FREE SPEECH AND COUNTER-TERRORISM IN AUSTRALIA

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I INTRODUCTION

Only one democratic nation fails to expressly protect freedom of speech in its Constitution or an enforceable national human rights instrument. That nation is Australia. Free speech is readily accepted as an important human right in Australia, as evidenced by ongoing public debate about legal restrictions on offensive speech.[1] But national protection of free speech is confined to constitutional implication and techniques of statutory interpretation. This contrasts with the formal protection afforded through the first amendment to the United States Constitution, s 2 of the *Canadian Charter of Rights and Freedoms*, or art 10 of the European Convention on Human Rights, as ratified in the United Kingdom (UK) through the *Human Rights Act 1998* (UK).

The lack of formal protection for free speech and other human rights has allowed Australia's federal Parliament to enact many laws in response to terrorism that would be unthinkable in these other countries. This is particularly the case with respect to the intelligence gathering powers of the Australian Security Intelligence Organisation (ASIO), Australia's domestic security service. Australia's counter-terrorism laws impact on free speech through broad criminal offences, strict requirements around operational secrecy, and a lack of protection for intelligence whistleblowers. In particular, Australia's legal responses to terrorism severely restrict the ability of journalists to report freely on national security matters in the public interest.

In this chapter, we assess the impact of Australia's counter-terrorism laws on freedom of speech. We adopt the meaning given to freedom of expression in article 19 of the *International Covenant on Civil and Political Rights* ('ICCPR'), which states:

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Australia has ratified the ICCPR and indicated its ongoing support for the instrument,[2] but has not incorporated this or other rights by way of statute. This inconsistency between the ideals of human rights and their actual protection in domestic law characterises Australia's unique approach to rights protection.

In Part Two, we explain the extent to which free speech is protected by Australian law, covering its constitutional, common law and statutory basis. In Part Three, we identify Australia's legal responses to terrorism that impact on free speech, including restrictions on 'advocating' terrorism,[3] and assess that impact. Here we also address policy programs for countering violent extremism, though these remain underdeveloped in Australia compared to

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[1] See, eg, Katherine Gelber, 'Free speech is at risk in Australia, and it's not from section 18C', *The Conversation*, 13 September 2016; David Leyonhjelm, '18C debate highlights the ethnic threat to free speech', *Australian Financial Review*, 30 March 2017; Andrew P Street, 'The 18C battle is about making hate speech acceptable, not protecting free speech', *Sydney Morning Herald*, 1 March 2017.
[2] See Australian Government, *International Covenant on Civil and Political Rights: Australia's Sixth Report to the United Nations Human Rights Committee* (2016).
[3] *Criminal Code Act 1995* (Cth), s 80.2C.

the UK and Western Europe. Such programs can impact on free speech by discouraging forms of expression that are contrary to a country's 'fundamental values'.[4] As addressed by other authors in this collection, the UK's *Prevent* strategy in particular has raised debates about free speech in schools and universities.[5]

In Part Four, we draw lessons and observations from Australia's experience of using counter-terrorism laws to regulate speech. A key theme is that the Australian government has used recurring threats of terrorism to justify increased surveillance powers and a crackdown on intelligence whistleblowing, which poses significant risks to freedom of the press.

I FREE SPEECH IN AUSTRALIAN LAW

The Australian *Constitution* contains only a few express rights, including to trial by jury and freedom of religion.[6] Free speech is protected by the *Constitution* only in a limited way through textual implication. The Constitution states in ss 7 and 24 that the members of federal Parliament must be 'directly chosen by the people'. In two cases in 1992,[7] the Australian High Court derived from these words an implied freedom of political communication. The court reasoned that the *Constitution* creates a system of representative government, and this necessarily implies that Australians must be free to communicate about political matters, such as the policies of those seeking election to the federal Parliament. In *Lange v Australian Broadcasting Corporation*,[8] the High Court set out two questions for determining whether a law is invalid due to the implied freedom:

1. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation of effect?

2. Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?[9]

The first limb demonstrates that the freedom is limited to speech about political matters; it is not a general right to freedom of expression. It does not protect artistic, commercial, personal or academic expression, except where those relate in some way to government or the election of members of Parliament. The second limb is essentially a proportionality test.[10] Neither of these limbs protects an individual right or freedom: rather, they establish a constraint on the federal Parliament's lawmaking powers to serve systemic interests in the *Constitution*.

Since those earlier cases, the implied freedom has only been used twice to strike down a law. In 2013, it was used to invalidate a New South Wales law which banned the making of donations to political parties by corporations, unions and individuals not on the electoral roll.[11] In 2017, it was used to invalidate Tasmanian legislation which banned participation in protest activities on business premises.[12]

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[4] Home Office, *Prevent Strategy* (Cm 8092, June 2011) 107.
[5] See, eg, Chris Kyriacou et al, 'British Muslim University Students' Perceptions of Prevent and its impact on their sense of identity' (2017) 12(2) *Education, Citizenship and Social Justice* 97; Sue Hubble, 'Freedom of Speech and Preventing Extremism in UK Higher Education Institutions (House of Commons Briefing Paper CBP 7199, 20 May 2015).
[6] *Australian Constitution*, ss 80, 116. See generally George Williams and David Hume *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed 2013).
[7] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[8] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[9] The words 'in the manner which' were added by *Coleman v Power* (2004) 220 CLR 1.
[10] In *McCloy v New South Wales* (2015) 257 CLR 178, the court applied a proportionality test more directly, holding that the second limb should assess whether the burden on political speech is suitable, necessary, and adequate in its balance of competing objectives.
[11] *McCloy v New South Wales* (2015) 257 CLR 178.
[12] *Brown v Tasmania* [2017] HCA 43.

In *Monis v The Queen*, a constitutional challenge to the federal offence of using a postal service to menace, harass or offend was unsuccessful after the High Court judges reached a 3:3 split.[13] The accused, later the Sydney Siege gunman who held 16 hostages in the Lindt café, had been charged with 13 counts of that offence after writing denigrating letters to the relatives of soldiers killed on active service in Afghanistan. The judges disagreed on the second limb of the *Lange* test, largely due to their divergent views on the purpose of the offence. Crennan, Kiefel and Bell JJ viewed the purpose as being to protect people from intrusive and seriously offensive communications, whereas French CJ, Hayne and Heydon JJ believed it was to prevent misuse of the postal service. For the latter, this was not seen as a 'legitimate end' that is compatible with representative government because it would prevent 'robust' political debate. According to French CJ, a reasonable person should expect robust political debate to include statements that are 'unreasonable, strident, hurtful and highly offensive'.[14]

Limited national protection for free speech is also provided by the principle of legality, a common law rule which guides judicial interpretation of statute. In a series of cases dating back to *Potter v Minahan*,[15] the High Court has recognised a judicial presumption that the legislature does not intend to interfere with fundamental rights and freedoms. This rule of statutory interpretation is considered an aspect of the rule of law.[16] More recently, in *Momcilovic v The Queen*, the court expressed the principle in the following terms:

> It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.[17]

The full extent of common law rights protected by the principle of legality is unclear, but free speech is among those typically recognised.[18] The problem comes when Parliaments restrict speech or other human rights through 'clear and unequivocal language'. In such a case, where no 'constructional choices are open', the presumption cannot be relied upon.

Statutory protection for human rights exists at the State level in Victoria and the Australian Capital Territory.[19] These include the right to freedom of expression.[20] Those Acts provide for weak-form judicial review, allowing the relevant Supreme Court to issue a declaration of incompatibility or inconsistent interpretation.[21] However, these laws only operate within their jurisdiction, and so have no impact on legislation enacted by the federal Parliament. While crime control is typically a State responsibility, most of Australia's counter-terrorism laws have been enacted by the federal Parliament. This was possible once the States 'referred' their powers in the area to the Commonwealth following the 9/11 attacks.[22]

There is no general statutory protection of free speech at the national level. This contrasts with the statutory protection of other human rights, like those to privacy and freedom from discrimination.[23] In 2011, the federal Parliament created a Parliamentary Joint Committee

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[13] *Monis v The Queen* (2013) 249 CLR 92.
[14] *Monis v The Queen* (2013) 249 CLR 92, [67].
[15] *Potter v Minahan* (1908) 7 CLR 277. See particularly *Coco v R* (1994) 179 CLR 427.
[16] *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309.
[17] *Momcilovic v The Queen* (2011) 245 CLR 1.
[18] See James Spigelman, 'The Common Law Bill of Rights: First Lecture in the 2008 McPherson Lectures – Statutory Interpretation and Human Rights' (Speech delivered at the University of Queensland, Brisbane, 10 March 2008) 23.
[19] *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).
[20] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 15; *Human Rights Act 2004* (ACT), s 16.
[21] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36; *Human Rights Act 2004* (ACT), s 32.
[22] *Australian Constitution*, s 51(xxxvii).
[23] *Privacy Act 1988* (Cth); *Racial Discrimination Act 1975* (Cth); Sex Discrimination Act 1984 (Cth).

on Human Rights, which allows for pre-enactment scrutiny of Bills on human rights grounds.[24] This process has had little impact, particularly in the face of political and community pressure to respond strongly to the threat of terrorism.[25] The Parliamentary Joint Committee also did not exist at the time when the majority of Australia's counter-terrorism laws were enacted.[26]

The limited protection offered to human rights under Australian law means there may be no remedy even for significant violations. For example, in *Al-Kateb v Godwin*,[27] a majority of the High Court held that there was no constitutional prohibition on legislation permitting the indefinite detention of asylum seekers. One judge described that result as 'tragic', but acknowledged that it was not for the court 'to determine whether the course taken by Parliament is unjust or contrary to basic human rights'.

The influence of human rights on Australian law remains very limited. International treaties and human rights norms can guide statutory interpretation through the principle of legality, but that presumption provides no protection where legislation clearly abrogates rights. There is otherwise no domestic reference point for gauging the impact of counter-terrorism laws on free speech or for post-enactment judicial review. Where legislation violating human rights is challenged, complainants are often forced to rely upon other features of the *Constitution* to argue their case. This can transform concerns over human rights into debates about federalism or judicial power, leaving little or no room for an effective human rights discourse. As Walker notes, this disappointing approach is characteristic of the Australian experience:

> The contrasting emphasis in Australia on the appropriate constitutional capacities of institutions of state, rather than the rights of individuals, certainly produces different, and sometimes (to British perspectives at least) disappointingly solipsistic and positivistic forms of reasoning.[28]

Ultimately, Australia (like other United Nations Member States) remains subject to oversight by the United Nations Human Rights Committee ('UN Committee'). This includes five-yearly reports on Australia's implementation of the ICCPR.[29] But this process also has little direct impact. The UN Committee has reported on recurring human rights violations by the Australian government, but only a small percentage of these have been remedied.[30] At times the process has also been treated with disdain. While in office, former Prime Minister Tony Abbott claimed in response to UN Committee findings that Australians were 'sick of being lectured to' by the United Nations.[31]

II REGULATING SPEECH IN COUNTER-TERRORISM

Since 2002, the federal Parliament has enacted 70 laws in response to terrorism.[32] Most of these were passed in response to 9/11 and the London bombings, but nine new laws have been

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[24] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), s 7.
[25] See G Williams and D Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41 *Monash Law Review* 469.
[26] See George Williams, 'The Legal Legacy of the War on Terror' (2013) 12 *Macquarie Law Journal* 3, 7; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35 *Melbourne University Law Review* 1136.
[27] *Al-Kateb v Godwin* (2004) 219 CLR 562.
[28] Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37 *Melbourne University Law Review* 143, 147.
[29] Australian Government, *International Covenant on Civil and Political Rights*, above n 2.
[30] See, eg, Anna Cody and Maria Nawaz, 'UN slams human rights record: what this means for Australia', *SBS News*, 10 November 2017; Ben Doherty, '"Unacceptable": UN Committee damns Australia's record on human rights', *The Guardian*, 19 October 2017.
[31] Lisa Cox, 'Tony Abbott: Australians "sick of being lectured to" by United Nations, after report finds anti-torture breach', *Sydney Morning Herald*, 10 March 2015.
[32] By 2013, the federal Parliament had enacted 61 counter-terrorism laws: see Williams, 'The Legal Legacy of the War on Terror', above n 27; Williams, 'A Decade of Australian Anti-Terror Laws', above

enacted in response to the threat of Islamic State.[33] These recent laws have introduced some of Australia's most controversial measures, including the stripping of citizenship for dual nationals involved in terrorism.[34] Kent Roach has described this extensive lawmaking as a form of 'hyper-legislation' – meaning that Australia has outpaced many other countries in enacting legal responses to terrorism, and that the 'relentless pace' of its lawmaking has prevented opposition parties and civil society from effectively reviewing the legislation.[35]

Many of these controversial laws have been possible because Australia lacks national protection for human rights. In this section, we identify Australia's legal responses to terrorism that impact on freedom of speech and assess that impact. We also address policy programs for countering violent extremism, although these have received far less attention and investment in Australia compared to the UK and Western Europe. Australia's approach to counter-terrorism is characterised by an almost exclusive focus on coercive legal measures, at the expense of longer-term approaches that would address the underlying causes of terrorism.

A *Advocating Terrorism*

In 2014, in response to the threat from foreign fighters, the federal Parliament enacted a new offence for advocating terrorism. This came relatively late compared to the UK's offence for encouraging and glorifying terrorism, which was enacted after the 2005 London bombings.[36] The Australian offence has yet to be prosecuted or tested in court.

Section 80.2C of the *Criminal Code Act 1995* (Cth) ('Criminal Code') makes it an offence punishable by five years' imprisonment to advocate the doing of a terrorist act or terrorism offence where the person is reckless as to whether another person will engage in that conduct as a result.[37] A person advocates terrorism if he or she 'counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence'.[38] Recklessness in this case means that the defendant was aware of a 'substantial risk' that another person would engage in terrorism, and a jury is satisfied (as a matter of fact) that taking the risk was 'unjustifiable'.[39]

This offence goes beyond the law of incitement by extending to reckless encouragement and the 'promotion' of terrorism. The offence could apply to reckless statements of support for terrorism posted online, even where the person has no intention to commit a terrorist act or to encourage others to do so. The idea of 'promotion' could even plausibly extend to a 'retweet' or Facebook 'like' of another person's words, meaning that an individual could be prosecuted for words they did not say, but simply repeated or agreed with. While the actions of Islamic State and other terrorist organisations cannot be morally justified, it does not follow that criminal liability should attach to speech acts which fall below the level of intentionally inciting violence.

Advocating terrorism also provides a basis for proscribing terrorist organisations. Under div 102 of the Criminal Code, an organisation may be declared as a terrorist organisation

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n 27. A further nine pieces of legislation have been enacted in response to the recent threat of foreign fighters and related homegrown terrorism: *National Security Legislation Amendment Act (No 1) 2014* (Cth), *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth), *Australian Citizenship Amendment (Allegiance to Australia) Act* 2015 (Cth), *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth), *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017* (Cth), *Transport Security Legislation Amendment Act* 2017 (Cth), *Telecommunications and Other Legislation Amendment Act 2017* (Cth).

[33] Ibid.

[34] *Australian Citizenship Amendment (Allegiance to Australia) Act* 2015 (Cth).

[35] Kent Roach, *The 9/11 Effect* (Cambridge University Press, 2011) 309.

[36] *Terrorism Act 2006* (UK), s 1.

[37] *Criminal Code Act 1995* (Cth), s 80.2C(1).

[38] *Criminal Code Act 1995* (Cth), s 80.2C(3).

[39] *Criminal Code Act 1995* (Cth), s 5.4.

in regulations made by the Governor-General.[40] Once this occurs, a number of serious offences apply to the organisation's members (including for membership, recruitment, and training).[41] For the purposes of div 102, advocating terrorism includes situations where:

> the organisation directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act'.[42]

This is especially problematic because it criminalises speech based upon the reaction of someone who suffers from a mental impairment (though it is narrower than the UK offences of indirectly encouraging terrorism, which do not require any risk of terrorist activity to have been created as a result of the expression).[43] A person could be imprisoned for membership of a terrorist organisation because the leader of that organisation praised terrorism where there was a risk that somebody with a severe mental disability or illness might act on their words. It also means that a person could be imprisoned for words said by the leader of an organisation which they do not even agree with.

Since 2007, advocacy of terrorism has also provided the basis for refusing classification of publications. The *Classification (Publication, Films and Computer Games) Act 1995* (Cth) ('Classification Act') sets out Australia's classification scheme, allowing for the regulation of dangerous and obscene publications. Section 9A of that Act provides that a publication, film or computer game must be refused classification if it advocates terrorism. The Classification Act relies on the same definition of advocacy as div 102, meaning that a publication can be refused classification on the grounds that somebody with an intellectual disability or mental illness might act on words or images that praise terrorism. These provisions have the capacity to censor a broad range of publications.[44] Few potential audience members are excluded from an assessment of whether a publication creates a risk of terrorism.

B *Urging Violence*

A series of offences in the Criminal Code criminalises speech acts that 'urge violence'. These provide penalties of up to 7 years' imprisonment where a person urges another person to overthrow the Constitution or government, interfere with parliamentary elections or a referendum, or use force or violence against a group on the grounds of 'race, religion, nationality, national or ethnic origin or political opinion'.[45] There is a defence for acts done in good faith, such as encouraging someone to lawfully bring about a change to the law.

There is some degree of overlap with the laws against advocating terrorism, given that both criminalise speech acts calling for politically or religiously motivated violence. However, to fall under these offences, the type of violence being encouraged must relate specifically to the constitutional and parliamentary system, or otherwise be directed at a group that is identifiable on racial, religious, ethnic or political grounds. The offences are partly targeting seditious conduct against the state and partly targeting hate crime.

This mix of objectives can be explained by the history of the legislation. The urging violence offences are an amended version of sedition laws that were enacted in 2005 in response to the London bombings. Those earlier laws were rushed through Parliament over the course of a few weeks, with little opportunity for scrutiny or debate. Indeed, at the time of their passage, it was widely regarded that the sedition offences were flawed and significantly impacted on free speech. The offences required only 'reckless' rather than intentional

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[40] *Criminal Code Act 1995* (Cth), s 102.1(1).
[41] See *Criminal Code Act 1995* (Cth), s 102.2-102.8.
[42] *Criminal Code Act 1995* (Cth), s 102.1(1A)(c).
[43] *Terrorism Act 2006* (UK), ss 1-2.
[44] See further David Hume and George Williams, 'Advocating Terrorist Acts and Australian Censorship Law' (2009) 20 *Public Law Review* 37; David Hume and George Williams, 'Australian Censorship Policy and the Advocacy of Terrorism' (2009) 31 *Sydney Law Review* 381.
[45] *Criminal Code Act 1995* (Cth), ss 80.2-80.2D.

encouragement, they were not linked to the use of force or violence, and there was no consideration given to genuine academic, scientific or artistic work. Despite this, the laws were enacted on the understanding that they would soon be reviewed by the Australian Law Reform Commission ('ALRC'). Unsurprisingly, the ALRC identified extensive problems with the laws,[46] but it was not until 2010 that they were amended into their current form.[47]

C *Operational Secrecy*

Many of Australia's counter-terrorism powers have strict legal requirements around operational secrecy. A key example is s 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('ASIO Act'), which criminalises the disclosure of information relating to 'Special Intelligence Operations' (SIOs). An SIO is an undercover operation approved by the Attorney-General in which ASIO officers are granted immunity from civil and criminal liability.[48] Immunity is not granted for acts that cause death or serious bodily injury, involve a sexual offence, cause serious property damage, or constitute torture.[49]

Section 35P provides a penalty of five years' imprisonment where a person discloses any information relating to an SIO and the disclosure 'will endanger the health or safety of any person or prejudice the effective conduct of a special intelligence operation'.[50] The person need only be reckless as to whether the disclosure will cause such harm, and the penalty is doubled to 10 years if the person intends or knows that such harm will result.[51]

The original wording of this offence did not include any requirement as to the harm caused by disclosing the information. It would have applied to any person who disclosed information relating to an SIO. This generated backlash from media organisations, as it exposed journalists to significant criminal penalties. A journalist would face five years in prison if they happened to reveal information that related to one of ASIO's special undercover operations, provided they were aware of a substantial risk that the information could relate to an SIO. This would have had a significant chilling effect on the ability of journalists to report on dawn raids, terrorism prosecutions, misconduct by intelligence agencies, and other national security matters in the public interest. The offence was amended to its current form after an inquiry and report by the Independent National Security Legislation Monitor (INSLM).[52] Even as amended, the offence may continue to have a chilling effect on media reporting as it includes no exemption for information disclosed in the public interest. The offence has been criticised by the Media, Entertainment and Arts Alliance as an 'outrageous attack on press freedom' and 'not worthy of a healthy, functioning democracy'.[53]

Similar offences apply to other counter-terrorism powers. Part III, div 3 of the ASIO Act allows the Attorney-General to issue 'questioning and detention warrants'. These allow ASIO to question a person for up to 24 hours in 8-hour blocks, and to detain them for up to a week for that purpose.[54] The powers are for intelligence gathering rather than investigation, which allows non-suspects – including family members or even members of the public – to be

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[46] Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (2006).
[47] *National Security Legislation Amendment Act 2010* (Cth).
[48] *Australian Security Intelligence Organisation Act 1979* (Cth), s 35K.
[49] *Australian Security Intelligence Organisation Act 1979* (Cth), s 35K(e).
[50] *Australian Security Intelligence Organisation Act 1979* (Cth), s 35P(1).
[51] *Australian Security Intelligence Organisation Act 1979* (Cth), s 35P(2).
[52] Independent National Security Legislation Monitor, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (Australian Government, 2015).
[53] Media, Entertainment and Arts Alliance, *MEAA Says National Security Law an Outrageous Attack on Press Freedom in Australia* (26 September 2014) Media, Entertainment and Arts Alliance Media Room <https://www.meaa.org/mediaroom/meaa- says-national-security-law-an-outrageous-attack-on-press-freedom-in-australia>; Christopher Warren and Mike Dobbie, *Surveillance State Seizes Its Chance*, (24 October 2014) Walkley Foundation <http://walkleys.com/surveillance-state-seizes-its-chance>.
[54] See *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34E, 34G.

detained. While the warrant is in force and for a period of two years after their detention, the person faces five years in prison for disclosing any information about the warrant.[55]

The power to issue 'Preventative Detention Orders' (PDOs) is another extraordinary Australian invention. Under div 105 of the Criminal Code, the Australian Federal Police may detain a person for up to 48 hours to prevent an imminent terrorist attack or preserve evidence in relation to a recent attack.[56] The period of detention can be extended to 14 days under State legislation.[57] During that time, a detainee may call a family member, employer and roommate, but they are not permitted to reveal anything about their detention, except to say they are 'safe but … not able to be contacted for the time being'.[58] If they disclose any information about their detention – including the bare fact that they are being detained – they can be imprisoned for up to five years.[59] It is even an offence for one parent to tell the other parent about their child's detention if the detainee has not separately contacted the second parent.[60] These extraordinary powers led the Council of Australian Governments Counter-Terrorism Review Committee ('COAG Review') to describe PDOs in the following terms:

> [T]he concept of police officers detaining persons 'incommunicado' without charge for up to 14 days, in other than the most extreme circumstances, might be thought to be unacceptable in a liberal democracy. There are many in the community who would regard detention of this kind as quite inappropriate. To some, it might call to mind the sudden and unexplained 'disappearances' of citizens last century during the fearful rule of discredited totalitarian regimes.[61]

The PDO powers and ASIO's questioning and detention powers were set to expire under a sunset clause in 2015. Before this time, the COAG Review and the INSLM recommended the repeal of PDOs, and the INSLM recommended the repeal of ASIO's detention powers.[62] However, both sets of powers were extended in response to the threat of foreign fighters.

D *Intelligence Disclosures*

The first of the Australian government's responses to foreign fighters included wide-ranging reforms on ASIO's surveillance powers and offences for disclosing intelligence information.[63] These laws did not relate directly to foreign fighters or Islamic State, but were framed as being urgently needed in response to that threat.[64] Under the *Intelligence Services Act 2001* (Cth) ('ISA'), it is now an offence punishable by 10 years' imprisonment for the employee of an intelligence agency to reveal information obtained in the course of their duties.[65] It is an offence punishable by three years' imprisonment to copy or record information outside the terms of the person's employment.[66]

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[55] *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS.
[56] *Criminal Code Act 1995* (Cth), 105.4
[57] See, eg, *Terrorism (Police Powers) Act 2002* (NSW), s 26K(2); *Terrorism (Preventative Detention) Act 2005* (Qld) s 12(2).
[58] *Criminal Code Act 1995* (Cth), 105.35.
[59] *Criminal Code Act 1995* (Cth), s 105.41(1).
[60] *Criminal Code Act 1995* (Cth), s 105.41(4A).
[61] Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (Australian Government, 2013) 68.
[62] *Council of Australian Governments, above n 60,* 6; Bret Walker SC, *Declassified Annual Report: 20th December 2012* (Australian Government, 2013) 67, 106. The Parliamentary Joint Committee on Intelligence and Security, *ASIO's Questioning and Detention Powers* (March 2018) has also since recommended the repeal of this power.
[63] *National Security Legislation Amendment Act (No 1) 2014* (Cth).
[64] See Keiran Hardy and George Williams, 'Australian Legal Responses to Foreign Fighters' (2016) 40 *Criminal Law Journal* 196, 204.
[65] *Intelligence Services Act 2001* (Cth), ss 39-40B.
[66] *Intelligence Services Act 2001* (Cth), ss 40C-40M.

Intelligence officers should be punished for leaking information to foreign agents or intentionally harming Australia's national security. However, these offences should also be viewed in light of the lack of legal protections for intelligence whistleblowers. The *Public Interest Disclosure Act 2013* (Cth) ('PID Act') effectively provides no protection for genuine whistleblowers who reveal intelligence information in the public interest.[67] There is no legal mechanism for an intelligence officer to reveal, for example, that ASIO officers had tortured a suspect or embezzled money from an undercover operation. Disclosures about misconduct must be made internally to the organisation in the first instance, or to the Inspector-General of Intelligence and Security (IGIS).[68] These mechanisms may be appropriate in many cases, but there is no separate protection for intelligence whistleblowers where these alternatives prove inadequate and it is in the public interest for serious misconduct or corruption to be revealed.

There is also no protection under the PID Act for journalists who might receive and publish information given to them by an intelligence whistleblower. Journalists could not be prosecuted under the ISA for disclosing information (as those offences apply to intelligence employees or contractors) but they could be prosecuted under several of the operational secrecy provisions described above or the expanded espionage offences explained below.

E *Metadata*

Journalists are also at risk from Australia's data retention laws, which require communications service providers to retain customers' metadata for a period of two years.[69] Metadata includes information other than the substance or contents of a communication – such as the time, date and location of a phone call, email or SMS. This data may be obtained by ASIO, State and Federal Police, and other 'enforcement agencies' without a warrant.[70]

Access to journalists' metadata could expose their sources, including government officials and intelligence whistleblowers. After media organisations raised these concerns, a 'journalist information warrant' process was introduced. Access to journalists' metadata is now restricted unless 'the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of the source'.[71] However, journalists are not able to contest these warrants (including because the journalist need not be notified of the warrant's existence) and the regime will not prevent journalists' metadata from being collected in connection with criminal offences like s 35P of the ASIO Act.[72] There also remains the possibility of misuse. Two weeks after the metadata laws came into force, a journalist's metadata was accessed without a warrant to investigate a leak of confidential police information. The journalist was not informed of the breach and the officer responsible faced no disciplinary action.[73]

F *Foreign Interference*

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[67] See Keiran Hardy and George Williams, 'Terrorist, Traitor or Whistleblower? Offences and Protections for Disclosing National Security Information in Australia' (2014) 37 *University of New South Wales Law Journal* 784.
[68] *Public Interest Disclosure Act 2013* (Cth), s 34.
[69] *Telecommunications (Interception and Access) Act 1979* (Cth), s 187A.
[70] *Telecommunications (Interception and Access) Act 1979 (Cth),* ss 175, 178.
[71] *Telecommunications (Interception and Access) Act 1979 (Cth),* ss 180L, 180T(2)(b).
[72] *Telecommunications (Interception and Access) Act 1979 (Cth),* s 176A(3B).
[73] Christopher Knaus, 'Federal police admit to accessing journalist's metadata without a warrant', *The Guardian*, 28 April 2017.

In June 2018, the federal Parliament passed legislation to combat foreign interference in Australia's political system.[74] The laws are widely regarded as targeting the influence of the Chinese Communist Party in Australia.[75]

Among other changes, the new laws significantly increase the scope of an existing espionage offence.[76] That offence now applies where a person 'deals' with information concerning Australia's 'national security' and the information is or will be made available to a foreign interest.[77] 'Dealing' with information includes not only communicating information but also copying, possessing or receiving it.[78] National security is defined to include not only security and defence but also anything relating to Australia's 'political, military or economic relations' with other countries.[79] A maximum penalty of life imprisonment applies where the person *intends* to prejudice Australia's national security. A maximum of 25 years' imprisonment applies where the person is *reckless* as to whether such harm will be caused. Penalties of 25 years' imprisonment are also available even where the information does not of itself relate to national security.[80]

This means that a journalist could face 25 years in prison for receiving information leaked from a government official, even if that information is not sensitive for national security reasons. The offences would apply where the journalist intends to publish the information in the public domain and is reckless as to whether disclosing the information would harm Australia's national security or advantage a foreign government. Indeed, the offences would be triggered before the journalist had decided to publish the information. This is an extraordinary expansion of the prior espionage offences, which criminalised the recording or communicating sensitive national security information with an intent to harm Australia's security or defence.[81] The recent amendments are likely to have a significant chilling effect on the ability of media organisations to report freely on Australia's foreign relations, including on political and economic matters.

G *Countering Violent Extremism*

In contrast to the UK and Western Europe, programs for countering violent extremism (CVE) have received far less attention and investment in Australia. Australia's counter-terrorism laws are framed by broader strategy documents relating to CVE,[82] but these have attracted little national attention. When the Abbott government came to office in 2013, it initially dropped the $9.7m in funding that the prior Labor government had allocated to a grants program for 'building resilient communities'. Rather than encouraging communities to work together, Prime Minister Abbott employed the divisive rhetoric of joining 'team Australia'.[83]

The Abbott government later allocated $64 million for CVE, though the majority of these funds are to be spent on policing activities. Aside from a small community-based grants

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[74] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth).
[75] See, eg, Andrew Greene, 'China blasts Australia over Turnbull government's foreign interference laws', *ABC News*, 6 December 2017; 'Turnbull admits China "tensions" over foreign interference laws', *SBS News*, 12 April 2018.
[76] *Criminal Code Act 1995* (Cth), s 91.1.
[77] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), cl 17.
[78] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), cl 10.
[79] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), cl 16.
[80] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), cl 17.
[81] *Criminal Code Act 1995* (Cth), s 91.1.
[82] Council of Australian Governments, *Australia's Counter-Terrorism Strategy: Strengthening Our Resilience* (Australian Government, 2015); Australian Government, *Preventing Violent Extremism and Radicalisation in Australia* (2015).
[83] See L Cox, '"You don't migrate to this country unless you want to join our team": Tony Abbott renews push on national security laws' *Sydney Morning Herald* (18 August 2014).

program,[84] similar to that introduced under Labor, the Coalition government's CVE strategy remains unclear and undeveloped. Prime Minister Malcolm Turnbull has instead focused on strengthening an already extensive legal framework. He has signalled a strong stance on terrorism, announcing new laws at press conferences in front of special forces soldiers and tactical police units.[85]

The lack of investment in CVE means that Australia has not experienced the same controversies as the UK over the impact of CVE strategies on free speech in schools and universities.[86] However, this does not signal any positive aspects of the Australian experience, but rather a lack of commitment to addressing the underlying causes of terrorism.

III TRENDS AND LESSONS

This section identifies several trends and lessons from Australia's experience of using counter-terrorism laws to regulate speech. The lack of national protection for human rights has allowed the federal Parliament to make extraordinary incursions into free speech and other human rights in ways that would not be possible in other countries. This has impacted most significantly on the freedom of journalists to report on national security matters.

A *Inadequate Parliamentary Process*

A recurring theme in Australian counter-terrorism is the lack of appropriate scrutiny given to laws passed by the federal Parliament. The 2014 legislation that introduced the offence of advocating terrorism provides a key example. The Bill was 160 pages long and introduced some of the most controversial changes to Australian counter-terrorism law in nearly a decade.[87] And yet, interested parties were given just eight days to make submissions to the Parliamentary Joint Committee on Intelligence and Security. Following that, the Bill was given just three days' scrutiny in Parliament, with debate in the House lasting just two days.

For laws impacting on free speech, a concerning practice has been to enact offences recognised as problematic, and then later seek to have them remedied. This was first seen with the Howard government's sedition offences in 2005. Those laws passed through Parliament on the understanding that they would be reviewed by the ALRC after their enactment. It was not until five years later that many of the problems with those laws were remedied. During that time, the law continued to provide for lengthy jail terms.

A similar process occurred with s 35P of the ASIO Act. It was only after the legislation was enacted that sections of the media became aware of the substantial impact that s 35P was likely to have on journalists by criminalising the disclosure of information relating to SIOs. A vocal media and community reaction led Opposition Leader Bill Shorten to write to the Prime Minister to request that s 35P be referred to the INSLM. After the INSLM's report, the offence was finally amended. The media's slow reaction to the danger was lamented by Laurie Oakes, a prominent Australian political journalist, in his 2015 Melbourne Press Freedom Dinner. Oakes conceded that journalists "didn't take up the issue at the start, and once the law is on the statute books winding it back becomes a very difficult proposition".[88] However, that delayed reaction was in large part due to the speedy passage of the legislation through Parliament.

Pre-enactment scrutiny of legislation by the Parliamentary Joint Committee on Human Rights has also proven ineffective in protecting free speech. In examining the 2014 foreign

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[84] Australian Government, *Living Safe Together* (2017) Available at: <https://www.livingsafetogether.gov.au/aboutus/Pages/current-activities.aspx> last accessed 14 May 2018.

[85] See Keiran Hardy, 'Caution needed as the government expands the military's role in counter-terrorism', *The Conversation*, 18 July 2017.

[86] See Kyriacou, above n 6; Hubble, above n 6.

[87] See Hardy and Williams, above n 65, 202.

[88] Laurie Oakes, 'These Things Can't Just Be Left to Government" (Speech delivered at the Melbourne Press Freedom Dinner, 25 September 2015).

fighters legislation, the Committee reported that the offence of advocating terrorism impacted unduly on free speech, and that the government had failed to offer a legitimate objective behind the legislation.[89] It identified a range of existing criminal offences, including incitement, that would perform a similar function without impacting on free speech to the same degree. It concluded that 'the advocating terrorism offence provision, as currently drafted, is likely to be incompatible with the right to freedom of opinion and expression'.[90] However, the legislation was enacted in its original form.

Even where significant violations of free speech are identified in legislation, little is done to remedy this in Parliament. This is a significant failing, as the legislation cannot be challenged in the courts post-enactment on the grounds of free speech or other human rights.

B *Promoting Terrorism*

Intentionally encouraging criminal acts has long been criminalised through the law of incitement. An important feature of Australia's new advocacy offence is that it criminalises the broader notion of 'promoting' terrorism. An organisation can also be listed as a terrorist organisation if it 'praises' terrorism where there is a substantial risk that the words will lead another person, even one with a severe mental illness, to engage in terrorism. These standards are similar to those in the UK's offence of encouraging terrorism, which includes reckless encouragement and statements which glorify the commission or preparation of terrorist acts.[91]

The precise meaning of 'promoting' terrorism is yet to be determined by an Australian court, but the wording is certainly broader than incitement, which requires intentional encouragement to commit a crime. In that respect, the Australian law (like the UK offence) goes beyond United Nations Security Council Resolutions 1624 and 2178, which called on Member States to criminalise the incitement of terrorism.[92] The Australian government has not given sufficient justification as to why free speech should be undermined by a broader offence for 'advocating' terrorism when this is not mandated internationally.

In counter-terrorism, the Australian and UK governments have moved beyond criminalising speech acts that would lead directly to harm being caused to others. Rather, any speech acts which create a *risk* of terrorism – including promoting, praising and glorifying terrorism – are now considered fair game for the criminal law. Indeed, the UK offences for indirect encouragement do not even require a risk of terrorism to be caused, provided that members of the public would interpret a statement or publication to be glorifying terrorism.[93] This is an unacceptable widening of the state's power to criminalise speech in a modern democracy. For speech to attract criminal sanction, the person uttering the words should intend harm to be caused, and the words being uttered should create a substantial risk of terrorism. In other words, intention and risk should both be required elements of a speech offence for terrorism. Intending people to act on your words without creating any risk of terrorism, or creating a risk of terrorism without intending people to act on your words, should not attract criminal sanction.

C *Preventing Speech*

A similar widening of the criminal law on speech can seen in expanded offences for intelligence disclosures and espionage. The penalties for these offences have been dramatically increased. Previously, an intelligence officer who disclosed classified information would face 2 years in

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[89] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011 (2014) – Fourteenth Report of the 44th Parliament* (2014), 51.
[90] Ibid 52.
[91] *Terrorism Act 2006* (UK), s 1.
[92] SC Res 1624, UN SCOR, 60th sess, 5251st mtg, UN Doc S/RES/1624 (14 September 2005); SC Res 2178, UN SCOR, 69th sess, 7272nd mtg, UN Doc S/RES/2178 (24 September 2014).
[93] *Terrorism Act 2006* (UK), ss 1-2.

prison – now they can face up to 10 years in prison.[94] The offence of espionage currently attracts a maximum penalty of 25 years' imprisonment.[95] If the current foreign interference Bill is passed, the maximum penalty will be life imprisonment.

More importantly, amendments to these offences signal a focus on preventing disclosures from happening in the first place, rather than punishing a person for disclosing information. In addition to increased penalties, intelligence officers now face three years in prison for 'unauthorised dealing with records'.[96] This includes any copying or recording of information outside the terms of the person's employment. If the current foreign interference Bill is passed, it will be a criminal offence merely to *receive* or *possess* information that could harm national security, where that information will be disclosed to a foreign principal.[97] There will also be a separate offence, punishable by 15 years' imprisonment, for preparing an act of espionage.[98] This will apply to *any* conduct that a person does in preparation for espionage.

This move towards preventing rather than punishing speech acts parallels that seen earlier in the development of preparatory terrorism offences. Whereas the criminal law has traditionally punished people for engaging in harmful conduct, counter-terrorism laws have consistently targeted early preparatory activities for terrorism, including training, membership of organisations and collecting terrorist documents. This has been conceived as a form of 'pre-crime' based on notions of risk and actuarial justice.[99] Recent amendments to Australia's national security laws suggest a similar trend in the criminal law on speech.

D *Freedom of the Press*

Recent additions to Australia's counter-terrorism laws have a substantial impact on freedom of the press. These include s 35P of the ASIO Act, the mandatory data retention scheme, and the current foreign interference Bill. Other offences ensure strict operational secrecy of PDOs and ASIO's questioning and detention warrant powers.[100] Each of these laws restricts the ability of journalists to report on national security matters. There are no exemptions for information disclosed in the public interest. National whistleblower protections in the *Public Interest Disclosure Act 2013* (Cth) apply only to public employees, not to journalists, private citizens or other employees of private companies.

These laws are not necessarily an intentional crackdown on journalists. Rather, they reflect a crackdown on intelligence whistleblowing in the wake of the WikiLeaks and Snowden revelations. The Australian government's approach has been opportunistic, framing these secrecy laws as a response to terrorism when otherwise there would not necessarily be the same public appetite for criminalising leaks from government agencies. Another important factor is growing concerns over Chinese influence in Australia.[101]

The Australian government has maintained that it will not use these laws to prosecute a journalist for 'doing their job', but such assurances are not sufficient to protect a free press. Instead, they make journalists dependent upon a government decision not to prosecute them, including in respect of information that may be damaging or embarrassing to the government. The effect is to make journalists think twice about whether to report on national security matters. Instead, the law itself ought to be crafted so that prosecuting journalists for official reporting in the public interest is not possible.

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[94] *Intelligence Services Act 2001* (Cth), ss 39-40B.
[95] *Criminal Code Act 1995* (Cth), s 91.1.
[96] *Intelligence Services Act 2001* (Cth), ss 40C-40M.
[97] National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth), cl 17.
[98] Ibid.
[99] See, eg, Lucia Zedner, 'Pre-Crime and Post-Criminology?' (2007) 11 *Theoretical Criminology* 261; Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the "War on Terror"' (2009) 49(5) *British Journal of Criminology* 628.
[100] *Criminal Code Act 1995* (Cth), s 105.41; *Australian Security Intelligence Organisation Act 1979* (Cth), s 34ZS.
[101] See, eg, Greene, above n 76.

Similar issues around press freedom have been debated in the UK,[102] but these tensions are characteristic of Australia's responses to terrorism in a way not fully replicated elsewhere. One commentator has argued that foreign interference laws will make Australia the 'worst in the free world for criminalising journalism'.[103] A coalition of Australia's largest media organisations believe that "fair scrutiny and public interest reporting is increasingly difficult and there is a real risk that journalists could go to jail for doing their jobs".[104]

IV CONCLUSION

Australia's record of enacting counterterrorism laws reveals a disturbing lack of sensitivity to the importance of freedom of speech. Laws have been enacted that enable people to be jailed for expressing opinions and for conduct that falls well short of an incitement to violence. The impact upon freedom of speech is particularly evident in the case of media freedom. Australia's laws in this regard sit uneasily with the recognition of the United Nations Human Rights Committee that an uncensored press remains 'one of the cornerstones of a liberal democracy'.[105]

Freedom of the press remains a core aspect of free speech more generally, which needs to be protected for a democracy to function effectively. Press freedom is a measure of how much a society values the rights to freedom of opinion and expression. It is necessary to ensure the enjoyment of other human rights, as an uncensored press allows information and ideas about public policy, including on national security matters, to be communicated freely between citizens and their elected representatives. A free press is necessary to maintain both an informed public and an accountable government.

Australia's legal responses to terrorism signal a distinct lack of concern for these values. Disclosure offences with significant penalties restrict the publishing of information which relates to operational matters, even if revealing that information would be in the public interest. It would take a brave journalist in Australia to reveal significant wrongdoing by employees of ASIO or another intelligence agency – even if it involved seriously harming suspects, large-scale fraud, systemic corruption or other misconduct.

Recent amendments also reveal that Australia now treats speech acts or related conduct which create a risk of harm to be worthy of criminal sanction. A series of offences now criminalises acts preparatory to some predicted future disclosure – including the copying, recording, receiving and possessing of national security information. This parallels the previous development of other counter-terrorism laws that criminalise preparatory action. Australia's approach is not yet as broad as the UK offences for indirectly encouraging terrorism,[106] but it represents a significant expansion of prior laws for inciting criminal conduct, espionage and making intelligence disclosures.

Many of these laws are possible because Australia is unique amongst democratic nations in lacking anything akin to a national Bill of Rights. This has enabled the enactment of 70 counter-terrorism laws which include wide-ranging powers and offences not found elsewhere. Australia faces a serious ongoing threat of terrorism and has experienced some recent attacks.[107] However, it is notable that Australia has not experienced the same number of

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[102] See, eg, Roy Greenslade, 'The data protection bill is yet another legal threat to UK press freedom', *The Guardian,* 4 December 2017.
[103] Johan Lidberg, 'New bill would make Australia worst in the free world for criminalising journalism', *The Conversation*, 1 February 2018.
[104] Media, Entertainment & Arts Alliance, *Joint Media Organisations Submission on National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (2017) Available at: <https://www.meaa.org/mediaroom/joint-media-organisations-submission-on-national-security-legislation-amendment-espionage-and-foreign-interference-bill-2017/>
[105] 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.
[106] *Terrorism Act 2006* (UK), ss 1-2.
[107] Australian National Security, *National Terrorism Threat Advisory System* (2017) Available at: <https://www.nationalsecurity.gov.au/securityandyourcommunity/pages/national-terrorism-threat-

recurring attacks or fatalities as other countries, and yet continues to develop some of the world's most extraordinary legal responses to terrorism.

advisory-system.aspx>. See, eg, Michael Safi and Shalailah Medhora, "Sydney CBD Siege: Hostages Forced to Hold Black and White Islamic Flag", *The Guardian* (Sydney), 15 December 2014; Nick Ralston, "Parramatta Shooting: Curtis Cheng Was on His Way Home When Shot Dead", *Sydney Morning Herald*, 3 October 2015.