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## WikiLeaks, Disclosure, Free Speech and Democracy: New Media and the Fourth Estate

Jennifer Robinson

Truth is the cry of all, but the game of few.

George Berkeley

**The past 12 months** have been, without a doubt, the most exciting in recent history in terms of disclosure of information. The disclosure of information by WikiLeaks, including collateral murder, the Afghanistan and Iraq War logs, Cablegate, the Guantanamo Bay files, the spy files and the global intelligence files, has meant that WikiLeaks and its editor-in-chief, Julian Assange, have been at the top of international headlines. As a result of WikiLeaks' disclosures we have learned more than ever before about corruption and human rights abuse around the world, the nature of diplomacy, the military–industrial complex, the extent of misinformation about war, and the abuse of government power and public–private partnerships in traditional government functions, such as intelligence sharing, which are being contracted out to private corporations that are beyond the scope of regulatory control. WikiLeaks has shown a courageous commitment to the finest traditions of journalism

and to the role of the Fourth Estate in our democracy, which has not only challenged authority and power to achieve greater accountability, but has also challenged the ‘old’ media to do better. This chapter reviews the phenomena of WikiLeaks and other forms of new media, as a part of the Fourth Estate, in modern democracy.

The traditional or ‘old’ media has always operated on leaks — and journalists, editors and publishers have relied on the protections afforded them under laws protecting free speech. But the political and legal responses to the success of internet publisher WikiLeaks in the past few years have called into serious question the legal regimes related to the disclosure of information, including protections related to freedom of speech and the press, protection for sources and whistleblowers, the alleged need for confidentiality in government, and the justification for concomitant limitations upon freedom of information and transparency.

Assange and WikiLeaks are beleaguered by false allegations of illegal conduct, resulting in lawsuits that threaten Assange’s liberty and WikiLeaks’ continued operation. Assange faces potential extradition to the United States to face criminal prosecution for his publishing activities. WikiLeaks is being financially strangled, cut off from supporter donations by a worldwide financial blockade of the world’s biggest financial companies: Visa, MasterCard, PayPal, Western Union and, of course, Bank of America. And yet, WikiLeaks engages in the very same activities traditional media have always done as an integral part of its role as the fourth estate: WikiLeaks speaks the truth about power by receiving leaked information and publishing that information in the public interest, so that we can make better-informed democratic and consumer choices. The difference? WikiLeaks does it bigger and better; with better protections for journalists and whistleblowers through the innovative technology of their anonymous dropbox system. WikiLeaks may have pulled off the

largest leak in history, but the size of the leak does not alter the underlying act or its legality. While other media organisations such as the *Wall Street Journal* have replicated (to various degrees of safety and success) the WikiLeaks dropbox model, its editor is not facing prosecution and you can still subscribe to the *Wall Street Journal* using your Visa or MasterCard.

The rush to silence WikiLeaks relies on the abandonment of any sustainable legal standard. Faced with the challenges of what disclosure of information might mean in the age of the new media, we have seen conflicting and inconsistent responses regarding the legality of WikiLeaks' operations from some Australian leaders, working under an even less sustainable US government position. WikiLeaks engages in the same conduct that journalists and media organisations have always engaged in: receiving confidential material and publishing it in the public interest. The inconsistent approaches to WikiLeaks rest upon a false dichotomy between the 'old' and 'new' media when it comes to information disclosure and legal protections — a dichotomy that is unsustainable and will inevitably have broader implications for all media organisations, whether new or old. The outcome of the legal battles facing Assange and WikiLeaks provides a litmus test for government commitment to free speech and preserving the role of the Fourth Estate in the new media age.

### **The media as the watchdog of democracy — the Fourth Estate or the Fourth Branch?**

Democracies die behind closed doors.

Judge Damon J. Keith,  
*Detroit Free Press v. Ashcroft* 303 F.3d 681  
26 August, 2002

The media is the watchdog and safeguard of democracy. When opening the press reporting gallery in the British Parliament in 1787, Edmund Burke described the role of the media as the

'Fourth Estate': it plays a constitutional role in ensuring the operation of representative democracy by remaining independent of government control, scrutinising government action and holding decision-makers to account by providing the public with the information it needs to make informed democratic choices. Media reporting on government action is central to public understanding of policy issues and the political process. A lack of information results in a lack of accountability, giving the government, and the powerful lobby groups that increasingly influence democratic process, absolute power. Disclosure of information or 'leaking' about government action (and about the actions of increasingly powerful private corporations) to the media is therefore essential in ensuring the media can play this role. As veteran Australian journalist, Laurie Oakes, has said: 'Leaks are the difference between a democracy and an authoritarian society ... The risk of being found out via leaks makes those in authority think twice about telling porkies, performing their duties sloppily, behaving badly or rorting the system.'

Seeking the truth and reporting that truth without fear or favour is one of the great traditions of journalism. In recent times, however, questions have been raised as to whether the 'old' media continues to — and is capable of — performing the role as the Fourth Estate in our modern democracy. Corporate ownership of media organisations (sometimes by the same corporations who back certain politicians and have interests in government contracts), combined with the economic pressures associated with the dying business model of the traditional media, has meant less focus on its traditional role and more focus on economic interests and the power relationships that guard those interests. Some argue that the commercial press have moved from being the Fourth Estate, a notional branch of government in a democracy to a literal one — the 'Fourth Branch', where the 'old' press is on the inside and therefore no longer has the antagonistic relationship with secrecy, concentration of power and corruption that is required to properly

perform its role. Ray McGovern, former CIA analyst and intelligence advisor to several US presidents, goes so far as to say: ‘The Fourth Estate is dead ... captured by government and corporations, the military-industrial complex, the intelligence apparatus.’

WikiLeaks is specifically designed to be independent of these pressures by being directly funded by the public through small donations, and for this reason itself remains accountable to the public. And through its dedication to the tradition of transparency journalism — a dedication borne of what Assange saw as the moribund state of the mass media — WikiLeaks has changed the media landscape and reinvigorated the Fourth Estate.

### **New Media and the Fourth Estate: WikiLeaks, Assange and their achievements**

WikiLeaks has made a remarkable contribution to journalism and to democracy. For this work, WikiLeaks — and its founder and editor-in-chief Julian Assange — have been recognised by a plethora of awards for both promoting peace and for journalism. Nominated twice for the Nobel Peace Prize for his work revealing human rights abuse and the horrors of war, Assange was awarded the Sydney Peace Prize in 2011 for his ‘exceptional courage and initiative in pursuit of human rights’ — an award previously awarded to Nelson Mandela and the Dalai Lama.

Other awards include the 2009 Amnesty International UK New Media Award for exposing extrajudicial assassinations in Kenya, the 2010 Sam Adams Award — an award given by a group of retired CIA officers to intelligence professionals or whistleblowers who have taken a stand for integrity and ethics — for their WikiLeaks’ work in publishing the Afghanistan and Iraq war logs, and the 2011 Martha Gellhorn Prize for Journalism, a prize awarded to journalists ‘whose work has penetrated the established version of events and told an unpalatable truth that exposes establishment propaganda, or “official

drivel”’. In giving Assange the award, the judges said: ‘WikiLeaks has been portrayed as a phenomenon of the hi-tech age, which it is. But it’s much more. Its goal of justice through transparency is in the oldest and finest tradition of journalism.’ In 2011, WikiLeaks was awarded the Walkley for Most Outstanding Contribution to Journalism in Australia for having ‘shown a courageous and controversial commitment to the finest traditions of journalism’.

Postmedia Network named Assange ‘Top Newsmaker of the Year’ after an informal poll of editors voted that he had ‘affected profoundly how information is seen and delivered’. For this ground-breaking work, Assange was named by *Le Monde* as Person of the Year and by *TIME* as among the 100 most influential people in the world. Despite being the Readers’ Choice in *TIME* magazine’s 2011 Person of the Year poll, Assange was controversially named runner-up by *TIME* behind Mark Zuckerberg (an announcement that was followed by stinging criticisms and jokes about the decision: ‘Assange gives you information about governments and private corporations for free. Zuckerberg gives your private information to corporations for money — and he gets Person of the Year?!’).

Given that journalism has always operated on leaks, what is so remarkable — and revolutionary — about what Assange has done with WikiLeaks?

### **Greater protection for journalists and their sources**

Leaking is best defined to mean ‘unauthorised disclosure of inside information’. As Professor AJ Brown states, not all leaking is whistleblowing and not all whistleblowing necessarily involves leaking, but the two come together in what the WikiLeaks organisation describes as its purpose: ‘principled leaking’ for the purposes of holding government and business to account. In order to protect the important role of the media plays in holding government (and, increasingly, corporations) to account, we have free speech protections for journalists to

protect the publication of material leaked to the media and to protect the anonymity of the source of that material. As recognised by the European Court of Human Rights in *Goodwin v. United Kingdom*:

Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

In addition to the duty upon journalists to protect their sources, public interest disclosure legislation operates to provide additional protection to whistleblowers through laws that recognise and grant higher authority for disclosures that would otherwise be unlawful or actionable.

Unfortunately, however, these legal protections — particularly those protecting whistleblowers — are notoriously inadequate the world over. Freedom of the press gives journalists legal protection to keep the identity of a confidential informant private even when demanded by police or prosecutors. Nevertheless, in countries around the world, withholding sources can land journalists in contempt of court and potentially in jail. For example, in 2005 Pulitzer prize-winning journalist, Judith Miller, spent three months in prison in the United States for refusing to reveal her CIA source in relation to the leak investigation by a federal grand jury into the naming of Valerie Plame as an undercover CIA officer. Similarly, laws protecting whistleblowers are few and far in between. Despite free speech protections, journalists and their sources are still at risk of prosecution and potential imprisonment for revealing information in the public interest. Legal protections designed to ensure free speech and protect the watchdog role of the media in a democracy are important but are still inadequate.

WikiLeaks provides, through technology rather than law, protection for journalists and their sources that the law the world over does not provide. The anonymous dropbox model allows sources and whistleblowers to provide information for publication by WikiLeaks and their media partners in a safe way that preserves their anonymity. The anonymity assured by WikiLeaks may therefore protect sources against prosecutions for unauthorised disclosures where public interest disclosure legislation does not yet protect their disclosure. WikiLeaks also provides an additional level of protection to journalists. How can Assange or any other WikiLeaks journalists be prosecuted, convicted and jailed for contempt when they simply do not know who their sources are? One cannot reveal what one does not know. How can any journalist be prosecuted and jailed for contempt if, having used material from WikiLeaks, they do not know who the source was?

In providing greater protection to sources, WikiLeaks provides greater confidence in the preservation of their anonymity and thereby facilitates the public watchdog role of the media.

### **Introducing an egalitarianism to access to information and journalism**

WikiLeaks has made available more information than ever before. This is remarkable not only because of the volume of the information made available, but also for the way in which WikiLeaks has made that information available — to everyone, and for free. WikiLeaks has forged partnerships with more than 90 traditional media organisations the world over, so that journalists with the relevant expertise and located in the relevant geographical region, can provide coverage of the information and provide it to the people to whom it matters most. From *The Hindu* in India, *Al Akbar* in Lebanon, *Sydney Morning Herald* in Australia, to *Liberte* in Haiti, the partnerships forged by



WikiLeaks have ensured maximum impact and dissemination of the information.

Before, documents demonstrating wrongdoing in government or business may have been leaked to one journalist in Washington DC or Canberra. WikiLeaks makes that information available and accessible, not just to one powerful journalist in the know, but to journalists all over the world, including in the developing world, who would not otherwise have had access to the information. In this way, I believe WikiLeaks has introduced an egalitarianism to journalism: it is not just the powerful journalists at the seat of political power who now have access to and control the information — WikiLeaks makes it available to all. This also has the effect of shortcutting the often cosy relationships that develop between journalists and government, which are part of the cause for criticism of the mass media as the ‘Fourth Branch’ — relationships which can (and have) resulted in self-censorship or journalists sitting on information and stories out of deference to their powerful friends.

### **Pioneering ‘scientific journalism’**

In providing the public with full access to the documents released, WikiLeaks has pioneered the practice of ‘scientific journalism’. As Assange himself said in an article entitled ‘Don’t shoot the messenger’, published in *The Australian* in December 2010:

We work with other media outlets to bring people the news, but also to prove it is true. Scientific journalism allows you to read a news story, then to click online to see the original document it is based on. That way you can judge for yourself: Is the story true? Did the journalist report it accurately?

Scientific journalism, otherwise known as ‘transparency journalism’ or ‘sunshine journalism’, is the practice of including primary sources along with journalistic stories. The rationale is that journalists, like academics, lawyers or scientists, should be accountable to reference the basis for their facts and assertions

so that the rigour of their analysis can be tested. Before, newspapers were limited in what they could publish by the length of the page, but in the modern media era online publication digital technologies provide essentially unbounded capabilities for hosting primary source documents. WikiLeaks has championed this form of journalism, by providing full access to documents, so that we, the public, can judge for ourselves whether the journalist has accurately reported the material and identify whether the writer has an agenda. In this way, WikiLeaks holds journalists to account by equipping a critical audience to scrutinise the bearers of information, and encourages a more responsible press.

### **The public interest — and the value in documentation in seeking accountability**

Finally, there is no denying the overwhelming public interest in the information disclosed by WikiLeaks. From Tunisia to Tonga and the West Bank to West Papua, WikiLeaks disclosures have provided an unprecedented insight into the conduct of diplomacy and revealed corruption, abuse of power and human rights abuse the world over.

Despite the overwhelming public interest in WikiLeaks' disclosures, many have complained that they reported 'nothing new' — or, at least, nothing we didn't already know. How those making this complaint can do so and logically explain why WikiLeaks has been such a huge international news story, I do not know. But the answer to their point is simple: 'knowing' something and seeing it in writing are two very different things. Just as big as the difference between 'on the record' and 'off the record' interviews with journalists, it is one thing to know something and quite another to be able to report it. Numerous journalists have told me that for many years they had 'off-the-record' reports from diplomats, but after WikiLeaks' release of Cablegate they finally had all of these reports — and more — on the record.

Similarly, WikiLeaks disclosures have been of immense benefit to the human rights community: accountability and justice for human rights abuse rests, fundamentally, on our ability to gain access to information about what is actually going on. As Assange said in 2006 on WikiLeaks' first website: 'The goal is justice, the method is transparency'. We may know that a regime is perpetrating human rights abuse, but documentation of those practices is powerful. WikiLeaks' disclosures related to West Papua confirmed what those of us working on human rights in West Papua have long known — the military is engaging in widespread human rights abuse while on the Freeport gold mine payroll — but the existence of these documents makes it much harder for our governments to deny that it is happening.

While journalists and international organisations are banned from access to West Papua and other hotspots around the world, WikiLeaks' documents have provided, in some cases, the only source of documentary information available. The documents have also proven to be a resource for human rights and public interest lawyers as they have been appended to legal submissions in courts (including, for example, before the Special Court for Sierra Leone in the Charles Taylor trial), and their revelations have formed the basis for legal action in courts around the world.

### **False allegations of illegal conduct and the financial blockade**

WikiLeaks engages in the same conduct that journalists and traditional media have long traded in. The contribution WikiLeaks has made in enhancing the work of the Fourth Estate in our democracy is clear — and journalistic accolades have been heaped upon WikiLeaks and Assange for this precise reason. Nevertheless, there have been persistent, but false allegations of illegal conduct made against both Assange and WikiLeaks. These allegations of illegal conduct have serious

ramifications, not just for Assange and WikiLeaks, but strike at the heart of our democracy and the free speech protections that are designed to ensure that those in power are kept accountable.

The US government announced in December 2010 a criminal investigation into Assange and WikiLeaks, which the Australian Ambassador to the United States has described as being ‘unprecedented both in its scale and nature’. Prior to this announcement, the State Department, the Pentagon and various US politicians had made statements accusing WikiLeaks of illegal conduct, with some politicians going as far as claiming WikiLeaks engaged in terrorism. But the documentary source for the US government allegations — and the source which was explicitly relied upon by PayPal and other financial providers to impose the financial blockade — is the 27 November 2010 letter written by Legal Advisor to the State Department, Harold Koh, to WikiLeaks. Leaked by government to the media to coincide with the publication of Cablegate (many forget that governments often leak information themselves when it suits them), the letter deliberately and falsely implies illegal conduct by WikiLeaks.

Days after the State Department letter was leaked, Prime Minister Julia Gillard echoed their wrongful accusation of illegal conduct against Assange, and the Attorney-General threatened to cancel his passport. Prime Minister Gillard’s comments were ill-considered, prejudicial and premature because they came prior to the Australian Federal Police investigation that ultimately concluded that Assange had broken no law. As Malcolm Turnbull very correctly pointed out, the Australian government response to WikiLeaks was like a sequel of the UK’s response to Spycatcher years ago: Gillard pulled a Thatcher on WikiLeaks. The Australian High Court made clear in the Spycatcher case that any action in an Australian court to restrain Assange from publishing the State Department cables would have failed. In the earlier case of *Commonwealth v Fairfax*, the

High Court was very clear in declaring that an Australian Court should not act ‘to protect the intelligence secrets and confidential political information’ of a foreign government, even one which was a very friendly one and even in circumstances where the Australian government requested the court to do so. Not only was it perfectly obvious that Assange had broken no Australian law, Turnbull noted that — despite the strenuous efforts of US authorities — there is no evidence to suggest he has broken US law. Shadow Attorney-General George Brandis SC has agreed. Both Turnbull and Brandis are right. Nevertheless, Australians are still prevented from donating to WikiLeaks using their Visa and MasterCard, and Assange, an Australian citizen, faces potential extradition to the United States to face prosecution. It is therefore important to consider carefully these incorrect allegations of illegality.

Koh’s letter was the US State Department response to a letter from WikiLeaks to the US Ambassador in London in advance of the publication of Cablegate. In the tradition of WikiLeaks, the following is the full correspondence chain between WikiLeaks and the US State Department, so readers can judge for themselves.

26 November 2010

Dear Ambassador Susman

I refer to recent public statements by United States Government officials expressing concern about the possible publication by WikiLeaks and other media organisations of information allegedly derived from United States Government records. I understand that the United States Government has recently devoted substantial resources to examination of these records over many months.

Subject to the general objective of ensuring maximum disclosure of information in the public interest, WikiLeaks would be grateful for the United States Government to privately nominate any specific instances (record numbers or names) where it considers

the publication of information would put individual persons at significant risk of harm that has not already been addressed.

WikiLeaks will respect the confidentiality of advice provided by the United States Government and is prepared to consider any such submissions made without delay.

Yours sincerely,

Julian Assange

The letter was communicated to the US ambassador under a cover note from me because Assange was, at the time, in an undisclosed location and communicating only via encrypted communication means. I received their response the following evening:

November 27, 2010

Dear Ms Robinson and Mr Assange:

I am writing in response to your 26 November 2010 letter to US Ambassador Louis B. Susman regarding your intention to again publish on your WikiLeaks site what you claim to be classified US Government documents.

As you know, if any of the materials you intend to publish were provided by any government officials, or any intermediary without proper authorization, they were provided in violation of US law and without regard for the grave consequences of this action. As long as WikiLeaks holds such material, the violation of the law is ongoing.

It is our understanding from conversations with representatives from *The New York Times*, *The Guardian* and *Der Spiegel*, that WikiLeaks also has provided approximately 250,000 documents to each of them for publication, furthering the illegal dissemination of classified documents.

Publication of documents of this nature at a minimum would:

- Place at risk the lives of countless innocent individuals — from journalists to human rights activists and bloggers to soldiers to individuals providing information to further peace and security;
- Place at risk ongoing military operations, including operations to stop terrorists, traffickers in human beings and illicit arms, violent criminal enterprises and other actors that threaten global security; and,
- Place at risk on-going cooperation between countries — partners, allies and common stakeholders — to confront common challenges from terrorism to pandemic diseases to nuclear proliferation that threaten global stability.

In your letter, you say you want — consistent with your goal of ‘maximum disclosure’ — information regarding individuals who may be ‘at significant risk of harm’ because of your actions.

Despite your stated desire to protect those lives, you have done the opposite and endangered the lives of countless individuals. You have undermined your stated objective by disseminating this material widely, without redaction, and without regard to the security and sanctity of the lives your actions endanger. We will not engage in a negotiation regarding the further release or dissemination of illegally obtained US Government classified materials. If you are genuinely interested in seeking to stop the damage from your actions, you should: (1) ensure WikiLeaks ceases publishing any and all such materials; (2) ensure WikiLeaks returns any and all classified US Government material in its possession; and (3) remove and destroy all records of this material from WikiLeaks’ databases.

Sincerely,  
s/ Harold Hongju Koh  
Harold Hongju Koh Legal Adviser

This letter was then leaked to Reuters, presumably by the State Department, and published around the world. On the eve of the publication of Cablegate, Assange communicated the following letter:

28 November 2010

Dear Ambassador Susman,

As you know, WikiLeaks has absolutely no desire to put individual persons at significant risk of harm, nor do we wish to harm the national security of the United States.

WikiLeaks have spent significant time and resources redacting the material in our possession to achieve this outcome and sought to cross check our work and that of our traditional media partners with the US government.

I wrote to you explicitly with this in mind in order to offer the US the opportunity to privately nominate specific instances where this may occur. Instead of eliminating the risk you allege to lives and military operations you have rejected our offer for constructive dialogue and chosen a confrontational approach. The response provided by the US State Department overnight was no more than a lawyer's press release, which is confirmed by the fact you have released it to the press (a matter about which I make no complaint).

I understand that the United States government would prefer not to have the information that will be published in the public domain and is not in favour of openness. That said, either there is a risk or there is not. You have chosen to respond in a manner which leads me to conclude that the supposed risks are entirely fanciful and you are instead concerned to suppress evidence of human rights abuse and other criminal behaviour. We will now proceed to release the material subject to our checks and the checks of our media partners unless you get back to me, as you promised in the call with our lawyers last Friday.

Yours sincerely,

Julian Assange

No response was ever received.

The US State Department letter is problematic for a number of reasons. Various lawyers' rights organisations made complaints to Mr Koh for breaching the UN Principles of the



Role of Lawyers and US law and interfering with Assange's right to legal representation. By addressing the letter to 'Ms Robinson and Mr Assange' and using the pronoun 'you', Koh's letter suggests that the impugned document release by WikiLeaks was a joint enterprise between lawyer and client. According to Lawyers Rights Watch Canada (LRWC), the letter made numerous 'exaggerated and unsubstantiated allegations of serious criminal wrongdoing' against Assange — and me as his lawyer. Having made the letter public at a time when accusations against Assange had provoked calls for his assassination or execution, LRWC said that Mr Koh had: '... invited upon Ms Robinson the denunciation and possible violence already directed at her client. The intention to put Ms Robinson's personal and professional safety at risk and to interfere with Mr Assange's right to be legally represented is inescapable.'

Aside from concerns raised about my own personal safety and US government interference with my ability to exercise my professional duties, LRWC emphasised the 'professional irresponsibility' of Mr Koh in 'publishing exaggerated and unsubstantiated allegations of serious criminal acts' against Assange. Koh's allegations have had vast consequences for WikiLeaks, forming the basis for action by financial and infrastructure service providers in blocking services. Just days after the release of publication of this letter, Amazon removed WikiLeaks materials from its cloud-storage facility. A spokeswoman for US Senator Joseph Lieberman announced that: 'Sen. Lieberman hopes that the Amazon case will send the message to other companies that might host WikiLeaks that it would be irresponsible to host the site'. And sure enough, in the weeks that followed, Bank of America, Visa, MasterCard, PayPal, and Western Union followed suit.

On 3 December 2010, PayPal announced that it was closing payment services to WikiLeaks, cutting them off from donations from the public.

PayPal has permanently restricted the account used by WikiLeaks due to a violation of the PayPal Acceptable Use Policy, which states that our payment service cannot be used for any activities that encourage, promote, facilitate or instruct others to engage in illegal activity.

PayPal did not detail the ‘illegal activity’ by WikiLeaks that violated the use policy but PayPal Vice-President, Osama Bedier, later stated that their decision to stop processing payments to WikiLeaks was the direct result of the 27 November letter from the US State Department that had been leaked to the press, presumably, to this very end.

MasterCard announced that it was cancelling all payments to WikiLeaks, providing the same justification as PayPal: ‘MasterCard is taking action to ensure that WikiLeaks can no longer accept MasterCard-branded products ... MasterCard rules prohibit customers from directly or indirectly engaging in or facilitating any action that is illegal’. Visa Europe followed. In July 2011, both Visa and MasterCard confirmed that the suspension of payments remained in effect. As recently as February 2012, MasterCard confirmed it would be maintaining its WikiLeaks blockade. ‘The WikiLeaks decision was complex and one that we did not take without due consideration — and our position has not changed,’ David Masters, the company’s vice-president of Strategy and Corporate Affairs told Crikey. They clearly have not given proper consideration because if they had they would realise their decision is without legal basis, is discriminatory, and has the effect of chilling free speech.

### **Debunking false allegations of illegal conduct**

The State Department letter is carefully worded to imply illegal conduct, but does not hold up to closer analysis. It states: ‘... if the materials you intend to publish were provided by any government officials, or any intermediary without proper authorisation, they were provided in violation of US law.’ The letter does not take the legally indefensible position that

WikiLeaks had itself broken the law. This is because it is clear from the US Supreme Court decision in the Pentagon Papers case that the publication of documents received by WikiLeaks and other news publishers is legal and is protected by the First Amendment.

Instead, the letter states that the law had been broken by someone, that is, the source or whistleblower. Even this statement is misleading; the disclosure by US state officials of documents with classification markings could be legal or illegal, depending on the circumstances of each case and, in some cases, whether specific public interest disclosure litigation protects such disclosure. The wording of the letter attempts to imply illegal conduct on the part of WikiLeaks, but this requires the government to elide the liability of the source who discloses the information with the liability of the person receiving the material — a direct attack on free speech protections for the fourth estate. The Pentagon alleged in August 2010 that WikiLeaks' activities were 'brazen solicitation to US government officials to break the law'. These and other statements have indicated that the US government may seek to make the case that solicitation of material through the provision of an anonymous dropbox amounts to active encouragement or assistance to an unlawful release such as to render the 'solicitor' complicit with the offence.

But this would put at risk the entire practice of investigative journalism. The WikiLeaks dropbox is the modern-day equivalent of receiving a brown paper envelope containing a dossier with no sender address marked. As Australian crime and national security journalist, Dylan Welch has written,

No longer will would-be whistleblowers meet journalists in underground car parks wearing trenchcoats clutching manila folders. Today the manila folder is an untraceable online dropbox; the trenchcoat an anonymous online chat system; and the underground carpark an obscure corner of the web's vast empire.

Professor AJ Brown argues that the allegation that WikiLeaks acts illegally or encourages illegal acts (i.e. leaks) by providing a dropbox demonstrates that policing the conduct of the new media has ‘reached almost comic proportions’. The allegation is close to absurd because other media outlets continue to actively solicit confidential information, just as they have always done. As WikiLeaks states explicitly on its website: ‘Like other media outlets conducting investigative journalism, we accept (but do not solicit) anonymous sources of information. Unlike other outlets, we provide a high security anonymous dropbox fortified by cutting-edge cryptographic information technologies.’ In Australia, the ABC website states: ‘The ABC News Online Investigative Unit encourages whistleblowers, and others with access to information they believe should be revealed for the public good, to contact us. To leak a story, please fill out the form below and click the “Send” button.’ Similarly, the *Wall Street Journal’s* ‘safehouse’ online dropbox tells whistleblowers that secret documents and databases ‘are the key to modern journalism, but they are almost always hidden behind locked doors, especially when they detail wrongdoing such as fraud, abuse, pollution, insider trading, and other harms; that’s why we need your help’. Neither the US or Australian governments appear to have demanded that News Corporation or the ABC desist from soliciting confidential information. Nor have either organisation been subjected to a banking blockade.

Indeed, by providing the anonymous dropbox, WikiLeaks does far less than most journalists in terms of encouraging sources to leak information. Any investigative journalist will tell you that, more often than not, journalists cultivate relationships with confidential sources and whistleblowers. There is often extensive communication between the journalist and their source, whether it occurs over a beer at the pub or in a dark alley or underground car park. Journalists will sound out the source to see whether the source is willing to provide

information, and directions may be given on how that information can be safely communicated.

This practical reality has implications in considering both the legality of WikiLeaks' actions and the potential US criminal prosecution of Assange. As Australian journalist, Dylan Welch, has written for the Walkely Foundation magazine,

Contrary to the posturing of the American and Australian governments, Assange and his colleagues are journalists. If US soldier Bradley Manning was the source for the US diplomatic cables, then the relationship he and Assange had was an entirely traditional journalist/source one.

The idea that Assange was what amounts to a 'foreign agent' attempting to suborn a US military is wrong. Ask yourself this: if you walked into a bar and met Manning, who did nothing more than say he was a US military intelligence analyst, would you perhaps nudge the conversation towards whether he might be willing to be a source? If you're not, you're either not a journalist or a too-timid one. The only difference between what Assange did and what any fair-minded hack with a nose for news would do is that Assange's interaction occurred online.

Any criminal prosecution of Assange in the United States would put at risk the work of all journalists and their interactions with confidential sources.

### **The persecution of WikiLeaks threatens the protections for old and new media**

It is therefore clear that WikiLeaks' operations are both legal and consistent with the practices of the 'old' media, which are protected by law. Allegations of illegal conduct levelled at WikiLeaks are without basis and put at risk all media organisations, whether new or old. The standard being set in respect of WikiLeaks cannot realistically be maintained — or imposed on any media organisation at least, not in any nation claiming to have a free media and a commitment to liberal democracy.

The letter goes further to state: ‘As long as WikiLeaks holds such material, the violation of the law is ongoing.’ This statement is a reference to the antiquated *Espionage Act*, which has never been successfully applied to news publishers, and numerous prominent legal scholars have reiterated that, in any event, the *Espionage Act* does not apply to WikiLeaks. Even if it were to apply, it would then apply to all the news agencies that held the material, including the *New York Times*, *The Guardian*, *Der Spiegel*, *El Pais*, and *Le Monde* and many more of the 90 media partners who published Cablegate material alongside WikiLeaks — all of whom held the same material. Of course, none of WikiLeaks’ partner media organisations are subject to financial blockades.

Nevertheless, financial service providers have relied upon the State Department letter to cut WikiLeaks off. The blockade remains in place, despite the fact the US Treasury concluded in January 2011 that there are no grounds to blacklist WikiLeaks.

When Visa announced its decision to suspend WikiLeaks donations on 8 December 2010, Visa stated it was awaiting an investigation into ‘the nature of its business and whether it contravenes Visa operating rules’ but did not go into further details. Visa instructed the Denmark-based financial services company Teller AS to investigate WikiLeaks and its fundraising body, Sunshine Press. Peter Wirren, Teller AS’s Chief Executive told Associated Press that, after review by their lawyers, they had concluded that neither WikiLeaks nor Sunshine Press had acted in contravention of Visa’s rules or Icelandic legislation. But the blockade remains in place.

The decision to block WikiLeaks is not based upon a law or by a decision of a judicial or even administrative authority (which could be subjected to constitutional challenge). Private corporations are acting upon extra-legal political pressure. The uniform argument, which began with PayPal and appears to have been replicated by Visa, MasterCard, Bank of America and others, is that WikiLeaks breaches use policies *not* because it

engages in illegal activity, but because it allegedly encourages illegal activity, by ‘encouraging sources to release classified material, which is likely a violation of law by the source’. The absurdity of the WikiLeaks blockade becomes more apparent when one considers how this applies more broadly. Following criticism PayPal announced:

We understand that PayPal’s decision has become part of a broader story involving political, legal and free speech debates surrounding WikiLeaks’ activities. None of these concerns factored into our decision. Our only consideration was whether or not the account associated with WikiLeaks violated our Acceptable Use Policy and regulations required of us as a global payment company. Our actions in this matter are consistent with any account found to be in violation of our policies.

If, as PayPal states, financial providers are to apply usage policies consistently — and WikiLeaks engages in the very same conduct as the ‘old’ media — then why is there no banking blockade for the ABC or News Corporation, or News International? Imagine if Visa, MasterCard and PayPal refused to process subscription payments or advertisements for the *Wall Street Journal* because of alleged ‘encouragement of sources to act in breach of law’ by providing their WikiLeaks-style anonymous dropbox. Imagine if the *Sydney Morning Herald* was subjected to a financial and banking blockade because one of its journalists encouraged a source, over a beer down at the pub, to hand over a classified document revealing government corruption?

Neither the US government nor the financial companies maintaining the blockade can point to one instance of illegal conduct by WikiLeaks or its employees.

Meantime, numerous people employed or engaged by News International have been arrested and are currently being prosecuted for the illegal practice of phone-hacking, and another — Phillip Campbell Smith — has been alleged to have hacked national security information from a British intelligence

agent. Phone-hacking was not an isolated practice at News International, but has been proven to have been part of an entire culture of criminal behaviour, endorsed explicitly or implicitly at the highest levels of the company. News International is not subjected to a financial blockade.

Bernard Keane has written for Crikey about the irony of the News International hacking scandal in light of the ‘concerted campaign of the demonisation of WikiLeaks conducted by elements of the media’ that WikiLeaks obtained information by hacking, rather than whistleblowing. Keane suggests that the false allegations of hacking were an attempt to somehow demonstrate WikiLeaks was not a legitimate media outlet — and yet:

... while WikiLeaks was obtaining information from whistleblowers, people engaged by News International, supposedly the sort of legitimate outlet to which WikiLeaks could be unfavourably compared, were hacking or alleged to have been hacking national security information.

News International is correctly accused of hacking, but suffers no financial blockade. WikiLeaks is falsely accused of hacking and suffers a financial blockade.

The absurdity and arbitrary nature of the blockade against WikiLeaks highlights how the rush to silence WikiLeaks has led to the abandonment of any sustainable legal standard.

### **Free speech, censorship and public–private partnerships**

The financial blockade against WikiLeaks amounts to effective censorship; in November 2011 WikiLeaks announced it had to shut down its publishing activities because the blockade had wiped out 95% of its income so it could no longer survive. For its impact upon free speech, the UN High Commissioner for Human Rights has openly criticised the financial blockade, as have the UN Special Rapporteur on the Promotion and



Protection of the Right to Freedom of Opinion and Expression and the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression. The European Commission is currently investigating whether to launch a full-scale investigation into its legality.

The blockade has been criticised as a public–private partnership to censor the new media, which systematically harnesses extra-legal pressure to achieve results beyond what the law would provide or even permit. As Professor Yochai Benkler, Co-Director of the Harvard University Berkman Center for Internet and Society, has written, the WikiLeaks blockade is evidence of a new, extra-legal path of attack aimed at preventing access and disrupting payment systems and service providers to effect censorship. The US government is prevented by the First Amendment from implementing this form of blockade against a media organisation — any law purporting to do so would be struck down as unconstitutional. But private corporations are achieving what the US government could not. By publicly stating or implying that WikiLeaks had acted unlawfully, the government pressured firms skittish about their public image and government relationships to cut off their services to WikiLeaks. The inapplicability of constitutional constraints to these non-state actors creates a legal void, permitting firms to deny services to WikiLeaks, while WikiLeaks and the consumers who wish to exercise their freedom of expression to support WikiLeaks by making a donation, are left with little legal recourse under overly broad commercial terms of service.

Attacks on WikiLeaks have grave implications not just for the rest of the media, but also for other non-profit organisations that rely upon donations to maintain their often controversial operations. For example, imagine if Amnesty were subjected to a blockade for campaigning for the release of political prisoners in a US client state? Imagine if Greenpeace were subjected to a blockade if the *Rainbow Warrior* crew boarded a whaling ship? If

the attack on WikiLeaks is allowed to stand, then it sets a worrying precedent for all not-for-profit organisations whose revenue is based upon public donations.

### **Inconsistent approaches to WikiLeaks and the need to reinforce protections for the media — including the new media**

While WikiLeaks has brought about an information revolution, it is important to remember that, at its core, the act of publication of information disclosed by confidential sources in the public interest is no different to what journalists have always done — just on a much greater scale and with greater technological sophistication. At the same time, WikiLeaks' high-impact strategy, combined with controversies regarding its relationships with 'old' media have made the organisation a game-changer in considering journalism, disclosure of information and regulation. WikiLeaks has become a byword for debate about the very nature of journalism and the role of journalists in the new media age. Assange and his colleagues are journalists, even if — as Welch describes them — they are 'unconventional ones'. According to Welch: 'WikiLeaks is an organisation committed to transparency, in the way any genuine member of the fourth estate should be.' If journalism is best described as a profession that is committed to transparency, truth and accountability, and one that brings down corrupt governments, highlights inequity and injustice, and gives a voice to the voiceless, then the past two years arguably demonstrate that WikiLeaks is more of an organisation of journalists than News International.

The inconsistent approaches to WikiLeaks' activities has led not only to an inconsistent approach to the application of existing legal protections to WikiLeaks and the new media, but also to law reform efforts aimed at improving legal protections for all media.

Knee-jerk political reactions to WikiLeaks are credited with the failure of the long-awaited US Federal shield laws in January

2011. Unlike Australian shield laws, purely voluntary, part-time or recreational web publishers were to be excluded in favour of persons who ‘regularly’ participate in news publishing ‘for a substantial period of time or for substantial financial gain’. I would argue that the definition adopted by the US bill adopts the wrong metric: it should not matter whether the person receives ‘substantial financial gain’ or even engages in news publication for ‘a substantial period of time’, but instead whether the person communicates news to the public through any medium. To make sure WikiLeaks would not benefit, US congressmen reportedly prepared an amendment to the Bill which would have explicitly exclude WikiLeaks from protections under the Act had it been passed. It is telling that the United States considered that shield laws required an explicit exception to the law in order to prevent WikiLeaks from benefiting from the law’s protection: Assange is a journalist.

While Australian shield laws are far from perfect, the implementation of a federal shield law in Australia was a major development. Both their Bills proposed to define ‘journalist’ to mean a person: ‘who in the normal course of that person’s work may be given information by an informant in the expectation that the information may be published in a news medium’. In the end, the government also accepted an amendment proposed by the Australian Greens, to extend the privilege to any person ‘engaged and active in the publication of news’, with the definition of ‘news medium’ expanded to ‘any medium’. Therefore, in Australia, the definition of ‘journalist’ was made broad enough to cover participants in news-gathering and publication in the age of the new media.

The attempt to single out WikiLeaks from the rest of the media as a web publisher was not limited to its categorisation for the purposes of shield laws in the United States, but extends to allegations that WikiLeaks had somehow participated in or solicited the act of disclosure itself, that is, the act of whistleblowing — an extremely dangerous precedent for all media. If

anything, the WikiLeaks affair ought to focus attention on the need for reforms to protect whistleblowers. At the recent House of Representatives Committee, Dreyfus referred to WikiLeaks in stating that without adequate whistleblowing protections, ‘many officials would simply resort to leaking information in ways that were more difficult to control and assess, including the anonymous disclosure of official information through websites like WikiLeaks’.

While Australia has made some headway in implementing certain whistleblowing protections, most notably in Queensland, which has one of the most progressive laws in the world, these have not gone far enough. Notably, almost four years since the Federal Government committed to enacting a federal *Public Interest Disclosure Act*, a further self-imposed deadline of 30 June 2011 passed without the government having made any major progress. Further, only marginal progress towards comprehensive whistleblowing protection in business and non-government sectors. Controversies regarding Blackwater and Haliburton, and more recently HB Gary and Stratfor and the privatisation of government services in the United States and elsewhere highlight the need for reform in this area.

## **Conclusion**

As the US Supreme Court said in the Pentagon Papers case: ‘Only a free and unrestrained press can effectively expose deception in government.’ Legal protection for journalists, sources and whistleblowers are essential to ensuring the media’s role in a democracy. In an era of change in the media, Australia and other governments must hold their commitment to an independent and free press, including both ‘old’ and ‘new’ media. Responses to WikiLeaks reinforce the need to maintain a clear, long-term vision about the role of the law and, indeed, the rule of law, in ensuring integrity and transparency in government and in regulating the disclosure of information. After all, as former US President John F. Kennedy has said:

A nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people.

The lawsuits facing Assange and WikiLeaks provide a litmus test for this commitment. Assange is facing potential extradition to the United States to face criminal prosecution. But as former State Department spokesperson PJ Crowley (sacked for admitting that Bradley Manning had been subjected to inhuman and degrading treatment) has said, ‘it is hard to distinguish what WikiLeaks did from what the *New York Times* did’, and that any ‘prosecution of Julian Assange would come at a tremendous cost to the interests and values that (Americans) hold dear’.

Yet, WikiLeaks’ latest release of confidential emails obtained from the US private intelligence firm Stratfor indicate the US Department of Justice has issued a secret, sealed indictment against Julian Assange. While the Department of Justice has refused to confirm the existence of the Assange indictment — it refuses to comment upon any alleged sealed indictment — the Stratfor email is the best confirmation we have of the long-stated concerns about the risk of Assange’s extradition to the United States to face criminal prosecution for his publishing activities with WikiLeaks. The email was from Fred Burton, Stratfor’s vice-president for counterterrorism and corporate security, and former deputy chief of the Department of State’s counterterrorism division for the Diplomatic Security Service. On Australia Day last year, Burton revealed in internal Stratfor correspondence: ‘Not for Pub — We have a sealed indictment on Assange. Pls protect’. It follows statements by David Coombs, defence counsel for Bradley Manning, who argued in Manning’s pre-trial hearing in December that the Department of Justice had an interest in Manning taking a plea-bargain to implicate Assange.

If extradited to the United States, Assange could face years in federal prison fighting charges, even though prominent

academics agree that he is entitled to the protections of the First Amendment. Financial companies have no legal basis for the blockade against WikiLeaks. Prominent academics agree that if implemented by the state — rather than private corporations — it too would be struck down for breach of the First Amendment. But private corporations are achieving what the US government cannot because of free speech constitutional protections: effective censorship. To remove the blockade requires the coordination of lawyers in jurisdictions around the world, technical analysis of transaction details and terms of service, and potentially litigation. It requires resources; resources that Assange and WikiLeaks simply do not have. But their fight implicates our rights, as the public, and so their fight is our fight. Similarly, WikiLeaks' legal battles implicate the entire media — new and old. The treatment of Assange and WikiLeaks creates a dangerous precedent and one that places all media on a dangerous and slippery slope. Editors and journalists, whether WikiLeaks' media partners or not, ought to see their own self-interest in standing together with WikiLeaks in defending free speech and public interest disclosures and pushing for better protection under law for those who risk their careers, their liberty — and sometimes their lives — to provide the leaks that allow the media to do their job in our democracy.



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