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Mr Stephen Palethorpe  
Secretary  
The Senate  
Environment & Communications References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

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Dear Stephen

## **INQUIRY INTO PRESS FREEDOM**

The Institute thanks the members of the Committee and the Secretariat for this opportunity to make a submission on press freedom, an important topic to the rule of law.

1. This submission does not consider press freedom in light of the recent actions by the Australian Federal Police, nor the very many amendments to our laws that have enabled the Executive of the Government to infringe upon press freedom. Others will no doubt address these topics. Rather it considers press freedom from the perspective of the rule of law.
2. In 2002, Prof David Weisbrot AM who was the then president of the Australian Law Reform Commission said:

*“Maintaining respect for the rule of law largely requires the preservation of faith in our major public institutions – parliaments that are sensible and responsible in balancing competing interests; courts and tribunals that are accessible, efficient and fiercely independent and impartial; and public service that is competent, transparent and free from corruption.”<sup>1</sup>*

3. A statement with which the Institute agrees. In addition to his many roles, Prof Weisbrot was the previous Chair of the Australian Press Council from 2015 to 2017. So as to maintain respect for the rule of law we need to ensure there continues to be

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<sup>1</sup> Australian Law Reform Commission – Reform Journal [2002] ALRCRefJl 1

trust and faith in the major public institutions mentioned by Prof Weisbrot being Parliament, Courts & Tribunals, and the public service.

4. Maintaining respect for the rule of law is paramount for any democracy. The concept of the rule of law was initially developed over many centuries in England from the time of the Magna Carta (1215) to the Bill of Rights (1689). The rule of law is the presumption upon which the Australia's Constitution is based. But it is not an ideal that is, or should be, mechanically accepted. It has been substantially honoured in Australia because of the public until recently has trusted its Governments and major public institutions. At this time however, the public's faith in these bodies is in significant decline.
5. Successive Governments have been largely responsible for this. Parliament has also been responsible for the passing of laws that have whittled down press freedom.
6. The traditional press is the only institution capable of bringing to the public's attention that parliaments may have passed laws that are not sensible and responsible in balancing competing interests, that Governments have taken actions to make courts and tribunals less accessible, less efficient, less independent and impartial, and that Governments are responsible for the decline in the effectiveness of the public service.
7. Press freedom is like the rule of law – an important ideal. With the exception of freedom of political communication (an implied Constitutional guarantee which we all have) press freedom has no force of law.

#### Public Sentiment and the Media

8. In December 2018 the Museum of Australian Democracy and the Institute for Governance and Policy Analysis at the University of Canberra released findings from their joint research entitled 'Trust and Democracy in Australia'. They have since 1996 conducted a national survey of public satisfaction with the way democracy works in Australia. According to their research, in 2007 86% of voters were satisfied with Australia's democracy. However in 2018 voter satisfaction with Australia's democracy had plummeted to 41%. They have established a program called 'Democracy 2025' to try to strengthen democratic practice in Australia. The Museum and the Institute have stated that:

*"Weakening political trust erodes civic engagement, reduces support for evidence based public policies, promotes risk aversion in government, and creates the space for the rise of authoritarian-populist forces. Trust is the glue that facilitates collective action for mutual benefit. Without trust we don't have the ability to address complex, long-term challenges. Trust is also closely tied to democratic satisfaction. The restoration of political trust in Australia is critical to the health of our society and to the defence of liberal democracy more broadly."*<sup>2</sup>

9. The Edelman Trust Barometer is an international survey measuring the public's trust of key organisations. In 2019 in Australia, the result of the survey of the general population was a distrust of Government (42%)<sup>3</sup>. Interestingly the percent trust for

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<sup>2</sup> Democracy 2025 an initiative of the Museum of Australian Democracy (MoAD) and the Institute for Governance and Policy Analysis at the University of Canberra (UC-IGPA) <https://www.democracy2025.gov.au/>

<sup>3</sup> 7 February 2019



business for 2019 was 52%, which was considered neutral, The distrust of the media for 2019 was the lowest at 40%.

10. It is worth considering at this point whether or not the media, which for this year ranks in distrust by the general public below that of the government, should have any more freedoms than it already has. Laura Tingle has said that "*The brutal and pragmatic truth is, one suspects, that most people don't give a rats about journalists being raided by the police or even press freedom. The media is, after all, one of the least trusted institutions in our society.*"<sup>4</sup> Although the last part of this quote is undoubtedly correct, the public do care about journalists' homes and offices being raided and they also care about press freedom. No one else can tell us how our major public institutions are being run.
11. As an avid reader of the traditional press the quality of journalism in Australia ranges from poor to excellent. Perhaps one of the reasons why the public distrust the media, is that it has not lived up to the public's expectation of quality. There are several problems. The media for example has been slow to bring to the public's attention the impact of numerous laws since 2001 that can restrict the public's and the media's freedoms, until after the 2019 raids. Individual journalists and press organisations have adopted particular political ideology that infuses their messages. The influence of media proprietors is the highest it has ever been. From time to time the press, usually after losing defamation cases, seek amendments to those laws in their own self-interest. Articles can play on our prejudices
12. But for all its faults, press freedom is an important goal. In his paper titled 'A Guide to Developing a Culture of Lawfulness' Dr Roy Godson a professor of Government, Georgetown University said in the context of discussing serious crime and corruption:

*"The mass media in modern society is a powerful institution that can expose crime and corruption and reinforce the culture of lawfulness as well. The media can play this role in several ways. One is to monitor the behaviour of public officials, in government programs as well as in the private sector, and make these findings public. This kind of independent, objective, and for reporting on crime and corruption is not easy, but is an important if not essential component in maintaining transparency.*

*The media and also make a difference by encouraging facilitating public involvement in the promotion of the culture of lawfulness and the rule of law by devoting time and coverage to those in their own and other societies who are actively involved"*<sup>5</sup>

### The Government

13. Successive governments, both federal and state, have not understood that that actions taken by them have been responsible for the erosion of faith and trust in our major public institutions. We briefly consider some examples.
14. Appointments to the Fair Work Commission have been political for many decades. In December 2018 the Labor opposition accused the Federal Government of stacking the

<sup>4</sup> Australian Financial Review 29 June 2019 "Get ready for a return season of political power plays"

<sup>5</sup> 14 December 2000 paper given by the Organisation of American States to the Symposium on the Role of Civil Society in Countering Organised Crime

industrial umpire after it appointed six people to senior positions, most from employer backgrounds. Perhaps not a complaint the opposition should make given its past appointments while in Government. The Commission has an important role including setting minimum wage, penalty rates, dealing with bargaining disputes and determining unfair dismissal cases. Unions and employer associations are also regularly accusing Governments of stacking the commission. It weakens the public's trust in institutions that are, or are perceived to be, political.

15. A more recent development is the stacking of members of the Administrative Appeals Tribunal. The Tribunal has an extremely important role in reviewing federal administrative decisions, including ministerial decision making. It can review decisions made under more than 400 Commonwealth Acts and legislative instruments. Such decisions can have significant consequences for the public and include areas such as child support, workers compensation, family assistance, migration, taxation, citizenship, bankruptcy, freedom of information, NDIS and security assessments. If administrative review proceedings were taken in a court, the best result for a successful applicant would be for the decision makers to be forced to make the decision again. The same outcome often ensues. On the other hand, the AAT stands in the shoes of the decision-maker and reconsiders the decision on merit, an important function. Members of the AAT are appointed for fixed terms. In the last few years the Federal Government has not been renewing the contracts of members that have made decisions that might be seen as contrary to government policy and replacing them with members more supportive of Government policy.<sup>6</sup> Although an unsuccessful applicant can appeal from the AAT to the Federal Court of Australia, such appeals are generally limited to questions of law. More importantly, to discourage appeals, the cost of an appeal is now \$4,735 (\$10,000 for a corporation), the highest filing fees in the Federal Court. To say the least, it is not a good policy for the Government to be stacking the AAT against the public that seeks its help in reviewing Government decisions, and creating obstacles for an appeal to an independent judiciary.
16. Successive Federal Governments, both state and federal, have since the 1980s substantially weakened their public services. Highly experienced commentators both in journalism and business have in recent times highlighted the very substantial impact this is having on our faith and trust in these institutions.
17. Laura Tingle in her essay titled 'Political Amnesia: How we Forgot how to Govern' states

*"Deregulation of the economy unleashed a process of structural change to what the public sector does, and how it interacts with the rest of Australia. Much of the change was well-intentioned and, indeed necessary. But some of it, sometimes unwittingly, has been destructive of the public sector – and is only beginning to dawn on people just how destructive. The changes of the past 30 years have left us largely bereft of an institutional memory of government policy let alone a memory of how relationships between politicians and the public service could be different. Yet the speed of political debate means the need for that working memory has never been more important."*<sup>7</sup>

<sup>6</sup> See for example SMH 2/2/19 'Federal Labor vows to end political appointments to the AAT.'

<sup>7</sup>Tingle, Laura. Quarterly Essay 60 'Political Amnesia: How We Forgot How To Govern' Schwartz Publishing Pty. Ltd 2015.

18. After discussing public sector sackings and redundancies since the 1980s, the rise of ministerial advisors, the contracting out of the public service to consultants, several examples of where public service advice was ignored to the detriment of the public, the author continued:

*“This is just one example of serious, continuing, real-world implications for the way Australia is governed, flowing from what has happened to the public service in the past 30 years. It is not just about politicisation. It is a result of politicians failing to value and preserve our institutions”<sup>8</sup>.*

19. This issue was taken up by the author of David Morgan’s 2019 biography. Mr Morgan AO was the CEO of Westpac from 1999 to 2008.

*“Increasingly, the lines of distinction between the political and bureaucratic systems become blurred. Tony Abbott took the decision in 2014 to sack Martin Parkinson as the nation’s top civil servant, while Scott Morrison chose four years later to appoint his own chief of staff as secretary to the Treasury: a decision condemned by the Sydney morning Herald<sup>9</sup> as ‘the flouting of convention and good governance’. Demonstrably, the once cast-iron status of the Australian Public Service (APS) as an apolitical body, free from government interference and concerned only with imparting frank and fearless advice, can no longer be guaranteed.*

*It is amid this rising sense of alarm that Morgan has made a submission to the independent review of the APS, pressing for a restoration of its original purpose. ‘To be responsive is to deal with the issues of the day,’ he says. ‘To be responsible is to nurture capabilities that equip the country to deal with long-term challenges. Today’s public service is very responsive, but is it responsible? Just as crucial, he argues, that the APS becomes independent again, if it ever hopes to empower staff to regain its place as a coveted destination for the best graduates. The environment, inescapably, has shifted, with public servants now jostling to make themselves heard above the panoply of think tanks, special advisors, lobby groups and NGOs. But of Australia continues on the path of devaluing its experts, Morgan warns, then it risks the destruction of a priceless national asset.”<sup>10</sup>*

20. Earlier this month in a speech to the Institute of Public Administration the Honourable Prime Minister acknowledged that middle Australia had lost faith in the public sector, referring to a “trust deficit”.<sup>11</sup> But there was no recognition from the Prime Minister that the problem has been decades in the making, the seriousness of the problem and why it has occurred. However the issues has been highlighted by a number of authors and commentators in the press.
21. An example of how the public’s trust and faith in the public service can be damaged by political interference arises in the circumstances that brought about this inquiry.
22. We may never have a definitive answer as to why the AFP elevated its investigation into a national security leak from ‘routine’ and of ‘low value’, to being a ‘corruption’

<sup>8</sup>Tingle, Laura. Quarterly Essay 60 Political Amnesia: How We Forgot How To Govern Schwartz Publishing Pty. Ltd 2015.

<sup>9</sup> Ross Gittens, 'Budget Office Feels Gap Left by Politicised Treasury' 22 July 2018

<sup>10</sup> David Morgan And Extraordinary Life by Oliver Brown 138 – 139

<sup>11</sup> speech by the Prime Minister to the Institute of Public Administration, ahead of the Theody public service review being handed to government

incident of ‘critical impact’ and ‘high value’.<sup>12</sup> However, we do know the AFP informed the Home Affairs Minister of the raid on the Department’s Canberra headquarters about a leak concerning the Minister’s intention to stop two foreign au pairs being deported.<sup>13</sup>

23. We read in today’s press that following the raid on the home of a News Corp reporter earlier in the year, the Secretary of the Department of Home Affairs called the Deputy Commissioner of the AFP to inform the Deputy Commissioner that the Secretary was fully supportive of the actions of the AFP.<sup>14</sup>
24. The AFP has been criticised by the Federal Court following the raids on Channel 7 that took place on 14 February 2014. Although the AFP acknowledged that Channel 7 was very cooperative before the execution of the search warrants, the Federal Court found that the affidavits of Mr Kokles and Mr Phun regrettably created an impression about the status of Channel 7’s production of documents that conflicted with the true position: *“Any reasonable person reading Mr Kokles affidavit would infer that Seven had produce documents up to 14 February 2014 and this production was inadequate. This was not the true position.....”* The Court further found that the AFP submission that there was no evidence that Mr Kokles and Mr Phun knew about the status of all communications with Seven’s solicitors at the time they swore their affidavits, had no merit<sup>15</sup>. Further the wording of the search warrants sought and obtained by the AFP provided that the Magistrates who issued the search warrants were satisfied the recipients of them were reasonably suspected of having committed the offence stated in the warrant. The AFP accepted that Channel 7 could not have committed an offence and that this was an innocent word processing error.<sup>16</sup> These raids are also referred to below in a different context.
25. The real issue in all of this is that the public’s trust and faith in the AFP, has and will decline as a result of these well publicised raids. This has long term repercussions for the AFP. There have as a result, been calls for greater Parliamentary oversight of the AFP.
26. Successive Governments have yet to take appropriate action to restore faith and trust in our public institutions. Consequently, the need for press freedom to make sure Government errors are exposed becomes greater. No one else will provide us with information on these important issues.

### Parliament

27. Parliament has passed the very many laws since 2001 that have had the effect of infringing upon press freedom. It would be an enormous task to find, review and critique each of those provisions. The raids on a NewsCorp journalist and the ABC headquarters are not the only raids on the press in recent memory. In 2014 the Institute made written and oral submissions to a Senate inquiry with respect to the AFP raid on Channel 7 headquarters in Martin Place and elsewhere, relating to Schapelle Corby.<sup>17</sup>

<sup>12</sup> SMH 6/7/19 ‘AFP emails shed new light on media raids’ Kyara Loussikian & Bevan Shields

<sup>13</sup> SMH “25 July 2019” “New AFP Commissioner vows to examine controversial police raids on journalists” by Bevan Shields

<sup>14</sup> AFR 30/8/19 “Home Affairs Chief praised journalist raid”

<sup>15</sup> Seven West Media Limited v AFP’s [2014] FCA 263 at [101] and [102]

<sup>16</sup> Seven West Media Limited v AFP’s [2014] FCA 263 at [50]

<sup>17</sup> Legal & Constitutional Affairs Reference Committee – Current investigative processes & powers of the Australian Federal Police in relation to non-criminal matters



The search warrants were reportedly executed by 34 armed AFP officers. As far as we are aware the 2014 raids have not been mentioned in newspaper articles the context of the AFP raids that are the subject of this inquiry.

28. Prior to 11 September 2001, the search warrants used to raid Channel 7 could not have been obtained by the AFP until the AFP had first issued a production order with which Channel 7 had not complied in a reasonable time. However in October 2001 a Bill was proposed to remove the requirement for the AFP to issue a production order before seeking a search warrant. There was no reference in the Explanatory Memoranda or in any of the second reading speeches that even indicated that the Bill would have this effect if enacted. It is obviously disappointing that this far-reaching effect of the Bill was not brought to the attention of either the House of Representatives or the Senate. It is hard to imagine that the keeping of Parliament in the dark on this issue, was anything but deliberate. Regardless, it does demonstrate how important laws can get enacted without proper consideration of their impact on press freedom.

### Conclusion

29. Freedom of the press is crucial for Australia for a number of reasons. This submission has focused on why it's important to the rule of law. Those freedoms should be expressed clearly in an Act of the Federal Parliament. If that does not occur past infringements on press freedom by Act or regulation will continue, and there are likely to be further intrusions.

Yours faithfully

Malcolm Stewart  
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