

Enhancing Press Freedom in Australia: Establishing a Media Freedom Act with Coordinated National Security Law Reform

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I Introduction

Australia requires a legal framework that comprehensively upholds national security upon: terrorism prospects; a widely shifting global political climate; malicious use of technology; and covert foreign interference. The September 11 2001 terrorist attacks prompted overwhelming legislative reform, which reinforced national security protections to address heightened security threat.¹ Protective national security rationalisation has equally empowered successive governments to confine the public's practical access to many of the rights and liberties that these legal frameworks intended to preserve.² Prioritisation of discretionary national security legislation and operational confidentiality can restrain governmental transparency and accountability. This article proposes that a functional 'Media Freedom Act' ('Act') requires adjacent national security reform in relation to: metadata privacy; disclosure offences; and espionage offences. Cogent legislative reform enables the Act to functionally safeguard press freedom, while recognising principal Commonwealth responsibilities, such as, national security protection and the confidentiality of stipulated Commonwealth personnel.³

This article will examine the key public interest role that journalists assume relative to the investigation

and disclosure of governmental and systemic institutional misconduct. A Media Freedom Act would sanction legislative review and reform to moderate wide statutory discretion for Commonwealth national security objectives. Accountability provisions could direct penalties if Commonwealth conduct is determined to unreasonably restrain press freedom. Provisions ought to protect verified publishers from overbearing law enforcement powers and civil proceedings. Consequently, the Act may reasonably extend defences for journalists to restrain prosecution where conduct meets a prescribed journalistic threshold. Any proposed Media Freedom Act must preface journalistic protections in relation to legitimate professional action, to ensure that rogue publishers do not exploit this enactment. The Act should conditionally qualify journalists to publish misconduct amid security and intelligence organisation in a manner that does not compromise national security. In summary, Australia requires a Media Freedom Act to enshrine definitive and operational press freedom.

II Media Freedom Standing in Australia

A) International Law

Freedom of the press is a principal right in democratic society, which is widely affirmed by Article 19(2) of the *International Covenant on*

Civil and Political Rights ('ICCPR') on freedom of expression:

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, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁴

Press freedom must enable media establishments to 'comment on public issues without censorship or restraint', while maintaining 'independence and editorial freedom'.⁵ The public preserve a corresponding right to freely consume information from a variety of sources.⁶ Press freedom does not merely regard a journalistic right to broadcast information – it infers that the entire public is ensured a right to access imperative material to democratic decision-making. *ICCPR* Article 19(3) acknowledges press freedom conditionality upon valid national security reasoning. Press freedom exceptions must be specified by law and essential towards 'the protection of national security or of public order, or of public health or morals'.⁷

UN Committee recognition for national security congruently declares that criminal offences must not excessively confine the publication of material that supports 'legitimate public interest'.⁸ The UN Committee has unequivocally specified that *ICCPR*

1 Alliance for Journalists' Freedom, *Press Freedom in Australia White Paper* (Report, May 2019) 8 ('*Press Freedom in Australia White Paper*').

2 George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136.

3 George Williams, Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 3 ('*Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security*').

4 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2) ('*International Covenant on Civil and Political Rights*').

5 United Nations Human Rights Committee, *General Comment No 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCRP/C/GC/34 (12 September 2011) 4 ('*General Comment No 34*').

6 *Ibid.*

7 *International Covenant on Civil and Political Rights* (n 4) art 19(3).

8 *General Comment No 34* (n 5) 7.

Article 19(12) does not authorise Member States to pursue legal action against journalists, when material in question does not impair national security and rather supports public interest.⁹ UN Committee compliance does not principally concern the standing of press freedom in relation to national security. The Committee rather reviews whether Member States' domestic legislation, plainly or in effect, encumbers expression through press freedom, and whether relevant legislation assumes proportionate and reasonable national security objectives.¹⁰

B) Commonwealth Interpretation

Australia does not legally recognise nor protect press freedom, which deviates from other western democratic nations, whereby rights to free speech comprise press freedom. Australia is the only nation within the *Five Eyes* intelligence alliance that has enacted powers to issue and perform search warrants on journalists and media organisations on a public interest basis – to apprehend whistleblowers for national security purposes.¹¹ At present, freedom of speech and freedom of the press are not unequivocally upheld by Commonwealth legislation.¹² Federal Parliament is subsequently empowered to legislate national security and other matters without due consideration for press freedom. As a result, a vast portion

of legislation defies fundamental democratic principles.¹³ *Kane* verifies that implied freedom of political communication is an incompetent protection scheme for press freedom in Australia.¹⁴ Professor Adrienne Stone reasoned that devising statutory protections for journalists and whistleblowers is a more critical than an expansive freedom of speech constitutional review.¹⁵

The *ICCPR*'s proportionality framework is coherent with the High Court's approach to implied freedom of political communication.¹⁶ This derives from ss 7 and 24 of the *Australian Constitution*, which compels express public election of all members of Parliament.¹⁷ However, Commonwealth legislation does not offer meticulous and certain protection for freedom of speech and press freedom in harmony with *ICCPR* Article 19.¹⁸ Parliament may subsequently enact legislation through national security and alternate frameworks, without requiring Parliament to fairly consider ratified freedoms. A disconcerting extent of Australian legislation has emerged in conflict with fundamental democratic values including press freedom.¹⁹ A Media Freedom Act must resultantly confine the interpretation and implementation of national security and additional laws that oppose press freedom. Ideological and statutory corrosion of press freedom

has restricted journalists' critical public interest role, which requires rectification through Commonwealth enactment of media freedom protections. Operative press freedom compels enforced cooperation from national security and other public agencies that currently wield precarious power that can defy critical press freedoms.

C) Applied Press Freedom Impacts in Australia

In June 2019, press freedom in Australia drew global attention after the Australian Federal Police ('AFP') directed two raids on journalists. The day after an initial raid on News Corp journalist Annika Smethurst, the AFP executed a warrant over the Australian Broadcasting Corporation ('ABC') Sydney headquarters.²⁰ Wide public and media condemnation of the ABC raid deterred a third AFP raid on News Corp's Sydney office.²¹ This AFP raid series has crucially initiated debate regarding the acknowledgement, protection and accessibility of press freedom in Australia. In the recent evaluation from Reporters Without Borders, Australia's ranking in the World Press Freedom Index has dropped five positions to 26th place.²² This shift was the fifth largest decline in a one year period, alongside nations including Benin, Singapore and Djibouti.²³ Reporters Without Borders unequivocally associated Australia's

9 Ibid.

10 Ibid.

11 Max Mason, 'Look to Five Eyes partners on press freedom, says Dreyfus', *Australian Financial Review* (online, 29 August 2019) <<https://www.afr.com/companies/media-and-marketing/look-to-five-eyes-partners-on-press-freedom-says-dreyfus-20190829-p52mod>>.

12 'Information concerning Australia's compliance with the International Covenant on Civil and Political Rights (2017)', *Australian Human Rights Commission* (Web Page, 18 September 2017) <<https://humanrights.gov.au/our-work/legal/submission/information-concerning-australias-compliance-international-covenant-civil>>.

13 *General Comment No 34* (n 5) 3.

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

15 Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (University of Melbourne Law School Research Paper 476) 12.

16 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

17 *Australian Constitution* ss 7, 24.

18 Australian Government, *International Covenant on Civil and Political Rights: Australia's Sixth Report to the United Nations Human Rights Committee* (2016).

19 Media, Entertainment and Arts Alliance, 'MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia', *Media, Entertainment and Arts Alliance Media Room* (Web Page, 26 September 2014) <<https://www.meaa.org/mediaroom/meaa-says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia/>> ('*MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia*').

20 Paul Karp, 'Federal Police Raid Home of News Corp Journalist Annika Smethurst', *The Guardian* (online, 4 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/04/federal-police-raid-home-of-news-corpjournalist-annika-smethurst>>; *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

21 John Lyons, 'AFP Raid on ABC Reveals Investigative Journalism Being Put in Same Category as Criminality', *ABC News* (online, 15 July 2019) <www.abc.net.au/news/2019-07-15/abc-raids-australian-federal-police-press-freedom/11309810>.

22 'Australia's slip in world press freedom index a reminder that we need a Charter of Human Rights and Freedoms', *Human Rights Law Centre* (Web Page, 24 April 2020) <<https://www.hrlc.org.au/news/2020/4/24/australias-slip-in-world-press-freedom-index-a-reminder-that-we-need-a-charter-of-human-rights-and-freedoms>>.

23 'World Press Freedom Report 2020', *Reporters Without Borders* (online) <<https://rsf.org/en/ranking>>.

decline with aforementioned AFP raids, which exposed how national security 'is used to intimidate investigative reporters'.²⁴ These raids determine that law enforcement divisions preserve a lawful ability to probe journalists and their sources under extensive provisions. National security prioritisation has subsequently cast doubt on Australia's status as a leading protector of press freedom in the Asia-Pacific. Reports that prompted AFP investigations did not specify whether pertinent disclosures and articles presented enduring national security risk. Ambiguous justification and vague evidentiary standards may subsequently corroborate extensive investigations by law enforcement agencies. Media, Entertainment and Arts Alliance's 2020 press freedom survey detailed that when asked whether press freedom in Australia had improved or declined throughout the past decade, 98 percent of respondents claimed press freedom declined, relative to 90.9 percent in 2019.²⁵

Justice Abraham ruled that the AFP raid on the ABC offices was lawful due to warrant compliance.²⁶ The ABC conversely contended, among other arguments, that Commonwealth 'shield laws' safeguarded sources in question.²⁷ The ABC additionally urged that the implied freedom of political communication had been contravened, an argument that was dismissed by Justice Abraham.²⁸ Shield laws were instead considered unrelated to the warrant's legitimacy. Justice Abraham additionally held that the basis of s 3E of the *Crimes Act*, which

reinforced the warrant, upheld any encumbrance on the implied freedom, 'There is no reasonably practical alternative available for investigating these serious breaches of the offence provisions'.²⁹ Therefore, political will has directed legislative enactments that empower disproportionate law enforcement powers throughout investigations. The Law Council of Australia reacted to associated High Court and Federal Court judgements by encouraging law reform – President Pauline Wright noted,

Any similar case in the future could be avoided through law reform measures to protect and recognise the importance of public interest journalism and to incorporate greater accountability mechanisms. Protections might include contested hearings, the involvement of a Public Interest Advocate to test the warrant process, and a requirement that warrants may only be issued by a judge of a superior court of record.³⁰

The tenuousness of press freedom in Australia emerges as journalists considerably face indeterminate raids by Commonwealth agencies. This justifies imperative need for measured law reform to uphold press freedom and the rule of law more broadly, as fundamental tenants of liberal democracy. The raids identify multifaceted concerns regarding the function of law in defending and corroding press freedom in Australia.

In 2018, numerous intergovernmental expert agencies delivered a joint statement on media independence, affirming trepidation as,

'Contemporary legal threats to freedom of expression and the media, including broadening and often ambiguous notions of national security'.³¹ A cumulative chilling effect persuades journalists and media organisations to resultantly shelve meaningful investigations due to untenable prosecutorial and subsequent financial risks.³² An unknown share of discarded publications may reveal genuine misconduct or corruption, with convincing public interest outcomes. Prospective sources and whistleblowers may resultantly opt to guard public interest information to abate conviction prospects, with the presumption that journalists cannot legally preserve source privacy.³³ This chilling effect collectively reduces broad democracy through the decline of free speech and governmental accountability. Chilling does not necessarily require mass prosecutorial action against journalists, as emerging silencing culture can independently dissuade reporting action.³⁴ A collection of bipartisan Australian campaigns that address challenges to press freedom have generated significant momentum, including the recent petition for a Royal Commission to 'Ensure a strong, diverse Australian news media amid growing media ownership concentration'.³⁵ Former Attorney-General George Brandis opposed an induction of 'blanket rules' for journalists, which include statutory exemptions and rebuttable warrants. Mr Brandis rather sought potential reform within freedom of information laws and court suppression orders.³⁶

24 'Australia', *Reporters Without Borders* (online) <<https://rsf.org/en/australia>> ('Australia').

25 'World Press Freedom Day 2020: reforms needed to reverse criminalisation of journalism', *Media, Entertainment and Arts Alliance* (Web Page, 5 March 2020) <<https://www.meaa.org/mediaroom/world-press-freedom-day-2020-reforms-needed-to-reverse-criminalisation-of-journalism/>>.

26 *Kane* (n 14) [387] (Abraham J).

27 *Ibid* [37] (Abraham J).

28 *Ibid* [246] (Abraham J).

29 *Crimes Act 1914* (Cth) s 3E; *Kane* (n 14).

30 Fiona Wade, 'High Court decision highlights ongoing vulnerability' *Law Council of Australia* (Web Page, 16 April 2020) <<https://www.lawcouncil.asn.au/media/media-releases/high-court-decision-highlights-ongoing-vulnerability>>.

31 'Joint Declaration on Media Independence and Diversity in the Digital Age', *Organisation for Security and Co-operation in Europe* (Web Page, 2 May 2018) <https://www.ohchr.org/Documents/Issues/Opinion/JointDeclaration2May2018_EN.pdf>.

32 Human Rights Council, *Report of the special rapporteur on the situation of human rights defenders on his mission to Australia*, 28 February 2018 (A/HRC/37/51/Add.3) 7 ('*Report of the special rapporteur on the situation of human rights defenders on his mission to Australia*').

33 Parliamentary Joint Committee on Corporations and Financial Services, *Parliament of Australia, Whistleblower Protections* (Report, September 2017).

34 MEAA *Says National Security Law an Outrageous Attack on Press Freedom in Australia* (n 19).

35 Jack Snape, 'Petition calling for media royal commission and setting Australian record tabled in Parliament', *ABC News* (online, 9 November 2020) <<https://www.abc.net.au/news/2020-11-09/media-diversity-petition-started-by-kevin-rudd-lodged-parliament/12863982>>.

36 Attorney-General's Department, Submission No 6.1 to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (7 June 2018) 6.

D) Scope of 'Media Freedom' Protection in Australia

Statutory definitions of a 'journalist' are crucial to the context and application of a Media Freedom Act as powers to prosecute journalists are contingent upon the acquiescent interpretation of 'journalist'. All Australian states except Queensland and Tasmania have passed shield laws, which protect press freedom by enabling a journalistic right to request protection source privacy, on the basis that identity publication would result in a serious professional ethical contravention.³⁷ The inclusive scope of protections for journalists and subsequent sources is significantly impacted by definitional provisions. When definitions are too narrow in an evolving media landscape, journalists and their sources can face reputational, prosecutorial and privacy risks.³⁸ This can motivate citizen journalists and underground publishers to preference operation in more protective jurisdictions.

Federal shield laws provide key protections for bloggers – in New South Wales journalists are defined as, 'A person engaged in the profession or occupation of journalism'.³⁹ This classification excludes bloggers, which serves to confine frivolous requests for protections.⁴⁰ The *Evidence Act*, further clarifies conditions that utilise the profession or occupation of journalism.⁴¹ This broadens definitional inclusion by connecting, 'The publication of information, comment, opinion or analysis in a

news medium...For the dissemination to the public or a section of the public of news and observations on news'.⁴² Commonwealth shield laws may apply to any individual engaged in the distribution of public information and news, hence bloggers are legally entitled to claim protections.⁴³ Mass news media diversification suggests that an over-inclusive definition of 'journalist' could exponentially increase application requests, while reducing the overall credibility of protections.⁴⁴ Since many whistleblowers with public interest significance now opt to share material with bloggers and other 'citizen journalists', key shield protections may require qualified statutory broadening.

In August 2020, the Parliamentary Joint Committee on Intelligence and Security's 'Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press' recommended that the Commonwealth government consider the harmonisation of State and Territory shield laws through National Cabinet, with relevant updates to expand public interest consideration, and reflect the variable digital media landscape.⁴⁵ However, this Inquiry failed to advocate that journalistic privilege extend to police investigations.⁴⁶ A perceivable gap in the law ensues, through which police can access and employ material that would otherwise be protected in court. The Committee rationalised its stance on shield laws in relation

to the 'public interest advocate'.⁴⁷ It appears that the 'advocate' faces the impacts of upholding the 'balance' between national security and public interest journalism, throughout public intelligence or law enforcement examinations of the media.⁴⁸

Commonwealth and South Australian shield laws congruently determine that a court may direct a journalist to reveal the identity of a source if public interest refutes any probable detriment to the source.⁴⁹ 'Shield' provisions under the *Privacy Act* additionally affirm that a journalist may face pecuniary penalties or imprisonment for declining to: disclose information; provide a response to the Court; or deliver a document – except when the journalist testifies that the document would divulge the identify of a source that supplied the material on a classified basis.⁵⁰ A uniform shield law regime in Australia is likely to assist the consolidation of press freedom. Australia would still remain significantly behind other western democratic nations in defending source discretion and press freedom in a law enforcement context.⁵¹ An effective Media Freedom Act requires greater regularity throughout shield law regimes through a standardised or more consistent definition of 'journalist'. Otherwise, a proposed Media Freedom Act could feature a national shield law scheme to optimise the Act's scope and extend protections for diversified press freedom.

37 *Press Freedom in Australia White Paper* (n 1) 20.

38 *Ibid* 16.

39 *Evidence Amendment (Journalist Privilege) Act 2011* (NSW) s 126J.

40 'Legal Issues for Bloggers', *Arts Law Centre of Australia* (Web Page, 2016) <https://www.artslaw.com.au/wp-content/uploads/2019/04/Legal_Issues_for_Bloggers_2016.pdf>.

41 *Evidence Act 2008* (Vic) s 126J.

42 *Ibid*.

43 Joseph Fernandez and Mark Pearson, 'Shield laws in Australia: Legal and ethical implications for journalists and their confidential sources' (2015) 21(1) *Pacific Journalism Review* 78.

44 Derek Wilding et al, 'The Impact of Digital Platforms on News and Journalistic Content', *Centre for Media Transition* (Web Page, 2018) <<https://www.accc.gov.au/system/files/ACCC%20commissioned%20report%20-%20The%20impact%20of%20digital%20platforms%20on%20news%20and%20journalistic%20content%2C%20Centre%20for%20Media%20Transition%20%28%29.pdf>>.

45 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry Into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Final Report, August 2020) xxii.

46 *Ibid* 63.

47 *Ibid* 82.

48 *Ibid*.

49 Rick Sarre, 'Why shield laws can be ineffective in protecting journalists' sources', *The Conversation* (online, 13 August 2018) <<https://theconversation.com/why-shield-laws-can-be-ineffective-in-protecting-journalists-sources-101106>>.

50 *Privacy Act 1988* (Cth) s 66.

51 *Australia* (n 24).

III Enhancing a Media Freedom Act in Practice

A) National Security Interpretation

The general definition of national security though amended espionage laws directs a further challenge to press freedom and a conceivable Media Freedom Act. The established definition of 'security' in the *Australian Security Intelligence Organisation Act ('ASIO Act')* is additionally wide-ranging to include violence that is 'politically motivated' and 'communal' – this spans beyond standard national security, defence and border control themes.⁵² Conduct meets this definition of 'security' when it does not regard terrorism nor generate national consequences.⁵³ The updated espionage and foreign interference legislative regimes define national security more inclusively to incorporate any matter regarding Australia's 'political, military or economic relations' with foreign nations.⁵⁴ Journalists may resultantly be prosecuted for violating espionage laws if they accept or retain undamaging material that may be indistinctly related to Australia's foreign or economic matters. This threshold imposes excessive penalties for minor matters regarding military action or terrorism reports. Aforementioned enactments objectionably extend the concept of national security under Commonwealth law. Deliberation for foreign affairs and economics may impact national security, yet it is unreasonable to assume that all foreign affairs and economic issues resultantly implicate national

security. To constrain the dubious capacity of espionage offences in relation to journalists, this article proposes that s 90.4(1)(e) of the *Criminal Code* regarding political, military or economic relations with foreign nations necessitates repeal in conjunction with a Media Freedom Act.⁵⁵

A Media Freedom Act does not nor should necessarily demand complete transparency for national security organisation. In conjunction with surrounding reform, the Act could rather support the public's active entitlement to distinguish dubious conduct by representative government. It is imperative that the public engage informed sources to review whether legislation is upholding a concealment of unlawful conduct. Alice Drury of the *Human Rights Law Centre* addresses relative concerns, 'The Government might not like scrutiny or having wrongdoing exposed, but we all have a fundamental right to know what our Government is doing in our name and journalists must be able to do their jobs without fear of being prosecuted or having their homes raided'.⁵⁶ Governmental discretion may permit unidentified secrecy through 'national security' privileges. However, unjustified discretion fosters mistrust, hence governmental concealment can additionally conceal error, legal infringements and support partisan directives. Peter Greste confirms that, 'Our press might look free and fearless, but without significant reforms that remains a dangerously fragile illusion'.⁵⁷ When

Commonwealth agencies are entitled to perform without accountability requirements, protected individuals are more inclined to unlawfully exploit authority.

B) Metadata Review

In 2015, the metadata retention framework anticipated a narrow application, by conferring few Commonwealth agencies access to support investigations of serious crimes.⁵⁸ Currently, up to 80 agencies, including the industry commission for taxi services, feature amid approximately 350,000 applications for metadata access per annum.⁵⁹ Secrecy offences remain under police investigation, hence journalists' intelligence has been frequently accessed by widespread agencies, occasionally without a requisite warrant.⁶⁰ The journalist information warrant scheme is subsequently a weak framework for the significant protection of privacy for sources.⁶¹ *The Telecommunications (Interception and Access) Act ('TIA Act')* obliges a two year metadata retention period from communications service providers.⁶² This is not inconsequential information, as metadata can expose critical private and detection matter concerning an individual's communications, undertakings, and whereabouts.⁶³ The Australian Security Intelligence Organisation ('ASIO') and alternating enforcement agencies can access this material without a warrant.⁶⁴ A recent Ombudsman report determined that frequent metadata access has been processed through the *TIA Act* without procedural authorisation. ACT police

52 *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act') s 4.

53 *Ibid.*

54 *Criminal Code Act 1995* (Cth) ('Criminal Code') s 90.4(1)(e).

55 *Ibid.*

56 'Privacy invasion laws must be scaled back', *Human Rights Law Centre* (Web Page, 14 February 2020) <<https://www.hrlc.org.au/news/2020/2/14/privacy-invasion-laws-must-be-scaled-back>> ('Privacy invasion laws must be scaled back').

57 Peter Greste, 'The High Court rules in favour of News Corp, but against press freedom', *The Conversation* (online, 15 April 2020) <<https://theconversation.com/the-high-court-rules-in-favour-of-news-corp-but-against-press-freedom-136177>> ('The High Court rules in favour of News Corp, but against press freedom').

58 *Telecommunications (Interception and Access) Act 1979* (Cth) ss 187A, 187C ('TIA Act').

59 *Privacy invasion laws must be scaled back* (n 56).

60 Paul Karp and Josh Taylor, 'Police made illegal metadata searches and obtained invalid warrants targeting journalists', *The Guardian* (online, 23 July 2019) <<https://www.theguardian.com/australia-news/2019/jul/23/police-made-illegal-metadata-searches-and-obtained-invalid-warrants-targeting-journalists>>.

61 Adele Ferguson, Lesley Robinson, Lucy Carter, 'Whistleblower exposes ATO "cash grab" targeting small businesses' *ABC News* (online, 9 April 2018) <<https://www.abc.net.au/news/2018-04-09/whistleblower-exposes-ato-cash-grab-targeting-small-businesses/9633140?nw=0>>.

62 *TIA Act* (n 58) ss 187A, 187C.

63 Will Ockenden, 'What reporter Will Ockenden's metadata reveals about his life', *ABC News* (online, 24 August 2015) <<https://www.abc.net.au/news/2015-08-24/metadata-what-you-found-will-ockenden/6703626?nw=0>>.

64 *TIA Act* (n 58) ss 177-180.

misused metadata access on 116 occasions.⁶⁵ These details corroborate numerous concerns noted prior to the confirmation of metadata laws.

Since access to journalists' metadata may disclose classified sources, the *TIA Act* devises a Journalist Information Warrant ('JIW').⁶⁶ A JIW requires an evidenced application for judicial consent to permit metadata access – the public interest outcome in issuing the warrant should counteract public interest concerning the protection of journalistic sources.⁶⁷ A JIW may be pursued for information access – specifically, to further ASIO investigations, administer criminal sanctions, locate a missing person in question, or impose statute that executes a pecuniary penalty or preserves public remuneration.⁶⁸ Journalists are unable to challenge a JIW, partly because journalists do not have a statutory right to notice upon the discharge of a JIW.⁶⁹ Journalists may initially become aware of ASIO or law enforcement metadata access when advised of an ongoing criminal investigation – namely, through a raid of a journalist's premises.⁷⁰ Indefinite investigatory procedures reduce journalistic access to due process and press freedom, when facing unforeseen Commonwealth raids. Lacking JIW notice requirements additionally empower investigations with limited evidentiary support to expose classified sources, despite reduced public interest outcomes if charges are later dismissed.

The *TIA Act* does not adequately prevent its misapplication or individual error which urges reform to

enforce accountability schemes within JIW procedure. Journalists' metadata is widely accessible as lawful access spans beyond investigations of serious criminal offences – any agency that asserts an enforcement title is entitled to request a JIW.⁷¹ JIW should solely be granted in the context of serious crimes, considering instances when journalists intend to confront national security through the dissemination of confidential intelligence – acquiescent to metadata retrieval processes in the *TIA Act*.⁷² Access ought to be additionally confined to ASIO and criminal law enforcement agencies. Notice to the editor-in-chief or equivalent head of a media company should mandatorily accompany warrants. Fair notice would optimise access to suitable legal counsel and warrant details, including its basis and scope. Protections must additionally ensure that journalists are provided opportunity to contest warrants within a judicial forum. Legislative reform would assist procedural fairness for journalists, and consolidate balanced consideration for national security requirements and press freedom.

C) Disclosure Offence Reform

In 2018, the UN Special Rapporteur on the Situation of Human Rights Defenders conveyed that Australian journalists tend to self-censor due to hesitation as to whether publication material concerns a security intelligence organisation.⁷³ Wide intelligence operational secrecy determines that journalists without ASIO corroboration are limited when evaluating whether relevant action

qualifies as a Special Intelligence Operation ('SIO').⁷⁴ A majority of disclosure offences intend to preserve operational privacy, for instance, ASIO's Preventative Detention Orders ('PDO') and special warrant powers may coercively intimidate legitimate journalistic activities.⁷⁵ Section 35P of the *ASIO Act* was added in 2014 and extends state and federal bans on the release of information in relation to anti-terrorist undertakings.⁷⁶ The provision imposes a five year imprisonment penalty, upon the disclosure of material concerning a SIO which, 'Will endanger the health or safety of any person or prejudice the effective conduct of a SIO'.⁷⁷ This strict liability framework solely requires 'recklessness' to ascertain that the disclosure generates harm and does not accept a defence that the journalist lacked knowledge of a SIO.⁷⁸ The imprisonment duration is extended to a decade, should an offender demonstrate premeditation or prior knowledge of resultant harm.⁷⁹ This low statutory threshold and exclusion of a 'public interest' defence will likely propagate further chilling on media reporting. Public ability to perceptively evaluate whether Commonwealth actions lawfully apply state power is directly impeded.

D) Espionage Offence Reform

Additional limitations for press freedom have emerged upon recent espionage offence revisions. Section 91.1(2) of the *Criminal Code* directs a penalty of 25 years imprisonment if an offender 'deals' with information that 'concerns Australia's national

65 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* (Report, November 2018).

66 *TIA Act* (n 58) ss 180L, 180T.

67 *Ibid.*

68 *Ibid.*

69 *Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security* (n 3) 6.

70 *TIA Act* (n 58) ss 180L, 180T.

71 *Ibid* s 176A.

72 *Ibid* s 180.

73 *Report of the special rapporteur on the situation of human rights defenders on his mission to Australia* (n 32) 7.

74 *Ibid.*

75 *Criminal Code* (n 54) s 105.4.

76 *ASIO Act* (n 52) s 35P.

77 *Ibid* s 35P(1).

78 *Criminal Code* (n 54) s 91.1(2).

79 *ASIO Act* (n 52) *ibid* s 35P(1B).

security' and is 'reckless' through resultant implications towards national security.⁸⁰ 'Dealing' with information involves: communicating; broadcasting; receiving; holding; reproducing; or; creating an information record.⁸¹ A penalty of 20 years imprisonment is enforceable, regardless of whether the information in question does not regard national security or retains a security classification.⁸² Journalists among others are subsequently exposed to criminal penalties for solely receiving or holding sensitive data, prior to any publication decision. A newsroom or media office could be admissibly raided to avert the release of material uncovered by journalists in connection to a Commonwealth staffer. Although raids on ABC headquarters concerned reports that were published two years earlier, the *Criminal Code* reasonably entitles anticipatory raids to impede publication altogether – this establishes complete abandonment of press freedom despite Australia's assumed liberal democratic organisation.⁸³ Offences under the *Intelligence Services Act ('ISA')* in relation to intelligence officers similarly convey 'unauthorised dealing with records' and disclosures.⁸⁴ Although journalists are not liable under these sections, journalists' metadata may be retrieved and media offices may be examined to determine the foundation of an intelligence agency leak.⁸⁵

Espionage and disclosure breaches ought to consider restricted

whistleblower protections for journalists and intelligence officers. The *Public Interest Disclosure Act ('PID Act')* constructs a whistleblower framework for Commonwealth personnel, however, this *Act* does not affect journalists.⁸⁶ Deficient protections subsequently reject intelligence material in the public interest.⁸⁷ Yet a lawful disclosure process for intelligence officers to reveal information in good faith is non-existent. For example, intelligence officers are prohibited from internally reporting details about covert operations that reference unethical torture. The recent 'Inspector-General of the Australian Defence Force Afghanistan Inquiry Report' determines the extreme implications upon lacking internal reporting and accountability procedures – limited transparency propagates institutionalised culture that incites malpractice.⁸⁸ Admissions about internal transgressions should be initially disclosed within the agency or organisation, or to the Inspector-General of Intelligence and Security ('IGIS').⁸⁹ These discrete procedures can be suitable in certain contexts, yet independent support for ethical whistleblowers is not available when this protocol does not provide adequate resolution. Commonwealth employees that disclose information in good faith, which does not compromise critical national security interests should be exempt if they receive a provably unsatisfactory response to internal and IGIS disclosure schemes. This does not endorse deliberate disclosures by

intelligence agents that intentionally dispute Australia's national security.

E) Public Interest Defence for Ethical Whistleblowing

Professor AJ Brown contends that Australia's whistleblowing statute 'currently amounts to a well-motivated but largely dysfunctional mess'.⁹⁰ Brown's 'Plan for restoring public confidence in Commonwealth whistleblower protection' features: complete reform or substitution of the *PID Act*; restructuring standards for whistleblowing protection external to internal schemes; reviewing crucial legislative definitions; reinforcing shield laws; revising 'anti-detriment protections' to implement best international procedures; renewing legislative thresholds for whistleblowing guidelines; founding a whistleblower protection power; directing incentives for public interest whistleblowing; and initiating a broad public interest defence.⁹¹ Therefore, an effective Media Freedom Act must be supported by substantive systemic reform. Disclosure offences each require a controlled public interest defence to preserve press freedom – this includes intelligence disclosure offences, espionage legislation, and violations amid ASIO's special warrant powers and PDOs.⁹² Intelligence officers must express an applied belief that genuine internal and IGIS disclosure attempts were futile, conditioned by the information's 'public interest' value.⁹³ 'Public interest' must be subsequently defined for this purpose, to ensure

80 *Criminal Code* (n 54) s 91.1(2)

81 *Ibid* s 90.1.

82 *Ibid* 91.2(2).

83 *Submission No 11 to the Parliamentary Joint Committee on Intelligence and Security* (n 3) 9.

84 *Intelligence Services Act 2001* (Cth) ss 39-40M.

85 Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information' (2014) 37 *University of New South Wales Law Journal* 784 ('*Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information*').

86 *Public Interest Disclosure Act 2013* (Cth) s 29 ('*Public Interest Disclosure Act*').

87 *Ibid*.

88 Matthew Doran, 'Afghanistan war crimes report released by Defence Chief Angus Campbell includes evidence of 39 murders by special forces', *ABC News* (online, 19 November 2020) <<https://www.abc.net.au/news/2020-11-19/afghanistan-war-crimes-report-igadf-paul-brereton-released/12896234>>.

89 *Public Interest Disclosure Act* (n 86) s 34.

90 AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection After the Australian Federal Police Raids' (Speech, 130th Anniversary Henry Parkes Oration, Tenterfield, 26 October 2019).

91 Parliamentary Joint Committee on Human Rights, *16th Report of the 44th Parliament*, October 2014, 56-57.

92 *ASIO Act* (n 52) ss 34E, 34G, 35P; *Criminal Code* (n 54) s 91.1(2).

93 *Public Interest Disclosure Act* (n 86) s 26(1).

clear scope for protections, while preventing improper disclosure. Section 29 of the *PID Act* offers a classification framework, which permits the dissemination of material that regards serious misconduct.⁹⁴ 'Disclosable conduct' concerns government action that: breaches a law; alters the passage of justice; establishes maladministration; exploits public confidence; mispends public funds; unduly produces a danger to health or safety; or escalates environmental hazardous risk.⁹⁵ Statutory offences for reasonably obtaining, holding and reproducing information require reform to considerably confine penalties in contrast to intentional information disclosure – the *ISA* currently applies this proposal.⁹⁶ The all-inclusive classification of 'dealing' with information necessitates an amendment to clarify the ambiguous scope of 'seriousness'.⁹⁷ Additional offences ensure strict operative confidentiality for PDOs and ASIO's interrogation and detention warrant entitlements.⁹⁸ Legislation confines journalists' capacity to document national security material as no exemptions authorise information disclosed in the public interest. *PID Act* protections for whistleblowers solely pertain to Commonwealth staffers, which resultantly excludes journalists, civilians and private employees.⁹⁹ Legislation does not necessarily depict overt prejudice against journalists, yet it rather signifies a clampdown on intelligence disclosures. Mounting public support for whistleblowers considers timely discoveries from Edward Snowden and WikiLeaks.¹⁰⁰

The Commonwealth's enforcement strategy appears opportune, justifying secrecy legislation as an

apparatus to mitigate terrorism risks. Hence challenges to press freedom are perceived as a means to assist democratic freedoms. The Federal government has upheld that it will not apply aforementioned laws to restrict routine journalistic function, yet this pledge does not adequately uphold press freedom.¹⁰¹ Unsubstantiated protective claims can generate journalistic dependence on discretionary governmental review to evade prosecution – despite material in question often comprising details that could harm or inconvenience government and/or public agencies.¹⁰² A Media Freedom Act would provide journalists with a functioning protective framework to minimise trepidation for reporting on critical national security matters in the public interest. This Act requires accompanied review of disclosure provisions in the *ASIO Act* to ensure that criminal penalties cannot intimidate critical journalistic procedure.¹⁰³ Accordingly, an addended defence for 'public interest' information regarding intelligence disclosure offences would assist ethical journalistic practices.

IV Conclusion

Liberal democratic organisation fundamentally enshrines representative and accountable government, which is dependent on media freedom and journalistic protection. Wide enactment of national security counterterrorism laws in Australia exposes a troubling shortage of consideration for the standing of press freedom and accountable governance. Australia's laws are subsequently retreating from UN Human Rights Committee sentiment that open media is 'one of the cornerstones of a liberal

democracy'.¹⁰⁴ A Media Freedom Act would secure greater access to public policy details, to ensure that a broader range of secure national security subjects can be unreservedly discussed between individuals and political representatives. Publication capacity must not be restrained by overbearing Commonwealth disclosure restrictions that confine access to critical public interest information. Legislative protections for journalists that support transparency in relation to governmental misconduct and corruption are additionally critical to functional democracy. Public reporting regarding the conduct of elected representatives ensures that constituents are able to nominate candidates with accurate and well-informed knowledge.

Press freedom and protections must encompass sources and whistleblowers, who disclose information in legitimate public interest. Severe imprisonment and pecuniary penalties for journalists with a low or 'reckless' threshold significantly challenges important access to key public interest information. Slowing the chilling effect upon limited press freedom would be supported by broader exemptions for journalists, to confine the ambit of criminal and civil penalties. Harmonious reform collectively assists a continuation of crucial public interest journalism by mitigating severe risks to professional standing and source privacy. A Media Freedom Act would consolidate surrounding legal reform to assist Australia's declining international standing, by enshrining democratic principles that value operative protection for press freedom.

94 Ibid s 29.

95 Ibid.

96 *Criminal Code* (n 54) s 90.1.

97 Ibid.

98 *ASIO Act* (n 52) ss 34E, 34G; *Criminal Code* (n 54) s 105.4.

99 *Public Interest Disclosure Act* (n 86) s 69(1).

100 *Terrorist, Traitor or Whistleblower? Offences and protections in Australia for Disclosing National Security Information* (n 85) 784.

101 Ibid 816.

102 *The High Court rules in favour of News Corp, but against press freedom* (n 57).

103 *ASIO Act* (n 52) ss 35P, 34ZS.

104 *General Comment No 34* (n 5) 3.