

**OPEN**

# DEMOCRACY DOSSIER

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Secrecy and Power in  
Australia's National Security State

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# ACKNOWLEDGEMENT OF COUNTRY

We, the authors, respectfully acknowledge the Traditional Owners of the land on which we work and live. We pay our respects to their Elders past and present, and recognise their sovereignty was never ceded.

We also recognise those whose ongoing effort to protect and promote Aboriginal and Torres Strait Islander cultures will leave a lasting legacy for future Elders and leaders.

This report was researched and written on the lands of the Bidjigal, Gadigal and Wangal peoples of the Eora Nation in New South Wales, and lands of the Jagera, Turrbal, Yugambah and Kombumerri peoples in Queensland.

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# 01 EXECUTIVE SUMMARY

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**A**ustralia has long been regarded as a leading liberal democracy, but our global reputation is declining. Extensive lawmaking in response to terrorism, combined with an entrenched culture of government secrecy, has put our democracy in a troubling state. Police investigations into journalists and prosecutions of whistleblowers suggest government respect for transparency, accountability and freedom of the press is at an all-time low.

11 September 2021 marked twenty years since the 9/11 attacks on New York and Washington. Across these two decades, the Australian government has built a powerful national security apparatus. Over this time, we have gone from having zero national laws addressing terrorism to 92 such laws.<sup>1</sup> Collectively these amount to more than 5000 pages of powers, rules and offences. This is significantly more than comparable western nations.

Many of these laws contain unprecedented powers – from preventive detention to citizenship-stripping and secret trials. Such powers deserve careful deliberation in Parliament, but they have been enacted in haste, sometimes in mere hours, their passage smoothed by a rhetoric of urgency and fear. Like Australia’s historical wartime powers, our counter-terrorism laws have been justified as extreme responses to an immediate threat. However, unlike their wartime equivalents, these laws are a permanent fixture. In 20 years, only one significant power has been repealed, and those with expiry dates have been routinely renewed.

These vast, complex laws undermine the core pillars on which Australia’s democracy is built. Recently, their impact on free speech and freedom of the press has been recognised globally. In 2021, Australia ranked 25th place on the RSF Global Press Freedom Index – down six places from 2018.<sup>2</sup> Ranked higher than Australia is Suriname, where the ‘public expression of hatred’ towards government is punishable by seven years in prison.<sup>3</sup> Its President, Desi Bouterse, has been amnestied for the 1982 murders of 15 political opponents, including five journalists.<sup>4</sup>

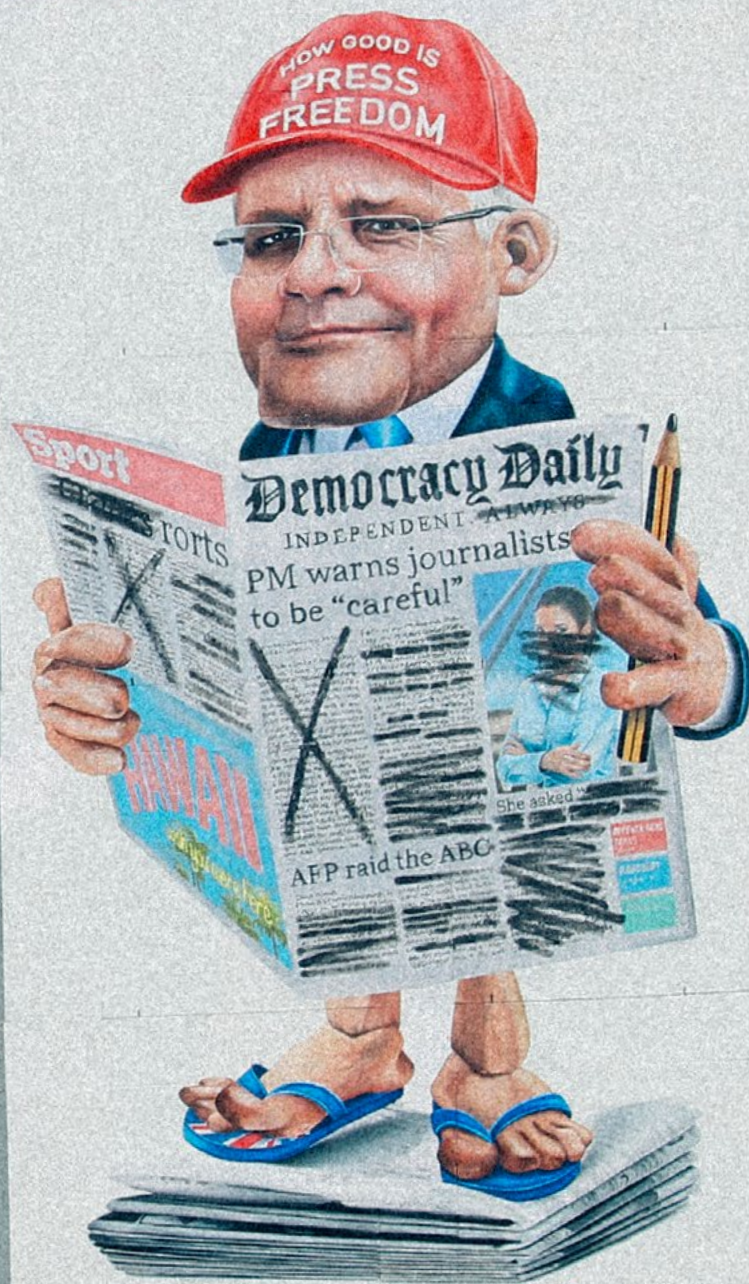
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1 See Appendix 1. For a detailed explanation of the methodology used to count these laws, see George Williams, ‘A decade of Australian anti-terror laws’ (2011) 35(3) *Melbourne University Law Review* 1136 <http://classic.austlii.edu.au/au/journals/MelbULawRw/2011/38.html>.

2 <https://rsf.org/en/australia>.

3 <https://rsf.org/en/suriname>.

4 Ibid.



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Australia also falls behind Samoa, where the Prime Minister, Tuila'epa Sa'ilele Malielegaoi, has threatened to shut down Facebook and warned citizens not to 'play with fire' by criticising the government online.<sup>5</sup> This sounds like a comment that Australian politicians would not make – but when Prime Minister Scott Morrison warned journalists to 'be careful' making allegations of sexual harassment,<sup>6</sup> and Defence Minister Peter Dutton threatened to 'pick out' some Twitter users to sue for defamation,<sup>7</sup> it became clear that the political climate in Australia had changed for the worse.

There has been a marked cultural shift in Australian politics. Holding politicians to account and exposing wrongdoing are core tasks that should be valued – and protected – in a democracy. Now, these tasks are not only much harder, but also riskier. A secretive culture which resists transparency and accountability has become the hallmark of the current Coalition government, making it difficult for journalists to access information about what government departments are doing, and what they are doing wrong. When this information is leaked, journalists and their sources face significant jail time, even if it is in the best interests of the Australian people to know about it.

Australia's counter-terrorism laws make public interest journalism a risky day job. Powers of surveillance and decryption mean that journalists who report on national security matters can no longer guarantee the identity of their sources will be protected. Journalists also face significant jail time under sweeping espionage offences, which define national security as anything relating to Australia's political or economic relations with other countries.<sup>8</sup> Holding governments truly accountable in this restrictive legal environment – and keeping the Australian people fully informed – is more of an ideal than a reality.

A healthy democracy demands open, transparent government. It demands legal protections for journalists and whistleblowers who act in the best interests of the Australian people, and careful deliberation of new laws in Parliament. A healthy democracy requires rigorous checks and balances on government power to uphold the rule of law.

In this report, we explore how these democratic values have been chiselled away by counter-terrorism powers and a growing culture of government secrecy. We identify four necessary actions to help repair this democratic deficit. It is time to take stock of what Australia has given up in the name of national security since 9/11 – and start gaining it back.

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5 <https://rsf.org/en/samoa>.

6 <https://www.theguardian.com/australia-news/2021/mar/23/scott-morrison-warns-journalists-to-be-careful-with-questions-as-he-publicly-airs-media-harassment-claim>.

7 <https://www.theguardian.com/australia-news/2021/apr/07/peter-dutton-issues-defamation-threats-to-social-media-users>.

8 *Criminal Code Act 1995* (Cth) s 90.4(1)(e) (<https://www.legislation.gov.au/Details/C2021C00183>).

**In the Introduction (Part 4), we outline the troubling state of Australia’s democracy.** Counter-terrorism laws, police investigations into journalists, and secret trials of whistleblowers are undermining free speech and freedom of the press. Raids by the AFP on the ABC’s Sydney headquarters and the home of News Corp journalist Annika Smethurst were bold examples, revealing a willingness to punish those who act in the public interest. The trial of Bernard Collaery, lawyer for the intelligence whistleblower Witness K, is another example, with the proceedings continuing largely in secret. This is made possible by evidence procedures in the NSI Act, which favour national security over the right to a fair trial. This law was introduced as part of Australia’s counter-terrorism laws to help prosecute terrorists, but is now being used against whistleblowers and their lawyers, to prevent information that could harm government from seeing the light of day. It was under this very same legislation that the trial of another former intelligence officer – known as Witness J – was almost entirely hidden from journalists and the Australian people.

**In Part 5, we identify the core requirements of a healthy democracy.** Democracies require free speech and freedom of the press, so that citizens can discuss, debate, and make informed choices come election time. Democracies divide power between institutions, to avoid too much being given to any particular one. Democracies require transparency and accountability, which are essential aspects of the rule of law. As citizens in a democracy, Australians have a right to know what is being done in our name.

**Next, in Part 6, we outline Australia’s counter-terrorism law framework.** These laws include wide-ranging criminal offences, expansive powers for police and intelligence agencies, and the possibility of secret, incommunicado detention. In several areas, particularly offences for espionage, the laws go further than Australia’s historical wartime powers. Even more concerning is how quickly they have been passed, and that proper deliberation has often given way to political manoeuvring. Quick, politicised lawmaking is highly problematic because it has proven very difficult to wind these powers back once they are on the statute books. Most of Australia’s counter-terrorism laws remain essentially in their original form – even when review bodies have identified significant problems and called for amendments or repeal.<sup>9</sup>

A key player in Australia’s national security state is the Department of Home Affairs. **In Part 7, we examine this Super Ministry, which oversees immigration, border security, policing, counter-terrorism, and many other areas.** Despite government claims to the contrary, this approach to managing national security affairs mirrors – and even exceeds – that found in the United States DHS. The Ministry represents an unprecedented concentration of government power. This is particularly concerning given it was created under the personal influence of the first Home Affairs Minister, Peter Dutton, and his Secretary, Michael Pezzullo, against the advice of multiple independent, expert reviews. We trace the origins of this Department, from being floated in Labor’s 2001 election policy, then repeatedly criticised by senior Liberals, to becoming a symbol for the Coalition’s strong stance on national security. Like Australia’s counter-terrorism laws, the story of Home Affairs is one of power readily expanding and rarely contracting.

<sup>9</sup> For example, in 2012, the INSLM recommended repeal of Control Orders and PDOs (<https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2012.pdf>). The 2013 report of the COAG Review of Counter-Terrorism Legislation also recommended repeal of PDOs (<https://www.ag.gov.au/national-security/publications/final-report-coag-review-counter-terrorism-legislation>).



**In Part 8, we consider how a culture of secrecy has become a hallmark of the current Coalition government.** Resistance to transparency can be traced back at least to Operation Sovereign Borders (OSB), when Scott Morrison as Immigration Minister refused to give even basic information about ‘on-water matters’.<sup>10</sup> Refusals to comply with FOI requests have now reached record levels, and when information is released, significant redactions often apply. These trends are apparent across government departments, though Home Affairs has been singled out by the Information Commissioner for lacking adequate FOI systems and culture.<sup>11</sup> This culture of secrecy across government is caused in part by broad definitions of national security, a managerialist ethos, increased outsourcing to private consultants, and a desire to control public narratives in a media-rich environment.

These developments have put Australia’s democracy in a troubling state. **In Part 9, we identify concrete actions that are needed to repair the democratic deficit.** We organise these according to four ‘vital signs’ of a healthy democracy: transparency, press freedom, oversight and engaged citizens. Action in these four areas is needed to prevent Australia from going down a path of secrecy from which it is difficult to turn back – and to prevent Australia’s national security state from creeping into further areas of government policy.

As we write this summary, the federal government has denied requests by journalists to access its vaccine agreement with AstraZeneca.<sup>12</sup> One of the grounds for refusal is that releasing the contract would pose a ‘real and substantial risk’ to national security.<sup>13</sup> This follows attempts to protect other pandemic-related documents through the principles of cabinet confidentiality and public interest immunity.<sup>14</sup> There are dangers, we are told, if we know too much.

But what about the dangers of not knowing? As we explain in this report, not knowing means we cannot be sure if politicians are acting in our best interests – or theirs. Not knowing means we cannot have informed discussions about politics around our dinner tables, in our workplaces, and in online communities. Not knowing means we cannot make proper choices come election time. Not knowing hampers the ability of journalists and members of the public to expose wrongdoing and hold politicians to account. Taken far enough, not knowing means good people are prosecuted for speaking out, even when the real wrongdoing was done by others. These are clear signs of a democracy gone wrong. The Australian people have a right to know, to the greatest possible extent, if wrongdoing is done in our name.

10 <https://www.abc.net.au/pm/content/2013/s3887267.htm>; <https://www.smh.com.au/national/no-comment-government-silent-over-fate-of-asylum-seekers-20131109-2x8a1.html>.

11 <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CII-Report-including-Secretary-Comments.pdf>.

12 <https://www.abc.net.au/news/2021-07-05/australia-covid-astrazeneca-deal-withheld-national-security/100261920>.

13 Ibid.

14 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Second\\_Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Second_Interim_Report) (Chapter 1); <https://www.themandarin.com.au/165173-rex-patrick-wins-fight-for-national-cabinet-documents/>.

# 02 KEY FINDINGS AND RECOMMENDATIONS

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## FINDINGS

1. Australia's status as a leading and open democracy is declining due to sweeping counter-terrorism laws and investigations into journalists and whistleblowers.
2. In the two decades since 9/11, Australia has enacted 92 counter-terrorism laws amounting to more than 5000 pages of powers, rules and offences. This is significantly more than comparable western nations.
3. Most of the laws received scant, politicised debate in Parliament, and only one significant power has ever been repealed. In some respects, including sweeping espionage offences and the Home Affairs Minister's citizenship-stripping power, these laws go further than Australia's historical wartime powers.
4. Secrecy and espionage offences, as well as metadata and decryption powers, are having a chilling effect on public interest journalism. Journalists face prosecution and jail time for reporting on matters of national security.
5. In Australia's espionage laws, national security is defined very broadly to include Australia's political or economic relations with other countries. This has contributed to the chilling effect, as it is difficult for journalists to know whether they are handling national security information and potentially committing a crime.
6. A culture of secrecy has become the hallmark of the Coalition government and the Department of Home Affairs. This resistance to transparency undermines the free information flows that are necessary for a democracy to function effectively.

# RECOMMENDATIONS

## *Action 1: Improve Transparency*

- The Australian government should work with the Office of the Australian Information Commissioner to determine how a culture of transparency can be strengthened at senior levels of government.
- An urgent review of the Public Interest Disclosure (PID) Act is needed to strengthen whistleblower protections.
- Under the PID Act, whistleblowers should be permitted to disclose intelligence information to professional journalists and members of Parliament in cases involving significant misconduct or criminal behaviour, where all other avenues have first been exhausted.

## *Action 2: Protect the Fourth Estate*

- An exemption for professional journalists acting in the public interest should be included in every offence for receiving or publishing information under federal law.
- The definition of national security found in Australia's espionage offences, which extends to all political, economic and military matters, should be confined to the definition of 'security' that guides ASIO's intelligence gathering activities.
- Journalists' confidential sources and materials should be protected. This includes strengthening whistleblower protections, and allowing journalists and media organisations to contest applications for police search warrants and metadata.
- The encryption laws should require sign-off from a judge, following a contested hearing, wherever decrypting communications is likely to identify a journalist's confidential source.

## *Action 3: Strengthen Oversight*

- An independent review is needed to determine whether some of the Home Affairs Minister's extensive statutory powers should be transferred to the Commonwealth Attorney-General to improve checks and balances, and promote contestable advice.
- The intelligence functions of Home Affairs should be included within the remit of the Inspector-General of Intelligence and Security.
- The Independent National Security Legislation Monitor should be made a full-time position with adequate staffing and resources.
- A review should examine whether the Parliamentary Joint Standing Committee on Intelligence and Security (PJCIS) could take on, with additional resources, a greater role in overseeing intelligence operations.
- The PJCIS should include membership from minor parties and/or independents.

## *Action 4: Get Involved*

- Australian citizens who care about growing government secrecy and expanding national security powers should actively raise their concerns by writing letters to members of Parliament, starting petitions, and contributing to parliamentary inquiries.

# 03 LIST OF ABBREVIATIONS

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|         |  |
|---------|--|
| AAT     | Administrative Appeals Tribunal                            |
| ABC     | Australian Broadcasting Corporation                        |
| ABF     | Australian Border Force                                    |
| AFP     | Australian Federal Police                                  |
| ASD     | Australian Signals Directorate                             |
| ASIO    | Australian Security Intelligence Organisation              |
| ASIS    | Australian Secret Intelligence Service                     |
| ATO     | Australian Taxation Office                                 |
| COAG    | Council of Australian Governments                          |
| DHS     | United States Department of Homeland Security              |
| FBI     | United States Federal Bureau of Investigation              |
| FOI     | Freedom of Information                                     |
| ICCPR   | International Covenant on Civil and Political Rights       |
| IGADF   | Inspector-General of the Australian Defence Force          |
| IGIS    | Inspector-General of Intelligence and Security             |
| INSLM   | Independent National Security Legislation Monitor          |
| NIC     | National Intelligence Community                            |
| NŞI Act | National Security Information Act 2004 (Cth)               |
| OAIC    | Office of the Australian Information Commissioner          |
| ONI     | Office of National Intelligence                            |
| OSB     | Operation Sovereign Borders                                |
| PDO     | Preventative Detention Order                               |
| PID Act | Public Interest Disclosure Act 2013 (Cth)                  |
| PJCIS   | Parliamentary Joint Committee on Intelligence and Security |
| RSF     | Reporters Without Borders                                  |
| SIO     | Special Intelligence Operation                             |

# 04 INTRODUCTION

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## NEED TO KNOW

1. Journalism has become a risky day job for those who publish stories based on sensitive government information.
2. Australia's global press freedom ranking has dropped significantly due to broad counter-terrorism laws, as well as investigations into and prosecutions of journalists and whistleblowers.
3. Due to wide-ranging secrecy offences, journalists can no longer maintain their core ethical obligation to protect the identity of their sources.
4. Prosecutions of whistleblowers are a reality in Australia, even when their conduct is clearly in the public interest.
5. Secret trials can and do happen in Australia. The NSI Act, which permits secret evidence and closed hearings, was created to help the prosecution of terrorists and is now being used against whistleblowers and their lawyers.

# THE WORLD'S MOST SECRETIVE DEMOCRACY?

**A**ustralia has long been regarded as a thriving democracy, built on strong respect for open government, free and fair elections, and the rule of law. But how strong are these foundations? Could today's Australia be, as *The New York Times* has claimed, 'the world's most secretive democracy'?<sup>15</sup> Recent events call for a health check on Australian democracy. The time has come to take stock of how Australia's extensive counter-terrorism laws and a pervasive culture of government secrecy are undermining the core values on which our democracy depends.

11 September 2021 marks 20 years since the 9/11 attacks on New York and Washington. Across these two decades, Australia has enacted 92 counter-terrorism laws amounting to more than 5000 pages of legal rules. This is significantly more than the other Five Eyes nations.<sup>16</sup> The laws include broad criminal offences, expansive powers for law enforcement and intelligence agencies, warrantless metadata access, enforceable decryption powers and the possibility of secret, incommunicado detention. This framework readily expands but rarely contracts. More powers – including new hacking and surveillance powers for federal police to 'Identify and Disrupt' criminal networks online – were just enacted.<sup>17</sup>

A feature of Australia's counter-terrorism laws – apparent in earlier years, but more obvious recently – is that they directly impact free speech and freedom of the press. While there are good reasons for keeping national security information secret, the broad approach in these laws hampers the ability of journalists to report information in the public interest. Secrecy offences make it a crime to even mention that some counter-terrorism powers have been used.<sup>18</sup> Metadata and decryption powers mean that journalists cannot guarantee the identity of their sources will be protected. Sweeping espionage laws make it a crime to receive, possess or handle national security information where it could ultimately be read by a foreign government or corporation. The definition of 'national security' in the espionage laws is not limited to matters of foreign spying or physical threats; it extends, quite remarkably, to anything about Australia's 'political, military or economic' relations with other countries.<sup>19</sup>

15 Archived at <https://perma.cc/86G9-HRE4>.

16 The Five Eyes is an intelligence-sharing partnership between Australia, Canada, New Zealand, the United States and the United Kingdom (<https://www.lowyinstitute.org/the-interpreter/suspicion-creeps-five-eyes>).

17 Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020 ([https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bid=r6623](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=r6623)).

18 These offences include: *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P (SIOs) (<https://www.legislation.gov.au/Details/C2021C00038>); *Criminal Code Act 1995* (Cth) s 105.41 (PDOs) (<https://www.legislation.gov.au/Details/C2021C00183>); *Telecommunications Act 1997* (Cth) s 317ZF (re encryption) (<https://www.legislation.gov.au/Details/C2021C00237>).

19 *Criminal Code Act 1995* (Cth) s 90.4 (<https://www.legislation.gov.au/Details/C2021C00183>).



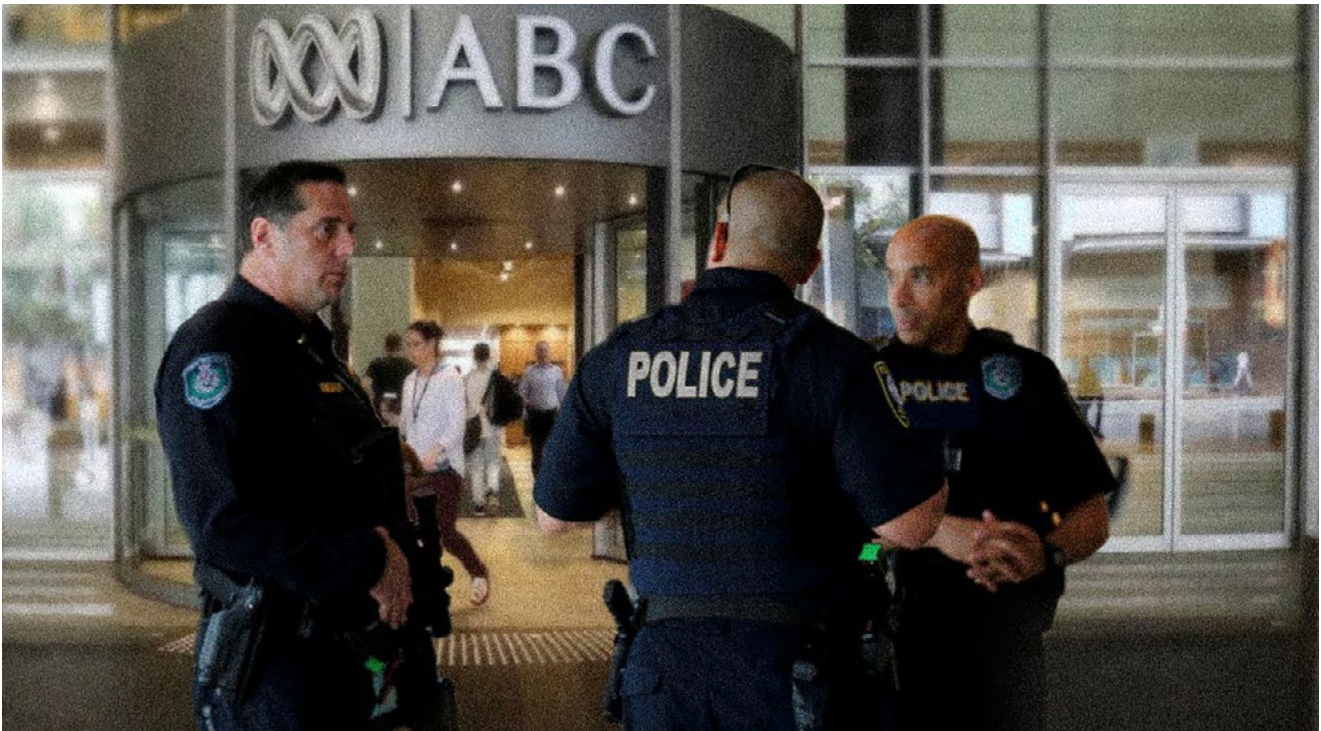
These powers and offences are having a very real chilling effect on public interest journalism. As Mark Maley, Editorial Policy Director at the Australian Broadcasting Corporation (ABC), has commented:

**I don't think there's any doubt that there's been stories which could have been told or should have been told which haven't been told because of a combination of the ASIO Act, the Espionage Bill and metadata laws. That's the chilling effect in practice. The chilling effect is a real thing ... We have killed stories off because of these laws. We're not talking about trivial stories, we're talking about the important stories.<sup>20</sup>**

In other words, because of Australia's broad counter-terrorism laws, some important news stories may never see the light of day. This is a significant loss to Australia's democracy and public debate. If Australians ever hear these lost stories, the damage might already be done. Wrongdoing that could have been exposed – and prevented – might have already continued. It might be too late to hold the right people accountable.

Where journalists publish stories based on leaked or sensitive information, they face an ongoing threat of surveillance and criminal prosecution. June 2021 marked two years since the Australian Federal Police (AFP) raided the home of News Corp journalist Annika Smethurst and the Sydney headquarters of the Australian Broadcasting Corporation (ABC). Both raids were prompted by public interest reporting based on leaked government documents. Smethurst revealed a proposal that would allow the Australian Signals

20 Quoted in [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf).



Directorate (ASD) to turn its military surveillance powers inwards on Australian citizens.<sup>21</sup> The ABC's 'Afghan Files' reporting revealed possible war crimes by Australian soldiers in Afghanistan and an alleged culture of cover-up in the Australian Defence Force (ADF).<sup>22</sup>

David McBride, the military lawyer who leaked the information to the ABC, faces serious criminal charges, even though he first raised his concerns through the chain of command and the reports were later validated.<sup>23</sup> The Inspector-General of the ADF (IGADF), James Gaynor, found credible evidence of incidents in which Australian special forces soldiers allegedly killed 39 Afghan civilians.<sup>24</sup> Thankfully, charges against the two ABC journalists were later dropped, but the threat of jail time for reporting these important news stories hung over their heads for more than two years.

21 <https://www.theguardian.com/australia-news/2019/jun/05/police-raid-on-annika-smethurst-shows-surveillance-expose-hit-a-nerve>.

22 <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>.

23 <https://www.theage.com.au/national/if-moral-courage-matters-this-whistleblower-needs-defending-20201116-p56ey4.html>.

24 <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>. See also <https://www.theguardian.com/australia-news/2020/nov/19/key-findings-of-the-brereton-report-into-allegations-of-australian-war-crimes-in-afghanistan>; <https://www.theage.com.au/national/australian-special-forces-soldiers-committed-up-to-39-murders-adf-report-20201110-p56dek.html>.





The AFP raids rightly attracted global condemnation. It was seemingly unthinkable that police in a liberal democracy would investigate a journalist and a public broadcaster. Reporters Without Borders (RSF) called them ‘flagrant violations of source confidentiality and public interest journalism’.<sup>25</sup> Two parliamentary inquiries into press freedom followed.<sup>26</sup> Those inquiries produced strong recommendations, but the government is yet to implement them. Legally speaking, Australia is in the same position as it was when those search warrants were executed. There are no new protections for journalists or whistleblowers who act in the best interests of the Australian people.

The scale of the problem was made clear when the ABC’s News Director, Gaven Morris, gave evidence to the Parliamentary Joint Committee on Intelligence and Security (PJCIS). He explained that Australian journalists could no longer fulfil their core ethical obligation: to keep the identity of their sources confidential when requested. Not only did this undermine the ethics and professionalism of the media industry; it meant that a fundamental aspect of democracy – the public’s right to know – had been irrefutably damaged:

**When we talk to a source we have always been able to say to them: ‘You can provide us with information and we will absolutely protect your identity and protect your wellbeing by doing that’. That is a crucial part of so many stories that have shaped policy in this country. We can't say that now because we don't know whether, in telling that story, the Federal Police are going to come and take those files away.’<sup>27</sup>**

25 <https://rsf.org/en/australia>.

26 One inquiry was conducted by the PJCIS ([https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/FreedomofthePress](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress)) and the other by the Senate Standing Committees on Environment and Communications ([https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/PressFreedom/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Report)).

27 Quoted in <https://about.abc.net.au/speeches/abc-chair-keynote-address-to-the-new-south-wales-council-for-civil-liberties/>.

In 2020, based on the AFP raids and our broad counter-terrorism laws, Australia dropped five places in the Global Press Freedom Index.<sup>28</sup> RSF reported that claims of national security are ‘used to intimidate investigative reporters’, who face sanction under ‘terrorism laws that make covering terrorism almost impossible’.<sup>29</sup> And yet, the Home Affairs Department believes our laws ‘appropriately balance the importance of press freedom with the imperative to protect national security’.<sup>30</sup> To the Super Ministry, at least, no fixes are needed.

## SECRET JUSTICE

As the AFP raids made global headlines, court proceedings arising from one of Australia’s biggest spy scandals were underway in the ACT Supreme Court.

In 2004, officers of the Australian Secret Intelligence Service (ASIS) posed as aid workers and bugged cabinet offices of the Timor-Leste government.<sup>31</sup> This surveillance operation gave Australia an advantage in trade negotiations with Timor-Leste over oil and gas reserves in the Timor Sea. The reserves were reportedly worth \$40 to \$50 billion.<sup>32</sup> By listening in, the Australian government was able to deprive Timor-Leste’s impoverished economy of billions in revenue from its own natural resources. The operation was approved by Alexander Downer, then the Foreign Minister, who later took on a lucrative consultancy at Woodside Petroleum, the Australian company which benefited from the rigged deal.<sup>33</sup>

Australians would not know about this shameful episode if it were not for an intelligence whistleblower known as Witness K and his lawyer, former ACT Attorney-General, Bernard Collaery. After Downer was appointed by Woodside, Witness K complained to the Inspector-General of Intelligence and Security (IGIS), who allowed him to seek legal advice from Collaery. Later, Collaery sought to bring proceedings against the Australian government, on behalf of Timor-Leste, in the International Court of Justice at The Hague. K was meant to be the key witness, but his passport was cancelled and Australian Security Intelligence Organisation (ASIO) officers raided both his and his lawyer’s house, seizing legal documents in the process.<sup>34</sup> Nearly five years after that, charges approved by Christian Porter, then Commonwealth Attorney-General, were brought against the pair.

28 <https://rsf.org/en/australia>.

29 Ibid.

30 <https://www.aph.gov.au/DocumentStore.ashx?id=373e1b94-c902-4c1f-99a4-375f77d8256e&subId=668414>.

31 <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>. For a more detailed account of events, see Bernard Collaery, *Oil Under Troubled Water* (University of Melbourne Press, 2020).

32 <https://www.abc.net.au/news/2015-11-25/east-timor-greater-sunrise-spy-scandal/6969830>.  
<https://www.abc.net.au/news/2017-12-29/east-timor-draft-treaty-march-deadline/9290906>.

33 <https://www.smh.com.au/politics/federal/prosecution-of-witness-k-and-his-lawyer-is-a-disgraceful-act-of-revenge-20180701-p4zou5.html>; <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>.

34 <https://www.smh.com.au/politics/federal/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>.



This long-running scandal has been called ‘the most significant threat to freedom of expression in this country’.<sup>35</sup> Collaery rightly sought to bring legal action against the Australian government for perpetrating a significant fraud against Timor-Leste – a Pacific neighbour in need of help, not deception. For their efforts, Witness K and Collaery were charged as criminals. Facing a conspiracy charge for an offence under the Intelligence Services Act, Witness K, an elderly man and 39-year veteran of the Australian navy and foreign intelligence services, chose to plead guilty. In a small mercy, the sentencing judge gave him a three-month suspended sentence. At the time of writing, Collaery continues to defend the charges against him in order to clear his name. So far, it has cost Australian taxpayers \$3.7 million to prosecute the pair for bringing the story to light.<sup>36</sup>

In a further injustice, Collaery’s trial has largely been conducted behind closed doors. Anthony Whealy, a former NSW Supreme Court judge who presided over some of Australia’s largest terrorism trials, has called it ‘one of the most secretive trials in Australian history’.<sup>37</sup> This has been possible under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), which was enacted in 2004 as part of Australia’s suite of counter-terrorism laws. This law was designed to help prosecutors convict people of terrorism and secrecy offences. It allows the Commonwealth Attorney-General to issue non-disclosure certificates relating to ‘national security information’.<sup>38</sup> This is defined broadly to include information relating to defence, security, or law enforcement interests.<sup>39</sup> The court holds a closed hearing to determine how this information can be used. The defendant and their legal

35 <https://theconversation.com/why-bernard-collaerys-case-is-one-of-the-gravest-threats-to-freedom-of-expression-122463>.

36 <https://www.theguardian.com/australia-news/2021/jul/24/cost-of-prosecuting-witness-k-and-lawyer-bernard-collaery-balloons-to-37m>.

37 <https://www.abc.net.au/4corners/secrets,-spies-and-trials/11451004>.

38 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 26 (<https://www.legislation.gov.au/Details/C2017C00374>).

39 *Ibid* s 8.

representative can be excluded from this hearing.<sup>40</sup> In deciding how the information can be used, the judge must give the greatest weight to national security over the defendant's right to a fair trial.<sup>41</sup> The judge can then allow the information to be summarised for use as evidence or with key points redacted.<sup>42</sup> These rules clearly tip the odds in favour of prosecutors. They significantly undermine a defendant's ability to challenge the evidence against them.

Collaery's trial is highly secretive, but it does not win the dubious honour of most secret trial. A few months before the AFP raids, a man known as Witness J was sentenced to two years and seven months imprisonment for multiple criminal offences.<sup>43</sup> No one knew about the trial or sentencing. No decisions of the court were made public. It was years before the public even became aware – thanks only to savvy investigative reporting and a stroke of luck – that Witness J existed and had been tried, sentenced and imprisoned. Once this small amount of information came to light, the reality of secret trials in Australia could not be denied. Closed hearings are familiar enough to the law, if rare, but the idea that a case could be hidden entirely from journalists and the public was antithetical to open justice. Despite this, the Attorney-General's Department, echoing the Home Affairs position on journalists, submitted to an independent review that the NSI Act was being used appropriately and requires no changes.<sup>44</sup> Quite literally, these Departments would have us believe: 'there's nothing to see here'.

## A TROUBLING STATE

Something is clearly awry. These cases should raise a red flag to everyone who cares about Australia's democracy, open justice, and the core task of keeping governments accountable. Even if charges are eventually dropped, journalists, lawyers and whistleblowers face an ongoing threat of search warrants, surveillance and criminal prosecution.

These issues are not limited to matters of national security. Richard Boyle is facing more than 20 serious charges for revealing that the Australian Tax Office (ATO) used aggressive debt collection practices, which impacted disproportionately on vulnerable people and small business owners. In line with federal whistleblower laws, Boyle first raised his concerns internally to his ATO supervisors, and spoke to the ABC's Four Corners program only after he felt his employer's response was inadequate.<sup>45</sup> A Senate inquiry confirmed that the ATO's investigation was 'superficial',<sup>46</sup> but Boyle still faces life in prison.

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40 Ibid s 29(3).

41 Ibid ss 29 and 31(8).

42 Ibid s 31(2).

43 <https://www.abc.net.au/news/2019-12-05/witness-j-revealed-secret-trial/11764676>.

44 [https://www.inslm.gov.au/sites/default/files/2021-05/6\\_attorney-generals\\_department.pdf](https://www.inslm.gov.au/sites/default/files/2021-05/6_attorney-generals_department.pdf).

45 <https://www.abc.net.au/news/2021-04-29/prosecutors-proceed-case-against-ato-whistleblower-richard-boyle/100105710>.

46 <https://www.abc.net.au/news/2020-06-18/ato-whistleblower-richard-boyle-senator-rex-patrick-parliament/12365136>.



Australian democracy is in a troubling state. Across wide-ranging areas of government policy, secrecy is paramount. Anyone who wishes to report on wrongdoing by members of government or their agencies best be careful who they speak to, what they say, and how they say it – all while bearing in mind the myriad laws they might breach. In most cases, it does not matter under the law if they acted in the best interests of the Australian people or revealed significant wrongdoing.

In this report, we take stock of Australia’s national security state and explore the impacts that counter-terrorism powers and government secrecy are having on our democracy. In Part 5, we start from first principles by outlining the key requirements of a healthy democracy. These include free speech, freedom of the press, the separation of powers and the rule of law. We explain why Australians have a right to know about government wrongdoing. In Part 6, we outline Australia’s counter-terrorism laws and explain their impact on democratic rights. We show how these laws go further in some respects than Australia’s historical wartime powers.

In Part 7, we map the controversial creation and rise of the Home Affairs Department. Home Affairs is the dominant player in Australia’s national security state. It was created in 2017 to consolidate immigration and border security powers with those relating to policing, intelligence, emergency management and multicultural affairs. Despite political claims to the contrary, it closely resembles the Department of Homeland Security (DHS) created by the Bush administration after 9/11. The Home Affairs Minister wields substantial powers, from visa determinations to citizenship stripping and many things between. This substantial consolidation – achieved against the advice of independent experts – is antithetical to the democratic idea that too much power should not be confined in too few hands.

In Part 8, we examine a wider culture of secrecy across government. Refusals to release information under Freedom of Information (FOI) laws are at record levels,<sup>47</sup> which hampers the ability of journalists to report public interest stories and hold governments to account. This resistance to transparency is particularly apparent in Home Affairs, which has been singled out by the Office of the Australian Information Commissioner (OAIC) for lacking adequate FOI systems and culture.<sup>48</sup> Multiple factors contribute to this secretive culture, including broad statutory definitions of national security, a managerialist ethos, outsourcing to the private sector, and a need to control public narratives in a 24/7 media environment.

In the Conclusion (Part 9), we explain how lawmakers can start repairing Australia's democratic deficit. We group our recommendations according to four 'vital signs' of a healthy democracy: transparency, press freedom, oversight and citizen engagement. Without urgent action in these areas, including reforms to secrecy offences and whistleblower laws, Australia's democracy may continue down a path from which it is too difficult to turn back.

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47 <https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>.

48 <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CIL-Report-including-Secretary-Comments.pdf>.



# 05 A HEALTHY DEMOCRACY

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## NEED TO KNOW:

1. A healthy democracy requires free flows of information between governments and the people, so we can make informed decisions at election time. This requires, at a minimum, freedom of speech, freedom of assembly, and freedom from arbitrary detention.
2. A healthy democracy requires a free and independent press. Journalists who act in the best interests of the Australian people should not face surveillance or criminal investigation.
3. Laws must be adequately debated in Parliament, so that politicians are reaching the best decisions for the Australian people. This is especially important when laws impact on free speech, freedom of the press, or other fundamental rights.
4. Democracies require an open, transparent court system in which defendants know the evidence against them.
5. Power in a democracy should not be unduly concentrated – it should be divided between different branches to create checks and balances and improve accountability.
6. Citizens in a democracy have a right to know information about government, unless there is a clear reason for keeping information secret, such as a threat to life or security.



# BY THE PEOPLE, FOR THE PEOPLE

To understand the impact of Australia's national security state, we must first understand the core principles that make a strong, healthy democracy. These are the rights, values and ideals that distinguish democracies from tyrannies and authoritarian states. Their weakness or absence can have grave impacts that ripple through society.

The defining feature of democracy is **representative government**. This means politicians hold power not for their own sake or to pursue their own agenda; they act for us, the people. This is why Abraham Lincoln, in the Gettysburg address, said that democracy means 'Government of the people, by the people, for the people'.

In liberal philosophy, representative government is explained through the metaphor of the social contract. It is the collective 'will' of the people that gives government its extensive powers. We lend our powers on the promise that government will, in exchange, act for our collective benefit. Power in a democracy ultimately belongs to us, not them.

Representative government requires **elections**, in which we choose the politicians who will act on our behalf. We choose based on who we think will best represent our values and interests. Practically speaking, this involves writing our choice on a piece of paper, folding it, and placing it in a box: something seemingly mundane that represents the core democratic act.

Elections must be free and fair; they are of little benefit to the people if they are rigged or corrupted. Thankfully, Australia does not have the same levels of electoral corruption as some other countries. However, the absence of corruption is not enough. For a healthy democracy, citizens must be able to make an **informed choice** when they cast their votes.

Making an informed choice requires information – about how governments have exercised their considerable powers, their policies and plans, their principles, actions, and values. We also need to know about alternatives: what do other political parties have to say about the government's actions, and what are their plans for our future? This demands open channels of communication between governments and the governed. We must not be misled, or misinformed, or have gaps in our knowledge that could impact our decisions on election day.

Automatic  
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Automatic  
door

# POLLING STATION

## OPENING TIMES

**7.00am–10.00pm**

Note that as long as you are in the polling station, or in a queue outside, before 10.00pm you will be entitled to apply for a ballot paper

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## BLURRED BRANCHES

Once politicians are elected, they sit in Parliament, where they debate the issues of the day and decide on the rules, published as laws, that guide our society. This must be done properly, with adequate care, even when a matter calls for urgent action. In this way – at least in the ideal – governments can reach the best collective decisions for the people.

A core feature of Australian Parliaments, following the Westminster system, is **responsible government**. Broadly speaking, this means governments should be accountable, but it refers more specifically to the requirement – found in s 64 of the Australian Constitution – that Ministers must sit as members of Parliament. This blurs two arms of government, as Ministers (who are leaders in the executive branch of government) are also part of the legislature. It contrasts with the strict separation of powers in the US, where the Secretaries of State, Defence and so on are not also members of Congress. We see our Ministers in Parliament, on TV screens and streaming online, debating with other politicians as they make rules for our society. This blurring of roles is designed to make Ministers more accountable. During Question Time, other politicians can ask them questions without notice (meaning they must respond, and can't prepare an answer in advance). The reality of Question Time may be quite different, but at least by appearing in parliament, Ministers are fronting up to the Australian people.

# A RIGHT TO SPEAK FREELY

As we gather this information, and our representatives in action, we must be free to discuss, debate and deliberate about government and society. We must be free to talk about current affairs – in our homes, in cafés and shops, on the street or online – without fear of punishment or reprisal. If we cannot do these things, democracy doesn't work. Democracies require **freedom of thought, opinion, speech and expression**.

The Australian Constitution does not formally protect freedom of speech. Instead, we have a limited 'implied freedom of political communication'. This thin protection applies only to political speech, and even then, laws can infringe it if they are proportionate to a legitimate aim (such as law enforcement or national security). In a court decision following the ABC raid, the Federal Court confirmed that the implied freedom cannot protect journalists from the exercise of police search warrants.<sup>49</sup>

To achieve free speech, we need other rights, too. We need freedom of movement and assembly, and freedom from arbitrary detention, or else we could be locked up for meeting to discuss our views. We need a right to protest peacefully, when governments have not listened in other ways. We need a right to participate in elections, and to be free from discrimination on the grounds of race, religion and ethnicity. Clearly, we also need the core human rights to freedom from slavery, torture, or inhumane treatment – or else democratic participation would be impossible.

We might take all of this for granted in Australia, but only two states and one territory have enacted human rights charters.<sup>50</sup> There is no charter or Bill of Rights at the national level. This sets Australia apart from every other liberal democracy.<sup>51</sup> Without sufficient legal protection, it becomes even more crucial to invoke these rights in public and political debate. Our system of government is based on the idea of 'parliamentary sovereignty', which means that Parliament has the ultimate power to protect fundamental rights – or undermine them. Politicians must be reminded of the gravity of these principles, and be held accountable when they do not uphold them.

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49 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 (<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0133>).

50 These are the Australian Capital Territory, Victoria and Queensland.

51 George Williams and Daniel Reynolds, *A Charter of Rights for Australia* (4<sup>th</sup> ed), NewSouth Press, 2017).



## THE FOURTH ESTATE

It is not just about our individual rights. A healthy democracy requires **freedom of the press**, so that journalists can help us to understand and debate the issues of the day. The United Nations considers a free press that is independent of government influence to be one of the ‘cornerstones of a democratic society’.<sup>52</sup> This is captured in article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Australia has ratified. Under article 19, freedom of expression includes not only the ability to say what we are thinking, but also to seek information from a variety of sources. It requires ‘freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’.<sup>53</sup>

Journalists play a core democratic role. They help us to understand what governments are doing, what they’re not doing, what they could be doing better, and what they’re doing wrong. Journalists inform, explain, expose, critique, test, probe, investigate – even irritate if needed. As the maxim goes, ‘news is something somebody doesn’t want printed; all else is advertising’.<sup>54</sup> Journalists who perform this core democratic role must not be subject to surveillance or criminal investigation.

52 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

53 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

54 This quote, in varied forms, is often attributed to William Randolph Hearst, the US newspaper magnate: <https://quoteinvestigator.com/2013/01/20/news-suppress/#note-5274-17>.

Put simply, a free press holds politicians accountable. For this reason, the media has been called the ‘fourth estate’. This builds on the **separation of powers**, a principle which says that governments should be divided into three branches: the Executive, Parliament, and the Courts. The aim of this structure is to create checks and balances, improve accountability and transparency, and ensure that too much power is not held in too few hands.

## CHECKS AND BALANCES

In contrast to democracies, the defining feature of a tyrannical or authoritarian state is that power is concentrated in a single person or body. An all-powerful decision-maker without separate bodies to hold it accountable can make arbitrary, unjustified and unlawful decisions while silencing dissent, disagreement and criticism. All governments require some degree of centralisation to govern, but too much concentrated power is a defining feature of tyranny and the antithesis of a healthy democracy. There must be adequate checks and balances in place to ensure that power is exercised properly for the collective benefit of the people.

The separation of powers requires, firstly, a **fair and independent court system**. Judges must have tenure: they are hired by the government of the day, but they cannot be fired or punished for holding Parliament or the Executive to account. Court proceedings must also be open and transparent, so that members of the public can learn how the laws that govern us are applied and interpreted. Anyone charged with a criminal offence must receive a fair trial in accordance with the requirements of due process, including adequate legal representation, the right to remain silent and appropriate rules of evidence. Secret trials and secret evidence, as permitted by the NSI Act, undermine the core right to open justice.

The separation of powers also requires, crucially, that the Executive is held to account. This branch – which administers the laws – is the largest and most powerful. It encompasses not only the Queen as our Head of State, the Governor-General, Prime Minister, Ministers and departmental secretaries, but also the military, police, intelligence agencies and all the other employees of government departments. Limiting executive power is therefore critical to a healthy democracy. Parliament helps in this respect, though Ministers, who are also part of the Executive, play the leading role in driving legal change, by determining policy direction in their portfolio areas and introducing Bills into Parliament. Ministers influence the development of laws which ultimately grant statutory powers to their departments.

These powers can have a significant impact on our day-to-day lives. For example, Ministers and their departments can determine whether a visa is granted, a passport cancelled, or welfare payment made. In many cases, Ministers and their agency heads, rather than judges, sign off on the use of covert powers to gather intelligence.<sup>55</sup> For all these reasons, it is essential that the executive branch of government is held accountable to the Australian people.

<sup>55</sup> See, for example, *Australian Security Intelligence Organisation Act 1979* (Cth) s 26 (surveillance device warrants), 27C (identified person warrants) and 34B (questioning warrants) (<https://www.legislation.gov.au/Details/C2021C00038>); *Intelligence Services Act 2001* (Cth) s 9 (collection of intelligence) (<https://www.legislation.gov.au/Details/C2021C00217>).

# A RIGHT TO KNOW

Protecting against arbitrary executive power is the essence of the **rule of law**. The rule of law means that everyone – including those in power – is subject to the same laws and treated equally under them. It also requires laws to be accessible and clearly written. While interpreting the law requires expertise, all laws must be capable of being understood. This repeats a recurring message of **transparency**: the rules that govern society, and the things governments do under those rules, should be made known so they can be discussed freely and tested – by journalists, judges, and the Australian people.

For all these reasons, unwarranted secrecy damages democracy. There are many things that government agencies can justifiably keep secret: for example, their military plans and methods of gathering intelligence, so other countries do not gain a tactical advantage. Providing security, in addition to protecting rights, remains a core function of government under the social contract. However, unless there is a clear case for keeping information secret, such as a threat to life or security, the presumption should always be that the Australian people have a **right to know**.

Not knowing means we cannot be sure if politicians are acting in our best interests – or pursuing their own interests instead. Not knowing means we cannot have informed discussions and make proper choices at the next election. Not knowing hampers the ability of journalists and members of the public to hold politicians to account. Taken far enough, not knowing means that people can be prosecuted for speaking out against the government, without even knowing the evidence against them. These are clear signs of a democracy gone wrong. Without free speech and open channels of communication between governments, journalists, and the Australian people, democracy is an ideal, not a reality.



# 06 A WAR WITH NO END

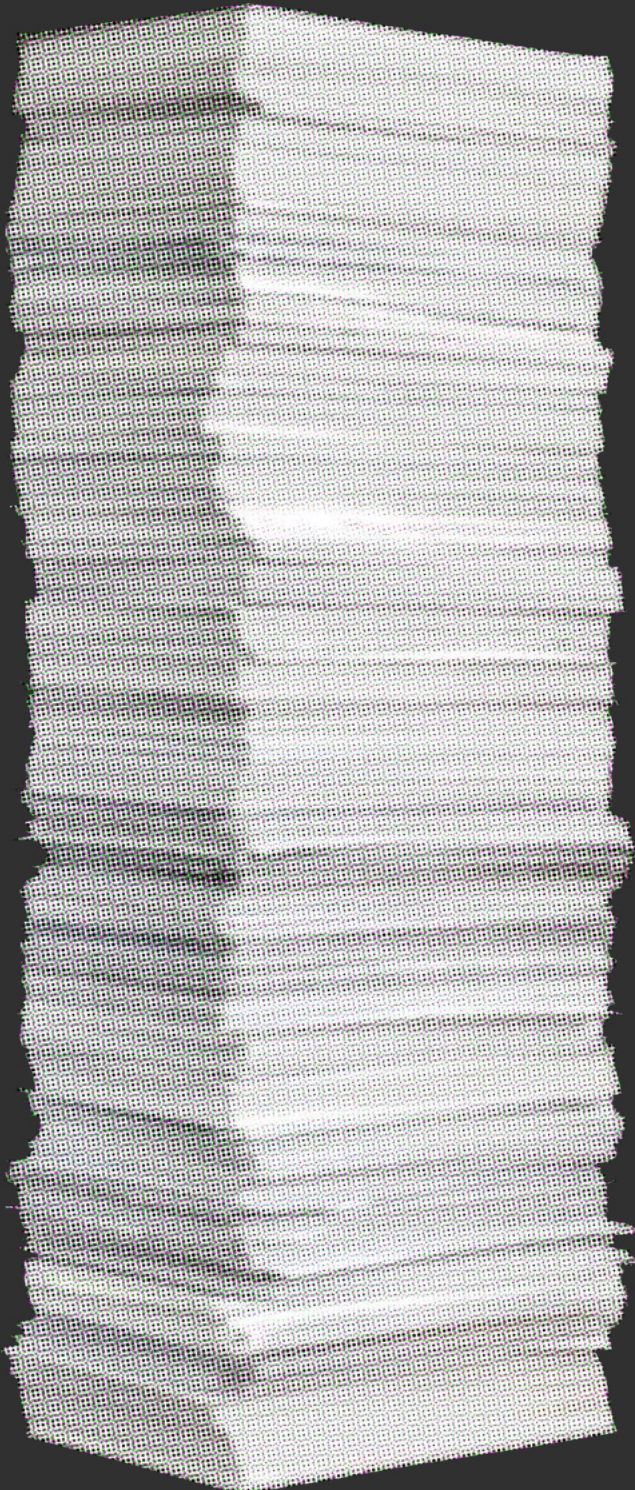
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## NEED TO KNOW:

1. Since 9/11, Australia has enacted 92 counter-terrorism laws amounting to more than 5000 pages of powers, rules and offences. This is significantly more than the other Five Eyes Nations.
2. Across all 92 laws, each took just under 2.5 days in the House of Representatives and just over two days in the Senate to be passed. It is unrealistic to think they were properly considered and debated in such a short timeframe.
3. Australia's counter-terrorism laws impact on many fundamental rights, including freedom from arbitrary detention, the right to a fair trial, free speech and freedom of the press.
4. Controversial powers with sunset clauses, including preventative detention orders and control orders, have been routinely renewed, despite repeated calls to amend or repeal them.
5. The permanence of our counter-terrorism laws contrasts with Australia's historical wartime powers, which were time-limited during an emergency. In some areas, such as citizenship stripping and preventive detention, our current laws go even further.
6. Sweeping new espionage offences are having a chilling effect on public interest journalism. Under these laws, journalists could be prosecuted for receiving information from intelligence insiders, or publishing stories on matters of international politics, economics, or defence.
7. This chilling effect is made worse by the metadata and encryption laws, which can allow police and intelligence agencies to identify journalists' confidential sources.



92 LAWS,  
5100 PAGES



## HYPER-LEGISLATING FOR TERRORISM

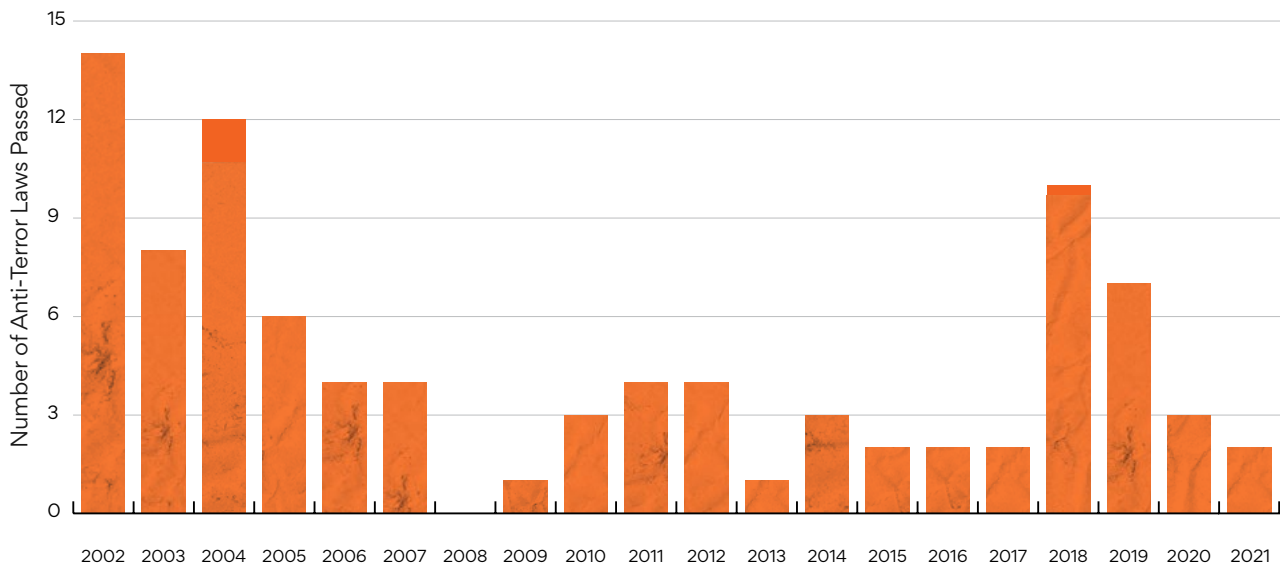
Two-decades ago, when the twin towers fell and the world looked on in terror, Australia had no national counter-terrorism laws. **Today, our national security state is built on more than 92 such laws, amounting to more than 5000 pages of rules.**<sup>56</sup> Professor Kent Roach, one of the world's leading experts on counter-terrorism laws, labelled this approach 'hyper-legislation',<sup>57</sup> as Australia has far outpaced similar countries in legislating against terrorism. He made this comment after the first decade of lawmaking, from 2001-2011. Since that time, Australia's federal Parliament has enacted another 37 counter-terrorism laws.<sup>58</sup>

<sup>56</sup> This includes amending legislation, which is a common way that counter-terrorism powers are expanded, but it does not include broader cyber-security or other legislation which can be relevant to counter-terrorism. We have included laws in this count only if the Second Reading Speech and/or Explanatory Memorandum referred to the threat of terrorism as a purpose of enacting the law.

<sup>57</sup> Kent Roach, *The 9/11 Effect: Comparative Counter Terrorism* (Cambridge University Press, 2011).

<sup>58</sup> See, for example, Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020 ([https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6623](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6623)).

**A total of 92 Anti-Terror Laws were passed by Federal Parliament between 2002-2021**



The breadth and depth of Australia’s counter-terrorism laws is staggering. They include criminal offences for ‘conspiring to prepare’ terrorist acts, possessing ‘things’ connected with preparation for terrorism, and collecting or making terrorist documents. Control orders, which can amount to virtual house arrest, are based primarily on an assessment of a person’s future risk. They can be imposed on children as young as 14.<sup>59</sup> Preventative detention orders (PDOs) allow a person to be detained for up to two days under federal law, or up to two weeks under state law, to prevent an imminent terrorist act.<sup>60</sup> From 2003, ASIO held a power to covertly detain people for up to seven days. This could be used to gather intelligence through compulsory questioning, meaning a detainee could be imprisoned for up to five years for refusing to answer ASIO’s questions. The detention power was repealed in 2020, but the compulsory questioning power still exists, and is now extended to children as young as 14.<sup>61</sup>

The list doesn’t stop there. Offences for association and advocacy, warrantless searches, rolling post-sentence detention, citizenship stripping, secret evidence procedures, presumptions against bail, extended non-parole periods, compulsory metadata retention and enforceable decryption: all these and more have been introduced in the name of national security since 2001. Many of the powers have made their way beyond the national security sphere and into the states and territories. For example, control orders directed at bikie gangs now exist in almost every state and territory. The NSI Act has inspired other secretive evidence schemes, which allow the use of ‘criminal intelligence’ in courtrooms across Australia.<sup>62</sup> In NSW, Serious Crime Prevention Orders allow for wide-ranging restrictions and obligations to be placed on a person, based on an assessment of future risk and public protection.<sup>63</sup>

59 *Criminal Code Act 1995* (Cth) s 104.28 (<https://www.legislation.gov.au/Details/C2021C00183>).

60 *Ibid* Div 105.

61 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34BB (<https://www.legislation.gov.au/Details/C2021C00038>).

62 See, for example, *Serious and Organised Crime (Control) Act 2008* (SA) s 13(2) ([https://www.legislation.sa.gov.au/LZ/C/A/SERIOUS%20AND%20ORGANISED%20CRIME%20\(CONTROL\)%20ACT%202008/CURRENT/2008.13.AUTH.PDF](https://www.legislation.sa.gov.au/LZ/C/A/SERIOUS%20AND%20ORGANISED%20CRIME%20(CONTROL)%20ACT%202008/CURRENT/2008.13.AUTH.PDF)). For a discussion of these schemes, see Rebecca Ananian-Welsh and George Williams, ‘The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia’ (2014) 38(2) *Melbourne University Law Review* 362 ([https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0008/1586987/382Ananian-WelshandWilliams2.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0008/1586987/382Ananian-WelshandWilliams2.pdf)).

63 *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) (<https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2016-015>).

Australia's counter-terrorism laws clearly impact on fundamental rights that democracies should uphold – including freedom of movement, freedom from arbitrary detention, the presumption of innocence, the right to remain silent, and the right to a fair trial. This impact has been justified, understandably, on the basis that terrorism can cause catastrophic harm. However, it means we are leaving behind many of the ideals we are trying to protect. It also tips the balance in favour of punishing people for what they might do, or say – rather than what they have done in the past. This is a dangerous path to head down, as it makes real the possibilities of 'thought crime' and 'talk crime', and it undermines core standards of proof and evidence. As prominent scholars have noted, counter-terrorism laws have seen Australia, the UK and other countries leave behind the idea of a criminal justice system focused on punishing past behaviour. Instead, we now have a 'pre-crime' society,<sup>64</sup> in which people have their liberty reduced or removed on the basis of what they might do in the future.

Many offences in these laws directly undermine free speech and freedom of the press. Secrecy offences attach to several specific powers, preventing discussion of their use. This additional layer of secrecy applies to Special Intelligence Operations (SIOs), ASIO's questioning warrants, the encryption laws, and PDOs. A person subject to a PDO can be imprisoned for five years if they reveal anything about their detention – even the mere fact that it happened. The only words that a detainee can say on the phone, when calling a family member, is that they are 'safe but not able to be contacted for the time being'.<sup>65</sup>

This power to detain people incommunicado led the Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation to conclude that PDOs were akin to something seen in 'discredited totalitarian regimes'.<sup>66</sup> The Independent National Security Legislation Monitor (INSLM) also recommended that the laws be repealed.<sup>67</sup> However, despite these findings, the PDO powers, like others, have been routinely renewed in response to evolving threats.

Certainly, many details about the use of counter-terrorism powers should be kept secret. Journalists and others should not be permitted to disclose, for example, the techniques used by intelligence agencies or the names of officers involved. However, the offences clearly encompass more than operational or identifying information. For example, a person cannot reveal *any* information about an ASIO questioning warrant – even the bare fact that it existed – for two years after it was issued.<sup>68</sup> There is no requirement that they intend to harm security by disclosing the information, nor any defence if they act in the public interest.

64 See, for example, Lucia Zedner, 'Pre-crime and post-criminology?' (2007) 11(2) *Theoretical Criminology*, 261 (<https://journals.sagepub.com/doi/10.1177/1362480607075851>).

65 *Criminal Code Act 1995* (Cth) s 105.35 (<https://www.legislation.gov.au/Details/C2021C00183>).

66 <https://www.ag.gov.au/sites/default/files/2020-03/Final%20Report.PDF>.

67 <https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2012.pdf>.

68 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34GF. (<https://www.legislation.gov.au/Details/C2021C00038>).

Other secrecy offences aim to prevent intelligence whistleblowing. It is an offence punishable by three years imprisonment for an intelligence officer to unlawfully copy, transcribe, remove or deal in any way with a document outside the terms of their employment.<sup>69</sup> In line with the pre-crime logic, this means they could be imprisoned for preparing to pass information to a journalist, even if they were undecided and would ultimately have deleted it. A journalist could also be prosecuted under the espionage laws if they received that information.<sup>70</sup> Under those laws, a newsroom could be raided and journalists prosecuted for receiving information obtained from an intelligence insider, even if the editors had decided not to publish it.

These offences make reporting on national security matters a risky day-job. Journalists may break the law simply by talking to a source or receiving material from them, even before they know the details of what the story involves or how they would report it. This is why RSF criticised Australia for having ‘terrorism laws that make covering terrorism almost impossible’.<sup>71</sup> In practice, this means that important public interest stories are not being told. Without greater protections for journalists and whistleblowers, the Australian public could remain in the dark on critical matters of national security involving government misconduct. The potential toll for Australian democracy is clear and direct.

## WATCHING FROM THE SHADOWS: SECRECY AND SURVEILLANCE

In addition to wide-ranging secrecy offences, Australia’s counter-terrorism laws grant significant powers to intelligence and law enforcement agencies. Two schemes in particular pose a risk to journalists and their confidential sources: compulsory metadata retention and the encryption laws, also known as ‘TOLA’.<sup>72</sup>

In 2015, the federal Parliament passed a law requiring telecommunications companies to keep ‘metadata’ for two years.<sup>73</sup> Metadata captures the time, date, location and recipients of all electronic communications – including phone calls, emails, and messages. This can be accessed by ASIO and ‘enforcement agencies’, including state and federal police, without a warrant.<sup>74</sup> Metadata does not include the content of the communications – that requires a warrant – but even without one, metadata can paint a very detailed picture of someone’s life. It constructs a GPS map of everywhere someone has been and the phone numbers and locations of everyone they have spoken to, including friends, family, and other frequent contacts.<sup>75</sup> This data is collected on *all* Australians – not just those of interest to police and intelligence agencies. Telecommunications companies have reported receiving over 350,000 metadata requests

69 *Intelligence Services Act 2001* (Cth) ss 40C-40M (<https://www.legislation.gov.au/Details/C2021C00217>).

70 *Criminal Code Act 1995* (Cth) ss 90.1, 91.1(2), 91.2(2) (<https://www.legislation.gov.au/Details/C2021C00183>).

71 <https://rsf.org/en/australia>.

72 *Telecommunications and Other Legislation Amendment (Assistance and Access Act 2018)* (Cth) (<https://www.legislation.gov.au/Details/C2018A00148>).

73 *Telecommunications (Interception and Access) Act 1979* (Cth) s 187A (<https://www.legislation.gov.au/Details/C2021C00235>).

74 *Ibid* ss 178-179 (<https://www.legislation.gov.au/Details/C2021C00235>).

75 <https://www.abc.net.au/news/2015-08-24/metadata-what-you-found-will-ockenden/6703626?nw=0>.

each year from more than 80 government agencies.<sup>76</sup> The list of agencies accessing metadata without a warrant include the Department of Health, the ATO, the Australian Postal Corporation, NSW Fair Trading, Greyhound Racing Victoria, the WA Department of Fisheries, the Queensland Building and Construction Commission, and the National Measurement Institute.<sup>77</sup> These laws clearly affect all of us – not just terrorists and criminals.

Metadata can also be used by police or ASIO to identify a journalist's confidential source. After media and law reform organisations raised concerns about this,<sup>78</sup> a warrant scheme was introduced, so judges must now approve access to a journalist's metadata.<sup>79</sup> However, in contrast to similar schemes in the UK and Canada,<sup>80</sup> Australian journalists cannot contest applications for these warrants. Our journalists are never even told that their metadata will be accessed, or that it has been in the past; they might only suspect as much from agency reporting, or if police come knocking on their door. Reports suggest that the AFP, in the lead-up to the AFP raids, accessed journalists' metadata 58 times under 2 of these warrants.<sup>81</sup>

These risks were heightened in 2018 when the federal Parliament passed the encryption laws. Under these laws, Australian police and intelligence agencies can request – and even require – technology companies to provide them with technical assistance.<sup>82</sup> The powers are designed to combat terrorist organisations using encrypted messaging applications, such as WhatsApp and Telegram, but they grant much wider powers. They can require almost any technology or software company anywhere in the world to remove electronic protections, including encryption.<sup>83</sup> A company can even be required to modify or substitute part of their service.<sup>84</sup>

These staggering powers were enacted against the best advice of the technology industry, locally and globally. Multinational tech companies like Apple, Google and Facebook argued that the powers risk invading the privacy of all technology users.<sup>85</sup> Apple suggested it could be forced to install eavesdropping capability in its home speakers.<sup>86</sup> Mozilla said the laws 'could do significant harm to the Internet'.<sup>87</sup>

76 <https://www.hrlc.org.au/news/2020/10/29/intelligence-committee-recommends-scaling-back-privacy-invading-metadata-laws>.

77 <https://www.abc.net.au/news/2016-01-18/government-releases-list-of-agencies-applying-to-access-metadata/7095836>.

78 <https://theconversation.com/data-retention-plan-amended-for-journalists-but-is-it-enough-38896>.

79 *Telecommunications (Interception and Access) Act 1979* (Cth) s 180J (<https://www.legislation.gov.au/Details/C2021C00235>).

80 *Police and Criminal Evidence Act 1984* (UK) (<https://www.legislation.gov.uk/ukpga/1984/60/contents>); *Journalistic Sources Protection Act 2017* (Can) ([https://laws-lois.justice.gc.ca/eng/annualstatutes/2017\\_22/FullText.html](https://laws-lois.justice.gc.ca/eng/annualstatutes/2017_22/FullText.html)).

81 <https://www.theguardian.com/world/2019/jul/09/australian-federal-police-accessed-journalists-metadata-58-times-in-a-year>.

82 *Telecommunications Act 1997* (Cth) ss 317G, 317L 317TAAA (<https://www.legislation.gov.au/Details/C2021C00237>).

83 *Telecommunications Act 1997* (Cth) s 317E(1)(a) (<https://www.legislation.gov.au/Details/C2021C00237>).

84 *Ibid* s 317E(1)(h) and (i).

85 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/TelcoAmendmentBill2018/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/TelcoAmendmentBill2018/Submissions).

86 <https://www.aph.gov.au/DocumentStore.ashx?id=ecd6be12-ab84-43de-be61-1599e1db2a74&subId=661073>.

87 <https://www.aph.gov.au/DocumentStore.ashx?id=2b42ce5e-e83e-4ce5-8712-d58abbde1f6f&subId=661054>.



The main limitation on the encryption laws is that a company cannot be required to build a ‘systemic’ weakness or vulnerability into their product.<sup>88</sup> This should prevent large-scale surveillance, but its precise meaning remains unclear and untested. TOLA poses a real threat to the privacy of all Australian technology users, including journalists. Under the laws, journalists who use encrypted messaging applications to avoid the reach of the metadata laws could still have their confidential sources identified by ASIO and police.

These secrecy offences and surveillance powers are having a pronounced chilling effect on public interest journalism. Journalists have dropped stories and cut off communication with sources, even when they know a story should be told.<sup>89</sup> Unless concrete changes are made soon, those stories may never be told.

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88 *Telecommunications Act 1997* (Cth) s 317ZG(1)(a) (<https://www.legislation.gov.au/Details/C2021C00237>).

89 Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, ‘Risk and uncertainty in public interest journalism: The impact of espionage law on press freedom’ (2021) 44(3) *Melbourne University Law Review* (advance) [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf).

# QUICK TO ENACT, SLOW TO CHANGE

Another problem for democracy is the speed with which Australia's counter-terrorism laws have been enacted. On average, across all 92 laws, each took a little under 2.5 days in the House of Representatives and just over two days in the Senate to be approved. Those are very generous figures – they count any day a Bill was merely mentioned in Parliament, even if it wasn't debated. It is staggering, considering the number of controversial, rights-infringing powers in the laws, that parliamentary debate was so limited and agreement reached in such a short timeframe. It is unrealistic to think these highly complex laws were properly read, understood, considered and debated.

Just two examples of this speedy passage are the foreign fighters and encryption legislation. The former was Australia's main legislative response to the threat of Islamic State.<sup>90</sup> It was 160 pages long and amended nearly 30 federal Acts. Among many other changes, it created new offences for foreign incursions, advocating terrorism, and entering or remaining in a 'declared area'.<sup>91</sup> Just eight days were given for public submissions to the PJCIS, and the Bill was approved by the House of Representatives in a single day.

Parliamentary debate on the encryption laws was also severely curtailed. Despite being widely criticised by industry and digital rights organisations, the laws were rushed through Parliament after the Home Affairs Minister, Peter Dutton, told the PJCIS there was an 'immediate need to provide agencies with additional powers' before Christmas.<sup>92</sup> In its interim report, the PJCIS commented that the 'expedited consideration ... precluded the Committee for incorporating a detailed presentation of the evidence'.<sup>93</sup>

The passage of the encryption laws was further marred by political tactics. On the final parliamentary sitting day of 2018, the Bill was used (unsuccessfully) as leverage to help the passage of Medevac legislation.<sup>94</sup> After a political stand-off, Labor backed down, abandoning amendments to the encryption laws it had proposed in the Senate, rather than preventing the powers from being available by Christmas. Just a week earlier, the Shadow Attorney-General, Mark Dreyfus, said the Bill was 'unworkable' and 'not fit to pass the parliament'.<sup>95</sup> Despite recognising significant problems with the laws, Labor agreed to the truncated timetable urged by Dutton, allowing the laws to pass without change.

90 *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) <https://www.legislation.gov.au/Details/C2015C00568>.

91 *Criminal Code Act 1995* (Cth) ss 80.2C, s 119.2, 119.4 (<https://www.legislation.gov.au/Details/C2021C00038>).

92 [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc\\_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment\(AssistanceandAccess\)Bill2018.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment(AssistanceandAccess)Bill2018.pdf;fileType=application%2Fpdf).

93 [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc\\_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment\(AssistanceandAccess\)Bill2018.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024247/toc_pdf/AdvisoryReportontheTelecommunicationsandOtherLegislationAmendment(AssistanceandAccess)Bill2018.pdf;fileType=application%2Fpdf).

94 <https://www.theguardian.com/australia-news/2018/dec/06/labor-passes-encryption-bill-as-morrison-dodges-lower-house-vote-on-nauru>.

95 <https://www.itnews.com.au/news/labor-wont-back-full-encryption-bill-dreyfus-516333>; <https://www.innovationaus.com/labor-rejects-encryption-bill/>; <https://www.itnews.com.au/news/govt-piles-on-encryption-pressure-in-final-week-516411>.



They did this on the understanding that the laws would be reviewed *after* their enactment<sup>96</sup> – but this is not how democratic deliberation is meant to work. Proposals for new powers should be debated in detail, and any problems ironed out, before a Bill becomes part of the law of Australia.

Opposition parties play a key democratic role by proposing amendments and withholding approval until a Bill is improved to their satisfaction. But Labor let the encryption laws sail through to the keeper. Then Opposition Leader, Bill Shorten, told the public: ‘Let’s just make Australians safer over Christmas.’<sup>97</sup> The backdown followed criticisms that Labor was being soft on national security; they were even accused by the federal Energy Minister, Angus Taylor, of ‘running a protection racket for terrorist networks’.<sup>98</sup> No political party wants those perceptions to stick. There are also some benefits to bipartisanship on counter-terrorism: it projects an image of cooperation and strength for the nation. But when laws are clearly problematic, a political party in Opposition, or one that holds the balance of power, must have the courage to stand up for the best interests of the Australian people.

This quick, politicised lawmaking is the antithesis of robust debate – which should characterise a thriving democracy. It is also highly concerning because it becomes very difficult to wind powers back once they are on the statute books. The vast majority of Australia’s counter-terrorism laws remain essentially in their original form, and many fundamental issues remain.

96 <https://www.zdnet.com/article/shorten-defends-process-of-passing-encryption-laws-and-reviewing-later/>;  
<https://www.zdnet.com/article/labor-says-it-will-fix-encryption-laws-it-voted-for-last-year/>.

97 <https://www.zdnet.com/article/labor-says-it-will-fix-encryption-laws-it-voted-for-last-year/>.

98 <https://www.skynews.com.au/australia-news/labor-running-a-protection-racket-for-terrorist-networks-angus-taylor/video/f1e4b3891080ec7e9d59bc055abe35a8>.





In the counter-terrorism laws enacted since 9/11, only one significant power has been repealed. This was ASIO's power to secretly detain individuals for interrogation.<sup>99</sup> That power had been routinely criticised not only by civil rights groups and law societies, but also by government and independent inquiries. Calls for its removal were made continually from 2003 until it was eventually repealed in late 2020. It took 17 years for the federal Parliament to reverse its decision. Even then, it also expanded ASIO's powers by allowing it to compulsorily question children as young as 14, removing their right to silence.<sup>100</sup>

For adults, the compulsory questioning power is available if ASIO seeks to collect intelligence on 'politically motivated violence'.<sup>101</sup> This is defined broadly to include 'acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective'.<sup>102</sup> This means ASIO could compulsorily question someone who attended a protest march relating to any political cause – such as climate change activism or the Black Lives Matter movement – if they made threats of violence or sought to damage property. ASIO has denied it would ever use the powers in this way,<sup>103</sup> but legally speaking there is nothing to prevent it. ASIO's detention power, now repealed, was subject to a sunset clause (a legislative expiry date) which was repeatedly renewed. Other powers subject to sunset clauses – including PDOs, control orders, police stop and search powers and the declared area offence – have also had their expiry dates routinely pushed back.

99 *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) (<https://www.legislation.gov.au/Details/C2020A00134>).

100 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34BB (<https://www.legislation.gov.au/Details/C2021C00038>).

101 *Ibid* s 34BA.

102 *Ibid* s 4.

103 <https://www.theguardian.com/australia-news/2020/jul/10/asio-boss-denies-expanded-powers-could-be-used-to-target-black-lives-matter-protesters>.

These controversial laws remain in force despite repeated calls for their amendment or repeal.<sup>104</sup>

National security threats continue to evolve and expand, so there is every reason to believe this pattern of creating new laws on an urgent, politicised timetable and renewing problematic powers will continue. This undercuts Parliament's capacity to constrain and oversee executive power. A culture shift in enacting counter-terrorism laws, towards a more considered, democratic approach, is long overdue.

## PERMANENT LAWS FOR A NEW KIND OF WAR

Constitutionally speaking, Australia's counter-terrorism laws can be permanent because the threat of terrorism has no defined endpoint. While Australia is not formally at war with terrorist groups, the threat of terrorism creates an ongoing war-like scenario which justifies coercive responses to internal threats. This is clear from the case of *Thomas v Mowbray*, in which the High Court held that control orders were constitutionally valid.<sup>105</sup> While the federal Parliament does not have a specific power to legislate against terrorism, it can rely on its lawmaking power for 'naval and military defence'. Justice Callinan wrote that:

**Defence is not something of concern to a nation only in times of a declared war. Nations necessarily maintain standing armies in times even of apparent tranquillity. Threats to people and property against which the Commonwealth may, and must defend itself, can be internal as well as external.**<sup>106</sup>

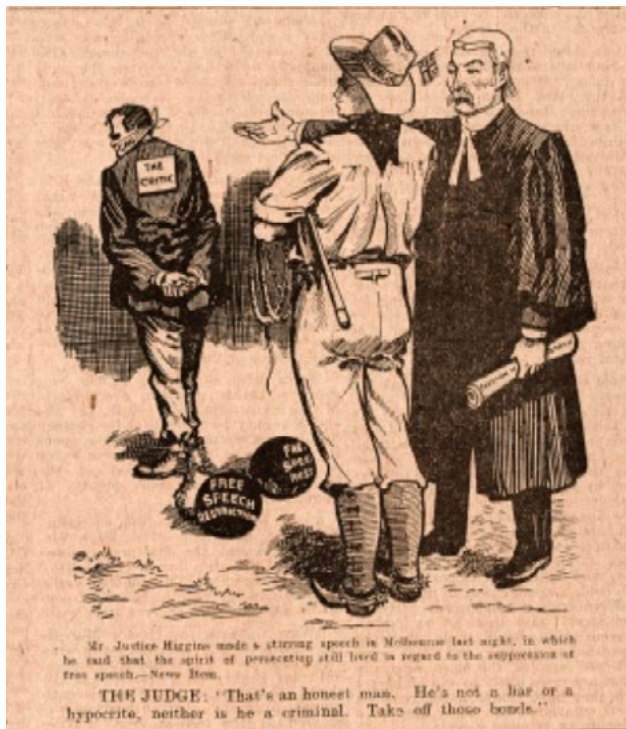
This logic continues to justify Australia's counter-terrorism laws, even as they evolve in response to new threats of foreign interference, espionage and right-wing extremism.

The permanence of our current laws contrasts with Australia's historical wartime powers. During the World Wars, many powers impacted on individual rights, but at least those laws had an end date. For example, Section 2 of the *War Precautions Act 1914* (Cth) stated from the outset that: 'This Act shall continue in operation during the continuance of the present state of war, and no longer'. The same caveat could be found in section 19 of the *National Security Act of 1939* (Cth), which was enacted in response to the threat from Nazi Germany.

<sup>104</sup> <https://www.inslm.gov.au/sites/default/files/inslm-annual-report-2012.pdf> (repeal of Control Orders and PDOs); <https://www.ag.gov.au/national-security/publications/final-report-coag-review-counter-terrorism-legislation> (repeal of PDOs).

<sup>105</sup> <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2007/33.html>.

<sup>106</sup> Ibid.



Worker, 27 April 1916. 'The Critic' is shackled with free speech restrictions. The judge is saying, "That's an honest man. He's not a liar or a hypocrite, neither is he a criminal. Take off those bonds".

Source: State Library of Victoria, <https://tols.peo.gov.au/parliament-and-the-war/war-precautions-act-1914>

There are clearly some major differences between the wartime powers and Australia's current laws. For a start, most of those offences and powers were contained in regulations, not primary legislation – that is to say, they were made by Ministers and not by Parliament. The WW1 regulations included a vague, broad-ranging offence for causing 'disaffection or alarm'.<sup>107</sup> We are also unlikely to see explicit censorship powers given to Ministers. For example, regulation 16 made under the 1939 Act allowed the Defence Minister to censor communications, postal articles, newspapers, broadcasting and films 'if it appears ... necessary or expedient to do so in the interest of the public safety, the defence of the Commonwealth, or the efficient prosecution of the war'.<sup>108</sup>

But there are sufficient parallels that demonstrate how broadly Australia's current laws have been drafted. The 1939 regulations made it a crime to prepare to do any other offence;<sup>109</sup> there are clear similarities here to preparatory offences for terrorism, foreign incursions and espionage.<sup>110</sup> Other rules allowed judges to exclude people from court proceedings or restrict the disclosure of classified information.<sup>111</sup> Similar processes are found in the NSI Act, which allows for closed hearings and sensitive information to be used in summary or redacted form.<sup>112</sup> An offence for entering enemy territory resembles the declared area offence, which prohibits entry to any area of a foreign country declared by the Foreign Minister.<sup>113</sup>

107 *War Precautions Regulations 1914* (Cth) reg 17 (<https://www.legislation.gov.au/Details/C1914L00154>).

108 *National Security (General) Regulations 1939* (Cth) reg 16 (<https://www.legislation.gov.au/Series/C1939L00087>).

109 *National Security Act 1939* (Cth) s 11 (<https://www.legislation.gov.au/Details/C1939A00015>).

110 *Criminal Code Act 1995* (Cth) s 101.6, 119.4 and 91.12 (<https://www.legislation.gov.au/Details/C2021C00038>).

111 *National Security Act 1939* (Cth) s 8 (<https://www.legislation.gov.au/Details/C1939A00015>).

112 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 26 and 31 (<https://www.legislation.gov.au/Details/C2017C00374>).

113 *National Security (General) Regulations 1939* (Cth) reg 22 (entering enemy territory) (<https://www.legislation.gov.au/Series/C1939L00087>); *Criminal Code Act 1995* (Cth) s 119.2 (<https://www.legislation.gov.au/Details/C2021C00038>).

Wartime restrictions on unlawful associations are echoed in the proscription of terrorist organisations and the many offences it triggers, including those of membership, support and association.<sup>114</sup> And while they might not allow explicit censorship, our current national security laws are drafted broadly enough to criminalise public interest journalism and are having a real chilling effect on journalists.<sup>115</sup>

In some respects, Australia's national security laws go even further than our wartime powers. The Home Affairs Minister holds an unprecedented power to strip the citizenship of dual nationals. This applies where the Minister is satisfied that a dual national aged 14 or over has been involved in terrorism overseas.<sup>116</sup> The detention of non-suspects incommunicado under PDOs, or covert detention and interrogation by ASIO, are further standout examples.

Espionage offences likewise go beyond those available in the World Wars. The War Precautions Regulations 1914 (Cth) set out the crime of espionage in the following terms:

**No person shall, without lawful authority, publish or communicate any information with respect to the movement or disposition of any of the forces, ships, or war materials of His Majesty or the Commonwealth or any of His Majesty's Allies, or with respect to the plans of any naval or military operations by any such forces or ships, or with respect to any works or measures undertaken for or connected with the fortification or defence of any place, if the information is such as is calculated to be, or might be, directly or indirectly, useful to the enemy.**<sup>117</sup>

Looking beyond the outdated language, this law made it a crime to publish or communicate information that would provide a direct military advantage to enemy forces (for example, troop numbers and movements). An expanded version in 1939 included recording or possessing information as well as publishing it.<sup>118</sup>

Australia's espionage laws were overhauled in 2002 and again in 2018. There are now 27 complex offences designed to address rising contemporary threats, such as cyber-espionage. Undoubtedly, some updates to previous versions were needed, but the offences are now broad enough to encompass a wide range of legitimate activities – including public interest journalism. One offence, punishable by 25 years imprisonment, makes it a crime to 'deal' with national security information – meaning to receive, copy, possess, communicate it or make it available – where the person is reckless as to whether this will prejudice Australia's national security.<sup>119</sup> As discussed throughout this report, the definition of national security includes anything relating to Australia's political, economic or military relations with other countries.<sup>120</sup> The information must

114 See *Criminal Code Act 1995* (Cth) Div 102 (<https://www.legislation.gov.au/Details/C2021C00183>).

115 Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, 'Risk and uncertainty in public interest journalism: The impact of espionage law on press freedom' (2021) 44(3) *Melbourne University Law Review* (advance) [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf).

116 *Citizenship Act 2007* (Cth) s 36B (<https://www.legislation.gov.au/Details/C2020C00309>).

117 *War Precautions Regulations 1914* (Cth) reg 10 (<https://www.legislation.gov.au/Details/C1914L00154>).

118 *National Security (General) Regulations 1939* (Cth) reg 17 (entering enemy territory) (<https://www.legislation.gov.au/Series/C1939L00087>).

119 *Criminal Code Act 1995* (Cth) s 91.1(2) (<https://www.legislation.gov.au/Details/C2021C00038>).

120 *Ibid* s 90.4.

be communicated or made available to a 'foreign principal',<sup>121</sup> but this could plausibly include publishing the information online, where it could be read by a foreign government, or sending it to a foreign news organisation, such as the British Broadcasting Corporation or Washington Post. Another offence, punishable by 20 years imprisonment, applies where a person deals with *any* information or article in the same way, regardless of whether it concerns national security.<sup>122</sup>

Under these offences, journalists could face significant jail time for receiving, copying, or possessing information, if they intend to pass that information to a foreign news organisation, and they are reckless as to whether doing so would prejudice Australia's national security. There are related offences for preparation, attempt and conspiracy,<sup>123</sup> meaning journalists could commit a crime merely by researching or talking to a source about a possible story. If there was a risk to national security, the laws could apply to a civil society organisation which collected information about human rights abuses for sending to the United Nations Human Rights Committee. These offences are shockingly broad. They clearly risk journalists and civil society groups being caught up in laws designed to target foreign spies.

Australia's current espionage laws are significantly broader than their wartime equivalents, which targeted collaboration with an enemy power. While the new laws encompass genuine acts of espionage, they restrict flows of information that the Australian people need to know about. This is clear from research which confirms that journalists and their editors are deciding not to publish important news stories due to fear of the espionage, metadata and other counter-terrorism laws.<sup>124</sup> In Australia's national security state, the job of investigative journalists and political reporters has become risky work indeed.

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121 Ibid s 91.1(2)(d).

122 Ibid 91.2(2).

123 Ibid ss 11.1, 11.5 and 91.12.

124 Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, 'Risk and uncertainty in public interest journalism: The impact of espionage law on press freedom' (2021) 44(3) *Melbourne University Law Review* (advance) [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf).

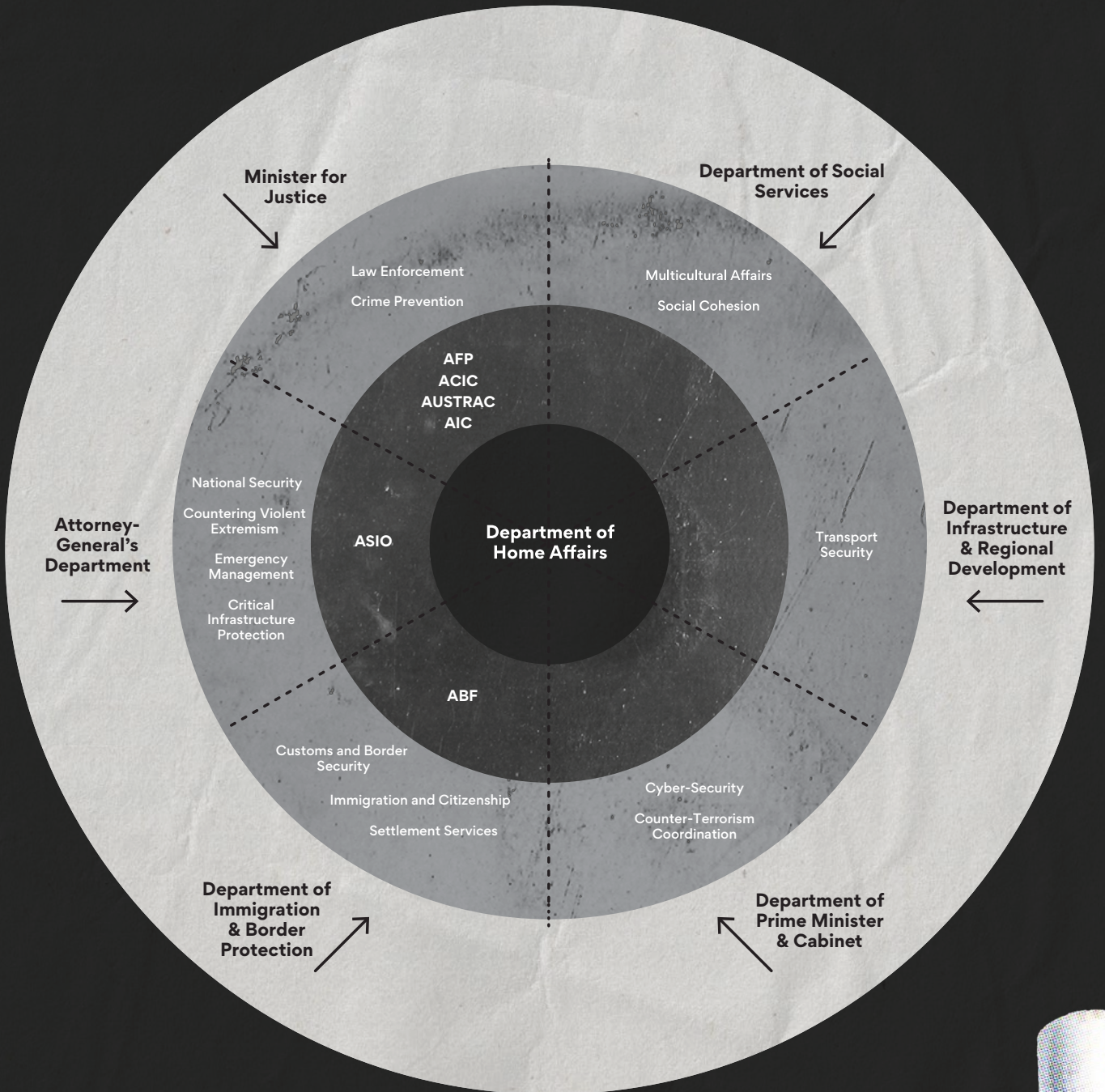
# 07 THE SUPER MINISTRY FOR SECURITY

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## NEED TO KNOW:

1. Home Affairs is a Super Ministry with wide-ranging powers over customs and immigration, counterterrorism and countering violent extremism, law enforcement, multicultural affairs, cyber-security and emergency management.
2. Despite political claims to the contrary, Home Affairs is very similar to Department of Homeland Security created by the Bush administration after 9/11. In some respects, its mandate is even wider.
3. The Home Affairs Minister has extensive statutory powers, including powers to strip the citizenship of dual nationals involved in terrorism and to determine which immigration and border security information is illegal to disclose. These make the position arguably the most powerful in Cabinet.
4. The mega-department was created as a 'captain's call' by Malcolm Turnbull from a position of political weakness. It is widely recognised that the first Home Affairs Minister, Peter Dutton, and his Secretary, Michael Pezzullo, pushed for its creation.
5. The merger was criticised repeatedly by senior Liberals. Multiple independent reviews recommended against it, and it lacked support from key agencies involved.
6. By placing diverse responsibilities in a single national security box, Home Affairs risks undermining social policy agendas. The merger also upended longstanding conventions on the effective management of national security.
7. The substantial consolidation of power in Home Affairs is antithetical to the core democratic principle that too much power should not be confined in too few hands. It also reveals the dangers of personality politics in a democratic system.

# THE SUPER MINISTRY



- Agencies moved to Home Affairs
- Policy areas moved to Home Affairs
- Departments/Portfolios with Prior Responsibility

ASIO: Australian Security Intelligence Organisation  
AFP: Australian Federal Police  
ACIC: Australian Criminal Intelligence Commission  
AUSTRAC: Australian Transaction Reports and Analysis Centre  
AIC: Australian Institute of Criminology  
ABF: Australian Border Force



# HOMELAND SECURITY DOWN UNDER

The story of Australia's counter-terrorism laws is one of growing power that won't be undone. This is also the story of the powerful Home Affairs Department. Home Affairs was created in late 2017 to consolidate multiple, broadly security-related, Departments under a single portfolio. It has responsibility over customs and immigration, counter-terrorism, countering violent extremism, national security, law enforcement, multicultural affairs, critical infrastructure protection, transport security and emergency management. It acquired these functions in whole or part from other, already large, portfolios. For example, responsibility for ASIO was taken from the Attorney-General's Department, but the Attorney-General continues to sign off on ASIO warrants and authorisations.<sup>125</sup>

In language reminiscent of Australia's founding, then Prime Minister, Malcolm Turnbull, said Home Affairs would simply be a 'federation, if you will, of border and security agencies'.<sup>126</sup> 'Let me be quite clear', he stressed, 'this is not a United States-style Department of Homeland Security'.<sup>127</sup> Given the connotations of Homeland Security with Bush-era responses to terrorism, including the PATRIOT Act, the wars in Afghanistan and Iraq, extraordinary rendition and enhanced interrogation, presenting Home Affairs as a different kind of beast was understandable.

Nonetheless, there are obvious similarities between Home Affairs and the DHS. Both were created as conglomerate departments in response to post-9/11 terrorism, requiring a 'wholesale reorganization' of national security efforts.<sup>128</sup> The UK Home Office, on the other hand, dates to the 1700s.<sup>129</sup> Home Affairs and DHS include emergency management, customs and transport security, which are added to immigration, law enforcement and counter-terrorism, creating a holistic national security response. Both follow the logic of 'homeland security', which recognises that

**Operational spheres as seemingly disparate as counterterrorism, law enforcement in the face of massive criminal activity, securing transport systems, borders, and critical infrastructure, and coping with ... crisis situations are all essentially part of the same effort.**<sup>130</sup>

125 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B (<https://www.legislation.gov.au/Details/C2021C00038>).

126 <https://www.theguardian.com/australia-news/2017/jul/18/peter-dutton-control-home-affairs-super-ministry>.

127 Ibid.

128 <https://apps.dtic.mil/sti/pdfs/ADA453727.pdf>.

129 <https://www.british-history.ac.uk/office-holders/vol5/pp1-10>.

130 <https://www.hsaj.org/articles/69>.





There are some differences. Australia does not, for example, have a secret service or separate coast guard. However, the common guiding mission – to protect the ‘homeland’ from diverse security threats – is clear. In some respects, Home Affairs has an even broader mandate than DHS. ASIO and the AFP now fall within Home Affairs, whereas the US Federal Bureau of Investigation (FBI) – their closest analogue – falls within the Department of Justice. Home Affairs oversees AUSTRAC, which conducts anti-money laundering and counter-terrorism financing operations, whereas that task remains with the US State Department.

This centralised approach to national security contrasts with the UK approach, which is more diversified. Like Home Affairs, the UK’s Home Office has overall responsibility for immigration and counterterrorism, but emergency management falls separately under the Civil Contingencies Secretariat, customs under HM Revenue and Customs, and transport and aviation security under the Department of Transport. In other words, the UK ‘does not view counterterrorism and emergency management ... as part of a common operational sphere’.<sup>131</sup>

Ultimately, Home Affairs is its own creation. Being similar to DHS is not necessarily a bad thing, and homeland security approaches can be seen elsewhere – including in Canada (under Public Safety Canada) and Singapore (under the Ministry of Home Affairs or so-called ‘Home Team’).<sup>132</sup> However, it is notable that the Coalition government sought to avoid any comparison to DHS and claimed greater similarities to the UK model, when on closer inspection the reality is something quite different.

<sup>131</sup> Ibid.

<sup>132</sup> <https://www.publicsafety.gc.ca/index-en.aspx>; <https://www.mha.gov.sg/who-we-are>.

# THE MOST POWERFUL MINISTER IN AUSTRALIA?

Australia's Home Affairs Minister has significant, unprecedented, wide-ranging powers. Peter Dutton was Australia's first Home Affairs Minister, holding the position for more than three years until March 2021. The office is now held by Karen Andrews. Among these far-reaching powers, the Minister can:

- Designate countries as sites for regional processing of asylum seekers;<sup>133</sup>
- Refuse or cancel visas on character grounds;<sup>134</sup>
- Order goods to be detained by customs on public interest grounds;<sup>135</sup>
- Prohibit certain types of cargo from entering Australia, including from a class of persons or a particular country;<sup>136</sup>
- Issue directions and guidelines to the Director-General of ASIO and the Australian Border Force Commissioner;<sup>137</sup>
- Decide that a person who is subject to an ASIO security assessment not be provided with a statement of grounds for that assessment, or even notified that it has been made;<sup>138</sup>
- Issue a certificate to prevent the disclosure of information relating to adverse security assessments in the Administrative Appeals Tribunal (AAT);<sup>139</sup>
- Decide what constitutes 'Immigration and Border Protection Information' for the purposes of secrecy offences in the Australian Border Force Act 2015 (Cth);<sup>140</sup>
- Consent to requests for interim control orders;<sup>141</sup>
- Issues notices to stop welfare being paid on security grounds;<sup>142</sup> and
- Strip the Australian citizenship of a person the Minister is personally satisfied is a dual national who has engaged in terrorism-related conduct.<sup>143</sup>

133 *Migration Act 1958* (Cth) 198AB (<https://www.legislation.gov.au/Details/C2021C00220>).

134 *Ibid* s 501.

135 *Customs Act 1901* (Cth) s 77EA (<https://www.legislation.gov.au/Details/C2021C00197>).

136 *Aviation Transport Security Act 2004* (Cth) s 65B (<https://www.legislation.gov.au/Details/C2021C00252>).

137 *Australian Border Force Act 2015* (Cth) s 23 (<https://www.legislation.gov.au/Details/C2020C00202>); *Australian Security Intelligence Organisation 1979* (Cth) s 8A (<https://www.legislation.gov.au/Details/C2021C00038>).

138 *Australian Security Intelligence Organisation 1979* (Cth) s 38 (<https://www.legislation.gov.au/Details/C2021C00038>).

139 *Administrative Appeals Tribunal Act 1975* (Cth) s 39B (<https://www.legislation.gov.au/Details/C2021C00063>).

140 *Australian Border Force Act 2015* (Cth) s 4(7) (<https://www.legislation.gov.au/Details/C2020C00202>).

141 *Criminal Code Act 1995* (Cth) s 104.2 (<https://www.legislation.gov.au/Details/C2021C00038>).

142 *Social Security Act 1991* (Cth) s 38N (<https://www.legislation.gov.au/Details/C2021C00273>).

143 *Australian Citizenship Act 2007* (Cth) s 36B (<https://www.legislation.gov.au/Details/C2020C00309>).



This long list of powers makes the Home Affairs Minister arguably the most powerful person in Cabinet. The Prime Minister sits at the head of government and plays many important roles, such as chairing National Cabinet. However, the Home Affairs Minister holds extensive statutory powers that directly impact the rights of individuals, by refusing visas, cancelling welfare payments and, remarkably, even stripping citizenship. The Minister can enhance secrecy and undermine due process by withholding information from individuals and the AAT, and by determining which immigration and border security information is criminal to disclose. The power to determine the scope of a criminal offence is particularly concerning, as this function, under the separation of powers, is one traditionally done by Parliament.

# MAKING A BAD IDEA A REALITY

It is striking that so much power was consolidated into Home Affairs when no expert seemingly recommended it. It might also seem surprising in hindsight that the proposal was, for a long time, a key Labor policy which senior Liberals criticised repeatedly.<sup>144</sup>

The idea was first raised publicly by Kim Beazley, as Opposition Leader, in the lead-up to the 2001 election.<sup>145</sup> It was subsequently echoed by Simon Crean and Mark Latham. In response to Labor's 2004 election policy, then Prime Minister, John Howard, said the proposals were 'ill suited to Australia's national security needs and if implemented will be counterproductive, leaving Australians less secure'.<sup>146</sup> He claimed that 'a Department of Homeland Security would represent an expensive exercise in bureaucratic reshuffling which will undermine the effective and proven systems already in place'.<sup>147</sup> In 2007, in response to the same election policy under Kevin Rudd, then Commonwealth Attorney-General, Philip Ruddock, repeated almost verbatim the same criticism.<sup>148</sup>

The idea of creating a Home Affairs Department – or, as it was referred to at that time, a Homeland Security Department – continued as Labor policy until 2008. Rudd, then Prime Minister, commissioned an independent Review of Homeland and Border Security by Ric Smith, a former Defence department secretary and Ambassador to China and Indonesia. Smith panned the idea:

**This approach raises several risks. It could disrupt unduly the successful and effective work of the agencies concerned and create significant new costs. Large organisations tend to be inward-looking, siloed and slow to adapt, and thus ill-suited to the dynamic security environment. For a number of the agencies concerned national security considerations are embedded with a broad range of other service delivery, policy, program and regulatory functions which could be jeopardised by restructuring them around their security roles.**<sup>149</sup>

Labor then dropped the proposal, and Malcolm Turnbull (who would later create the Super Ministry) said we could all be thankful for Rudd's backflip. He called it 'a very poorly conceived idea – a cheap copy of an American experiment'.<sup>150</sup>

144 For a detailed account, see [https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5394016/upload\\_binary/5394016.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/5394016/upload_binary/5394016.pdf).

145 [https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/H9556/upload\\_binary/h95566.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/H9556/upload_binary/h95566.pdf).

146 [https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/4EOE6/upload\\_binary/4EOE6.pdf](https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/4EOE6/upload_binary/4EOE6.pdf).

147 Ibid.

148 [https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/SHIO6/upload\\_binary/shio61.pdf](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/SHIO6/upload_binary/shio61.pdf).

149 <http://ict-industry-reports.com.au/wp-content/uploads/sites/4/2013/10/2008-Review-Homeland-and-Border-Security-Ric-Smith-June-2008.pdf>.

150 [https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-12-04/0047/hansard\\_frag.pdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-12-04/0047/hansard_frag.pdf).

# THE PATH TO HOME AFFAIRS

Labor Party Proposes a Department of Homeland Security

## OCTOBER 2001



Opposition Leader Kim Beazley, Labor Party election Policy: **“Labor will formally adopt the concept of ‘homeland security’.** This means that in addition to protecting our sea, air, immigration and electronic borders ... we will improve our ability to protect important physical assets and installations within our borders.”

## OCTOBER 2004

Prime Minister John Howard, Coalition Election Policy: **“A Department of Homeland Security is “ill suited to Australia’s national security needs and if implemented will be counterproductive, leaving Australians less secure”**



## OCTOBER 2007

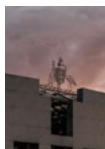


The Hon Arch Bevis MP, Labor Shadow Minister for Homeland Security: **“The Howard Government’s continuing insistence on splitting these functions over a number of departments invites overlap, wastage, confusion and missed opportunities.”**



Attorney-General Philip Ruddock: **“A Department of Homeland Security would not enhance current security arrangements. It would be expensive and it would create bureaucratic upheaval that could undermine well-tested arrangements.”**

## DECEMBER 2008



Independent Review by Ric Smith AO PSM, commissioned by Prime Minister Kevin Rudd: **“This approach raises several risks. It could disrupt unduly the successful and effective work of the agencies concerned and create significant new costs. Large organisations tend to be inward-looking, siloed and slow to adapt, and thus ill-suited to the dynamic security environment.”**

Following an independent review, Labor Party drops proposal

## DECEMBER 2008



Opposition Leader Malcolm Turnbull: **“We note that the Labor Party has abandoned its election pledge to create a department of homeland security. This is one broken promise for which we can all be very thankful. It was a very poorly conceived idea—a cheap copy of an American experiment. It was crafted more to capture campaign headlines than as a serious public policy reform. “**

## SEPTEMBER 2014

Minister for Foreign Affairs Julie Bishop: **“If there were such a proposal, it would have to demonstrate any current failures in co-operation between the intelligence agencies, federal and state police and Defence and I am not aware of any such failures”.**



## JANUARY 2015



Review of Australia’s Counter-Terrorism Machinery by Department of Prime Minister & Cabinet: **“A ‘super-agency’ would likely be less, not more, responsive as large agencies tend to be less agile, less adaptable and more inward looking than smaller departments.”**

## FEBRUARY 2015



Prime Minister Tony Abbott: **“The Review confirmed that Australia has strong, well-coordinated counter-terrorism arrangements and there is no reason to make major structural changes.”**

## JULY 2017



Prime Minister Malcolm Turnbull: **“The arrangements that I have announced are ones that are logical, they’re rational, they make operational sense and they will enable Peter Dutton as the Minister for Home Affairs to be able to have the responsibility for those key agencies that are defending, preserving, protecting our national security at home.”**

Department of Home Affairs Established



The idea seemingly went off the radar until 2014, when rumours began circulating that the Coalition government, now in power, would create the Super Ministry. Scott Morrison was tipped to take on the new portfolio, following his efforts as Immigration Minister running Operation Sovereign Borders (OSB). But the agencies themselves reportedly opposed the idea,<sup>151</sup> as did other senior Liberals. Then Foreign Minister, Julie Bishop, and Commonwealth Attorney-General, George Brandis, both said publicly there were no apparent deficiencies in cooperation that would justify the merger.<sup>152</sup> Ultimately, following an independent Review of Australia’s Counter-Terrorism Machinery (Machinery Review), then Prime Minister, Tony Abbott confirmed that ‘Australia has strong, well-coordinated counter-terrorism arrangements and there is no reason to make major structural changes’.<sup>153</sup>

In early 2017, rumours emerged once more in the lead-up to the release of an Independent Intelligence Review. That review did not recommend the change either, but by the end of the year, Home Affairs was a new department and ministerial portfolio. ASIO and the AFP apparently did not support the merger; neither did Bishop, Brandis, nor Marise Payne as Defence Minister.<sup>154</sup> In response to claims the move was political, then Prime Minister, Malcolm Turnbull, said that ‘[h]aving these agencies together is common sense, it is logical’.<sup>155</sup> From his earlier criticism of Rudd’s backflip, calling it a ‘poorly conceived idea’,<sup>156</sup> his own backflip could not have been more obvious.

151 <https://www.smh.com.au/opinion/malcolm-turnbulls-star-rises-as-tony-abbott-revels-in-ministers-jockeying-20141024-11bd8z.html>.

152 [https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3425334/upload\\_binary/3425334.pdf](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3425334/upload_binary/3425334.pdf); <https://www.theage.com.au/politics/federal/national-security-experts-cast-doubt-on-push-for-usstyle-department-of-homeland-security-20170307-gusogc.html>.

153 [https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3676124/upload\\_binary/3676124.pdf](https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/3676124/upload_binary/3676124.pdf).

154 <https://www.theage.com.au/politics/federal/national-security-experts-cast-doubt-on-push-for-usstyle-department-of-homeland-security-20170307-gusogc.html>.

155 <https://www.abc.net.au/news/2017-07-19/fears-immigration-short-changed-in-peter-dutton-super-portfolio/8721930>.

156 [https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-12-04/0047/hansard\\_frag.pdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2008-12-04/0047/hansard_frag.pdf).



What then explains the creation of Home Affairs, given this political to-and-froing, and the apparent lack of agency, expert – and even Liberal party – support? Three factors made the climate right for this radical change to Australia’s national security apparatus.

First, the rise of Islamic State had created an appetite for expanding national security powers. This resulted in a steady stream of new counter-terrorism laws from 2014, which enlarged executive power across many areas.

Second, the changes followed the apparent success of OSB. OSB involved a merger of immigration and customs into the Australian Border Force (ABF), which provided the foundation for the department to come. While that operation was heavily criticised for its tough approach to asylum seekers and impenetrable secrecy, it was viewed amongst the Liberal Party and its conservative base as delivering successfully on a key election promise: to ‘Stop the Boats.’<sup>157</sup> In particular, OSB showed that a single Minister could coordinate more than a dozen immigration and security agencies, across various portfolios, in a substantial Joint Agency Task Force.<sup>158</sup>

<sup>157</sup> <https://minister.homeaffairs.gov.au/peterdutton/Pages/opinion-operation-sovereign-borders-milestone.aspx>.

<sup>158</sup> <https://www.smh.com.au/opinion/malcolm-turnbulls-star-rises-as-tony-abbott-revels-in-ministers-jockeying-20141024-11bd8z.html>.

The third and arguably most important factor is that Turnbull was in a weak leadership position, facing challenges from the right of his own party. Of course, he denied the move was political, saying his only concern was ‘the safety of all Australians’.<sup>159</sup> But it is impossible to ignore the political machinations and personal conflicts that led to Turnbull being challenged for the Liberal Party leadership by Peter Dutton and Scott Morrison, then replaced as leader before the 2019 federal election. According to political journalists for *The Guardian*, Katharine Murphy and Christopher Knaus:

**Turnbull agreed to establish the home affairs bureaucracy from a position of political weakness. Dutton, the government’s most powerful conservative, and then a key member of the prime minister’s Praetorian guard, wanted his mega-department, and it would have been almost impossible in the circumstances for Turnbull to decline that ambition. Realpolitik, as much as operational need, drove the on-balance decision to say yes.<sup>160</sup>**

This coincidence of factors meant that Australia got its Home Affairs Super Ministry, more than 15 years after the idea was floated by Labor.

It is impossible to ignore the personal role and influence of Peter Dutton and his powerful first secretary, Michael Pezzullo, in making Home Affairs a reality. The Super Ministry is widely seen as their baby, and the result of a persistent internal campaign by Pezzullo to establish the Super Ministry since at least 2001.<sup>161</sup> Pezzullo worked as Kim Beazley’s deputy chief of staff in Opposition, and before that, for Labor Foreign Minister Gareth Evans. According to Evans, Pezzullo ‘has always been a “fierce warrior” for the home affairs apparatus he now heads’.<sup>162</sup> He ‘has been able to persuade successive prime ministers and ministers that this structure is the way forward’.<sup>163</sup> Pezzullo, a veteran, ‘empire-building’ bureaucrat,<sup>164</sup> is the common denominator that explains why the idea was first raised by Labor and rolled out by a Liberal government so many years later.

159 <https://www.abc.net.au/news/2017-07-19/fears-immigration-short-changed-in-peter-dutton-super-portfolio/8721930>.

160 <https://www.theguardian.com/australia-news/2019/jun/15/how-did-mike-pezzullo-become-australias-most-powerful-bureaucrat>.

161 Ibid.

162 Ibid.

163 Ibid.

164 Ibid.



# A DEMOCRATIC DEFICIT

Despite the lack of historical support for the idea, Australia now has a Super Ministry for Security that is unlikely to be split apart. There are several reasons why this should raise alarm bells for Australian democracy.

First, Home Affairs views multiple policy areas through a national security lens. This can affect the priorities, values and independence of its constituent agencies – from migration to policing. This is why the Refugee Council opposed the merger, as it furthers misunderstandings that asylum seekers are a national security issue.<sup>165</sup> The same can be said for multicultural affairs, which is unlikely to benefit from stronger links to national security.

Even the AFP, as a federal law enforcement agency more aligned with the concept of homeland security, has opposed the Super Ministry on the grounds of independence. The Australian Federal Police Association, which represents 6500 AFP officers, has called the situation ‘embarrassing’, because Home Affairs makes the AFP ‘look the least independent police force in Australia’.<sup>166</sup> ‘Surely the other police forces are laughing at us’, the President of the Australian Police Force Association, Angela Smith, told reporters from The Guardian.<sup>167</sup>

A second concern is that a substantial consolidation of power was achieved under the personal influence of Dutton and Pezzullo, and against the expert advice of independent reviews. Both the Review of Homeland and Border Security commissioned by Kevin Rudd, and the Machinery Review by Tony Abbott, recommended strengthening existing structures rather than overhauling them. The latter found there was ‘no compelling reason to change the current system of ministerial oversight and departmental structures’.<sup>168</sup> It concluded that ‘a Department of Home Affairs would not be an optimal response to the terrorism threat in Australia’.<sup>169</sup>

The 2017 Independent Intelligence Review did not specifically recommend against it, but it did not really discuss it either. The authors said their ‘starting point was not oriented to significant changes’, even though the terms of reference asked whether the Australian Intelligence Community was ‘structured appropriately’ and ensured ‘effective co-ordination and contestability’.<sup>170</sup> The structural changes recommended by the authors were to create the Office of National Intelligence (ONI) and to put the Australian Signals Directorate (ASD) on a statutory footing.<sup>171</sup>

165 <https://www.abc.net.au/news/2017-07-19/fears-immigration-short-changed-in-peter-dutton-super-portfolio/8721930>.

166 <https://www.theguardian.com/australia-news/2019/jun/15/how-did-mike-pezzullo-become-australias-most-powerful-bureaucrat>.

167 Ibid.

168 <https://www.homeaffairs.gov.au/nat-security/files/review-australia-ct-machinery.pdf>.

169 Ibid.

170 <https://pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf>.

171 Ibid.

A core democratic principle, which distinguishes democracies from tyrannies and authoritarian states, is that power should be divided to ensure adequate oversight and improve checks and balances. Any substantial consolidation of power should be viewed with caution – but especially so when it is the product of individual ambitions and runs against expert advice from within and outside government.

In matters of national security, this is a practical concern as much as a principled one. Professor John Blaxland, national security expert at the Australian National University and the author of ASIO's official history, called the merger 'a fraught move'.<sup>172</sup> He explained that Australia's intelligence community has long been structured to 'maintain the separation of powers while upholding robust accountability'.<sup>173</sup> Intelligence functions and ministerial responsibilities are divided to promote 'a high degree of healthy contestability concerning intelligence judgments and operational options'.<sup>174</sup> This diffusion of power has 'come to be broadly accepted as the best way of managing intelligence and security affairs'.<sup>175</sup> It contributes to better intelligence outcomes, in the same way that collective decision-making in a democracy produces better outcomes for the people. By contrast, Home Affairs puts everything in the same homeland security box, merging intelligence, law enforcement and social policy functions. According to Blaxland, this 'upends long-standing conventions' as to how national security affairs should be managed.<sup>176</sup>

A third concern is that Home Affairs avoids a key avenue for oversight and accountability. The Super Ministry is a key component of the National Intelligence Community (NIC), but it is not subject to oversight by the IGIS. The IGIS is an independent statutory office that oversees Australia's intelligence agencies; it investigates complaints, conducts inquiries and undertakes inspections, with full access to classified information. It has strong investigatory powers akin to those of a royal commission.

One of the key recommendations of the 2017 Intelligence Review was for IGIS to oversee the intelligence functions of any NIC agency, not just the core ones like ASIO and ASD.<sup>177</sup> A Bill currently before the federal Parliament would extend IGIS's oversight to AUSTRAC and the Australian Criminal Intelligence Commission, which are also NIC members, but still not to Home Affairs.<sup>178</sup> This is despite Home Affairs performing 'classical intelligence functions' in its Intelligence Division.<sup>179</sup> Home Affairs has four 'principal enduring tasks', one of which is to 'produce intelligence outcomes'.<sup>180</sup> Its Intelligence Division provides strategic intelligence analysis, as well as operational and tactical support to Australian Border Force.<sup>181</sup> These are not subject to the same type and depth of oversight that is provided by IGIS to other agencies.

172 <https://theconversation.com/the-new-department-of-home-affairs-is-unnecessary-and-seems-to-be-more-about-politics-than-reform-81161>.

173 Ibid.

174 Ibid.

175 Ibid.

176 Ibid.

177 <https://pmc.gov.au/sites/default/files/publications/2017-Independent-Intelligence-Review.pdf>.

178 *Intelligence Oversight and Other Legislation Amendment (Integrity Measures) Bill 2020* (Cth) ([https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=r6655](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6655)).

179 <https://www.homeaffairs.gov.au/foi/files/2019/fa-190600628-document-released.PDF>.

180 Ibid.

181 Ibid.



Ultimately, the creation of Home Affairs shows the significant influence that politics and personalities can have in a democracy, even in the face of contrary expert advice. While parliamentary approval of legislation is needed to adjust various statutory powers and technical provisions,<sup>182</sup> the new Ministry was a ‘captain’s call’ by Prime Minister Turnbull,<sup>183</sup> whose weak hold on the leadership made him vulnerable to the ambitions of Dutton and Pezzullo.

Dutton’s personal influence can be seen in his early actions as Minister for Defence. He overruled a decision by the Chief of Defence to strip medals of Australian special forces soldiers in Afghanistan, following the IGADF inquiry into alleged war crimes.<sup>184</sup> He threatened to tear up a \$90 billion deal with a French submarine contractor, and provoked China by saying conflict over Taiwan could not be discounted and the ADF was ready to act.<sup>185</sup> Pezzullo once more made this a double-act by warning, in an Anzac Day speech, that the drums of war were beating ‘ever closer’ – a comment widely viewed as ‘hawkish and provocative’.<sup>186</sup> Dutton is, by many accounts, ‘out to make a name for himself’ in the position.<sup>187</sup> If Pezzullo joins Defence as Dutton’s secretary, their influence on the future of Australian defence policy is likely to be extensive.

The most concerning action taken by Dutton in his new role did not even relate to defence policy. In April 2021, he commenced legal proceedings against a refugee activist for allegedly making defamatory comments on Twitter.<sup>188</sup> This followed threats, made in an interview on 2GB, that there would be a ‘price to pay’ for social media users who defame him.<sup>189</sup> ‘I’m going to start to pick out some of them to sue’, he warned listeners.<sup>190</sup> The idea of a Defence Minister suing an activist on Twitter – when the main tweet in question received a mere 14 likes, 13 retweets, and one reply – suggests a level of control and avoidance of criticism that is essentially anti-democratic.<sup>191</sup> It epitomises a culture of controlling media narratives that has come to characterise the current Coalition government.

182 *Home Affairs and Integrity Agencies Legislation Amendment Act 2018* (Cth) (<https://www.legislation.gov.au/Details/C2018A00031>).

183 <https://www.afp.com/politics/malcolm-turnbull-announces-home-affairs-department-in-national-security-overhaul-20170718-gxd8qq>.

184 <https://www.theguardian.com/australia-news/2021/apr/19/peter-dutton-overrules-decision-to-strip-medals-from-sas-soldiers-who-served-in-afghanistan>.

185 <https://www.theguardian.com/australia-news/2021/may/01/dutton-digs-in-the-new-defence-minister-is-making-some-people-uncomfortable>.

186 <https://www.abc.net.au/news/2021-04-28/mike-pezzullo-war-china-drumbeat-may-be-seeking-defence-job/100098708>.

187 <https://www.theguardian.com/australia-news/2021/may/01/dutton-digs-in-the-new-defence-minister-is-making-some-people-uncomfortable>.

188 <https://www.theguardian.com/australia-news/2021/apr/27/peter-dutton-sues-refugee-activist-shane-bazzi-for-defamation-over-apologist-tweet>.

189 <https://www.2gb.com/peter-dutton-threatens-to-sue-the-twitterati/>.

190 Ibid.

191 <https://www.theaustralian.com.au/breaking-news/activist-defends-peter-dutton-defamation-lawsuit-as-honest-opinion/news-story/822b61087556815cd09f60fe4d83b3bc>.

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# 08 HOW GOOD IS SECRECY?

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## NEED TO KNOW:

1. Australia's reputation as an open democracy has been damaged by sweeping counter-terrorism laws and investigations into journalists and whistleblowers.
2. Senior members of government have issued directives not to prosecute journalists for acting in the public interest, but these promises do not go far enough.
3. With only one exception, there are no legal barriers to prosecuting journalists who disclose information in the public interest.
4. Investigations into journalists and whistleblowers reflect a wider culture of secrecy across government, including a reluctance to comply with FOI requests.
5. A secretive culture has been a hallmark of the current Coalition government since at least the election of Tony Abbott as Prime Minister in 2013.
6. Home Affairs has been singled out by the OAIC, which found the department lacks adequate FOI systems and culture.
7. Government secrecy can be explained by broad interpretations of national security, a managerialist ethos, outsourcing to the private sector and a need to control public narratives in a media-rich environment.



# AUSTRALIA'S PRESS FREEDOM PROBLEM

On the morning of Monday 21 October 2019, people across Australia picked up their newspapers to find the front pages a mass of blacked out text. This bold statement against media censorship was led by The Right to Know Coalition – an unlikely alliance of Australian news outlets who found themselves united in a fight for press freedom. Just decipherable through the mass of black lines was the message: ‘When government keeps the truth from you, what are they covering up?’<sup>192</sup> The front-page protest aimed to highlight Australia’s expanding national security laws and the AFP raids on Annika Smethurst and the ABC. Together, these suggested a concerted attack on public interest journalism. The campaign attracted international attention, with The New York Times reporting that ‘no other developed democracy has as strong a stranglehold on its secrets as Australia’.<sup>193</sup>

Australia’s national security state has damaged our reputation as an open democracy with a vibrant free press. In 2021, Australia ranked 25th on the RSF Global Press Freedom Index - six places lower than 2018.<sup>194</sup> Ranked higher for offering greater protection to press freedom is Suriname, where the ‘public expression of hatred’ towards government is punishable by seven years in prison.<sup>195</sup> Its President, Desi Bouterse, has been amnestied for the 1982 murders of 15 political opponents, including five journalists.<sup>196</sup> Australia also falls behind Samoa, where the

<sup>192</sup> <https://www.theguardian.com/media/2019/oct/21/australian-newspapers-black-out-front-pages-to-fight-back-against-secrecy-laws>.

<sup>193</sup> Archived at <https://perma.cc/86G9-HRE4>.

<sup>194</sup> <https://rsf.org/en/australia>.

<sup>195</sup> <https://rsf.org/en/suriname>.

<sup>196</sup> <https://rsf.org/en/suriname>.

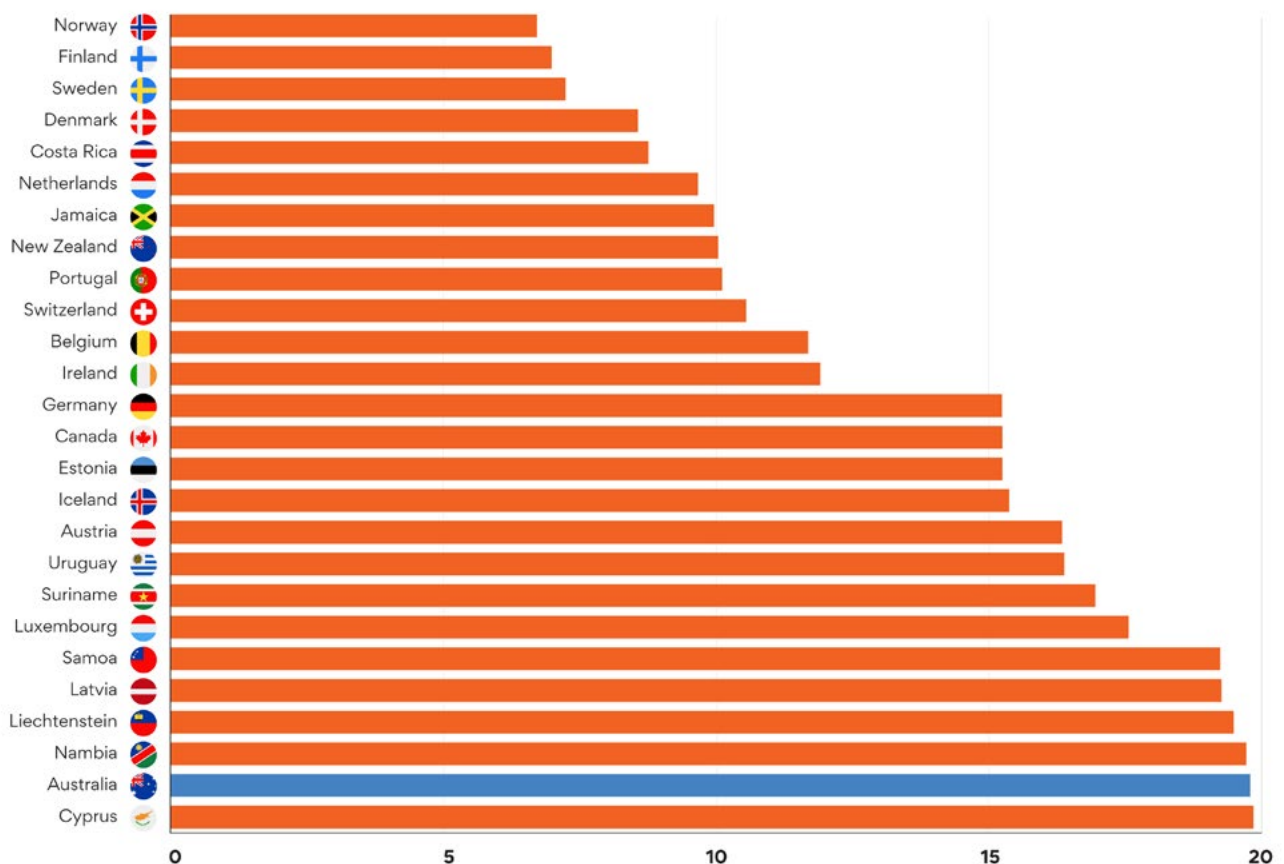
Prime Minister, Tuilaepa Sa’ilele Maleilegaoi, threatened to shut down Facebook and warned citizens not to ‘play with fire’ by criticising the government online.<sup>197</sup>

To be clear, attacks on press freedom are a global problem. President Trump’s animosity towards independent media was on show during his press conferences, with disagreement and criticism routinely dismissed as ‘Fake News’. The US and the UK have gone to great lengths to prosecute whistleblowers, including Julian Assange, Chelsea Manning and Edward Snowden. In Hong Kong, in June 2021, Apple Daily announced its closure after its newsrooms were raided by some 500 police officers and its leadership team imprisoned under sweeping national security legislation.<sup>198</sup> Indeed, in the most recent Global Press Freedom Index, journalism was restricted or blocked in a staggering 73% of countries surveyed.<sup>199</sup>

Global problem or not, attacks on press freedom should not be accepted by the Australian people. Our country ought to be a world leader in fostering vibrant political discourse across a free media landscape. Our worsening position in these global rankings provides immediate cause for concern.

### The World Press Freedom Index

180 countries are given scores from 0-100 according to the level of freedom available to journalists, in 2021 Australia ranked 25th



Source: [https://rsf.org/en/ranking\\_table](https://rsf.org/en/ranking_table)

197 <https://rsf.org/en/samoa>.

198 <https://www.bbc.com/news/world-asia-china-57578926>.

199 <https://time.com/5956009/press-freedom/>.



# CRACKING DOWN ON WHISTLEBLOWERS

Australia's counter-terrorism laws, especially the sweeping secrecy and espionage offences, are a major reason for this declining ranking. Australia not only has the most extensive and complex national security legislation in the western world; it also remains the only liberal democracy that has no codified national human rights protection. Unlike comparable democracies and our closest allies, in Australia, free speech and press freedom can be undermined by Parliament with no viable recourse in the courts.

Importantly, it is not just the fact that broad national security laws are available for authorities to use. It is also the development of political attitudes which suggest a willingness to use them against journalists, whistleblowers and lawyers. Until recently, a certain respect seemed to exist between government and the media. Media organisations felt some assurance that public interest reporting (even if it embarrassed the government) was valued and would not lead to legal action. Explicit protections were perhaps less necessary, because an unspoken rule said that journalists would not be prosecuted holding the government accountable. Today, government attitudes to media reporting have shifted, and assurances of protection are fragile.

This cultural shift can be seen in multiple investigations into the conduct of journalists, lawyers and whistleblowers who speak out in the public interest. Among these brave individuals are Dan Oakes and Sam Clark, the two journalists who were the target of the ABC raid; David McBride, the defence lawyer who gave them the Afghan Files; Annika Smethurst and her alleged source in ASD, who revealed proposals to expand ASD's powers; Witness K and Bernard Collaery, who revealed the ASIS bugging scandal; and Richard Boyle, who blew the whistle on ATO's unfair debt collection practices. These stories revealed serious wrongdoing and were clearly in the public interest. They were disclosed responsibly and seemingly raised no threat to life or ongoing operations. The resulting investigations and prosecutions appear to have more to do with avoiding political embarrassment and maintaining a hard-line on government secrecy, than with genuine threats to life or national security.

This willingness to crack down on public interest reporting undermines the health of our democracy. It sends a clear message to journalists and others who wish to speak out against government misconduct to be very careful, or else they will face a similar fate. The threat remains even when prosecutions are eventually dropped or charges reduced, because, legally speaking, there is nothing in place to prevent similar prosecutions from moving forward.



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# PROTECTED BY A PROMISE

Senior members of government have offered assurances that journalists will not be prosecuted for public interest reporting – some of these more believable than others. George Brandis as Attorney-General promised there was ‘no possibility ... that in our liberal democracy a journalist would ever be prosecuted for doing their job’.<sup>200</sup> He instructed the Commonwealth Director of Public Prosecutions to obtain his consent before prosecuting any reporter. Similar comments and directives were later made by Peter Dutton as Home Affairs Minister and Brandis’ successor, Christian Porter.<sup>201</sup>

Dutton’s initial response to the outcry over the ABC and Smethurst raids was to say that ‘nobody is above the law and the police have a job to do’.<sup>202</sup> Facing widespread criticism for these comments, he later backed down and announced a directive to the AFP, that they should not investigate a journalist without his consent.<sup>203</sup> This was done, perhaps sheepishly, at 4pm on a Friday – a time known as ‘take out the trash day’ in political reporting circles: ‘the perfect opportunity to bury bad news’.<sup>204</sup> His assurance was unconvincing, especially as Scott Morrison’s only response as Prime Minister was to say: ‘it never troubles me that our laws are being upheld’.<sup>205</sup> Investigating journalists and whistleblowers ruffled few feathers in Liberal party leadership, even if widespread condemnation meant a public backdown was needed.

Executive directives not to prosecute journalists are little more than promises. They turn on discretion and involve a judgement call whether to prosecute or not. Prosecution is still legally available. In Australia’s vast secrecy and disclosure offences, only one journalism-based defence exists. This protects journalists acting in the public interest from being prosecuted for dealing with or communicating sensitive information received from Commonwealth officers.<sup>206</sup> It was the product of extensive advocacy by media organisations during the drafting of the Bill and parliamentary debate.<sup>207</sup> This ‘news reporting defence’ shows that legal protections for journalists can be included in disclosure offences, if politicians are willing to add them. But the same protections are absent from all other secrecy and disclosure offences in Australia’s counter-terrorism laws. Without stronger legal protection along these lines, the attitude of particular politicians at particular times can determine whether a journalist or whistleblower walks free or spends years in jail.

200 <https://www.theguardian.com/australia-news/2014/oct/30/george-brandis-attorney-general-approve-prosecution-journalists-security-laws>.

201 <https://www.afp.gov.au/sites/default/files/PDF/Ministerial-Direction-signed-2019.pdf>.

202 <https://www.smh.com.au/politics/federal/nobody-is-above-the-law-journalists-committed-a-crime-says-peter-dutton-20190712-p526il.html>.

203 <https://www.abc.net.au/news/2019-08-09/peter-dutton-orders-afp-press-freedom-investigating-journalists/11401108>.

204 <https://theconversation.com/dutton-directive-gives-journalists-more-breathing-space-but-not-whistleblowers-121730>; <https://www.theguardian.com/politics/shortcuts/2015/dec/18/take-out-the-trash-day-the-perfect-opportunity-to-bury-bad-news>.

205 <https://www.theguardian.com/australia-news/2019/jun/05/scott-morrison-deflects-questions-about-raid-on-news-corp-journalist>.

206 *Criminal Code Act 1995 (Cth)* s 122.5(6) (<https://www.legislation.gov.au/Details/C2021C00038>).

207 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/EspionageInterference/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/EspionageInterference/Submissions).

For several reasons, executive promises not to prosecute journalists are inadequate. First, there is the potential for a conflict of interest to arise. Ministers have the power to personally determine whether an investigation moves forward, even if the information embarrasses their own government, department or colleagues.

Second, these promises do little to alleviate the chilling effect of counter-terrorism laws on public interest journalism. The possibility of jail time under broad secrecy offences remains, and the only thing protecting a journalist is the decision of a senior Cabinet Minister, who may wish to protect the government's best interests. This may create more fear, not reduce it.

Third, such promises can worsen perceptions that Ministers are too close to law enforcement and prosecution services, whose decisions are meant to be independent. This echoes concerns raised by the Australian Federal Police Association that the AFP became less independent under Home Affairs.<sup>208</sup> For this reason, a recent inquiry into press freedom actually recommended that the Attorney-General *withdraw* his directive requiring ministerial consent to prosecute journalists.<sup>209</sup>

Press freedom is too important to be left to the mercy of political promises. Nothing less than concrete legal protections is needed to prevent public interest reporting from being investigated and prosecuted in the first place.

## STOP THE BOATS, STOP THE PRESS

The threat of prosecution hanging over journalists and whistleblowers reflects a wider culture of secrecy across government. While all governments are careful to avoid embarrassment, this secretive culture has been a hallmark of the Coalition government since at least the election of Tony Abbott as Prime Minister in 2013.

Secrecy as a Coalition government priority first became obvious during the military-style OSB – the mission to ‘Stop the Boats’ that was a core part of Tony Abbott’s election policy. Weekly press briefings on OSB were provided by Scott Morrison as Immigration Minister and Angus Campbell, the military chief appointed as head of the joint agency task force. Tellingly, this same model of appointing a military commander to a civil operation has been used during ‘Operation COVID Shield’.<sup>210</sup>

208 <https://www.theguardian.com/australia-news/2019/jun/15/how-did-mike-pezzullo-become-australias-most-powerful-bureaucrat>.

209 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/PressFreedom/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Report).

210 <https://www.theguardian.com/australia-news/2021/jul/11/general-confusion-who-is-john-frewen-and-what-is-his-role-in-australias-vaccine-rollout>.



During OSB, Morrison and Campbell repeatedly refused to give any details about ‘on-water’ matters, including whether any boats were actually stopped.<sup>211</sup> As David Speers, then Political Editor for Sky News, commented:

**We have absolutely no idea what is really going on, day-by-day, on Manus, Christmas Island, Nauru, or on the water ...  
[T]hings have taken place in Australia’s name and we really have no scrutiny of, and no way of independently knowing if we’re following the moral and ethical rules we’d like to think we stand for.<sup>212</sup>**

The tragedy of secrecy is that it can hide individual experiences of abuse and trauma, and prevent victims from speaking out. This was demonstrated by Paul Farrell’s 2016 investigative report ‘The Nauru Files’. That story was based on a cache of 2,000 leaked OSB incident reports, which detailed examples of trauma and physical and sexual abuse suffered by asylum seekers, including children, held in offshore detention.<sup>213</sup>

While these atrocities were happening, Abbott defended the media blackout, likening OSB to a war with people smugglers. ‘If we were at war,’ he reasoned, ‘we wouldn’t be giving out information that is of use to the enemy just because we might have an idle curiosity about it.’<sup>214</sup> To mistake public interest reporting for ‘idle curiosity’ fundamentally misunderstood the need for transparency in a democracy, and the Australian people’s right to know what is being done in their name.

211 <https://theconversation.com/operation-sovereign-borders-dignified-silence-or-diminishing-democracy-21294>.

212 <https://www.abc.net.au/mediawatch/episodes/secrecy-on-the-high-seas/9973468>.

213 <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention>.

214 <https://www.abc.net.au/news/2014-01-10/abbott-likens-campaign-against-people-smugglers-to-war/5193546?nw=0>.

# FOI AND THE RIGHT TO KNOW

This culture of secrecy manifests across government on a daily basis. It is not limited to matters of national security, and can be seen more widely in departmental reluctance to comply with FOI requests. FOI laws are recognised as a key pillar of democracy, as they allow journalists and members of the public to access documents that otherwise would not see the light of day. This right to know is ‘increasingly seen as a basic political participation right within the context of substantive democracy’.<sup>215</sup> As Stubbs notes:

**The rationale for FOI is multidimensional. At a basic level, access to government-held information is essential for the populace to participate effectively in policy formulation, within the arena of open and accountable government ... In addition to ensuring open government through information disclosure, the laws contribute to freedom of expression and opinion by increasing the amount and nature of information available.**<sup>216</sup>

This is how FOI is meant to work – but in practice it doesn’t live up to the ideal. Intelligence agencies are exempt from FOI, and refusal rates across government have risen to record levels. FOI teams have been shrunk in at least 20 departments, and long delays in responding to requests are ‘used deliberately to take the sting out of sensitive documents’.<sup>217</sup> **In 2019/20, the office of the Prime Minister complied with the 30-day deadline for responding to requests in just 7.5% of cases.**<sup>218</sup> In the same year, across all departments, intention to refuse notices were up 71% and complaints were up 79%.<sup>219</sup> Peter Timmins, a lawyer and FOI specialist, believes that the ‘Morrison government’s record on and enthusiasm for open, transparent and accountable government is at the low end of the scale’.<sup>220</sup>

Only 7.5% of cases complied with the 30-day deadline

## Percentage of compliant FOI cases actioned in 2019/2020



215 <https://www.tandfonline.com/doi/abs/10.1080/10361140802429270>.

216 <https://www.tandfonline.com/doi/abs/10.1080/10361140802429270>.

217 <https://www.theguardian.com/australia-news/2019/jan/02/how-a-flawed-freedom-of-information-regime-keeps-australians-in-the-dark>.

218 <https://www.theguardian.com/australia-news/2020/nov/19/scott-morrison-office-met-freedom-of-information-deadlines-in-just-75-of-cases>.

219 <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CII-Report-including-Secretary-Comments.pdf>; <https://www.theguardian.com/australia-news/2020/nov/19/scott-morrison-office-met-freedom-of-information-deadlines-in-just-75-of-cases>.

220 Ibid.

Even when documents are released under FOI, they can look like this:



The documents pictured above were released in response to an FOI request by ABC political journalist Andrew Probyn. They did not relate to intelligence, foreign affairs, national security or counter-terrorism. They didn't even relate to policing or the courts. This blanket redaction withheld information about waiting times for the National Disability Insurance Scheme.

Even basic information about how departments spend money can be difficult or prohibitively expensive to access. In one case, SBS News requested documents to find out how much it cost the Defence Industry Minister to take a one-week trip to Britain and France. The Department of Defence replied that it would cost \$2500 to respond to the request.<sup>221</sup> Apparently, it would have taken the Department 45 hours of searching for documents and a further 97 hours of 'deliberation' to determine whether the documents could be released, with no guarantee of a favourable outcome.<sup>222</sup> In a win for public interest journalism, the Minister overturned this decision, but only after it was reported by the media. Sadly, this scenario indicates the closed attitude that government departments can take to routine and perfectly reasonable requests to access information in the public interest.

221 <https://www.sbs.com.au/news/defence-industry-minister-says-she-wasn-t-consulted-about-laughable-foi-response>.

222 Ibid.



The secretive Home Affairs department has been singled out for its particularly poor FOI record. By the time the Super Ministry was just two years old, the Office of the Australian Information Commissioner (OAIC) had received sufficient complaints to justify a specific inquiry.<sup>223</sup> This followed reports by *The Guardian*, based on data released to Independent Senator Rex Patrick, that 70 per cent (7,800 of 11,131) of the Department’s responses that did not comply with the 30-day deadline ended up as ‘deemed refusals’. This meant they were automatically denied and could be omitted from the number of publicly reported refusals.<sup>224</sup> In other words, Home Affairs had a much poorer record of FOI compliance than was publicly known. In its report, the OAIC concluded that ‘the Department does not have adequate governance and systems of accountability in place to ensure compliance with statutory time frames for processing FOI requests.’<sup>225</sup> It found that the Department does not have senior staff ‘responsible for promoting a culture of compliance with the FOI Act’.<sup>226</sup>

223 <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CII-Report-including-Secretary-Comments.pdf>.

224 <https://www.theguardian.com/australia-news/2019/sep/25/home-affairs-accused-of-simply-ignoring-its-obligations-in-law-over-foi>.

225 <https://www.oaic.gov.au/assets/freedom-of-information/reports/Department-of-Home-Affairs-CII-Report-including-Secretary-Comments.pdf>.

226 Ibid.



# WHY ALL THE SECRECY?

The effect of counter-terrorism laws and government secrecy on public interest reporting is substantial, as is the threat to Australian democracy. What can explain the government's continual need for secrecy and its resistance to transparency – other than the basic political needs to avoid embarrassment and maintain power? There are, arguably, three contributing factors.

First, national security is a legitimate reason for secrecy, but the current Coalition government favours a very broad interpretation of what this means. In the espionage offences, which were updated in 2018, national security is defined to include all political, economic and military relations with other countries.<sup>227</sup> National security is not simply about terrorism and espionage – it now encompasses almost anything relating to the federal government and its place in the world. This goes beyond even the contentious idea of 'homeland security', to something more authoritarian.

A second, less obvious, explanation can be found in the increasing managerialism of the public service. Complying with FOI requests requires substantial resources, especially when they involve large amounts of documents or data. So, while there are obvious benefits to journalists or others seeking the information, the time and costs of complying may outweigh the apparent benefits to a department in releasing it. FOI also becomes more difficult when government services are contracted out to consultants and corporations, as larger amounts of information are protected as commercial-in-confidence. As Stubbs has written:

**the transformation of government services into a marketplace is, arguably, challenging views about the place of accountability and the role of the citizen. The process of privatisation and outsourcing has stripped away most of the accountability mechanisms that have operated within the public sector, including FOI, the Ombudsman, scrutiny of the Auditor-General and ministerial responsibility.<sup>228</sup>**

In other words, the public service is not as public as it used to be, as important work is frequently outsourced to the private sector. This has significant implications for transparency and accountability. One particularly egregious example, where a public-private partnership undermined democratic transparency, involved a strategic review of Home Affairs. The Super Ministry paid \$5 million of public money, largely to private consulting firms, to assess its capabilities and improve its efficiency.<sup>229</sup> Dutton confirmed that the review had been completed, but claimed it was not in a form that could be made public.<sup>230</sup>

227 *Criminal Code Act 1995* (Cth) s 90.4 (<https://www.legislation.gov.au/Details/C2021C00183>).

228 Rhys Stubbs, 'Freedom of information and democracy in Australia and beyond' (2008) 43(4) *Australian Journal of Political Science* 667 (<https://www.tandfonline.com/doi/abs/10.1080/10361140802429270>).

229 <https://www.sbs.com.au/news/wasteful-home-affairs-under-fire-over-one-page-report-on-5-million-review/Oc08cf5e-3cb2-4cb2-82cf-2bb6bb5f2c9d>.

230 *Ibid.*

The only publicly available evidence of this review, tabled by Dutton in Parliament, was a single-page summary. Labor Senator Kristina Keneally was, rightly, highly critical of this, saying:

**This is a \$5 million piece of paper. This is either the single most expensive piece of paper in the history of this chamber or a blatant rejection of the will of the Senate by a minister who is allergic to scrutiny ... The community has the right to know how one of our largest government departments – and one that is so fundamental to our national security – is being administered.<sup>231</sup>**

Similar levels of secrecy, including those influenced by public-private partnerships, have pervaded the federal government's response to COVID-19. The lack of transparency surrounding the vaccine rollout has been widely criticised.<sup>232</sup> The creation of a National Cabinet, via the principle of cabinet confidentiality, helped to shield pandemic-related documents from public view.<sup>233</sup> Additional claims to public interest immunity by senior members of government have hampered the work of the Senate Select Committee on COVID-19.<sup>234</sup> In July 2021, the ABC's 7.30 program was denied a copy of the government's contract with AstraZeneca on the grounds that its release would pose a 'real and substantial risk' to national security.<sup>235</sup> These matters affect all Australians and the health of our nation.

Arguably, a third factor contributing to government secrecy is the need, in a media-rich environment and 24-hour news cycle, to *control the narrative*. Information that contradicts a government's practised policy position is more likely to be viewed as a threat than something to be openly debated. This reflects the 'mediatisation' of politics: governments have learnt that sound-bites and 'announceables', which are short and easy to remember ('Stop the Boats', 'Lives and Livelihoods') can promote their agendas more effectively to more people.<sup>236</sup> It reflects a pervasive culture of promotion – evident across various institutions and social media, not just government – in which businesses compete for customers to buy what they are selling.<sup>237</sup> If information would damage the brand of a company, individual or political party, it is better for business if it never sees the light of day.

Information affecting all Australians is commonly released by government on a need-to-know basis. In a democracy, the reverse should be our starting point: we should know everything the government knows, unless there is good reason not to. Australians should not allow the presumption of secrecy to become the defining culture of our democracy. If concrete changes are not made soon, Australia may progress down a path from which it is too difficult to return.

231 <https://www.sbs.com.au/news/wasteful-home-affairs-under-fire-over-one-page-report-on-5-million-review/Oc08cf5e-3cb2-4cb2-82cf-2bb6bb5f2c9d>.

232 <https://www.abc.net.au/news/2021-04-08/known-unknowns-secrecy-of-australias-covid-vaccine-rollout/100053404>; <https://www.theguardian.com/australia-news/2021/apr/13/pfizer-covid-vaccine-is-now-crucial-to-australia-why-the-secrecy-about-how-much-we-have>.

233 Claims that National Cabinet documents could be protected by cabinet confidentiality were recently overturned by a decision of the Administrative Appeals Tribunal: <https://www.themandarin.com.au/165173-rex-patrick-wins-fight-for-national-cabinet-documents/>.

234 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/COVID-19/COVID19/Second\\_Interim\\_Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/COVID-19/COVID19/Second_Interim_Report).

235 <https://www.abc.net.au/news/2021-07-05/australia-covid-astrazeneca-deal-withheld-national-security/100261920>.

236 Brian McNair, Terry Flew, Stephen Harrington and Adam Swift, *Politics, Media and Democracy in Australia* (Routledge, 2017).

237 Ibid.

R.I.P. DANNY FRAWLEY: A.F.L. LEGEND DIES IN CRASH PAGE 34

# The Canberra Times

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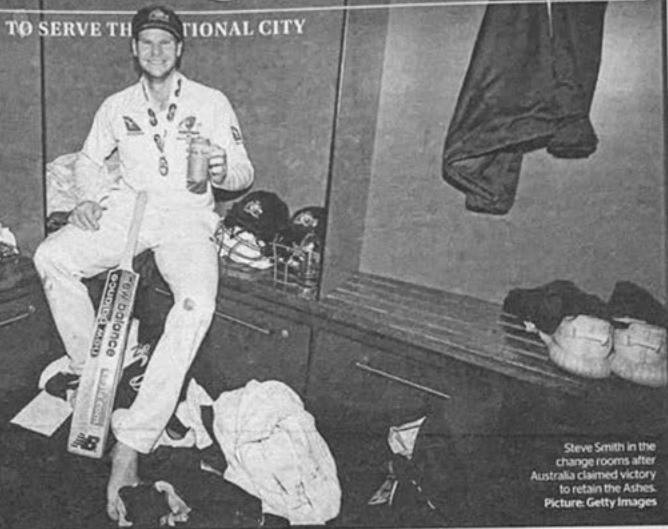
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## YOU EARNED IT Smith leaves England's dream in ashes

Australia have retained the Ashes on foreign soil for the first time in 18 years - thanks largely to a remarkable comeback performance by former captain Steve Smith.

Smith, who collected his second man-of-the-match award of the series, has already amassed 671 runs at 134.2 to give him a shot at reaching Don Bradman's peerless mark of 974 runs during the 1930 Ashes.

FULL REPORT: SPORT



Steve Smith in the change rooms after Australia claimed victory to retain the Ashes. Picture: Getty Images

AFFORDABLE HOUSING ACT Greens say targets are still too low

## Housing stocks to grow

Dan Jervis-Bardy

A FIFTH of the dwellings to be released for the first stage of the City Hill precinct redevelopment will be set aside for cheaper housing, as the ACT government targets an

increase in housing stock for low-income earners. The government has published its housing targets for 2019-20, setting out what percentage of new land release sites will be allocated for public, affordable and

community housing. Of the 3440 residential sites to be sold off this financial year, 628, or 18.2 per cent, will be aimed at low-income earners. That is well above the government's 15 per cent

target for affordable housing in new land releases, which was outlined in last year's long-awaited housing strategy. This year's 18.2 per cent allocation is up from 13.5 per cent in 2018-19, and 3.5 per

cent in the year prior. The government's 2017-18 targets were roundly criticised, with University of Sydney affordable housing expert professor Peter Phillips branding them "so small they're almost insignificant".

The government is this year due to sell off the first block of land in the City Hill precinct at the south end of Northbourne Avenue, where developers will be permitted to build up to 350 dwellings.

Continued on Page 4

## THE WORST THING ABOUT PRESS CENSORSHIP IS

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WOMEN OF INFLUENCE 100 TOP ACHIEVERS REVEALED

FINANCIAL REVIEW

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# 09 REPAIRING DEMOCRACY

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**A**ustralians are rightfully proud of our strong democratic traditions. We revel in vibrant political debate. We criticise governments, politicians and policies in the media, on the streets, and around dinner tables. We vote. We protest. We satirise. We unionise, picket and strike. The story of modern Australia is deeply rooted in the liberal democratic tradition. In part, these traditions explain why we don't have a constitutional Bill of Rights. To the drafters of our Constitution, a national human rights instrument was seen as unnecessary. At the constitutional conventions of the 1890s, they argued successfully that the protection of fundamental rights could be entrusted to a federal Parliament that represents the Australian people.

But the health of our democracy, and Australia's global reputation, are declining. This trend started with 9/11, as democracies sought to protect their core values but often responded in ways that undermined them. In Australia, the federal government has created expansive powers to detain people incommunicado, decrypt private communications, even strip the citizenship of dual nationals – all in the name of national security. Secret trials under the NSI Act are a reality not just for those charged with terrorism offences, but also whistleblowers and their lawyers. The belief that Parliament will reliably constrain executive power and protect fundamental rights is unsustainable.

Symbolising this growth in national security powers is the Department for Home Affairs – a Super Ministry that governs almost every facet of immigration, security and policing. This can accurately be called a homeland security approach – claims to the contrary only made it sound more palatable to the Australian people. The Super Ministry was created from a position of political weakness against the advice of independent expert reviews and the wishes of key agencies involved. It is unlikely this centralisation of power will ever be undone – which shows the dangers in being complacent when governments seek to expand their power. It is easy for governments to expand their power. It is much harder to rein it back in.

Australia's status as a leading democracy is now fragile. This is reflected in our lower ranking on the Global Press Freedom Index. As citizens, we are kept in the dark about things that are done in our name. Even when corruption and misconduct comes to light, true accountability is disturbingly rare. We are more likely to see legal action, under sweeping secrecy offences, against those who were brave enough to break the story. It is worrying to think what the next prosecution of a journalist or whistleblower might bring.

It is possible, however, to repair these cracks in Australian democracy. This can be achieved through meaningful action in four areas. We organise these tasks according to four 'vital signs' of a healthy democracy: transparency, press freedom, oversight, and citizen engagement.

### **Action 1: Increase Transparency**

A vital sign of a healthy democracy is whether governments are transparent and accountable – including (and especially) if they have done something wrong. This requires, firstly, an effective FOI regime, in which government departments provide information promptly and affordably when requested.

In Australia, FOI laws have been in place since the early 1980s, but many departments lack the culture of openness and transparency needed for these to operate with maximum benefit. A recent Senate inquiry into press freedom confirmed this secretive culture, in which requests for information are 'processed well outside of statutory timeframes and redacted beyond all comprehension'.<sup>238</sup>

The Senate committee singled out Home Affairs, noting the 'cavalier attitude' of its Secretary, Michael Pezzullo, who stated 'he had no intention of requesting or allocating additional resources' to FOI compliance.<sup>239</sup> This aversion to transparency frustrates the very purposes for which the FOI regime was created. Until it is addressed, journalists and citizens will continue to lack information needed to hold government to account. Cultures and attitudes can be difficult to change. However, as the Senate committee and PJCIS have recommended, the Australian government should work with the OAIC to determine how a culture of transparency can be strengthened within senior levels of government and the public service.<sup>240</sup>

238 [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/PressFreedom/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Report).

239 Ibid.

240 Ibid.

Efforts to improve FOI culture must be made alongside an urgent review of Australia's whistleblowers laws. Australia has a national whistleblower scheme, found in the *Public Interest Disclosure Act 2013* (Cth) (PID Act). This protects government employees who disclose information in the public interest. However, it contains blanket exemptions for 'intelligence information', which is defined broadly to include defence and law enforcement information.<sup>241</sup> At present, if an intelligence, ADF or AFP officer believed that their colleagues engaged in corruption, fraud, or even torture, they could reveal this to their supervisors or an integrity body such as IGIS.<sup>242</sup> However, if their concerns were not addressed adequately through those avenues, there is nowhere else they can go. If they revealed even very limited information about the misconduct to a journalist or member of Parliament – after removing all identifying and operational information – they could still face significant time in prison.

Exemptions to the PID Act explain how brave individuals like David McBride, the defence lawyer who leaked the Afghan Files to the ABC, can face prosecution for revealing serious misconduct, criminal offences, or even possible war crimes. This is unacceptable in a democracy – not just the prosecution of David McBride as an individual, but the wider problem that our whistleblower laws do not provide an adequate release valve for cases of serious misconduct. There may be other scandals that the Australian people need to know about, but fear of prosecution means the information has never seen the light of day.

For these and other reasons, pressing calls to review the PID Act have come from Senate committees, the PJCIS and the Australian Law Reform Commission, as well as leading experts and academics.<sup>243</sup> An extensive empirical study of whistleblowing in Australia, led by A J Brown, found that whistleblowers 'are the single most important way that wrongdoing or other problems come to light in organisations'.<sup>244</sup> Whistleblowers play a critical democratic role in calling out misconduct, from abuse to harassment, crimes and corruption. These brave individuals must be protected from liability and victimisation.

Amendments to the PID Act should allow intelligence information to be released in the most serious cases. Drafting these changes will be a difficult task – if the rules are relaxed too much, disclosures could harm national security – but it can be done. Public interest disclosures of intelligence information should be permitted if a disclosure reveals serious misconduct or criminal offences, any identifying or operationally significant information is removed, and disclosure is made only to a professional journalist or member of Parliament.

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241 *Public Interest Disclosure Act 2013* (Cth) s 41 (<https://www.legislation.gov.au/Details/C2019C00026>).

242 *Ibid* s 26.

243 <https://www.alrc.gov.au/publication/the-future-of-law-reform-2020-25/>; [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/FreedomofthePress/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report); [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/PressFreedom/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/PressFreedom/Report); <https://www.journalistsfreedom.com/wp-content/uploads/2019/06/AJF-Press-Freedom-In-Australia-2019.pdf>; Rebecca Ananian-Welsh, Rose Cronin and Peter Greste, 'In the Public Interest: Protections and Risks in Whistleblowing to the Media' (2021, forthcoming) *UNSW Law Journal*; <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>; <https://transparency.org.au/safeguarding-our-democracy/>.

244 <https://transparency.org.au/safeguarding-our-democracy/>.

## Action 2: Protect the Fourth Estate

Another vital sign of a healthy democracy is the extent to which it values and protects its news organisations. These must be free from influence and intimidation. When journalists act in the best interests of the Australian people, investigation and prosecution should not be legally possible. Unfortunately, as we have seen, many aspects of Australia's counter-terrorism laws affect public interest journalism, including operational secrecy offences, sweeping espionage laws, compulsory metadata retention, and enforceable decryption.

A starting point is to ensure that professional journalists who report news in the public interest will not be found guilty of a crime. A model for this already exists: section 122.5 of the Criminal Code Act 1995 (Cth), which relates to various secrecy offences for Commonwealth employees, makes it a defence for journalists to receive or deal with information. This applies where someone acts in their 'capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media'.<sup>245</sup> In addition, the journalist must reasonably believe they were acting in the public interest.<sup>246</sup> There is no good reason to have these rules attached to some secrecy offences but not others.

An exemption for professional public interest journalism should be attached to every disclosure offence in Australia's counter-terrorism laws. This could be done most efficiently through a Media Freedom Act, as recommended by the Alliance for Journalists Freedom and other experts.<sup>247</sup> This approach would avoid the need for continual changes to the law. It would signal nationally that legitimate, public interest journalism is never a crime.

Another change urgently needed is to narrow the sweeping definition of 'national security' found in the espionage laws. Currently, national security means anything relating to Australia's political, economic or military relations with other countries.<sup>248</sup> This is far too broad and has had a chilling effect on journalists, who fear prosecution for dealing with information on these wide-ranging topics.<sup>249</sup> Again, a model for reform already exists, in the definition of 'security' that guides ASIO's activities.<sup>250</sup> That definition more sensibly covers espionage, sabotage, politically motivated violence, attacks against Australia's defence systems, border security, and acts of foreign interference. It includes relations with other countries, but only where they relate to one of these significant security threats.

To reinforce these changes, journalists need additional protections from surveillance and investigation. In contrast to the UK, Canada, and New Zealand,<sup>251</sup> Australian law does not allow journalists to contest applications for search warrants. In *ABC v Kane*, the Federal Court confirmed that no ethical, statutory or constitutional considerations could protect journalists

245 *Criminal Code Act 1995* (Cth) 122.5(6) (<https://www.legislation.gov.au/Details/C2021C00038>).

246 *Criminal Code Act 1995* (Cth) 122.5(6) (<https://www.legislation.gov.au/Details/C2021C00038>).

247 <https://www.journalistsfreedom.com/wp-content/uploads/2019/06/AJF-Press-Freedom-In-Australia-2019.pdf>; <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>.

248 *Criminal Code Act 1995* (Cth) s 90.4 (<https://www.legislation.gov.au/Details/C2021C00038>).

249 [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0007/3790240/Ananian-Welsh-Kendall-and-Murray-443-Advance.pdf).

250 *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 (<https://www.legislation.gov.au/Details/C2021C00038>).

251 *Police and Criminal Evidence Act 1984* (UK) sch 1 (<https://www.legislation.gov.uk/ukpga/1984/60/contents>); *Criminal Code 1985* (Can) s 488.01(2) (<https://laws-lois.justice.gc.ca/eng/acts/c-46/>); *Search and Surveillance Act 2012* (NZ) s 145 (<https://www.legislation.govt.nz/act/public/2012/0024/latest/DLM2136536.html>).

from the exercise of a police search warrant.<sup>252</sup> These other jurisdictions have decided that the dangers of leaving newsrooms open to police raids are too significant, compared to the small risk that journalists could hide or delete evidence if made aware of a search in advance.

Under Canadian law, a court takes custody of the data or information in question until the validity of the warrant is resolved.<sup>253</sup> A model along these lines could provide a healthy compromise between the legitimate needs of law enforcement and the democratic imperative to protect freedom of the press. Similar contested hearings, allowing media organisations to make submissions to a judge, should be available when any agency seeks access to a journalist's metadata. Finally, the encryption laws should include a warrant scheme, requiring sign-off from a judge after a contested hearing, if decrypting communications is likely to identify a journalist's confidential source.

### **Action 3: Strengthen Oversight**

A third vital sign of democracy is whether adequate checks and balances ensure strong oversight of government agencies. On matters of national security, important oversight bodies exist, but gaps and limitations remain. The three main oversight bodies are the Inspector-General of Intelligence and Security (IGIS), the Independent National Security Legislation Monitor (INSLM) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS). Each of these must be adequately resourced to oversee Australia's substantial counter-terrorism law framework and actions taken under it.

The IGIS performs a unique role by examining the operations and inspecting the records of Australia's intelligence agencies. The office has strong investigative powers akin to a royal commission, including the power to compel documents and witnesses. It oversees ASIO, ASIS, and Australia's other intelligence agencies, but not Home Affairs. This is so even though the Super Ministry is part of the NIC and performs intelligence functions.<sup>254</sup> This means Home Affairs avoids a critical avenue for accountability. Home Affairs' intelligence functions should be subject to IGIS oversight and that office's resources should be increased accordingly. To achieve the necessary legal change, a Private Member's Bill introduced into the Senate in February 2020 should be revived and enacted.<sup>255</sup>

To further enhance oversight of Home Affairs, a review of the Minister's statutory powers should identify whether some could be transferred to the Commonwealth Attorney-General. This would be consistent with the role of that office as the 'first law officer' of the nation. Importantly, it would reduce the significant consolidation of power in Home Affairs that was made against expert advice. It would strengthen checks and balances, and create more 'contestable advice' in the management of national security affairs.<sup>256</sup>

252 *Australian Broadcasting Corporation v Kane (No 2)* [2020] FCA 133 (<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0133>).

253 *Criminal Code 1985* (Can) ss 488.01(6) and 488.02 (<https://laws-lois.justice.gc.ca/eng/acts/c-46/>).

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The INSLM conducts law reform inquiries to determine whether Australia's counter-terrorism laws are necessary, effective, proportionate, and consistent with fundamental rights.<sup>257</sup> Similar to IGIS, the office has access to classified information, but it does not hold the same strong investigative powers, and it does not oversee intelligence operations. The office has conducted many important reviews of Australia's counter-terrorism laws,<sup>258</sup> but it is only funded on a part-time basis and requires greater resources. The office should be made a full-time position with adequate staffing and resources to examine Australia's wide-ranging counter-terrorism laws on a rolling basis. This important investment is required to ensure that Australia's counter-terrorism laws remain effective and proportionate over the long-term.

The primary role of the PJCIS is to examine Australia's counter-terrorism laws as they progress through Parliament. These inquiries provide a crucial opportunity to examine new powers and offences before they are enacted, but the timeframes are often heavily truncated. In addition, the committee oversees the finance and administration of Australia's intelligence agencies, but not their operations. This contrasts with the wider mandate given to similar parliamentary committees in the UK and the US, which both examine operational matters.<sup>259</sup>

To enhance parliamentary oversight of intelligence operations – in addition to the executive oversight provided by IGIS – consideration should be given to whether the PJCIS, with additional resourcing, could oversee intelligence operations. In either case, the committee should include representation from the crossbench, so that it reflects the make-up of politicians elected by the Australian people. Currently, the committee only includes members from the two major parties – Liberal and Labor – which does not ensure the same diversity of views. This small change could enhance discussion and oversight of Australia's counter-terrorism laws, including the many offences that impact on free speech and press freedom.

#### **Action 4: Get Involved**

A fourth vital sign of a healthy democracy is the extent to which its citizens are engaged in matters of politics and current affairs. In this report, we have highlighted many areas of concern with Australia's national security state. A healthy democracy thrives on this political participation. It can take many forms and all of them are important. If you care about these issues, talk about them with your friends and family, write a letter to your local member of Parliament, or make a submission to the next parliamentary inquiry. Democracy means that a government acts in the best interests of its people – **and you should make those interests known.**

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# APPENDIX 1: AUSTRALIA'S COUNTER- TERRORISM LAWS

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1. *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 (Cth)*
2. *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*
3. *Suppression of the Financing of Terrorism Act 2002 (Cth)*
4. *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002 (Cth)*
5. *Border Security Legislation Amendment Act 2002 (Cth)*
6. *Telecommunications Interception Legislation Amendment Act 2002 (Cth)*
7. *Proceeds of Crime Act 2002 (Cth)*
8. *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002 (Cth)*
9. *Crimes Amendment Act 2002 (Cth)*
10. *Criminal Code Amendment (Terrorist Organisations) Act 2002 (Cth)*
11. *Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth)*
12. *Charter of the United Nations Amendment Act 2002 (Cth)*
13. *Australian Protective Service Amendment Act 2002 (Cth)*
14. *Australian Crime Commission Establishment Act 2002 (Cth)*
15. *Australian Protective Service Amendment Act 2003 (Cth)*
16. *Criminal Code Amendment (Terrorism) Act 2003 (Cth)*
17. *Criminal Code Amendment (Hizballah) Act 2003 (Cth)*
18. *Terrorism Insurance Act 2003 (Cth)*
19. *Criminal Code Amendment ( Hamas and Lashkar-e-Tayyiba) Act 2003 (Cth)*
20. *Maritime Transport Security Act 2003 (Cth)*
21. *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth)*
22. *ASIO Legislation Amendment Act 2003 (Cth)*
23. *Australian Federal Police and Other Legislation Amendment Act 2004 (Cth)*

24. *Australian Security Intelligence Organisation Amendment Act 2004 (Cth)*
25. *Aviation Transport Security Act 2004 (Cth)*
26. *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004 (Cth)*
27. *Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth)*
28. *Telecommunications (Interception) Amendment Act 2004 (Cth)*
29. *Surveillance Devices Act 2004 (Cth)*
30. *Anti-Terrorism Act 2004 (Cth)*
31. *Anti-Terrorism Act (No 2) 2004 (Cth)*
32. *Anti-Terrorism Act (No 3) 2004 (Cth)*
33. *National Security Information (Criminal Proceedings) Act 2004 (Cth)*
34. *National Security Information (Criminal Proceedings) (Consequential Amendments) Act 2004 (Cth)*
35. *National Security Information (Criminal Proceedings) Amendment (Application) Act 2005 (Cth)*
36. *National Security Information Legislation Amendment Act 2005 (Cth)*
37. *Maritime Transport Security Amendment Act 2005 (Cth)*
38. *Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (Cth)*
39. *Anti-Terrorism Act 2005 (Cth)*
40. *Anti-Terrorism Act (No 2) 2005 (Cth)*
41. *ASIO Legislation Amendment Act 2006 (Cth)*
42. *Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth)*
43. *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Act 2006 (Cth)*
44. *Telecommunications (Interception) Amendment Act 2006 (Cth)*
45. *Law and Justice Legislation Amendment (Marking of Plastic Explosives) Act 2007 (Cth)*
46. *Aviation Transport Security Amendment (Additional Screening Measures) Act 2007 (Cth)*
47. *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2007 (Cth)*
48. *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 (Cth)*
49. *Customs Amendment (Enhanced Border Controls and Other Measures) Act 2009 (Cth)*
50. *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 (Cth)*
51. *Independent National Security Legislation Monitor Act 2010 (Cth)*
52. *National Security Legislation Amendment Act 2010 (Cth)*
53. *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011 (Cth)*
54. *Defence Legislation Amendment (Security of Defence Premises) Act 2011 (Cth)*
55. *Combating the Financing of People Smuggling and Other Measures Act 2011 (Cth)*
56. *Aviation Transport Security Amendment (Air Cargo) Act 2011 (Cth)*
57. *Nuclear Terrorism Legislation Amendment Act 2012 (Cth)*
58. *Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 (Cth)*
59. *Aviation Transport Security Amendment (Screening) Act 2012 (Cth)*
60. *Customs Amendment (Military End-Use) Act 2012 (Cth)*
61. *Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Act 2013 (Cth)*

62. *National Security Legislation Amendment Act (No 1) 2014* (Cth)
63. *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth)
64. *Counter-Terrorism Legislation Amendment (No 1) Act 2014* (Cth)
65. *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth)
66. *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth)
67. *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth)
68. *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth)
69. *Transport Security Legislation Amendment Act 2017* (Cth)
70. *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth)
71. *Home Affairs and Integrity Agencies Legislation Amendment Act 2018* (Cth)
72. *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Cth)
73. *National Security Legislation Amendment (Espionage and Foreign Interference Act 2018* (Cth)
74. *Counter-Terrorism Legislation Amendment Act (No 1) 2018* (Cth)
75. *Aviation Transport Security Amendment Act 2018* (Cth)
76. *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth)
77. *Office of National Intelligence Act 2018* (Cth)
78. *Office of National Intelligence (Consequential and Transitional Provisions) Act 2018* (Cth)
79. *Defence Amendment (Call Out of the Australian Defence Force) Act 2018* (Cth)
80. *Intelligence Services Amendment Act 2018* (Cth)
81. *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth)
82. *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth)
83. *Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Act 2019* (Cth)
84. *Australian Security Intelligence Organisation Amendment (Sunsetting of Special Powers Relating to Terrorism Offences) Act 2019* (Cth)
85. *Crimes Legislation Amendment (Police Powers at Airports) Act 2019* (Cth)
86. *Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Act 2019* (Cth)
87. *Telecommunications (Interception and Access) Amendment (Assistance and Access Amendments Review) Act 2019* (Cth)
88. *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth)
89. *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020* (Cth)
90. *Australian Security Intelligence Organisation Amendment Act 2020* (Cth)
91. *Security Legislation Amendment (Identify and Disrupt) Act 2021* (Cth)
92. *Foreign Intelligence Legislation Amendment Bill 2021* (Cth)

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