PROTECTING THE PRESS FROM SEARCH AND SEIZURE: COMPARATIVE LESSONS FOR THE AUSTRALIAN REFORM AGENDA

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The federal government has committed to law reform to protect press freedom in police investigations. But what form should this protection take? This article undertakes the first critical, comparative analysis of the protections afforded to the press from search and seizure powers across Australia, Canada and the United Kingdom. It is also informed by developments in the United States and New Zealand. The analysis demonstrates that Australia lags well behind these comparable nations in providing even a bare minimum of protection for the press. More importantly, it illuminates a workable and appropriate law reform agenda for Australia, capable of achieving law enforcement aims without undue incursion on press freedom.

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I Introduction

A free and independent press is 'one of the cornerstones of a democratic society';[1] it keeps the public informed about legitimate matters of public interest and plays a vital role in maintaining accountability, integrity and, relatedly, the rule of law.[2] A 'self-evident'[3] threat to press freedom is the issuance and execution of orders which authorise the search and seizure of property on premises occupied by a media organisation or journalist. These actions can stifle journalistic conduct, compromise journalists' ethical obligations to their sources, chill free speech, and erode the reality and perception of the media's

[1] 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) 3 [13] ('*General Comment No 34*'), citing Human Rights Committee, *Views: Communication No 1128/2002*, 83rd sess, UN Doc CCPR/C/83/D/1128/2002 (18 April 2005) 14 [6.8].

[2] Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 78. See also Damian Tambini, 'A Theory of Media Freedom' (2021) 13(2) *Journal of Media Law* 135, 149–50.

[3] *Zurcher v Stanford Daily*, 436 US 547, 571 (Stewart J for Marshall and Stewart JJ) (1978) ('*Zurcher*').

independence from government and its utility as a fourth estate check on public power.[4] Such concerns have motivated many liberal democracies to introduce legal limits on state access to journalistic materials.

This article undertakes a comparative analysis of protections for press freedom from search and seizure in Australia, the United Kingdom ('UK') and Canada. It reveals that Australia falls short of providing even a minimum standard of protection to press freedom in police investigations and illuminates a novel reform agenda, grounded in the law and practice of comparable jurisdictions.

The press freedom issues discussed in this article are based on fundamental legal values, but they also have real-world significance. This significance was thrown into sharp focus in June 2019, when the Australian Federal Police ('AFP') obtained and executed warrants to search the Canberra home of News Corp journalist Annika Smethurst and the head office of the Australian Broadcasting Corporation ('ABC') in Sydney.[5] Each investigation concerned reporting based on leaked government materials, which prompted the police to investigate both the journalists and their confidential sources.[6] Specifically, Smethurst published a redacted photo of a top-secret classified memorandum which revealed a government proposal to grant the Australian Signals Directorate unprecedented domestic surveillance powers.[7] The ABC's 'Afghan Files' reports drew on a dossier of classified materials, revealing alleged misconduct, war crimes and a culture of cover-up within the Australian Defence Force.[8] Despite immediate backlash from the press and others,[9] the government stood by

[4] Julianne Schultz, *Reviving the Fourth Estate: Democracy, Accountability and the Media* (Cambridge University Press, 1998) 1.

[5] See Damien Cave, 'Australia May Well Be the World's Most Secretive Democracy', *The New York Times* (online, 5 June 2019) <https://www.nytimes.com/2019/06/05/world/australia/journalist-raids.html>, archived at <https://perma.cc/TKS5-WFK7>.

[6] See generally Annika Smethurst, 'Spying Shock: Shades of Big Brother as Cyber-Security Vision Comes to Light', *The Daily Telegraph* (online, 29 April 2018) <https://www.dailytelegraph.com.au/news/nsw/spying-shock-shades-of-big-brother-as-cybersecurity-vision-comes-to-light/news-story/bc02f35f23fa104b139160906f2ae709>, archived at <https://perma.cc/U3M5-553T>; Dan Oakes and Sam Clark, 'The Afghan Files: Defence Leak Exposes Deadly Secrets of Australia's Special Forces', *ABC News* (online, 11 July 2017) <https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642>, archived at <https://perma.cc/N94E-NVKD>.

[7] Smethurst (n 6).

[8] Oakes and Clark (n 6).

[9] See Cave (n 5); Australian Law Reform Commission, *The Future of Law Reform: A Suggested Program of Work 2020–25* (Report, December 2019) 44 [2.108], citing Patricia Drum, 'Raids, Outrage and Reform: What Now for Press Freedom?' (2019) 59 *Law Society of NSW Journal* 36, 37–8; Fergus Hunter, '"A Culture of Secrecy": What Is the Right To Know Campaign

the raids,[10] and the AFP indicated that similar investigations could be expected whenever sensitive government information was leaked to the media in the future.[11] Although reportedly not unprecedented,[12] the raids contributed to Australia dropping a staggering 20 places between 2018 and 2022 in Reporters Without Borders' annual Global Press Freedom Index,[13] and prompted two parliamentary inquiries to examine the relationship between federal law enforcement and press freedom.[14]

These raids and their aftermath illustrate a point of disturbing Australian exceptionalism. Across Australia, journalists and media organisations are afforded no special legal protection against the issuance of search warrants. An application for such a warrant concerning a media organisation, journalist or journalistic material (a 'media warrant') is treated like any other: a law enforcement officer makes an application in an ex parte proceeding before a magistrate or justice of the peace who, broadly speaking, may grant the warrant where there are reasonable grounds to suspect that evidence relating to a criminal offence is located on the relevant premises.[15] No additional requirements operate to protect press freedom, even where the purpose of the investigation is to

About?', *The Sydney Morning Herald* (online, 21 October 2019) <https://www.smh.com.au/national/a-culture-of-secrecy-what-is-the-right-to-know-campaign-about-20191018-p5323v.html>, archived at <https://perma.cc/4GRZ-T29E>. See generally Alliance for Journalists' Freedom, *Press Freedom in Australia* (White Paper, May 2019) <https://www.journalistsfreedom.com/wp-content/uploads/2019/06/AJF-Press-Freedom-In-Australia-2019.pdf>, archived at <https://perma.cc/BQM5-FUXZ>.

10 Bevan Shields, '"Nobody Is above the Law": Journalists Committed a Crime, Says Peter Dutton', *The Sydney Morning Herald* (online, 12 July 2019) <https://www.smh.com.au/politics/federal/nobody-is-above-the-law-journalists-committed-a-crime-says-peter-dutton-20190712-p526il.html>, archived at <https://perma.cc/K578-7TG4>.

11 Ian McCartney, 'AFP Says They Will Continue To Pursue Cases like That of Annika Smethurst' (Press Conference, 27 May 2020) <https://www.abc.net.au/news/2020-05-27/afp-says-they-will-continue-to-pursue-cases-like/12292164>, archived at <https://perma.cc/R364-B6UZ>. These announcements aligned with early statements by then Minister for Home Affairs, Peter Dutton, in the immediate aftermath of the raids, to the effect that 'if you've got top secret documents and they've been leaked, it is an offence under the law' and '[n]obody is above the law': ibid.

12 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) 19 [2.29] ('*PJCIS Report*').

13 'Global Press Freedom Index', *Reporters without Borders* (Web Page) <https://rsf.org/en/index>, archived at <https://perma.cc/Q88U-LWKE>.

14 *PJCIS Report* (n 12) 1 [1.4]; Senate Environment and Communications References Committee, Parliament of Australia, *Freedom of the Press* (Report, May 2021) 1 [1.1]–[1.3] ('*Senate Report*').

15 See, eg, *Crimes Act 1914* (Cth) ss 3C (definition of 'issuing officer'), 3E; *Crimes Act 1900* (ACT) ss 185 (definition of 'issuing officer'), 194; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 46 (definition of 'eligible issuing officer'), 47; *Police Administration Act 1978* (NT) s 117; *Crimes Act 1958* (Vic) s 465.

identify a journalist's confidential source or to gain access to confidential material. This lack of protection also extends to the *execution* of search warrants. The only exceptions are Victoria and Queensland, where certain individuals are entitled to object to the execution of a search warrant where it would result in the disclosure of a journalist's confidential source.[16]

This sets Australia apart within the Five Eyes alliance. This critical relationship between Australia, Canada, the UK, New Zealand ('NZ') and the United States ('US') provides for an unprecedented degree of intelligence sharing and cooperation, founded on strong alliances and longstanding agreements.[17] It reflects the fundamentally similar political and legal systems operating in each jurisdiction, as well as their sense of shared history and purpose. It is unsurprising, therefore, that a significant degree of legal migration and influence takes place between these fundamentally comparable nations, including in the spheres of security[18] and rights protection.[19]

In NZ, the US, the UK and Canada, clear statutory and common law safeguards protect press freedom by limiting the circumstances in which warrants may be issued and executed against journalists and media organisations. Indeed, federal law in the US provides a robust statutory immunity against the search and seizure of all journalistic material, subject to limited exceptions, and

[16] *Evidence and Other Legislation Amendment Act 2022* (Qld) pt 3 div 3 items 16–19, amending *Criminal Code Act 1899* (Qld) ss 590AI–590AK, 590AO; *Evidence Act 2008* (Vic) ss 126J–126K, 131A. See also below Parts III(A)–(B).

[17] The Five Eyes alliance has its origins in the bilateral *British–US Communication Intelligence Agreement* (signed and entered into force 5 March 1946), entered into by the US and the UK in 1946 for the sharing of signals intelligence. That agreement was revised between 1946 and 1955 to include Canada and again in 1956 to include Australia and NZ: Corey Pfluke, 'A History of the Five Eyes Alliance: Possibility for Reform and Additions' (2019) 38(4) *Comparative Strategy* 302, 303. For discussion, see, eg, J Vitor Tossini, 'The Five Eyes: The Intelligence Alliance of the Anglosphere', *UK Defence Journal* (Blog Post, 14 April 2020) <https://ukdefencejournal.org.uk/the-five-eyes-the-intelligence-alliance-of-the-anglosphere/>, archived at <https://perma.cc/279Q-FDU8>.

[18] For example, the UK definition of terrorism influenced definitions in other Five Eyes countries: Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011) 238, 256–7. Also, Australia modelled its control order regime and countering violent extremism programme off those found in the UK, while the UK's introduction of an offence of entering a designated foreign area was based on a similar offence in Australia: Andrew W Neal, 'The Parliamentarisation of Security in the UK and Australia' (2021) 74(2) *Parliamentary Affairs* 464, 467. See also George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1171–2.

[19] For example, the 'Commonwealth model' of human rights protection emerged in the UK and now prevails in Canada, NZ, the Australian Capital Territory and Victoria. For discussion, see George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 7th ed, 2018) 1215–20.

similar protections now exist in many US states.[20] NZ was recently on the verge of bringing its privilege-based protections broadly into line with those of the UK.[21] Whilst detailed examination of NZ and US protections is beyond the scope of this paper, they inform our analysis and conclusions in Part V.

The 'serious shortcoming'[22] in Australia's protection of the press prompted the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') to recommend several reforms in an inquiry that spanned from 4 July 2019 to 21 August 2020.[23] However, the broad range of options arising from that process revealed more confusion than clarity as to what form such protections might take. Some argued that media warrants should only be granted at a fully contested hearing before a senior judge and should be subject to a high-threshold public interest test.[24] Others, notably the Department of Home Affairs and the AFP in a joint submission, argued that a mandatory contested warrant procedure could undermine the efficacy of warrants 'and the ability of law enforcement or intelligence agencies to effectively investigate criminal activities'.[25] The PJCIS further cited government concerns that such a contested process could

[20] The *Privacy Protection Act of 1980*, 42 USC § 2000aa (2018) ('*PPA*') renders it unlawful to search or seize 'work product materials' or 'documentary materials' which are 'possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication'. See also Part V(B) below.

[21] See generally Protection of Journalists' Sources Bill 2021 (NZ). But see Parliamentary Counsel Office (NZ), 'Protection of Journalists' Sources Bill', *New Zealand Legislation* (Web Page, 2023) <https://www.legislation.govt.nz/bill/member/2021/0069/latest/whole.html>, archived at <https://perma.cc/Q4X8-DGG4>.

[22] Lawrence McNamara and Sam McIntosh, 'Confidential Sources and the Legal Rights of Journalists: Re-Thinking Australian Approaches to Law Reform' (2010) 32(1) *Australian Journalism Review* 81, 88. In 2019, the Australian Law Reform Commission also identified '[p]ress freedom and public sector whistleblowers' as one of five priority areas in the future of Australian law reform: Australian Law Reform Commission (n 9) 10. Their scope of inquiry included consideration of whether 'current laws and processes regarding warrants to be executed on journalists and media organisations are appropriate': at 42 [2.94]. For discussion of the broader concerns raised in relation to this dearth of press protection, see generally Alliance for Journalists' Freedom (n 9). See also Rebecca Ananian-Welsh, 'Australia Needs a Media Freedom Act: Here's How It Could Work', *The Conversation* (online, 22 October 2019) <https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>, archived at <https://perma.cc/H4QV-FGB8>; AJ Brown, 'Safeguarding Our Democracy: Whistleblower Protection after the Australian Federal Police Raids' (Henry Parkes Oration, Griffith University, 26 October 2019).

[23] *PJCIS Report* (n 12); *Senate Report* (n 14) xi (recommendation 14), 109–10 [6.93]–[6.105].

[24] See, eg, Australia's Right to Know, Submission No 23.3 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (10 December 2019) 6 [16].

[25] Department of Home Affairs and Australian Federal Police, Submission No 32.10 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (July 2019) 4.

risk 'the government's ability to secure information and provide assurances to international partners'.[26] Whilst the Department of Home Affairs and the AFP maintained that reform was unnecessary, they proposed one option for consideration, namely, a 'Notice to Produce Framework'.[27] Although the proposal lacked detail, it was clearly intended to operate as a flexible additional option for law enforcement, rather than to replace existing warrants powers.[28]

Ultimately, the PJCIS resisted drawing conclusions, noting that 'meaningful reform in this space requires collaboration, not the staged proposal and counter-proposal process of a parliamentary inquiry'.[29] Nonetheless, it recommended a further option: that media warrant applications continue to be made ex parte, but that an independent Public Interest Advocate ('PIA') be appointed to represent the public interest of a free and independent media in the proceeding.[30] This recommendation has been roundly criticised by media representatives and others, including members of the PJCIS itself, as a 'bare minimum' which fails to go far enough in protecting press freedom.[31] One such member of the PJCIS was Mark Dreyfus KC who, since the conclusion of the inquiry, has become federal Attorney-General. Speaking to the National Press Club on 12 October 2022, Dreyfus affirmed his government's commitment to press freedom reform, as set out by the PJCIS.[32] Whether change will be forthcoming, and what form it might take, are yet to be seen.

This article enters this debate by proposing a workable and appropriate law reform agenda for Australia by closely examining the distinct media warrant regimes of two comparable nations. In the UK, a specialised notice to produce framework has been heralded as the gold standard in press freedom protections. In Canada, a similarly principled scheme presents a less radical model by

[26] *PJCIS Report* (n 12) 51 [3.19].

[27] Ibid 53 [3.24]–[3.26], citing Department of Home Affairs and Australian Federal Police (n 25) 4–5.

[28] Department of Home Affairs and Australian Federal Police (n 25) 5.

[29] *PJCIS Report* (n 12) 57 [3.41].

[30] Ibid xv–xvii.

[31] Ibid 153. See also Max Mason, 'Press Freedom Inquiry Rejects Contestable Warrants Proposal', *The Australian Financial Review* (online, 26 August 2020) <https://www.afr.com/companies/media-and-marketing/press-freedom-inquiry-rejects-contestable-warrants-proposal-20200826-p55pmv>, archived at <https://perma.cc/BV5E-S7PV>; Rebecca Ananian-Welsh, 'Security Committee Recommends Bare Minimum of Reform To Protect Press Freedom', *The Conversation* (online, 27 August 2020) <https://theconversation.com/security-committee-recommends-bare-minimum-of-reform-to-protect-press-freedom-145105>, archived at <https://perma.cc/VB57-C9ZN>.

[32] Mark Dreyfus, 'Address to the National Press Club of Australia' (Speech, National Press Club, 12 October 2022) <https://ministers.ag.gov.au/media-centre/speeches/address-national-press-club-australia-12-10-2022>, archived at <https://perma.cc/4TA6-C8DT>.

incorporating press freedom 'add-ons' within orthodox investigatory processes. We begin, in Part II, by outlining the competing interests in law enforcement and press freedom that shape and complicate the regulation of state access to journalistic materials. In Part III, we critically examine the protections for journalists' materials and sources that currently apply when media warrants are executed in Victoria and Queensland, as well as the PIA proposal set out by the PJCIS. Part IV outlines the dedicated regimes that exist in Canada and the UK. Based on the Canadian and UK models, Part V identifies the elements of an effective and proportionate media warrant framework, focusing on the *mode* used by authorities to obtain information, the *substance* of the protections, and the *procedure* adopted where an investigatory order is sought and/or executed. The UK approach emerges as preferable in many respects, and we conclude with recommendations for reform capable of ensuring legitimate and proportionate access to journalistic materials in Australia and, potentially, elsewhere.

II The Interests at Stake

The search and seizure of journalistic materials has the capacity to impact a host of private and public interests. Some interests are familiar to the investigatory context (eg law enforcement, property and privacy). Others concern the media's social and democratic roles (eg promoting free speech and public accountability). Designing an appropriate media warrant scheme in the liberal democratic context requires a frank comprehension of the varied interests at stake and how they might come into conflict.

For centuries, it has been accepted that state actors will sometimes need to enter private property and seize material in order to fulfil legitimate law enforcement and investigatory functions.[33] However, the common law has long regarded private property, along with personal liberty and security, as sacrosanct. In order to protect such fundamental rights, it was famously held in *Entick v Carrington* ('*Entick*') that a public officer may not enter private property without consent, unless sanctioned by positive law.[34] Thus, the legal foundation for such action must be expressly authorised, usually in the form of a warrant granted under statutory powers to search premises and seize material for potential use as evidence.

[33] See Thom Dyke, 'Ripe for Reform? Recent Developments in Search Warrants' (2018) 23(4) *Judicial Review* 279, 280.

[34] (1765) 2 Wils KB 275; 95 ER 807, 817–18 (Lord Camden CJ) ('*Entick*'), most relevantly cited in *Smethurst v Commissioner of Police* (2020) 272 CLR 177, 230 [124] (Gageler J) ('*Smethurst*').

Given their capacity to infringe civil liberties, search warrants have been described as 'draconian',[35] 'extraordinary',[36] 'exceptional',[37] and as a '"nuclear weapon" in the court's armoury'.[38] Therefore, an application for a search warrant must be closely scrutinised[39] and should only be granted in strict compliance with the statutory conditions under which it is authorised.[40]

It is evident that search warrants are both necessary and highly invasive. They encapsulate a tension between competing public interests, identified by Bingham LJ as 'first of all, … the effective investigation and prosecution of crime' and, secondly, the protection of 'the personal and property rights of citizens against infringement and invasion'.[41] Well-designed warrant provisions seek to balance these interests so as to achieve law enforcement aims without undue encroachment on rights and liberties.[42] However, where a search warrant is sought against a journalist or media organisation, additional interests are at stake: namely, press freedom and the important role of the press in democratic systems of government.

The importance of a strong and independent media within the liberal democratic tradition is well accepted.[43] However, as Tambini has observed, 'we are living in a period of confusion and contestation at the most fundamental level about media freedom'.[44] Technological and political developments have raised complex questions around, for instance,

[35] *R (Mills) v Sussex Police* [2015] 1 WLR 2199, 2206 [26] (Elias LJ, Ouseley J agreeing at 2216 [73]) ('*Sussex Police*'), quoting *R (Faisaltex Ltd) v Preston Crown Court* [2009] 1 WLR 1687, 1697 [29] (Keene LJ for the Court).

[36] *R v Tillett; Ex parte Newton* (1969) 14 FLR 101, 108 (Fox J), quoting *Re Worrall* (1965) 48 DLR (2d) 673, 680 (Roach JA) (Ontario Court of Appeal).

[37] *Smethurst* (n 34) 200 [23] (Kiefel CJ, Bell and Keane JJ).

[38] *Sussex Police* (n 35) 541 [26] (Elias LJ, Ouseley J agreeing at 2216 [73]). See also *R (Mercury Tax Group) v Revenue and Customs Commissioners* [2009] STC 743, 767 [71] (Underhill J).

[39] *R (Rawlinson & Hunter Trustees) v Central Criminal Court* [2013] 1 WLR 1634, 1653 [78]–[79], 1655 [85] (Sir John Thomas P for the Court).

[40] *Smethurst* (n 34) 200 [25] (Kiefel CJ, Bell and Keane JJ), citing *George v Rockett* (1990) 170 CLR 104, 110–11 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*George*'), *New South Wales v Corbett* (2007) 230 CLR 606, 628 [88] (Callinan and Crennan JJ).

[41] *R v Crown Court (Lewes); Ex parte Hill* (1991) 93 Cr App R 60, 66, quoted in *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2014] AC 885, 893 [24] (Lord Toulson JSC for Baroness Hale DPSC and Lords Kerr, Reed, Hughes and Toulson JJSC) ('*British Sky Broadcasting (Supreme Court)*').

[42] See, eg, the discussion in *Smethurst* (n 34) 200 [24]–[25] (Kiefel CJ, Bell and Keane JJ), citing *George* (n 40) 110–11 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[43] See, eg, *General Comment No 34* (n 1) 3–4 [13]; Bingham (n 2) 78.

[44] Tambini (n 2) 137.

> who or what are media? What should they be free from, and to do what? … [H]ow to balance media freedom with justified restrictions … [and] confusion between freedom of expression and media freedom.[45]

These concerns permeate this article.[46] Questions as to the nature, content and requirements of press freedom from state interference are raised each time a warrant is sought or executed against a journalist or media organisation. Before considering how legal frameworks in Australia, the UK and Canada have been designed to protect press freedom in police investigations, we must understand some of the relatively settled practical requirements of press freedom and how they can be impaired by the operation of investigatory powers.

At its core, press freedom requires that laws should not criminalise, punish or otherwise prohibit legitimate journalism or newsgathering.[47] But press freedom goes further than this; it also requires that the press not be subjected to state interference which has the effect of unduly disrupting, impeding or deterring independent journalistic activity.[48] Thus, warrants executed against journalists and the media concerning the investigation of offences *committed by others*, including journalistic sources, can interfere with the media's legitimate functions.

Most obviously, the execution of search warrants can interrupt the day-to-day operations of the press. As explained by Stewart J of the Supreme Court of the United States in *Zurcher v Stanford Daily* ('*Zurcher*'):

> It seems … self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate … injury caused by such a visitation by the police is physical disruption of the operation of the newspaper. Policemen occupying a newsroom and searching it thoroughly for what may be an extended

[45] Ibid 139.

[46] The first question, concerning the definition of the media, is relevant to our analysis, but is not dealt with in detail. For critical analysis of Australian legal definitions of 'journalism' and 'journalist', see generally Rebecca Ananian-Welsh, 'Who Is a Journalist? A Critical Analysis of Australian Statutory Definitions' (2022) 50(4) *Federal Law Review* 449.

[47] For a discussion of laws that criminalise legitimate journalistic activity, particularly in the national security context, see generally Keiran Hardy and George Williams, 'Free Speech and Counter-Terrorism in Australia' in Ian Cram (ed), *Extremism, Free Speech and Counter-Terrorism Law and Policy* (Routledge, 2019) 172; Keiran Hardy and George Williams, 'Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information' (2014) 37(2) *University of New South Wales Law Journal* 784; Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review* 764.

[48] See Ian Cram, 'Terrorism Investigations and the Coerced Disclosure of Journalists' Materials' (2009) 14(2) *Communications Law* 40, 40.

> period of time will inevitably interrupt its normal operations, and thus impair or even temporarily prevent the processes of newsgathering, writing, editing, and publishing.[49]

Less immediate, but undoubtedly more serious, consequences for press freedom may also arise. In particular, the prospect of a warrant being executed against the media could have a chilling effect in the form of self-censorship by journalists and their sources.[50]

Particularly concerning chilling effects relate to confidential journalistic sources and whistleblowers. The free flow of information to the media is recognised as a 'vital ingredient' in investigative journalism[51] and in the media's role as a public 'watchdog'.[52] In large part, this is contingent upon the willingness of sources to share important public interest information with journalists.[53] Some sources are eager to reveal information; others may only do so where they have developed a relationship of trust with a particular journalist.[54] In many cases, a source will only be willing to supply information to journalists on the condition of anonymity. The professional obligation of the journalist is that, once an assurance of confidentiality is given, it must not be broken under any circumstances.[55]

The search and seizure of journalistic materials raises the possibility that the identity of a confidential source will be revealed to law enforcement officers during a search, or upon later inspection of the material. Source identification may be the very object of a warrant: for example, where police wish to investigate a government source for disclosing classified information to the media, as in the raid on Smethurst's residence.[56] At other times, source identification may be an inadvertent consequence of a warrant directed at obtaining other material. Either way, the risk of disclosure may deter confidential sources from

[49] *Zurcher* (n 3) 571 (Stewart J for Marshall and Stewart JJ).

[50] Ibid 572–3.

[51] *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 354 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) ('*Cojuangco*').

[52] *Goodwin v United Kingdom* [1996] II Eur Court HR 483, 500 [39].

[53] For discussion of the relationship between press freedom, source confidentiality and whistleblowers, see Rebecca Ananian-Welsh, Rose Cronin and Peter Greste, 'In the Public Interest: Protections and Risks in Whistleblowing to the Media' (2021) 44(4) *University of New South Wales Law Journal* 1242, 1244–6.

[54] See ibid 1244, 1270–1.

[55] Ibid 1271, quoting 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (Web Page) <https://www.meaa.org/meaa-media/code-of-ethics/>, archived at <https://perma.cc/B6H9-DKS7>.

[56] Ananian-Welsh, Cronin and Greste (n 53) 1250.

engaging with journalists, thereby impeding the supply of information to the media. As Stewart J explained in *Zurcher*:

> It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed. … Since the indisputable effect of such searches will thus be to prevent a newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.[57]

Similar statements regarding the reality and consequences of a chilling effect have been made by superior courts globally,[58] as well as by the High Court of Australia.[59]

The importance of protecting confidential sources as an aspect of press freedom has been recognised in the gradual introduction of 'journalists' privilege' — also known as evidentiary 'shield laws' — in all Australian jurisdictions[60] as

[57] *Zurcher* (n 3) 572–3 (Stewart J for Marshall and Stewart JJ).

[58] See, eg, *Branzburg v Hayes*, 408 US 665, 725–31 (Stewart J for Brennan, Marshall and Stewart JJ) (1972) ('*Branzburg*'); *R v Vice Media Canada Inc* [2018] 3 SCR 374, 397–8 [25]–[27] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ), 436–9 [127]–[132] (Abella J for Wagner CJ, Abella, Karakatsanis and Martin JJ) ('*Vice Media (Supreme Court)*'); *R v National Post* [2010] 1 SCR 477, 504–5 [33] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ), 541–3 [120]–[124] (Abella J) ('*National Post*'); *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1129 (Lord Denning MR), 1184 (Viscount Dilhorne), 1184 (Lord Salmon), 1203 (Lord Russell); *John v Express Newspapers* [2000] 1 WLR 1931, 1938 [23] (Lord Woolf MR for the Court) ('*Express Newspapers*'), quoting *Camelot Group plc v Centaur Communications Ltd* [1999] QB 124, 138 (Schiemann LJ); *R (Miranda) v Secretary of State for the Home Department* [2016] 1 WLR 1505, 1539 [113] (Lord Dyson MR, Richards LJ agreeing at 1540 [120], Floyd LJ agreeing at 1540 [120]) ('*Miranda*'); *Television New Zealand Ltd v A-G (NZ)* [1995] 2 NZLR 641, 648 (Cooke P for the Court).

[59] See, eg, *Cojuangco* (n 51) 354 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

[60] *Evidence Act 1995* (Cth) s 126K; *Evidence Act 2011* (ACT) ss 126J–126L; *Evidence Act 2004* (Norfolk Island) ss 126A–126F; *Evidence Act 1995* (NSW) s 126K; *Evidence (National Uniform Legislation) Act 2011* (NT) ss 10A, 127A, 131A; *Evidence Act 1977* (Qld) ss 14Q–14ZB; *Evidence Act 1929* (SA) s 72B; *Evidence Act 2001* (Tas) ss 126A–126F; *Evidence Act 2008* (Vic) s 126K; *Evidence Act 1906* (WA) ss 20H–20I. For a discussion of shield laws, see generally Hannah Ryan, 'The Half-Hearted Protection of Journalists' Sources: Judicial Interpretation of Australia's Shield Laws' (2014) 19(4) *Media and Arts Law Review* 325.

well as in NZ,[61] the UK,[62] Canada,[63] and nearly all states of the US.[64] Shield laws operate to excuse journalists from being compelled to reveal information capable of identifying a confidential source in evidence in judicial proceedings unless, broadly speaking, the public interest in source protection is outweighed by the public interest in disclosure.[65]

However, the potential chilling effects of media warrants are by no means limited to the revelation of confidential sources; they may also arise in relation to the supply of information by *non-confidential* sources.[66] For example, if documents in the media's possession are seized to obtain evidence to prosecute an open source (as was the case in the AFP raid on the ABC), sources may still be deterred from supplying documents to the media in the future.[67] A capacity for the police to easily access journalistic materials to assist with their investigations raises the spectre that the media will be viewed as 'an investigative arm of

[61] *Evidence Act 2006* (NZ) s 68.

[62] *Contempt of Court Act 1981* (UK) s 10.

[63] *Canada Evidence Act*, RSC 1985, c C-5, s 39.1 ('*Canadian Evidence Act*').

[64] See Hank Nuwer, 'Understanding Shield Law', *Quill* (Blog Post, 8 April 2021) <https://www.quillmag.com/2021/04/08/understanding-shield-law/>, archived at <https://perma.cc/U53L-NYNZ>.

[65] See below Part III. Note, however, that many states in the US provide an absolute statutory immunity against disclosure of journalists' sources: see, eg, Ala Code § 12-21-142 (2022).

[66] See, eg, *Vice Media (Supreme Court)* (n 58) 401–2 [38] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ), 438–9 [131]–[132] (Abella J for Wagner CJ, Abella, Karakatsanis and Martin JJ); *Miranda* (n 58) 1537 [107] (Lord Dyson MR, Richards LJ agreeing at 1540 [120], Floyd LJ agreeing at 1540 [121]). For discussion of the need to protect both truthful and untruthful sources, see also Devin M Smith, 'Thin Shields Pierce Easily: A Case for Fortifying the Journalists' Privilege in New Zealand' (2009) 18(1) *Pacific Rim Law and Policy Journal* 217, 223.

[67] Justin Safayeni, 'The Supreme Court of Canada's Vice Media Decision: The Good, the Bad, the Ugly and the Questions That Remain', *Centre for Free Expression* (Blog Post, 7 January 2019) <https://cfe.ryerson.ca/blog/2019/01/supreme-court-canada%E2%80%99s-vice-media-decision-good-bad-ugly-and-questions-remain>, archived at <https://perma.cc/FN24-DNGD>; *Miranda* (n 58) 1539 [113] (Lord Dyson MR, Richards LJ agreeing at 1540 [120], Floyd LJ agreeing at 1540 [121]). Cf *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 692 ('*Bright*'), where Maurice Kay J said:

> I am not impressed by the argument that to grant a production order in relation to special procedure material which is not the subject of an obligation of confidentiality to the source of the material would stand as a disincentive to future whistle-blowers or other suppliers of information …

The raid on the ABC concerned a tranche of classified material provided to journalists by David McBride who, by June 2019, had publicly admitted to such. At the time of writing, the prosecution of McBride has been subject to numerous delays but remains on foot. For further discussion of this case and related issues at the juncture of press freedom and whistleblowing, see generally Ananian-Welsh, Cronin and Greste (n 53).

the police'.[68] Consequently, the public may lose 'faith in the media's ability to execute its functions independently and impartially',[69] with potentially dire consequences. As explained by Eady J in *R (British Sky Broadcasting) v Chelmsford Crown Court* ('*Chelmsford Crown Court*'):

> If the perception takes hold that [the media] are working on behalf of the police, or are likely to co-operate with them by supplying such material routinely, life could become very difficult. They might find it more difficult to obtain access to areas where demonstrations are taking place or to work in the vicinity of those who are prone to violence. Moreover, at its most acute, the perception could increase the risk of violence towards cameramen or their equipment. … [T]o the extent that they are perceived as being separate from the police and relatively neutral when disputes are taking place, they have more opportunity of carrying out their task and, correspondingly, the public has a greater opportunity of receiving the coverage they intend to provide.[70]

The threat of these consequences could chill newsgathering and publishing activities in yet other ways. Journalists might 'consciously avoid recording and preserving their notes, contact lists, internal deliberations, and other work product' to prevent such content from becoming available to the police,[71] and the media may self-censor to prevent the police from becoming aware that certain information is in their possession. These impacts on journalistic practice could have a deleterious effect on both the quality and quantity of public interest reporting and, it follows, public debate, accountability and democracy.[72]

In sum, an appropriately designed scheme to authorise and regulate state access to journalistic materials will support the effective investigation and prosecution of crime, while preventing undue incursion into privacy, property rights, and press freedom. Threats to press freedom may present as, inter alia, the punishment of legitimate conduct by a journalist or source; undue disruption, impediment or deterrence of journalistic activity; access to journalistic

[68] *Canadian Broadcasting Corporation v Lessard* [1991] 3 SCR 421, 432 (La Forest J) ('*Lessard*'). See also *Vice Media (Supreme Court)* (n 58) 397–8 [26] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ); *R (British Sky Broadcasting Ltd) v Chelmsford Crown Court* [2012] 2 Cr App R 454, 462 [25] (Eady J) ('*Chelmsford Crown Court*'); Cram (n 48) 40.

[69] See *Vice Media (Supreme Court)* (n 58) 398 [26] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ) (citations omitted).

[70] *Chelmsford Crown Court* (n 68) 462 [25].

[71] *Vice Media (Supreme Court)* (n 58) 397–8 [26] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ). See also *Lessard* (n 68) 452 (McLachlin J).

[72] See Ananian-Welsh, Cronin and Greste (n 53) 1242–3; Danielle Ireland-Piper and Jonathan Crowe, 'Whistleblowing, National Security and the Constitutional Freedom of Political Communication' (2018) 46(3) *Federal Law Review* 341, 342, 358, 364–5.

material to investigate (open or confidential) sources; or broader chilling effects on sources and/or journalistic practice.

III Australia: Extended Shields and the Public Interest Advocate

The various impacts of media warrants on press freedom have prompted the introduction of specific protections across the Five Eyes alliance. In Australia, however, only Victoria and Queensland have taken this path. In these states, journalists have a right to object to the execution of a search warrant where the search would, or might, disclose the identity of a confidential source.[73] Where such an objection is made, a court may nevertheless permit the material to be made available to law enforcement officers on public interest grounds.[74]

In the absence of similar (or any) legal protections at the federal level, certain *political* assurances have been given. In 2014, Attorney-General George Brandis said there was 'no possibility … that in our liberal democracy a journalist would ever be prosecuted for doing their job'[75] and instructed the Commonwealth Director of Public Prosecutions to obtain his consent before prosecuting any reporter. Similar comments and directives were made in respect of media prosecutions and investigations by the Minister for Home Affairs, Peter Dutton, and Brandis's successor, Christian Porter.[76] While commendable, ministerial directives do little to alleviate the chilling effects outlined above. After all, the government's initial response to the AFP raids included comments such as '[n]obody is above the law and the police have a job to do'[77] by Dutton,

[73] *Evidence Act 1977* (Qld) ss 14ZC–14ZG; *Evidence Act 2008* (Vic) ss 126K, 131A–134.

[74] *Evidence Act 1977* (Qld) s 14ZF; *Evidence Act 2008* (Vic) s 126K(2).

[75] Lenore Taylor, 'George Brandis: Attorney General Must Approve Prosecution of Journalists under Security Laws', *The Guardian* (online, 30 October 2014) <https://www.theguardian.com/australia-news/2014/oct/30/george-brandis-attorney-general-approve-prosecution-journalists-security-laws>, archived at <https://perma.cc/U546-R42J>.

[76] Minister for Home Affairs, *Ministerial Direction to Australian Federal Police Commissioner Relating to Investigative Action Involving a Professional Journalist or News Media Organisation in the Context of an Unauthorised Disclosure of Material Made or Obtained by a Current or Former Commonwealth Officer* (8 August 2019). See also Brett Worthington, 'Attorney-General Orders Prosecutors Seek His Approval before Charging ABC, News Corp Journalists', *ABC News* (online, 30 September 2019) <https://www.abc.net.au/news/2019-09-30/attorney-general-grants-journalists-limited-protection/11560888>, archived at <https://perma.cc/9ZX6-MDXP>.

[77] Shields (n 10).

and '[it] never troubles me that our laws are being upheld' by Prime Minister Scott Morrison.[78]

In this part, we examine existing and proposed *legal* protections for journalists from search and seizure powers in Australia, namely, the extended evidentiary shield laws in Victoria and Queensland, and the PJCIS's recommended reforms.

A *Victoria: A Simple Shield Model*

In Victoria, s 126K of the *Evidence Act 2008* (Vic) — titled '[j]ournalist privilege relating to the identity of informant' — provides that neither a journalist nor their employer is compellable to give evidence that would reveal the identity of a confidential source (an 'informant'). This presumption may be rebutted if the court is satisfied, 'having regard to the issues to be determined in the proceeding', that the public interest in disclosure outweighs two countervailing factors.[79] The first factor looks to 'any likely adverse effect of the disclosure on the informant or any other person'.[80] The second concerns press freedom — specifically the 'public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts'.[81] Similar shield laws can be found in evidence statutes across Australia.[82]

Journalists' privilege aims to protect confidential sources by limiting the circumstances in which journalists may be compelled to give evidence in, or in relation to, court proceedings. However, s 131A of the *Evidence Act 2008* (Vic) extends the operation of that privilege beyond the courtroom: source confidentiality is also a ground for objecting to compliance with a court-ordered 'disclosure requirement', which includes 'a search warrant'.[83] Thus, journalists'

[78] Amy Remeikis, 'Scott Morrison Deflects Questions about Raid on News Corp Journalist', *The Guardian* (online, 5 June 2019) <https://www.theguardian.com/australia-news/2019/jun/05/scott-morrison-deflects-questions-about-raid-on-news-corp-journalist>, archived at <https://perma.cc/LUU8-5NEH>.

[79] *Evidence Act 2008* (Vic) s 126K(2).

[80] Ibid s 126K(2)(a).

[81] Ibid s 126K(2)(b).

[82] See, eg, *Evidence Act 1995* (Cth) s 126K; *Evidence Act 2011* (ACT) s 126K; *Evidence Act 2004* (Norfolk Island) ss 126A–126F; *Evidence Act 1995* (NSW) s 126K; *Evidence (National Uniform Legislation) Act 2011* (NT) ss 10A, 127A, 131A; *Evidence Act 1977* (Qld) ss 14ZC–14ZG; *Evidence Act 1906* (WA) s 20I.

[83] *Evidence Act 2008* (Vic) s 131A(2)(g).

privilege applies to the execution of search warrants made under any one of the vast array of search warrant powers that exist under Victorian law.[84]

At first blush, the extension of journalists' privilege presents an elegant means of protecting press freedom in police investigations. As far as the authors are aware, s 126K has not yet been applied in respect of a Victorian media warrant — certainly there are no publicly available cases on point.[85] Nonetheless, three potential problems with the Victorian approach may be observed.

First, the approach limits protection to confidential sources and therefore fails to protect critical aspects of press freedom outlined in Part II. The gravity of this weakness becomes clear when we consider the far broader protections in Canada and the UK in Part IV.

The second problem relates to the *substance* of the public interest balancing test employed to determine whether a journalist should be compelled to reveal confidential source information. Section 126K(2) requires that the public interest in disclosure be assessed 'having regard to the issues to be determined *in the proceeding*'.[86] This makes sense once proceedings are on foot. However, it entails a more difficult assessment at the time a warrant is applied for or executed. It is a considerable expectation that prior to the commencement of proceedings, or prior even to the completion of the police investigation, an issuing authority will be capable of assessing the precise issues that will need to be determined in a future proceeding (eg at trial if a person is charged with an offence to which the warrant relates), let alone the relevance or probative value of the (as yet uncollected) evidence to those issues.[87] It is perhaps one thing for likely probative

[84] In 2005, the Law Reform Committee of the Parliament of Victoria reported over 80 different statutory bases for search warrants in Victoria alone: Law Reform Committee, Parliament of Victoria, *Warrant Powers and Procedures* (Report No 170 of 2003–05, November 2005) xliii. However, 'three provisions … accounted for almost 80% of the search warrants issued in Victoria in 2003–2004'. Those provisions are ss 92(1) (stolen goods) and 465 (general warrant power) of the *Crimes Act 1958* (Vic), and s 81 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

[85] However, for an application of s 126K of the *Evidence Act 2008* (Vic) in the curial context, see generally *Madafferi v The Age Co Ltd* (2015) 50 VR 492.

[86] *Evidence Act 2008* (Vic) s 126K(2) (emphasis added).

[87] For comments to this effect, see, eg, *Vice Media (Supreme Court)* (n 58) 408 [56] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ), quoting *Descôteaux v Mierzwinski* [1982] 1 SCR 860, 889 (Lamer J for the Court); *R v Vice Media Canada Inc* (2017) 412 DLR (4th) 531, 547 [40] (Doherty JA) (Ontario Court of Appeal). See also the following comments by Mason J in *Baker v Campbell* (1983) 153 CLR 52, 83 ('*Baker*'), in the context of legal professional privilege and search and seizure warrants:

> It is simply impossible for a police officer executing a warrant to make an instant judgment on the admissibility, probative value or privileged status of the documents which he may encounter in his search. Generally speaking, it is in the course of the subsequent

value and relevance at trial to be significant *factors* in the warrant application; it is quite another to require the issuing authority to assess the public interest in disclosure *solely* by reference to the issues to be determined in a future, as yet hypothetical, proceeding. In assessing whether the privilege should prevent the disclosure of information under warrant, it would be more straightforward to focus on the public interest in furthering the *investigation* of crime. At a broader level, this complication suggests that protecting press freedom in media warrant applications demands a more sophisticated approach than extending a pre-existing evidentiary privilege.

A third problem is one of *process*. Generally speaking, the exercise of the power to grant statutory warrants in Victoria must comply with standard procedures contained in the *Magistrates' Court Act 1989* (Vic).[88] But no statute establishes a process for asserting privilege or for guarding against the disclosure of potentially privileged material prior to a court determination. These are grave deficiencies. Once the identity of a journalist's source is (deliberately or inadvertently) discovered during a search, press freedom has been impacted and the practical utility of the privilege could be lost. Put another way, once the identity of a confidential source (for instance, an intelligence whistleblower) is known by police, can they be expected to un-know it?

Some level of protection against disclosure is arguably provided under the common law requirement that warrants be executed *reasonably*.[89] In the context of legal professional privilege, this requires that a reasonable opportunity be available to make a claim to privilege during the execution of a warrant[90] and

> investigation following seizure of the documents that informed consideration can be given to the documents and an assessment made of their worth or significance in the respects already mentioned. … In the case of production on discovery and under subpoena duces tecum there is a court or tribunal already exercising jurisdiction in the matter which could determine questions of relevance and privilege. It is otherwise in the case of search and seizure under a warrant.

Indeed, requiring the court to focus on the use of the information as evidence in future court proceedings seems to be reinforced by the *Evidence Act 2008* (Vic), which provides that, in its extended application, the privilege under s 126K(2) must be determined 'by applying the provisions … with any necessary modifications as if the objection to giving information or producing the document *were an objection to the giving or adducing of evidence*': s 131A(1) (emphasis added).

88 *Magistrates' Court Act 1989* (Vic) pt 4 div 3.

89 See *Arno v Forsyth* (1986) 9 FCR 576, 580 (Fox J), 587 (Lockhart J) ('*Arno*'); *Allitt v Sullivan* [1988] VR 621, 632 (Murphy J), 654 (Hampel J) ('*Allitt*'); *JMA Accounting Pty Ltd v Commissioner of Taxation* (2004) 139 FCR 537, 542–3 [16] (Spender, Madgwick and Finkelstein JJ) ('*JMA Accounting*').

90 *Construction, Forestry, Mining and Energy Union v Commissioner of the Australian Federal Police [No 2]* [2016] FCA 833, [97]–[101] (Reeves J); *AWB Ltd v Australian Securities and*

that the search be conducted in such a way that, once claimed, the privilege not be defeated by disclosure.[91] This may require that documents be sealed and delivered to a court to determine the validity of the claim to privilege prior to them being inspected by the police.[92] Perhaps the same requirements would apply to journalists' privilege despite it being a creature of statute, rather than the common law, or perhaps not.[93] In any case, in the interests of certainty and clarity, the courts have expressed a strong preference that the procedure for asserting and managing privilege in the warrants context be set out in statute, rather than left to the vague requirement of reasonableness under the common law.[94] For this reason, the Victorian Law Reform Commission has also recommended that procedures governing claims to all forms of privilege relating to search warrants be prescribed by statute.[95]

B *Queensland: A Tailored Shield Model*

Until 2022, Queensland lacked any protection for press freedom in the form of evidentiary shield laws. Recent reforms, contained in the *Evidence and Other Legislation Amendment Act 2022* (Qld), have created detailed shield protections, which extend journalists' privilege to search warrants and avoid some of the shortcomings of the Victorian provisions.

Investments Commission (2008) 216 FCR 577, 589 [35] (Gordon J); *MM v Australian Crime Commission* (2007) 244 ALR 452, 460–1 [35]–[36] (Emmett J); *Prescience Communications Ltd v Commissioner of Taxation Office* (2006) 64 ATR 664, 671 [31] (Greenwood J); *JMA Accounting* (n 89) 541–2 [11]–[12] (Spender, Madgwick and Finkelstein JJ); *Kennedy v Baker* (2004) 135 FCR 520, 545 [96] (Branson J); *Commissioner of Taxation v Citibank Ltd* (1989) 20 FCR 403, 417–18 (Bowen CJ and Fisher J), 437 (French J); *Allitt* (n 89) 631 (Murphy J), 654 (Hampel J); *Arno* (n 89) 580 (Fox J), 587 (Lockhart J). Cf *Question of Law Reserved (No 1 of 1998)* (1998) 70 SASR 281, 290, 292–8 (Doyle CJ, Cox J agreeing at 299, Matheson J agreeing at 299).

91 *Allitt* (n 89) 630, 632 (Murphy J), 660–1 (Hampel J); *JMA Accounting* (n 89) 543–4 [20]–[23] (Spender, Madgwick and Finkelstein JJ).

92 *Allitt* (n 89) 630–1 (Murphy J); *Arno* (n 89) 580 (Fox J).

93 Indeed, there is no doubt that it would be contrary to law for an enforcement officer to act in a way that would reveal the identity of a source *after* an objection to disclosure is made by a journalist, either on the basis that to do so is outside the scope of the authority of the warrant: see *Allitt* (n 89) 630–2 (Murphy J) (in the context of legal professional privilege); or because it directly contravenes ss 126K and 131A of the *Evidence Act 2008* (Vic) — or both.

94 See, eg, *JMA Accounting* (n 89) 540–1 [7]–[8] (Spender, Madgwick and Finkelstein JJ); *Allitt* (n 89) 642 (Brooking J); *Arno* (n 89) 580 (Fox J).

95 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act* (Report, February 2006) xxiv–xxv [19]–[20], 40–2 [2.83]–[2.87].

During the execution of a search warrant, journalists[96] and 'relevant person[s]'[97] are entitled to object to an authorised officer inspecting a particular document or thing on the basis that such an inspection would enable the identification of a confidential source.[98] If the officer still wishes to inspect the material, they may ask the journalist if they will agree to it being sealed in a container or stored securely by the officer and held for safekeeping,[99] thus addressing the problem of inadvertent source identification discussed above. If the journalist refuses this option, the officer is entitled to deal with the material in accordance with the warrant.[100] However, if the journalist agrees, the material is sealed, and within seven days the journalist or authorised officer may apply to the Supreme Court of Queensland to determine the application and consequences of privilege.[101] The sealed material must be given to the registrar until any such application is determined;[102] but, if an application is not made within the seven day timeframe, the material may be accessed according to the terms of the warrant.[103]

In considering the application, the Court must first determine whether the inspection of the material would enable a confidential source to be identified.[104] The burden falls on the journalist to establish this.[105] If so, the Court may decide that the material may nonetheless be inspected under the warrant if the public interest in disclosing the source's identity outweighs, first, the potential for adverse effects on the informant or another person and, second, the public interest in the capacity for news media to access sources and facts, and to communicate

96 A 'journalist' is defined as a person who 'is engaged and active in … gathering and assessing information about matters of public interest' and 'preparing the information, or providing comment or opinion on or analysis of the information, for publication in a news medium': *Evidence Act 1977* (Qld) s 14R(1). A range of factors are specified for determining whether a person meets this definition: s 14R(2).

97 A 'relevant person' is defined to include 'a current or previous employer of the journalist'; 'a person who has engaged the journalist on a contract for services'; or a person who 'is or has been involved in the publication of a news medium' and who 'works or has worked with the journalist in relation to publishing information in the news medium': ibid s 14T (definition of 'relevant person').

98 Ibid s 14ZC(b).

99 Ibid s 14ZD(1).

100 Ibid s 14ZD(3).

101 Ibid ss 14ZE(1)–(3).

102 Ibid s 14ZD(5).

103 Ibid ss 14ZD(6), 14ZE(3).

104 Ibid s 14ZF(1)(a).

105 Ibid s 14ZF(1)(b).

'facts and opinion to the public'.[106] The Court is required to provide reasons for its decision.[107]

The Court's decision whether to grant access to the material is informed by reference to a further 12 matters to which it 'may have regard'.[108] These include: the public interest in the information provided; whether the informant's identity is already in the public domain; how the journalist kept the information and whether they complied with a recognised professional code of conduct; the likelihood of the Court's order deterring potential informants; the nature of the investigation to which the warrant relates; the importance of the information to the investigation, taking into account the availability of other evidence; and the purpose for which the information and the source's identity are intended to be used.[109]

The Queensland scheme is a clear improvement on Victorian law. It focuses on the importance of the information to the investigation to which the warrant relates and does not direct the Court to consider a 'proceeding'.[110] It also establishes a clear and practical process for journalists to assert their objection and maintain the confidentiality of source material until access has been resolved by the Court. However, as in Victoria, the Queensland regime is limited to preventing the disclosure of *confidential* source information and only operates, strictly speaking, to prevent media warrants from being *executed*.[111] The

[106] Ibid ss 14Y(1)(a)–(b), applicable to search warrants by virtue of s 14ZF(3).

[107] Ibid s 14ZF(6).

[108] Ibid s 14ZF(4), referring to ss 14Y(2)(a), (e)–(l).

[109] Ibid s 14ZF(4), referring to ss 14Y(2)(a), (e)–(l).

[110] This appears to be a deliberate drafting decision. There are a series of factors concerning 'the relevant proceeding' to which a court may have regard in determining the application of journalists' privilege in curial proceedings: ibid ss 14Y(2)(b)–(d). These considerations are specifically excluded from — and further considerations are added to — the list which guides the Supreme Court of Queensland in determining privilege applications relating to search warrants: s 14ZF(4).

[111] We do not consider whether an applicant for a search warrant might be required to raise the possibility of statutory journalists' source privilege with an issuing magistrate, and what role such a consideration might play in the decision to grant a search warrant. However, the drawing of analogies with legal professional privilege should be treated with caution. Legal professional privilege is recognised as a fundamental common law right, and the High Court of Australia has held that, unless expressly authorised by statute, documents protected by legal professional privilege cannot be made the subject of a search and seizure warrant: *Baker* (n 87) 89–91 (Murphy J, Wilson J agreeing at 97, Deane J agreeing at 120, Dawson J agreeing at 132). In contrast, journalists' privilege is a creature of statute, and it is clear that neither the law in Victoria nor the law in Queensland prevents a search warrant from being granted in respect of documents covered by journalists' source privilege; rather, the law simply allows a journalist to refuse to comply with a search warrant that has already been granted: ibid ss 14Z, 14ZC; *Evidence Act 2008* (Vic) ss 126K, 131A(1).

privilege is irrelevant to the issuance of media warrants and, even if it was a relevant consideration, the application takes place ex parte and without notice to the relevant organisation, journalist, or even a third-party representative (such as a special advocate or PIA).

C *PJCIS Recommendations: The Public Interest Advocate*

The PJCIS examined the problem of protecting press freedom in federal police investigations in its Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press. Relevantly, the PJCIS made two principal recommendations. Those were, first, that the power to grant warrants relating to journalists and/or media organisations be limited to superior court judges[112] and, second, that 'the interests of the principles of public interest journalism'[113] be represented by an independent PIA in all federal media warrant applications.[114] In arriving at these recommendations, the PJCIS accepted the AFP's submissions that providing notice of a warrant application so as to enable an *inter partes* rather than an ex parte hearing would risk the destruction of evidence and, it follows, the effectiveness of police investigations.[115] In lieu of a contested process, a PIA would make submissions on a range of matters, including the privacy of those affected by the warrant, the gravity of the matter in relation to which the warrant is sought, the degree of assistance that the information would provide, whether reasonable attempts have been made to obtain the information by other means, as well as the public interest in preserving the confidentiality of journalistic sources and 'the exchange of information between journalists and members of the public to facilitate reporting of matters in the public interest'.[116]

The federal Coalition government accepted the PJCIS recommendations in October 2020,[117] but failed to implement them before the change of government in 2022. A separate inquiry by the Senate Environment and Communications References Committee on freedom of the press endorsed the recommendations of the PJCIS and encouraged their urgent implementation.[118]

[112] *PJCIS Report* (n 12) 82–3 [3.139].

[113] Ibid 83 [3.139].

[114] Ibid 82–3 [3.139].

[115] Ibid 61–2 [3.57]–[3.58], 78 [3.118].

[116] Ibid 82 [3.139].

[117] See generally Australian Government, *Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security Report: Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Report, October 2020).

[118] *Senate Report* (n 14) xi (recommendations 14–15), 109–10 [6.93]–[6.105].

There are compelling reasons why applications for media warrants should be heard and determined only by superior court judges. Indeed, this is consistent with the position not only in Queensland, but also in the UK and Canada.[119] However, as a whole, the PJCIS proposal provides little more than tokenistic protection for the press. Remarkably, the PJCIS did not recommend any change to the existing threshold test: it recommended that the PIA make submissions regarding press freedom without indicating the relevance of, or the weight to be given to, those submissions. This approach stands in contrast to the press freedom-focused balancing tests applied in other contexts.[120]

The PJCIS reform proposal also lacks sufficient procedural safeguards. The role of the PIA is modelled on the 'journalist information warrant' ('JIW') process under the federal metadata retention regime contained in the *Telecommunications (Interception and Access) Act 1979* (Cth).[121] Under this regime, a JIW is required before law enforcement authorities are permitted to access a journalist's metadata[122] where the purpose of the access is to identify the journalist's confidential source.[123] PIAs were included in the scheme to assuage concerns

[119] *Criminal Code*, RSC 1985, c C-46, s 488.01(2) ('*Canadian Criminal Code*'); *Police and Criminal Evidence Act 1984* (UK) sch 1 para 1 ('*PACE*'). But see *Investigatory Powers Act 2016* (UK) s 30(1).

[120] See above Part III(B) (on Queensland); *Telecommunications (Interception and Access) Act 1979* (Cth) ss 180L, 180T. For further discussion, see generally Rebecca Ananian-Welsh, 'Journalistic Confidentiality in an Age of Data Surveillance' (2019) 41(2) *Australian Journalism Review* 225, 235 ('Journalistic Confidentiality'); Benedetta Brevini, 'Metadata Laws, Journalism and Resistance in Australia' (2017) 5(1) *Media and Communication* 76.

[121] *Telecommunications (Interception and Access) Act 1979* (Cth) pt 4-1 div 4C. Note that the PIA model also applies to 'identify and disrupt' powers introduced in 2021: see, eg, *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth) sch 1 items 52–62. These powers enable warrants to be granted to remotely access computers to disrupt data, to access data used by criminal networks, and to take control of online accounts. A detailed analysis of these powers is beyond the scope of this paper. However, it should be noted that the protection of journalists under these new powers is extremely weak: see, eg, *Surveillance Devices Act 2004* (Cth) ss 27KC(2)(ce), 27KM(2)(fa). See also *Crimes Act 1914* (Cth) s 3ZZUP(2)(dc).

[122] That is, data *about* a communication, rather than the content of the communication itself: see Ananian-Welsh, 'Journalistic Confidentiality' (n 120) 227. Note that the Act does not use the word metadata, but contains a table of various kinds of information that must be retained and that may be accessed under the scheme: *Telecommunications (Interception and Access) Act 1979* (Cth) s 187AA. This information may depart from technical understandings of metadata, but it generally complies with the notion that it is data about the given communication, rather than the content of that communication itself.

[123] *Telecommunications (Interception and Access) Act 1979* (Cth) ss 180G–180H. Where the metadata is sought to be accessed by the Australian Security Intelligence Organisation, the Attorney-General has statutory power to grant a JIW: ss 180J, 180L. Where access is sought by any other enforcement agency, judges, magistrates and members of the Administrative Appeals Tribunal who have been appointed by the Attorney-General have the power to grant a JIW: ss 6DC, 180Q.

that applications were made ex parte, in secret, and without notice to the journalist.[124] The PIA plays the role of amicus curiae by putting before the issuing authority submissions as to whether the JIW should be granted in the public interest.[125] However, they are not permitted to communicate with the journalist,[126] and may therefore be limited to providing abstract submissions regarding freedom of the press and the importance of maintaining source confidentiality generally.[127] This, combined with the secrecy of the process, has led to the widely accepted view that the PIA provides limited, if any, meaningful protection to press freedom — even where press freedom has a clear place in the applicable tests to be applied.[128]

The role of the PIA in the PJCIS proposal would be similarly limited. They would also face an additional hurdle of providing submissions on issues with no clear relevance to the determination. This suggests the PJCIS model would be considerably weaker than even the extended shield models in Victoria and Queensland.

IV Canada and the UK: Rights-Informed Statutory Frameworks

In Canada and the UK, robust protections exist to regulate the search and seizure of journalistic materials. UK law provides a broad statutory immunity for confidential materials (outside the national security context), combined with a dedicated *inter partes* production order regime for state access to non-confidential journalistic material. The Canadian approach occupies a middle ground between Australia's shield models and UK production orders. Like Australia,

124 Ibid ss 180L(2)(b)(v), 180T(2)(b)(v). See also Madeleine Wall, 'Data Retention and Its Implications for Journalists and Their Sources: A Way Forward' (2018) 22(3) *Media and Arts Law Review* 315, 325.

125 *Telecommunications (Interception and Access) Act 1979* (Cth) s 180X.

126 See Sal Humphreys and Melissa de Zwart, 'Data Retention, Journalist Freedoms and Whistleblowers' (2017) 165(1) *Media International Australia* 103, 106; Wall (n 124) 338.

127 Wall (n 124) 338.

128 Ibid 325, 337–9. See also Media, Entertainment & Arts Alliance, *Criminalising the Truth, Suppressing the Right To Know: The Report into the State of Press Freedom in Australia in 2016* (Report, 2016) 70; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Thirty-Second Report of the 44th Parliament* (Report, 1 December 2015) 47–8 [1.247]–[1.248]; Richard Ackland, 'Data Retention: "Journalist Information Warrants" Are Warrants in Name Only', *The Guardian* (online, 22 March 2015) <https://www.theguardian.com/commentisfree/2015/mar/23/data-retention-journalist-information-warrants-are-warrants-in-name-only>, archived at <https://perma.cc/8D3R-DTX8>; Clinton Fernandes and Vijay Sivaraman, 'It's Only the Beginning: Metadata Retention Laws and the Internet of Things' (2015) 3(3) *Australian Journal of Telecommunications and the Digital Economy* 47, 52; Brevini (n 120) 78–9.

Canada has introduced press freedom 'add-ons' which supplement orthodox investigatory procedures. However, the quality and scope of these protections far exceed those in Victoria and Queensland.

A *Canada: Layered Statutory and Common Law Protections*

The *Journalistic Sources Protection Act*, SC 2017, c C-5 ('*JSPA*') amended the *Criminal Code*, RSC 1985, c C-46 ('*Canadian Criminal Code*') to provide journalists with enhanced protection in the context of a range of investigatory orders, including search and seizure warrants[129] and production orders.[130] Under the *JSPA*, an application for a warrant or production order that relates to either a journalist's communications or an 'object, document or data relating to or in the possession of a journalist' must be made before a superior court judge, rather than a justice of the peace (as is ordinarily required).[131] Furthermore, the judge may only issue the order if, in addition to being satisfied as to the regular statutory conditions for the order, they are also satisfied by the applicant that:

- there is no other way by which the information can reasonably be obtained; and
- the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.[132]

These two additional substantive conditions — the '*JSPA* conditions' — codify and strengthen protections that had already been developed under the common law to guide the exercise of the judicial discretion to grant police access to journalistic materials — known as the '*Lessard* framework'.[133] While the *JSPA* now governs the issuance of media warrants and production orders, the *Lessard* framework remains relevant to its interpretation and application.[134]

[129] *Journalistic Sources Protection Act*, SC 2017, c C-5, s 3 ('*JSPA*'), inserting *Canadian Criminal Code* (n 119) ss 488.01–488.02, which apply to ss 487–487.01, 487.1.

[130] *Canadian Criminal Code* (n 119) ss 487.014–487.017.

[131] Ibid s 488.01(2).

[132] Ibid s 488.01(3).

[133] See below Part IV(A)(1).

[134] See, eg, Justin Safayeni and Mannu Chowdhury, 'Bad Ad(Vice): On the Supreme Court's Approach to Press Freedom, Source Protection and State Interests in *R v Vice Media Canada Inc*' (2020) 94 *Supreme Court Law Review (2d)* 415, 423.

1 *Substantive Protection: Balancing under the* JSPA *and the* Lessard *Framework*

The *Lessard* framework was established in the companion cases of *Canadian Broadcasting Corporation v Lessard*[135] and *Canadian Broadcasting Corporation v Attorney General (New Brunswick)* ('*New Brunswick*'),[136] and was designed to take into account the important role performed by the media in a free and democratic society[137] and to accommodate the rights and freedoms afforded to the media under the *Canadian Charter of Rights and Freedoms* ('*Canadian Charter*').[138] In developing the framework, the Supreme Court of Canada held that the issuance of search and seizure warrants against the media does not *directly* engage the right to freedom of expression under s 2(b) of the *Canadian Charter*. Instead, the *Lessard* framework requires that a balance be struck between the media's right to *privacy* in gathering and disseminating news (protected under s 8 of the *Canadian Charter*) and the state's interest in investigating and prosecuting crime. However, in considering that balance, the Supreme Court of Canada recognised that the right to freedom of expression provides a 'backdrop' against which to evaluate whether the interference with the media's right to privacy was 'reasonable' in all of the circumstances.[139]

In 2018, the *Lessard* framework was refined and reorganised by Moldaver J in *R v Vice Media* ('*Vice Media (Supreme Court)*')[140] — a case based on the law

[135] *Lessard* (n 68).

[136] [1991] 3 SCR 459 ('*New Brunswick*').

[137] See *Lessard* (n 68) 444–5 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ, L'Heureux-Dubé J agreeing at 436); ibid 475 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ); *National Post* (n 58) 527 [79] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ).

[138] *Canada Act 1982* (UK) c 11, sch B pt I. See *New Brunswick* (n 136) 475–8 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ); *National Post* (n 58) 527 [79] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ).

[139] *New Brunswick* (n 136) 475–6, 478 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ). Note that Abella J, writing for Wagner CJ, Abella, Karakatsanis and Martin JJ in *Vice Media (Supreme Court)* (n 58), held in a minority opinion that s 2(b) provides a distinct and independent constitutional right to 'freedom of the press' that protects the media's work product (as compared to the media having a mere derivative right from the broader notion of freedom of expression), and that this right, along with the media's right to privacy under s 8, should be explicitly balanced against the public's interest in investigating and prosecuting crimes: at 434–46 [122]–[151]. For arguments in favour of recognising a distinct 'free press' right under s 2(b), see generally Benjamin J Oliphant, 'Would Independent Protection for Freedom of the Press Make a Difference? The Case of *R v Vice Media Canada Inc*' (2020) 98 *Supreme Court Law Review (2d)* 273.

[140] *Vice Media (Supreme Court)* (n 58) 418–20 [82]–[83] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ).

as it existed prior to the *JSPA* coming into force.[141] Justice Moldaver's formulation requires that the authorising judge undertake a 'four-part analysis'.[142] The third part — the 'heart'[143] — of the newly framed *Lessard* framework reflects the balancing of investigatory, prosecutorial and privacy interests now required by the second *JSPA* condition.[144] Justice Moldaver set out a non-exhaustive list of relevant considerations to guide this balancing of interests, namely:

> (a) the likelihood and extent of any potential chilling effects (b) the scope of the materials sought and whether the order sought is narrowly tailored (c) the likely probative value of the materials (d) whether there are alternative sources from which the information may reasonably be obtained and, if so, whether the police have made all reasonable efforts to obtain the information from those sources (*Lessard*, factor 5) (e) the effect of prior partial publication, … assessed on a case-by-case basis (*Lessard*, factor 6) and (f) more broadly, the vital role that the media plays in the functioning of a democratic society and the fact that the media will generally be an innocent third party (*Lessard*, factor 3).[145]

In *New Brunswick*, Cory J also identified as relevant 'the nature of the objects to be seized, the manner in which the search is to be conducted and the degree of urgency of the search'.[146]

Under the balancing exercise, if it is considered that the warrant or production order would impede the media's ability to gather and disseminate news in such a way that could not be avoided by the imposition of conditions on the execution of the warrant, then a warrant should only be granted 'where a compelling state interest is demonstrated'.[147] This might be established by reference to 'the gravity of the offence under investigation and the urgent need to obtain the evidence expected to be revealed by the search'.[148] Alternatively, as reflected in the list above, it might also be satisfied where there are no alternative sources of the information sought to be obtained or, if an alternative source exists,

[141] This was because the production order under appeal was issued before the *JSPA* (n 129) was brought into force: ibid 389–90 [6].

[142] *Vice Media (Supreme Court*) (n 58) 418 [82] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ). See also at 419–20 [82]. Only the first and third parts of the newly cast *Lessard* framework are relevant to our analysis: the requirement to give notice to the media, and the substantive balancing exercise that dictates whether an order should be granted.

[143] Safayeni and Chowdhury (n 134) 418.

[144] *Vice Media (Supreme Court)* (n 58) 419–20 [82] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ).

[145] Ibid.

[146] *New Brunswick* (n 136) 476 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ).

[147] Ibid.

[148] Ibid.

where reasonable steps have been taken to obtain the information from that source.[149] Importantly, this alternative source requirement is now reflected in the first *JSPA* condition.[150] However, the *JSPA* strengthens the *Lessard* framework by elevating the absence of a reasonably available alternative source from a *highly relevant factor* to a standalone *precondition* that must be satisfied by the applicant before a media warrant can be granted.

The *JSPA* conditions for *granting* media warrants and production orders (as opposed to the procedure for challenging the inspection of material seized under such orders),[151] do not distinguish between materials capable of revealing the identity of a confidential source, and those which are not. However, somewhat complicating matters, such a distinction is recognised under the common law in the form of a special privilege, which operates in tandem with the application of the *Lessard* framework.[152] As with the *Lessard* framework itself, this privilege is now relevant to the balancing of interests under the second *JSPA* condition. In *R v National Post* ('*National Post*'), a majority of the Supreme Court of Canada recognised that reliance upon confidential sources is an important element in the newsgathering functions of the press, and held that:

> the law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests — including criminal investigations.[153]

However, the majority stopped short of establishing a strong constitutional immunity[154] or broader class-based privilege.[155] Instead, it gave authority to a common law privilege, to be established on a case by case basis according to the so-called 'Wigmore criteria'.[156] The burden of establishing the confidentiality-based privilege rests on the media or journalist, who must establish that the public interest in 'protecting the identity of the informant from disclosure

[149] Ibid. Note, however, that Cory J rejected the notion that the absence of alternative sources was a constitutional prerequisite for the issuance of a search and seizure warrant against the media: at 478. See also *Lessard* (n 68) 446 (Cory J for Sopinka, Gonthier, Cory and Stevenson JJ).

[150] *Canadian Criminal Code* (n 119) s 488.01(3)(a).

[151] See below Part IV(A)(2).

[152] *Vice Media (Supreme Court)* (n 58) 400–2 [33]–[38] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ).

[153] *National Post* (n 58) 505 [34] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ).

[154] Ibid 506–8 [37]–[41].

[155] Ibid 508–12 [42]–[49].

[156] Ibid 513–14 [51]–[53].

outweighs the public interest in getting at the truth.'[157] The weighing up will involve consideration of a range of factors including

> the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist's promise of confidentiality.[158]

The majority in *National Post* further indicated that the underlying purpose of the investigation is significant: for example, an investigation conducted with the objective of silencing a secret source (eg a whistleblower) may justify a court's refusal to order disclosure.[159]

2 *Procedural Protections*

The enhanced substantive protections in the *JSPA* sit alongside a number of key procedural protections for the press. As mentioned above, applications for access to journalistic materials must now be determined by a superior court judge.[160] In addition, the scheme created by the *JSPA* and the *Lessard* framework provides procedural protections in the form of notice, special advocates, and the safekeeping of material.

The first part of Moldaver J's reformulated *Lessard* framework provides that the judge must consider whether to give *notice* of the application to the media.[161] While the statutory status quo is that search and seizure warrants and production orders are granted on an ex parte basis and without notice, the authorising judge retains an overriding discretion to require that the media be given prior notification to enable them to appear and contest an application for

[157] Ibid 514 [53]. See also at 516–17 [60].

[158] Ibid 517 [61]. In relation to the latter public interest, the majority said at 519 [64] (emphasis in original):

> The public interest in free expression will *always* weigh heavily in the balance. While confidential sources are not constitutionally protected, their role is closely aligned with the role of the 'freedom of the press and other media of communication', and will be valued accordingly …

In *Globe and Mail v A-G (Canada)* [2010] 2 SCR 592, the Supreme Court of Canada indicated that the reasonable availability of the information from alternative sources is a crucial, arguably determinative, factor in tipping the scales in favour of protecting a confidential source. This is because an order compelling a journalist to reveal confidential information should only be made where it is necessary and, therefore, where it is found to be a '*last resort*': at 628–9 [62]–[63] (LeBel J for the Court) (emphasis added).

[159] *National Post* (n 58) 517–18 [62] (Binnie J for McLachlin CJ, Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ).

[160] *Canadian Criminal Code* (n 119) s 488.01(2).

[161] *Vice Media (Supreme Court)* (n 58) 418–19 [82] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ).

a warrant or production order.[162] While Moldaver J refused to recognise a requirement, or even a presumption, that the media should be given notice,[163] he did indicate that judges should ordinarily insist on notice in the absence of evidence of 'urgency or other circumstances' that would otherwise justify an ex parte proceeding.[164] Justice Abella in her concurring opinion said that it will only be in '*rare cases* where the Crown can show that there are exigent circumstances or that there is a real risk of the destruction of evidence' such that prior notice to the media 'may not be feasible'.[165] The *JSPA* does not require that the journalist or media organisation be given prior notification of an application. However, it is presumed that the approach set out in *Vice Media (Supreme Court)* will continue to apply and that a judge should ordinarily require that notice be given to the media unless the police can provide evidence as to why the application should be heard ex parte.

Alongside the usual requirement for notice, the *JSPA* contains two express protections for the media. First, it provides that the authorising judge has the discretion to request that a 'special advocate present observations in the interests of freedom of the press' as they pertain to the *JSPA* conditions.[166] Thus, the *JSPA* special advocate has a clearer role and importance than the PIA proposed by the PJCIS.[167] It is likely that submissions from a *JSPA* special advocate will only be requested where the journalist or media organisation against whom the order has been sought has not been given the opportunity to make submissions on the application. Furthermore, the media's request for the appointment of a

[162] Ibid.

[163] Ibid 411–12 [65].

[164] Ibid 412 [66]. See also at 418 [80]. However, at 412 [67] (emphasis in original), Moldaver J said that 'bare assertions' will not constitute sufficient evidence:

> To illustrate, a broad and unsupported claim that the media is unlikely to cooperate with police or that the media could theoretically put the materials beyond the reach of authorities if notice were to be given — which is *always* a risk to at least some degree — should not suffice.

In a separate concurring judgment, Abella J largely adopted the approach of Moldaver J on the issue of notice. She observed that while notice is ultimately a matter of discretion for the authorising judge, 'it is, obviously, highly preferable in most cases to proceed on notice to the media rather than ex parte': at 448 [153] (Abella J for Wagner CJ, Abella, Karakatsanis and Martin JJ) (emphasis omitted).

[165] Ibid 448 [154] (Abella J for Wagner CJ, Abella, Karakatsanis and Martin JJ) (emphasis added).

[166] *Canadian Criminal Code* (n 119) s 488.01(4).

[167] See above Part III(C).

special advocate will be contingent on the media first receiving notice of the application for the *JSPA* order.[168]

Finally, the *JSPA* establishes a 'bifurcated procedure' — along the lines of that adopted in Queensland — to ensure that privacy rights are not unjustifiably intruded upon.[169] Under this procedure, any document obtained from a journalist or media organisation pursuant to a relevant order must be placed in a sealed packet and kept in the custody of the court in a secure place.[170] It is not to be examined or reproduced by a public officer (including the police) unless they provide notice to the journalist or media organisation.[171] Within 10 days of receiving such notice, the journalist or media organisation may apply for an order that the document is not to be disclosed to an officer on the ground that it will or is likely to disclose a *confidential* journalistic source.[172] If such an application is made, the document may only be disclosed to an officer if the court grants a disclosure order.[173] A disclosure order will only be granted where the *JSPA* conditions are satisfied.[174] As with the granting of the warrant or production order used to obtain the document, this will involve the application of the *Lessard* factors as well as a case by case application of journalists' common law privilege in respect of confidential sources.[175] If a disclosure order is not

168 Note that where such an application is made, it appears that the onus is on the media to establish how the special advocate would be of assistance: see *R v Canadian Broadcasting Corporation* [2018] OJ No 5117, [25] (MR Dambrot J) ('*R v CBC*').

169 Ibid [20].

170 *Canadian Criminal Code* (n 119) s 488.02(1). Unlike in Queensland, this requirement is not contingent on a person contesting access to the material during the execution of the order: cf *Evidence Act 1997* (Qld) s 14ZC.

171 *Canadian Criminal Code* (n 119) s 488.02(2).

172 Ibid s 488.02(3). 'Journalistic source' is defined in s 39.1(1) of the *Canadian Evidence Act* (n 63):

> [J]ournalistic source means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source.

In *R v CBC* (n 168), it was held by MR Dambrot J that a source whose identity is known to law enforcement does not cease to be a confidential journalistic source, provided the journalist has 'undertak[en] not to divulge the identity of [the] source': at [20].

173 *Canadian Criminal Code* (n 119) s 488.02(4).

174 Ibid s 488.02(5).

175 Note that the *JSPA* (n 129) s 2 also introduced a new evidentiary shield provision into the *Canadian Evidence Act* (n 63). However, this shield is not relevant to the balancing exercise under the bifurcated procedure in the *Canadian Criminal Code* (n 119). Certainly, there is no cross-reference between the evidentiary shield provisions and the relevant provisions of the *Canadian Criminal Code* (n 119). The shield was recently considered by the Supreme Court of Canada: *Denis v Côté* [2019] 3 SCR 482.

granted, the judge must order that the document be returned to the journalist or media outlet.[176]

There are two important points to note about the bifurcated procedure. First, where it is apparent that a warrant or production order is applied for in relation to a document that will or is likely to reveal a *confidential* journalistic source, the court may be unwilling to insist that notice and/or a right to be heard on the application be granted to the media. This is because the media will be entitled to object to disclosure under the bifurcated procedure once the document has been obtained and is in the custody of the court. In *R v Canadian Broadcasting Corporation*, for example, the Ontario Superior Court of Justice refused the request of the Canadian Broadcasting Corporation ('CBC') that an application for a production order with respect to confidential source information be conducted on an *inter partes* basis.[177] According to MR Dambrot J, to grant the media a right to be heard on the application would result in the bifurcated procedure giving the CBC 'a second kick at the can'.[178] However, this reasoning assumes that the application for the production order would be granted — the very thing the CBC wished to challenge. Furthermore, by refusing to accede to the CBC's request, the decision can be seen as having the effect of simply 'kicking the can down the road' on the ultimate question of whether the *JSPA* conditions are satisfied.

Second, the media's right to object to the disclosure of material in the custody of the court under the bifurcated procedure applies *only* to confidential source information. Therefore, the media must look to alternative legal avenues to prevent the police from examining all other types of journalistic material in the court's possession (for example, non-confidential documents or confidential documents obtained from a non-confidential source). In practice, this is unlikely to arise as an issue in the case of production orders. It is expected that the media will rely upon a dedicated statutory right of review of production orders contained in the *Canadian Criminal Code* to have a production order revoked *before* documents are produced and, therefore, before they are placed in the custody of the court.[179] However, the position with respect to material obtained pursuant to a warrant is almost certain to be problematic. There is no

176 *Canadian Criminal Code* (n 119) s 488.02(7)(a).

177 *R v CBC* (n 168) [19] (MR Dambrot J).

178 Ibid [20].

179 *Canadian Criminal Code* (n 119) s 487.0193. Under this provision, a production order may be revoked or varied if 'production of the document would disclose information that is privileged or otherwise protected from disclosure by law': s 487.0193(4)(b). Notice of an intention to apply for review must be given to a 'peace officer or public officer named in the order' within 30 days of the production order being granted: s 487.0193(2).

statutory right under the *Canadian Criminal Code* to have a warrant reviewed,[180] nor is there a statutory right of appeal;[181] instead, the usual course with respect to the review of warrants issued under the *Canadian Criminal Code* is an application for certiorari in a superior court to have the warrant quashed.[182] However, by confining the exercise of the power to grant media warrants to superior court judges, the *JSPA* effectively removes this option. This is because 'certiorari does not lie against a decision of a superior court judge'.[183] The only remaining option is to seek leave to appeal directly to the Supreme Court of Canada,[184] though the prospects of being granted leave are likely to be remote. Consequently, in the absence of a clear path to object to police access to journalistic material (other than confidential source material) once it has been seized under a warrant, it is of crucial importance that the media, unless compelling reasons dictate otherwise, be afforded the right to appear and be heard on a media warrant application before the issuing judge.

Despite these apparent limitations, the scheme created by the *JSPA*, the *Lessard* framework, and the *Canadian Charter* represents a significant advancement on the extended shield models of Queensland and Victoria. It layers comparatively robust substantive and procedural protections at the application, execution and review stages. However, by adapting pre-existing regimes for warrants and production orders, it is subject to potentially problematic uncertainties and convolutions, particularly as to the interactions between the common law, *Charter* rights, and statute.

B *The UK: Contested Production Orders*

Rather than adapting traditional processes, UK law creates specialised statutory frameworks for state access to journalistic materials. These frameworks extend

[180] James A Fontana and David Keeshan, *The Law of Search and Seizure in Canada* (LexisNexis, 12th ed, 2021) 396.

[181] *Kourtessis v Minister of National Revenue* [1993] 2 SCR 53, 72 (La Forest J for La Forest, L'Heureux-Dubé and Cory JJ); *Goldman v Hoffman-LaRoche Ltd* (1987) 60 OR (2d) 161, 178 (Finlayson JA for the Court).

[182] *Canadian Criminal Code* (n 119) s 784.

[183] *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835, 865 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ) (emphasis omitted) ('*Dagenais*'). See also *Vice Media (Supreme Court)* (n 58) 412–13 [68] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ).

[184] *Supreme Court Act*, RSC 1985, c S-26, s 40. This is also the position with respect to publication bans issued by superior court judges: *Dagenais* (n 183) 860–1 (Lamer CJ for Lamer CJ, Sopinka, Cory, Iacobucci and Major JJ).

significant protection to press freedom and have been described as 'the high-water mark of journalistic protections'.[185]

1 *The* Police and Criminal Evidence Act 1984 *(UK)*

Search and seizure warrants and other investigatory powers in the UK are predominantly governed by the *Police and Criminal Evidence Act 1984* (UK) ('*PACE*'). A search warrant may be granted under s 8 where there are reasonable grounds for believing that material exists on a specified premises, that the material is likely to be of substantial value to the investigation of an indictable offence, and that it is likely to constitute relevant evidence. However, warrants may not generally be issued under the *PACE* in respect of 'journalistic material',[186] defined broadly as 'material acquired or created for the purposes of journalism'.[187] Ordinarily, such material may only be accessed by police by obtaining a *production order* pursuant to a special procedure contained in the *PACE*.[188] A warrant, rather than a production order, may *only* be issued in respect of journalistic material on the rare occasion where there is specific evidence that notice of the production order would 'seriously prejudice the investigation', or where it is not practicable to communicate with any person entitled to grant entry to the premises or access to the material.[189]

As in Canada, all *PACE* production orders in respect of journalistic material must be sought from a judge, rather than from a magistrate or a justice of the peace.[190] Moreover, the judge must provide detailed reasons for their

[185] Romana Canneti, 'What Price a Free Press?' (2019) 169(7847) *New Law Journal* 11, 12. Note, however, that the UK provisions are not without controversy. The robust protections are not always complied with, and the media do not always challenge noncompliance due to resource constraints: see Gavin Millar and Andrew Scott, *Newsgathering: Law, Regulation, and the Public Interest* (Oxford University Press, 2016) 64 [4.05].

[186] *PACE* (n 119) ss 8(1)(d), 9(1), 11(1)(c).

[187] Ibid s 13(1). Note, however, that the definition excludes material that is out of the possession of a person who acquired or created it for the purposes of journalism: s 13(2).

[188] Ibid s 9(1). See also sch 1. Where a production order is granted, the material must be provided to the police within seven days from the date of the order or some other specified period: sch 1 para 4.

[189] Ibid sch 1 paras 12, 14. See especially sch 1 paras 14(a)–(b), (d). See, eg, *Re Fine Point Films* [2021] NI 387 ('*Fine Point Films*'), where a search warrant relating to documents obtained from a confidential source was issued because a production order may have seriously prejudiced the investigation: at 398–9 [28] (Morgan LCJ for the Court). This order was quashed on judicial review on the basis that there was no evidence presented to the judge that the journalist would destroy or otherwise dispose of the documents: at 402–3 [46]–[47], 404 [53]–[55].

[190] *PACE* (n 119) sch 1 para 1.

decision,[191] the journalist or media organisation who would be subject to the production order must be notified of the application,[192] and the application must be heard on an *inter partes* basis *without exception*.[193] The critical importance of this final requirement has been emphasised in case law. For instance, in *R (British Sky Broadcasting Ltd) v Central Criminal Court*, the Supreme Court of the United Kingdom linked the *inter partes* requirement to a notion of equal treatment, whereby each party should know what the other is asking the court to take into account in making its decision, and have a fair opportunity to respond.[194]

The availability of a *PACE* production order rests, first, on whether the journalistic material is confidential or non-confidential. Generally speaking, a production order may not be granted *at all* in respect of confidential journalistic material[195] — referred to as 'excluded material'.[196] Thus, confidential journalistic material simply cannot be accessed by police during an investigation.[197] A narrow exception relates to search powers that predate the *PACE*.[198]

[191] According to Moses LJ, reasons '[provide] an important discipline on the decision-maker and assists in providing some assurance that the judge has scrupulously examined the facts and those features which favour disclosure against those which militate against it': *Chelmsford Crown Court* (n 68) 465 [42].

[192] *PACE* (n 119) sch 1 paras 7–9.

[193] Ibid sch 1 para 7. Note, however, that in the exceptional circumstances where a search warrant (rather than a production order) would be justified under sch 1 para 12, the application is heard ex parte: s 15(3). The UK courts have maintained robust standards for fairness in such ex parte applications. Specifically, the applicant is obliged not only to alert the judge that free speech and free press rights 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) ('*ECHR*') have been engaged, but also to provide relevant jurisprudence around that: see *R (Malik) v Manchester Crown Court* [2008] 4 All ER 403, 418 [101] (Dyson LJ for the Court) ('*Malik*'); *Fine Point Films* (n 189) 402 [41]–[42] (Morgan LCJ for the Court).

[194] *British Sky Broadcasting (Supreme Court)* (n 41) 895 [30] (Lord Toulson JSC for Baroness Hale DPSC and Lords Kerr, Reed, Hughes and Toulson JJSC).

[195] *PACE* (n 119) sch 1 paras 1–2.

[196] Ibid s 11. For a discussion of how different legislative schemes for the seizure of material may work together to circumvent this protection for journalistic confidentiality, see Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006) 373.

[197] Contrast this with the position during court processes under the *Contempt of Court Act 1981* (UK) s 10.

[198] *PACE* (n 119) s 9(2) provides that pre-existing search and seizure powers cease to have effect in relation to all journalistic material. However, sch 1 para 3 provides that if, but for s 9(2), a search warrant *could have* been authorised under a prior enactment that remains in force, a production order (rather than a search warrant) may be issued if the warrant 'would have been

In respect of non-confidential journalistic material (referred to as 'special procedure material'),[199] a production order may be issued if 'access conditions' set out in sch 1 of the *PACE* are satisfied.[200] Alongside the standard requirements for a search warrant set out above,[201] two conditions must be met. First, as under the *JSPA*, it must be established that other methods of obtaining the material have either been tried unsuccessfully or not tried because they would be futile.[202] Second, it must be established that it is in the public interest that the material should be produced or given access to, having regard to the benefits to the investigation and the circumstances under which the material is held by the person.[203] The judge must not proceed 'on the basis of bare assertion by a police officer' that these conditions are met;[204] they must be personally satisfied that the requirements have been established by '[a] close and penetrating examination of the facts advanced by way of justification'.[205] Furthermore, it is imperative that the application identify specific material that will assist in the investigation of a specific offence — a 'scattergun approach'[206] or fishing expedition is not permitted.[207] Finally, in assessing the criteria,

> [t]here must at least be cogent evidence as to: (i) what the [material] sought is likely to reveal; (ii) how important such evidence would be to carrying out

appropriate' in the circumstances. This includes search warrants that could have been granted in relation to confidential journalistic material under s 9 of the *Official Secrets Act 1911*, 1 & 2 Geo 5, c 28, cited in Miller and Scott (n 185) 69 [4.18]. See also *British Sky Broadcasting (Supreme Court)* (n 41) 887 (J Lewis QC and S Naqshbandi) (during argument). This also includes warrants that could have been granted under s 26 of the *Theft Act 1968* (UK) in respect of stolen material obtained by a journalist from a confidential source: Mark Hanna and Mike Dodd, *McNae's Essential Law for Journalists* (Oxford University Press, 25th ed, 2020) 440 [34.6.1.2]. On stolen documents obtained from a confidential source, see generally *Fine Point Films* (n 189).

199 *PACE* (n 119) s 14.

200 Ibid sch 1 paras 1–3.

201 Ibid sch 1 para 2(a), which substantially replicates s 8(1).

202 Ibid sch 1 para 2(b).

203 Ibid sch 1 para 2(c).

204 *Bright* (n 67) 673 (Judge LJ); *Chelmsford Crown Court* (n 68) 459 [13] (Eady J).

205 *Chelmsford Crown Court* (n 68) 463–4 [34] (Moses LJ). See also *R v Shayler* [2003] 1 AC 247, 281 [61] (Lord Hope).

206 *Chelmsford Crown Court* (n 68) 460 [19] (Eady J).

207 Ibid 460–1 [18]–[19], 463 [31]. Cf *R v Bristol Crown Court; Ex parte Bristol Press and Picture Agency Ltd* (1987) 85 Cr App R 190, 195 where Glidewell LJ said:

> [I]n my view the learned judge was perfectly entitled to conclude that the material before him, albeit that in its nature it could not identify any particular photograph as relating to any particular incident of violence or other criminal offence, satisfied [the relevant access criteria].

> the investigation; and (iii) why it is necessary and proportionate to order the intrusion by reference to other potential sources of information.[208]

This should include evidence of what material is already in the hands of the police.[209]

If these criteria are satisfied, the judge nonetheless retains an overriding discretion whether to grant the order.[210] This residual discretion is considered a 'final safeguard against an oppressive order' and allows the judge to 'take account of matters which are not expressly referred to in the set of relevant access conditions',[211] including the 'exercise of an individual's right to free speech or [exercise by] the press of its freedom to investigate and inform'.[212] The discretion must be exercised compatibly with the right to freedom of expression under art 10 of the *European Convention on Human Rights* ('*ECHR*').[213] Specifically, the objective of the production order must be sufficiently important to justify interference with the right to disseminate information under art 10; the production order 'must be rational, fair and not arbitrary'; and, finally, it must interfere with the right to freedom of expression 'as little as is reasonably possible'.[214]

According to McNamara and McIntosh, a clear and overarching judicial discretion has been vital in ensuring that 'the public interest in media freedom and the relationship between source protection and the flow of information are given serious consideration' by the courts.[215] However, it should be noted that there are no publicly available decisions where a production order against the media or a journalist has been refused or quashed on judicial review on the basis of the discretion alone. Rather, in *all* available decisions, production orders were refused or quashed on the basis that the access conditions were either not satisfied or not properly considered by the granting judge.[216]

[208] See *Chelmsford Crown Court* (n 68) 463 [31] (Eady J), 464–5 [39]–[41] (Moses LJ).

[209] Ibid 463 [29]–[30] (Eady J), 464–5 [39]–[41] (Moses LJ).

[210] *Bright* (n 67) 678 (Judge LJ); ibid 459 [13] (Eady J), 464 [35] (Moses LJ).

[211] *Bright* (n 67) 678 (Judge LJ).

[212] Ibid 681.

[213] *ECHR* (n 193).

[214] *Chelmsford Crown Court* (n 68) 464 [35] (Moses LJ), citing *R (Gaunt) v Office of Communications* [2011] 1 WLR 2355, 2365 [33] (Lord Neuberger MR, Toulson LJ agreeing at 2369 [55], Etherton LJ agreeing at 2369 [56]).

[215] McNamara and McIntosh (n 22) 91. See also at 90–1, discussing *Bright* (n 67), *Malik* (n 193).

[216] *Fine Point Films* (n 189) 404 [55] (Morgan LCJ for the Court); *R (British Broadcasting Corporation) v Newcastle Crown Court* [2020] 1 Cr App R 16, 289 [56] (Leggatt LJ for the Court); *British Sky Broadcasting (Supreme Court)* (n 41) 895 [31] (Lord Toulson JSC for Baroness Hale DPSC and Lords Kerr, Reed, Hughes and Toulson JJSC); *Chelmsford Crown Court* (n 68)

2 *Terrorism Investigations*

Even in national security investigations where the risk and, therefore, the public interest in law enforcement could be at its highest, press freedom is given clear procedural and substantive protection. Following the introduction of the *PACE*, a specific regime for terrorism investigations was introduced through the *Terrorism Act 2000* (UK) ('*TA*'). This regime, contained in sch 5 of the *TA*, largely adopts the *PACE* regime, subject to three key differences. First, the *TA* provides a uniform process for granting production orders to access *both* confidential and non-confidential journalistic materials.[217] Second, there is no express requirement to establish that other methods of obtaining the material have either been tried unsuccessfully or not tried because they would be futile.[218] Third, the police are not required to notify the person against whom they are seeking a production order; therefore, applications proceed ex parte as a rule.[219] Despite this ex parte procedure, there is an obligation on the party making the application to lay before the court material relevant to the absent party's rights and interests.[220] Furthermore, the court has the power to request the Attorney General to appoint a special advocate to represent the interest of the journalist where it is required in the interests of justice, although it has been held that such power should only be exercised in an 'exceptional case and as a last resort'.[221]

As under the *PACE*, it must be established that there are reasonable grounds for believing that it is in the public interest that the material be produced, having regard to the likely benefit to the investigation and the circumstances under which the person concerned possesses the material.[222] Once this is satisfied, the judge maintains an overarching discretion to consider the circumstances of the

463 [32] (Eady J), 465–6 [44]–[45] (Moses LJ); *R (British Sky Broadcasting Ltd) v Central Criminal Court* [2012] QB 785, 798 [36] (Moore-Bick LJ for the Court); *Bright* (n 67) 685–8 (Judge LJ, Maurice Kay J agreeing at 688, Gibbs J agreeing at 699).

217 *Terrorism Act 2000* (UK) sch 5 para 5 ('*TA*'). See also McNamara and McIntosh (n 22) 89.

218 *Malik* (n 193) 415–16 [38]–[40] (Dyson LJ for the Court). However, it is established that any warrant, unless expressly authorised in legislation, should only be sought and granted as a 'last resort and should not be employed where other less draconian powers can achieve the relevant objective': *Sussex Police* (n 35) 2206 [26] (Elias LJ, Ouseley J agreeing at 2216 [73]).

219 See McNamara and McIntosh (n 22) 89.

220 *Malik* (n 193) 429 [101] (Dyson LJ for the Court). On the obligation of disclosure in the warrants context, see *Re Stanford International Bank Ltd* [2011] Ch 33, 109 [191] (Hughes LJ).

221 *Malik* (n 193) 428 [99] (Dyson LJ for the Court). See also at 428 [97]–[99], citing *R v H* [2004] 2 AC 134, 150–1 [22] (Lord Bingham for the Court) ('*R v H*'); *R (Roberts) v Parole Board* [2005] 2 AC 738, 803 [144] (Lord Carswell), citing *R v H* (n 221) 150–1 [22] (Lord Bingham for the Court).

222 *TA* (n 217) sch 5 para 6(3).

case, including whether the order is a proportionate and justified interference with the right to freedom of expression under art 10 of the *ECHR*. According to the Court in *R (Malik) v Manchester Crown Court* ('*Malik*'), considerable weight should be attributed to freedom of speech where an application for a production order is sought against a journalist, meaning that the application must be justified on clear and compelling grounds.[223] In particular, consideration should be given to

> the gravity of the activities that are the subject of the investigation, the benefit likely to accrue to the investigation and the weight to be accorded to the need to protect the sources.[224]

While the availability of alternative sources is not a relevant access condition under sch 5 of the *TA* (as it is under the *PACE* and the *JSPA*), it is a determining factor in assessing whether an order constitutes a justified and proportionate interference with art 10 rights. Indeed, as accepted in *Malik*,

> [b]efore the courts require journalists to break what a journalist regards as a most important professional obligation to protect a source, the *minimum requirement* is that other avenues should be explored.[225]

V The Elements of an Effective and Proportionate Framework

The above survey reveals a range of potential approaches to protecting press freedom in the investigatory context. This part critically examines these approaches with a view to identifying those elements best suited to facilitating an effective and proportionate framework of regulating state access to journalistic materials. These elements form the basis of our reform agenda in Part VI, though those recommendations must be tailored to the Australian context by, for instance, accounting for the absence of an overarching rights-protective framework akin to the *Canadian Charter* or *ECHR*.

In Part II, we argued that an appropriately designed search and seizure framework should do more than support law enforcement. In line with internationally accepted norms and standards regarding limitations on freedom of the press, its impacts on press freedom must be *proportionate* to achieving law

[223] See *Malik* (n 193) 418 [48] (Dyson LJ for the Court).

[224] Ibid 419 [56].

[225] Ibid 418 [50] (emphasis added), quoting *Express Newspapers* (n 58) 1939 [27] (Lord Woolf for the Court).

enforcement goals.[226] For our purposes, proportionality requires two things: first, that a law limiting freedom of the press will only be necessary and justified if legitimate (eg law enforcement) goals cannot be achieved by a less intrusive or restrictive measure; and, second, the extent of any interference with freedom of the press must be reasonable and proportionate to the attainment of those goals (ie proportionality *stricto sensu*).[227]

In our view, the question of proportionality applies to three broad aspects of those investigatory measures which curtail freedom of the press: the *mode* used by law enforcement authorities to obtain information from journalists and the media; the *substance* of the protections; and, finally, the *procedure* adopted where an investigatory order is sought and/or executed.

[226] For discussion, see Fenwick and Phillipson (n 196) 46–50; Daniel Joyce, *Informed Publics, Media and International Law* (Hart Publishing, 2020) 45–6. For a discussion of proportionality more broadly in constitutional and human rights law, see generally Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations*, tr Doron Kalir (Cambridge University Press, 2012). We note that in countries with human rights enshrined in law, the principle of proportionality may be used to determine the validity of a particular statutory power that authorises media warrants, and/or to determine whether a particular decision to grant a media warrant unlawfully curtails freedom of speech and/or freedom of the press. Of course, this will differ between jurisdictions. In Australia, the only protection against legislative interference with freedom of speech is the implied freedom of political communication contained in the *Australian Constitution*: see *Farm Transparency International Ltd v New South Wales* (2022) 403 ALR 1, 8–9 [26]–[29] (Kiefel CJ and Keane J, Gleeson J agreeing at 65 [271]), 19 [77] (Gageler J), 36 [152]–[153] (Gordon J), 52 [223] (Edelman J). We do not attempt to consider whether the various warrants regimes currently in operation in Australia are compatible with any particular constitutional or human rights system, nor do we consider what minimum protections for media freedom might be required to save a particular regime from being declared invalid in Australia or elsewhere. We note, however, that in *Australian Broadcasting Corporation v Kane [No 2]* (2020) 377 ALR 711 ('*Kane*'), the Federal Court of Australia held that the general warrants regime at the Commonwealth level, contained in s 3E of the *Crimes Act 1914* (Cth), was constitutionally valid: *Kane* (n 226) 769–70 [267]–[274], 782 [345] (Abraham J). This is despite the fact that s 3E does not contain special protections for the media. Justice Abraham found that while the operation of s 3E posed an indirect burden on freedom of political communication, it nevertheless served a legitimate aim and was 'reasonably appropriate and adapted': at 769–70 [266]–[270], 770 [274]. For discussion, see generally Rebecca Ananian-Welsh and Joseph Orange, 'The Confidentiality of Journalists' Sources in Police Investigations: Privacy, Privilege and the Freedom of Political Communication' (2020) 94(10) *Australian Law Journal* 777.

[227] See, eg, Grégoire Webber, 'Proportionality and Limitations on Freedom of Speech' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 173, 179–81, 184–92.

A *Mode*

It is critical that privacy and property rights only be intruded upon with the sanction of positive law.[228] Warrants are the usual form of that sanction and are significantly less intrusive than some other options (such as warrantless searches or surreptitious surveillance).[229] But is there a less intrusive option that is still capable of achieving law enforcement aims?

In the UK, both the *PACE* and the *TA* demonstrate the workability of an approach characterised by production orders in lieu of warrants. A similar scheme was recently before Parliament in NZ, where it would have replaced the existing extended shield model (which resembles, though extends beyond, Victorian law).[230] In Canada too, production orders can be issued against the press, although warrants are also available.

The preference for production orders over warrants from a press freedom perspective cannot be overstated.[231] First and foremost, the service of a notice to produce journalistic material, rather than the unannounced search of a newsroom or a premises occupied by a journalist under a warrant, avoids the risk that confidential information will be inadvertently disclosed. A production order scheme would also remedy a striking weakness in the Victorian and Queensland positions, namely, the absence of *any* protection for press freedom until privilege is actively asserted during the execution of a warrant. Relatedly, production orders avoid journalists and their employers bearing the burden of asserting their rights on an urgent basis during a police search.

Production orders also ensure there are adequate opportunities to avoid unnecessary intrusions, by creating room for legal advice and potential negotiation and cooperation between media and the police. They open the prospect of early compliance and a narrowing of issues or materials over which access is disputed. They also remove the action from the aggressive criminal justice setting and can avoid the physical intrusion of police officers on media

[228] See *Entick* (n 34) 817–18 (Lord Camden CJ), cited in *Smethurst* (n 34) 230 [124] (Gageler J).

[229] See, eg, *Crimes Act 1914* (Cth) s 3UEA.

[230] See generally Protection of Journalists' Sources Bill 2021 (NZ). But see Parliamentary Counsel Office (NZ) (n 21). For the current shield model, see *Search and Surveillance Act 2012* (NZ) s 136(1)(i).

[231] In a supplementary submission to the PJCIS inquiry, the Australia's Right to Know Coalition rejected a production order regime on the basis that it would offend a journalist's privilege against self-incrimination where the journalist subject to the production order is alleged to have committed an offence: Australia's Right to Know, Submission No 23.4 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (9 March 2020) 5–10 [27]–[51]. However, this would not be of concern where a production order is sought in respect of an offence committed by a person other than the journalist: see at 7–8 [44].

organisations' and journalists' premises.[232] Press freedom is undoubtedly impacted by the issuing of intrusive access orders and their execution, not only by the actual seizure of property and materials. Consider, for example, the likely chilling effects that news coverage of the AFP raids of June 2019 had on actual and potential journalistic sources. Crucially, production orders front-load press freedom considerations and protections, so that unnecessary intrusions may be avoided at the outset, and allow journalists and media organisation to object to access prior to journalistic material falling into the possession of law enforcement officers.[233]

The real question becomes whether the notice provided by a production order could scuttle law enforcement objectives. Unlike traditional warrants, the service of production orders on journalists and media organisations provides an opportunity for the destruction, disposal or relocation of evidentiary material in order to avoid its production. This was the Department of Home Affairs and the AFP's main objection to the Australia's Right to Know Coalition's proposal for contested warrant applications in the PJCIS inquiry.[234] Specifically, the agencies claimed that a contested process

> would threaten the efficient work of law enforcement and intelligence agencies, as well as undermin[e] the ability to collect untampered evidence and delaying processes.[235]

The PJCIS accepted this objection at face value.[236] In our view, however, this concern is overblown.

It must be assumed that professional journalists and media organisations will operate with integrity and according to both their professional ethical obligations and laws regarding the destruction of evidence and perverting the course of justice. Of course, there may be instances of rogue behaviour. Individual journalists might destroy evidence, or a culture of disobeying the law could pervade a media organisation. (The now defunct *News of the World* in the UK comes to mind.) However, the same could be said regarding law enforcement agencies and personnel. For example, it may be anticipated that there will be instances where law enforcement agents will not comply with protections afforded to journalists. This is not pure speculation: an official review of the metadata surveillance regime conducted between 1 July 2016 and 30 June 2017 uncovered systemic failure by the police to follow legally required

[232] *Zurcher* (n 3) 571 (Stewart J for Marshall and Stewart JJ).

[233] See below Part V(C)(2).

[234] Department of Home Affairs and Australian Federal Police (n 25) 4.

[235] *PJCIS Report* (n 12) 51 [3.20].

[236] Ibid 78 [3.118].

procedures.[237] This resulted in at least three instances of improper access to journalists' metadata to identify a confidential source, and a further 122 instances where telecommunications data was accessed without proper authority.[238] Of these instances, 116 arose in a single fortnight and, despite requests from the Ombudsman to quarantine the obtained data, the AFP continued to use and share it.[239] The balance to be struck here is between protections provided to the police and journalists against the possibility of misconduct and/or illegality by the other party. In a society committed to the protection of civil liberties and the ends served by press freedom, such as 'the search for truth, democratic self-government, and individual autonomy and self-expression',[240] and in light of the power disparity between citizens and the state, we argue that the balance should fall firmly in favour of protections *against* state action.

This view is reinforced by the fact that specific protections against risks to police investigations can be built into the legal framework, as in the UK. Warrants obtained on an ex parte basis without notice, rather than production orders, should remain available in respect of journalistic material in the rare circumstances where an applicant establishes to the satisfaction of an issuing authority that a notice to produce has been ineffective (if previously granted), would be impracticable, or would prejudice investigations. Demonstrable urgency should also provide a sufficient basis. The threshold to obtain a warrant rather than a production order in such circumstances should be high, with the burden on an applicant to establish the exception based on cogent evidence, rather than bare assertion or speculation.[241] It should also attract heightened procedural protections, as outlined below in Part V(C). Tellingly, a recent report by the UK Law Commission on search warrants did not raise any concerns about the destruction or relocation of evidence in relation to production orders.[242] The UK position under the *PACE* therefore appears to be a suitable response.

[237] Commonwealth Ombudsman, *A Report on the Commonwealth Ombudsman's Monitoring of Agency Access to Stored Communications and Telecommunications Data under Chapters 3 and 4 of the* Telecommunications (Interception and Access) Act 1979 (Report, November 2018) 10–11.

[238] Ibid 8–9, 11.

[239] Ibid 10–11.

[240] Tambini (n 2) 149.

[241] This draws on the *PACE* (n 119), but similar points were also made by the Law Council of Australia before the PJCIS: *PJCIS Report* (n 12) 55–7 [3.37].

[242] See generally Law Commission, *Search Warrants* (Law Com No 396, 7 October 2020).

B *Substance: Scope of Protection and Access Conditions*

1 *Scope of Protection: Confidential and Non-Confidential Journalistic Material*

In Part II, we justified a conception of press freedom which encompasses the facilitation of information flow by the protection of journalistic sources and materials. Any scheme that protects press freedom solely through evidentiary shield laws (as in Queensland, Victoria and, presently, NZ) is clearly inadequate against this standard. Shield laws fail to recognise any need to protect non-confidential sources or materials and, therefore, risk unregulated (and therefore disproportionate and unduly disruptive) infringements on press freedom. And where the protection applies only to the execution and not the issuance of a search warrant, even confidential sources enjoy incomplete and, we argue, inadequate protection.

The *PACE* and the *JSPA* both apply to confidential *and* non-confidential journalistic materials — although they differentiate between these categories in terms of strength of protection. Under the *JSPA*, the protections for the *granting* of investigatory orders apply to all journalistic materials, and the common law renders confidentiality a significant factor. However, the availability of procedural protections regarding *access* to material under the bifurcated procedure depends on whether the material identifies, or is likely to identify, a confidential source. Under the *PACE*, a blanket immunity from access applies to all confidential journalistic material (except in very limited circumstances), while non-confidential journalistic material can only be accessed via a production order where a stringent public interest test is satisfied. It is also worth noting that, in the US, a blanket immunity regarding the search and seizure of *all* journalistic materials is provided at the federal level under the *Privacy Protection Act of 1980* ('*PPA*'),[243] to which we return below. In all, UK law and, to a lesser extent, Canadian law, support a broader, more realistic, view of press freedom than the current confidentiality-focused privileges in Victoria and Queensland. Press freedom demands protection of journalistic materials *generally*, and confidentiality should only become relevant to justify the *standard* of protection that is applied.

2 *Reasonable Necessity and Alternative Sources*

A straightforward way of limiting incursions on press freedom without sacrificing law enforcement goals exists in both the UK and Canada, namely through a *requirement* that an investigatory order may only be sought with respect to journalistic material if the applicant can demonstrate that other avenues by

[243] *PPA* (n 20) § 2000aa.

which the information might be accessed have been exhausted or would be futile. Even in UK terrorism investigations, the availability of an alternative source is a weighty, if not determinative, consideration.

Failing to codify an alternative source requirement prompted criticism in NZ,[244] but has attracted scant attention in Australia. Tellingly, NZ courts remedied this failure by indicating that the existence of an alternative avenue by which information may be obtained is a relevant factor to the public interest analysis by which shield protections may be overcome.[245]

Ultimately, intruding on press freedom despite the availability of a reasonably practicable alternative means of accessing the material is enough to suggest disproportionate and, specifically, *unnecessary* interference with press freedom.[246] Thus, overseas experience, as well as basic logic, weigh heavily in favour of the adoption of an alternative source requirement in Australia, both in relation to production orders and warrants.

3 *A Public Interest Balancing Test*

The press freedom protections surveyed in Parts III and IV all centre on public interest tests and, relatedly, judicial 'balancing' of competing interests. Generally speaking, access to journalistic materials may be authorised where the interests in accessing journalistic material for law enforcement purposes outweigh countervailing press freedom interests, framed variously to include the likely adverse effects of disclosure on individuals and the media's public role in newsgathering and publication.[247] This aptly reflects the well-accepted non-absolute nature of press freedom, and the broad understanding that it is a public interest, capable of being defined and regulated against other public interests.[248]

It is important to note, however, that a balancing test is not the only option in protecting press freedom from investigatory powers. An alternative is the provision of a blanket statutory immunity. The UK has adopted this approach in respect of 'excluded' (confidential) materials (outside of terrorism

[244] New Zealand Law Commission, *Evidence Law: Privilege* (Preliminary Paper No 23, May 1994) 114–15 [354], cited in Smith (n 66) 239.

[245] *Police v Campbell* [2010] 1 NZLR 483, 503 [96] (Randerson J).

[246] This effectively constitutes the requirement of 'reasonable necessity' in a structured proportionality analysis. For an elucidation of this test in Australian (constitutional) law, see generally *McCloy v New South Wales* (2015) 257 CLR 178.

[247] See, eg, the Australian shield laws: *Evidence Act 1995* (Cth) s 126K; *Evidence Act 2011* (ACT) ss 126J–126L; *Evidence Act 2004* (Norfolk Island) ss 126A–126F; *Evidence Act 1995* (NSW) s 126K; *Evidence (National Uniform Legislation) Act 2011* (NT) ss 10A, 127A, 131A; *Evidence Act 1977* (Qld) ss 14Q–14ZB; *Evidence Act 2008* (Vic) s 126K; *Evidence Act 1906* (WA) ss 20H–20I.

[248] See, eg, Tambini (n 2) 149–50.

investigations).[249] In the US, on the other hand, the blanket immunity provided by the *PPA* applies to *all* journalistic material.[250] This protection was introduced after a majority opinion of the US Supreme Court held that the First Amendment did not require any specific protection for the press — procedural or substantive — in respect of search and seizure warrants.[251] The *PPA* makes it unlawful to search or seize 'work product materials' or 'documentary materials' which are 'possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication'.[252] This immunity is subject to limited exemptions, including where there is probable cause to believe that the person in possession of the materials has committed an offence.[253] However, that limitation does not include offences relating to the receipt, possession, communication, or withholding of material, unless such offences relate to national defence, classified information, or restricted data.[254] Thus, if a similar immunity existed in Australia it would not have protected Smethurst or the ABC against the AFP raids of June 2019, as those investigations concerned defence and classified information.

249 *PACE* (n 119) s 11.

250 *PPA* (n 20) § 2000aa.

251 *Zurcher* (n 3) 565 (White J for the Court, Powell J agreeing at 568). This is consistent with the US Supreme Court's earlier decision in *Branzburg* (n 58), where a majority held that the First Amendment did not guard against journalists having to reveal their confidential sources: at 690–1 (White J for the Court).

252 *PPA* (n 20) § 2000aa.

253 Ibid § 2000aa(b)(1). Critically, the relevant offence must not consist of the receipt, possession, communication, or withholding of the material or information.

254 See, eg, *Sennett v United States*, 677 F 3d 531, 535–7 (Traxler CJ for the Court) (4th Cir, 2012); *American News and Information Services Inc v Gore*, 778 Fed Appx 429, 431 [4] (Wardlaw, Hurwitz and Korman JJ) (9th Cir, 2019). *PPA* (n 20) protections also do not apply where there is reason to believe that immediate seizure of the material is necessary to prevent the death of, or serious bodily injury to, a human being: § 2000aa(b)(2). Finally, in relation to documentary materials, a warrant may be granted where there is reason to believe that the documentary material will be altered, destroyed or concealed if notice were given pursuant to a subpoena *duces tecum*: see *Berglund v City of Maplewood*, 173 F Supp 2d 935, 949–50 [35]–[36] (Doty J) (D Minn, 2001); or where they have not been produced in compliance with a subpoena *duces tecum* and all appellate remedies to enforce compliance have been exhausted, or where delay caused by such enforcement avenues would threaten the interests of justice: ibid § 2000aa(b)(4). Over time, provisions resembling the *PPA* (n 20) have been introduced in the US: see, eg, Cal Pen Code § 1524(g) (Deering 2022), referring to Cal Evid Code § 1070 (Deering 2022); Colo Rev Stat § 13-90-119(6) (2022), referring to ibid § 2000aa; Conn Gen Stat § 54-33j (2020); 725 Ill Comp Stat tit V § 108-3(b); Neb Rev Stat § 29-813(2) (2022); NJ Stat Ann § 2A:84A-21.9 (West 2022); Or Rev Stat § 44.520(2) (2021); Tex Code Ann arts 18.01(e), 18.02 (2021); Wash Rev Code § 10.79.015(3) (2003).

Whilst offering stronger protection for press freedom, the absolute immunity in the *PPA* carries the dual risks of being too broad and too narrow. For instance, pressing law enforcement aims may be sacrificed by the operation of the blanket ban, where the public interest in disclosure is strong, but the categories of exemption are not engaged. Alternatively, the public interest in press freedom may be strong despite an exemption applying. In short, the *PPA* scheme uses an all or nothing paradigm in circumstances where achieving proportionate outcomes requires a case-by-case approach. Thus, balancing emerges as a preferable model — but, do the same criticisms apply to the blanket exclusion of *confidential* materials under the *PACE*?

There is no doubt that confidential materials — most importantly, those which are capable of revealing the identity of a journalist's confidential source — deserve a heightened degree of protection. However, this does not necessarily justify absolute protection against disclosure. There may be circumstances, albeit rare, where the public interest in the capacity of law enforcement to access confidential journalistic material will outweigh freedom of the press. This fact necessitated the creation of an alternative scheme for terrorism investigations in the UK, and it is not unforeseeable that similar additional schemes could be necessitated in the future. For example, similar concerns could attach to investigations concerning espionage, foreign interference, the leaking of classified material, or imminent threats to national security. These factors suggest that a more flexible, nuanced approach may be more durable than a blanket exclusion, even for confidential journalistic materials. Having said that, access to confidential journalistic materials should be subject to an extremely high threshold, particularly where those materials are capable of revealing the identity of a confidential source. Thus, confidentiality should be a weighty factor in any public interest balancing test.

While public interest balancing may have advantages over blanket immunities, it remains controversial. In Australia and NZ, public interest balancing has been decried as undermining protections by opening a door to inappropriate degrees of deference. Speaking to journalists' privilege in NZ, Devin Smith argued that

> [t]he presumption of confidentiality afforded in [s 68(1) of the *Evidence Act 2006* (NZ)] is all but gutted in the very next breath … [by] a balancing test that gives the presiding judge wide latitude to overcome the presumption.[255]

Even the New Zealand Law Commission acknowledged that rights considerations and 'broader social costs' were at risk of being overlooked by '[j]udges

[255] Smith (n 66) 228.

who administer justice every day [and] may perhaps be more conscious of costs for the legal system'.[256] These concerns echo similar criticisms of public interest balancing tests in Australian shield laws.[257] This is not to say that a balancing test is incapable of preventing disproportionate infringements on press freedom — only that a tangible risk seems to exist of the scales becoming tilted in favour of law enforcement and related interests. In contrast, as we discussed earlier, judicial discretion and balancing in the UK have provided avenues by which judges can, and have, harnessed art 10 of the *ECHR* to bolster the focus on press freedom and minimise the risk of it becoming overwhelmed by state interests.

It is difficult to say with confidence why the public interest balancing test has attracted such divergent reactions across jurisdictional settings. The evolution and application of the test certainly depends on contextual factors.

It may be attributable to the stronger human rights framework within which art 10 sits in the UK (as compared to the frameworks provided by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZBORA*')), encompassing jurisprudence of the European Court of Human Rights.[258] This could suggest the same public interest test could offer weaker protection in Australia than in the US or Canada, and that a blanket immunity might provide a more reliable degree of protection.

Judicial balancing is also, inevitably, influenced by procedural factors. In Australia and NZ, media warrant applications are ex parte by default. By contrast, *inter partes* proceedings are the norm in the UK and have been strongly encouraged in Canada since *Vice Media (Supreme Court)*. This contested process allows for press freedom interests to be argued from the outset and, therefore, to contribute more weightily in the balancing analysis.

Contested proceedings, overarching human rights frameworks, and an express requirement to give reasons have facilitated the development of the wider suite of reported case law in the UK, which has allowed superior courts to guide and influence decision-makers. Conversely, a dearth of case law in Australia (and in NZ) has meant discretion tends to be exercised by issuing authorities without such guidance. This could place decision-makers at higher risk of adopting a deferential approach. If this is the case, then the obligation on judges to issue reasons for their decisions regarding access to journalistic material (as

256 New Zealand Law Commission (n 244) 75 [219].

257 See generally Ryan (n 60).

258 That said, NZ shield laws in s 68 of the *Evidence Act 2006* (NZ) have been interpreted in light of the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZBORA*') and NZ's 'healthy commitment to press freedoms, particularly the protection of confidential sources': see Smith (n 66) 217, 224.

is clearly required in Queensland and the UK) serves a critical, if unexpected, role in appropriately constraining judicial discretion.[259]

In sum, balancing and discretion have much to commend them. However, they risk both deference and, arguably, activism. But there are simple ways to guard against these results without going so far as an all or nothing blanket immunity. Experienced judges should be entrusted with the task of balancing, assisted by contested proceedings and a clearly articulated list of relevant considerations. Such a list can bolster rights considerations in the absence of a strong human rights framework. Although the decision to grant a warrant turns on the specific facts of the individual case, the provision of reasons for previous determinations will not only assist decision-makers, but improve submissions made by parties in application and review proceedings. This, again, makes it clear that the mode and substance of press freedom protections rely for their effectiveness on procedural factors, to which we now turn.

C *Procedural Protections*

1 *A Judicial Decision-Maker*

As the PJCIS recognised, access to journalistic materials ought to be *issued* only by superior court judges. Far from being a radical innovation, this is the case in Canada and the UK, and was proposed in NZ.[260] The sole outliers are Victoria and Queensland. In Queensland, where the extended shield model means the journalist must assert their right to object during the execution of a warrant, the Supreme Court is only involved in the subsequent resolution of the dispute over access. Ultimately, international practice strongly supports press freedom protections that bite early (well before an access order is executed) and, it follows, the involvement of superior court judges in the *issuing* as well as the *reviewing* of access orders concerning journalistic material.

In Australia, constitutional factors will impact whether a judge undertakes the task of issuing a warrant or production order in a judicial or personal capacity. Specifically, ch III of the *Australian Constitution* operates to prohibit *courts* from issuing federal warrants, but not federal or state judges acting *persona designata*.[261] The judicial or administrative character of the warrant authorisation will also, necessarily, colour whether and how reasons are given,

[259] It is also recognised that the process of giving reasons, particularly written reasons, has a disciplining effect on judges and improves the quality of decision-making: see Jason Bosland and Judith Townend, 'Open Justice, Transparency and the Media: Representing the Public Interest in the Physical and Virtual Courtroom' (2018) 23(4) *Communications Law* 183, 195.

[260] See above n 21 and accompanying text.

[261] See, eg, *Grollo v Palmer* (1995) 184 CLR 348, 363 (Brennan CJ, Deane, Dawson and Toohey JJ).

and the review process attaching to it.[262] While the issue of review raises a host of associated questions and complexities, we note that a clear and robust statutory review process should accompany any reforms in this area. Such a process could not only ensure the necessary oversight of intrusive search and seizure powers, but also bring certainty and clarity to a potentially fraught area.

2 *Production Orders: The Availability of* Inter Partes *Hearings Prior to Access*

An essential element of the procedural aspects of protection of the press in this context is the capacity to object to investigatory orders *prior* to journalistic material ending up in the hands of law enforcement officers. As stated in *R (Miranda) v Secretary of State for the Home Department*,

> the exercise of an independent review that takes place only *after* the handing over of material capable of revealing … sources would undermine the very essence of the right to confidentiality and cannot therefore constitute a legal procedural safeguard commensurate with the rights protected by article 10.[263]

As discussed above, this is one reason why, from a press freedom perspective, production orders are superior to warrants.

Procedurally, a production order might be contested on review *after* it has been issued and served, but *before* it is required to be complied with. If production orders are to be issued only by superior court judges, this should be facilitated by a clear statutory right of de novo review, thus avoiding any limitations that might arise regarding the availability or scope of traditional judicial review. However, there is no reason why an opportunity should not also be provided to object to a production order at an *inter partes* hearing at the time that it is *applied* for. This would require that the relevant journalist and/or media organisation receive sufficient notice of the application and be granted a right to be heard.

Any objection to such a procedure, on the basis that prior notice of an application for a production order would thwart law enforcement efforts by prompting the destruction or relocation of material, is nonsensical: it is no riskier than the notice inherent in the service of the production order itself.[264] Moreover, an *inter partes* procedure is an express requirement in the UK under the *PACE*, while the Supreme Court of Canada has relegated ex parte proceedings to their (familiar and accepted) place as being highly exceptional and

[262] See ibid 367.

[263] *Miranda* (n 58) 1535 [100] (Lord Dyson MR, Richards LJ agreeing at 1540 [120], Floyd LJ agreeing at 1540 [121]) (emphasis in original).

[264] See above Part IV(A).

requiring strong, positive justification.[265] This certainly casts a pall over claims that an *inter partes* process in Australia would carry significant risks, including to information sharing arrangements with international partners[266] — after all, our most critical partners favour *inter partes* proceedings for production order applications.[267]

3 *Warrants: Procedural Safeguards*

We have argued that warrants, rather than production orders, should *only* be granted in respect of journalistic materials in rare circumstances of urgency, or where a production order has previously been ineffective, would be impractical, or would prejudice an investigation. It is obvious, therefore, that an application for a warrant in such circumstances should proceed ex parte and without notice, and that different procedural protections would be required. Specifically, PIA involvement and safekeeping procedures should apply, the absence of which are weaknesses of the *PACE* regime, which provides no express procedural protections for the media in the rare circumstance where a warrant, rather than a production order, is granted over journalistic material.

Whilst inclusion of a PIA would be inadequate to wholly address the press freedom shortcomings in Australia's warrant schemes,[268] a PIA could play a valuable role in representing press freedom interests in our proposed, highly exceptional, media *warrant* framework. This is a key feature of the *JSPA* in Canada and was the central reform recommendation made by the PJCIS. However, the involvement of the PIA should not be discretionary; it should be mandatory except in cases of extreme urgency.

Where a warrant to obtain access to journalistic material is issued, safekeeping and review procedures (as in Canada and Queensland) should also be adopted. Seized journalistic materials ought to be immediately secured, not searched, and held for safekeeping by a superior court. This should be the case even if the executing officers did not expect to encounter journalistic material. At this point, Queensland law provides for a seven-day window within which objections to access may be made.[269] By contrast, the *JSPA* provides a 10-day window which does not commence until an officer provides notice of their

[265] *Vice Media (Supreme Court)* (n 58) 412 [66]–[67] (Moldaver J for Moldaver, Gascon, Côté, Brown and Rowe JJ), 447–8 [153] (Abella J for Wagner CJ, Abella, Karakatsanis and Martin JJ).

[266] See *PJCIS Report* (n 12) 51 [3.19].

[267] But see the abandonment of the Protection of Journalists' Sources Bill 2021 (NZ): Parliamentary Counsel Office (NZ) (n 21).

[268] See above Part III(C).

[269] *Evidence Act 1977* (Qld) ss 14ZD(6), 14ZE(3).

intention to examine the material.[270] This latter option has the dual advantages of allowing police greater flexibility in conducting their investigation, and providing a longer time period for the media to prepare its possible objections. At a broader level, the provision of notice by the officer kickstarts the process for judicial resolution of access rights and conditions and paves the way to a contested hearing governed by the rules of natural justice and procedural fairness.

In Canada, the safekeeping and (bifurcated) access procedure applies to production orders as well as warrants. In our view, the application of these procedures to material obtained by way of a production order is unnecessary given that the media would already have a statutory right to challenge a production order prior to complying with it — that is, while they still retain control of the relevant material. Thus, we suggest that the protection afforded by safekeeping and access is only necessary where material is seized under a warrant.

VI Conclusion: Setting the Australian Reform Agenda

The rule of law requires effective law enforcement as well as public accountability facilitated by a free and independent press. However, press freedom can conflict with law enforcement when orders for the search and seizure of journalistic materials are issued or executed. This article has explored this tension and argued that an appropriately designed framework for regulating state access to journalistic materials will support the effective investigation of crime, whilst making only necessary and proportionate incursions on press freedom. A balance between press freedom and law enforcement is the goal of various statutory and common law protections across the Five Eyes alliance. In this respect, however, Australia lags well behind its closest allies. Only Victoria and Queensland have *any* relevant protections, and these suffer from serious weaknesses. Clearly, reform is necessary.

Whilst Canada presents a model for incorporating press freedom protections within pre-existing investigatory frameworks, the wholly separate and specialised UK scheme under the *PACE* emerges, with some modifications, as a preferable approach. We see the ideal regime of protection as primarily relying upon production orders rather than warrants, effectively mirroring the *PACE*. A warrant should only be available in exceptional circumstances of urgency or necessity. Both production orders and warrants should be subject to the same substantive test, applied by a superior court judge. Thus, the usual conditions for a warrant must be satisfied, along with two additional substantive criteria:

[270] *Canadian Criminal Code* (n 119) s 488.02(3).

(1) that the material not be reasonably available from an alternative source; and (2) that the public interest in the investigation of crime outweigh the public interest in freedom of the press. This public interest balancing test should be assisted by a list of relevant considerations, inspired by similar lists in Queensland statute and Canadian common law. This list should include reference to, inter alia: the nature and seriousness of the offence; consequent chilling effects on journalism or journalistic sources; the disruption of media business; the specificity of the order sought; criminal or unethical conduct on the part of the journalist; and the media's democratic and social roles. The protections outlined should apply in relation to both confidential *and* non-confidential journalistic material, with confidentiality relevant to the application of the public interest balancing test. Unlike under the *PACE*, there should be no blanket immunity for access to confidential source information.

The following procedural protections should also apply, depending on whether a production order or warrant is sought. In the case of a production order, notice should be provided of an impending application, paving the way for an *inter partes* process. This is necessary even though production orders may be objected to *after* their issuance. In the case of warrants, which are ex parte and highly exceptional, a PIA must be appointed to make representations on the substantive criteria, as well as whether a warrant, rather than a production order, is required. Any orders resulting from the ex parte warrant application should be drafted as narrowly as possible and, as outlined below, the bases of review should go beyond mere jurisdictional error and approach a de novo hearing of the issues. Furthermore, if the warrant is granted, then the relevant materials would be sealed and held by a court. Should an officer wish to examine the material, they would need to provide notice to the relevant journalist and/or media organisation, who would then have a specified period of time (say, 10 days, as in Canada) to object.[271] If an objection is lodged, the dispute over access would be determined by a superior court in an *inter partes* hearing, applying the two substantive criteria.

We have framed these recommendations as a reform agenda for Australia, where successive governments have committed to press freedom reform and where change is most sorely needed. However, our findings have broader implications. For instance, they broadly support the proposed (and now abandoned) reforms in NZ, which would have seen the present shield approach replaced by protections modelled on the UK approach. In NZ, however, those reforms would have been bolstered by the *NZBORA* and jurisprudence which already recognises the importance of press freedom and its relationship with

[271] Failure to contest access in this time period would be taken as consent to police access.

codified rights.[272] We have also limited our discussion to search and seizure in police investigations. However, much of our analysis and many of our findings are readily transferable to other warrant and authorisation schemes across the (often blurred) law enforcement and intelligence spheres. In particular, the procedural and substantive protections identified in this article have potential application, to varying degrees, in the rapidly evolving fields of electronic data access and surveillance — areas which have given rise to the recent attempts to protect press freedom in Australia and elsewhere.[273]

Finally, the search and seizure of journalistic materials is but one thread in the tapestry of press freedom. Meaningful protections must also safeguard journalists' sources through privacy law, whistleblower protections, and limitations on data surveillance. Legitimate public interest journalism ought to be immune from criminal prosecution, whether through the operation of defences[274] or exceptions.[275] If these protections were introduced, then our reform recommendations might, for instance, be revisited to ease access to journalistic materials to investigate suspected criminal wrongdoing by a journalist or media organisation — as such criminality would itself be rare and highly exceptional. At present, however, it is simply too easy for public interest journalism to cross the line into criminal conduct — something ABC investigative reporter Dan Oakes discovered when threatened with charges for receiving stolen Commonwealth property (being the leaked documents received from whistleblower David McBride).[276] The events of June 2019 made it abundantly clear that police raids on the media are a real possibility, with tangible effects on press freedom, and that mere political promises not to investigate or prosecute journalists cannot be relied upon. Robust legal protections are needed. Australia need not reinvent the wheel in designing those protections, but it should be prepared to step up and meet, if not lead, the protections offered by comparable democracies to safeguard press freedom.

[272] *NZBORA* (n 258) ss 14, 21. See also *Hager v A-G (NZ)* [2016] 2 NZLR 523, 532 [30], 540–1 [66], 561 [137] (Clifford J).

[273] See, eg, *Surveillance Devices Act 2004* (Cth) ss 27KC(2)(ce), 27KM(2)(fa); *Crimes Act 1914* (Cth) s 3ZZUP(2)(dc); *Investigatory Powers Act 2016* (UK) ss 28–9.

[274] See, eg, *Criminal Code 1995* (Cth) s 122.5(6).

[275] See, eg, ibid s 119.2(3)(f).

[276] Ibid s 132.1. See also Ananian-Welsh, Cronin and Greste (n 53) 1248–9.