PROTECTING PRESS FREEDOM THROUGH HUMAN RIGHTS CHARTERS IN AUSTRALIA

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Press freedom has received heightened attention in Australia since 2019, when the Australian Federal Police raided a journalist and the Australian Broadcasting Corporation in consecutive days. Subsequently, there has been increased discussion about how to better protect public interest journalism. Such discourse has not been framed in the language of human rights. None of Australia's existing human rights laws explicitly protect press freedom. In contrast, human rights laws in several other jurisdictions provide express or implied press freedom protection. Drawing on comparative law, this article identifies opportunities for Australian human rights law to address encroachments on press freedom. It argues that the right to freedom of expression might provide heightened protection for journalists, their sources and newsgathering activities, and that a constellation of rights might together limit attempts to undermine journalism. The article concludes by considering the potential for stronger press freedom protection in Australian human rights law.

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I Introduction

> If I were to choose between living in a society which enjoys freedom of expression, but not having the right myself, or enjoying the right in a society which does not have it, I would have no hesitation in judging that my own personal interest is better served by the first option.[1]

> A free press is the unsleeping guardian of every other right that free men prize.[2]

Article 19 of the *Universal Declaration of Human Rights* ('*UDHR*'), the United Nations General Assembly's seminal 1948 proclamation, declared:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[3]

Inherent in this statement is the role of the press as a necessary component of freedom of expression — critically, the right is to 'seek, receive and impart information and ideas',[4] and in democratic societies, a free press is the primary source of contemporary factual information.[5] The *UDHR* was neither the first nor last human rights-protecting instrument to acknowledge, expressly or by implication, the role of the media. The First Amendment to the *United States Constitution* provides that 'Congress shall make no law … abridging the freedom of speech, or of the press'.[6] Canada's constitutionalised human rights

[1] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, rev ed, 1994) 54.

[2] Winston Churchill (Speech, 1949), quoted in Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (Report No 780, November 2012) vol 1, 56.

[3] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) ('*UDHR*').

[4] Ibid.

[5] See, eg, Rowan Cruft, 'Journalism and Press Freedom as Human Rights' (2022) 39(3) *Journal of Applied Philosophy* 359, 365.

[6] *United States Constitution* amend I.

charter explicitly protects press freedom,[7] and European human rights law has similarly developed a rich seam of press freedom-protecting jurisprudence.[8]

Not Australia. The phrases 'press freedom' or 'freedom of the press' do not appear in Australia's three human rights charters: the *Human Rights Act 2004* (ACT) ('*ACT Charter*'), the *Human Rights Act 2019* (Qld) ('*Queensland Charter*') and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*') — ('*Charters*').[9] Neither free speech nor press freedom is expressly protected in the *Australian Constitution*, and the frail constitutional shield that does exist — the implied freedom of political communication[10] — has provided limited press freedom protection in practice.[11] Statutory and constitutional protections for human rights generally are limited; Australia is the only comparable liberal democracy without a federal human rights framework and the three State and Territory *Charters* largely adopt a dialogue model.[12] Even these limited extant protections do not expressly protect press freedom.

The weak protections for press freedom in Australia came into stark relief in mid-2019. On 4 June, the Australian Federal Police ('AFP') raided the Canberra home of News Corp journalist Annika Smethurst in relation to 'alleged

[7] *Canada Act 1982* (UK) c 11, sch B pt I s 2(b) ('*Canadian Charter*').

[8] Dirk Voorhoof, in a study of almost 1,000 cases arising under art 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention*'), notes that the 'jurisprudence has manifestly helped to create an added value for the protection of freedom of expression, journalistic freedom, freedom of the media and public debate in the member states of the *Convention*': Dirk Voorhoof, 'The Right to Freedom of Expression and Information under the European Human Rights System: Towards a More Transparent Democratic Society' (Working Paper No 2014/12, Centre for Media Pluralism and Media Freedom, Robert Schuman Centre for Advanced Studies, February 2014) 2.

[9] *Human Rights Act 2004* (ACT) ('*ACT Charter*'); *Human Rights Act 2019* (Qld) ('*Queensland Charter*'); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*').

[10] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

[11] See, eg, *Australian Broadcasting Corporation v Kane [No 2]* (2020) 377 ALR 711, 754–5 [193], 770 [273]–[274] (Abraham J) ('*Kane*').

[12] See, eg, Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 16(1) *Australian International Law Journal* 219, 221, 223; Queensland Government, *A Human Rights Approach for Queensland* (Fact Sheet) <https://www.forgov.qld.gov.au/__data/assets/pdf_file/0025/183346/a-human-rights-approach-for-queensland.pdf>, archived at <https://perma.cc/739P-9SB6>; Sara Jackson, 'Designing Human Rights Legislation: "Dialogue", the Commonwealth Model and the Roles of Parliaments and Courts' (2007) 13 *Auckland University Law Review* 89, 94 n 28.

publishing of information classified as an official secret'.[13] Smethurst had previously reported on proposed plans to give the Australian Signals Directorate the ability to spy on Australian citizens.[14] The following day, 5 June, the AFP raided the Sydney headquarters of the Australian Broadcasting Corporation ('ABC') in relation to its reporting on alleged war crimes committed by Australian forces in Afghanistan.[15] Both News Corp and the ABC subsequently took legal action: News Corp succeeded, albeit on statutory grounds,[16] with the High Court declining to consider a press freedom-linked implied freedom argument,[17] while the ABC was unsuccessful in its implied freedom challenge.[18] Ultimately, the AFP ruled out proceeding with the case against Smethurst,[19] while the Commonwealth Director of Public Prosecutions declined to prosecute an ABC journalist,[20] although it has continued with a case against the alleged source, former military lawyer David McBride.[21] The ongoing prosecution of a

[13] 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-corp-journalist-annika-smethurst>, archived at <https://perma.cc/Q3XX-TYGH>.

[14] Ibid.

[15] Amy Remeikis, 'ABC Vows to Continue Reporting "without Fear" after Police Raid Sydney Offices', *The Guardian* (online, 5 June 2019) <https://www.theguardian.com/media/2019/jun/05/abc-offices-raided-by-australian-federal-police>, archived at <https://perma.cc/8BRU-LVEK>.

[16] *Smethurst v Commissioner of Police (Cth)* (2020) 272 CLR 177, 206 [44] (Kiefel CJ, Bell and Keane JJ, Gageler J agreeing at 227 [115], Nettle J agreeing at 236 [142], Gordon J agreeing at 246 [166]), 265 [225] (Edelman J). However, the majority declined to award an injunction requiring the AFP to destroy the information obtained through the invalid warrant: at 221 [99] (Kiefel CJ, Bell and Keane JJ), 245 [163] (Nettle J).

[17] Ibid 223 [105]–[106] (Kiefel CJ, Bell and Keane JJ, Gordon J agreeing at 257 [198]), 288 [280] (Edelman J).

[18] *Kane* (n 11) 770 [273]–[274], 782 [344]–[347] (Abraham J).

[19] Paul Karp, 'AFP Rules Out Charges against News Corp Journalist Annika Smethurst after Raid', *The Guardian* (online, 27 May 2020) <https://www.theguardian.com/media/2020/may/27/afp-rules-out-charges-against-news-corp-journalist-annika-smethurst-after-raid>, archived at <https://perma.cc/4QV6-T9DJ>.

[20] Paul Karp, 'ABC Journalist Dan Oakes Will Not Be Charged over Afghan Files Reporting, AFP Says', *The Guardian* (online, 15 October 2020) <https://www.theguardian.com/media/2020/oct/15/abc-journalist-dan-oakes-will-not-be-charged-over-afghan-files-reporting-afp-says>, archived at <https://perma.cc/ZJT2-FTKB>.

[21] Australian Associated Press and Christopher Knaus, 'David McBride Will Face Prosecution after Blowing Whistle on Alleged War Crimes in Afghanistan', *The Guardian* (online, 27 October 2022) <https://www.theguardian.com/law/2022/oct/27/david-mcbride-afghanistan-alleged-war-crime-whistleblower>, archived at <https://perma.cc/YDE8-WCG7>.

former public servant, Richard Boyle, who blew the whistle on wrongdoing in the Australian Taxation Office to the ABC and Sydney Morning Herald, has also generated alarm.[22]

These developments have prompted public outcry across Australia. A grouping of major media organisations — Australia's Right to Know Coalition — ran redacted front pages with the headline: 'When Government Keeps the Truth from You, What Are They Covering Up?'[23] Changes were made to approval processes for prosecuting journalists, requiring the federal Attorney-General's consent.[24] Two separate federal parliamentary committees undertook inquiries into press freedom in Australia and made a raft of recommendations.[25] The new federal Labor government has endorsed many of these recommendations;[26] in December 2022, it commenced a review of federal

[22] See, eg, Christopher Knaus, 'Are Australia's Whistleblowing Laws Fit for Purpose? A Former Tax Officer's Hearing May Tell Us', *The Guardian* (online, 17 September 2022) <https://www.theguardian.com/australia-news/2022/sep/17/are-australias-whistleblowing-laws-fit-for-purpose-a-former-tax-officers-hearing-may-tell-us>, archived at <https://perma.cc/D7R8-MG3K>.

[23] See, eg, Charles Miranda, 'When Government Keeps the Truth from You, What Are They Covering Up?', *Herald Sun* (online, 21 October 2019) <https://www.heraldsun.com.au/news/national/when-government-keeps-the-truth-from-you-what-are-they-covering-up/news-story/b7e8d17423bd679156c79e74d203d291>. See also Calla Wahlquist, 'Australian Newspapers Black Out Front Pages To Fight Back against Secrecy Laws', *The Guardian* (online, 21 October 2019) <https://www.theguardian.com/media/2019/oct/21/australian-newspapers-black-out-front-pages-to-fight-back-against-secrecy-laws>, archived at <https://perma.cc/9WDD-RKPY>.

[24] Rosemary Bolger, 'Attorney-General Stops Prosecutors from Charging Journalists without His Consent', *SBS News* (online, 30 September 2019) <https://www.sbs.com.au/news/article/attorney-general-stops-prosecutors-from-charging-journalists-without-his-consent/vpwjqtfje>, archived at <https://perma.cc/KS2P-542R>.

[25] 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* (Report, August 2020) xi, xv–xxii ('*PJCIS Press Freedom Inquiry*'); Senate Environment and Communications References Committee, Parliament of Australia, *Inquiry into Press Freedom* (Report, May 2021) ix–xii ('*Senate Press Freedom Inquiry*').

[26] See Michael Pelly, 'Labor's Legal Agenda: Integrity, Press Freedom and Class Actions', *Australian Financial Review* (online, 24 February 2022) <https://www.afr.com/politics/labor-s-legal-agenda-integrity-press-freedom-and-class-actions-20220217-p59x8t>; Mark Dreyfus, Attorney-General's Department (Cth), 'Address to the National Press Club of Australia' (Media Release, 12 October 2022); Mark Dreyfus, Attorney-General's Department (Cth), 'Attorney General To Hold Media Roundtable' (Media Release, 19 January 2023).

secrecy offences, including consideration of 'any amendments that are necessary to adequately protect public interest journalism'.[27]

Notably absent from the public discourse around the prosecution and subsequent campaigns for law reform has been the language of human rights. The phrase was only used once by the Parliamentary Joint Committee on Intelligence and Security in its 177-page inquiry report, noting the '[p]erceived impacts on press freedom could affect the perception of Australia as a suitable trading partner [and] human rights compliant country'.[28] While the Senate Environment and Communications References Committee inquiry did recommend a review of national security laws with a view to 'aligning those laws with Australia's international human rights obligations', it did not go any further — making no specific recommendations in relation to human rights compliance.[29] Notwithstanding extensive public, media and academic commentary on the raids and the absence of robust press freedom protections in Australia,[30] this debate has largely disregarded the intersection between press freedom and human rights.

It is timely, then, indeed overdue, to ask: what role could and should Australian human rights law play in protecting press freedom? In light of the contrasting comparative experience at a national and regional level, could Australia's existing human rights frameworks — the *Charters* — be used to protect press freedom? Should the *Charters* be reformed to provide explicit press freedom protection? And how might a federal charter of human rights, if enacted, seek to protect and empower public interest journalism?

Drawing on domestic and comparative case law, this article identifies several opportunities for Australian human rights law to prevent or respond to encroachments on press freedom. It begins by outlining the field, exploring

[27] Attorney-General's Department (Cth), *Review of Secrecy Provisions* (Consultation Paper, March 2023) 3.

[28] *PJCIS Press Freedom Inquiry* (n 25) 41 [2.113].

[29] *Senate Press Freedom Inquiry* (n 25) 130 [7.75].

[30] See, eg, Alliance for Journalists' Freedom, *Press Freedom in Australia* (White Paper, May 2019); Keiran Hardy and George Williams, 'Press Freedom in Australia's Constitutional System' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 222; Peter Greste, 'The Cardinal Role of Press Freedom and How To Protect It', *The Lighthouse* (online, 29 August 2022) <https://lighthouse.mq.edu.au/article/august-2022/press-freedom-and-national-security>, archived at <https://perma.fcc/R3WZ-GMMZ>; Scott Ludlam and David Paris, *Breaking: A Report on the Erosion of Press Freedom in Australia* (Report, September 2019) <https://digitalrightswatch.org.au/wp-content/uploads/2019/09/2701-PressFreedom_Report_digital.pdf>, archived at <https://perma.cc/P3HY-E2RT>.

international examples of press freedom protection in human rights instruments and sketching recent analysis of whether press freedom is a human right. The article then considers four case studies: (1) the use of freedom of expression rights by individual journalists in cases where press freedom is constrained; (2) the protection of whistleblowers through freedom of expression rights; (3) protection for newsgathering activities (including source protection); and (4) whether a constellation of existing rights, such as the rights to education and participation in public life, might provide the grounding for press freedom protection. Collectively, the first and second case studies might be characterised as involving the right to disseminate information; the third case study concerns the right to gather information; and the fourth relates to the right to receive information. The article concludes by exploring the desirability of amendments to existing and future human rights law to expressly protect press freedom.

At the outset, a few shortcomings should be acknowledged. The article focuses on positive law, across Australian, Canadian and European Strasbourg jurisprudence. While it touches on deeper normative and conceptual issues — which have been considered in more detail elsewhere — these are not the focus of the article.[31] Additionally, the article seeks to cover different facets of press freedom (from newsgathering to whistleblowing) to consider the extended context of the topic. At times, this means sacrificing depth for breadth — a decision made deliberately. It is hoped individual facets might be explored in more detail in the future.

Ultimately, the article seeks to demonstrate the potential of previously unconsidered human rights law avenues for protecting press freedom in Australia. It is hoped it might provide helpful food for thought, spur further academic consideration and lead to practical application by lawyers representing media interests. In the absence of other robust legal channels for protecting press freedom, the *Charters* offer a tantalising prospect of statutory support for the important democratic role of the media in Australia.

[31] Media freedom and related issues have been a rich seam for scholarly output, mined in recent times by the likes of Andrew T Kenyon, Paul Wragg, Daithí Mac Síthigh, Damian Tambini, C Edwin Baker and Seana Valentine Shiffrin. See, eg, Damian Tambini, *Media Freedom* (Polity Press, 2021); Paul Wragg, *A Free and Regulated Press: Defending Coercive Independent Press Regulation* (Hart Publishing, 2020); Daithí Mac Síthigh, 'From Freedom of Speech to the Right to Communicate' in Monroe E Price, Stefaan G Verhulst and Libby Morgan (eds), *Routledge Handbook of Media Law* (Routledge, 2013) 174; C Edwin Baker, *Human Liberty and Freedom of Speech* (Oxford University Press, 1992); Andrew T Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge University Press, 2021).

II Context

A *Press Freedom and Human Rights Law*

Press freedom's place in the wider human rights context remains uncertain. Despite implicit recognition in the *UDHR* and other human rights frameworks,[32] press freedom receives no explicit recognition in any primary international human rights instrument. Article 19(2) of the foundational *International Covenant on Civil and Political Rights* ('*ICCPR*'), for example, provides:

> 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.[33]

There is much here to support journalistic activities, but no explicit protection for press freedom more generally. Conversely, art 19(3) proceeds to expressly limit the right to freedom of expression:

> The exercise of [these] rights … carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[34]

Thus, Wiebke Lamer laments 'there is no legally binding instrument on press freedom in international law. If anything, the [*ICCPR*] puts more emphasis on restrictions on the press, rather than its protections.'[35]

In practice, though, human rights law at a national and regional level has proven helpful in protecting press freedom in a range of jurisdictions. Interestingly, this has been the case whether or not the law explicitly protects press freedom. Two instructive examples — the Council of Europe and Canada — will be the primary sources of comparative insight throughout the article.

[32] *UDHR* (n 3) art 19. See, eg, below nn 37, 41 and accompanying text.

[33] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[34] Ibid.

[35] Wiebke Lamer, 'Promoting the People's Surrogate: The Case for Press Freedom as a Distinct Human Right' (2016) 15(3) *Journal of Human Rights* 361, 363.

Europe has been chosen because of the breadth and depth of its press freedom jurisprudence; Canada has been chosen given the similarities of its constitutional and legal context with Australia. Together, the comparative cases provide richly-textured detail and sometimes contrasting substantive outcomes.

The *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention*') does not explicitly protect press freedom; journalism is not covered in the text and the press is only referenced once in relation to open justice and the right to a fair trial.[36] However, art 10 provides:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[37]

From this text, the European Court of Human Rights ('ECtHR') has implied robust protection for journalists, media organisations and whistleblowers.[38] The Council of Europe states on its website: '[t]he right to freedom of expression and freedom of the media as protected by Article 10 … are pillars of democratic security in Europe'.[39] Indeed, the fourth edition of a compilation of ECtHR case law on press freedom published by the Council of Europe extends beyond 500 pages covering 272 cases.[40] Despite no explicit language, the *European Convention* has provided a bedrock of support for press freedom in Europe. It should be noted, though, that there are some limitations in relying on

[36] *European Convention* (n 8) art 6(1).

[37] Ibid art 10.

[38] Voorhoof (n 8) 3.

[39] 'Freedom of Expression', *Council of Europe* (Web Page) <https://www.coe.int/en/web/freedom-expression/media>, archived at <https://perma.cc/TAQ8-ANC6>.

[40] See generally Dirk Voorhoof et al, *Freedom of Expression, the Media and Journalists: Case-Law of the European Court of Human Rights*, ed Tarlach McGonagle (European Audiovisual Observatory, 4th ed, 2017) vol 3.

ECtHR jurisprudence: it is a court of review rather than an apex appellate body, which reviews for compliance with minimum standards rather than stating the law as such and does not rely on the principle of *stare decisis*.[41]

Canada, on the other hand, does have explicit protection for press freedom. The *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*') provides protection for rights and freedoms 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[42] It proceeds to enshrine 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication'.[43] Since its enactment, the *Canadian Charter* has proven an important tool for protecting press freedom in a range of contexts.[44] However, curiously, much of this has come about through the framework of freedom of expression and other rights, whereas the express protection for freedom of the press has been given little work to do.[45] Thus, in a survey of the first three decades of the *Canadian Charter*, one scholar notes:

> It is puzzling that there have been only a few Supreme Court decisions on the press, and troubling that it remains uncertain whether freedom of the press is an independent entitlement, with distinctive content, or is subsumed in expressive freedom.[46]

Another observes that 'Canadian courts have tended to treat the term as one of the *Charter*'s few superfluities: a freedom that is protected largely if not exclusively through freedom of expression writ large'.[47] This complexity aside, it is clear that press freedom has been protected through the *Canadian Charter* — even if that protection has come about indirectly.[48]

[41] See *Cossey v United Kingdom* (1990) 184 Eur Court HR (ser A) 14 [35]; Joseph M Jacob, *Civil Justice in the Age of Human Rights* (Routledge, 2016) 14–15.

[42] *Canadian Charter* (n 7) s 1.

[43] Ibid s 2(b).

[44] See Benjamin Oliphant, 'Freedom of the Press as a Discrete Constitutional Guarantee' (2013) 59(2) *McGill Law Journal* 283, 285–6 and cases cited therein.

[45] Ibid.

[46] Jamie Cameron, 'Section 2(b)'s Other Fundamental Freedom: The Press Guarantee, 1982–2012' in Lisa Taylor and Cara-Marie O'Hagan (eds), *The Unfulfilled Promise of Press Freedom in Canada* (University of Toronto Press, 2017) 201, 202.

[47] Oliphant (n 44) 285.

[48] See generally ibid.

B *Conceptualising Press Freedom as a Human Right*

One of the difficulties in considering whether press freedom is a human right is the occupational and group-like quality of the right.[49] The right to press freedom, if indeed there is such a thing, accrues to individuals in their professional capacity as journalists and through their employer (typically a media company, being a group of journalists brought together through a publishing function).[50] This fits uneasily in prevalent human rights frameworks, including under the *Charters* in Australia. The *Charters* entrench rights for individuals, not groups or corporations.[51] The closest the *Charters* come to group rights are cultural rights, particularly the protection for the distinct cultural rights of Aboriginal and Torres Strait Islander peoples, although even these are expressed in an individualistic manner.[52]

This article does not seek to comprehensively answer the wider philosophical query about whether press freedom is a human right or is protected as a necessary consequence of other human rights (such as freedom of expression). However, it is helpful to outline the human rights significance of press freedom. In a recent article in the *Journal of Applied Philosophy*, Rowan Cruft defends a human rights approach to press freedom (although without definitively arguing that it is a human right).[53] Cruft grounds journalism in three distinct human rights: the right to education about matters of public interest, the right to a voice in public debate[54] and the right not to be subject to illegitimate power.[55] In turn, the practice of journalism involves individuals accepting moral obligations to fulfil these rights. 'These moral duties give the journalist morally justified role-based rights to pursue her practice, which at the very least share much of the high-priority importance of the human rights they protect', Cruft argues.[56]

The ongoing conceptual and legal uncertainty is helpfully illustrated by the four categories of potential press freedom protection under the *Charters* to be

[49] For a deeper consideration of such issues, see Tambini (n 31) 128–31.

[50] See ibid 128–9.

[51] See *ACT Charter* (n 9) s 6; *Queensland Charter* (n 9) s 11(2); *Victorian Charter* (n 9) s 3(1) (definition of 'person').

[52] See *ACT Charter* (n 9) s 27; *Queensland Charter* (n 9) ss 27–8; *Victorian Charter* (n 9) s 19.

[53] Cruft (n 5) 359–61.

[54] As Cruft explains: 'it is not that each person must actually participate in public political debate, but she must be able to do so, through intermediaries if need be. I would argue that in the modern world of mass democracies, such participation is often served by journalism': ibid 366.

[55] Ibid 365–6.

[56] Ibid 371.

considered next. The first and second categories involve freedom of expression of journalists and whistleblowers. The relevant human rights protection attaches to them as individuals — on one approach, it applies not because they are journalists or whistleblowers, but simply because they are human. But it is at least arguable that their expression deserves heightened protection in light of the wider societal interest being served — there is greater societal value in their speech. Issues arise in the third category, newsgathering. Is the activity too distant from the actual expression to engage protection? Are journalists entitled to greater rights than ordinary citizens in undertaking newsgathering — would the denial of a document access request contravene human rights obligations when the request is made by a journalist, but not by an individual seeking government material relating solely to them? And how should we conceptualise category four, a form of right to receive public interest journalism? This right is complicated by its multifaceted basis, seemingly underpinned by the freedom to seek information (part of freedom of expression), the right to education and the right to participate in public life. Press freedom is in effect a right accruing to the public but fulfilled by a particular class of people — who, then, can enforce it?

Recent developments and trends in the media landscape only compound these complexities, including 'the way technology has democratized the gathering, dissemination, and sharing of information'.[57] If journalists *are* entitled to some degree of heightened press freedom protection, who is a journalist? Though this is not necessarily a novel definitional issue,[58] it does become more pressing if human rights are elevated for a certain category of person. As one scholar has noted:

> Conventional conceptions of the press have been destabilized in recent years by transformative technological change. This change has eroded the boundary between the institutional press and journalism professionals, and an undifferentiated group who may exercise their right of expressive freedom in ways that overlap with, mimic, or claim to engage a press function.[59]

There are also perhaps wider instrumentalist arguments for protecting press freedom through human rights — it is a necessary condition for the protection

[57] Cameron (n 46) 214.

[58] See generally Dominic Frost, 'Who Is a Journalist?: The Legal Definitions' (Background Briefing No 1/2021, Press Freedom Policy Papers, University of Queensland, 2021).

[59] Cameron (n 46) 214.

of human rights. As Cruft observes, '[a] world anything like our own but without journalistic activities, or with such activities forbidden, would necessarily leave our human rights unfulfilled'.[60] This article does not seek to definitively answer these complex questions, but it does engage with them in the parts that follow.

C *Rights and Responsibilities*

Victoria's human rights instrument is, pointedly, titled the *Charter of Human Rights and Responsibilities 2006* (Vic).[61] Few human rights are absolute, and the history of protection for freedom of expression is steeped in acceptance of necessary and proportionate limitations on free speech. As outlined above, the *ICCPR* expressly limits freedom of expression.[62] Australia's *Charters* are similarly limited, which might tend against heightened protection.[63] The force of this proposition is strengthened by art 19(3) of the *ICCPR* being inspired by a desire to limit the influence of the press, and the adoption of its wording in Australia's *Charters*. As Bell J explained in *McDonald v Legal Services Commissioner [No 2]* ('*McDonald*'), a disciplinary case involving intemperate language used by a solicitor in correspondence to opposing lawyers,[64] the *Victorian Charter*

> states that '[s]pecial duties and responsibilities are attached to the right of freedom of expression', which comes from art 19(3) of the *ICCPR*, except that in art 19(3) the duties and responsibilities explicitly attach to the 'exercise' of the right … As explained by Manfred Nowak, this statement was intended to 'offer States parties an express tool to counter abuse of power by the modern mass media' and to 'reinforc[e] the obligation of States to ensure that interference d[oes] not take place at the horizontal level'. The object of this statement was indeed the mass media, as the *travaux preparatoires* demonstrate:
>
> > Those supporting [this statement] were of the opinion that freedom of expression was a precious heritage as well as a dangerous instrument, and they maintained that, in view of the powerful influence the

[60] Cruft (n 5) 367.

[61] *Victorian Charter* (n 9).

[62] *ICCPR* (n 33) art 19(3).

[63] See *ACT Charter* (n 9) ss 16, 28; *Queensland Charter* (n 9) ss 13, 21; *Victorian Charter* (n 9) ss 7(2), 15.

[64] [2017] VSC 89, [1]–[2] ('*McDonald*').

> modern media of expression exerted upon the minds of men and upon national and international affairs, the 'duties and responsibilities' in the exercise of the right to freedom of expression should be especially emphasized.[65]

While this context does not preclude heightened protection for press freedom under the *Charters*, it does suggest that any such protection will be subject to limitations grounded in concerns about any 'abuse of power' by journalists and media outlets.[66] As Tambini notes, 'media freedom in international human rights law is not absolute, but carries "duties and responsibilities" and has media pluralism as a corollary'.[67]

III Using the *Charters* To Protect Press Freedom

The article will now consider the practical utility of existing rights in Australia under the *Charters* to protect public interest journalism. Four aspects of *Charters*-based press freedom protection will be considered: (1) the right to freedom of expression protecting journalistic activities; (2) the same right protecting and empowering whistleblowers; (3) protection for newsgathering activities (including source protection); and (4) a collection of rights providing an overarching basis for press freedom protection.

A *Freedom of Expression and the Media*

The first and perhaps most obvious way in which the *Charters* could protect press freedom is through the existing protection for freedom of expression. All three *Charters* expressly protect freedom of expression, in similar terms. The *ACT Charter* provides:

> Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of

[65] Ibid [35], quoting Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2nd rev ed, 2005) 458 [42], Marc J Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff, 1987) 386.

[66] See generally Wragg (n 31) for a discussion of the need for more robust press regulation and its compatibility with press freedom.

[67] Tambini (n 31) 130.

> borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.[68]

The *Victorian Charter* similarly offers that '[e]very person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds [in any medium]'.[69] However, the provision is expressly limited: '[s]pecial duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary' for prescribed purposes.[70] The relevant Queensland provision is expressed in identical terms to the Victorian one, albeit without the self-contained limitation.[71] This Australian model of freedom of expression is expressed in similar terms to art 10 of the *European Convention* and art 19 of the *ICCPR*.[72]

It is readily imaginable that laws or executive action which limit press freedom might be contrary to these provisions of the *Charters*. Take a simple hypothetical: say Queensland enacted a law preventing newspapers publishing news articles about ongoing investigations by the Crime and Corruption Commission.[73] Such a law would, on its face, limit the freedom of expression of journalists in Queensland. The *Queensland Charter* would therefore be engaged — questions would arise about incompatibility,[74] which would involve consideration of whether the limitation was reasonable and demonstrably justified in a free and democratic society.[75] Alternatively, if the hypothetical law enabled an official of the Commission to issue an order prohibiting publication of news articles about ongoing investigations in certain circumstances, and such an order was issued, an aggrieved journalist might make a complaint to the

[68] *ACT Charter* (n 9) s 16(2).

[69] *Victorian Charter* (n 9) s 15(2).

[70] Ibid s 15(3).

[71] *Queensland Charter* (n 9) s 21.

[72] *European Convention* (n 8); *ICCPR* (n 33).

[73] This hypothetical is not entirely unimaginable in light of recent discussions in Victoria: Josh Gordon and Ashleigh McMillan, '"No Plans To Change the Law": Andrews Rejects IBAC Call for Jailing Journalists', *The Age* (online, 5 November 2022) <https://www.theage.com.au/politics/victoria/corruption-watchdog-calls-for-tough-laws-against-journalists-as-andrews-rebuffs-questions-on-investigation-20221105-p5bvta.html>, archived at <https://perma.cc/DJS8-JZUN>.

[74] *Queensland Charter* (n 9) s 53.

[75] Ibid s 13.

Queensland Human Rights Commission.[76] The journalist might also be able to bring proceedings against the official pursuant to s 59 of the *Queensland Charter*, arguing that they acted unlawfully by making a decision (to prohibit news articles about an ongoing investigation) that was 'not compatible with human rights' or that, in making the decision, they failed 'to give proper consideration to a human right relevant to the decision'.[77]

At first glance, such hypotheticals give rise to a straightforward application of the *Charters*. In these examples, the freedom of expression right applies equally to journalists and non-journalists alike — prima facie, there would be no difference in calibrating the human rights compliance of a law in its application to journalists or non-journalists (such as ordinary citizens who might wish to write or speak about an ongoing corruption investigation). However, less straightforward questions might arise in seeking press freedom protection under the *Charters*. Are journalists entitled to some heightened level of protection in light of their special role? Does the significance of press freedom influence the analysis in determining whether a limit on freedom of expression is justified?

The concept of heightened protection for particular groups is not foreign to European human rights jurisprudence in this context. The ECtHR has repeatedly recognised the special status of the media in art 10 cases, given its 'watchdog' role.[78] Indeed, the Court has gone further — finding that Non-Government Organisations ('NGOs') and campaign groups have a special interest in art 10 protection.[79] The Court has recognised 'a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest'.[80] In the proportionality analysis, providing special weighting to countervailing public interests, such as confidentiality and transparency, is not novel.[81] In ECtHR case law there has, for example, been recognition of the particular importance of public interest journalism in relation to unlawful conduct

[76] Ibid s 64.

[77] Ibid s 58(1).

[78] See, eg, *Goodwin v United Kingdom* [1996] II Eur Court HR 483, 500 [39] ('*Goodwin*'), quoted in Voorhoof (n 8) 11.

[79] Voorhoof (n 8) 11.

[80] *Steel v United Kingdom* [2005] II Eur Court HR 1, 36 [89].

[81] See, eg, Hava Charlotte Lan Yurttagül, *Whistleblower Protection by the Council of Europe, the European Court of Human Rights and the European Union: An Emerging Consensus* (Springer, 2021) 133 ('*EU Whistleblower Protection*').

by public authorities: 'in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed'.[82] It is unclear how these issues might be confronted in Australian jurisprudence — but it is at least conceivable that the right to freedom of expression in the *Charters* might provide press freedom protection for individual journalists.

B *Freedom of Expression and Whistleblowers*

Whistleblowers play an important role in public interest journalism. Freedom of expression rights in Australia's existing *Charters* may also provide protection for whistleblowers, particularly public servant whistleblowers, where laws unduly limit the lawful ability of whistleblowers to speak up in the public interest or where government authorities take detrimental action in response to a public disclosure. While whistleblower protection laws exist in all Australian jurisdictions,[83] they are not all encompassing or consistent. For example, there is very limited ability for whistleblowers who go public with their disclosure to qualify for protection under the *Public Interest Disclosures Act 2012* (Vic).[84] It is readily imaginable that whistleblowers may go public without necessarily complying with the qualifying criteria for such disclosures;[85] indeed, in both the McBride and Boyle cases (albeit under federal law), whistleblowers are on trial despite arguing that they spoke up consistently with whistleblowing law.[86] Accordingly, it might helpfully be asked whether the *Charters* provide protection for Australian whistleblowers, either in addition to protections under whistleblowing law, or in circumstances where other protections are not available.

On its face, the public disclosure of information by a whistleblower to a journalist is a core expressive activity engaging the protection of the freedom of

[82] *Voskuil v Netherlands* (2007) 50 EHRR 9, 220 [70].

[83] See generally *Public Interest Disclosure Act 2013* (Cth); *Public Interest Disclosure Act 2012* (ACT); *Public Interest Disclosures Act 2022* (NSW); *Independent Commissioner Against Corruption Act 2017* (NT) pt 6; *Public Interest Disclosure Act 2010* (Qld); *Public Interest Disclosure Act 2018* (SA); *Public Interest Disclosures Act 2002* (Tas); *Public Interest Disclosures Act 2012* (Vic); *Public Interest Disclosure Act 2003* (WA).

[84] *Public Interest Disclosures Act 2012* (Vic) pt 6.

[85] Ibid pt 2.

[86] *Boyle v DPP (Cth)* [2023] SADC 27, [1]–[5] (Kudelka J). See also 'Whistleblowers on Trial: Richard Boyle and David McBride', *Human Rights Law Centre* (Web Page) <https://www.hrlc.org.au/whistleblowers-on-trial-richard-boyle-and-david-mcbride>, archived at <https://perma.cc/W4VR-7FGE>.

expression right in the *Charters* — 'this right includes the freedom to … *impart information* … whether orally, in writing or in print'.[87] Laws or executive actions which seek to inhibit whistleblowers' disclosures are therefore in tension with this right. Such restrictions are manifold and may include: laws which impose confidentiality obligations on public servants; express directions by government agencies to public servants not to publicly disclose information; and disciplinary action taken against public servants who contravene such laws and directions. The salient question will be whether such restrictions are proportionate;[88] as above, answering that will also require consideration of whether whistleblowers should be entitled to heightened protection.

Helpfully, there is considerable European human rights jurisprudence considering the special role of whistleblowers and the attendant freedom of expression protections available to them. In *Guja v Moldova*, the ECtHR considered the public interest in whistleblower protections when evaluating the proportionality of the interference with the applicant's art 10 rights under the *European Convention*.[89] The case arose after a public servant had been dismissed for leaking confidential letters from the prosecutor's office to the press.[90] While the ECtHR indicated whistleblowing should ordinarily take place via internal means, it was accepted that in some exceptional cases, disclosing to the media will be the only viable course of action.[91] Accordingly, the ECtHR held:

> [T]he signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large.[92]

The ECtHR also expressed its concern about the chilling effect that arises when whistleblowers are dismissed from their employment, discouraging other staff from speaking up about wrongdoing.[93] A similar position was reached in

[87] *ACT Charter* (n 9) s 16(2) (emphasis added). See also *Queensland Charter* (n 9) s 21(2); *Victorian Charter* (n 9) s 15(2).

[88] *ACT Charter* (n 9) s 28; *Queensland Charter* (n 9) s 13; *Victorian Charter* (n 9) ss 7(2), 15(3).

[89] [2008] II Eur Court HR 1, 28 [72], 33 [97] ('*Guja*').

[90] Ibid 7–8 [3], 9 [13].

[91] Ibid 28 [73], 30 [83]–[84].

[92] Ibid 28 [72].

[93] Ibid 32–3 [95].

Bucur v Romania ('*Bucur*'), a case involving the disclosure of information revealing unlawful activities undertaken by Romania's intelligence services.[94] The ECtHR held that a criminal conviction for unlawful disclosure of the information was contrary to art 10.[95] In light of this jurisprudence, Hava Yurttagül writes that the *European Convention* has become 'a central human rights instrument for the protection of whistleblowers in Europe'.[96]

In undertaking the proportionality analysis, which is partly about balancing an employee's art 10 rights with their duty of loyalty to their employer, the ECtHR has articulated a multi-factor framework to guide the overarching assessment.[97] The ECtHR has considered: (1) the reporting channel used to blow the whistle; (2) the public interest in the information disclosed; (3) the authenticity of the information disclosed; (4) the impact of disclosure on the employer; (5) the motive of the whistleblower; and (6) the severity of the penalty imposed upon the whistleblower.[98] The use of these factors has enabled the ECtHR to be sensitive to the context of particular cases (for example, declining art 10 protection in certain cases arising in national security and diplomacy contexts),[99] while broadly protecting and empowering whistleblowers. One scholar has described the use of this framework as enabling the ECtHR to promote 'a rather whistleblower-friendly approach'.[100] Similar factors may well guide Australian courts in applying human rights protections to whistleblowers — indeed, a similar attempt to provide a framework for balancing freedom of expression and confidentiality can be found in Edelman J's reasoning in *Comcare v Banerji*.[101]

Accordingly, protection for whistleblowing sourced in the *Charters* may helpfully support press freedom, whether deployed in conjunction with

[94] (European Court of Human Rights, Third Section, Application No 40238/02, 8 January 2013) 3 [11].

[95] Ibid 34 [120].

[96] Yurttagül, *EU Whistleblower Protection* (n 81) 111.

[97] *Guja* (n 89) 27–9 [70]–[78].

[98] Ibid.

[99] See Yurttagül, *EU Whistleblower Protection* (n 81) 133, discussing *Hadjianastassiou v Greece* (1992) 16 EHRR 219, 239–40 [45]–[47], *Stoll v Switzerland* [2007] V Eur Court HR 267, 314 [136].

[100] Hava Yurttagül, 'LuxLeaks Whistleblower Not Protected by Article 10 ECHR: Case Analysis of "Halet v Luxembourg" (ECtHR, Appl No 21884/18)', *Jean-Monnet-Saar: Europarecht Online* (Article, 2 June 2021) <https://jean-monnet-saar.eu/?page_id=61634#_edn3>, archived at <https://perma.cc/J79B-T6ZL>.

[101] (2019) 267 CLR 373, 448–9 [182]–[183].

standalone statutory protections or in cases where those protections are not engaged for whatever reason. However, this protection will be partial only — applying to public sector whistleblowers or private sector whistleblowers where the limitation on disclosure arises from state law or action, and not necessarily to private sector whistleblowers where there is no governmental nexus.[102] It is notable that the ECtHR jurisprudence arose prior to the enactment of a standalone European Union directive on whistleblower protections;[103] in contrast, statutory whistleblower protections in Australia largely predate the *Charters*, which may explain the absence of human rights-based claims by whistleblowers in Australia. Nonetheless, in the appropriate case, it is apparent that the *Charters* may protect whistleblowers. Indeed, the *Bucur* case offers a helpful analogy at the intersection of national security and whistleblowing to the public: while the federal public sector whistleblowing law, the *Public Interest Disclosure Act 2013* (Cth), permits public disclosure in certain circumstances, it provides no avenue for lawful public disclosure of intelligence information.[104] If a federal human rights charter were ever enacted, it is readily imaginable that the public disclosure of intelligence information which demonstrated unlawful conduct by Australia's intelligence services might benefit from *Charter* protection, even in the absence of statutory whistleblower protections. The Witness K case, involving the public disclosure of Australia's alleged espionage against Timor-Leste, has parallels with *Bucur* — in both cases, apparent wrongdoing by intelligence services was publicly exposed despite the absence of clear legal frameworks for doing so.[105]

[102] However, the ECtHR has indicated art 10 protections may apply in the private sector employment context in certain circumstances, imposing positive obligations on member states to protect employees' free speech rights: see Yurttagül, *EU Whistleblower Protection* (n 81) 118 n 47.

[103] Indeed, the ECtHR jurisprudence influenced the development of the directive: see *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law* [2019] OJ L 305/17, recitals 24, 26, 31, 33, 42.

[104] See *Public Interest Disclosure Act 2013* (Cth) ss 10, 26(1) item 2(h).

[105] See generally Christopher Knaus, '"Witness K and Bernard Collaery Are Heroes": How Australia Made Two Men Pay for Its Dirty Secrets', *The Guardian* (online, 9 July 2022) <https://www.theguardian.com/australia-news/2022/jul/09/a-grave-injustice-bernard-collaery-case-characterised-by-eight-years-of-secrecy-and-delay>, archived at <https://perma.cc/BZJ2-B8TN>.

C *Newsgathering and Source Protection*

The above analysis has considered separate but related components of journalistic activity arising under the freedom of expression right: the expression of journalists and their sources, whistleblowers.[106] But expression is only the final product of journalistic activity — before media organisations can publish news, they must gather it. The reporting process takes various forms, but includes discussions with sources (such as whistleblowers) and seeking public documents. Both types of newsgathering activity may benefit from protection under the *Charters*.

1 *Source Protection*

Australian law already recognises the importance of the relationship between a journalist and their sources: all jurisdictions have shield laws that provide journalists with partial (although not absolute) protection from being required to disclose their sources.[107] However, these laws have been criticised for their patchwork nature and limited practical efficacy.[108] Could human rights law provide an alternative or supplementary basis for source protection?

Protection arising under the *Charters* for journalistic sources may have two bases. First, the freedom of expression right: it might be argued that source protection is a necessary corollary of speech rights for journalists. This argument has found traction in the ECtHR, where a number of cases involving intrusion on the materials of journalists — raids on offices, confiscation of notes and so on — have been considered art 10 violations.[109] In *Goodwin v United Kingdom* ('*Goodwin*'), for example, a journalist received confidential information about a company's financial affairs from a source.[110] An injunction was granted by a domestic court ordering the journalist to disclose the source; he refused and was fined for contempt.[111] The ECtHR determined that although an injunction

[106] See above Parts III(A)–(B).

[107] *Evidence Act 1995* (Cth) s 126K; *Evidence Act 2011* (ACT) s 126K; *Evidence Act 1995* (NSW) s 126K; *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A; *Evidence Act 1977* (Qld) s 14V; *Evidence Act 1929* (SA) s 72B; *Evidence Act 2001* (Tas) s 126B; *Evidence Act 2008* (Vic) s 126K; *Evidence Act 1906* (WA) s 201.

[108] Anna Kretowicz, 'Reforming Australian Shield Laws' (Reform Briefing No 2/2021, Press Freedom Policy Papers, University of Queensland, 2021) 4–5, 7.

[109] See, eg, *Roemen v Luxembourg* [2003] IV Eur Court HR 87, 129 [17]–[18]; *Tillack v Belgium* (2012) 55 EHRR 25, 786 [15]–[16], 796 [68].

[110] *Goodwin* (n 78) 3–4 [10]–[11].

[111] Ibid 5 [15], 9–10 [19].

to prevent publication may have been necessary, it was disproportionate to order the journalist to reveal the source.[112] The Grand Chamber observed:

> Protection of journalistic sources is one of the basic conditions for press freedom … Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.[113]

In reaching this position, the ECtHR also noted the 'potentially chilling effect' of an order for source disclosure.[114] The *Goodwin* precedent has been affirmed on many occasions, leading one scholar — following analysis of 17 ECtHR judgments — to recently observe 'a high level of protection over journalistic sources', even if the protection 'is not absolute'.[115] Another observer has described intrusions on journalistic research and investigative activities as requiring 'the most scrupulous [art 10] examination'.[116] Such jurisprudence might provide a helpful parallel in Australia in cases of state intrusion on the press, such as the 2019 raids (albeit they were conducted by the federal police and there is not, yet, a federal charter).

However, this does not represent a universal approach. In Canada, the Supreme Court declined to read in source protection to the *Canadian Charter*,[117] despite its explicit protection for press freedom.[118] As Binnie J wrote for the majority, constitutionalising source protection for

> a heterogeneous and ill-defined group of writers and speakers and whichever 'sources' they deem worthy of a promise of confidentiality … would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.[119]

[112] Ibid 16–17 [42], 18 [46].

[113] Ibid 15 [39].

[114] Ibid.

[115] Yusepha Polidano, 'The Protection of Journalistic Sources under Article 10 of the European Convention' (MA Thesis, University of Malta, September 2021) II.

[116] Voorhoof (n 8) 11.

[117] See *R v National Post* [2010] 1 SCR 477, 508 [40]–[41] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ) ('*National Post*').

[118] *Canadian Charter* (n 7) s 2(b).

[119] *National Post* (n 117) 508 [40] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ).

Instead, the Court accepted that existing common law protections were sufficient.[120]

In the absence of developed Australian jurisprudence, it is difficult to predict how domestic courts might grapple with these questions. The only indirect authority, *Knight v Shuard* ('*Knight*'), does not suggest a robust approach to encouraging communication between sources and the media (even though that case was approached from the opposite direction, from the perspective of the prospective source).[121] In *Knight*, a convicted murderer detained at Port Phillip Prison argued that the interception of his mail addressed to journalists was contrary to his *Victorian Charter* rights to freedom of expression (under s 15) and to take part in public life (under s 18).[122] The letters had been intercepted due to a concern by prison authorities that

> such discussion would raise matters about a notorious crime, re-introduce those matters into the media and cause distress and harm to the applicant's victims … comparison of the applicant's crimes with other prisoners, including those who have killed whilst on parole, may be distressing to victims, as well as to the victims of the crimes of other prisoners, some of which involve high profile murderers in Victoria … [and] the letter, once with the media, could not be controlled and thus the Manager held a concern as to how material in the letter may be reported and published.[123]

The trial judge, Rush J, considered these reasons were 'objectively reasonable'.[124] Justice Rush also found that, given the prison authorities had not deployed a relevant prison policy, whether they complied with the *Victorian Charter* was irrelevant.[125] Furthermore, his Honour found that the power to intercept letters was 'an appropriate and proportionate measure' for implied freedom of political communication purposes.[126]

It is difficult to know how much weight to give *Knight* — it was a preliminary assessment only for the purposes of determining an application in relation to the applicant's status as a vexatious litigant, so these issues were not fully

[120] Ibid 515 [55].

[121] [2014] VSC 475, [43]–[44] (Rush J).

[122] Ibid [1], [4].

[123] Ibid [28]–[29].

[124] Ibid [31].

[125] Ibid [43].

[126] Ibid.

ventilated and determined.[127] It might be suggested, with respect, that some of Rush J's conclusions may be open to challenge. In particular, the finding that it was reasonable for the prison authorities to conclude the applicant's communication with the media could 'not be controlled' and thus grounded a legitimate concern about how the contents 'may be reported and published' raises significant press freedom concerns.[128] But for now, the case stands in the way of robustly interpreting the *Victorian Charter* in a way that protects communication between a journalist and actual or prospective sources.

An alternative approach would be to seek source protection through the privacy protections in the *Charters*. All *Charters* protect an individual's privacy from unlawful or arbitrary interference.[129] It might be possible for a journalist to resist disclosure of the identity of a source by arguing that doing so would arbitrarily interfere with a source's privacy. Interestingly, neither a privacy nor freedom of expression approach was pursued in *F v Crime and Corruption Commission*, one of the more recent cases to consider source protection (although first determined in 2020 and then appealed in 2021, the underlying facts arose prior to the *Queensland Charter* taking effect, which might have inhibited such arguments).[130]

2 *Access to Information*

An important component of public interest journalism is seeking, analysing and reporting on information contained in public documents. All Australian jurisdictions have some form of freedom of information law, which empowers journalists (and other members of society) to request official documents.[131] Could the *Charters* provide a further tool in seeking information? Once again, European jurisprudence provides helpful guidance. Initially, the ECtHR declined to use art 10 of the *European Convention* to support a positive right to information, notwithstanding its express application to situations of imparting

[127] Ibid [2], [7]–[8].

[128] Ibid [29], [33].

[129] *ACT Charter* (n 9) s 12(a); *Queensland Charter* (n 9) s 25(a); *Victorian Charter* (n 9) s 13(a).

[130] See generally *F v Crime and Corruption Commission (Qld)* (2020) 355 FLR 254, affd (2021) 9 QR 451.

[131] See generally *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 2016* (ACT); *Freedom of Information Act 1989* (NSW); *Information Act 2002* (NT); *Right to Information Act 2009* (Qld); *Freedom of Information Act 1991* (SA); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA).

and receiving information. In a 1998 case, for example, the ECtHR held that the freedom to receive information

> 'basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him' … That freedom cannot be construed as imposing on a State … positive obligations to collect and disseminate information of its own motion.[132]

However, that view has shifted considerably in the past two decades.[133] In 2006, the Inter-American Court of Human Rights held that the right to 'seek' information protected in the *American Convention on Human Rights: 'Pact of San José, Costa Rica'* ('*ACHR*')[134] extended to protecting the rights 'of all individuals to request access to State-held information'.[135] The only permissible exception to the provision of information was when doing so was consistent with the limitations built into the *ACHR*.[136] This approach has subsequently been adopted by the ECtHR in several cases where the 'censorial power of an information monopoly' would undermine the 'watchdog' function of the press if information was not disclosed.[137] In *Roşiianu v Romania*, for example, a journalist sought information on the use of public funds.[138] This request was denied.[139] The ECtHR found that the request for information was made in order to contribute to informed debate on a topic of public significance, such that access could only be denied pursuant to limitations within the *European*

[132] *Guerra v Italy* [1998] I Eur Court HR 210, 226 [53], quoting *Leander v Sweden* (1987) 116 Eur Court HR (ser A) 29 [74].

[133] For earlier context in this area, see generally Wouter Hins and Dirk Voorhoof, 'Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights' (2007) 3(1) *European Constitutional Law Review* 114; CG Weeramantry, 'Access to Information: A New Human Right. The Right to Know' (1994) 4 *Asian Yearbook of International Law* 99.

[134] *American Convention on Human Rights: 'Pact of San José, Costa Rica'*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 13(1) ('*ACHR*').

[135] *Claude-Reyes v Chile (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 151, 19 September 2006) 41 [77].

[136] Ibid 44 [88]. The relevant limitations are contained in art 13(2) of the *ACHR* (n 134).

[137] See, eg, *Társaság A Szabadságjogokért v Hungary* (2011) 53 EHRR 3, 138 [36].

[138] (European Court of Human Rights, Third Section, Application No 27329/06, 24 June 2014) 2 [6], [8]–[10].

[139] Ibid 2 [11].

Convention.[140] In the absence of adequate grounds for refusal, the denial of information was contrary to art 10.[141]

Would such an approach find favour in Australia? The freedom of expression right in all three *Charter* jurisdictions includes the right to 'seek' information.[142] A decision to refuse to release government documents would, on its face, engage this right. The analysis would then turn on the reason for refusal and whether it was justifiable in light of the *Charters* — which turns on the inbuilt limitation in the *Victorian Charter* (ie 'for the protection of national security, public order, public health or public morality')[143] or the generalised proportionality analysis in all three *Charters*.[144]

These issues were considered in an important 2010 decision involving the *Victorian Charter*: *Re XYZ v Victoria Police* ('*XYZ*').[145] In *XYZ*, a police officer who had been subject to a disciplinary investigation sought access to documents under the Victorian freedom of information regime.[146] Access to some of the documents was denied on the basis of exemptions.[147] The officer sought review and argued that the *Victorian Charter* 'incorporates a positive right to freedom of information'.[148] Justice Bell extensively canvassed international jurisprudence,[149] before noting:

> It is hard to conceive of human rights without democracy and the rule of law, and equally hard to conceive of democracy, in anything but name, without a legal (although not absolute) right of access to government-held information.[150]

His Honour subsequently added:

> As freedom of expression is essential to democratic and civilised society, so freedom of information is essential to the human right of freedom of expression. Freedom of information is in the blood which runs in the veins of freedom of

[140] Ibid 15 [63]–[65].

[141] Ibid 15–16 [66]–[68].

[142] *ACT Charter* (n 9) s 16(2); *Queensland Charter* (n 9) s 21(2); *Victorian Charter* (n 9) s 15(2).

[143] *Victorian Charter* (n 9) s 15(3).

[144] *ACT Charter* (n 9) s 28; *Queensland Charter* (n 9) s 13; ibid s 7(2).

[145] (2010) 33 VAR 1, 7 [6] (Bell J) ('*XYZ*').

[146] Ibid 8 [1], 9 [4].

[147] Ibid 9 [4].

[148] Ibid 9 [6].

[149] Ibid 66–86 [409]–[513].

[150] Ibid 90 [535].

> expression. The two operate organically as a functioning unit. In respect of government-held information, freedom of information is thus a necessary aspect of the human right of freedom of expression.[151]

For these reasons, Bell J concluded that the freedom of expression right in the *Victorian Charter* 'implicitly imposes a positive obligation on the government to give access to government-held documents (freedom of information)'.[152] However, his Honour added:

> The right to obtain government-held documents is not absolute and is subject to justifiable exceptions for objective, proportionate and reasonable purposes. The government has a margin of appreciation in this regard.[153]

Ultimately, Bell J held that the relevant particulars of the Victorian freedom of information scheme that had seen the requests denied were 'not, in principle, incompatible with the human right of freedom of information'.[154]

XYZ therefore places Australian *Charter* jurisprudence in a similar position to the European context. This has significant relevance for access to information by media organisations. While the right to access information is not limited to journalists and media organisations (and, indeed, *XYZ* did not involve the media), it might be anticipated that Australian courts, like their foreign counterparts, will recognise the particular public interest served by ensuring access to information sought by journalists. Indeed, the ECtHR jurisprudence has recognised the special role of civil society more broadly and its consequent need for access to information. In *Youth Initiative for Human Rights v Serbia,* for example, an art 10 violation was found in the context of the denial of an access to information request by a youth NGO;[155] the ECtHR noted that NGOs play a social 'watchdog' function akin to the press.[156] In this vein, Bell J noted in *XYZ* that the scope of the right to freedom of information 'at least extends to cases in which the individual seeks information on a subject engaging the public interest or in which he or she has [a] legitimate interest', but that its exact scope

[151] Ibid 94 [554].

[152] Ibid 95 [558].

[153] Ibid.

[154] Ibid 96–7 [566].

[155] (European Court of Human Rights, Second Section, Application No 48135/06, 25 June 2013) 6–7 [24]–[26].

[156] Ibid 5–6 [20].

had not been argued before his Honour and therefore could not be articulated 'in more specific terms'.[157]

More recent *European Convention* jurisprudence has led to mixed outcomes for those seeking information through art 10. In *Magyar Helsinki Bizottság v Hungary* ('*MHB*'), the ECtHR Grand Chamber clarified the status of the right to access information, holding that art 10 *does not* confer a *general* right on individuals to access information held by government bodies.[158] Instead, the ECtHR set out criteria that would inform whether, in a particular case, a denial of a request for information would constitute an art 10 violation.[159] First, was the relevant information sought 'necessary' to an applicant's exercise of freedom of expression?[160] Second, was provision of the information in the public interest?[161] Third, was 'the person seeking access to the information in question [doing] so with a view to informing the public in the capacity of a public "watchdog"'?[162] Fourth, is the information readily accessible by the government body?[163] In the particular facts of the case, involving an NGO's request for information from the Hungarian police,[164] the ECtHR found that these criteria were satisfied and art 10 had been violated.[165] Although preceding *MHB*, the Supreme Court of the United Kingdom in *Kennedy v Charity Commission* similarly held that the *European Convention* did not provide a freestanding right to receive information from public authorities.[166] Should the approach adopted in *XYZ* be reconsidered, clarified or expanded based on a different factual matrix, the criteria set out in *MHB* may be of assistance.

157 *XYZ* (n 145) 95 [559].

158 (2020) 71 EHRR 2, 64 [156] ('*MHB*').

159 Ibid 49–50 [157]–[170].

160 Ibid 50 [159].

161 Ibid 51 [161].

162 Ibid 53 [168].

163 Ibid 53 [170].

164 Ibid 4 [16].

165 Ibid 55 [180], 61 [200].

166 [2015] AC 20, 520–22 [93]–[99], 523 [101] (Lord Mance JSC, Lord Neuberger PSC agreeing, Lord Clarke JSC agreeing, Lord Sumption agreeing at 533 [152]), 532–3 [144]–[148] (Lord Toulson JSC, Lord Neuberger PSC agreeing, Lord Clarke JSC agreeing, Lord Sumption agreeing at 533 [152]), 534 [154] (Lord Sumption JSC, Lord Neuberger PSC agreeing, Lord Clarke JSC agreeing).

D *Receiving Public Interest Journalism: A Rights-Based Approach?*

The final way in which the rights found in the *Charters* could be used to protect press freedom is through a constellation of rights underpinning an entitlement to receive public interest journalism. First, the freedom of expression clauses in the *Charters* explicitly recognise a right to receive information, expressed in near-identical terms: '[e]very person has the right to freedom of expression which includes the freedom to … receive … information and ideas'.[167] Additionally, the *ACT Charter* provides for a right to take part in public life: '[e]very citizen has the right, and is to have the opportunity, to … take part in the conduct of public affairs, directly or through freely chosen representatives'.[168] The *Queensland Charter* and *Victorian Charter* similarly provide a right to 'participate in the conduct of public affairs' and to do so 'without discrimination'.[169] Finally, the *Queensland Charter* provides for a right to education — both for primary and secondary education for children and for 'further vocational education and training that is equally accessible to all'.[170] The *ACT Charter* provides for a right to education in similar terms.[171]

It is at least arguable that, collectively, these provisions ground a degree of broader protection for press freedom — protection arising beyond the narrow conception of the freedom of expression of individual journalists and whistleblowers, focusing instead on the recipients and their entitlement to benefit from public interest journalism. This is the most novel approach to press freedom protection in the *Charters* argued in this article; it is by no means clear such a right would find a foothold in Australian human rights jurisprudence. But it is almost the most holistic and innovative way to approach press freedom from a *Charters* perspective — with the right accruing not only to journalists, individually and as a class, but to all Australians. Such an approach, despite its novelty and jurisprudential uncertainty, might go some way towards addressing what Cruft describes as the 'glitch in the idea of role-based rights grounded by what they do for people other than the role holder'.[172] As Cruft explains:

[167] *Queensland Charter* (n 9) s 21(2); *Victorian Charter* (n 9) s 15(2). See *ACT Charter* (n 9) s 16(2).

[168] *ACT Charter* (n 9) s 17(a).

[169] *Queensland Charter* (n 9) s 23(1); *Victorian Charter* (n 9) s 18(1).

[170] *Queensland Charter* (n 9) s 36.

[171] *ACT Charter* (n 9) s 27A.

[172] Cruft (n 5) 368.

> It can seem obscure why violating rights held by a role bearer (journalist X) that are justified by their protecting the rights of some other person (citizen Y) counts as wronging X rather than simply Y. If Y's good is the moral ground for X's rights, why is their violation a wrong to X? Why are the relevant duties really rights of X at all, rather than simply rights of Y?[173]

The answer, perhaps, is that press freedom rights can be rights that accrue to Y, the citizen, rather than X, the journalist. If conceptualised as a right to *receive* public interest journalism rather than as a right to *do* journalism, underpinned by a constellation of rights within the *Charters*, press freedom can be articulated more clearly as a right belonging to all of us. Without press freedom, how can these other rights — the right to education, the right to seek information, the right to participate in public life — truly be fulfilled?

IV Reform

The existing rights arising under the *Charters* offer the potential for at least some protection for public interest journalism. However, in the absence of express recognition for press freedom, these protections will always be limited and contingent — dependent on jurisprudential development in the manner outlined above. The absence of express press freedom protection may also encourage a deferential approach to the proportionality analysis. There will no doubt be some cases arising at the heart of the freedom of expression right — say, state action undertaken to silence journalistic speech — where existing protection will be robust and law reform may add little. However, in many cases — particularly those arising on the periphery, or where the balancing exercise is multifaceted — express protection in the *Charters* for press freedom may be desirable. This final section of the article will consider possibilities for reform in the existing *Charters* and in the long-awaited federal human rights charter.

A *Reform to the* Charters

Amending the *Charters* to provide explicit protection for press freedom would not be a particularly difficult legislative task. There are at least two ways to include press freedom. To use the *ACT Charter* as an indicative model, it would be possible to amend s 16(2) to include reference to press freedom within the concept of freedom of expression. For example:

[173] Ibid.

> (2) Everyone has the right to freedom of expression [including freedom of the press]. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

Alternatively, a new sub-s (3) could be added to s 16 to provide standalone press freedom protection. For example:

> (3) Everyone has the right to freedom of the press.

An alternative approach might be to focus on the special duties and responsibilities limitation referenced in s 15(3) of the *Victorian Charter*, and acknowledged in *McDonald* as being an intentional response to concerns about undue media influence.[174] It might be considered desirable to 'balance' this exception and its aim of limiting press freedom with explicit, countervailing recognition of the 'special importance' of a free press. For example, a new s 15(3) could be introduced to the *Victorian Charter*, whilst retaining the in-built limitation provision:

> (3) The press has special importance in ensuring the realisation of the right to freedom of expression.

Would an amendment of the kind outlined above substantially improve the potential for the *Charters* to protect press freedom in Australia? It is tempting, alluring even, to answer affirmatively. In the absence of express protection, it is easier to read down the *Charters* and ignore the potential for press freedom protection. But the Canadian example suggests otherwise. In an analysis of s 2(b) (the press freedom subsection) of the *Canadian Charter*, a Canadian scholar based in Australia notes the *Canadian Charter* 'adds nothing to freedom of the press if Canada is being compared to its closest constitutional cousin Australia, and so tangentially to what it might have looked like today without the [*Canadian*] *Charter*'.[175] This is somewhat of a paradox. European jurisprudence has developed robust press freedom protection without express wording in the *European Convention*, whereas Canada has developed lesser (although

[174] See *McDonald* (n 64) [35] (Bell J).

[175] James Allan, 'The View from Down Under: Freedom of the Press in Canada' (2012) 58 *Supreme Court Law Review* 147, 160. Although it should be noted that Allan is critical of human rights legislation generally, favouring parliamentary sovereignty: see, eg, James Allan, 'Why Australia Does Not Have, and Does Not Need, a National Bill of Rights' (2012) 24 *Giornale di Storia Costituzionale* 35, 39–42.

still substantial) protection from the general freedom of expression clause and given little work to the explicit press freedom protection.

On balance, though, the desirability of amending the *Charters* to explicitly protect press freedom is twofold. First, as canvassed above, Australian human rights jurisprudence has not developed in a way that is strongly protective of press freedom by implication through freedom of expression and other rights; we have not taken the European path. Explicit protection therefore provides an impetus for such jurisprudential development, at a time when press freedom is under threat. From 2018–22, Australia dropped from 19th to 39th out of 180 countries on the Reporters Without Borders' World Press Freedom Index — an alarming decline.[176] Explicit statutory intervention is needed to provide a signal that the *Charters* can and should protect press freedom. Second, relatedly, even if Australian jurisprudence were to follow the Canadian path, the addition of a (possibly superfluous) press freedom clause would encourage press freedom litigation, emboldening journalists and media organisations to avail themselves of protection under the *Charters*. It would be ironic if it takes amending the *Charters* to include an explicit press freedom clause to nudge jurisprudence in a way that sees the existing text (especially the freedom of expression clause) fulfil its press freedom-protecting potential. But that would be a desirable outcome in any event. Accordingly, notwithstanding that (a) the *Charters* already contain sufficient textual basis for press freedom protection; and (b) the Canadian experience suggests explicit press freedom protection is not a panacea, it would nevertheless be a significant step forward for press freedom in Australia if the *Charters* were amended.

B *Press Freedom and a Federal Charter*

Similar considerations would animate discussion around the inclusion of a press freedom clause in a federal human rights charter. Statutory human rights

[176] See 'World Press Freedom Index 2018', *Reporters Without Borders* (Web Page) <https://rsf.org/en/index?year=2018>, archived at <https://perma.cc/KB62-WDJK>; 'World Press Freedom Index 2022', *Reporters Without Borders* (Web Page) <https://rsf.org/en/index?year=2022>, archived at <https://perma.cc/2Y94-FZRQ>. See also Max Walden, 'Australia Lags behind New Zealand, Taiwan and Timor-Leste on World Press Freedom Index', *ABC News* (online, 4 May 2022) <https://www.abc.net.au/news/2022-05-04/australia-falls-down-world-press-freedom-index-2022/101036252>, archived at <https://perma.cc/KEQ7-FG54>. As of 2023, Australia is ranked 27th out of 180 countries: 'World Press Freedom Index 2023', *Reporters Without Borders* (Web Page) <https://rsf.org/en/index?year=2023>, archived at <https://perma.cc/65Q9-2ABY>.

protections have long been sought at a federal level, to date unsuccessfully.[177] The most significant consideration in recent times was the National Human Rights Consultation, led by Father Frank Brennan and finalised in 2009.[178] The final consultation report did not expressly canvass protection for press freedom, although it did support the inclusion of freedom of expression within a federal charter.[179] Since the Brennan report, there was little substantive progress on a federal human rights charter — until a recent comprehensive report by the Australian Human Rights Commission.[180] Following the report, and the latest federal election, there are renewed prospects for reform. The Australian Labor Party's national platform includes a commitment to reviewing the existing human rights framework and considering 'whether it could be enhanced through a statutory charter of human rights or other similar instrument'.[181] The wording of this commitment was strengthened at the most recent national conference, just as this article was going to press.[182]

There has been support indicated for explicit press freedom protections recently, albeit arising in a constitutional rather than statutory context. During the last term of government, Senators Stirling Griff and Rex Patrick proposed a referendum to embed freedom of expression and press freedom in the *Australian Constitution*.[183] A number of parties who made submissions to a related parliamentary inquiry advocated for explicit press freedom protection. Professor George Williams, for example, proposed borrowing from the Canadian model and enshrining a s 80A in the *Australian Constitution*:

[177] See Frank Brennan et al, *National Human Rights Consultation* (Report, September 2009) 229–37.

[178] See generally ibid.

[179] See ibid xxxvi.

[180] Australian Human Rights Commission, *Free & Equal: A Human Rights Act for Australia* (Position Paper, December 2022).

[181] Australian Labor Party, *ALP National Platform* (Platform, Australian Labor Party Special Platform Conference, March 2021) 60 <https://alp.org.au/media/2594/2021-alp-national-platform-final-endorsed-platform.pdf>, archived at <https://perma.cc/SVR3-UGPU>.

[182] Sarah Basford Canales, 'Labor National Conference: Who Won, Who Lost and Where Is the Party Going Next?', *The Guardian* (online, 19 August 2023) <https://www.theguardian.com/australia-news/2023/aug/19/labor-national-conference-who-won-who-lost-and-where-is-the-party-going-next>, archived at <https://perma.cc/9URG-LNRS>.

[183] Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (Cth) sch 1 cl 1; Explanatory Memorandum, Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (Cth) 2.

> Everyone has the right to freedom of expression, including freedom of the press, subject only to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.[184]

Such an amendment, Williams argued, 'would prioritise speech and media freedom by putting these on a par with other rights and values enshrined in our *Constitution*'.[185] The Alliance for Journalists' Freedom also supported the amendment:

> While the Alteration is intended to guarantee freedom of expression to all Australians, media freedom is acknowledged as a subset because of the special role it plays in our democracy, setting it apart from all other forms of expression.[186]

The inquiry did not proceed[187] and it is highly unlikely constitutional reform to protect freedom of expression and press freedom is forthcoming, with at least two other referenda (an Indigenous Voice to Parliament and becoming a Republic) expected to have parliamentary priority.

The inclusion of express press freedom protection in a federal human rights charter is more likely. In the absence of an existing charter, the drafters of such an instrument will have a blank canvas upon which to consider such a clause — it would not need to integrate into an existing scheme. However, because the federal parliament has limited rather than plenary legislative power, the inclusion of a press freedom right must be supported by a constitutional head of power.[188] Typically, federal laws implementing international obligations have relied on the external affairs power in s 51(xxix) of the *Australian Constitution*.[189] A relevant question in considering the adoption of press freedom as a standalone part of any federal charter would therefore be whether its

[184] George Williams, Submission No 15 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* (19 July 2021) 3.

[185] Ibid.

[186] Alliance for Journalists' Freedom, Submission No 2 to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* (2021) 3.

[187] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019* (Report, 30 June 2022).

[188] See *Australian Constitution* s 51; *R v Barger* (1908) 6 CLR 41, 67 (Griffith CJ, Barton and O'Connor JJ).

[189] Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7(1) *Public Law Review* 20, 21.

inclusion is validly supported by the external affairs power. Similar questions have been considered in relation to the ongoing discussion over a right to a healthy environment in Australian human rights law.[190] While this article does not seek to answer that question in relation to press freedom, it might be suggested that ongoing recognition of the relevance of press freedom in the *ICCPR* could be sufficient.

On balance, there are strong reasons to support the express inclusion of press freedom protection in a federal charter. Almost two decades of jurisprudence under the *Charters* at the state and territory level has not given rise to robust implied protections for public interest journalism, in contrast to the European experience. Additionally, even more so than at state level, federal laws have the ability to constrain press freedom — both quantitatively, given their application across all Australian media, and qualitatively, in light of the areas regulated by the federal government with heightened press freedom implications. National security and secrecy laws,[191] for example, have proliferated at the federal level since the September 11 terrorist attacks — with almost 100 new laws passed, many of which having a negative impact on press freedom.[192] The heightened impact of federal laws on press freedom in Australia means it is even more important for a federal human rights law to explicitly protect public interest journalism.

To all of this, a caveat might be added. The dialogue model adopted thus far in Australian human rights law is inherently limited. The focus on administrative decision-making and legislative ambiguity, together with override provisions and the ability for legislatures to use clear words to undermine rights, means that explicit protection for press freedom would be necessarily subject to major qualifications. A press freedom right might look good on paper. But there is every risk that it would only operate in a limited manner and not work the way journalists and media companies might expect or hope.

[190] See Environmental Defenders Office, *A Healthy Environment Is a Human Right: Report on the Status of the Human Right to a Healthy Environment in Australia* (Report, 2022) 43.

[191] See, eg, Kieran Pender, '"Creeping Stalinism": Secrecy Law Could Imprison Whistleblowers and Journalists', *The Guardian* (online, 11 January 2018) <https://www.theguardian.com/australia-news/2018/jan/11/creeping-stalinism-secrecy-law-could-imprison-whistleblowers-and-journalists>, archived at <https://perma.cc/2UDM-Z3JY>.

[192] See Keiran Hardy, Rebecca Ananian-Welsh and Nicola McGarrity, *Open Democracy Dossier: Secrecy and Power in Australia's National Security State* (Research Report, September 2021) 14.

V Conclusion

The description of press freedom as a human right is contested. But whether or not it is accurate or conceptually helpful to describe press freedom as a standalone human right, the importance of public interest journalism in fulfilling other human rights is inarguable. The description of legal professional privilege as a necessary corollary of human rights protection — 'a fundamental, constitutional or human right, accessory or complementary to other such rights' — appears equally apt in relation to press freedom.[193] Without public interest journalism, the human rights of all Australians, both embedded in the *Charters* and part of international frameworks to which Australia is a signatory, cannot be fully realised. Press freedom must be considered a central feature of Australia's human rights framework.

This article sought to explore these issues, in light of the notable absence of human rights discourse in the press freedom debate that followed the 2019 raids on the press and the ongoing prosecution of two whistleblowers. It argued that Australia's existing human rights regimes, the *Charters*, can be used to protect press freedom in at least four ways. The article explored the use of human rights contained in the *Charters* to protect the freedom of expression of journalists and whistleblowers and as part of the newsgathering process. It also argued that a constellation of existing rights — including the right to seek and receive information in the freedom of expression right, the right to participate in public life and the right to education — could collectively act as a de facto protection for press freedom.

These possible protections are a start, but the absence of express press freedom protection in the Australian human rights framework will hinder reliance on the *Charters* in practice and leave much up to judicial discretion and jurisprudential development. Accordingly, this article has argued that the existing *Charters* should be revised to include explicit recognition of the human rights significance of press freedom. Public interest journalism should also be expressly protected in the long-mooted federal human rights law.

In 2011, in a general comment on the *ICCPR*, the United Nations Human Rights Committee noted that the instrument 'embraces a right whereby the media may receive information on the basis of which it can carry out its

[193] *AM & S Europe Ltd v Commission of the European Communities* (C-155/79) [1982] ECR 1577, 1607 [8].

function'.[194] It added that the 'communication of information and ideas about public and political issues' among citizens enshrined by the document 'implies a free press', with the 'media able to comment on public issues without censorship or restraint', and a 'corresponding right' of the public 'to receive media output'.[195] Australia is a signatory to the *ICCPR*, together with many other international human rights instruments.[196] These international frameworks provide support for the approaches to the *Charters* argued in this article, aiding interpretation in a way that protects press freedom and adding encouragement for explicit press freedom protection in domestic human rights law moving forward.[197] Human rights law can and should protect press freedom in Australia. 'A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights', the Committee added.[198] 'It constitutes one of the cornerstones of a democratic society.'[199]

[194] Human Rights Committee, *General Comment No 34: Article 19 (Freedoms of Opinion and Expression)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) para 13 ('*General Comment No 34*').

[195] Ibid.

[196] 'International Human Rights System', *Attorney-General's Department (Cth)* (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/international-human-rights-system>, archived at <https://perma.cc/FN33-V4X6>.

[197] Tambini (n 31) speaks of the 'emerging theory of media freedom in international human rights law': at 138.

[198] *General Comment No 34*, UN Doc CCPR/C/GC/34 (n 194) para 13.

[199] Ibid.