DOI: http://dx.doi.org/10.5235/17577632.5.1.104 (2013) 5(1) JML 104–132

Anti-Terror Laws and the News Media in Australia Since 2001: How Free Expression and National Security Compete in a Liberal Democracy

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The September 11 2001 terror attacks in the United States prompted governments internationally to pass new national security laws, partly in response to United Nations conventions and protocols.[1] In the UK the issue of open justice has been debated in the context of the Justice and Security Bill,[2] where proposed provisions would allow the civil courts to be closed when hearing sensitive national security evidence.[3] A comparative context can shed light on such debate and offer new perspectives, particularly when the comparison focuses on a Western democracy like Australia with close historical connections to the UK.

The Australian Parliament passed at least 54[4] legislative instruments related to national security and counter-terrorism in the 2001–11 period, with some having potential implications for open justice and news reporting. This article reviews the stated purpose of selected Australian national security laws; examines cases where they appeared to impinge upon the role of the news media and open justice; questions the actual implications of such laws for the Fourth Estate functions of journalism in a democracy lacking free expression protections in human rights instruments or its Constitution;[5] and offers some points of similarity and contrast with the UK and the US.

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1 United Nations Office on Drugs and Crime, *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (V.03-85663 (E), 2003).

2 Justice and Security HL Bill (2012–13).

3 A Horne, 'Justice and Security Bill: Bill No 99 2012–3', House of Commons Library Research Paper 12/80 (2012), www.parliament.uk/briefing-papers/RP12–80.pdf.

4 G Williams, 'The Laws that Erode Who We Are', *Sydney Morning Herald* (Australia, 10 September 2011), www.smh.com.au/opinion/politics/the-laws-that-erode-who-we-are–20110909–1k1kl.html.

5 Commonwealth of Australia Constitution Act (1900).

Its central thesis is that anti-terror laws tend to impact upon the truth-seeking and truth-telling functions of journalists in a democracy, partly through disruptions to, and imbalances in, the flow of information from government agencies to the citizen via the media. Further, it argues that some of these laws are unnecessary because justice has been done and reportage has been undertaken effectively when authorities have chosen not to take advantage of these new powers. The interests of free expression and open justice during any review of such laws can be hampered by a lack of enshrined constitutional or human rights protection of freedom of communication for either citizens or the media, as well as variations in the commitment of legislators and judicial officers to the principle of open justice.

This article's aims are twofold: to offer scholars from other jurisdictions an Australian reference point for discussion of open justice and free expression in the context of national security and counter-terror laws; and to identify and debate some of the consequences for Fourth Estate journalism and open justice that these laws pose. While this is not the first article written on anti-terror laws and the Australian media, the research is original in that it is the first thorough exploration of Australian case studies about the interface between counter-terror laws and the media. The driving research question is: 'What do key cases involving Australian anti-terror laws and the media tell us about the relative and comparative roles of national security, free media expression and open justice in that democracy?'

LITERATURE AND METHOD

Journalists are driven by an imperative to expose what appears to be hidden, while at the same time informing their audiences.[6] This often clashes with the imperatives that drive politicians and the policing and security agencies they administer, whose powers have been enhanced under many of the new national security laws.[7] Journalists in Australia have traditionally subscribed to the model of journalism that positions the media as the Fourth Estate—that is, a watchdog on the government, judiciary and executive.[8] Each of the Australian anti-terror laws augmented the powers of the executive and the judiciary and remains in effect after timetabled review and some amendments. While the laws supplemented or replaced a range of national security laws already in existence prior to 2001,[9] the extent of this 'second wave' of counter-terror laws and their effects upon the media has not been completely tested.

6 M Rix, 'The Show Must Go On: The Drama of Dr Mohammed Haneef and the Theatre of Counter Terrorism' in N McGarrity, A Lynch and G Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010).

7 See eg Australian Security Intelligence Organisation Act 1979 (Cth), s 34ZQ(4)(b).

8 J Schultz, *Not Just Another Business: Journalists, Citizens and the Media* (Pluto Press, 1994) 23.

9 M Pearson and N Busst, 'Anti-Terror Laws and the Media after 9/11: Three Models in Australia, NZ and the Pacific' (2006) 12(2) *Pacific Journalism Review* 9, 10.

In an environment characterised by restraints on some aspects of media freedom, journalists have faced increasing difficulties in fulfilling their Fourth Estate role.[10] Rix elaborated on these difficulties: 'As executive government steadily grows in power … and the counter balancing powers of parliaments and legislatures decline … it becomes increasingly important for the media and other civil society organisations to hold the executive … accountable and answerable for their actions.'[11]

It was always acknowledged that the post-9/11 changes to Australia's security laws, made with a view to strengthening the capacity of policing and security agencies to respond to and deal with terrorism and other security issues, would impact upon other rights and interests including free expression, natural justice and transparency of process. However, at the time the new laws were enacted, the extent to which they would impact on journalists' ability to report on security and terrorism matters was less clear. Then Federal Attorney General Darryl Williams did, however, specifically recognise that journalists were amongst those who could be detained under the 48-hour detention powers provided to the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP). This was because of the likelihood of journalists being privy to relevant information.[12]

Nash undertook the first examination of Australia's various pieces of new security legislation in an effort to identify their impacts on journalists. He suggested that the effect of the anti-terrorism laws would be to make journalists and editors 'think long and hard before publication'.[13] Pearson and Busst also looked at the anti-terrorism laws in Australia and New Zealand and their potential impacts on journalism, and reached similar conclusions.[14] Johnston and Pearson examined some of these laws and the ways they stood to restrict media reportage.[15] At least 10 potential effects upon the reportage of terror-related news and current affairs were listed by Pearson and Polden. These included:[16]

- being subject to new detention and questioning powers;
- falling victim to new surveillance techniques;
- seizure of journalists' notes and records, including those stored on electronic media;

10 N McGarrity, 'Fourth Estate or Government Lapdog? The Role of the Australian Media in the Counter-Terrorism Context' (2011) 25(2) *Continuum Journal of Media and Cultural Studies* 273.

11 Rix (n 6).

12 Radio National, 'Law Report: Australia's Proposed Anti-Terrorism Laws', Australian Broadcasting Corporation (12 February 2002), www.abc.net.au/radionational/programs/lawreport/australias-proposed-anti-terrorism-laws/3504370.

13 CJ Nash, 'Freedom of Press in the New Australian Security State' (2005) 28(3) *University of New South Wales Law Journal* 900, 903.

14 Pearson and Busst (n 9) 24.

15 J Johnston and M Pearson, 'Australia's Media Climate: Time to Renegotiate Control' (2008) 14(2) *Pacific Journalism Review* 72.

16 M Pearson and M Polden, *The Journalist's Guide to Media Law* (Allen and Unwin, 4th edn 2011) 324.

- destroying journalists' ethical obligations of source confidentiality;
- limiting the information which may be reported through the closure of court hearings;
- suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
- restricting access to certain areas where news might be happening;
- potentially opening themselves up to criminal liability simply by associating or communicating with some sources;
- exposing journalists to sedition charges through the publication of statements deemed to be inciting or encouraging terrorism; and
- reducing the effectiveness of Freedom of Information applications.

McGarrity provided a useful summary of the impacts of the anti-terrorism laws on the media.[17] She noted that, while the media had a significant role in holding the executive to account for the national security laws that had been introduced since 2001, three key factors had limited the media's ability to effectively fulfil this role. These included the limited provision of and access to information about terrorism-related investigations and court cases, a chilling effect on freedom of speech, and media manipulation by the Federal Government.[18] McGarrity suggested that one of the most important factors was the limited information available to the media about national security issues including ongoing investigations and judicial proceedings.[19] This impact is reflected in the Dr Haneef case study, discussed below.

McNamara examined the 'actual and potential effects' of Australia's counter-terrorism laws on journalists, public debate and circulation of information.[20] He wrote: '[A]n investigation of how Australian counter-terrorism laws affect the media is important because it provides the occasion for a critical study of how (both putative and real) liberal democratic commitments to press freedom are operationalised in the context of national security.'[21] McNamara revealed that journalists and in-house media lawyers had a limited understanding of the anti-terrorism laws and their operation.[22] He interviewed 10 journalists employed by major media organisations and nine in-house lawyers for media organisations around the time of the arrest of suspected terrorist Dr Mohamed Haneef, which enabled him to undertake a first-hand exploration of the actual impact of Australia's anti-terrorism laws on journalists. McNamara identified that the coercive

17 McGarrity (n 10).
18 *Ibid*, 274.
19 *Ibid*, 280.
20 L McNamara, 'Counter-Terrorism Laws: How they Affect Media Freedom and News Reporting' (2009) 6(1) *Westminster Papers in Communication and Culture* 27.
21 *Ibid*, 31.
22 *Ibid*, 36.

powers given to ASIO, which forced journalists to reveal their sources or face five years in jail, 'have the potential to affect the way journalists, editors and media lawyers make judgments and decisions about news gathering and publication'.[23] Although McNamara said that the laws appeared to have 'only limited direct effects on the media', he raised the important question of what influence they might have on media freedom.[24] He found that journalists were concerned about the direct and indirect impacts of anti-terrorism laws on their freedoms. One of McNamara's most significant findings was that journalists had 'a strong commitment to not undermining policing and investigation of matters involving terrorism', but that they had problems with security and policing agencies' selective and non-disclosure of information.[25] Australian journalists have complained that the national security laws have curbed their freedom to report[26] and, internationally, journalists' experiences of the resultant censorship that comes with reporting on certain aspects of terrorism cases has largely been negative.[27]

This paper seeks to further explore the actual impacts of these laws. It uses a triangulation of traditional legal, policy and case study analysis to present and engage with the legislation and literature on the interface between the journalism and anti-terrorism law. This combination of methods allows for an explanation of the relevant legislation and case law, discussion of the policy considerations (both stated and implicit) behind the new laws with some comparisons with other jurisdictions, and original analysis through the application of this knowledge to our selected case studies. While the article generally follows this sequence, the methodology is not a purely linear process, and some backgrounding on case law, legislation and policy arises throughout the case studies.

We have purposely selected our four case studies to focus on episodes highlighting tensions between the new security laws, the news media's Fourth Estate role and the legal principle of open justice. Real describes the case study method as the selection of 'a problematic expressed in a text (or texts)'. He goes on to explain that the text is then subjected 'to ethnographic description, exegetical clarification, and critical examination in the search for a full understanding of its social origins, meanings, and consequences'.[28] Thomas explains this approach as the study of a range of factors including policies and decisions.[29] The case study allows, as both Thomas and Real explain, the illumination of

23 *Ibid*, 33.

24 *Ibid*, 36.

25 *Ibid*, 41.

26 H Thomas, 'Pawns in a Political Play' (2007) 46 *The Walkley Magazine* 9.

27 G Simons and D Strovsky, 'Censorship in Contemporary Russian Journalism in the Age of the War against Terrorism: A Historical Perspective' (2006) 21 *European Journal of Communication* 189; ZCW Tan, 'Media Publicity and Insurgent Terrorism: A Twenty-Year Balance Sheet' (1988) 42(4) *International Communication Gazette* 3.

28 M Real, *Super Media: A Cultural Studies Approach* (Sage, 1989) 70.

29 G Tomas, *How to Do Your Case Study: A Guide for Student and Researchers* (Sage, 2011).

a particular problem.[30] In this instance the 'problem' is the impact of Australia's security laws on the truth-seeking and truth-telling functions of journalism in a democracy.

AUSTRALIAN ANTI-TERROR LEGISLATION IN BRIEF

At the end of 2011, approximately 54 new legislative instruments had been introduced through the Australian Parliament since the 9/11 attacks on the US (in addition to numerous laws enacted by the nation's six states).[31] The majority of the federal instruments took the form of amendments to existing legislation. It would be impractical to attempt a full description of these laws, but the Australian Human Rights Committee summarised the key ones as follows:[32]

- The Security Legislation Amendment (Terrorism) Act 2002 (Cth), which includes provisions defining a 'terrorist act',[33] introducing offences criminalising acts involving the planning and committing of a terrorist act,[34] introducing offences criminalising a person's involvement or association with a terrorist organisation,[35] and giving the Attorney-General power to ban a terrorist organisation.[36]
- The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), giving the Australian Security Intelligence Organisation (ASIO) powers to seek 'questioning' warrants and 'questioning and detention' warrants (detention for up to seven days) with applications conducted *ex parte* and the subject not being informed of the grounds supporting the warrant (other than seeing the warrant itself).[37] The ASIO Act created two offences for anyone who discloses 'operational information' about an ASIO warrant. This extended to cover the mere fact that it had been issued. Disclosure is punishable by five years' imprisonment, for 28 days after the warrant's issue.[38] Section 34ZS(2) also prohibited revealing operational information during the two years after an ASIO warrant expires. Those who did reveal operational information faced up to five years in prison. The Act offered a broad definition of 'operational information', covering information that was or is in

30 *Ibid*; see also Real (n 28).

31 S Collerton, 'Ten Years of Anti-Terror Laws', Australian Broadcasting Corporation (12 September 2011), www.abc.net.au/news/2011–09–12/ten-years-of-anti-terror-laws/2881034.

32 Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008).

33 Criminal Code Act 1995 (Cth), s 100.1.

34 *Ibid*, s 101—these offences apply even where a terrorist attack does not occur or where there is no connection to a specific attack.

35 *Ibid*, s 102.2–102.8.

36 *Ibid*, s 102.1(2).

37 Australian Security Intelligence Organisation Act 1979 (Cth), s 34ZQ(4)(b).

38 *Ibid*, s 34ZS(1).

ASIO's possession; a source of information that ASIO has other than the subject of the warrant; or an operational capability, method or plan of ASIO.[39] The intent may be to stop suspects talking to other terrorists, but the effect is more sinister. It means that no matter what human rights or natural justice breaches might have happened in the process of the operation or its subsequent arrests, suspects and their families and lawyers can be imprisoned for even discussing the events. This has clear repercussions for the media, not only in terms of their ability to access information from certain sources, but also for their ability to publish information—effectively a gag. The ASIO Act does differentiate between suspects (and their lawyers) and ordinary citizens. This is accomplished via the test for liability. Suspects and their lawyers are subject to strict liability, whereas ordinary citizens must demonstrate 'recklessness' in their disclosure.[40] 'Recklessness' requires that the citizen be aware of the implications of their disclosure and to have shown a disregard for the consequences. Whether or not a journalist could argue public interest as their motivation for disclosure is still an open question. However, one would expect that many would not be willing to test it when a five year jail sentence remains a possibility.[41]

- The Anti-Terrorism Act (No 2) 2005 (Cth), which gave federal courts the power to make 'control orders',[42] introduced new sedition offences[43]—requiring the 'intentional' urging of prohibited conduct—generally violence against the state, its organs or the public—and recklessness in regard to the consequences; granted police new powers to 'stop and search'[44] or detain and question terrorism suspects, without charge;[45] and reversed the onus of proof in bail applications for terrorism matters.[46]
- The National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI) has the potential to prevent evidentiary disclosure in court hearings if they are deemed prejudicial to national security.[47] Division 3 of the Act allowed prosecutors and courts to use national security information in criminal proceedings while preventing the broader disclosure of such information, sometimes even to the defendant. Section 29 gave courts the power to decide whether to close the court for such matters and required the reasons for such a decision to be published.

39 *Ibid*, s 34ZS(5).

40 *Ibid*, s 34ZS.

41 Media, Entertainment and Arts Alliance, *Turning Up the Heat: The Decline of Press Freedom in Australia 2001–2005*, Inaugural MEAA Report into the State of Press Freedom in Australia from September 11, 2001–2005 (2005) 5.

42 Australian Security Intelligence Organisation Act 1979 (Cth), Division 104.

43 *Ibid*, s 80.2.

44 Crimes Act 1914 (Cth), ss 3UD—3UA and 3UK: these provisions are the definitions and sunset provisions for the Crimes Act Division 3A: Police powers in relation to terrorist attacks.

45 *Ibid*, s 23 C.

46 *Ibid,* s 15 AA.

47 National Security Information (Criminal and Civil Proceedings Act) 2004 (Cth), s 19.

Relevantly, the principle of open justice carried considerable weight in the *Lodhi*[48] case in 2006, where the NSW Court of Criminal Appeal held that the trial judge had made some efforts to keep the court open. Lodhi was given a 20-year jail sentence on 23 August 2006, for planning a terrorist attack on Australia.[49]

- The National Security Legislation Amendment Act (2010) (Cth) removed the term 'sedition', which had originally been introduced as part of the Anti-Terrorism Act (No 2) 2005 (Cth), from federal criminal law and replaced it with references to 'urging violence offences'.

Other reforms potentially impacting upon the news media included the issue of 'control orders' banning terror suspects' communications with 'specified individuals' under section 104.5(3)(e) of the Criminal Code Act 1995; 'associating' at least twice with a person who promoted or directed the activities of a terrorist organisation under section 102.8(1) of the Criminal Code Act 1995; and amendments to the Telecommunications (Interception and Access) Act 1979 allowing enforcement *agenc*ies to obtain warrants to access stored communications such as SMS, MMS, email and voicemail messages held by journalists which might jeopardise the identity of their confidential sources.

KEY CASES IN THE INTERFACE BETWEEN ANTI-TERROR LAWS AND THE AUSTRALIAN MEDIA

Several cases have demonstrated the effects of Australia's anti-terror laws on journalists and other researchers or publishers.[50] The following four have been selected because they display a range of interactions between the news media and law enforcement authorities or the courts and the operation of different anti-terror laws in each situation, further offering useful points of international comparison.

Case Study 1: Mohamed Haneef

Although most national security laws were in operation prior to 2007, a significant test of journalists' understanding of these laws and their impact on media reportage occurred during the 2007 arrest and detention of Dr Mohamed Haneef—an Indian citizen who was employed as a registrar at a hospital on the Gold Coast in Queensland.[51] He was arrested and later charged with recklessly supplying material support to a terrorist organisation. This is an offence under section 102.7(1) of the Criminal Code Act

48 *R v Lodhi* (2006) 199 FLR 303.
49 D King, 'Terror Plotter Gets 20 Years', *The Australian* (24 August 2006), 1.
50 Pearson and Polden (n 16) 328–9.
51 J Ewart, *Haneef: A Question of Character* (Halstead Press, 2009) 31.

1995.[52] The 'support' was in the form of a SIM card he allegedly provided to a relative in the United Kingdom. It was initially alleged that the SIM card had been used in the 2007 attempted bombing of the Glasgow Airport, but it later emerged that at the time of Dr Haneef's arrest his SIM card had been in the possession of a relative in Liverpool.[53]

After being arrested, Dr Haneef was detained using new powers introduced into the Crimes Act in 2004, which granted police, following an application to a judicial officer, the authority to detain persons for an extended period without charge.[54] Dr Haneef's detention was the first time these powers had been used.[55] He was detained for 12 days before being charged.[56] The hearings held to extend his detention were closed to journalists.[57] Although a Brisbane magistrate granted him bail, then Immigration Minister Kevin Andrews cancelled Dr Haneef's work visa. As a result, he was confined to immigration detention.[58]

The police case against him eventually fell apart, and the Director of Public Prosecutions dropped the charge. Dr Haneef appealed the decision to remove his work visa, returning to India while the appeal was heard. Although the Federal Court of Australia overturned Minister Andrews' decision and Dr Haneef's visa was reinstated, he elected not to return to Australia to work. Following an inquiry in 2008—which found that the case had been poorly managed by AFP[59]—Dr Haneef briefly returned to Australia in late 2010 for a confidential compensation discussion with the Australian Government. He was awarded an undisclosed amount of compensation, although Indian reports suggested that the figure was approximately A$1 million.[60]

Initially, the media reported the case on the assumption that Haneef was guilty of the charges.[61] This was the view provided to the media via information 'leaked' by the Executive and unnamed sources from other agencies. Information that did not support this view tended to be deemed contrary to national security and was therefore not available

52 Anonymous, 'Mohammed Haneef Case', Law Council of Australia (2008), www.lawcouncil.asn.au/programs/criminal-law-human-rights/anti-terror/haneef.cfm.

53 Ewart (n 51) 50.

54 Crimes Act 1914 (Cth), s 23 C.

55 T Allard and C Marriner, 'Doctor's Email: I Have to Get Out', *Sydney Morning Herald* (14 July 2007), www.smh.com.au/news/national/doctors-email-i-have-to-get-out/2007/07/13/1183833776803.html.

56 J Pearlman, 'Terrorism Law Revamp Dumps Haneef Charge', *Sydney Morning Herald* (14 August 2009), www.smh.com.au/national/terrorism-law-revamp-dumps-haneef-charge-20090813-ejyi.html.

57 Ewart (n 51) 54.

58 P Coorey and J Gibson, 'Haneef Detained after Bail Win', *Sydney Morning Herald* (16 July 2007), www.smh.com.au/news/national/haneef-free-on-10000-bail/2007/07/16/1184438190629.html?page=fullpage.

59 MJ Clarke, *Report of the Inquiry into the Case of Dr Mohammed Haneef* (Commonwealth of Australia, 2008) 81, 101. While the inquiry found that, generally, the case had been poorly managed, it found that the officers themselves were 'almost without exception, dedicated, competent and impressive', at viii.

60 Australian Associated Press, 'Haneef Awarded $1m, India Reports Say', *The Australian* (22 December 2010), www.theaustralian.com.au/news/nation/haneef-awarded-1m-india-reports-say/story-e6frg6nf-1225974873281.

61 T Dreher, 'News Media Responsibilities' in A Lynch, E MacDonald and G Williams (eds), *Reporting on Terrorism in Law and Liberty in the War on Terror* (Federation Press, 2007) 211.

to journalists.[62] It was not until Haneef's barrister Stephen Keim SC provided journalist Hedley Thomas with the transcript of a lengthy interview between Haneef and police that journalists were afforded an alternative source of information.[63] Keim's actions attracted significant criticism from security officials. As soon as the leak occurred, then AFP commissioner Mick Keelty claimed that it 'undermined the prosecution … [W]e now have a published document that … has provided information that should never have been provided until the court had an opportunity to hear it for the first time and test the veracity of that evidence.'[64] Then Prime Minister John Howard was also strongly critical of the leak.[65] Once the source of the leak became apparent, Commissioner Keelty lodged a complaint with the Queensland Legal Services Commission, the body that regulates the conduct of legal professionals in Queensland. The Commission found that, while the leak constituted a breach of the Bar Association's rules on disclosures of matters currently before a court, it did not amount to unsatisfactory professional conduct or professional misconduct.[66] The Commission emphasised that the exceptional circumstances of the case were critical factors in their decision.[67]

Regardless, following the provision of the transcript to the media, the trajectory of the case changed markedly. It allowed the flaws in the police case to be exposed by Hedley Thomas (of *The Australian*) and the Australian Broadcasting Corporation's European correspondent Rafael Epstein.[68] These flaws included the false allegation that the SIM card had been found in a Jeep which was used during the attempted terrorist attack.[69] As prominent lawyer and human rights advocate Geoffrey Robertson QC explained: 'Through smears and leaks, police and politicians had sent the media into a feeding frenzy of hostility against the defendant.'[70] As the lack of evidence against Dr Haneef became apparent—to the investigators—they sought another method to continue detaining Dr Haneef—via cancellation of his visa.[71]

62 M Rix, 'Counter-Terrorism and Information: The NSI Act, Fair Trials and Open, Accountable Government' (2011) 25(2) *Continuum: Journal of Media and Cultural Studies* 285.

63 P Beattie, 'Sordid Saga of the Terrorist Who Wasn't', *The Australian* (1 January 2011), www.theaustralian.com.au/news/opinion/sordid-saga-of-the-terrorist-who-wasnt/story-e6frg6zo-1225979113373.

64 T Eastley, 'AM: Leaked Haneef Transcript Could Affect Court: Keelty', Australian Broadcasting Corporation (18 July 2007), www.abc.net.au/am/content/2007/s1981358.htm.

65 M Rix, 'The Case of Dr Mohammed Haneef; An Australian "Terrorism Drama" with British Connections' (2009) 2 *Plymouth Law Review* 126, 133.

66 J Briton, 'Media Statement: Complaints against Stephen Keim SC', Legal Services Commission (1 February 2008), www.lsc.qld.gov.au/__data/assets/pdf_file/0004/106348/stephen-keim-response.pdf.

67 *Ibid.*

68 Rix (n 65) 134.

69 S Neighbour, 'Police Chief on the Back Foot', *The Australian* (4 August 2007), www.theaustralian.com.au/news/features/police-chief-on-the-back-foot/story-e6frg6z6-1111114104543.

70 Ewart (n 51) 7.

71 S Keim, 'Reversing the Onus and Raising the Bar: Being Alert and Alarmed when Acting for those Accused of Terrorism Offences', National Access to Justice and Pro Bono Conference, Sydney, 14–15 November 2008, 6–7.

Journalists experienced some of the actual impacts of the anti-terrorism legislation during this case. The legislation impacted on access to some hearings and the information available to reporters. Dr Haneef's solicitor was prevented from being present at one of the detention extension hearings on the basis that information would be tabled that was protected under national security.[72] The case also highlighted that attempts by authorities to restrict the information provided to the public via the media about these types of cases had serious implications for democratic process. While the Haneef case revealed the lack of understanding many journalists had of Australia's security laws, it also exposed serious communication breakdowns between the media managers of policing and government organisations and journalists.[73] It emphasised the dangers of a press that is limited in its investigation of a complex terrorism case to information provided by the Executive. Commissioner Keelty criticised some media for the way certain aspects of the story were covered, particularly the publication of serious errors and rumours about the case by some media outlets.[74] Regardless of the criticisms of the media, it has been argued that the primary cause for the misguided reporting of the story was the forced reliance upon government and authorities' spin as a source of information.[75] Had the media already been privy to information such as that leaked by Haneef's lawyer, then, arguably, this saga would not have proceeded as far as it did.

Case Study 2: 'Jihad' Jack Thomas

In 2006, the AFP served search warrants on Ian Munro, a journalist from the *Age* newspaper in Melbourne and on the Australian Broadcasting Corporation's *Four Corners* programmes, demanding their notes and tapes of interviews with an alleged terrorist 'sleeper', 'Jihad' Jack Thomas—the first Australian to be convicted using the anti-terrorism laws introduced into Australia post-2001.[76]

Thomas had travelled to Afghanistan in 2001 to train at a Taliban training camp.[77] He then successfully appealed a conviction under section 102.6 of the Criminal Code 1995 which prohibited receiving funds from a terrorist organisation. The section had been inserted under anti-terror amendments in 2002 and 2003. The Appeal Court quashed

72 *Ibid*.

73 *Ibid*; L McNamara, 'Counter-Terrorism Laws: How they Affect Media Freedom and News Reporting' (2009) 6(1) *Westminster Papers in Communication and Culture* 27.

74 M Keelty, 'Terrorism: Policing's New Paradigm', Sydney Institute (29 January 2008), www.afp.gov.au/media/national_media/national_speeches/2008/address_to_the_sydney_institute .

75 Rix (n 62); Ewart (n 51) 65; J Ewart, 'Dr Haneef and the Media' in H Rane, J Ewart and M Abdalla (eds), *Islam and the Australian News Media* (Melbourne University Press, 2010) 212; Thomas (n 26).

76 Anonymous, 'Terrorism Court Cases', Parliament of Australia, www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/TerrorismLaw/Courtcases; V Burrow, 'Thomas: Warrant Served on *Age* Man', *The Age* (4 September 2006), 5.

77 N Leys, '"Jihad" Jack Thomas Welcomes Bin Laden Death but Warns of Martyrdom', *Herald Sun* (2 May 2011), www.heraldsun.com.au/news/jihad-jack-welcomes-bin-laden-death/story-e6frf7jo-1226048407755.

the conviction on the basis of the inadmissibility of the police record of interview. On 20 December 2006 the Director of Public Prosecutions obtained an order for retrial, and the *Four Corners* interview and Ian Munro's materials were subsequently used as evidence of admissions, as they covered similar ground to the inadmissible police interview.[78] Ian Munro cooperated with the police, defusing a situation where police would have been tempted to use seizure powers.[79]

On 27 August 2006, a federal magistrate issued the nation's first 'control order' over Thomas under section 104.4 of the Criminal Code, restricting his movements, requiring him to report to police and banning his contact with a long list of organisations.[80] The High Court upheld the validity of the relevant legislation in a challenge.[81] Thomas was eventually found not guilty of terrorism charges, but on 23 October 2008 he was found guilty of having falsified an Australian passport, and sentenced to nine months' imprisonment.[82]

The *Four Corners* interview had not been published at the time of Thomas's trial.[83] The court held that, in circumstances where the evidence to be relied upon in a retrial was unknown or unknowable by the prosecution, the retrial did not constitute a case of the prosecution attempting to supplement a defective case.[84] The court held that the statements given in the *Four Corners* interview were sufficiently cogent to support a conviction.[85]

The case raises questions about the media's role and obligations in these types of cases. Had the interview with *Four Corners* occurred before the first trial of Thomas, the prosecution would likely have used that interview as an admission, rather than relying on the interview with Pakistani authorities. Of course, the interview in Australia was conducted after the trial. Ordinarily, a defendant cannot be retried following an acquittal—the fundamental principle of double jeopardy—and therefore the *Four Corners* interview would not have been of any great significance if Thomas had been acquitted. However, the court's ruling that Thomas's statements in the *Four Corners* interview were of a quality that would support a conviction prevented an outright acquittal.

The case posed several ethical questions for journalists, including the extent to which they should cooperate with the authorities in the provision of evidence for counter-terror trials, the fate of the journalists and media organisations if they had refused to cooperate, and the level of protection that might have been afforded by the new federal shield law

78 *R v Thomas (No 3)* 2006 VSCA 300 (20 December 2006).
79 Burrow (n 76).
80 Anonymous, 'Directory of Anti-Terrorism Legislation and Links', Parliament of Australia, www.aph.gov.au/library/intguide/law/terrorism.htm.
81 *Thomas v Mowbray* (2007) 233 CLR 307.
82 *R v Thomas* [2008] VSC 620 (29 October 2008).
83 *R v Thomas (No 3)* 2006 VSCA 300 (20 December 2006), [13].
84 *Ibid*, [18].
85 *Ibid*.

for journalists if it had been in existence at that time. The Commonwealth Parliament enacted the Evidence Amendment (Journalists' Privilege) Act in 2011, which inserted into the Evidence Act 1995 section 126H(1), providing a presumption of privilege for 'journalists' with regard to their sources ('journalist' was defined broadly to potentially include bloggers). Under section 126H(2), the court may still compel disclosure if:

> the public interest in the disclosure of evidence of the identity of the informant outweighs:
>
> (a) any likely adverse effect of the disclosure on the informant or any other person; and
>
> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

Although it is yet to be tested in a trial, it is likely that a court would rule that a national security or counter-terror issue would constitute a situation where the public interest would outweigh a journalist's obligation to a source. Such a ruling might prompt the classic contempt scenario where a journalist refuses to reveal a confidential source in a trial. The Thomas case also prompts the question of whether it is ethical for a news organisation to interview a terrorism suspect when the interview may be used against that individual to secure a retrial or a conviction. If it is not, then important information may effectively be suppressed. If journalists wish to avoid this potential outcome, they may have to ensure that any interviews that are conducted are only conducted after the prosecution has exhausted all rights of appeal and an acquittal (or conviction) secured. This could take years—meaning that important information may be kept from the public for a considerable time.

Case Study 3: Operation Pendennis

The arrests of eight men in Melbourne and nine men in Sydney in 2005 on terrorism charges raised concerns about national security, public interest and the media. The men were arrested following an operation that lasted for 16 months which involved the AFP, ASIO and the Victoria Police.[86] Several high-profile venues were thought to be the target of those arrested, but it was never conclusively proven which venues were targeted. Several of the charges were dropped against some of the men and 12 men faced trial in February 2008. Seven were found guilty of one or more of the charges.[87]

Immediately following the arrests, then AFP Commissioner Keelty stated that the Department of Public Prosecutions would apply for suppression orders to prevent details of the allegations against those arrested being published or broadcast by the

86 A Caldwell, 'Terror Cells in Sydney and Melbourne Connected', ABC: *PM with Mark Colvin* (20 September 2011), www.abc.net.au/pm/content/2011/s3321962.htm.

87 K Kissane, 'Tip-Off Led to Intense 16-Month Investigation', *The Age* (17 September 2008), www.theage.com.au/national/tipoff-led-to-intense-16month-investigation-20080916-4hxp.html?page=-1.

media. Keelty justified the action by arguing, '[W]e give these people a fair opportunity to prepare their defence before the court rather than run the trial in the media'.[88] During the trial, Victoria's Supreme Court imposed over 30 suppression orders, lifting many upon verdict.[89]

Despite these restrictions, the presiding judge, Justice Bernard Bongiorno (and the magistrate at the committal, Paul Smith), took several steps to accommodate the media's interest in the case. The court officer established several communications channels to keep the media up to date with the case.[90] Justice Bongiorno also arranged a pre-trial briefing for journalists covering the case, as well as the lawyers retained by their media organisations. He emphasised that he wanted the media to be able to report the proceedings of the open court, while reminding journalists that they could only report what was said in court while the jury was present. He outlined his concerns about the potential problems with media coverage of the trial and explained the processes that had been put into place by the court to help avoid those problems. This included providing journalists with transcripts of each day's court proceedings, so that they could refer to the transcript when preparing stories.[91] Following a media application for access to court exhibits, Justice Bongiorno, in what was considered an unusual step, released trial exhibits to the media 'subject to an undertaking not to use them until the verdict, which was strictly observed by the media'.[92] While journalists were restricted in what they could report because of the suppression orders—some of which were not lifted for three years[93]—a report by free expression lobby group Australia's Right to Know found that, for the most part, journalists appreciated the pre-court briefings, provision of court documents and information arranged by Justice Bongiorno. The report also stated that the media were prepared to cooperate with the court's requests about how the trial was reported.[94]

In this respect the case marked a milestone in the development of cooperation between a court and media organisations, suggesting that it may be possible to cover terrorism trials within the restrictions placed on reportage by the courts. However, the suppression orders also meant that journalists were circumscribed in what they could report. Some were critical of this aspect, with one claiming that the suppression orders in conjunction with the hysteria surrounding terrorism cases led to journalists being far more conservative than usual.[95] It was also significant that in this case the AFP lobbied

88 Australian Broadcasting Corporation, *ABC News and Current Affairs—Accuracy and Impartiality—Fact Sheet* (2005).

89 K Kissane, 'Trial and Error', *The Age* (18 September 2008), www.theage.com.au/national/trial-and-error-20080917-4imf.html.

90 Australia's Right to Know, *Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information* (2008), 75.

91 *Ibid*.

92 *Ibid*.

93 Caldwell (n 86).

94 Australia's Right to Know (n 90) 75.

95 *Ibid*, 81.

for suppression of the names of those on trial, justifying this with claims about the need for a fair trial for the defendants, but in the Holsworthy Army Barracks case (which we detail below), they did not appear to have similar concerns.

Case Study 4: Holsworthy Army Barracks bomb plot

The competing tensions around national security, public interest and media freedoms were again highlighted in 2009 during the arrests of five men on 4 August 2009 in Melbourne on charges over a plot to attack the Holsworthy Army Barracks, in the south-western suburb of Holsworthy in Sydney. The men planned to attack Army personnel with automatic weapons.[96] Three of the men were eventually sentenced to 18 years in prison following the AFP's 'Operation Neath'.[97]

The *Australian* newspaper received leaked information about Operation Neath prior to the arrests of suspects, and copies of the newspaper containing the story about the arrest raids were published before the raids took place.[98] The newspaper's editor at the time, Paul Whittaker, had reached an agreement with the AFP over the timing of the publication of the newspaper's exclusive story about the terror plot, but the Victoria Police Commissioner, Simon Overland, criticised *The Australian* for publishing information about the raids prior to the arrests. He said that the publication of the material could have tipped off some of the suspects.[99] On 6 August 2009, a journalist and a reporter from the *Daily Telegraph* entered the Holsworthy Army Barracks and each was charged with illegally taking photographs of the barracks. A court gave them good behaviour bonds and no conviction was recorded.[100] In 2011 the discussions about the case between the AFP and *The Australian*'s editor were made public, with significant criticisms over the interchanges, negotiations and agreements reached between the two groups.[101]

Further tensions in this case were revealed when *The Australian*'s reporter Cameron Stewart revealed the name of a police source of his leak (with the source's permission). The Victorian Police source, detective senior constable Simon Artz, pleaded guilty to a charge of unauthorised disclosure of information and was given a four-month suspended sentence in the Victorian County Court on 5 February 2013.[102]

96 C Stewart and M Rout, 'Somali Extremists on a "Fatwa Order" from God', *The Australian* (5 August 2009), 1.

97 N Ross, 'Judge Berates Terrorists who were Given Refuge in Australia', *Herald Sun* (17 December 2011).

98 M Simons, '*Crikey* Wins Right to Publish "Embarrassing" Docs on The Oz Editor', *Crikey* (2 November 2011), www.crikey.com.au/2011/11/02/simon-artz-case-the-gut-wrenching-raids-leak-to-the-oz.

99 Mediawatch, 'The Australian v Victoria Police', Australian Broadcasting Corporation (22 March 2010), www.abc.net.au/mediawatch/transcripts/s2853028.htm.

100 B Kontominas, 'Journalists Guilty of Photographing Army Base', *Sydney Morning Herald* (25 September 2009), www.smh.com.au/national/journalists-guilty-of-photographing-army-base-20090925-g5rv.html.

101 M Simons, 'The Oz editor Bargained over Lives in AFP Raid', *Crikey* (2 November 2011), www.crikey.com.au/2011/11/02/artz-affidavit-the-oz-editor-bargained-over-lives-in-afp-raid.

102 *Director of Public Prosecutions v Simon Justin Artz* [2013] VCC 56.

Significant ethical concerns were raised by allegations made by Tony Negus, then AFP Commissioner, in an affidavit to Artz's committal hearing. In the affidavit Negus alleged that Paul Whittaker had 'bargained with lives' during discussions over whether or not to publish.[103] The affidavit stated that Negus told Whittaker that publishing before the operation could endanger lives, to which Whittaker allegedly replied, 'Well, how many lives … what are we talking about, one person being killed, or are we talking about a number of people being killed?'[104] Whittaker has publicly denied making these comments. This raises many questions over the ethical responsibilities of journalists during matters of national security. *The Australian* disputed many aspects of the affidavit in an editorial in late 2012.[105]

The case attracted further attention when *Crikey* journalist Margaret Simons posted reports on the social media site Twitter from the committal heating. Simons was ordered by the magistrate to cease tweeting because of national security issues. There was concern that any suppression orders made would be pointless if there was live reporting of the case.[106]

This case highlighted many ethical conundrums journalists face when major terrorism cases break. In matters of national security, where major infrastructure and lives are potentially at risk, the question of whether or not to publish, and the consequences of that decision, are significant. The issues that arose regarding live tweeting were also unique in this case. Margaret Simons' experiences highlighted the inconsistencies in the courts' approaches to journalists tweeting court proceedings and the need for a consistent and clear policy on the matter. The case again highlighted journalists' lack of knowledge of Australia's security laws, in particular the law that prevents the photographing of military installations. It was also significant that the authorities were prepared to charge journalists for breaching security laws.

POLICY AND REFORM ISSUES

The broad competing policies behind anti-terror laws are usually expressed as: the public's interest in national security and the public's interest in a free and fully informed press, along with the individual's right to a fair and open trial (open justice), the right to privacy and related rights against reputation damage and discrimination. While journalists and media organisations have suggested that Australia's anti-terrorism laws have

103 Simons (n 101).

104 *Ibid*.

105 Editorial, 'Scoop Handled Ethically Despite Hollow Criticisms', *The Australian* (18 December 2012), www.theaustralian.com.au/opinion/editorials/scoop-handled-ethically-despite-hollow-criticisms/story-e6frg71x-1226538657425.

106 M Simons, 'Simons: To Tweet or Not To Tweet from Court', *Crikey* (4 November 2011), www.crikey.com.au/2011/11/04/simons-to-tweet-or-not-to-tweet-from-court.

been over-judiciously applied to suppress reportage of terrorism trials and cases,[107] members of the Howard Coalition Government, which introduced most of these laws, and the Rudd and Gillard Labor Governments that continued them, argued that the restrictions were justified.[108]

The AFP has claimed that a terrorism event in Australia is not a matter of 'if' but 'when'.[109] Australia's last executed terrorist attack on home soil was in 1986.[110] Since 9/11, several suspected terrorist plots have been foiled in their planning stages. These events have given rise to concerns for the journalists trying to cover them and the resultant court trials. While Australia has remained relatively safe from terror attacks, Australian citizens have been killed and injured in terrorism events in other countries, most notably in the Bali bombings in 2002 and 2005, which together claimed 92 Australian lives.[111] Australia's political leaders therefore have to balance issues of security and public safety against these other democratic principles when reviewing, refining and introducing legislation aimed at ensuring Australia's security.

The development of the anti-terror laws has been criticised through submissions to parliamentary inquiries by various industry groups. Only some of the reservations raised have been reflected in the legislation eventually enacted or amended. Some groups have also been criticised for being too supportive of the proposed laws.[112]

The Media, Entertainment and Arts Alliance (MEAA), which releases annual media freedom reports, has expressed many concerns about the national security and anti-terror laws.[113] In its 2005 report the MEAA criticised amendments to the ASIO Act for establishing warrants limiting media exposure of any of the national spy agency's operations—'even if the operation is in violation of international human rights conventions'.[114]

107 C Warren, 'You Wouldn't Read about It: Press Freedom is Never a Given Gift From Government' (2009) 56 *Walkley Magazine* 29; Australian Broadcasting Corporation, *ABC News and Current Affairs—Accuracy and Impartiality—Fact Sheet* (2005); Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia* (2007); Jack Herman, 'Freedom of the Press under Threat?' (2005) 57 *University of New South Wales Law Journal* 909; Media Entertainment and Arts Alliance, *Official Spin: Censorship and Control of the Australian Press* (2007).

108 Ewart (n 51) 200–14.

109 Keelty (n 74).

110 Australian Government, *Counter-Terrorism White Paper: Securing Australia, Protecting Our Community* (White Paper, 2010) 7.

111 *Ibid*, 9.

112 D Bossio, 'A War about Meaning: A Case Study of Media Contestation of the Australian Anti-Terror Laws' (2011) 25(2) *Continuum: Journal of Media & Cultural Studies* 261.

113 Media, Entertainment and Arts Alliance: *Secrecy and Red Tape* (2009); *Breaking the Shackles: The Continuing Fight against Censorship and Spin* (2008); *Official Spin: Censorship and Control of the Australian Press 2007* (2007); *The Media Muzzled: Australia's 2006 Press Freedom Report* (2006); *Turning Up the Heat: The Decline of Press Freedom in Australia 2001–2005* (2005).

114 Media, Entertainment and Arts Alliance, *Turning Up the Heat: The Decline of Press Freedom in Australia 2001–2005* (2005).

The MEAA expressed concern over the potential for the two-year gag on information about an ASIO operation[115] to be, in effect, indefinite through the issue of successive warrants.[116] The provisions also have some extra-territorial effect, rendering journalists in other countries subject to Australian prosecution and jail.[117] While the gag may be lifted by certain personnel and agencies under section 34ZS(5), the only person that would likely lift the gag would be a minister under significant public pressure. It is difficult to imagine spy agencies volunteering to lift any gag.

The ASIO Act amendments also possessed a 'sunset clause', which would have seen the legislation repealed in 2006. However, in 2006, the three-year sunset clause for these provisions was extended from 2006 to 2016, as detailed at section 34ZZ. In its 2006 report, the MEAA suggested that journalists needed to assume that their conversations with sources on terrorism stories would be intercepted, as one of the 2006 amendments allowed phone tapping of third parties in connection with suspected terrorist plots.[118] Those who take the risk of contacting sources by phone may be giving authorities access not only to conversations with the suspect but also identifying other sources. This is irreconcilable with a journalist's professional duty of confidentiality.[119]

The Anti-Terrorism Act (No 2) 2005 attracted the most criticism from media lobby groups and civil rights organisations. The Act defined terrorist organisations, outlined new crimes for financing them, and gave agencies new powers to issue 'control orders' and preventative detention orders to stop, search, question and obtain information and documents from suspects.

Concerns expressed by media organisations about the restrictive nature of the Australian laws led to a review of the legislation covering reportage of terrorism trials by the Standing Committee of Attorneys-General.[120] This review developed model provisions for suppression orders, which were aimed at harmonising suppression and non-publication orders across the various State jurisdictions. While the Attorneys-General endorsed these model provisions, individual states remain in charge of implementing them, which New South Wales has done.[121] At the federal level, the reforms were proposed as part of the Access to Justice (Federal Jurisdiction) Amendment Bill 2011, which received assent in late 2012.[122] This Bill, and the 2010 model provisions, each contain a clause stating that, when considering whether or not to grant a suppression order, the court must take into account that 'a primary objective of the administration of justice is to safeguard the

115 Australian Security Intelligence Organisation Act 1979 (Cth), s 34ZS(2).
116 *Ibid*.
117 *Ibid*, s 34ZS(4).
118 Media, Entertainment and Arts Alliance, *The Media Muzzled: Australia's 2006 Press Freedom Report* (2006), 9.
119 *Ibid.*
120 Warren (n 107) 30.
121 Explanatory notes to the Access to Justice (Federal Jurisdiction) Amendment Bill 2011, 3.
122 Parliament of Australia: Access to Justice (Federal Jurisdiction) Amendment Bill 2011.

public interest in open justice'.[123] However, national and international security is listed as a specific exemption at section 102PF.

In the wake of the various police agencies' handling of the media during the Holsworthy Army Barracks matter (case study 4), Federal Attorney-General Robert McClelland called for new protocols regarding the provision of information to media about terrorism cases. While he commended *The Australian* for acting responsibly during the negotiations with the AFP, his call for protocols around reporting terrorism was met with significant hostility from media organisations, especially Australia's Right to Know, a lobby coalition which includes representatives from major news corporations.[124] However, the 2012 MEAA report *Kicking at the Cornerstone of Democracy* congratulated Robert McClelland for his role in achieving a satisfactory outcome following a 'round table' discussion between security agency representatives and major media organisations.[125] The discussions reached agreement on a set of 'principles' rather than 'protocols', to the relief of media organisations, who had feared that protocols would become policy and therefore much more restrictive.[126] The meetings were conducted with mutual respect and cooperation and recognised the public interest in receiving news about security matters.[127] Whether or not the consensus reached will be carried into practice is a question which has not yet been answered.

LEGISLATIVE REVIEW MECHANISMS

Notwithstanding the extension of the sunset clauses for certain legislation, as discussed above, there has been some movement towards review of the current laws at the executive level. In 2006 the Howard Government, which was responsible for much of the enactment of Australia's initial anti-terror legislation, agreed to a review of Australian anti-terror laws during a Council of Australian Governments (COAG) meeting.[128] The communiqué resulting from that meeting provided the terms of the review.[129] The review would be undertaken by COAG, which consists of representatives of both the Fed-

123 *Ibid*, s 102PD; Model Court Suppression and Non-Publication Orders Bill 2010 (NSW).

124 Philip Dorling, '"Chilling" Bid by Government to Control the Media Rejected', *Sydney Morning Herald* (20 October 2011), www.smh.com.au/national/chilling-bid-by-government-to-control-the-media-rejected-20111019-1m7wq.html.

125 Media, Entertainment and Arts Alliance, *Kicking at the Cornerstone of Democracy* (2012), 51.

126 *Ibid*, 50–51.

127 *Ibid*.

128 B Keane, 'Ghosts of COAG—The Counter-Terrorism Review that Vanished', *Crikey* (16 April 2012), www.crikey.com.au/2012/04/16/coag-counter-terrorism-review-delayed.

129 Council of Australian Governments, 'Council of Australian Governments' Meeting 10 February 2006: Attachment G—Details and Process for Council of Australian Governments', COAG Review of Counter-Terrorism Legislation (2006).

eral Government and the State Governments.[130] It was scheduled to start in December 2010 and be completed by June 2011, and was to cover a review of both Commonwealth and State legislation.[131] The review was delayed due to the anticipated creation of the Independent National Security Legislation Monitor (INSLM), who was appointed by the Commonwealth Government on 21 April 2011. The role and report of the INSLM are discussed below.

The COAG review finally commenced on 6 August 2012 and was due to report within six months. Its terms of reference required it to:

- review and evaluate the operation, effectiveness and implications of the relevant amendments in each jurisdiction. The goals of this Review include recommendations by the Committee as to whether the laws the subject of the Review
    - are necessary and proportionate
    - are effective against terrorism by providing law enforcement, intelligence and security agencies with adequate tools to prevent, detect and respond to acts of terrorism
    - are being exercised in a way that is evidence-based, intelligence-led and proportionate, and
    - contain appropriate safeguards against abuse.[132]

The ambit of the review covered state, territory and federal counter-terrorism laws, including laws relating to control orders, preventative detention orders, and police powers, but not the legislation dealing with security agencies. Six public consultation hearings were held throughout Australia in October and November 2012, and two of the authors of this article appeared at the Brisbane hearings on 23 October 2012 to explain many of the matters discussed here.[133]

Meanwhile, Bret Walker SC had been appointed as the inaugural Independent National Security Legislation Monitor and had handed down his first annual report.[134] Pursuant to the Independent National Security Legislation Monitor Act 2010 (Cth), the Monitor's role was essentially to 'review and report on the operation, effectiveness and implications' of Australia's national security legislation scheme.[135] Reports were to

130 *Ibid*, 1.

131 *Ibid*, 2.

132 Council of Australian Governments, 'Council of Australian Governments Review of Counter-Terrorism Legislation: Terms of Reference' (2012), 3, www.coagctreview.gov.au/about/Documents/Terms%20of%20Reference.pdf.

133 *Ibid*.

134 B Walker, *Independent National Security Legislation Monitor Annual Report*, Annual INSLM Report (16 December 2011), www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf.

135 Anonymous, 'Independent National Security Monitor', Law Council of Australia, www.lawcouncil.asn.au/programs/criminal-law-human-rights/anti-terror/legislation-monitor.cfm.

be produced on an annual basis, and the Monitor was to consider whether the laws remained proportionate and necessary to respond to any perceived threats to national security.[136] Even the States extended the review dates for their own legislation to accommodate the creation of this office.[137]

In December 2011 Mr Walker's first report as INSLM was released, but it contained little in the way of recommendations. As Mr Walker stated, he only had two months from appointment before the first report was due.[138] As a result, the focus was primarily on elucidating the principles and general policy matters which would guide the performance of the office, to highlight the most significant questions the anti-terror laws raised—especially in relation to human rights—and to establish a provisional agenda for his upcoming 2012 report.[139] In relation to press freedom and open justice, the report said little of direct relevance. A search of the 118-page report revealed the word 'press' three times in relation to access to court, only single mentions of 'free expression' and 'open justice', while the words 'journalism', 'journalist' and 'media' did not earn a mention.

Some points were, however, relevant to this study. The report stated that questioning powers, which provide that a person being interviewed must answer the questions, are not unusual and are analogous to a testifying witness's compellability to answer questions.[140] The report pointed out that the penalties were not substantially different to contempt—but it failed to address the somewhat unique nature of journalists' sources and a journalist's obligations of confidentiality. For instance, in 2007, two Australian journalists, Michael Harvey and Gerard McManus, were each fined A$7,000 for contempt of court.[141] This followed the pair's refusal to answer questions in court about a confidential source.[142]

The report also stated that, in relation to the exclusion of the press from terrorism trials, under Article 14 of the International Covenant on Civil and Political Rights, the press may be excluded from trials for reasons of national security in a democratic society.[143] Walker did, however, point out that what exactly constituted 'national security' was in need of investigation, along with the appropriate level of secrecy.[144]

While not directly referencing media freedom, Walker stated that even if legislative provisions, especially those concerning detention or custody, were not actually used, their mere existence may well serve to have a 'cowing or chilling' effect.[145] Unfortunately,

136 *Ibid*.
137 See, for example, the Terrorism (Community Protection) Amendment Bill 2011 (Vic).
138 Walker (n 134) 1–2.
139 *Ibid*, 2.
140 *Ibid*, 32.
141 K Jones, 'Journalists Avoid Jail', *Herald Sun* (26 June 2007), www.heraldsun.com.au/news/more-news/journalists-avoid-jail/story-e6frf7kx-1111113819422.
142 *Ibid*.
143 *Ibid*, 62.
144 *Ibid*, 63.
145 *Ibid*, 12.

he neglected to mention press freedom as a question to be investigated in his 2012 report, which was released in May 2013.

AUSTRALIA'S ANTI-TERROR LAWS IN AN INTERNATIONAL HUMAN RIGHTS CONTEXT

It is appropriate that Walker should consider human rights in his report. International human rights obligations have been front and centre in comparable democracies contemplating laws sacrificing personal liberties for national security, particularly the UK and US. A range of globally accepted principles can potentially be infringed by anti-terror laws, including freedom from arbitrary arrest,[146] freedom from interference with privacy, home and reputation,[147] the right to liberty and security,[148] freedom of association,[149] freedom from discrimination,[150] and, most pertinent to this study, the right to a fair and public trial[151] and freedom of expression.[152] Arguments against the introduction of anti-terror and national security legislation are usually premised on the basis that we should not be sacrificing the fundamental values of our democratic society in the name of national security because in that way we serve the goals of terrorists who oppose that system. President of the Israeli Supreme Court, Justice Aharon Barak, summed up that view: 'Terrorism does not justify the neglect of accepted legal norms. This is how we distinguish ourselves from the terrorists themselves.'[153] Free expression becomes an even more crucial right when the news media are attempting to reveal breaches of other human rights.

While the US led the international push for tougher anti-terror laws with the USA PATRIOT Act under the Bush Administration,[154] its impact upon the media has been reviewed through the lens of First Amendment free expression jurisprudence. For example, in 2012, the Obama administration attempted to compel a *New York Times* journalist, James Risen, to testify as the 'only witness' to CIA agent Jeffrey Sterling's crime of leaking classified information about a failed plan against the Iranian Government.[155]

146 Universal Declaration of Human Rights, GA res 217A (III), UN Doc A/810 at 71 (1948), Art 9.

147 *Ibid*, Art 12; International Convention on Civil and Political Rights, 23 March 1976, 999 UNTS 171, Art 17.

148 International Convention on Civil and Political Rights, Art 9.1.

149 *Ibid*, Art 22.

150 *Ibid*, Art 26.

151 *Ibid*, Art 10 and also Art 14.

152 *Ibid*, Art 19.

153 A Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(16) *Harvard Law Review* 151, 152.

154 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act 2001.

155 M Calderone, '"Reporters' Privilege" under Fire from Obama Administration amid Broader War on Leaks', *Huffington Post* (10 May 2012), www.huffingtonpost.com/2012/05/18/reporters-privilege-obama-war-leaks-new-york-times_n_1527748.html.

The argument advanced by the Department of Justice Attorney, promoting disclosure, was that there was no reporter's privilege when the leak itself made the reporter the only witness to the crime.[156] The panel of Fourth Circuit Court Appellate judges were apparently unconvinced, with Judge Robert Gregory noting:

> The beneficiary of the privilege is the public … the people's right to know … We need to know what the government is doing … The king never wants anyone to disclose.[157]

In May 2012, Federal District Judge Katherine Forrest ruled *prima facie* unconstitutional a provision of the National Defense Authorisation Act (NDAA). President Obama had signed the NDAA into force in December 2011. It enabled the US military to detain indefinitely anyone, either within or outside the US, who provided 'substantial support' for terrorists or who associated with terrorists.[158] It did not define the term 'substantial support'.[159] The suit, brought by *New York Times* journalist Chris Hedges, intellectual Noam Chomsky and activist Daniel Ellsberg (amongst others), alleged that the provision, Section 1021, infringed their First Amendment rights by forcing them to limit some of their reporting and activism due to a fear that they may be violating the provision.[160]

At the time of writing, the UK has been undergoing its own debate over the tension between national security, open justice and free expression in the form of its proposed Justice and Security Bill.[161] The Bill is aimed at modernising and strengthening the oversight of the intelligence and security services. Controversially, and related to this study, it will 'allow civil courts to use closed material procedures to hear sensitive evidence in cases that raised national security concerns' and will 'preclude the courts from ordering the disclosure of sensitive information in certain circumstances'.[162]

Originally, secrecy powers were to cover both inquests and civil court hearings, but following significant public pressure the Bill has been limited to civil hearings only.[163] The Bill allows for an application by the Secretary of State to a court for a declaration that a 'Closed Material Procedure' (CMP) order is required.[164] The court must then grant the order if it considers that a party will be required to disclose information damaging

156 *Ibid*.

157 *Ibid.*

158 B Keane, 'Barack Obama's Remorseless Assault on Basic Rights', *Crikey* (21 May 2012), www.crikey.com.au/2012/05/21/barack-obamas-remorseless-assault-on-basic-rights.

159 *Ibid.*

160 D Kuipers, 'Federal Judge Blocks National Defense Authorisation Act Provision', *Los Angeles Times* (18 May 2012).

161 Justice and Security HL Bill (2012–13).

162 A Horne, *Justice and Security Bill: Bill No 99 2012–13 Research Paper 12/80* (HC 14 December 2012), 1.

163 J Chapman and M Robinson, 'Climbdown on Secret Justice: Victory for the Mail's Campaign as Clarke Says Inquests Won't be Held behind Closed Doors but Civil Rights Groups Say Changes Still Fall Short', *Daily Mail* (28 May 2012), www.dailymail.co.uk/news/article–2151343/Secret-justice-Kenneth-Clarke-says-inquests-wont-held-closed-doors.html#ixzz1wz7yRxeg.

164 Justice and Security HL Bill (2012–13), s 6(1).

to national security during the hearing.[165] If a CMP is granted, the non-government party and his or her advocate (as well as the media) are excluded from the portion of the hearing where the information is presented to the judge. The non-government party's interests are represented by a security-cleared 'special advocate', appointed by the government.[166] The result is that evidence may be considered by the judge which will never be disclosed to the non-government party. This raises clear questions about procedural fairness and natural justice, and especially questions of executive accountability. If, for instance, a torture victim successfully brought a compensation claim against a UK spy agency, the fact that the spy agency acted incorrectly would not be reportable.

Most relevant to this study is the report of the Joint Committee on Human Rights (JCHR) on the Government's Justice and Security Green Paper. This report contains a chapter titled 'The impact on media freedom and democratic accountability', which covers the impact of the reforms upon open justice, the media generally, court reporting and public trust in the government and the courts.[167] While its review was limited to a single legislative reform, the JCHR was at pains to reinforce the open justice principle 'as both a foundational common law principle and an important human rights obligation'.[168] It listed numerous potential impacts of the proposal compiled from the evidence of journalists, NGOs and media law scholars, including: the importance of court evidence to investigative journalism about national security,[169] the value of court testimony and documents in testing facts asserted in 'spin' by governments and agencies,[170] and eroding journalists' defamation defence when publishing a fair and accurate report of what is said in open court.[171] The chapter also quoted evidence from media law academic Dr Lawrence McNamara, who cited his research into the Australian experience where he had found that the National Security Information (Criminal and Civil Proceedings) Act 2004 had created a 'culture of closure and caution' where 'the default became to use closed proceedings where possible',[172] and the legislature's decision to ignore the advice of the Australian Law Reform Commission 'that open justice be an express consideration in national security law'.

Another point of comparison between the UK and Australia might be found by contrasting the events and inquiries associated with our Mohamed Haneef case study, which occurred in 2007, with the counter-terror raid, wrongful arrest and shooting of a suspect

165 *Ibid*, s 6(2).

166 Anonymous, 'Justice and Security: Inquests are Gone, But So is Judicial Discretion' (29 May 2012), www.liberty-human-rights.org.uk/media/press/2012/-justice-and-security-inquests-are-gone-but-so-is-judici.php.

167 House of Lords and House of Commons Joint Committee on Human Rights, 'Justice and Security Green Paper' (HL 2010–12, 286; HC 2010–12, 1777) 55–62.

168 *Ibid*, 55.

169 *Ibid*, 58.

170 *Ibid*, 58.

171 *Ibid*, 59.

172 *Ibid*, 61.

at Forest Gate in 2006. Points of similarity include the police's use of new terror laws to make their arrests, the ultimate proven innocence of the accused, and misreporting of events by journalists starved of information by the 'spin' arms of the police.[173] Points of contrast, however, appear to be the extended detention of the suspect in Australia with the closure of related court proceedings; the dogged commitment of police and government to proceed with the charges and the later deportation of the accused despite a lack of supportive evidence; and the *mea culpa* of authorities about their errors in the form of the IPCC report and public apologies.[174]

Crucial to understanding the legislative reform and case differences is the fact that, unlike the United Kingdom, the US, Canada, New Zealand and most other Western democracies, the legislature and judiciary in Australia are not bound by any national or regional charter or bill of human rights. The framers of the Constitution of Australia chose to allow the democratic process to determine the rights of citizens—rather than prescribe those rights.[175] The High Court has determined that the Constitution implies an unstated 'freedom to communicate on matters of politics and government', but this judicially prescribed law is still uncertain and slow in development.[176] This is not an absolute right and can be infringed where there is a legitimate purpose and the infringing legislation is appropriate and adapted to that purpose.[177] 'National security' inevitably qualifies as one of the most legitimate purposes.[178]

The implied freedom of political communication is not a personal right.[179] It is proscriptive—not prescriptive. It operates as a restriction upon the powers of the legislature and the executive[180] and arises out of the constitutional requirement that the members of the House of Representatives and the Senate be chosen by the people.[181] As Brennan J opined in *Nationwide News v Wills*:[182]

> [I]t would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.

173 D Glass, 'IPCC Independent Investigations into Complaints Made Following the Forest Gate Counter-Terrorist Operation on 2 June 2006', Independent Police Complaints Commission (February 2007), 7–8, http://webarchive.nationalarchives.gov.uk/20100908152737/www.ipcc.gov.uk/forest_gate_2_3report.pdf.

174 *Ibid*.

175 *Kruger v Commonwealth* (1997) 190 CLR 61 (Dawson J).

176 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

177 *Ibid*, 562.

178 B Golder and G Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8(1) *Journal of Comparative Policy Analysis* 43, 58.

179 *Cunliffe v Commonwealth* [1994] HCA 44, [30] (Brennan J).

180 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108 (2010), para 41.16, citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 168; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

181 *Nationwide News v Wills* (1992) 177 CLR 1.

182 *Ibid*, 47–49.

The media, of course, perform a valuable role in informing the public's discussion of whom, and which political ideologies and policies, they wish to support. Certainly when considering the extent of some of the anti-terror laws and the significant potential for personal liberties to be infringed, the freedom of political communication is of critical importance.

To determine whether the implied freedom of political communication has been infringed, the High Court will look at the following:[183]

1. Does the impugned law effectively burden freedom of communication regarding government or political matters in its terms, operation or effect?
2. If so, is the law reasonably appropriate and adapted to serve a legitimate end?

Although the freedom has attained the status of a recognised constitutional principle, the extent of its application is not certain.[184] What is clear, however, is that if an impugned law purports to unreasonably impinge upon the freedom of political communication, it will be invalid.[185] This may simply mean that the specific section of the relevant legislation is read down, or it may mean that it is 'struck out' as invalid.[186] If that section is integral to the operation of the Act, then the entire Act could be found invalid. The Australian Government has apparently acknowledged this in the wording of some of its national security legislation. Section 34ZS(13) of the ASIO Act (discussed in more detail below) provides that the section 'does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'. Similar clauses appear in other Acts.[187] The difficulty for journalists may be in demonstrating that the matter upon which they are communicating is a political matter, and further, demonstrating that it would be unreasonable for that to be burdened.[188]

An important recent development—and point of contrast with the UK—has been the apparent diminished public defence of free expression and open justice in Australian intellectual debate. Early in the post-2001 decade, the restrictive nature of Australia's anti-terrorism laws was the subject of criticism from human rights advocates, lawyers, media executives, unions, industry groups and journalists. Many of their reports and submissions have been cited above. When the laws were being introduced post-2001, those who voiced their opposition were assured by the Howard Government that the

183 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

184 P Keyzer, *Principles of Australian Constitutional Law* (LexisNexis Butterworths, 3rd edn 2010).

185 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

186 See eg *Coleman v Power* (2004) 220 CLR 1, where legislation purporting to outlaw obscene words, while held to be valid, was read down as not extending to cover the conduct with which the appellant was charged.

187 See, for example, the Spam Act (2003) (Cth), s 44.

188 For instance, in *Levy v Victoria* (1997) 189 CLR 579, laws burdening political communication in relation to animal activism were held reasonably appropriate and adapted by prohibiting access to hunting grounds without a licence. McHugh J accepted that the regulations were justifiable due to the risk to 'life and limb'.

laws were urgently needed to ensure that Australia was protected from the threat of terrorism.[189] In recent times, the number of such submissions appears to have declined, particularly when compared with the groundswell of media and human rights opposition to the Justice and Security Bill in the UK. For example, at 17 February 2013, the COAG counter-terror review had received 30 submissions, none of which were from media-related companies or organisations, or free expression lobby groups.[190] Theories about this relative silence deserve exploration in a future research project. Possible explanations include the diminished time and resources of media executives who are preoccupied with an industry under technological and economic siege, the changing role of the Australian Press Council, and the fact that several regulatory inquiries throughout 2012 occupied the attention and resources of the usual free expression and open justice advocates. Whatever the reason, it is unsurprising that policymakers might overlook arguments in favour of national security law reform if they are not being presented at every possible opportunity. Gelber[191] explores the tensions between freedom of speech and legislative restrictions on those freedoms in her book.

CONCLUSION

This article's aims were twofold: to offer scholars from other jurisdictions an Australian reference point for discussion of open justice and free expression in the context of national security and counter-terror laws; and to identify and debate some of the consequences for Fourth Estate journalism and open justice posed by such laws. The literature review of terrorism and the news media in Australia, combined with the case studies, shows that the anti-terror laws introduced since 9/11 have already had the following demonstrable impacts on the reporting of national security matters:

- The willingness of judges to take advantage of new powers to issue suppression orders in national security cases, limiting public knowledge of aspects of cases as they proceed through the courts.[192]
- Arrest, questioning and detention restrictions increasing media reliance on official spokespeople once a suspect has been arrested, as evidenced by the control of information by the Federal Police in the arrest and charging of Haneef.

189 G Carne, 'Hasten Slowly: Urgency, Discretion and Review—A Counter-Terrorism Legislative Agenda and Legacy' (2008) 13(2) *Deakin Law Review* 49.

190 *Ibid*; Anonymous, 'COAG Review of Counter-Terrorism Legislation: Make a Submission', www.coagctreview.gov.au/submissions/Pages/default.aspx.

191 K Gelber, *Speech Matters: Getting Free Speech Right* (University of Queensland Press, 2011).

192 Caldwell (n 86); Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia* (2007), 75.

- Demands by judges for journalists to reveal their sources of counter-terror stories, evidenced by the making of such demands upon *The Australian*'s Cameron Stewart regarding leaks from the Federal Police over the Holsworthy Barracks raids.
- Related to this, the freezing of information about counter-terror operations by government agencies after the above incident where *The Australian* published an account of one operation before it had commenced.
- Readiness of counter-terror agencies and prosecutors to make use of raw footage and interview material captured by journalists as prosecution evidence in their cases against terror suspects.[193]

These documented instances demonstrate that the post-9/11 counter-terror regime has already impacted upon journalists' access to sources and court information, their information gathering and data storage protocols, and their relationship with sources, particularly those in counter-terror agencies. Future research should endeavour to document this further, by building a database of free expression limitations resulting from such laws and by delving into Hansard and parliamentary committee records to determine whether the projected threats to free expression raised when the legislation was first mooted have actually come to fruition.

Our primary research question was: 'What do key cases involving Australian anti-terror laws and the media tell us about the relative and comparative roles of national security, free media expression and open justice in that democracy?' Our study shows that Australia's recent experience offers a reference point for other democracies trying to balance these interests. The challenge for all democratic governments is to provide the counter-terror agencies with sufficient powers and resources, while continuing to defend the rights of the media and citizens to report upon and criticise the process. In a nation like Australia, where free expression has no formal written protection, the public need to have great faith in the willingness of governments to temper their own powers of suppression when terrorism offers them a mandate to censor. We have seen some movement by the legislature towards providing accountability measures for the executive. The creation of the Independent National Security Legislation Monitor is a step towards ensuring that national security laws remain appropriate. That said, the initial report contained no mention of plans to investigate the impacts of the laws on press freedom, and relatively little on the issue of open justice.

Arguably, the most significant effect of the anti-terror laws on the truth-seeking and truth-telling functions of journalists is in the unbalanced flow of information these laws create. There is inherent hypocrisy in providing one side of the story surrounding a terrorism trial while suppressing unfavourable information or prosecuting investigative journalism. 'National security' provides a convenient justification for censorship, and

193 *R v Thomas (No 3)* 2006 VSCA 300 (20 December 2006).

there are certainly some occasions when the use of this justification will be legitimate. The danger for the citizens of all democracies is in not being aware—or not being *capable* of being aware—that the justification is itself unjustified.

As Bret Walker SC pointed out in the inaugural review of the INSLM, the circumstances surrounding the creation of Australia's anti-terror laws, and the justifications for them, are not eternal.[194] The contexts and environments will change. The people and their Parliament must keep track of whether anti-terror laws remain appropriate and proportionate to the perceived threat to national security. If they become disproportionately invasive to personal liberty, then they should be wound back or even repealed.[195] The media's role, then, is essential in informing the people whether or not these laws remain appropriate. Laws which prevent the media from fulfilling this role—particularly at the micro level of access to sources and court proceedings—deserve to be greeted with the greatest skepticism and subjected to the deepest scrutiny.

194 Walker (n 134).
195 *Ibid*.

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