Don't Ask Journalists to Keep Your Secret: Source Confidentiality In Australian Media

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I Introduction

Dubbed the 'Fourth Estate', the media plays a vital role in representing the interests of individuals in a society, holding government to account and facilitating a healthy democracy.[1] Especially in this context, sources are the 'wellspring of journalist's work' and provide information on the assurance of confidentiality.[2] Source confidentiality and press freedom are thus inextricably linked.[3] It is also more than just a promise; journalists are bound under the Media, Entertainment & Arts Alliance Code of Ethics to 'respect [source confidences] in *all circumstances*'.[4] Journalists take this seriously, often subjecting themselves to curial punishment in upholding it.[5] However, the 2019 raids by the Australian Federal Police (AFP), culminating in the cases of *Smethurst v Commissioner of Police*[6] and *Australian Broadcasting Corporation v Kane and Others (No 2)*,[7] demonstrated that police powers of search and seizure pose both an unjustified and disproportionate threat to these principles. Those powers operate as a loophole to existing protections for source confidentiality and more concerningly, rest on provisions that effectively criminalise public interest journalism. The result is that our own executive is a greater threat to our democracy than any foreign power, and proposals for reform must be acted upon.

II The Legislative Framework

Police powers of search and seizure are commonly invoked pursuant to secrecy and espionage offences, when exercised against journalists. Since 2001, the federal Parliament has enacted some 82 (and counting) pieces of national security legislation.[8] What has resulted is a complex, unclear and even inconsistent regime criminalising various forms of unauthorised dealings with information, where it is or may be prejudicial to national security.[9] These offences are defined by reference to broad concepts: 'national security' includes 'carrying out the country's responsibilities to any other country' and 'political, military or economic relations with another country',[10] while 'security' encompasses behaviour from outright 'sabotage' to more general 'politically motivated violence' and 'acts of foreign interference'.[11] The Parliamentary Joint Committee on Intelligence and Security (PJCIS) observed that these laws could therefore easily capture journalists in the course of public interest journalism, despite being far removed from the terrorism or military operations that the laws intend to target.[12]

To investigate the alleged commission of these offences, law enforcement agencies have complementary powers of search and seizure. The legislation creates a smorgasbord of warrants: the classic search warrant,[13] to modern-day computer access warrants,[14] to the peculiar Journalistic Information Warrant (JIW).[15] They are issued by senior officers, judges, Magistrates

1 Martin Hirst, 'Right To Know: The 'Nation', The 'People' and the Fourth Estate', *The Conversation* (News Article, 11 December 2013) <https://theconversation.com/right-to-know-the-nation-the-people-and-the-fourth-estate-21253>; Public Interest Journalism Initiative, Submission No 18 to Senate Standing Committee on Environment and Communications, *Inquiry into Press Freedom* (30 August 2019) 1.

2 Des Butler and Sharon Rodrick, *Australian Media Law* (5th edn, Thomson Reuters, 2015) 689.

3 Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 2.

4 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (Web Page, 2020) <https://www.meaa.org/meaa-media/code-of-ethics/> (emphasis added).

5 Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth 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) 128 [3.300]. See, eg, *R v Barrass* (District Court of Western Australia, Kennedy J, 7 August 1990).

6 (2020) 376 ALR 575.

7 (2020) 377 ALR 711 (*'Kane (No 2)'*).

8 Parliamentary Joint Committee on Intelligence and Security (n 5) 15 [2.13]; Nicola McGarrity and Jessie Blackbourn, 'Australia Has Enacted 82 Anti-Terror Laws Alone Since 2001. But Tough Laws Alone Can't Eliminate Terrorism', *The Conversation* (News Article, 30 September 2019) <https://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>; Daniel Hurst, '"Chilling Attack on Democracy": Proposed ASIO Powers Could be Used Against Journalists', *The Guardian* (News Article, 20 October 2020) <https://www.theguardian.com/media/2020/oct/20/chilling-attack-on-democracy-proposed-asio-powers-could-be-used-against-journalists>.

9 See, eg, *Australian Security Intelligence Organisation Act 1979* (Cth) ss 18(2), 18A(1), 18B(1), 35P, 92; *Crimes Act 1914* (Cth) ss 3ZZHA, 15HK; *Criminal Code Act 1995* (Cth) ss 91.1-92A, 131.1, 132.1; *Defence Act 1903* (Cth) ss 73A(2), 73F; Parliamentary Joint Committee on Intelligence and Security (n 5) 22-3 [2.49], [2.52].

10 *Criminal Code Act 1995* (Cth) s 90.4(1)(d), (e).

11 *Australian Security Intelligence Organisation Act 1979* (Cth) s 4; *Crimes Act 1914* (Cth) ss 15GD, 15GE(2).

12 Parliamentary Joint Committee on Intelligence and Security (n 5) 25 [2.58].

13 *Crimes Act 1914* (Cth) ss 3E, 3F, 3LA, 3ZQN.

14 *Australian Security Intelligence Organisation Act 1979* (Cth) s 25A; *Surveillance Devices Act* 2004 (Cth) s 27A.

15 *Telecommunications (Interception and Access) Act 1979* (Cth) Ch 4, Part 4-1, Div 4C. See further *Australian Security Intelligence Organisation Act 1979* (Cth) ss 25, 26, 27; *Surveillance Devices Act 2004* (Cth) s 14; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 9, 9A, 46, 46A, 109, 110; *Crimes Act 1914* (Cth) s 3ZA; Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 9.

and other legally qualified issuing authorities, upon application by the law enforcement agencies, with the key criterion generally being whether it is necessary for some purpose in furthering an investigation, often by the seizure of evidential material.[16] Search warrants typically allow access to persons of interest or particular premises,[17] but more recently the government introduced data surveillance schemes that reach deeper into journalists' communications. There is the mandatory 'data retention scheme', which obliges all telecommunications providers operating in Australia to retain customers' (including journalists') metadata, potentially revealing phone numbers, the time and length of calls, and even the location of callers.[18] That can be accessed by a range of government agencies without a warrant, although a JIW is required if a law enforcement agency wishes to access a journalists' or their employers' metadata for the purpose of identifying a source.[19] Additionally, there is the 'industry assistance scheme', that goes beyond metadata and allows policing and intelligence agencies to compel, with a warrant, 'Designated Communications Providers' to do a broad range of 'acts or things' to assist them in their objectives, such as removing a form of encryption.[20] Together, this plethora of warrants leaves journalists vulnerable to being searched, like Smethurst, 'from [their] mobile phone and computer, to [their] underwear drawer and cookbooks'.[21] As the following analysis will demonstrate, this represents a fundamental imbalance between two competing public interests, as Attorney-General Christian Porter pithily described: 'a free press, against keeping Australians safe'.[22]

III Exploiting Loopholes

The first problem, and indication of the imbalance, is that these powers cut behind existing protections for source confidentiality. At common law, judges generally have a discretion to uphold a journalist's claim to immunity from disclosing a source's identity, even if that information is 'relevant and proper'.[23] And although media organisations will incur an equitable obligation to disclose information, including a source's identity, if it amounts to an actionable wrong, that is only required if it is necessary in the interests of justice.[24] There is also the 'newspaper rule', which protects journalists from having to reveal their sources' identity at the interlocutory stage in defamation proceedings, unless disclosure is necessary in the interests of justice, or would otherwise not reveal their identity.[25] However, these common-law protections are weak. They are highly discretionary, operate either only in trial or pre-trial situations, and the newspaper rule is confined to defamation proceedings and is court practice, rather than a rule of evidence.[26] For example, they could provide no relief in *Smethurst* and *Kane (No 2)*, neither involving defamation proceedings or disclosure at trial stage.

Most Australian jurisdictions now have 'shield laws', which create a rebuttable presumption of non-disclosure of an informant's identity. Enacted with the specific goal of 'foster[ing] freedom of the press and better access to information for the Australian public', they are a statutory recognition of journalists' ethical obligations.[27] Positively, shield laws strengthen the common-law position in allowing journalists to make a prima facie claim to privilege.[28] It is not absolute, but explicitly requires consideration of the public interest in press freedom.[29] However, they are far from adequate in fully recognising the extent that obligation. Where they exist, they are not uniform, and Queensland lacks them entirely.[30] Relatedly, they only apply to a 'journalist' and that is defined differently in each

16 Rebecca Ananian-Welsh, Submission No 17 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (26 July 2019) 9.

17 See, eg, *Crimes Act 1914* (Cth) s 3E.

18 Rebecca Ananian-Welsh, 'Journalistic Confidentiality in An Age of Data Surveillance' (2019) 41 *Australian Journalism Review* 225, 226-7; *Telecommunications (Interpretation and Access) Amendment (Data Retention) Act 2015* (Cth).

19 *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) s 5(1), Chapter 4, Pt 4-1, Div 4C; Ananian-Welsh (n 18) 227-8.

20 *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ('*TOLAA*'), ss 317A, 317E(1)(a), 317B, 317ZH; Ananian-Welsh (n 18) 230-2.

21 Rebecca Ananian-Welsh, 'Explainer: What Did the High Court find in the Annika Smethurst v AFP Case?', *The Conversation* (News Article, 15 April 2020) <https://theconversation.com/explainer-what-did-the-high-court-find-in-the-annika-smethurst-v-afp-case-136176>.

22 Letter from The Hon Christian Porter MP, Attorney-General to the Chair of the Parliamentary Joint Committee on Intelligence and Security, 4 July 2019, 1.

23 Butler and Rodrick (n 2) 500-1 [7.530]. See, eg, *Attorney-General v Clough* [1963] 1 QB 773, 792; *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354-5.

24 Butler and Rodrick (n 2) 508-9 [7.600].

25 Ibid 504 [7.580]; *Tony Madafferi v The Age* [2015] VSC 687, [28]; Patrick George, 'Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act' (2017) 36 *Communications Law Bulletin* 24, 26; *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354; *Hodder v Queensland Newspapers Pty Ltd* [1994] 1 Qd R 49, 57; *Liu v The Age Company Ltd* [2010] NSWSC 1176, [45]; *Wran v Australian Broadcasting Commission* [1984] 3 NSWLR 241, 252-3; *Liu v The Age Company Ltd* [2016] NSWCA 115, [122].

26 *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 352, 354; *West Australian Newspapers Ltd v Bond* (2009) 40 WAR 16, 180; *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, [78]; *Isbey v New Zealand Broadcasting Corporation (No 2)* [1975] 2 NZLR 237; George (n 24) 26, 30.

27 Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.306]. See *Evidence Act 1995* (Cth) ss 126J, 126K, 131A, 131B; *Evidence Act 2011* (ACT) ss 126J-126L, 131A; *Evidence Act 1995* (NSW) ss 126J-126L, 131A; *Evidence Act 2008* (Vic) ss 126J, 126K, 131A; *Evidence Act 1906* (WA) ss 20G-20M.

28 *Ashby v Commonwealth of Australia* [2012] FCA 766, [18]; Butler and Rodrick (n 2) 516 [7.660].

29 See, eg, *Evidence Act 1995* (Cth) s 126K(2)(b).

30 Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.306].

jurisdiction. Only two jurisdictions, the Commonwealth and Australian Capital Territory, give a definition that encompasses non-traditional forms of journalism, which is arguably necessary to reflect the modern environment.[31] Most problematically, they only cover any 'process or order of a court that requires disclosure of information or a document'.[32] That deficiency was highlighted in *Kane (No 2)*, where Abraham J entertained no possibility of the Commonwealth iteration extending to search warrants.[33] Victoria is exceptional in extending them to search warrants, although the JIW scheme circumvents that and is imperfect.[34] Although a JIW will only be issued if it is for a specified law enforcement purpose and is in the public interest, and a Public Interest Advocate (PIA) assists on these matters, the purpose test is easy to satisfy given the broad scope of offences and the public interest test does not always apply.[35] The PIA is also 'under no obligation to champion the journalist's position', potentially swayed by the government that appointed them.[36]

The disproportionate nature of this regime is underscored by the availability of clear, reasonable alternatives. Shield laws should be harmonised Australia-wide (with Queensland enacting mirror legislation), and extended to include search warrants. More radically, there have been calls for a contested warrants process, similar to the UK,[37] whereby journalists or media organisations have the opportunity to object at an early stage to the issuing of warrants; essentially a more robust JIW scheme. It would cover all warrant types and have an independent third-party, ideally a senior judge, deciding whether or not to authorise the issuing of the warrant considering necessity, and the competing public interests in accessing the information against press freedom.[38] It is no argument that there are existing avenues, like urgent injunctions to halt the execution of warrants and the availability of judicial review to challenge their validity,[39] because those ignore the crux of the problem: once a source is identified (or at risk of identification) through investigatory processes, the cat is out of the bag and the damage done. And as the High Court recently ruled, albeit by a slim majority, there is no scope for unlawfully seized material to be returned or destroyed.[40] Although Abraham J thought that '[i]dentifying the evidential material says nothing about whether there is… any risk of identifying the confidential source',[41] with respect that is difficult to avoid, as the very goal of a search warrant investigating secrecy offences is to pinpoint the unauthorised disclosure.

IV Fruit of the Poisoned Tree

The second problem arises in relation to the framework of secrecy and national security offences that the powers operate on. Secrecy of government information has long been acknowledged as productive to our Westminster system of government and the need to protect national security, particularly since the rise in terror attacks since September 11, 2001.[42] Secrecy and national security offences, which criminalise the unauthorised disclosure of information pertaining to these interests, therefore serve the important purpose of not just protecting the persons directly involved in national security and related operations, but the integrity and efficiency of those mechanisms.[43] Relatedly, police powers to search and seize are 'important and legitimate tool[s] in the detection and prosecution of criminal offences'.[44] *Kane (No 2)* and *Smethurst* reflect this, as the courts in both cases took a 'a largely orthodox approach' to assessing the validity of the warrants (despite it being struck down in the latter),[45] essentially reflecting the 400-year old common-law principle that prohibits only *general* warrants.[46] It was affirmed that warrants need not be precise, given that they are issued for an investigative purpose, and all that is required is that they inform the subject why the search

31 Ibid 129-130 [3.303], [3.307]; Commonwealth, Parliamentary Debates, House of Representatives, 21 March 2011, 2393-4; Sara Phung, 'Function Not Form: Protecting Sources of Bloggers' (2012) 17 *Media and Arts Law Review* 121. See *Evidence Act 1995* (Cth) s 126J(1); *Evidence Act 2011* (ACT) s 126J.

32 *Evidence Act 1995* (Cth) s 131A(2); *Evidence Act 2008* (Vic) s 131A(2); *Evidence Act 1995* (NSW) s 131A(2); *Evidence Act 2011* (ACT) s 131A(2); *Evidence Act 1906* (WA) s 20H.

33 *Kane (No 2)* (2020) 377 ALR 711, 755-9 (Abraham J).

34 *Evidence Act 2008* (Vic) s 131A(2)(g); Parliamentary Joint Committee on Intelligence and Security (n 5) 129 [3.303]; Ananian-Welsh (n 18) 228-9.

35 Ananian-Welsh (n 18) 227-9; *Telecommunications (Interception and Access) Act 1979* (Cth) ss 178-180(4); 180J-180L, 180T.

36 Sal Humphreys and Melissa de Zwart, 'Data Retention, Journalist Freedoms and Whistleblowers' (2017) 165 *Media International Australia* 103, 106; *Telecommunications (Interception and Access) Act 1979* (Cth) s 180X(1); Paddy Manning, 'Dissent in Press Freedom Inquiries', *The Saturday Paper* (News Article, August 15 2020) <https://www.thesaturdaypaper.com.au/news/media/2020/08/15/dissent-press-freedom-inquiries/159741360010279?cb=1602675859>.

37 See, eg, *Police and Criminal Evidence Act 1984* (UK) ss 8(1)(d), 9, 11, 13, 14.

38 Parliamentary Joint Committee on Intelligence and Security (n 5) 50-1, 60-1 [3.15], [3.52]; Ananian-Welsh (n 16) 13-4; Australia's Right to Know, Submission No 23 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (31 July 2019) 5.

39 Parliamentary Joint Committee on Intelligence and Security (n 5) 59 [3.49].

40 *Smethurst v Commissioner of Police* (2020) 376 ALR 575,

41 *Kane (No 2)* (2020) 377 ALR 711, 782 (Abraham J).

42 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) 98; Butler and Rodrick (n 2) 677-8 [10.10].

43 Explanatory Memorandum, National Security Legislation Amendment Bill (No 1) 2014 (Cth) [553]; Australian Law Reform Commission (n 39) 103.

44 *Kane (No 2)* (2020) 377 ALR 711, 730, citing *Hart v Commissioner, Australian Federal Police* (2002) 124 FCR 384, 401.

45 Bradley Dean, 'Search Warrants and the 'Fourth Estate': Recent Judgments' (2020) 67 *Law Society of NSW Journal* 78, 78.

46 *Semayne's Case* (1604) 77 ER 194.

is being conducted, state the nature of the offences, and have a 'real and meaningful perimeter' as to its scope.[47] That allows a balance between precision and complying with the rule of law, while keeping the 'operational realities' of investigations in mind.[48] So on one side of the equation sits the effective functioning of the executive, and the public interest in protecting national security.

On the other side of the equation sits the competing public interest in press freedom and source confidentiality. Search warrants and the offences they rest on, legitimate as they may be, are an incursion on that and freedom of speech more generally, and the UN Human Rights Committee has implored that such restrictions must be clearly and properly justified.[49] While Australia has no federal bill of rights to enforce this, the implied constitutional freedom of political communication has instead been called upon. In *Kane (No 2)*, it was argued that the discretion to issue a search warrant pursuant to s 3E *Crimes Act 1914* (Cth) unduly infringed that freedom.[50] Applying the three-stage test from *McCloy v New South Wales*,[51] it was accepted that s 3E 'may indirectly' burden the freedom, because 'information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to its sources'.[52] Yet the countervailing interest, as described above, was given primacy; warrants are a particular investigatory method for gathering evidence in criminal cases, which serves a purpose 'plainly compatible with the maintenance of the prescribed system of representative government'.[53] The warrant was also not framed wider than necessary and there were no reasonably practicable alternatives available for investigating serious breaches of the offence provisions.[54]

On its face it seems settled; search and seizure powers do not infringe the implied freedom. But with respect, that proceeds on a mistaken assumption. While it is true that warrants investigate criminal offences, that assumes the underlying offence is itself legitimate and justified. This is the question that remains unanswered following *Smethurst* and sits at the heart of the problem. As addressed in Section II, the secrecy and national security offences that the warrants piggy-back off are overly complex and operate by reference to vague definitions. This is inconsistent with the rule of law, which requires that laws be 'accessible, and so far as possible, intelligible, clear and predictable'.[55] The consequence is that activities which arguably pose little to no harm to national security and are thus unconnected to the purpose of those laws, namely public interest journalism, are criminalised.[56] As Peter Greste observed, 'nobody has ever suggested national security suffered as a result of [Smethurst's] story'.[57] Indeed, many professional journalists actually acknowledge the gravity of the information they handle and aim to have a cooperative relationship with authorities when publishing it.[58] Recognising this, there have been calls for review of the secrecy laws and more defences for public interest journalism.[59] So, it is arguable that the underlying offences are an unjustified intrusion on the implied freedom of political communication, and therefore press freedom. Indeed, recent external legal advice warns that newly proposed powers to expand ASIO's questioning powers may cross this line.[60] If the offence 'trees' are tainted, so must be the warrant 'fruit' that grow from them.

V The Real Threat to our Democracy

The practical effect of this framework is a 'chilling effect' on the Fourth Estate and their freedom of speech, which is detrimental to our democracy. As raised in Section III, freedom of speech may be restricted, so long as it is clearly justified and there is a direct connection between the threat and restriction. Indeed, absolute press freedom is not desirable; there have been several instances where unauthorised disclosure, ostensibly in the public interest, has harmed it - think WikiLeaks and Edward Snowden.[61] Further, the rise of new media and 'citizen journalism'

47 *Kane (No 2)* (2020) 377 ALR 711, 730-1, 737-41 (Abraham J); *Smethurst v Commissioner of Police* (2020) 376 ALR 575, 628 (Edelman J).

48 *Kane (No 2)* (2020) 377 ALR 711, 730 (Abraham J), citing *Caratti v Commissioner of Australian Federal Police* (2017) 257 FCR 166, 177.

49 Australian Law Reform Commission (n 39) 90-1; United Nations Human Rights Committee, General Comment 34 on Article 19 of the ICCPR on Freedoms of Opinion and Expression, UN Doc CCPR/C/GC/34 (12 September 2011) [35].

50 *Kane (No 2)* (2020) 377 ALR 711, 763-4, 771, 775 (Abraham J).

51 (2015) 257 CLR 178; *Kane (No 2)* (2020) 377 ALR 711, 770 (Abraham J).

52 *Kane (No 2)* (2020) 377 ALR 711, 778-9 (Abraham J).

53 Ibid (Abraham J).

54 Ibid 780-2 (Abraham J).

55 Lord Bingham, 'The Rule of Law' (2007) 66 *The Cambridge Law Journal* 67, 69.

56 Rebecca Ananian-Welsh (n 16) 5; Australia's Right to Know (n 38) 2.

57 Peter Greste, 'The High Court Rules in Favour of News Corp, But Against Press Freedom', *The Conversation* (News Article, 15 April 2020) <https://theconversation.com/the-high-court-rules-in-favour-of-news-corp-but-against-press-freedom-136177>. See also Australian Law Reform Commission (n 39) 100.

58 Parliamentary Joint Committee on Intelligence and Security (n 5) 36, 37 [2.99].

59 Ibid 100 [3.194]; Australia's Right to Know (n 38) 9-15.

60 Daniel Hurst, '"Chilling Attack on Democracy": Proposed ASIO Powers Could be Used Against Journalists', *The Guardian* (News Article, 20 October 2020) <https://www.theguardian.com/media/2020/oct/20/chilling-attack-on-democracy-proposed-asio-powers-could-be-used-against-journalists>.

61 Butler and Rodrick (n 2) 499 [7.520].

creates a risk of 'fake news' and mistrust in democracy.[62] But as argued, the current framework is premised on unjustifiably broad offences and search and seizure powers that disproportionately favour security interests over press freedom. Consequently, faced with the risk of criminal prosecution and identities being leaked, journalists restrain themselves from fully and frankly engaging in their work and sources are hesitant to come forward. For example, one journalist described that in response to the 2019 raids, he 'did an immediate stocktake of what was at [his] desk because I thought Jesus, am I going to be next?'[63]

A degree of free speech is an intrinsic good, promoting the self-fulfilment of individuals in society, the search for truth, and is 'the lifeblood of democracy'.[64] That is because it is a 'vital ingredient' of investigative journalism, and thus facilitates the role of the Fourth Estate.[65] These principles are so important that, in addition to the aforementioned reforms, there have been calls for a 'Media Freedom Act'. It would enshrine principles of press freedom in our legal system and affirm the role of the Fourth Estate, require transparency from government and protect 'legitimate journalism' from the scope of criminal offences.[66] Again, without this protection the current framework of police powers of search and seizure are an unjustified and disproportionate incursion on journalists' ethical obligations and press freedom.

VI Conclusion

The 2019 raids and subsequent court battles have revealed the imbalance between two core public interests: national security and secrecy, against press freedom and source confidentiality. In operating as a loophole to, and therefore undermining, existing protections for source confidentiality, and piggy-backing off offences that criminalise legitimate public interest journalism, journalists struggle to uphold their ethical obligations. This would be unacceptable for a lawyer or doctor, so what makes a journalist different?

62 See, eg, Miguel Paisana, Ana Pinto-Martinho and Gustavo Cardoso, 'Trust and Fake News: Exploratory Analysis of the Impact of News Literacy on the Relationship with News Content in Portugal' (2020) 33 *Communication & Society* 105; Vian Bakir and Andrew McStay, 'Fake News and the Economy of Emotions' (2018) 6 *Digital Journalism* 154.

63 Parliamentary Joint Committee on Intelligence and Security (n 5) 30 [2.74]. See also Rebecca Ananian-Welsh, 'Why the Raids on Australian Media Present a Clear Threat to Democracy' (2019) 11 *Australian Policing* 12, 12.

64 *R v Secretary of State for the Home Department; ex parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

65 *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 354. See, eg, Shyamal K Chowdhury, 'The Effect of Democracy and Press Freedom on Corruption: An Empirical Test' (2004) 85 *Economics Letters* 3; Christine Kalenborn and Christian Lessmann, 'The Impact of Democracy and Press Freedom on Corruption: Conditionality Matters' (2013) 35 *Journal of Policy Modelling* 857.

66 Rebecca Ananian-Welsh, 'Australia Needs a Media Freedom Act. Here's How it Could Work', *The Conversation* (News Article, 22 October 2019) <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>; Greste (n 55).

Stage 2 of the Australian Defamation Law Reform Process - Report

By **Joel Parsons** (CAMLA YL Representative, Bird and Bird)

On 12 May 2021, CAMLA and Johnson Winter & Slattery hosted a webinar on Stage 2 of the Australian defamation law reform process. The event broadly focused on the question of internet intermediary liability for defamation tackled in the Defamation Working Party's Discussion Paper. Moderated by Kevin Lynch, Partner, Johnson Winter & Slattery, the webinar brought together a panel of eminent defamation experts, comprising Kieran Smark SC, Clayton Noble (Microsoft), her Honour Judge Judith Gibson (District Court of NSW), and Dr Daniel Joyce (UNSW Law & Justice).

The panel discussion facilitated an engaging and thought-provoking exploration of different perspectives on the key issues, such as the desirability of the U.S. approach (via an immunity similar to that provided by section 203 of the United States' Communications Decency Act) and innocent dissemination in the age of social media. The panel also had an opportunity to reflect on the Stage 1 reforms.

The webinar was well attended and CAMLA is grateful to Johnson Winter & Slattery for hosting an excellent event.