The Punishment of Journalists for Contempt for Refusing to Reveal Their Sources in Court

Anthony Gray*

Recently, the Australian Federal Police conducted raids at the home and office of two journalists. The validity of such action is currently before the courts. It is argued here that it is possible that the High Court might find that action that effectively forces a journalist to reveal their sources breaches the implied freedom of political communication. Journalists play a pivotal role in permitting the public to hold governments accountable in our democratic system of government. Laws that effectively force them to betray their confidential sources may well limit the supply of information to journalists, in turn curbing the flow of information to voters. Courts in other jurisdictions have found that raids on journalists' homes and offices infringe freedom of expression in a way that cannot be justified in a democracy.

INTRODUCTION

In June 2019, members of the Australian Federal Police (AFP) raided the home of News Corporation reporter Annika Smethurst, apparently seeking information regarding a leaked government plan to spy on citizens. It was claimed that the information might relate to a criminal offence concerning leaked classified information. On the same day, the AFP raided the premises of the Australian Broadcasting Corporation, seeking similar information. The raids on a media outlet and one of their employees created significant consternation amongst the Australian media and the public generally, given our reputation as a strong democracy that defends and protects freedom of speech. At the time of writing, challenges to the legal validity of the raids have been launched.

One of the issues raised by the raids is the extent to which the law does, and should, protect the confidentiality of journalists' sources. This is because it is possible, as a result of these raids, that the identity of confidential sources has been revealed. Alternatively, it may be that the information obtained during these raids is used to support a further legal process, at which time journalists may be called upon to answer questions relating to the source of the material they had in their possession. Either way, the raids potentially implicate the confidentiality of journalists' sources, which raises broader questions about freedom of speech and freedom of the media.

Courts have inherent and rule-based power to punish for contempt. This power has been considered in earlier articles in the *Journal of Judicial Administration*, in terms of the compatibility of the courts' power to punish so-called instances of "scandalising the court" and sub judice contempt in relation to the implied freedom of political communication,[1] and in terms of the constitutionality of statutory reforms to courts' power to punish for contempt.[2] It is possible that, if a journalist is asked in a legal proceeding to reveal the identity of sources used for articles or stories, that they will decline to do so, consistent with their understanding of the *Journalist Code of Ethics*.[3] However, they risk being punished for contempt, and journalists have been jailed in Australia and elsewhere as a result.[4]

* Professor of Law, School of Law and Justice, University of Southern Queensland.

[1] Anthony Gray, "Contempt and the Australian Constitution – Part I" (2017) 27(1) JJA 3.

[2] Anthony Gray, "Contempt and the Australian Constitution – Part II" (2018) 27(2) JJA 55.

[3] Media, Entertainment and Arts Alliance, *Journalist Code of Ethics*, 3: "where confidences are accepted, respect them in all circumstances".

[4] *Nicholls v Director of Public Prosecutions* (1993) 61 SASR 31.

Various legislative provisions contemplate search warrants being executed specifically against journalists, and contemplate abrogation of the confidentiality of their sources. Examples are found in the *Telecommunications (Interception and Access) Act 1979* (Cth). Division 4C of Ch 4 of this legislation deals with journalist information warrants. Section 180L permits the Director-General of the Australian Security Intelligence Organisation (ASIO) to apply to the Attorney-General for a journalist information warrant. Section 180L(2)(b) states that the Attorney-General must not issue the warrant unless they are satisfied that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the identity of sources. Relevant factors are stated to include the extent to which an individual's privacy is likely to be affected, the gravity of the matter about which information is sought, the extent to which such information could assist ASIO in the performance of its functions, whether reasonable efforts have been made to obtain the information by other means, any submissions made by the Public Interest Advocate, and any other matter the Attorney-General considers relevant. If issued, the warrant may be effective for up to six months.[5]

Similarly, s 180T permits a law enforcement agency to apply to an issuing authority for a journalist information warrant. An issuing authority includes judges, magistrates and members of the Administrative Appeals Tribunal (who do not generally enjoy tenure). The issuing officer must be satisfied the warrant is reasonably necessary for law enforcement purposes. They are to consider the same factors noted in the previous paragraph in relation to the Attorney-General's decision under s 180L. Warrants issued under s 180T are valid for a maximum duration of three months.[6] More generally, search warrants are available under s 3E of the *Crimes Act 1914* (Cth) in respect of premises reasonably suspected of hosting "evidential material". Section 3LA specifically contemplates a court order that a person assist law enforcement authorities to access material on a computer at the search premises. Section 3LA (5) and (6) provide that a person subject to such an order who fails to comply is liable to a prison sentence of five years, or 10 years if the information relates to a "serious offence".

Commonwealth legislation provides some protection against disclosure of the identity of a person who has made a public interest disclosure. Section 20 of the *Public Interest Disclosure Act 2013* (Cth) creates an offence of revealing the identity of a person who has made a public interest disclosure. This is punishable by a possible jail term of six months, and/or 30 penalty units. However, s 26 of the Act defines a public interest disclosure in narrow terms. It is confined to "disclosable conduct", defined in s 29,[7] where an internal investigation has occurred that the discloser reasonably considers to be inadequate or was not completed in a timely manner, disclosure is not contrary to the public interest, does not relate to an intelligence agency, is not intelligence information (defined in s 41), and where no more information is disclosed than is reasonably necessary. The Act does apply to the Crown and its officers, but the Crown cannot be liable to penalty or be prosecuted for an offence.[8]

History – Free Speech and the Media

Traditionally, the common law did not strongly protect freedom of speech, including freedom of the "press". It should be acknowledged that the meaning of this word in this context has changed over time. Initially, it referred to those who owned a printing press, used to circulate materials such as pamphlets, as well as books and journals. Over time, it came to be a synonym for the media, those who engage journalists to report news and provide various perspectives on contentious issues.

For many years, English law provided for a system of "prior restraint". The government effectively sought control over the publication of matter through its regulation of intellectual property, which purported to

[5] *Telecommunications (Interception and Access) Act 1979* (Cth) s 180N.

[6] *Telecommunications (Interception and Access) Act 1979* (Cth) s 180U(3).

[7] This means conduct that: is contrary to Commonwealth or State law, or the applicable law of another country; perverts or attempts to pervert the course of justice or involves corruption; constitutes maladministration (based on improper motives, is unreasonable or negligent); is an abuse of public trust; involves falsification of scientific research; results in waste of public money or public property; or creates a health risk or danger to the environment.

[8] *Public Interest Disclosure Act 2013* (Cth) s 3.

provide protection for the creator of works, but operated as a de facto form of censorship. During the reign of Elizabeth I, every book had to be approved by the Archbishop of Canterbury or London before it could be published. Those who published an unapproved work were punished. This licensing system finally lapsed in 1694. The system of censorship was complemented by other measures to discourage, in particular, material seen to be critical of the monarch, political leaders, judges or religious figures. These measures included the *Scandalum Magnatum* (1275 and later), which dealt with the spreading of "fake news" about the monarch, and the offence of treason. Ecclesiastical courts would enforce religious orthodoxy, and the Star Chamber created the common law offence of seditious libel in 1606.[9]

Legal scholars at the time did not recognise freedom of the media in the way we do now. In the 18th century, Sir William Blackstone believed that freedom of speech in the context of the media was confined to a lack of prior restraint on speech, and was consistent with other content-based restrictions:

> Where blasphemous, immoral, treasonable, schismatical, seditious or scandalous libels are punished by the English law … the liberty of the press, properly understood, is by no means infringed or violated … (it) consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published.[10] The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity … to punish … any dangerous or offensive writings which (are) … of a pernicious tendency is necessary for the preservation of peace and good order.[11]

Over time, however, conceptions of government changed. When a Hobbesian-view of government was held, whereby a strong government was seen as necessary to curb the "animal instincts" of humans, it was not surprising that courts gave short shrift to arguments about free speech. An example is found in a prosecution against Tutchin for publishing criticism of the then government in his newspaper *The Observators.* Finding Tutchin guilty of seditious libel for such publication, Holt CJ explained that:

> But this is a very strange doctrine, to say, it is not a libel, reflecting on the government … if men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist, for it is very necessary for every government, that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has been always looked upon as crime, and no government can be safe unless it be punished.[12]

However, as ideas of a Lockean social contract, as opposed to a strong authoritarian, form of government took hold, courts became more accepting of the importance of free speech. This occurred at a time when government itself might have been seen as more stable, and not vulnerable. A new-found acceptance of freedom of speech might be connected with more confidence that the system of governance that had been established was strong enough to withstand any criticism of it. Stephen notes this:

> Two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken, his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority. If on the other hand the ruler is regarded as the agent and servant, and the subject of the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being

[9] *De Libellis Famosis* (1606) 5 Co Rep 125a; 77 ER 250.

[10] William Blackstone, *Commentaries on the Laws of England 1765-1769* (Clarendon Press, 1769) 151–152.

[11] Blackstone, n 10, 152. Blackstone apparently did not accept Locke's social contract theory involving individuals ceding limited rights to a collective legislature; instead he favoured a more authoritarian view of rulers along the lines of Hobbes.

[12] *R v Tutchin* (1704) Holt KB 424, 424–425; 90 ER 1133, 1133–1134 (QB).

> exercises in his own person the right which belongs to the whole of which he forms a part … to those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition.[13]

By 1832 prosecutions for seditious libel had ended in the United Kingdom, and by the late 19th century the courts were lauding the strong protection that the common law accorded free speech.[14] The United Kingdom (UK) courts have reflected more broadly on the important role that the media plays in the system of representative government. An example is the following statement in *Attorney-General v Times Newspapers Ltd*:

> People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.[15]

Various theories are said to justify why (and how) the law should protect freedom of speech. These range from ideas about an individual's self-development and self-actualisation,[16] to notions regarding the marketplace of ideas,[17] to concepts of self-government[18] or distrust of the government.[19] None of these is considered to be at odds with recognition of a privilege to protect the confidentiality of journalists' sources.

Freedom of Speech in Australia

Until 1992, freedom of speech was accorded common law protection in Australia. As such it was not recognised as a constitutional right. It existed only to the extent that Parliament did not abrogate the right.[20] It was supplemented by the principle of legality, under which a law is presumed not to interfere with fundamental human rights unless the will of Parliament to do so is clear,[21] and principles of constitutional interpretation, including that in determining whether or not a law is reasonably appropriate and adapted, or proportional, to a head of power, the extent to which it impacts on fundamental freedoms is relevant.[22]

In 1992, the High Court of Australia recognised that the system of representative government contained in the Australian *Constitution* contemplated an implied freedom of political communication. In order for that system of government to operate, it was necessary that there be freedom of communication about political matters.

Both of the 1992 High Court decisions in which the freedom was recognised involved the media. The first, *Nationwide News Pty Ltd v Wills*,[23] involved the question of the constitutionality of a federal law creating an offence of bringing a member of the Industrial Relations Commission into disrepute. The second, *Australian Capital Television Pty Ltd v Commonwealth*,[24] involved the question of the constitutionality of a federal law prohibiting the broadcast of political advertising leading up to a federal election. All members of the Court in *Nationwide News* declared the law to be invalid, either on the basis that it

---

[13] James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1904) 299–300. He adds that "the practical enforcement of this doctrine (of sedition) was wholly inconsistent with any serious public discussion of political affairs is obvious" (348); see also Zechariah Chafee, "Freedom of Speech in War Time" (1919) 32 *Harvard Law Review* 945–947.

[14] *Wason v Walter* (1868) 4 LR (QB) 73, 93 (Cockburn CJ).

[15] *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 315 (Lord Simon).

[16] John Stuart Mill, *On Liberty* (Everyman, 1972).

[17] *Abrams v United States*, 250 US 616, 630 (Holmes J, dissenting) (1919).

[18] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper, 1960).

[19] Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1981).

[20] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (all members of the Court).

[21] *X7 v Australian Crime Commission* (2013) 248 CLR 92, 109–110 (French CJ and Crennan J), 132 (Hayne and Bell JJ), 153 (Kiefel J); [2013] HCA 29.

[22] *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ).

[23] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

[24] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

impermissibly infringed the implied freedom of political communication, or was not supported by a head of power. A majority of the Court in *Australian Capital Television*[25] declared the law to be invalid, because it impermissibly infringed the implied freedom of political communication.

Members of the High Court found that Australia's *Constitution* was premised on the idea that all powers of government belonged to, and were ultimately derived from, the people.[26] The people had the ultimate power of government control. Therefore, it was necessary, in order that the people could exercise this power effectively, that the people have access to material relating to particular candidates and a broad range of information to enable them to assess what was in Australia's best interests. The essentiality of communication about political matters to ensure the accountability of public officials to the public was emphasised in *Australian Capital Television*.[27] The freedom applies not only to communication between elected officials and the public, but also between members of the public. Mason CJ said that individual judgment "turns upon free public discussion in the media of the views of all interested persons, groups and bodies, and on public participation in, and access to, that discussion".[28] Members of the Court distinguished between laws that targeted speech because of its content, and laws of general application that incidentally impacted freedom of speech.[29] Laws of that former kind would be more difficult to justify, and therefore would require compelling justification.

The implied freedom of political communication has been considered in the context of the media in three further cases. In *Theophanous v Herald and Weekly Times Ltd*[30] the Court considered allegedly defamatory comments contained in a newspaper article published by the defendant. In *Lange v Australian Broadcasting Corporation*[31] the Court considered allegedly defamatory comments contained in a television program broadcast by the defendant. In these cases, the Courts noted that the common law of Australia (there, the common law of defamation) had to yield to the implied freedom. In the other case, *Stephens v West Australian Newspapers Ltd*,[32] a majority of the Court found the implied freedom could extend to discussion of State political matters.[33]

The High Court has emphasised that the freedom is a negative freedom, rather than a positive right. This means it may be used as a defence – for example, to find a legislative provision to be invalid. It is not the source of a positive right – for example, to compensation in the event the freedom is not observed. Further, the Court has repeatedly indicated that the freedom is limited to whatever is within the description of a "political" communication, though it is difficult to accurately define what this is.[34] Finally, initially the Court adopted a two-stage test in order to determine the validity of legislation challenged under it.[35]

---

[25] Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.

[26] *Nationwide News Pty Ltd v Commonwealth* (1992) 177 CLR 1, 72 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137 (Mason CJ).

[27] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ), 231 (McHugh J).

[28] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 139.

[29] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 169 (Deane and Toohey JJ), 234–235 (McHugh J).

[30] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104.

[31] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[32] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

[33] A fourth case related to the media only tangentially; it concerned the constitutionality of legislation that permitted a Parole Board to grant parole on condition that the parolee not speak with the media about particular matters. This was found to be constitutionally valid in *Wotton v Queensland* (2012) 246 CLR 1; [2012] HCA 2.

[34] In *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124, Mason CJ, Toohey and Gaudron JJ suggested it might mean "all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about", quoting leading free speech scholar Eric Barendt.

[35] This test was developed by a unanimous Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567. It considered: (1) whether the law burdened the freedom to discuss political matters in terms or effect; and (2) if so, whether it was appropriate and adapted to serve a legitimate end in a manner compatible with representative and responsible government (as slightly modified by a majority of the Court in *Coleman v Power* (2004) 220 CLR 1).

However, in *McCloy v New South Wales*[36] a majority of the Court accepted a three-stage test, which embraced aspects of the two-stage test, but more overtly considered proportionality analysis. According to the test, which a majority now use, there are three questions:

(1) Does the law effectively burden the freedom in terms, operation or effect?
(2) Are the purpose of the law and the means adopted to achieve it legitimate, in the sense they are compatible with maintenance of representative government?
(3) Is the law reasonably appropriate and adapted to advancing that legitimate object? This is proportionality testing. The Court considers whether the law is: suitable (rationally connected with its purpose); necessary (no obvious and compelling alternative way of fulfilling the legitimate objective that is less invasive of the freedom); and adequate in its balance. This considers the importance of the purpose served by the challenged legislation in comparison with the extent of the infringement of the freedom.

To date, the High Court has not considered the implied freedom of political communication in the specific context of questions of possible journalist privilege. Nor, in terms of the various theories and rationales for free speech, has the High Court settled upon a particular theory that is said to underlie the implied freedom of political communication. This has been trenchantly criticised.[37] However, it is considered that, given the High Court sourced the implied freedom in the system of representative and responsible government enshrined in our *Constitution*, Meiklejohn's theory of a self-governing democracy[38] and the fundamental role of free speech in ensuring it works effectively would be the most appropriate fit.[39] In fact, one of the later cases on the implied freedom,[40] if not the landmark first two, referred with evident approval to Meiklejohn's work.

If the self-governing democracy theory were accepted, this should recognise a pivotal role for the media. Individuals are not capable of discovering all of the information needed to make an informed decision of how they have been, and should be, governed. Good decisions are informed by good information. In terms of economics, it is not worth a person's while to devote the kind of resources that would be needed to discover sufficient information about their government to make an informed judgment, when they are one person among millions of voters whose individual vote will not sway outcomes. A rational person would not make the needed time investment.[41] In any event, most people probably lack the time and inclination to do so. This makes the role of the media critical in permitting the kind of informed decisions needed.

Relatedly, media can play a role as a watchdog. It might discover abuse of government power or wrongdoing.[42] Our government structures and legal principles were created partly as a response to a risk of abuse of power. Constitutional principles such as the rule of law and separation of powers, as well as administrative law principles, reflect consciousness of this risk. The media also plays an

---

[36] *McCloy v New South Wales* (2015) 257 CLR 178, 212–221 (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 34.

[37] Michael Chesterman, *Freedom of Speech in Australia: A Delicate Plant* (Ashgate, 2000) 19.

[38] "When (individuals) govern themselves it is they – and no-one else – who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American … the principle of the freedom of speech springs from the necessities of the program of self-government. It is not a law of nature or of reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage": Meiklejohn, n 18, 27.

[39] Adrienne Stone, "The Limits of Constitutional Text and Structure Revisited" (2005) 28 *University of New South Wales Law Journal* 842, 849, stating it was "only a very short step" between Meiklejohn's theory and the position of the High Court.

[40] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 124 (Mason CJ, Toohey and Gaudron JJ).

[41] *Cox Broadcasting Corporation v Cohn*, 420 US 469, 491–492 (White J, for the Court) (1975): "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of … government, [they rely] necessarily upon the press to bring … in convenient form the facts of those operations … without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."

[42] Monica Langley and Lee Devine, "Branzburg Revisited: Confidential Sources and First Amendment Values" (1988) 57 *George Washington Law Review* 13, 43.

important role here.[43] At its best, it can shine a light on wrongdoing, bringing it to the public's attention, which governments may be trying to avoid. Again, the media indirectly permits the public to hold their representatives accountable and responsible for their behaviour and decisions, and allows them to make an informed judgment on their representatives at election time.[44] In this way, the media can be a force for good (or better) government.[45]

Coincidentally, at the time of writing, Queensland is celebrating the 30th anniversary of the release of the Fitzgerald Inquiry Report. That Report uncovered widespread corruption among government and police officers in Queensland, leading to sweeping reforms, including in relation to electoral boundaries, establishment of anti-corruption agencies, and greater transparency and accountability in decision-making. It must never be forgotten that the Inquiry was only established after media, including the *Four Corners* television program, exposed the rotten and corrupt government. This example highlights the pivotal role played by the media in Australia's system of democratic government that the implied freedom underpins and supports.

JOURNALISTS' PRIVILEGE IN AUSTRALIAN LAW

A journalist's privilege is typically argued to exclude journalists from legal requirements that would ordinarily apply to others – for example, to answer questions posed to them in court, and to respond to subpoenas or other legal process with relevant information in their possession. Specifically, a journalist might claim an exemption from general requirements to answer questions from legal authorities on the basis that they wish to maintain the confidentiality of their sources.

There are many possible reasons why a journalist may wish to maintain the confidentiality of sources. First, if the identity of the source becomes known, it may place that person in physical danger, or danger of another kind of reprisal such as disciplinary action. Secondly, it is argued that if the journalist were required to reveal the source of information, as well as placing the source in a dangerous or difficult position, it may prejudice the future free flow of information on important matters. There may be a strong public interest in society being aware of these matters. It is argued that, for journalists to fulfil their important role in a democracy, it is essential that they have access to confidential sources.

The High Court has not traditionally recognised the concept of journalists' privilege. The matter was considered in *McGuinness v Attorney-General of Victoria*.[46] There a newspaper published allegations that individuals were collecting money so that they could bribe members of Parliament to prevent particular legislation being passed. A Royal Commission was established to investigate the allegations. It called the editor of the newspaper and asked him to reveal the sources upon which he had based his story. He refused to answer the question. The government commenced criminal proceedings against the editor, who claimed journalistic privilege, based on some suggestion of this in UK case law.

All members of the High Court rejected the editor's defence. Latham CJ stated that the UK cases related only to interlocutory processes involving discovery, and were matters of practice rather than based on a legal principle.[47] Rich J agreed that the practice was an exercise of the decision-maker's discretion (only),

[43] *Richmond Newspapers Inc v Virginia*, 448 US 555, 569 (Burger CJ, for White and Stevens JJ), 592 (Brennan J, dissenting) (1980).

[44] David Hume, *Of the Liberty of the Press* (1742): "[A]rbitrary power would steal in upon us were we not careful to prevent its progress and were there not an easy method of conveying the alarm from one end of the (country) to the other … nothing so effectual to this purpose as the liberty of the press, by which all that learning, wit, and genius of the nation may be employed on the side of freedom and everyone be animated to its defense. As long, therefore, as the republican part of our government can maintain itself … it will naturally be careful to keep the press open as of importance to its own preservation."

[45] It should be acknowledged that the media is far from perfect, and can act to the detriment of democracy as well. Particularly egregious practices might include sensationalist journalism, selective reporting, misleading reporting, and focusing on the trivial, or "gotcha" moment, as opposed to what many would consider to be the substantive, important issues. Sometimes, the media has an agenda, and chooses information to support their agenda.

[46] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73.

[47] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 85.

rather than a legal rule, and that it had been applied at an interlocutory stage of proceedings (only).[48] He observed that courts were generally entitled to the full range of available information in dealing with cases, such that cases of privilege, or exemption from this general rule, were narrowly construed on grounds of public policy. He said journalists' claims that confidentiality assisted their search for news were not unique, that those involved in other trades or pursuits could make the same argument. However, the law had not recognised such a general exemption from the traditional rule.[49] Starke J agreed the UK cases reflected simply a discretion in the decision-maker, rather than a legal rule.[50] McTiernan J agreed, adding that it applied only at an interlocutory stage of proceedings.[51]

Dixon J considered the matter at some length:

> No-one doubts that editors and journalists are at times made the repositories of special confidences which … they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice … and the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party … except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and state secrets and by statute physician and patient and priest and penitent, an inflexible rule was established that no … duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box. Claims have been made … for the protection of confidences to trustees, agents, bankers and clerks … and they have all been rejected.[52]

Dixon J agreed with the other justices that the UK practice was limited to interlocutory proceedings involving questions of discovery, and should not be extended or upgraded to a general principle of the law of evidence. He agreed with evidence luminary Wigmore in dismissing "pretensions to a privilege on the part of journalists".[53] The position in the United Kingdom would evolve subsequently to Dixon J's judgment, as discussed below.

The High Court considered the matter again in *John Fairfax & Sons Pty Ltd v Cojuangco*.[54] The case involved a defamation action against a newspaper and journalist for claiming that the plaintiff was a "crony" of a foreign president who had participated in the loss of $9 billion. The plaintiff sought discovery, including details of the sources used for the story. The defendant relied on a so-called journalists' privilege to refuse to provide such details. The High Court emphatically rejected the defendant's argument:

> It is a fundamental principle of our law, repeatedly affirmed by Australian and English courts, that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice … there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to a superior public interest (like) … national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a (trial based) … on relevant and admissible evidence. No doubt the free flow of information is a vital ingredient in the investigative journalism which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information. It stands to reason that the free flow of information would be reinforced, to some extent at least, if the courts were to confer absolute protection on that confidentiality. But this would set such a high value on a free press and on freedom of information as to leave the individual without an effective remedy in respect of defamatory imputations published in the media. That is why the courts have refused

[48] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87.

[49] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87.

[50] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 92.

[51] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 107.

[52] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 102–103.

[53] *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 105.

[54] *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346.

> to accord absolute protection on the confidentiality of the journalist's source of information whilst at the same time imposing some restraints on the entitlement of a litigant to compel disclosure of the identity of the source. In effect, the courts have acted according to the principle that disclosure of the source will not be required unless it is necessary in the interests of justice.[55]

The Court expressed concern that recognition of an immunity from disclosure of sources would permit irresponsible journalists to hide behind anonymous, or even fictitious, sources. The fact that journalists might be required to reveal sources would, in the Court's view, tend to encourage responsible journalism and avoid the great power that media had from being abused.[56] It must be borne in mind that both of these High Court decisions were rendered prior to the landmark 1992 decisions recognising an implied freedom of political communication in the Australian *Constitution*. They also contain observations about English law that were correct at the time, but that no longer reflect the position in that jurisdiction, as discussed below.

Subsequent decisions have applied these principles. There are examples where journalists have been jailed[57] or fined[58] for contempt for refusing to reveal their sources when asked during legal proceedings to do so.

Statutory reform then occurred at the Commonwealth level and in four States. Section 126K(1) of the *Evidence Act 1995* (Cth) now provides that, in cases where journalists have promised an informant that they will not reveal their identity, neither the journalist nor their employer is required to answer any question or produce any document that would disclose the informant's identity, or permit it to be discovered. Subsection (2) states that the privilege contained in subs (1) does not apply if the court is satisfied that the public interest in disclosure of the evidence outweighs the likely effect of the disclosure on the informant, the public interest in media disclosure of facts and opinion to the general public, and the ability of the media to access sources.[59]

It is not entirely clear whether a journalist is limited to "a person engaged in the practice of journalism for a living". Section 126J states that a journalist is someone who is "engaged and active" in the publication of news who may be given information by an "informant" in the expectation it will be published in a news medium. This seems to suggest that a person writing a blog, without qualifications as a journalist and who is not employed as a journalist, could meet the definition. However, the definition of "informant" is a person who provides information to a journalist "in the ordinary course of the journalist's work". This suggests an intention that the protection is limited to those who engage in journalism as a paid career.[60]

In any event, New South Wales,[61] Victoria,[62] South Australia[63] and Western Australia[64] have passed provisions that are substantially identical to s 126K of the Commonwealth *Evidence Act* . There is no specific journalists' privilege provided for in the *Evidence Act 1977* (Qld). Tasmania provides a general

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

[56] *John Fairfax & Sons Pty Ltd v Cojuangco* (1988) 165 CLR 346, 355.

[57] *Nicholls v Director of Public Prosecutions* (1993) 61 SASR 31 (four months' jail, reduced on appeal to 12 weeks' jail); *Wood v Staunton (No 5)* (1996) 86 A Crim R 183 (11 months' jail and eight months' jail for separate contempts).

[58] *R v McManus and Harvey* [2007] VCC 619 (convictions recorded).

[59] This section will not apply in respect of family law proceedings where the court believes the best interests of the child require disclosure: *Family Law Act 1975* (Cth) s 69ZX(4).

[60] The equivalent Victorian provision specifies this – *Evidence Act 2008* (Vic) s 126K(1) – adding the phrase "in the course of the journalist's work" in describing the privilege; the Western Australian legislation also makes this clear in its definition of journalist – *Evidence Act 1906* (WA) s 20G.

[61] *Evidence Act 1995* (NSW) s 126K; see Dyson Heydon, *Cross on Evidence 10th Australian Edition* (LexisNexis, 2015) 928–932.

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

[63] *Evidence Act 1929* (SA) s 72B.

[64] *Evidence Act 1906* (WA) ss 20I, 20J.

privilege regarding professional confidential relationships, as do other States,[65] at the court's discretion.[66] This privilege is limited to cases where the confidant was acting in a professional capacity.[67]

Application of s 126K was considered by the Victorian Supreme Court in *Madafferi v The Age Co Ltd*.[68] There the plaintiff commenced defamation action for articles in the defendant's newspaper that alleged the plaintiff was the head of the Victorian mafia. He sought information about the sources the defendant had used in compiling its articles. However, the Court applied the statutory journalists' privilege, and rejected the application. The Court took into account the significant and substantial public interest in discussion of these matters in public and how it was necessary in the circumstances of this case that the media have recourse to confidential sources. The Court noted that "informed public debate about the [subject matter of the articles] weighs heavily in the balance in favour of maintaining the presumption of non-compellability".[69] It also noted that it was not necessary for a fair trial to be had that there be complete, or perfect, disclosure of all relevant evidence.[70] Non-disclosure of the sources the defendant had used would not hamper the plaintiff in the preparation of his case.[71]

Given that these amendments have occurred only recently, it is too early to make authoritative statements about how they will be interpreted. However, the traditional reluctance of courts to explore the public interest involved in preserving the confidentiality of a journalist's sources has been noted in the Australian context.[72] Courts might, based on prior practice, readily find that the "public interest" favouring disclosure of the source's identity overrides the protection given by s 126K and State equivalents. It will be interesting to see whether and to what extent this traditional reluctance will be carried over into interpretation of the statutory reforms.

Journalists' Privilege in Comparable Jurisdictions

United States

The United States provides perhaps the strongest protection for free speech in the common law world with its First Amendment. The Amendment provides that no law of Congress shall abridge freedom of speech or freedom of the press. The Amendment has been extended to apply to State laws by virtue of the Fourteenth Amendment. The rights found in the First Amendment have never been found by a majority of the court to be absolute in nature; however, time and again the United States (US) Supreme Court has underlined the fundamental nature of freedom of speech in American society.[73] The Court has also noted the valuable contribution that anonymous speech has made to important public debates, and that anonymity is generally accorded First Amendment protection.[74]

---

[65] *Evidence Act 1995* (NSW) s 126B; *Evidence Act 1906* (WA) s 20C; *Evidence Act 2011* (ACT) s 126B.

[66] *Evidence Act 2001* (Tas) s 126B.

[67] *Evidence Act 2001* (Tas) s 126A.

[68] *Madafferi v The Age Co Ltd* (2015) 50 VR 492; [2015] VSC 687.

[69] *Madafferi v The Age Co Ltd* (2015) 50 VR 492, [125] (Dixon J); [2015] VSC 687.

[70] *Madafferi v The Age Co Ltd* (2015) 50 VR 492, [51]; [2015] VSC 687.

[71] *Madafferi v The Age Co Ltd* (2015) 50 VR 492, [20]; [2015] VSC 687.

[72] Hannah Ryan, "The Half-Hearted Protection of Journalists' Sources: Judicial Interpretation of Australia's Shield Laws" (2014) 19 *Media and Arts Law Review* 325, 327; Georgia Price, "Pack Your Toothbrush: Journalists' Confidential Sources and Contempt of Court" (2003) 8(4) *Media and Arts Law Review* 259, 266.

[73] *West Virginia Board of Education v Barnette*, 319 US 624, 642 (Jackson J, for Stone CJ, Roberts, Reed and Rutledge JJ) (1943): "[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are circumstances which permit an exception, they do not now occur to us." *Garrison v Louisiana*, 379 US 64, 74–75 (Brennan J, for six members of the Court) (1965): "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."

[74] *Talley v California*, 362 US 60 (1960), where the Court invalidated a statute prohibiting the distribution of pamphlets unless the person who sponsored them included their name and address on the pamphlet. Black J for the Court noted that *The Federalist Papers*, so critical for the development of American constitutional government, had been written under fictitious names (64–65);

Questions of press freedom were considered well prior to the development of the American *Constitution*. In a classic case, printer Peter Zenger was prosecuted for distributing leaflets that were allegedly seditious in nature. The leaflets were critical of a colonial governor that had been appointed to New York by the British. The only question given to the jury to consider was whether he had "published" the relevant material, not the contentious matter of whether they were seditious as the judge had already found that they were. All of the evidence suggested that Zenger had in fact published the material, and Zenger himself admitted he had. However, in a famous victory for freedom of the "press", the jury acquitted him.[75]

Many leading First Amendment cases have involved the media. Government attempts to censor the media by selectively imposing a tax on some media outlets foundered on First Amendment grounds.[76] In one famous case, *New York Times Co Ltd v Sullivan*,[77] the Court found that the law of defamation had to yield to the First Amendment. The *New York Times* had allegedly cast aspersions on a police commissioner in relation to his behaviour during a civil rights protest in the South. He sued the newspaper for defamation. In this case, the Court significantly narrowed the ability of public figures to sue defendants such as newspapers for defamation, requiring that the plaintiff in such cases prove that the publication was motivated by malice or reckless disregard. This case went on to partly influence the Australian High Court when it adapted Australian defamation law given the dictates of the Australian implied freedom of political communication.[78] Press freedom also won out in the landmark case of *New York Times Co v United States*,[79] where the newspaper published extracts from a leaked report concerning US activity in Asia, including the Vietnam War. The US Government unsuccessfully sought to prevent publication. The Court vindicated the newspaper on First Amendment grounds.

Given this history, when the Supreme Court considered the question of the First Amendment in relation to the confidentiality of media sources, the result was somewhat surprising.[80] This occurred in the landmark, controversial case of *Branzburg v Hayes*.[81] There, reporter Branzburg wrote two articles: one describing the actions of an individual producing an illegal drug from which they derived significant money; another was based on his observations of and interviews with those using illegal drugs. He was subpoenaed, and asked to identify those who formed the basis of his stories. He refused, arguing that his First Amendment rights meant he was not required to identify his sources. By a majority of 5–4, the Supreme Court rejected his First Amendment claim.

The majority joint reasons (White J, for Burger CJ, Blackmun and Rehnquist JJ) noted that the First Amendment did not confer the press an absolute freedom and that laws of general application could incidentally restrict these freedoms in the public interest. The majority joint reasons stated that arguments that abrogation of the confidentiality of sources would impede the flow of information to journalists were speculative only, and little concrete evidence had been provided to support the claim.[82] To the extent that the one confiding to the media was involved in criminal activity, which was the case here, the argument for confidentiality was further weakened. The reasons noted the lack of past recognition of

McIntyre v Ohio Elections Commission, 514 US 334 (1995); RonNell Andersen Jones, "Rethinking Reporter's Privilege" (2013) 111 *Michigan Law Review* 1221.

[75] Sandra Davidson and David Herrera, "Needed: More Than a Paper Shield" (2012) 20 *William and Mary Bill of Rights Journal* 1277, 1296–1297.

[76] *Grosjean v American Press Co*, 297 US 233 (1936).

[77] *New York Times Co Ltd v Sullivan*, 376 US 254 (1964).

[78] *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130–131 (Mason CJ, Toohey and Gaudron JJ).

[79] *New York Times Co v United States*, 403 US 713 (1971).

[80] Bennett Fuson, "An International Case for the United States Adopting a Qualified Privilege for Source Confidentiality" (2016) 26 *Indiana International and Comparative Law Review* 175, 176: "[F]or a nation that prides itself on constitutional protections granting a free press, the United States has engaged in a troubling and systematic pursuit of confidential information (and … confidential sources) gathered by reporters in an effort to pursue leaked information."

[81] *Branzburg v Hayes*, 408 US 665 (1972).

[82] *Branzburg v Hayes*, 408 US 665, 693–694 (1972).

journalistic privilege, yet press freedom had flourished.[83] The fifth justice in the majority, Powell J, wrote separately to indicate his agreement with the joint majority reasons on the facts of this case. However, he said the assessment of whether the confidentiality of journalists' sources should be protected should be considered on a case-by-case basis.[84] Thus, though he sided with the majority, he was clearly more sympathetic to recognition of the confidentiality of sources in an appropriate case. As indicated, in this case the confidants were involved in criminal activity, which may have swayed him on the facts.

There were four dissentients. Douglas J claimed the Court's judgment would have serious implications for American democracy:

> Today's decision will impede the wide-open and robust dissemination of ideas and counterthought which a free press both fosters and protects and which is essential to the success of intelligent self-government. Forcing a reporter before a (court) will have two retarding effects upon the ear and the pen of the press. Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And fear of accountability will cause editors and critics to write with more restrained pens.[85]

Douglas J opined that the press had a preferred position in the constitutional scheme. This was not to favour the media, or enable it to make money. Rather, it was a reflection of the media's role in fulfilling the public's right to know.[86] The media had a critical role in telling the people what was going on, and to explore and investigate matters. He feared that if journalists were required to reveal the confidentiality of their sources, their leads would dry up and their efforts to educate and inform the people would be thwarted. He noted evidence from experienced reporters on the record as to the impact that denial of the confidentiality of sources would have on their ability to do their job.

Stewart J (dissenting), with whom Brennan and Marshall JJ agreed, stated that the protection of the confidentiality of journalists' sources existed not for the journalist or the informant, or their First Amendment rights, but rather "it functions to ensure nothing less than democratic decisionmaking through the free flow of information to the public and it serves, thereby, to honour the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open'".[87]

The dissentients discussed the need for an educated citizenry in order that democracy could flourish and the pivotal role of the press in that enterprise. This was an "incontestable precondition of self-government".[88] In order to play that role, the media must have the right to gather news. Its ability to do so would be crippled if they could not guarantee the confidentiality of sources. If journalists could be compelled to reveal sources, the flow of information would be substantially impeded.

Stewart J's view was that journalists would only be expected to reveal confidential sources where three conditions were met: (1) there was probable cause to believe that the journalist had information relevant to a specific probable illegal act; (2) the information sought could not be obtained in another way less destructive of First Amendment rights; and (3) there was a compelling and overriding interest in the information.[89]

Stewart J rejected the supposed conflict between First Amendment freedoms and the administration of justice. He concluded that, in the long run, the freedoms were complementary rather than in conflict.[90] He said that law enforcement authorities depended on third parties like newspapers providing general information to the public.

---

[83] *Branzburg v Hayes*, 408 US 665, 698 (1972).

[84] *Branzburg v Hayes*, 408 US 665, 710 (1972).

[85] *Branzburg v Hayes*, 408 US 665, 720–721 (1972).

[86] *Branzburg v Hayes*, 408 US 665, 721 (1972).

[87] *Branzburg v Hayes*, 408 US 665, 737–738 (1972), quoting *New York Times Co Ltd v Sullivan*, 376 US 254 (1964).

[88] Stewart J, with whom Brennan and Marshall JJ agreed.

[89] *Branzburg v Hayes*, 408 US 665, 743 (1972).

[90] *Branzburg v Hayes*, 408 US 665, 746 (1972).

Journalists have been jailed in the United States for refusing court orders to reveal the identity of confidential sources. Almost all jurisdictions in the United States have now passed legislation conferring some kind of protection for the confidentiality of journalists' sources.[91]

United Kingdom/Europe

Over many years, the United Kingdom common law developed a rule, known loosely as the "newspaper rule", which protected defendant newspapers from having to divulge the source of material they had published. However, the rule only applied in actions for defamation, and only applied at an interlocutory stage of proceedings, such as discovery, as opposed to the trial itself.[92]

In the United Kingdom, legal protection for journalists' sources was initially weak. The House of Lords considered the suggestion of media privilege from disclosure of information in *British Steel Corporation v Granada Television Ltd*.[93] The defendant broadcast a television program about a strike involving the plaintiff company. The program included serious criticisms about the internal management of the defendant, its inefficiencies and its inability to compete with rivals. The plaintiff sought information that would identify the source of the material that Granada Television had used. Granada Television refused to divulge the identity of its source, claiming media privilege. A majority of the House of Lords rejected claims of media privilege.

Lord Wilberforce, with whom Lord Russell agreed,[94] found that the "freedom of press" generally meant freedom from prior restraint.[95] The law did not recognise a right to the free flow of information.[96] While generally there were public benefits in the free flow of information, this had to be balanced with the benefits derived from respecting the confidentiality of information.[97] Various relationships featured obligations of confidence, including banker and customer, priest and penitent, and doctor and patient. In all such cases, while the law respected confidentiality, on occasion it abrogated it in the interests of justice.[98] There was nothing special about the relationship between journalist and source that suggested it should receive special treatment by the law.[99] He concluded journalists were not free to refuse to divulge the identity of sources where this was necessary in the interests of justice.[100] Lord Wilberforce rejected arguments that if the confidentiality of sources was not protected, sources of information would dry up. This was mere speculation.[101] Other majority justices denied the case concerned freedom of the press at all.[102] They concluded the so-called newspaper rule, under which defendant newspapers had been spared in past cases from having to reveal sources, was limited to cases of defamation and only applied at an interlocutory stage of proceedings.[103] Viscount Dilhorne claimed that if the confidentiality of the source was protected, the plaintiff would effectively be denied justice by not being able to seek redress for a wrong.[104]

---

[91] Fuson, n 80, 180; Leslie Siegel, "Trampling on the Fourth Estate: The Need for a Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure of News Sources and Information" (2006) 67 *Ohio State Law Journal* 469.

[92] *Attorney-General v Mulholland* [1963] 2 QB 477.

[93] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.

[94] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1203.

[95] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168.

[96] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168.

[97] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168; a similar view was expressed by Viscount Dilhorne (1176) and Lord Fraser (1202).

[98] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1169.

[99] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168–1169.

[100] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1169.

[101] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1173.

[102] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1176 (Viscount Dilhorne), 1203 (Lord Russell).

[103] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1179 (Viscount Dilhorne), 1197 (Lord Fraser).

[104] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1184; see also 1203 (Lord Russell).

Lord Salmon dissented. He said that a free press reported matters of general public importance and could not, unless exceptional circumstances applied, be required to reveal the identity of confidential sources. This was necessary to ensure that the press could maintain its sources of information and fulfil its role of educating the public on matters of great importance.[105] He said there was no reason why the so-called newspaper rule should be confined to defamation.[106] A later UK decision would confirm the fundamental role of the media in facilitating discussion and comment about important public issues in a democracy.[107]

Shortly after the *Granada* case was decided, the UK Parliament passed the *Contempt of Court Act 1981* (UK). Section 10 stated that a court would not require a person to disclose the source of information that they had published, unless it was satisfied disclosure was in the interests of justice or national security.[108] Subsequent legislation makes specific provision for the abrogation of the confidentiality of journalists' sources.[109]

However, in time stronger legal protection for the protection of journalists' sources emerged. The European Court of Human Rights (ECHR) asserted the importance of preserving the confidentiality of journalists' sources in *Goodwin v United Kingdom*.[110] There the journalist had been given confidential information about financial aspects of a company. He wrote about them in a newspaper. The company obtained a court order directing the journalist to reveal his sources. The journalist refused to comply with the order. The Court of Appeal and House of Lords had both found that in this case, in relation to the possible application of s 10 of the *Contempt of Court Act*, that disclosure was in the interests of justice. Thus, the journalist could be required to reveal their sources.

The Grand Chamber disagreed. It observed that Art 10 of the *European Convention on Human Rights* protected freedom of expression,[111] subject to exceptions.[112] It found that signatory nations enjoyed a margin of appreciation in restricting freedom of expression. However, this was limited by the "interest of democratic society in ensuring and maintaining a free press".[113] Protection of confidentiality of journalists'

[105] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1184.

[106] *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1188.

[107] *Reynolds v Time Newspapers Ltd* [2001] 2 AC 127, 200 where Lord Nicholls referred to the "importance of the role discharged by the media in the expression and communication of information and comment on public matters. It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment". He added that the press discharged a vital function as a bloodhound as well as a watchdog. As such, a court should be slow to find that publication is not in the public interest and that the public had no right to know, especially in the realm of discussion about political matters (205). Lord Cooke (217) and Lord Hobhouse (237) expressed agreement with the judgment of Lord Nicholls.

[108] Section 10 has been described as being "relatively toothless" because of the exception under which the confidentiality of sources can be breached "in the interests of justice", which can and has been interpreted very broadly: Stuart Wallace, "The Journalist-Source Relationship in Context: A Comparative Review of US and English Law" (2009) 38 *Common Law World Review* 268, 275–276. See also Kelly Buchanan, "Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists" (2004) 35 *Victoria University of Wellington Law Review* 609, 630: "[T]he threshold that disclosure be necessary in the interests of justice is quite low."

[109] *Police and Criminal Evidence Act 1984* (UK) s 9 allows a police officer to apply to have access to "excluded material". Excluded material is defined in s 11 to include journalistic material that a person holds in confidence. The judge hearing the application must be satisfied there are reasonable grounds for believing that a serious offence has been committed, the material sought would be relevant and admissible to a proceeding for such offence, that it is not practicable to obtain the material in another manner, and that it would be in the public interest for the journalist to provide it.

[110] *Goodwin v United Kingdom* [1996] ECHR 16.

[111] *European Convention for the Protection of Human Rights*, signed 4 November 1950, ETS 5 (entered into force 3 September 1953) Art 10(1) states: "[E]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive or impart information and ideas without interference by public authority and regardless of frontier."

[112] *European Convention for the Protection of Human Rights*, n 111, Art 10(2) states: "[T]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity of public safety, for the preservation of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[113] *Goodwin v United Kingdom* [1996] ECHR 16, [40].

sources was held to be a basic condition of press freedom. Without it, sources might be deterred from providing important information. The media often played an important public watchdog role, and confidentiality of sources was critical in that regard.[114] It found that restrictions on the confidentiality of journalists' sources called "for the most careful scrutiny",[115] and referred to the "vital public interest" involved in preserving such confidentiality.[116] Here, this outweighed the plaintiff's interest in preserving confidential, internal, sensitive details about its finances. The Court found that in order to overturn the confidentiality of a journalist's source it was not sufficient for the plaintiff to argue that, without doing so, they would be unable to exercise their legal rights.[117]

Subsequent decisions of the ECHR have emphasised the chilling effect that an order to journalists to reveal their sources might have on future supply of information.[118] The Court has viewed with some scepticism claims by authorities that disclosure of confidential sources is necessary in order that a person obtain a fair trial.[119] In one case concerning the jailing of a journalist for refusing to reveal a source, the Court dismissed arguments that forced disclosure was necessary in that case. The ECHR found that the Court dealing with the substantive criminal matter had been able to consider the allegations on their merit, without having to know the source of the material. It had access to other sources to obtain the information that the journalist refused to reveal. In such a case, at least, the journalist was within their rights in refusing to reveal sources.

The ECHR has considered on numerous occasions the concept of journalists' privilege in relation to the freedom of expression protected by Art 10, in the context of raids on journalists' homes and places of work. Some of these cases also implicated the Art 8 right to respect for private life, but this aspect is not considered here given it has no equivalent in Australian human rights law.

One example is *Tillack v Belgium*.[120] The applicant was a journalist for a newspaper. He wrote two articles about possible irregularities concerning governance in European institutions. His home and workplace were raided, and almost all of his working papers and tools for work (laptops, phones etc) removed. The applicant argued the raids infringed his freedom of expression enshrined in Art 10. The ECHR upheld his complaint. It found that the confidentiality of journalists' sources was not a mere privilege, which may or may not be protected depending on whether the information was obtained lawfully or not.[121] It was essential to the right to information, and should be treated with "utmost caution".[122] The information relied upon by the investigating officers was relevant to the search, but given the extent of interference to the journalists' work was not sufficient to justify it in the Court's view. The measures utilised were disproportionate to the legitimate aim.[123]

Similar sentiments are evident in *Nagla v Latvia*,[124] where again a journalist's home and work premises were raided after she wrote a story alleging that the government's storage of individuals' personal data was insecure. The ECHR upheld the journalist's Art 10 claim. It found that searches conducted to identify a journalist's source were more drastic than a court proceeding seeking such identification, and required the "most careful scrutiny".[125] The interference was exacerbated by the fact that the search warrant upon which the raid was based was in general and vague terms.[126] It noted that any search that involved

[114] *Goodwin v United Kingdom* [1996] ECHR 16, [39].

[115] *Goodwin v United Kingdom* [1996] ECHR 16, [40].

[116] *Goodwin v United Kingdom* [1996] ECHR 16, [45].

[117] *Goodwin v United Kingdom* [1996] ECHR 16, [45].

[118] *Becker v Norway* [2017] ECHR 834, [82].

[119] *Voskuil v Netherlands* [2007] ECHR 965.

[120] *Tillack v Belgium* [2008] ECHR 1901.

[121] *Tillack v Belgium* [2008] ECHR 1901, [65].

[122] *Tillack v Belgium* [2008] ECHR 1901, [65].

[123] *Tillack v Belgium* [2008] ECHR 1901, [66]–[68].

[124] *Nagla v Latvia* [2013] ECHR 688.

[125] *Nagla v Latvia* [2013] ECHR 688, [95].

[126] *Nagla v Latvia* [2013] ECHR 688, [95].

seizure of data storage devices such as computers, hard drives, memory cards and flash drives belonging to a journalist had to be protected by "sufficient and adequate safeguards against abuse".[127] The reasons for the raid were not relevant and sufficient, so the interference did not pass the proportionality test. The fact that authorities might have obtained the information required in ways other than conducting unannounced raids is also relevant.[128] The Court has noted the likely chilling effect on the disclosure of information in future if such raids are permitted to continue.[129]

In summary, numerous ECHR decisions have found breaches of the Art 10 freedom of expression when, during court proceedings, it is sought that journalists reveal the identity of confidential sources. It has also considered raids on journalists' homes and work premises, and regularly found that these also breached journalists' freedom of expression rights. These cases are considered highly relevant in regards to the possible application of the implied freedom of political communication to such interferences with journalists' confidentiality of sources in Australia. One reason for this is that they are based on the principle of proportionality enshrined in the *European Convention*. The High Court has also expressly adopted proportionality analysis in its latest jurisprudence on the implied freedom,[130] and noted its source in German law.[131] It should be conceded that members of the High Court have stated that proportionality is not necessarily applied in the same way in Australia as in Europe.[132] Nonetheless, these cases are considered highly relevant in the High Court's consideration of these issues in the context of journalists. Further, the importance of preserving the confidentiality of journalists' sources, and the critical role that journalists play in Australia's system of self-government was acknowledged by four US Supreme Court justices in *Branzburg*.

Arguments That Abrogating the Confidentiality of Journalists' Sources Does Not Breach the Implied Freedom of Political Communication

One case of which the author is aware has considered the question of the protection of journalists' sources in the context of the implied freedom of political communication – *Liu v The Age Co Ltd*.[133] In essence, the Court of Appeal of New South Wales found that an order for journalists to reveal a confidential source of information did not in the circumstances infringe the implied freedom.

The case involved three journalists for The Age newspaper who wrote an article alleging that the plaintiff had paid money to a federal politician in order to obtain political advantage. The plaintiff commenced legal action against The Age for defamation. During discovery, she requested that The Age provide details of the sources that the journalists had used in compiling the relevant articles. The Court has power under r 5.2 of the *Uniform Civil Procedure Rules 2005* (NSW) to order a party to provide information about or otherwise reveal the identity of persons, where one of the parties has made reasonable inquiries to ascertain the identity of a person in order to commence legal action against them. The defendants argued that they were not required to accede to the request, due to the implied freedom of political communication in the Australian *Constitution*, because the power of the court just described was circumscribed by the implied freedom. Alternatively, they argued in favour of the so-called newspaper rule. Both arguments failed.

[127] *Nagla v Latvia* [2013] ECHR 688, [101].

[128] *Roemen and Schmit v Luxembourg* [2003] ECHR 102, [56].

[129] *Gormus v Turkey* [2016] ECHR 91.

[130] *McCloy v New South Wales* (2015) 257 CLR 178, 212 (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 34; *Comcare v Banerji* [2019] HCA 23, [32] (Kiefel CJ Bell Keane and Nettle JJ) and [188] (Edelman J); *Clubb v Edwards* (2019) 93 ALJR 448, [5]–[6] (Kiefel CJ, Bell and Keane), [266] (Nettle J), [408] (Edelman J); [2019] HCA 11.

[131] Susan Kiefel, "Proportionality: A Rule of Reason" (2012) 23 PLR 85, 85–88.

[132] *McCloy v New South Wales* (2015) 257 CLR 178, 195–196 (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 34.

[133] *Liu v The Age Co Ltd* (2012) 257 FLR 360; [2012] NSWSC 12.

This decision was rendered at a time when the High Court applied the two-stage *Lange* test to determine whether laws infringed the implied freedom. As discussed above, this required the Court to consider whether: (1) the impugned measure burdened the freedom of political communication in terms, operation or effect; and if so (2) whether the law was passed for a purpose that was consistent with the system of representative and responsible government and was reasonably appropriate and adapted to achieving that purpose.

On the facts, the single judge found that (1) was met. The relevant provision of the *Uniform Civil Procedure Rules* gave a court the power to effectively compel a journalist to reveal the identity of a confidential source. The Court found that such a power did in fact burden the freedom of political communication.[134] Thus, requirement (1) of the *Lange* test was satisfied.

The judge also found that the law met the requirements of (2). The constitutionally prescribed system of representative and responsible government did not require that absolute protection be given to the confidentiality of journalists' sources. As the High Court made clear in *Lange*, other interests, including rights to reputation, were important. The judge found that the constitutional system of government would in fact be impeded if there were an "unqualified freedom to defame people involved in government or politics".[135] The provision in the *Uniform Civil Procedure Rules* served a legitimate aim of achieving justice by allowing a person to proceed with a claim that another had wronged them, where they would otherwise be without remedy.[136] The order would only be made where the interests of justice so required, providing the flexibility for the court to take into account issues such as the benefits of preserving confidentiality of sources.[137]

McCallum J noted that not all sources were reliable. If no journalist source could be the subject of a court order under r 5.2, material that was actually false might be published. This would likely adversely affect the system of representative and responsible government. The judge concluded:

> I am not satisfied that it is necessary, in order to maintain the constitutionally prescribed system of government, to protect from the reach of preliminary discovery every communication between a journalist and a source of political information who wishes to remain confidential. The newspaper rule … will ordinarily protect the source, unless disclosure of [their] identity is necessary in the interests of justice. … Rule 5.2 is reasonably appropriate and adapted to serve the legitimate end of providing a mechanism for the identification of an alleged tortfeasor for the purpose of commencing legal proceedings in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government … the fact that the power is discretionary and the requirement to take into account the considerations underlying the newspaper rule in the exercise of the court's discretion achieve the required compatibility.[138]

The defendants in the case had sought to use evidence from respected investigative journalist Chris Masters, concerning the need to preserve the confidentiality of journalists' sources. The judge rejected use of this evidence "principally in the interests of sparing court time, since I regard the propositions sought to be proved by calling Mr Masters as [so obvious] that no further time on them was warranted".[139] The Court of Appeal dealt with the constitutional issue briefly, agreeing with McCallum J that if it were decided otherwise, a person in public life who had been defamed might not otherwise have a remedy. Bathurst CJ, with whom Beazley and McColl JJA agreed, also emphasised the discretionary nature of the court's power under the rule.[140]

---

[134] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [36]; [2012] NSWSC 12.

[135] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [45]; [2012] NSWSC 12.

[136] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [46]; [2012] NSWSC 12. This sentiment is repeated at [167]: "[A]n absolute and immutable protection of confidentiality wherever demanded by a journalist's source [in cases of political discussion] would itself be inimical to the maintenance of the system of government required by the Constitution. It would expose politicians and others involved in government and politics to the risk of false and malicious attack from their detractors without recourse or remedy. To allow such sources to shield themselves under the respectable cloak of investigative journalism would be contrary to the high ideals of a free press."

[137] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [49]; [2012] NSWSC 12.

[138] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [59]–[61]; [2012] NSWSC 12.

[139] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [166]; [2012] NSWSC 12.

[140] *The Age Co Ltd v Liu* (2013) 82 NSWLR 268, [96]–[99]; [2013] NSWCA 26.

CRITIQUE

By way of respectful response, it is submitted that it is not entirely correct to suggest that, unless the identity of the confidential source is revealed, the person claiming to have been wronged would be left without a remedy. They would be entitled to bring a claim against the media outlet that published the allegedly defamatory material. The media outlet would be liable if it published defamatory material, unless they could establish a defence under the relevant defamation legislation. And it is perhaps inappropriate to speculate as to whether or not the defendant might have a relevant defence at an interlocutory stage of proceedings in determining that unless the identity of the source was revealed the plaintiff would (or might be) left without a remedy.[141] It is not clear why the judge in *Liu* apparently believed that unless the identity of the source was revealed, the plaintiff would be left without a remedy. The plaintiff may well have a remedy against the newspaper that published the allegations. The possibility of a successful defence cannot be resolved and should not be countenanced during an interlocutory proceeding. Thus, in the author's opinion, it is not correct to argue that unless the identity of the source was revealed, "it would expose politicians and others involved in government and politics to the risk of false and malicious attack from their detractors without recourse or remedy".[142]

Further, in the event that a person believed they had been defamed, they would have options open to them other than recourse to legal action. They could go to a public outlet and refute the claims made. The ubiquitous nature of social media today makes it very easy for anyone to counter public claims made about them.

Secondly, as alluded to above, the phrase "the interests of justice" is an inherently broad concept with an uncertain nature. It could be interpreted and applied in an extremely broad manner, and two commentators mentioned above noted that in fact this had occurred, effectively narrowing the practical scope of the protection for confidential sources. This point has also been made in the European case law.

An impression might also be created through the Court's decision in *Liu* to reject proposed evidence from an award-winning investigative journalist about the importance of maintaining the confidentiality of sources. Though the judge explained that this was because the propositions were "so obvious", it is suggested the judgment does not discuss in detail the importance of preserving the confidentiality of journalists' sources, in terms of preserving public discussion of political issues. A perception might thereby arise that, in the scheme of things, the judge placed too much weight on the need to provide the plaintiff who alleged defamation with a remedy (which, as discussed above, was arguably overstated), in comparison with the utility of maintaining confidentiality of sources. The judgment might also fit with the observations scholars have previously made that courts have traditionally been very willing to discard journalists' claims of confidentiality.

As discussed above, the law in relation to the implied freedom of political communication has altered to some extent since the *Liu* decision. The following section considers an argument that abrogating the confidentiality of journalists' sources does (or may) breach the implied freedom of political communication.

A preliminary point should first be made. If it were found that legislation that abrogated the confidentiality of journalists' sources did breach the implied freedom of political communication, this would effectively create an absolute privilege for journalists. There are arguments for why this should not be the case. For instance, it might be that the law enforcement authorities needed to know the source for genuine, legitimate reasons of national security concern. There is an argument, therefore, that the privilege should not be automatic or absolute in nature.

On the other hand, the alternative is to say that legislation that abrogates the confidentiality of journalists' sources may breach the implied freedom; in other words, that the privilege is a qualified one. The difficulty with this, as alluded to above, is that the privilege will then probably be subject to an "interests of justice"

[141] *The Age Co Ltd v Liu* (2013) 82 NSWLR 268, [99] (Bathurst CJ, with whom Beazley and McColl JJA agreed); [2013] NSWCA 26.

[142] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [167] (McCallum J); [2012] NSWSC 12, with similar sentiment expressed in the appeal: *The Age Co Ltd v Liu* (2013) 82 NSWLR 268, [99]; [2013] NSWCA 26.

analysis. This can be interpreted very broadly, such that the privilege is narrowed considerably. Scholars have noted that, traditionally, this has been the experience, with courts giving little weight to the need to protect confidential sources. Arguably, this also occurred in *Liu*. Further, because no one can know in advance what a judge might find that the interests of justice require, it creates uncertainty as to whether sources are entitled to confidentiality or not. This very uncertainty will arguably create a chilling effect on freedom of speech, contrary to the intent and ideal of the implied freedom of political communication. Courts elsewhere, at least, have factored in this chilling effect.

Arguments That Abrogating the Confidentiality of Journalists' Sources Does (or May) Breach the Implied Freedom of Political Communication

As discussed above, today (a majority of)[143] the High Court determines whether a law infringes the implied freedom of political communication by considering:

(1) whether the law burdens the freedom in terms, operation or effect;
(2) whether the law was passed for a purpose compatible with representative and responsible government (compatibility testing); and
(3) whether the law was suitable, necessary and adequate in its balance (proportionality testing).

For the purposes of argument, the article now applies these tests to r 5.2 of the *Uniform Civil Procedure Rules* of New South Wales, and to ss 180L and 180T of the Commonwealth *Telecommunications (Interception and Access) Act*. Comments made about ss 180L and 180T are also considered relevant to consideration of the "public interest" exception to confidentiality protection in s 126K of the Commonwealth *Evidence Act* and State equivalents.

It is clear that all of these provisions burden the implied freedom of political communication. In *Liu*, McCallum J found that r 5.2 did impose such a burden,[144] but, with respect, did not explain how or why. The revealing of the identity of a source may well reduce the volume of discussion about "political matters" between informant and journalist in future, as informants fear being exposed. This is considered to be a burden – in the alternative or in addition, forcing a person to provide information when they otherwise would choose not to burden their freedom of communication. Freedom of communication must logically include the freedom not to communicate. And because these sources are likely to dry up, the ability of journalists to bring these matters to the attention of the public is reduced. The role of the journalist in facilitating and encouraging public debate is minimised. Thus, public discussion of the matters that would have been raised by the journalist are also muted – such restrictions burden the freedom of communication of the source, the journalist and the general public. The burden is significant in its scope.

The purpose of r 5.2 is to assist a plaintiff in identifying a possible defendant, in order that their legal rights might be vindicated in court if they can establish their case. It is conceded that this is a purpose consistent with representative and responsible government. The purpose of ss 180L and 180T is to obtain information from a journalist that is considered in the public interest for law enforcement authorities to have. It cannot be put more precisely than that, and the sections may be used to seek to justify a wide range of abrogations of confidentiality on many different factual bases.

It is accepted that r 5.2 is suitable to achieve its purpose of identifying a person for the purposes of litigation where they cannot otherwise be located. It might be arguable that it is necessary, because the rule only applies where the applicant has made reasonable efforts to obtain the person's identity and has not been able to do so. On the other hand, it is not necessary in order that the applicant obtain some remedy for the wrong of which they complain in the current context, since they are clearly aware of the newspaper that has published the allegedly defamatory material, and would have a remedy against them if the material was shown to be defamatory and no defence applied. Thus, if the purpose of the

[143] Gageler and Gordon JJ continued to adhere to the two-stage *Lange* approach.

[144] *Liu v The Age Co Ltd* (2012) 257 FLR 360, [36]; [2012] NSWSC 12.

provision is defined more broadly as providing a person with a remedy for a wrong, r 5.2 is not necessary to achieve that purpose because the applicant will know in the current context who the publisher of the newspaper is. But if the purpose of the provision is defined more narrowly as identifying a particular person for the purposes of a claim, then yes, the section might be argued to be necessary.

Similarly in relation to ss 180L and 180T, one of the relevant factors is whether the applicant has made reasonable efforts to obtain the information elsewhere. On this basis, the court might find that the section is necessary, in that (obviously) less invasive means of obtaining the information are not available. The author concedes for current purposes that the relevant provisions might be argued to be "necessary", as well as that the relevant measures might be argued to be "suitable" to achieve their stated purpose.

However, there are real questions in both contexts as to whether the provisions are adequate in their balance. Here the court will weigh up the extent of the interference of the freedom with the importance of the purpose of the challenged provision.

Regarding r 5.2, in some factual scenarios, including that in *Liu*, the applicant did not need to obtain the identity of the source in order to bring a legal action against the defendant, the publisher of the newspaper, and would very likely have the financial means to honour any judgment made against them. This means that the interest actually vindicated by interference with the confidentiality freedom is quite minimal. The plaintiff will (likely) not be denied a remedy if their application to discover the source of the information is refused.

Sections 180L and 180T do mention the public interest in maintaining the confidentiality of sources in relation to a decision as to whether a journalist information warrant should be issued. However, it is just one factor mentioned, to be weighed along with other interests, including the gravity of the matter and the extent to which the information would assist the enforcement authorities. It is certainly arguable that this is insufficient in the "balance". The tendency of judges to disfavour privileges,[145] including that pertaining to journalists, has been noted.[146] It has been observed that judges can be extremely deferential to assertions by the Executive that information is required, based on the supposed needs of national security. Of course, sometimes the government's assertions are true. However, on some occasions, governments have been prone to exaggerate or mislead concerning national security needs.[147] Merely prescribing it as one factor to be considered may also be inadequate, given these influences.[148]

On the other hand, the damage to freedom of political communication is potentially great. It is accepted that journalists and media outlets play a fundamental role in our democracy. They inform citizens, in turn permitting citizens to make informed decisions at election time, as well as investigate possible wrongdoing. While media outlets are often criticised for their sensationalist and sometimes misleading reporting, at their best they perform a very valuable public service. As mentioned above, it was the media, and in particular the ABC *Four Corners* program, that shone a light on police corruption in Queensland in the 1980s, leading to the Fitzgerald Inquiry, and substantial reform of governance in Queensland, including fair electoral boundaries, the right to peaceful protest, the establishment of anti-corruption authorities, and freedom of information reform. The media has also played a substantial role in informing Australians about problems with the live cattle export industry, institutional child sexual abuse, and the

[145] Jeffrey Nestler, "The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalists' Privilege" (2005) 154 *University of Pennsylvania Law Review* 201, 246: "[J]udges are typically opposed to privileges – all privileges – because they hinder the search for truth."

[146] Ryan, n 72, 329 noting that "Australian courts have traditionally considered there to be no public interest, or only a weak public interest, in protection journalist/source confidentiality".

[147] *A v Secretary of State for the Home Department* [2005] 2 AC 68, 130 (Lord Hoffmann), 165 (Lord Walker); [2004] UKHL 56; Heidi Kistrosser, "Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers" (2015) 56 *William and Mary Law Review* 1221.

[148] It has been argued that permitting the privilege to be considered as one factor is inadequate because it implies (wrongly) that the costs and benefits of the privilege can be assessed at the time the privilege is asserted. Some argue this is inadequate because it does not take account of the costs to society of the non-disclosure that occur because of the uncertainty over whether privilege applies to the situation: Geoffrey Stone, "Why We Need a Federal Reporter's Privilege" (2005) 34 *Hofstra Law Review* 39, 52.

conduct of some within the banking industry. It is idle to speculate as to whether and to what extent any of these issues would have been ventilated in the public sphere if the media had not uncovered them.

Media experts have regularly explained the importance of maintaining the confidentiality of sources in order that media can play its fundamental watchdog role. Respectfully, the law should listen to these explanations. It is interesting that Chris Masters was prepared to testify to this fact in the *Liu* litigation. Chris Masters was the Walkley-winning journalist who ran "The Moonlight State" story on *Four Corners* in 1987, which set in motion events that resulted in lasting, positive reforms to Queensland governance. The law must seriously weigh up the importance of the confidentiality of journalists' sources, and the implications for discussion of political issues and accountability of government if the law willingly abrogates such confidentiality. As the ECHR said in *Goodwin v United Kingdom* and in subsequent decisions, restrictions on the confidentiality of sources for journalists warrant the most careful scrutiny. Four members of the US Supreme Court in *Branzburg* recognised the pivotal role that the media plays in democratic government. For these reasons, it might be argued that these provisions are not, according to the proportionality test, adequate in their balance.

This conclusion on proportionality analysis in the Australian context is fortified by a consideration of the cases involving journalists and the ECHR, given that is the jurisdiction from which proportionality in this context in Australia was derived. The Court was not satisfied in *Goodwin* that breaching the confidentiality of journalists' sources was necessary in the interests of justice. And the ECHR has repeatedly refused to accept that raids on journalists' homes and offices pass proportionality analysis.[149] Respectfully, the Australian High Court might reach the same conclusion when applying our version of proportionality analysis to the provisions discussed here.

Chilling Effect

The European cases have repeatedly considered the likely chilling effect on the production of future information if they permit the identity of confidential sources to be revealed in the journalistic context. If disclosure is ordered this time, it may well reduce the flow of important information to journalists in the future. This is not an idle concern. Many respected journalists are on the record as indicating the very serious threat that revealing the identity of confidential sources will have on future supply. Research supports this view,[150] and some courts have recognised it.[151] The law should take these concerns seriously. Generally, the High Court in the constitutional context will consider the practical effect of measures. There are many possible examples, but specific cases include the consideration of whether laws are compatible with ss 90 and 92 of the *Constitution*, where the practical effect of legislation is a real consideration in determining constitutionality.[152]

The High Court has also accepted in a slightly different context the consequences of removing anonymity of sources. This occurred in the context of the identity of a police informant. All members of the Court accepted that the confidential identity of a police informer had to be preserved, because if it were not the public would in the future be unprepared to provide relevant information to police.[153] With respect, the same

[149] *Tillack v Belgium* [2008] ECHR 1901; *Nagla v Latvia* [2013] ECHR 688; *Roemen and Schmit v Luxembourg* [2003] ECHR 102.

[150] Nestler, n 145, 250; Vince Blasi, "The Newsman's Privilege: An Empirical Study" (1971) 70 *Michigan Law Review* 229; Laurence Alexander, "Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information" (2002) 20 *Yale Law and Policy Review* 97, 102.

[151] Donald Gillmor, "Journalists' Privilege and the Constitution" (1981) 2 *Journal of Media Law and Practice* 115, 120–121.

[152] *Cole v Whitfield* (1988) 165 CLR 360, 399–400 (all members of the Court): "The Court looks to the practical operation of the law in order to determine its validity" (s 92). *Ha v New South Wales* (1997) 189 CLR 465, 498 (Brennan CJ, McHugh, Gummow and Kirby JJ): "when a constitutional limitation or restriction on power is relied on to invalidate a law, the effect of the law in and upon the facts and circumstances to which it relates – its practical operation – must be examined as well as its terms" (s 90).

[153] *AB (a Pseudonym) v CD (a Pseudonym)* (2018) 93 ALJR 59; [2018] HCA 58. The High Court also dismissed constitutional challenges that permitted the police to tender secret evidence from confidential sources in court, without the need to disclose the identity of the person providing the evidence in court. The Court accepted the importance of maintaining the anonymity of sources in the public interest: *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [2009] HCA 4; *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38; [2013] HCA 7.

kind of protection should be accorded to the anonymity of journalists' sources, for similar reason. Both the police officer and the investigative journalist are seeking out possible wrongdoing. Their jobs are in the public interest. They need legal protection to do their jobs properly. Their ability to do so must be protected and defended, not hindered. The rationale for the preservation of attorney-client privilege is similar.[154]

In contrast, the High Court has rejected the use of arguments about the chilling effect of laws regulating the implied freedom of political communication, concluding that they are not relevant.[155] It is respectfully suggested that the High Court should reconsider this position, in light of how the ECHR has interpreted what is required by proportionality, and in light of the High Court's use of practical effects considerations elsewhere in the constitutional realm.[156]

Conclusions and Suggestions

It is respectfully submitted that the High Court, if and when it is called upon to do so, might acknowledge the fundamental role that the media plays in supporting and protecting the self-government system of democracy enshrined in the Australian *Constitution*. This system is the source of the implied freedom of political communication that the High Court has recognised. This suggests that, when the High Court considers the implied freedom in the context of a law that impacts the media, the Court should have due regard to the need to permit the media to play its fundamental role. Maintaining the confidentiality of journalists' sources is considered to be absolutely critical in achieving this. Simply, the media cannot provide the kind of information that the public needs to make informed assessments and decisions about their government unless they have access to sources who may wish to remain confidential. The media plays the role of watchdog in bringing allegations of misfeasance and maladministration to the attention of the public. The media is certainly not perfect, but it plays a fundamental role in our democracy, which the law must reflect.

This article has considered the constitutionality of provisions whereby the identity of a journalist's source might have to be revealed. While this is subject to court discretion in the relevant provisions discussed, there has been a tendency for courts to discount the importance of maintaining confidentiality in the supposed public interest. It has been argued that provisions of this nature might not pass the kind of proportionality testing now undertaken by the High Court as part of its implied freedom of political discussion jurisprudence. Clearly, requiring that sources be revealed burdens political communication in multiple ways. The burden is severe. The legislation might be passed for legitimate purposes that are consistent with representative and responsible government – for instance, to permit a person claiming they have been wronged to obtain a remedy, or in the interests of national security. Such laws may be suitable for such purpose, and arguably in some cases, necessary. However, it is submitted they are not adequate in their balance. They refer to the public interest in maintaining confidentiality as one factor. Experience tends to show this is not actually sufficient, because it will often be overborne by other factors and/or courts will readily find a public interest in disclosure. Thus, as drafted and as applied, the laws are not adequate in their balance.

It is possible they might be redrafted so that they are adequate in their balance. For example, a redrafted law might emphasise the public interest involved in maintaining the confidentiality of journalists' sources in areas of political communication, and it might emphasise that a court should only order that the identity of a journalist's source be revealed in exceptional cases, such as cases involving national security. Even in such cases, there must be clear and convincing evidence that disclosure of the identity of the source would materially assist law enforcement authorities in bringing alleged wrongdoers to justice and/or there was no other way to prevent a likely threat to national security other than to order that the source be revealed. At present, the legislation is too permissive, allowing courts to readily discard interests around journalistic confidentiality that are in fact fundamental to the kind of government and the kind of society we are and wish to remain.

---

[154] *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Mason and Murphy JJ).

[155] *Brown v Tasmania* (2017) 261 CLR 328, [151] (Kiefel CJ, Bell and Keane JJ), [466] (Gordon J); [2017] HCA 43.

[156] Anthony Gray, "The First Amendment to the United States Constitution and the Implied Freedom of Political Communication in the Australian Constitution" (2019) 48(3) *Common Law World Review* 141, 171–172.