

Heavy Secrets: The Filing Cabinet Papers

“Those journalists who have been prepared to fight for the principle that stories that advance the public interest should be published have usually been vindicated. At every stage, the media must insist upon their right to investigate and to publish such stories: if they are right in their identification of the public interest, they are unlikely to come to harm in the long run.”¹

In February 2018, Australians were captivated by the story of the cabinet files cabinet papers. In Canberra in mid-2017, at a second-hand auction house selling used government supplies, a man purchased two filing cabinets for \$10 each. According to media reports, the filing cabinets were sold at the bargain price of \$10 on the basis that they were heavy, and the auction house selling them did not have keys for them.

After taking the heavy filing cabinets home and drilling holes in the locks, the man discovered that the filing cabinets contained cabinet papers from the Howard, Rudd, Gillard and Abbott governments. He contacted Michael McKinnon at the Australian Broadcasting Corporation (ABC), and according to reports published by the ABC McKinnon told the man that he should seek his own legal advice before handing over the cabinet papers. After a few weeks, the man called McKinnon back and over a number of months the cabinet papers were handed over to the ABC. Instead of “doing a Wikileaks”, and publishing all of the cabinet papers online, ABC journalists went through the cabinet papers, authenticated each document and established whether there were stories of public interest that could be published by the national

broadcaster that would not also be a national security threat. The identity of the purchaser of the filing cabinets who contacted McKinnon, was not revealed by the ABC.

In an article published by the ABC, ABC journalist John Lyons stated that he had: ‘been appalled when WikiLeaks in 2016 did one of their “dumps” of thousands of documents which revealed information which in my view had no public interest... WikiLeaks had published medical files belonging to scores of ordinary citizens while many hundreds had had sensitive family, financial or identity records posted to the web.’²

The ABC was resolute, and according to media reports, not only did journalists contact those in the documents for comment, they only published information and documents on the basis of public interest. In response, the Australian Security Intelligence Organisation (ASIO) sent safes with combination locks to the ABC’s offices. After negotiations between the ABC and the Commonwealth Government, the ABC reported that its main concern was the protection of its source (the man who had originally contacted McKinnon and handed over the documents), and the cabinet papers were returned to the Commonwealth Government.

Critics characterised this as a failure to publish. The filing cabinet papers story illustrates the delicate balance between the public interest and national security in Australian law.

Australia has no constitutional equivalent to the First Amendment express guarantee set out in the US Constitution to hang public interest publications on. There is however the Constitutional implied freedom of political communication on government and political matters. As Michael Chesterman argues: ‘freedom to communicate on matters of public interest is an integral element of any genuinely democratic society.’³ Certainly freedom of expression aids self-government and democracy through the generation of open discussion on matters of public interest.⁴ This entails recognition that freedom of the press is fundamentally in the public interest, and integral to the free flow of information, a functioning democracy and society, the administration of justice and open justice, informed political decision making and accountability.⁵ Traditionally a number of subjects have been considered matters of general public interest, including: the conduct of those seeking political office or public trust;⁶ politics and affairs of the national and local government;⁷ government policy;⁸ conduct of trade unions;⁹

¹ Geoffrey Robertson and Andrew Nicol, *Robertson & Nicol on Media Law* (4th edition, Sweet & Maxwell: London, 2002), xv.

² John Lyons, ‘The Cabinet Files: How classified documents were found at a Canberra second-hand shop’, 3 February 2018, <http://www.abc.net.au/news/about/backstory/news-coverage/2018-02-03/the-cabinet-files-and-how-they-were-found/9393008>.

³ Michael Chesterman, *Freedom of Speech in Australian Law: a delicate plant* (Ashgate: Dartmouth, 2000), 301.

⁴ Andrew Kenyon, ‘What Conversation? Free Speech and Defamation Law’ (2010) 73(5) *The Modern Law Review* 697.

⁵ British Royal Commission on the Press, Final Report. (Cmd. 6810, 1977), 8–9, cited in Geoffrey Robertson QC and Andrew Nicol QC, *Robertson & Nicol on Media Law* (5th Edition, Law Book Company: 2007), vii.

⁶ *Slatyer v Daily Telegraph Newspaper Co* (1907) 7 SR(NSW) 488; *Whitford v Clarke* [1939] SASR 434; *Roberts v Bass* [2002] 212 CLR 1.

⁷ *Slim v Daily Telegraph* [1968] 2 QB 157 (CA); *Stephens v West Australian Newspapers Ltd* (1994) CLR 211

administration of justice and fair and accurate reporting;¹⁰ public institutions, local authorities and administration of these institutions and authorities;¹¹ religious affairs; waste and extravagance on a public project;¹² police corruption;¹³ and recently, political donations and obtaining access to a politician.¹⁴ All these matters of public interest have the flavour of governmental and political matters.

This implied right is coupled with the fact that journalistic reporting in Australia is not restricted on the basis of media specific registrations, licences, accreditations or other permissions required for entities or individuals to engage in newsgathering activities. Despite the regulation of broadcasting more generally, there are also no media specific registrations, licences, accreditations or other permission required in Australian entities or individuals to sell news content to local news and media outlets. In contrast, the content produced by journalists and media organisations in Australia is highly regulated. All media organisations broadcasting or publishing content in print or online in Australia must comply with Australian intellectual property, contempt, defamation, varying State and Territory statutory reporting restrictions, and privacy laws (noting that there are exemptions for media organisations under the *Privacy Act 1988* (Cth) in circumstances where journalists commit to observing published written standards that deal with privacy).

More specifically when it comes to the issue of national security, section 79 of the *Crimes Act 1914* (Cth) (**Crimes Act**) and the *Criminal Code 1995 Act* (Cth) schedule 1 (**Criminal Code**) prohibit the

disclosure of official secrets, which would prejudice national security or defence. Specifically, the disclosure of official secrets to unauthorised persons with the intention of prejudicing the Commonwealth's security or defence, or giving an advantage to another country. It can also be an offence to receive this type of information, if the recipient (in this case a journalist) knew or had reasonable grounds to believe that the material was communicated in contravention of the Crimes Act or the Criminal Code. Section 80.3 of the Criminal Code provides for defences for acts done in good faith, including where a person publishes in good faith a report or commentary about a matter of public interest.

Section 92 of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) and section 41 of the *Intelligence Services Act 2001* (Cth) (**Intelligence Services Act**), also include provisions that prevent publication of material that might identify a person as an ASIO or Australian Secret Intelligence Service (**ASIS**) officer, employee or agent. Further to this, section 35P of the ASIO Act prohibits the unauthorised disclosure of information relating to covert operations designated "special intelligence operations" (which could include Australian Federal Police operations that relate to "special intelligence operations"). A contravention of this provision carries a penalty of 5 years imprisonment, or 10 years where the disclosure endangers the health or safety of any person or prejudices the effective conduct of a "special intelligence operation." Section 15K provides for a similar offence in relation to a "controlled operation". There is no journalist immunity or public interest defence to the

offences, however recklessness is the requisite degree of fault.

On 7 December 2017, the Commonwealth Government introduced the *National Security Legislation (Espionage and Foreign Interference) Bill 2017* (Cth) (**National Security Bill**) to strengthen existing espionage, secrecy, treason, sabotage and related offences, introduce new offences targeting foreign interference and economic espionage, and establish a Foreign Influence Transparency Scheme. The National Security Bill amends the Crimes Act, Criminal Code and *Telecommunications (Interception and Access) Act 1979* and makes consequential amendments to other legislation to reform the Commonwealth's secrecy offences, including the criminalisation of leaks of harmful information and the possession of sensitive information that is in the national interest.

Of most relevance to journalists, is subsection 122.5(6) which will provide a defence to prosecution for an offence relating to the dealing with or holding of information, if the person dealt with or held the information in the public interest and in the person's capacity as a journalist engaged in fair and accurate reporting. As set out in the Explanatory Memorandum, this extension of the defence to a person who deals with or holds information would allow journalists to undertake a range of activities, such as collecting and holding information received from a source in the course of researching, writing or editing a story and determining an appropriate balance between competing public interests and filtering out stories that are not in the public interest. In the draft

8 *ACP v Uren* (1966) 117 CLR 185.

9 *Duane v Granrott* [1982] VR 767.

10 *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 159; *Rogers v Nationwide News Pty Ltd* [2003] HCA 51.

11 *Renouf v Federal Capital Press of Australia Pty Ltd* (1977) 17 ACTR 35; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183.

12 *Johnston v Australian Broadcasting Corporation* (1993) 113 FLR 307.

13 *Hardie v The Herald and Weekly Times Pty Ltd* [2015] VSC 364.

14 *Hockey v Fairfax Media Publications Pty Limited* [2015] FCA 652.

legislation, the term 'journalist' is not limited in any sense to those acting in a professional capacity, and is given its ordinary and natural meaning. The Explanatory Memorandum refers to the Macquarie Dictionary definition of 'journalist' as a person engaged in 'journalism', being 'the business or occupation or writing, editing, and producing photographic images for print media and the production of news and news analysis for broadcast media.' And the Oxford Dictionary definition of 'journalist' as 'a person who writes for newspapers, or news websites or prepares news to be broadcast'. However, the defence will only apply to a journalist 'engaged in fair and accurate reporting'. This is similar to the fair and accurate reporting concept used within section 18D of the *Racial Discrimination Act 1975* (Cth). The requirement for journalists to be engaged in fair and accurate reporting will therefore limit the scope of the defence, and will exclude those who are publishing information or documents without engaging in fair and accurate reporting, who are using information or documents to produce false or distorted reporting, or those who are not journalists engaged in fair and accurate reporting. In addition, the defence will only be available where the conduct is in the public interest (in accordance with section 13.3 of the Criminal Code). However, dealing with or holding certain information will not be in the public interest. This includes information protected by section 92 of the ASIO Act and section 41 of the Intelligence Services Act (protecting the identity of ASIO and ASIS officers, employee or agents respectively), individuals protected under the *Witness Protection Act 1994* (Cth), or where it is information that will or is likely to harm or prejudice the health or safety of the public or a section of the public. The defendant bears the burden of proof, and the Explanatory Memorandum stresses that a journalist should be able to point to evidence that their conduct

was done in the public interest and in their capacity as a journalist engaged in fair and accurate reporting. Further to this, section 123.1 of the Bill proposes that injunctions may be used to restrain a person from contravening a provision of Division 122 of the Bill.

Media organisations, journalists and lawyers have been critical of the National Security Bill. In response to the National Security Bill, The Media Entertainment Arts Alliance (MEAA) recommended that to protect public interest reporting, a general public interest and news reporting defence be included for all relevant provisions in both the secrecy and espionage sections of the National Security Bill. The Law Council provided a submission to the Parliamentary Joint Committee on Intelligence and Security's Inquiry into the National Security Bill. This submission stressed the Law Council's concern that many of the offence provisions are broadly drafted to capture a range of benign conduct that may not necessarily amount to harm or prejudice to Australia's interests. Of particular concern to the Law Council is the broad definitions of key terms, and the potentially broad application of these measures. The Law Council proposed that a narrowing of the provisions would provide both greater clarity regarding their operation and the protection of national security, while also addressing concerns that some of the provisions are not a necessary or proportionate limitation on freedom of expression and the Constitutional implied freedom of political communication.

The National Security Bill was referred to the Parliamentary Joint Committee on Intelligence and Security in December 2017, and was considered by the Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights in February 2018.

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will continue to be a source of tension between those concerned with public interest journalism and investigative reporting freedom of the press and freedom of speech, on the one hand, and national security on the other.

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