PROGRESS UNDER LIBERTY

The State of Press Freedom in Australia 2010

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an alliance initiative ★

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2010 Australian Press Freedom Report

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245 Chalmers Street,
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Printed by Printcraft,
23 Links Avenue,
Queensland, 4009

FOREWORD

"Transparency, accountability and the people's right to know are achievable and worthwhile goals for a free and vibrant democracy"

We're entitled to be optimistic that the hurdles journalists face in keeping the public informed are slowly being dismantled.

But it is a painfully slow process, born of hard work, co-operation between industry stakeholders, including the Media Alliance, continuous lobbying at State and Federal levels and the guts and tenacity of individual journalists whose work has shown to the community at large and its elected representatives that transparency, accountability and the people's right to know are achievable and worthwhile goals for a free and vibrant democracy.

As we started to research this report it seemed that the promises made by the incoming Rudd government in 2007 had fallen into inertia. But the past couple of months have seen some positive steps, with the promise of real action on Freedom of Information, whistleblower protection and a more modern attitude towards national security legislation that will make it easier for journalists acting in good faith to keep the Australian people informed about things that matter.

But it is a continuing slog. Shield laws for journalists need urgent attention. If journalists cannot guarantee confidentiality to their sources, those sources will dry up and important stories will not be told. This is particularly problematic in anti-corruption agencies. These tend to have extraordinary coercive powers which, when directed at the media, effectively take away the right to silence and can require journalists to name the sources of their stories.

The courts remain mired in suppression orders and journalists and their lawyers are often confused as to what they can and can't report, depending on which jurisdiction they are operating within.

Public servants who want to release information are similarly confused at the incredible number of secrecy clauses lurking in legislation – more than 500 provisions in Commonwealth legislation alone, attracting more than 350 criminal secrecy offences.

The key to both of these areas must be a presumption that – unless there is a compelling case to the contrary – all government information should be available to the public.

There is also a big debate underway about the right to privacy after the NSW Law Reform Commission, in its recent review, found a cause of action for a statutory right to privacy. Australia's journalists – compared to some comparable markets – have a pretty good record on recognising this right to privacy and on occasions where we may step over the mark we are quick to recognise this as well.

So there's a lot to do – and in the pages that follow you'll read the opinions of some of the experts in the field: senior journalists, lawyers, academics, who have surveyed this vital terrain on our behalf.

But all the difficulties and red tape with which we wrestle in Australia, pale in comparison to the pressure and violence with which some of our colleagues in the region contend on a daily basis. Too many journalists find themselves closely censored by their governments – we've seen this most recently in Fiji where the military regime has launched a repressive and controlling new media decree.

Too many journalists in our region practise journalism at the cost of their lives. Most appalling was the pre-meditated murder of 32 journalists in the troubled Maguindanao province of the Philippines and we call for their killers to be held to account.

In a country that has become too well known for its culture of impunity for the murderers of journalists, we must maintain our rage and disgust until we see justice for all journalists and media workers killed carrying out their work.

Christopher Warren
Federal Secretary
Media Alliance

April 2010

SECRECY

The Rudd Government came to power in November 2007 proclaiming that they intended to usher in a new era of openness and accountability in government and the public service.

One of the first tasks they faced was to clean up what Federal Court justice, Paul Finn, has referred to as "an ill-fitting, sometimes unintelligible mosaic of prescriptions and proscriptions".[1]

The incoming Government asked the Australian Law Reform Commission to prepare a comprehensive review of secrecy laws in Australia, which was due to report in October 2009.

The Media Alliance made a submission to the review in March 2009, calling for sweeping reform of Australia's secrecy laws including the repeal of ss70[2] and 79[3] of the *Crimes Act (1914)* which, the submission asserted, has a chilling effect on the release of information.

Overall, the submission called for the automatic release of government-held information, subject to a public interest test.

"Only in situations where there is an overwhelming public interest preventing disclosure – generally matters of national security, foreign affairs or public safety – should disclosure not be automatic."[4]

The Media Alliance submission also supported the appointment of an Information Commissioner to adjudicate claims arguing that the release of information is not in the public interest and to promote the reality of open government.

In October 2009, the ALRC asked the Attorney General for an extension on its review, citing the number of late submissions that had been handed in, mainly by government departments. This was granted and the report was finally tabled in March 2010.

The review has identified 506 secrecy provisions in 176 pieces of Commonwealth legislation, including 358 criminal secrecy offences.

The review chair, Professor Rosalind Croucher (now president of the ALRC) restated the widely held view that criminal sanctions should be wound back, including the repeal of ss70 and 79 of the Crimes Act: "Criminal sanctions should only be imposed where the unauthorised release of information has caused, or is likely or intended to cause, harm to identified public interests."

The ALRC report recommends:

- every Australian Government agency should develop and publish information-handling policies and guidelines to clarify the application of secrecy laws.
- the proposed new Office of the Information Commissioner should provide independent oversight of the manner in which Australian Government agencies discharge their information-handling responsibilities.
- the Australian Government should legislate to introduce a comprehensive public interest disclosure legislation covering all Australian Government agencies.
- the repeal of ss70 and 79 of the Crimes Act (1914) and the introduction of a new general secrecy offence, limited to disclosures that harm essential public interests.

"Criminal sanctions should only be imposed where they are warranted—when the disclosure of government information is likely to cause harm to essential public interests—and where this is not the case, the unauthorised disclosure of information is more appropriately dealt with by the imposition of administrative penalties or the pursuit of contractual remedies".[5]

Recent events have been cited by press freedom advocates in questioning the depth of the Government's commitment to openness and accountability.

The refusal of the Prime Minister, Kevin Rudd, to reveal the contents of letters he had received from the then minister for the environment, Peter Garrett, about the controversial home insulation scheme, citing the "cabinet process".[6]

There has also been considerable disquiet about the seeming blanket secrecy applying to defence and intelligence. As Richard Ackland wrote in the *Sydney Morning Herald* in February 2010: "There is any number of cases where ASIO manipulates state secrecy for entirely unclear reasons."[7]

Ackland pointed to a case in the UK where the Foreign Office was ordered to produce documents it had withheld on the grounds that their release would damage relations with the US. Since the documents were released on the instruction of the Court of Appeal, there has been no discernible damage to security relations between Britain and the US, Ackland argues.

Last month, writing in *The Australian*, Stephen Kirchner, a fellow of the Centre for Independent Studies, told of his attempts to access the transcript of a speech given by Patrick Colmer of the Foreign Investment Review Board in which Colmer outlined government policy on the regulation of foreign investment.

Kirchner applied under Freedom of Information legislation and sought a remission of the $30 fee under section 30A of the act, on the grounds that the release of the speech would be of public interest and benefit.

His application for a fee waiver was refused on the grounds that "mere curiosity on the part of a person or a substantial section of the public will generally not constitute a public interest ground".

"Only in situations where there is an overwhelming public interest preventing disclosure should disclosure not be automatic"

Cartoon by Rocco Fazzari

Kirchner asserted that this was an "extraordinarily narrow reading of the public interest and public benefit" and questioned whether it should take an FOI request to obtain a copy of a public speech by a senior public servant that was designed to explicate government policy.[8]

The Alliance believes that government information is held in trust for the Australian public and should be available. Governments should adopt presumption towards publication except where there is a clear public interest against disclosure.

Government action gives grounds for optimism

JULIAN DISNEY

A decade or so ago Australia began a slide down the international press freedom rankings, largely due to new legislation aimed at combating terrorism and other perceived threats to national security. The slide was exacerbated by governments' decreasing commitment to Freedom of Information processes, suppression orders being issued more widely in the judicial system and the vulnerabilities of whistleblowers becoming more apparent.

The last couple of years, however, have raised hopes of greater access to information on matters of public interest and a greater openness of public institutions, especially governments. An array of commitments, proposals and reviews has achieved good progress in some areas and holds the potential for substantial improvement.

On the other hand, there is still much to be done before ongoing reviews yield specific proposals, promising recommendations become binding commitments, and changes in legislation or policy are implemented effectively. Moreover, there are also risks of deterioration in some key areas.

Some of the most heartening progress concerns access to public information through Freedom of Information (FOI) processes and protection for whistleblowers making "public interest disclosures". There are also prospects of improvement in protection of journalists refusing to disclose confidential sources and in access to material arising from court proceedings.

Protection of privacy and restriction of access to material on the Internet are areas where, although some government action may be justifiable, there is also a clear risk of undue encroachment on freedom of expression and public access to information and ideas.

On balance, there are grounds for optimism in some key aspects of press freedom, especially Freedom of Information processes, public sector whistle-blowing and perhaps protection of journalists' sources and access to court information. There are dangers of deterioration in areas such as privacy and regulation of the Internet but they will not be averted by simplistic rejection of the need for reform.

The preservation of freedom for the media is crucially dependent, of course, on the maintenance of professional and responsible standards by publishers and journalists. When allegations and other material relating to politicians and other public figures are published without adequate checking, or are released in a manipulative sequence of disclosures which endanger due judicial process, the cause of freedom is harmed.

Professor Julian Disney is Chair of the Australian Press Council.
Read his summary of press freedom issues here

FREEDOM OF INFORMATION

Commonwealth

The Rudd government announced as part of its 2007 election policies that it would reform the Freedom of Information Act 1982 (FOI Act) to promote a disclosure culture across the government.

The first stage of this reform was a repeal of the power to issue abolition of conclusive certificates. The relevant Act, the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009 commenced on 7 October 2009[9].

After a comprehensive review of the FOI Act, in November 2009 the government introduced the Information Commissioner Bill 2009 and Freedom of Information Amendment (Reform) Bill 2009, into the Parliament and the Bills were reviewed by the Senate Finance and Public Administration Committee.[10]

It is expected the Bills will pass both Houses of Parliament by the end of 2010.

The highlights of the new regime will be:

Creation of Office of the Information Commission; On 26 February 2010 the Government announced the appointment of Professor John McMillan AO as the Information Commissioner Designate. He will be responsible for the running of the Office of the Information Commission.

Revamping of fee structure: The government has announced no application fees (including for internal review) will apply to access requests; no charges will apply to applicants seeking access to their own personal information under the FOI Act; for all other applications, the first hour of decision-making time will be free (except for journalists and not-for-profit community groups where the first five hours of decision making time will be free); and applications not decided within the statutory time frame will be processed free of charge.

The Government also announced that the Information Commissioner will be requested to undertake a comprehensive review of charges within 12 months of the Commissioner's appointment.

Reformulated single public interest test: The new test is weighted in favour of the disclosure of documents and list factors which may not be taken into account when deciding the public interest test and a list of non-exhaustive factors which would favour disclosure.

New Cabinet exemption test: The new test limits the Cabinet exemption to only apply to documents prepared for the *dominant* purpose of submission to Cabinet.

Other features include: new objects clauses to express the intention to increase public participation and scrutiny, pro-active publication of information, a shorter period for access to Cabinet records (20 years not 30 years) and a wider application of the regime particularly in relation to contracted service providers.

"Queensland was the first jurisdiction in Australia to conduct a full and comprehensive review of its FOI regime"

Queensland

Led by Premier Bligh, Queensland was the first jurisdiction in Australia to conduct a full and comprehensive review of its FOI regime. In 2007, the government appointed an independent panel to review Queensland's FOI and after extensive consultation and recommendations from the panel, the government passed new legislation in 2009[11].

The highlights of the regime are:

- Abolition of the controversial Cabinet document exemption used to avoid scrutiny and applying a test that looks at the consequence of releasing a Cabinet document;
- A system for proactive release of information online;
- A single public interest test with a starting presumption of openness;
- Abolition of the power to issue conclusive certificates; and
- An improved fee regime.

New South Wales

The NSW government also took the initiative to review their FOI regime and in early 2009 the Ombudsman undertook a comprehensive review of the NSW system. The government responded quickly to the recommendations of the review and a package of reforms transforming FOI legislation in NSW was passed in June 2009.

The Acts are:

- *Government Information (Public Access) Act 2009*
- *Government Information (Information Commissioner) Act 2009*
- *Government Information (Public Access) (Consequential Amendments and Repeal) Act 2009*

The highlights of the regime are:

- Establishing an Information Commissioner with dedicated funding;
- A single public interest test;
- Abolition of the power to issue conclusive certificates; and
- Introduction of offences for breaching the Act.[12]

Tasmania

In 2009 the Tasmanian Department of Justice undertook a comprehensive review of its

Freedom of Information Act 1991 and receiving a considerable number of submissions the new Right to Information Act 2009 was passed in December 2009.The new Act will commence on 1 July 2010.[13]

Highlights of the new regime will be:

- a new public interest test which lists the factors relevant to the public interest test and those that are irrelevant to the test;
- a revamp of the fees and charges;
- mandating of proactive release of government information; and
- an enhanced role for the Ombudsman in relation to review and monitoring the release of information.

Australian Capital Territory

Recognising the reviews of FOI regimes undertaken by the Commonwealth and other Australian jurisdictions, the ACT Standing Committee on Justice and Community Safety is conducting a review of the ACT's Freedom of Information Act 1989.

The wide terms of reference invite a comprehensive update of FOI along the lines of that taken in other jurisdictions.

Western Australia

The Office of the Information Commissioner has recently commenced a review of the manner in which public sector agencies are administering the FOI process. The Information Commissioner has called for submissions on a range of issues including; fairness of the processes of agencies, readiness of agencies to publish information, speed of the process and fees and charges.

While this is a welcome review a comprehensive review similar to that conducted in other jurisdictions would be beneficial.

Victoria

In 2006 the Victorian Ombudsman undertook a review of the Victorian Freedom of Information Act 1982. The recommendations of the review led to a number of legislative changes including:

- abolition of conclusive certificates;
- abolition of FOI application fees; and
- greater emphasis on publishing of information online.

Cartoon by Alan Moir

"Effective governments don't need to hide the truth yet few politicians have found the courage to embrace openness through better FOI laws"

While the changes were welcome, there still needs to be a comprehensive review of the entire Act focussing on exemptions (including the broad Cabinet exemption test), public interest tests, timeliness of decision making, access fees and the value of a Victorian Information Commission.

South Australia

While a number of amendments have been made to the South Australian Freedom of Information Act in the past decade, the South Australian regime and legislation is due for a comprehensive review similar to that conducted in other jurisdictions.

The issue of highest priority is the lack of a proper process for FOI decisions to be reviewed. Unlike other jurisdictions, there is no administrative appeals body and no Information Commissioner. The only option is an application to the District Court.

The review could address the legislation and FOI practices focussing on reforming the exemptions and public interest tests, establishing an Information Commission with real power to bring about openness in government and setting up a workable, and inexpensive administrative appeals system for FOI decisions.

Freedom of Information and two state elections

PETER TIMMINS

Elections in Tasmania and South Australia at the end of March 2010 saw major swings against both governments. Trust was a common issue, but transparency in government received different treatment in the campaigns.

In Tasmania the incumbent Labor Government was able to point to significant action on reform with a good (subject to quibbles as you might expect) Right to Know Act passed by Parliament last year and scheduled to commence on 1 July 2010. The act includes some "lead the nation" elements such as the Parliament being covered in respect of administrative functions, and the abolition of all charges for processing applications.

While Labor didn't appear to make much of this during the campaign, Matthew Denholm in *The Australian* acknowledged the Premier's improvements to freedom of information laws, whistleblower protection, and the creation of the state's first anti-corruption watchdog as positives in an otherwise ordinary report card on government performance.

Government reform initiatives last year made the Opposition policy commitment to a complete overhaul of the FOI Act if elected sound a little out of date. The Greens policy, Democracy and Participation, included an impressive list of general commitments.

The result of the election is still not clear. Whoever wins office will have a tenuous hold on power. All three parties are at least interested in the subject, which is likely to attract further attention.

In South Australia, the Rann Labor Government showed no interest in broad Freedom of Information reform in recent years, although it claims credit for changes in 2005, and for winding back the cabinet exemption to protect documents for 10 years.

Governments elsewhere: Tasmania, the Commonwealth, Queensland and NSW, meanwhile all recognised the need to bring 1970's and 1980's laws about the right to know into the 21st century.

The *Adelaide Advertiser* editorialised during the campaign that South Australia has a reputation as a place where secrecy flourishes: "a state that grants more suppression orders than any other, it is a state where it is acceptable to leave hundreds, if not thousands, of parliamentary questions unanswered for years at a time, where pursuing Freedom of Information requests is nothing short of a battle."

Isobel Redmond, South Australia's opposition leader, and the Liberals ran with a policy commitment to "transparency as the key to restoring confidence in government." The policy included commitments on corruption prevention, whistleblower protection, open justice, conduct of members of parliament and Freedom of Information.

The specifics in the FOI pitch were modest, but at least gave the issue a direct nod:

"The flow of information from Government during the Rann Government has been appalling. Freedom of Information applications have increased but the level of information released has not. Last year 10 per cent of applications made to the State Government were refused. That is up from 6 per cent in 2000/01. For Freedom of Information to work properly, interference cannot be permitted. Under a Liberal Government advice will be provided to Minister's Offices but those offices will not be permitted to interfere with timelines for the release of information.

In his 2008/09 Annual Report, the South Australian Ombudsman Richard Bingham referred to an over-application of the Cabinet exemption rule for FOI applications. He said a Liberal Government would:

- Work with the Ombudsman to enhance this exemption clause to provide greater access to documents which should not necessarily be exempt.
- Remove fees for FOI applications made by journalists if they can be dealt with in less than five hours to provide greater scrutiny of government decisions."

With the Rann Government the winner, these commitments once again become simple scraps of paper. The question now is whether the Government, which within days in office started a "Labor listens" campaign, gets the message that fundamental reform on integrity, accountability and transparency is a necessary part of dealing with trust concerns, and fostering renewal after eight years in office.

Peter Timmins is a Sydney based lawyer and consultant specialising in Freedom of Information and associated issues. An earlier version of this article was published on the Open and Shut Blog-www.FOI-privacy.blogspot.com

Secret government is bad government

MICHAEL MCKINNON

Victoria and South Australia are now vying for the unenviable crown of the most secretive government in Australia as a wave of Freedom of Information reform sweeps across Australia.

Perhaps the main impetus for reform arose with the establishment of Australia's Right to Know in 2007 – a coalition of Australia's 12 largest media companies – set up after *The Australian* newspaper's failed High Court challenge over access to bracket creep and First Home Buyers Scheme documents.

All politicians understand that secret government is bad government. It is only failures that require secrecy in a bid to try to protect political reputations and the fate of the government at the hands of voters. Effective governments don't need to hide the truth yet few politicians have found the courage to embrace openness through better FOI laws.

While Commonwealth FOI reform received support at the Prime Minister's 2020 summit in April 2008, it was Queensland Premier Anna Bligh who was the first Australian political leader since the early 1980s to bite the bullet and push through real reform of Australia's Freedom of Information laws with the Queensland Right to Information Act 2009 now up and running. The reforms were based on the Solomon Report that identified a core failure of FOI laws that in "theory should have delivered the new, open and accountable system of democratic government that everyone seemed to want".

As I write this, Brisbane's *Sunday Mail* is one newspaper that is enjoying the fruits of the new Right to Information laws in Queensland. Two news stories up the front of the paper, gained through RTI, showed the value of easy and reliable access to information to the media industry with the newspaper's sister publication, *The Courier-Mail*, also regularly breaking stories using RTI.

While the new laws improve access and improve complexity, it is the undoubted leadership of Premier Anna Bligh that has really driven the cultural reforms hoped for, and needed, as part of the reform process. Journalists are the most prolific users of the new laws in Queensland and they are finding that the vast majority of public servants are no longer worried or scared about protecting the government's political reputation with the Premier's support for reform understood and supported by bureaucrats.

This has started removing much of the distrust that unfortunately characterised relations between media and government in the past on FOI.

Requests are being processed almost always on time, except when complex, and the use of exemptions just to block access appears to have disappeared with the old Act. While government agencies are slowly adapting to a new world where information should be pushed out rather than dragged out against trenchant opposition, certainly access to documents sought under RTI is proving remarkably easy.

Other governments have also joined the reform push. In September 2009, The Commonwealth Government introduced a bill to Parliament to abolish conclusive certificates from its FOI Act. Certificates, the subject of the High Court appeal, allowed ministers or departmental heads to decide the public interest was never to release a given documents allowing secrecy without any real chance of court appeal. The removal of certificates has been followed by most other jurisdictions around Australia.

The devil still remains in the detail with FOI reform and while the Commonwealth Government has publicly supported reform and makes significant improvement with its proposed new Act, included in its final bill was a bitter poison pill.

While FOI often provides easy access to non-controversial documents, often the most important information can be blocked in a long, legal battle. Information, for example, about how much money a government rakes in through bracket creep or how much further the Howard Government may have wanted to take industrial relations reforms is precisely what needed by a voting public to decide whether they support a government. This information however was blocked from release forcing legal challenges to the Administrative Appeals Tribunal. Sadly, in the past, it is only the start of legal action in the AAT that has forced the government to reluctantly hand over documents.

Yet in the Commonwealth's new FOI bill, the onus on the government to prove why information should be exempt from release was set to be removed. This onus forced the government lawyers to show evidence and provide witnesses why documents should be exempt. When the government is the only one with access to the documents, it is impossible for any applicant to argue for their release in the absence of government evidence in support of secrecy.

As Opposition FOI spokesman and eminent lawyer Senator George Brandis noted, the removal of the onus in the new legislation was a backward step in the FOI reform.

Thankfully, the Rudd Government has accepted proposed amendments to the new FOI Act, suggested and drafted by ARTK, with a new proposed s11A. Effectively, the changes will work with section 23 of the Act so no decision maker can deny access once a request was made unless positively satisfied that the document was exempt. This puts the onus fair and square back on the Commonwealth in any appeals.

The Rudd Government commitment to FOI reform however has been bolstered by the appointment of former Commonwealth Ombudsman Professor John McMillan as the new Commonwealth Information Commissioner. McMillan is well regarded and given his role in the lobby group that first suggested FOI in Australia in the 1970s, he can be expected to push for a more open regime. Equally, as a former professor of administrative law at ANU, the well-respected lawyer should produce decisions that will provide useful benchmarks across every state in Australia.

Also joining the FOI reform bandwagon is the NSW government. In February 2009, the NSW Ombudsman delivered a special report to Parliament showing similar problems identified with the Solomon report. Once again, while problems were extensive, they were also long-standing and it was the political will that pushed for reform that will now mean the establishment of a new Information Commissioner tasked to improve government transparency.

It is currently expected that the new regime in NSW will become fully operational sometime towards the middle of 2010 with an information commissioner already appointed.

Another government undertaking FOI reform is in Tasmania where University of Tasmania law lecturer and FOI expert Rick Snell has been involved in the reform process.

He said the new FOI Act in Tasmania will come into force in July this year with the public service undergoing training in preparation. "All of the new Acts around the country have adopted a new approach to FOI and to some extent mirror each other," he said. "But they are all different to some extent ▶

Secret government is bad government (CONTINUED)

▶ because all have moved into new territory.''

Snell said one difficultly however is that if governments really embrace the "push'' model where information is systematically and purposely released, it may be difficult to judge the success of FOI because of fewer applications.

"Negative indicators like delays in processing, expensive costs and flawed exemption application may be harder to see if fewer applications are occurring,'' he said. "Under the new legislation, the onus is on government to proactively release information so if they are working it may hard tell what is really happening.''

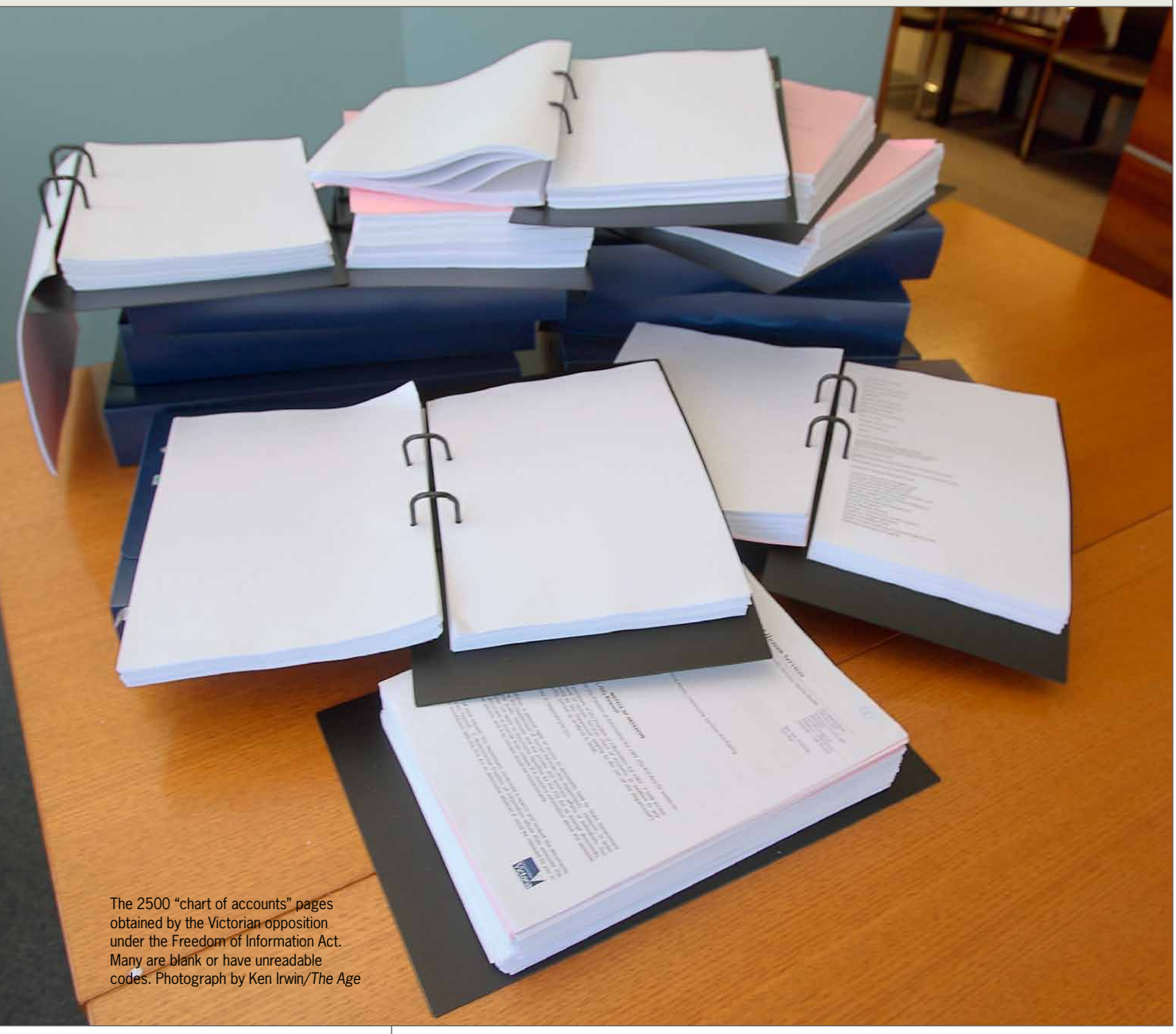
Mr Snell said the important role played by information commissioners should also improve FOI access.

"They will have a far more proactive facilitation role then they did previously and importantly they should be able to change the culture of secrecy that occurs with governments,'' he said. "It may be the path of least resistance is going to be for governments to release some or all of the information that is being sought given information commissioners will be able to check on decision making.''

Once current reform is finished, the only states without information commissioner will be South Australia and Victoria although at least Victoria has the option of an appeal to a low cost administrative appeals tribunal.

The clock is now ticking for political leaders in those states to show the courage of fellow Labor leaders in other States and the Commonwealth.

Michael McKinnon is FOI Editor with the Seven Network. He was awarded the 2009 Walkley Award for Journalistic Leadership for his work on FOI



The 2500 "chart of accounts" pages obtained by the Victorian opposition under the Freedom of Information Act. Many are blank or have unreadable codes. Photograph by Ken Irwin/*The Age*

WHISTLEBLOWERS

When the Alliance launched the 2009 Press Freedom Report at the annual fundraising dinner in May last year, Laurie Oakes made the keynote speech, which was effectively a report card on the Rudd Government's performance on press freedom issues.

He was particularly scathing about the report of the Dreyfus Committee which proposed new legislation offering little or no protection to public service whistleblowers: "I don't believe we're getting anywhere at all when it comes to public servants who take their concerns to the media," he said, adding: "Maybe we're even going backwards."

Oakes pointed out that under the proposed Public Interest Disclosure Bill: "The only circumstances where blowing the whistle via the media would be protected would be where a matter had been disclosed through the internal public service system but had not been acted on within a reasonable time…and then only if the matter threatened "immediate and serious harm to public health and safety. Most scandals – most government and bureaucratic acts of impropriety, maladministration, wastage of public funds, nepotism, corruption, breaches of public trust – would not qualify. Watergate would not qualify. Deep Throat would end up in clink under the Dreyfus rules."

He added: "A public servant who went to the media to expose appalling weaknesses in security measures at Australian airports – the offence customs officer Alan Kessing was accused of and prosecuted over – would only be covered by the Dreyfus rules if a terrorist attack was imminent…or maybe already underway."[14]

On March 17 the Cabinet Secretary, Joe Ludwig, tabled its response to the Dreyfus Committee's report and announced he would introduce legislation, this year, that would "facilitate proper reporting of corruption, misconduct or other wrongdoing in the Commonwealth public sector."[15]

The report has signaled the Government's intention to address the media's concerns, so eloquently laid out by Oakes in his Press Freedom speech. While adopting many of the Dreyfus committee's recommendations, the Public Interest Disclosure Bill will set up a mechanism that protects disclosure to the media in "matters relating to corruption, maladministration, wastage of public funds and official misconduct."[16]

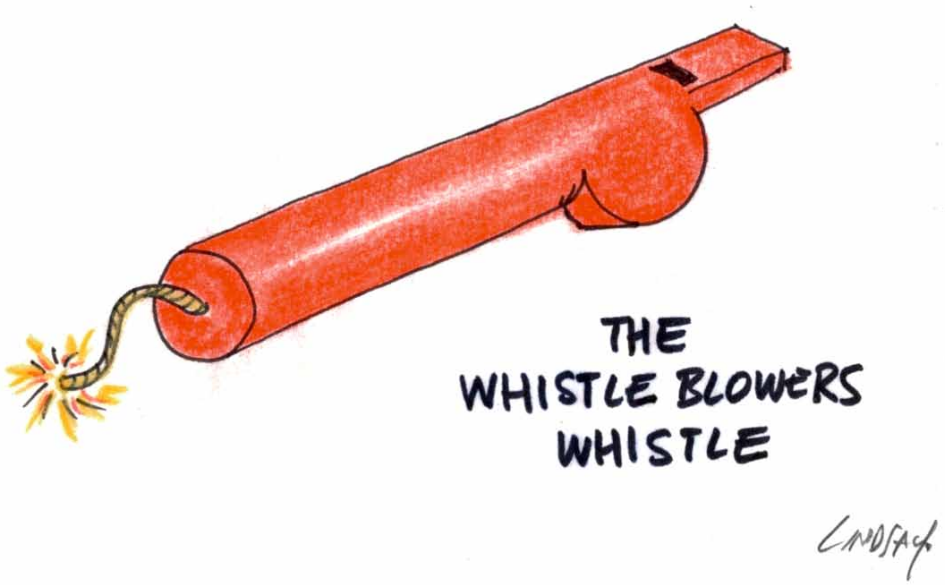
Reaction has been favourable. Legal expert A.J. Brown was quoted by *The Australian* as calling the proposed Bill: "world's best practice", while the president of Whistleblowers Australia, Peter Bennett said: "It will change the culture of government".[17]

For the Australian media, perhaps the most important yardstick is that the proposed legislation would "pass the Kessing test".[18]

Most observers now believe that the obvious next step to close the circle in public service accountability would be the introduction of effective shield laws for journalists.

The Alliance believes the proposed Public Interest Disclosure Bill is a positive step towards encouraging accountability in the public service. However this must be matched by new legislation to allow journalists to protect their confidential sources.

"For the Australian media, perhaps the most important yardstick is that the proposed legislation would pass the Kessing test"



Cartoon by Lindsay Foyle

Public Interest Discloser: the new name for an unprotected species

STEPHEN KEIM

The ability of large organisations to crush the insider who has trespassed against a prevailing culture is almost unlimited. We are familiar with this ability of the Corporation and the Government Agency to strike back against would be reformers from movies such as *The Insider*. However, the happy endings that sometimes occur, both in reality and in the fictionalised accounts, should not be mistaken for the more usual outcome where the insider's decision to blow the whistle costs them hugely, both financially, and in terms of lifestyle and mental health.

The tactics available to the offended organisation range from drowning out the messenger with noisy spin often accompanied with outright falsehoods; through the taking of disciplinary and other legal action on unrelated or related matters; to actual blackmail and threats of violence.

One reason why whistleblowers are always vulnerable is the uneven way in which laws are administered both within government departments and out in the real world. All of us have something to hide. Most of us have photocopied or printed out on the work computer our list of footy tips or latest dream team selections. These "breaches" of the ethics guidelines are able to be scrupulously investigated by the powers that be. If necessary, they can be made part of a long running disciplinary proceeding intended to convince the foolish whistleblower, and any who may contemplating following her lead, that virtue and courage, at the end of a long day, are not really worth it.

The greatest resource available to deploy against whistleblowers, however, is relentlessness. It is ironic that the government's current proposals to introduce a Public Interest Disclosure Bill are in response to the recommendations of a House of Representatives Committee known as the Dreyfus Committee. Alfred Dreyfus, a Jewish Captain in the French Army was wrongly convicted in a secret Court Martial of espionage. Despite conclusive evidence that Dreyfus was innocent, the upper echelons of the French defence establishment continued to rig inquiries and to resist both the release of Dreyfus and the clearing of his name. A pardon eventually came in 1906. However, the French defence establishment are as relentless as any other big organisation which guards its turf. As Julian Burnside reports in his excellent analysis of the Dreyfus Affair in his book, *Watching Brief*, Scribe, 2007, it was not until 1995 that the French army acknowledged, publicly, that Dreyfus had been wrongly convicted. Relentlessness, indeed.

The French army knew from an early stage that Captain Dreyfus had been framed. However, it was not until Emile Zola published his famous "*J'accuse*" letter in *L'Aurore* addressed to the President of the Republic on 13 January 1898 that there was any likelihood of the wrongs being righted. Did the generals then roll over and confess that the game was up and the Jew was innocent? No. Rather, Zola was charged with criminal libel; one of the Generals perjured himself (and called on national security issues); and Zola was the subject of a heavy fine. Seven months later, however, the public pressure led to the key witness in the first Dreyfus trial confessing his perjury. Thirteen months later, Dreyfus was released and went on to serve his country in the First World War. Without the publication of Zola's letter, the release and subsequent pardons may never have come.

The proposed Bill, which was outlined by Senator Ludwig in mid March, proposes an elaborate system of protection for those who are compelled to blow the whistle. A Public Interest Disclosure by a Commonwealth employee may be made to an external agency such as the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security. The external agency has the option of investigating, itself, or requiring the affected Agency to investigate.

Ultimately, a whistleblower receives a very restricted right to go the media. Two grounds might save a future Allan Kessing from a criminal conviction. One is where she has gone through the proper channels and got nowhere. This is very restricted. The disclosure must relate to a serious matter. The agency to which it was disclosed must have failed to act or responded inadequately. No unnecessary information must have been disclosed. And there must be no countervailing public factor such as protecting Cabinet deliberations or the protection of international relations.

The second ground which lets the discloser go straight to the media is even more restricted. The discloser must have had a reasonable belief that the matter threatened substantial and imminent danger to life or public health and safety. There must also be exceptional circumstances explaining why the discloser did not go via the new regime.

Any regime to protect disclosure in the public interest must involve the option of disclosing to an independent agency charged to investigate the allegation. Disclosure to another public service agency will, however, give the persons complained of plenty

"The Public Interest Disclosure Bill, if it matches Senator Ludwig's outline and is passed into law, will be amount to a distinct improvement in Australia's law concerning disclosure in the public interest"

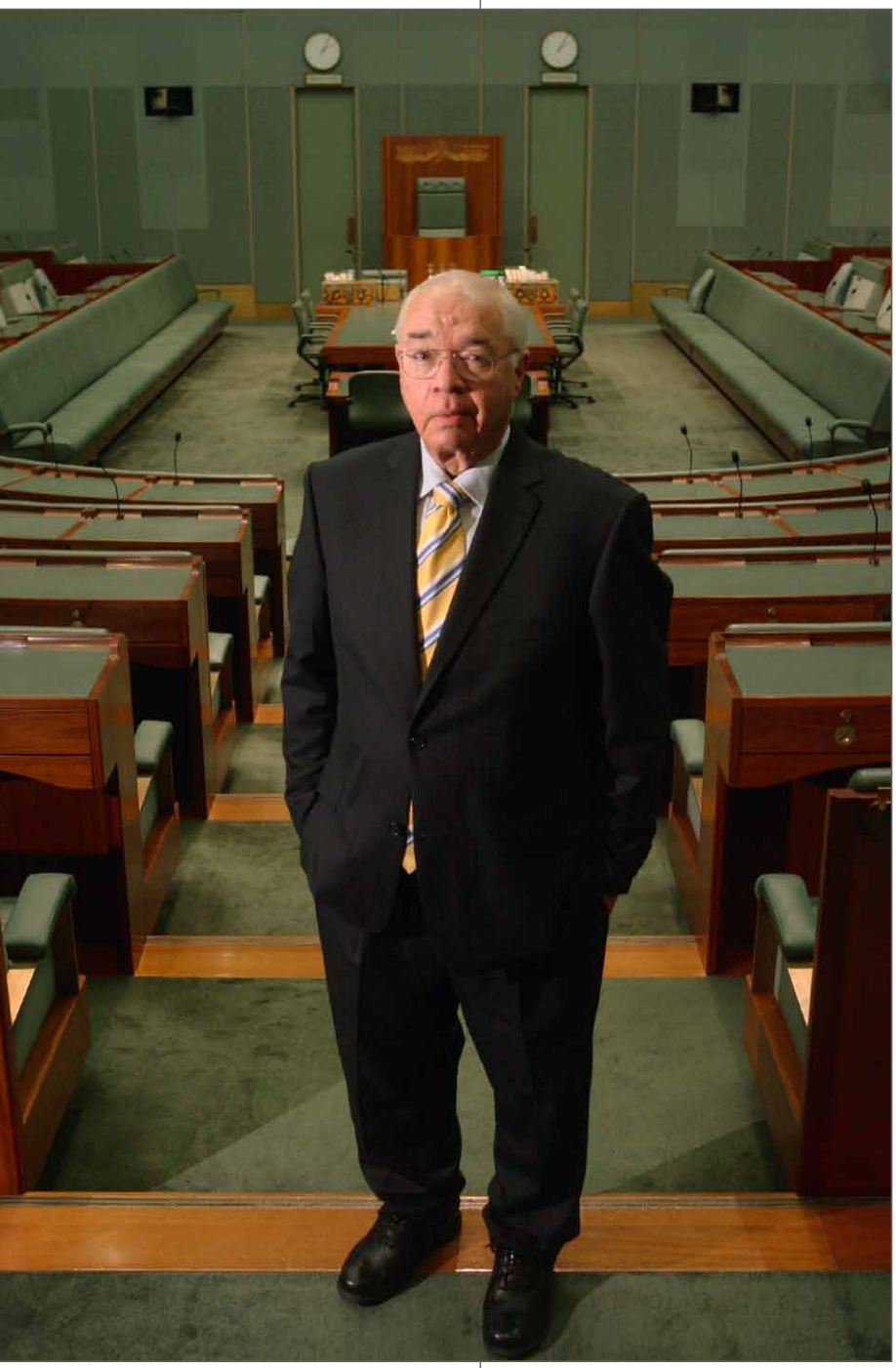
Stephen Keim: "Australia's politicians have a long way to go in distinguishing between political convenience and the public interest." Photograph by Lyndon Mechielsen/*The Australian*

of notice of the need to obfuscate and retaliate and cover up while an under resourced Agency contemplates the complaint and writes some introductory letters. At the very least, as Kim Sawyer pointed out in the *Sydney Morning Herald*, such a regime must be accompanied by serious penalties for any kind of retaliation against the person who made the complaint.

The worst flaw of the scheme, however, is the ungenerous grounds by which public disclosure direct to the outside world is permitted. There is no sign that the government really believes that "sunshine is the best disinfectant". The bureaucratic disclosure system to be established by the proposed Bill might be successful in dealing with obvious cases of theft and misappropriation. However, I have little confidence that it will deal successfully with situations where the voices of scientists in government scientific bodies are muzzled or important government reports are placed in a top drawer and conveniently forgotten. Equally, the circumstances in which disclosure to the world is permitted are both very vague and very restricted. A public servant who seeks to rely upon them, at best, will have to expend her life savings on a ten day trial before she knows whether she is in the clear.

The Public Interest Disclosure Bill, if it matches Senator Ludwig's outline and is passed into law, will amount to a distinct improvement in Australia's law concerning disclosure in the public interest. Its failings show, however, that Australia's politicians have a long way to go in distinguishing between political convenience and the public interest.

Stephen Keim SC was cleared of disciplinary complaints made against him for leaking the transcript of an AFP interview with Dr Mohamed Haneef. In 2009 he was awarded the Human Rights Medal



Laurie Oakes: the need for shield laws is particularly acute in WA, where journalists have been pressured to give up their sources. Photograph by Andrew Taylor/*The Age*

SHIELD LAWS FOR JOURNALISTS

When Cameron Stewart rose at the Melbourne Press Club in March to accept the Gold Quill Award for Outstanding Journalism for his reporting of Operation Neath, which culminated in series of raids in Melbourne in August 2009 aimed at netting members of a suspected terrorist cell, he spoke passionately about the need for effective shield laws for journalists.

Stewart told the assembled audience that his story, which the Victorian Police allege appeared in the streets of Melbourne before the raids had been completed, had led to a "very, very difficult and ugly legal battle behind the scenes ...which for reasons of legal confidentiality, which has been slapped on me by certain organisations, I cannot say a thing about tonight".

He remains bound by this confidentiality. However his words may give an indication of the sort of pressure he has been put under: "The lack of shield laws for sources, for journalists, and everything in this country is an absolute disgrace."[19]

In March 2009 the attorney general, Robert McClelland, told Parliament that the *Evidence Amendment (Journalists' Privilege) Bill 2009* would help provide protection for journalists who attempt to shield the identity of their sources.

The changes spelled out in the Bill would apply to all cases involving commonwealth law, whether heard in federal, state or territory courts.

McClelland said the amendments would try to balance the need to inform the public through the use of confidential sources, which has led to journalists being charged for refusing to disclose their identity, and the public interest in the administration of justice. It would be up to the courts to determine the balance between these two competing interests.

The amendments would provide "guided discretion" through an objects clause that would be inserted in the evidence law. Judges would have to consider the potential harm disclosure of identity could cause to both the source and to the journalist. Where the harm outweighed the desirability of the evidence being given "the court must uphold the privilege," McClelland said.

The Alliance press freedom report 2009: *Secrecy and Red Tape*, expressed journalists' views that the proposed legislation would be more effective were it to include a presumption in favour of protecting journalists and their sources.[20]

In his speech to the 2009 Press Freedom Dinner, Laurie Oakes criticised the proposed legislation for this omission: "Judges have a discretion under this legislation to allow journalists not to reveal a confidential source, but they've had that discretion under common law anyway. And they've shown time and again that they're not inclined to use it," he said.

"The equivalent laws in New Zealand and Britain begin with a presumption that the privilege of a journalist not to disclose a confidential source exists. The onus to rebut the presumption is placed on the party seeking disclosure. The law being considered by the US congress would do much the same. But not the McClelland Bill."[21]

The Media Alliance made a submission to the Senate Standing Committee on Legal and Constitutional Affairs in May 2009 calling for any Commonwealth shield law to include an overarching statement of the spirit of the law that favours journalist source confidentiality protection.[22]

At the time of writing the Bill had passed the House of Representatives and remains before the Senate. Key cross-bench senators, including Nick Xenophon, have indicated they will not support the legislation in its current form.[23]

States bogged down on road to shield laws

JOSEPH FERNANDEZ

The road to uniform, effective shield law protection for journalists' confidential sources in Australia is torturously slow although for a fleeting moment it appeared we were getting somewhere.

The heading in Commonwealth Attorney-General Robert McClelland's March 2009 media release to accompany the introduction into Parliament of the Evidence Amendment (Journalists' Privilege) Bill 2009 boldly proclaimed that the "government delivers commitment on journalist shield laws".

There was no mistaking how McClelland saw that Bill.

The Bill was aimed at delivering on a Rudd government promise to "strengthen journalist shield laws" to remedy the Howard Government's "flawed legislation in 2007 which was a quick fix to a complex issue".

The Explanatory Memorandum accompanying the Bill contained further bold pronouncements about the Bill's aim – it would "give recognition to the important function the media plays in enhancing the transparency and accountability of government." The media's role in informing the community on government matters of public interest is a vital component of a democratic system, the Memorandum further proclaimed.

If any doubt remained as to the Bill's intended purpose, the Memorandum neutralised it by insisting that "[t]his important reform has potential benefits for the community in informing Australians on public interest matters generally. In particular, where government matters are concerned, the amendments may encourage more informed political debate and more thorough scrutiny of the political process – which are necessary for an open and accountable government."

A more emphatic commitment to shield law would be hard to beat.

As it turned out a year on, the Bill is stuck in a quagmire, with five members (three Liberal, one Greens and one Independent) of a nine-member Senate Committee that reviewed the Bill finding the Bill inadequate. The three Liberal senators in their report agreed with the Media Alliance's call for "greater protection of journalist-source confidentiality" and agreed that the "substantive provisions of the Bill should do more in this regard." The Committee members who pushed for more effective shield law – Liberal Senators, Australian Greens, and the Independent Senator – all supported an amendment to create a rebuttable presumption in favour of journalist-source confidentiality.

In Western Australia, a significant stage for the shield law debate, the impetus for the enactment of shield law provided by the Harvey/McManus saga of 2007 received resounding endorsement following a rash of seemingly independent recourses by the WA Police, Parliament and the Corruption and Crime Commission to statutory investigatory apparatus containing "coercive" provisions that could be deployed to pursue journalists' confidential sources.

Unlike Commonwealth shield laws whose enactment relied essentially on legislators in Canberra, the enactment of shield law to cover the Australian States and Territories was more complex given the need for consensus among eight jurisdictions, each with their own law-making powers. That initiative came before the Standing Committee of Attorneys-General (SCAG), which has been deliberating on shield laws since July 2007.

In July 2007 SCAG endorsed the insertion of a confidential communications privilege into the Model Uniform Evidence Bill. In April 2009, SCAG Ministers considered options for journalist shield laws that could be included in the model Uniform Evidence Bill based upon advice from the National Evidence Working Group, and the model provisions are "still under consideration by SCAG".

Whether at State or Commonwealth level Australian legislators have demonstrated tardiness, if not nonchalance, towards the enactment of effective shield laws. This state of affairs is all the more remarkable given that the media's quest is not for unfettered protection of confidential sources but for a qualified protection grounded in the spirit our politicians also profess – the attainment of greater openness, transparency and accountability.

The inference that any support or commitment that our politicians profess towards shield law is no more than rhetoric is irresistible. Shield law to protect journalists' confidential sources has been on the drawing boards for about two decades. Such protection is available in other established democracies including the United States, United Kingdom and New Zealand.

The current Australian position indicates a breakdown in collaboration between legislatures on the attainment of uniform shield law nationwide but while this position is far from healthy, shield law is more urgent in the jurisdictions notorious for pursuing journalists' confidential sources.

Joseph Fernandez holds the chair of Journalism at Curtin University. He wrote the Media Alliance's 2009 submission on shield laws to the Senate Standing Committee on Legal and Constitutional Affairs

Cartoon by Rod Emmerson

The minority report of the Senate Standing Committee on Legal and Constitutional Affairs, written by Xenophon, expresses the risk of a "chilling effect" on the flow of information to the public and asserts that "the Government's proposed laws don't go far enough and that the Bill should more closely mirror the protections offered to journalists in the NZ and UK legislation."[24]

In his speech, Laurie Oakes particularly highlighted the need for the introduction of shield laws in Western Australia, where several journalists have allegedly been called before the Crime and Misconduct Commission and threatened with fines and/or imprisonment if they would not reveal the source of their stories.

Another journalist, Paul Lampathakis, was threatened with jail for refusing to give up his source to a parliamentary committee. Lampathakis had appeared before the Select Committee into the police raid on the *Sunday Times* in July 2008.[25]

In March 2010, a Media Alliance petition signed by more than 300 West Australian journalists called on State Premier Colin Barnett to urgently introduce new laws to stop journalists being threatened with arrest, jail and fines unless they reveal the names of whistleblowers and other confidential sources of information.

The Alliance will continue to campaign for effective shield laws for journalists. Any legislation in this area must include a presumption in favour of the protection of sources unless there is a clear public interest in favour of disclosure.

ANTI-CORRUPTION BODIES: AUSTRALIA'S STAR CHAMBERS

Victoria

On November 23, 2009, the Victorian Premier, John Brumby, announced a review of the state's integrity and anti-corruption system, appointing Public Sector Standards Commissioner Elizabeth Proust as chair with the task of considering "whether any reforms are needed to enhance the efficiency and effectiveness of Victoria's integrity and anti-corruption system, including the powers, functions, coordination and capacity of the Ombudsman, Auditor-General, Office of Police Integrity, Victoria Police and the Local Government Investigations and Compliance Inspectorate."[26]

The review has not involved public hearings and the terms of reference established that submissions would not be published until after the release of the final report and the Government's response.

The Media Alliance made a submission to the review focussing on the establishment, in 2009, of the LGI warning that its powers could be prejudicial to the legal safety of journalists pursuing their work in an ethical manner.

The most disturbing of the coercive powers of the LGI (in common with many of Australia's state-based anti-corruption agencies) is the ability to compel a journalist to answer questions about the source of his or her information or to require the journalist to hand over their notes of interview. This would be a dramatic assault on press freedom.

The penalties that could be imposed on a journalist for refusing to identify a confidential source and handing over their notes are unnecessarily harsh. The penalties include a jail term of up to two years and/or a fine of up to $28,000. There would also be a criminal conviction recorded against the journalist which has long-term consequences for both their professional and personal life, including their ability to travel overseas.[27]

The absence of shield laws for journalists in Australia lies at the heart of the Alliance's misgivings about the coercive powers of Australia's anti-corruption watchdogs.

Queensland

The question of protection for journalists called in front of one of these bodies was raised in an August 2009 submission by Australia's Right to Know, a coalition of publishers and media organisations including the Media Alliance to the Queensland Government's review of Integrity and Accountability in Queensland.

The submission highlighted the positive steps made by the Bligh government towards more transparent and accountable government in Queensland but highlighted amendments to the CMC Act in 2008 which curtailed the ability of journalists called in front of the Crime and Misconduct Commission (CMC) to refuse to answer questions about the sources of their stories.[28]

"The 2008 amendments not only give rise to an inflexible rule which provides no scope for the protection of a journalist's confidential sources, but expose a journalist who dares to honour the strict ethical and legal obligations of confidence they owe their sources, to criminal prosecution."

The submission called for further amendment of the Act to enable journalists to protect their sources on the basis of protection of free speech.

Western Australia

Similar misgivings are held in Western Australia where the Crime and Corruption Commission (CCC) has similar powers of coercion and is known to have wielded them on at least five occasions in 2008.

The Alliance has made repeated calls for journalists to be afforded protection and in November 2009 a petition signed by more than 300 WA journalists called on the Attorney-General, Christian Porter, for action.

Mr Porter recently said that the issue of shield laws remained under consideration and would be pursued subject to State government priorities.

Professor Johann Lidberg of Murdoch University, himself a former journalist, has strongly criticised the lack of protection for journalists: "This is how the law currently stands in WA. It really is a national and international embarrassment to have laws that you would be more likely to find in totalitarian countries such as Zimbabwe or North Korea."[29]

There have been calls for anti-corruption watchdogs with similar powers in Tasmania and South Australia, but no detailed plans have been announced as yet.

The Alliance believes there should be a general review of the coercive powers of anti-corruption agencies and the circumstances in which they are used. At present there is a very clear risk that these powers may be used to pressure journalists to reveal the identities of their sources in clear breach of the Code of Ethics.

To see a state-by-state breakdown of anti-corruption bodies and their powers, click here

"The absence of shield laws for journalists in Australia lies at the heart of the Alliance's misgivings about the coercive powers of Australia's anti-corruption watchdogs"

Silent witness rates badly

MICHAEL BACHELARD

Media organisations and journalists love anti-corruption bodies. They are there to turn over the rocks in our political system and expose the spiders to the light.

Sometimes they follow-up our own journalistic investigations, backing up our findings, digging out the emails and invoices that prove our case, then affording all our conclusions the protection of parliamentary privilege.

At the least, anti-corruption bodies provide regular yarns through their reports to parliament. A search of the term "ICAC" in the *Sydney Morning Herald* in the past six months turns up no fewer than 71 stories.

For these reasons, and simply because we like to see the bastards being kept honest, media organisations regularly opine on the desirability of such bodies. This is particularly the case in Victoria, which has a powerful Ombudsman and an Office of Police Integrity, but no body to examine political corruption more broadly.

This *Age* editorial is typical: "*The Age* has long called for an independent anti-corruption commission with full powers to investigate politicians and their staff, a proposal resisted by Mr Brumby and his predecessor".

And *The Australian*, after a fire-breathing Ombudsman's report into Victoria's Brimbank council last year, wrote: "Why will the Government not appoint a permanent anti-corruption commission charged with rooting out such situations before they take hold?"

In the minds of editors when they call for these commissions is the kind of corruption-busting that the Tony Fitzgerald Royal Commission did in Queensland – the kind that can change politics forever and bring down governments. But should we really be rushing so headlong to support these bodies?

Recent experience in Victoria and Western Australia suggests we should, at the very least be cautious. Because increasingly the practice of journalism, and journalists themselves, are in the firing line.

The powers these bodies have are frightening, even when measured against the normal investigative techniques of police and courts. Witnesses called before them can be compelled under threat of jail to answer questions, even ones that incriminate them.

Witnesses are often denied access to a lawyer, and refusing to answer a single question can see you in jail for up to two years. In theory, refusing to answer five questions racks up a 10-year sentence – a powerful incentive to blab. To increase the pressure, witnesses are often prevented from discussing their predicament with anyone.

They are powers that were, at one time, reserved for investigating the worst of the worst – to break organised crime syndicates and their code of silence. Now, particularly in Victoria, they are being peppered throughout society in the hands of any number of different bodies with different remits and varying standards of accountability.

The Victorian Ombudsman, for example, reports to parliament as a whole, but there is nobody, other than the Ombudsman himself, to whom a person can complain if they feel ill treated. And there is evidence already that these powers have been used by gung-ho investigators to smear the good name of innocent people.

The Office of Police Integrity has been humiliated over the past 12 months because, despite ruining a number of careers with public accusations of corruption, there has been insufficient evidence to support any prosecutions in court.

They are significant and worrying failings.

But in Victoria, the problem has recently grown worse. After the aforementioned "scandal" at Brimbank Council (actually a pretty minor set of vaguely undesirable events) the state Government responded with a sledgehammer. Apart from sacking the council and stopping parliamentary staffers from being elected to councils, the Brumby Government established a whole new body, the Local Government Investigations and Compliance Inspectorate, and equipped it with the full gamut of coercive powers.

The Local Government Act was amended and nine full time staff appointed to investigate administrative matters in councils. This inspectorate is now empowered to compel any person to answer questions.

It has already, reportedly, called a local journalist before it to try to extract from them the name of a source of a comparatively minor story. The secrecy powers prevent anybody from furnishing any more details of this case. If you are unlucky enough to be called, you cannot legally refuse its requests. If you do you face two years jail, a $28,000 fine, or both. And it can compel you to keep silent.

But it gets worse. Unlike any other body using such powers, the local government inspectorate is not a stand-alone body responsible to parliament. It's responsible to the departmental secretary, and there is no obligation upon it to report publicly, or at all. There's no requirement in the legislation that they tell anyone what they are up to – what or who they are investigating, and when and if an investigation is finished.

It's not even clear if a chief inspector can be appointed, or if they have the power to conduct own-motion investigations, though they have claimed both powers and used them.

It's a shoddy, ill-thought through arm of the public service, rushed in by a Government desperate for a political fix. It has been given barely any coverage in the media, but it can do people serious damage.

And its existence is a clear sign that governments are now emboldened enough to take what was once considered the most extreme step in law enforcement, with no more than a flick of the administrative wrist.

This inspectorate's activities should be enough to frighten off anyone – councillors or council bureaucrats – from discussing stories with journalists. It's a serious blow to free speech and good governance in an area where information has, until now, been fairly freely traded.

This proliferation of bodies with coercive powers is particularly concerning in the context of another change – the criminalisation of leaks. In the oft-cited good old days, bureaucrats could talk to the media, on background, to fill in the gaps. Leaks to the media were considered by governments to be part of the fabric of democracy – regrettable, sometimes disastrous, but rarely criminal.

That is not the case any more. Allan Kessing, Harvey and McManus, and numerous cases in the Western Australia prove that the mere act of leaking information to a media outlet, no matter how worthy of public discussion, is an act that will now prompt a criminal investigation.

And when the investigative bodies are equipped with full Royal Commission powers, that means journalists will increasingly find themselves the target of legally sanctioned coercion.

From the point of view of investigators, who are all desperate to justify their existence, hauling in a journalist to quiz them

about their expose might seem the quickest way to close the case.

Though we do not yet know full details, it's clear from his public statements as he collected the Melbourne Press Club's top award for journalism recently, that Cameron Stewart of *The Australian* has been put through just this sort of treatment.

As the number of bodies with these powers increases, more areas of reporting will be covered by such draconian rules. Increasingly the mere act of meeting a source, getting a yarn about a matter of public administration, standing it up with other information, then reporting it, could find the journalist between two rocks – jail on the one hand and his or her code of ethics on the other.

The code of ethics is clear on protection of sources: "where confidences are accepted, respect them in all circumstances". But the coercive provisions of various bodies are equally blunt: "it is an offence not to answer questions or produce documents or other things when required", says the Office of Police Integrity legislation.

There are some positive trends. At the state level in Victoria, an inquiry is currently considering the accountability mechanisms in place for these coercive bodies. With luck it will at least establish a mechanism for hearing complaints against them.

And at the Federal level, there are some other countervailing measures being put in place. Whistleblower legislation, recently announced by the Cabinet Secretary, Joe Ludwig, says that, once internal public service procedures fail to respond adequately to an issue, a leaker may legally take a story to the media. And shield laws for journalists are designed to allow reporters to ask the court's discretion to allow them to protect their source.

But while these developments are to be warmly welcomed, they constitute very limited protection for reporters, especially at the state level. The trend towards more coercive questioning bodies could, ironically, have dire implications for the fight against corruption.

It was public interest journalism that first prompted the Fitzgerald Royal Commission in Queensland – its terms of reference were formulated from the transcript of the *Four Corners* program, "Moonlight State".

That it was left to journalists, not the government, to lift the scab is testament to how a corrupt government corrupts all its institutions. And if coercive questioning powers are frightening under normal circumstances, what would they be like if wielded by a corrupt body?

With no countervailing protection for journalists, these bodies and their approach to leaks will inevitably have the effect of chilling free speech, reducing the number of avenues that whistleblowers have to expose wrongdoing, and centralising all investigations in government run institutions.

We should think about this when calling for new anti-corruption commissions, and we should wonder if we are not sleepwalking towards disaster.

Michael Bachelard is an author and an investigative journalist for *The Sunday Age*

Cartoon by Peter Nicholson

PRIVACY

In 2006 the NSW Attorney-General, Bob Debus, approached the NSW Law Reform Commission (NSWLRC) to report on whether existing legislation in NSW provides adequate protection for the privacy of individuals.

In 2008, the Australian Law Reform Commission (ALRC) – as part of its review of privacy laws, found a cause of action for serious invasion of a person's privacy:

"Federal law should provide for a private cause of action where an individual has suffered a serious invasion of privacy, in circumstances in which the person had a reasonable expectation of privacy. Courts should be empowered to tailor appropriate remedies, such as an order for damages, an injunction or an apology. The ALRC's recommended formulation sets a high bar for plaintiffs, having due regard to the importance of freedom of expression and other rights and interests."[30]

In April 2009 the NSWLRC handed down its report which also recommended the state amend the *Civil Liability Act 2002 (NSW)* to provide a cause of action for invasion of privacy.

The report's central recommendation was that: "Liability would arise in these contexts if the claimant could show that, in the circumstances, there was a reasonable expectation of privacy; and that the act or conduct complained of was highly offensive to a reasonable person of ordinary sensibilities."[31]

Cartoon by Eric Lobbecke

David Marr, who was an adviser to the commissioners, wrote in the *Sydney Morning Herald*, in opposition to the report's findings.

"Impossible to define, ceaselessly abused by governments and thrown away by kids on Facebook, privacy is being offered fresh protection in the courts. The drift appears irresistible. All that's really been at issue round the world in the past decade or so is how to ground this new action in law while protecting free speech.

"The great protection offered in countries going down this track are solid guarantees of free speech in bills and charters of rights. We have nothing like that in NSW, which frankly pleases the NSW commissioners: a former judge, James Wood, a current judge, Kevin O'Connor, and Professor Michael Tilbury. It lets them lower the bar.

"They write: 'We can think of no reason why in Australian law freedom of expression or any other interest should be privileged above privacy'."[32]

Some industry observers believe that legislation, rather than litigation, may be the preferred path, given UK case law in recent years which has tended to favour the plaintiff in such cases. In one example, where Formula One boss, Max Mosley was accused by the UK Sunday tabloid, *News of the World*, of taking part in a "sick Nazi orgy", he opted to sue for breach of privacy, rather than defamation and was awarded £60,000.[33]

Similarly, in 2004, supermodel Naomi Campbell sued the UK's *Daily Mirror* after the newspaper ran a photograph of her emerging from a meeting of Narcotics Anonymous. The case ended up in the House of Lords after an appeal court ruled the newspaper had been justified in running the photographs. The Law Lords voted three to two to overturn the appeal court ruling.

Lord Hope, who voted in favour of Miss Campbell, told journalists: "Despite the weight that must be given to the right to freedom of expression that the press needs if it is to play its role effectively, I would hold that there was here an infringement of Miss Campbell's right to privacy that cannot be justified." [34]

Daily Mirror editor, Piers Morgan, said at the time that the case was creating a "back-door privacy law". Media commentators and legal experts said the split decision reflected the law's confusion about privacy.

Over the past year there have been several complaints against journalists and publishers based on alleged breach of privacy.

In August 2009, ACMA announced it would review privacy guidelines for broadcasters after ruling that Channel 10's coverage of a fatal boat explosion in May had failed to exercise the requisite sensitivity under clause 4.3.6 of the Commercial Television Industry Code of Practice 2004 by broadcasting prolonged footage of a man who had lost his parents in the explosion.

In June, Ten's coverage of a fatal house fire drew criticism from ACMA which ruled the broadcaster had failed to comply with

clause 4.3.8 of the code and take "reasonable steps" to ensure that an accident victim's family had been notified prior to broadcasting the victim's identity.[35]

More recently, a complaint by former police officer, Wendy Gale Hatfield, about her portrayal in the third series of *Underbelly: The Golden Mile*, was dismissed by the NSW Court of Appeal which agreed with the NSW Supreme Court that she had no right to view episodes of the crime drama prior to public airing because the issues were already in the public domain due to evidence given to the Wood Royal Commission.

Justice Ruth McColl said, in a written statement: "In such circumstances, it can be said that the appellant has lost whatever right of privacy she might be entitled to in respect of that aspect of her reputation."

Ms Hatfield was ordered to pay costs, but the justices said Ms Hatfield would have the option to sue for defamation after the series aired.[36]

Commentators believe there is unlikely to be any movement on the creation of a statutory cause of action in 2010 but the ALRC's recommendation that unless there is legislative action, judges will fill the void is the cause of much discussion in media circles.

Any statutory recognition of the right to privacy must be fully balanced by a countervailing recognition of the right to freedom of speech and expression.

"Unlike many other Western democracies, there is no statutory or constitutional right to free speech in Australia"

Privacy versus the public interest

JONATHAN HOLMES

When the ALRC came out with its proposal in 2008, the President of the Commission, Dr David Weisbrot, told *Media Watch* that it was aimed at "the most outrageous cases – and only the most outrageous cases" of breach of privacy. For example, he said, "the nude photos that are sent out over the internet or those kinds of things".

He admitted that the Commission had received relatively few complaints about actual breaches of privacy by the mainstream media. The law was aimed mainly at what people feared might happen. And he added: "I'd be very concerned… if anything we recommended halted genuine investigative journalism of which there's precious little in Australia and there should be a great deal more. And I think we've crafted it in such a way as not to do that."

Well, the media can be forgiven for cynicism. The examples of breach of privacy quoted in the ALRC Report are quite broad, including, for example, "interfering with, misusing or disclosing correspondence".

As Sam North, the then managing editor of the *Sydney Morning Herald*, told *Media Watch*, that this could well have given a cause of action to Rene Rivkin to block the *Australian Financial Review*'s publication of material from a secret interview between Rivkin and the Swiss authorities. That leaked material was central to the report which won the *AFR* the Walkley Award for investigative journalism in 2004.

The way the defamation laws have worked gives journalists every reason to fear, in News Ltd Chairman John Hartigan's words, that a statutory right to sue for breach of privacy "would mainly benefit only those public figures who are rich enough to cry "privacy" when the media threatens to expose their hypocrisy and corruption. Such a law might be a bonanza for lawyers, but would do little to protect ordinary innocent citizens, or democracy."

The law would require judges to balance the harm to the plaintiff alleging breach of privacy against the public interest, including the need for a free and unfettered press.

But, unlike many other Western democracies, there is no statutory or constitutional right to free speech in Australia. No Bill of Rights. No Human Rights Act. And judges in this country have tended to give little weight to the principle of a free press when balancing it against specific harm caused to individuals who come before them.

And, of course, any legal right to privacy would threaten an entire industry based on celebrity gossip. It may not be the most high-minded journalism; it may not be essential to democracy; judges would see little merit in it. But magazines, websites, blogs and social media thrive on it; the public appetite for it seems insatiable. If the celebrity mags were forced to abandon the paparazzi's efforts in favour of stills handed out by the stars' PR companies, the world, for many people, would be a great deal duller.

The problem, of course, is that with freedom comes responsibility. And too often, the media have not acted responsibly. In theory, mainstream media outlets accept that they should not invade people's privacy unless there's a powerful public interest to be served in doing so. In practice, money too often talks.

On the very weekend that Mr. Hartigan wrote his attack on the ALRC proposal quoted above, the *Sunday Telegraph* and several other News Ltd newspapers rushed to publish phony pictures of a young, naked "Pauline Hanson" on their front pages. The pictures sold a lot of papers. The same day, before they were proven to be fraudulent, *Media Watch* asked the *Sunday Telegraph* what public interest was served by their publication. The paper's deputy editor (who now edits *The Australian Women's Weekly*) told us: "That's for our readers to tell. That will be determined by the number of people that buy the paper."

A privacy statute, framed with some input from the media, may well be preferable to a right to privacy that emerges in the courts through an accumulation of case law. At least judges could be required by Parliament to take into account the public interest in a free press.

But we're faced with the dilemma, arguably, because the media have demonstrated too often that, where the intrusion into privacy will sell newspapers and magazines, and attract viewers and listeners, they can't be trusted to regulate themselves.

Jonathan Holmes is the presenter of ABC TV's Media Watch.

ANTI-TERROR AND SEDITION

In March 2010, the Attorney-General, Robert McClelland, moved the second reading of the Government's National Security Legislation Amendment Bill 2010. He noted that the Bill was the result of an extensive process of independent and bipartisan review, including the Clarke inquiry into the Haneef affair, a review of security and counter-terrorism legislation by the Parliamentary Joint Committee on Intelligence and Security, an inquiry by the Parliamentary Joint Committee on Intelligence and Security, into the proscription of "terrorist organisations" under the Australian Criminal Code, and the Australian Law Reform Commission's review of Australia's sedition laws.

As part of this process, the Media Alliance – as part of the Australia's Right to Know Coalition – made a detailed submission to the Attorney General's office proposing important changes to the raft of legislation addressing national security, sedition and anti-terror laws.[37]

Our submission noted that there had been 44 separate pieces of legislation – or amendments to existing legislation, between September 11, 2001 and the federal election of November 2007. The submission noted Alliance concerns that, while "badged with the impeccable objectives of deterring, detecting, disrupting and ultimately punishing terrorism … 9/11 and threats to terrorism should not be 'used' as a way to expand laws which dubiously justify infringements of free speech and other civil liberties".

Some of this raft of legislation had, the submission noted, impacted adversely on the media's ability to report on issues of national security and on terrorism-related stories.

In his study *The Journalist's Guide to Media Law*, Bond University professor of journalism, Mark Pearson, summarised these effects as follows:

- leaving reporters exposed to new detention and questioning regimes;
- exposing journalists to new surveillance techniques;
- seizing journalists' notes and computer archives;
- closing certain court proceedings, thus leaving matters unreportable;
- suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
- restricting journalists' movement in certain areas where news might be happening;
- exposing journalists to new risks by merely associating or communicating with some sources; and
- exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism.[38]

"Threats of terrorism should not be used as a way to expand laws which dubiously justify infringements of free speech and other civil liberties"

The submission made the following recommendations:

- Amendments to the treason offences in the *Criminal Code Act 1995* to provide that conduct must "materially assist" an enemy are welcome but, in addition, it should be a requirement that a person had "criminal intent" when doing so.
- The current "good faith" defence to urging force or violence should be repealed and replaced with the specific wording proposed by the ALRC.
- S101.4 of the *Criminal Code Act* relating to "possessing a thing" related to a terrorism act is too broad and vague and should be reviewed. The provision could jeopardise a journalist's ability to do his or her job properly by potentially criminalising information acquired innocently in the course of their usual work.
- s102.1(1A) which proscribes an organisation that "praises" a terrorist act, threatens free speech and should be repealed.
- s3UEA of the *Crimes Act* which provides for a warrantless search in the case that a police officer suspects a "thing" connected with a terrorist act may be on the premises is too vague and could threaten a journalist undertaking their usual work. Warrantless search should not be permitted.
- The *ASIO Act* continues to threaten journalists whose job involves investigating terrorism activities and the activities of security agencies. The ability to detain citizens not suspected of a crime and the restrictions on the ability to disclose information regarding warrants and questioning should be re-examined as a matter of urgency.
- The definition of national security information in the National Security Information Act should be narrowed to ensure it only applies to genuine national security information.
- *Telecommunications Act 1979* gives broad powers to police and security agencies to intercept communications which could threaten a journalist's confidential communication with sources.

The National Security Legislation Amendment Bill 2010 goes a long way towards meeting these suggestions.

Cartoon by Peter Nicholson

The "good faith" defence has been expanded along the lines proposed by the ALRC and now protects any acts done:

- in the development, performance, exhibition or distribution of an artistic work;
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest;
- in the dissemination of news or current affairs.[39]

However there are still objections to the package of measures. The proposed legislation would still allow warrantless searches, such as the raids on the premises of *The Sunday Times* in Perth in April 2008.[40]

The definition of what could be ruled as "national security information" remains nebulous. Item 8: Section 7 inserts a new definition of "national security information" into the *National Security Information Act*: "national security information means information:

- that relates to national security; or
- the disclosure of which may affect national security."

This remains too broad. Does information relating to budgets and administration of intelligence agencies fall into this definition? The proposed Bill needs to be clearer.

The power to intercept telecommunications is not addressed in the proposed legislation, meaning that journalists' conversations with confidential sources remain under threat if they are considered to be relating to information judged to "relate to national security". A review of the Telecommunications Act is urgently required as part of any constructive reform of national security legislation.

There is still considerable concern about the power of police and intelligence agencies to intercept communications, an area not addressed in the Bill. There must also be a clearer definition of what is considered to be "national security" information.

National Security isn't always in the national interest

MARK PEARSON

It is a welcome development that the Australian Government has finally moved to erase the word "sedition" from its statutes and has taken some steps through a good faith defence to reduce the chances of journalists being charged with this ancient crime when reporting the comments of others.

Instead of "sedition", a term long associated with censorship by colonialist and autocratic regimes, the words "urging violence" will be used. This would just be a symbolic measure if not for the simultaneous introduction of a new defence for either dissemination of news or current affairs.

Some might still be concerned over this change (why, for example, does it not excuse opinion and commentary?) but there are many more alarming restrictions on our reportage that will remain on the statutes regardless of whether the National Security Legislation Amendment Bill 2010 is enacted.

The reality is that the public's right to know about important matters related to their own safety and the activities of public officers entrusted with investigating national security is limited by a raft of legislation. Some of it preceded the September 2001 attacks in the United States while much of it has been extended in the decade since that incident.

Rather than frame the debate in terms of journalists' rights, it is more compelling to see this as a public safety and accountability issue.

Firstly, there is little evidence to show that federal agencies' investigations into national security have been compromised by the free flow of information to citizens via their news media. Certainly, there has been nothing to justify the post 9/11 increase in news media restrictions.

To the contrary, the media have been instrumental in assisting prosecutors in at least one case and in exposing their shortcomings in at least one other.

The first Australian to be made subject to a control order –"Jihad" Jack Thomas – won his appeal against conviction on terrorism offences in 2006 because a Federal Police interview with him in Pakistan was inadmissible. The Director of Public Prosecutions had to rely on media interviews with him on the *ABC* and in *The Age* as the basis for a retrial. (He was later acquitted on the terrorism charges and convicted of a passport offence.)

The second example was the case of Gold Coast Hospital registrar Dr Mohamed Haneef who was arrested on suspected links with UK terrorists in 2007. Only media coverage of the matter, helped partly by Haneef's lawyer's leak of the police record of interview with his client, exposed the full facts of the matter in which the charges were withdrawn and the Minister's cancellation of Dr Haneef's visa was quashed. (The leak prompted an unprofessional conduct complaint by the AFP Commissioner to the Legal Services Commission which in turn dismissed the complaint.)

These are interactions between security agencies and the media we know about. There are a few others, too, such as the AFP raid on *Canberra Times* journalist Phil Dorling's home in September 2008 after a leak of briefing papers for the defence minister, and the suppression orders in terrorism trials that have been revealed after the trial has finished.

The greater concern for journalists and their publics is over the material that cannot go into this article because it may be suppressed or censored. Material still subject to suppression orders from various terrorism trials cannot be mentioned, of course. Neither can some security information of which journalists may be aware but are prevented from publishing at risk of imprisonment. An example is operational information relating to an ASIO warrant under s.34ZS of the *Australian Security Intelligence Organisation Act 1979*, preventing anyone discussing an ASIO arrest for up to two years after it has happened. Journalists wanting to report this in a more newsworthy timeframe can face five years in jail.

Add to this the extended detention and questioning powers of federal agencies, their surveillance and seizure powers, and the continued immunity of national security matters from reformed FOI laws, and the symbolic elimination of the word "sedition" can be seen in better perspective.

True reform would inject a public interest or good faith defence into every one of the national security laws impacting upon the work of journalists so that Australian citizens can be sure they are being fully informed about potential threats and the performance of the public servants being paid to protect them.

Dr Mark Pearson is professor of journalism at Bond University, author of The Journalist's Guide to Media Law *(Allen & Unwin), and Australian correspondent for Reporters Sans Frontieres*

CENSORSHIP

In January this year the NSW Government announced it would remove the "artistic defence" from sections of the *NSW Crimes Act* concerning child pornography. The news has divided the media – with some arguing that the move would be de facto censorship, while others believe that it would provide a useful clarification of the line between pornography and art.[41]

The announcement, which followed the controversy over the work of photographer Bill Henson last year, has been greeted with dismay by the arts community who feel that the motivation behind creating a work of art will not be given sufficient weight, particularly in a situation inflamed by media and public sentiment as it was with the Henson case in 2009.

Writing in the *Sydney Morning Herald*, barrister Charles Waterstreet noted: "Under the Commonwealth Criminal Code, 'the literary, artistic or educational merit [if any] of the material' is just a factor in deciding if material is child pornography. It allows for expert evidence to be given on the issue. The proposed state laws would take away the defence of artistic merit and replace it with visions that suggest such intent and pursuits can be taken into account in deciding if the material is child pornography."[42]

It is with regard to the prevention of the spread of child pornography, among other material deemed to be unhealthy and possibly risky, that the Minister for Broadband, Stephen Conroy, has proposed the introduction of a mandatory internet filter, imposed at ISP level.

His proposal for new legislation, which was due to be introduced into Parliament in March but has been delayed, aims to block material "refused classification". Internet Service Providers will not be able to opt out.

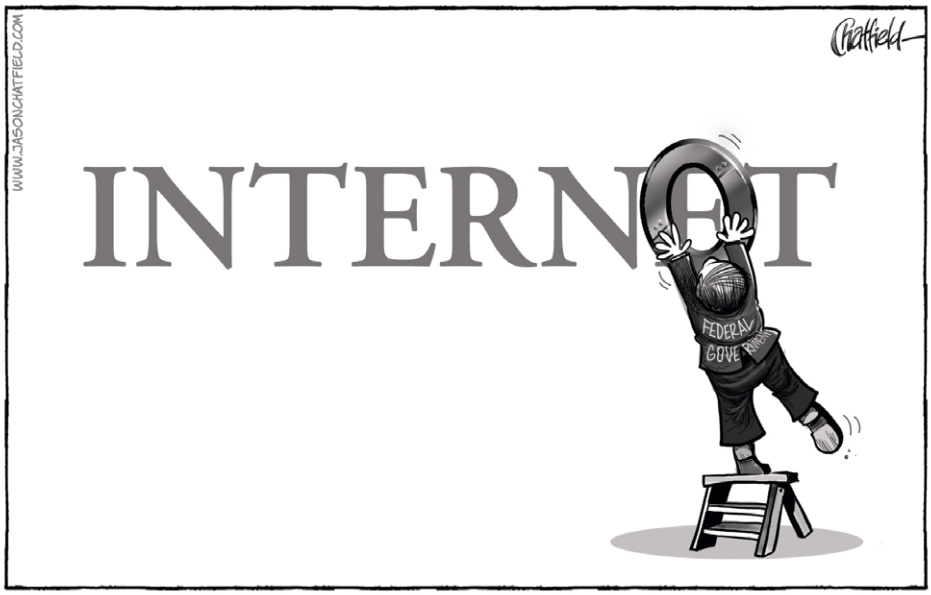
The proposal has led to a storm of protest from technology companies, internet user associations and civil liberties groups. It has led to Australia being placed on a "watchlist" of countries deemed by Reporters Without Borders to be "Internet Enemies". Mr Conroy himself was awarded the "Internet Villain of the Year" by the Internet Service Providers' Association in Britain.

The plan has also been criticised by Google, Yahoo!, SAGE, Save the Children and *Choice Magazine*. Former High Court judge Michael Kirby said he feared the filter would be "the thin end of the wedge of the Government moving into regulating the actual internet itself", while the Shadow Treasurer, Joe Hockey, called it: "a scheme that will create the infrastructure for government censorship on a broader scale".[43]

For his part, Mr Conroy said the proposed filter would be "100 per cent accurate - no overblocking, no underblocking and no impact on speeds" and that the scheme was merely an extension of the existing classification laws applying to books, films and other media. "Why is the internet special?", he asked, saying the net was "just a communication and distribution platform ... This argument that the internet is some mystical creation that no laws should apply to, that is a recipe for anarchy and the wild west. I believe in a civil society and in a civil society people behave the same way in the physical world as they behave in the virtual world."

However there remain serious concerns that, in addition to blocking child pornography, bestiality, extreme violence and pro-rape websites, the filter could also be used to block access to sexual health discussions, euthanasia material, instructions on safer drug use and instructions in minor crimes such as graffiti, which have also been refused classification.[44]

A Google spokesperson pointed out that homosexuality was a crime in NSW until 1984. "Political and social norms change over time and benefit from intense public scrutiny and debate," he said.



Cartoon by Jason Chatfield

"Stephen Conroy was named 'internet villain of the year' by the Internet Service Providers Association in Britain"

Internet experts say internet filter ineffective pain in the RC

BERNARD KEANE

Several months on from Stephen Conroy's December announcement that the Government would be introducing legislation to impose internet censorship via a mandatory filter to block Refused Classification (RC) content, and optional filtering for "adult content", we're still waiting to see what the filter scheme will look like in detail. The Autumn Parliamentary sessions came and went without the legislation promised by the Minister, who was said to have wanted to introduce it in mid-March.

With only five sitting weeks (and only three for the Senate) before late August, the chances of a net filter bill passing this year now look poor, given election timing and the likelihood it will be referred to a Senate inquiry. The delay gives the Rudd Government – should it be returned – an opportunity to consider and address a number of problems at the heart of its proposal.

Filter ineffectiveness The Government's own filtering trial last year concluded that any "technically competent" person could bypass a filter, suggesting the filter will be more voluntary than mandatory. There is no suggestion this filter will be any more effective than filters currently available to parents from ISPs, meaning the mandatory filter will be redundant.

That's before you get to the problem of a regulator manually trying to blacklist web pages when the number of pages on the internet is more than a trillion, and, as ACMA itself admitted this year, addresses of banned content are regularly changing.

Filter unfeasibility The Government's trial found that most filters had small impacts on access speeds for users, though ones more resistant to bypassing imposed serious delays. However, the technical problem of filtering high-traffic sites like YouTube led to negotiations between YouTube's owner, Google, and the Minister about Google's willingness to participate in voluntary enforcement of the filter scheme.

These broke down in February when Google announced it would not voluntarily implement the Government's scheme. Things worsened in March when it was revealed Google had made a submission to Conroy indicating Google would make its own decisions about whether to block material subject to legal restrictions. This leaves the filtering of one of the Internet's most popular sites – where, for example, euthanasia material and RC films can be easily found – up in the air.

Filter scope Another issue raised by Google in its submission was the widely-held concern that the proposed "RC" restriction is far too wide. A running theme since Stephen Conroy became Minister is his suggestion that internet filtering is primarily about blocking access to "the worst of the worst" – invariably, child abuse material and criminal/terrorism material.

As a number of critics have pointed out, the RC classification is far wider than those areas, and embraces material such as that relating to euthanasia, legal but non-mainstream sexual practices and even scholarly material relating to the study of fundamentalist terrorism. All such material will be captured by the proposed filter. ACMA's current blacklist also captures legal, classified, "local newsagent" sexual material that doesn't have an age-based access restriction.

Conroy has done himself no favours on this issue by suggesting opponents of the filter support child pornography.

Filter implementation In addition to Google's refusal to cooperate, a series of administrative and legal questions remain to be resolved. What the process will be for identifying RC content to be blocked under the filter remains unclear. There are already multiple process relating to banned online content now: some content is illegal under the Criminal Code (for example, euthanasia-related material that "counsels suicide"); other content must be formally "Refused Classification" by the Classification Board (such as Philip Nitschke's *Peaceful Pill Handbook*, refused classification not for "counselling suicide" but for instructions on drug use); and ACMA may by itself determine on the basis of a complaint that material should be added to its blacklist.

Conroy has since said the process of "deeming" that material will be added to the filter will be similar to that under current arrangements, maintaining ACMA's significant power to blacklist material without referral to any external party.

Since the revelations of ACMA's bungling of its blacklist in 2009, including the blacklisting of anodyne sites and anti-abortion content, the Government has acknowledged that a net filter requires greater transparency and accountability, and called for submissions on the issue. How it will proceed, however, is another mystery.

Despite these problems, Conroy has refuses to concede any ground, and opinion polls suggest there is strong public support for filtering, based on concerns that children are at risk of encountering harmful material on the internet. The Federal Opposition at this time is divided on the issue, and has yet to formally indicate its position. The primary political opposition to the proposal has come from Conroy's own side – Labor backbencher Kate Lundy has committed to trying to convince her colleagues to back a formal opt-out of mandatory filtering, in line with Labor's original 2007 election commitment to "offer" an internet filter, not impose one.

Given how easy it will be to evade the filter for "technically competent" IT users, the fury coming from the online community over the filter appears hard to understand. Conroy's filter proposal may be nothing more than a populist attempt to formalise existing blacklisting and play on general community fears about what evils their children may stumble upon on the internet. Conroy's "solution" stands up only when considered without any basic understanding of online media, and is unlikely to materially inconvenience those who want "no clean feed."

However, the filter raises more serious issues. Conroy is vehement in insisting he will fight any attempt to broaden the scope of the filter beyond RC content. However, Conroy will not be Minister for Communications forever – or indeed perhaps even in 2011. Politicians of all persuasions in Australia readily respond to moral panics, frequently whipped up by the mainstream media, which regards the Internet as an unfair competitor for precious advertising dollars and audience eyeballs. Once the filter software and regulatory mechanisms are in place, history suggests they are only likely to be amended in one direction – toward greater control. Moreover, filter companies – the real beneficiaries of this policy – are working on improving the effectiveness of filters all the time. Evading a mandatory filter will become more difficult, and "better" key word filtering may encourage governments to make that mandatory as well.

Worst of all, as many of Conroy's critics and most recently Google have pointed out, a mandatory filter will afford an entirely false sense of security to parents about what their children can access on the internet. No filter, no matter how effective, will ever be a viable substitute for hands-on parenting that teaches children about responsible and safe internet use and backs that up with monitoring. If the filter will do anything, it will undermine that.

Bernard Keane is political editor of Crikey.com

Governments should not be in the business of censoring material on the internet. This must remain in the hands of the public. However increased resources should be directed to preventing those who create and distribute harmful material via the internet.

SPIN

In March 2010, an investigation of newspapers by Sydney's University of Technology revealed that news reporting is heavily influenced by the public relations industry to the extent that, in the week of September 11-15, 2009, 55 per cent of the news reports carried by Australia's major metropolitan newspapers had been driven, in one way or another, by some form of PR.

The research, conducted by UTS's Australian Centre for Independent Journalism and published in Crikey, looked at 2203 stories in 10 newspapers, including *The Australian*, the *Australian Financial Review*, the *Sydney Morning Herald, the Daily Telegraph*, *The Age*, the *Herald Sun*, *The Courier-Mail*, the *Adelaide Advertiser*, the Hobart *Mercury* and the *West Australian*[45].

The research found that, of the 10, Sydney's *Daily Telegraph* carried the highest percentage of PR-driven stories – of 178 stories examined as part of the survey, 70 per cent were found to have been driven in some way by PR. The research also found that an average of 24 per cent of stories examined involved no significant journalism work.

Stories involving technology or innovation were most likely to have been driven by PR – 77 per cent of 88 stories, followed closely by police stories (although this is likely to have been distorted by the involvement of police media units on which many journalists depend for news leads or information). Motoring, education, environment and arts stories also had a high incidence of PR involvement.

Researchers requested interviews from the editors of the newspapers under survey. Only three of the 10 editors agreed to speak with the researchers. The most outspoken was the editor-in-chief of *The Australian*, Chris Mitchell, who said he was not surprised at the level of PR involvement in Australian newspapers, but stressed he was trying to steer his reporters away from "diary-driven" content towards stories found and developed under their own steam.

"Research found that 55 per cent of news reports carried by Australia's major metropolitan newspapers had been driven by some form of PR"

However he said that the rationalisation in the numbers of journalists and the rise of the PR industry made this very difficult: "What I think you've found is all pervasive in the Australian media at the moment. It's very difficult I think, given the way resources have drifted from journalism to public relations over the past 30 years, to break away as much as you really want to. But I live in hope that over the course of my remaining time in this job I can develop the paper along the lines that more of it is its own efforts."[46]

Editors who were interviewed insisted that the involvement with public relations professionals and "news managers" had not affected the quality of their journalism. Most also said that press releases were assessed for their news value and allocated space accordingly. They also noted that the pressure, due to declining staff numbers and increasing workloads, meant that press releases had become an accepted part of the news gathering business: journalists depended on government and police media units rather than developing their own contacts.

The editor of *The Courier-Mail*, David Fagan, said that business journalists were increasingly hamstrung by ASX reporting requirements which meant that every significant piece of news regarding listed companies had to be disclosed.[47]

Cartoon by Ron Tandberg

It's the way you (don't) tell 'em

LAURA TINGLE

When the Rudd Government finally released the report of its own National Health and Hospital Reform Commission last July, the news was dominated on the day of the release with the prospect that every Australian would be guaranteed access to a GP and by the spectre of an ambitious new national dental scheme.

These particular recommendations of the report had been judiciously "dropped" to the Canberra Press Gallery the night before the report's official release. Journalists weren't going to say "no, we won't run it", since it all represented something not previously known.

But lost along the way was the most important question about Kevin Rudd's proposed health reforms: whether the government was going to proceed with its plan to take over Australia's hospitals, and if so, how it was going to do it.

Television and radio took their lead on what the story was from the newspapers. Only a few hardy journalists actually went back and looked at what else the report said. The pressure that was growing on the government to outline its health reforms was therefore, at least for a while, sidestepped.

This is one of the better examples of the way spin works in Australian politics at the moment.

There's lots of talk these days about spin and playing the media cycle.

But the real test of any bit of media manipulation is where, with the use of a judicious "drop" ahead of the release of a report, or the promotion of some new (but perhaps not centrally important fact) you can set the news agenda on any particular day.

It's not the case that journalists are getting thicker or more gullible that promotes effective spin in the political world. It's not even that governments both State and Federal now employ batteries of media and public relations consultants.

It is that we are all spinning a lot faster in general. The news cycle has sped up, the agenda has exploded, and, with it, the time in which journalists can devote to really getting in to any particular issue has shrunk.

The 24hr news cycle – and the sorts of spin seen with the way the health reform commission report was dealt with – means most issues in politics these days are one-day wonders.

You report on them, then you move on to the next issue. There are fewer dedicated roundspeople for specific policy issues on newspapers, and less tolerance, page space or on-going interest from news editors in pursuing an issue day after day.

If you opened a newspaper of 40 years ago – say *The Australian* – you might find a controversy about the cost of postage stamps the *cause celebre* in acres of news reports and commentary for at least several days if not a week.

If you opened a newspaper of 20 years ago, you might find a report of which departments were saying what in an interdepartmental committee report into an issue that everybody in Canberra knew was going to go to Federal cabinet within a few weeks.

But if you open a newspaper today, you will virtually never find anything that tells you about what internal debates have been going on in the bureaucracy about a particular issue, not even much public debate between interest groups with a view on a policy that is being formulated.

The really dangerous bit of spin is not in what the "spin doctors" tell you, it is in what they contribute to ensuring never emerges in the first place.

Public policy positions now get reported in the media as a finished product, leaving the only room for controversy at the political level as a debate between the political parties.

The days when all sorts of issues might be debated for months at a time are now largely in the past.

Consider the emissions trading scheme. It was hotly debated by all involved through most of 2009 but the Government went to extraordinary lengths to keep its internal deliberations strictly behind closed doors.

For example, once it had released its (now very rare) discussion paper – the Green Paper – the government shut down the interdepartmental committee which had helped formulate policy until that point and left just a few key agencies involved in developing the government's final position – outlined in its White Paper.

It didn't want a widespread debate internally. And it certainly wanted to contain the number of people who were in the know to stop anything leaking out.

That doesn't mean issues aren't pursued now and then. But when they are pursued, it is generally in the clean-up stages – looking back at what went wrong – rather than debating how to get something right in the first place.

Laura Tingle is the political editor of the Australian Financial Review

Pre-prepared video and audio packages

In November 2009, Edelman Asia Pacific President Alan VanderMolen told a conference in Sydney that with fewer reporters, a greater use of video and more diverse audiences, the market for pre-prepared news reports had grown considerably[48]. The use of video news reports has been growing since the mid-1990s but changes in media consumption, together with a rationalisation in the number of journalists and an expansion in news organisations' content requirements meant that packaged news was more likely to be welcomed by the news media.

This trend has its roots in the US and was used by the government to push the Bush Administration's "No Child Left Behind" campaign. It has since been condemned as "covert propaganda" by the Government Accountability Office.[49]

In Australia, according to Crikey's *Spinning the News* report, companies such as VNR, based in Sydney's Surry Hills and Media Game work for a broad range of PR agencies – Media Game boasts that "Every day we help Australia's largest corporations and PR agencies produce and deliver their message, their story, quickly and effectively to consumers, stakeholders and the media… We tell your story…. And broadcast it to the world."[50]

As the ABC's *Media Watch* noted in 2006: "These are ready made news stories that the media can run as 'news items' without doing any journalism themselves."[51]

Most recently the Commonwealth Bank used Media Game to package and publicise its $40 million financial literacy program for school children which was picked up by many regional and metropolitan radio stations and newspapers.

No more "safe harbour" defence

In April 2009 the High Court ruled that the Seven Network could not rely on Section 65a of the *Trade Practices Act* as a defence for misleading the viewers after *Today Tonight* broadcast a series of stories about the get-rich scheme Wildly Wealthy Women, which proved to be misleading.

The Australian Competition and Consumer Commission took action after the report and it was found that the stories had been arranged through a marketer who had made arrangements to receive a commission for every woman who signed up to the scheme as a result of the program.

The Federal Court found in June 2008 that Section 65a should apply, giving protection to Seven, but the ACCC successfully argued that because of the arrangement between Seven and WWW to broadcast the program, the defence should not apply.

ACCC chairman, Graeme Samuel, said in a news release: "Where publishers enter into arrangements with others and adopt their representations they risk breaching the Act and like every business must check their facts."[52]

"The news cycle has sped up, the agenda has exploded, and, with it, the time in which journalists can devote to really getting in to any particular issue has shrunk"

The increasingly successful management of news comes partly as a result of rationalisation in news organisations, which has left fewer journalists doing more work, and partly as a result of the increasing sophistication of media managers. There is also greater public awareness of "spin" at work in news reports which is harmful to the bond of trust between journalists and their audiences.

DEFAMATION AND STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION (SLAPPs)

Since the removal of a corporation's ability to sue under the *Uniform Defamation Acts* which passed into law in 2005, large corporations have increasingly been using s.52 of the *Trade Practises Act*, which prohibits "misleading or deceptive conduct in trade or commerce".

Lawyer and consultant, Bruce Donald AM, told the Walkley Foundation's Public Affairs Convention in May 2009 that, while most public issues debate is not in trade or commerce, "the lawyers are trying to stretch that boundary and the judges are helping".[53]

Under s.52, Mr Donald said, damages must be quantified and proven to have flowed from the criticism – and this is often difficult – but this has not inhibited use of the statute as damages occur late in any law suit and the risk of incurring costs is a powerful inducement to defendants to settle.

Gunns finally silent

On January 30, 2010, the six-year legal battle between Gunns and its critics has finally ended, as the timber company agreed to settle with the last four of the "Gunns20". Gunns agreed to pay costs of $155,088 to the defendants, "to avoid the need for an expensive and lengthy court case".

The case began in 2004 as an action for damages against 20 people or groups that had

Vindicated: Alec Marr, executive director of the Wilderness Society. Photograph by Jason South/*The Age*

criticised its operations including logging of native forests. The matter quickly attracted criticism from supporters of free speech who called it a prima facie case of strategic litigation to deter individuals from voicing concerns about Gunns.

Greens leader, Senator Bob Brown referred to the settlement as "a humiliating defeat" for Gunns.[54]

Victorian Greens spokesperson, Sue Pennicuik MLC, called for states and territories to adopt anti-SLAPP legislation similar to that adopted in the ACT in 2008: "Anti-SLAPP laws empower a judge to dismiss a case if he or she considers that the court is being misused for an ulterior non-legal purpose, i.e. to stop protesters from protesting", she said. "Powerful companies should not be able to use our courts to effectively silence community protest or participation in issues that affect their lives".[55]

To see who won and lost from the Gunns case, click here

Relief for reviewers

The long-running Coco Roco defamation case was finally resolved on December 18 2009 when NSW Supreme Court judge, Justice Ian Harrison, ruled that Matthew Evans' 2003 review of the Sydney restaurant Coco Roco was entirely defensible as comment.

Evans' highly unfavourable review of the harbourside restaurant was published a few weeks before the eatery went into receivership. They sued Evans and his publisher, John Fairfax Publications for defamation, and the case progressed to the High Court which found that the imputations of the review: that the proprietors sold unpalatable food at their restaurant; that they charged excessive prices; that some of the service was bad and that the proprietors were incompetent because they employed staff who made unpalatable food, were defamatory.

In the NSW Supreme Court, Fairfax successfully defended the case on the grounds that the review was an honest opinion, qualifying as comment.

During the proceedings it was necessary for Evans to take the stand to answer the question of whether he honestly held the views expressed in the review.

Lawyer and food blogger, Stephen Estcourt QC has written that the matter presents a warning for bloggers and reviewers: "Use sarcasm, much less vitriol, sparingly, if at all, and avoid snide comments and pejorative terms or terms that are unnecessarily strident or unflattering. Only that way will you avoid the suggestion that the very terms of the expression of your unfavourable opinion of the restaurant you are reviewing demonstrates that you could not hold the opinions you express honestly."[56]

Chesterton vs 2UE and John Laws

The Coco Roco matter referred to above involved the notion of "business defamation" – understood to mean that the test for "business defamation" was different from the usual application of "community standards". In other words, judges could direct juries that libel could exist even though the material "did not lower them in the eyes of right-thinking members of the community".

Former News Ltd columnist Ray Chesterton has sued radio station 2UE over remarks made by Laws on air in 2005 that Chesterton was "bombastic, beer-bellied buffoon", a "creep". He also said that Chesterton's nickname in rugby league circles was "ankles" which led to hours of debate as to the true meaning of the name and whether people did in fact refer to Chesterton with that epithet.

The High Court established that the notion of business defamation did not exist as a distinct species of the tort, and that the matter should concentrate on whether the plaintiff was able to show he had been defamed in a way that was "likely to lead the ordinary reasonable person to think the less of a plaintiff".[57]

The case continues.

The year in the law

PETER BARTLETT

Prominent courts in international jurisdictions are examining media-related decisions of Australian courts and rejecting them as being too restrictive, in that they place too much of a restraint on freedom of expression.

On example is the High Court decision in the case of *Gutnick v Dow Jones* which determined that a defamation action could be brought in a jurisdiction provided that there had been an internet "hit" in that jurisdiction. Since then, we have seen a number of courts reject or vary the High Court decision. Looking at the question of jurisdiction that was addressed in Gutnick, foreign courts such as those in the UK, Germany and Canada have looked beyond the question of whether there have been internet "hits" in the jurisdiction, looking to the number of "hits".

As another example, the House of Lords and New Zealand courts have rejected the narrow High Court defence formulated in *Lange v ABC* (which provides for a defence to defamation actions in relation to communications about "government and political matters") as being too narrow, instead favouring a broader defence for media organisations related to responsible reporting.

In addition, we have two Canadian Supreme Court decisions delivered just before Christmas that are critical of the narrow "government and political matters" defence in Lange. They have adopted a new "responsible communication public interest" defence. In my view this encourages responsible journalism.

The UK Ministry of Justice Report of the Libel Working Group was released in late March 2010. It recommends restrictions on libel tourism (where a plaintiff issues proceedings in the jurisdiction that provides them with the greatest likelihood of success), especially in relation to internet only publications. Australia could potentially receive more of these libel tourism actions unless similar steps are taken to increase the protections for media defendants.

Australia has the "multiple publication" rule, which, basically, results in us not having a limitation period for online publication, as a publication is considered to be re-published every time it is downloaded. In the UK, which also currently has the multiple publications rule, the Ministry of Justice report has recommended a single publication rule for such publications – a significant change which recognises the increasing number of online publications.

It is time for the Australian courts to review what protections are being provided to the media in other, similar jurisdictions and embrace the media's role in our community and its importance. Defences adopted in the UK and Canada go far further than the defences available under the common law or pursuant to the Uniform Defamation Act in Australia.

New media

Journalists and media lawyers alike were shocked last year by an order made by the Victorian Supreme Court against *The Age* and News Limited. The order required both organisations to take down from the internet all historical/archived articles that contained any reference to a well known crime figure who had a pending criminal trial. The order was made on the ground that the material, if read by a juror, could prejudice the trial, despite the fact that it was, essentially, "old news" that was only accessible via a deliberate search. In addition, there was the worrying observation by the Judge that once a suppression order is made, the media would be in contempt if anyone downloaded a historical online article which, although not in contempt at the time it was posted, would contravene the latest suppression order. He was of course relying on the finding in *Gutnick v Dow Jones* that every time an article is accessed, it is a new publication.

The Victorian Court of Appeal, in a two-one decision, held that the order was within the power of the court to make but it was unnecessary given that the risk of the historical material being accessed by a juror could be cured by a simple jury direction. In addition, the accessing of trial related extrinsic material by a juror is now also a criminal offence in many Australian jurisdictions. The majority of the Court of Appeal also concluded that the order was futile given that even once the two media organisations had taken down their historical articles, there were still some 500,000 articles online.

Permanent stay application

Peter Dupas is seeking a permanent stay of his re-trial for murder, on the basis that unfair publicity will prevent him from receiving a fair trial. This would be a worrying development both for the media and for the general public, which has a strong interest in ensuring that alleged criminals face trail.

Damages

The merit (in the eyes of the media) of having a cap on

The year in the law (CONTINUED)

damages in the Uniform Defamation Act was clear when Dyson Hore-Lacy SC was awarded $630,000 in compensatory and aggravated damages in March 2010. The book in question was published before the cap. The book sold only 3,400 copies earning the author close to $20,000.

As one would expect, it has been a pretty good year for plaintiffs – Dr Peter Haertsch $267,919 against Nine, David Woolcott $70,000 against Gilbert Seeger (undefended), Tony Papaconstuntinos $25,000 against Peter Holmes a Court, Tony Simeone and ors $200,000 against Robert Walker and ors, Michelina Greig $200,000 against WIN, Peter Mohammod $240,000 against Seven, Jennie Ryan $80,000 against Rajaratnam Premachandran.

Online

There are an increasing number of decisions relating to online publications and publications by email – David Woolcott ($70,000), Jennie Ryan ($80,000), Tony Simeone ($200,000).

How many caps?

The Victorian Court of Appeal decided in *Buckley v Herald & Weekly Times* that the plaintiff was entitled to issue separate proceedings over separate publications and was thus entitled to the potential benefit of two statutory caps on compensatory damages.

Social Media

Serving documents on Facebook: Although the growth of websites such as Facebook present many challenges to the law, in 2009 the courts moved with the times, finding a practical use for the popular social network – serving court documents. In situations where a defendant cannot be found any other way, Australian courts are allowing court documents to be served via Facebook.

Preliminary discovery applications may discover the identity of people posting defamatory material on the internet using pseudonyms. DataMotion Asia Pacific successfully ascertained the identity of a blogger and won an award of damages in Western Australia.

A tale of two cities

With due respect to those readers outside of NSW and Victoria, I think it is worthwhile pointing out how media law seen in those two States is moving further apart.

1) Open Justice: Victoria allows the media to search court files. NSW does not. Under a new law announced in NSW, court officials could face jail terms of up to two years or fines up to $11,000 if they disclose material to the media.
2) Suppression orders: As a NSW Supreme Court Judge observed, this is not a national problem, it is a Victorian problem. 288 suppression orders were made in Victoria in 2008 and nearly 300 last year. There are some 1,200 active orders.

   This creates a minefield for the media in Victoria and denies the public a not insignificant amount of information regarding what is taking place in the courts.

   All too often orders refer to pseudonyms for the accused or witnesses, without any guidance to the media as to who those people are (thereby making it difficult for the media to know who the orders relate to). Orders often do not have an expiry date and are often made even though there is already legislation in place that protects the information or the person that is the subject of the suppression order, for example the identity of victims of sexual assault is protected by legislation.

   The Standing Committee of Attorneys General is looking at a national register of suppression orders. That is a positive step. Such a register needs to be accessible to the media with a user friendly search facility. The full text of the order needs to be on the database and the person known as witness R or accused N needs to be identifiable.

   NSW has introduced a Court Suppression Bill which provides that in deciding whether to make a suppression order, a court must take into account that the primary objective of the administration of justice is to safeguard the public interest in open justice. This is a positive step for media interests.

   In the three days prior to submitting the article for publication, nine suppression orders from Victoria came across my desk. Two in the Magistrates Court, six in the County Court and one in the Supreme Court. Four were blanket suppressions on the proceedings, two prevented the publication of the accused under the Serious Sex Offenders Act and one under Crimes Mental Impairment and Fitness to be Tried Act.

   Two use pseudonyms, with no indication who they were referring to. One prevented the identification of the accused and witnesses and one prevented a report of the current charges which link the accused to any offences committed by him whilst he was a child.

   At least with that last order, the media know they could not run such a report.
3) Contempt: In the aftermath of Melbourne's gangland war, the *Herald Sun* and the Nine Network were fined $25,000 and $15,000 respectively for breaching suppression orders prohibiting the identification of six witnesses in the gangland trials. Otherwise it was a quiet year for contempt prosecutions in Australia.
4) Proceedings: The defamation capital of Australia continues to be Sydney. The media has been served with a large number of claims under the Uniform Defamation Act. In contrast, the number of actions issued in Victoria has fallen. One wonders why.

Media successes

It was a reasonably good year for the media in contesting various actions. Fairfax was successful in the Gacic Coco Roco restaurant review case relating to a fair comment defence, Nationwide News in the Macquarie Bank case, Fairfax successfully avoided an injunction over allegations of improper activity on Sydney's waterfront, the ABC in a claim brought by Bruce Hall, Nationwide News against Daniel Sedden (a.k.a Captain Dragan), Nationwide News against Archer Field (over a report on a hotel), Seven Adelaide and ABC against Derick Sands (the former boyfriend of an MP) and 2GB against Muslim community leader Keysar Trad.

Sources

New Idea was ordered to disclose the source of a story on Bec Hewitt, again bringing the issue of source protection to the fore. Another challenge is before the courts as this report goes to press. *The Australian*'s Cameron Stewart is attempting to protect one of the sources for his Gold Quill winning article on police raids over alleged terrorism offences.

Corporations

As expected, companies are looking at taking action in injurious falsehood and misleading and deceptive conduct, now that they cannot sue for defamation. Metcash Trading Limited was able

The year in the law (CONTINUED)

▶ to obtain an injunction against Peter Bunn in the Federal Court on this basis.

Privacy

The Australian Law Reform Commission and the NSW Law Reform Commission have recommended the introduction of a statutory tort of privacy. In circumstances where the State and Territory borders are basically irrelevant to the media and online publications, such a law in one State or Territory would be a significant restraint on freedom of expression throughout the country. The Australian government has not as yet made a decision on the recommendations.

The Victorian Court of Appeal in *Giller v Procopets* followed recent UK decisions in extending the right to damages for "mere distress" caused by breach of confidence, thereby obviating the need to determine the matter on privacy grounds.

Over the last 12 months there have been a number of embarrassing breaches of privacy by the media. That said, I am still of the view that a statutory or common law tort of privacy would be equivalent to cracking a nut with a sledgehammer and would greatly increase the exposure of the media to legal actions.

Conclusion

Another challenging year for the media. Another challenging year for media lawyers.

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COPYRIGHT

Two legal judgements over the past year in the copyright arena have given cause for both comfort and alarm.

1) In February, the Federal Court ruled that the pop group, Men at Work, had plagiarised part of their worldwide 1980s hit "Down Under", using a famous riff from the 1930s classic "Kookaburra Sits in the Old Gum Tree".

   Copyright owners Larrikin Music took Sony BMG and EMI to court in 2007 for copyright infringement demanding compensation from Down Under songwriters Colin Hay and Ron Strykert.

   Justice Jacobson further found that such replication was more than just a mere coincidence. He held that "Down Under" reproduced a substantial part of "Kookaburra" and did not consider the flute riff to be trivial in either a qualitative or quantitative sense.

   The percentage of past royalties income from "Down Under" to be paid Larrikin has not been determined yet. Larrikin claims it is entitled to up to 60 per cent. Justice Jacobson emphasized that his findings so far do not amount to a conclusion that the flute riff is a substantial part of "Down Under" or that it is the "hook" of the infringing song.[58]

   Larrikin claims it is entitled to up to 60 per cent of past royalties from the song.

2) Meanwhile in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*, the Federal Court found that ISP iiNet was not responsible for the infringement of the *Copyright Act 1968* (Cth) (Copyright Act) as a result of its users downloading material and sharing television show episodes and films using the peer-to-peer protocol BitTorrent.[59]

   The studios argued that because of notices sent to iiNet, the ISP knew about – or reasonably suspected – that its users were illegally infringing copyright and could have taken stops to discourage this by either warning users, narrowing the bandwidths available or by terminating the accounts of repeat offenders, none of which it had done.

   In its turn, iiNet argued that under section 112E of the Copyright Act, it is a carriage service provider that is "merely providing facilities" which its customers have allegedly used to infringe copyright.

   Previous cases (the music industry's successful

Lost copyright case: Men at Work's Colin Hay. Photograph by Simon Alekna/ *Sydney Morning Herald*

Cartoon by Alan Moir

action for illegal music file sharing in *Universal Music Australia Pty Ltd & Ors v Sharman License Holdings Ltd & Ors* (2005) 220 ALR 1; (2005) 65 IPR 289 (the *Kazaa* decision) had found the ISPs were aware of and/or actively encouraged file-sharing from their sites.

However iiNet argued it did not have any power to prevent infringing conduct and it derived no commercial advantage from its users downloading and file-sharing.

Justice Cowdroy noted that while iiNet had knowledge of infringing conduct and did not stop that conduct, iiNet's conduct fell short of authorisation of copyright infringement. He further commented that simply because copyright infringement does occur on a very large scale on the Internet, this was not a reason to impose authorisation liability on an ISP.

Announcing it would appeal the judgement, Australian Federation Against Copyright Theft (AFACT) executive director, Neil Gane, said "If this decision stands, the ISPs have all the protection without any of the responsibility."

The Alliance believes that copyright theft and internet piracy is a serious problem for Australia's creative sector resulting in the loss of millions of dollars for creative industries.

Our public broadcaster: The ABC and SBS

QUENTIN DEMPSTER

The public broadcasters; ABC and SBS, are now moving within funding constraints to expand their services in free-to-air digital multi-channelling.

For the ABC this means an expansion of its journalism through a 24hr continuous news channel, scheduled to begin broadcasting from mid-2010. For the first time in many years, the ABC is hiring journalists and producers.

In the May 2009 federal budget the ABC was allocated an additional $165 million over three years, said by the ABC Board to be the single largest funding increase since incorporation in 1983.

The major point to note is that although this new money is already ear-marked, the lift in operational base funding will be re-current. The uplift came in the teeth of the GFC. Many at the public broadcasters were frightened the Rudd government would use the GFC as an excuse to leave the ABC withering on the vine.

But in its second budget since coming to office in 2007 the Rudd government has, for the first time, addressed the downward trend in operational base funding through the Hawke/Keating (1983-1996) and Howard/Costello (1996-2007) years. Both these political regimes held public broadcasting and its contribution to Australia in barely disguised contempt while accommodating the policy demands of the media mates, Rupert Murdoch and Kerry Packer (now deceased).

The bulk of the ABC money will go to outsourced drama, a new digital children's channel and regional and local multi-media content. Significantly the 24hr continuous news channel is said by the management to be funded not from this new money but by savings derived from new technology and associated work practice efficiencies.

This is code for redundancies and job attrition, collateral human displacement caused by incoming computer-screen desktop editing required from retrained journalists and studio automation. Understandably the technological survivors are demanding a pay rise for the greater increased workload which has come with multi-skilling on the ABC's multi-platforms.

SBS did not fare comparatively as well as the ABC in the 2009 budget, receiving only $20 million over three years. Like the ABC, SBS has moved to digital multi-channelling, but remains very limited in any new content it can create.

In the fallout from SBS's underfunding, the strategy of the (Carla) Zampatti Board to develop SBS as a so called "hybrid" model was revealed to be a mistake. Not only has SBS alienated its once loyal audience through incessant, low rent, ads now breaking into foreign movies, documentaries and news, current affairs and general programming, its crass commerciality distracts from its charter purpose: to give ethnic minorities a sense of welcome and inclusiveness in "Aussie" society and democracy.

With the Rudd government's projection that Australia's population will build to 36 million by 2050, largely through immigration, the need for SBS as a genuine public broadcaster enhancing cohesion in what is now a polyglot Australia should be emphasised.

Instead the Zampatti board has been trying to turn SBS into Australia's fourth commercial TV channel. Public broadcasters hope that with Ms Zampatti's departure, the new chairman Joe Skrzynski will see the board's strategic error and implement urgent reforms. SBS is a great Australian invention and sometimes a risk-taking program maker with ground-breaking, courageous journalism and documentary. It can fill the gaps often left by a complacent ABC and inspire new creativity. But its commerciality now directly threatens its survival.

It's our ABC: Maurice Newman with Liberal Senator Helen Coonan shortly after Mr Newman was appointed as ABC chairman. Photograph by Natalie Boog/ *Sydney Morning Herald*

Hybridism has destroyed the political support and *raison d'être* of public broadcasting in New Zealand and Canada. The commercial networks have a strong case to make when they complain about public broadcasters treading on their territory. With the digital and multi-channel revolution and the consequent fragmentation of the advertising market, the private sector is entitled to ask the government to get SBS out of their commercial turf where they are battling for advertising cash flow.

SBS must be saved. Until the Skrzynski board changes strategic course all public broadcasting supporters in Australia must join together to campaign for a non-commercial SBS, committed to its multi-cultural charter.

The ABC is under attack from the subscription television industry (Foxtel and Austar) over its continuous news ambitions. This is a bit rich from a sector which has had ten years to build its business and more than recover its capital investment. Only recently has the FTA industry – the commercial TV networks, the ABC and SBS – been able to extend multi-channelling mainstream output. For nine years, the Howard Government by regulation constrained FTA multi-channelling even though, since 2001, the industry has been required to simulcast in analog and digital.

The ABC's continuous news channel is a logical extension of existing services through digital technology. It will not take advertising or sponsorship. It is analogous to ABC News Radio started in the early 1990s when it was realised that ABC news producers could take any audio collected domestically and internationally by the ABC's journalists and work it hard into a continuous news service.

While there was internal scepticism about News Radio when it started it is now a permanent feature of public broadcasting services, having found a solid and appreciative audience mainly among those citizens on the move in their cars, trucks, vans and tractors around Australia.

Sky News, the Foxtel news channel, has complained about the ABC's ambitions in continuous news. It is important that Sky News survives in the interests of a diversity of news sources available to the Australian people. It remains to be seen if ▶

Our public broadcaster: The ABC and SBS (CONTINUED)

▶ the ABC's effort emerges as an audience-depleting threat to Sky's offerings on Foxtel and Austar.

At the moment there is a concern within about exactly what the ABC can offer by way of distinctive programming on its continuous news channel. Public broadcasters want it to be more than just ambulance chasing.

Groupthink

Recently ABC chairman Maurice Newman warned of the dangers of "groupthink" by journalists (not just those from the ABC) on the issue of climate change. In the process Mr Newman has declared that he is a "climate change agnostic". He counsels agnosticism in the practice of journalism.

This is revealing and goes to the issue of editorial judgment, on which objective journalism is based. Journalism's primary function is to tell the public what is really going on – not what an individual, government, corporation or its agents may insist is the truth. Journalism is therefore much more than reporting both "sides" of a debate, conflict or discussion.

Journalism at its core digs for, finds and reports evidence. Clause 1 of the Media Alliance Code of Ethics sets the standard for the publication of any evidence: *Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis.*

In climate change coverage it is true that journalists necessarily report the probative and alarming evidence researched and compiled by scientists, analysts and climatologists commissioned by government (Stern, Garnaut , IPCC, CSIRO and the Bureau of Meteorology among others).

It is true that governments have been known to deceive. Perhaps the best recent example of this was the UK, US and Australian confabulation of WMD intelligence prior to the invasion of Iraq.

Self-censorship and gullibility may afflict some journalists, but the robust culture of journalism is well-established internationally, now with an enhanced instantaneous impact through the digital revolution. This helps to ensure that contrary evidence, however shattering to any groupthink pushed by government, does get out.

It may take time. It may take courageous informants. Another example of this was the 2004 Abu Ghraib torture photographs exposed by *60 Minutes* (US) and journalist Seymour Hersh of the *New Yorker* which shattered American righteousness post 9/11.

In the climate change context, if there is evidence of scientific fraud in the compilation of data, the public has a right to know about it. Maurice Newman has urged ABC journalists to reenergise the spirit of enquiry, to be dynamic and challenging, to look for contrary views and the maverick voice.

All good stuff in the practice of journalism. But his invocation of "agnosticism" in that practice could, if implemented in editorial guidelines, breach the ABC Act's obligation on the broadcaster to report news and information "according to the recognised standards of objective journalism".

"Objective journalism" requires editorial judgements to be made on the basis of all available, essential evidence/facts, however unpalatable that may be. Agnosticism in the practice of journalism would let journalists off having to make intellectually honest news value judgements. Evidence/facts could be ignored with a consequent distortion of emphasis. Thus, agnosticism would defeat journalism.

To help us understand where he is coming from, Mr Newman told ABC leaders of his formative experience with Australian journalism and the media in his years as a young securities analyst (stockbrokers Bain and Co): "I would puzzle why the Bonds, Skases, Rivkins, Judges et al could ever have been seen for other than what they were. I concluded that these adulatory waves of uncritical group-think came easily for journalists who were spoon fed exclusive stories, lavishly entertained and given other incentives by these corporate wizards. It encouraged laziness and a lack of critical enquiry. Group-think so limits curiosity that instead of fresh thinking, it encourages the same stale orthodoxies and superficial stereotypes".

Mr Newman's point appeared well-intentioned and well made. Finance journalists at the time of the 1980s covering the entrepreneurs Bond, Skase and Judge did have to take a hard look at themselves. Ethical standards and their practical application were reviewed across the Australian media and finance journalism in particular.

The same critical re-assessment occurred in police rounds coverage in the 1980s when it was revealed that police reporters were often captured by their corrupt police informants. They now teach about these pitfalls in all the journalism schools.

If Mr Newman was implying a "groupthink" culture exists within the ABC, perhaps he could reflect on the broadcaster's reporting of Australian business and corruption from the 1980s. In 1989 the ABC's *Four Corners*, through Paul Barry's *Bondy's Bounty,* tracked the Bond group's money trail to a shed in the Cook Islands tax haven, to identify the international headquarters of Bond's Dallhold Investments.

An enraged Alan Bond famously stomped on Barry's business card while his supporters denounced the ABC as anti-business and run by a "socialist collective".

It would be interesting to know exactly what Maurice Newman (who later became chairman of the Australian Securities Exchange) did at the time of Bond, Skase and Judge to alert and warn investors and (gullible) journalists about the activities and methods of these once-admired Australians.

If he had any evidence or reasonable suspicion of malfeasance his first duty would be to warn the NCSC (now ASIC) ... or the police or, perhaps, the investing public through an investigative finance journalist. Through the code of ethics, his confidentiality as a source and his future employability could be protected, if necessary. How did Mr Newman, as a securities insider, act on his suspicions?

Journalists across Australia must be hoping that this influential company director, philanthropist and university chancellor will now join us in the front line of our campaigns for shield laws for journalists, press freedom and the right to know.

His helpful observations about groupthink on climate change should be seriously addressed by all journalists.

Another question arising from Maurice Newman's contribution: Which credible critic of global warming science does Mr Newman suggest has not been covered by the ABC or the Australian media? Which whistleblower could help journalists expose a global inter-governmental conspiracy to deceive the public?

Do not wait for groupthink, fuelled by official propaganda about humanity's survival on the planet to drive the world into the very expensive transition to a low carbon economy.

In the name of cost containment, do not sit on the fence. Please, Mr Chairman, speak up.

Quentin Dempster, an ABC journalist, is chairman of the Walkley Advisory Board

Cartoon by David Pope

ATTACKS ON JOURNALISTS, THREATS AND INTIMIDATION

In May 2009, a car belonging to John Mort, a senior reporter for the Perth bureau of *A Current Affair*, was firebombed outside his home. Mort said he believed the attack was probably linked to either stories concerning the illegal activities of West Australian motorbike gangs or other crime figures he had reported on. The incident is being investigated by the WA gang crime squad.

In June 2009, *Daily Telegraph* photographer, Bill Hearne, and two cameramen were set upon by three men in Five Dock, Sydney. One of the cameramen was taken to hospital for scans after being hit in the face by a torch. Police arrested one of the alleged assailants.

In July 2009 an Indian reporter working on *Four Corners* was attacked after she went undercover to report on immigration scams. The reporter, who has not been identified, told ABC News that she had received threats during the making of the program. The attack occurred near the ABC studios in the inner-Sydney suburb of Ultimo but the exact time and location have not been made public. *Four Corners* supervising producer Mark Bannerman said a direct link between telephone threats received by the reporter and the assault had not been confirmed but it would be "too great a coincidence" for them to be unrelated. The Indian media reported the incident as a racist attack, part of a wave of such attacks on Indian students, but the reporter has denied this. "I know it was not a racially motivated attack... It was absolutely not. My attacker looked like an Indian person and I was threatened in Hindi," she told *The Australian* newspaper.

The same month, *Today Tonight* reporter, Damien Hansen, was allegedly attacked while reporting on a family squatting in a Gold Coast mansion. The reporter was left with facial injuries after the attack – footage of the incident, in which a camera was also allegedly damaged, appears to bear this out. An 18-year-old man was arrested and charged with assault occasioning bodily harm and damage.

In August 2009 a TV soundman was injured in an affray outside Melbourne Magistrates Court, where five men were appearing charged with terrorism-related

offences. The ABC journalist was allegedly pushed to the ground by an assailant who is believed to be a supporter of one of the defendants.

The Alliance believes that such attacks on journalists in the course of their legitimate duties represent a risk to freedom of the press in Australia. The authorities should pursue criminal sanctions against the perpetrators of such attacks to make it clear that the community will not tolerate such behaviour.

PRESS FREEDOM IN NEW ZEALAND

In New Zealand two significant reviews are under way into pieces of legislation which have an impact on the work journalists do.

The New Zealand Law Commission is reviewing the Official Information Act and the Privacy Act. Both can be problematic for journalists.

In the case of the Privacy Act the Law Commission is looking at what changes should be made to the law, including making changes to the powers and functions of the Privacy Commissioner. For example, it has raised the option of giving the Privacy Commissioner the power to audit the way agencies handle personal information.

Another option it is considering is to give the commissioner the power to issue enforcement notices if the Privacy Commissioner considers that an agency is in breach of the Privacy Act.

Genuine privacy concerns are legitimate but they can also run hard up against freedom of information concerns.

That was a key part of the message from the Media Freedom Committee, which represents newspaper editors and broadcasters, in its submission to the Law Commission.

It argues the ability of the news media to inquire without fear or favour into all aspects of society and those who run it should remain as unfettered as possible.

"There are also still too many legitimate grounds, in journalists' eyes, for not releasing information"

The committee is particularly concerned about giving politicians greater power in determining privacy issues, saying decisions about what is in the public interest should be made by the mainstream media, not by those who would seek to restrict its activity.

The submission points out that every day journalists intrude on someone's privacy, but that this is a matter of definition and depends on who is defining privacy.

It gave a series of examples of where the use of the existing Privacy Act impeded news gathering. In one case the *Waikato Times* visited a kindergarten to do a "feel good" story on teachers working extra hours for the good of their children. The paper, however, was refused permission to photograph any children. The photographer was told that under the Privacy Act he needed to get the permission of each child's parent or caregiver. The story was abandoned.

The Media Freedom Committee also states clearly it would resist any new legislation aimed at preventing intrusion of privacy, unless a newsworthiness exemption is also introduced.

In a second and related review the Law Commission is looking at the Official Information Act and relevant parts of the Local Government Official Information and Meetings Acts.

For journalists the laws have led to more openness about official information. But worries still remain. Officials can, and often do, delay the release of information. There are also still too many legitimate grounds, in journalists' eyes, for not releasing information.

Most officials still start from the premise of withholding as much as possible. That said, it is clear official information is now more freely available and accessible than it was a few decades ago.

In its submission on this review the Media Freedom Committee argues the public interest is often not given enough weight by public servants considering a request under the Act. It also recommends the underlying principle of openness should be strengthened. At the moment requests can be refused if there is "good reason" not to release the information. The committee has suggested the wording should be changed to "exceptional reason".

It also wants the removal of the excuse that to release information would harm "free and frank expression" of views by public servants. It says the reason is overused and not justified.

Many requests to government departments or ministries are also routinely transferred to the minister's office for sign-off. The Media Freedom Committee says this practice adds a political dimension to the request and should stop.

And the committee complains too often privacy issues are cited for not releasing information.

Finally, the committee says the Parliamentary Service, the House of Representatives, the

Officer of the Clerk, the Speaker's Office, Parliamentary Counsel and the courts should all be subject to the Official Information Act. At the moment all those bodies are exempt from the Act.

In the case of this review the Law Commission has stopped taking submissions. It is due to publish an issues paper in the next month or two. It will then seek further comment before making its final recommendations to the Government.

The review of the Privacy Act is still accepting submissions but will follow a similar procedure to the Official Information Act review. It will then be up to the Government to act on the recommendations it receives on both Acts and in all likelihood introduce amendments to existing legislation.

It is still an open question whether changes to both laws will strengthen or dilute press freedom principles.

Brent Edwards is political editor for Radio New Zealand and convenor of the EPMU's print and media council

PRESS FREEDOM IN THE ASIA-PACIFIC REGION

Several serious new threats to journalists and the work they do have developed in our region during the past year. The most notorious incident was the murder of 32 media workers in the Maguindanao province of the Philippines on November 23, 2009. In Fiji, where the interim military government of Commodore Frank Bainimarama has clamped down on the media over the past two years, deporting two Australian editors of Fijian newspapers and installing censors in newsrooms, the government released a Draft Media Decree in April which effectively enshrines this repression in law.

Thailand's political uncertainty has again spilled over into violence. Japanese journalist Hiroyuki Muramoto, a cameraman for Reuters – who had worked with the ABC in the 1990s – was killed and freelance photographer Winnai Ditthajorn, who was working for Australia's *ABC News*, was wounded in Bangkok on 10 April while covering anti-Government demonstrations that left more than 20 people dead.

The ABC was forced to temporarily close its Bangkok bureau after screening a report critical of the Thai royal family. Bangkok correspondent, Eric Campbell, has left Thailand rather than be exposed to the country's controversial *lese majeste* law and a possible 18 years in prison.

An IFJ report, released in January, revealed the extent of government censorship of the media which imposed 62 banning orders among hundreds of other directives and regulations.

In Sri Lanka, in the aftermath of the long and bitter war between the central government and the Liberation Tigers of Tamil Eelam, many journalists have been forced to flee the country and several have been kidnapped or murdered.

Philippines

Philippines has long been a dangerous place to be a journalist – 136 journalists or media workers have been killed in the course of their work since 1986, 100 of them during the administration of President Gloria Macapagal Arroyo.

The November 23 atrocity took place against a background of unrest as Philippines prepared for the national elections of May 2010. The murdered media workers were accompanying a convoy of family and supporters of a candidate for a local gubernatorial post when it was ambushed by gunmen and taken to a pre-prepared execution site and murdered. Some 57 bodies have been recovered from the site.

Six members of the rival Ampatuan clan, including Andal Ampatuan Jnr, the son of local warlord Andal Ampatuan, have been detained and four have been charged with the murders. However there have been allegations of threats and bribery to dissuade witnesses from giving evidence in the trial.

The International Federation of Journalists led an International Solidarity Mission to the province in December 2009 and released a report, *Massacre in the Philippines, International Solidarity Mission Assessment, December 2009* , which made the following recommendations:

- The Government and local authorities must undertake all necessary measures to fully investigate the massacre and to ensure all evidence is properly preserved and available;
- The Government and local authorities must provide all necessary measures for the protection and safety of witnesses, investigators, prosecutors, lawyers and judges;
- Families must be provided with legal support to pursue the prosecution of perpetrators;
- Observers and human rights groups must have full open access to legal proceedings;
- The Government is urged not to reimpose martial law ahead of the May 10 elections.

Andal Ampatuan Jr, who is accused of leading the massacre, talks to his lawyer from his cell at National Bureau of Investigation headquarters in Manila. Photograph by Dondi Tawato/Dateline Philippines.

Justice on trial in Philippines killing fields

RUTH POLLARD

Born out of decades of escalating clan violence, entrenched corruption and political kickbacks, the massacre of 58 people including 32 journalists and media workers in the Philippines on November 23 last year sent shockwaves around the world.

Its premeditated nature – with an excavator on hand to bury the bodies and cars – was chilling, the culmination of decades of impunity.

A blow to democracy and free media in the Philippines, the massacre also underlined the terrible dangers that Filipino journalists face just doing their job, elevating the Philippines to the top of the list of the world's most dangerous places for journalists. Since 1986, 136 journalists have met violent deaths, and their killers – particularly those who organised the hits – have rarely been brought to justice.

More than four months after the Ampatuan Town massacre, which targeted rival politician Ismael "Toto" Mangudadatu's election convoy, killing his wife and sister and other supporters along with the journalists travelling with them and six members of the public, the wheels of justice continue to turn slowly.

One principal suspect – Andal Ampatuan Jnr, a former local mayor and the son of Maguindanao's governor, Andal Ampatuan Snr – has been charged with mass murder. Prosecutors have filed an indictment against his father and 195 others, mostly former government-armed militiamen and 63 police allegedly loyal to the Ampatuan clan.

The Ampatuans, who have been close political allies of the president, Gloria Macapagal Arroyo, have denied any involvement in the massacre.

"The judicial process has been painstakingly slow considering that this is one of the worst crimes in the Philippines in recent years and also the worst single attack on journalists," says Nestor Burgos Jr, chairman of the National Union of Journalists of the Philippines.

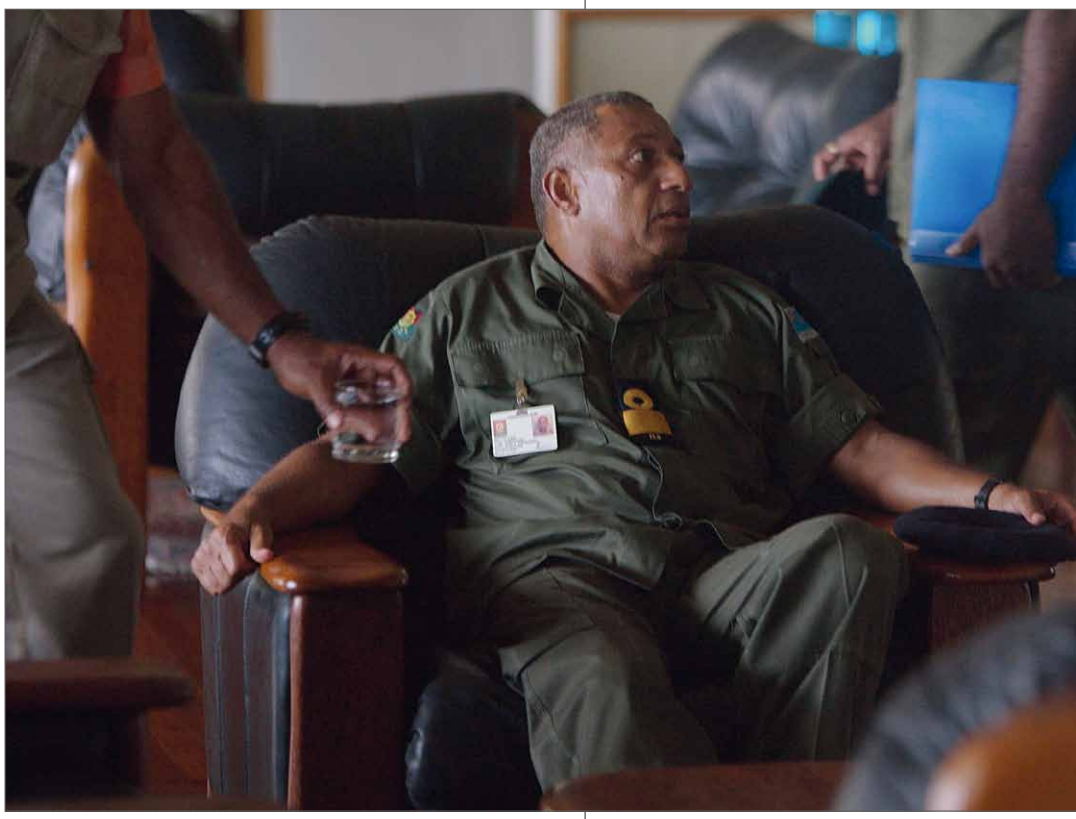
The delaying tactics – including multiple motions filed by Ampatuan's lawyers – are common to the Philippine judicial process and made worse by the lack of judges to handle cases, Burgos says.

"Coupled with reports of attempted bribes and threats, this could be part of plan to give time to the defence until the witnesses or complainants back out or accept settlements."

The Ampatuan clan remains a powerful force in the Philippines, and that, combined with the fact that not all those responsible for the massacre have been arrested, has left many witnesses, as well as the families and colleagues of the victims, living in constant fear, he says.

Fiji

On April 7, 2010 the IFJ obtained a copy of the Draft Media Decree which delivered to media stakeholders in Fiji hours before public consultations on the decree were to begin. Stakeholders were reportedly not permitted to allow copies to leave the location of the discussions. The IFJ expressed its alarm that the draft decree proposes to invest all power of interpretation over the meaning of fair, balanced and quality journalism to officers and authorities appointed by the Bainimarama regime. Aidan White, the IFJ General Secretary, said: "It is not surprising that Fiji's regime says it will drop its emergency regulations once the media decree is adopted. The decree is clearly focused on the regime retaining control and entrenching its highly oppressive restrictions, not only on the media but on members of the public who might wish to express dissenting views."[61]



Fiji's interim government led by Frank Bainimarama has installed censors in newsrooms. Photograph by Wade Laurie/ *Sydney Morning Herald*

"There have been persistent reports ... of attempts to bribe the families of the victims," Burgos says. "Until the Ampatuans and others responsible for the massacre are convicted and jailed, journalists, especially in Mindanao, will feel threatened. As the trial drags on, the culture of impunity deepens."

And although six senior Ampatuan men are behind bars, their bail denied, they remain a family of considerable means, with their wives reportedly holed up in their mansions maintaining the well-armed private armies, warned Sidney Jones, a senior advisor with the International Crisis Group.

It is also understood the Ampatuans were prepared to pay a high price for witnesses to retract their statement – one apparently received 5 million pesos to recant, Jones says.

"For most people now the real problem is protection for the witnesses," she says. "There has already been two shootings, one person killed and one guy's house was burned down, so it is a real risk for people to come forward."

Under such pressure, and in the face of such lawlessness and impunity, it is difficult for media workers to ever fully ensure their safety, despite widespread safety training throughout the Philippines and good local procedures on the ground.

Indeed, media safety consultant Chris Cobb-Smith, a member of the independent forensic team that worked with the Commission for Human Rights to examine the mass grave sites and ensure evidence was properly collected and preserved, said it was difficult to imagine how the journalists could have taken any more precautions, short of not going on the convoy.

"How can you criticise a group of journalists accompanying a legitimate political convoy [that involves] representatives of a candidate going to file papers for an upcoming election – this killing was so blatant."

In its report on the Ampatuan Town massacre, the International Federation of Journalists urged the Philippines Government to take urgent measures to protect the media personnel who witnessed the events of November 23, including the provision of a safe haven during the investigation and legal process.

The IFJ, along with the National Union of Journalists in the Philippines, is also working to ensure journalists working in Mindanao are provided with trauma counseling. A regional safety office in Mindanao was established in mid-April to provide further safety training and support for journalists.

Yet as the May 10 national election draws near and the focus turns from the Philippine's flawed judicial process to political campaigning, many to fear little will be achieved for the victims of the massacre as the issue fades from the public spotlight.

Ruth Pollard is the national president of the Media Alliance. She represented the Alliance on the IFJ's international solidarity mission to Mindanao

Independent voices doomed in press crackdown

CAMPBELL COONEY

I think we're doomed," was the unequivocal reaction of one Fiji editor when contacted for a response to the unveiling of the Fiji military government's draft media laws.

It is not a diagnosis I agree with, but I can understand why it was given. The decree envisages putting into law many of the severe curbs imposed on Fiji's media by emergency regulation after the scrapping of the country's constitution just over a year ago. It also sets out penalties no reporter or media executive can ignore.

To paraphrase coup leader, and interim Prime Minister Frank Bainimarama, the decree will lift the standard of reporting in Fiji, and help ensure balance. But invariably that statement is made in the same breath as a demand that Fiji's media work in the national interest, and be an active partner in achieving the commodore's own vision and aims.

The interim government says the decree is something the media should be glad about, as it means an end to emergency regulations, and the removal of censors from newsrooms. That is true, but only because the power to censor is now firmly in the grip of the information minister, one of the many portfolios held by the interim PM.

Commodore Bainimarama will be able to order media organisations not to run a story; that his office be given a copy of a story for preview; and if it is judged necessary, that a media organisation be shut down.

On paper, news organisations will once again be able to talk to opposition politicians and other community leaders. But the way the decree describes the need for balance raises the question that if the government will not talk, what then? Will the fact comment was sought, and refused, be enough to allow a piece to run? Or will the unavailability of an interim minister or government officer be used as a way of forcing a story on to the spike?

No media is perfect. None gets it right every time. But creating a tribunal with the power to impose fines of up to $100,000 Fiji dollars and five years' jail if you get it wrong, appears to have less to do with improving standards, and more to do with engendering fear of being judged wrong. A penalty like that is enough to scare anyone, and I know many Fijian reporters and editors will take it into account when doing their job. I do not blame them. It is easy for us in Australia and elsewhere to say to them, "be brave". But such penalties are not to be ignored, and the decree makes it clear if you are found guilty, there is little avenue of appeal, either in the courts or elsewhere.

Campbell Cooney is the ABC's pacific correspondent for Radio Australia, where he works as part of the Asia Pacific News Centre. Since the 2006 Coup Campbell has reported extensively on developments in Fiji, and the actions of its military backed regime. His reporting includes numerous trips to the island nation since the coup

THE ALLIANCE SAFETY AND SOLIDARITY FUND

Media Safety and Solidarity is a fund supported by donations from Australian journalists and media personnel to assist colleagues in the Asia-Pacific region through times of emergency, war and hardship. Established in 2005 and administered through the Asia-Pacific office of the International Federation of Journalists in collaboration with the Alliance and Media Safety and Solidarity board, the fund is a unique and tangible product of strong inter-regional comradeship. It is entirely funded by journalists to aid their colleagues who work in less privileged circumstances.

Philippines:

The massacre of 32 media personnel, among a group of 58 in the southern Philippines on November 23, 2009 is the world's worst single atrocity committed against the media in living memory. The Fund is now working with local newspapers in the Philippines to provide financial assistance to the families of all slain journalists, including those killed in Maguindanao, to enable their children receive a full year of education. To date, the number of children under this support program numbers 82.

Nepal:

Nepal's transition to democracy since a violent coup in 2005 has been nurtured by the hard work of the independent journalism community and journalists' organisations. This transition has come at great personal sacrifice to Nepal's media community, with more than 25 journalists killed or disappeared since 2001. More than 75 children of journalists have lost one of their parents, and their families struggle to sustain their livelihoods. Media Safety and Solidarity has committed to support a long-term program to fund the schooling and educational needs of all children of killed journalists through to adulthood – a projected commitment of at least 20 years.

Sri Lanka:

Media Safety and Solidarity continues to provide emergency financial assistance to journalists leaving Sri Lanka either temporarily or permanently. Funds from Media Safety and Solidarity have enabled them to purchase emergency flights, cover the costs of visas and administration fees, contribute to living costs while in temporary exile, and start-up costs as they begin their new lives, as well as to support their families who remain in Sri Lanka.

Pakistan:

Intense conflict between Pakistan's military and insurgent groups in the country's north-west in May 2009 forced an exodus of hundreds of thousands of people. Among the internally displaced were up to 160 media personnel and their families. Media Safety and Solidarity provided an emergency grant of USD $10,000, joining similar funds from the IFJ, which the Khyber union and the PFUJ have distributed to enable these journalists and their families to get back on their feet.

Indonesia:

Media Safety and Solidarity responded to a public appeal from the Alliance of Independent Journalists (AJI) in Indonesia for financial support for its members and their families affected by earthquakes in and near West Sumatra in late September and early October 2009. AJI identified 21 members who have been directly affected and said there were likely to be dozens of other members who will also have suffered tragic loss of family members and of property and livelihoods. The A$2500 donation by Media Safety and Solidarity will be used to provide the affected journalists and their families with essential goods such as food and clean water.

Pacific Trauma Support:

Media Safety and Solidarity supported a trauma debriefing mission to assist local media personnel in dealing with the impacts of reporting the wide-scale disaster caused by a tsunami that hit Samoa and surrounding islands on September 29, killing 119 people. The mission was conducted in local newsrooms with journalists and management, implemented by the Dart Centre for Journalism and Trauma, at the request of JAWS and the IFJ, and with the support of the Alliance..

China:

The Media Safety and Solidarity fund continues to support a long-term press freedom monitoring project in China which began in the lead-up to the 2008 Beijing Olympics. Run by IFJ Asia-Pacific, it is jointly funded by the National Endowment for Democracy. The 2009 annual press freedom in China report, *China Clings to Control* listed over 300 orders issued by China's authorities banning media content. The information caused public outrage and made international news headlines.

THE WAY FORWARD

There has been some real progress over the past year in realising the Rudd Government's stated aims of developing a culture of openness and accountability in public affairs.

Commonwealth FOI legislation and the appointment of an Information Commissioner with the experience and credentials to push for change should lead to a more proactive approach to the release of government information, while most states appear to be taking FOI reform seriously. The exceptions, notably South Australia, will need to respond to pressure to follow suit.

With new legislation in place to facilitate the release of information, departments need to ensure that FOI requests are dealt with more efficiently than has been the case during the past few years.

On the whole, as the ALRC review has found, there are still far too many secrecy clauses within Commonwealth and State legislation. The Commonwealth Government should, as a matter of urgency, implement the findings of the Croucher Review, with particular regard to winding back criminal sanctions by repealing *ss70 and 79 of the Crimes Act (1914).*

The proposal of whistleblower legislation to protect disclosures to the media in the case of serious corruption or maladministration or a threat to public health or safety is a positive step. However the legislation could be improved by following the lead set by similar legislation in the US which contains mechanisms to protect whistleblowers from possible reprisals in the workplace.

The introduction of effective shield laws for journalists must be addressed as a matter of urgency and the coercive powers of State anti-corruption and integrity bodies must be reviewed.

Suppression orders across various jurisdictions continue to confuse journalists and stifle the reporting of court proceedings. Steps should be taken to expedite the introduction of a national register of orders that is electronically searchable.

The Alliance is mindful of the steps that have been taken to promote openness and accountability in Australia and applauds the leadership that has driven this progress. But we urge governments at both State and Federal level to press for further reform in the areas outlined above. The Alliance, and our colleagues in the Right to Know Coalition, will continue to fight for freedom of the press to ensure our members are able to fully perform their most important function: keeping the Australian people properly informed.

Endnotes

1 "The Public Interest and Whistleblowing." In Official Information; Integrity in Government project interim report 1 (199) edited by Paul Finn, page 92
2 Crimes Act (1914) s70 http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/s70.html
3 Crimes Act (1914) s79 http://www3.austlii.edu.au/au/legis/cth/consol_act/ca191482/s79.html
4 Media Alliance submission to the ALRC Review of Secrecy Laws, March 2009, p2
5 http://www.alrc.gov.au/inquiries/title/alrc112/5.ExecutiveSummary.pdf
6 http://www.theaustralian.com.au/politics/pm-to-face-pressure-on-garrett-warnings-on-home-insulation-scheme/story-e6frgczf-1225840929053
7 http://www.smh.com.au/opinion/society-and-culture/secrecy-is-a-denial-of-our-rights-20100225-p5ur.html
8 http://www.theaustralian.com.au/news/opinion/more-inscrutable-than-the-chinese/story-e6frg6zo-1225831954203
9 *Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009* http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/30D01FF28A4C0F94CA25764D0018A017/$file/0992009.pdf
10 Freedom of Information reform – Department of Prime Minister and Cabinet http://www.dpmc.gov.au/consultation/foi_reform/index.cfm
11 Queensland FOI reforms, Right to Information: http://www.qld.gov.au/right-to-information/
12 NSW FOI reforms: http://www.dpc.nsw.gov.au/prem/FOI_reform_-_open_government_information
13 Tasmanian FOI reforms: http://www.justice.tas.gov.au/legislationreview/FOI_act_1991/FOIreview
14 *The Walkley Magazine*, issue 57, p23 http://www.walkleys.com/features/162
15 Press release issued by Cabinet Secretary, march 17, 2010: http://www.smos.gov.au/media/2010/mr_142010.html
16 *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector.*http://www.aph.gov.au/House/committee/laca/whistleblowing/report.htm
17 Whistleblowers get protection in federal legislation, *The Australia*n, March 18 http://www.theaustralian.com.au/politics/whistleblowers-get-protection-in-federal-legislation/story-e6frgczf-1225842083099
18 Protection would have saved Kessing from flawed prosecution, *The Australian*, March 18 http://www.theaustralian.com.au/news/opinion/protection-would-have-saved-kessing-from-flawed-prosecution/story-e6frg6zo-1225842061738
19 *Media Watch*, episode 7, March 22, 2010: *The Australian* v Victoria Police http://www.abc.net.au/mediawatch/transcripts/s2853028.htm
20 *Alliance Press Freedom report 2009: Secrecy and Red Tape* http://www.alliance.org.au/documents/2009_press_freedom_report.pdf
21 Laurie Oakes speech to the Alliance Press Freedom Dinner, May 2009 http://www.walkleys.com/features/162
22 Media Alliance submission on the Evidence Amendment (Journalists' Privilege) Bill 2009 (Commonwealth) http://www.aph.gov.au/Senate/Committee/legcon_ctte/journalists/submissions/sub07.pdf
23 Senators raise concerns over shield laws, *The Australian*, April 24, 2009 http://www.theaustralian.com.au/business/legal-affairs/shield-laws-fall-short/story-e6frg97x-1225702923488
24 Minority report from the Senate Standing Committee on Legal and Constitutional Affairs on the Evidence Amendment (Journalists' Privilege) Bill 2009 http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/report/d03.htm#anc2
25 Transcript of the Select Committee into the police raid on the *Sunday Times*, July 7, 2008 http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/1109E6B8DB271D3CC825748A002AC394/$file/sy.all.080707.tro.001.pl.d.pdf
26 Victorian State Services Authority website http://www.ssa.vic.gov.au/CA2571410025903D/0/579DC317D4CD4BACCA25735C000E61B4?OpenDocument
27 February 2010, Alliance Submission to the Integrity and Anti-Corruption System Review http://www.alliance.org.au/resources/2010_submissions/?mosmsg=You+are+trying+to+access+from+a+non-authorized+domain.+(www.google.com.au)
28 August 2009, ARTK submission to Queensland Government's review of Integrity and Accountability http://www.premiers.qld.gov.au/community-issues/open-transparent-gov/submissions/assets/australias-right-to-know-submission.doc
29 December 2009, Dr Johann Lidberg: Information access in WA… an international embarrassment http://www.cla.asn.au/0805/index.php/articles/2009/FoI-open-access-rules-need-reversing
30 *For Your Information: Australian Privacy Law and Practice* (ALRC 108), August 2008 http://www.alrc.gov.au/media/2008/mbn10.pdf
31 *NSW Law Reform Commission, Report 120 Invasion of Privacy*, April 2009 http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf
32 David Marr, *Sydney Morning Herald*, August 2009: Pesky press annoying you? Now you can just sue them http://www.smh.com.au/opinion/pesky-press-annoying-you-now-you-can-just-sue-them-20090814-el51.html

33 *The Guardian, July 24, 2009: Max Mosley wins £60,000 in privacy case*
http://www.guardian.co.uk/uk/2008/jul/24/mosley.privacy
34 Naomi Campbell wins privacy case, BBC, May 6, 2004
http://news.bbc.co.uk/2/hi/uk_news/3689049.stm
35 ACMA press release, , August 19, 2010: TEN News—breach of code—ACMA to review privacy guidelines for broadcasters
http://www.acma.gov.au/WEB/STANDARD/pc=PC_311859
36 *SMH*, April 8, 2010: Underbelly, privacy and the policewoman: court decides
http://www.smh.com.au/nsw/underbelly-privacy-and-the-policewoman-court-decides-20100408-rui4.html
37 ARTK submission on National Security Legislation
http://bit.ly/9ZfcvZ
38 Mark Pearson: *The Journalist's Guide to Media Law* (3rd ed 2007) p314
39 National Security Amendment Bill 2010
http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4320_first/toc_pdf/10072b01.pdf;fileType=application%2Fpdf
40 Media outrage after police raid on *Sunday Times* newspaper http://www.heraldsun.com.au/news/national/media-outrage-after-raid-on-paper/story-e6frf7l6-1111116217556
41 February 3, 2010: Art and Pornography, Kathy Keele, ABC Unleashed
http://www.abc.net.au/unleashed/stories/s2808116.htm?site=goulburnmurray
42 January 17, 2010: Art is not Porn, Charles Waterstreet, *Sydney Morning Herald*
http://www.smh.com.au/opinion/politics/art-is-not-porn-20100116-mdd0.html
43 In defence of Liberty, Joe Hockey address to the Grattan Institute, March 11, 2010
http://joehockey.com/useruploads/File/InDefenceOfLiberty.pdf
44 RC material, the NCB & Senator Conroy's claims
http://libertus.net/censor/isp-blocking/rc-ncb-govclaims2010.html
45 Spinning the Media, UTS Australian Centre for Independent Journalism
http://www.crikey.com.au/2010/03/15/over-half-your-news-is-spin/
46 Spinning the Media: interview with Chris Mitchell
http://www.crikey.com.au/2010/03/16/chris-mitchell-on-pervasive-pr-press-releases-and-paywalls/
47 Spinning the Media: The editors fire back
http://www.crikey.com.au/2010/03/16/spinning-the-media-the-editors-fire-back-or-dont/
48 Edelman Australia Pharma Digital Breakfast
http://www.youtube.com/watch?v=QNMBHUxU6CQ&feature=related
49 US Center for Media and Democracy
http://www.prwatch.org/node/8984
50 Media Game corporate website: http://www.mediagame.tv/
51 *Media Watch*, Fake PR News, episode 14, 2006
http://www.abc.net.au/mediawatch/transcripts/s1639005.htm
52 ACCC news release:
http://www.accc.gov.au/content/index.phtml/itemId/870726
53 Bruce Donald AM, address to Walkley Foundation National Public Affairs Convention, Sydney, May 18-19, 2009
54 *The Australian*, January 30, 2010: Gunns settles with last pulp mill opponents.
http://www.theaustralian.com.au/news/nation/gunns-settles-with-last-pulp-mill-opponents/story-e6frg6nf-1225824866593
55 Greens press release, February 2010: Gunns case shows we need anti-SLAPP laws in Victoria
http://cgn.org.au/dp/node/1029
56 Stephen Estcourt QC Disgusting Oysters and Fair Comment: Lessons from the Coco Roco case.
http://stephenestcourt.blogspot.com/
57 *Gazette of Law and Journalism*, April 26, 2009: Gacic a gaffe says High Court
http://www.glj.com.au/1311-article
58 The Brand: Australian Judge Rules 'Men at Work' Liable for Infringement Thirty Years Earlier
http://brandlaw.org/2010/04/infringement-down-under/
59 Blake Dawson, February 14, Through the net: The Studios v iiNet
http://www.blakedawson.com/Templates/Publications/x_publication_content_page.aspx?id=57671
60 January 2010, IFJ Asia Pacific report: *Massacre in the Philippines: International Solidarity Mission Rapid Assessment*
http://asiapacific.ifj.org/assets/docs/203/037/15d11cb-013d725.pdf
61 Press release, April 7, 2010: Fiji Media Decree Must be Opposed, Says IFJ
http://asiapacific.ifj.org/en/articles/fiji-media-decree-must-be-opposed-says-ifj

Notes


whistleblowers
protecting sources
defamation
interferen
cabinet secrets
leaked documents
internet filter
star chamber
defamation
shield laws
raids
government censorship
privilege
media
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