Before you refer, have you done certain things, with your own due diligence, within the department?' And that needs to come with it".

The question then was asked:

What had the Department of Home Affairs done before it referred the matter to the AFP?

And the answer is, 'The AFP understands'—well, what you were actually told, I think, is what the question's getting at, and I think the committee potentially should have been favoured with a more detailed response.

**Mr Gaughan:** I think in the answer we gave to Senator Keneally's question in relation to that particular matter we said we would provide a more fulsome list of what we did during that issue. We'll clarify that for you.

**Senator ABETZ:** Yes, but it would help—

**Mr Gaughan:** I understand.

**Senator ABETZ:** I won't labour the point any further, thank you very much.

**Senator FAWCETT:** Only one thing to clear on the record: there was an inference before of differential in your approach to information that was favourable to the government or not. You said in your submission:

... the AFP is not, and cannot legally be, directed by the Government or an individual Minister or Department to exercise, or abstain from exercising, police powers in an individual investigation.

Can I just get you to put on the record again that in these cases there was no direction from the minister, one way or the other, for you to commence or not commence an investigation.

**Mr Kent:** That's correct.

**Mr BYRNE:** On that: you mentioned that you have this committee which sets and makes deliberations about whether or not a matter should proceed. In the 12-month period how often did that committee meet?

**Mr Gaughan:** They meet in relation to a raft of matters that aren't necessarily subjects of this discussion, so I'll definitely have to take that on notice. Certainly, the regional operations committees, ROCs, in the states and territories meet weekly, but in relation to the Canberra office I will have to take that on notice.

**Mr BYRNE:** Then I have a subset of questions with respect to that. How often in those meetings would discussions of matters with some political sensitivity—potential investigations that had a political ramification or had some sort of connection with politics—have taken place in the space of 12 months?

**Mr Gaughan:** Again, noting that that activity would be undertaken in the Canberra office, because all matters of political sensitivity are handled by the same team, we will have to take that on notice. But I will say to the

committee that because of the nature of the investigations undertaken by that area—not all of them are leak investigations—the vast majority, unless it's an offshore investigation, are sensitive and therefore political.

**Mr BYRNE:** I'll subset that for you: let's talk about leak investigations. How many decisions were taken not to pursue leak investigations versus decisions that were taken to pursue investigations? Can I have total numbers in a 12-month period, please?

**Mr Gaughan:** We'll provide that on notice.

**CHAIR:** Final question. Can I refer you to question on notice number 58. It starts by saying, or referring to the AFP's submission to this inquiry:

The AFP's standard practice is to notify the Minister for Home Affairs when politically sensitive matters are referred to the AFP unless there is a conflict of interest or potential for perceived conflict of interest.

Is that standard practice written down or are you referring to an operational judgement that is made by the leadership at any certain time, given any number of considerations?

**Mr Gaughan:** The national guideline articulates what you've just spoken about, but, in relation to the consideration, that would be a decision that would be taken at senior levels of the organisation to determine whether or not, in our view, there was potential for a conflict of interest.

**CHAIR:** It's not a set-in-stone procedure; it's a judgement. That's what I wanted to clarify.

**Mr Gaughan:** That's correct, yes.

**CHAIR:** No further questions. If we could get answers to questions taken on notice by 5 pm on 4 October, two weeks from now, that would be great. Thank you very much.

**BARNES, Mr Greg, National Spokesman, Australian Lawyers Alliance**

*Evidence was taken via teleconference—*

[09:46]

**CHAIR:** Welcome. Do you have any comments to make on the capacity in which you appear?

**Mr Barnes:** I am a barrister, a spokesman for and also a former national president of the Australian Lawyers Alliance. For the sake of disclosure, I should also put on the record I've been a long-time adviser to Julian Assange and WikiLeaks, which is relevant in the context of some of the things the alliance have said in our submission.

**CHAIR:** Thank you. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings. It's over to you for an opening statement.

**Mr Barnes:** Thank you. We have set out in our submission the essential issues that concern us about these two pieces of legislation. Particularly we'd refer you to paragraphs 6 and 7. One of the issues that we are concerned about is how one defines 'journalist' and how one defines 'news'. This is an era where we have seen an explosion of traditional and now non-traditional media, and there's contention on the part of some about whether the work of WikiLeaks, for example, is traditional journalism or not. But, of course, such organisations and, in fact, individuals are often the ones who expose misconduct.

The other issue is that the defences which are in relation to news reporting only apply to secrecy offences; they wouldn't cover espionage or foreign interference offences and would only cover those persons who are in the business of reporting news, making the point that of course there is a good deal of reporting and disclosure now via other media platforms which are not-for-profits. For example, there are NGOs or individuals who directly report on what they've seen and heard. There's a shifting of the onus that's placed on journalists in raising the defence rather than keeping the burden with the prosecution to prove that the exception does not apply.

We also have some concerns about the protection of journalists' confidential data. We set that out in paragraph 9 of our submission. In particular, it's about the erosion of the ability of journalists to protect their confidential sources, which in the context of this legislation and the sort of material that might be used are obviously of extreme importance.

I could sum up our position by saying that we don't think the right balance has been struck between national security and the right to freedom of expression, freedom of opinion, and the inherent, one would say, right of people in a democracy to understand if there has been wrongdoing on the part of government agencies either in overseas conflicts or domestically. The lack of a broader human rights protection in Australia in the form of a charter or constitutionally means that the sorts of defences which would be available, for example, in the United States, in Canada or in the United Kingdom—freedom-of-expression defences and the striking down of some legislation encroaching upon those matters—isn't available in Australia. That's all we would want to say in terms of an opening statement. Thank you.

**CHAIR:** Thank you, Mr Barnes.

**Mr DREYFUS:** Mr Barnes, thank you very much for assisting the committee with its inquiry, with your written submission and by attending this hearing today. This question of defining 'journalist' or defining 'journalism' is one that has caused considerable difficulty. You'd probably be aware that the Public Interest Disclosure Act of the Commonwealth avoids the problem altogether—

**Mr Barnes:** Yes.

**Mr DREYFUS:** by authorising external disclosure in certain circumstances to anybody. Other parts of Commonwealth law use the terms 'journalist' and 'journalism' but don't attempt to define them. Can you offer any assistance to the committee in relation to what we suggest to the government as a definition that might be used?

**Mr Barnes:** We haven't included it here—and we'd be happy to get back to the committee to assist you, Mr Dreyfus, and others—but there is some work that has been done in relation to the law more broadly concerning the definition of 'journalist'. One of the difficulties of the traditional definition is that it doesn't take account of what we would call non-traditional agencies. Again, to use WikiLeaks, simply because it is a well-known example, there is that debate about whether or not WikiLeaks is a media organisation and Assange a journalist et cetera. It throws up those sorts of issues. One of the difficulties is that an organisation or an individual who is not

a traditional journalist could expose information which is then republished by traditional media organisations. So you may have a situation where the person who revealed the information, either on social media or in some form of report, is not protected, but the person or the organisation that publishes it might be protected because they are seen as traditional journalists.

I think I could take part of your question on notice and undertake to get back to you with some better and more reflective discussion about that issue of whether or not one should define that narrowly or whether there ought to be certain criteria and, if you fit within those criteria, you are deemed to be protected by the act. So if I can take that on notice in part and get back to you, that may be of assistance.

**Mr DREYFUS:** I have just couple of other matters. You've suggested that the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018, which amended the Criminal Code, has criminalised the disclosure of information in a manner which encroaches on journalists' freedom. That is on page 5 of your submission. Are you able to describe how the legislation does this?

**Mr Barns:** I think the difficulty with the legislation is that it narrows the defences, if you like, and narrows the context in which a journalist can disclose. In other words—and we refer to it a bit more in paragraph 6—because there is a shifting of the onus, because there is that relatively narrow definition of 'public interest' and because there is this ongoing issue about journalists, and fairly narrow disclosure in terms of the sort of activity that can be disclosed, we would say that that's an excessive encroachment on journalists' freedom, particularly in the absence of any enshrinement in legislation of media freedom or, of course, more broadly in the context of the right to freedom of expression, which is very narrowly defined. More recently, as you know, the High Court reiterated the narrowness of its definition.

**Mr DREYFUS:** To follow on from that, at page 7 you've suggested that, in relation to secrecy offences and espionage offences, exceptions to offences are a better way to protect journalists and their sources than defences to offences.

**Mr Barns:** It's really around the question of defences. We would suggest that the shifting of the onus in criminal proceedings is generally speaking undesirable because it removes the traditional position, which of course is that the prosecution has to prove its case. It's often of more utility to carve out exceptions, so that they are clearer, rather than simply saying, 'We'll take the risk,' knowing that the onus is going to be shifted to us in order to prove that the defence is operable.

**Mr DREYFUS:** In a practical sense it simply means that, if you move to that approach to drafting offences, the onus falls on the prosecution to show that the particular facts or circumstances relating to a journalist don't fall within the exception.

**Mr Barns:** That's right. Precisely, yes. We would say that it's cleaner, and, as you would know, it's commonly used in other forms of criminal legislation at the Commonwealth, state and territory levels.

**Mr DREYFUS:** Have you given any thought to the particular offences you're suggesting journalists and their sources should be excepted from?

**Mr Barns:** I knew that's where the next question was going to go, because I was thinking about it as you were responding. I think I'll take that on notice. I know Mr Schetzer, our policy director, has done some work on this, and I meant to get across it before I came on this morning—

**Mr DREYFUS:** That's all right, Mr Barns. It would be helpful if you could give us a list. To give it context, this committee has been asked, as you can see from our terms of reference, to look at the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. All of us on this committee are concerned to make practical suggestions to government about what the impact is, and, if necessary, how the impact might be lessened, so the more specific you're able to be about the particular offences you're talking about in your submission, the more helpful that'll be.

**Mr Barns:** We'll certainly undertake to get back to you in relation to that matter as quickly as we can.

**Mr DREYFUS:** Lastly, in your submission you made a suggestion that the Commonwealth might consider enacting a media freedom act. This is a suggestion or recommendation that's been made by quite a number of submitters. At the last hearing we asked the Attorney-General's Department and the Department of Home Affairs to provide us with a response to as many of the suggestions that have been made via submitters as possible. Have you had an opportunity to look at that departmental response, particularly as it relates to the media-freedom-act suggestion?

**Mr Barns:** No, and I'm grateful to you for bringing it to our attention. Certainly I haven't had a chance to have a look at it. My colleagues in the secretariat of the alliance may have had a look at it. Again, perhaps what we

might do, by way of our response to you on the other two issues, is that, if there are any suggestions we have in relation to the response or any points we want to make about the response, we could make those to you.

**Mr DREYFUS:** That would be of assistance, too, Mr Barns. To be helpful, it's supplementary submission 32.3.

**Mr Barns:** Thank you very much.

**Mr DREYFUS:** Thank you. I've got nothing further.

**CHAIR:** Mr Barns, we noted your objection to the espionage and foreign interference act of 2018. Noting the importance of journalism to a free society and a liberal democracy, how then do we investigate potential acts of espionage within the world of media?

**Mr Barns:** That's a large question—no criticism of the question. In a sense, the legislative response has to strike that balance between ensuring that there is no undermining of Australia's interests by way of espionage through the media and accepting the fact that in a democratic society there is and there should be, as it were, a shift in the balance to ensure that as much transparency as possible is enshrined in legislation. There are provisions in current legislation, which I haven't got in front of me but which deal with, for example, espionage-type activity and which would cover some activity that may or may not be within the media. This, in a sense, is not a new issue; you'd be aware that of course there were suggestions of espionage activity in the media back in the context of the Cold War et cetera. There was certainly some legislation which was drafted in the 1960s and seventies which was to take account of that. But we would say that one has to be very careful in ensuring that there's not suppression of the reporting of misconduct on the part of security agencies or, alternatively, the capacity to severely curtail disclosure and transparency. This is our major concern.

**CHAIR:** Sure. My point—without verballing Mr Assange, but I think he'd agree it's a fairly dangerous world out there—is that our task as parliamentarians is to ensure that we protect the national interest through laws that protect our national secrets.

**Mr Barns:** I think the issue is always: what is a secret? For example, in the Assange case, one has to remember that what he did in 2010 was reveal pretty serious war crimes on the part of the United States. Of course, that was republished in *The Guardian*, *The Washington Post* and *The New York Times*. One of the concerns we have is the veil of secrecy. I have experience dealing with the National Security Information Act and, to be blunt, it is often misused to throw a veil of secrecy over information which might be inconvenient to government for it to be disclosed but which in fact ought to be disclosed if we are committed to principles of transparency, democracy and fairness. And so I think the issue of secrecy is one that is complex. It's one that doesn't lend itself neatly to legislative definition and does rely to some extent on the way in which the courts are prepared to interpret legislation. It is a dangerous tool only in the sense that it can be misused, and I do see it misused often.

**CHAIR:** Thank you. Senator Fawcett has some questions for you.

**Senator FAWCETT:** Mr Barns, you referred to some of the incidents that came out of the Snowden disclosures. I take it you're familiar with Mr Peter Greste?

**Mr Barns:** Yes, we are.

**Senator FAWCETT:** Have you read his piece where he contrasts the approach that he and other journalists took to that of Mr Assange in terms of how they dealt with that information?

**Mr Barns:** I have. I should say that in my conversations with him and in some public utterances he has moved slightly away from that position. I can say without verballing him, because it's all on the public record, that he presented at a conference on media freedom in London in July and said that he thought Mr Assange—he didn't refer to Mr Assange—should be protected because he's within the same 'ecosystem'. I think that is the term that he used. We've had discussions with him. I've had discussions with him, not through the ALA but privately, about this issue of journalism and not journalism. There was also a presentation given by Mark Davis, a former SBS journalist, in which Mr Davis made it clear that there was quite a deal of editing and culling by Assange and WikiLeaks in 2010 before the release of material.

So I take Mr Greste's point. I would say that he has moved his position slightly and that there's also some contrary evidence on the part of Mr Davis.

**Senator FAWCETT:** Sure. My point, which you've almost reinforced through that, is that Mr Greste's contention is that responsible journalism, whether or not you extend that envelope as far as including Mr Assange, is journalism that seeks to understand the importance, and he talks about going through—and we've had other witnesses talk about engaging with—agencies to get their input into what's actually important and what's not

before they look at printing or releasing information. The witnesses we've had have indicated that they would normally contact an agency but not always. If that were made a requirement in order for them to have any kind of exemption, do you think that would achieve the dual purposes of protecting national information but also not suppressing, or even giving the impression of suppressing, freedom of the media?

**Mr Barns:** It gives the spy agencies a right of veto, in effect, with a criminal sanction hanging over your head, and I don't have the same faith and trust in security agencies. That of course is a matter of opinion for all of us. I'd say in relation to Mr Snowden: the world is a better place for understanding the extent to which there was unlawful activity by the national security agencies in the United States and also involving its allies.

**Senator FAWCETT:** Here in Australia we have the IGIS and the Ombudsman. We have the public interest disclosure scheme. There are frequent briefings to people within our agencies as to how they can raise information if they have concerns about the legality or ethics of something that they have seen. Under what circumstances would you encourage or endorse somebody breaking the existing law by an unauthorised disclosure when there are avenues that are in place for them to raise concerns about the conduct of Australia's agencies?

**Mr Barns:** Without getting into current litigation that's before the court not too far from you, I think the answer to that is whether or not a person is simply told to go away and shut up or their concerns are not taken seriously. I think in those sorts of cases this sort of complexity arises, so it does depend on whether or not a person's concerns are taken seriously and, if taken seriously, investigated and, if investigated and it's felt necessary, there are sanctions applied. If that doesn't happen, or if the conduct is so egregious and cancerous across the whole organisation, that may be a different position. I think every case is different. But I don't think it is the case always that whistleblowers—which in effect is what we're talking about here—are treated with the sort of respect that they ought to be treated with, even by independent agencies that have a watchdog role.

**Senator FAWCETT:** Do you have any evidence or case examples of that last comment?

**Mr Barns:** Yes, I do, but I'm not going to talk about it, because it's currently a matter before the courts.

**Senator FAWCETT:** Are you talking about IGIS?

**Mr Barns:** As I said, I'm mindful of the fact that there are judicial proceedings on foot in relation to a matter which is not too far from you, and I don't want to go further. I'm not briefed in that matter. I have no role in that matter but I'm familiar with the matter and I do know something about it. I don't mean to be rude, Senator, but I don't want to traverse territory that's currently before the courts.

**Senator FAWCETT:** I understand that.

**CHAIR:** Just a follow-up question, Mr Barns: you mentioned the secrets that were released by WikiLeaks that were subsequently published in *The New York Times* and *The Washington Post*; is it not true that *The New York Times* and *The Washington Post* redacted names and operationally sensitive information in those articles?

**Mr Barns:** I wasn't involved in WikiLeaks at the time. As I understand it, from what Mr Davis said, that was a collaboration. It wasn't a matter of republishing; it was a collaboration. One of the issues in relation to the WikiLeaks case that will be dealt with, of course, by the British courts, and one of the reasons that there has been a huge conflict within the department of justice for a number of years in relation to this case, is that there are some in the department of justice who say that what Assange did was effectively what *The New York Times* and *The Washington Post* did et cetera. In fact, I think they've editorialised similarly.

There is another view, which appears to have won out—and that's why you have a request for extradition before the British courts—which essentially says that that doesn't apply. I think they are matters that'll be agitated before the British courts, probably all the way to the UK Supreme Court. But I think you'll find that it was a collaborative effort, rather than simply: 'Here's a whole lot of material; now go and republish it.' It was a collaborative effort between all these organisations, one which was, in the eyes of some people, a non-traditional organisation versus more traditional organisations such as *The New York Times* et cetera.

**CHAIR:** Sure. I was driving at what we would consider responsible journalism, and dropping a whole bunch of national secrets into the open—revealing names, operations, sources and methods—versus a responsible approach by *The New York Times* and *The Washington Post* where, of course, they would consider the national interest in publishing a story to do with some of the information that was leaked by WikiLeaks.

**Mr Barns:** Yes, and I think what I'm saying to you is that I'm not sure it's that simple. Furthermore, the key material revealed very serious war crimes on the part of the United States. That, of course, was in the public interest, as it always has been. Again I'd say to you that there's been a good deal of work done upon this—and I'm only talking in relation to the 2010 material; I'm not getting into other material—but no evidence that any person

was placed in jeopardy as a result of the publication by anyone, because the material was effectively historic by that point in time.

**CHAIR:** Sure, but it had consequences for the Five Eyes relationship. I know that the US, for example, after the Snowden leaks, had to change the way they operated in the Five Eyes community when it came to intelligence sharing. So my point is that there is a place for responsible journalism, and, respectfully, I would exclude Mr Assange and WikiLeaks from that category. But that's a discussion for another—

**Mr Barns:** That's a matter for you, and we all have different views on that. We could spend all day, you and I, talking about it. But I'll say this: I'm often suspicious of the claims of security agencies. Particularly in more recent times, one always has to be very cautious about claims that are made. Of course, you and I might share very different philosophical views about transparency and the notion of what is responsible and what is not. These are all loaded terms. I don't mean that in a pejorative sense, but one person's view of 'responsible journalism' might be another person's view of 'censorship'. These are matters for conjecture and they're not easily defined.

**CHAIR:** No, but here we are having a healthy discussion—

**Mr Barns:** We are—exactly.

**CHAIR:** in our democracy.

**Mr Barns:** That's right.

**CHAIR:** Mr Barns, I know we've had to reschedule several times. We thank you for your flexibility, for your submission—

**Mr Barns:** I appreciate it. Just to reiterate the matters to get back to the committee about—the things Mr Dreyfus asked me about—so I don't forget them: we'll come back to you with a list of the exceptions. I don't know if Mr Dreyfus is still there. I'm trying to recall the first one he wanted. When is the transcript of this available, by the way, because that'll help me?

**CHAIR:** The transcript should be available in the next couple of working days.

**Mr Barns:** Excellent. That's all right.

**CHAIR:** You'll have an opportunity to correct it as well.

**Mr Barns:** Yes. It'll be set out there. We'll get back to you. I know there were three matters that Mr Dreyfus raised and that we undertook to get back to you on, so I'll have a look at the transcript and we'll get back to you shortly.

**CHAIR:** You've got until 4 October, so plenty of time.

**Mr Barns:** Excellent. Thank you very much.

**CHAIR:** Thank you again, Mr Barns.

**Proceedings suspended from 10:13 to 10:30**

**HANSFORD, Mr Hamish, First Assistant Secretary, National Security and Law Enforcement Policy Division, Department of Home Affairs**

**PEZZULLO, Mr Michael, Secretary, Department of Home Affairs**

**WARNES, Mr Andrew, Assistant Secretary, National Security Policy Branch, Department of Home Affairs**

**CHAIR:** Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings. Mr Pezzullo, do you have an opening statement?

**Mr Pezzullo:** I do. It is an extension of the evidence I gave at our last appearance before this committee on this same topic, especially in relation to the opening statement I made at that time.

**CHAIR:** Please go ahead.

**Mr Pezzullo:** Thank you. Since our appearance last month I've been advised, through public means, by Mr Dreyfus and others to give consideration to the force of my views and the mode of their expression. Senator Patrick, who is not a member of this committee, has similarly expressed views. So I've taken that as wise, eminent counsel and have indeed engaged in a period of thoughtful reflection on the question of press freedom, and I've come to these conclusions that might potentially inform our conversation with this committee over the next period.

First of all, in relation to those who engage in unauthorised disclosure of Commonwealth information that is entrusted to them, particularly for those of us who hold very high levels of clearance—up to and, in some cases, beyond top secret—it remains my view that those who engage in an unauthorised disclosure or a leak, as it is commonly labelled, without good reason, without having availed themselves of public interest protections and with no lawful authority should indeed feel the full force of the law. That, of course, involves a properly constituted investigation, the preparation of a brief of evidence, a prosecution that is pressed in the public interest, a fair trial—that goes without saying—and the bringing down, where appropriate, if it is to the satisfaction of the criminal justice standard, of a conviction and a sentence. If that, regrettably—I say 'regrettably', because there are humans at the bottom of all of this—involves a term of imprisonment, so be it. Some of the offences included in both the Crimes Act 1914, now superseded, and the Criminal Code Act involve, depending on their level of aggravation, terms of imprisonment ranging from two to seven years in the applicable area.

We Commonwealth officers—and those who have served in the parliament would know this as well—swear an oath. We effectively do so when we sign our acknowledgement of the granting of a security clearance, which is explicitly expressed in terms of saying, 'You will protect this information and only disclose it to those who are authorised to receive it.' That is especially so, in terms of the importance of that oath, for those of us who hold clearances at top secret and above. So, as regrettable as it might appear to be, we do swear an oath and, if we don't have a lawful reason or a lawful excuse for doing otherwise, especially if we haven't availed ourselves of public interest disclosure protections, we should expect to feel the full force of the law. That's the first point.

The second point is in relation to the investigation of journalists. Rather than having an opinion or engaging in commentary on this, I'm in a privileged position, along with the Federal Police commissioner, by law, of providing advice to the minister responsible for the administration of the Federal Police Act, particularly pursuant to section 37(2). So I don't have the luxury of engaging in opinions or engaging in commentary; I've actually got to give advice. Mr Colvin, the soon-to-retire commissioner, and I have been engaged for months on this question of how we assist the government, particularly the minister of the Crown responsible for the administration of the relevant act, in the striking of a proper balance between the enforcement of our criminal laws, in relation to which there can never be an absolute immunity or carve-out, and the imperative of having a free press, which is so integral to the functioning of a free democracy, which, I say gratefully, we have.

To that end, Mr Colvin and I were very pleased to be able to collaborate in the lead-up to the signing on 8 August by Mr Dutton of the ministerial direction, which I know this committee is well seized of. I won't go through its particulars; I suspect it's probably going to come up in our discussion. I can advise this committee that Mr Colvin and I put a lot of thought into that; indeed, quite significant elements of it are drafted by our own hands, with advice from our excellent and wonderful policy and legal staff. It does really reflect the distilled position that we ultimately took as advice to the minister. We obviously engaged with him in discussions, and it ultimately reflects his views as the signatory of the direction. I just want to make the point that the striking of an

appropriate balance between secrecy and an open democracy with a free media was encapsulated in that direction. I particularly wish to draw attention to the fact—you heard Mr Kent speak to this issue this morning, and you also heard Mr Colvin speak to this when he appeared before you last month—that the Federal Police will now revise their guidance and—as I suspect they already were doing implicitly but are now doing explicitly—on engaging in investigations of journalists and those engaged in the business of news media, very much investigate those actions as a last resort where it is strongly in the public interest that that be done—and only in those areas where a significant harm to national security has arisen through the disclosure of sensitive information.

When I last appeared before you, and you asked me about the types of categories that might form the basis of a national security harm assessment, both in my opening remarks and in the discussion we had pursuant to your questions I spoke about ADF operations and capabilities, sensitive intelligence operations and capabilities, information security and cyberwarfare, the identity of our protected personnel, and, in some cases, the location and purpose of very sensitive installations. I don't seek to speak on behalf of Mr Colvin, but I know his view and I'm sure he would want me to join him in making these remarks: frankly, all other matters should be very carefully considered before they are referred to the Federal Police. The Federal Police, as you heard from Mr Kent this morning, would take a view that would place a higher hurdle on taking references that don't go to those areas and similar and related areas. No doubt we can have a further discussion about that.

I do say, in parentheses, that in the two matters that have been most prominently discussed in the public square that have occasioned this inquiry—the story about ASD powers, published by Ms Smethurst, and the story pertaining to ADF operations in Afghanistan—in both cases the material in question, which is currently protected by court order, relates to documents with classifications of secret, top secret and above. It's not merely the description of procedures, operations and documents that have been imparted to journalists; the transmission of documents has occurred in the case of Ms Smethurst's story—so much so that a screenshot of a document appeared. We went over that ground at our last engagement. So that's in relation to journalists.

Finally, I've reflected on the question of press freedom more generally. I don't wish to engage as a peer or a counterpart to elected members who have made comments on this, so these comments are set at a much lower level of profundity. I note that the Deputy Prime Minister made comments in the House yesterday and that the minister, the Leader of the Opposition and others—including you, Mr Dreyfus—have made comments. It's not for me to involve myself in a debate amongst elected members of parliament. My personal reflection is: when there are two matters that particularly have caused, in some quarters of our democracy, a sense of grievance, particularly in relation to police investigators attending a person's residence—which would be difficult and stressful for all of us; I fully acknowledge that—is there a crisis around press freedom? I don't think so, as I said in my opening statement in August. I think, though, that there is an issue around media and government engagement.

I don't think it is satisfactory to anyone—government officials, ministers or indeed publishers, editors and journalists—to solely have a situation where highly technical documents and technical procedures, which on their face might not cause any harm if they're published, can have a judgement made by a journalist, sometimes not necessarily experienced deeply in national security matters or has covered other ground, that it's in the public interest to disclose that information and either lives are put at risk or capabilities are seriously harmed. We need to get through that. Whether we move to the practices and the arrangements that are evident in other democracies, of having some sort of formalised engagement between the government, its officials and the press and broadcasting sector, is something that we discussed last time—Senator Fawcett, you certainly raised it. That's something I'm keen to explore with the committee. I thank the committee for its indulgence in listening to my opening statement. Thank you.

**CHAIR:** Thank you very much, Mr Pezzullo. Could we go straight to your last point, and that was improving media and government engagement. Can you give us some practical suggestions as to how we might achieve that?

**Mr Pezzullo:** I think the starting point would be the latter two paragraphs of Mr Dutton's direction, which clearly both require the AFP in terms of its internal procedures—I heard Mr Kent describe those in general terms, and I think Senator McAllister asked that those documents be made available. There's a question there about internal guidance that refers to the triaging and assessment process that the Federal Police will henceforth undertake.

Mr Dutton's statement also refers to the potential for the AFP to have regard to broader whole-of-government guidance around what constitutes national security harm. Speaking personally—because we haven't engaged on this in a concrete fashion with the government, because obviously we're keen to see what the committee's views are, and we'll obviously assist the government in considering a response to your report—I would have thought that to be an explanation of how the security classification system works and how matters are defined to be and

stamped to be top secret, in some cases accompanied by additional code words and caveats and secrets. Matters below those two levels of classification, which were quite explicitly put into law in terms of the disclosure offence that's in the Criminal Code, now at section 122—I think matters that fall below that range of classification tend not to relate to the harm areas that I indicated earlier. I think having some sort of process whereby there's a trusted dialogue, whereby those matters can be explained without the further putting of lives or assets at risk, should be explored.

The challenge here—and I think this came up in our conversation last time—is the question of protection of sources. It's always going to be intrinsically challenging, if you're dealing with it at that very tactical stage, for a journalist or an editor to come forward and say: 'Look, we've got something. It appears to be extremely sensitive, but it appears to us to be in the public interest for it to be disclosed.' Now, this does happen. I want to assure the committee that this does happen, and stories are published in the criminal space, in the terror space and indeed in other areas whereby, through sensible, mature and quiet negotiations—and I know from personal experience it's happened under governments of both persuasions—details are held. With certain details that could lead to someone being killed—literally where a human source is exposed, particularly to dangerous criminal groups—their identity is veiled and there's a process of appropriate negotiation, which is not censorship.

Does it aggrieve me and cause me frustration that a document or very sensitive information is in the hands of a journalist? Well, yes, quite possibly. How did it get to you? Why do you have it? Why does someone think that there's a legitimate reason to give it to you?

I'm familiar with cases where all of those questions are set aside, a sensible resolution is arrived at, often case by case, lives are not put at risk and sensitive capabilities are not exposed and compromised but where the news organisation, in its own wisdom, because it's a free democracy, has made a judgement that the public's got a right to know about certain military operations and intelligence operations, and, if you will, honour is served and saved on all sides. The question is: can that be done in this fast-paced world where there's a changing business model for the media—where it's important to get information out and where there's constant online publishing and blogging? We don't have the rhythms and cycles like before, where there were break points throughout the news cycle which afforded you a bit more time to negotiate. Can those sorts of arrangements be somehow not codified—I'm not suggesting for a moment that's a practical suggestion that I would put to this committee, but, in the spirit of that approach, can that be operated at scale and at speed such that we have both free media and appropriately secured information?

**CHAIR:** So you would have, at the heart of a more refined media and government engagement, some sort of strategy for risk mitigation to protect national secrets whilst also enabling journalists to pursue stories of public interest?

**Mr Pezzullo:** Essentially, and that already happens. On a case-by-case basis, particularly for those who are experienced in what are typically called the national security intelligence or defence rounds, there are trusted confidential relationships. I know personally who in the fourth estate I can trust implicitly if we handshake or we say, 'Okay, that's not going to be published.' Sensitive information is not disclosed but—and it's not for me to judge; we don't engage in censorship—if the news organisation believes it to be in the public interest, the story is still run. You've read these stories; you often just don't know. It extends back many years and, I can assure you, under many different ministers and under many different governments. You simply just don't know where those trusted conversations have occurred and where sensitive capabilities in the areas that I indicated earlier have been protected but where the news import or the news value has still been achieved in the public interest as determined by the journalist and the news organisation, not by some form of censoring activity on the part of the government.

**CHAIR:** Are these established relationships of trust with the fourth estate unique to individuals, not institutionalised, as it were?

**Mr Pezzullo:** They tend to be. Again, I stress this not as a representative of the government; I'm here as the head of the department, and we haven't engaged in concrete terms on this question because it's my judgement that the government would want to see your report before it turns its mind to this. Regrettably, we've let those procedures fall away. The last time the Defence department convened what used to be called the D-notice committee was 1982—I had occasion to check the records. In this day and age, is that sensible? Perhaps some people would say yes and some would say no. The types of harms that I indicated earlier have not changed over time—ADF operations; sensitive intelligence source of methods; the location of certain facilities and their purpose, which might not be disclosed publicly—they might operate either completely covertly or under a veil; and the identity of personnel, some of which, of course, is protected explicitly statutorily—for instance, the identity of officers in the Australian Secret Intelligence Service and the Australian Security Intelligence Organisation—below certain levels. The last time there was a serious engagement in my judgement—again, I'm

expressing a personal view on this—was when former Attorney-General McClelland engaged in quite an extensive process of consultation with the press and broadcasting sector, and that goes back to the years 2010 and 2011.

One of the things that I would counsel and advise this committee to look at seriously is: is there a modern construct short of legislation that is applicable, potentially? Last time, Senator Fawcett asked about whether such an arrangement would have any practical effect or force outside of legislation. Senator, it's my view that it would; it would take a lot of the noise out of these concerns. But, in the end, there's always going to be the potential for a news organisation quite properly in the pursuit of its democratic functions to say: 'We're not going to engage. We don't trust the agency or the government or the officers involved, and we will make our own judgements.' All I say in that circumstance is that the Criminal Code Act, as amended in December 2018 with the bipartisan support of both sides of parliament, put in place very strict penalties for the publication of certain types of information—secret, top-secret and above—and, as the Deputy Prime Minister said in the House yesterday, also put in strong protections around the public interest associated with journalism.

**CHAIR:** You mentioned the D-notice committee; the last time—

**Mr Pezzullo:** Just as an illustrative historical—and indeed, decades-old—example, without necessarily having contemporary relevance.

**CHAIR:** It last met in the year of my birth. So I was wondering if you could—

**Mr Pezzullo:** I didn't realise that you were so young, Mr Chairman!

**CHAIR:** For the listening public, could you just take us a little further into the historical metaphor and explain the basic workings of that committee and the role that it served.

**Mr Pezzullo:** Well, it was more than a metaphor; it was a real thing. It was the real practice. It does date back to the Cold War, where there were very serious concerns about espionage: about what were, in those days of course, very direct threats by Soviet agents, particularly of the KGB but also of the GRU, who were seeking to suborn individuals, penetrate institutions and plant agents in very sensitive areas of government, from the late forties right through to the end of the Cold War. Without retailing the full history of it, going back to the Menzies period but observed thereafter well into the eighties, there was a process whereby the defence department ran a press and broadcasting committee. It was not a censorship committee. The press organisations were represented and the departments were represented. It was convened by the Department of Defence but also assisting in that endeavour were other departments as well.

I want to stress that it was a very different era. There were fewer news outlets. There was a rhythm to the news day. For most of us, when we were growing up—which, in my case, goes back to the sixties, Mr Chairman, so I'm shocked at how young the chair of the committee is; it makes me feel very old!—in the seventies, you would get your news at a particular time through the day. That actually created break points in the news cycle. It created an opportunity for people to come forward. That said, all through the seventies and eighties there were very dramatic disclosures.

Brian Toohey, the very well-known investigative journalist, has written effectively a memoir but also a history of secrecy, which is well worth reading; he's a very esteemed and accomplished practitioner in this field. I don't necessarily agree with much of what Mr Toohey says. But documents were dropped off the back of trucks and all the rest of it. He made his own choices about publishing those. He broke some very significant stories. Other stories were not broken.

It's a question of how that engagement works, and a matter for this committee is the extent to which some of those protections carved out should be codified in statute. That's something that I'm not personally inclined to advise you to consider, but that's not really a matter for me; it's a matter for the committee as elected representatives to come to a view about and for the government to respond to. The other point to make—and I'll finish on this note—is that, even with such arrangements in place, quite egregious breaches of national security were evident, through the sixties, seventies and eighties, so it was certainly not foolproof. But the one redeeming feature that might be thought of as having some contemporary resonance is that there were established relationships where at least people could say, 'I'm looking you in the eye. Can I trust what you're telling me? Can you trust what I'm saying to you?' It just seems to me that to have those relationships in place before there's a crisis, before there's an incident, is always better than trying to establish those relationships in the heat of an incident.

**CHAIR:** Last question: do the US, or the UK, for example, operate an institution like that in the present day?

**Mr Pezzullo:** The United States is very different. They've got the constitutionally entrenched privileges pursuant to the first amendment. I'm not aware of them engaging in the practice that is still evident in Britain,

where they do have a press and broadcasting committee. It has been in existence continuously from that era that I described earlier. The US system, though, has a much more formalised process, particularly in agencies such as the CIA, for persons to come forward—for instance, former agents who wish to produce a memoir—to engage in what's called historical review and scrutiny, and indeed they come to a view about what is permissible and, in cases where there is ongoing operational risk, advice is provided either to authors who approach them or, in the case of former employees, pursuant to their longstanding—and, indeed, lifelong—obligations.

Can I finish on this point. I think it is very important in our democracy for there to be as a last resort—we spoke about last resort investigations earlier—a free media that can actually get to official wrongdoing and programs that are fundamentally illegal and criminal. We do not operate intelligence, special forces or military programs that are not founded in law. I'm going to engage in a completely fictional scenario. Were it to be the case that we on this side of the table were running an off-the-books clandestine program, let's call it Black Briar just for the purposes of the committee, and an officer was so aggrieved that there was no parliamentary scrutiny of such a program—it was unethical, immoral, illegal, not sanctioned or based on any law that this parliament had passed and indeed not even constitutionally grounded because it wasn't grounded in any head of power—I would be the first person to say, yes, there is going to be a situation in that fictional scenario where you will not get any protection internally. That's because such a program—and this is a fictional scenario—would be so vigorously defended that you wouldn't even know who to go to within government. In that case, a disclosure to the press would be something that I would morally support. We don't run such programs. We don't run off-the-books programs that are not known to members of this parliament, that are not authorised by a warrant authorisation given by either a minister of the crown or a judge and that are not briefed to oversight agencies such as the Inspector-General of Intelligence and Security. We don't run a Black Briar type program, and that is the circumstance in which the media is both the first and last line of defence.

**Senator FAWCETT:** Chair, I take it Steve Lewis and Chris Uhlmann will get a copy of this *Hansard*.

**CHAIR:** I think they will! Do you want to repeat that a little louder for Mr Pezzullo?

**Senator FAWCETT:** It's all right; it was tongue in cheek.

**Senator McALLISTER:** My colleagues have questions about other matters, but I thought it would be worth following up some of your observations about the informal relationships that presently exist between intelligence and security officials and the press. You indicated a procedural unwillingness to make a recommendation for a codification of those processes. In terms of providing the committee with policy advice, what risks or problems would codification present to the parliament and in relation to the broader policy objective?

**Mr Pezzullo:** Thank you, Senator. As I said, and I'm not suggesting anything firm, in the genre of some kind of trusted process of engagement between agencies of the government that possess these secrets at the very high end of top-secret information and the press and broadcasting and the journalistic sector more generally, any attempt to codify and put in practice some kind of apparatus will always run several risks. Even though it has some attraction to it, in the end you are never going to be able to say that there is an immunity, absolute or otherwise, that flows from that engagement. In the end, whatever is published, whatever is disclosed—or, to use the colloquial parlance, 'leaked'—still potentially runs foul of the Criminal Code. If the Criminal Code Act, as amended in December 2018, remains in force—my job is to apply the laws of this parliament and, as I understand it, that is the intent of this parliament—there is no way that any administrative, professional, non-statutory process could ever give an absolute level of certainty. So if the starting point is that we have to carve out and provide if not absolute protection then comprehensive protection, there is no administrative arrangement in the world that will ever satisfy that test. So I think that is an issue.

**Senator McALLISTER:** I see. So you mean codified administratively rather than codified legislatively?

**Mr Pezzullo:** It's not for me to provide freewheeling advice before I've spoken to the government about potential changes to law. But if you are asking me what my personal view would be, I don't think such an arrangement would warrant a legislative carve-out. In relation to the laws that this parliament has passed, it's not for the police, as you heard Mr Kent say, to second-guess what you intended by the passage of those laws. This parliament has criminalised the publication—I refer you to section 122.4A—of information that has the characteristics that I indicated earlier: secret and top secret and where there's a harm to national security and where, in the public interest, there's no defence available at section 122.5(6), from memory, that it was otherwise in the public interest for that information to be disclosed by way of publication. That is the law that this parliament has passed.

**Senator McALLISTER:** To summarise a perhaps lengthy answer—

**Mr Pezzullo:** I do apologise.

**Senator McALLISTER:** the qualification you're providing is that administrative, rather than legislative, codification falls short of immunities or protections and could only ever be a source of advice rather than actual legal protection. I think that is the tone of your comments.

**Mr Pezzullo:** And, axiomatically, an administrative arrangement can never rise higher than the statute that it relates to.

**Senator McALLISTER:** What are the public policy risks and challenges with retaining the current arrangement where informal contacts are utilised to obtain similar ends?

**Mr Pezzullo:** I touched on this in our discussion in August. I think it might have been in relation to Mr Dreyfus's question, or it might have been Senator Keneally's. I've run this scenario in my mind a number of times, because I'm quite familiar with the documents that sit at the heart of the article by Ms Smethurst. As you've heard from the Federal Police, any offences that arise there—and, as I've indicated to you previously, I'm not briefed on either their investigation or who they're looking at; in fact, I've given evidence that I put it out of my mind that they were looking at that matter for some 14 months, and I won't reprise all of that evidence. Those matters, as you've heard from the Federal Police, pertain to the now superseded and obsolete provisions of the Crimes Act 1914. This is going to be completely hypothetical, so I'm just going to draw on the document rather than what Ms Smethurst did with it, but, were a similar disclosure to occur, with a screenshot of a document classified 'TOP SECRET COMINT AUSTEO'—that's on page 4 of *The Sunday Telegraph* on 29 April 2018, when the Crimes Act offences were in force; they've since been superseded; various extracts and descriptions of the document were then contained in the body of the reporting, but I'm not going to go to whether the reporting was well founded; put that to one side—on its face, there would be a prima facie breach of section 122 of the Criminal Code. The defence in that case would be: 'It was in the public interest because there was some classified mass spying program that was being proposed.' Were a court not to be satisfied by that defence, the term of imprisonment there would be five years, so we have to get serious about this. I'm concerned that people are going to stumble into jail.

**Senator McALLISTER:** My concern was about the risk in informal arrangements with the people you describe as, I think, trusted media contacts. What are the risks associated with that?

**Mr Pezzullo:** Who are well versed in the round that they're covering; they've actually got expertise in defence intelligence, national security and criminal matters.

**Senator McALLISTER:** Those are the present arrangements. What are the risks and challenges in maintaining that model? You're inviting us to contemplate different models—legislative, administrative and informal—and I'm asking about the challenges and risks associated with the present arrangements, which are entirely informal.

**Mr Pezzullo:** As a safety net, particularly given that both the new offence but also the new protection—as the Deputy Prime Minister said yesterday, there's been a change to the law, so there's now an active defence, but you've still got to argue that defence. The safety net of informality, in my personal judgement, has got many holes in it. I wouldn't want to be falling and hoping to bounce off that safety net.

**Senator McALLISTER:** If you were a journalist?

**Mr Pezzullo:** Or an editor or a publisher or an owner of a news organisation with a duty of care to my journalists. Absolutely. I'd want a finer mesh in the safety net. That would be the best way to put it.

**Senator KENEALLY:** I will follow that up, Chair. Could you give us a sense of how many people in the Australian media landscape you think fall into this category of trusted media contacts?

**Mr Pezzullo:** Of those who cover the ground, it's a relatively small market. It's certainly not as expansive as, say, the US media environment. There wouldn't be many and I wouldn't want to put a finite number on it, but there are, axiomatically and self-evidently, very few people—there are perhaps fewer than two dozen; perhaps there might be more—who cover these areas intimately, persistently and constantly. They generate stories that range from the irritating through to the informative, but they work the patch and they understand the area. They're often familiar with the history, the code words—whether they're true or not—the capabilities et cetera, and they take a professional stance of informing themselves about those matters beyond whatever particular document or story they might be promoting that day.

**Mr DREYFUS:** Are all of these less-than-two-dozen journalists, in the round, journalists with whom you have a trusted, confidential relationship, to use your term?

**Mr Pezzullo:** No.

**Mr DREYFUS:** So how many journalists have you got a trusted, confidential relationship with out of the less-than-two-dozen?

**Mr Pezzullo:** Well, in my case, I engage with other members of the fourth estate who don't operate in those rounds, because that's not all they do.

**Senator KENEALLY:** That doesn't actually answer Mr Dreyfus's question.

**Mr DREYFUS:** I was asking for a number, Mr Pezzullo.

**Mr Pezzullo:** I know you were.

**Mr DREYFUS:** Well, can you give me an answer? It's not an exercise in evasion, Mr Pezzullo.

**Senator KENEALLY:** To be fair, this is new information that you're providing to the committee. In your role as secretary of the Department of Home Affairs, you have chosen to operate in the context of having a group of trusted media contacts. You have provided that voluntarily to the committee.

**Mr Pezzullo:** Yes.

**Senator KENEALLY:** We're trying to understand that informal arrangement—why does that group of people exist, do they come from multiple media organisations—

**Mr Pezzullo:** Yes.

**Senator KENEALLY:** or are they all located within one?

**Mr Pezzullo:** No.

**Senator KENEALLY:** And, as Mr Dreyfus has just asked, can you put a number on the ones that you—we're trying to understand the extent to which the Australian media are both competent and trusted by government and, then, to consider ways that we could recommend improvements in those relationships.

**Mr Pezzullo:** The best way to answer your question is to say that, because we often have to collaborate with our colleague partner agencies in dealing with inquiries that come in, all of us in this area would be familiar with those members of the press and the broadcasting sector who have got, if not deep, at least a degree of knowledge of the field and who come forward saying, 'I don't want to have anyone killed, I don't want to expose anything that doesn't need to be exposed, but I've got a story that I feel needs to be told. When can I run with it?' There wouldn't be a head of an agency, a head of a department, a minister or a senior official who wouldn't know of cases where those relationships have been used to protect lives and to avoid the disclosure of information unnecessarily. As to the question of whether they're in one outlet or many, I know from personal experience that I've had occasion to understand people coming from all of the major outlets—I'm not going to name them—and they relate to stories which potentially put people's lives at risks, in terms of dangerous drug cartels, foreign and hostile intelligence services, and elsewhere. I'm really reluctant to name outlets, but I can assure you that they extend from those outlets that might be considered to be—I'm going to use a political Left and Right spectrum only for illustrative purposes—on the Left of the media landscape right through to the Right, and maybe at the edges. I don't know anyone in Tribune, the Marxist-Leninist broadcasting corporation.

**Senator KENEALLY:** To go back to Mr Dreyfus's question, can you give us a sense of the number of people that you would consider to be trusted media contacts? We're trying to understand the scope of the capacity of the Australian media?

**Mr Pezzullo:** It's capacity, and having regard to the fact that there's been a lot of cost-cutting and lot of diminution of specialised rounds, which I think is regrettable, but—

**CHAIR:** Are you asking for him to disclose his rolodex?

**Senator KENEALLY:** No, well—

**Senator McALLISTER:** Actually, yes, because this is what we're talking about. We're exploring the set of present arrangements that exist in relation to the interaction between law enforcement and intelligence agencies performing their functions—

**Senator KENEALLY:** and the media.

**Senator McALLISTER:** and the impact of the exercise of those powers on journalists' work. That is the first point in the terms of reference for this committee. Mr Pezzullo has explained that there are informal arrangements presently—

**Mr Pezzullo:** Yes.

**Senator McALLISTER:** and he's asked us to contemplate other administrative arrangements or legislative ones that might differ from these—

**Mr Pezzullo:** Potentially contemplate.

**Senator McALLISTER:** potentially—but we are now trying to establish the current arrangements in fact and then also explore some of the pros and cons of the current arrangements. That is a perfectly reasonable line of inquiry, Chair, and we'd like to continue asking those questions.

**Mr Pezzullo:** I'm very happy to answer it, Mr Chairman. Senator Keneally, regrettably, and this is said as much as a citizen, I think that the undervaluing of specialised reporting, of allowing journalists to develop around and become experts in their field—I understand the commercial and business imperatives—is regrettable. All I can say is I follow much more learned views on this, such as those put by Ms Tingle, for instance, whose work I read very closely. I agree with her that the industry has gone through major disruption. It's becoming—I won't say a smaller pool, because that starts to get to the question of how big the pool should be—

**Senator McALLISTER:** It's not about how big the pool should be; it's a factual question about how big it is. You indicated that there's a small number of trusted journalists with whom you and perhaps some of your colleagues engage with on questions around the publication of sensitive material to guide and shape the way that those sensitive materials are handled.

**Mr Pezzullo:** I think that's a slight mischaracterisation, but it's not far off the mark, Senator. There are a number of people who routinely come forward to get their stories checked, on the basis of fierce independence: 'I will publish something. I have a document. Someone's told me this. I know this occurred, but I don't want someone to be killed and I don't necessarily want to blow a military or intelligence capability which is not germane to my story.' I said to Mr Dreyfus and possibly Senator Keneally that I think there's probably in the realm of about two dozen people who would operate in that way.

**Senator McALLISTER:** Right.

**Mr Pezzullo:** Does that mean that I personally operate with them—

**Mr DREYFUS:** Now you've shifted ground, Mr Pezzullo, because—

**Senator KENEALLY:** No, to be fair, he said—

**Mr DREYFUS:** He said, 'about two dozen who operated in the defence or security field'—

**Mr Pezzullo:** Yes, which is the relevant field. I'm not talking about people—

**Mr DREYFUS:** and then you said—I'm paraphrasing your answer now, but I'm really trying to get you to give direct answers and concentrate hard on the questions, Mr Pezzullo—there was a lesser number with whom you had trusted, confidential relationships.

This started with you saying—I wrote it down—'there are trusted confidential relationships with certain journalists.' My questions and those of my colleagues are directed at finding out how many. It's a number, Mr Pezzullo. It doesn't call for a lengthy excursus or philosophising about anything. It's a subset number of the less than two dozen journalists—your number—that you identified as working in the defence and security field. So, how many do you have a trusted and confidential relationship with?

**Mr Pezzullo:** It'd be the same number. I'd say there are about two dozen people who have the judgement, the depth, the scale of knowledge, the wit and the sensibility to come forward and say, 'Look, I'm going to run this yarn, whether you like it or not. Let's talk about making sure that it can be done safely.'

**Senator KENEALLY:** Is Annika Smethurst one of those?

**Mr Pezzullo:** I wouldn't know her other than—I've come to know of her, but I wouldn't know her at all.

**Senator McALLISTER:** You indicated that—

**Mr Pezzullo:** I mean, I know who she is now.

**Senator McALLISTER:** the relationship is one where people bring a story to you.

**Mr Pezzullo:** Always, yes—to check.

**Senator McALLISTER:** Have you ever provided information to any of those journalists that represented an unauthorised disclosure—

**Mr Pezzullo:** No, no, and not in breach of the criminal law, I can assure you.

**Mr BYRNE:** Have you ever provided any classified or secret information to a journalist?

**Mr Pezzullo:** No. I didn't realise that this was going to be a sort of mock trial, but—

**Senator McALLISTER:** No—

**Mr BYRNE:** You opened it up.

**Senator KENEALLY:** You opened the door, Mr Pezzullo.

**Mr BYRNE:** You basically said you've been talking to trusted journalists, so you've invited this question.

**Mr Pezzullo:** Mr Byrne—

**Mr BYRNE:** Hang on, I haven't finished.

**Mr Pezzullo:** Mr Byrne, I—

**Mr BYRNE:** No, no. I haven't finished. You stop, you listen and then I ask questions. That's my role here. I'm asking you: are you saying to me that you've never provided classified—

**Mr Pezzullo:** Correct.

**Mr BYRNE:** or secret information to a journalist in any conversation that you've had with them—

**Mr Pezzullo:** Yes. Correct.

**Mr BYRNE:** for the record?

**Mr Pezzullo:** Correct. The reason I can give you that assurance is that, as someone who reads many classified documents—and, in many cases, created them, over a long career—I know where the lines are. That's the point.

**Mr BYRNE:** Have you had discussions where you've discussed excerpts taken from classified documents?

**Mr Pezzullo:** No, and that's the point—

**Mr BYRNE:** Hang on, I haven't finished here. So you're saying that, in any conversation that you've ever had with journalists, you've never quoted or referred to classified documents or secret documents that you're aware of—with any journalist, your trusted friends?

**Mr Pezzullo:** More than 'aware of'; I know for a fact. Because I read so many documents, and I have so many documents cross my desk, I know exactly where the lines are. That's the point.

**Mr BYRNE:** And you're happy, basically, for that to be almost a definitive statement to this committee, are you—

**Mr Pezzullo:** Yes.

**Mr BYRNE:** knowing that, my understanding is—

**Mr Pezzullo:** Yes.

**Mr BYRNE:** Hang on; I haven't finished—the answer is in contempt of this committee if, in fact, that's not true?

**Mr Pezzullo:** Yes.

**Senator ABETZ:** Congratulations on your reappointment, Secretary. I have a quick question to clarify assertions that were made earlier today, in relation to the Minister for Home Affairs providing short-term tourist visas that were the subject of a Senate inquiry. Can I just confirm that the minister, in both those cases—yes, it was two cases—acted on the advice of the department?

**Mr Pezzullo:** Is this in the so-called au pair matter?

**Senator ABETZ:** I don't like using that term, because—

**Mr Pezzullo:** No; I say, 'so-called'.

**Senator ABETZ:** Yes, 'so-called'. It's a falsehood. We know from the evidence that they were not au pairs. But a person tried to ventilate this issue—clearly with an axe to grind, I would suggest. Nevertheless, as to that which was granted, they were, as I understand it, short-term tourist visas. Were they granted by Minister Dutton on the advice of the department?

**Mr Pezzullo:** Yes. Advice was given, and we've covered that extensively in another committee.

**Senator ABETZ:** And that has been the case in relation to ministers of both political persuasions over many years: that people will seek an intervention, the department will provide advice and then the minister will make a decision yay or nay?

**Mr Pezzullo:** Yes.

**Senator ABETZ:** But, in both those cases, the department gave advice that it would be appropriate to grant the visas sought?

**Mr Pezzullo:** I need to check the record—advice was given, and the minister acted on the advice.

**Senator ABETZ:** Yes.

**Mr Pezzullo:** Whether the exact term, or whether the minister chose to exercise his discretion and modify the term, I'd just need to check, because we've given extensive evidence.

**Senator ABETZ:** Just to clarify: the department did not advise that the person should be removed from the country?

**Mr Pezzullo:** As I recall our evidence—it's been a while since I've looked at the material—that is right.

**Senator ABETZ:** In relation to public disclosure, we have the Public Interest Disclosure Act 2013; in your estimation is there any conduct that would be considered to be in the public interest that is not covered by the definition of 'disclosable conduct' in that act?

**Mr Pezzullo:** Sorry, Senator, if you'd just unpack that question for me: in relation to the 2013 act, is there any conduct that has what characteristic?

**Senator ABETZ:** Disclosable conduct. The legislation is entitled Public Interest Disclosure Act 2013.

**Mr Pezzullo:** Yes.

**Senator ABETZ:** The question is: in your estimation, is there any conduct that would be considered to be in the public interest that is not covered by the definition of 'disclosable conduct' in that act?

**Mr Pezzullo:** It's not an act that I'm particularly expert in. It's an act administered by the Attorney-General and the Attorney-General's Department. I might see if Mr Hansford wishes to add to my answer—or Mr Warnes—but it's my judgement that, as to all of the matters that, potentially, are the subject of a public interest disclosure, with all of the protections that that act provides, it's comprehensive and covers all the relevant disclosable grounds. Mr Hansford?

**Mr Hansford:** That's right. We covered some of the public interest disclosure provisions in our supplementary submission, which is a joint submission between Attorney-General's and the Department of Home Affairs. The submissions to the inquiry have recommended a range of different changes, and we outlined those. Subsequently, in the submission we highlighted the fact that there's been an independent review of the Public Interest Disclosure Act by former Integrity Commissioner, Mr Philip Moss, and the government is considering that review and will look to whether or not they make changes.

**Senator ABETZ:** Thank you, Chair.

**Senator FAWCETT:** Mr Pezzullo, there are two groups of people that we have been talking about at this inquiry: journalists and their sources, colloquially known by many as whistleblowers. I hear and concur with your assessment in terms of saying that trusted officials are just that, and trusted officials have obligations. But the assertion has been made numerous times that people feel as though their complaints are not taken seriously internal to departments. If we are to reassure the Australian public that, in fact, anyone who is a trusted official and has a concern has an avenue to get a fair hearing, we need to make sure that our public interest disclosure schemes are robust and effective.

I note that the Ombudsman in 2016 issued his second version of the 'Guide to agencies', which is a lengthy and detailed document suggesting methods as to how the agencies may wish to proceed. Could you talk to the committee about how Home Affairs, as an example, and those agencies that operate within or under your authority, have implemented that guide from the Ombudsman? I'm looking particularly at section 7.4.4, where it talks about, 'What if the discloser is not satisfied with the agency's action?' and the Ombudsman says:

Agencies may want, therefore, to consider review or reconsideration measures to address situations where a discloser is not satisfied with the agency's handling of an internal disclosure.

So I think it is really important to get onto the public record what is in place and an assurance that, if a complaint is made and the person is not satisfied, there are avenues where that can be elevated to an independent authority that can make a judgement about the legality, ethics and morality of what is occurring.

**Mr Pezzullo:** Unless my colleagues can assist on the details of our internal scheme—but, as the accountable officer, I'm familiar with the complaints that come to me, because I've got to assess them and then delegate them to one of the trusted internal assessors. There have been occasions where a person comes forward and says, 'I'm not satisfied' with either the urgency or the vigour or the authenticity of how the matter has been dealt with. Sometimes it's the case, regrettably, that their level of grievance is such that they're probably, frankly, never going to be satisfied. In other cases, people have explained to them the measures and steps that were taken. There is always recourse to the Ombudsman himself who administered the legislation, and it is open to me or one of my delegates to refer those matters, or for the person to independently go forward.

Of course, going back to the earlier discussion about the interaction between sources, so-called, or whistleblowers—or public interest disclosers, to use the proper term—and journalists. Of course there's a carve-

out in exceptional circumstances when all other things have failed—that there is a limited degree of protection available. But, Mr Hansford, is there anything further that you can add to assist the senator in response to his question?

**Mr Hansford:** I think you've covered the field internally. Obviously, there are external agencies to which internal staff can refer matters if they are so inclined. Anyone can refer something to the AFP independently if they think a criminal act has occurred. They can refer it to the Australian Commission for Law Enforcement Integrity; or the Ombudsman, as the secretary said; and, in the case of the intelligence community, the Inspector-General of Intelligence and Security.

**Senator FAWCETT:** Sure. Could you clarify for the committee the degree of training and reinforcement that is made to your staff, both in the department and agencies, about the existence of the PID and the steps available to them as well, as their obligations—the avenues available to them? If need be, take this on notice. Since 2013, when this act was put in place—albeit it is a new department; I recognise that—how many times has this been used?

**Mr Pezzullo:** I think I'd prefer to take that question in whole on notice and divide it up into its segments—the training; the awareness of the procedures. It's integral to our integrity framework. There are resources that you can go to on our intranet. The complexity here is that we also have oversight from the Australian Commission for Law Enforcement Integrity. If a matter comes to the attention of an officer, they think: 'Do I go down to a public interest disclosure, do I "whistleblow", do I go directly to the ombudsman or do I go directly to the Commission for Law Enforcement Integrity?' All of these avenues are known to the officers. I'll take on notice how often they're trained or how often they're reminded.

In terms of the question about frequency of actions—I'm sure that, in aggregate, the numbers can be disclosed; I don't think there's an issue there—and subject only to checking the legislation, we'll just need to backtrack to 2013 and take all of the various components that the department has been formed out of. They were the Australian Customs and Border Protection Service—of which I was the head at that time—the Department of Immigration and Border Protection and the functions that have come in from the Attorney-General's Department and a number of other areas. We'll just need to aggregate that across those different streams.

**Senator FAWCETT:** My request here is not to have the exact science as to whether it was precisely 99½ times, or whatever. It's important for the Australian public to understand that there is a system in place, people are trained and they are aware. If the system has been exercised, how frequently did a complaint come up and where did it end up? Was it resolved? Was it reported? So, rather than the opaque assertions that are currently being made—that someone who goes to a journalist does so because there is no other option and there is no confidence that an internal report will be effective—I'm keen to make sure we get on the record what does exist and how frequently, the training, explanations and support are reinforced to staff. Has it been exercised? Where it has been exercised, what has the outcome been?

**Mr Pezzullo:** I understand the question and the intent and rationale behind the question fully. We'll give a comprehensive answer through you to the committee in detail. It speaks to the material that we've already put before you in our submission, but we'll operationalise that. How does the scheme work? How is it promoted? How are our staff made aware? What are the checks and balances where a staff member is perhaps not satisfied that appropriate action has been taken? And how do we de-conflict between those different avenues of disclosure? Sometimes the same matter can be disclosed to several and different officers.

**Senator FAWCETT:** The last part of that—and this may be for the committee to decide—is that if you examine that and say: 'Well, in some cases, perhaps the end of a complaint or a disclosure didn't result in an action that was appropriate, perhaps we need to change the 2013 act in terms of where things end up.' As a starting point, I think it's really important to get on the record what is in place and whether or not people are actually using it.

**Mr Pezzullo:** I understand the question. Just to repeat Mr Hansford's evidence, the act has been statutorily reviewed by the former integrity commissioner, Mr Moss, and that's a matter for the Attorney-General's Department and a matter before the Attorney-General. The matters before this committee and this inquiry tend to cross over and touch on those issues. As I said earlier in relation to relationships with journalists, I'm sure the government will be very minded to take very seriously what this committee might recommend in that area, but we'll certainly give you that data and that advice on the record.

**Mr Hansford:** If it's helpful, in terms of training, I can give you a practical example of how we undertake training in the Department of Home Affairs. It's integrally linked to our performance. In order to look at performance annually, you need to complete annual training—or biannual training, in certain cases. In one of

those training modules, you're required to go through an integrity module—and it covers some of the similar ground that we've been talking about—and, at the end, you're required to take a test. The pass result for that particular test is 100 per cent. If you fail the test, you've got to go back and learn some more information in the module and then pass the test at 100 per cent. It also covers things like WHS and security modules. So we have a good understanding about who has completed the training, particularly as we come to performance time. And on a monthly basis, particularly in my division, we check who has not completed their training, both in a revalidation sense but also in a new sense—whether or not they've ever completed the training. And we do that on a quite active basis. So we can give the committee a bit of a microcosm of how it works in practice, noting the secretary has taken the framework on notice.

**Senator FAWCETT:** The other element that is important is the culture of the leadership. I'd be interested to understand what you do for your various levels of leadership to reinforce how this framework is to be treated and how individuals who come forward are to be treated so that the whole culture is one of, yes, 100 per cent integrity and an ethical approach, but also a culture where everyone knows and believes that if they have a complaint it will be dealt with fairly and effectively.

**Mr Pezzullo:** That's a particularly important part of an integrity framework at large. For this department, because we are under the oversight also of the Integrity Commissioner—the law enforcement and integrity commissioner—it's actually mandatorily required for us to promote those values. Whether it's public interest disclosure across the Commonwealth generally or the additional burdens of oversight that we're under—and we understand why—because of the nature of the information that we handle, it is very much from the top down. From the leadership level—which I think is the point of your question—it is permeated all the way through our organisation that wrongdoing is not going to be tolerated, not in terms simply of the perpetrator of the wrongdoing but that your knowledge of wrongdoing has to be brought to attention. In the modality question that arises—because it will depend somewhat on the nature of the conduct, whether you afford yourself and avail yourself of the public interest path; or whether you go straight to the ombudsman, if it's a matter that you don't think the department itself is well-equipped or minded to handle—that occasionally does happen; or indeed whether it's a matter of corrupt conduct, or indeed misconduct, within the meaning of the law enforcement integrity legislation.

We provide our staff with both knowledge and training, and there's one particular divisional example that you've been given by Mr Hansford that promotes both—and obviously, deterrence as well—a positive cultural message against wrongdoing, with the deterrence, but also with, 'If you see it, report it' as well. And that's whether it's under PID or it's under law enforcement integrity. I don't want to get into the integrity commission debate, but we're already under scrutiny of an integrity commission, and it's essential—particularly given, for instance, to take one example, what happened in the Customs service some years ago where a number of officers ended up going to jail for their corrupt conduct. It's important that everyone understands how serious this can be, but that they've also got a positive cultural orientation towards doing the right thing in the first instance.

**Mr DREYFUS:** Mr Pezzullo, on 28 August the committee asked you how many warrants, including covert warrants like interception warrants, surveillance device warrants and computer access warrants, have been issued to state and territory police in relation to journalists on a year-by-year basis since 2004 under federal law. Why did it take until yesterday, the day before this hearing, for you to reply?

**Mr Pezzullo:** I'm not sure whether and why there was a hold-up. I know there was an issue about the data not being collected by employment occupation; I think you might have heard that from Mr Kent as well. Mr Hansford, can you shed light on Mr Dreyfus's question?

**Mr Hansford:** Sure. There were a number of questions on notice, and we worked actively to try and respond to all of them within the time available and, particularly, ahead of this particular committee hearing. When we looked at all of the questions the AFP took an analysis, and you'll see that they have responded to each of the different questions in relation to AFP. The department took the responsibility of looking at states and territories. We did try as much as possible to look at: what is the information that would be able to be achieved and put in the response to the question on notice? When you look at the search warrants, and there are search warrants under multiple pieces of legislation, not only the 3E search warrants in the Crimes Act, that are executed on a daily basis—and you could anticipate there's potentially hundreds executed across Australia on a daily basis—there is no central registry of any state and territory police that has a full list of search warrants. The AFP, I think this morning, made the point about there being no legislative requirement because they're, by and large, with the exception of delayed notification search warrants, overt search warrants. So the regime around search warrants in particular does not lend itself to an easy collation of material, and that's why, in the question on notice response, we say that would be a significant task to undertake and potentially would take many months.

**Mr DREYFUS:** Given that the department's had three weeks to work on responses, would it have been reasonable for the committee to expect that those answers would provide the committee with some useful information?

**Mr Hansford:** I think we tried to provide useful information in answer to the questions on notice.

**Mr DREYFUS:** Mr Hansford, or Mr Pezzullo, we weren't asking for the names of any journalists, just how many warrants of these kinds have been issued in relation to journalists. Is that right?

**Mr Pezzullo:** And I think Mr Hansford's evidence—

**Mr DREYFUS:** No. Is that right, that that's what we're asking for—that is, just how many of these kinds of—

**Mr Pezzullo:** As a matter of fact that's what you asked.

**Mr DREYFUS:** warrants had been issued for journalists.

**Mr Pezzullo:** That's what you asked, and I think we both heard Mr Hansford just say the information is not collated in that form. So you could give us months, you could give us years—

**Mr DREYFUS:** Let's be clear about this: the committee, in other words, was asking the department to provide it with the basic information that's fundamental to the task that the Prime Minister has given to this committee, which is to inquire into—and this is the title of this inquiry—the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. That's right, isn't it?

**Mr Pezzullo:** That is a factual statement, yes.

**Mr DREYFUS:** We did ask similar questions of the AFP, and they provided us with some very limited information about their own use of warrants in relation to journalists.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** It's possible that we'll be putting further questions to the AFP about that, but at least the AFP made an effort to assist this committee, Mr Pezzullo. In contrast, the department has declined to provide any information at all. In fact, you've said:

The effort required to produce an accurate list of this information is an unreasonable diversion of resources.

This was because, you said:

... collation would involve both liaison with multiple parts of agencies that have applied for a search warrant from the judiciary or the—

AAT. In other words, you'd have to speak to state and territory law enforcement agencies about how they're using federal powers. That's all you're saying.

**Mr Pezzullo:** And go through every investigation, be told who's been warranted and establish whether or not they're on a list of working journalists or associated occupations. Is it fair to say, Mr Hansford, that the judgement made, just in terms of time and effort—forget about principles or whether there's merit in that—was that it would have been an unreasonable diversion of resources? Was that the thrust of our response?

**Mr Hansford:** That's correct, in relation to search warrants, which I note were generalised.

**Mr DREYFUS:** No, let's be clear about this, Mr Hansford and Mr Pezzullo. The question was not just about search warrants; it was about covert warrants, interception warrants, surveillance device warrants and computer access warrants. The AFP went to some trouble to give us limited information. So I would just focus on this: this is an inquiry about the impact of law enforcement powers on the freedom of the press. The committee's asked you to provide a quantifiable measure of what that impact is, being the number of overt and covert surveillance powers that have been used in relation to journalists. That's what this inquiry is about. And your answer is to say that providing the information would be an 'unreasonable diversion of resources'. Have I got that right?

**Mr Pezzullo:** Yes, you have. That's exactly the answer that you were given.

**Mr DREYFUS:** So you've spent three weeks preparing an answer to the committee's request that amounts to saying, 'We don't know, and we don't care to find out.' Why did it take three weeks to say that?

**Mr Pezzullo:** I suppose we could have put that in on the first day, Mr Hansford.

**Mr Hansford:** We assiduously went through all of the questions on notice. And I think, helpfully—

**Mr DREYFUS:** And you left the one you weren't going to answer until last—is that it?

**Mr Hansford:** No, we worked on all of them together. Helpfully for the committee, where we had information that was available—I mentioned at the last hearing that we do maintain a general register of warrants; it's a selection of warrants—in the second last paragraph of our answer to the question on notice we have outlined that we did a review of the general register of warrants for the period 1 July 2018 to 30 June 2019. It had

particular reference to the Commonwealth Crimes Act sections 70 and 79 and the relevant provisions in the Criminal Code that relate to journalists in some form. We did not find, in that period of time, any evidence that there was a warrant, a TI warrant, against a journalist.

**Mr Pezzullo:** That you knew of?

**Mr Hansford:** That we knew of.

**Mr Pezzullo:** In terms of if you knew the occupation?

**Mr Hansford:** That's right. Now, in saying that, we also said that occupations are not outlined in the general register of warrants. We looked at the offence. So it's not a holistic understanding of whether or not there has been a TI warrant against a journalist; it was purely looking at those two particular offences and whether or not they were documented in the general register of warrants. And we've said in the response: no.

There were, of course, a number of different offences that related to corruption, illicit drugs, murder et cetera—and this is a holistic list of the Commonwealth and every state and territory—but we were not generally aware of whether or not there was a journalist involved in any of those warrants based on our understanding of the information that has been provided to us. So, helpfully for the committee, we did do a level of analysis, which is outlined in the question on notice where there is a general—

**Mr DREYFUS:** Which number?

**Mr Hansford:** This is in relation to questions 8, 10 and 12 of question on notice No. 018. So this is immediately after the paragraphs that you referenced in your question.

**Mr Pezzullo:** So the penultimate paragraph, is it?

**Mr Hansford:** Yes, penultimate.

**Mr Pezzullo:** The burden of that evidence is that a randomised sample was taken of—what was it, 18 months?

**Mr Hansford:** A year.

**Mr DREYFUS:** A year, for two offences.

**Mr Pezzullo:** Two offences, looking at the compiled list, which is a legislative requirement because the TIA requires that that list be compiled and provided in written form, and Mr Hansford said that they went through that just to see if they could find any journalists who'd been the subject of warrants.

**Mr DREYFUS:** Sure, but our inquiry, Mr Pezzullo, is not confined to two offences.

**Mr Pezzullo:** Understood.

**Mr DREYFUS:** It's about the impact of the exercise of law enforcement and intelligence powers—

**Mr Pezzullo:** It's fully understood, Mr Dreyfus.

**Mr DREYFUS:** generally on the freedom of the press. So how many warrants in relation to journalists under federal law have been issued over, say, the last six years, Mr Pezzullo? Hundreds? Thousands?

**Mr Pezzullo:** It would be the same methodical issue that Mr Hansford's raised—that is, trying to correlate employment status with a named individual is not something that the register and the databases allow.

**Mr DREYFUS:** Can you give me a ballpark figure, some idea? Is it more than two? Is it 10? Is it 20?

**Mr Pezzullo:** We don't know.

**Mr DREYFUS:** Can you provide any assurances at all?

**Mr Pezzullo:** An assurance in what regard—about our level of knowledge?

**Mr DREYFUS:** About how many of these warrants, covert surveillance warrants or interception warrants, are currently enforced in Australia under federal law—

**Mr Pezzullo:** I understand the question. It's as many as the investigative authorities, which are federal, state and territory, feel that, pursuant to their investigative processes, they need to seek from a judge.

**Mr DREYFUS:** How can the committee possibly draw any conclusions about the impact of law enforcement powers on the freedom of the press if you're refusing to provide the committee with even the most basic information about the impact of law enforcement powers on the freedom of the press?

**Mr Pezzullo:** All I can say is that for reasons that have been explained to you, and I don't know that Mr Hansford can explain it any more plainly, the data that's available does not allow us to interrogate it in those terms—at least in that respect of your committee's work. I'm not sure that it turns on the committee's work completely, but you might approach it from a first principles point of view—

**Mr DREYFUS:** But you've declined to even inquire of state and territory agencies.

**Mr Pezzullo:** I don't know that's what Mr Hansford said. We've done sampling and—

**Mr DREYFUS:** No, you have not done sampling, Mr Pezzullo; you've done a sample of two offences over one year at the federal level. The question went to the state and territory police forces using federal powers.

**Mr Pezzullo:** The register is federal; it has all the states and territories.

**Mr DREYFUS:** And you've declined to talk to the state and territory agencies, and you've said it's an 'unreasonable diversion of resources'. Now I take that as a refusal.

**Mr Hansford:** So we spoke to our colleagues in the Federal Police to have an understanding of how, in state and territory police forces, and, indeed, in the AFP, they compile information for search warrants. They have search warrants executed on a daily basis all across the nation, and because they're overt search warrants, and by and large a journalist would know that they had a search warrant executed and there wasn't a plethora of evidence given by—

**Mr DREYFUS:** You keep saying the words 'search warrants', Mr Hansford; the question expressly, in writing, went to a broader group of warrants.

**Mr Hansford:** There were multiple warrants. So we answered the search warrant one in the way that I've described. We've done a level of analysis on the TI warrants that we've outlined in response to the question on notice.

**Mr Pezzullo:** How about the metadata ones?

**Mr Hansford:** The metadata ones you'll see in the annual report for the Telecommunications (Interception and Access) Act, but they're the only requirement—

**Mr DREYFUS:** Yes, we talked about this at the last hearing, because the parliament has seen fit to impose an actual legislative requirement that there be reporting of access to journalists' metadata under the data retention scheme that was put in place in 2015.

**Mr Pezzullo:** Indeed.

**Mr Hansford:** And the reason for that is that the threshold is whether or not something's reasonably necessary to support an investigation, which is internally approved within law enforcement agencies, not externally approved by a judge or an AAT member.

**Mr DREYFUS:** Let's move on. In your first submission to this inquiry you asserted to this committee:

The current legislative frameworks appropriately balance the importance of press freedom with the imperative to protect national security.

... ..

The current processes for issuing warrants in relation to journalists and news media organisations are appropriate ...

... ..

The current thresholds for law enforcement and intelligence agencies to access electronic data on devices used by journalists or the media are appropriate.

How can you possibly know if the legislative framework, the current processes and the current thresholds appropriately protect the freedom of the press if you don't even know how many journalists have been or are being monitored by law enforcement agencies right now?

**Mr Pezzullo:** I think I understand the burden of your question, but I'm struggling to see—and I'm seeking your counsel and guidance on this, Mr Dreyfus. I don't know that that turns on the numbers; it turns on the principles. This parliament has seen fit, with the metadata issue being the one exception where reporting is required—

**Mr DREYFUS:** Mr Pezzullo, you—

**Senator ABETZ:** Let him finish.

**Mr DREYFUS:** He's waffling again. Mr Pezzullo, I need to know from you how it is that you can draw the conclusions you put in your first submission when you've got no data—other than the journalist information warrants, which you are legislatively required to record and disclose—and you've not been prepared to do any work to give this committee any data.

**Mr Pezzullo:** Perhaps you can assist me by illuminating whether the data would make any difference, because I'm struggling to see how it relates to the underpinning of that assertion or conclusion that we've drawn. Are you saying that if thousands of journalist warrants—or warrants associated with journalists, I should say, because that's a particular term—were being issued, as opposed to hundreds, tens or single digits, that would make a

difference to the point of principle here? It's not for me to ask you a question; I'm just seeking to illuminate for myself—

**Mr DREYFUS:** You're quite right; it's not for you to ask me a question.

**Mr Pezzullo:** No, but what's the point—

**Mr DREYFUS:** And, if you're even posing the question, I think we've got a problem. But I need to give you the opportunity. I'm going to keep moving.

**Mr Pezzullo:** I'm seeking your clarification.

**CHAIR:** I'll take it as a rhetorical question.

**Mr DREYFUS:** I'll take it as a rhetorical question too.

**Mr Pezzullo:** Mr Chairman, I'm seeking clarification because Mr Dreyfus is troubled by the premise of the assertion, as I think you called it, that we've made.

**Mr DREYFUS:** I'm troubled by the lack of assistance from the department to this committee, Mr Pezzullo, and I'm going to keep moving.

**Mr Pezzullo:** Thank you.

**Mr DREYFUS:** You've said elsewhere that press freedom is a fundamental pillar of Australian democracy.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** Yet you've told this committee that working out how many warrants have been issued in relation to journalists would be an 'unreasonable diversion of resources'. How do you reconcile those positions? Can you think of a more reasonable diversion of resources, given that it's a fundamental pillar of Australian democracy that we're concerned with?

**Mr Pezzullo:** Well, I can also assign those resources to other issues such as counterterrorism, counterespionage and foreign interference matters. It's the same pool at limited resources at work in this area. That's point 1. Point 2—

**Mr DREYFUS:** Just on point 1, when you were last here, on 14 August, you told this committee, 'We respond to what the parliament asks us to do.' Those were your words. The parliament, in the form of this committee, is asking you for assistance.

**Mr Pezzullo:** I understand that.

**Mr DREYFUS:** And you've decided that it's an unreasonable diversion of resources to answer the questions.

**Mr Pezzullo:** I understand the point you're making. We comply with the statutory requirements that the parliament sees fit to pass as part of the laws. Where we have to keep registers and databases in particular forms, we do. Where it's not incumbent on us to do so, because it's not required—and Mr Hansford has particularly touched on the question of employment categories—we don't. Then we've given you a good-faith response as to why it's difficult to reverse-engineer the number, which is what you're asking be done, and I can't really do anything more than that.

**Mr DREYFUS:** I'm not suggesting that it's simple, but I am asking why the department is not even collecting, and is in fact refusing to provide to this committee, more data than you have. Just to be clear, a journalist will never know if a covert warrant has been issued in relation to them, and use of such a covert power would obviously compromise the anonymity of every single one of the journalist's sources—

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** even sources who've got nothing to do with the particular police investigation.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** The sources could be corporate whistleblowers who work at one of the big banks, they could be public sector employees who are blowing the whistle on corruption or they could be people who have been abused in Commonwealth or state-run institutions who don't want their identity to be known. There's an endless range of people who want to remain anonymous sources to journalists. But you've told this committee that you don't know and it's too hard to find out—or perhaps you're not interested in finding out—how many covert warrants have been issued in relation to journalists since 2004, or this year or last year or any year.

**Mr Pezzullo:** And all I can do is repeat that there's not a requirement to retain data around employment categories, so to go back over that ground would involve an extensive effort which is unreasonable in terms of the resource burden that would impose.

**Mr DREYFUS:** That's your position: you say it's unreasonable for this committee to ask this question and be provided with an answer to the question?

**Mr Pezzullo:** No, I didn't say it was unreasonable for this committee to ask the question. That's not for me to judge.

**Mr DREYFUS:** But it's unreasonable for you to answer. By what measure, Mr Pezzullo?

**Mr Pezzullo:** The resource effort, for the reasons that Mr Hansford has explained. Perhaps there's something else he could add that he may have missed, but the resource effort would be onerous and unreasonable.

**Mr DREYFUS:** Did you discuss the committee's request for this information with the Minister for Home Affairs or his office?

**Mr Pezzullo:** I haven't, but I know there's engagement with the office around the submission of answers to questions taken on notice. Mr Hansford or Mr Warnes can illuminate on that. But, no, I haven't had a discussion with the minister.

**Mr Hansford:** Every question on notice response was provided to Minister Dutton's office for noting, and they noted every response.

**Mr DREYFUS:** Did the minister or anyone from the minister's office provide you with assistance on how to answer this request for information?

**Mr Hansford:** I think in relation to one there was a point of clarification discussed with an adviser.

**Mr DREYFUS:** Which one?

**Mr Hansford:** I will take that on notice.

**Mr DREYFUS:** Thank you, but did the minister or the minister's office seek to discourage you—

**Mr Hansford:** Not in relation to this question.

**Mr DREYFUS:** Whatever the other one was—

**Mr Hansford:** In relation to the timing.

**Mr DREYFUS:** Did the minister or anyone from the minister's office seek to discourage you from diverting resources to obtain the information that the committee's requested?

**Mr Hansford:** No.

**Mr Pezzullo:** No.

**Mr DREYFUS:** I want to go to another thing that the committee's asked you about. On 28 August, following your evidence on 14 August, the committee also asked you to provide a detailed comparison of a number of things, including: the legislative thresholds for law enforcement and intelligence agencies to obtain warrants in each of the Five Eyes countries, investigatory powers that can be exercised without a warrant in each of the Five Eyes countries—an Australian example of which would be the ability of law enforcement and intelligence agencies to access a person's telecommunications data without a warrant—and legislative thresholds for law enforcement and intelligence agencies to obtain warrants in relation to journalists in each of the Five Eyes countries. Do you think it's reasonable for the committee to inquire into how our closest security allies protect and uphold press freedom?

**Mr Pezzullo:** I wouldn't want to venture an opinion about whether your lines of inquiry are reasonable or not. That's not for me to say.

**Mr DREYFUS:** But I thought you'd reflected on the subject matter of this inquiry since you were last here, Mr Pezzullo.

**Mr Pezzullo:** I reflected on the matters you asked me to reflect on, which I chose to do.

**Mr DREYFUS:** The response of the department to the request I have just referred to was:

Providing a comprehensive response to these questions would require detailed analysis of a vast number of statutes across each of the Five Eyes countries. This would result in a significant diversion of the Department of Home Affairs' resources. Further, the Department is not in a position to undertake a detailed and critical comparison of the laws of sovereign nations without undergoing an extensive consultation process.

Frankly, when the committee put this question to the department, I assumed you'd be available to provide an immediate response because you'd already have the information to hand. I find it extraordinary that the department responsible for Australia's national security and law enforcement functions doesn't seem to have a detailed understanding of how our closest security and intelligence allies approach these issues. It strikes me as

almost incredible. These are the four English-speaking countries that constitute our close Five Eyes intelligence relationship. Why doesn't the department have that information?

**Mr Pezullo:** I draw your attention to the attachment that's been appended to the supplementary submission that contains what looks to be—I read it at the time; I won't call it a mini essay—a four-page summary done in the time available plus, based on our own knowledge of these matters, the practices, procedures and legal arrangements in Canada, New Zealand, the United Kingdom and the United States of America.

**Mr DREYFUS:** Yes, about search warrants. I'm going to come to that, but the question was a larger question.

**Mr Pezullo:** A larger question, but to the extent that—

**Mr DREYFUS:** Since you've raised it, who wrote that: was it the Attorney-General's Department or the Department of Home Affairs?

**Mr Pezullo:** It was a joint production wasn't it, Mr Hansford?

**Mr Hansford:** We jointly wrote it.

**Mr DREYFUS:** I know it's a joint submission. I'm asking you another, more fine grained, question. Who produced attachment A, headed 'Five Eyes' search warrant schemes and protection for journalists'?

**Mr Pezullo:** Anything that's jointly authored is always, for good or ill, owned by the joint authors.

**Mr DREYFUS:** I'm asking you who prepared it first.

**Mr Hansford:** We provided the first draft. We provided it to the Attorney-General's Department for their review. Indeed, the whole submission is a split of responsibilities between the two departments, so it is fair to say we co-wrote it. But particularly attachment A, the Department of Home Affairs drafted the initial one.

**Mr DREYFUS:** You've got liaison with the four Five Eyes partners, haven't you?

**Mr Pezullo:** Yes.

**Mr DREYFUS:** You could've asked your counterparts in each of the four jurisdictions to provide you with that information. Did you make any inquiries at all?

**Mr Hansford:** We met with the government of the United Kingdom, and they're undertaking, particularly as it relates to search warrants, a complete review of their search warrant regime. They've got up to about 146—

**Mr DREYFUS:** Just be careful again. You keep talking about search warrants, Mr Hansford. The question went to other coercive powers, not just search warrants.

**Mr Hansford:** Okay. Well, we had a—

**Mr DREYFUS:** I don't want your answer to be confused on that.

**Mr Hansford:** We had a discussion with the United Kingdom, particularly in relation to search warrants but also in relation to other issues. It is a significantly complex landscape in which to summarise 146 search warrants—just to take that example—in the short amount of time that we had. What we did do was try and provide a helpful analysis in a couple of pages, as well as the homework that you gave us responding to each of the different proposals that were put forward by other submissions. So in the time available we came up with 19 pages worth of analysis, in addition to the questions on notice that we tried to respond to.

**Mr DREYFUS:** The 19 pages of analysis, as you've called it, is a response to the committee's general question, which was to please respond to the various recommendations and suggestions that the committee's received from the many submissions that we've received.

**Mr Pezullo:** Yes.

**Mr DREYFUS:** And I thank you and the department, and the Attorney-General's Department as well, for the effort that you've gone to to respond, over some 15 pages, to those various other submitters' recommendations. I also thank you for attachment A, which is a description of the situation in respect of search warrants—not telecommunications warrants, not access to telecommunications data but search warrants—in the Five Eyes, the four other countries.

**Mr Pezullo:** We understand the narrow basis on which that attachment is couched.

**Mr DREYFUS:** And thank you for that. But why does the department think that obtaining the more general information that we sought would be a diversion of Department of Home Affairs resources, rather than a good use of them? You might actually learn something, mightn't you?

**Mr Hansford:** We do routinely have, particularly where we support the government with new policy, discussions with the United Kingdom and the United States on their respective regimes.

**Mr DREYFUS:** We are engaged here in examining whether or not the government should be doing new policy, as you put it. That's the purpose of this inquiry.

**Mr Pezzullo:** I take the point of your question, Mr Dreyfus. I think it's also fair to say that as part and parcel of the amendments and the extensive work that was done by both the Attorney-General's Department and our department in the lead-up to the amendments to the Criminal Code, which went centrally to the question of protection of journalists vis-a-vis the protection of information—and I well recall reading the submissions that went to government on those matters, and we've had that previous discussion about the amendments made to section 122—we did look, on a comparative basis, at what others do. That included common-law countries more so, perhaps, than the US, although that's always got a basis for at least learning something. So the act has been quite recently overhauled.

**Mr DREYFUS:** The question wasn't about our act; the question was about the situation before—

**Mr Pezzullo:** I understand, and I'd—

**Mr DREYFUS:** our four other Five Eyes partners.

**Mr Pezzullo:** I understand, Mr Dreyfus, and I said very carefully that, in the process of preparing that work and the explanatory memorandum and landing on how to both deal with publication of sensitive information and provide a public interest defence in relation to journalism, I've got no doubt—and I wasn't on the keyboard myself—that the colleagues who were experts in providing advice to the government were well learned in what happens in other jurisdictions. And that was as recently as parliament's consideration of this matter in December last year. So we're less than a year into—

**Mr DREYFUS:** Parliament actually considered this between 7 December 2017 and June 2018.

**Mr Pezzullo:** Yes, 2018, and then it came into effect—

**Mr DREYFUS:** That's when it was enacted.

**Mr Pezzullo:** Indeed.

**Mr DREYFUS:** It came into effect in December.

**Mr Pezzullo:** So still quite recent—and I'm not sure that there have been significant movements in those other jurisdictions, especially the common-law jurisdictions, that would cause us to think that there is much to be gained through a greater diversion of resources than we've applied.

**Mr DREYFUS:** But, again, it's your decision—

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** to decline to assist the committee further.

**Mr Pezzullo:** To apportion the amount of resources that I have, yes.

**Mr DREYFUS:** Why did it take three weeks for the department to provide what is in effect a nonresponse?

**Mr Pezzullo:** I'm limiting this just to the search warrant attachment. I do take your earlier admonishment that that is not necessarily the scope of your question, but that itself would have taken more than one day, presumably, to research and prepare, I assume.

**Mr DREYFUS:** I ask again—and let's confine it, to be clear, to the questions that were asked about the use by state and territory police forces of a range of warrants over a defined period—why did it take three weeks to not respond, with the assertion 'it's an unreasonable diversion of resources'? You could have done that on day one.

**Mr Pezzullo:** That's what I myself asked Mr Hansford about. We should have just done it on day one and been done with it. But—

**Mr DREYFUS:** It's getting worse, Mr Pezzullo! Did you discuss this particular request with the minister or the minister's office?

**Mr Pezzullo:** Same answer as before.

**Mr DREYFUS:** No?

**Mr Pezzullo:** Not me personally—and, in the context of finalising responses to questions on notice, there would have been liaison, and I think Mr Hansford said there was one case where a request for clarification of a particular matter arose. He might just further explain that.

**Mr DREYFUS:** But it wasn't this one?

**Mr Pezzullo:** But it wasn't this one.

**Mr DREYFUS:** If I could move on, on 14 August, when you were last here, Senator Keneally asked you to provide this committee with a copy of the advice you'd provided to the Minister for Home Affairs relating to investigative action involving professional journalists or news media organisations, and you told the committee that you'd take that request on notice and ask the minister 'what his attitude to that is'.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** You have declined to provide that advice to the committee, in the form of either a public or a classified submission. Are we to infer from your comments on 14 August, and the fact that you didn't provide the committee with that advice, that the minister directed the department not to provide the committee with that advice?

**Mr Pezzullo:** I don't think you can necessarily draw that inference. We would have gone back to the office and looked at the deliberative material that we prepared by way of, in this case, I think several submissions, from memory, and put a position to the minister's office, and that would have been the subject of the discussion with the minister's office. As a former minister of the cabinet, you well know that submissions to ministers are things that they take very seriously. It's advice that's provided to them personally, it's part of the deliberative process of government—hence our answer.

**Mr DREYFUS:** So was the minister happy for you to provide the information, but you made a decision not to provide the advice anyway?

**Mr Pezzullo:** I'll just check with Mr Hansford. He led the liaison with the minister's office. The minister and I have not discussed this, so I don't have any personal knowledge or view.

**Mr DREYFUS:** Mr Hansford?

**Mr Hansford:** This is the item that I believe was the discussion with the office, and I've taken the specifics on notice, but the minister's office were consulted on the draft reply.

**Mr DREYFUS:** And agreed?

**Mr Hansford:** And agreed.

**Mr DREYFUS:** Okay.

**Mr Hansford:** To the best of my knowledge.

**Senator KENEALLY:** Can I put on notice again, then, that I would like you to provide this committee with a copy of the advice you provided to the Minister for Home Affairs relating to the investigative action involving professional journalists or news media organisations. It's a repeat of question No. SCLA/002.

**Mr Pezzullo:** We'll take it on notice again, and I'll ensure that the question is put to the minister himself.

**Mr DREYFUS:** If I could follow up a bit further, you said that you would ask the minister 'what his attitude to that is'—that is, providing the committee with a copy of your joint submission, with the commissioner. What was his attitude?

**Mr Pezzullo:** As Mr Hansford has given evidence on, there was liaison with the minister's office, and the result of that is seen in the answer.

**Mr DREYFUS:** The committee has asked you to provide a document, and your answer says:

As the joint advice formed part of a deliberative process relating to the functions of the Minister of Home Affairs, the Department of Home Affairs is not in a position to provide it to the inquiry.

Of what relevance is it that the advice formed part of a deliberative process? And can I just point out to you that this process, this inquiry by the intelligence committee, tasked by the Prime Minister of Australia, is not governed by the Freedom of Information Act 1982.

**Mr Pezzullo:** I fully understand that, and I understand how committees work and the privilege that they work under. It's still the case that advice provided to ministers, whether in estimates or in other committees of the parliament, is always checked with the minister or their staff as to their level of agreeability to its release. And the position that you've seen stated in the answer is the position that arose out of those discussions.

**Mr DREYFUS:** That's not an answer, Mr Pezzullo. Part of your answer was that it formed part of a deliberative process. I've just explained to you that that has no relevance to the inquiry by this committee, no relevance to any standing order of this parliament. And the first sentence of your response isn't an answer. I'll read the first sentence of your response, so that it's in *Hansard*: 'The joint advice to the Minister for Home Affairs'—we were asking for the joint advice—'resulted in the public release of the ministerial direction to the Australian Federal Police Commissioner relating to investigative action involving a professional journalist or news media

organisation in the context of an unauthorised disclosure of material made or obtained by a current or former Commonwealth officer.'

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** So you haven't given, in your answer, any reason for not producing the document that the committee has asked for. And you haven't told us, yet, what the attitude of the minister was to that request.

**Mr Pezzullo:** Well, I can only infer from the fact that the answer which was the subject of consultation with the minister's office reflects the view of the office and the minister, so—

**Mr DREYFUS:** But it doesn't mean anything, Mr Pezzullo, and that's what I'm trying to get to. There is not a reason, other than the nonreason that it's part of the deliberative processes of the function relating to functions of the minister, and that's not a reason.

**Mr Pezzullo:** With due respect, you say that's not a reason; it's the attitude taken both by the department and by the minister. But, out of deference and respect to the committee, I'll ask the question again. So effectively I'll take Senator Keneally's question on notice again and reflect on it more directly and make sure that I understand the minister's attitude personally.

**Mr DREYFUS:** Perhaps in your answer you could make it clear what the minister's attitude is, because that's what you were going to do when you were here last.

**Mr Pezzullo:** And I accept that if we're going to state the grounds upon which the document has not been rendered to the committee, we'll explain those ground with more precision and/or detail.

**Mr DREYFUS:** Would it be right to say that the Minister for Home Affairs instructed you not to cooperate with this inquiry called by the Prime Minister of Australia?

**Mr Pezzullo:** No, it would not be right at all.

**Mr DREYFUS:** Has the minister or his office provided any other directions or made any other suggestions, apart from the one we're looking at?

**Mr Pezzullo:** No—well, there's my staff and the minister's staff working through, as occurs after estimates and any other process, the mechanical process. I don't mean to diminish that process in describing it in those terms. But, in terms of strategic engagement between the minister and I, he's fully supportive of me. In fact, in the one conversation we've had, or the material conversation we've had, he was fully supportive of me providing to this committee my views, which I expressed earlier, when we had the discussion about the need to build trust and the need to ensure that members of the press and the broadcasting sector are supported in their endeavours as best as can be achieved.

We spoke earlier about assisting journalists to avoid the pitfalls of potentially putting lives at risk and/or compromising capabilities. We had that discussion earlier. He's very supportive—I've had direct discussions with both he and other members of the executive—of those views being ventilated. And to the extent that they assist the committee with its deliberations, which in some cases—and this is opinion, if you don't mind me venturing it—might have to flow from a first-principles view of how the press might operate in a free democracy in a way that also protects security equities, if the committee's not being well served by our lack of response around data et cetera, I take your point on board; we'll see what more we can do. In response to no doubt the questions that we'll further get—because the time for this committee's deliberations has been extended—we'll see what more we can do.

**Mr DREYFUS:** Thank you for that. If the minister were to instruct the department later today to provide a comprehensive response to the committee's questions, including in relation to warrants and the international comparisons that we're looking at, would the department do so, or would you still say no?

**Mr Pezzullo:** We would always follow any lawful direction given to us by a minister of the Crown. The position, materially, won't change. I can't change gravity. The data does not lend itself to a decomposition around employment categories. A lot of the data is held in state and territory police holdings. The AFP have got their own holdings.

**Mr DREYFUS:** You've said that. The minister could demonstrate his support, though, for this committee by providing that instruction. Indeed, I'd be expecting him to do so.

**Mr Pezzullo:** He will form his own view about whatever expectation you might have of him. That's not for me to mediate or comment on.

**Mr DREYFUS:** I live in hope! What do you think of the expression 'the public's right to know'? It's an expression that appears frequently in—

**Mr Pezzullo:** I support it.

**Mr DREYFUS:** So you do think it's important for the public to be informed on matters of government?

**Mr Pezzullo:** Yes. As I said earlier—as a citizen more so than as a secretary of a department—if there were a program that had the sorts of features I described earlier that was extrajudicial and beyond law, frankly I'd not only be encouraging my officers to disclose it; before we even got to that, I'd be pulling my officers out of such a program.

**Mr DREYFUS:** You do think that the department plays a role in informing the public of that?

**Mr Pezzullo:** Yes, indeed.

**Mr DREYFUS:** Can I turn to another one of the committee's inquiries—

**Mr Pezzullo:** Sorry; hence my earlier support for careful, confidential and secure engagement with journalists that allows them to do their job, which means that classified information that gratuitously doesn't need to be out in the public arena is not ventilated, particularly where lives are potentially at risk. I spoke earlier to examples of lives being at risk—for instance, in terms of stories about criminal cartels. To revert back to our discussion of perhaps an hour or so ago: whether through the auspices of this committee or the government's response to this committee's work, we need, as a democracy, to restitch some of those threads, which I think have been frayed in recent years because of the changing nature of how secrecy can be affected in a highly disrupted media landscape.

**Mr DREYFUS:** Thank you. I would like to turn to another one of the committee's current inquiries—the inquiry into the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019. It is a bill that closes some loopholes that relate to the high-risk terrorist offenders scheme.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** When that bill was introduced, the Attorney-General publicly stated that, firstly, 76 people have been convicted of terrorism related offences, and that, secondly, 11 of those individuals are due for release over the course of the next 18 months. Subsequently the government explained publicly that, of the 76 people who have been convicted of terrorism related offences, 52 are currently serving sentences of imprisonment. Our committee asked the department—you—to provide further information about those 52 people in a public submission, including the date on which they are due to be released. The department—you may not have personal knowledge of this, Mr Pezzullo, but perhaps someone with you does—refused to provide any information about the 52 offenders in a public submission, even with names redacted. That's right, isn't it?

**Mr Pezzullo:** I don't have direct personal knowledge of that. Can I just check, because I suspect you have got information superiority over me at this stage.

**Mr DREYFUS:** I don't mean to!

**Mr Pezzullo:** Did we give a reason?

**Mr DREYFUS:** Well, you gave many. You gave about 10 different reasons—none of them, to my mind, acceptable. Moving on—

**Mr Pezzullo:** Could I trouble you for a sense of the flavour of the reasons, just so I know what I'm walking into?

**Mr DREYFUS:** You don't need to. I'm holding here a public document, which I'm happy to hand to you. It has been prepared by the Commonwealth Director of Public Prosecutions. It's on the internet. Anybody across the world with an internet connection can access it. It provides almost all of the information that we asked the department to provide in a public submission; in some respects, it provides more. For each of the 52 offenders, it provides the name, the terrorism offence that they were convicted of, the date on which they were sentenced, and the outcome and the non-parole period. You have previously told this inquiry that the department doesn't inappropriately classify information. How can that possibly be credible if the department is not even prepared to provide to this committee, in a public submission, information that other government agencies have on their websites—the information that I'm holding now? It's laughable, isn't it, for the department to have taken this position?

**Mr Pezzullo:** I'll need to look into the facts of the matter. I'm not in a position this afternoon to give you advice on that.

**Mr DREYFUS:** Did you discuss the committee's request for information about the 52 offenders, who are serving terms of imprisonment in Australian jails right now, with the minister or his office?

**Mr Pezzullo:** I've said to you that I don't have personal knowledge of how that answer was constructed or whether the document that you've held up several times now has got any bearing whatsoever; I'm assuming it has got some nexus.

**Mr DREYFUS:** The department has been provided with the Commonwealth Director of Public Prosecutions document by the committee secretariat. You personally may not be aware of it, Mr Pezzullo, but your officers certainly are.

**Mr Pezzullo:** I'm most appreciative of that. As I said, I will undertake to look into the matter personally.

**Mr DREYFUS:** It's a significant matter. It goes to how this committee is to receive information but it goes more generally to how the department treats information as confidential, when other arms of government have not treated it in a like manner.

**Mr Pezzullo:** I fully respect the position you've taken, and I accept, on its face, the assertion you make—that there is a nexus between the answer, or, in your words, the nonanswer, that we gave and the document that you've drawn to my attention several times now. I will look at the facts myself. That's all I can reasonably do in the face of you asking me something in relation to which I have no direct recall or personal knowledge.

**Mr DREYFUS:** I want to go back to something that we dealt with at the last hearing, or that you raised at the last hearing. It goes to the story which appeared in *The Sunday Telegraph* on 29 April last year, written by Annika Smethurst. The committee asked you to elaborate on an answer you provided in relation to that story at the last public hearing. I've got to say that, in the answers, the department—

**Mr Pezzullo:** Sorry; is this a question that we took on notice subsequent to our appearance?

**Mr DREYFUS:** Yes. The department has declined to assist the committee. I'm going to just cut through this by asking you now. I think last time you had a laminated copy of Ms Smethurst's article with you. Do you have it?

**Mr Pezzullo:** It wasn't laminated; it was just in a plastic sleeve.

**Mr DREYFUS:** Do you need it again?

**Mr Pezzullo:** No, I know it quite well. I'm, regrettably, intimate with it.

**Mr DREYFUS:** You told the committee on 14 August:

... Ms Smethurst mischaracterised the documentation that she was given ...

and—

... the reporting was so erroneous.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** I just want to take you through what aspects of Ms Smethurst's story were erroneous, noting, as you have already noted, that the accuracy of Ms Smethurst's story is not the subject of any legal proceedings. Looking at this story, to start off with, was it erroneous for Ms Smethurst to write:

Two powerful government agencies are discussing radical new espionage powers that would see Australia's cyber spy agency monitor Australian citizens for the first time.

**Mr Pezzullo:** Yes.

**Mr DREYFUS:** In what way?

**Mr Pezzullo:** Because the matters in issue in that submission—which I'm very familiar with, because one of the attachments, I know for a fact, represents concern that I'd raised with Secretary Moriarty; you have got the benefit of engaging with him after lunch, as well as with the acting director-general of the ASD—related to two very specific gaps in law, which I have given extensive evidence on. For the purposes of summarising, one relates to the inability of the Australian Signals Directorate, on the face of the law as it stands—the Intelligence Services Act—to actively defend critical infrastructure networks. The issues of liabilities, insurance, joint sharing of risk—I won't go into answers previously given. That's one lacuna in the legislation. That has to be addressed one way or another. Mr Dutton, since we last met, has issued a discussion paper with Minister Reynolds on cyberactivities. This is touched upon directly. I can assure this committee—

**Mr DREYFUS:** My question is: what part of that sentence that I just—

**Mr Pezzullo:** All of it—for the reasons I'm halfway through explaining. The protection of critical infrastructure does not enable, require or, in fact, envisage the monitoring of Australian domestic communications. It's a simple as that. If—and I'm saying this in the abstract—a person who has access to such a document does not understand the basic difference between the protection of cybernetworks versus signals intelligence, they are dealing with matters on which they could perhaps benefit from some explanation of.

The second issue, which my correspondence to Mr Moriarty referenced and which Mr Dutton has already spoken about publicly, is the gap in the legislation when you're hunting child exploitation networks on the dark web. Where the VPN links and the links of networks cross the onshore-offshore divide—and the risk we see is the potential for Australia to become a safe haven for such practices—it would be a criminal offence to disrupt things like the live streaming of the torture or murder of a child if the telecommunications infrastructure was in any way based onshore. I invite you to ask General Frewen and Mr Moriarty about this. I'm confident that they have the same view as I have. We have been in active discussion about it. In both the protection of critical infrastructure and the onshore disruption of criminal or terrorist-related activities the legislation does not require or envisage, nor is it designed around, an expansion of ASD's collection powers against Australian citizens. It is binary: that position is either wrong or it is right.

Mr Byrne reminded me earlier of the consequences of the contempt of privilege that this committee has and stating a mistruth to this committee. They are two very different disciplines; they are disconnected. For the report to confuse those two issues—signals intelligence and cyber matters—was a fundamental error which was very basic in nature. So the statement is wrong.

**Mr DREYFUS:** I'm just going to ask you about one more sentence, because my colleagues have got questions.

**Mr Pezzullo:** We can go through every sentence if you wish.

**Mr DREYFUS:** Let me go to the next sentence. The journalist, Ms Smethurst, writes: 'Under the plan emails, bank records and text messages of Australians could be secretly accessed by digital spies, without a trace, provided the defence and home affairs ministers approved.'

**Mr Pezzullo:** Wrong.

**Mr DREYFUS:** In what way?

**Mr Pezzullo:** It's infeasible. If you are protecting your network—let's say you are an electricity grid—if you were disrupting very specific masked dark web transmissions of the most abhorrent child exploitation material you can imagine, either, or both, of those capabilities and capacities does not give you the capacity to do what you have just read. It is binary. It is simply wrong.

**Mr DREYFUS:** So your complaint about this sentence is as to what part of the network can be accessed if this proposal were to have gone forward?

**Mr Pezzullo:** Not particularly. There is a deeper error. To actively collect at scale, en masse—the stories about mass spying I invite you to—

**Mr DREYFUS:** It does not say 'mass spying'. The words were 'secretly—

**Mr Pezzullo:** Read the headline.

**Mr DREYFUS:** No, I'm not reading you the headline; I'm reading you the sentence. The sentence reads 'secretly accessed by digital spies without a trace'.

**Mr Pezzullo:** Yes. Wrong.

**Mr DREYFUS:** What's wrong about that?

**Mr Pezzullo:** Even a person with the most basic knowledge—I won't even say undergraduate; I would say year 10—of information architecture, network engineering cyberoperations, be they defensive or offensive, would understand this: unless you set up the actual capabilities that the story was talking about, which would have to be warranted under law, you could not access those communications or that data. In other words, you couldn't do it incidental to defending, say, the electricity grid. It is a different skill set, a different methodology and different capabilities.

I'll give you one example which I've had approval to speak about in the past, in the evidence given in May last year when Mr Turnbull was the Prime Minister. If you are defending, for instance, the electricity grid, which is currently not able to be actively done by government agencies, and you engage in offensive cyberactivities to kill the malware that's coming in, none of that—to take that example—enables you, entitles you or gives you the capacity—I'll continue with verbs and adverbs and nouns and adjectives if you wish—to do the things that are stated in the article. It's simply wrong.

**Mr DREYFUS:** I fear we're running out of time again, Mr Pezzullo. The chair has some questions—

**Mr Pezzullo:** Well, an appreciation of the technical complexities of these issues would actually assist the committee, I suspect, because it goes, quite separately from the article, to your remit in terms of the oversight of

intelligence and security matters. You cannot conduct signals intelligence collection unless you set up a signals intelligence collection capability. It is as simple as that.

**CHAIR:** On this question, Mr Pezzullo, how does the public exposure of alleged proposals like this, true or not, jeopardise the operations and capabilities of our intelligence and security agencies?

**Mr Pezzullo:** In this case, as I've given evidence before, mercifully—and I don't want to give any of the journalists who might have access to this material a second bite at this—the technical capabilities that you'd need to engage, for instance, in a cyber-counterhack to kill the malware that's taking down your electricity grid are highly sensitive and classified; hence the classification of the document. It wasn't classified for the reason of the avoidance of embarrassment. If our adversaries—that is to say, those state and non-state actors who might be minded to attack us with a cyberweapon that would destroy our grid—knew about the extent of our current capabilities and what we're proposing to field, that would be deleteriously impactful upon our national security; hence the classification at top-secret codeword.

**CHAIR:** What are the consequences of unauthorised disclosures like this upon our relationship with our intelligence allies, particularly the Five Eyes community?

**Mr Pezzullo:** In nearly all cases—and I want to stress that, and, again, please, I invite you to engage with the secretary of Defence and the head or acting head of ASD, because the signals intelligence part of this is in their remit; the cyberdefence part is jointly shared between us—all of our capabilities in the cyber-realm are heavily dependent on engagement with the Five Eyes, and particularly our engagement with our partners in the US and the UK. If they see this material in the newspaper—as we would be affronted if we saw our material in their newspapers—they would have cause to think, 'Can we share this material with the Australians if we're going to be reading about it in the newspaper?'

**CHAIR:** And on what basis would a public official decide to release such a document?

**Mr Pezzullo:** I couldn't venture to guess why some person or persons—because I don't know who's in the frame for this—would be so motivated, but I did give evidence, and I should reprise it, back in August that it certainly wasn't blowing a whistle on an off-the-books program that didn't exist, because you can't blow a whistle on a falsehood. So, given the way the story was framed around sweeping powers for ASD at the urging of Home Affairs, I can only assume that it had something to do with a view about issues that I think I described in the last hearing as concerns about which agencies have got which particular remits within the Canberra system.

**CHAIR:** Is it reasonable to conclude that their actions undermined the democratically elected government of the day?

**Mr Pezzullo:** Yes.

**CHAIR:** Thank you. Senator Keneally—very quickly.

**Senator KENEALLY:** I have two very quick questions. Mr Pezzullo, I want to give you the opportunity to address something that you said earlier, because, while you have been sitting here, it has caused a little bit of discussion on social media.

**Mr Pezzullo:** I don't follow social media.

**Senator KENEALLY:** Well—

**Mr Pezzullo:** I find it's a disorientating, fact-free—

**Senator KENEALLY:** Mr Pezzullo, I was asked to ask these questions quickly—and I am actually trying to help you, if the truth be told.

**Mr Pezzullo:** I'm heartened.

**Senator KENEALLY:** You said that your relationships are with journalists from outlets on the left and right, but 'maybe not at the edges. I don't know anyone in *The Tribune* or at the Marxist-Leninist broadcasting corporation.' Now that has given rise to some discussion on social media as to whether or not you were referring to the ABC. So perhaps right now, Mr Pezzullo, you would like to just clarify for the people who are following this on social media whether you were referring to the ABC.

**Mr Pezzullo:** I'm most appreciative of the opportunity that you have afforded to me. I very genuinely and warmly will embrace the opportunity that you've provided. I have many longstanding friends going over, in some cases, three decades. You get to know people when you're standing on the doors with the Leader of the Opposition awaiting their arrival. I have many deep friendships with the Australian Broadcasting Corporation. Senator Abetz might not agree with this characterisation, but I don't know any communists in the ABC.

**Senator KENEALLY:** And you weren't referring to the ABC?

**Mr Pezzullo:** Most definitely not. And I think I said—and Hansard, I am sure, will check—'either extremes'. I did use the example of the Marxist, Leninist broadcasting corporation, and I think I said something like 'or on the other team' at the edges of parties and groups that are actually antithetical to our democracy. To all my friends at the ABC, here's a shout-out.

**Senator KENEALLY:** Thank you, Mr Pezzullo. I'm sure you have many friend at the ABC these days. I want to go back very quickly just to clarify something. There was an exchange between you and Senator Abetz—

**Mr Pezzullo:** Sorry, Senator; is that seriously running on social media?

**Senator KENEALLY:** It is, sir.

**Mr Pezzullo:** This is why I wouldn't waste my time. But, anyway, we have different tastes.

**Senator KENEALLY:** If I can go back very quickly just to clarify an exchange that occurred between you and Mr Abetz. Just to clarify, this is in relation to the au pair case.

**Mr Pezzullo:** Yes.

**Senator KENEALLY:** Senator Abetz said, just to clarify, the department did not advise that the person should be removed from the country. And you said, as I recall—it's been a while since I've looked at the material—'That's right.'

**Mr Pezzullo:** I think that's right, yes.

**Senator KENEALLY:** I do note the inquiry into this matter quotes Minister Dutton, who told parliament:

The decision that was taken, I was advised, was that the tourist visas would be cancelled, that those two young tourists would be detained and that they would be deported.

He was referring to advice he received from the Australian Border Force. So I would ask you to go back and review the advice provided to the parliament by Minister Dutton, which seems to suggest that the department did, in fact, advise that those au pairs should be removed.

**Mr Pezzullo:** I do recall the minister's statement to the House. I'll have to refresh my memory, because there are lots of things that you—

**Senator KENEALLY:** I'm happy for you not to answer it here today. I am merely pointing out that Minister Dutton has told the parliament that the department—that is, the Australian Border Force—did advise that these people should be removed from the country, and—

**Mr Pezzullo:** I will check the record—

**Senator KENEALLY:** Yes.

**Mr Pezzullo:** because there was a very specific inquiry held into this matter. I am going to stress that it's based on my instant recollection—having prepared on the question of press freedom but not the machinations of that issue or the detail of that issue—that that was the position because that actually gave rise to phone calls being made to the minister's office. He then sought advice about his options about extending, bridging, allowing. As I recall it—and I'm stressing that; I'm putting in a caveat—he then acted on that additional amplifying advice. If I'm mistaken in that recollection, I will come back to you.

**Senator KENEALLY:** So the advice that you provided to the minister was not on whether or not these people should or shouldn't be deported; it was just the options he had available to the minister?

**Mr Pezzullo:** There is an automatic process whereby, if it doesn't seem as though you've got a lawful basis to be here, you could be deported. As I recall the evidence, we went through many, many documents. I'll need to just carefully go back over that ground. Representations are made all the time—we've been over this ground before—to many immigration ministers going back many, many decades. A minister's perfectly entitled to then ask: 'What options do I have? How does the law work in this area?' And then advice is rendered.

**Senator KENEALLY:** But you don't dispute that Australian Border Force did advise that these people were going to be removed from the country, that they had breached their visas?

**Mr Pezzullo:** I'm not sure that's an entirely accurate rendition, in the sense that the Border Force were taking actions under the law that they were responsible for. A minister can intervene. I think you've had cause to make reference to interventions otherwise, and a minister is entitled to seek advice. What I'm saying is—

**Senator KENEALLY:** As to his options under the act?

**Mr Pezzullo:** Correct, yes. Now, I'll need to go back over the chronology to make sure that I've cast that correctly back to you and, if I haven't, I'll come back to you.

**Senator KENEALLY:** Thank you. I appreciate it.

**Senator ABETZ:** Very quickly, these matters are only elevated once a decision is made by somebody questioning somebody's entry.

**Mr Pezzullo:** Or is in prospect.

**Senator ABETZ:** Yes. It is then elevated to departmental officials to then advise the minister once it's elevated. If the person was allowed to enter at the border, there would be no issue.

**Mr Pezzullo:** Indeed.

**Senator ABETZ:** So all that stands to reason.

**Mr Pezzullo:** Indeed.

**Senator ABETZ:** And I think everybody that was on the hearing fully understood those facts.

**Mr Pezzullo:** That's as I recall it too.

**Senator KENEALLY:** But just to clarify, Mr Abetz wanted to establish the department did not advise the person should be removed from the country.

**Senator ABETZ:** That's right.

**Senator KENEALLY:** Can I then also ask: did the department advise the person should not be removed from the country?

**Mr Pezzullo:** We've given evidence on this, Senator Keneally. I would prefer to remind and refresh myself as to that evidence.

**Senator KENEALLY:** I'm happy for you to take that question on notice.

**Mr Pezzullo:** And thank you for the opportunity for my friends at the ABC; I also appreciate that.

**CHAIR:** There are many questions on notice to come.

**Mr Pezzullo:** Sorry, Chair; is that something that's known to you?

**Mr DREYFUS:** That's a known known. I had a large number of other questions which I would have put had we had more time, but they'll now come to you in writing.

**Mr Pezzullo:** Do you want to give us a sense of them, so I can start thinking about them?

**Mr DREYFUS:** They relate to freedom-of-information practices in the Department of Home Affairs.

**Mr Pezzullo:** I'm just trying to be helpful.

**Senator ABETZ:** You will find them out when they arrive.

**CHAIR:** It's been a long morning but no doubt more enjoyable than the climate strike rally, so thank you very much for coming today. If you could, get the answers to those questions on notice by 4 October at 5 pm.

**Proceedings suspended from 12:36 to 13:19**

**D'AMICO, Mr Adrian, Head, Defence Legal, Department of Defence**

**FREWEN, Lieutenant General John, Acting Director-General, Australian Signals Directorate**

**MORIARTY, Mr Greg, Secretary, Department of Defence**

**SCHOLTEN, Ms Kylie, First Assistant Secretary, Security and Vetting Service, Department of Defence**

**SKINNER, Ms Rebecca, Associate Secretary, Department of Defence**

**CHAIR:** Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings. Do you have an opening statement before we commence?

**Mr Moriarty:** No, I do not.

**Lt Gen. Frewen:** I thank the committee for the opportunity to contribute to what is an important and timely inquiry. A free and open press is extremely important in our democracy. That must be balanced with protecting critical intelligence capabilities that keep Australians safe. Exactly where that balance lies is a matter for the community to debate through parliament. ASD's purpose is to defend Australia from global threats and help advance our national interests. We do this by providing foreign signals intelligence, cybersecurity advice and assistance and conducting offensive cyber operations offshore as directed by government. Our functions are clearly defined in the Intelligence Services Act, together with the limitations to those functions and oversight arrangements. It is important Australians understand how ASD keeps them safe and acts strictly within the letter and spirit of the law.

ASD is committed to being more open and transparent, but some information must remain protected. The national intelligence community will not be able to effectively defend Australia from global threats if our capabilities are known to those who would do us harm. ASD relies on sources of intelligence and methods of access many would assume to be improbable or even impossible. This is the edge that needs to be protected to ensure that Australia's intelligence agencies can continue to guard and advance the national interest. Australia's national security depends on a network of international intelligence partnerships. Our capabilities would be greatly reduced without the support of these partners. If they cannot trust us to keep information confidential, they will be less willing to share future intelligence that could protect Australians and Australian interests. Accordingly, there must be robust mechanisms in place to protect information of this nature.

**CHAIR:** Thank you. I'll ask you a question I asked Mr Pezzullo. It goes not to the substance of the article published by the *Herald Sun* but rather: how does the public exposure of alleged proposals like the one contained in the article, whether it be true or not—and we've heard evidence from Mr Pezzullo saying it's categorically false—jeopardise the operations and capabilities of our intelligence and security agencies? Moreover, what are the consequences of unauthorised disclosures like this one, particularly as it affects our relationships in the Five Eyes community?

**Lt Gen. Frewen:** The classification of those documents in question was made to protect capabilities and operating methods of the intelligence community. In ASD's case, some of these capabilities are developed over many years, at great expense to the nation, and they do provide us unique advantages against threats. Any compromise of those methods can mean we lose the capabilities, at great expense, or it can compromise that edge that we get in the types of intelligence roles that we perform. As I mentioned in my opening statement, we also have relationships across the Five Eyes community whereby we share both capabilities and information, much of which is very sensitive to our own respective nations, and there is a trust relationship that is fundamental to our ability to protect the sorts of classified information and capabilities that were alluded to in some of these documents. If there is loss of capability, there is loss of trust and there can be quite dire consequences for specific operations.

**CHAIR:** Mr Moriarty, did you want to add anything to that?

**Mr Moriarty:** No, thank you, Chair.

**CHAIR:** Was there any external management with those relationships that you had to undertake when this article was published? I know you did a joint press release, Mr Moriarty, with Mr Pezzullo and the former ASD director Mr Burgess. Are you able to elaborate on some of the stakeholder management that you had to do as part of responding to the claims in the article?

**Mr Moriarty:** It is fair to say that, after the articles became public, a number of our liaison officers did raise the articles with us, and we sought to reassure them that the capabilities and the intelligence-sharing arrangements that we have in place with them were being adequately protected and that Defence and the Australian Signals Directorate take their security obligations seriously.

**Lt Gen. Frewen:** We routinely consult with Five Eyes partners, whenever there are compromises or potential compromises to classified materials, to make sure that we are all fully aware of the potential compromises and that we are able to best mitigate any concerns or threats to us.

**CHAIR:** Thank you. Do you have a question, Senator Fawcett?

**Senator FAWCETT:** Yes. This inquiry is coming down to two large groups of people. One is journalists, and the government's interaction with them, but many witnesses are also talking to us about officials entrusted with classified information who make unauthorised disclosures, and are referring to them as whistleblowers or sources and seeking exemptions on the basis of claims that the only way they can raise concerns is by going to the media. Now, we obviously have the PID scheme from 2013. The Ombudsman, in 2016, released the second version of the guide to agencies about how to implement the PID scheme. What I would like to understand from the Department of Defence, and any agencies within it such as ASD, is how that guide released by the Ombudsman is being implemented in terms of training, the culture of your leadership and processes, so that we can get in the evidence for this committee just where that's at and an assurance that it's effective, so that members of the Australian public have an assurance that there is a system in place where every individual who is entrusted with information knows that there is a system and a leadership who will respect that system, and that they can raise concerns if they think there is behaviour that is illegal or unethical.

**Ms Skinner:** You've spoken about the PID scheme. I think it's worthwhile making the point that, within Defence, as with other Commonwealth agencies, that is not the only way in which people who had some sort of concern could raise issues. We have a strong security reporting framework, so people may raise security matters and, indeed, are expected to raise security matters. We have fraud reporting; some of that comes out through the PID scheme. We have the public interest disclosure scheme; that is well embedded in the Defence department. If you'd like, I can go to some statistics around that. People are also able to make complaints directly to the Commonwealth Ombudsman. We would expect people to use their chain of command. They can go to the Inspector-General of the Australian Defence Force. ADF members can go to the Joint Military Police Unit or the Defence Force Ombudsman. Then there are other ways of making complaints, including, for example, the Inspector-General of Intelligence and Security. So there are a range of mechanisms through which people with concerns could bring those forward in a way separate from a public disclosure, through providing it to someone outside of that chain who is authorised to deal with it.

**Senator FAWCETT:** It's been put to the committee that people haven't had confidence that the response by departments either would be or has been adequate, which is why they have gone to the media. Could you provide the committee the figures—and I'm happy for you to take this on notice—

**Ms Skinner:** No, I've got them.

**Senator FAWCETT:** of how many times people have either exercised the PID scheme or gone to the Ombudsman, or one of the other avenues, and what the outcomes have been—obviously not necessarily the details. Has it been resolved satisfactorily? The final part of the question is: for any disclosures that have pertained to Defence or its agencies in the last several years, have the cases there gone through those processes and exhausted those processes before the individual went public? I'm conscious that with some cases you may not be able to talk about that right at the moment.

**Ms Skinner:** I've got with me the public interest disclosure statistics, and I can start there. Some of that other detail I'd need to take on notice. But the PID scheme's been around since 2013, and Defence has taken about 1,907 cases into the scheme and 1,219 have been actioned. Sometimes cases aren't related to anything substantial or are assessed in that way, but we actively use that process. People do receive an outcome from participating in that process. I can't talk to the others. Clearly, some of those others are schemes that are administered by other parts of the Commonwealth, and they would need to take that question for you. But we can perhaps provide on notice some further statistics on some of the other internal mechanisms.

**Senator FAWCETT:** If you could. But what I'm also interested in is this: if you had 1,900 and you dealt with roughly 1,200, were the complainants satisfied—with those ones that weren't progressed through the system? And, in accordance with section 744 of the Ombudsman's guide to agencies, what processes do Defence have in place when a complainant is not happy with the result that comes back to them after they have actually used that scheme or, indeed, as you mentioned, one of your other schemes? I'm happy for that to be taken on notice. But it's

vital that we give assurance to the Australian public that there is a scheme that people are trained in and aware of, there is a culture within the organisation that opens the door for people to use this system and it gets effective outcomes.

**Ms Skinner:** I'd add that part of the Defence mandatory training includes an element of integrity training that goes to ensuring that all staff understand the public interest disclosure scheme, and we have very high percentages of staff—in the 80 to 90 per cents—who take that training annually. But I'll get back to you on those other points on notice.

**Lt Gen. Frewen:** I'd add that, in ASD's case, we have a very strong security culture that requires training and ongoing consideration of individual circumstances. When it comes to avenues for reporting, similarly, we welcome people raising any concerns with their immediate supervisors. People are able to make disclosures under the public interest disclosure scheme. We are also able to make representations directly to the Inspector-General of Intelligence and Security. We have mandatory fraud and ethics training that everybody must complete every two years. We have got very high—in the 90 percentile range—compliance with that at the moment. We will take the detail on notice, but I can give you an indication that, over the approximately 18 months that we have been a statutory agency, we have had a handful of PID matters raised. We have also, over the last five years, had about a dozen matters raised to the Inspector-General of Intelligence and Security. In amongst those there are clear cases where people have brought matters of concern forward. The IGIS have considered those. There have been some matters where fault was found and there have been remedial processes put in place, and the individuals have been satisfied with the outcome.

**Mr DREYFUS:** Have you got a copy of the article that appeared in *The Sunday Telegraph* on 29 April 2018? That's Ms Smethurst's article. Before I get to that, I'm reminded about the other matter—that is, the Afghan files matter. There is a current criminal prosecution of Major David McBride. We weren't able to be informed by witnesses appearing earlier this morning where that's up to. Do you know, since the alleged offences were committed against the Department of Defence—not as to detail, but when is it next in court?

**Mr D'Amico:** I believe it's got a number of pre-trial directions. I know that there is one in December, so it is—

**Mr DREYFUS:** The reason I ask is that it had been reported that it was next in court in September, but you're telling us, Mr D'Amico, that it is next in court in December.

**Mr D'Amico:** I know that there is one date in December, but it may well be in September. I actually don't have the details of that.

**Ms Skinner:** I've got the details here.

**Mr DREYFUS:** Thank you very much, Ms Skinner.

**Ms Skinner:** Two pre-trial applications have been listed on 25 October 2019 and 9 December 2019 in relation to admissions made to the AFP and in relation to the public interest defence, respectively. That's what I've got.

**Mr DREYFUS:** So, at the moment, it's at the procedural hearing stage—about how evidence is to be led and whether some part of the proceeding might be conducted in camera and those sorts of matters, as is usual in a national security trial?

**Ms Skinner:** I am not a lawyer, so I will not chance my arm there!

**Mr DREYFUS:** That's why I was asking Mr D'Amico!

**Ms Skinner:** I just happen to have the dates in my brief, and I was being helpful with the dates.

**Mr D'Amico:** That is correct. As I understand it, it's likely to go to a substantive hearing next year. So there is quite a bit of work to go before then.

**Mr DREYFUS:** It has also been reported that Mr McBride—should I call him Major McBride or Mr McBride? He served as a major in the ADF.

**Mr D'Amico:** Mr McBride, I think.

**Mr DREYFUS:** 'Mr'; okay. He is retired. It's been reported that Mr McBride has made a number of admissions. Are you able to say anything about that? Just say no if you can't. I'm going on what's been reported in the media.

**Mr D'Amico:** No, I'd prefer not to go down that path.

**Mr DREYFUS:** That's all right. Thank you.

**Senator McALLISTER:** This morning, we had an extended conversation with officials from the Department of Home Affairs which included canvassing the present arrangements via which journalists might informally

interact with officials in the national security environment if they have information that is sensitive and they are seeking clarification about how best to report on that without doing harm. Historically, have journalists or media organisations ever contacted the Department of Defence or ASD to discuss the potential harms to national security of publishing certain information?

**Mr Moriarty:** Yes, on a number of occasions, they have, and we have a standard approach and points of entry for media organisations to contact us. It's the same route that we use for people who are seeking comment for a story or who are writing a story and hoping that we can provide some comments. So we don't have a separate chain for people to raise sensitive issues, but, on a number of occasions, people who have wished to discuss with the department a sensitive matter have used that route and we have on occasion been able to engage in a professional and respectful conversation about said matters. But it's not a separate, different process to the normal media inquiry process. It's also the case that former defence members who are intending to write articles or perhaps contribute to a book or publication will sometimes also seek the department's views on a chapter or a contribution that they were thinking of making.

Could I draw to the committee's attention just one particular example. In February 2018, *The Canberra Times* came into possession of a notebook, which was the property of one of our staff members, that contained some national security information. *The Canberra Times* made contact with the department and allowed a departmental officer to secure the notebook and the passes that were associated with it. *The Canberra Times* discussed with us what could or could not be published without harm, and agreed not to publish certain information that we advised would have harmed national security. They did publish a number of stories in relation to that matter, but the notebook and the other material were returned.

The story was embarrassing to the department, but the publication of the information which we were able to discuss with them did not harm national security. For the committee, I'd like to commend the approach that *The Canberra Times* took on that occasion to reach out to us and help us manage what was a difficult and challenging issue.

**Senator McALLISTER:** Nonetheless, in the example you provide, the information that was published may not have done harm but publishing it still would have meant the potential for them to be charged with an offence. Is that correct?

**Mr Moriarty:** I don't know that that was ever in play.

**Senator McALLISTER:** The reason I ask is not to invite you to contemplate the possibility of prosecuting *The Canberra Times*; it's that, in the discussion this morning, Mr Pezzullo made the obvious point that no administrative process, whether formal or informal, of a kind that you describe can provide immunity from prosecution for a journalist or a publication which proceeds to publish material that is classified.

**Mr Moriarty:** Should a journalist come into possession of a document or information and through our normal procedures bring it to the department's attention and say, 'Look, I intend to publish a story, but I would be grateful for a view on information that is particularly damaging,' my personal view would be that, after consulting with my minister, I would probably agree to engage in a discussion—and that discussion may well be a productive one—but I don't think I could ever say, 'Because we've had this engagement, I won't refer this matter for further investigation.' It would depend on the nature of it.

**Senator McALLISTER:** I understand.

**Mr Moriarty:** I think it would still need to be case by case, but, I think, with appropriate regard to the fact that the media outlet had in good faith asked for some advice, I would seek to give that advice, if I could, to help mitigate the risk to national security.

**Senator McALLISTER:** In the case of defence, you mentioned that such an inquiry would ordinarily come through the media unit.

**Mr Moriarty:** Yes, that's correct.

**Senator McALLISTER:** Would senior officials such as you be involved in speaking to the journalists, the publications or the editors? I'm really asking about the organisational arrangements that support this informal arrangement in the Department of Defence.

**Ms Skinner:** I can talk on that a little bit. We have a media operations room. Journalists are used to working with defence in that context, and they will normally come in through that process. We have an assistant secretary for communications—that's probably the senior entry point for journalists. They would all know who that individual is and they would, and do, make contact with that individual. That individual would then assess the merit of the case and advise others more senior in the department about the matter or the issue and about how to

engage. That's how it would flow up in the organisation. It's a very dynamic system. That individual has a morning meeting several times a week where any sort of key issues like that would be raised.

**Mr Moriarty:** Say, for example, a number of journalists who I've known for a number of years were to reach out to me directly, I would still handle it through that process. There would be an acknowledgement to the media unit that a journalist had contacted me. We require all of our officers to report contact with the media. That's not to hinder, but it's simply so that we can help manage our broader department's engagement with the media and respond to inquiries, because obviously our ministers have imposed on us requirements for how quickly we must respond to media inquiries and how we need to be fulsome in our support for those.

**Senator McALLISTER:** Are there written guidelines about this available to support staff who either are directly responsible for handling media engagements or might incidentally have contact with the media?

**Ms Skinner:** Yes, we've got a Defence communications manual that outlines all of the practices and policy arrangements around media and communications in the department.

**Senator McALLISTER:** Does that go directly to this question about media inquiries that might be in response to a journalist who has acquired sensitive or classified information or information that might do harm if published?

**Ms Skinner:** I wouldn't say that it would go to that. What it sets out is what should happen when media inquiries come in, how quickly they need to be responded to and what the escalation paths are. It also sets out some obligations for departmental employees to go through an authorisations process should they be going to speak in public or release some information and things like that. So it outlines that; it wouldn't go to what you asked. That would be quite a rare situation anyway.

**Senator McALLISTER:** Your feeling is that this kind of contact where someone is seeking guidance about how to best handle publication would be quite rare?

**Ms Skinner:** Yes, except if we were in a project with someone who was writing a book that was using some material, like the War Memorial type history. We would have a very structured process around that to make sure that they don't inadvertently disclose things that are still very important to us.

**Senator McALLISTER:** Depending on how big it is, can the communications manual be provided to the committee?

**Ms Skinner:** I will undertake to do that.

**Mr DREYFUS:** Taking you back to the Smethurst article, as you know, this is an inquiry into the impact of the exercise of law enforcement and intelligence powers on press freedom, and it seems to have been prompted by two raids—the raids on the home of Ms Smethurst, the journalist who wrote this story, and the offices of the Australian Broadcasting Corporation the following day in relation to a different story, the one that has been called the Afghan files. Somewhat unusually we've got the possibility of what is perhaps a case study or a form of case study in this article. Mr Pezzullo, when he was here on the last occasion, on 14 August, talked about—and I'm going to be careful here—the image of the top of a torn document, the first two lines of which have the security classification:

SECRET AUSTEO

COVERING TOP SECRET COMINT AUSTEO

Just to assist members of the public who might not be as familiar with these classifications as all of us are, could one of you just say what all that means?

**Ms Skinner:** In terms of the straightforward doctrine going on there, that means that the document, that ministerial submission that you can see, is—

**Mr DREYFUS:** We can see the top 10 lines of it.

**Ms Skinner:** It says that the document itself is 'secret AUSTEO'. The fact that it says 'covering'—

**Mr DREYFUS:** You have to go really slowly.

**Ms Skinner:** It means secret Australian eyes only, and 'secret' goes to the level of harm that is anticipated if the document was to be released, and 'Australian eyes only' means that no citizen of any other nation is to have access to that document. The 'covering' means that it is likely that there are some attachments to that document of which one of those attachments is classified at top secret. The 'COMINT' refers to communications intelligence, so it goes to something to do with the work that Lieutenant General Frewen is in charge of, and then again you have the classification 'Australian eyes only'. I hope that helps.

**Mr DREYFUS:** Thanks very much, Ms Skinner. Of course, we don't have the attachment; we've only got an image, which may well have been digitally altered to represent a ripped-off top 10 lines or so of this secret document. We don't have the attachment. The newspaper didn't publish the attachment.

**Ms Skinner:** The newspaper has published a picture of the top part of the front page.

**CHAIR:** That looks like a screenshot, doesn't it?

**Mr Moriarty:** A screenshot of the front page of what may have been a submission.

**CHAIR:** So potentially a leaker has taken a photo of it and sent it on, and that's the image?

**Mr Moriarty:** We don't know.

**Ms Skinner:** We have no idea.

**Mr DREYFUS:** I'm getting to a different point, which is that the *Sunday Telegraph* has chosen to publish only that, and certainly has not published any other part of the document, let alone the top-secret attachment or attachments—that's right, too?

**Mr Moriarty:** Senator, in the article—

**Mr DREYFUS:** I've been promoted! Mr Dreyfus will do.

**Mr Moriarty:** Sorry, Mr Dreyfus.

**Senator FAWCETT:** Don't be sorry!

**Ms Skinner:** We're warming up for Senate estimates!

**Mr Moriarty:** The story then explores what is purported to be issues raised in correspondence between Mr Pezzullo, me and Mr Burgess.

**Mr DREYFUS:** That's right. I will come back to that. Having set the scene, if you like—Mr Pezzullo said to the committee on 14 August:

... the reason why the document attracted that classification is that in both the body of the text and the attachments were very sensitive descriptions—which, regrettably, we've had to slightly unveil and talk about ahead of proper scrutiny of the relevant legislation, including by this committee—of how we would conduct the cyber-defence of Australian critical infrastructure down to the type of capabilities that we would use. That's what attracted the top-secret classification, not the proposal for legislative change.

The committee asked the Department of Foreign Affairs and Trade a series of questions on notice about that statement, which, regrettably, we don't have answers to yet. I wanted to ask you to put this in a bit of context. I don't want you to comment on whether or not you agree with the way in which Ms Smethurst chose to characterise the proposal, but is it right to say that her story appears to relate entirely to the proposal for legislative change? In other words, we're not seeing in her story as published in the *Sunday Telegraph* anything about the matters that Mr Pezzullo was talking about that may or may not have appeared in the attachments.

**Mr Moriarty:** Mr Dreyfus, I think the article does suggest quite a bit about assumed ASD computer network exploitation capabilities and offensive cybercapabilities. It doesn't go into the details, but I'm—

**Mr DREYFUS:** I'm seeking guidance here. I'm interested to know—without, of course, you making any further revelation of any secret matter—what is it in the story that goes beyond describing the proposal for legislative change?

**Mr Moriarty:** I think when it talks about what ASD might be asked to do to step in to protect networks or to step in to disrupt networks—that is exceptionally sensitive.

**Lt Gen. Frewen:** We had two concerns with the article that was presented. The first was the portrayal of highly classified material, of course, whose unauthorised release is of great concern to us, and illegal if that is in fact what has happened. The second was the premise of the article, which does intimate that the contents of the document were proposing a secret plan to 'spy on Aussies'—that there was some proposal to conduct the mass surveillance of Australians. The proposals were—

**Mr DREYFUS:** Where does it say 'mass surveillance'? I'm quite interested to—

**Lt Gen. Frewen:** It purports that there would be powers sought that would allow wideranging ability to pry into the affairs of everyday Australians. There has never been any such proposal. In the case of ASD, we are a foreign signals intelligence agency. We have no interest in the everyday affairs of Australians nor access to their data. This document is inferring that there was a plan to have broad surveillance powers related to everyday Australians, and that is not the case. It is misleading the public in relation to the types of activities that ASD would conduct and the types of proposals that were actually being put forward, which were related very

specifically to keeping Australians safe in relation to matters of cybersecurity and critical infrastructure in the main.

**Mr DREYFUS:** Inaccuracy is surely not a basis for the prosecution of anyone, is it?

**Lt Gen. Frewen:** The release of classified documents is what we are most concerned about in relation to legal matters.

**Mr DREYFUS:** Sure, but it's certainly not just the fact that you think that Ms Smethurst has inaccurately portrayed the proposal that is the basis for which she is being currently investigated and may yet be charged—it's not inaccuracy?

**Lt Gen. Frewen:** Our legal concern is the release of the document. Our broader concern is the way potential activities have been portrayed to the Australian people. They are two separate concerns.

**Mr DREYFUS:** The second concern is a political concern or a public relations concern, isn't it?

**Lt Gen. Frewen:** It's a concern that we have, that we take our mission and our legal authorities very seriously. We are very committed to helping the public to understand the types of operations that we lawfully do and that we take the privacy of Australian citizens very seriously. We are interested in foreign communications and foreign threats to Australia. For us it is not appropriate for people to be given the impression that agencies such as ours are seeking broad domestic powers to spy on everyday Australians, which I have said we have no interest in the conduct of our important intelligence role.

**Mr DREYFUS:** And your organisation, headed as it was then by Mr Burgess, sought to deal with what you perceived to be the misapprehension that had been created by this story by putting out a media release—Mr Moriarty had a hand in that, too—seeking to correct the misapprehension?

**Lt Gen. Frewen:** That is what occurred at the time.

**Mr Moriarty:** Mr Dreyfus, could I add—

**Mr DREYFUS:** Of course. Be as expansive as you like.

**Mr Moriarty:** You're aware of my referral of the matter to the AFP. In accordance with agreed procedures, I referred matters to the AFP involving the unauthorised disclosure of Commonwealth information. That was the purpose of my referral. I made no comment in that referral to the nature of the article or the judgements in the article that Ms Smethurst had made.

**Mr DREYFUS:** Thank you for that clarification. I'm going to ask you about the story, as distinct from the possible release of the document or the possible leaking of part or all of the document with or without attachments. I'm not asking you about the document; I'm asking about the story, which appears to relate to a proposal for legislative change, which you've said is not an accurate description of whatever proposal there was. In that sense, as an article about a proposal for legislative change, did Ms Smethurst's story harm Australia's national security?

**Mr Moriarty:** I believe it did, because I believe that in the story she was talking about ASD's computer network exploitation capabilities and offensive cybercapabilities.

**Mr DREYFUS:** Where in the story does she talk about ASD's cybercapability as distinct from writing about a proposal for legislative change?

**Mr Moriarty:** I'm referring to an article on page 4, where the article says:

The Sunday Telegraph can reveal the Secretary of the Department of Home Affairs Mike Pezzullo first wrote to the Defence Secretary Greg Moriarty in February outlining a plan to potentially allow government hackers to "proactively disrupt and covertly remove" onshore cyber threats by "hacking into critical infrastructure".

**Mr DREYFUS:** Yes. That's the proposal that she's describing.

**Mr Moriarty:** But the ASD's capability to have these capabilities and to use them—we are very interested in the development of offensive cyber for wartime purposes and for military purposes. My department is very interested in what ASD can do to protect vital infrastructure in times of war and in times of national emergency. I believe that floating and canvassing those capabilities in public and alerting others to the fact that these capabilities may or may not exist is harmful to our national interest.

**Lt Gen. Frewen:** I would add that our agency's licence to operate is grounded in the legislation that underpins our activities, and the public and the parliament's confidence that we operate strictly within the spirit and letter of those laws. We strive to maintain the faith of the Australian public that we have their privacy concerns central, and our compliance with the law is central to all we do. This article sought to undermine the confidence of the Australian public in the sorts of capabilities that we have and the ways that we execute them.

**Mr DREYFUS:** I'm not sure that you can say what the motive of the journalist was, with all respect, Lieutenant General Frewen. It might be that it had that effect, or your perception is that it had that effect, but I don't think you could say that it sought to do that.

**Lt Gen. Frewen:** I accept that point.

**Mr DREYFUS:** I'm just looking at the website for the Australian Signals Directorate. I can go on the website, and any Australian or any non-Australian can go on the website, and see that the functions of the ASD, under the Intelligence Services Act, are these:

- collect foreign signals intelligence
- communicate foreign signals intelligence
- prevent and disrupt offshore cyber enabled crime
- provide cyber security advice and assistance to Australian governments, businesses and individuals
- support military operations
- protect the specialised tools ASD uses ...
- cooperate with ... the national security community's performance ...

Further down I read, among the strategic objectives:

- ASD capabilities play an important role in **countering cyber-enabled threats**.

This is all on the website of the ASD, which is a good thing, because it tells—

**Lt Gen. Frewen:** Countering offshore cyber enabled threats.

**Mr DREYFUS:** What I'm getting at is that the paragraph you've pointed to is not Ms Smethurst disclosing anything about anything the ASD does. It is merely writing about a plan to allow something to occur in future, which would require legislative change. I'm really interested to know from either you or Mr Moriarty: what is it that Ms Smethurst has disclosed in this story that causes a problem beyond the public relations or public confidence aspects of this plan having been revealed?

**Mr Moriarty:** We didn't refer Ms Smethurst for damaging national security.

**Mr DREYFUS:** I understand that. But I said to you at the start of these questions that I'm using this as a case study. I'm trying to find out what, in the opinion of the Secretary of Defence and the Acting Director-General of ASD, there is about what was reported, as distinct from the leak of the document—I appreciate entirely, Mr Moriarty, that what was referred was the leak of the document, a photo of the first 10 lines of which appears, regrettably, in this story. Is there anything in the story itself that harms Australia's national security?

I'm seeking to have you identify what it is in the story because, to me, it reads as a story about a proposal to change the law. We get proposals to change the law every day in this building. Some of them take the form of bills. Some of them take the form of recommendations by committees. Some of them take the form of lobbying. It is not an unusual thing for legislative change to be proposed, and that's what her story is about. You might not like the headline much and it might be sensationalised but the story is what I'm asking about, not the leak of the document.

**CHAIR:** If the document pictured had at the top 'unclassified' or 'confidential', would we be having this conversation?

**Mr Moriarty:** When you're talking about 'available to members of the public', that means to foreign intelligence services in any country in the world who can access online the material that's published in the Australian media. So we're not talking about releasing to the public; we're talking about releasing, to everyone with curiosity or ill intent towards our country, more information than I think is appropriate about ASD capabilities, operations and methods.

**CHAIR:** My point is that surely the real issue here is that a top-secret AUSTEO document is in the public domain. That's the issue here, isn't it?

**Senator McALLISTER:** There's a distinction.

**CHAIR:** Well, not the totality of the document.

**Senator McALLISTER:** Well, has any part of the document apart from the headline been published? That's the question Mr Dreyfus is going to.

**Mr BYRNE:** I think Mr Dreyfus's question is actually quite legitimate. It leads me to think about some other matters that pertain to it, which is about the individual concern that you—so I'm going to start asking you some questions.

**Mr DREYFUS:** If I could finish—

**Mr BYRNE:** Yes, you finish; then I'll go after you.

**Mr DREYFUS:** Going back to Mr Pezzullo's description given to us on 14 August—I'm certainly not seeking to go beyond that description, but he offered it—of attachments: he said the body of the text and the attachments were very sensitive descriptions of how we would conduct the cyberdefence of Australian critical infrastructure, down to the type of capabilities we would use. Did Ms Smethurst's story, not the documentation that may or may not have been leaked to her, refer to very sensitive descriptions of how we would conduct the cyberdefence of Australian critical infrastructure down to the type of capabilities that we would use? You're best placed to tell me the answer to that, because all I've got is the article.

**Mr Moriarty:** No, it talks about what ASD may or may not do.

**Mr DREYFUS:** As a matter of law?

**Mr Moriarty:** Yes.

**Mr DREYFUS:** Right now?

**Mr Moriarty:** Yes.

**Mr DREYFUS:** It doesn't talk about what the capabilities are.

**Mr Moriarty:** Mr Dreyfus, you're correct to say it doesn't go into technical capabilities. That is the case. I'm still of the view that talking about the types of operations and methods that ASD might do is giving away more than would be prudent for the protection of our national security interests.

**Mr DREYFUS:** How is there anything in this story that goes beyond what's available on the ASD website? I'm asking. The ASD website describes the functions of ASD. The ASD website, on the front page, describes what the objectives are and something about capability too, which is a good thing. It's good for Australians to know what our agencies do, at least in the broad. I don't want Australians to know what they do specifically, but I do want them to know what the functions are. I think it's helpful and confidence-building for Australians to know what the limitations are and what the actual capabilities are, without going to the detail. That's what the website does. I'm not seeing in the story anything particularly that is beyond what's already known about ASD. You can read the limitations on ASD's functions in the Intelligence Services Act—helpfully, because we've now legislated. So can I just ask, for the last time: what is it in this story that's a problem?

**Mr Moriarty:** No. I don't have anything further to add, Mr Dreyfus.

**Mr DREYFUS:** Okay.

**Senator McALLISTER:** The reason it's interesting is that earlier this morning Mr Pezzullo suggested that, through careful engagement between security personnel and journalists seeking to publish, on occasion it may be possible for such publication to be facilitated in a way that is not damaging. You gave an example of such a thing earlier in your testimony around the *Canberra Times*. Yet, in this example, something has been published—certainly an investigation using significant coercive powers to gain information for the purpose of the investigation is underway—yet we're struggling to identify the actual harm associated with the publication in this conversation here. It's why the questions Mr Dreyfus is asking are so relevant. Perhaps you could reflect upon them. It may be that there are things you don't wish to discuss in a public hearing and it may be that you're in a position to provide the committee with advice in camera or in a subsequent confidential briefing that might assist us in thinking this through.

**CHAIR:** Mr Byrne.

**Mr BYRNE:** Do you have any idea about who the person was or do you suspect who it was that provided the information to the journalist in question?

**Mr Moriarty:** I do not.

**Mr BYRNE:** So no-one from ASD does?

**Lt Gen. Frewen:** It would be inappropriate to comment on an ongoing AFP investigation.

**Mr BYRNE:** Could you contemplate—what do you think was the motive of the individual in providing the information to the journalist?

**Lt Gen. Frewen:** It wouldn't be appropriate for me to speculate on what the motivations of the individual would be.

**Mr BYRNE:** Of course you would be speculating. He's a member of—anyway, I disagree with you. Do you believe that this individual had more information that he could have put out into the public domain?

**Lt Gen. Frewen:** I don't have a view on that, nor would I comment on what is clearly the subject of an ongoing AFP investigation. What I would say, though, is that classified documents such as these are very important to protect, and there are laws that are designed to protect this sort of information. As we discussed earlier, there are appropriate avenues for individuals to take up matters of concern and there is no evidence that I have that concerns around this document or these proposals were—

**Mr BYRNE:** Were ever raised.

**Lt Gen. Frewen:** brought up through any of the legitimate paths for concern. So, for us, as we've talked about, primarily the concern is keeping safe classified information that is very sensitive and gets to very important capabilities to our nation and our national advantage and the security of Australians.

**Mr BYRNE:** Given what you've just said then, reading between the lines, I'll ask you again: what do you think the motivation was? In a sense, you've just—if you just go back to exactly what you said in that question, you talked about a process and you talked about a process that appeared not to be adhered to. So, without going into too much information, again, I just—because we're talking about national harm; this is what you're talking about. I think you were saying that you think that the leak of that particular document caused harm, had the potential to cause harm. So, again I'll ask you: what do you think was the motivation of this person?

**Lt Gen. Frewen:** I couldn't speculate as to the individual's motivation to leak this document; nor could I speculate on the reasons they didn't raise their concerns through appropriate channels.

**Mr BYRNE:** So you're just saying that ASD never thought about this at all?

**Ms Skinner:** Mr Byrne, I might be able to help. We would classify this sort of activity as an 'insider threat'. The research and work that's been done on insider threat identifies ranges of motivations for people to conduct—insider collection of information or distribution of information. And they can be a whole range of things, from greed through to some sort of foreign espionage through to some sort of mental health issue or something like that. There is a body of evidence around insider threat that there can be a range of motivations, so I don't think anybody here is qualified to speculate on this particular case's motivation.

**Mr BYRNE:** And yet there was a referral to the police to investigate in a fairly obvious way about who might have provided that information to the journalist, and then the journalist's home was raided—

**CHAIR:** Searched.

**Mr BYRNE:** Searched; sorry. Let me be precise. I've got to say that, in a public sense—because the public are trying to understand this—you're saying that there's a document that provides harm. You can't tell me whether or not this source has got other documents—or you won't tell me. You don't know what the motivation is. You're implying it's an insider threat. And yet you're here testifying about a journalist. I feel like I've got information about one side of the equation, which is that the journalist has been not investigated but, to use the precise term, searched, but we have, as a committee, not understood the motivations of the person who provided that, not known who that person is—at least publicly—not known if that person has other information that could then explain why you're so anxious to sort of pursue the matter. In particular on the basis of what Mr Dreyfus said, in my perception and my judgement of the document itself and what was published by the media, it struggles to tick particular boxes in terms of harm, particularly given that there's ASD. My question to you is: was there another motivation? I'm going to ask you this on the record for you to refer this to the police: was it really because you were worried about the individual in question that you suspected leaked the information?

**Mr Moriarty:** As the Commonwealth official that referred the matter to the Commissioner of the Australian Federal Police, I was motivated by a real concern that somebody had provided to a journalist a top secret or AUSTEO document. I believe that those documents are of such high classification and such sensitivity that I would have been derelict in my duty if I had not referred such a matter to the Australian Federal Police.

**Mr BYRNE:** So it's just on the basis of that one document. You don't have any concerns about other documents?

**Mr Moriarty:** That one document was enough for me. I would be very concerned about one document of that classification.

**Mr BYRNE:** That's fine.

**CHAIR:** That is because it's breaching a very significant compartment and that's precisely the point. If we go to Canada, for example—and I'm referring to on-the-record information about Cameron Ortis, who was arrested recently—the public prosecutor, John MacFarlane, says Ortis was accused of having:

... obtained, stored, processed sensitive information we believe with the intent to communicate it to people that he shouldn't be communicating it to.

The point is not that details were spilled out in the press but that there were significant breaches in the integrity of the Royal Canadian Mounted Police.

**Mr BYRNE:** Which comes to my point: intent. I think the chair has very helpfully amplified my point. From my perspective, it is the intent of the individual.

**Lt Gen. Frewen:** If I may: in my opening statement I mentioned that documents such as these contain materials about capabilities and methods that can take many years to develop and can be very expensive to develop, and our ability to manage these types of materials also gets to the trust relationship within our coalition community. So the release of these documents poses a whole range of concerns to us.

**Mr BYRNE:** If you use that as a benchmark, what did you say to the Americans when you had Snowden? I know what the Americans said, because I spoke to them about it. What about Snowden as well as Assange? We're talking about our alliance partnerships, but we've had some pretty devastating leaks. We may yet have some more, as you are well aware. So I take that particular point in terms of our alliance partners. Perhaps I might ask you to reflect on this and then, if we have a classified briefing at some stage, I've got to say I'd like to have some further answers to the questions that I put to you.

**Senator FAWCETT:** Following on from the questions Mr Dreyfus was raising: the article itself appears to have been somewhat light-on in terms of detail. That doesn't change the severity of the crime that was committed by an officer who, in the wording of section 79 of the Crimes Act, was 'entrusted' as a Commonwealth official with a duty to keep secret information providing an unauthorised disclosure to another person, given the classification on it, with the significant potential for harm. My concern is that relying on the journalist's interpretation of what the journalist prints as the measure of harm, as opposed to the fact that we have an individual who didn't use the avenues available to them to register a concern about immoral, inappropriate or illegal activity, breached an act they were very clearly aware of, with material that causes significant harm. Is that not, in and of itself, sufficient reason to pursue this regardless of what actual harm the published article caused?

**Mr Moriarty:** It's the unauthorised disclosure that was the subject of my referral to the Australian Federal Police. If the article had not been written but there had been still been some acknowledgment that, 'I have in my possession a secret AUSTEO covering top-secret COMINT AUSTEO document,'—if that had have been a two-line tweet—I would have referred the matter to the Australian Federal Police.

**Senator FAWCETT:** That's exactly my point. Whether or not the article actually manifested the harm is almost irrelevant in this case, because the individual had avenues, didn't exercise them, had an obligation which he or she breached, and committed a crime.

**CHAIR:** Social media is buzzing away as we're speaking. Ben Packham from *The Australian* has tweeted: Greg Moriarty tells PJCIS that @annikasmethurst piece damaged national security because it disclosed capabilities. But former ASD head Mike Burgess did same in this speech ...

And it is linked there; I think it was to the Lowy Institute. I would argue there is no equivalence. My understanding of that speech is that he was doing what directors do—that is, talk in general terms about the capabilities. I don't think there's an equivalence here. The real issue, as you've said and as Senator Fawcett has made very clear, is that a top-secret AUSTEO COMINT document was potentially leaked by a person who had a responsibility to protect that document. That's what all this ultimately boils down to.

**Mr Moriarty:** Mr Burgess is a very experienced and clever practitioner in a good, well-informed position to come to a judgement about what can be released without significant, or any, harm to our national interests. When somebody provides a secret covering top-secret COMINT AUSTEO document, that person then loses control of the document. Mr Burgess, in giving a speech, is in total control of what he says and how he might respond.

**CHAIR:** He knows what equities he needs to protect.

**Lt Gen. Frewen:** I would add that the two public speeches that the previous director-general made in relation to ASD's roles and functions were made in a firm commitment to transparency and giving the Australian public confidence that they could understand the types of activities we lawfully conduct and how seriously we take our commitment to the privacy of Australians.

**Mr DREYFUS:** Are you aware that the Australian Federal Police initially classified the unauthorised disclosure to Annika Smethurst as a routine investigation that was of low value to the AFP, of routine impact to the client and of medium impact to Australian society?

**Mr Moriarty:** I'm not aware of how the AFP may have characterised it.

**Mr DREYFUS:** The AFP later reclassified the unauthorised disclosure as essential, the value to the AFP as high, the impact on the client—which, presumably, is you—as critical and the incident type as corruption. They'd

initially classified it as 'other Commonwealth crime'. Did anyone from Defence or ASD have any contact with the AFP at this particular point, in May 2018, after the referral?

**Ms Skinner:** Not that I'm aware of.

**Mr Moriarty:** I'll take that on notice.

**Lt Gen. Frewen:** I'm not aware of any contact between ASD and AFP at that time, but I'll take that on notice.

**Mr DREYFUS:** You weren't there. You might not have known. Could you take that on notice. I'm interested in whether there were interactions that might have led to the AFP up-classifying the importance of the matter.

**Lt Gen. Frewen:** I was a member of ASD at the time, but I will take that on notice.

**Mr DREYFUS:** Sorry. 'You weren't on this,' is all I'm trying to say.

**CHAIR:** Thanks very much. We appreciate your appearing today. Could you get answers to questions taken on notice to the secretariat by 4 October at 5 pm. You'll get a copy of your transcript to correct evidence.

**FAIR, Ms Bridget, Chief Executive Officer, Free TV Australia**

**GILL, Mrs Clare, Group Director, Regulatory Affairs and Spectrum Strategy, Nine Entertainment**

**JANZ, Mr Chris, Managing Director, Publishing, Nine Entertainment**

**MALEY, Mr Mark, Manager Editorial Policies, ABC News, Australian Broadcasting Corporation**

**MURPHY, Mr Paul, Chief Executive, Media, Entertainment and Arts Alliance**

**REID, Mr Campbell, Group Executive-Corporate Affairs, Policy and Government Relations, News Corp Australia**

**WILLACY, Mr Mark, Investigative Journalist, Australian Broadcasting Corporation**

[14:33]

**CHAIR:** I now welcome representatives from Australia's Right to Know Coalition of media companies to give evidence. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings. Do you have an opening statement you'd like to make?

**Mr Reid:** In the interests of time, we've gathered a group of people so that we can, hopefully, answer questions, so we don't have a long opening statement, other than to point out that it's now more than 100 days since the raids on the ABC and Annika Smethurst's home, and the people who were the subject of those raids are still, as we have described repeatedly, in a legal limbo. We think that that's an unfair and untenable position.

We're here today to continue a conversation about balancing the principles of an open society with the practicalities of how we achieve that. We've made six recommendations and we're happy to explore them with you. I think we have a gathering of people who can assist the committee in its endeavours. We want to repeat that what we are asking to re-establish, to recalibrate, is a society that favours openness over secrecy, and we believe that the raids are—to use a phrase—the straw that broke the camel's back. It's a process that—over the last decade or so and particularly over the last three or four years—has seen that culture of openness as a first principle eroded. We want to do what we can, in a constructive way, to correct that. So, on that basis, we're happy to have the conversation. Thanks for the opportunity.

**Senator FAWCETT:** In the interests of accurate reporting, do you accept that the actions of the AFP were searches and not raids?

**Mr Reid:** No. I think if it looks like a raid and feels like a raid, it's probably a raid.

**Senator FAWCETT:** Okay. Thank you. That's interesting!

**Senator McALLISTER:** In your submission you have some quite specific propositions for reform. When we last convened a hearing we confined our discussion to the more general principles at stake, but part of the reason for having a second hearing and inviting you back is to talk a little more about some of the specific ideas that you think we ought to consider. I invite you to take us through, in whichever way you think best, some of the specific proposals for reform that are in your submission.

**Mr Reid:** We welcome input from fellow members of the Right To Know Coalition. Perhaps we should start with the contested warrants. We feel strongly about having to justify your actions as a journalist after the event, as opposed to arguing about your right to have something published in the first place, before a proper forum. It goes to the questions that are being posed here today. Certainly, in Annika Smethurst's case, if we had had the opportunity before a senior judicial body to say we didn't think that Annika Smethurst's story posed any threat to our national security, surely we could have had that debate tested and thrashed out in a public place where we could have put our case, the investigators could have put their case and a qualified senior third party could have said, 'No, on balance the search'—to use your term—'is justified and it's going ahead.'

Again, this goes to the principle and the practicality. The principle of that is we are having a debate about the Australian public's right to be informed and we're having it upfront. The practicality of it is, well, what risk is there to a successful investigation, by whichever investigating body it is, if you have that debate upfront?

Our contention is that, in this case, the threat to the practicality of the investigation is small but the protection of the principle of open society is large. And therefore, on balance, in a practical sense, we strongly suggest that we put in place that ability for us to have an argument as to why an investigation like this is justified or not. I would

note, as we have noted previously, that thankfully these occasions are rare. And, in the past, there has been a negotiation and a conversation between the investigative body and the journalistic organisation to say: 'We are doing an investigation. We need to come to your offices.' No evidence has been destroyed. The regime that we are asking for is similar, if not almost identical, to other societies we compare ourselves to. So we would like to have a process where we really explore the opportunity to put that kind of regime in place.

**Mr Murphy:** In the Police and Criminal Evidence Act in the United Kingdom, a similar jurisdiction, there is the capacity for contested applications. There is no evidence of any impediment to the investigations that are able to take place there. I'm not aware of any evidence of destruction of material, for example, which is specifically made an offence in that act anyway—or indeed in the UK's Investigative Powers Act, which has a much higher level of judicial oversight than is available under any of the recent legislation in this country.

**Senator McALLISTER:** When you say there is a higher level of judicial oversight are you referring to the seniority of the judges involved in decision-making or are you saying it is earlier and more frequent?

**Mr Murphy:** With interception warrants, for example, there is a double lock in place in the UK. It requires approval from the secretary of state and there is also a commissioner who is either a current or former High Court judge. So it is a very senior level of judicial involvement in those processes. And, as I say, under the PACE Act, there is indeed contestability of warrant applications.

**Senator McALLISTER:** And these provisions in the UK, and indeed similar provisions in Canada and New Zealand, go specifically to journalism and the practice of journalism, don't they? They are not generally available protections for the public—they are specific to journalists?

**Mr Murphy:** That's correct. I think the PACE Act uses the terminology 'journalistic material'.

**Senator McALLISTER:** As far as you are aware, have there been significant challenges in defining who is in and who is out? I know that all of you were asked questions at our last hearing about defining 'journalistic activity', 'journalistic material' or 'public interest journalism'—and that is an interesting debate to have in the abstract. But in the practical and concrete issues of law enforcement in all of these jurisdictions that have these special protections, has there been a significant challenge or difficulty in identifying who is a journalist?

**Mrs Gill:** I refer the committee to the ACCC report on the digital platforms inquiry. It spent a lot of time and did a lot of research in defining 'journalism' and 'journalistic content'. So we could start there and refer to that; I think it is a good analysis.

**Mr DREYFUS:** You'd be pleased to know, Ms Gill, that Mr Sims came to brief the committee this week about the digital platforms report.

**Mrs Gill:** That's wonderful.

**Senator McALLISTER:** You spoke about the higher level of judicial oversight. In previous evidence, one suggestion was that search warrants, particularly where they impact on journalists, should occur in higher courts. That remains the position of the coalition?

**Mr Maley:** Absolutely, yes.

**Senator McALLISTER:** Before we move on to your other proposals, there might be follow-on questions.

**Mr DREYFUS:** In relation to the UK search warrant laws and the UK intercept warrant laws, have you had a chance to look at the response of the Department of Home Affairs and the Attorney-General's Department to your submission?

**Mr Murphy:** Not yet; I haven't specifically, Mr Dreyfus, no.

**Mr DREYFUS:** I'd be indebted to you, and the committee would be indebted, if you could have a look at it. To some extent these are technical legal questions that are being raised in answer to the propositions that have been put forward, specifically, for example, about contested warrants. It's always difficult to orally deal with those legal questions in a hearing like this. But I wanted to put to you—just the comment now—what it is that the two departments have said about contested warrants. They've said quite a few things, but one of the propositions was this:

As demonstrated by legal proceedings brought against the Australian Federal Police by the Australian Broadcasting Corporation and News Corp Australia, journalists and media organisations already have access to legal recourse through which the validity of a warrant may be challenged, during which access to seized materials may be restricted.

Now, do you accept that the ability, limited though it might be, of the subject of a search warrant to go to court to challenge the issue of the search warrant is anything that could be equated to the contested warrants suggestion that you've put forward?

**Mrs Gill:** I'd like to just refer you back to the ACCC digital platforms review, which goes to how much journalism is under pressure at the moment. The business model is really under pressure. These things cost money, and if we get the legal framework right in the public interest we can put that money into real journalism and not lawyers.

**Mr Maley:** I would just add in relation to that—and I understand the point, but we're creating—

**Mr DREYFUS:** It's not my point; it's the point made in response—

**Mr Maley:** Sorry, I understand it's not your point.

**Senator McALLISTER:** It's almost certainly not our point.

**Mr Maley:** But we would hate to see a situation where we have to go through this long, expensive and convoluted process every time there's a potential for a warrant. I think we accept that the AFP has a right to seek warrants. What we're suggesting is an efficient, practical and contestable way that those warrants can be tested before they're enacted and before all the distress, confusion, expense and waste of time that's occurred after these warrants have been exercised. It would be in everybody's interests in a sense—obviously, particularly, in the interests of the media but also in the interests of the AFP—that these things be done in a much more efficient way, a quicker way and a more transparent way upfront.

**Mr Murphy:** If I may, that is indicative of the problem that runs through all of this legislation: the presumption that there is no public interest in journalistic activity; the presumption that we see in the Criminal Code that you have to mount a defence and with evidentiary burden, rather than it being the way that we think it should be that the presumption is in favour of the public interest in the public's right to know.

**Mr DREYFUS:** We were told yesterday by the Department of Home Affairs that it simply was unable to tell the committee how many warrants of any kind other than journalistic information warrants, which are a very, very confined, limited type of warrant upon which there's now a statutory reporting obligation—that's of course limited to access to journalists' metadata. The department told us yesterday in a written answer that we waited three weeks for that they didn't know how many warrants have been issued or are current against journalists in Australia under federal law either by state and territory agencies or by federal agencies. Does it concern you that we don't know—and apparently the Department of Home Affairs doesn't know and is not wanting to find out either, because they didn't make the effort—and what's the impact on journalists of not knowing?

**Mr Reid:** Perhaps I could answer that. I heard that this morning, and I must say my blood ran a little bit cold, because I was still optimistic enough to think that the number of journalists under surveillance of any kind by authorities in Australia would be a handful. The answer seems to suggest otherwise, and I would really ask that more work be done on that, because I think the Australian public and journalists and, most importantly, people who speak to journalists should know what risk they are under of their conversations or their engagement with a journalist being under some kind of official surveillance. So I find that answer deeply disturbing, to be frank.

**Senator McALLISTER:** Mr Reid, you would have heard Mr Pezzullo, who gave us evidence this morning, put the proposition to the committee that it really doesn't matter—that we're dealing with questions of principle and that the number of warrants is not relevant to establishing whether or not the questions of principle have been breached and the appropriate balances have been struck. Do you accept that evidence that the number of warrants is an unimportant matter?

**Mr Reid:** Absolutely not. I think the number of warrants is a very important matter. I think the reason why the members of this coalition keep coming back to our deep concern about it is that the countries that we compare ourselves with universally have in their founding or guiding documents the right of freedom of speech, and in this country we do not have it. So the fact that there are, let's assume, a worrying number of investigations into journalists establishes a precedent, and in our society there's no counterbalancing document that says: 'Hang on a minute. Freedom of speech is really important. Therefore, perhaps you shouldn't be investigating journalists.' It is a creeping culture that has no reference point back to a guiding principle, and I think it's very worrying.

**Mr Maley:** I was just going to add that, from a practical point of view for journalists, it has a genuinely chilling effect. Over the last two to three years, the atmosphere amongst journalists has changed enormously on, if you like, the newsroom floor—literally on the newsroom floor when you, as I do, walk around the newsroom floor and talk about these issues with working reporters who, for the first time in their lives, feel as though they are potentially under surveillance and potentially committing criminal acts when they believe themselves to be law-abiding citizens working in the public interest. They are proud of what they do, and the thought that, in the context of genuinely ethical public interest journalism, people feel as though they're being surveilled and are at risk of criminal sanctions and having to defend criminal actions is genuinely chilling and distressing for people who see themselves as ordinary reporters and feel as though they're doing good daily work. It has an effect. It is

something which is brought up and discussed on the newsroom floor in a very negative way. I could go on, but it's just one of the chilling effects of the recent round of legislation, the raids and the revelations about warrants that obviously we don't know about. We don't know about these warrants. We don't know who's being surveilled. We don't know why they're being surveilled. It is personally distressing for journalists who are not used to dealing with this sort of material.

**Senator McALLISTER:** One of the things this committee often has regard to, when we're contemplating recommendations for new laws which are intrusive, is the question of proportionality: is the response proportionate to the threat that's presented? In most other circumstances, the number of occasions—the number of times that an agency might propose to use an intrusive power—is relevant to that. In fact, we've had plenty of examples of quite intrusive powers which are not deployed by agencies because they—I think rightly—perceive that they ought to be used sparingly. It's not really possible for us to assess whether or not the powers are proportionate if we don't have any sense about the extent to which they're being exercised at the moment, is it? It strikes me as being a genuine impediment to the objectives of the committee to establish whether or not these powers are proportionate at the moment.

**Mr Maley:** What we see, in the probably small minority of cases where we're aware of what warrants are around and have been acted on, is that, as far as I know without exception, they're in cases where journalists believe that they're acting ethically and properly. That's not to say that they're necessarily perfect or their stories are perfect, but they are genuinely, in their own minds and in the minds of their managers, working in the public interest, yet they are subject to the surveillance warrants and so on.

**Mrs Gill:** The fact that they don't actually track the numbers is a cultural issue. There's no critical thought as to: 'What are we doing here? Should we really track how many we're issuing warrants to?' This is a real impact on our democracy and our society, and critical thought really needs to be put towards it. You would think that, if there were critical thought being put towards it, they would track it to really understand the proportionality that you're talking about. That's the concern.

**Mr DREYFUS:** This committee is obviously engaged in looking at what suggestions can be made to government in this area. This is a committee which often looks for confidence-building measures in the way in which legislation is drafted, in the way in which regulations are drafted and in the way in which processes and procedures are instituted, being, namely, confidence in our security agencies that they've got powers and that there are also safeguards on the use of those powers. Following on from those comments, particularly your comment, Mr Maley: because of the effect—and I for one accept that it's a real effect, a chilling effect; I can't speak for all of my colleagues—on journalism and journalists personally, should we be looking for measures to suggest to government that go towards lessening that chilling effect or rebuilding confidence?

**Mr Maley:** Personally, I think there are two areas—and they're reflected in this—where the chilling effect has been real. The first one goes to the proportionality issue, which Senator McAllister brought up, in relation to so-called whistleblowers and sources. I think every institution—every organisation or company—accepts that there's a degree of confidentiality required in normal day-to-day practice. But the consequences, whether it's in the Public Service or whether it's in the security services, of taking a stand and coming out and saying something bravely, in the public interest, to a journalist and putting your career on the line should be proportionate. The problem that we see, particularly in relation to whistleblowers, is that the consequences for whistleblowers are completely disproportionate to whatever misdeed they may be perceived to have done. The notion that a person can go to jail for 10 years for releasing to a journalist information which is subsequently demonstrated to be in the public interest is completely disproportionate, in my view. That, probably more than anything else, and similar sorts of lesser consequences in other parts of the public sector have unquestionably had a chilling effect in journalism, in the sense that fewer people are coming forward. Anecdotally, there are reams of examples from within the ABC alone—and I'm sure it's no different in Nine or in News Limited—of sources saying, 'It's just too dangerous,' or, 'I've got a story and I can't tell you because it's too dangerous; the consequences are great.' There are stories that are not being told, because whistleblowers are afraid. They're afraid not just of losing their job but of losing their liberty. That's obviously at a much, much higher level, and in my view it's disproportionate.

The other thing which is disproportionate on the other side, from journalists, is that there are still criminal offences for which there is no public interest defence. And, in those areas where there is a public interest defence, the onus is on us to prove it. It's still merely a defence; it's not an exemption. It's hard to communicate, if you're not a manager of journalists, what a serious impact that change has had, because we've always operated under the expectation that what we do is legal—and that it's in the public interest, but particularly that it's legal. As managers, we don't direct our staff to go out and break the law. So we're now in a situation where what we have considered for generations to be normal, legal journalism in the public interest is now, as the starting position, a

criminal act that a journalist would then have to defend. And a manager is going to have to say: 'Well, yes, you can do that story, you can meet that source, but you're committing a criminal offence. We'll fund your defence.' If you're on an average salary with a family, being told, 'At least we'll fund your defence,' is not much consolation.

The recent raids have only highlighted that sense for people that, yes, this is serious; this has gone up to a different level. We're now at a level where people have to consider the consequences of being convicted of a criminal offence for doing something that has been normal practice and I believe is justified and in the public interest. The automatic decriminalisation—for instance, under the espionage and foreign interference act—is one thing, but that doesn't go far enough. There are still acts on the books where there is no public interest defence. Frankly, it is absurd that a journalist can still be charged with a criminal offence for receiving documents because they are stolen property. That just doesn't pass the common-sense test. I think one of the things that are most important is the extension of public interest defences and journalist exemptions.

**Senator McALLISTER:** Right—which, if the committee were of a mind to recommend it, would require an audit of existing criminal offences relevant to journalism.

**Mr Maley:** Yes.

**Senator ABETZ:** Just so I understand how at least some journalists operate—and correct me if I'm wrong—I understand that for some journalists, if they're able to write an article with a by-line of their name, the more often that article gets read or their article is copied or whatever, the more often they get something; they get a dividend from that. Is that correct?

**Mr Maley:** No—certainly not where I work.

**Mr Murphy:** There was a system in place, and agreements with some of the publishers, for some return to journalists through the Copyright Act. Those returns have all but disappeared, because the publisher retains all copyright of digital material. In the days—you may recall them; I certainly do—when you'd get a bundle of photocopied articles in your office first thing in the morning, that was a system that offered a return to the author.

**Senator ABETZ:** But nowadays that's fallen out of practice.

**Mr Reid:** Senator, if you're talking about current information, I think I can help. As our business increasingly moves to a subscription business, if a story is of interest of people and triggers somebody to subscribe to the news organisation, we have certainly made it very clear to our journalistic staff that stories that are of interest to the public and inspire them to take a digital subscription are something that we are absolutely pursuing. It is no different to the way that we in past years expected people to buy a newspaper. If we're publishing interesting information that people consume, we've made it very clear that we like that activity.

**Senator ABETZ:** But do you financially reward that 'liked' activity?

**Mr Reid:** In some instances, particularly in our smaller newspapers, we actually have pilot programs to give a financial reward to journalists to set a target or an internal enthusiasm: 'Hey, if you write a story, you can get a financial reward for it if it is a successful subscription driver.' What we have discovered, to our delight, is that the stories that trigger subscriptions are the heart-and-soul stories of journalism, particularly local journalism—stories about property developments or crimes in my suburb. If the fear is that this process is encouraging misbehaviour, that's wrong. It has always been in the interests of commercial journalism companies to produce journalism that people are interested in consuming; we're just moving from a print era into a digital era.

**Mr Janz:** And I'd add that our focus is also very much on digital subscriptions, and that focus on digital subscriptions has led to a focus on journalism that people are willing to pay for. They reward journalism that is deep investigative journalism, journalism that makes a difference to society. Our individual journalists don't benefit financially from that gain in subscriptions.

**Senator ABETZ:** All right. Thank you. We're told about the chilling effect of recent events. What about the chilling effect of the recent events of defamation proceedings in relation to Mr Uhlmann and the Chinese fellow, Mr Wing? We haven't heard much from you about that chilling effect and how that impacts on journalism. I'd be interested to get a bit of a compare and contrast as to what we're dealing with. Is it just a little bit cool over here and deep freeze over there? I'd like to get a bit of a feel for it, if I may.

**Mr Maley:** They're not totally unrelated.

**Senator ABETZ:** If it were totally unrelated, I'm sure the chair would rule me out of order.

**Mr Maley:** They interact with each other. There is no question that everybody working in journalism at the moment—serious journalism—will tell you that defamation is a serious problem. It hampers not just the strength of our stories but the ability to tell certain stories, which we believe we should be able to tell—at least we should be able to tell them in a certain way. The ABC is taxpayers' dollars; we're very cautious about this. Nonetheless,

we do find ourselves in situations where we are paying out defamation payments for stories where there are absolutely no factual errors, where there is no suggestion of factual errors. These are perfectly factual stories, clearly in the public interest, but we find ourselves in the situation, in some jurisdictions, where we're defending imputations which we didn't intend and don't believe we made. That is a serious problem because it's costing us money and making us hold back on stories which should be told better and should be told stronger. I'm sure Mark can tell you more about that in detail.

The interaction with this is that the best defence for defamation action is to have a witness on the record, and the chilling effect on whistleblowers has meant that it has become noticeably more difficult over my working life to convince—we're not even necessarily talking about national security whistleblowers, but that would obviously apply in national security areas as well but in all areas of serious journalism. It has become more difficult to get people to commit to go on the record, and that is because the consequences are so serious for them. The impact of that is we have weaker defamation defences, weaker stories and aspects of stories that we can't tell.

That's how they interact. It's the pressure on potential whistleblowers and potential sources and potential sources of information, combined with a defamation law where there's, essentially, no public interest defence. The qualified privilege defence effectively doesn't operate. So the only defence that we have is the truth defence, in practical terms, and the truth defence ends up having to apply to imputations, which we can't defend, because we didn't intend them. These are factually accurate stories in the public interest, and we're paying out on them, and that inevitably has an impact on the output of all our organisations, I suspect, at some point.

**Senator ABETZ:** So, when you walk the production floor, could I suggest to you, it is the defamation laws as opposed to the national security laws that exercise the minds of your journalists on a lot—

**Mr Janz:** It is absolutely both of those. And we—

**Senator ABETZ:** If I can finish—on a lot more regular a basis?

**Mr Maley:** Yes, I think that's fair.

**CHAIR:** The example that Senator Abetz gave had a national security flavour, the Uhlmann-McKenzie, story—also Mr John Garnaut—and I'm sure there are others that we're missing here. Is there a way we could recommend reform as it pertains to reporters reporting on national security matters that may be brought before a court with a charge of defamation?

**Mr Murphy:** Obviously, there is a separate process underway with the Council of Attorneys-General, to which we've made a detailed submission, in terms of defamation law reform. I'm not sure how to answer the question about the specific intersection in the context of national security, though.

**Mrs Gill:** I don't think you would want to isolate it. You need to look at it on the whole.

**CHAIR:** Sure. The point I'm making is that I think the current system, as it stands, incentivises that approach of using our legal system as a form of statecraft. We call it 'lawfare' and I'm wondering whether, to prevent 'lawfare' in the future, we could reform defamation laws as they stand.

**Mr Reid:** We are thankful for the attention that the state attorney-generals are giving to the defamation issue, and I think, with guidance from people in this building as well, we will make some progress. But the fact of the matter is that it's not an exaggeration to say that Australia—and particularly New South Wales—is literally the defamation capital of the world. We feel that, regarding defamation cases—to Mark's point—the test of journalism has become a judicial test. When you publish an article, it's not a brief of evidence; it's a story—it's the first cut of history. We get to a point where we are now being tested on whether it passes high judicial barriers in the wrong forum, with payouts that have reached an obscene level. People's hurt feelings get thousands and thousands of dollars more money than somebody who has lost their life or who has been badly injured. The whole thing is not only out of kilter with the public interest test; it's chilling and closing down good investigative journalists like Mark. In concert with the other pressures that we're under—which are why we are so agitated about this whole grab bag of issues—it's closing down the ability of journalism to keep the Australian public properly informed.

**Mr Willacy:** We as working journalists find that we're starting to spend just as much time with our legal teams as we are on the editorial side of the story. It's bogging stories down. Our lawyers are inherently very thorough but quite conservative at times. As someone who's defending a defamation suit at the moment, I agree with Mark about some of the imputations that are raised under defamation law that were never aired in the story—and we're expected to defend that. Some of the imputations are quite outlandish, and we have to then stump up and defend something that we did not express. So, as Senator Abetz raised, I think defamation law is something that we do talk about, and I think we need to talk a lot more about it.

**CHAIR:** I'll just round out my point with reference to Professor Rory Medcalf, head of the National Security College, who yesterday said that a free media is a strategic asset. My point about the national security component is that if that asset is diminished or constrained by defamation law in an increasingly competitive geopolitical environment then we're the poorer for it. That's the heart of my question.

**Mr Maley:** Yes, and I think at least part of the answer is that, at our best, what we are about is providing accountability. Accountability inevitably means that people are accountable—officers are accountable—and what the defamation law has done is seriously erode our capacity to provide accountability to individuals. So we are now routinely doing stories where the names are stripped out. We know the names. We have high levels of proof—maybe not beyond reasonable doubt, but more likely than not a much higher level of proof than that—about individuals where we believe it would be legitimate and justified to name those individuals to provide accountability. It's not unfair and it's reasonable to name those individuals, but we don't, and that is a function of the defamation laws. It's in that way, on pretty much a daily basis, that stories are changed. Names are stripped out of stories because of the defamation laws. The stories may still go to air or still get published in some form. I wouldn't say it's a bowdlerised form but it's certainly a much sharper form which provides less accountability. I think national security is an area where the stakes are so high that, when we do do stories on national security, genuine accountability and individual accountability should be something which is possible. That's what we should be seeking. As a society we should be seeking accountability for people who are in positions of enormous trust. The interplay between the security laws and the defamation laws makes it extraordinarily difficult for us to achieve that.

**CHAIR:** Did you want to make a comment?

**Ms Fair:** I did just want to say this: whilst defamation law reform is one of the areas that we're seeking action in, we don't want to lose sight of what has prompted this whole inquiry—the matter of journalists being charged with criminal offences. That is, of course, our primary focus in appearing before this committee. There are a range of laws which actually expose journalists and media operators to criminal action. We are very interested in the committee focusing on those matters, particularly given that there is already a very active consideration of state legislation which affects defamation.

**Senator FAWCETT:** You've just made that point, but I'm afraid I'm going to go to one of your other recommendations—

**Ms Fair:** Great!

**Senator FAWCETT:** which doesn't affect journalists. It is your recommendation No. 2, about public-sector whistleblowers being adequately protected—

**Ms Fair:** Absolutely.

**Senator FAWCETT:** and saying that the law needs to change. We had evidence this morning from Defence that, with the introduction of the PID scheme, they've had over 1,200 instances where people have used that scheme and the loop has been closed—people have been happy that the issue has been dealt with—and, in the issue affecting News Corp, that there is no evidence of an attempt to use that scheme before that information was leaked. So I'm interested to understand: what needs to be reformed? If we now have a PID scheme—and Defence and Home Affairs mentioned a whole raft of other independent agencies and disclosure schemes that people have access to, and obviously a high take-up within Defence with a high level of satisfaction, and, in the incident that has caused this inquiry, no attempt to use the existing scheme—on what basis do you call, certainly in the national security space, for a change to the law?

**Mr Reid:** I'd have to educate myself further on the evidence that you've just outlined, because I'm not across that. Doesn't that, though, assume—and forgive me if I'm wrong—that that source of information, which we don't know, had to have come from that part of the world? What say it came from somewhere else? I don't see how those dots connect between the publication of News Corporation's story and the failure of someone to use that system. They don't necessarily connect in a logical chain, do they?

**Senator FAWCETT:** Because of the fact that documents are tightly controlled, particularly at the level of classification that that one was—

**Mr Reid:** Sure.

**Senator FAWCETT:** it would have had to have come from someone who had access to that document. By default, certainly on the evidence that was presented this morning by both ASD and Defence, they are wrapped up in a system that has not only initial but also recurrent training, cultural awareness around ethics, reporting systems available, a strong leadership culture of encouraging people to disclose and, as I say, over 1,200 examples of people using the system and satisfactorily seeing that closed out.

**Mr Janz:** I'd also just add that whistleblowers don't approach the media lightly. They put absolutely everything on the line—their careers; their families. There's a great history of stories that have made a real difference to Australian society as a result of whistleblowers. Their first port of call is not to pick up the phone to a journalist to make a difference.

**Ms Fair:** We have recommended changes to the Public Interest Disclosure Act, so we do absolutely support there being a strong process for people to be able to make disclosures in an authorised manner. But there are considerable deficiencies in that system as it stands, and that's why we're asking for reform. Those deficiencies include that the bill does not cover intelligence agencies personnel, as I understand it; that staff of members of parliament are not subject to any of the protections under that act; that the wrongdoing of members of parliament is not included in the scope of the legislation; and that the public interest test is skewed against external disclosure. It's great to hear that they've had 1,200 incidents in Defence, although I'm slightly alarmed that there are that many things going wrong, but, if you reach the point where you feel that the complaint you are making is not being actioned, then you have to have somewhere to go, and there needs to be an appropriate way to make that complaint externally if it's not being appropriately handed internally.

**Senator FAWCETT:** Sure. ASD made the point this morning, as have other agencies, that they do have coverage. In particular, they have access to people like the IGIS, who reports to this committee. They have avenues. So my point is: why would we extend an exemption or a protection to somebody who hasn't even attempted to use the systems that are in place for exactly the kind of concern that apparently has led to this disclosure?

**Mr Maley:** You may or may not, but there needs to be a system which tests whether that disclosure wasn't in the public interest. It's too much of a hypothetical to answer.

**Senator FAWCETT:** But it's a very real case.

**Mr Maley:** It's a real case, but it's a hypothetical in the sense that we don't know who the person was and we don't know what the real circumstances were. There's an enormous amount that we don't know. I sat through some of the evidence earlier, and they don't know who did it, they don't know what the motivation was, they don't know what the background to it is. So there is still a lot that's not known about that specific case. But the more general point which you're getting at is that of course it's a good thing that there are systems. I think it's probably fair to say there wouldn't be these comprehensive systems in the public sector if it hadn't been for media pressure and media exposures over the years. They are a response, to a large degree, to the media revealing that adequate systems of that sort weren't in place. So we're all in favour of good systems that protect internal whistleblowers, but, to be honest, the media is ultimately about dysfunction, when things don't work. Those systems will not work in all cases, and there are examples within the Department of Defence, for instance, where those sorts of processes haven't worked and people have complained to the media to good effect. That's the point of free media—we are here when the other systems fail to work. We are the ultimate backstop. Without being too pompous about it, we represent the population outside of government and parliament. That's who we represent. We represent the audience and the ordinary people when those systems fail them. It is great to hear that the Department of Defence has set up comprehensive and effective systems, but it's naive to think they'll work in 100 per cent of cases.

**Mr Willacy:** For example, we recently did a story for *Four Corners* about children in Queensland being held in adult watch houses. We relied on whistleblowers to begin with. Then we used the freedom of information scheme up there. We went through official channels, but the whistleblower was important at the beginning. And that whistleblower had made complaint after complaint after complaint through internal processes all the way up to the minister. That's an example where an official channel or a process was followed but nothing happened. Of course, once the story was broadcast, there was a response from the political level. The children were cleaned out of the watch houses and a new department was created. I'm not familiar with the Defence internal system, and it's good that it works, but there are other cases where these systems do not work at all, and we're the last resort for many of these people.

**Senator FAWCETT:** Sure, and under the 2016 agency guide to the PID scheme, in section 7.4.4, the ombudsman actually lays out the fact that agencies have to have a scheme in place for people who are not happy with the fact that they haven't got a response. There's a pathway to external disclosure, and protections are then offered. But I come back to the point that here we have an example of a significant unauthorised or illegal disclosure by someone who has not even attempted to use the system. Not so much in what you've written here, but certainly in the previous inquiry we had in Sydney, there was a call for exemptions to be provided for someone who was a whistleblower. Why would we exempt illegal activity by someone who hasn't even attempted to use the systems that are in place to internally raise a public interest disclosure?

**Mrs Gill:** I think that's ignoring what a workplace is like. We've got to be realistic. Sometimes managers don't act in the best interests of employees. Sometimes people don't feel that there is a culture. I think it's naive to think it'll always work. This is the reality of the workplace; it's the reality of how people work. I think they said: 'We don't know this case. We don't know the motivation,' et cetera. On the whole, it's great that there's a system there. But we have to acknowledge how workplaces work, and sometimes people just don't feel comfortable. That's the reality of Australian workplaces.

**Ms Fair:** Can I go back to your example, though—

**Senator FAWCETT:** Sorry, can I come back to Mrs Gill's point. That is why Defence has not only that internal system but also the Ombudsman, or, for people who work within places like the ASD, the IGIS—which is a completely independent system—that people can go to. Even if your individual workplace—and that's not the evidence that was presented; I think the fact that they've had 1,200 users of the system says that the culture actually encourages people to step up. There are completely independent systems that are widely respected as being independent and thorough in their roles in the intelligence community, so why would we give an exemption to some of the—

**Mr Maley:** I think you're misinterpreting our position slightly, with respect.

**Senator FAWCETT:** I apologise if I'm verballing you. That was not my intent.

**Mr Maley:** My understanding is that we're not asking for an exemption for whistleblowers; we're asking for a defence for whistleblowers, which is an important difference. If it can be established that a whistleblower hasn't gone through the proper processes, has got bad motivation or whatever—I'm sure there will be situations where good defences don't stack up, and then the law comes into effect. I don't think we're asking for an exemption. The difference between an exemption and a defence for whistleblowers is, I think, quite a significant one.

We're not arguing that there should be no secrecy in the defence department or that there should be no secrecy in intelligence services. Obviously, there's a necessity for secrecy; I think we recognise that. I don't think we're suggesting an exemption. There obviously is a need for secrecy in the defence department, and it's something which needs to be respected. A blanket exemption for people giving top-secret information to anybody willy-nilly, media or otherwise, is obviously not a sustainable system. But that's not what we're arguing for; we're arguing for a circumstance where, when the systems haven't worked and where the public interest is genuine and sufficient, there should be a defence and consideration for the whistleblower as well—that the whistleblower mustn't be in a situation where he or she has gone through the processes, has tried to do the wrong thing, believes that there is still an injustice or a wrong that has been committed and goes public. That is a criminal offence with virtually no defences. In a situation like that, a whistleblower, in our view, should have a defence.

**Senator FAWCETT:** Could I ask you to have a look at the Ombudsman's agency guide, April 2016, version 2, and tell me where you think the gaps in that are, because, as I read through it, it's a pretty comprehensive document which actually addresses pretty much everything you've just outlined.

**CHAIR:** Can we do that on notice?

**Mr Maley:** Yes. I might have misrepresented the right to know. I don't think we're going quite so far as a blanket exemption for whistleblowers.

**Ms Fair:** To come back to the question you raised: as Campbell pointed out, it's based on an assumption that the person who leaked the document is somehow subject to these procedures, which nobody knows. That's the point of why there was an AFP raid—to try and find out who it was. It could quite easily be somebody who isn't even subject to any of these Public Interest Disclosure Act systems.

**Senator FAWCETT:** Nobody with access to those documents is not subject to at least one of those systems, including the IGIS.

**Ms Fair:** Members of parliament and the staff of members of parliament—and I know nothing about the story, I might say—are not subject to those procedures.

**Mr Reid:** Just one more point: if there are a tiny number of people who have access to those documents, and they didn't use that system, then why did you raid Annika Smethurst's home? Don't you know the answer to this already?

Hypothetically, with those people who did search Annika's home then, if the level of that information is as tightly controlled as you're suggesting, why, 100 days down the track, does Annika still not know whether she's under investigation or not? Your characterisation of the process makes me even more concerned about this.

**Mr DREYFUS:** I just want to confirm that you're going to have a look at, collectively, the responses of the Attorney-General's Department and the home affairs department to your suggestions. Could you take that on notice, as it were, and let us know, particularly as to the technical matters—

**Mr Reid:** Yes, thank you.

**Mr DREYFUS:** and whether there are any aspects of that response that give you concern?

**Mr Reid:** Yes.

**CHAIR:** Thank you very much. Answers to questions on notice should be to the secretariat by 5 pm on 4 October, two weeks from today. You will get a copy of your transcript. Thank you so much.

**MOSES, Mr Arthur, SC, President, Law Council of Australia**

[15:31]

**CHAIR:** I now welcome the representative from the Law Council of Australia to give evidence. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I also ask that you are mindful of the written advice provided by the secretariat regarding current legal proceedings.

Do you have an opening statement, Mr Moses?

**Mr Moses:** Yes, thank you. I'll be brief. The Law Council thanks the committee for the opportunity to provide further evidence to assist this important inquiry. There is no doubt that protecting the community must be a priority for government and, indeed, the parliament, but this must always be considered with the potential impacts on fundamental human rights and freedoms. I don't need to persuade any member of this committee that this is a delicate balance, one that requires constant reflection and recalibration.

In protecting, respecting and upholding the rights and freedoms of Australians, our parliament is aided by the media, which plays a key role in defending the public interest and scrutinising the exercise of power. As I've said recently, a free press is not the enemy of our nation, nor should the actions of journalists in legitimately scrutinising government be criminalised. Australia's journalists are amongst the best in the world, and this inquiry heard in August that the media takes steps to consider the public interest and community safety before publishing information. This is a responsibility that publishers and journalists take very seriously.

Our legal framework must respect and reflect the important role that a free, independent media plays in safeguarding human rights, especially in national security legislation. The Law Council's submissions in evidence to this inquiry have offered the committee recommendations as to how our national security laws can better achieve this outcome. You've of course heard the word 'proportionality' being used many times. That, of course, is the key, and our recommendations seek to balance legitimate aims of safety and security with the rights to freedom of expression and freedom of the press.

The reforms we propose would not undermine the important work of our law enforcement and intelligence agencies to keep the community safe but would help centre policies. These reforms, as you would have seen in our most recent submissions, include introducing a multifaceted approach to strengthening safeguards in the warrant issuance process when they relate to journalists and journalism. This approach is not revolutionary but picks up the learning from other statutes of this parliament and other jurisdictions.

As the committee will be aware, the Law Council recommends introducing a legislative public interest test similar to the test currently provided in section 180T of the Telecommunications (Interception and Access) Act along with an improved version of the public interest advocate scheme that exists for journalism warrants. At the moment, section 3E of the Crimes Act governs the issuance of warrants, and all you need to be satisfied of as an issuing officer is the fact that material may be on the premises over the next 72 hours. In our view also, a judge of the superior court of record should be required to issue such a warrant and to that extent section 3C of Crimes Act should be amended.

Establishing a warrant application process that involves a public interest advocate would be a reasonable considered approach to creating a more adversarial environment, and, as we all know, for practising lawyers, appearing in an ex parte application is one of the most difficult applications a lawyer can do you, because you bear the onus of establishing the arguments both for and against why the court should not make an order. We believe this would improve scrutiny of the grounds seeking a warrant and assist the judicial officer. At the committee's request, our supplementary submission considers four existing models as practical examples. The existing model for journalist information warrants under the TIA Act and models used in Victoria, Queensland, and in particular, Canada's Journalism Sources Protection Act 2017. These are the best practical examples we could locate which may assist you in the work you have undertaken, and we're quite content to answer any questions you have on those issues or any other issues that may assist this committee.

**CHAIR:** Thank you very much, Mr Moses. On behalf of the committee, can I thank you for both of the submissions. They are very comprehensive and detailed. We appreciate the work that you do in helping us review legislation. You were present for the previous discussion we just had. Senator Abetz started the defamation line of questioning. We have had several submissions. We're wondering if the Law Council of Australia has a position and, if not, if you have a personal position on the matter?

**Mr Moses:** I did listen with interest to what Senator Abetz and indeed Senator Fawcett said. I think the difficulty in terms of publishing matters relating to national security, and giving that some sort of potential exemption or lesser protection in terms of our defamation laws or refining our defamation laws, is that the Commonwealth official who may be the subject of the defamation themselves are under a secrecy obligation, so they're unable to defend themselves. So if somebody comes out and publishes material about them, whether it be you, Chair, in your previous life, or anybody else, you in effect are handcuffed as that public official from being able to defend yourself by disclosing matters concerning your service of our country overseas, and that's a difficult issue. And I don't think public officials, whether they be senators, ministers, members of our Defence Force or members of our police force, should have lesser rights than other members of the community to defend themselves out there if somebody makes claims about them. I think the point you raised is right about there being a chilling effect in the newsrooms about defamation. But let's be honest about it; they're in the business of making money. So, if they can publish a story that will go viral, that makes them money, and money will pay for the defamation. It won't end in a jail term for journalists, which is what these laws do. That, I would say as a lawyer who has advised many corporations and individuals, has more of a chilling effect if there's a pair of handcuffs waiting at the end of their actions rather than a bag of money to be handed over.

**Senator ABETZ:** That's a fair point.

**Mr DREYFUS:** Australia's Right to Know Coalition, who are the group that were on before you, have made a detailed submission to this inquiry of the intelligence committee but they've also made a detailed submission to another current inquiry. This committee has a number of current inquiries. This specific submission they made was to the current inquiry that we have in relation to the data retention scheme that became law in 2015. That's the scheme in which there is already a journalists' information warrant process prescribed where agencies authorise access to journalists' metadata. One of their contentions, and a suggestion that's therefore on the table, is that the journalists' information warrant process should be extended to every single warrant that's obtained under the Telecommunications (Interception and Access) Act. I just want to make sure that that's the Law Council's suggestion as well. I'm going to come in a minute to your public interest advocate propositions.

**Mr Moses:** What we've said in relation to that issue, about the test to be applied in relation to the granting of warrants under the Crimes Act, is that the public interest test that already exists in section 180T of the Telecommunications (Interception and Access) Act is a good guide as to how the Crimes Act could be improved to deal with warrants against journalists. As you would have seen from our submission, what we expressed was that the provision contained in section 180T(2)(b) is probably a good guideline in that it basically directs the attention of the judicial officer to 'the public interest in issuing the warrant' as to whether that 'outweighs the public interest in protecting the confidentiality of the identity of the source in connection with whom authorisations would be made under the authority of the warrant', and then it asks you to take into account a number of things:

- (i) the extent to which the privacy of any person or persons would be ... interfered with by the disclosure of information ...
- (ii) the gravity of the matter in relation to which the warrant is sought; and
- (iii) the extent to which that information ... would be likely to assist in relation to that matter; and
- (iv) whether reasonable attempts have been made to obtain the information or documents by other means; and
- (v) any submissions made by a Public Interest Advocate ...

That, I think, is a good framework in relation to dealing with the question of the issuing of warrants, because it directs the attention of the judicial officer and the police, or the law enforcement agency, to those factors when the warrant is being issued. I've noted that there are guidelines that have been issued by the home affairs minister that direct attention to these things, but, as we know, if guidelines are breached within a department there are disciplinary consequences but it doesn't impact upon the legality of their actions. I think that framework would assist judicial officers. Otherwise they actually have nothing to guide them when you stump up before them and seek a warrant using the mechanisms under section 3 of the Crimes Act. This would give them some assistance, I think.

**Mr DREYFUS:** I was rather getting at the extension that's been suggested of the journalist information warrant process—which, as I've said, only applies because these are the most recent amendments to the (Telecommunications Interception and Access) Act—to other warrants and coercive investigatory powers.

**Mr Moses:** To deal with journalists or warrants generally?

**Mr DREYFUS:** No, to deal with journalists and media organisations.

**Mr Moses:** That is something that I would like to get back to you on in terms of consideration of that issue.

**Mr DREYFUS:** Thank you, if you would do that. I raise it only because Australia's Right to Know Coalition has raised it for us to consider.

**Mr Moses:** Of course.

**Mr DREYFUS:** And some other submissions have made the same point. But, as to the existing provisions for public interest advocates that are in the Telecommunications (Interception and Access) Act, could you just remind us what it is that the public interest advocates are meant to do.

**Mr Moses:** Under section 180X, the Prime Minister may appoint public interest advocates, and they may make submissions to the Attorney-General about matters relevant to a decision to issue or refuse to issue a journalist information warrant. What we hope to do, in terms of our assistance to this committee, is to have that model implemented in respect of warrants generally concerning journalists so that that advocate would appear before a judicial officer in order to put submissions concerning the approval of a warrant and also then subsequently report to parliament about the number of warrant applications that have been made, the applicant organisation and the number of warrant approvals and refusals, because you then get, I think, a pretty easy understanding of which law enforcement agencies are using these like confetti and which are actually measured in their use—so which are the lazy ones and which are good at their jobs in terms of investigating. It's very easy to target the journalists to get to the source without having done the work before. So you'd get an idea as to which law enforcement agencies are using this too readily, and it may then temper their use of these matters if they know that they'll be publicly disclosed as being agencies that readily seek such warrants, and it will focus the minds of judicial officers to test them, really: 'What are the real steps you've taken to obtain this information before you've come to bother me with this application?'

**Mr DREYFUS:** You mentioned that the information would be put before a judicial officer. Why does the Law Council think it's important that a judge of a superior court should hear a request to issue warrants—I don't want to get into too much of the technicalities—as the designated person and sitting as that person and not as a judge of a court, rather than the AAT or a registrar of the Queanbeyan magistrates court?

**Mr Moses:** It's no disrespect to the individuals who hold those very important offices, but, as Chief Justice Bathurst said when he implemented a regime under the New South Wales Criminal Assets Recovery Act that it had to be a Supreme Court judge making orders in relation to those matters rather than registrars, these are important, invasive steps that are being taken, which impact upon the rights of the community. and it should be that a superior court judge with the experience and the lateral thinking is there to deal with these matters, rather than registrars or members of the AAT, who would not have subject matter expertise in relation to these matters. If I were the judicial officer and I were being asked to issue a warrant that would have somebody go into a person's home and search it, I would want to be very careful in reviewing that material. Registrars and members of the AAT can be very busy at times, and these things may slip off their desk in terms of their dealing with them in a very quick fashion.

**Mr DREYFUS:** In your submission you've noted:

... reports have raised concerns about the secretive, covert nature of the way in which the PIA system operates.

The committee asked the department to respond to those concerns by providing information about how the system was operating. Have you been able to read those responses?

**Mr Moses:** We have. As we understand it, the information that is provided is very limited in relation to this area. But which response were you in particular referring to there?

**Mr DREYFUS:** In short, the department said that it did not know how the system is operating. In fact, the department said it was 'not aware of any records maintained on public interest advocates contesting the issuing or the substance in a warrant'. In other words, the department has no idea how the system's operating. Are you reassured by the department's response?

**Mr Moses:** No. I think that was the quote I read in the *Guardian* article this morning. That is a concern, because there should be records kept for transparency and accountability, because at the end of the day—I keep coming back to this point—the powers that are exercised by these agencies are ultimately in the name of the people, so the people of this country deserve to know the number of warrant applications being made and the number of approvals and refusals by certain agencies. They're entitled to that information. It's not confidential or secret. It's not going to harm national security. So, if they're being deployed, the public has a right to know.

**Mr DREYFUS:** We heard earlier from Mr Pezzullo, the Secretary of the Department of Home Affairs, that the government apparently has no idea how many covert or overt warrants have been issued in relation to journalists, either historically or currently. Now we also have heard that the government doesn't know how the

public interest advocate regime is operating in practice. Are you surprised by how little the government actually seems to know about the impact of law enforcement powers on journalists?

**Mr Moses:** Yes and no. There has to be, ultimately, a legislative provision that would warrant that information being published and made available. At the moment there is nothing that mandates that the government do that, so it's really up to the parliament—without being critical of the government. If this parliament determines that that is information that ought be out there, it should legislate. It is often very hard for government to publish material if there is no legislative mandate to do it, and you'll always have public officials in the back room asking you, 'Why should we do it if the law doesn't require it?' So I think, rather than me being critical of the government, I would rather have the parliament legislate provisions that would force the publication of that material, and that will have to be a parliamentary decision, because public officials in the background will always ask their minister, 'Why should we do this when the legislation doesn't require it?'

**Mr DREYFUS:** A short answer might be that there's a general standing instruction in the Freedom of Information Act for government departments to make as much information available as possible.

**Mr Moses:** There is, but if you don't have the legislative mandate concerning a specific area, especially in areas that relate to national security, I can well understand that behind closed doors public officials would use that as a shield in relation to publishing material. So, rather than have a general provision, now that we're alert to this issue I think it should be made specific as a code so that it is published, which would enhance journalism and freedom of journalism in this country.

**Mr DREYFUS:** Going to another matter, do you have a view on whether the Australian Security Intelligence Organisation Act should be amended in relation to specific intelligence operations?

**Mr Moses:** In what respect?

**Mr DREYFUS:** If there needs to be amendment. This is 35P and those other provisions that have been the subject of concern in relation to how a journalist might be affected in publishing information about special intelligence operations.

**Mr Moses:** I think the general observation has been made by some of the media groups and, again, I think we may have expressed some views on this generally in terms of whether there needs to be a defence available in relation to that area. But, again, it's something that I think I will take on notice and I'll probably provide you with a written response to that.

**Mr DREYFUS:** You've given us detailed written submissions, which the committee is greatly assisted by, twice. You've made several comments about division 122 of the Criminal Code Act—in particular, in relation to the need for an 'express harm' element. Is that directed at dealing with ambiguity?

**Mr Moses:** It is. We have been following some of the evidence to the committee today. I think the issue that has been raised by some critics of this provision is that there needs to be a nexus between what is said to be the public interest and the harm that flows from publication. This provision, in our view, should never be deployed in a situation where there is disclosure between agencies about law reform—for instance, in national security—because we take the view that it could never be harmful to the public interest for the people to know that an agency wishes this parliament to make a law in its name for a particular purpose. There needs to be some sort of nexus between the public interest and actual harm rather than it just being said, I think by some that we've heard today, that if you, in effect, leak something about potential law reform it may have a chilling effect within government about people raising ideas. I just can't see how that impacts upon the national interest. In fact, it would undermine the national interest if the people did not know why bureaucrats wanted certain laws to be passed by this parliament in their name. It misunderstands our Constitution and our democracy.

**Mr DREYFUS:** The last one, I think, I'll make as a question to take on notice. The Department of Home Affairs and the Attorney-General's Department were asked to provide responses to various suggestions made by other submitters to this inquiry. They've done so in a submission, which is supplementary submission 32.3, where they deal at some length—over about 15 pages—with issues like contested warrants, classification of documents, general secrecy offences, journalist information warrants, issue of warrants, Public Interest Disclosure Act, defamation, Media Freedom Act and Freedom of Information Act, and then they've given us a little attachment where they've analysed one form of coercive power—namely, search warrant schemes across the Five Eyes. Would it be possible for the Law Council to respond in writing? A lot of what the department said is pretty technical, and I don't want to take up the time now.

**Mr Moses:** We've actually started work on that already.

**Mr DREYFUS:** I'm heartened to hear that, Mr Moses.

**Mr Moses:** If we could have the leave of the chair to provide that response by next week sometime, if the chair would permit us?

**Mr DREYFUS:** I think we've given other submitters until 4 October.

**Mr Moses:** Chair, through you, if we were able to provide a response to the Department of Home Affairs submissions—

**CHAIR:** Yes, 4 October.

**Mr Moses:** If that's convenient, thank you.

**CHAIR:** Yes.

**Mr Moses:** Thank you. You'll see in that submission, Mr Dreyfus, that we will deal with section 35P. In the very helpful notes that my policy team have already provided me, we have already started work on that, which is the concern about the absence of a public interest defence in the ASIO Act concerning section 35P. But we'll deal with that for you in the written submission.

Could I just deal with one issue that Senator Fawcett correctly raised before, which related to the issue of the Public Interest Disclosure Act? In 2016, Philip Moss AM published a report in which he made 33 recommendations. This was the review of the Public Interest Disclosure Act. We would recommend the committee go back to look at that review as to how the PID can be improved, because key recommendations, including requiring agencies to provide the Commonwealth Ombudsman or the IGIS with a copy of a PID investigation report and the ability to share information with relative investigative agencies, were made. On our review, none of those key critical recommendations have been taken up. Senator Fawcett, it might be useful if we include that in our supplementary submission for you—if that is useful?

**Senator FAWCETT:** That would be great. I don't know if you were here for the earlier evidence, but I think that one of the keys to this is assuring the Australian public that the system that's in place there is robust, efficient and effective such that we can maintain high security standards with a good internal disclosure system.

**Mr Moses:** I think that none of us in this hearing room say that there should in fact be a blank cheque given to Commonwealth officials to publish information that would harm national security, and there must be some mechanism where that can be protected and there are ramifications for its misuse.

**Senator FAWCETT:** Sure.

**CHAIR:** Thank you very much, Mr Moses. We appreciate your time.

**Mr Moses:** Thank you for your patience. Am I excused?

**CHAIR:** You are. Have a lovely weekend! I declare this public hearing closed.

**Committee adjourned at 15:56**