Press Freedom in Australia's Constitutional System

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Freedom of the press remains a topic of significant public debate in Australia. A series of investigations into whistleblowers and journalists, combined with the continued expansion of Australia's counter-terrorism laws, has generated backlash against the federal government from media outlets, law reform groups and the wider public. In this article, we examine how Australia's counter-terrorism laws undermine press freedom and analyse the extent to which press freedom is legally protected in Australia's constitutional system. Part II outlines recent investigations into the conduct of Australian journalists and whistleblowers who have acted in the public interest. Part III explores counter-terrorism laws that threaten press freedom and freedom of speech. Part IV examines possible protections for journalists from criminal prosecution. To assess the strength of these protections, we analyse the Federal Court decision in Australian Broadcasting Corporation v Kane. *This judgment confirms that legal protections for a free and independent media in Australia are sorely lacking. Short-term statutory and longer-term constitutional reform is needed before Australia can claim to be a democracy that provides adequate protection to freedom of the press.*

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I. Introduction

In October 2019, a coalition of Australian news outlets printed their newspaper front pages with blacked-out text and the question: "When government keeps the truth from you, what are they covering up?".[1] For the public broadcasters and private companies to join together in this way was a significant display of unity in a highly competitive media environment. The reason for the front-page protest was to raise awareness about ongoing criminal investigations into Australian whistleblowers and journalists, as well as the encroachment of national security laws on press freedom. It attracted international attention, with the *New York Times* reporting that "[n]o other developed democracy has as strong a stranglehold on its secrets as Australia".[2]

Other western governments have also gone to great lengths to prosecute whistleblowers, including Julian Assange and Edward Snowden.[3] Nevertheless,

1 Matthew Doran, "Media unites to rally for press freedom, taking campaign to front pages and airwaves" (20 October 2019), online: *ABC News* <www.abc.net.au/news/2019-10-21/media-unites-to-rally-for-press-freedom/11621806>; Jamie Tarabay, "Australian media redact their front pages to protest secrecy laws" (21 October 2019), online: *The New York Times* <www.nytimes.com/2019/10/21/world/australia/news-media-protest-secrecy-government-right-to-know.html>.

2 Tarabay, *ibid*.

3 See Ben Quinn, "US attorney general may be using Assange case for political ends, court told" (27 July 2020), online: *The Guardian* <www.theguardian.com/media/2020/jul/27/us-attorney-general-julian-assange-extradition-case-political-ends-uk-court-told>; Rob Evans, Ian Cobain & Nicola Slawson, "Government advisers accused of 'full-frontal attack' on whistleblowers" (12 February 2017), online: *The Guardian*

Australia's reputation as an open democracy has certainly been damaged in recent years. A low point for press freedom, examined in this article, was the police raids on the home of a News Corp journalist and the offices of the Australian Broadcasting Corporation ("ABC"), Australia's public broadcaster.[4]

Our aim in this article is twofold: we examine how Australia's national security and counter-terrorism laws undermine press freedom and analyse the extent to which press freedom is legally protected in Australia's constitutional system. While we focus on the freedom of journalists to publish information, we also consider the ability of government whistleblowers to pass inside information to journalists. As the examples discussed below demonstrate, it is impossible to separate the conduct of one of these groups from the other. Public interest reporting depends on a symbiotic relationship between whistleblowers and journalists who are committed to exposing wrongdoing, even in the face of criminal sanctions.

In Part II, we outline a series of recent investigations into the conduct of Australian journalists and whistleblowers. Several of these resulted in prosecutions that are ongoing at the time of writing.[5] Part III explores a wide

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<www.theguardian.com/uk-news/2017/feb/12/uk-government-accused-full-frontal-attack-prison-whistleblowers-media-journalists>; Peter Finn & Sari Horwitz, "U.S. charges Snowden with espionage" (21 June 2013), online: *The Washington Post* <www.washingtonpost.com/world/national-security/us-charges-snowden-with-espionage/2013/06/21/507497d8-dab1-11e2-a016-92547bf094cc_story.html>.

4 See John Lyons, "AFP raid on ABC reveals investigative journalism being put in same category as criminality" (14 July 2019), online: *ABC News* <www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>; Amy Remeikis, "Police raid on Annika Smethurst shows surveillance exposé hit a nerve" (4 June 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jun/05/police-raid-on-annika-smethurst-shows-surveillance-expose-hit-a-nerve>.

5 See Christopher Knaus, "Witness K lawyer Bernard Collaery to appeal against secrecy in Timor-Leste bugging trial" (10 July 2020), online: *The Guardian* <www.theguardian.com/australia-news/2020/jul/10/witness-k-lawyer-bernard-collaery-to-appeal-against-secrecy-in-timor-leste-bugging-trial> [Knaus, "Appeal Against Secrecy"]; Nassim Khadem, "Commonwealth dumps 42 charges

range of national security and counter-terrorism laws that threaten press freedom and freedom of speech. Since the 9/11 attacks in 2001, Australia has enacted more than 80 laws in response to terrorism.[6] Many of these laws impact press freedom and freedom of speech more generally. Despite assurances from the federal government that journalists will not be "prosecuted for doing their job",[7] it is clear that Australia's counter-terrorism laws can be used against journalists and whistleblowers who act in the public interest. These laws contain not only criminal offences but also intrusive powers of decryption and digital surveillance.

Part IV examines possible protections for journalists from criminal prosecution. It considers ethical codes for journalists, shield laws, statutory whistleblower protections and the implied freedom of political communication. The implied freedom is a constitutional restriction on the lawmaking power of parliaments with regard to political speech. As will be explored, it does not equate to a right to freedom of speech or explicit protection for press freedom.

To assess the strength of these protections, Part IV analyses the recent decision of the Federal Court in *Australian Broadcasting Corporation v Kane*

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against ATO whistleblower Richard Boyle but threat of prison looms" (2 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-03/charges-against-ato-whistleblower-richard-boyle-dropped-dpp/12419800>; Jordan Hayne, "Investigation into Afghan Files that sparked ABC raids enters next phase with brief of evidence sent to prosecutors" (2 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-02/federal-police-seek-charges-abc-investigation-afghan-files-dpp/12415930> [Hayne, "ABC Raids"].

6 See Nicola McGarrity & Jessie Blackbourn, "Australia has enacted 82 anti-terror laws since 2001. But tough laws alone can't eliminate terrorism" (29 September 2019), online: *The Conversation* <theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>.

7 Lenore Taylor, "George Brandis: attorney general must approve prosecution of journalists under security laws" (30 October 2014), online: *The Guardian* <www.theguardian.com/australia-news/2014/oct/30/george-brandis-attorney-general-approve-prosecution-journalists-security-laws>.

("*Kane*").[8] This case followed the ABC raid. It involved, among other issues, a dispute over whether the search warrant was valid and whether the implied freedom could protect journalists from criminal investigation. The court's judgment confirms that legal protections for a free and independent media in Australia are sorely lacking. Short-term statutory and longer-term constitutional reform is needed before Australia can claim to be a democracy that provides adequate protection to freedom of the press.

II. Prosecuting Whistleblowers and Journalists

A concerning trend has developed recently in Australia in which whistleblowers and journalists are being investigated for disclosing classified information in the public interest. Several of these investigations have led to prosecutions for serious criminal offences. Certainly, criminal prosecution should be available for disclosing classified information where the person intends to undermine security or endanger life. However, in the cases outlined below, the circumstances are very different, creating serious doubts that the prosecutions are justified.

There are two main factors that distinguish the cases outlined below from what should be prosecuted as a crime. First, the information disclosed was of significant public interest. It has highlighted serious misconduct (including possible criminal offences and even war crimes) by employees of the Australian government. Second, the information has been disclosed responsibly by professional media organisations, with apparently little threat to human life or ongoing operations. In other words, the strong response to the leaks appears to have more to do with the embarrassment caused to the Australian government and its agencies than with threats to life or security. It is also important to distinguish these cases from the large-scale leaks led by Assange and Snowden. While debates about the morality of national security whistleblowing will continue, it is clear that these disclosures are more limited in scope.

One high-profile case surrounds Witness K, a former intelligence officer in the Australian Secret Intelligence Service ("ASIS"). ASIS is Australia's foreign

8 *Australian Broadcasting Corporation v Kane (No 2)*, [2020] FCA 133 [*Kane*].

intelligence collection service and the equivalent of the United Kingdom's MI6. Witness K and his lawyer, Bernard Collaery, were both charged under section 39 of the *Intelligence Services Act*[9] with a conspiracy to disclose information acquired or prepared by ASIS. Witness K pleaded guilty, but Collaery's prosecution continues in the courts.[10] The charges resulted from revelations that, in 2004, ASIS officers bugged Cabinet offices of the Timor-Leste government during negotiations over oil and gas reserves in the contested Timor Sea. The bugging was deceptive and tainted the negotiations with bad faith, but more than that, it helped Australia derive commercial benefit for multinational oil companies at the expense of an impoverished neighbour.[11] Timor-Leste, still recovering from the impacts of Indonesian occupation, was deprived of substantial natural resources that could have aided its transition out of poverty.[12]

Witness K reported his concerns to the Inspector-General of Intelligence and Security ("IGIS"), who gave permission to seek legal advice from Collaery, a security-cleared lawyer. Collaery then helped the Timor-Leste government mount a challenge to the treaty's validity in The Hague. At that point, the media reported on the bugging scandal. Collaery's home and offices were raided by officers from the Australian Security Intelligence Organisation ("ASIO"), Australia's domestic intelligence agency, and Witness K was arrested. The prosecutions commenced in 2018 after the terms of the treaty concluded. Much of Collaery's trial has been conducted in secret, according to procedures set out

9 *Intelligence Services Act 2001* (Cth) (Austl), s 39 [*ISA*].

10 Knaus, "Appeal Against Secrecy", *supra* note 5.

11 See Bernard Collaery, *Oil Under Troubled Water* (Melbourne: Melbourne University Press, 2020) [Collaery]; Christopher Knaus, "Witness K and the 'outrageous' spy scandal that failed to shame Australia" (10 August 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>.

12 Collaery, *ibid*. See also "Stop punishing Witness K for telling the truth on East Timor" (3 September 2019), online: *The Sydney Morning Herald* <https://www.smh.com.au/politics/federal/stop-punishing-witness-k-for-telling-the-truth-on-east-timor-20190903-p52nkt.html>.

in the *National Security Information Act* ("*NSIA*").[13] The *NSIA* was introduced after 9/11 to allow the successful prosecution of terrorists using summary and redacted evidence.[14]

Another high-profile case surrounds the police raid on the ABC. That case stems from "The Afghan Files", a series of stories published by journalists Dan Oakes and Sam Clark. The headline refers to a collection of defence force documents that were leaked to the ABC by David McBride, an Australian Defence Force lawyer. The documents contain reports of incidents involving alleged unlawful killing and possible war crimes, including shooting unarmed children and severing the hands of dead Taliban fighters.[15] After the stories were published, McBride admitted to the leak, claiming it was his duty to the Australian public.[16] In 2019, two years after publication, the Sydney offices of the ABC were raided by the Australian Federal Police ("AFP"). McBride has been charged with a series of offences including breaches of the *Defence Act*[17] and the theft of Commonwealth property. He is contesting the charges in the Australian Capital Territory's ("ACT") Supreme Court on the basis that he had a duty to report illegal conduct.[18] The ABC journalists face the ongoing

13 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (Austl).

14 Mark Rix, "Counter-terrorism and Information: The NSI Act, Fair Trials, and Open, Accountable Government" (2011) 25:2 Continuum: Journal of Media & Cultural Studies 285.

15 See Dan Oakes & Sam Clark, "The Afghan Files: Defence leak exposes deadly secrets of Australia's special forces" (10 July 2017), online: *ABC News* <www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642?nw=0>.

16 David McBride, "'My duty was to stand and be counted': Why I leaked to the ABC" (9 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/national/my-duty-was-to-stand-and-be-counted-why-i-leaked-to-the-abc-20190608-p51vte.html>.

17 *Defence Act 1903* (Cth) (Austl).

18 Lyons, *supra* note 4.

possibility of prosecution.[19] In *Kane*, discussed in Part IV, the Federal Court upheld the validity of the AFP search warrant, meaning that the digital material seized by the AFP during the raid can be used as evidence against them.[20]

The ABC raid was sufficiently concerning on its own, but the discontent was amplified because it followed a police search on the home of a News Corp journalist. In 2018, Annika Smethurst published a story in the Sunday Telegraph, based on leaked information, that the Home Affairs and Defence departments discussed a proposal to give greater powers to the Australian Signals Directorate ("ASD"), Australia's signals intelligence agency. The proposed powers would give ASD the power, with ministerial authorisation, to spy on Australian citizens by secretly accessing their emails, bank accounts and text messages.[21] Rupert Murdoch called the search "outrageous and heavy-handed" and a "dangerous act of intimidation".[22] Another search was conducted on the house of a former intelligence officer who may have been Smethurst's source,[23]

19 Elizabeth Byrne, "Afghan Files leak accused David McBride faces ACT Supreme Court for first time" (13 July 2019), online: *ABC News* <www.abc.net.au/news/2019-06-13/abc-raids-afghan-files-leak-accused-court-canberra/11206682>.

20 Hayne, "ABC Raids", *supra* note 5.

21 See Remeikis, *supra* note 4. Currently, ASD, like Australia's other foreign intelligence agencies, cannot spy on Australian citizens.

22 *Ibid*; Rebecca Ananian-Welsh, "Why the raids on Australia media present a clear threat to democracy" (5 June 2019), online: *The Conversation* <theconversation.com/why-the-raids-on-australian-media-present-a-clear-threat-to-democracy-118334>; Paul Karp, "Federal police raid home of News Corp journalist Annika Smethurst" (4 July 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corp-journalist-annika-smethurst>.

23 Andrew Tillett, "Police raid home of senior federal bureaucrat" (4 September 2019), online: *The Australian Financial Review* <www.afr.com/politics/federal/police-raid-home-of-senior-federal-bureaucrat-20190904-p52nx3>.

though a plan to raid News Corp's Sydney headquarters was shelved amid the combined backlash from these and the ABC raid.[24]

Charges against Smethurst were ruled out by the AFP after the High Court held that the search warrant used to raid her home was invalid.[25] This was because the warrant failed to meet its basic requirements: it misstated the offence and was not sufficiently specific.[26] However, despite finding the warrant invalid, the High Court held by a narrow majority that police were not required to destroy the information they seized or return it to Smethurst.[27] The court considered, among other issues, that there was no actionable right to require this, and there were public interest considerations in favour of the investigation and prosecution of crime.[28] In other words, under Australian law, journalistic material can be kept by police even if it is illegally obtained. This is a remarkable finding and further evidence that protections for freedom of the press are lacking. In contrast to the Federal Court in *Kane*, the High Court did not discuss wider questions as to whether the implied freedom of political communication or other relevant protections, such as shield laws, could protect journalists from criminal investigation.

The Witness K, Afghan Files and Smethurst cases all involved an intelligence or military insider. However, it is not only cases of national security whistleblowing that have been prosecuted. Richard Boyle, a former employee of the Australian Taxation Office ("ATO"), currently faces life in prison for blowing

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24 Lyons, *supra* note 4.

25 Leo Shanahan & Richard Ferguson, "AFP won't charge News Corp journalist Annika Smethurst following raid" (27 May 2020), online: *The Australian* <www.afr.com/politics/federal/police-won-t-charge-news-corp-journalist-annika-smethurst-20200527-p54wwo >; Jordan Hayne, "AFP will not lay charges against Annika Smethurst over publishing of classified intelligence documents" (27 May 2020), online: *ABC News* <www.abc.net.au/news/2020-05-27/afp-will-not-lay-charges-annika-smethurst-raid/12291238>.

26 *Smethurst v Commissioner of Police*, [2020] HCA 14 at para 44.

27 *Ibid* at para 104.

28 *Ibid* at paras 85, 101.

the whistle on aggressive debt collection practices.[29] Similar to Witness K and McBride, Boyle initially raised the matter internally — in this case with his ATO supervisors — before taking his concerns to the media.[30] This is important procedurally, as it means these three insiders followed requirements outlined in the *Public Interest Disclosure Act* ("*PIDA*"),[31] Australia's federal whistleblowing legislation. The *PIDA* requires whistleblowers to first raise the matter internally and to disclose the information to an external source only if they reasonably believe the internal investigation to be inadequate.[32] Despite following this process, and only going to the media after being "frustrated with inaction" by their employers and police,[33] the insiders have not been legally protected as whistleblowers. While the exact reasons for this are not known, it is likely that the information fell under exemptions for intelligence information,[34] or, according to the authorities, the insiders could not have reasonably believed the internal investigations were inadequate.

These cases suggest a willingness amongst government and law enforcement to prosecute genuine whistleblowers who report sensitive information in the public interest. In these cases, the information was communicated to a lawyer or journalist as a professional outsider. It is related to past operations or proposed policy changes, with apparently little ongoing threat to life or national security. In other words, there is a willingness to prosecute those who reveal sensitive information, even if the discloser's intention is to promote transparency and

29 Khadem, *supra* note 5.

30 See Christopher Knaus, "Whistleblower protections 'a sham', says lawyer whose leaks led to ABC raids" (6 June 2019), online: *The Guardian* <www.theguardian.com/media/2019/jun/06/whistleblower-protections-a-sham-says-lawyer-whose-leaks-led-to-abc-raids>. It is not clear whether the Australian Signals Directorate insider who passed information to Annika Smethurst has sought whistleblower protections, as his or her identity is not publicly known.

31 *Public Interest Disclosure Act 2013* (Cth) (Austl) [*PIDA*].

32 *Ibid*, s 26.

33 Knaus, *supra* note 30.

34 *PIDA*, *supra* note 31, ss 33, 41.

accountability of government. The cases also suggest, as we confirm through the analysis in Part IV, that legal protections for whistleblowers and journalists are sorely lacking.

III. National Security Laws and Press Freedom

The risks of criminal prosecution to whistleblowers and journalists in Australia are aggravated by a wide range of national security offences and powers. Many of these laws were enacted recently in response to the threat of terrorism from Islamic State and foreign fighters but have more to do with keeping information secret than criminalising terrorism. This recent spate of lawmaking in response to terrorism is not a new phenomenon: since 2001, the federal Parliament has enacted more than 80 counter-terrorism laws.[35] Kent Roach dubbed this a form of "hyper-legislation", meaning that Australia, with a comparatively low threat of terrorism, has outpaced other countries in the number and scope of its legal responses to terrorism.[36]

Like other countries around the world, Australia responded strongly to the threat from the Islamic State with new and updated counter-terrorism laws. These laws supplemented more than 60 pieces of legislation passed by the Australian Federal Parliament in response to terrorism since 9/11.[37] The first legislative response to Islamic State, passed in October 2014, made further changes to the powers available to Australia's intelligence agencies and a series of related offences. Disclosure offences in the *ISA* were strengthened, such that intelligence officers now face 10 years imprisonment for disclosing information obtained in the course of their duties,[38] or three years for "unauthorised dealing" with records, including copying or recording information.[39] The latter offences

35 See McGarrity & Blackbourn, *supra* note 6.

36 Kent Roach, *The 9/11 Effect* (Cambridge: Cambridge University Press, 2011) at 309.

37 George Williams, "The Legal Legacy of the War on Terror" (2013) 12 Macquarie Legal Journal 3 at 7 (AustLII).

38 *ISA*, *supra* note 9, ss 39–40B.

39 *Ibid*, ss 40C–40M.

are clearly pre-emptive, designed to allow the prosecution of intelligence officers before they disclose information to an external source. Where that source would be a foreign government or intelligence agency, such pre-emptive action may well be justified, although separate espionage offences would also apply.[40] Copying information to pass it on to a journalist or member of Parliament is very different, as this could be intended to enhance rather than undermine the public interest, but the legislation makes no distinction between these two very different scenarios.

The unauthorised dealing offences do not include a requirement that the person intends to communicate the information to anyone. The penalty applies provided the information was copied outside the course of their duties, it was not done in accordance with a requirement of the Inspector-General of Intelligence and Security, and the information was not publicly available.[41] This means that a whistleblowing intelligence officer could be imprisoned if they thought about passing the information on to a journalist but later changed their mind.

Another major change introduced at this time was to give ASIO, Australia's domestic intelligence agency, powers to conduct "Special Intelligence Operations" ("SIO"). An SIO is an undercover intelligence operation, approved by the federal Attorney-General, in which ASIO officers receive immunity from civil and criminal liability.[42] This scheme was controversial for its own reasons, including the initial possibility that the laws might have authorised the use of torture.[43] However, the main controversy surrounding press freedom is related

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40 *Criminal Code Act 1995* (Cth) (Austl), div 91 [*Criminal Code*].

41 *ISA*, *supra* note 9, ss 40C(1)(d), (2), (2A).

42 *Australian Security Intelligence Organisation Act 1979* (Cth) (Austl), ss 35C, 35K [*ASIO*].

43 See *e.g.* Paul Sheehan, "George Brandis' new anti-terror law allows ASIO to torture" (17 September 2014), online: *The Sydney Morning Herald* <www.smh.com.au/opinion/george-brandis-new-antiterror-law-allows-asio-to-torture-20140917-10i9hv.html>. An amendment was later included in the Bill to ensure this was not possible. See also Teneille Elliott, "Only in America? Australia needs safeguards against torture too" (12 December 2014), online:

to a new offence, found in section 35P of the *Australian Security Intelligence Organisation Act*.[44]

Section 35P prohibits the disclosure of information about SIOs. In its original form, the offence provided five years' imprisonment where a person disclosed any information about an SIO. Similar to the unauthorised dealing offences, this was an offence of strict liability: it applied regardless of the person's intention. The penalty doubled if the disclosure endangered health or safety, or prejudiced an SIO, or the person intended one of those consequences.

This new offence was heavily criticised by media organisations, as it would prevent them from reporting on misconduct by ASIO officers, even where they did so responsibly in the public interest. The Media, Arts and Entertainment Alliance called it "an outrageous attack on press freedom" that was "not worthy of a healthy, functioning democracy".[45] In a public address, Lachlan Murdoch claimed that "we do not need further laws to jail journalists who responsibly learn and accurately tell".[46] Many of these criticisms came after the law was already enacted, but they were sufficient for the government to request an inquiry into the law by Roger Gyles QC, at that time the Independent National

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The Conversation <theconversation.com/only-in-america-australia-needs-safeguards-against-torture-too-35376>.

44 *ASIO*, *supra* note 42, s 35P.

45 "MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia" (26 September 2014), online: *Media, Entertainment and Arts Alliance* <www.meaa.org/mediaroom/meaa-says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia/>; Christopher Warren & Mike Dobbie, "Surveillance state seizes its chance" (October 2014), online (pdf): *The Walkley Magazine* <www.meaa.org/wp-content/uploads/2014/02/ebook_walkleys81web.pdf>.

46 Rachael Brown, "Lachlan Murdoch hits out at new anti-terror laws saying they threaten press freedom" (23 October 2014), online: *ABC News* <www.abc.net.au/news/2014-10-24/lachlan-murdoch-hits-out-at-new-anti-terror-laws/5838030>; Michael Bradley, "Murdoch's Belated Stand for Press Freedom" (23 October 2014), online: *The Drum* <www.abc.net.au/news/2014-10-24/bradley-murdochs-belated-stand-for-press-freedom/5839584>.

Security Legislation Monitor ("INSLM"). INSLM is an independent statutory review office modelled on the UK's Independent Reviewer of Terrorism Legislation.

Following recommendations by INSLM,[47] section 35P was amended so that it now distinguishes between "entrusted persons" (intelligence agency employees) and any other person. For entrusted persons, the offences remain the same,[48] but the offences for all other persons (including journalists and lawyers) have been amended. A penalty of five years' imprisonment now applies where the disclosure will endanger the health or safety of any person or prejudice an SIO, and the penalty doubles where the person intends those results.[49]

The amendments to section 35P were a welcome improvement, but the offences remain problematic. Strict liability offences still apply to intelligence insiders,[50] and there are no exemptions across any of the offences for disclosing information in the public interest. In addition, the offences do not require that the person even knows that the information relates to an SIO: the person need only be reckless as to that connection. This is not a significant issue for insiders, who are likely to know what the information relates to, but it is problematic for journalists. Journalists reporting on counter-terrorism raids or other common aspects of national security reporting are not likely to know if the stories they are telling relate to an SIO or not. This is likely to have a chilling effect on the ability of Australia media organisations to report more widely on national security matters in the public interest. In 2018, the United Nations Special Rapporteur on the Situation of Human Rights Defenders reported as much, warning that Australian journalists may engage in self-censorship due to fears about section 35P:

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47 Independent National Security Legislation Monitor, *Report on the Impact on Journalists of Section 35P of the ASIO Act* by the Hon Roger Gyles (Canberra: Independent National Security Legislation Monitor, 2015) at 3.

48 *ASIO*, *supra* note 42, ss 35P(1), 35(1B).

49 *Ibid*, ss 35P(2), 35(2A).

50 *Ibid*, ss 35P(1A), 35(1C).

> Given the overall secrecy of intelligence operations and without confirmation from ASIO, it is challenging for journalists to determine if an activity of interest would be a special intelligence operation. Due to high sanctions, the provision may lead to self-censorship by the media, which may take a more cautious approach to reporting on ASIO's activities.[51]

These concerns were compounded when new metadata laws were introduced the following year. In early 2015, the federal Parliament enacted laws requiring communications service providers to retain metadata — including the time, date, location, sender and recipient of all telephone calls, emails and messages — for two years.[52] These metadata can be accessed by ASIO and enforcement agencies without a warrant.[53] Enforcement agencies include police and other criminal investigative bodies,[54] though in practice, a much wider range of organisations — including local councils — have been able to gain access to metadata under the new laws.[55]

In addition to wider privacy issues, the metadata laws raised specific concerns that journalists' metadata could be accessed by ASIO or law enforcement to identify their confidential sources. In response, a Journalist Information Warrant ("JIW") scheme was introduced. Under this scheme, a journalist's metadata can be accessed only if a judge determines that the public interest in issuing the warrant outweighs the public interest in protecting the source.[56] This is a welcome addition, although journalists cannot make submissions to contest the

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51 *Report of the Special Rapporteur on the Situation of Human Rights Defenders on his Mission to Australia*, UNHRC, 37th Sess, UN Doc A/HRC/37/51/Add.3 (2018) at 7.

52 *Telecommunications (Interception and Access) Act 1979* (Cth) (Austl), s 186A [*Telecommunications Act 1979*].

53 See *ibid*, ss 175, 178–179.

54 *Ibid*, s 176A.

55 See Melissa Clarke, "Metadata laws under fire as 'authority creep' has more agencies accessing your information" (19 October 2018), online: *ABC news* <www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348>.

56 *Telecommunications Act 1979*, *supra* note 52, ss 180L, 180T.

warrants before a judge. Indeed, they need not be notified that an application is being made, or that a warrant has been issued. The first time a journalist is likely to suspect their metadata has been accessed is when they become aware of an investigation (for example, through a raid on their home or offices). Even then, they would not necessarily be able to confirm that fact. The investigation need not relate to a serious crime, as metadata can be accessed by ASIO for intelligence gathering purposes, or by enforcement agencies to enforce the criminal law, find a missing person, or protect the public revenue.[57]

The JIW scheme also does not prevent the misuse of the laws. In 2018, the Commonwealth Ombudsman reported that metadata had been accessed repeatedly without proper authorisation.[58] This was done more than 3000 times by the Australian Capital Territory police alone, suggesting it had become common practice.[59] In at least one case, an AFP officer accessed a journalist's metadata to identify a source without applying for a JIW.[60] Journalists' metadata has also been accessed according to the warrant scheme. Under two JIWs, which were likely related to the ABC raids, journalists' metadata was accessed 58 times.[61]

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57 *Ibid*, ss 178–179.

58 Commonwealth Ombudsman, *A Report on the Commonwealth Ombudsman's Monitoring of Agency Access to Stored Communications and Telecommunications Data Under Chapters 3 and 4 of the Telecommunications (Interception and Access) Act 1979*, (2018) at 10 [*Commonwealth Ombudsman*].

59 *Ibid* at 10 (initially it was reported by the Commonwealth Ombudsman that ACT police had access metadata without authorisation 116 times); Paul Karp, "ACT police admit they unlawfully accessed metadata more than 3,000 times" (26 July 2019), online: *The Guardian* <www.theguardian.com/australia-news/2019/jul/26/act-police-admit-unlawfully-accessed-metadata-more-than-3000-times>. ACT police later admitted that the actual number was more than 3000.

60 *Commonwealth Ombudsman*, *ibid* at 9.

61 Bevan Shields, "Federal police accessed the metadata of journalists nearly 60 times" (8 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/federal-police-accessed-the-metadata-of-journalists-nearly-60-times-20190708-p52598.html>.

Following section 35P and the metadata laws, a further expansion of national security powers threatened journalists once more. Through the *National Security Legislation Amendment Act*[62] the federal government sought to address growing foreign influence in Australia. This included a foreign influence transparency register, which requires foreign entities to identify their political interests, as well as expanded espionage offences. While the government has not said so explicitly, the laws are widely recognised as targeting the influence of the Chinese Communist Party in Australia.[63]

The new espionage laws include an offence punishable by 25 years imprisonment where a person "deals" with information that "concerns Australia's national security" and they are reckless as to whether they will prejudice national security as a result.[64] Similar to the unauthorised dealing offences, the definition of "dealing" includes not only communicating or publishing information but also receiving, possessing, copying, or making a record of it.[65] The definition of "national security" is also exceptionally broad, as it extends beyond matters concerning defence or terrorism to include Australia's "political, military or economic relations" with other countries.[66] A penalty of up to 20 years' imprisonment is available even if the information itself does not have a security classification or relate to national security.[67]

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62 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (Austl).

63 See David Wroe & National Security Correspondent, "What took you so long? Experts predict China's reaction to foreign influence laws" (5 December 2017), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/what-took-you-so-long-experts-predict-chinas-reaction-to-foreign-influence-laws-20171205-gzzdiu.html>.

64 *Criminal Code*, *supra* note 40, s 91.1(2).

65 *Ibid*, s 90.1.

66 *Ibid*, s 90.4(1)(e).

67 *Ibid*, s 91.2(2).

The information must be "made available" to a foreign principal,[68] suggesting it involves collaboration with a foreign government or intelligence agency and would not apply to public-interest journalism. However, the definition of the foreign principal includes any entity owned, directed or controlled by a foreign government.[69] In theory, this could include passing (or preparing to pass) information to public broadcasters in other countries, such as the British Broadcasting Corporation. The meaning of 'make available' includes placing the information somewhere it can be accessed or describing how to access it.[70] These do not directly describe publishing the information online or in a newspaper but appear broad enough to capture those scenarios. Certainly, even if the espionage offences are directed towards other harms, there is sufficient risk for journalists to fear prosecution. Under these updated laws, a newsroom could plausibly be raided on suspicion that journalists possessed information relating to Australia's economic relations with other countries. This is an extraordinary expansion of the traditional concept of espionage, which involves communicating sensitive information to an enemy power.[71]

Yet another piece of legislation during this period of counter-terrorism lawmaking was the *Telecommunications and Other Legislation Amendment Act* ("*TOLA*"),[72] also referred to as the "encryption laws". *TOLA* creates a scheme whereby Australian police and intelligence agencies can request technical assistance from "designated communications providers" ("DCPs"). The primary aim of the legislation is to address the problem of terrorist organisations 'going dark' by using encrypted messaging services, such as WhatsApp, Telegram and

68 *Ibid*.

69 *Ibid*, s 90.2(d).

70 *Ibid*, s 90.1.

71 See Sarah Kendall, "Australia's New Espionage Laws Another Case of Hyper-Legislation and Over-Criminalisation" (2019) 38:1 The University of Queensland Law Journal 125.

72 *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (Austl).

Signal.[73] ASIO and law enforcement can now require Facebook and other technology companies to assist in decrypting secure messages sent over their servers. Companies that refuse to comply face fines of up to AUD $10 million.[74] However, the potential scope of the law is much broader. The definition of a DCP is exceptionally broad, extending to essentially any type of technology company anywhere in the world,[75] and the types of technical assistance available extend beyond decryption to include substituting part of any service or modifying any product.[76] Again, these laws are controversial for wider reasons, including how quickly they were rushed through Parliament and the risks they create to cyber-security,[77] but they raise specific concerns around journalists and their confidential sources. In response to concerns about the metadata laws, journalists increased their use of encrypted messaging,[78] but then TOLA meant this strategy would not necessarily protect their sources' identities.

Concerns over these wide-ranging national security powers, as well as the ongoing investigations surrounding Witness K, the Afghan Files and Annika Smethurst, led to the front-page protest mentioned in the introduction. The backlash also triggered two parliamentary inquiries, including one by the Parliamentary Joint Committee on Intelligence and Security ("PJCIS"). It remains to be seen what will come out of these inquiries in terms of recommendations and amendments, but it is clear they will need to address

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73 See Nicola McGarrity & Keiran Hardy, "Digital Surveillance and Access to Encrypted Communications in Australia" (2020) 49:1 Common Law World Review 1.

74 *Telecommunications Act 1997* (Cth) (Austl), 1997/47, ss 317ZA-317ZG [*Telecommunications Act 1997*].

75 *Ibid*, s 317C. See McGarrity & Hardy, *supra* note 73.

76 *Telecommunications Act 1997*, *supra* note 74, s 317E.

77 See Ariel Bogle, "'Outlandish' encryption laws leave Australian tech industry angry and confused" (6 December 2018), online: *ABC News* <www.abc.net.au/news/science/2018-12-07/encryption-bill-australian-technology-industry-fuming-mad/10589962>.

78 See "Digital security for journalists" (10 June 2019), online: *Digital Rights Watch* <digitalrightswatch.org.au/2019/06/10/digital-security-for-journalists>.

widespread discontent amongst Australia's media organisations. In evidence to the PJCIS, the ABC news director captured the seriousness of these powers. He explained that journalists working in Australia could no longer provide the core promise of their profession:

> 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 … We simply can't say to a source anymore that we absolutely can guarantee that they will be protected here. That is what is at risk and that is what is at stake.[79]

It is not only recently introduced powers that threaten press freedom and freedom of speech. Secrecy offences attach to other counter-terrorism laws, including ASIO's special questioning powers and Preventative Detention Orders.[80] The NSIA, which was introduced in 2004 to assist in terrorism prosecutions, has meant that much of Collaery's trial will be conducted in secret.[81] The espionage offences have a much longer history,[82] as do secrecy

79 Austl, Commonwealth, House of Representatives, *Parliamentary Debates* (13 August 2019) at 20 (Mr Morris, ABC News Director).

80 *ASIO*, *supra* note 42, s 34ZS; *Criminal Code*, *supra* note 40, s 105.41.

81 Christopher Knaus, "Court rules parts of Bernard Collaery trial to be held in secret" (26 June 2020), online: *The Guardian* <www.theguardian.com/australia-news/2020/jun/26/court-rules-key-parts-of-bernard-collaery-trial-to-be-held-in-secret>; Keiran Hardy, "Australia's quest for national security is undermining the courts and could lead to secretive trials" (1 October 2019), online: *The Conversation* <theconversation.com/australias-quest-for-national-security-is-undermining-the-courts-and-could-lead-to-secretive-trials-122638>.

82 Kendall, *supra* note 71.

offences for government officers.[83] Longstanding offences in the *Crimes Act*[84] prohibited Commonwealth officers from disclosing information obtained in the course of their duties, or disclosing official secrets. David McBride, the defence lawyer who passed the Afghan Files to the ABC, has been charged with one of those offences, although they have now been repealed by the 2018 foreign interference laws, with new versions introduced.[85] It is the cumulation of these new and updated offences, combined with expanded powers of digital surveillance and an appetite for prosecuting journalists and whistleblowers acting in the public interest, that have contributed to the current low point for freedom of the press in Australia.

In response to concerns about these national security laws and the ongoing prosecutions, senior members of the government have said that journalists will not be "prosecuted for doing their job".[86] This assurance was provided by George Brandis, Attorney-General when section 35P was introduced, and both he and his successor, Christian Porter, issued directives to the federal prosecution office that journalists must not be prosecuted without their consent.[87] Home Affairs Minister Peter Dutton also issued a similar directive to the AFP.[88] However, while these directives are promising, they merely reinforce that the

83 Keiran Hardy & George Williams, "Terrorist, Traitor or Whistleblower?" (2014) 37:2 The University of New South Wales Law Journal 784 at para 799.

84 *Crimes Act 1914* (Cth) (Austl) [*Crimes Act*].

85 *Criminal Code*, *supra* note 40, div 122.

86 Taylor, *supra* note 7.

87 *Ibid*; Max Mason, "Porter Declares No Prosecution of Journalists without His Consent" (30 September 2019), online: *The Australian Financial Review* <https://www.afr.com/companies/media-and-marketing/porter-declares-no-prosecution-of-journalists-without-his-consent-20190930-p52wbe>.

88 See Jade Macmillan, "Peter Dutton orders AFP to consider importance of press freedom before investigating reporter" (9 August 2019), online: *ABC News* <www.abc.net.au/news/2019-08-09/peter-dutton-orders-afp-press-freedom-investigating-journalists/11401108>; Denis Muller, "Dutton directive gives journalists more breathing space, but not whistleblowers" (11 August 2019), online: *The Conversation* <theconversation.com/dutton-directive-gives-journalists-more-breathing-space-but-not-whistleblowers-121730>.

choice to prosecute relies on executive discretion; they cannot prevent a journalist from being prosecuted for acting in the public interest, nor do they provide wider protection for freedom of the press. When asked whether he was concerned that journalists were being tried in the courts, the Prime Minister responded only that "no one in this country is above the law".[89] Such statements, uttered similarly by Porter and Dutton before issuing their directives,[90] do not breed confidence that Australian journalists will be able to report freely in the public interest. Under Australia's wide-ranging national security powers, the investigation and prosecution of journalists remain not only a possibility but a reality.

IV. Protecting Journalists and Whistleblowers

Freedom of the press is "one of the cornerstones of a democratic society".[91] It is closely related to the freedom of expression, found in article 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ("ICCPR"). According to article 9(2) of the ICCPR:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

89 Fergus Hunter, "'Common sense changes': Media companies reject claim they want to be 'above the law'" (22 October 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/common-sense-changes-media-companies-reject-claim-they-want-to-be-above-the-law-20191022-p5334u.html>.

90 Bianca Hall, "Press freedom is a necessary and important part of a democracy" (26 October 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/press-freedom-is-a-necessary-and-important-part-of-a-democracy-20191025-p5347p.html>; Bevan Shields, "'Nobody is above the law': Journalists committed a crime, says Peter Dutton" (12 July 2019), online: *The Sydney Morning Herald* <www.smh.com.au/politics/federal/nobody-is-above-the-law-journalists-committed-a-crime-says-peter-dutton-20190712-p526il.html>.

91 *General Comment No. 34, Article 19: Freedom of opinion and expression*, UNHRC, 102nd Sess, UN Doc CCPR/C/GC/34 (2011) at 3.

> regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[92]

For media organisations to report freely in the public interest is essential to achieving this freedom. Press freedom also has wider significance, as a free and independent media contributes to transparency and accountability of government. It is therefore essential not only for free speech as a public good but also for the enjoyment of other human rights.[93] It is important not only to media organisations, which publish the information but also to citizens, who have a right to access information from a diversity of sources.[94] This is essential to ensuring the proper election of the people's representatives to Parliament. Press freedom is both a human right and a democratic one.

Australia has ratified the ICCPR and indicated its ongoing support for the instrument.[95] However, Australia lacks domestically enforceable protection for freedom of speech and freedom of the press. Indeed, Australia remains the only democratic country without some form of nationally enforceable human rights instrument.[96] Three of its states — the ACT, Victoria and more recently Queensland — have enacted statutory rights instruments,[97] but human rights remain absent from the federal Constitution. The Australian Constitution does include some limited rights, including those to trial by jury and freedom of religion, but it does not mention freedom of speech or freedom of the press.

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92 *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art19(2) (23 March 1976).

93 *Supra* note 91 at 1.

94 *Ibid* at 4.

95 "International human rights system", online: Attorney-General's Department <www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>.

96 See George Williams & Daniel Reynolds, *A Charter of Rights for Australia*, 4d (Sydney: University of New South Wales Press, 2018).

97 *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Austl); *Human Rights Act 2004* (ACT) (Austl); *Human Rights Act 2019* (Qld) (Austl).

This differs from the other Five Eyes partners, which have either constitutional or national statutory protection for freedom of speech.

With one exception, there are also no explicit protections for journalists or whistleblowers in the offences themselves. Of all the national security disclosure offences, only one includes a defence for public interest reporting. This is a new offence introduced in 2018 when the secrecy offences in the *Crimes Act* were updated. Section 122.4A of the *Criminal Code Act* makes it an offence for any person to communicate information that they obtained from a government employee, where the information has a security classification or the communication would damage security or defence, health or safety, or prejudice a criminal investigation.[98] It is a defence if the person dealt with the information "as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media", and the person reasonably believed they acted in the public interest.[99]

Australia does have federal whistleblowing laws, which can provide immunity from the other disclosure offences. However, these only apply to government employees,[100] and so provide no protection for journalists. The scheme requires a valid public interest disclosure, meaning that the employee must first raise their concerns to their supervisor or a recognised oversight body, such as the IGIS.[101] If the person reasonably believes that the internal investigation was adequate, they can then disclose that information externally, provided the disclosure is limited to the information necessary to expose some specific wrongdoing.[102] However, the scheme includes exemptions for intelligence information and information related to intelligence agencies.[103]

98 *Criminal Code*, *supra* note 40, s 122.4A.

99 *Ibid*, s 122.5.

100 *PIDA*, *supra* note 31, ss 26, 69.

101 *Ibid*, s 26.

102 *Ibid*.

103 *Ibid*, ss 33, 41.

These render the prospect of an intelligence officer or military insider receiving immunity for national security whistleblowing virtually non-existent.[104]

In the absence of these explicit protections, there are four remaining possibilities in Australia's legal system for protecting journalists from criminal investigation. First are ethical guidelines and codes, which require journalists to ensure the confidentiality of their sources.[105] Second is a common law "newspaper rule", which protects source confidentiality during discovery processes.[106] Third are shield laws,[107] which provide stronger legal protections for source confidentiality. Fourth is a possibility that the implied freedom of political communication, derived by the Australian High Court from the text of the Constitution,[108] could invalidate or limit the scope of laws that enable criminal investigations into media reporting.

In *Kane*,[109] the Federal Court examined each of these possibilities. That case involved a challenge to the validity of the search warrant executed by the AFP on the ABC offices. Much of the initial discussion surrounded whether the warrant was sufficiently specific. The ABC argued that the warrant did not set "real and meaningful parameters", as it referred to news programs (such as the "7:30 Report") in their entirety, and it relied on vague terms like "military information". A similar challenge was that the warrant was "legally unreasonable" although this test sets a very high bar and would essentially require the investigation to be vexatious or irrational.[110] In contrast to the High Court's decision in *Smethurst*, the Federal Court found that the ABC warrant was sufficiently specific. It held that the warrant did not need to be "precisely or

104 See Hardy & Williams, *supra* note 83.

105 "MEAA Journalist Code of Ethics", online: *Media, Entertainment & Arts Alliance* <www.meaa.org/meaa-media/code-of-ethics/> [*MEAA Code*].

106 *John Fairfax & Sons Ltd v Cojuangco* (1988), 165 CLR 346 [*Cojuangco*].

107 *Evidence Act 1995* (Cth) (Austl), s 126K [*Evidence Act*].

108 *Lange v Australian Broadcasting Corporation* (1997), 189 CLR 520 [*Lange*].

109 *Kane*, *supra* note 8.

110 *Minister for Immigration and Border Protection v Stretton*, (2016) 237 FCR 1 (Austl).

exactly drawn", as warrants are necessarily based on suspicion rather than knowledge, and this one was, in any case, adequately tied to a series of offences.[111]

The Federal Court then considered the four possibilities above, finding no relevant protections for the ABC. First, unsurprisingly, it found that journalists' ethical codes and guidelines do not have the legal force necessary to protect journalists from a police search warrant or other legal order. For example, the Media, Entertainment and Arts Alliance's *Journalist Code of Ethics*, first issued in 1944, requires that source confidentiality be respected "in all circumstances".[112] Similarly, Principle 5 in the Australian Press Council's *Privacy Principles* provides that "the identity of confidential sources should not be revealed".[113] The court held that these do not provide an absolute guarantee of source confidentiality and "must be read subject to the law of the land".[114]

Second, the court considered the common law "newspaper rule". This rule recognises the "special position of those publishing and conducting newspapers … and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity".[115] However, this is not an absolute privilege, as it must be balanced against the need for individuals to launch defamation proceedings against media organisations that malign their reputations. As the High Court explained in *John Fairfax & Sons Ltd v Cojuangco*, there must be some possibility of identifying journalists' sources in order to encourage responsible reporting, or else journalists could hide behind fictitious sources:

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111 *Kane*, *supra* note 8 at para 368.

112 *MEAA Code*, *supra* note 105.

113 "Statement of General Principles", online (pdf): *Australian Press Council* <www.presscouncil.org.au/uploads/52321/ufiles/GENERAL_-_PRIVACY_PRINCIPLES_-_July_2014.pdf>.

114 *Kane*, *supra* note 8 at para 196.

115 *McGuinness v Attorney-General*, (1940) 63 CLR 73 at 104 (Austl) [*McGuinness*].

> The liability of the media and of journalists to disclose their sources of information in the interests of justice is itself a valuable sanction which will encourage the media to exercise with due responsibility its great powers which are capable of being abused to the detriment of the individual. The recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious, sources.[116]

In *McGuiness v Attorney-General*,[117] Dixon J had earlier explained that the newspaper rule is not a rule of evidence but rather a practice by which journalists may refuse to reveal the identity of their sources in discovery proceedings. It is not strictly a privilege but rather a procedural limitation, which may be upheld, depending on the interests of justice in the circumstances of the case.[118] In *Kane*, the Federal Court followed this line of reasoning, holding that the newspaper rule "is not a principle of broader application and it does not assist in this case".[119]

Third, the Federal Court considered the relevance of statutory shield laws. For example, section 126K of the *Evidence Act* provides that a journalist who has promised not to disclose an informant's identity is not "compellable to answer any question or produce any document that would disclose the identity of the informant".[120] Section 131A explains that this protection applies in relation to certain processes or orders, including a summons or subpoena, pre-trial or non-party discovery, interrogatories, or notices to produce.[121] In considering the applicability of these protections to the ABC warrant, the court reasoned, firstly, that refusing to answer questions or produce a document does not describe

116 *Cojuangco*, *supra* note 106 at para 15.

117 *McGuinness*, *supra* note 115.

118 *Ibid.*

119 *Kane*, *supra* note 8 at para 186.

120 *Evidence Act*, *supra* note 107, s 126K(1).

121 *Ibid*, s 131A.

"what occurs in the execution of a search warrant",[122] and secondly, that the list of legal processes clearly did not extend to police investigations.[123] In addition, the court considered, the protection is not absolute, as the court can hold that it does not apply if the public interest in identifying the source outweighs the likely adverse impact on the informant and the public benefit in media reporting.[124] Similar to the newspaper rule, shield laws establish a presumption that source identity will be protected, but this is not an absolute privilege, and it only applies during discovery and other specific legal processes. They do not provide any general immunity that would prevent police from searching for and seizing information that would identify a journalist's confidential source.

This lack of protections for journalistic materials in police search warrants differs from the situation in the other Five Eyes partners. In New Zealand, journalistic sources are treated as privileged information, and journalists must be given an opportunity to claim that opportunity, firstly to police and then, if needed, before a judge.[125] In the UK, a special procedure involving contested hearings and a public interest test applies before journalistic information can be seized by police.[126] In the United States, due to the 1st and 4th amendments to the US Constitution, the starting point is that newsroom raids are unlawful, and a search is permissible only if the information is security classified or the seizure of documents is necessary to prevent death or serious bodily injury.[127] In Canada, journalistic documents seized by police may be kept in the custody of the court, and journalists may make submissions to have the documents returned.[128] In Australia, no such explicit protections exist to protect journalistic material from being seized by police in the exercise of search warrants.

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122 *Kane*, *supra* note 8 at para 204.

123 *Ibid* at para 205.

124 *Evidence Act*, *supra* note 107, s 126K(2).

125 *Search and Surveillance Act 2012* (NZ), s 145.

126 *Police and Criminal Evidence Act 1984* (UK), s 60(1).

127 USC 42 § 2000aa.

128 *Journalistic Sources Protection Act*, SC 2017, c 22.

Finally, the Federal Court considered the possibility that the implied freedom of political communication could partially invalidate the legislation that provides the police search warrant power. The warrant in the ABC case was issued under section 3E of the *Crimes Act*, which provides, similar to other search warrant powers, that a magistrate can issue a warrant if there are reasonable grounds that for suspecting there will be evidential material on the premises in the next 72 hours.[129] The ABC argued that section 3E should be invalid in some of its operations if it was capable of issuing the warrant that led to the raids on its offices.

The ABC based this argument on the implied freedom, which derives from the requirement in sections 7 and 24 of the Australian Constitution that members of the federal Parliament be "directly chosen by the people". In two cases in 1992,[130] the Australian High Court implied from those words a restriction on the lawmaking of Parliaments with regard to political communication. The court reasoned that the Constitution creates a system of representative government, and this necessarily implies that Australians should be free to communicate about political matters, such as the conduct of candidates for parliamentary elections. In *Lange v Australian Broadcasting Corporation*,[131] the High Court set out a two-limb test for determining whether a law is invalid due to the implied freedom. That test has since been amended to include three questions, structured as follows:

1. Does the law effectively burden freedom of communication about government or political matters in its terms, operation or effect?
2. If yes to 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

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129 *Crimes Act*, *supra* note 84, s 3E.

130 *Nationwide News Pty Ltd v Wills* (1992), 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992), 177 CLR 106.

131 *Lange*, *supra* note 108.

3. If yes to 2, is the law reasonably appropriate and adapted to advance that legitimate purpose?[132]

A law will be invalid if the answer to the first question is yes and the answer to the second or third question is no.

The first question means that the implied freedom does not provide general protection for freedom of speech, as it is limited to speech about political matters. This was confirmed recently in *Comcare v Banerji*,[133] and followed by the Federal Court in *Kane*. The court drew a clear distinction between the implied freedom and wider protections for free speech in the 1st amendment to the US Constitution. It held that "the notion of speech as an affirmative value has no role to play".[134] The court further confirmed that the implied freedom is not strictly a right or privilege at all, but rather "operates solely as a restriction" on the lawmaking power of Parliament.[135] The second and third questions involve compatibility testing and a structured proportionality analysis, which requires consideration of whether the law is suitable, necessary, and adequate in its balance.[136] This means that laws can limit political speech, provided they do so in a way that is proportionate to achieving a legitimate aim which is needed to maintain Australia's system of representative and responsible government.

In considering the validity of section 3E, the Federal Court held that the question should be determined on the face of the provision as a matter of interpretation, and not by reference to a specific outcome in the case at hand.[137] It recognised that section 3E could burden political speech, but held that the law had a legitimate purpose — to investigate crime — and the means it adopted were proportionate to achieving that aim. Consequently, it found that

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132 *McCloy v New South Wales*, (2015) 257 CLR 178 at 194–195; *Brown v Tasmania,* [2017] HCA 43 at 82 [*Brown*].

133 [2019] HCA 23.

134 *Kane*, *supra* note 8 at para 193.

135 *Ibid.*

136 *Brown, supra* note 132.

137 *Kane*, *supra* note 8 at para 264.

the "power in section 3E for a warrant to be issued is a validly conferred power across the whole range of its operations".[138]

The court also discussed the conduct of the AFP, which had liaised with the ABC before executing the warrant and conducted their search on a computer in one room rather than raiding the offices intrusively.[139] To some degree, these facts might leave open a challenge if police conduct a newsroom raid less sensitively and appropriately in the future. However, it remains clear from the Federal Court's judgment that there are essentially no valid grounds —in guidelines, codes, legislation or the Australian Constitution — for protecting journalistic sources or documents during the exercise of a police search warrant. Now that the warrant has been upheld, it remains to be seen whether the ABC journalists who published the Afghan Files stories will be prosecuted. At the time of writing, more revelations about possible war crimes committed by Australian soldiers in Afghanistan continue to rise to the surface.[140]

V. Conclusion

Freedom of the press remains a topic of significant public debate in Australia. Recent high-profile prosecutions of whistleblowers and journalists, combined with the ongoing expansion of national security and counter-terrorism laws, has generated backlash from Australian media outlets, law reform groups and the wider public. Two main factors — one contemporary, one historical — have allowed these recent encroachments. First, the ongoing threat of terrorism has enabled stricter controls on the publication of sensitive information. This dates back to Australia's first legal responses to 9/11 but has accelerated in recent years in response to the rise of the Islamic State and the threat of returning foreign fighters. Many new offences and powers have been enacted in response to that

138 *Ibid* at para 271.

139 *Ibid* at paras 382–383.

140 See Mark Willacy & Alexandra Blucher, "Witnesses say Australian SAS soldiers were involved in mass shooting of unarmed Afghan civilians" (13 July 2020), online: *ABC News* <www.abc.net.au/news/2020-07-14/australian-special-forces-killed-unarmed-civilians-in-kandahar/12441974>.

threat, many of which directly or indirectly undermine the ability of whistleblowers and journalists to report on national security matters in the public interest.

Second, Australia has a permissive constitutional environment that allows rights-infringing legislation to be enacted, without a realistic possibility of judicial review. Australia's Constitution contains only limited express rights and no explicit protections for free speech or freedom of the press. As the Federal Court's decision in *Kane* demonstrates, legislative protections, the common law, and journalistic codes and guidelines do not fill this gap. Nor does the implied freedom of political communication, which is the closest Australia comes to having constitutional protection of freedom of speech. The implied freedom protects only political speech, and even then, it is only a restriction on the lawmaking powers of Parliament; it cannot act to protect journalists or whistleblowers from police investigations. Further, due to a series of exemptions for intelligence information,[141] Australia's federal whistleblowers laws do not provide adequate protection for national security disclosures.

Statutory change is needed to better protect Australian whistleblowers and journalists who act in the public interest. Such changes could be introduced through a '*Media Freedom Act*',[142] which could provide two main protections. First, a general public interest exemption should provide immunity from criminal prosecution where a government officer or professional journalist discloses information with the intention of advancing the public interest. The immunity could be limited to situations where the disclosure revealed serious misconduct or illegal behaviour committed by the Australian government. Additional protections for sensitive information could be included, such as a

141 *PIDA*, *supra* note 31, ss 33, 41.

142 See Peter Greste, "A media freedom Act" (3 May 2019), online (blog): *Peter Greste* <pressfreedom.org.au/a-media-freedom-act-37ff9856dc02>; Rebecca Ananian-Welsh, "Australia needs a Media Freedom Act. Here's how it could work" (22 October 2019), online: *The Conversation* <theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>.

requirement that the journalist took all reasonable steps to prevent harm to Australia's national security or defence. These could be inserted into individual disclosure offences, though a general exemption would be simpler to enact and provide greater clarity. It would also apply to any future national security disclosure offences without the need for further debate or repetition.

Second, a *Media Freedom Act* should provide explicit protection for journalists in the exercise of investigative powers. Contested hearings should be required before search warrants are executed on newsrooms or journalists' homes, and before their metadata is accessed. Currently, there are no protections for journalists in the exercise of police search warrants, and the JIW process in the metadata laws does not go far enough, as applications for journalists' metadata remain secret. Contested hearings would give journalists and law enforcement an opportunity to make submissions before a judge. The judge could then decide whether the public interest in reporting the story and protecting source confidentiality outweighs the public interest in exposing the source for criminal investigation. This is a more independent and fairer process than police catching journalists by surprise in the execution of a warrant or conducting surveillance in secret. There is, of course, a risk that journalists, if advance warning of an investigation is given, could destroy information that would identify their sources. However, the importance of press freedom as a human and democratic right justifies a special approach. This risk can also be limited by a requirement, on fear of penalty from the court, that journalists do not destroy any relevant data while a judicial determination is being made. These procedures would put Australia more closely in line with Canada, the UK and New Zealand, which all require contested hearings to protect journalistic documents from a police investigation.

Ultimately, constitutional change is required to ensure that freedom of speech for whistleblowers, journalists, and all Australians is adequately protected. Compared to statutory change, this is more difficult to achieve. The change would need to be approved by the Australian people voting at a referendum, with no such vote on any topic succeeding nationally in Australian since 1977. As with other proposals, the prospects of achieving constitutional

change for human rights remain remote. Three states now have statutory protection, and if more join, there may be greater momentum and appetite for constitutional change at the national level. For now, a *Media Freedom Act* presents a viable interim solution that would provide urgently needed protections for freedom of the press.