

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

PO Box 6021

Parliament House

Canberra ACT 2600

27 August 2019

To the Committee,

In the public hearing in Sydney on 13 August 2019, we discussed models for protecting press freedom in the other ‘Five Eyes’ jurisdictions. Below is a brief account of these protections. Each of these jurisdictions provides explicit statutory protections for press freedom with regard to the use of investigative powers.

United Kingdom

The *Police and Criminal Evidence Act 1984* (UK) (PACE) sets out a scheme by which journalistic material is protected under the exercise of search warrants by police. Section 13 of PACE defines journalistic material broadly as any ‘material acquired or created for the purposes of journalism’, provided that material is ‘in the possession of a person who acquired or created it for the purposes of journalism’.¹ Journalistic material is considered ‘excluded

¹ *Police and Criminal Evidence Act 1984* (UK) s 13.

material’,² meaning that it cannot be seized under the ordinary search warrant process.³ Instead, a special procedure found in Schedule 1 must be followed.⁴ The special procedure involves applying to a judge for an order that the journalistic material must be produced within 7 days.⁵ Notice must be given to the journalist(s) or relevant media organisation,⁶ and the application must be heard *inter partes* (i.e. the journalists must be given an opportunity to make submissions).⁷ The journalistic material must not be destroyed unless and until the application has been complied with or dismissed.⁸ The relevant test used by the judge is twofold: (1) whether other possible methods of obtaining the material have been tried without success, and (2) it is in the public interest that the material should be produced or access granted.⁹ What constitutes the ‘public interest’ is undefined, although the judge is to consider ‘the benefit likely to accrue to the investigation’ and the circumstances in which the person possesses it.¹⁰

The committee should also consider protections in the Investigatory Powers Act 2016 (UK) which governs access to metadata. Under that Act, unless there is an ‘imminent threat to life’, access to a journalist’s metadata must be authorised by a judicial commissioner, who must consider the public interest with regard to protecting journalistic sources.¹¹ This is broadly similar to the journalist warrant information scheme in Australia’s metadata regime, as notice need not be given to the journalist(s) or media organisations.¹² However, there are several key differences. First, this process applies not only to law enforcement but also to MI5, the UK’s domestic security service.¹³ By contrast, the Director-General of Security need only apply to

² *Police and Criminal Evidence Act 1984* (UK) s 11.

³ *Police and Criminal Evidence Act 1984* (UK) s 8(1)(d).

⁴ *Police and Criminal Evidence Act 1984* (UK) s 9.

⁵ *Police and Criminal Evidence Act 1984* (UK) sch 1, cl 4.

⁶ *Police and Criminal Evidence Act 1984* (UK) sch 1, cls 8-9.

⁷ *Police and Criminal Evidence Act 1984* (UK) sch 1, cl 7.

⁸ *Police and Criminal Evidence Act 1984* (UK) sch 1, cl 11.

⁹ *Police and Criminal Evidence Act 1984* (UK) sch 1, cl 2(b).

¹⁰ *Police and Criminal Evidence Act 1984* (UK) sch 1, cl 2(b).

¹¹ *Investigatory Powers Act 2016* (UK) s 77(6).

¹² *Investigatory Powers Act 2016* (UK) s 77(4).

¹³ See *Investigatory Powers Act 2016* (UK) sch 4.

the Attorney-General (not a judge) for a journalist information warrant under the Australian legislation.¹⁴ Second, judicial commissioners are former or serving High Court judges, not magistrates, district court judges or tribunal members.¹⁵ Third, judicial commissioners are members of the Investigatory Powers Commission, a standing commission which has 70 full-time staff as well as legal and technical support.¹⁶ This provides standing judicial oversight and auditing of the investigatory powers regime, in addition to the authorisation role. Finally, the UK's metadata scheme is different in that metadata retention can be authorised only by judicial commissioners for 12-month periods.¹⁷ It is not mandatory for all providers for 2 years.

Canada

In Canada, the Journalistic Sources Protection Act 2017 (JSPA) made amendments to provide both shield laws for journalists and protections under search warrants. The starting point of the scheme is a shield law, which provides that journalists may object to the disclosure of information or documents to a court, person or other body on the grounds that they are likely to identify a confidential source.¹⁸ 'Journalist' is defined in the following terms:

journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.¹⁹

The possibility of somebody 'occasionally' producing journalism suggests that these protections are broad, and would apply to freelancers as well as the permanent employees of

¹⁴ *Telecommunications (Interception and Access) Act 1979* (Cth) s 180J.

¹⁵ As in *Telecommunications (Interception and Access) Act 1979* (Cth) s 6DB.

¹⁶ See Investigatory Powers Commissioner's Office: <https://www.ipco.org.uk/>.

¹⁷ *Investigatory Powers Act 2016* (UK) ss 87-89.

¹⁸ *Canada Evidence Act 1985* (Can) s 39.1(2).

¹⁹ *Canada Evidence Act 1985* (Can) s 39.1(1).

established media outlets. A ‘journalistic source’ means a source that confidentially transmits information to a journalist on the journalist’s undertaking not to divulge their identity, and ‘whose anonymity is essential to the relationship between the journalist and the source’.²⁰

With regard to search warrants, the JSPA provides that applications for access to journalistic sources must be approved by a judge of a higher court.²¹ This must be done where an applicant knows that the warrant relates to ‘a journalist’s communications or an object, document or data relating to or in the possession of a journalist’.²² The judge will have exclusive jurisdiction over the application, and may only issue the warrant if he or she is satisfied of two things: (1) ‘that there is no other way by which the information can reasonably be obtained’, and (2) ‘the public investigation in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in gathering and disseminating information’.²³ In issuing the warrant, the judge may include any conditions that he or she ‘considers appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities’.²⁴

Some differences in procedure depend on a distinction drawn between two sets of circumstances: (1) where the offence may have been committed by someone else (e.g. a government employee) and journalistic material is sought to discover the source of a leak, and (2) where a journalist may have committed an offence. In the first set of circumstances, the judge may request that a special advocate ‘present observations in the interests of freedom of the press’.²⁵ In the second set of circumstances, stronger protections apply. Where a journalist may have committed an offence, the judge may place the documents in the custody of the court

²⁰ *Canada Evidence Act 1985* (Can) 39.1(1).

²¹ *Criminal Code 1985* (Can) s 488.01(2).

²² *Criminal Code 1985* (Can) s 488.01(2).

²³ *Criminal Code 1985* (Can) s 488.01(3).

²⁴ *Criminal Code 1985* (Can) s 488.01(7).

²⁵ *Criminal Code 1985* (Can) s 488.01(4).

and sealed so that no public access is possible.²⁶ No police officer is permitted to examine or reproduce the documents without giving the journalist and the relevant media organisation notice of that intention.²⁷ Within 10 days of receiving that notice, the journalist or media outlet may apply to the judge to issue an order that the documents not be disclosed, on the grounds that doing so would reveal a journalistic source.²⁸ The judge then applies the same test as above, being a public interest test and consideration of whether other avenues for obtaining the information have been exhausted.²⁹ The judge may also place such restrictions and conditions on the delivery of the document as are deemed appropriate,³⁰ suggesting it may be possible in some circumstances to disclose the document whilst protecting the identity of the source.

New Zealand

New Zealand's shield laws, which prevent journalists from revealing confidential sources in civil and criminal proceedings, are found in s 68 of the *Evidence Act 2006* (NZ). The protection provided by these shield laws is recognised as a type of privilege under the *Search and Surveillance Act 2012* (NZ), which contains police search warrant powers.³¹ As with other forms of privilege (such as confidential lawyer-client or doctor-patient information) the person responsible for executing a search warrant must, if he or she reasonably believes the search may reveal privileged information, give the affected person a reasonable opportunity to claim that privilege.³² This means the affected person has a right to prevent the thing from being searched, or to have it returned, pending a judicial determination of the claim to privilege.³³

²⁶ *Criminal Code 1985* (Can) ss 488.01(6), 488.02.

²⁷ *Criminal Code 1985* (Can) s 488.02(2).

²⁸ *Criminal Code 1985* (Can) s 488.02(3).

²⁹ *Criminal Code 1985* (Can) s 488.02(5).

³⁰ *Criminal Code 1985* (Can) s 488.02(7)(b).

³¹ *Search and Surveillance Act 2012* (NZ) s 136.

³² *Search and Surveillance Act 2012* (NZ) s 145.

³³ *Search and Surveillance Act 2012* (NZ) s 142.

United States

In the United States, due to the First and Fourth amendments to the US Constitution, the starting point is that newsroom raids are unlawful.³⁴ A search is permissible only if the information relates to national defence, has a security classification, or is restricted data, or if the seizure of documents is necessary to prevent death or serious bodily injury.³⁵

As in the other Five Eyes countries, this is a very different starting point. They each demonstrate how press freedom is explicitly protected in a country with national protection for human rights.

Yours sincerely,

Dr Keiran Hardy

Lecturer, School of Criminology and Criminal Justice, Griffith University; Postdoctoral Research Fellow, Griffith Criminology Institute

Professor George Williams AO

Dean, Anthony Mason Professor, Scientia Professor and Founding Director, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales

³⁴ 42 U.S. Code § 2000aa.

³⁵ 42 U.S. Code § 2000aa.