PUBLIC GOOD, PRIVATE MATTERS

The State of Press Freedom in Australia 2011

the walkley foundation
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IFJ

2011 Australian Press Freedom Report

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FOREWORD

The past few months have given us an object lesson on the power of information to galvanise people. Anyone watching the momentous events in the Middle East cannot help but have been moved by the bravery and commitment of those activists who risked their lives in the cause of democracy and human rights.

It's worth noting that the first people Egypt's Hosni Mubarak tried to blame for the unrest were journalists. Having tried hard to shackle his own country's press, the 30-year despot claimed it was the foreign journalists who were stirring up dissent. His thugs responded with arrests, threats, violence and, in one case, sexual assault against the foreign media workers.

But you only have to look to Libya to see what happens when there are no independent journalists around to hold a dictator to account: arbitrary arrest, shooting and torture.

Exactly what part the publication by WikiLeaks of diplomatic cables uncovering the extent of corruption played in galvanising the "Arab Street" has yet to be assessed. But I was saddened to hear the knee-jerk reaction of our prime minister last year declaring that what WikiLeaks was doing was "illegal". It's no more illegal than the leaking of inside information to Laurie Oakes about the power struggle in the Labor Party that brought Julia Gillard to power.

No matter what they may say in public, governments are rarely fans of openness and accountability. At best, it's something they learn to live with, although they'll generally do whatever they can to put up barriers of red tape to avoid releasing information. When they can't keep that information under wraps, they'll spin like hell to ensure whatever gets out is their side of the story.

Which is why, while journalists are not often imprisoned (or worse) in this country, we need to keep pushing for a better, more efficient and freer environment that allows the press to fulfil its most important role – keeping the public informed and holding the powerful to account.

There is some cause for optimism. In March this year, the federal government passed new shield laws in the shape of the *Evidence Amendment (Journalists' Privilege) Act 2011*, which reinforces the assumption that journalists must, as required by their Code of Ethics, protect confidential sources.

It's not perfect, but it represents a good start that must now be followed by all state governments and extended to include all anti-corruption and crime commissions as a balance to their extraordinary coercive powers.

As a corollary to this legislation, we are waiting for an improved regime to protect public service whistleblowers. As we saw a couple of years ago with its Freedom of Information laws, Queensland has made the running here with the *Public Interest Disclosures Act 2010* that has been described as "world's best practice" in the area. I hope to see the Commonwealth and other states and territories follow the lead set here by the Bligh government.

Of course, the main inhibitor to a culture of openness and accountability among our public servants and elected officials is the ludicrous plethora of secrecy provisions on statute books in Canberra and around the nation. More than a year after the Australian Law Reform Commission reported on more than 500 separate pieces of legislation containing secrecy clauses, its recommendations have yet to be followed. This must be addressed, as a matter of urgency.

In New Zealand, shield laws got their first real test – and came up short when the Serious Fraud Office was able to compel the handover of interview tapes from one news organisation, while court reporters continue to wrestle with an overabundance of suppression orders.

As in Australia, the New Zealand media continues to wrestle with privacy issues and courts have responded with the development of a tort of privacy.

In the pages that follow you will read the opinions of some of our leading journalists and other experts who have generously given their time to bringing us up to date on these important issues.

We're grateful for their work and also thankful that, among many other blessings, we live in a country where free and open debate is an achievable goal.

Christopher Warren
Federal secretary
Media Alliance

"We need to keep pushing for a better, more efficient and freer environment that allows the press to fulfil its most important role – keeping the public informed and holding the powerful to account."

THE YEAR IN THE LAW

Peter Bartlett

It's easy to focus on the financial pressures that are facing traditional media, and the challenges from the online environment and social media, but we should not lose sight of the fact that there are many who would like to limit the public's right to know.

The online environment poses many challenges for media lawyers and the courts. We need to ensure that this brave new world is not stifled by attempts to limit freedom of speech.

Protecting sources

A shiver went down the spine of many journalists in 2007 when *Herald Sun* reporters Gerard McManus and Michael Harvey were convicted of contempt of court and fined $7000 each for refusing to reveal their sources. The journalists had published details of the federal government's decision to reject a $500 million increase in war veterans' entitlements. The source could have been prosecuted if his or her identity was revealed. This was a story that the public had a right to know. Without appropriate promises of confidentiality, the source may never have spoken to the reporters.

Currently we have Helen Liu, former defence minister Joel Fitzgibbon's friend, seeking access to *Age*/Fairfax sources.

In March 2011, the federal parliament finally recognised that there are circumstances where a confidential source should be protected (see page 22).

The Evidence Amendment (Journalists' Privilege) Bill 2010 protects the journalist and the journalist's employer from disclosing the identity of the source unless the public interest in the identity of the source outweighs any likely adverse effect on the source or any other person. The courts have the task of assessing the "public interest" issue.

At the eleventh hour the Greens secured an amendment to extend the definition of "journalist" to include citizen journalists, bloggers, tweeters and others. This could lead to some interesting cases.

The Act will only apply to proceedings under Commonwealth law. It does not go far enough but it is a step in the right direction. The Victorian government is looking at introducing similar legislation, but without the extended definition of "journalist".

Open access to court files

While this is taken for granted in Victoria, it's yet to be the case in NSW. The *Courts Information Act 2010* (NSW) was assented to on May 26, 2010. It is still not in force. The Act seeks to bring open access more into line with Victoria and the Commonwealth.

We hope the new O'Farrell government in NSW will bring the legislation into operation or, even better, enact legislation that provides for the more open access regime that exists in the Victorian and Federal courts.

Suppression orders

"The publication of fair and accurate reports of court proceedings is… vital to the proper working of an open and democratic society and to the maintenance of public confidence in the administration of justice." (*McHugh J, Fairfax v Police Tribunal NSW*).

The comments made by Justice McHugh appear so obvious. However, our system of open justice is under threat. An accused, worried by potential media interest in his or her trial, desperately looks for arguments to put to the judge to suppress any reporting. Judges, focused on a fair trial and getting on with the trial, sometimes agree to such orders. The media, operating under financial pressures, do not oppose as many of these applications as in the past.

The accused has a fundamental right to a fair trial. The public has a right to know what is going on in our courts. The judge has the often difficult task of balancing these two rights. Where they clash, the right to a fair trial should take precedence, but there are very few cases where such a clash cannot be remedied by a proper instruction by the judge to the jury. Even if there is a perceived risk of prejudice to a fair trial, it has to be substantial to justify the issue of a suppression order.

Suppression orders are becoming more frequent. To be fair, as pointed out to me by a Queensland judge, this is more a Victorian problem. NSW had some 54 reported suppression orders made from early 2006 to June 2008. Victoria had 627. More than 25 per cent of these Victorian orders were blanket orders, preventing any publication "until further orders". With so many interrelated gangland trials and terrorism trials, an increase in suppression orders was warranted. However, will 240 suppression orders in the Victorian County Court, 219 in the Magistrates' Court and 168 in the Supreme Court, stand up to critical analysis?

There is no sign that Victorian courts are reducing the number of suppression orders.

SCAG on suppression orders

The Standing Committee of Attorneys-General (SCAG) is recommending the introduction of the Court Suppression and Non-publications Orders Bill 2010 in each state and territory. If this happens, there will be even more scope for the accused to seek to suppress all or part of a hearing.

The bill extends the basis on which a judge can make a suppression order. It provides that a court can make such an order where "the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)". The identity of a victim of sexual assault is, as it should be, protected by existing laws. However, this addition allows the court to protect the rapist from embarrassment.

There are many areas where the public would benefit from uniform laws throughout Australia. But personally I would not have suppression orders as one of those priority areas screaming out for uniformity. If such legislation is to be introduced, however, it should be closer to the South Australian model.

NSW adopted the model provisions in the *Court Suppression and Non Publication Act 2010*. It was assented to on November 29, 2010 but has not as yet commenced.

We hope the new attorneys-general in Victoria and NSW will assign this legislation to the rubbish bin.

Online publications and the jury

An argument often advanced for a suppression order is that the jury will be influenced by what they have seen or heard in the media and, more frequently, by what they see online.

As the High Court said as recently as June this year: "There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts." The court added that the "unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury".

This view was supported by Chief Justice Spigelman in the District Court of NSW case in which he criticised a tendency of judges to regard jurors as "exceptionally fragile and prone to prejudice" when the reality is that "trial judges of considerable experience have asserted again and again that jurors listen to the directions that they're given and implement them".

In addition, many states and territories now have legislation making it an offence for a juror to engage in independent inquiries such as an online search. Any judge who contemplates making an order that the media take down historical internet material would be assuming that jurors were going to deliberately break the laws.

Late last year a Victorian judge did order *The Australian*, *The Age* and the *Herald Sun* to take down historical online articles on the basis that the material in the articles was prejudicial to a pending trial. The media appealed. The Court of Appeal overturned the decision on the basis that the take-down order was unnecessary given that the risk that a juror would search the internet for references to the accused could be cured by a simple direction to the jury. I cannot mention the accused's name as it is suppressed.

A judge should also realise that a take-down order would be largely ineffective. Articles would still be accessible on sites far beyond the court's jurisdiction. In the case just mentioned, even after *The Australian*, *The Age* and the *Herald Sun* had taken down online articles, there were still tens of thousands of articles relating to the accused online.

Cartoon by Matt Bissett-Johnson

Online publications and defamation

There has been a significant increase in the number of defamation actions aimed at online publications. Social media sites are attracting more attention (see page 43).

Since *Gutnick v Dow Jones* we have recognised that a publisher can be sued where the article is comprehended by the readers.

There are still many unanswered questions, for example, whether an Australian court would follow courts in the United Kingdom in finding that Google was not liable in defamation for an automatically generated search result, whether online publishers are liable for links to other defamatory articles and the scope of the provision in the *Broadcasting Services Act* protecting internet service providers.

Cap on damages

The uniform *Defamation Act 2005* provides for a cap on damages, presently some $311,000. Every state and territory government voted this cap into law.

Plaintiffs are now seeking to get around this limitation on payouts by bringing separate proceedings against each publication. If News Limited or Fairfax publish in various hard-copy and online publications, they are likely to receive separate proceedings for each masthead. Andrew Wily issued seven separate sets of proceedings against Fairfax entities and reporters. Fairfax is challenging this.

The media's position is clear: this constitutes a clear abuse of process. Plaintiffs are seeking to litigate the same issues in separate proceedings between the same plaintiff and related defendants, simply to avoid the cap on damages.

A related question raised in *Carey v ABC* is going to the NSW Court of Appeal.

Social media and the "St Kilda school girl"

It is interesting to note the different approaches taken by the media on whether to identify the 17-year-old girl at the centre of the St Kilda football club and Ricky Nixon scandal. At all times her identity was available through social media.

The media initially took the view that the girl should not be named or identified for editorial reasons. They took her age into account in reaching this decision. The public would be surprised just how many times such decisions are taken. Editors and news directors are conscious of protecting the young and vulnerable.

On December 24, 2010 the Federal Court suppressed the girl's name and identity. From then on the media did not have a discretion. The suppression order was lifted on January 28, 2011. From that date the girl could again be identified. *The Age* and the *Herald Sun* still did not identity her, again for editorial reasons.

The media were aware of a few other no-go areas in relation to the girl. There were also photos and a video apparently taken in the girl's bedroom and allegedly showing Ricky Nixon which were arguably in breach of Victoria's *Surveillance Devices Act*.

60 Minutes decided to name, show footage and interview the girl. Still the Victorian mainstream media did not identify her.

Legally wrong – morally right?

The High Court has found that the Victorian *Sex Offenders Act* is not invalid. Derryn Hinch had argued invalidity on the basis that it breached the implied freedom of political communication. Hinch had breached a suppression order made under the Act by naming child sex offenders at a rally in 2008 and on his website. He argued that people are entitled to know if a serious sex offender is living near their house or their child's school.

He describes these people as "evil men, cunning, plotting rapists and paedophiles… scum, the baddest of the bad". He now faces the real prospect of seeing these "evil men" in jail.

WikiLeaks

The US diplomatic cables leaked by WikiLeaks have resulted in a number of fascinating revelations, and many media lawyers around the world have provided advice on the publication of the cables (see page 8).

Super injunctions

Injunctions are being granted in the UK against the media in circumstances where the media cannot even repeat the name of the plaintiff. *The Guardian* and other media are attacking these injunctions as a further erosion of free speech in the UK. Recently, Australian media have received threats from UK lawyers, following the granting of such injunctions in the UK (see page 35).

Cross vesting

Those who are frustrated when defamation actions are issued in the ACT Supreme Court will gain some encouragement to seek to cross vest the action back to a more appropriate venue, by the decision in *Pugh v Morrison* (March 2011).

Peter Bartlett is a partner at Minter Ellison law firm

Between the bench and the press

There's a big difference between "is the public interested?" and "is it in the public interest?" Journalists ask themselves one question and judges decide the other, writes Michael Pelly

Media personality Derryn Hinch had no doubt he was acting "in the public interest" when he named two convicted sex offenders idea at a public rally in June 2008. The problem for Hinch – as the High Court reminded him in March – is that journalists don't get to decide what's "in the public interest". That's a job for the judiciary.

Yet journalists and judges bring very different attitudes to their jobs.

Judges are trained to resolve private disputes and protect private interests. They do not willingly sacrifice the rights of anyone in the name of a greater good such as "the public interest". Journalists, however, see very few limitations on what is in the public interest – and even those are being broken down with the march of the internet. "Would the public be interested in reading about this?" is the only test – subject to the limits of good taste and reader sensibilities.

Take a key passage from the judgment of Chief Justice Robert French in the Hinch case. He noted that in exercising its suppression powers under section 42 of the *Serious Sex Offenders Monitoring Act 2005* a court must assess whether it is in the "public interest" to do so. This he said, "may require a balancing of competing interests".

"The court is not free to apply idiosyncratic notions of public interest … [it] must consider the extent, if any, to which the order would enhance the protection of the community. It must also consider its effect upon the offender's prospects of rehabilitation.

"Rehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest. A court considering such an order must also look to… the effect of the order upon the open justice principle, on common law freedom of speech, and on the human rights guaranteed by the Charter."

Even these require balancing as they include the right to freedom of expression, the right to participate in public life, the right of children to be protected and the right to privacy.

This is what seemed to outrage Hinch after the case. He zeroed in on French's comments about rehabilitation: "Personally I don't care about his rehabilitation."

Hinch may protest that he had conducted his own balancing of competing interests, and that the public's right to know where a sex offender lived outweighed any private rights of an offender. Yet that is a judgment a court will rarely make – partly because of the judiciary's distaste for the excesses of the tabloid media.

For proof, look no further than a speech made by the then Justice French in 2005 on electronic coverage of court proceedings. The last of three concerns for the judiciary, he said, was a "cultural abhorrence of tabloid television journalism whose distorting effects may be the more powerful because of their access to visual and sound imagery".

There also seems a reluctance to treat journalism as a profession, like the law or psychiatry, which respects confidentiality of information.

Take the words of the chief judge of the Victorian County Court, Michael Rozenes, who convicted *Herald Su*n journalists Michael Harvey and Gerard McManus of contempt and fined them $7000 each after they refused to reveal their source for a story abut the $500 million clampdown on veterans' entitlements by the Howard government.

"Journalists are not above the law and may not, without penalty, expect to be permitted to follow their personal collegiate standards where those standards conflict with the law of the land."

Central to this attitude is a deep – almost institutional – suspicion of the media. For many judges, the Right to Know campaign is not a principled protest against restrictions on free speech and access to information, but a self-interested bullying exercise that disregards the importance of a fair hearing.

There is also no constitutional protection of a free press, as in the United States, to make life easier for the media. Sure, there is an implied right to free speech on government and political matters – framed by the High Court – but even that can fall over when the judiciary regards a restriction as justified "in the public interest".

It's a bit like the test of "reasonableness", which is an undefined staple of the common law. Politicians put these words into legislation, usually with little guidance, and then leave it up to the courts to decide what they mean.

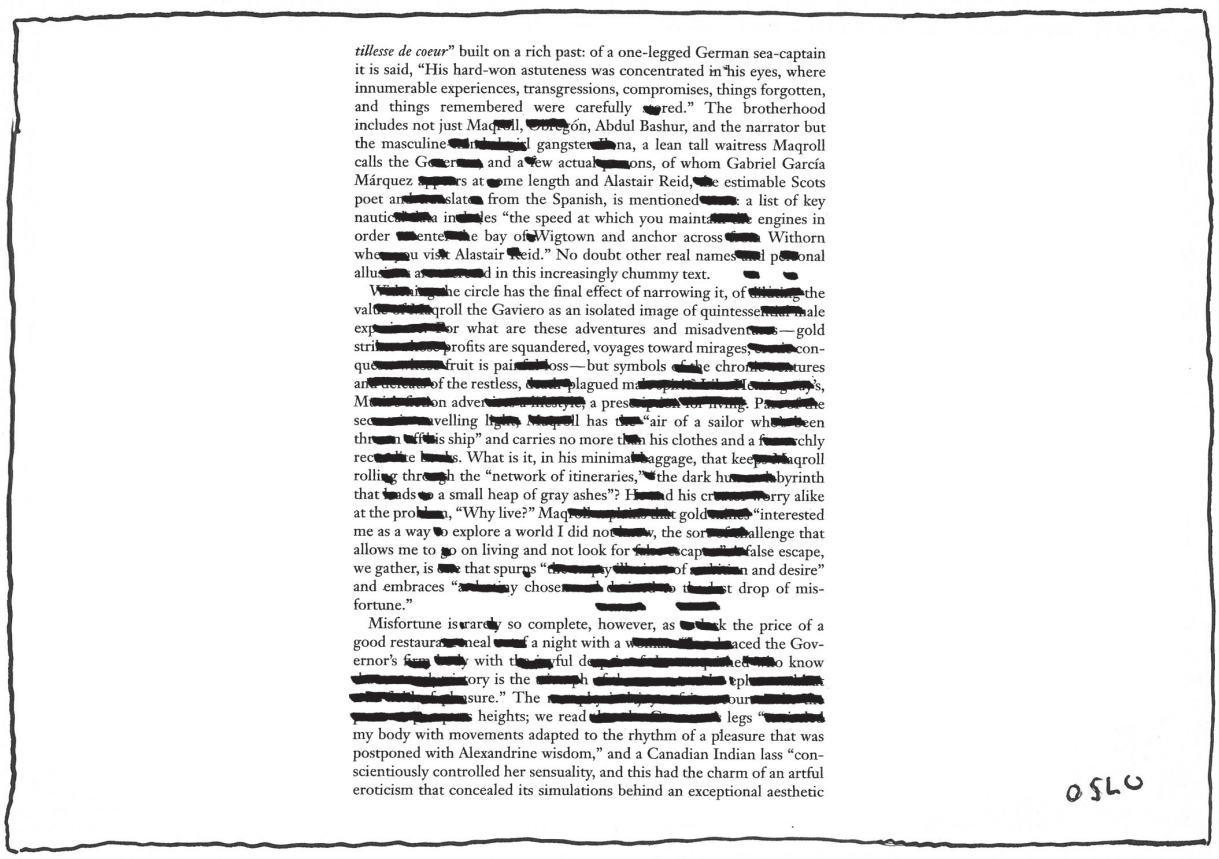
Many courts have made vast improvements to media access in recent years. However, they aren't about to adopt the media's idea of what is "in the public interest". As the former NSW Chief Justice Jim Spigelman once said, "the 'principle of open justice' is a principle, it is not a freestanding right" and "does not create some form of Freedom of Information act applicable to courts".

Now there's an idea.

Michael Pelly is a NSW-based legal affairs writer

Public interest: Derryn Hinch after failing to have contempt-of-court charges struck down
Photograph by Aaron Francis/*The Australian*

"Central to this attitude is a deep – almost institutional – suspicion of the media."



Cartoon by Oslo Davis

Wrongs and rights and WikiLeaks

Just who has broken what rules in the WikiLeaks scandal? Julian Burnside offers his opinion.

There are accusations of illegality everywhere in the WikiLeaks saga, so let's look at exactly what has been done by the main players.

Julian Assange

Assange published material that had been leaked. WikiLeaks is set up in a way that allows whistleblowers to upload material anonymously and with no possibility of being traced.

The United States has arrested US Army soldier Bradley Manning, alleging that he leaked the material to WikiLeaks. Whatever wrongs Bradley Manning may have committed, Julian Assange merely published the material. So did the Murdoch press, and the Fairfax press and all the other major media outlets around the world.

Leaking classified government material is likely to involve a breach of the law. Publishing leaked material does not. Publishing leaked material requires a balance to be struck between competing interests: secrecy and free speech. In America, free speech prevails unless publishing the material would create a real and present danger. On the face of it, Assange has done nothing wrong, apart from embarrassing the US.

If Assange did anything wrong by publishing leaked material, the wrong was magnified and compounded by the mainstream media. The US is not chasing Rupert Murdoch, so far as we know.

"On the face of it, Assange has done nothing wrong, apart from embarrassing the US."

The United States

Apparently responsible politicians in the US have publicly branded Assange as a public enemy and as a terrorist. Massive government pressure caused Visa, MasterCard and PayPal to withdraw their services from WikiLeaks.

In parallel with its attacks on Assange, the US government has thrown Bradley Manning into jail, where he has been held in humiliating conditions. He has been stripped naked,

ostensibly for his own protection. His lawyers have been intimidated by the authorities. Their access to him has been deliberately obstructed.

If Assange is handed over to the US, he can expect the same treatment.

Australia

The Australian Prime Minister denounced Assange, saying that his actions were illegal. She then shifted her position, saying that the leaks were "based on an illegality". Despite the shift, Ms Gillard's position was that Assange did not deserve Australia's help or support. It is alarming that she has so little regard for the distinction between legal and illegal; and so little regard for the principles of free speech.

The Australian Attorney-General initially spoke of cancelling Assange's passport: a move which would clearly announce that Australia regarded Assange as an outcast.

Although the Government has softened its rhetoric in the face of overwhelming public support for Assange, the Australian Government betrayed Assange. The basic transaction between citizen and State is that the citizen yields some measurable autonomy in exchange for the protection the State can offer. This has been recognised since Hobbes and Locke. The State's obligation to protect a citizen is tested when a citizen is in trouble in another country. The importance of this social contract highlights the fundamental role of free speech and a free press. If the actions of government cannot be seen, then governments cannot be held to their side of the bargain. Honesty in politics is just an optional extra when governments believe they will not be held to account.

The Howard Government betrayed David Hicks and Mamdouh Habib. The Gillard Government betrayed Assange. And governments betray all of us when they mislead or deceive us. If they want to avoid embarrassment, they should stop doing embarrassing things, because they are no longer protected by a cloak of secrecy if the press is free to report their betrayals.

Sweden

The Swedish prosecutor alleges that Assange had consensual sex with two women, but did not use a condom appropriately. The Swedish prosecution has been an on-again, off-again affair. The prosecutor declined the opportunity to question Assange in London.

Once the US was publicly embarrassed by Assange, the Swedish authorities decided that it would seek to extradite Assange to Sweden, apparently in order to ask him questions about what is, on any view, an ambiguous suggestion of sexual assault.

Naomi Wolf, who for decades has been investigating sexual assault around the globe, wrote this of the current treatment of Julian Assange:

> *...never in 23 years of reporting on and supporting victims of sexual assault around the world have I ever heard of a case of a man sought by two nations, and held in solitary confinement without bail in advance of being questioned – for any alleged rape, even the most brutal or easily proven. In terms of a case involving the kinds of ambiguities and complexities of the alleged victims' complaints – sex that began consensually but allegedly became non-consensual when dispute arose around a condom – please find me, anywhere in the world, another man in prison today without bail on charges on anything comparable.*
>
> *...Keep Assange in prison without bail until he is questioned, by all means, if we are suddenly in a real feminist worldwide epiphany about the seriousness of the issue of sex crime: but Interpol Britain and Sweden must, if they are not to be guilty of hateful manipulation of a serious women's issue for cynical political purposes, imprison as well – at once – the hundreds of thousands of men in Britain, Sweden and around the world who are accused in far less ambiguous terms of far graver forms of assault.*

One inference is overwhelming: the Swedish government is acting as an instrument of the US; its prosecution has got nothing at all to do with alleged sexual misconduct and everything to do with WikiLeaks.

The Australian public

The Australian public has been almost unanimous in its support for Assange. That is a fine thing, but it is not enough. Politicians need to be held to account. Every politician in the Australian parliament should be asked whether they will express public support for Assange. Those who refuse should be asked to explain why.

Assange has introduced a new element into global politics: tell the truth, or fear that the truth will be exposed. It is a development which will benefit citizens in many countries around the world. We, the public, welcome it. Let's make sure that our politicians genuinely support it.

Julian Burnside is a barrister, human-rights advocate and author

"If Assange did anything wrong by publishing leaked material, the wrong was magnified and compounded by the mainstream media. The US is not chasing Rupert Murdoch, so far as we know."

Surfeit of secrecy: A recent ALRC report identifies 506 secrecy provisions in 176 pieces of legislation
Photograph by Greg Newington/*AFR*

SECRECY

> *"Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not."*[1]

This quotation opens the most recent report by the Australian Law Reform Commission (ALRC) into Australia's complex regime of secrecy laws, *Secrecy Laws and Open Government in Australia*. The report was tabled in federal parliament in March 2010.

The maxim was taken from the 2003 matter in which Peter Bennett, an employee of the Australian Customs Service and president of the Customs Officers Association of Australia, challenged the right of his employer to silence him from speaking to the media about matters to do with his public service job.

The ALRC report notes that "Secrecy laws that impose obligations of confidentiality on individuals handling government information – and the prosecution of public servants for the unauthorised disclosure of such information – can sit uneasily with the Australian government's commitment to open and accountable government."[2]

The report identifies 506 secrecy provisions in 176 pieces of legislation, including 358 distinct criminal offences.

The report recommends the repeal of the secrecy provisions in the *Crimes Act 1914 (Cth)* to be replaced with a general secrecy offence that is limited to disclosures that clearly harm the public interest. It also looks at other secrecy offences with recommendations for their review, amendment or repeal.

A new general offence

The ALRC's recommendation is that criminal sanctions should be reserved for disclosures that harm essential public interests. These are defined in the report as those disclosures that are likely to:

- damage the security, defence or international relations of the Commonwealth
- prejudice the prevention, detection, prosecution or punishment of criminal offences
- endanger the life or physical safety of any person
- prejudice the protection of public safety

Exemptions contained in the *Freedom of Information Act* are the starting point for identifying categories of information that, if disclosed, would potentially prejudice the effective working of government

The new offence would replace s. 70 of the *Crimes Act 1914 (Cth)*.

Specific secrecy offences

The ALRC considers that disclosure of certain types of information – for example, sensitive intelligence information – must attract specific offences as a way of protecting the public interest. Regulatory agencies such as taxation, social security and corporate regulators may also justify having a specific secrecy offence as a way of preserving the vital relationship of trust between the government and the public that's needed for these agencies to do their jobs.[3] According to the ALRC such offences should:

- differ in significant and justifiable ways from the recommended general secrecy offence
- not extend to conduct other than the disclosure of information – such as making a record of, receiving, or possessing information – unless such conduct would cause, or is likely or intended to cause, harm to an essential public interest
- specify penalties that reflect the seriousness of the potential harm caused by the unauthorised conduct and the criminal culpability of the offender

Proactive publication of government information

One of the stated aims of the incoming Labor government in 2007 was to change the culture of the Australian public service from one of secrecy and red tape to a culture of disclosure and accountability.

In his speech launching the Freedom of Information Amendment (Reform) Bill 2009, the then special minister of state, John Faulkner, told a conference organised by Australia's Right to Know coalition that governments face an "underlying challenge to create a pro-disclosure culture within government and the public service around the release of, and access to, government information. A challenge to change the culture of FoI from one of resistance to one of disclosure, to a recognition that the public interest can often mandate disclosure, rather than being a factor weighed only as a reason to refuse."[4]

As a companion piece of legislation to his Freedom of Information (FoI) reforms, the federal parliament passed the *Australian Information Commissioner Act 2010* which sets up the office of the Australian Information Commissioner and two other statutory office holders, the Freedom of Information Commissioner and the Privacy Commissioner.
In July 2010, the then finance minister, Lindsay Tanner, issued a Declaration of Open Government, pledging to "open government based on a culture of engagement".[5]
The declaration is as follows:

> *The Australian government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government-held information, and sustained by the innovative use of technology.*
>
> *Citizen collaboration in policy and service delivery design will enhance the processes of government and improve the outcomes sought. Collaboration with citizens is to be enabled and encouraged. Agencies are to reduce barriers to online engagement, undertake social networking, crowd sourcing and online collaboration projects and support online engagement by employees, in accordance with the Australian Public Service Commission Guidelines.*
>
> *The possibilities for open government depend on the innovative use of new internet-based technologies. Agencies are to develop policies that support employee-initiated, innovative Government 2.0-based proposals.*
>
> *The Australian government's support for openness and transparency in government has three key principles:*
> - *Informing: strengthening citizens' rights of access to information, establishing a pro-disclosure culture across Australian government agencies including through online innovation, and making government information more accessible and usable*
> - *Engaging: collaborating with citizens on policy and service delivery to enhance the processes of government and improve the outcomes sought*
> - *Participating: making government more consultative and participative*

Fighting for the right to know: Former special minister of state, John Faulkner, waged war on secrecy
Artwork by Karl Hilzinger

Information publication scheme

The information publication scheme requires Australian government agencies to publish information publication plans in a number of different categories, and also provides a means for agencies to proactively publish government information.

Under the scheme, each agency must publish a plan showing what information it proposes to publish, and how it intends to do so.

The *Freedom of Information Act* spells out nine categories of information that agencies must publish:

- details of the agency's structure (for example, in the form of an organisation chart)
- details of the agency's functions, including its decision-making powers and other powers affecting members of the public
- details of statutory appointments of the agency
- the agency's annual reports
- details of consultation arrangements for members of the public to comment on specific policy proposals
- information in documents to which the agency routinely gives access in response to requests under the *Freedom of Information Act*
- information that the agency routinely provides to parliament
- details of an officer (or officers) who can be contacted about access to the agency's information or documents under the *Freedom of Information Act*
- the agency's operational information (which is information that assists the agency to exercise its functions or powers in making decisions or recommendations that affect members of the public. This includes the agency's rules, guidelines, practices and precedents relating to those decisions and recommendations).

The scheme also urges agencies to publish other material that might be of assistance/interest to academics and researchers.

Disclosure log

From May 1, 2011 agencies and ministers must publish information that has been released in response to FoI access requests. Three options are specified in the legislation: making the information available by download from the agency's or minister's website, linking to the source of the information or giving details of how the information may be obtained.

This information must be published within 10 working days of giving the FoI applicant access.

Some categories of information are exempt from the disclosure scheme, largely information about a person or business that was requested by that person or business.

The published information must be easy to find and understand, and be formatted so it can be downloaded in tabular form.

For an example of how a disclosure log works, go to the website of the Commonwealth Treasury: www.treasury.gov.au/content/foi_publications.asp

Several journalists have complained that after going to the time and expense involved in an often complex FoI request, which may have involved a reference to the Administrative Appeals Tribunal for determination, the information is released to the applicant at the same time as it is lodged on the disclosure log, meaning there is no practical advantage to the applicant.

data.gov.au

In March 2011, special minister of state Gary Gray announced the launch of the federal government's new information and data site, www.data.gov.au.

"Data.gov.au plays a crucial role in realising the Australian government's commitment to informing, engaging and participating with the public, as expressed in its Declaration of Open Government and Freedom of Information (FoI) reforms. It is the Australian equivalent to similar overseas sites such as the United States' data.gov, the United Kingdom's data.gov.uk and New Zealand's data.govt.nz," he wrote in his accompanying blog post.[6]

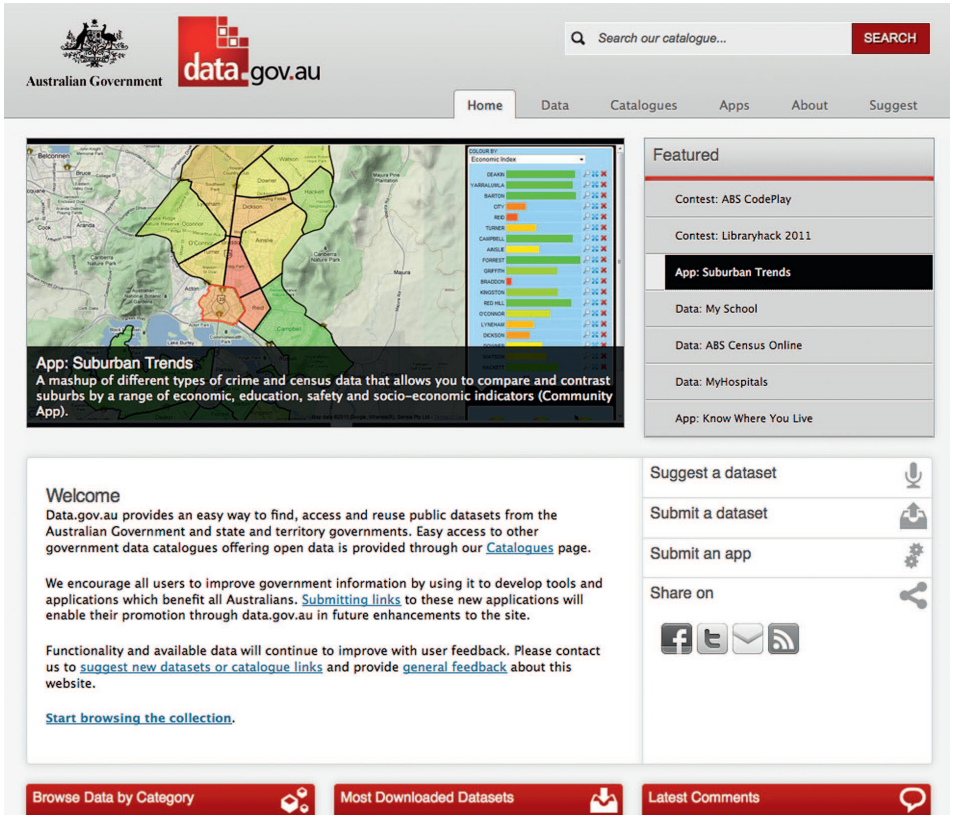
Data.gov.au offers new features for both the public and government agencies. People can:

- suggest datasets they would like released by Australian government agencies, which the Australian Government Information Management Office will forward to relevant agencies;
- participate on the site by rating and commenting on datasets;
- provide feedback and suggestions for site improvements;
- contribute submissions of mashups or data-based initiatives they produce.

The site also offers:

- support for hosting datasets in a cloud-based storage solution (alternatively, agencies can continue to store datasets on their agency site and provide a link through data.gov.au);
- a showcase of mashups and prominent Australian government data-based initiatives;
- links to other government data catalogues such as the Australian Bureau of Statistics, Australian Spatial Data Directory and the Queensland Government Information Service. These and various other data sources will continue to exist separately from data.gov.au, however future updates will also make their data holdings discoverable directly through data.gov.au.

The Alliance notes recent efforts by government agencies to improve the proactive publication of information online. Information about Australia and the way we are governed belongs to, and his held in trust for, the Australian public. Such information should be published wherever possible without the requirement of a freedom of information request.



Opening government: *data.gov.au* is part of the federal government's commitment to push information out to the public

Canberra's secret squirrels

If we really want to achieve greater transparency in government, it's the public servants that must be wooed and won, says Markus Mannheim.

I wouldn't trust a journalist who wasn't a sceptic, yet those who write about government can be too critical. There are sometimes good intentions behind this: we aim to tell the stories of those who are disadvantaged by what governments do. But, just as often, our criticism is habitual and unproductive. We report conflict rather than analyse the merit of the ideas behind it. Important work goes unnoticed because no-one opposes it loudly enough to catch our interest.

The Rudd-Gillard governments achieved some genuine progress in their first term that elements of the media took for granted. The obvious change was in Freedom of Information (FoI) law. It was no giant leap forward, and Australia's federal bureaucracy remains a secretive workplace compared with most of its Western counterparts. But the reforms – which improve access to information and make it cheaper to ask for it – were still the most significant step towards transparency that the Commonwealth has taken in almost 30 years. Other positive changes also took place. Parliament reports in more detail on public spending than it ever has; for example, on legal services and parliamentarians' staff. Taxpayer-funded advertising has some (albeit limited) independent oversight.

The Government 2.0 Taskforce – set up in 2009 to "expand the uses of Commonwealth information and improve the way government consults and engages with citizens" – set ambitious targets for making vast amounts of data available publicly, and freely, for the first time.

Former special minister of state John Faulkner and to, a lesser extent, ex-finance minister Lindsay Tanner drove this agenda, often against the will of their Labor colleagues. It yielded no political benefit, but that wasn't the point. Transparency has a powerful transformative effect on public sector workers: put simply, those who know their work is open to scrutiny perform better. These changes were important for the public good, and, as new information commissioner Professor John McMillan said recently, "Once you've got to a level of transparency, you can't undo it." What government would dare?

Yet Faulkner now sits on the backbench and Tanner has left politics. Without this pair, Labor's integrity campaign has lost its oomph. Whistleblowing laws, promised back in 2009, have not materialised. Nor has the government responded to an Australian Law Reform Commission report, now more than a year old, which identified 506 secrecy provisions and 358 related criminal offences in federal laws. The commission wants to "wind back" these punitive measures (including the notorious section 70 of the Crimes Act, under which bureaucrats who leak can be jailed for two years), saying they are inappropriate unless the public interest is harmed. However, the Gillard government seems increasingly uninterested in an agenda that some dismiss as Kevin Rudd's esoteric interest in public-sector management theory.

Nevertheless, the real opposition to open government has come from neither Labor nor the Coalition, but from the public service. Policy is pointless unless it's implemented – and bureaucrats appear to be deploying every trick in the book to avoid greater scrutiny of their work. In recent months, Canberra legal firms have received a flood of briefs from government agencies seeking advice on how to delay FoI requests. The Government 2.0 agenda is bogged down in enthusiastic debates over software formats, rather than discussion about which documents should actually be published online.

The WikiLeaks exposures of United States diplomatic cables coincided with Australia's policy shift towards disclosure, and has heightened the bureaucracy's nerves still further. More public servants, even at low levels, now require security clearances. There are also anecdotal reports of pressure to classify documents as secret or confidential, even when unnecessary. One senior bureaucrat told me that the FoI reforms were a "complete disaster" that would be regretted for years. "What a terrible shame if Faulkner, who's done so much in his career, ends up being remembered for this." His is not an isolated view in Canberra.

Journalists are at the heart of this cultural clash because, in some ways, we are its cause. Many senior mandarins (notably the recently retired Treasury head, Dr Ken Henry) believe the media lacks the sophistication to understand the complexity of their work, or the maturity to report it without bias.

Australia's top public servant, Terry Moran, the secretary of the prime minister's department, acknowledged this deep suspicion in March, saying: "The way in which the modern media works is such that it is a constant recycling game of 'gotcha', and anything that comes out which looks as though it might be embarrassing or a source of difficulty is immediately seized

"Policy is pointless unless it's implemented – and bureaucrats appear to be deploying every trick in the book to avoid greater scrutiny of their work."

"The information policy war within the federal bureaucracy is far from won. As more documents become publicly available, we must ensure that we get it right, and be fair, when we report on them."

Culture clash: Some senior public servants say journalists lack the sophistication to understand their work
Artwork by Theresa Ambrose / Fairfax Media

on, particularly if it comes from an esteemed person... And public servants are very wary of this, because the last thing a senior public servant can afford to do these days is have himself or herself be the source of a `gotcha' moment for government."

Professor McMillan, too, says the most common complaint he hears from bureaucrats is "we believe in open government but it's a pity the media looks only for the bad story".

Some of these attitudes are simply oversensitivity. Australian public servants are unused to the public glare, as our bureaucracies have long mirrored the comparative secrecy of Whitehall, rather than the more open democracies of continental Europe and North America. But bureaucrats play important public roles and must learn to accept that they will, at times, become part of the public debate. I'm sure they'll develop a thick skin soon enough.

Some journalists, too, must change. The information policy war within the federal bureaucracy is far from won. As more documents become publicly available, we must ensure that we get it right, and be fair, when we report on them. There are many eyes in Canberra watching for and counting our mistakes, hoping to use them to argue against any further moves to open up of government. Let's not give them the pleasure.

Markus Mannheim edits the monthly Public Sector Informant *and writes for* The Canberra Times

FREEDOM OF INFORMATION

> *"The message of cultural change has certainly got across, including at the highest levels in government. But I'm also struck by the number of instances in which officials making decisions have just not adequately read the new act or the guidelines. They've made decisions that clearly show they're not up to date with the detail of the new law."*
> Australian information commissioner, Professor John McMillan[7]

After a comprehensive review of the *Freedom of Information (FoI) Act* in November 2009, the government introduced the *Australian Information Commissioner Act* and the *Freedom of Information Amendment (Reform) Act*. The legislation passed through the parliament on May 13, 2010 and received royal assent on May 31, 2010. The majority of the measures, including the establishment of the new Office of the Australian Information Commissioner, commenced on November 1, 2010.

In the three months to January 31, 2011, the Office of the Australian Information Commissioner responded to 5542 phone enquiries and 673 written inquiries. It received 290 privacy complaints, 22 FoI complaints, 15 requests for FoI decisions to be reviewed and 256 requests for extensions of time to process FoI requests.[8]

"These statistics show that Australians care about, and are willing to enforce, their information rights," Professor McMillan said when he put on the record information about the first three months of operation of his office and the new Freedom of Information regime.

"I'm delighted that Australian government agencies are increasingly adopting a pro-disclosure culture," he added.[9]

"I'd agree... that there appears to have been a move in the right direction in some agencies at least. But there's no substitute for meaningful measures of performance and change," FoI and privacy expert Peter Timmins wrote on his blog, Open and Shut.[10]

"The commissioner's conclusion after the first three months of operation of his office also strikes me as full of hope and optimism, rather than based on evidence."

On May 1, 2011, an Information Publication Scheme commenced requiring agencies to publish a range of information about the agency and to publish a register of information known as a "disclosure log". Disclosure logs will be available from an agency's website and contain information that has been released in response to FoI requests.

"The purpose of the disclosure log is to provide the public with ready access to information that has already been publicly released by an agency or minister. Disclosure logs, together with the Information Publication Scheme, will facilitate a pro-disclosure culture across government," McMillan said on March 13.[11]

"Many journalists, meanwhile, are worried about the introduction of disclosure logs on May 1, when the legislation requires agencies to start publicly detailing their FoI releases within 10 business days," *The Australian's* Sean Parnell wrote on March 18.[12]

"Already, Treasury is publicly releasing FoI documents the same day they are given to an applicant, removing any competitive advantage journalists might have over rivals."

In response to the information commissioner's discussion paper on disclosure logs, Australia's Right to Know coalition noted: "Allowing the public and other journalists to have simultaneous access disregards the work expended and costs incurred by the applicant in pursuing the FoI request."[13]

In its submission, the Right to Know coalition called for the introduction of a five-day "grace period" between the release of information to a journalist following an FoI request and the release of the same information to the public.

"This time frame reflects the complexity of many of the documents in a number of FoI applications," the Right to Know submission asserted.

New South Wales

On July 1, 2009, the *Government Information (Public Access) Act 2009* (the GIPA act) commenced. Earlier in the year, the NSW government appointed an information commissioner whose role is to ensure compliance with the new regime for accessing government-held information

The GIPA Act also requires government agencies to make certain information easily available to the public, without an application having to be made. This is known as open access information and includes:

- an agency's current publication guide;
- information about the agency in any document tabled in parliament by or on behalf of the agency policy documents;
- disclosure logs of all the information released in response to applications;
- a register of government contracts.

Agencies must also make a record of a decision not to make any open access information publicly available.

Cartoon by Cathy Wilcox

Before the NSW election on March 26, the NSW Coalition parties promised to pursue a "new era of open government", including the reform of Freedom of Information (FoI) process based on the following basic principles and initiatives:[14]

- proactive disclosure of government information;
- one-stop online shop for information from all government agencies;
- enforced public disclosure of government contracts and grants;
- no cost for FoI applications and the establishment of mandatory deadlines.

The pre-election promises included a commitment to appoint a fully independent open government commissioner within the Office of the NSW Ombudsman who would:

- play an independent "watchdog" role and drive the information-sharing performance of government agencies toward the highest standards of openness, accountability and transparency;
- provide citizens with advice and hear complaints on FoI and other government information matters;
- report annually on the government's overall performance and on the comparative performance of government agencies, including total number of requests, number of requests complied with, turnaround times, number of complaints and number of complaints upheld or denied.

In his informative blog, Open and Shut, Peter Timmins made the following recommendations:[15]

- instructions for prompt public release of those parts of the incoming government briefs prepared for ministers that outline the state of things in NSW;
- a letter to the Liberal and National parties urging/insisting on disclosure as soon as practicable of donations received prior to March 26 and voluntary adoption of something close to real-time disclosure from now on, with legislative changes along these lines to follow;
- order immediate review by each agency of any GIPA matters before the information commissioner, the Administrative Decisions Tribunal or the courts with a view to speedy resolution;
- ask the information commissioner for a report on issues that have arisen in the first nine months of operations, to identify agencies that appear to be lagging in fully embracing the open government principles underpinning the GIPA act, and to bring to attention any proposed changes in legislation that may be necessary – for example, regarding information commissioner powers – to give full effect to the scheme;
- put parliamentarians on notice that changes coming to arrangements for allowance and support payments will include publication of details of payments online.

Victoria

The Freedom of Information regime in Victoria relies on the *Freedom of Information Act 1982*. Former attorney-general, Rob Hulls, stated that Victorian government agencies had handled 31,343 requests – a 9.2 per cent increase on the previous year. He said it was a testament to the government's commitment to "openness and accountability" that access to documents had been granted in part or full in 97.6 per cent of applications.

However, there has yet to be any move in Victoria to introduce legislation to establish a "push" culture, putting the onus on the government to proactively release information.

The new Baillieu government, elected in November 2010, came to power pledging to break what Ted Baillieu described as "Labor's culture of secrecy which is designed to suppress information deemed harmful to their interests", but at the time of writing this report, no move has been made to introduce FoI reform.[16]

Queensland

Back on June 10, 2008, Queensland premier Anna Bligh received an independent review of Queensland's Freedom of Information act. It stated that a new approach was needed from the government, putting forward 141 recommendations for reform. The government agreed, supporting in full or part 139 of the recommendations.

From July 1, 2009 the *Right to Information Act 2009* replaced the *Freedom of Information Act 1992* and is part of a broader "push" model of greater proactive and routine release of information.

The 2009/10 annual report from Queensland's information commissioner, Julie Kinross, highlights a 60 per cent increase in external review applications to 439 – 90 per cent of which were resolved early without the need for a formal decision.

Tasmania

On July 1, 2010 Tasmania's new *Right to Information Act* commenced. The framework in the Act has four key elements, which are:

- it mandates the proactive release of information;
- it includes an enhanced role for the ombudsman in relation to both review and the monitoring of the release of information;
- it minimises fees payable for the formal release of information;
- for the first it time seeks to clarify what exactly the public interest test consists of.

A copy of the Act is available at www.thelaw.tas.gov.au

However, according to FoI blogger Peter Timmins, the ombudsman's website has "no published review decisions, no information about complaints or review applications received, no other statistics, no audit or investigation reports, no performance measures that agencies will be held to or that apply to the ombudsman's review functions, no speeches on RTI – or any other RTI-related information – since the publication of guidelines and a manual last year, and the announcement of half-day workshops once a month".[17]

South Australia

South Australia still relies on the *Freedom of Information Act 1991*, which confers on members of the public "a legally enforceable right of access to documents in the possession of South Australian State and Local Government and the Universities, subject only to such restrictions that are consistent with the public interest and the preservation of personal privacy".[18]

During 2009-10, 11,612 applications were determined across the three sectors, with 87 per cent being granted access either in full or in part. While this figure is slightly less than last year, agencies reported a decrease of 8 per cent in the number of exemptions claimed and an increase in the number of applications being satisfied by providing information outside of FoI.

New exemptions

In early 2008, SSABSA was declared an exempt agency under the *Freedom of Information (Exempt Agency) Regulations 2008*. This "blanket" exemption was carried over (and now applies) to the SACE Board of South Australia.

On August 20, 2009, the *Freedom of Information (Exempt Agency) Regulations 2008* was varied by the *Freedom of Information (Exempt Agency) Variation Regulations 2009*. The variation declared the following agencies exempt in respect to information relating to the investigation into the City of Burnside carried out by the investigator appointed under section 272 of the *Local Government Act 1999*:

- any agency assisting in the investigation;
- the Department of Primary Industries and Resources;
- the Minister for State/Local Government Relations;
- the Department of Planning and Local Government.

The variation sought to ensure that a person with information relevant to the investigation was not inhibited from coming forward, as might be the case if the information was accessible through FoI. The regulations also declared the investigator to be an exempt agency.

The *Statutes Amendment (Victims of Crime) Act 2009* amended various acts, including the *FoI Act*. Specifically, it amended Schedule 2 – Exempt Agencies, to include the Commissioner for Victims' Rights as an exempt agency. This variation sought to ensure that victims of crime have confidence that documents received, generated and processed by the commissioner are not at risk of disclosure to a third party. The variation recognises that information relating to victims of crime is highly sensitive and personal in nature. This Act commenced operation on September 19, 2010.

Ten-Year Rule

On October 1, 2009, the South Australian government introduced its *Freedom of Information Release of Cabinet Documents under the Ten-Year Rule* policy issued as Premier and Cabinet Circular 31. The Ten-Year Rule sets out the state government's policy in regard to the release of Cabinet documents under the *FoI Act* after 10 years rather than the 20 years currently prescribed in the *FoI Act*.

Fees

On March 10, there was an unsuccessful move by the opposition to allow five hours of free processing for journalists' Freedom of Information applications. An editorial in *The Advertiser* on March 11 noted: "South Australia has a poor record of disclosure – its courts are notorious for handing down suppression orders. The importance of public disclosure has become political, rather than a principle. Every opposition demands it, while every government attempts to avoid it."

FoI consultant Peter Timmins commented on his blog Open and Shut on March 14, 2010: "Given the state is one of the laggards on FoI reform generally, a proposal for reduced charges for journalists seems a long way short of the mark, although a wider reform agenda seems foredoomed."

Western Australia

Western Australia still relies on the *Freedom of Information Act 1992*. This legislation was subject in 2010 to a review by the independent information commissioner of the way the Act is administered by State and local Government agencies.

The Media Alliance made a submission, first of all highlighting the limited scope of the review which was confined to the administration of the legislation, rather than the content of the legislation itself, and secondly, identifying several problems with administration of FoI in Western Australia.[19]

According to the latest annual report of the Office of the Information Commissioner, charges collected for access to documents containing non-personal information rose by 176 per cent between 2004/05 and 2008/09.

The submission also highlights the number of FoI complaints made by MPs against decisions by ministers, from four in 2007/08 to 80 in 2008/09.

"If our MPs are encountering such difficulty in accessing information, the scale of our challenge confronting ordinary citizens may reasonably be inferred as being monumentally difficult," the submission asserts.

WA's information commissioner, Sven Bluemmel, commented in the 2008/09 annual report that there were concerns as to whether government agencies were complying with the Act "in the spirit in which parliament originally envisaged", citing a seeming presumption on the part of agencies that the legislation was the "primary or sole mechanism" for making government information available and a tendency to focus on the procedural aspects of the Act rather than its intended outcome – to make information available to the public.[20]

Freedom of Information regimes have come a long way over the past few years, but many journalists report that their information requests are too often met with reluctance, and only granted after lengthy appeals. Further, several states have yet to modernise their FoI regimes, which hampers journalists trying to access information which should be freely available. This must be addressed as a matter of urgency.

Roadblocks on the freedom ride

Michael McKinnon knows what wobbly legal gymnastics bureaucrats will try when blocking Freedom of Information requests.

Last year, a wave of Freedom of Information (FoI) swept across Australia, hopefully heralding a new age of improved transparency and access to the secrets of government. The Commonwealth and NSW have followed the Queensland reform model yet, despite the broad public support for FoI, there is a lurking fear that even the best legal reforms will not vanquish a culture of concealment.

The reforms offer some improvement but are a long way short of the best FoI regulations worldwide. Australian governments, for example, still place way too much (unnecessary) reliance on Cabinet confidentiality.

Two cases illustrate how strongly bureaucrats, presumably with the support of their political masters, wriggle and fight to avoid releasing information overwhelmingly in the public interest. Both appeals will also test the capacity and will of ombudsmen and information commissioners to investigate, name and shame the offenders that remain committed to a culture of secrecy.

In early 2010, *Seven News* received a tip-off about a report on a Victoria Police operation that was commissioned at great expense but never released. Auditing firm PricewaterhouseCoopers had reviewed Victoria Police's Safe Streets Taskforce, designed to target drug and public-order offences in Melbourne's CBD.

The response from Victoria Police to Seven's request for a copy of the report was swift and negative. That report, and another by the same firm on public safety in Victoria (*Safer Victoria*), were "Cabinet-in-confidence" – an exempt document under FoI laws because it was prepared for the consideration of Cabinet. Both documents would have provided the public with greatly improved understanding of the success of the Brumby government's law and order policies. For any state government, law and order remains a key issue in the assessment of voters.

The information was also denied on the basis that the release of an "internal working document" disclosing advice, opinion or recommendation of officers of the agency would not be in the public interest.

The response from *Seven News* was that the agency had no evidence to suggest the documents had been prepared for Cabinet. Cabinet processes are, not surprisingly, rigorously documented but, funnily enough, a senior public servant appears to have a formed a reasonable view that the documents were Cabinet-in-confidence without a single bit of paper in support. Seven also argued that, by definition, an internal working document had to be prepared by someone working for the agency and, in any case, the public interest overwhelmingly favoured release.

Following an internal appeal, a one-page response from Victoria Police's director of legal services said Seven could not have the documents. No reason was given, so Seven lodged an appeal with the Victorian Civil and Administrative Tribunal (VCAT).

Victoria Police had claimed the *Safer Victoria* report's findings were not endorsed by the force and that, if released, they were "likely to be confused and misrepresented as the established views of Victoria Police and therefore mislead the public".

Police said the findings of the other report, *Safe Streets*, were not endorsed by Victoria Police and that, if released, it would "injure the public interest because it would promote pointless and capricious debate".

Despite the flawed claims, Victoria Police kept fighting. Until, that is, a barrister advised them that no, in fact, the documents were not Cabinet-in-confidence and no, they were not internal working documents. On November 5, after six months of blocking *Seven News* at every turn, Victoria Police lawyers informed us in a VCAT hearing that they would supply all, or a substantial part, of the report's 400 pages.

But a little over a fortnight later, on the Monday starting the last week of the Victorian state election campaign, Victoria Police informed *Seven News* in a VCAT directions hearing that we would not get the documents before polling day. There were stakeholders that needed to be informed, the representatives claimed. There was "due process".

Despite more than six months of hiding the documents, suddenly the department needed some new "due process".

"Australian governments, for example, still place way too much (unnecessary) reliance on Cabinet confidentiality."

Not surprisingly, Victoria's then opposition leader, Ted Baillieu, suggested it smacked of a political cover-up. Neither Victoria Police nor the Labor government would comment, although John Brumby, under heated questioning at a press conference, said the issue was an operational matter for police and he could not be involved.

While Seven was still thwarted in telling the public the truth, the story of the government's secrecy dominated our coverage in the last week of the campaign.

In a press conference on the Tuesday of that election week, John Brumby said he was not aware of the *Safe Streets* document and said it was a matter for the police commissioner.

"The chief commissioner has made a decision that he doesn't believe it's appropriate for release," Brumby repeated.

This claim beggared belief, given the regular emails between the premier's media unit and police, advising them on strategy.

The reports have been now been released in their entirety and have revealed why secrecy was judged to be more important than the voters' right to know. One of the reports, *Safer Victoria*, written in 2009 by PricewaterhouseCoopers, recommends that a single "Office of Public Safety" be set up to promote a whole-of-government approach to tackling the rising incidence of crimes such as assaults, property damage and robbery.

The report's findings were at odds with the policies of the then Brumby Labor government and were not supported by police commissioner Simon Overland's leadership team.

Following Labor's defeat, Victoria's new crime prevention minister, Andrew McIntosh, has criticised Victoria Police's tardiness in releasing the reports and said that public debate on the issue of public safety was to be welcomed, not shunned. However, Victoria's ombudsman will now investigate and hopefully the political considerations that justified secrecy will be exposed.

The Civil Aviation Safety Authority (CASA) provides another example of how bureaucrats will fight for secrecy instead of presuming a document should be released. Indeed, a successful appeal by Seven and the Australian Licensed Aircraft Engineers Association (ALAEA) in relation to two separate (but linked) FoI applications shows that some public servants will go to almost any lengths to justify secrecy, including providing their own witnesses with carefully stage-managed answers in a bid to provide apparently supportive evidence.

Both FoI requests were about information on overseas maintenance by Qantas and grew out of concern for Australia's air safety. ALAEA had sought information in August 2007 about audits of CASA-approved aircraft maintenance facilities located in Hong Kong, Malaysia, New Zealand, Singapore and the Philippines, and on Australian registered aircraft undergoing maintenance in Hong Kong, Malaysia, New Zealand, Singapore and the Philippines.

CASA had identified audit reports but claimed they were all exempt documents for two reasons: because of the potentially adverse effect of their disclosure on CASA's compliance audit activities, and because of the potentially adverse effect of their disclosure on the maintenance and repair organisations to which they related.

CASA claimed disclosure would inhibit frankness and candour in future audits of maintenance organisations and that it relied on such expected candour in being able to conduct its safety regulation functions effectively. Coincidentally, on August 7, 2007 Seven had documents relating to repairs and maintenance standards for Qantas aircraft, including information about potential problems. When it requested information from CASA, the authority used the same reasons it gave ALAEA to block release of almost all documents.

Both cases wound their way through internal reviews and were ultimately joined in one appeal to the Administrative Appeals Tribunal (AAT), managed by Seven.

The first problem was CASA had failed to provide all the documents relevant to the two requests. We were aware of this failure because, as the Tribunal noted, "The existence of at least some of these documents had been disclosed in various media releases and reports of interviews, including a CASA media release dated September 1, 2008."

On December 16, 2008 the AAT ordered CASA to lodge the requested documents with the Tribunal. The AAT was to find that "there was a substantial number of identified documents that CASA had wrongly regarded as not within the scope of this initial application."

As the AAT noted, the potential availability of air safety audit reports to the general public would "afford a greater potential for informed public discussion of, and satisfaction about, details of audit practices and findings. It will also heighten both CASA's and airline organisations' awareness of the potential for informed independent scrutiny."

But it's the costs judgment, handed down by AAT senior member Peter Taylor on February 11, that lays bare the flaws in CASA's legal defence. For example, CASA principal witness, Mr Barry, "ultimately disavowed any real apprehension" that audit disclosure would have a material impact on the CASA audit process.

Indeed as the costs judgment notes: "CASA's general claims about the effect of disclosure of the contentious Service Difficulty Reports (SDR) were advanced through Mr Laws, despite the fact that he had no personal responsibility or involvement in relation to them.

"Mr Laws' apprehensions about the effect of SDR disclosure had merely been suggested to him in the draft statement provided by CASA's legal section and were not the product of his own informed and experienced assessment. Neither were they based on a detailed assessment of the individual reports."

It is worth noting that a CASA FoI officer (Ms Ng) gave evidence that her affidavit had been prepared by CASA's legal team as well.

The costs judgement also records that CASA's actions in a series of contested applications made by Seven's legal team "substantially increased the costs of the proceedings, and contributed to the length of the delay that occurred prior to the substantive hearing of the two review applications."

Those lengthy and expensive proceedings would not have been necessary if CASA had understood its obligations under the FoI act.

Seven has requested an investigation by the new information commissioner into CASA's action during its legal battle in the Administrative Appeals Tribunal. Like the Victoria Police, CASA will hopefully find there is a further price pay to pay for secrecy apart from the embarrassment of a lost legal battle.

Michael McKinnon is the FoI editor for the Seven Network

CONFIDENTIAL SOURCES AND WHISTLEBLOWER PROTECTION

On March 18 this year it was reported that two *Sydney Morning Herald* journalists, Dylan Welch and Linton Besser, had been served with subpoenas in the NSW Supreme Court ordering them to hand over to the NSW Crime Commission their mobile phones and any SIM cards they might have used over the past 12 months.

The pair had published a number of stories alleging wrongdoing at the Crime Commission, including allegations that officers at the Crime Commission had allowed major criminals to keep some of the proceeds of their criminal activities and had used money from criminal ventures to pay some of the Crime Commission's legal costs.

The stories had apparently been generated by investigations being carried out by the NSW Police Integrity Commission (PIC).

Fairfax Media Ltd was also served with a subpoena demanding the company hand over any documents that any of its employees might have relating to any investigation of the NSW Crime Commission by the PIC. The subpoenas have subsequently been withdrawn.

As the NSW Crime Commission was serving its subpoenas, the federal parliament was preparing to pass the *Evidence Amendment (Journalists' Privilege) Act 2011*, which substantially strengthens the position of journalists in maintaining confidentiality by providing for a rebuttable presumption against disclosure of the identity of a journalist's confidential source.

The legislation applies in matters concerning Commonwealth laws or heard in federal courts.

Evidence Amendment (Journalists' Privilege) Act 2011[21]

The legislation passed the federal parliament on March 21 with amendments lodged by Greens senator Scott Ludlam.

The private member's bill was introduced in October 2010 by independent MP Andrew Wilkie, co-sponsored by independent senator Nick Xenophon.

The bill's explanatory memorandum is reproduced below:

> *This bill amends the* Evidence Act 1995 *(Evidence Act) by strengthening the protection provided to journalists and their sources. This bill is intended to foster freedom of the press and better access to information for the Australian public.*
>
> *This bill provides that if a journalist has promised an informant not to disclose his or her identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable their identity to be ascertained.*
>
> *This is based on the premise that it is vital that journalists can obtain information so they can accurately inform the Australian public about matters of interest. Accordingly, strong protection must be provided to enable the full disclosure of information.*
>
> *The bill does recognise that there may be circumstances where the public interest in the disclosure of information is so strong that it should be provided to the court, but it is in line with existing legislation in the United Kingdom, New Zealand and many states in the United States, where it is up to those parties who want to force a journalist to reveal their source to prove that the public interest in disclosing the source outweighs the likely harm to the source and the public interest in the information being provided in the first place.*
>
> *In 2007, journalists, Gerard McManus and Michael Harvey were convicted of contempt of court and fined $7000 each for refusing to reveal their source for stories they wrote in 2004 for Melbourne's Herald Sun newspaper. This was a clear example of when journalists would not have otherwise been able to report on the actions of the government (in this case, the federal government's decision to reject a $500 million increase in war veterans' entitlements) without their source, who, had he or she been revealed, would have suffered harm.*
>
> *This bill will replace the existing provisions in Division 1A of the* Evidence Act. *It will include a new provision that provides clear authority for a presumption that a journalist is not required to give evidence about the identity of the source of their information. This presumption can be rebutted in circumstances where the public interest outweighs any likely adverse effect for the person who provided the information to the journalist as well as the public interest in communication of information to the public by the media. These amendments are based on similar provisions of the* New Zealand Evidence Act 2006, *modified to ensure appropriate application in the context of Australian evidence law.*

The Wilkie bill passed the House of Representatives on October 28 and was passed to the Senate. The Media Alliance gave evidence to a hearing of the Senate Legal and Constitutional Affairs Legislation Committee on November 18 at which the scope of the reforms were discussed.

At issue was the definition of "journalist" for the purposes of the legislation. The Alliance position was, and remains, that the legislation ought to reflect the nature of the information rather than the person or persons who had published it.[22]

In the shadows: Shield laws recognise the important bond of trust between journalists and their sources
Photograph by Andrew Quillty/*AFR*

This position is largely reflected by amendments subsequently proposed by Greens senator Scott Ludlam[23], which broaden the protections established by the legislation, so that "journalist" is defined as a person who is engaged and active in the publication of news and may be given information by an informant in the expectation that it may be published in a news medium.

Further, a news medium means any medium for the dissemination to the public or a section of the public of news and observations on news.

New South Wales

NSW is the only state with a shield law in place but it falls short of a rebuttable presumption in favour of protection of a source's identity.

In September it was reported in *The Australian* that Coalition parties in NSW endorsed a scheme to establish consistent shield laws with the backing of federal and Victorian law. The agreement is understood to have been based on the model proposed by Liberal senator George Brandis, which includes a rebuttable presumption in favour of protection, but does not reflect the amendments successfully proposed by Senator Ludlam.[24]

Victoria

In April 2011, Victorian attorney-general Robert Clark said shield laws would be introduced into the Victorian parliament within the next six months. He said the legislation would closely model the federal government's except for the Greens' amendments to extend protection to amateur bloggers.[25]

Queensland

In September 2008, Queensland's attorney-general, Kerry Shine, proposed amendments to the state's Criminal Code. The effect is that a person brought before a Crime and Misconduct Commission (CMC) hearing is not entitled to remain silent or refuse to answer a question on a ground of privilege, other than legal professional privilege, public interest immunity or parliamentary privilege.[26]

The Media Alliance sought a meeting with Shine to highlight journalists' concerns over the development and urged him to introduce shield laws to protect journalists from being

forced into such a fundamental breach of their Code of Ethics. Shine noted at the time that it was CMC policy not to coerce journalists into giving up their sources, but the Alliance believes a "policy" to be inadequate and continues to press for this to be adopted in law.

In March 2011, following the passage of the *Federal Evidence Amendment (Journalists' Privilege) Act 2011*, the Alliance again approached the office of the attorney-general for an update as to whether the Queensland government was considering the introduction of shield laws.

We received this response: "The state government is aware of the recent passage of the Commonwealth legislation and will consider the implications of this for Queensland."

Western Australia

In February 2011 it was reported in *The Australian* that the Western Australian attorney-general, Christian Porter, had foreshadowed state shield laws which would extend further than that of the Commonwealth, by providing protection before investigative bodies such as the Corruption & Crime Commission.[27]

"We've consulted with the journalist profession and, I must say, my position has moved closer to their position," Porter told a conference organised by the Law Society of Western Australia.

The Alliance congratulates the authors of the *Evidence Amendment (Journalists' Privilege) Act 2011* and urges state and territory governments to introduce similar legislation in their own jurisdictions. We also commend the West Australian government for its determination to extend journalists' privilege to the Crime and Corruption Commission in Western Australia ,and urge all states and territories to follow suit. Though subsequently withdrawn, the serving of subpoenas on the two *Sydney Morning Herald* journalists illustrates the urgency of this issue.

WHISTLEBLOWER PROTECTION

Queensland takes the lead

As with Freedom of Information, the Bligh government in Queensland has taken the lead with whistleblower legislation that sets the standard for the rest of the country.

The *Public Interest Disclosure Act*, which passed the Queensland parliament in September 2010 has been rated by A.J Brown, the co-author of the landmark Griffith University study *Whistling While They Work*[28], as world's best practice in the area, being "simpler and more flexible than Britain's Public Interest Disclosure Act… the most liberal in the world".

The Act provides that public officials will be legally protected if they take a public interest disclosure to a journalist, provided they have first taken it to an official authority and that authority has:

- decided not to investigate or deal with the disclosure, or
- investigated the disclosure but not recommended the taking of any action, or
- failed to notify the person, within six months of the disclosure, whether or not the disclosure is being investigated or dealt with.

For journalists the most significant provision of the new legislation is that whistleblowers can go to the media and still receive legal protections, an area where other proposed legislation has fallen short in the past.

"The new provision will guarantee that government agencies make better efforts to listen to whistleblowers, act promptly on their concerns, and do their best to protect them from reprisals. Because now, if they don't, senior government managers and ministers can expect to see the problem aired more rapidly in the public domain," A.J. Brown wrote in *The Australia*n newspaper a few days after the bill passed the Queensland parliament.

"It is a true 'sunlight' provision. If a government agency or integrity authority fails to act when it should, there are no arbitrary time limits or other artificial restrictions on when a public servant may go public."[29]

Commonwealth legislation to follow

In March 2010 the Cabinet secretary, Joe Ludwig, outlined the federal government's long-awaited proposal for whistleblowers. The legislative model, while offering plenty to be pleased about, does not offer the same level of protection as the Queensland legislation for public servants who disclose to the media.

While the proposed model goes further than recommended by the Dreyfus Report in 2009, and will not limit public disclosure of wrongdoing "to matters that threaten immediate and

serious harm to public health and safety", there are a number of areas in which the protections offered fall short of the ideal.

The proposed Public Interest Disclosure legislation offers protection to public servants providing information to the media if:

- the disclosure relates to a serious matter
- the disclosure was not acted on in a reasonable time or the whistleblower had a reasonable belief the response was inadequate
- the public interest outweighs other factors such as national security or cabinet confidentiality.

Protection will also be afforded to cases where:

- there was a reasonable belief a matter threatened substantial and imminent danger or harm to life or public health and safety
- there were exceptional circumstances justifying no prior internal or external disclosure.

While the proposed changes allow disclosure to a third party without going through a responsible agency, this course of action is limited to matters threatening health or public safety. This means that some key issues of maladministration or corruption cannot be brought to media attention even if they satisfy (b) (ii) in recommendation 21: that is, the existence of exceptional circumstances justifying no prior internal or external disclosure.

From protected to protector: Andrew Wilkie's experience as a whistleblower led to his advocacy of journalist shield laws
Photograph by Alex Ettinghausen/Fairfax Media

It is not hard to envisage a case in which a whistleblower harbours a reasonable belief that taking a matter through official channels will be futile or will result in victimisation and perceives the media as the only possible vehicle for bringing to light a serious matter of maladministration.

There is also no real provision for compensation for public servants whose actions in disclosing information have adversely affected their career prospects. Any workable whistleblower system must acknowledge the need for remedies that deal with the issue of adverse treatment and facilitate a financial reward or other recognition system for whistleblowers who contribute to the public good.

Whistleblowers should have a clear right to claim compensation for loss or injury suffered as a result of making disclosures.

As for financial reward for whistleblowers, this is a more contentious area of debate, but it is a feature of some overseas systems, particularly in the United States, where the "qui tam" provisions used in the US *False Claims Act* have enabled whistleblowers to collect a share of money recovered if they provide information that forms the basis of a successful prosecution for fraud against the government.

Kessing still waits for justice

Meanwhile further evidence has emerged that Allan Kessing, who was convicted in 2007 of being the whistleblower behind the leaking of reports about security lapses at Australia's airports – a charge he has always denied – may have been the victim of a miscarriage of justice.

It has been reported in *The Australian* newspaper that important information that could have helped Kessing's case was not disclosed to the defence.[30]

A potential witness whose evidence could have undermined the prosecution case was not interviewed, while it has also emerged that the Australian Federal Police did not disclose it had received a letter from the internal affairs unit at Customs which Kessing's barrister, Peter Lowe, believes could have helped the former Customs officer's defence.

Having addressed the area of shield legislation for journalists, the federal government now needs to pass similar laws offering protection to whistleblowers. This legislation must prohibit discrimination against whistleblowers that may affect their careers and must include penalties for those managers found to be punishing any staff who have made disclosures in the public interest.

Whistleblower Wilkie kicks a goal

There's a new approach to shield laws and whistleblower protection, and for that we should thank the hung parliament and Andrew Wilkie, says Laurie Oakes.

Politicians. You've gotta love 'em. Just a couple of years ago federal attorney-general Robert McClelland was telling us that the direction taken in New Zealand on shield laws for journalists was "misguided". But on March 21 this year, there he was supporting legislation in parliament that he boasted was based on those very same laws that operate across the Tasman. "The key element of the bill is the introduction of a rebuttable presumption in favour of journalists' privilege, based on journalistic shield laws in New Zealand," he said.

What changed? Last year's federal election produced a hung parliament, that's what. Tasmanian independent MP Andrew Wilkie – with views based on his own whistleblowing experience – was in a pivotal position. And Julia Gillard's government found itself over a barrel. It could either support Wilkie's legislation to prevent journalists being forced to reveal their sources in court unless there is an overriding public interest, or it could face defeat on the floor of parliament as Wilkie and other independents joined with the federal opposition to achieve the same result. McClelland performed his 180-degree turn with nary a blush.

As summed up in the explanatory memorandum, Wilkie's legislation "provides clear authority for a presumption that a journalist is not required to give evidence about the identity of the source of their information". This presumption "can be rebutted in circumstances where the public interest outweighs any likely adverse effect for the person who provided the information to the journalist as well as the public interest in communication of information to the public by the media".

It was a massive advance on the largely useless 2007 legislation introduced by the then attorney-general Philip Ruddock in the wake of the contempt convictions of Michael Harvey and Gerard McManus. The political reporters from Melbourne's *Herald Sun* newspaper had refused in court to identify the source of a story about veterans' entitlements that embarrassed the Howard government and been fined $7000 each. While calling itself a "journalists' privilege" bill, the Ruddock effort contained no presumption in favour of source protection at all.

The most controversial aspect of the Wilkie legislation was not the "rebuttable presumption" principle, which all parties accepted in the end, but an amendment proposed by the Greens in the Senate and accepted by Wilkie and the government. This amendment broadened the definition of a journalist – as Wilkie put it – "from the traditional, where someone works for a newspaper, radio or television station or news wire, to include those who work in what we call 'the new media'." Anyone "engaged and active" in the publication of news in any medium – those who blog, tweet or use Facebook or YouTube – will be covered.

The federal opposition found the change unacceptable, with shadow attorney-general George Brandis arguing that "it would extend a protection meant to facilitate the work of journalists to anyone engaged in whatever form of opportunistic activities". But the amendment stood.

There had been concern that the shift to "a pro-disclosure culture" in the federal government and bureaucracy, promised by Labor's John Faulkner when he was special minister of state, might stall after his enlightened revamp of Freedom of Information (FoI) laws. But the precarious post-election parliamentary balance ensured that momentum has been maintained. The next step – or so we hope – is whistleblower protection legislation that is consistent with the new FoI transparency and the shield laws. Again, Wilkie will be central to the process.

The federal government had already given ground on this issue before the election, in its response to a timid report from the House of Representatives Standing Committee on Legal and Constitutional Affairs, chaired by Victorian Labor MP Mark Dreyfus, QC. The Dreyfus committee took the view that public service whistleblowers should be protected only if they blew their whistles inside the bureaucracy. The emphasis was on discouraging and preferably preventing public disclosure.

The only circumstances in which blowing the whistle via the media would be protected was where disclosure was first made through the internal public service system but not acted on within a reasonable time. Even then, protection would apply only if the matter threatened "immediate and serious harm to public health and safety". Most government and bureaucratic scandals – acts of impropriety, wastage of public funds, nepotism, corruption, breaches of public trust – would not be covered. Clearly this flew in the face of Faulkner's commitment to openness and transparency, and it was ridiculed by those with a commitment to the public's right to know.

"Tasmanian independent MP Andrew Wilkie – with views based on his own whistleblowing experience – was in a pivotal position. And Julia Gillard's government found itself over a barrel."

In March last year, the then Cabinet secretary, Senator Joe Ludwig, announced there would be legislation providing, for the first time under Commonwealth law, "protections for public disclosures, including to the media and other third parties" under certain circumstances, and that it would not be confined to issues involving public health and safety. A public servant who went through specified internal disclosure procedures and did not get adequate or appropriate action within a reasonable time would be able to go to the media about other serious matters – so long as the public interest in disclosure outweighed countervailing public interest factors such as national security, protection of international relations, or Cabinet deliberations.

This was an advance, but the power-sharing parliament will almost certainly push the government to go further, as long as Wilkie applies enough pressure. Part of Wilkie's agreement with the government was that whistleblower protection legislation would be in place by the end of June. He is not holding the current special minister of state, Gary Gray, to that deadline now, because he wants plenty of time to consider the government's proposals (he has not been shown a draft bill yet). He wants to get advice from experts, among them Professor A.J. Brown of the Griffith University Law School, who headed the *Whistling While They Work* research project on whistleblower protection.

Professor Brown regards Queensland's new Public Interest Disclosure legislation, passed late last year, as best practice in this area. He wrote in *The Australian* in September that the Queensland law is the simplest, clearest and most liberal provision in the world for public servants to be able to go public with serious concerns about wrongdoing if official authorities fail to act. The requirement that public servants have a reasonable belief that wrongdoing needs to be rectified is – according to Brown – more straightforward than the equivalent test in the federal government's proposed regime. Brown regards the Queensland act as better than the law in NSW, the only other Australian jurisdiction to have similar public disclosure provisions. "This reform sets a new standard for other jurisdictions to follow," he says. His views will obviously be given great weight by Wilkie.

So progress is being made federally and there is movement at the state level, too – the Queensland whistleblower legislation being the most obvious example. Greg Smith, the attorney-general in the new NSW coalition government, is on record as favouring journalist shield laws for that state modelled on the New Zealand *Evidence Act*. While he was in the opposition, he also argued for a uniform NSW/Victorian/federal approach. The WA Government has telegraphed shield legislation going further than the federal law by providing protection for journalists before investigative bodies such as WA's Corruption and Crime Commission.

The signs are encouraging. But it should be noted that at the very time the legislation on protection of journalists' sources was going through federal parliament, the NSW Crime Commission issued subpoenas requiring two *Sydney Morning Herald* journalists to hand over phone records, phones and SIM cards and to reveal any direct or indirect communication with the Police Integrity Commission or its staff over the previous year. Why? Because the journalists had produced stories embarrassing to the Crime Commission while it was being investigated by the Police Integrity Commission.

That demand has since been withdrawn, but the battle is far from over.

Laurie Oakes is the political correspondent for the Nine Network and is a political columnist for News Ltd newspapers. He won the Gold Walkley in 2010

Raising the shield: Laurie Oakes is a prominent advocate for journalist shield laws
Photograph supplied

"The power-sharing parliament will almost certainly push the government to go further, as long as Wilkie applies enough pressure."

AUSTRALIA'S STAR CHAMBERS

Across Australia there exists a patchwork of anti-corruption and crime fighting bodies, each armed with investigative powers. These bodies, which exist at both state and federal level, emerged as a response to the organised crime and corruption uncovered by royal commissions in the 1980s and '90s. They are established by acts of parliament which give them the power to investigate serious crimes, from systemic corruption and organised crime to drug trafficking and terrorism.

Although their aim of defeating corruption is welcome, these extrajudicial bodies are often secretive, lacking both transparency and oversight. They have wide-reaching powers to subpoena and compel witnesses to reveal information, variously without legal representation or the protection of the common-law right to silence. The wording of the legislation which governs them refers almost universally to their witnesses' lack of a right to refuse to produce a "document or thing" – which could mean anything from mobile phone records and laptops, to tape recordings and primary source material which could reveal confidential sources. Often there is no right to refuse to answer questions, or the right may be tempered by privilege only extended to legal professionals.

These extraordinary powers can be effective in investigating serious crimes, but when they are turned on journalists – as they increasingly have been – they conflict ideologically with both the Journalist's Code of Ethics (which requires journalists to respect the confidences they give to sources under all circumstances), and with the recently enacted *Evidence Amendment (Journalists' Privilege) Act 2011 (Cth)*, which enshrines the right for journalists to protect confidential sources in Commonwealth law.

If journalists stick to their ethical code, they can be slapped with a wide range of fines and even jail (in some cases up to five years).

Victoria

In Victoria, the Alliance is closely monitoring plans to establish a "super-star chamber" to be known as the Independent Broad-based Anti-corruption Commission (IBAC), based on a recommendation that came out of the review of Victoria's integrity bodies completed last year (the Proust Review).[31]

The establishment of an IBAC is likely to result in the abolition of the Office of Police Integrity (OPI) and the Local Government Investigations and Compliance Inspectorate (LGICI). These two bodies have a record of coercion and intimidation in trying to force journalists to reveal their sources. The Media Alliance has long lobbied to have these coercive powers curtailed, including in a submission to the Proust Review.[32]

The Office of Police Integrity was established by the *Police Integrity Act 2008 (Vic)* to investigate police corruption and serious misconduct. Among its legislated powers, it can compel journalists to reveal confidential sources. People called before it as witnesses must not "refuse or fail to answer a question", nor may they "refuse or fail to produce a document or other thing" without "reasonable excuse".[33] Journalist-source privilege is not a "reasonable excuse".

A journalist who fails to comply with the Act is guilty of an indictable offence and can be jailed for up to five years.

Meanwhile, the officials of the Local Government Investigations and Compliance Inspectorate, known as Inspectors of Municipal Administration, are granted extensive powers under section 223B of the *Local Government Act 1989 (Vic)*, which allows them to require a journalist to give all "reasonable assistance", hand over any documents required and answer questions under oath. A refusal to do so can be punished with up to two years' imprisonment and/or fines of up to $28,000.

The Alliance is concerned that if the activities of these two bodies are subsumed into the IBAC, the new organisation may incorporate these existing coercive powers and override any state-mirrored shield laws that protect a journalist's source. The only option is for the protection of journalist privilege to be written into the Act which establishes the IBAC, and we await a response from Victorian attorney-general Robert Clark on the matter.

Queensland

The Crime and Misconduct Commission (CMC) is Queensland's sprawling super-watchdog, with jurisdiction over police integrity, crime and corruption. Its coercive powers come from the *Crime and Misconduct Act 2001 (Qld)*.

Journalists hauled before the commission are legally bound to answer questions under oath and assist investigations, and may be required to "immediately produce a stated document or thing that the presiding officer believes… is in the witness's possession, and relevant to the investigation".[34] In practice this could extend to a journalist's phone and SIM card.

Again, any failure to answer questions or assist investigations, even if to do so would conflict with a journalist's ethical code, can result in up to three months in prison. The Queensland legislation specifically notes that "a claim of privilege, other than legal professional privilege, is not a reasonable excuse [for noncompliance]".

In Queensland, a journalist can appeal against the decision of a presiding officer by taking the matter to the Supreme Court. But the only course of action as we see it is to have the *Crime and Misconduct Commission Act 2001* amended to reflect journalists' privilege.

New South Wales

In NSW, there are three main organs with coercive powers: the Independent Commission Against Corruption (ICAC), the Police Integrity Commission (PIC), and the NSW Crime Commission.

The NSW Crime Commission, which evolved from the State Drug Crime Commission and is governed by the *NSW Crime Commission Act 1985 (NSW)*, is notoriously secretive in its dealings. It is the subject of an ongoing report by two *Sydney Morning Herald* journalists that resulted in the journalists themselves being subpoenaed by the commission (see 'Watching the watchdogs', page 30). The commission has the power to remove the common law right to silence, and force journalists to produce documents and answer questions (including those which would reveal a source), or face a fine of $2200 and/or imprisonment for up to two years.[35] Giving false or misleading information attracts the much higher penalty of $55,000 and up to five years in jail.[36] In comparison, there is a provision in the legislation that allows members of the clergy of any church or religious denomination to refuse to divulge the contents of a religious confession.[37]

A journalist can appeal orders of the Commission to the NSW Supreme Court (if they apply within five days of the order)[38]. But here's the rub: they can't do so until they've actually produced the document and left it, sealed, in the custody of the court.[39]

When the Police Integrity Commission was established by the *Police Integrity Commission Act 1996 (NSW)*, it was invested with the power to investigate the NSW Crime Commission. However, its powers too can be used to force journalists to answer questions or produce documents or other "things". Refusal attracts a $2,200 fine and/or up to six months' imprisonment.[40] The provisions of the Act that relate to privilege and the right to refuse to answer questions, however, are more liberal than those of the Crime Commission, and allow a public interest test.[41]

There is a similar public interest test built into the *Independent Commission Against Corruption Act 1988 (NSW)*, the legislation which established the Independent Commission Against Corruption (ICAC), in terms of the right to refuse to answer questions or produce a document or thing.[42] Harsh penalties still apply for refusing to co-operate, however, with a $2,200 fine and/or up to six months in prison.[43]

Western Australia

In Western Australia, the Alliance is cautiously optimistic about re-establishing journalists' privilege, after comments made by former Western Australian attorney-general, Christian Porter, at a Law Society of Western Australia conference. These suggested that the Barnett government is interested not only in bringing in state shield laws in line with the federal standard, but also in extending this protection to investigative bodies such as the notoriously shadowy Corruption and Crime Commission (CCC).[44]

The CCC was famously behind the 2008 raid which saw 16 armed police officers invade the office of Perth's *Sunday Times* in an effort to identify the source of a story by investigative journalist Paul Lampathakis on how $16 million of taxpayer money was spent on political advertising.

The Barnett government's move is positive. In the middle of 2010, the government asked for a submission on its proposed shield law from the Western Australian arm of the Media Alliance. Our response was that while such a move is a step in the right direction, the proposed legislation was not sufficient to protect the sanctity of the confidences journalists need to give to sources in circumstances where they are unable to go on the record.[45]

As it stands, the *Corruption and Crime Commission Act 2003* (WA) allows the CCC to force journalists to "give evidence" and "produce any record or other thing".[46] If journalists stand by their sources and refuse to do so, they can face a charge of contempt[47] which can be tried in the Supreme Court.

Under the legislation, a "reasonable excuse" for refusing to comply with the commission does not include "breach of an obligation... not to disclose information, or not to disclose the existence or contents of a document",[48] even if breaching this trust will result in the prosecution of a source.[49] The obligation of journalists to protect their confidential sources has no weight under the existing legislation.

The Alliance believes that, with scope to appeal in some jurisdictions to a state's Supreme Court, it is vital that the recently passed Commonwealth shield law is echoed by mirror legislation in state jurisdictions. But if we are to protect the right of journalists not to be coerced by extrajudicial bodies, it is the acts of parliament which establish them – such as the *Crime and Misconduct Act 2001* (Qld) and the *Corruption and Crime Commission Act 2003* (WA) – that must themselves be amended to protect journalists' privilege, a fundamental tenet of press freedom.

Watching the watchdogs

Extrajudicial investigative bodies continue to use their coercive powers on the press, writes Michael Bachelard

Corruption-fighting commissions have not covered themselves in glory in the past 12 months when it comes to respecting the freedom of the press.

In Victoria, the Australian Federal Police and the state Office of Police Integrity have been at loggerheads over the reporting of anti-terror raids on the morning they happened in 2009. Fallout from the matter continues and the affair has prompted federal attorney-general Robert McLelland to propose an informal protocol between media and law enforcement agencies for the reporting of major crime and security issues.

In NSW, two Sydney Morning Herald journalists, Dylan Welch and Linton Besser, have been caught up in a similar feud between the NSW Crime Commission and the Police Integrity Commission — both armed with frightening coercive questioning powers.

The reporters resisted an order to give up their mobile phones, which would presumably be used to discern the sources of a number of their stories. On April 9 the *Sydney Morning Herald* reported the order had been dropped.

Meanwhile in the NSW Supreme Court, at the time of writing, a judge was considering forcing investigative reporters Richard Baker, Nick Mckenzie and Philip Dorling from *The Age* to reveal sources.

The case was brought by Chinese entrepreneur and Labor mate Helen Liu, to try to find who passed on the information about the ministerial career of former defence minister Joel Fitzgibbon.

As important as they might be in cracking down on official corruption, dodgy developers, crooked cops and organised crime figures, Australia's proliferating crime and corruption commissions seem also to be making it more difficult, not easier, for reporters to do their own investigative work.

In the jaws of the watchdog: Journalists are vulnerable to extraordinary coercion and intinidation from super-judicial bodies. Artwork by Rocco Fazzari

Federal shield laws for journalists, which allow reporters to protect the confidentiality of sources, are a step in the right direction, but they have not so far helped at the state level, where most of these crime-fighting bodies are based.

Through the prism of the new style of law enforcement, it is a conspiracy between an alleged source and a journalist to leak information that threatens the security of the realm, and then to cover up the leak with lies and obfuscation, also criminal. In this prism, the full weight of the law comes down on both the alleged leaker and the journalist.

When leaking to a journalist is a criminal offence, or corrupt conduct, then only two people, the journalist and the source, are able to tell the story, and journalists will increasingly be subject to the kind of treatment faced by Stewart, Baker, McKenzie, Dorling, Welch and Besser.

The effect on free speech, public discussion, disclosure, independent journalism and robust public debate could be disastrous.

It's in this context that the Baillieu government in Victoria is re-making its anti-corruption framework, and introducing an Independent Broad-based Anti-corruption Commission, or IBAC.

Details are sketchy and Crime Prevention Minister Andrew McIntosh has not yet elaborated, but we know IBAC will be similar to the ICAC in NSW, except it will combine even more bodies.

Police, ministers, MPs and their staff, the judiciary, the public service and local governments will all come under its jurisdiction.

Journalists called as witnesses to these hearings are forbidden to tell anyone that they've been called to appear – including their bosses and even their own families. They lose the right to silence and are compelled to hand over documents.

This is a process which takes journalists, who may have been reporting on episodes of crime or corruption, and places them at the centre of an investigation.

It has become axiomatic in recent years that such bodies, when handed these extraordinary coercive powers originally designed to break into criminal brotherhoods, will wield them.

A refusal to incriminate oneself in front of such bodies can itself be an illegal act.

A crucial balance to the extraordinary powers wielded by these bodies are shield laws for journalists, which allow them to protect sources who are making disclosures in the public interest.

But while, before the last Victorian election, both parties appeared to commit to these shield laws, talk on the subject since last November's election of the Baillieu government has been scant.

Let's remember that none of these bodies is perfect. The state Ombudsman, which has wielded the anti-corruption powers since the days of the gangland war in 2004, will lose them partly because of criticisms that he was too aggressive and too unaccountable.

In her review of the Victorian anti-corruption system last year, former senior public servant Elizabeth Proust said "the most widely identified concern … was the conduct of investigations by the Office of the Ombudsman".

"Credible" people, she said, had complained of being denied legal representation, of being intimidated during interviews, of being stressed because they were barred from discussing the case even with their families.

The Ombudsman had no parliamentary committee to oversee his operations, meaning the only place to complain was to the Ombudsman himself – and he refused to answer critics.

It is unclear whether the oversight planned for the new IBAC will be any more independent and robust. We await the government's announcements on the subject.

The public and the media accept, indeed, welcome the presence of anti-corruption bodies as an important part of keeping public officials in check. But there is equally no doubt that they are, like all human institutions, flawed.

If the combined effect of courts and commissions with coercive powers is to frighten sources from making public interest disclosures to journalists and deter reporters from investigating in areas that they have a responsibility to explore, then these flaws, and many others, might go undetected.

As we increasingly accept the need for anti-corruption commissions, the presence of strong shield laws for journalists and their sources become even more important.

Michael Bachelard is a senior investigative journalist with The Sunday Age

PRIVACY

> *"The tide continues to turn very much in favour of a law on privacy, hastened by cheap 'gotcha' stories by the media."*
> Richard Ackland, editor, The Justinian[50]

In the Alliance's press freedom report for 2010, *Progress under Liberty*, we reported that both the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC) had found a cause of action for serious invasion of privacy[51].

"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," stated the ALRC. However, its recommended formulation sets a high bar for plaintiffs, having due regard to the importance of freedom of expression and other rights and interests.[52]

At that stage there had been discussion in both journalistic and legal circles that legislation, rather than litigation, may be the preferred path, given how in recent years UK case law has tended to favour the plaintiff.

Over the past year there has been much discussion of this prospect but little sign of any action, despite incidents such as those "gotcha" stories, referred to by Richard Ackland and dealt with in more detail later in this chapter.

At present there is neither a statutory right to privacy (the *Privacy Act 1988* is effectively restricted to information and data privacy issues) nor a developed common law tort of privacy in Australia. Instead, we depend on a patchwork of legal and legislative remedies including breach of confidence and defamation.

However in the UK, the establishment of a right to privacy under the UK's Bill of Rights has enabled the development of a common law solution that has – as noted – tended to favour the plaintiff.

Background

In 2001 the High Court in *ABC v Lenah Game Meats Pty Ltd* cleared the way for the emergence of a tort of privacy. At the time, however, Chief Justice Murray Gleeson warned of the lack of precision of the concept of privacy.

As a legal concept, privacy is unwieldy and has become mixed up with confidentiality, secrecy, property, information storage and defamation. Article 17 of the International Covenant on Civil and Political Rights states:

- no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation
- everyone has the right to the protection of the law against such interference or attacks.[53]

In an address to the Australian Legal Philosophy Students' Association in 2008, Peter Applegarth, SC – now Justice Applegarth with the Queensland Supreme Court – referred to the 2007 matter, *Jane Doe v Australian Broadcasting Corporation,* as a "simple but bold step" which held that a tort of invasion of privacy exists in the common law.

ABC Radio broadcast the identity of a rape victim and was held liable for breach of statutory duty, for breach of a duty of care and also for breach of confidence.

In his address, *Is Nothing Private? Privacy and the need for legislative intervention*[54], Justice Applegarth said that the development of a tort of privacy in Australia was likely to focus on two areas: intrusion upon seclusion or solitude, and the public disclosure of private facts.

Both are of significance to the news media. The first area was examined in *Grosse v Purvis (2003)* in the Brisbane District Court. The trial judge, Judge Tony Skoien, noted there had been no case before in Australia that expressly recognised the civil right of action for invasion of privacy. Using principles established in US jurisprudence, he detailed four categories associated with the notion of privacy:

- intrusion on the plaintiff's seclusion or solitude, or into his or her private affairs;
- public disclosure of embarrassing private facts about the plaintiff;
- publicity which places the plaintiff in a false light in the public eye;
- appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The judge developed a set of tests for invasion of privacy:

- a willed act by the defendant;
- which intrudes on the privacy or seclusion of the plaintiff;
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;
- and which causes the plaintiff detriment in the form of mental psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which he or she is lawfully entitled to do.

In the second area, public disclosure of private facts, the development of technology for unauthorised surveillance, and the widespread use of cameras and recording equipment have created an enhanced danger of invasion of privacy.

In his 2008 speech, Justice Applegarth cited the case of footballer Sonny Bill Williams, whose private act with a woman in a toilet was recorded on a mobile phone camera and found its way "on to the internet and into the pages of the Murdoch press".

More recently, the matter of the 17-year-old Melbourne girl who posted photos of nude AFL players from St Kilda football club in retaliation for alleged ill treatment at the hands of various players, highlights a new problem faced by the courts in relation to invasion of privacy.

As lawyer Katy Barnett wrote on the Skepticlawyer blog: "An action restraining the girl didn't work, because the photos were already in the hands of other people who were not restrained. Also, the girl showed a distinct lack of respect for the injunction, as she went on to defy it by publishing more photos. The law finds it difficult to deal with mass media, and if you're dealing with a private individual with mass publishing capabilities rather than a newspaper, the difficulties are magnified. Unlike a newspaper, this girl apparently doesn't care about her reputation or about being seen to breach the law."[55]

Barnett writes that the girl's actions could attract penalties via an action for breach of confidence, breach of copyright or defamation, but pointed out there is no coverage available in any privacy law in Australia, although it could be argued there is a nascent common law tort of invasion after *ABC v Lenah Game Meats* which may cover the girl's actions.

David Campbell and Seven: justified invasion of privacy?

On May 20, 2010, David Campbell resigned as the NSW transport and roads minister after Seven News aired footage of him exiting a gay sex club in Sydney.

Academics and journalists such as Lawrie Zion, David Dale, Margaret Simons and Kayt Davies put their names to a statement, which, in part, said: "We know that sometimes the private lives of public figures need to be exposed for public good, in the public interest. But you exposed this man for no public good; nor was it in the public interest. It was shameful and hurtful – not just for Campbell and his family; but for all of us. It demeans journalism."

In February 2011, the broadcasting regulator, the Australian Communications & Media Authority (ACMA), found that the invasion of Campbell's privacy was justified. "While the broadcast invaded Mr Campbell's privacy, the Authority concluded it was nonetheless in the public interest to use the material as it explained the minister's resignation," ACMA stated in a media release.[56]

"Most of the media world, and most journalists who have expressed an opinion on the topic, think there was zero public interest in Channel Seven's broadcast about the private, after-hours attendance at a gay sauna by the former minister for transport David Campbell," wrote Richard Ackland in *The Sydney Morning Herald*.

"ACMA's decision to create a loophole for sufficiently vindictive breaches of privacy will live with us forever now, unless the laws are changed," Harley Dennett wrote on Crikey on February 11.[57]

A legislated outcome?

In 2010 the federal government created the position of privacy commissioner, integrated into the Office of the Australian Information Commissioner (OAIC), and under the control of the Department of Prime Minister and Cabinet.

The OAIC performs functions under the *Privacy Act 1988,* which regulates the way in which personal information can be collected, the accuracy of the information, how it is kept secure, and how it is used and disclosed. It also provides rights to individuals to access and correct the information organisations and government agencies hold about them.

In April 2011, the Senate Environment and Communications References Committee tabled its report on *The adequacy of protections for the privacy of Australians online*.[9]

The committee's recommendations include:

- The government accept the ALRC's recommendation to legislate a cause of action for serious invasion of privacy.
- The privacy commissioner's statutory complaint-handling role be expanded to more effectively address complaints about the misuse of privacy consent forms in the online context.
- The Office of the Privacy Commissioner (OPC) examine the issue of consent in the online context and develop guidelines on the appropriate use of privacy consent forms for online services.
- The second tranche of reforms to the *Privacy Act 1988* amend the Act to provide that all Australian organisations which transfer personal information overseas, including small businesses, must ensure that the information will be protected in a manner at least equivalent to the protections provided under Australia's privacy framework.
- The OPC in consultation with web browser developers, ISPs and the advertising industry, should, in accordance with proposed amendments to the Privacy Act, develop and impose a code which includes a "Do Not Track" model following consultation with stakeholders.

- The Privacy Act be amended to require all Australian organisations that transfer personal information offshore be fully accountable for protecting the privacy of that information.
- The government consider the enforceability of these provisions and, if necessary, strengthen the powers of the privacy commissioner to enforce offshore data transfer provisions.

A second tranche of reforms, expected in 2012, will deal more specifically with the question of invasion of privacy.

The Alliance believes a debate on privacy is long overdue. Lawmakers must weigh up the community's right to know with the right to a reasonable expectation of privacy. In the absence of an Australian bill of rights which would enshrine these two ideas in law, there needs to be a robust public debate about privacy to ensure that judgements in this area are not left to the courts.

Now and Ken's: The privacy fallout

As David Marr sees it, exposing a politician's sexual foibles for scandal's sake plays straight into the hands of privacy crusaders. The result could prove fatal for free, honest reporting.

If NSW's former transport minister David Campbell had put a bullet through his brain, it seems the Australian Communications and Media Authority (ACMA) would have come to the same conclusion: footage of the tubby minister emerging from the Ken's at Kensington gay bathhouse could go to air because the public has a right to a "deeper explanation" of the circumstances behind him topping himself – or simply committing political suicide, which he did when Seven told him he was about to be outed on the evening news.

Those of us who want the least possible restriction on what can be broadcast in this country might applaud ACMA for letting Seven off the hook, but for doubts the poor bastard deserved such humiliation. There is also a fear that ACMA's failure to condemn Seven is an open invitation to those lawyers keen to give Australians whose lives have been trashed in such a way the right to sue.

Impossible to define, thrown away by kids on Facebook and ceaselessly abused by governments, privacy is being offered fresh protection in the courts of the world. It began in America, has been fine-tuned in the UK and adopted in New Zealand. At least all those jurisdictions have bills or charters of rights to help protect free speech. We don't, yet the move to new privacy laws in Australia seems all but irresistible.

Since truth alone became a complete defence to libel claims in Australia – a wonderful development for the media – lawyers and politicians here have been lining up to plug the gap with new laws protecting privacy. The latest proposal by the NSW Law Reform Commission would offer damages and injunctions to those who suffer no more than "annoyance and anxiety" when their privacy is breached by the media. As a little extra, the commission argues the media might also be punished for honestly reporting accurate material contained in old public documents.

To fend off that nightmare, the Right to Know coalition has been arguing to anyone who will listen that all's well in Australia because journalists honour their code of ethics; the Press Council exposes reprobates in print; and ACMA is poised to punish any breaches of clause 4.3.5 of the Commercial Television Industry Code of Practice that says radio and television stations:

"They just don't grasp that honest and free reporting requires the law to respect a robust distinction between what people would prefer not reported and what is truly private."

Private affairs: ACMA's response to Channel Seven's David Campbell exposé provoked public outrage
Photograph by Edwina Pickles/Fairfax Media

Now and Ken's: The privacy fallout (continued)

▶ *Must not use material relating to a person's personal or private affairs or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast.*

Then *The Sunday Telegraph* claims pictures of a Russian tart show Pauline Hanson romping in her underwear; Kyle and Jackie O interrogate children about their sex lives; and ACMA gives Seven the all-clear after Adam Walters tails the NSW minister for transport to a gay bathhouse on Anzac Parade, shoots him emerging on a hidden camera, and puts the grainy footage to air in a welter of mistaken allegations and grubby innuendo – including this:

Since 1999, Campbell has campaigned strongly and successfully as a family man in his Wollongong seat of Keira. He sends constituents Christmas cards featuring his children and wife who is battling cancer.

Australian attitudes have shifted a bit over the past 30 or so years – a development unnoticed by the news team at Seven. Their Campbell scoop was derided in nearly every quarter except by Fred Nile and, as it turned out, by ACMA. The decision by ACMA chairman, Chris Chapman, and his deputy, Richard Bean, to forgive Seven is, in fact, a good deal more bizarre than was reported when it was announced just before Christmas.

What, asked Chapman and Bean, was Seven's report "about"? Their answer makes you wonder about ACMA's grasp of news values. These two lawyers with extensive commercial television experience decided the story was not about Campbell's sexuality but the minister's resignation, events leading up to that resignation and his "performance in matters of politics, government and public administration". Campbell's homosexuality was merely "strongly implied" in Seven's report about other things.

After that cockamamie effort they turned their attention to the matter of Campbell's privacy. Politicians and lawyers keen to see privacy protected by ACMA can take heart from the way Chapman and Bean dismissed all but one of Seven's excuses as "incorrect, ill founded or irrelevant". This was good work.

Visiting Ken's was a private matter; the minister's sexuality was not in the public domain; that the club's door was on a busy street was irrelevant; Seven failed to prove he was neglecting his official duties for sex; he had not slipped away early from parliament; and he did not consent to the broadcast of the footage simply because he didn't protest to Seven about it going to air.

ACMA was concerned that Campbell's covert sex life left him vulnerable to being compromised as a minister. "However, the mere vulnerability cannot be sufficient to permit the broadcast of otherwise protected material in the absence of, for example, any identifiable basis upon which to apprehend actual compromise."

The need to destroy a man to save him from blackmail is the great rationale of the muckraker. Back in 2002 Senator Bill Heffernan justified his parliamentary attack on then High Court judge Michael Kirby on just such grounds. ACMA made it clear in the Seven decision that such an argument doesn't wash unless there is some proof of actual compromise. That's useful work.

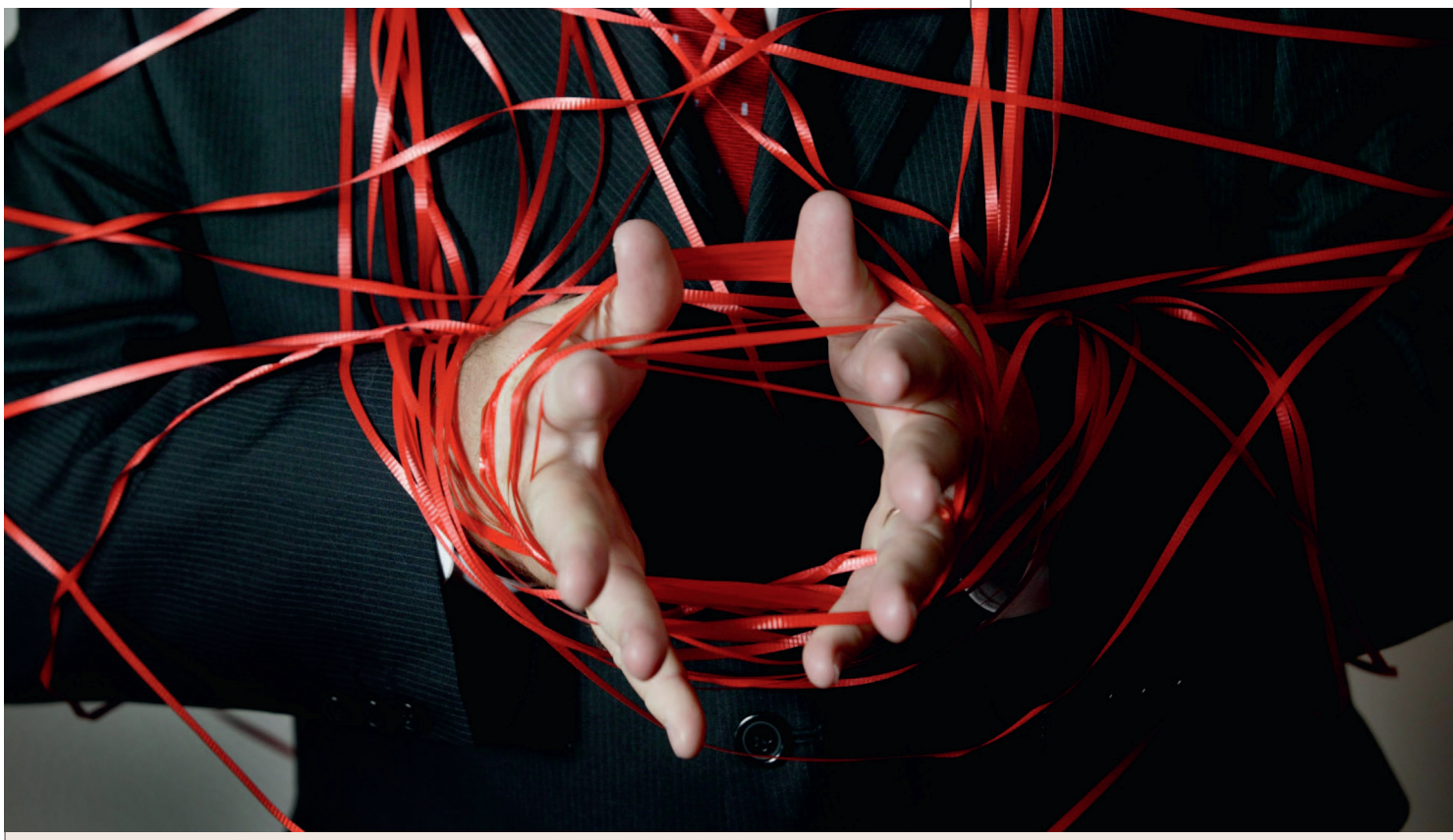
But then they let Seven off the hook: "The suddenness of his resignation and the lack of insight that the explanation for his resignation (that is 'for personal reasons') provided… the need for a deeper explanation of the circumstances behind the resignation…" So out with the grainy footage.

We shouldn't underestimate the instinctive hostility of the lawyers engaged in working up proposals for new privacy laws. I know this because I worked for months as an adviser to judges who drafted the NSW proposals. They are civilised, worldly men but they just don't grasp that honest and free reporting requires the law to respect a robust distinction between what people would prefer not reported and what is truly private.

Our position is not helped when ACMA responds to the Campbell mess by offering Seven an open slather because the network so thoroughly trashed Campbell's reputation that his political career was destroyed. It's a strange and unimpressive message: when grossly violating the privacy of a public figure, avoid half measures. Destruction or nothing.

David Marr is a Walkley Award-winning journalist with The Sydney Morning Herald

Cartoon by Peter Nicholson/*The Australian*



Tied up in court: Super-injunctions can prevent the media reporting material that is in the public interest. Photograph by Virginia Star/*AFR*

Super-injunctions

Super-injunctions are used in the United Kingdom to muzzle the press, and could be coming soon to a newsroom near you, writes Bernard Keane

In Britain, the transformation of news into celebrity-focused infotainment has had another, arguably more serious consequence, with British judges deciding that, without action by parliamentarians, the burden of establishing privacy protections falls to the courts. Unlike British MPs, who would face the wrath of both the tabloids and the broadsheets if they seriously pursued a right to privacy aimed at curbing media intrusion, British judges face no such pressure, and have established superinjunctions as a viable method for the wealthy to protect their privacy.

Corporate lawyers, naturally, spotted the opportunity created by celebrities going to court, and turned superinjunctions to the purpose not of preventing the media from embarrassing pop singers or soccer plays, but of preventing the media from revealing material very much in the public interest. The obsession with celebrity has thereby brought about a new era of draconian restrictions on what those journalists and editors still pursuing serious journalism can report.

This, naturally, further enlarges the opportunity for WikiLeaks or, more likely, the host of similar anonymising whistleblower sites springing up online. It was salient the notorious Trafigura superinjunction was smashed apart by WikiLeaks putting the suppressed report on toxic waste dumping online (with a little help from Stephen Fry, who tweeted the link to a million people), and that it was Anonymous whose crack of HBGary Federal led not only to revelations about dirty tricks campaigns at the highest levels of corporate America, but provided an ongoing insight into the new cyberspace military-industrial complex.

All of this looks like a potential roadmap for the Australian media. We've already had one version of a super-injunction, when Peter Beattie successfully prevented revelation of the basis on which former minister Merri Rose was prosecuted for blackmail. And media revelations of the affairs of John Della Bosca and Troy Buswell, neither of which was in the public interest, the disgraceful outing of David Campbell and coverage of the Mike Rann assault all show a mainstream media increasingly willing to abandon the traditional restraint on reporting non-public interest personal lives of politicians.

It's even extended to political journalism – don't forget last year's election campaign, when Julia Gillard's physical appearance, her lack of children and her relationship with her partner were all considered matters of considered public debate by the national broadsheet.

But no major party politician is likely to be willing to adopt the recommendations of the Australian Law Reform Commission, which urged a statutory protection of privacy be developed before the courts did. Like their British counterparts, they're too concerned about the likely response of the media.

Which means that, unless things go very differently here to how they have gone in the UK, judges will start protecting privacy themselves. And that will be far, far worse for the media than any statutory public interest test for privacy protections. Just ask the Brits.

Bernard Keane is a journalist with Crikey.com.au
This is an edited version of an article that first appeared in Crikey on April 13. To read the original, go to: http://www.crikey.com.au/2011/04/13/superinjunctions-phone-hacks-and-wikileaks-media-at-the-crossroads/

ANTI-TERROR AND NATIONAL SECURITY ARRANGEMENTS

In November 2010, the federal attorney-general Robert McClelland wrote to the Alliance seeking comments on the possible development of "mutually agreed arrangements relating to the publication of sensitive national security and law enforcement information".

The proposal came a few months after publication in *The Australian* of an article by Cameron Stewart on Operation Neath, a counter-terrorism operation in Melbourne in August 2009 that resulted in the arrest of five people.

The affair remains subject to legal proceedings, so it's not possible to discuss the matter in detail here, but there had been an arrangement between *The Australian* and the Australian Federal Police on the timing of the article's publication.

McClelland wrote: "The media outlet acted responsibly in that matter by engaging with the relevant agencies over the publication of the story."

However he suggested that "to achieve greater clarity and facilitate more systematic arrangements in the future, I would like to explore the possibility of developing a more formal mutually agreed arrangement with the media on the handling of sensitive national security and law enforcement information".

He suggested:

- The arrangement would take the form of a stand-alone document with "guiding steps and principles" to be taken by media and government.
- This would be voluntary and provide some flexibility for agreements to be reached on a case-by-case basis.
- The arrangements would apply to the publication of sensitive national security and law enforcement matters where inadvertent or pre-emptive publication could endanger the life and safety of personnel or the public or could compromise the operation – ie: undercover operations or raids to be carried out on individuals or groups that are likely to be armed.
- It is important to achieve a balance between the need to protect sensitive information and the public's right to know. Public safety would be at the heart of such an arrangement.
- Any arrangement would need to avoid being too prescriptive as it would have to take into account the "fluid operational environments of law enforcements and other agencies and the media".
- Guidelines could include publishing factual details of the investigation or operation with any sensitive details omitted, delaying publication until after an agreed date or event and/or providing additional publishable information relevant to the operation so that the sensitive information does not need to be reported.

McClelland also wrote that a key practical aspect of the arrangement would be to identify appropriate points of contact within both government and the media with those contact points on both sides authorised to make and implement any decisions.

Media Alliance federal secretary Christopher Warren replied on February 18, 2011.[58]

He said that in the case of the Operation Neath article, the media outlet had acted in accordance with normal journalistic practice by contacting the relevant authorities to seek confirmation and any relevant information. An informal arrangement was then struck between the parties involved regarding the timing of publication.

Warren argued that to set up a prior arrangement or set of guidelines relating to all possible circumstances would be "unworkable and risks a chilling effect on free speech". He suggested, however, that it would be appropriate to set up a contact list available to both government agencies and media organisations. This would ensure both sides could make contact in the event that a journalist obtained sensitive information, and reach an arrangement for publication.

Doing this would mean there was no need to set up any protocol – voluntary or otherwise – which might put a barrier in the way of free speech. "If such a protocol is found to be necessary, it must be stressed that editorial independence is critical and that the protocol must make it clear that it does not give government agencies the ability to influence what a media outlet is able to publish."

Secure line: Attorney-General Robert McClelland wants to encourage greater communication between government agencies and the media on stories concerning national security
Photograph by Glenn McCurtayne/*The Sydney Morning Herald*

The Allliance believes that a protocol or "arrangement" between media organisations relating to the reporting to national security information is unneccessary and is likely to become a formal requirement over time. Journalists in possession of sensitive information about national security or major crime will always contact the relevant agency for further information if they are acting responsibly and ethically. We understand such as scheme is presently under discussion.

CENSORSHIP AND THE CLASSIFICATION REVIEW

Internet censorship

After the public furore caused by communications minister Senator Stephen Conroy's plans to impose a mandatory internet filter in Australia, Conroy announced in July 2010 that he had decided to shelve his plans until the middle of 2012.[59]

He said the proposed internet filter would be revisited once his department had completed its review of classification categories.

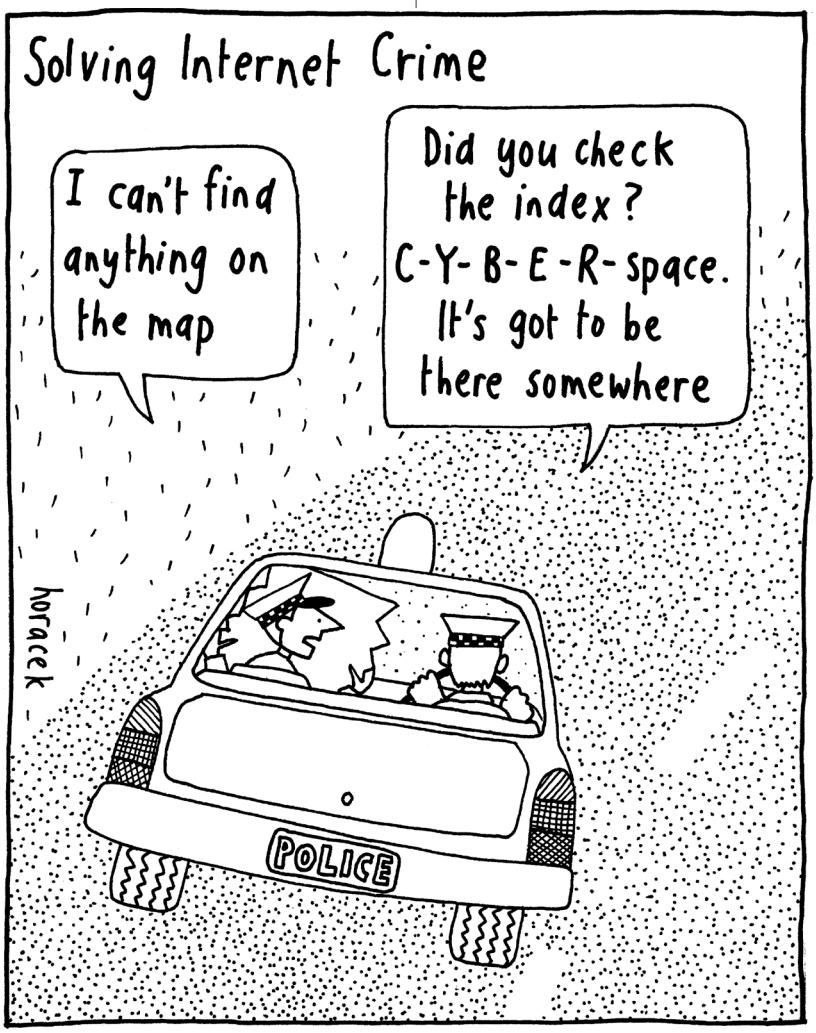
"Some sections of the community have expressed concern about whether the range of material included in the RC [Refused Classification] category correctly reflects current community standards," Conroy said. "As the government's mandatory ISP filtering policy is underpinned by the strength of our classification system, the legal obligation to commence mandatory ISP filtering will not be imposed until the review is completed."

Between December 2009 and February 2010, the department conducted a public consultation process on measures to improve the accountability and transparency of processes that lead to material being placed on the RC Content List.

Submissions to this consultation stressed the need for transparency and accountability. In their joint submission, Professors Catharine Lumby, Leila Green and John Hartley stressed that: "Given the breadth of material that exists online and is potentially caught by the prohibited content provisions it seems to us, imperative, that at the very least the federal government commits to a clear system of appeal and judicial review of decisions and that there is transparency about what is put onto such a blacklist with rare exceptions."[60]

Conroy released his department's response to the consultation in July 2010, with the following recommendations:

- All internet content complaints to the Australian Communications and Media Authority (ACMA) that are assessed as being potentially RC will be classified by the Classification Board.
- Where material has been assessed by ACMA as potentially RC, and the owner of the material or the content service provider is readily contactable and identifiable, ACMA will provide that content owner or content service provider with brief reasons why the material has been assessed as potentially RC.
- A standardised "block" page will be used to advise people trying to access a filtered URL, including end users, content owners, or content service providers, that the content they have attempted to access is blocked by the filter because it is on the RC Content List.
- ACMA would regularly publish on its website an up-to-date "high-level" breakdown of the RC Content List by category and provide on request to end users resident in Australia, high-level reasons as to why a particular URL is on the RC Content List.
- A content owner or content service provider may seek a review where they believe material has been wrongly classified as being RC and therefore wrongly included on the RC Content List (appropriate fees apply).
- An independent expert (possibly a retired judge) would undertake an annual review of the processes leading to placement of URLs on the RC Content List.



Cartoon by Judy Horacek

The Alliance believes that governments should not be in the business of censoring internet content. This must remain in the hands of the public. However, increased resources should be directed towards preventing those who create and distribute harmful material via the internet.

The classification review

Australia's system of classification of publications, films and computer games is under review by both the Australian Law Reform Commission and the Senate Legal and Constitutional Affairs Committee.

The Media Alliance, as part of Australia's Right to Know coalition, made a submission to the committee stressing that while news and current affairs content is quarantined from classification, there are two areas of concern that need to be addressed as part of the review.

The rapid convergence of media platforms has brought with it a blurring of boundaries between "traditional media" and "new media", and this has led to a blurring of the regulatory ambit of existing schemes. This was clearly seen in the case of a *Sydney Morning Herald* news piece from 2010.

Video footage on newspaper websites

An article titled "A martyr emerges from the bloodshed" published by *The Sydney Morning Herald* on its website, smh.com.au,[61] detailed the death of a woman during the anti-government protests in Iran in June 2010. Accompanying the article on the newspaper's website was an embedded video clip with graphic footage of the incident. The video provided a warning to readers that the clip included footage of a distressing nature.

This video was referred by ACMA to the Australian Classification Board. The Classification Board ruled that: "The use of brief low-resolution footage and warnings to viewers as well as the context of genuine news reportage mitigate the impact of violence to the extent that it does not exceed mild. Within this context, the Board considered that the content warranted a PG classification."[62]

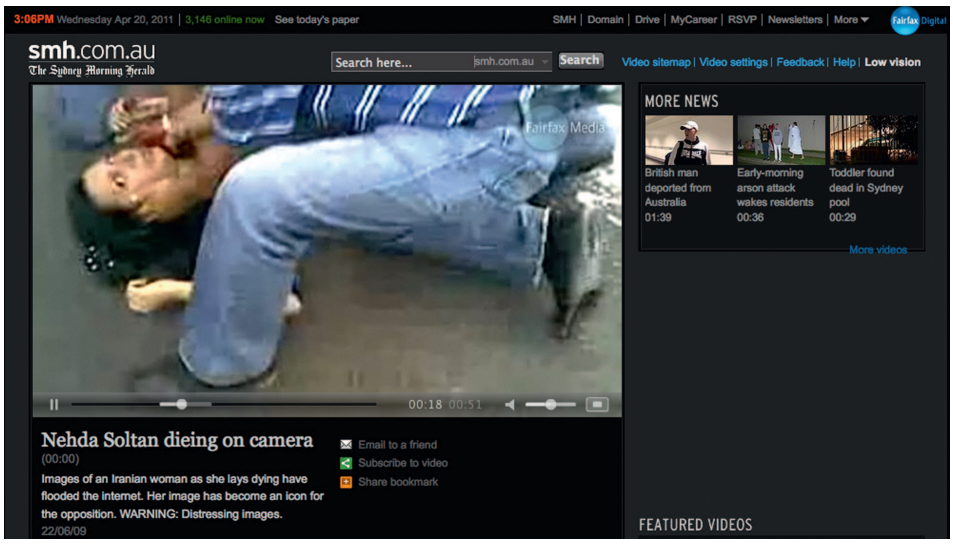
While the outcome did not involve the newspaper being forced to censor its material, the intervention by ACMA and the Classification Board is concerning as it moves alarmingly close to government classification of news and current affairs content.

Classification of iPad apps

Similarly there has been a call for mobile applications, such as those released for mobile phones or tablet computers, to be subject to classification. The director of the Classification Board, Donald McDonald, told a Senate Estimates committee hearing in October 2009 of his concern that material produced for mobile applications, especially computer games, should be submitted for classification.[63]

While there may be a strong argument for computer game content to be subject to classification, the Right to Know coalition maintains that news applications should remain free of classification, as they are on other platforms.

The Media Alliance believes that news and current affairs content should continue to be quarantined from classification. Australia has been well served by the principle of industry regulation and non-classification for news and current affairs content, and this should be maintained regardless of the media platform or delivery system through which the public accesses such content.



Harrowing footage: Violent and shocking news content, such as that of the death in Iran of Neda Agha-Soltan, should be exempt from government censorship
Screenshot from http://media.smh.com.au/nehda-soltan-dieing-on-camera-598561.html

SPIN

Public relations, media relations, public and corporate affairs, call it what you will, journalism's relationship with what journalists call "flacks" and "spin doctors" remains symbiotic and dysfunctional.

In our previous report, *Progress under Liberty*, we reported on an investigation by Sydney's University of Technology, which found that in the week of September 11–15, 2009, 55 per cent of the news reports carried by nine of Australia's most popular metropolitan and national newspapers had been driven, in one way or another, by some form of PR.

There is no evidence to suggest that anything has changed since that survey was undertaken.

The 2010 federal election campaign has been widely criticised as one of the most meaningless political exercises since Australia was federated. Policy discussion was jettisoned in favour of what US journalism educator Jay Rosen called the "horse race" version of politics.[64]

Reporters trying to cover the campaign were typically confined to buses, not told where the next stop would be, issued with press releases a matter of minutes before the next "opportunity" and virtually coerced into ignoring issues of public importance in favour of the "beauty contest" that was playing out for their benefit.

Mid-campaign, incumbent prime minister Julia Gillard relaunched her own image as the "real Julia Gillard", a stunt which dominated the news cycle for at least 24 hours despite clearly being a piece of not particularly sophisticated media management.

As veteran political reporter Tony Wright wrote in *The Age* the month after the August 21 poll:

> *Neither Julia Gillard nor Tony Abbott travelled on the journos' buses or planes. They were cocooned with their spin doctors, working out how to link a staged event with the message of the day while not revealing very much of consequence lest it invite risk. They had their own planes, their own limousines, their own floors of hotels and offices and they appeared and disappeared at will.*
>
> *Policy, policy, policy? On the road, there was bugger all to be had.*
>
> *And what came out of this vacuum? A public so disenchanted that it couldn't choose between the two contesting parties. Should anyone be surprised?*

ABC journalist Annabel Crabb wrote an article for The Drum website in which she described life as an embedded journalist whose every move was controlled by the minders from the major political parties.[65]

She highlighted the deliberate way journalists were deprived of advance information, usually not even knowing where the bandwagon would take them from day to day, out of the parties' fear that if the information leaked out it could have led to a demonstration or some unplanned event – anathema to political minders.

"They call it 'the bubble' because when you are inside Campaign Bus-World, you have no control over where you are going or when," she wrote. "From the instruction to bring baggage to the lobby, the message recipient can intuit that an interstate flight is likely at some point during the day, and that it's time to pocket some mini shampoos and bid farewell to the hotel room. More than that, you never know."

Crabb also observed that the media minders strenuously avoided allowing journalists access to policy documents – or even press releases about policy documents – until the very last minute: "If journalists had the documents in advance, it is reasoned, they could leak them. Or ring lobby groups, academics, or policy advisers who might supply questions more probing than those arrived at by a sleep-deprived journo with three minutes' notice, who is trying to absorb a major policy initiative while simultaneously filing a Twitpic and wondering if this is Ballarat or Bundaberg."

The Public Relations Institute of Australia (PRIA) estimates that there are more than 15,000 PR professionals working in Australia, which is close to two for each full-time journalist.

Many of these are former journalists who are aware of the demands of the news cycle and the opportunities this brings to manage the message.

Journalists must use their news judgement and ethical skills to ensure that the public are fully informed, without undue reliance on "spin". We are concerned that the political process relies too much on media managers whose job it is to present one side of the story. A press release or media briefing should only be used as a starting point. News leaders should provide sufficient resources to ensure that journalists have sufficient time to cut through to the heart of the story.

Caught in a spin-cycle

Australian politicians are spinning out of control, writes Kerry Green

Last year Sydney's University of Technology revealed an average 55 per cent of news reports in Australia's major metropolitan newspapers were influenced by the public relations industry. Twelve months later, has anything changed?

The answer is a resounding "No!"

A year after UTS's disturbing study, journalists continue to do battle with the "PR State" – a state where government media apparatchiks at both federal and state levels vastly outnumber journalists covering government or politics. University of Queensland political scientist Ian Ward said in 2007 he was not surprised by an estimate that puts the number of media advisers in Australia at 4000. The figure is higher now.

The problem besets journalists Australia-wide. As recently as this month, the new Bailleau government in Victoria, in a secret briefing note, told ministers what they may and may not say in Parliament, restricting cabinet ministers to a robotic formula that also restricts the information to which Victorian citizens have access. Such stage management is a serious cause for concern for any news organisation that takes its fourth estate function seriously.

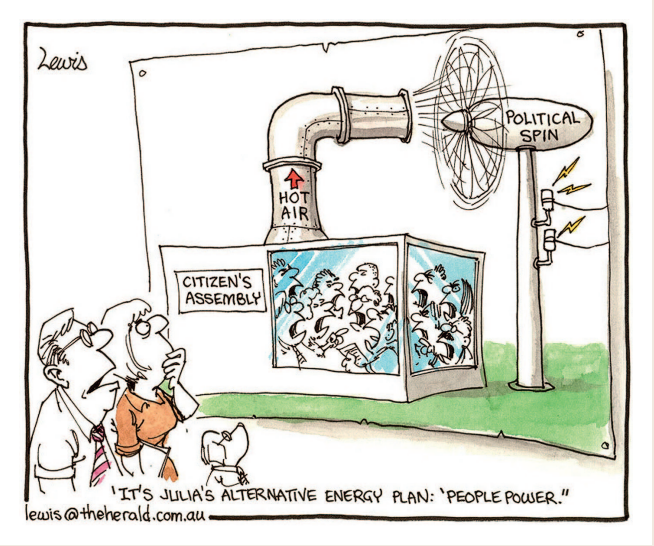
In Victoria, the previous Labor Government was said to have 700 media advisers last year. The Queensland Government has been accused of employing more media advisers than the *Courier-Mail* has journalists. In South Australia, the Rann Government last year was charged with employing 499 spin doctors for public relations, media and communications functions. Ironically, the accusation came from the South Australian opposition, who used Freedom of Information legislation to produce the figure and thus demonstrate how effective FoI can be.

It's a tactic South Australian Liberal opposition leader at the time, Rob Lucas, may have picked up from former NSW Labor premier Bob Carr. According to Carr's biographers Andrew West and Rachel Morris, he decided when in opposition to turn shadow cabinet into "a team of investigative journalists ... to mine their contacts ... for scandal". Journalists can at last take comfort in the thought that pale imitation is the sincerest form of flattery!

Comforting as the thought may be, the cause for concern remains, as the UTS study reveals a growing trend towards control of news content by governments (and corporations) via spin. Earlier, and more limited, studies have highlighted the problem. Clara Zawawi's 1994 study, for example, showed almost two-thirds of the stories appearing in *The Australian* and *The Sydney Morning Herald* were influenced by public relations, while Wendy Bilboe's unpublished study of a decade ago produced a much higher figure (above 80 per cent).

In 1992, Jim McNamara (now at UTS) took a slightly different approach, looking not only at content but also at contact between public relations practitioners and journalists. This study concluded 31 per cent of content in a wide range of publications was wholly or partly based on press releases, with up to 70 per cent of content published in suburban or specialist media being sourced from public relations.

One of the most interesting Australian projects is Barbara-Ann Butler's investigation into the influence of spin during parliamentary sittings in 1991 and the federal election of 1993. She examined free-to-air news and newspaper content in Brisbane, Sydney and Melbourne (and in *The Australian*) and, not surprisingly, found staged events, press conferences and press releases were major sources of news.



Cartoon by Peter Lewis/*Newcastle Herald*

How effective is government spin? One indication lies in the Top 10 PR Disasters for 2010, as collated by the website PRDisasters.com. Only one of the 10 was a government issue (the corporate backlash against Labor's proposed "super tax") – all the others came from the corporate world or the world of sport. The absence of other government issues indicates the media minders have been good at their jobs.

The prevalence of spin and the ubiquity of "media advisers" in government and corporate institutions mean journalists continue to have limited control of the news agenda and even more limited control of the political agenda. In an age of citizen journalism, that might not be such a bad thing, if it meant greater citizen participation in the democratic processes – especially greater involvement in public debate on issues of consequence.

But the sheer size of the army of media advisers and their huge contribution to news media content mean citizen participation in the democratic processes is likely to be lost along with any fourth estate function of the news media that journalists might want to enact. Journalists implementing the "watchdog" function of a free press in Australia continue to find the army of media advisers an effective barrier between them and any detailed scrutiny of government activity, as governments attempt to maximise the impact of good news and minimise the impact of bad news.

Given the size of the media minder army and the influence of public relations on news content, the news agenda in the past year has been set not by the news media, and not even by the news media in conjunction with an increasingly stronger citizen journalism movement. For political and government news, at least, the evidence is that the agenda is largely set by governments.

The hungry beast that is "the news media" needs to be fed and, with a 24-hour news cycle, it needs to be fed continually. For most news organisations, the fuel they produce themselves is augmented by fodder from government public relations units and media advisers; items appear on the menu because media minders want them to.

Journalists can and do influence the agenda. But while ever newsrooms remain understaffed and under-resourced, at a time when the PR State is expanding, their capacity to resist government spin will be limited.

Professor Kerry Green is head of the School of Communication, International Studies and Languages at the University of South Australia

Just who is spinning health?

Pharmaceutical companies aren't the only ones skewing the news on health. Melissa Sweet outlines a list of suspects

When people think of "spin" in the health sector, they generally think of the pharmaceutical industry, which has been remarkably successful in exerting its influence over media coverage for many years.

It's often achieved this through the use of third-party endorsements via health professionals, researchers, consumers or various organisations involved in its PR and marketing campaigns.

It's not at all uncommon to see experts quoted in the media with no mention of their ties to a relevant company, or of the fact their comments are being disseminated as part of a company-funded PR campaign.

The industry has also used many of the strategies that it has employed for "relationship-building" with doctors and other opinion leaders. For example, pharmaceutical and other medical companies have extended their largesse to journalists, including paying for them to attend conferences, dinners and other events.

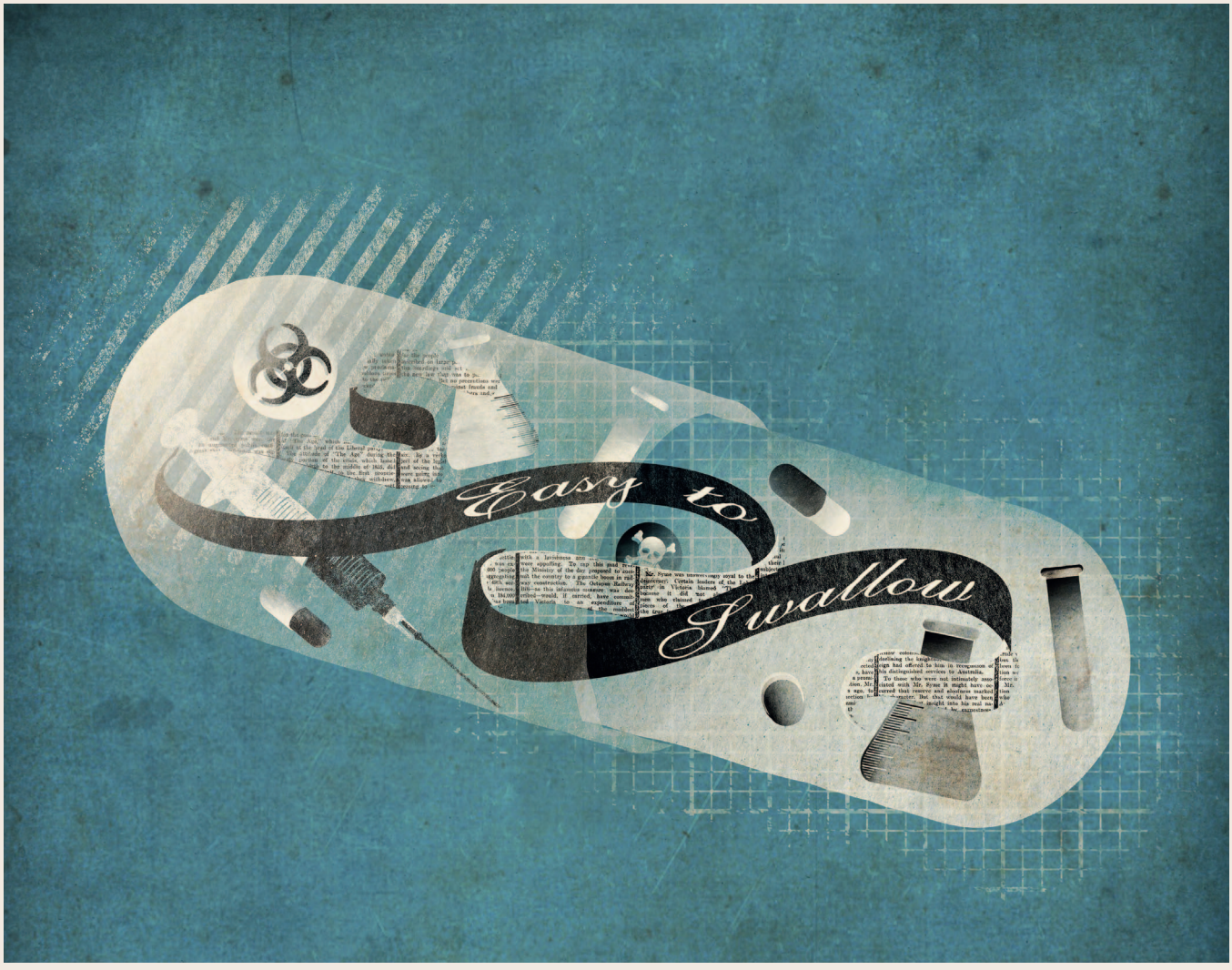
Just as the industry funds educational programs and prizes for researchers and healthcare professionals, they have also sponsored such initiatives for journalists.

For example, an ethical debate recently erupted over a seminar on cancer for journalists hosted by the National Press Foundation in Washington DC. The event was funded by Pfizer, which makes cancer drugs and clearly has a stake in raising public awareness about the field.

These industry strategies are nothing new. When a rash of stories about impotency cropped up in the Australian media back in the late 1980s, with headlines such as "impotence rate set to skyrocket", it later transpired that Pfizer had sponsored the journalists involved to attend a conference on impotence in Paris.

Sponsored journalism awards have also been around for too long. Examples have included the Eli Lilly award for "excellence in journalism in the field of menopause", which later became a women's health journalism award; an award for promoting public understanding of biotechnology from biotech company Amgen; a Kellogg's award for nutrition reporting; and the Pfizer Eureka Prize for Health and Medical Research Journalism. Meanwhile, the principal sponsor of the National Press Club awards for health and medical journalism is the industry body Medicines Australia.

Illustration by Karl Hilzinger/*AFR*



Just who is spinning health? (continued)

The wisdom of sponsored journalism awards has often been questioned, but the fact that many journalists continue to apply for them shows there are a variety of views. In many ways, the attitudes of journalists about these issues mirror those of doctors and other health professionals. Many journalists and doctors believe their professionalism will protect them from the influence of marketing strategies. Studies show, for example, that doctors generally think that accepting gifts will not affect their own practice – although the evidence suggests otherwise.

According to Professor Ian Kerridge, director of the Centre for Values, Ethics and the Law in Medicine at the University of Sydney, doctors who are closely involved with industry – by being on advisory boards, receiving gifts or travel funding or through other mechanisms – are more likely to prescribe and demand funding and access for specific products.

One study found, for example, that physicians who accept travel sponsorship to attend a meeting are 10 times more likely to prescribe that company's product and seven times more likely to request that the product be listed on the hospital formulary than someone who attends the same conference but is self-funded.

It would be unwise to assume that journalists are any more immune to such attempts to influence their behaviour than are doctors. However, we should soon know more about this thanks to research funded by the National Health and Medical Research Council (NHMRC) that is investigating Australian journalists' views and practices around these issues (declaration: I have an honorary involvement with this work).

It is worth noting that the US-based Association of Health Care Journalists, which does not accept funding from commercial organisations with a financial interest in health care, recommends that members refuse gifts, favours and special treatment, refuse meals from drug companies and device manufacturers and refuse unsolicited product samples sent in the mail.

AHCJ members are also advised to:

- Weigh the potential benefits involved in accepting fees, honoraria, free travel, paid expenses from organisers of conferences or events against the desire to preserve credibility with the audience and the need to avoid even the appearance of a conflict of interest.
- Also weigh the potential benefits of accepting awards from organisations sponsored by an entity with a vested interest in healthcare against the need for credibility.
- Weigh the potential conflict in accepting support from public, private, or foundation sources.

However, the pharmaceutical industry is only one of many forces that help spin the news we receive about health. Another major corporate source of spin is what some call the anti-health brigade, including the junk food and drink, alcohol, carbon-polluting and gambling industries. Again, they employ many of the same tactics of the pharmaceutical industry, including the use of third-party experts and organisations to convey their messages.

For example, the Dietitians Association of Australia is listed on the Crikey Register of Influence because of its role in food industry marketing. The register aims to draw attention to the links between opinion leaders (including experts and journalists) and professional organisations and industry marketing.

A recent example of such compromising ties comes from the US where the American Beverage Association (the lobbying arm of soft drink companies) donated US$10 million to the Children's Hospital of Philadelphia obesity program. There are obvious implications for the ability of the hospital's experts to comment independently and publicly on issues such as proposed soft drink taxes. The grant also raises questions for journalists – should it be declared when quoting the hospital's experts?

Institutional conflicts of interest may be as important as individual ones but we generally hear far less about them.

Professional groups also wield undue influence over the health news. Many well-informed observers of the health system believe health policies are often not driven by the community's interests but by politically powerful lobbies such as the Australian Medical Association (AMA) and Pharmacy Guild.

The media must share some responsibility for this situation. The AMA is too often the first port of call for journalists whenever a health issue hits the news. The AMA's job, quite rightly, is to represent the interests of its members. Sometimes there is convergence between their interests and those of the broader public, but often there is not. And yet we are so ready to hand the microphone to the AMA to be the voice for health.

Bureaucratic interests are also a major impediment to informed debate. Rather than encouraging experts to be their corporate mouthpieces, bureaucracies are often actively seeking to discourage experts from engaging in public debate. I have even heard of health department PR people telling eminent professors what they should or should not say about matters in their field of expertise. Many journalists express intense frustration at the excessive information control imposed by health bureaucracies and services. The Government 2.0 movement faces a huge challenge in seeking to change this culture.

Institutional interests, including universities and research organisations, are also adept at spinning the news. There is also intense competition for the headlines between the various health charities and organisations, all seeking to win public profile and, as a consequence, policy/funding attention for their particular issues.

A result of there being so many powerful spinners in the health sector is that the broader public interest often goes missing, particularly around groups and issues without the resources to mount PR campaigns. Too often we see health spending and policy distorted in favour of those groups and interests with the influence, dollars and savvy to focus the news their way.

Internationally there are moves to ensure much greater transparency around the ties between health and medical experts, institutions and related vested interests, particularly in the US. We haven't seen anything like this in Australia yet. Universities and other institutions have been dragging the chain in ensuring public declaration of their experts' or institutional conflicts of interests.

The media industry's record is hardly better, although online publishing offers new opportunities for declaration of the conflicts of interest not only of journalists, but also of the experts and other sources we quote. The online revolution is also enabling a greater diversity of voices into the health debate and new opportunities for journalists and others, including citizens, to cut through health industry spin.

One recent example of this is the Dollars for Docs database, created by ProPublica in collaboration with other media partners. It lists payments by seven drug companies to US doctors and has produced many good stories, as well as coming with various widgets to enable the public to harvest the database themselves. A US health journalism critic, Gary Schwitzer, has called it "an historic piece of journalism".

Let there be more like it.

Melissa Sweet is a freelance health journalist who moderates Crikey's health blog, Croakey

DEFAMATION

Over the past few years, we have begun to see how the courts will deal with matters concerning internet-specific forms of information, such as comments on news websites, blogs and tweets.

Media lawyer Robert Todd, of Blake Dawson, told *Lawyers' Weekly* there is a widespread lack of awareness in the community about the rules of defamation and how they may apply to social media.

"There's clearly a continuing divergence between what the public thinks it can say on the one hand and what the law and the courts say you can say on the other," Todd said. "That divergence is exposed in areas like social media and, in particular, review sites. People, rightly or wrongly, assume that if they go somewhere and say something that they're entitled to do it... I think they suspect they have some right of free speech, which is obviously a misapprehension."[66]

The Broadcasting Services Act (Cth) provides some defence to an internet service provider (ISP) which carries internet content in Australia and which was not aware they were carrying a defamatory publication.

However, this provides no relief to media organisations or individuals hosting a blog on which defamatory information is posted.

Charmyne Palavi v Queensland Newspapers Pty Ltd & Anor

In November 2010, self-described NRL "cougar" Charmyne Palavi sued Queensland Newspapers over reader comments on a *Courier-Mail* web story from April that year. In her action, she said the comments conveyed the imputation she was, among other things "a slut".

Incidentally, the NSW Supreme Court threw out the case, upholding a judgment from the NSW District Court that found Palavi had given false evidence, and deliberately destroyed mobile-phone evidence.[67]

But the case emphasises a point that media organisations ignore at their peril: websites are sites of publication, and if not duly and carefully moderated, defamatory reader comments can and will result in defamation actions against the publisher.

A number of working Australian journalists have told the Alliance that they face an increased pressure of moderating the reader comments on their own stories.

The opportunity to give audiences the scope to interact directly with news content is one of the most fundamental shifts brought by online news, and it is an important one. It engages audiences, builds online communities, and draws eyes back to the stories (and the ads that surround them) as the conversation continues.

But the case of Palavi shows that these conversations will be treated under the law as "published". Most journalists have a working knowledge of defamation and media law, but with the immediacy of online news and the perceived decline in the quality of Australian journalism[68], it is important to ensure that publishers take great pains not to expose themselves to potential litigation.

"Twitdef" – at loggerheads over 140 characters

In November 2010, Chris Mitchell, the editor-in-chief of *The Australian*, threatened legal action after Canberra-based academic and journalist Julie Posetti tweeted verbatim excerpts from a conference that he considered to be defamatory.

Posetti had tweeted the words of Asa Wahlquist, a former rural reporter with *The Australian*, to the effect that she had been instructed on what to write about environmental issues in the run-up to the 2010 federal election.

An audio recording of the conference confirmed that Posetti had tweeted Walhquist's comments accurately.

Mitchell denied Wahlquist's allegations and added that while he didn't intend to take action against his former employee, he had no intention of dropping the case: "There is no protection from the law in repeating accurately allegations falsely made," he said in an article in *The Australian*.

In February, Mitchell told *The Canberra Times* in an email that he intended to follow through with his threat to take action, although at the time of writing, no writs had been issued.

Review of Uniform Defamation Acts

Australia's defamation law is notorious for its labyrinthine complexity[69] and was described by one judge as "the Galapagos Islands division of the law of torts". But it is approaching the starting blocks for a fresh reform initiative. NSW is spearheading the reform courtesy of the fact that it was the only jurisdiction that provided for a review in its *Defamation Act 2005*. NSW's section 49 requires that its Act be reviewed five years from its introduction to determine whether the Act's policy objectives and provisions are still valid. This will obviously have an effect on the "Uniform Defamation Acts" (UDA), the collective term for the defamation Acts nationwide.

Australian defamation law has long been riddled with quirks and inadequacies making it a plaintiff's haven, thanks partly to the "unprincipled mishmash"[70] that plagued defamation's pre-UDA defences. Among the features of the old landscape was the failure in some jurisdictions to recognise truth as a complete defence, making a mockery of a key defamation principle – *no harm is done to a person by telling the truth about her or him*. Then came what was touted as a major reform followed by the nationwide introduction of "uniform law", fanned along by the Commonwealth government and pressure from the media industry.

Right to Know's submission – the achievements:
As part of the current reform exercise, Australia's Right to Know coalition has made a 32-page submission to the NSW government. Right to Know, a grouping of 12 media organisations, was formed in 2007 to examine legislation's impact on the media's ability to inform the public.[71] In its submission, Right to Know notes that although the last reform moves did not adopt all the media's proposals at the time, the UDA provided an effective regime "in many respects".[72] This view stands in contrast to NSW Supreme Court judge Justice Peter McClellan's view expressed at a 2009 conference, that he had "little doubt that the path [taken in the 2005 Act] was not the correct one – either from the plaintiff or the defendant's viewpoint".[73] In Right to Know's view, the UDA's features and achievements that are of "greatest note" are:[74]

- The speedy, non-litigious dispute resolution thanks especially to the *offer of amends* provisions, which requires plaintiffs to state their complaint early and enables the defendant to defuse the claim through an apology, correction, payment of an amount, etc
- The adoption by all jurisdictions of truth alone as a defence (in reality this only changed the status quo in the NSW, ACT, Queensland and Tasmania; in the remaining jurisdictions truth alone was already a complete defence)[75]
- The removal of the right of corporations to sue
- The cap on damages ($250,000 for non-economic loss, adjusted from time to time;[76] plus, if warranted, damages for non-economic loss or aggravated damages[77]).

Right to Know's reform proposals:
Despite its broad endorsement of the outcomes of the previous reforms, Right to Know has identified about half a dozen reform needs that have been exposed by the passage of time.[78]

Cap on damages: In the pre-UDA era the defamation stakes – whether in damages, costs or settlements – would often breach the million-dollar mark. In one spectacular example, Sydney solicitor the late John Marsden, who sued Seven for defamation and got a confidential settlement, wrote in his 2004 book (*I Am What I Am,* Penguin Books) that he would be surprised if Seven got "any change out of $30 million".[79]

Then came the UDA "cap" of $250,000 which, as it turned out, contains a loophole that allows plaintiffs to "return defamation to its old status of a lottery".[80] The plaintiffs' trick is to start separate proceedings against related defendants in respect of the same or similar defamatory matter.[81] In the *Davis v Nationwide News Case* (2008), the plaintiff succeeded in achieving a combined "cap" of $561,000 – double the UDA-intended cap.[82] Right to Know wants section 23 amended to prevent plaintiffs from arbitrarily "enlarging their damages awards".[83]

Contextual truth defence: A second cousin of the truth-alone defence – contextual truth – is found in section 26.[84] This defence was aimed at preventing unjust outcomes where the published matter contained a minor (untrue) and a serious (true) allegation but the plaintiff decided to sue only on the minor claim.[85] This defence is aimed at helping the defendant to say – *but I said something more serious in that article and you have not complained about it.* One noted defamation judge, Justice Levine, described the purpose of this defence as "quite simple",[86] although one could be forgiven for missing this simplicity upon reading section 26.

In the *Kermode v Fairfax Media Publications Pty Ltd* (2010) case, involving this defence, the judge found herself having to hand down "a most regrettable result".[87] Justice Simpson said this was not what parliament intended, and that a drafting inadvertence produced a provision that could "work injustice to the defendants".[88] In calling for amendment, Right to Know argues that this defence provides an important balance in proceedings and focuses on the published matter's substance "rather than on the pleaders' art".[89]

Qualified privilege defence: This defence is aimed at protecting inaccurate communications that are made honestly and with pure intentions founded on a legal, moral or social duty to publish information to those with a legitimate interest in that information.[90] As Right to Know puts it, this defence applies when people get it wrong or cannot prove truth "in circumstances where it is better to speak out and get it wrong, than say nothing at all".[91] One major obstacle posed by this defence under the UDA is the requirement of reasonable conduct by the defendant.[92]

Right to Know argues that reform is even more important given the technological changes sweeping the media industry, compounded by the recent split High Court decision in the *Aktas v Westpac Banking Corporation Ltd Case* (2010) which leaves defendants exposed.[93] Right to Know argues that the courts' interpretation of this reasonableness requirement imposes "a standard of perfection which is almost impossible to attain for professional journalists"[94] making the defence "almost entirely ineffective".[95] Cases in which reasonableness has been established "are extremely rare".[96] The coalition proposes the adoption of the more media-friendly UK approach,[97] which frowns upon treating the test of reasonableness as traps for the media or "hurdles at any of which the defence may fail".[98]

Comment/opinion defence: This defence has traditionally been the most useful to defendants because of a long-established and cherished proposition that views the right of fair comment as "one of the fundamental rights of free speech".[99] Its scope was generously formulated in the English case *London Artists v Littler* (1969), to facilitate comment whenever a matter affects "people at large so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others".[100] The relevant UDA provision is Section 31.

Right to Know, however, is concerned that the defence is too technical and fails to reflect the way people express their opinions "especially on blogs, forums and opinion sites".[101] Right to Know notes with approval commentator Richard Ackland's criticism of the High Court decision in *Channel Seven v Manock* (2007), where Ackland wrote that the "right of the crank or ratbag to rail in favour of unpopular causes has been severely curtailed, if not abolished".[102] Right to Know's proposed solution is to adopt the pre-UDA approach in some jurisdictions where it was lawful to publish a fair comment on a number of listed matters (eg, the conduct of anyone who participates in public affairs[103]), and to more explicitly guide judicial interpretation towards upholding freedom of speech.[104]

Other Right to Know proposals: (a) *Fair report defence*: This defence is aimed at protecting the publication of fair reports of public proceedings, including court proceedings.[105] Right to Know wants the law changed to prevent an "unduly technical application of the defence" and to protect media reports that avoid "replicating the more dense form of legal linguistics".[106]

(b) *Single publication rule*: The UDA addressed the problem of multiple varying suits caused by the pre-uniform inconsistent law in Australia.[107] The same, however, cannot be said for material produced in Australia but received abroad.[108] As a result the (differing) law of each place where the material is received is likely to apply, imposing additional burdens on the media.[109] Right to Know wants the "choice-of-law rule" to be clarified.[110]

(c) *Right of legal entities to sue*: The UDA removed the right of corporations to sue, greatly opening up the public discussion of corporations' affairs. Now Right to Know wants all "artificial legal entities" to be disqualified from suing in defamation – including educational institutions, sporting bodies, charities and trade and industry organisations.[111]

Where to next?

The NSW review is due for completion by October 26, 2011 and a report will be tabled in each house of the NSW parliament.[112] All Australian attorneys-general were advised of the review and under the Inter-Governmental Agreement (IGA) any amendments proposed by the NSW government will be considered by the Standing Committee of Attorneys-General.[113] The IGA promotes defamation law uniformity[114] – thus, it is likely that the current regime of substantial uniformity will be maintained.

The Media Alliance thanks Associate Professor Joseph M Fernandez, head of the Department of Journalism at Curtin University, for his contribution to this chapter.

The Alliance believes that any review of defamation laws should attempt to resolve the widespread uncertainty in the Australian community about how these laws affect online media, especially on social media platforms.

Defending Andrew Bolt

Andrew Bolt has offended people, but that's what free speech is about, says Jonathan Holmes. What a pity we don't have it

"Just about everybody who makes their living in journalism has agreed that it would be bad for freedom of speech if Bolt lost in court."

There's been an unusual unanimity from the commentariat about the Andrew Bolt "white Aborigines" racial vilification case. Whether or not they've prefaced their remarks with "*Naturally I deplore and detest what he's written…*", just about everybody who makes their living in journalism has agreed that it would be bad for freedom of speech if Bolt lost in court.

Media Watch sees its role as puncturing the pretensions and exposing the errors of journalists and news organisations, in the interests of non-journalistic folk.

So when the most-read (and no doubt one of the best-paid) columnists in the land, backed by the might of News Limited, gets stuck into a bunch of relatively powerless academics, artists and political activists because they're not as black as he thinks they should be – and when he makes several careless factual errors in the process – *Media Watch's* job should be to get stuck into him, right?

Especially when everyone else, from left to right, is queuing up to defend him.

Instead, I've joined the chorus.

Back in 1995, I was a freelancer writing narration scripts for natural history docos, and doing one trip a year for *Foreign Correspondent*. The debate about the amendments to the Racial Discrimination Act passed me by.

Others – again, from both ends of the political spectrum, from Phillip Adams to the Institute of Public Affairs – warned that the clauses that were intended to combat incitement to racial hatred were in fact far broader than that. But they got passed anyway.

Section 18C of the amended Act makes it unlawful to do an act which is *reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and the act is done because of the race, colour or national or ethnic origin* of the people involved.

Well, it's easy to offend people. I do it on *Media Watch* every week. And I don't believe that offending people, on any grounds, should be unlawful.

Section 18D is obviously intended to protect freedom of speech. It exempts from the provisions of 18C artistic expression, and debates and discussions, fair reports and fair comment about matters of public interest. But it seems it won't be as easy as it should be, in my view, for Andrew Bolt's columns to gain that exemption.

In the hands of skilled lawyers, the word "fair" can be the subject of endless parsing.

Of course, to the targets of his vituperative sallies, his comments probably seem anything but fair. But they reflect what many ordinary Australians think, what Bolt himself thinks (at least, he's entitled to that presumption) and to declare them unlawful is not the way to combat them.

Bolt upright: The conservative commentator has been accused of racial vilification
Photography by Craig Abraham/*The Age*

After all, whatever you may think of Bolt's columns and blogs, they are not motivated by, and nor do they incite, racial hatred. They're saying that in his view, jobs and opportunities reserved for people who are genuinely disadvantaged by their ethnicity have been taken by people who aren't.

Wrong-headed? Perhaps. At times, bitchy? Certainly ("*mein liebchen*"). But inspired by racial hatred, Nazi eugenics, the thinking that led to the Holocaust? I don't think so.

Still, the law is there. Passed by our elected representatives, the people whom Andrew Bolt has said that he'd rather trust than the "unelected elite" who would be empowered by a Charter of Rights.

The fact is that, unless you count the "implied right" that the High Court (the elite of unelected elites) has found in the Constitution, there's no right to freedom of speech in Australia.

More's the pity.

Jonathan Holmes is presenter of ABC TV's Media Watch *and has been a journalist for 35 years*

COURT INFORMATION AND SUPPRESSION ORDERS

In February 2011, the chief executive of News Limited, John Hartigan, gave an address at the "Courts and the Media in the Digital Era" conference at Bond University on Queensland's Gold Coast, deploring what he called a lack of openness and accountability in Australia's court system.

"Without openness the administration of justice is not possible," he said. "The public have a right to understand – and witness in action – the laws that govern them."

Hartigan told the conference that News Limited's legal counsel had logged more than 500 suppression orders in the previous 12 months – 270 of those in Victoria alone.

"But they were just the ones we knew about," he said, noting that this had cost News Limited a "lot of time and money"[115].

Hartigan called for:

- still cameras and television cameras allowed into courts for opening remarks and s entencing judgments;
- real-time access to transcripts and documents used in court;
- rejection of the model suppression orders legislation as it stands; the presumption of openness must be given priority;
- removal of current take-down orders.

The Alliance believes that access to court information in Australia by journalists (and through them, the general public) is based on outdated principles and is overdue for reform.

According to a November 2008 review of suppression orders and access to court documents by Prue Innes, on behalf of the Right to Know coalition, a survey of journalists working in courts around Australia found the following:

- courts tend to have informal policies on granting access to documents and much is left to the discretion of registrars;
- many reporters gave examples of excessive delays in registrars' decisions as to whether or not to grant access. There were also concerns as to the excessive costs of photocopying or viewing documents. There is also inconsistency as to whether documents can be viewed while proceedings are underway.

Model Court Suppression Orders and Non-publication Bill

In May 2010, the Standing Committee of Attorneys-General (SCAG) endorsed model provisions on suppression and non-publication orders and agreed to consider implementing them in their jurisdictions.

It was also noted that the Commonwealth has developed a "proof of concept" and will take steps to develop a publicly accessible website where courts and tribunals can indicate that a suppression or non-publication order has been made in relation to a particular case.

The attorneys-general also requested the National Justice CEOs Group investigate improvements to the distribution of suppression orders.

Problems with the bill

In August, Australia's Right to Know coalition made a submission to SCAG, pointing to fundamental flaws in the bill which "substantially shift[s] the framework for issuing suppression and non-publication orders away from the principle of open justice and… substantially broaden[s] the power to make suppression orders."

- The bill steers away from the accepted framework that a court, tribunal or "person or body having power to act judicially" must conduct its proceedings in public and adopts a position that open justice is a primary objective (of presumably many public interests) that must be taken into account. This approach invites a court, tribunal or "person or body having power to act judicially" into a balancing exercise of the objectives of the administration of justice and weigh each of them taking open justice into account.
- The bill represents a substantial broadening of power to make suppression orders and is likely to be perceived by judicial decision makers as a warrant to support the making of more such orders.

A national register of suppression orders

SCAG is also investigating the establishment of a national register of suppression orders in response to long-standing and widespread complaints that journalists are often unaware of what information is subject to non-publication orders.

In 2009, SCAG released a proposal for a national register. The model canvasses the creation of both a publicly available register and a register with access restricted to authorised people.

The Alliance sees some merit in a publicly available register, which would facilitate the principle of open justice by allowing access to all members of the Australian community, but believes this would not solve the problem of inadvertent breaches of non-publication orders.

Obviously, where the name of a witness or any other party to a court matter has been suppressed, this name could not appear in a publicly available register. The Alliance believes the media and those whose jobs involve providing information about court matters should have access to a register with full details of the information that has been suppressed.

Further, a national register must also provide additional information, where relevant, including names and/or any material that the order suppresses and a copy of the order itself.

There should also be an automated system for informing those with access to the register of any changes or updates to existing orders.

The Alliance believes that suppression orders should be made only where essential to protect some specified type of public interest which, in the circumstances, clearly outweighs the public interest in open justice. They should be accompanied by specific reasons for reaching that determination, specifics about the details covered by the order and the duration for which they are in force. They should also be widely disseminated to news organisations and journalists.

Lex's law: The judge in the trial of Robert Farquharson (pictured) ordered a story about a similar case pulled to avoid influencing the jury. Photograph by John Woudstra/*The Age*

When you can't tell the story

There are 10 suppression orders a week from Australian courts. Caroline Overington ran into one

Believe it or not, the Australian media does understand that there is no such thing as free speech – not if that means the freedom to say whatever you want, about anyone at all. On the contrary, the media understands – or most of us do – that the media is not allowed to tell lies about people, and that there probably are some government files (how to make a nuclear weapon, for example) that should be kept secret.

I'd argue that people's medical records (and their love affairs) are pretty much their own business. The fact that a NSW politician visits a gay sauna in his own time, whether or not he's married, isn't a news story in my view.

Divorce is a little trickier. The public does have a right to know, in general terms, what's going on in the Family Court – does Mum get custody 90 per cent of the time, or is that a myth? – but the privacy of individuals needs to be respected, meaning there is no public interest in naming children caught in the middle of a custody dispute.

That said, criminal and civil courts should be open to the public. The media should be allowed to examine all the evidence from any particular trial and see what the judge has had to say. The public, and the media, also have a right to an opinion about how well the courts are working.

But the fact is many Australian court cases are closed to the media, and key facts are often suppressed. To illustrate the point, News Limited chairman John Hartigan recently asked legal counsel to draw up a rough guide to the number of suppression orders they'd been asked to look at over a 12-month period.

What is your best guess? Ten? Twelve?

There were actually 500 suppression orders issued over the past 12 months – that's 10 a week – and 270 of them were in Victoria alone.

By way of comparison, Hartigan then asked legal counsel at the *New York Post* (also owned by News) to do a rough count of how many suppression orders it had seen in, say, the past five years.

The answer was none.

It's difficult to believe that what happens in New York courts – where people stand accused of terrorism and rape, murder and corruption, mob activity and organised crime – can be that much less sensitive than what happens in Melbourne, Australia.

Given the rate at which Victorian courts issue suppression orders, it isn't at all difficult to run into one. It happened to me last year, when I wrote an article about the death of a small boy in Coober Pedy.

A Victorian judge suppressed the article, which in turn led to the suppression of an entire edition of *The Weekend Australian Magazine*. I accept that some people will assume that must have been done for a good reason; I'm pretty sure I can convince them otherwise.

Imran Zilic was a three-year-old boy whose parents had separated. In April 2010, Imran's father, Aliya, arrived to pick him up from his home in Perth and then, without telling the

"The fact is many Australian court cases are closed to the media, and key facts are often suppressed."

boy's mother, drove him across the Nullarbor Plain at manic speeds, slit his throat and threw his body down a mineshaft.

His father didn't deny the facts of the matter, but said he was mentally impaired at the time of the killing and pleaded not guilty to murder.

The court backed him. He was found not guilty by reason of mental impairment, and is now receiving treatment for a mental illness in a Perth psychiatric hospital.

As a reporter, it seemed to me that Imran's story deserved some exploration: was his father really mad when he killed him, and if so, who says so? Should there have been a trial by jury, instead of a judge alone and, if so, would the outcome have been different? Imran's family was distressed by the idea that the father was "not guilty" of any crime. Is there room in the system for a new kind of verdict, such as "guilty, but insane" that might more accurately reflect that something happened – a child had been killed – while also acknowledging that some people are too mad to be able to take responsibility for their actions?

I sought permission from the magazine editor, Steve Waterson, and the editor-in-chief, Chris Mitchell, to follow in the footsteps of Imran and his father, in the week before the child was killed. The idea was to find people who met and saw them, to talk about the mood and demeanour of Imran's father. It was also to feel something of the journey itself – 2500 kilometres through the heat and dust – while giving proper consideration to this question: is it still possible in Australia to be found guilty of the brutal murder of your own child? Or is the act now considered so horrific that we, as a community, assume that any person who does such a monstrous thing must be completely mad?

The assignment was difficult, time-consuming, and expensive. Photographer Adam Knott and I tried hard to keep to the same pace Zilic had as he sped through the desert with his son in the car, but it was impossible: he travelled at more than 150km/h non-stop, for almost 30 hours.

We stopped where Zilic stopped, to examine footage of him from the CCTV cameras at a petrol station. We went into the hotel where he reserved a room that he later abandoned. We tracked down people who served him and observed him. We noted that he'd cut and dyed his hair after killing his son (a sign that he did know what he'd done was wrong?) and, when he was finally arrested, that he was in process of thoroughly scrubbing his car clean.

A day before the article was due to be published, a Victorian judge, Justice Lex Lasry, banned it. Why? Because he was, at the time, presiding over the trial of Robert Farquharson, a Melbourne man accused of murdering his three sons by driving them into a dam. Farquharson's defence lawyer claimed that Imran's story might influence the jury in the Farquharson trial.

To say that the decision surprised News Limited's legal team would be to understate it. The trial of Imran's father was over – Zilic was in psychiatric care. Imran's mother, unable to cope with the loss of her boy, had already taken her own life (she is buried in a plot at Perth cemetery, by Imran's side). Also, Imran's story had nothing at all to do with the Farquharson trial.

Given that Imran's story was already printed into the magazine, the only way to abide by the suppression order was to pull the whole thing – including other unrelated stories and all the precious advertising – out of *The Weekend Australian*. It cost a great deal of money – some say around $250,000. I mention that not because money really matters where an issue like this is at stake (easy for me to say, I agree) but because it illustrates another point: if you think the courts won't issue a suppression order simply because it's going to cost the newspaper company a small fortune, you can think again.

I believe Justice Lasry was wrong to suppress the story. It seemed to me that the more sensible thing to do would have been to take aside the jurors – 12 good people and true – and say: there's going to be an article in *The Weekend Australian Magazine* this week, and it concerns the death of a child. It has nothing to do with this case – it's a different boy, in a different state, killed by a different man, in different circumstances. But I don't want you to read it, in case you're somehow influenced by it, when you're deciding whether Robert Farquharson is guilty of the murder of his three boys.

That would have shown genuine respect not only to people on the jury, but to the principles of open justice and to the rights of other Victorians to examine Imran's story, if they wished.

I've been pleased to see judges, senior lawyers, and others come out in support of that view. I hope it will be a while before we see such a decision again.

That said, there is one more thing I should say about the matter, and it's this: Robert Farquharson did drive his three boys into the dam. He didn't call for help; instead, he asked a driver of a passing car to take him to his ex-wife's house, so he could be the one who told her that her children were dead.

On one of the last days of the trial – long after the article about Imran had been suppressed – Crown Prosecutor Andrew Tinney gave what I regard as one of the finest jury summations in a Victorian murder trial, ever.

"Well, what do you do, members of the jury?" Tinney asked. "You are Robert Farquharson. You are driving along a dark country road when out of the blue you cough and lose consciousness for the first time in your life.

"You wake up to the noise of one of your sons screaming out, 'Dad, we're in water'…

"So what do you do? Well, of course you turn off the ignition and you turn off the headlights … because the last thing you would want out there in the middle of this dark dam is any light.

"What do you do? What do you do in that situation? Well, you undo your own seatbelt of course.

"You undo the door to the car closest to you, of course. You get out of the car, of course.

"Without any effort to take any of your children with you, out you go, leaving those three panicking and helpless boys in that car on the dam. That's what you do.

"Or do you? Because in the real world, what loving father would leave his children in that cold dark place alone, even if he thought they were dead?"

That summation exploded whatever hope Farquharson had that his version of events – it was all a terrible accident – might be believed. He was convicted.

In the months since then, I have had time to think about the suppression order. What would have happened if Farquharson's lawyers hadn't seen Imran's story until after it was published, and then used it to complain that their client – Farquharson – couldn't get a fair trial?

What if Justice Lasry had bought that argument, and it had brought on a mistrial? Farquaharson had already been tried, and found guilty, once before, but a mistrial had been declared. What if the public's appetite for a third trial had waned, if the costs had been considered too great, if the feeling had taken hold that it was just too hard to get a conviction in this case, and it had been abandoned?

I can live with the suppressed article. Had Farquharson walked – well, I'm not sure I could have lived with that.

Caroline Overington is a two-time winner of the Walkley Award for investigative journalism. Her recent novels about child murder and child neglect are derived from her experience as a reporter for The Australian

Access to court information

Journalists run up against a host of barriers when it comes to reporting trials, writes Geesche Jacobsen

Recently, a Sydney judge retrospectively suppressed details of a legal argument which had taken place in open court. Had a journalist been in court at the time, they could have heard and reported it.

When I asked for access to the transcript of proceedings in the judge-alone trial a few days later, thereby alerting the parties to our interest, I was confronted with a roadblock to open justice.

The case is just one example of the haphazard system of access to court information and suppression orders in NSW.

In 2003, the NSW Law Reform Commission raised the need to define rights to access court information. A year later, the Supreme Court tried to clarify the rules. Since then there's been community consultation, a discussion paper, a meeting of all attorneys-general and a working party.

Eventually, in 2010, two bills passed parliament: the *Court information and Access Bill*, and the *Court Suppression and Non-publication Orders Bill*. Both are expected to become operative in the second half of this year, when the relevant regulations have been finalised.

Until then, what a reporter can gain access to, and report on – especially in the lower courts – remains largely a decision made by individual registrars, magistrates and judges on a case by case basis.

In the Federal Court, every case filed is listed on the internet, and originating documents (such as pleadings) are publicly available as soon as they are filed.

In the NSW Supreme Court, one antiquated computer (non-windows based) which allowed access to a basic record of all cases in the higher courts has been removed, and reporters have to ask for information on a case by case basis.

Access to statements of claim in civil cases is granted only after it has been read in court – often months down the track.

All requests for access to exhibits, files or transcripts in the Supreme and District Court are processed by one hard-working media liaison person. While most applications for file access at the Supreme Court are granted, at the lower courts such requests are not always decided according to consistent principles. Often, of course, it is the parties, rather than the courts or judicial officers, who oppose media access.

Where access to transcripts or exhibits is refused, reporters are nevertheless expected to report fairly and accurately – even in cases where they do not have access to transcripts of crackly intercepted conversations played in court.

In 2005 in the C7 case a Federal Court judge ordered the parties to supply media representatives with access to the large volume of documents tendered as exhibits, while transcripts were provided through the court.

NSW seems to be catching on and in three recent high-profile criminal cases in the Supreme Court similar arrangements were made: daily transcripts and copies of exhibits were provided to interested parties.

In Victoria, courts keep a register of all non-publication orders which ban publication of all of, or a part of legal proceedings, however small. Last year 270 suppression orders were made in that state.

In NSW, there is no comprehensive record of such orders and only if judges and magistrates inform the relevant media officer are journalists informed about such orders. Under this haphazard system, reporters who are not in court at the time an order is made, rely on their own initiative to ensure they do not inadvertently breach any orders.

The other reform which the Supreme Court has introduced is to allow the use of mobile phones and laptops in court. Tweeting from court – while sometimes fraught with legal pitfalls – is now possible. Not so in the District and Local Courts, where some courts still display signs warning that all mobiles have to be switched off completely.

Of course photos and audio recording of court proceedings are still not permitted, though the Supreme Court has allowed some sentences to be broadcast. But the matter is at the judge's discretion and one recently refused an application for a sentence to be filmed, and there are strict guidelines on what can be filmed.

In other respects, too, the Supreme Court has started to realise that the world is changing and publication is taking many more forms: media organisations were recently ordered to remove old articles from the internet ahead of a criminal trial. However, the same or similar material might be available on other sites which are not subject to the same court orders.

When the judge put in place a suppression order after we asked for access to the transcript of the legal argument which had taken place in open court, we were left weighing up the cost of briefing a barrister to fight the order. Unfortunately, it is another sign of the times that such expenses are becoming harder to accommodate in the balance sheets of media companies.

This time we got lucky: after we asked the judge in writing for the terms of the order and the reasons for making it, he realised he did not have the power to make the order, and we received the transcript, which resulted in a good story.

The new NSW laws due to come into force later this year promise to clarify the rules across the board and guarantee access to certain kind of information in all courts in front of all judicial officers. This should reduce the haphazard approach and guarantee access to some documents not always granted now. A good way forward, though it is as yet uncertain if access will be free and timely.

There is also concern that the NSW laws – which will still ensure less media access than for example the Victorian regime – will become a national model, thereby leading to a tightening of rules for media in some states.

Geesche Jacobsen is crime editor of The Sydney Morning Herald

Artwork by Karl Hilzinger

COPYRIGHT

Copyright issues continue to raise a threat to press freedom in that the widespread breach of intellectual property rights undermines the business model on which news content is based.

The federal attorney-general, Robert McClelland, has flagged a review of Australian copyright legislation and will refer the matter to the Australian Law Reform Commission (ALRC) later this year, he told a conference in February.

"Copyright still provides an economic incentive for the creation of new works," he told the Blue Sky conference in Sydney. "It underpins whole creative industries: music, films, books, software, computer games and art. It also plays an important role in the Australian economy."[116]

Any review of copyright issues would, he said, have to strike a balance "between those who support an owners' perspective and those who seek greater access in our community".

This problem with copyright is summed up in an article in the UK's *Observer* newspaper in the UK: "The relationship between the cost of producing quality entertainment and the ethical responsibility to pay for it has long since broken down, and the habits of those aged under 25 who have grown up with the something-for-nothing internet culture (and the vague libertarian argument that supports it) will not go away."[117]

For "quality entertainment" one could just as easily read: "quality news and current affairs content".

iiNet

In the latest twist of a matter that has extended for more than 18 months in Australian courts, the full bench of the Federal Court ruled in February that internet service provider iiNet had not authorised the infringing conduct of its customers (effectively to download online film and music content), so could not be held responsible for that conduct.

However, the full decision bears examination, as it appears to give an acknowledgement that ISPs and other carriage service providers could be held liable for the known repeat infringements of their customers.[118]

Justice Emmet said: "It does not necessarily follow from the failure of the present proceeding that circumstances could not exist whereby iiNet might in the future be held to have authorised primary acts of infringement on the part of users of the services provided to its customers under its customer service agreements."

Justice Jagot said that it was reasonable to suppose that sending warnings to customers known to be repeatedly infringing copyright would act as a deterrent: "The benefit of informing customers of the receipt of evidence of copyright infringements occurring on their accounts, as noted, is twofold. First, some will become aware that their activities are unlawful. Second, some will become aware that their activities are detectable. The idea that neither would be a material deterrent to many people is unrealistic."

A new code of conduct for the internet?

Shortly after the iiNet decision, the Internet Industry Association (IIA) announced it had developed an industry code of practice to protect ISPs from future infringement claims. IIA chief executive, Peter Coroneus, said in a press release that, having reviewed the decision of the full Federal Court in the iiNet case, the association would develop a code to "give a range of internet intermediaries greater certainty around their legal rights and obligations".

He wrote: "The iiNet case has provided us with welcome guidance on where responsibilities should begin and end, but falls short in defining reasonable steps intermediaries should take in responding to allegations of infringement by their users. The Code will address this gap."[119]

He added that responsibility should not end with ISPs, and that content providers needed to work on new business models to ensure that their content was easily accessible and affordable in a paid-content system.

"If users have access to more and better content, when, where and in the form they choose to consume it, and at a realistic price, we're quite sure the motivation for infringement will decline. We certainly don't condone the infringement of copyright – but internet users need attractive, lawful alternatives if we are to see positive behavioural change. There's no reason why Australia shouldn't be leading the way here," he said.

Trans-Pacific Partnership Agreement

It has also been reported that signatories to the Trans-Pacific Partnership Agreement (TPP) have been working on an international copyright treaty that includes extensive new powers for copyright holders, including[120]:

- a new legal regime of ISP liability
- ISPs to identify internet users
- established damages for the rights holder
- criminal enforcement for technological measures beyond World Intellectual Property Organisation internet treaties, even when there is not copyright infringement
- outlawing parallel trade in any copyrighted good
- a 95-year copyright minimum term for works for hire.

Safe harbour

McClelland also flagged possible changes to the "safe harbour" provisions of the *Copyright Amendment Act 2006*, which was intended to provide legal incentives for ISPs to co-operate with copyright owners in deterring infringement of copyright.

He told the Blue Sky conference in February 2011 that he would consult on proposals to broaden the definition of "carriage service providers" to include entities such as Google and Yahoo!, which do not provide network access but provide online services.

The Attorney-General's Department is expected to release a consultation paper on the issue later this year.

MEDIA CONCENTRATION

Current media ownership controls

The *Broadcasting Services Act 1992* imposes limits on the ownership and control of major Australian media. Transactions involving commercial television licences, commercial radio licences and certain newspapers are subject to rules aimed at preserving diversity and reducing the concentration of ownership. These are:

- "5/4 rule" – at least five independent media groups must at all times be present in metropolitan commercial radio licence areas and four such groups in regional commercial radio licence areas
- "2 out of 3 rule" – media mergers may involve no more than two of the three regulated media platforms (television, radio and associated newspapers) in any one commercial radio licence area
- Licence limits – a person may control only one commercial television licence in any commercial television licence area and two commercial radio licences in any commercial radio licence area
- Audience reach limits – a person may not control commercial television licences with a combined reach of more than 75 per cent of the Australian population.

A number of these provisions came into effect in November 2006 following the passage of the *Broadcasting Services Amendment (Media Ownership) Act 2006*.

More detailed information regarding the ownership and control limits is available on the Australian Communications and Media Authority website, www.acma.gov.au, by following the links to: "For licensees & industry: Licensing & regulation" and then "Media ownership and control".

The media, the miners and the billionaires' club

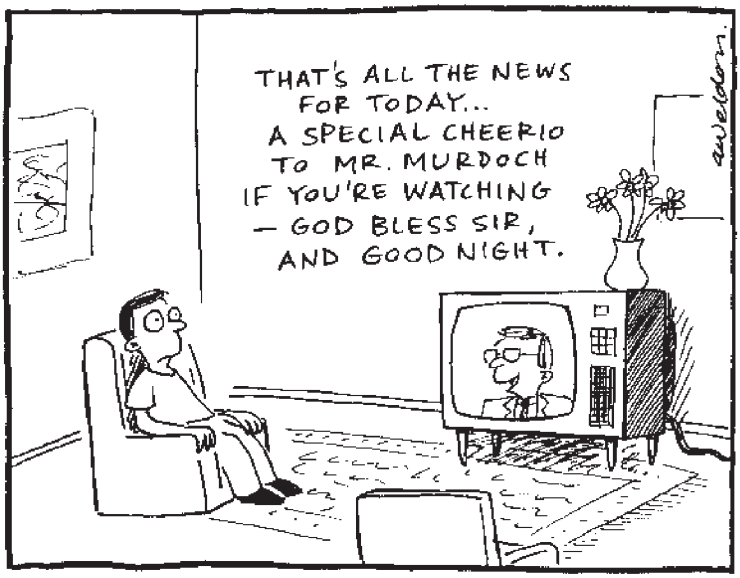
Cross-ownership rules are a distant memory as Stephen Mayne watches Australia's media carved up between a cosy club of billionaires

Coalition control of the Senate from July 2005 until the defeat of the Howard government in late 2007 produced some lasting change in Australia. The period is perhaps best remembered for the over-reach that was WorkChoices, but changes to Australia's media ownership laws have also been profound.

The internet was supposed to usher in a golden period of media plurality but the events at Network Ten over the past few months once again demonstrate Australia's concentration of media ownership and the return of the "influence model".

Think of the deals that flowed over the past five years since ownership rules were liberalised. Southern Cross Media is currently in the process of buying Austereo to create the biggest radio company in Australian history.

Fairfax snapped up the biggest regional newspaper publisher, Rural Press, along with the most powerful talkback radio network through a carve-up of Southern Cross Broadcasting.



Cartoon by Andrew Weldon

Kerry Stokes wasted no time cashing in on the private equity boom by selling almost half of Seven to private equity group Kohlberg Kravis Roberts (KKR) while retaining control. He then used some of his surplus cash to seize control of WA News, putting one billionaire in charge of the monopoly newspaper and the biggest television station in Perth.

Such a move was illegal before Steve Fielding came along.

The liberation of foreign ownership rules arguably brought new players to the table and it is true that private equity firm CVC was a genuine new voice when it paid more than $5 billion for Nine and ACP from James Packer's PBL.

However, Packer retained his 50 per cent stake in Fox Sports and 25 per cent stake in Foxtel, which he now shares with the acquisitive Kerry Stokes after what was at first a hostile raid on Consolidated Media Holdings.

It is never good for democracy when wealthy media moguls do deals to carve up control of key assets and the peace accord between James Packer and Kerry Stokes has some troubling aspects which have played out at Network Ten.

"It is never good for democracy when wealthy media moguls do deals to carve up control of key assets..."

"Packer may have exited PBL Media with a tidy profit but he… probably noticed the palpable drop in his political clout."

Packer may have exited PBL Media with a tidy profit but he blew most of the gains splurging on over-priced casino assets and probably noticed the palpable drop in his political clout. Anyone wishing to control a gambling empire dependent on government licences can only be strengthened by the perceived and real power that comes from simultaneously owning important media assets. This might explain his return to free-to-air television with last year's share raid on Network Ten.

The media, more than any other industry, is characterised globally by unusually high levels of family control. This comes back to the desire of individuals to influence societies, something the state always insists on doing where democracies do not flourish.

For examples in democracies, look no further than the Murdochs and News Corporation, the Sulzbergers and *The New York Times*, Sumner Redstone and Viacom, John Malone's Liberty Media group and, of course, the indefatigable Silvio Berlosconi. You don't see nearly the same amount of moguls in more mundane industries such as manufacturing or banking.

Media moguls are certainly preferable to state domination, but the challenge for democracies is to maintain a diverse range of responsible media owners who are motivated by the high ideals of journalism and democracy.

Which brings us to Network Ten and Gina Rinehart.

Australia has arguably the world's most valuable dowry of natural resources and the China boom has catapulted the lucky few such as Andrew Forrest, Clive Palmer and Gina Rinehart from relative obscurity to the top 10 of the rich list with a combined wealth of almost $20 billion.

Kevin Rudd's proposed Resources Super Profits Tax was an audacious government grab for revenue which ultimately failed after a highly effective advertising campaign by the mining industry.

It also had the effect of politicising a whole generation of miners. Gina Rinehart is a known climate change sceptic who campaigned against the tax and is now a rising political power through minority stakes in Fairfax and Network Ten, which yielded by giving her a board seat.

While Rinehart bristles when the media label her a "mining heiress", in Russia she would be known as an oligarch – a billionaire who consorts with other political and corporate interests to exert power over policy.

The influence and connections of the mining industry run deep in Australia. When Kerry Stokes cleaned out the board of WA News he appointed Rio Tinto's iron ore boss Sam Walsh and Woodside Petroleum CEO Don Voelte as non-executive directors.

Stokes himself is great friends with Fortescue Metals controlling shareholder Andrew Forrest and is leveraged to the mining boom through Seven's ownership of the Caterpillar franchise in Western Australia, NSW and northern China.

James Packer is also friends with both Forrest and Gina Rinehart. Miner Clive Palmer is a former National Party staffer in Queensland and the biggest individual donor to the Coalition in history.

While miners are a rising political force in Australia, the Murdoch family remains pre-eminent when it comes to media power and their outlets campaigned relentlessly against the proposed mining tax.

News Corporation owns more than 60 per cent of Australia's newspapers, has the third biggest magazine business and management control of Foxtel. This amounts to enormous influence which could be about to rise again if Foxtel's mooted takeover of regional pay-TV provider Austar materialises.

Then you have Rupert's eldest son, Lachlan, who personally owns 50 per cent of radio operator DMG and almost 10 per cent of Ten Network Holdings, where he is acting CEO until James Warburton is free to move across from Seven.

Lachlan was supported into the role by Gina Rinehart and his old One-Tel buddy James Packer, who promptly departed from the Ten board when Warburton was poached so as to preserve his relationship with an angry Kerry Stokes.

As a director of Ten, you would expect James Packer to be actively competing against Seven, not attempting to maintain some form of non-poaching agreement with Kerry Stokes.

All these dramas at Ten just highlight what a small pond the Australian media game is. For instance, the largest shareholder in Ten is Bermuda-based billionaire Bruce Gordon, an old ally of the Packer family.

The Ten board was overwhelmed by what might be described as the "buy 10 per cent and get a board seat" club. In the case of Gordon, he is now directly represented on the Ten board even though he's supposedly a fierce competitor of the company through his ownership of Channel Nine in Adelaide and Perth.

That's the Australian media scene for you – a cosy club of associated billionaires wheeling and dealing their way into ever-increasing influence.

Stephen Mayne is a shareholder activist, business commentator and the founder of Crikey.com

Growing our public voice

With the explosion in digital broadcasting, it's more important than ever that public broadcasters promote an Australian voice – and that takes money, says Quentin Dempster

The ABC and SBS, Australia's unique public broadcasting sector, have to devise new strategies to sustain themselves through volatile political times. Now major players in free-to-air multi-channelling on TV, the ABC and SBS have been collaborating with the commercial networks – Seven, Nine and Ten – to persuade Australians to take up digital set-top boxes and new TVs.

The good news is that 85 per cent of Australian households are now accessing the full suite of public and commercial multi-channel services for the once-only cost of the digital set-top box component of their new TVs.

This should enable the Department of Communications to meet its scheduled switch-off of analogue transmission by 2013. If it happens, this will be quite an achievement. We started digital broadcasting only in 2001 and through the first six years encountered resistance by vested interests to the full (multi-channel) benefits of the revolutionary digital technology.

The ABC has been funded through an enhanced triennial funding appropriation for a children's channel. Through its own (stretched) resources it also launched News24, a continuous TV news service. The ABC and SBS are now major content providers for multi-channel free-to-air television in Australia. Admittedly a lot of the entertainment content is acquisitions from the programming of other (mainly British and US) broadcasters and time-shifted and repeated to fill out the multi-channel schedules.

Cartoon by Lindsay Foyle

Original Australian-made content is now a live issue with the announcement of a government review of "convergence" and its impact on content in this country. "Convergence" means the converging of broadcasting (television and radio), the mobile phone/iPad and the internet as instantaneous broadcast and retrieval platforms for video and audio content from any source, domestically or internationally. National cultural boundaries are smashed through convergence.

This technological phenomenon changes the business plans of domestic commercial broadcasters and puts the current legislated local content quotas at risk. Currently, 55 per cent of the total content on domestic Australian television – including news, sport, drama, game shows and light entertainment – are Australian-made by law.

The quota system has sustained a local television production industry for 50 years. Strong audience support has also helped to build a solid market for the locally made programs. But convergence, particularly with the almost limitless capacity of fibre-optic data and content delivery to the home, could easily fragment and shift national sense and sensibility. While local commercial operators will have to rethink their business models in the face of cyber attacks from competitive and accessible programming from external sources, the ABC and SBS should be playing an enhanced role in developing and broadcasting Australian content, particularly drama.

If the commercials want financial respite from the 55 per cent local content quota, the public broadcasters should be funded accordingly to fill the cultural gap. The complementary nature of the relationship with the commercial networks should be one unarguable imperative for the ABC's adequate recurrent funding in particular. The rebuilding of the ABC as an in-house television production operation should become our objective as convergence impacts on the entire Australian industry.

Quality at the ABC: what's that?

The relentless demands of ABC News24 are making the broadcaster confront its own resourcing deficiencies and are causing internal angst that quality news and current affairs programming cannot be sustained as other resources are urgently diverted to meet those demands. A tsunami in Japan, an earthquake in New Zealand, a revolution in Egypt, an uprising in Libya – all must be comprehensively and professionally covered with ABC cameras and reporters on the ground. Anything less and the ABC will be

"If the commercials want financial respite from the 55 per cent local content quota, the public broadcasters should be funded accordingly to fill the cultural gap."

"In what looked like an indictment of SBS and its commercial and programming diversions, Brown detailed attitudinal research that showed a broad lack of awareness about Australia's immigration history."

vilified by its rivals and critics, and risk serious reputational damage. Budget blowouts to drive coverage are inevitable.

Staff have asked management to consult about auditing resources to meet a yet-to-be-agreed definition of "quality". Significantly, ABC management representatives recently declined to offer their definition of quality and how it is to be measured and seemed to be instructing staff to "just get on with it". "Just get on with it" has been taken as code that management does not really care about quality, beyond memos from certain editorial executives about adherence to grammar and pronunciation standards. Staff has submitted their own definition of quality in a letter to ABC management:

We would define quality content as displaying the following applied skills and production values:

- *crisp audio and sound catching;*
- *the clearest possible pictures, capturing grabs and sequences which illustrate the narrative;*
- *seamless and creative audio and video editing which fully engages the listener and viewer in the content;*
- *original and thorough research;*
- *news-breaking reporting which displays deeper insight through the establishment by journalists of trusted contacts and reliable informants;*
- *clever use of graphics and audio-visual animation;*
- *fine writing, analysis, presentation and interviewing which engage and inform the audience;*
- *ethical and resourceful practice of journalism. Fidelity to truth – the ability to see through spin and media manipulation techniques and to strive to present the truth unencumbered by pressures from without or within.*

We believe that current human and production resources are inadequate to meet the multi-platform demands now imposed on all content makers by ABC News.

Realising that funding is constrained, constructively the staff have asked the management to form a joint "resources adequacy review". This internal ABC debate about the inadequacy of resources will be integral to the ABC's formulation of its next triennial funding submission, which will be prepared by the end of 2011 for despatch to the Gillard government.

SBS: Let them eat "The Ashes"

After years of boosterism of its commercial hairy chest, SBS has at last changed its corporate tune. SBS enraged its once loyal supporters when, three years ago, its board decided to break into programming with advertising. The SBS Board was unapologetic, claiming that the revenue so derived would enable it to fund more Australian programming. One SBS marketing manager once told the advertising industry that it was SBS's intention to become Australia's fourth commercial television channel.

No-one told the government or the rest of the industry, struggling to maintain cash-flow through the global financial crisis, that there was a new aggressive competitor for scarce advertising dollars. The Rudd government declined to save SBS from itself in its budget allocations, leaving SBS underfunded and bereft of *raison d'etre,* and destructively reliant on its advertising strategy.

But in 2009 the chairmanship of SBS changed to Joseph Skrzynski, a financier and arts industry leader. It seems that he has been thinking deeply about what SBS really means to a now polyglot Australia.

Recently the outgoing SBS managing director, Shaun Brown, started to sing a different song. While stating that he was proud of *Top Gear*; the ad break-ins to fund Australian content; SBS Two and SBS Online; proud to have stolen the rights to the Ashes "from under the noses of every other deep-pocketed but ultimately timid network"; proud to have locked up the rights to the FIFA World Cup and the Tour de France; proud of programs such as *Remote Area Nurse*, *The Circuit*, *East-West 101*, *First Australians* and *Immigration Nation*, Brown at last genuflected towards SBS's charter.

Shaun Brown said in a recent speech ("New opportunities for culturally driven broadcasting", Broadcasting Australia Conference, February 14): "In our recently updated corporate plan, SBS – for the first time – explicitly states that one of our core objectives is to contribute to social cohesion. That has always been implicit in our purpose and has been an integral part of the spirit of SBS… But elevating it to a stated goal obliges you to look afresh at our output and activities to ensure not only that they are aligned with that purpose, but that they are being fully leveraged for maximum impact. To help achieve that, we seek to be a catalyst for the national conversation about multiculturalism and social inclusion."

This has been a long time coming, Mr Brown. Thank you. Thank you, Mr Skrzynski. (One suspects that inside the SBS boardroom the deputy chairman, one Gerald Stone –

the noted author and Kerry Packer Nine acolyte – has been bluntly told the commercial strategy of recent years has taken SBS up a dry gulch.)

Research commissioned by SBS (Ipsos Mackay) showed that broadly there was support for multiculturalism in Australia. But according to Brown: "...disturbingly, the majority of respondents believe that racial prejudice had increased in the last five years." In what looked like an indictment of SBS and its commercial and programming diversions, Brown detailed attitudinal research that showed a broad lack of awareness about Australia's immigration history. "One worrying trend in the last 10 years has been the gradual but obvious demise in sympathy for asylum seekers. As support for skilled migrants has risen, the suspicion of 'boat people' has also risen."

No-one wants SBS to be a feel-good propaganda arm for government or multiculturalism. It must be more sophisticated and intelligent than that. SBS's primary reason for being surely is to make immigrant Australians feel included, first by hearing and seeing programs in their native languages and also through programs which engage them directly. Over inter-generational time the migrant communities will come to know that Australia greatly values them and that an Australian taxpayer-funded broadcaster – SBS – has been crucial to their engagement with Australia and the ultimate full citizenship of themselves and their children.

In the event that the SBS board ever has the courage to propose that it should no longer be made dependent on commercial advertising for any of its funding, all public broadcasting supporters should rally in support.

Although both Prime Minister Julia Gillard and Opposition Leader Tony Abbott now say they no longer want a "big Australia", the fact remains that under lobby pressure from the Business Council of Australia and the top construction, mining, retail and housing corporations, migration is continuing at projected levels to rise to 36 million by 2050. A bigger Australia is coming.

There can be no more compelling national investment reason to have an adequately funded (non-commercial) SBS than this.

Quentin Dempster, an ABC journalist and broadcaster, is a self-appointed advocate for public broadcasting in Australia

Public discussions: The Minister for Communications, Stephen Conroy, talks future strategies with ABC managing director Mark Scott and SBS director of strategy Bruce Meagher Photograph by Andrew Taylor /*The Sydney Morning Herald*

PRESS FREEDOM IN THE ASIA-PACIFIC

The Asia-Pacific region is one of world's most dangerous for journalists and media workers. In 2010, another horror year, 31 journalists and media workers were confirmed killed. In many Asia-Pacific nations, those who threaten and even murder media personnel go unpunished. Media workers are also vulnerable to economic exploitation, and censorship efforts from authorities remain a critical concern.

Pakistan

The relationship between exploitation and personal risk is brought into focus in Pakistan, where the toll of killed media personnel doubled to 16 in 2010. Another two journalists were killed in January 2011. The prevalence of conflict and financial hardship across Pakistan has a direct impact on the risks of the job, whether media personnel work in designated conflict areas or report from the major cities. With some of the country's largest media houses not paying employees for months at a time, and those with jobs fearful of retrenchment, individuals are more prepared to take the dangerous jobs for which they might be paid.

Afghanistan

In Afghanistan, two foreign journalists accompanying US forces were killed in separate blasts involving improvised explosive devices (IEDs) in 2010. In the third case, a former Afghan journalist who worked as spokesman for the speaker of the Afghan parliament was murdered. As election-related conflict and allegations of corruption fuelled tensions in the country, Afghan journalists contended with low wages, poor working conditions, inadequate training and little safety support from employers. The ongoing IFJ Media for Democracy project supports the monitoring and reporting of media rights violations in the country.

India

In 2010, two journalists died in India in separate assassination attempts on politicians, a third was shot dead as he left home for work while a fourth was killed as he reported on a fire in Delhi. Another was killed in January 2011. Threat levels for media remain high in conflict-prone zones. In the north-eastern states, Jammu and Kashmir, and the Maoist insurgency area in central India, local governments pressure the media via legal mechanisms and security forces, while militants vie to control media content in their favour. Journalists feel besieged, especially in the Maoist insurgency area, where major security operations involving large paramilitary deployments commenced in 2009 and intensified during 2010. In Manipur, media workers shut down newspapers in October to protest against threats from underground armed groups.

Indonesia

In Indonesia, free and independent reporting is attracting trouble. Journalists are facing risks and threats from fundamentalist militants as well as increasing obstruction in reporting on environmental issues. IFJ Indonesia affiliate Aliansi Jurnalis Independen (AJI) reported 40 cases of violence, threats, intimidation and censorship against media personnel in the year to August 2010**.** There is particular concern for the safety of journalists reporting in distant and under-reported areas of conflict and post-conflict transition, including West Papua, Maluku, North Sumatra and Aceh. One journalist was killed as he reported on a clash among villagers in Maluku. In East Kalimantan, a reporter known for his environmental and anti-corruption reporting was found dead. In West Papua, a journalist who had suffered threats due to his environmental reporting was found drowned. Neither of these last two cases is confirmed as a killing, but police have failed to provide an autopsy report to either family. Punitive criminal defamation and blasphemy laws are another disincentive to independent, critical reporting. Despite a 2005 Supreme Court ruling that complaints against the media be dealt with as civil matters, criminal defamation and libel cases continue to be filed against journalists.

Thailand

In Thailand, two foreign media staff were killed as violence between security forces and anti-government protesters erupted in Bangkok mid-year. At least six other foreign media workers were reported injured. The risks were further highlighted when a sniper killed a protest leader as the media was interviewing him.

Pacific

Fiji remains a key concern: government censors remain in newsrooms and a draconian media decree severely restricts the activities of journalists and media workers. Journalists require permits to meet in groups, a clear breach of the right to freedom of association. Press freedom has been boosted through the IFJ's Media for Democracy and Human Rights in the Pacific project, supported by the European Union. This began in July 2010 and

aims to build journalists' skills in monitoring and reporting media rights violations and build a strong network of support across the Pacific Islands. The project works through the Pacific Freedom Forum as the project associate, and involves the Alliance, the New Zealand journalists' union (EPMU) and the Journalists Association of Samoa (JAWS). Preparations are underway for the inaugural *Press Freedom in the Pacific* report and the Pacific Media Summit, to be held later in 2011.

Sri Lanka

The situation for media personnel in Sri Lanka remains dire, and the Media Safety and Solidarity Fund continues to provide emergency financial assistance to journalists and their dependants. The fund has pledged support for the children of prominent cartoonist and columnist Prageeth Eknaligoda, who disappeared on January 24, 2010, two days ahead of the presidential election that saw incumbent President Mahinda Rajapaksa returned to power. The IFJ Asia-Pacific is leading an international campaign calling for a full investigation into his disappearance.
LankaeNews.com news editor Bennett Rupasinghe was arrested on March 31 for allegedly threatening another man. But Rupasinghe's lawyers believe the police are turning him into a suspect for political reasons, as the website has run stories critical of the government. The LankaeNews offices were set on fire in January and a columnist for the website is still missing more than a year since he disappeared. Rupasinghe was released on bail in April.

Cartoon by Alexander Pope/*The Canberra Times*

In Sri Lanka, the IFJ Asia-Pacific has been working with a network of five journalists' organisations linked around the IFJ affiliates in the country (the Sri Lanka Working Journalists Association and the Free Media Movement). These organisations and their activists have been under immense pressure due to the crackdown on independent journalists and the media over the past four years. Many of the activists have fled into exile.

Philippines

The Philippines is among the most dangerous countries in the world for media professionals. Since the end of military rule in 1986, the total number of known killings of media workers is 144. The murder of 32 journalists and media workers, who were among the 58 people killed on November 23, 2009 in Maguindanao province on the island of Mindanao, was the world's single worst incident of targeted violence against the media. The IFJ Asia-Pacific with affiliate the National Union of Journalists of the Philippines (NUJP) led a Global Day of Action to mark the one-year anniversary of the Ampatuan Town Massacre on November 23. The IFJ and the NUJP are preparing an appeal of regional affiliates to President Aquino to end the decades-long culture of impunity for violence against journalists in the Philippines. Since the Ampatuan Town massacre, another six journalists have been killed in the course of their work.

Nepal

According to statistics compiled by IFJ affiliate the Federation of Nepali Journalists (FNJ), 31 media people have been killed in Nepal since July 2001. This tells of the immense sacrifice that journalists and media personnel have made in trying to progress democracy in Nepal. While the number of killings of media personnel has dropped since the end of the war, the assaults, bombings and threats have continued against journalists and media offices. In the period April 2010 to March 2011, the IFJ documented 25 attacks on journalists and media organisations, much of it by disaffected individuals and groups, and increasingly by insurgent factions and criminal gangs who have taken advantage of the insecurity beyond the capital. Safety concerns for journalists are compounded by poor working conditions and low wages, as confirmed by a November 2010 report of the Minimum Wage Fixation Committee set up under *Nepal's Working Journalists' Act*.

China

At the time of writing, a clampdown on journalists and media workers, human rights activists, writers and lawyers was gripping China. It has come in the wake of February's online call for a "jasmine revolution" in China, following unrest in the Middle East. Journalists covering the resulting "jasmine" protests from outlets including Bloomberg TV, BBC, CNN, Deutsche Presse-Agentur, German-based broadcaster ARD, Voice of America, Hong Kong-based broadcasters including ATV, TVB, Cable TV, RTHK and Taiwan-based San Li TV were harassed, assaulted, detained and interrogated by Chinese police. Journalists were also threatened by police officers that their working visas might not be extended if they continued to report on the protests.

Media Safety and Solidarity Fund

The Media Safety and Solidarity Fund is funded entirely by the contributions of journalists and media personnel in Australia and New Zealand to aid their colleagues in the Asia-Pacific region in times of emergency, war and hardship. It was established in 2005 and is administered through the Asia-Pacific office of the International Federation of Journalists (IFJ) in collaboration with the Media Safety and Solidarity Management Committee.

Media Safety and Solidarity supported an IFJ-led international campaign advocating for the release of senior Tamil journalist J.S. Tissainayagam, who received a presidential pardon in May 2010 for his 2009 conviction on terrorism charges. He immediately went into exile, with support from the IFJ Asia-Pacific. Tissa's pardon was a key demand of the IFJ's Release Tissa campaign, which began in March 2008. Since September 2009, Media Safety and Solidarity has supported the families of Jesiharan and Valamarthy, colleagues of J.S. Tissainayagam, who had incurred significant debts in legal costs and other fees in defending terrorism-related charges. As a result of the continued IFJ campaign, Jesiharan and Valamarthy have had the charges against them dropped, been released from remand and fled Sri Lanka. They are now living in exile.

The fund has also pledged support for an annual commemoration lecture for Lasantha Wickrematunge, the former editor of *The Sunday Leader* newspaper, who was murdered in January 2009. The annual event aims to renew a national debate about press freedom and human rights in Sri Lanka.

In the Philippines, Media Safety and Solidarity has renewed its support for financial assistance to the families of all journalists killed, specifically to enable their children to receive a full year of education. To date, the number of children supported by this program numbers 47.

Media Safety and Solidarity continues to support a long-term program in Nepal to fund the schooling and educational needs of all children of killed journalists through to adulthood. As Nepal continues its transition to democracy since 2005's violent coup, the fund now supports more than 75 children. The program supports children's education until the conclusion of senior high school and has a projected commitment of at least two decades.

Since 2008, Media Safety and Solidarity has supported a project which monitors and reports on violations of media rights in China. The project regularly produces media statements, a monthly e-bulletin and background reports on media violations which are distributed through an international network of China press freedom advocates, journalists and freedom of expression experts. The project's report, *Voices of Courage: Press Freedom in China 2010*, uncovered 88 restrictive orders issued by the Central and Provincial Propaganda departments, thought to be a mere sample of the vast array of directives continually flowing through the system. The project also launched a *Handbook for Investigative Reporting in China* which lists Chinese laws and international instruments which journalists can cite when contending with vexatious and unwarranted actions from authorities.

The devastating floods that engulfed Pakistan in 2010 had a colossal impact on that country's media community. Media Safety and Solidarity has allocated funds to support journalists who have lost their homes and livelihoods in the disaster. The fund has also committed to support journalists who have suffered as a result of the devastating February 22 Christchurch earthquake in New Zealand, and the horrific earthquake and tsunami which hit Japan on March 11. Support will be delivered through IFJ affiliates in both countries.

Drawing a line: A protest over the disappearance of celebrated Sri Lankan cartoonist Prageeth Eknaligoda
Photograph by Sampath Samarakoon

The curious case of Ross Dunkley

The editor's arrest in Burma came just weeks after he outlined a robust new editorial policy for The Myanmar Times. David Armstrong tells the story

On February 10, a businessman passing through Rangoon airport noticed a pink slip of paper taped to the wall of the Immigration booth. Printed on the paper was the name Ross Dunkley. When the Australian founder of *The Myanmar Times* newspaper returned to Rangoon that day, he was arrested.

Dunkley, 53, was arrested about three weeks after a woman told police he had assaulted her, given her drugs and held her against her will. The police investigated her allegations thoroughly but took no action at the time. The woman then withdrew her complaint.

Yet suddenly the police had decided they would not let the woman withdraw her complaint – and that they would pursue the case through the courts. This is just one curious aspect of a very curious case.

Dunkley's arrest coincided with a long-running disagreement with his local business partner over who would be the top man in the company. It followed coverage by *The Myanmar Times* of the national elections in November, including stories about opposition candidates.

It also followed publication of a policy statement in both the Burmese- and English-language editions of the newspaper, suggesting that the "new" post-election Burma would have a more vigorous *Myanmar Times*.

It is hard to talk about press freedom in Burma, because the country is run by a military regime. Every story that the private sector newspapers might want to publish is subject to censorship by the Press Scrutiny Office. But it does seem likely that press freedom issues were involved in the arrest, trial and imprisonment of Ross Dunkley.

Dunkley grew up on the land in Western Australia and studied agricultural economics before getting a cadetship on the *Stock & Land* newspaper. In 1982, he won a Walkley Award for his coverage of the impact of a series of waterfront disputes on farm businesses.

In the early 1990s he went to Vietnam and took a stake in a new business paper, the *Vietnam Investment Review*. He sold out in the mid-1990s to Australian Consolidated Press but kept working on the paper. In 2000, with money in the bank and the backing of a small group of investment partners, he went to Burma, also known as Myanmar.

At the time, Military Intelligence was the dominant faction among the generals and they wanted to open up the country a little, to lighten the load of Western pressure. It suited them to allow Dunkley to set up a weekly English-language newspaper, *The Myanmar Times*. Dunkley and his friends owned 49 per cent of the venture; their local partner, Sonny Swe, the son of a Military Intelligence general, held 51 per cent. But the international investors had management control.

Two years later, Dunkley started a Burmese-language edition and that is now the flagship, outselling the English edition by almost 10 to one.

In 2004 the hardliners purged the Military Intelligence grouping and a year later Sonny Swe was sentenced to 14 years in jail. Eventually, Dunkley was given a new business partner, Dr Tin Tun Oo, a publisher who was also a senior official of the Myanmar Writers and Journalists Association. Oo became publisher of the newspaper company, Myanmar Consolidated Media; Dunkley was chief executive officer, managing director and editor-in-chief.

Towards the end of last year Oo started insisting that as the majority partner, he should be chief executive. Oo was backed

In the news: Ross Dunkley being escorted by police at the Kamaryut township court in Rangoon on March

by the information minister, Brigadier General Kyaw Hsan. Later, Oo would refuse to sign visa renewal forms for Dunkley and other expatriate staff.

On January 18, Dunkley met a woman at a Rangoon nightclub and she went to his home with him. The woman did not stay long and when she left she went straight to the local police station to make her complaint against Dunkley. The woman later gave a statement to the local media: the statement included Dunkley's precise address, his passport number and the date of issue.

The police interviewed Dunkley several times. They spoke to witnesses. They searched his house for drugs and found none. After an investigation lasting about a week, they took no action.

Late in January, Dunkley published his policy statement for the "new Myanmar". It said, in part: " [We] believe public enlightenment is the forerunner of justice… This paper seeks to be free of obligation to any interest other than our readers' right to know..."

In early February Dunkley flew to Tokyo to give a speech on his hopes for the "new Myanmar". His working visa still had not been renewed so he got a tourist visa to enable him to return.

On February 10, he came home and was arrested. On February 13, his Australian business partner, Bill Clough, flew to Rangoon for a directors' meeting. Tin Tun Oo was made chief executive officer and editor-in-chief of the paper's Burmese-language edition. Clough became acting managing director and chief editor of the English edition, filling in for Dunkley, who was now in Insein Prison. He was to stay there for 47 days before finally being released on bail.

Another curious aspect of the case is that Dunkley was not formally charged until April 4, his seventh court appearance. He was charged with administering dangerous drugs, assault, wrongful restraint, causing harm and breaching his visa conditions by committing a crime. He pleaded not guilty. At the time of writing, the case is continuing.

Given the censorship constraints, and the requirement to run government propaganda, *The Myanmar Times* will never be one of the world's great newspapers. But it can be surprisingly robust, especially when compared with the official newspaper, *The New Light of Myanmar*. It did its best to cover the elections professionally and it runs stories some in the regime would prefer not to see in print. A recent edition, for instance, had a big picture story on steep increases in the price of petrol.

Perhaps, given the business dispute, the sometimes spirited reporting and Dunkley's policy statement there is an element in this case of teaching the brash Australian journalist a lesson he can never forget.

David Armstrong is chairman of Post Media Ltd, publisher of the Phnom Penh Post *(in which Ross Dunkley has an interest). He is a former editor-in-chief of* The Australian *and of Hong Kong's* South China Morning Post

The year in New Zealand media law

New Zealand courts have sometimes been slow to insist on the rigorous justifications the Bill of Rights requires when free speech is in play, writes Steven Price

Confidential sources

The new provisions protecting journalists' sources in the *Evidence Act 2006* got their first run in the courts when the police applied for a court order requiring TV3 to name a source. Current affairs programme *Campbell Live* conducted an anonymised interview with a man they claimed was one of the thieves behind an infamous burglary of military medals from an army museum. The police wanted his name. The *Evidence Act* creates a rule protecting source confidentiality, but allows a judge to overrule it if the public interest in disclosing the source's identity outweighs the harms caused to the source and the flow of information to the public. The judge said the presumption of protection is not to be lightly displaced, and recognised the potential chilling effect, but the seriousness of the charge and the importance of the evidence need to be factored in. He indicated he would make the order. However, TV3 then agreed to provide some information in a "will say" statement, which meant the order was unnecessary. One prominent media law lecturer criticised the judge's approach as displaying too great a readiness to depart from the presumption of protection.

In another incursion into source confidentiality, the Serious Fraud Office ordered the *National Business Review* to turn over its notes and tapes from an interview with someone relevant to its investigations into a collapsed finance company. NBR was outraged, but had to acknowledge that the SFO's information-gathering powers were untrammelled. It reluctantly handed over the materials, noting that they didn't in fact contain anything confidential, but loudly complaining about the precedent that was being set.

Defamation

Defamation cases are not thick on the ground in New Zealand. However, there have been several significant hearings and trials in the past year. Businessman Michael Stiassny was awarded nearly a million dollars in damages against Vince Siemer in what the Court of Appeal has described as the worst case of defamation in the British Commonwealth. Siemer had criticised Stiassny's business practices, and because of his failures to pay costs in some pre-trial skirmishes, was debarred from defending the case. Siemer represented himself and didn't make much of a fist of it. But it's troubling to see such a huge damage award imposed on someone who wasn't even permitted to try to prove his accusations were accurate, especially where the Court of Appeal referred to no evidence about the extent of the publication (which was largely on websites) and made no attempt to assess the proportionality of the award under the Bill of Rights.

The Court of Appeal was on surer ground in allowing the appeal of former government PR staffer Erin Leigh, who sued over a briefing paper that said her work had attracted "consistent adverse comment" and been through a series of six drafts in two months. The High Court judge said that this couldn't be seen to reflect badly on her: it simply indicated that her approach was different to that of her critics. The Court of Appeal reinstated this claim, saying it was indeed capable of defaming her.

In another high-profile case, property magnate Bob Jones successfully sued columnist Chris Lee for botching key facts when he criticised Jones's management fees. He was awarded $104,000 and $80,000 costs after Lee's honest opinion defence was struck out because it didn't respond to the sting of the defamation.

Suppression

The courts continued to grant numerous suppression orders, some relating to the identities of celebrity defendants, and some with questionable justification. The media continued to criticise the suppressions, sometimes without giving the context that might help the public understand them, including the facts that suppression orders are only made in 1 per cent of criminal cases and most are temporary.

A blogger was convicted of breaching a number of suppression orders, sometimes by using pictograms encouraging readers to guess their names. The case is under appeal. Meanwhile, the government has introduced reforms setting the threshold higher for name suppression orders, following a recommendation from the Law Commission.

Official Information

The Law Commission has also been looking into New Zealand's official information laws. Its issues paper neatly summarises the strengths and weaknesses of the NZ regime. It has tentatively proposed:

- Sticking with the case-by-case approach which requires officials to assess the harm which disclosure would cause to particular listed interests (such as privacy or commercial interests), and to balance it against the public interest, in the circumstances of each case.
- Developing a system of "rules of thumb" drawing on existing case notes and guidelines to be used as accessible precedents for officials and requesters, injecting more consistency and principle.
- Restating the withholding grounds protecting the policy process so that they are easier to understand and apply (including dumping the vexed reference to constitutional conventions)
- Heading off misuse of the ground permitting withholding when information is soon to be made publicly available. It has been wrongly used to defer release of information into the indefinite future.
- Requiring officials to clarify requests with requesters
- Keeping the 20 working day time limit
- Encouraging proactive disclosure, especially online (but not insulating such disclosures from legal liability)
- Providing affected third parties with notice of pending release, and perhaps creating "reverse" freedom of information complaints, where information is released which should not have been
- Drawing up regulations on charging for release of information
- Allowing complaints about improper or late transfers of requests
- Increasing oversight of the OIA regime, perhaps by an Information Commissioner

Broadcasting standards

A change in personnel on the Broadcasting Standards Authority has seen some controversial decisions. Broadcasters are challenging two decisions they say take a new approach to matters of taste and decency in entertainment programmes. The BSA upheld complaints about a sleazy scene in Australian soap *Home and Away*, broadcast at 5:30pm, and an oral sex scene in the American drama *Hung* at 10:10pm. TVNZ and TV3 have teamed up to mount High Court appeals, arguing that these decisions are inconsistent with the existing approach and with the Bill of Rights. Broadcasters and media law watchers are awaiting the High Court decision with keen interest: not only is it likely to clarify the standard for raunchiness on television, it may well have wider significance for the interface between the Bill of Rights and the powers of the BSA.

Privacy issues continue to test the BSA. A story about a beach drowning, showing a sobbing woman being told that attempts to resuscitate her husband had failed, drew complaints. The majority of the BSA upheld them. It said the story showed a "callous disregard for the suffering of the family", and that structuring the story around a water safety message didn't redeem it. But the BSA's chair disagreed. He said the item was "compassionate" and "sensitive" and delivered a powerful message that drownings involve real people and their families.

This debate about privacy – even in public places – was echoed in connection with footage of victims of two recent disasters: the Christchurch earthquake and Pike River mining disaster. Was the coverage of grieving families and victims, especially in their moments of greatest despair, offensively intrusive? These issues may yet play out in broadcasting standards or court decisions.

Privacy

In addition to the BSA's powers about breaches of privacy by broadcasters, the courts have also developed a tort of invasion of privacy, in cases where sensitive private information is published in a manner highly offensive to a reasonable person of ordinary sensibilities, and there is no genuine public concern in the material. Cases have been rare. However, an injunction was granted recently to protect the identity of an 18-year-old complainant in a highly publicised incident involving an opposition MP. He visited the MP's house after an evening on the town following a celebrity debate, and was seen naked on the street later that night. He alleges sexual offending. The MP has resigned, though claims to have done nothing wrong.

The judge accepted that the complainant had a reasonable expectation that his identity would remain private during the police investigation, particularly since if charges are laid, his name will be automatically suppressed as an alleged sex crime victim. The judge said the real public interest was in the fact of the incident and not the identity of the complainant. The order was made without notice to the media. It applies to everyone with knowledge of it, whether named as defendant or not, the first time such an order has been made in New Zealand. However, the judge allowed the media or any other defendants to apply to have the order varied "on short notice", and indicated that the situation could change if the police decided not to lay charges or the name leaked out into the public domain.

Steven Price is a Wellington barrister specialising in media law, and a lecturer at the law school at Victoria University of Wellington

THE WAY FORWARD

Good things can sometimes happen for the most unlikely reasons. In the eyes of many industry observers it took the hung parliament elected in August 2010, and the deal-making skills of the newly powerful independent MPs to break a deadlock and procure shield laws for journalists that finally brought Australia into line with other liberal democracies.

In the same way, it was the failure of an arrangement concerning a story about a terror raid that has led to a sensible discussion about the best way to inform Australians about national security issues, while at the same time ensuring that the safety of our citizens – and security personnel – remains paramount.

But in an entirely different way, it was Julia Gillard's off-the-cuff and ill-advised reaction to the WikiLeaks dump of diplomatic cables – that they were "illegal" and that Julian Assange was breaking the law – that suggested her true attitude towards free and open government.

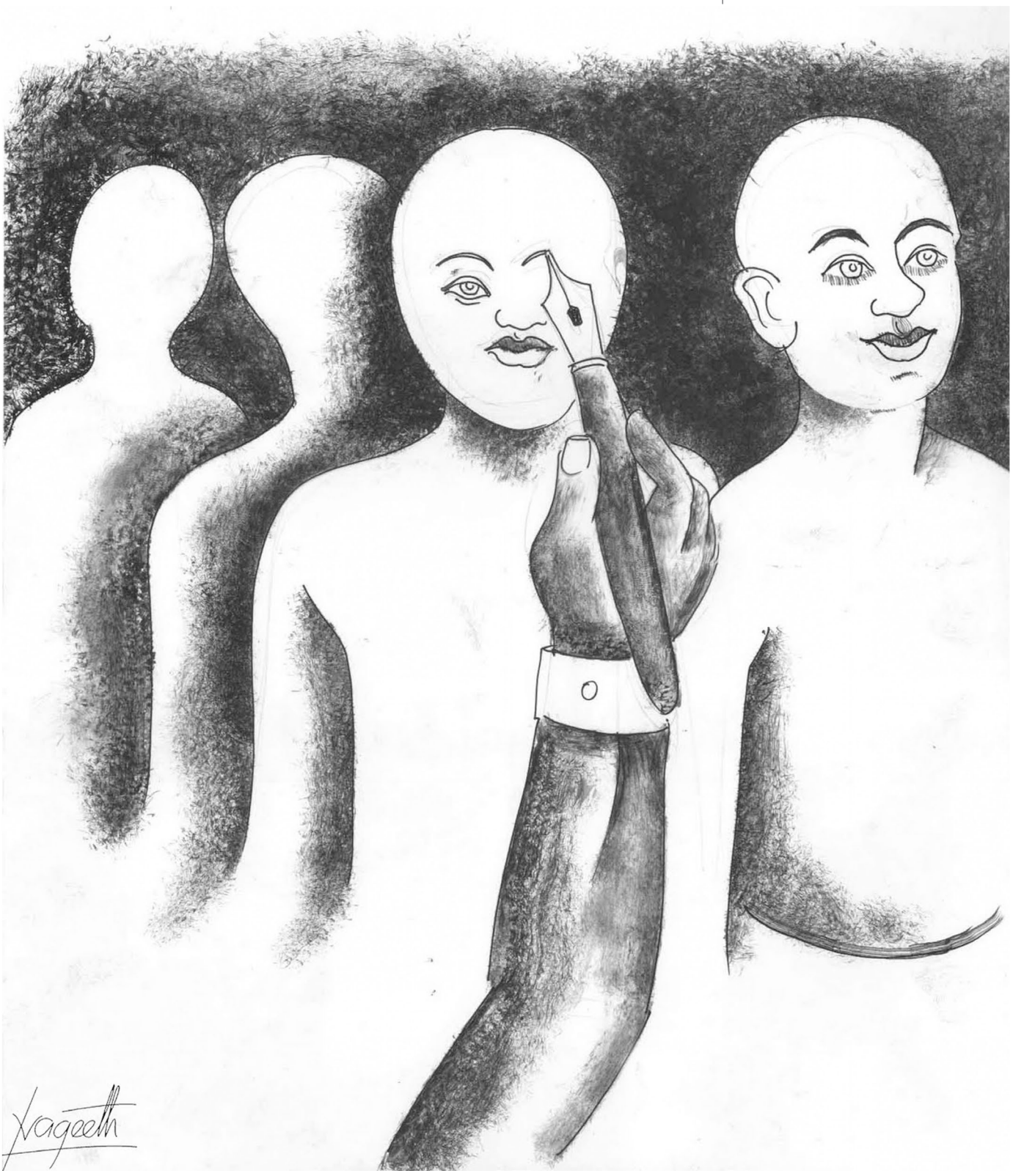
Of course, it is unfair to single out the prime minister in this way – Australia was suffocating under a blanket of secrecy and red tape long before she moved into The Lodge, but on her shoulders rests the responsibility of breaking the mould and putting in place legislation that will move Australia further towards open and accountable government.

Federal shield laws are only a start – we want to see similar laws enacted in every state and territory and the reform of state-based anti-corruption bodies to adopt similar principles. As a matter of urgency, we must see companion legislation brought in that properly protects whistleblowers in the public service, and eventually in the private sector as well.

We need to address the explosion in the number of suppression orders being issued in Australian courts and make it easier for journalists covering courts to access and publish information about the operation of our legal system.

And we must strike at the heart of this malaise – the plethora of secrecy clauses, backed by the *Crimes Act 1914* (Cth), which remain on statute books in every state and territory of Australia. We must reverse this criminalisation of information and allow public servants to release details that should be open and available to every Australian citizen.

The Media Alliance is mindful of the steps that have been taken and applauds the leadership that has driven these changes. But we will continue, with our colleagues in the news media and the Right to Know coalition, to press for further reform to ensure our members can perform their most important functions: keeping the people of Australia informed, and holding the government of the day to account.



"Providing eyesight is a sacred duty of the media" – Prageeth Eknaligoda, missing in Sri Lanka since January 2010

Illustration reproduced with the kind permission of the Eknaligoda family

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The Attorney General
IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, COUNTY DIVISION
BOARD OF ELECTION COMMISSIONERS OF THE
RICHARD A. COWEN and THERESA M. PETRONE,
Plaintiffs,
vs.
Defendants,
PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION
honor to serve at your pleasure. After much
as Attorney
Plaintiffs in the above-entitled cause, by their
moves this Court to enter a temporary restraining order, without bond, pursuant to Section 11-
Section 11-102 of the Code of Civil Procedure, notice having been
BANK, INC., and each them and their agents, emp
them from using or ope
by any other name in any manner as a forum
and DOMAIN
Thank you for