Law Council
OF AUSTRALIA

Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press

Parliamentary Joint Committee on Security and Intelligence

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Table of Contents

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
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- The Victorian Bar Inc
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the National Criminal Law Committee in the preparation of this submission.

Introduction

1. The Law Council is grateful to have had the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) on 14 August 2019 in relation to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (**the Inquiry**).

2. As the Committee would be aware, in the Law Council's first written submission, it was recommended that the determination of warrants authorising investigative action of journalists or media organisations, either as the suspect of an offence or as a third party in possession of information relevant to an investigation, would be improved through a three-step approach involving the:

    (a) introduction of a legislative public interest test similar to which occurs under the test provided in section 180T of the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**);

    (b) requirement that a 'issuing officer' is a judge of a superior court of record rather than that currently provided in section 3C of the *Crimes Act 1914* (Cth); and

    (c) adoption of a Public Interest Advocate (**PIA**) or Public Interest Monitor (**PIM**) regime that includes appropriate transparency and accountability mechanisms.

3. Regarding the last element of this approach, the Law Council noted that the introduction of a PIA or PIM regime could serve to promote an adversarial process in relation to search warrants relating to journalists and media organisations in a manner similar to what occurs under the TIA Act for journalist information warrants.

4. However, the Law Council, in its submission and at its appearance before the Committee, expressed concerns with the current PIA regime as it operates under the TIA Act and provided recommendations to increase the scheme's transparency and accountability. Specifically, the Law Council recommended that annual reporting to the Parliament take place, which includes the:

    (a) number and identity of PIAs;

    (b) number of cases where a PIA contested a journalist warrant;

    (c) number of cases where a PIA attended the hearing of an application for a journalist warrant; and

    (d) number of journalist warrants that were successfully contested by a PIA.

5. In the course of providing evidence, the Law Council's representatives were asked whether there is a particular PIA or PIM model – either in Australia or internationally – that the Law Council considers to represent best practice. This question was taken on notice.

6. This additional written submission provides the Committee with an explanation of four models – three from Australia and one from Canada – as practical examples of the involvement of advocates who represent the public interest in warrant contexts.

7. The Law Council's position is that an improved PIA scheme for journalist information warrants under the TIA Act could be adopted for search warrants relating to journalists.

The Law Council considers that the reporting requirements of the PIM models in Queensland and Victoria could be of assistance to the Committee (see below paragraphs 30 to 32 and 40 to 44), as well as the provisions in the Canadian model that allow media organisations to contest the disclosure of documents that have been obtained during a search by the law enforcement agency (see paragraphs 51 to 54).

8. The Law Council also reiterates its recommendation that the Committee should obtain the advice of former and current PIAs as to whether they are able to effectively perform their roles as defined in the *Telecommunications (Interception and Access) Regulations 2017* (Cth) (**TIA Regulations**).

Models of a Public Interest Advocate/Monitor

Domestic examples

Public Interest Advocate for journalist information warrants

9. The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) (**Data Retention Act**) introduced amendments to the TIA Act to establish a mandatory national data retention regime. The amendments commenced on 13 October 2015. Under this regime, a higher threshold is required for access to telecommunications data where metadata is sought in relation to a journalist for the purpose of identifying that journalist's source.

10. Division 4C of Chapter 4.1 of the TIA Act sets out the requirements and procedure for a law enforcement agency to apply and for Australian Security Intelligence Organisation (**ASIO**) to request a journalist information warrant to be issued. Journalist information warrants may be requested by the Director-General of Security to the Attorney-General and applied for by enforcement agencies to a 'Part 4-1 issuing authority'.[1]

11. The Attorney-General or the Part 4-1 issuing authority must not issue a journalist information warrant unless satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source in connection with whom authorisations would be made under the authority of the warrant, having regard to:

    (a) the extent to which the privacy of any person or persons would be likely to be interfered with by the disclosure of information or documents under authorisations that are likely to be made under the authority of the warrant;

    (b) the gravity of the matter in relation to which the warrant is sought;

    (c) the extent to which that information or those documents would be likely to assist in relation to that matter;

[1] *Telecommunications (Interception and Access) Act 1979* (Cth) ss 180J, 180Q. A 'Part 4-1 issuing authority' is a person appointed by the Attorney-General who is a judge of a court created by the Parliament, or a magistrate, or a person who holds an appointment to the Administrative Appeals Tribunal as Deputy President, full-time senior member, part-time senior member or member, is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or a Territory, and who has been enrolled for at least 5 years: *Telecommunications (Interception and Access) Act 1979* (Cth) s 6DC.

(d) whether reasonable attempts have been made to obtain the information or documents by other means;

(e) any submissions made by a PIA under section 180X; and

(f) any other matters the Part 4-1 issuing authority or Attorney-General considers relevant.[2]

12. The applications for this type of warrant are also subject to the scrutiny of the PIA. Subparagraphs 180L(2)(b)(v) and 180T(2)(b)(v) require that in the issuing authority's consideration of whether the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source, the issuing authority is to have regard to any submissions made by a PIA under section 180X of the TIA Act. As explained below in paragraph 20, the PIA assists the issuing authority in its consideration of whether the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source.

13. Regarding a decision to issue, or refuse to issue, a journalist information warrant requested by the Director-General of Security, a PIA may make submissions to the Attorney-General about matters relevant to that decision or a decision about the conditions or restrictions that are to be specified under the warrant.[3] A PIA may make the same kind of submissions to a Part 4-1 issuing authority about a decision to issue or refuse to issue a warrant under section 180T or a decision about the conditions or restrictions that are to be specified under the warrant.[4]

14. Pursuant to subsection 180X(3) of the TIA Act, the TIA Regulations establish the PIA scheme for journalist information warrants.

15. If the Director-General of Security is requesting a journalist information warrant from the Attorney-General under section 180J of the TIA Act, before this request is made, the Director-General of Security must ensure that a copy of the proposed request is given to a PIA who has either been cleared for security purposes to the same level and at the same frequency as that required of an ASIO employee,[5] or who is a former judge.[6]

16. If an enforcement agency is making a written application for a journalist information warrant to a Part 4-1 issuing agency under section 180Q of the TIA Act, before making that application the enforcement agency must ensure that a PIA is given a copy of the proposed application.[7]

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[2] Ibid ss 180L(2)(b), 180T(2)(b).
[3] Ibid s 180X(2)(a).
[4] Ibid s 180X(2)(b).
[5] ASIO employees must acquire and maintain a security clearance level of 'Positive Vetting' (**PV**): Australian Intelligence Security Organisation, 'Security Clearances' (Web Page) <https://www.asio.gov.au/security-clearances.html>. Revalidation of a PV security clearance must be undertaken at least every five to seven years and personnel holding a PV security clearance are subject to additional requirements for annual security appraisals: Attorney-General Department, 'Protective Security Policy Framework - Ongoing Assessment of Personnel' (2018) <https://www.protectivesecurity.gov.au/personnel/ongoing-assessment-of-personnel/Documents/pspf-persec-13-ongoing-assessment-personnel.pdf>.
[6] *Telecommunications (Interception and Access) Regulations 2017* (Cth) cl 11. Paragraph 18(1)(b) of the *Telecommunications (Interception and Access) Act 1979* (Cth) requires that the person has served as a judge of the High Court, a court that is or was created by the Parliament under Chapter III of the Constitution, the Supreme Court of a State or Territory or the District Court (or equivalent) of a State or Territory, but who no longer holds a commission as a judge of a court listed in that paragraph.
[7] *Telecommunications (Interception and Access) Regulations 2017* (Cth) cl 12(1).

17. Upon receiving a proposed request from the Director-General of Security or a written application by an enforcement agency, the PIA may consider the proposed request or application and must advise the applicant whether they will prepare a submission in response.[8]

18. If an enforcement agency is making an oral application, then the PIA must be notified of the proposed application.[9] Upon being notified about a proposed oral application by an enforcement agency, the relevant PIA must advise the applicant agency of whether he or she is able to attend the hearing of the application.[10]

19. If the PIA who receives the journalist information warrant request or application is unable to prepare a submission, the request or application must be given to another PIA.[11]

20. In all circumstances where the PIA is to make a written submission, he or she must do so within a reasonable period but no later than seven days after being given the proposed request or application.[12] If a PIA provides a copy of the submission, or updated submission, after the end of the seven day period, the Attorney-General or Part 4-1 issuing authority may consider the late submission or updated submission.[13] Without limiting the facts or considerations that the PIA may include in the submission, the PIA must include the facts and considerations he or she considers:

    (a) are relevant to the decision whether to issue a journalist information warrant (including any facts and considerations which support the conclusion that a journalist information warrant should not be issued);

    (b) are relevant to the decision about the conditions or restrictions (if any) that are to be specified in the warrant; and

    (c) have not been satisfactorily addressed in the proposed request by the Director-General of Security or application by the enforcement agency.[14]

21. In circumstances where an enforcement agency has made an oral application for a journalist information warrant, a PIA may attend the hearing of an oral application in person, by telephone or other means of voice communication, where they can make submissions in the presence of the enforcement agency.[15]

22. If further information is obtained by the Attorney-General from the Director-General of Security or by the Part 4-1 issuing authority from the enforcement agency, the TIA Regulations allow the Attorney-General or the Part 4-1 issuing authority to request that the information is received by the PIA.[16] If further information is given to the Director-

[8] Ibid cl 13(1).
[9] Ibid cl 12(2).
[10] Ibid cl 13(2).
[11] Ibid cl 11(2), 12(3).
[12] Ibid cl 14. In determining what is a reasonable period to prepare the submission, the Public Interest Advocate must take into account: the time that could reasonably be expected to be required to prepare the submission; the gravity of the matter in relation to which the proposed request or application relates; the urgency of the circumstances in which the proposed request or application is made; and any other matter that the Public Interest Advocate considers relevant: cl 14(4).
[13] Ibid cl 14(9).
[14] Ibid cl 14(3), 14(4).
[15] Ibid cl 15(1), 15(2). The submission must include the same as described at paragraph 19 of this submission: cl 15(3), 14(4).
[16] Ibid cl 16. In deciding whether the information is provided to the PIA, the Attorney-General or the Part 4-1 issuing authority may have regard to the following matters: the extent to which further information would be likely to be relevant to a PIA's preparation of a new submission, or the updating of his or her submission,

General of Security or the enforcement agency and the PIA is also given this information or a summary of it, then the PIA will have again the opportunity to make written or oral submissions.[17]

Public Interest Monitor scheme in Victoria

23. The Victorian Parliament introduced a PIM scheme in 2011. This regime was established, and continues to be governed, by the *Public Interest Monitor Act 2011* (Vic) (**PIM Act**) and the *Public Interest Monitor Regulations 2013* (Vic) (**PIM Regulations**).

24. In Victoria, there are two PIMs – the Principal PIM and the Deputy PIM.[18] The PIMs must be an Australian lawyer and cannot be a member of Parliament, the Director of Public Prosecutions, the Solicitor for Public Prosecutions or an employee of the Office of Public Prosecutions.[19]

25. The PIM is conferred functions under the Major Crimes (Investigative Powers) Act 2004 (Vic) (**Major Crimes Act**), the Surveillance Devices Act 1999 (Vic) (**Surveillance Devices Act**), the Telecommunications (Interception) (State Provisions) Act 1988 (Vic) (**Telecommunications Act**) and the Terrorism (Community Protection) Act 2003 (Vic) (**Terrorism Community Protection Act**).[20]

26. The object of the PIM Act is to provide further safeguards for the following 'relevant applications' (as well as their extension, variation, renewal or revocation):[21]

    (a) coercive powers orders under the Major Crimes Act;[22]

    (b) telecommunications interception warrants under the Telecommunications Act;[23]

    (c) surveillance device warrants, retrieval warrants, assistance orders and the approval of emergency authorisations under the Surveillance Devices Act;[24]

    (d) covert search warrants, preventative detention orders and prohibited contact orders under the Terrorism Community Protection Act.[25]

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relating to the application; the gravity of the matter in relation to which the application relates; the urgency of the circumstances in which the application is being made; any other matter considered relevant: ibid cl 16(2), 16(4).

[17] Ibid cl 13(3).

[18] *Public Interest Monitor Act 2011* (Vic) ss 6, 7.

[19] Ibid s 8.

[20] Ibid s 1(b).

[21] Ibid s 3.

[22] See Part 1A of the *Major Crimes (Investigative Powers) Act 2004* (Vic) for the role of the PIM. See Part 2 of the *Major Crimes (Investigative Powers) Act 2004* (Vic) for coercive powers orders.

[23] See Part 1A of the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) for the role of the PIM. This Part applies if an officer of the Police Force or an IBAC Officer intends to apply under the Commonwealth Act for a Part 2-5 warrant or a renewal of a Part 2-5 warrant: s 4. The Part 2-5 warrants are those listed in Division 4 of Part 2-5 of the *Telecommunications (Interception and Access) Act 1979* (Cth): *Telecommunications (Interception) (State Provisions) Act 1988* (Vic) s 3, definition of 'part 2–5 warrant'.

[24] See Division 1AA of Part 4 of the *Surveillance Devices Act 1999* (Vic) for the role of the PIM. See Subdivision 2 of Division 1 for surveillance device warrants, Subdivision 3 of Division 1 for retrieval warrants, Division 2 for assistance orders and Division 3 for the approval of emergency authorisations.

[25] See Division 1 of Part 1A of the *Terrorism (Community Protection) Act 2003* (Vic) for the role of the PIM. See Part 2 for covert search warrants, Part 2A for preventative detention orders and sections 13L and 13M for prohibited contact orders.

27. A PIM is entitled to appear at any hearing of a relevant application to test the content and sufficiency of the information relied on and the circumstances of the application. This can involve:

    (a) asking questions of any person giving information in relation to the application; and

    (b) making submissions as to the appropriateness of granting the application.[26]

28. The Law Council notes that while neither the PIM Act nor PIM Regulations include an express public interest assessment provision, the PIM serves an important public interest function and acts as a strong accountability measure on the use and exercise of investigatory powers.

29. Law enforcement agencies required to notify the PIM of a relevant application are Victoria Police, the Australian Criminal Intelligence Commission (**ACIC**), the Independent Broad-based Anti-corruption Commission (**IBAC**), the Department of Environment Land, Water and Planning (**DELWP**), the Department of Economic Development, Jobs Transport and Resources (**DEDJTR**) and the Game Management Authority.[27]

30. This requirement to notify the PIM about an application to exercise one of these powers includes giving a PIM a copy of the application and any affidavit.[28] There is an obligation on an applicant agency to provide full disclosure of all matters relevant that are adverse to the application.[29] A breach of this obligation to provide full disclosure is an offence.[30]

31. The Administrative Appeals Tribunal (**AAT**) hears and determines applications for telecommunications interception warrants. The Supreme Court deals with all other relevant applications, except for tracking devices under the Surveillance Devices Act, which may be heard and determined by the Magistrates' Court.[31]

32. Section 19 of the PIM Act requires the PIM to provide an annual report to the Minister on the performance of its functions. The Annual Report for 2017-18 provided that:

> *Except in limited circumstances, a PIM attended every hearing of a relevant application. The applicant provided the PIM with a draft affidavit prior to the listing of matters for hearing. On most occasions, the PIM had questions and raised issues in relation to applications. In the main, these issues were dealt with in a satisfactory manner prior to the parties attending court or the AAT, thereby minimising the time required for hearings*.[32]

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[26] *Public Interest Monitor Act 2011* (Vic) s 14.
[27] See *Public Interest Monitor Regulations 2013* (Vic) pt 2. Within Victoria Police, relevant applications are made by the Office of Chief Examiner, Special Projects Unit, Professional Standards Command and Legal Services Department: *Public Interest Monitor Annual Report 2017-18* (22 August 2018) 5 <https://www.parliament.vic.gov.au/file_uploads/PIM_Annual_Report_2017-18_2KcDxr2c.pdf>.
[28] *Public Interest Monitor Regulations 2013* (Vic) cl 11(2).
[29] Ibid pt 3.
[30] Ibid.
[31] *Public Interest Monitor Annual Report 2017-18* (22 August 2018) 5.
[32] Ibid.

33. The annual report must include:

    (a) the total number of relevant applications in respect of which a PIM appeared at a hearing during that year;

    (b) the number of relevant applications by each law enforcement agency in respect of which a PIM appeared at a hearing during that year;

    (c) the number of orders made, warrants issued or authorisations approved on relevant applications by each law enforcement agency during that year;

    (d) the number of relevant applications made by telephone during that year; and

    (e) the number of relevant applications by each law enforcement agency that were refused or withdrawn during that year.[33]

34. The Annual Report for 2017-18 provided the following information about the number of relevant applications between 1 July 2017 and 30 June 2018:

    (a) there were 387 relevant applications in total;

    (b) out of the 338 applications that were made by Victoria Police, 322 were approved, 4 were refused and 12 were withdrawn, and the PIM appeared in 313 of cases;

    (c) out of the 44 applications that were made by IBAC, 41 were approved and 3 refused, and the PIM appeared in all but one case;

    (d) the OCE made 4 applications, all of which were approved and had the PIM appear;

    (e) the DELWP and the DEDJTR made one application which was approved and had the PIM appear;

    (f) no relevant applications were made by the ACIC; and

    (g) 12 were made by telephone.[34]

35. In addition, the Law Council notes the potential utility of guidelines established by the PIM regarding processes of engagement with law enforcement agencies.

Public Interest Monitor in Queensland

36. A PIM scheme has been operating in Queensland for over twenty years. The PIM and Deputy PIMs are appointed by the Governor in Council.[35] They are conferred functions under the *Police Powers and Responsibilities Act 2000* (Qld) (**Police Powers Act**), the *Crime and Corruption Act 2001* (Qld) (**CCA**), the *Terrorism (Preventative Detention) Act 2005* (Qld) (**Terrorism Act**) and section 104 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

37. In the Police Powers Act, the PIM's functions are set out in section 740. The PIM has the function of appearing in court hearings to test the validity of applications by law

[33] *Public Interest Monitor Act 2011* (Vic) s 19(3).
[34] *Public Interest Monitor Annual Report 2017-18* (22 August 2018) 6.
[35] *Crime and Corruption Act 2001* (Qld) s 324; *Police Powers and Responsibilities Act 2000* (Qld) s 740.

enforcement authorities for surveillance device warrants, retrieval warrants and covert search warrants and approvals for the use of surveillance devices under emergency authorisations.[36]

38. When contesting the validity of the application either in the Supreme Court or Magistrates Court, the function of the PIM is to present questions for the applicant to answer and examine or cross-examine any witness and make submissions on the appropriateness of granting the application.[37] The Law Council notes that while in Queensland, as in Victoria, the role of the PIM as set out in section 740 of the Police Powers Act does not include an express public interest assessment function, the PIM acts as an important accountability measure as its functions serve to ensure that investigatory powers are tested in the public interest.

39. The PIM also has functions regarding applications for control orders under the Criminal Code[38] and preventative detention orders under the Terrorism Act.[39]

40. Further functions of the PIM are monitoring, reporting and gathering statistics in relation to the relevant applications, including with respect to compliance and noncompliance by law enforcement officers with the applicable legislative requirements.[40] The Deputy PIMs have the same functions as the PIM, except for some of the reporting functions.[41] In Queensland, there are currently one PIM and two Deputy PIMs.[42]

41. The PIM's functions in relation to the Crime and Corruption Commission are set out in section 326 of the CCA and effectively mirror those set out in section 742 of the Police Powers Act. However, the PIM is not the inspection and reporting entity for the Crime and Corruption Commission. Rather that task is the responsibility of the Parliamentary Crime and Misconduct Commissioner.[43]

42. The PIM produces an annual report which encompasses the annual reports that are required pursuant to section 743 and subsection 363(1) of the Police Powers Act and section 328 of the CCA. This covers the reporting requirements with respect to covert search warrants and surveillance device warrants,[44] consorting notices issued by the Queensland Police,[45] public safety orders issued by Commissioned Officers,[46] as well as in respect of detention and prohibited contact orders[47] and control orders.[48] The annual report must be received by the Minister within four months after the end of the

[36] *Police Powers and Responsibilities Act 2000* (Qld) ss 740(1)(a), 742(2)(a)-(d).
[37] Ibid s 742(2)(c).
[38] Ibid s 742(4)(a).
[39] Ibid s 742(4)(b).
[40] Ibid ss 742(2)(e)-(g), 742(2A), 742(4)(c)-(f).
[41] A Deputy PIM cannot provide reports on noncompliance by officers with the legislative requirements relating to surveillance device warrants, retrieval warrants, covert search warrants, and surveillance devices under emergency authorisations, nor provide six-monthly reports on the results of the PIM's inspections of records or the PIM's annual reports: *Police Powers and Responsibilities Act 2000* (Qld) s 742(3).
[42] Mr Peter Michael Lyons is the PIM for the period from 24 November 2018 to 23 November 2021. Ms Patricia Anne Kirkman-Scroope and Ms Gail Hartridge are the Deputy PIMs for the same period: Minister for Police and Minister for Corrective Services and Attorney-General and Minister for Justice and Leader of the House, Queensland Government, *Appointment of the Public Interest Monitor and Two Deputy Public Interest Monitors* (October 2018).
[43] *Crime and Corruption Act 2001* (Qld) ss 322, 362, 363.
[44] *Police Powers and Responsibilities Act 2000* (Qld) s 743(1).
[45] Ibid s 743(3A).
[46] Ibid s 743(3B).
[47] Ibid s 743(2).
[48] Ibid s 743(3).

financial year and the Minister must table the report within 14 sitting days of receiving it.[49]

43. Unlike the Victorian PIM reporting requirements, the annual report prepared by the Queensland PIM differentiates between the types of applications that were made by each agency. The Annual Report for 2017-18 provides that Queensland Police made no applications to the Supreme Court for a covert search warrant and made one application for a retrieval warrant.[50] There were no applications for control orders or preventative detention orders in which the PIM was required to be involved.[51] Queensland Police made 50 applications to the Supreme Court and Magistrates Court for surveillance device warrants and all applications were successful.[52] The annual report also breaks down the types of applications made by the Crime and Corruption Commission,[53] as well as the number of breaches of warrant conditions,[54] and the number of instances where there was interference with the property rights of third parties.[55]

44. Additionally, in the Annual Report the PIM provided some detail on how an application proceeds and what occurs on a practical level when Queensland Police or the Crime and Corruption Commission bring an application.[56]

45. The Annual Report also provides a one-page explanation regarding opposed applications.[57] However, the information provided is not precise and does not provide any statistics regarding opposed applications. Instead, it is reported that:

    (a) '*in a small number of cases* the PIM may have concerns about an application';

    (b) '*in some instances* additional evidence or information is provided with a view to satisfying concerns expressed by the PIM prior to the hearing of the application';

    (c) '*on other occasions* during the actual hearing of an application the agency may be asked by the Judge or Magistrate to provide a further affidavit or sworn evidence may be taken while the hearing'; and

    (d) '*quite frequently* an exchange will take place between the Court, the PIM and the agency during the course of the hearing to clarify an issue'.[58]

46. The PIM concluded that '*in general*, though, it is safe to say that the applications, almost without exception, brought by the CCC and QPS comply with all of the legislative requirements'.[59]

47. It is likely that this nondescript language is a result of the fact that there are no legislated reporting requirements on opposed applications. Therefore, the Law Council reiterates its recommendation that in the PIA's legislated requirement to provide an

[49] Ibid ss 743(1), 743(4).
[50] Public Interest Monitor (Qld), *20th Annual Report – Public Interest Monitor: Reporting Period 1 July 2017 to 30 June 2018* (2018) 5 [8].
[51] Ibid 5 [11]-[12].
[52] Ibid 5 [9].
[53] Ibid 6.
[54] Ibid 7.
[55] Ibid 7-8.
[56] Ibid 8.
[57] Ibid 9.
[58] Ibid 9 [emphasis added].
[59] Ibid [emphasis added].

annual report to Parliament, there be an obligation to report on the number of warrants where the PIA opposes the application and the number of successfully opposed applications.

International examples

Special Advocate in Canada

48. In Canada, the *Journalistic Sources Protection Act 2017* (**Journalistic Sources Protection Act**) was introduced in 2017.[60] This amended the *Canada Evidence Act 1985* (**Canada Evidence Act**) and the *Criminal Code 1985* (**Canada Criminal Code)**.[61] Under the Canada Evidence Act, journalists are now permitted to protect the confidentiality of journalistic sources as they are allowed to not disclose information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.[62]

49. Of greater significance to the Committee's inquiry and this additional written submission, the Journalistic Sources Protection Act also amended the Canada Criminal Code to provide strengthened protections for journalists' sources when search warrants relate to journalists. It is important to note that the process detailed below in the following paragraphs also applies to applications for warrants other than a search warrant, including applications for 'information for general warrant'[63], a 'telewarrant',[64] and a 'warrant for a tracking device',[65] as well as certain applications for authorisations of telecommunications interceptions[66] and applications for orders for general production orders and production orders relating to tracking data.[67]

50. The strengthened protections introduced by the Journalistic Sources Protection Act include that:

    (a) a search warrant must be issued by a judge of a superior court;

    (b) a heightened threshold be met before a judge of a superior court can issue the search warrant;

    (c) a 'special advocate' may be involved; and

    (d) media organisations can contest the disclosure of documents obtained during the execution of a search warrant to the law enforcement agency.

51. Each of these protections is explained in further detail. First, a search warrant relating to 'a journalist's communications or an object, document or data relating to or in the possession of a journalist' must be issued by a judge of a superior court of criminal jurisdiction.[68]

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[60] *Journalistic Sources Protection Act* SC 2017, c 22.
[61] *Canada Evidence Act* RSC 1985, c C-5; *Criminal Code* RSC 1985, c C-46.
[62] *Canada Evidence Act* RSC 1985, c C-5, s 39(7).
[63] *Criminal Code* RSC 1985, c C-46, s 487.01.
[64] Ibid s 487.1.
[65] Ibid s 492.1.
[66] Ibid ss 184.2, 184.3, 186, 188.
[67] Ibid ss 487.014, 487.017.
[68] Ibid s 488.01(2). Section 487 of the Criminal Code contains the provision of the issuance for a search warrant.

52. Secondly, the judge may issue a warrant, authorisation or order of this type only if, in addition to the conditions required for the issue of the warrant, authorisation or order, if satisfied that:

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

    (b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.[69]

53. Thirdly, while applications for search warrants (and the other warrants authorisations and orders detailed above in paragraph 46) are still made *ex parte*, this model provides for the involvement of a 'special advocate' at the judge's discretion. A judge may request that a special advocate present observations in the interest of freedom of the press concerning the conditions set out in the issue of the warrant authorisation or order.[70]

54. Lastly, section 488.02 of the Canada Criminal Code provides an opportunity for journalists and media organisation to contest the disclosure to law enforcement of the documents seized during a search. It provides that any documents that are obtained pursuant to a warrant, authorisation or order issued in accordance with the provisions introduced by the Journalistic Sources Protection Act must be placed in a packet and sealed by the court that issued the warrant, authorisation or order. This must then be kept in the custody of the court in a place with no public access or in such other place as the judge may authorise.[71]

55. Before an officer can examine, reproduce or copy the document contained within that sealed packet, the journalist and relevant media organisation must be notified of the officer's intention to examine or reproduced the document.[72] The journalist then has 10 days from receiving that notice to apply to a judge of the court that issued the warrant, authorisation or order to issue an order that the document is not be disclosed to an officer on the grounds that the document identifies or is likely to identify a journalistic source.[73]

56. The judge may order the disclosure of a document only if satisfied that the threshold as outlined in paragraph 49 above is met.[74] The judge may, if necessary, examine a document to determine whether it should be disclosed.[75] If the judge is not satisfied and is of the opinion that the document should not be disclosed, the judge must order that it be returned to the journalist or the media outlet. If the judge is satisfied and is of the opinion that the document should be disclosed, the judge must order that it be delivered to the officer who gave the notice to the journalist or media outlet, subject to such restrictions and conditions as the judge deems appropriate.[76]

57. It is important to note that these protections do not apply in respect of an application for a warrant, authorisation or order that is made in relation to the commission of an

[69] Ibid s 488.91(3).
[70] Ibid s 488.01(4).
[71] Ibid s 488.02(1).
[72] Ibid s 488.02(2).
[73] Ibid s 488.02(3).
[74] Ibid s 488.02(5).
[75] Ibid s 488.02(6).
[76] Ibid s 488.02(7).

offence by a journalist.[77] However, if a warrant, authorisation or order of the kind referred to above in paragraph 46 is sought in relation to a commission of an offence by a journalist and the judge considers it necessary to protect the confidentiality of journalistic sources, the judge may order that some or all documents obtained pursuant to the warrant, authorisation or order are to be dealt with in accordance with the process outlined in section 488.02.[78]

58. The application of the provisions introduced by the Journalistic Sources Protection Act is currently being examined for the first time in the Supreme Court of Canada in the case of *Denis v Côté* (2018) QCCA 611. While the facts of this case engage the provisions in the Canada Evidence Act as introduced by the Journalistic Sources Protection Act, the ruling of the Quebec Superior Court (from which the appellant appealed to the Supreme Court of Canada) in *Side v R* (2018) QCCS 1138 provides some commentary around the circumstances in Canada which gave rise to the introduction of the Journalistic Sources Protection Act.

59. The Quebec Superior Court explained that in autumn 2016, there were revelations that certain methods of investigation were being used by the police, namely the tapping of journalists under warrants obtained from justices of the peace with the aim of identifying their sources.[79] These revelations were described by the Quebec Superior Court to have 'shook the world of journalism' and 'raised a real uproar', so much so that they led governments to take steps to avoid the abuses that such police investigations could lead to.[80] The Quebec Government set up the Commission of Inquiry into the Protection of Journalistic Sources,[81] which made recommendations for reform in its report tabled in Parliament in 2017.[82] In the wake of this report, a bill was drafted which sought to protect journalistic sources,[83] which received wide support and led to the introduction and passing of the Journalistic Sources Protection Act.[84]

Recommended model

60. The Law Council is supportive of reforms which seek to create an adversarial environment in which a greater degree of scrutiny is brought to bear on the grounds advanced for seeking a warrant concerning journalists. The Law Council recommends a multifaceted approach to strengthening safeguards for when a warrant concerns a journalist, either as the suspect of an offence or as a third party in possession of information relevant to an investigation.

61. To this end, the Law Council reiterates three recommended reforms from its primary submission. First, a judge of a superior court of record should issue warrants authorising investigative action of journalists or media organisations. Secondly, the judge should be required to apply a public interest test similar to that which occurs under the test provided in section 180T of the TIA Act.

62. Lastly, the participation of a PIA in the warrant process should be legislated. The Law Council considers that the PIA scheme in place for journalist information warrants

[77] Ibid s 488.01(5).
[78] Ibid s 488.01(6).
[79] *Side v R* (2018) QCCS 1138, [78].
[80] Ibid.
[81] Ibid, citing the Commission of Inquiry on the Protection of the Confidentiality of Journalistic Sources (Report, 2017).
[82] Ibid [79].
[83] Ibid, citing Bill S-231: *An Act to amend the Canada Evidence Act and the Criminal Code (Protection of Journalistic Sources)*.
[84] Ibid [80].

under the TIA Act, with improved transparency measures such as annual reporting, could be adopted for search warrants relating to journalists.