

Human
Rights
Law
Centre

Protecting Press Freedom and Public Debate in Australia

Human Rights Law Centre

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The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Introduction

The Human Rights Law Centre is a national not-for-profit legal centre which promotes and protects human rights in Australia. We welcome the opportunity to make a submission to the Legal and Constitutional Affairs Legislation Committee on the *Constitution Alteration (Freedom of Expression and Freedom of the Press) 2019 (the Bill)*.

Democracy vests power in the people. An informed and educated public is therefore one of the most important pillars of our democracy. Freedom of expression and freedom of press have rightly been described as among the most important rights in a democratic society.

Too often in Australia, these ideals have been taken for granted. The absence of entrenched constitutional or statutory protections for free speech and a free press leave these values at risk. The rise of national security and surveillance laws are jeopardising freedom of expression. The prosecution of whistleblowers and raids on Australian media outlets have had a significant chilling effect. Australia has dropped in a number of well-regarded international metrics and rankings in relation to civil and political rights and civic space.

The Human Rights Law Centre supports greater safeguards for press freedom and free speech in Australia. In principle, we support this Bill. However, we have some concerns about a unilateral constitutional amendment aimed at addressing just one of the many human rights deserving more robust protection in Australia.

We are apprehensive about the possibility of unintended consequences; for example, that laws establishing safe access zones to uphold abortion rights or those prohibiting racial vilification could be negatively impacted by a singular constitutional focus on free speech and press freedom. Accordingly, we consider that it would be preferable for the human rights of Australians to be comprehensively protected, in a scheme that provides a framework for resolving the tension between different rights, through a federal Charter of Human Rights and Freedoms.

2. Recommendations

The Human Rights Law Centre recommends that:

1. the Parliament enact a Federal Charter of Human Rights and Freedoms;
2. the federal government accept and implement the recommendations contained in the two recent parliamentary inquiries into press freedom; and
3. the *Public Interest Disclosure Act* be urgently reformed to provide stronger protections for public interest whistleblowers.

3. The Problem

Over the past two decades, the federal government has passed a raft of new surveillance and secrecy laws. Over 75 national security laws have been introduced in this period, more than most democratic states in the world.¹ The recent prosecutions of whistleblowers and raids on Australian media outlets have highlighted the lack of safeguards in these laws to ensure freedom of speech and the press is maintained. These laws heighten government secrecy, and their use is stifling public interest journalism and whistleblowing.

In June 2019, the Australian Federal Police raided the ABC's Sydney headquarters and the home of News Corp political journalist Annika Smethurst over separate news stories on leaked government documents. Police raided the ABC for eight hours after the broadcaster published the "Afghan Files", a series of stories alleging human rights violations, such as unlawful killings and misconduct, by Australian special forces in Afghanistan.² The news reports were based on Department of Defence documents leaked to the ABC. The *Daily Telegraph* separately published a series of news reports by Annika Smethurst about letters between the heads of the Department of Home Affairs and Defence, which revealed a proposal to give new domestic surveillance powers to the Australian Signals Directorate. Over a year later the police executed a warrant investigating the "alleged publishing of information classified as an official secret", giving police authority to search Smethurst's home, computer and mobile phone. A number of files were seized by police in both raids.

Both the ABC and Smethurst challenged the validity of the search warrants. While ABC's challenge was rejected in the Federal Court, the High Court unanimously found the search warrant over Smethurst's property to be invalid. Despite the illegality of the raid, the Court allowed the police to retain the seized data. These cases highlighted the extent to which Australian authorities have the power to monitor journalists' communication and devices, access and alter the data of media outlets, ultimately dissuading people from revealing information to journalists in the public interest.³

The federal government has also authorised several prosecutions against whistleblowers for secrecy offences, demonstrating how these laws have increasingly criminalised speech and journalism. The Commonwealth Director of Public Prosecutions has sought to prosecute David McBride, the Afghan Files whistleblower, as well as Bernard Collaery, Witness K and Richard Boyle. Witness K and his lawyer, Collaery, have been prosecuted for exposing the government's alleged spying of the Timor-Leste government during oil and gas negotiations.⁴ Richard Boyle, a former Australian Taxation Office employee, was charged after he blew the whistle on aggressive debt recovery practices targeting small businesses in order to meet revenue goals.⁵ A number of these cases have been heard partly or largely behind closed doors, with limited public scrutiny.

Collectively, the recent raids on journalists and prosecution of whistleblowers reveal the fragility of public debate and free press in Australia and the urgent need for considered law reform to protect these core elements of the rule of law and democracy.

¹ Scott Ludlam and David Paris, Digital Rights Watch and GetUp!, *A report on the erosion of press freedom in Australia* (Report 2701, 2019) 4 <https://digitalrightswatch.org.au/wp-content/uploads/2019/09/2701-PressFreedom_Report_digital.pdf>.

² Lorna Knowles, Elise Worthington and Clare Blumer, 'ABC raid: AFP leave Ultimo building with files after hours-long raid over Afghan Files stories', *ABC News* (online, 5 June 2019) <<https://www.abc.net.au/news/2019-06-05/abc-raided-by-australian-federal-police-afghan-files-stories/11181162>>.

³ Human Rights Law Centre, Submission to the Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (26 July 2019) 2.

⁴ David Dixon, 'Prosecution of Witness K and his lawyer is a disgraceful act of revenge', *Sydney Morning Herald* (online, 1 July 2018) <<https://www.smh.com.au/politics/federal/prosecution-of-witness-k-and-his-lawyer-is-a-disgraceful-act-of-revenge-20180701-p4zou5.html>>.

⁵ Nassim Khadem, 'Prosecutors proceed with case against ATO whistleblower Richard Boyle', *ABC News* (online, 29 April 2021) <<https://www.abc.net.au/news/2021-04-29/prosecutors-proceed-case-against-ato-whistleblower-richard-boyle/100105710>>.

These events have also gained international attention, undermining Australia's credibility in upholding democratic rights and freedoms globally. In the past three years, Australia's position in the World Press Freedom Index has slipped several places from 19th to 25th.⁶ Since 2018, Australia's ranking by Freedom House in its annual global report on political rights and civil liberties has also dropped.⁷ Australia's civil liberties rating has decreased to 57/60, with its free and independent media rating dropping significantly.

4. International Standards

At international law, freedom of expression and freedom of press are fundamental human rights.

Article 19 of the *Universal Declaration of Human Rights* provides:

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

Article 19(2) of the *International Covenant on Civil and Political Rights* offers:

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 is a signatory to both treaties.

5. A Charter of Human Rights

Despite these international law standards, Australia lacks, at a national level, entrenched protections of freedom of expression and freedom of press. These are not the only human rights lacking protection. Australia is the only liberal democracy without comprehensive statutory or constitutional protection of human rights. A national Charter of Human Rights and Freedoms would help to maintain the health of our democracy by requiring laws that infringe on free speech and press freedom to be carefully weighed against the interests of (for example) national security, and for any limitations on rights to be necessary, reasonable and proportionate.

In addition, a Charter of Human Rights will ensure the decisions and actions of our federal government are guided by the values of freedom, equality, compassion and dignity. At a minimum it should protect all rights contained in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. A Charter will help prevent human rights violations, provide a powerful tool to challenge injustice, and foster broader understanding and respect for human rights. Human rights laws have already been successfully implemented in Victoria, Queensland and the Australian Capital Territory.

6. Legislative Reform is Overdue

6.1 Solutions found in existing press freedom reports

Parliamentary committees undertook two separate press freedom inquiries after police raids at the premises of the *ABC* and Smethurst. The Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) and Environment and Communications References Committee (**ECRC**) made 16 and 17 recommendations

⁶ Reporters Without Borders, *World Press Freedom Index* (2021) <<https://rsf.org/en/ranking/2021>>.

⁷ Freedom House, *Freedom in the World 2021* (2021) <<https://freedomhouse.org/country/australia/freedom-world/2021>>.

respectively providing potential solutions.⁸ The Government has failed to implement these recommendations: it has yet to respond to the ECRC report, which made more comprehensive and holistic recommendations, and has yet to act on the 15 of 16 PJCIS recommendations it agreed to.⁹

Australians have a right to know what the government is doing in their name, and journalists have a right to do their jobs without fear of prosecution. In particular, we echo the PJCIS and ECRC recommendations on national security legislation and secrecy offences that:

...as part of its upcoming review of all secrecy provisions in Commonwealth legislation...the Attorney-General's Department specifically consider whether the relevant legislation adequately protects public interest journalism.

...

the Government give consideration to whether defences for public interest journalism should be applied to other secrecy offences within relevant Commonwealth legislation.

6.2 Whistleblowing protections

Whistleblower protections are an 'essential element in an effective system of open government and a necessary complement to secrecy laws'.¹⁰ The federal government must urgently reform whistleblowing law to protect people who speak up about wrongdoing. Federal Court justice John Griffiths has described the *Public Interest Disclosure Act 2013* (Cth) as "technical, obtuse and intractable" and as "largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public".¹¹

In 2016, the Moss Review of the *PID Act* recommended a range of reforms.¹² Although the Government accepted (in whole or in part) 30 of Moss' 33 recommendations and declared its intention go further in some respects, draft amendments are yet to be shared publicly. Five years since the Moss Review, and despite the prosecution of several whistleblowers who attempted to make use of the *PID Act*, no reform has been forthcoming. Whistleblowers are key agents of public interest journalism and democratic accountability. Stronger legal protections for whistleblowers are vital to protecting press freedom and open public debate in Australia.

⁸ Environment and Communications Reference Committee, Parliament of Australia, *Inquiry into Press Freedom* (19 May 2021); 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* (August 2020).

⁹ Government response to 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* (16 December 2020).

¹⁰ ALRC, *Secrecy Laws and Open Government in Australia* (2010, Report 112) <<https://www.alrc.gov.au/publication/secrecy-laws-and-open-government-in-australia-alrc-report-112/>>.

¹¹ *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 at [17].

¹² Philip Moss AM, *Review of the Public Interest Disclosure Act 2013: An independent statutory review* (15 June 2016).