POWER, PROTECTION & PRINCIPLES

THE STATE OF PRESS FREEDOM IN AUSTRALIA 2013

2013 Australian Press Freedom Report

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FOREWORD

Imagine you have just been issued with a subpoena. The subpoena requires you to divulge the name of a confidential source and all the notes, recordings and documents you have relating to that source.

The wheels of justice move slowly but surely. You anticipate a court appearance knowing that if and when you're asked to name your source and hand over all your related research, you cannot do so. For you are a journalist – you have an ethical obligation to your source to maintain the confidences you accepted.

It's a dilemma that an unprecedented number of senior Australian journalists are facing right now. In some cases, subpoenas have been launched against them by wealthy businesspeople. Every one of those subpoenas has been issued in the knowledge that the journalists in question will scrupulously maintain their ethical obligation and refuse to reveal their sources. And yet the subpoena is issued regardless.

What's worse, in every jurisdiction where those subpoenas have been launched, shield laws exist that are meant to recognise journalistic privilege and protect reporters from this type of harassment. And yet the subpoena is issued regardless.

What's more, in most cases, the accuracy of the story written by the journalist is not in question. The journalist's only wrongdoing is perhaps in bringing information to light and exposing the powerful to scrutiny. The court action is not to do with defamation; there is another motivation behind these orders. The journalist is merely an obstruction in the way of seeking information. And so the subpoena is issued regardless.

The consequences for a journalist can be grim. As the notorious Harvey and McManus case in 2007 demonstrated and as Tony Barrass recounts in the pages of this report, journalists who refuse to cooperate with the court and name their source face a charge of criminal contempt. That could mean a fine, or jail term, or both. At the very least it could mean the permanent stain of a criminal conviction which can severely curtail the ability of a journalist to do his or her job.

So how has it come to this? How did we get to a point where politicians stand up and make noble speeches about the need for shield laws, and their desire to preserve and protect press freedom, then enact shield laws that don't work. Or laws that have only limited application, as if press freedom can and should be overturned on occasion.

The Media Alliance has been disturbed at how this commitment to press freedom is turned on and off like a tap. We have seen it with shield laws where the fine speeches and statements don't match what is drafted and enacted in the legislation. We have seen grand statements about open and transparent government only to have diluted Freedom of Information laws enacted across the country, and whistleblower protection that offers no protection at all in certain circumstances. We have seen it in a judicial system that uses suppression orders, injunctions and now super-injunctions to draw a veil over the public's right to observe the operation of justice.

Press freedom should not be a variable but an absolute. It should not alter when crossing state borders from one jurisdiction to another.

The Media Alliance has seen an extraordinary rise in the powers handed to anti-corruption bodies, intelligence agencies and corporations. Their ability to operate in secret, seize information and coerce and compel individuals to appear before them with no right to silence are hallmarks of recent legislation.

Press freedom withers when our right to scrutinise, investigate, inquire and even complain is withdrawn. The extreme rules placed on media access to detention centres apply a dangerous new standard to the way the media operates in the rest of Australian society. It is outrageous that the government's rules have been created in the name of "privacy" (even if the individual detention centre "clients" give their informed consent). The rules are more directly related to "control" and in a functioning democracy where governments act in our name that is a perilous step.

What our government does in our name should be subject to openness, transparency, and scrutiny by the media.

On January 30 this year, Reporters Without Borders published its annual press freedom index. Australia was ranked 26, up four places from last year, but still behind New Zealand (8th), Sweden (10th), Ireland (15th) and Canada (20th). The report warned about democracies that stall and go into reverse, citing among others Italy (57), Japan (53) and Argentina (54) as examples where bad legislation, a poor professional environment for journalists and tension over media regulation had threatened press freedom.

As the following pages demonstrate, there is still far too much to do in Australia to protect press freedom. To do nothing would mean Australia slides further on the press freedom index. If that happens, it will take a mighty effort to turn the slide around.

Christopher Warren
Federal Secretary
Media Alliance

Christopher Warren
Federal secretary
Media, entertainment & Arts Alliance

THE YEAR IN AUSTRALIAN MEDIA LAW

Peter Bartlett

Introduction

The media itself was very much in the news over the last 12 months. Traditional media continued to face challenges from the online environment. We saw further revelations coming out of Britain through the Leveson Inquiry. In Australia, we have had the Finkelstein report, the Convergence Review and many other developments in the media law space.

Defamation

It was not a great year for the media. Fraud squad detective Rafiq Ahmed was awarded $325,000 against Nationwide News over a story in *The Sunday Telegraph* that labelled him "corrupt". Invalid pensioner Mise Petrov won damages of $350,000 against the publishers of a Macedonian language newspaper who failed to turn up to court. Milorad Trkulja, who in March 2012 was awarded $225,000 damages against Yahoo! over an internet search result that made him appear linked to Melbourne criminals, was in November awarded $200,000 against Google Inc. Andrew Holt, a man who used money from an insurance payout to his terminally ill wife to buy himself a speedboat, among other things, was awarded $4500 against TCN Channel 9 over a report on *A Current Affair* about his actions. And former Tasmanian policeman Andrew Gunston won $124,500 against the Hobart *Mercury* over stories that referred to him as "Sergeant Sleaze".

In addition, Justice Peter Hall is presently considering the level of damages in the long-running Gacic v John Fairfax Publications matters, in which an unfavourable review by Matthew Evans was claimed to have caused the failure of the Coco Roco restaurant at Sydney's King Street Wharf.

The Ahmed and Petrov decisions are two of the highest awards made against the media since the introduction of the Uniform Defamation Act in 2005.

There were also a number of awards against non-media defendants and various websites.

The 2005 Defamation Act

Sufficient time has now passed since the introduction of the Defamation Act to reflect on just how it is operating. The huge positive is that it is uniform throughout Australia, with some very minor differences.

It is clearly not perfect. It is far more pro plaintiff than we see in most major jurisdictions. The cap on damages is now around $350,000, which is a significant potential penalty for the media. Added to that would be significant legal costs. A real problem is that plaintiffs are using the multiple publication of virtually the same article in different mastheads and online to issue multiple actions against that company, to seek multiple caps.

There is also a problem in that the online environment does not have a statute of limitations, whereas an action against traditional media must be taken within 12 months. The procedural steps within the court process are still far too complex.

Media regulation

The communications minister, Senator Stephen Conroy, had the advantage of thorough reviews of media regulation from the Finkelstein report (February 2012), the Convergence Review (March 2012) and the UK's Leveson report (November 2012). He announced his proposals for changes to Australia's media regulation in mid-March 2013, and gave the federal parliament a week to pass them or he'd take them off the table.

The bills sought to establish the office of the Public Interest Media Advocate, a government appointee, who could declare an organisation as a news media self-regulation body (eg the Australia Press Council) and also take away its accreditation. If media companies did not become a member of the declared organisation by a specified date, they would no longer be exempt from the Privacy Act.

The journalism exemption was inserted into the Privacy Act in 2001 to recognise the essential role that free journalism plays in a healthy democracy, and to achieve a balance between the public interest in allowing a free flow of information to the public through the media and an individual's right to privacy. Removing the exemption would severely impact the way news journalists gather and report stories. The Australian Law Reform Commission had looked at the media exemption in 2008 and supported keeping the exemption.

The media collect, use and disclose to the public large amounts of personal information (including photographs) each day. Without the exemption:

- the media would be required to notify individuals about all personal information collected
- the media could not collect sensitive information, such as information relating to health, racial or ethnic origin, political opinions, sexual preference or criminal record without the individual's consent
- individuals would have a right to correct information, and
- individuals could complain to the Privacy Commissioner.

Communications minister Senator Stephen Conroy announced changes to media regulation in Parliament House in Canberra on 12 March 2013.
PHOTO: ANDREW MEARES

The media's position is that Australia does not need statutory intervention. The media point out that the Press Council works pretty well. The media has doubled funding to the Australian Press Council (APC) and is now contractually bound to publish the APC findings and consult on placement and prominence.

Online publishers Nine MSN and Crikey have now joined the Press Council. All good developments.

That said, it is very disappointing that the *West Australian* pulled out of the Press Council.

It has to be recognised that Australia does not have evidence of significant breaches of ethics such as Leveson examined in the UK. The UK has some 5000 potential phone-hacking victims, 300 phone-hacking claims, millions of pounds paid in compensation and some 50 people charged.

Privacy

Mark Dreyfus, in his first week as federal attorney-general,raised doubts as to whether we should have a statutory tort of privacy.

Yet the communications minister has yet again referred this issue to the Australian Law Reform Commission (ALRC). The ALRC has previously looked at this question in 1979, 1983 and 2008.

You would be a brave person if you tried to guess what the ALRC will say this time. In 1979 it recommended some privacy protection but it sought to strike a balance between privacy and other competing interests. It noted that "the price, in terms of freedom of speech, must not be excessive."

It concluded that "the price of a general right of privacy might exceed the benefits gained". In 1983 the ALRC recommended, in a further report, that a general tort of invasion of privacy should not be introduced in Australia because "such a tort would be too vague and nebulous".

Then in 2008 the ALRC did an about-face and recommended the introduction of a surprisingly wide statutory cause of action for serious invasion of privacy. In an extraordinary move, it did not include a public interest defence.

The ALRC is likely to produce another report that will gather dust. It should take note of the report by the UK Joint Committee on Privacy and Injunctions. The report argues strongly against the introduction of a statutory tort. It recommends that the area of privacy should be left to the courts to develop. According to the committee, "the concepts of privacy and the public interest are not set in stone and evolve over time." They concluded that "the current approach, where judges balance the evidence and make a judgment on a case by case basis, provides the best mechanism for balancing privacy and freedom of speech rights."

Anti-discrimination

The government released a bill that extended the definition of discrimination to include

anything which "offends, insults and humiliates". After significant criticism of the foreshadowed amendment, the then attorney-general Nicola Roxon confirmed that the government would review the bill.

While we all accept that we need anti-discrimination legislation, it has to be acknowledged that it creates issues for the media. We need a system where the regulator should dismiss frivolous complaints without requiring the media to go to great lengths to explain why they are frivolous, to be required to attend mediation and then face court. It's a significant expense if the complaint is frivolous.

Whistleblowers

Legislation to protect whistleblowers has been introduced into federal parliament with the Public Interest Disclosure Bill. This is an initiative of the new attorney-general, Mark Dreyfus, who in 2009 chaired the parliamentary inquiry into whistleblowing. It is a significant step in the right direction, although critics have pointed out that in the legislation's current form, public servants blowing the whistle on corrupt politicians or anything to do with intelligence agencies would not be protected.

Disclosure of sources

The federal government and the state governments of New South Wales, Victoria, Western Australia and the Australian Capital Territory are to be commended for introducing shield laws. However, it is a pity that the legislation is not uniform. Journalists may still be ordered to disclose sources where it is in the public interest or in the interest of justice to do so.

Online media is covered to varying degrees. Whether people in this environment are defined as "journalists" and so can rely on a journalist's privilege is a question that is sure to arise.

There is an increasing number of applications for journalists to disclose sources. We have seen one application in the Federal Court for a journalist to disclose who gave them the applicant's mobile phone number. The application failed.

Two of Australia's top investigative reporters, Nick McKenzie and Richard Baker, are facing two applications to disclose sources. Justice Lucy McCallum ordered them to disclose sources in the Helen Liu case in New South Wales. The decision is on appeal.

More recently they were ordered into the witness box in Victoria in the Securency committal. The Victorian Court of Appeal overturned the decision. If the Liu appeal fails they will get into the witness box and, in line with the Media Alliance's *Journalist Code of Ethics*, will decline to reveal their sources. They could then face contempt proceedings and jail – this for doing their job.

Then we have Gina Rinehart seeking disclosure of sources from Adele Ferguson from Fairfax Media, exposing Ferguson to criminal sanctions for contempt simply for doing her job well.

In the Ashby v Commonwealth of Australia (No. 2), former federal speaker Peter Slipper issued a summons against Steve Lewis from News Limited, seeking to prove whether James Ashby had disclosed material to Lewis. Lewis sought to avoid being required to disclose his sources by relying on the Commonwealth Act. His solicitor filed an affidavit noting that Lewis had promised confidentiality to the source and that if Lewis was compelled to produce the document sought, it would disclose the identity of his source. The application was adjourned with no final decision made by the judge at the time of publication.

Suppression orders

Most judges accept the observation of Justice Michael McHugh in Fairfax v Police Tribunal New South Wales: "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."

The problem is that too many judges, especially in Victoria, then go on to say "but" and suppress reporting of the case or some aspect of it.

This is a continuing problem.

Gina Rinehart made multiple applications to suppress the details of her family trust battle. The applications went to the NSW Court of Appeal and even to the High Court. The Court of Appeal (Chief Justice Tom Bathurst and Justice Ruth McColl) held that suppression orders should only be made in exceptional circumstances.

The media opposed Rinehart's application and, initially, were the only party objecting to the suppression orders. This highlights the important role the media plays in maintaining the free flow of information, but it also illustrates the financial burden such court action places on media businesses. In the future, will media businesses be able to afford to attend court to oppose such applications?

While the decisions of the various courts detailed here emphasise the fundamental importance of open justice, we still see far too many suppression orders issued.

Court reporting

It was rather disturbing to see the NSW government looking at banning tweeting, smartphones and tablets from NSW courts. What happens in the court should be up to the presiding judge.

Super-injunctions

These injunctions have become notorious in Britain where celebrities have obtained injunctions to stop the media publishing items, and even an order that the media cannot publish the fact that an injunction had been granted.

Two such injunctions were granted in December against Fairfax Media. The first related to defamation. The judge noted that to hold an injunction for defamation, the plaintiff needs to establish a *prima facie* case of defamation, that damages would be an inadequate remedy and that the balance of convenience favours the granting of the injunction. The judge recognised the public interest in free speech.

In light of this, it is difficult to obtain an injunction for defamation. That injunction has been lifted.

The second, brought by mining entrepreneur Nathan Tinkler, claimed breach of confidentiality and defamation. This is a greater challenge. It was lifted, but with some limits on Fairfax.

These injunctions are a significant threat to freedom of speech.

It has been suggested that Nathan Tinkler sought his injunction against *The Sydney Morning Herald* in Victoria (where he does not live) because the Victorian Courts have a record of ordering far more suppression orders than other states. Who would know if that is, in fact, the reason?

Online historical articles

Britain's Law Commission has issued a consultation paper looking at the risk of jurors accessing the internet during a trial and if stronger powers should be given to a court to order the media to take down historical articles.

This is one of the areas where the Australian courts and parliament are ahead of the UK. The NSW Court of Appeal in Ibrahim and the Victorian Court of Appeal in Mokbel have set the ground rules.

I have made a submission to the Commission pointing out the Australian position:

i. Historical archived articles are not displayed on the face of the newspaper website as available and contemporaneous material
ii. They lie passively in the newspaper electronic archive until they are accessed
iii. They need a positive act of searching by a third party
iv. A third party would be more likely to search using a recognised search engine such as Google or Yahoo!, rather than going directly to a newspaper site
v. There should be proper instruction to the jurors by the presiding judge
vi. Many Australian jurisdictions have a statutory provision making it an offence for a juror to access the internet researching an issue relevant to a trial that the juror is sitting in
vii. Jurors should be referred to that statutory provision, and
viii. The New South Wales Court of Appeal in Ibrahim and the Victorian Court of Appeal in Mokbel made it clear that courts should not make orders that they cannot enforce (where the online publisher is outside the jurisdiction) or that are ineffective (where local media take down the articles but there are still many online from foreign websites).

In Victoria, the court compared searching on the internet with searching in a library and stated that "it has never been suggested that a suppression (non-publication) order should be made requiring libraries that held newspaper articles to embargo those articles or references in some other way, stopping the searchers from having access to them."

In New South Wales, in the Ibrahim decision, the court said that "as a matter of principle, to make the order effective, material must either be removed from any website globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales. The evidence did not disclose that either of these was a realistic possibility."

Online publications

As a general rule, the courts in any country have jurisdiction where a particular article was accessed within that country. Often, while it might be reasonably safe to publish an article in hard copy in Australia as the potential plaintiff is unlikely to come to Australia to sue, there are added dangers in publishing online. A relatively recent example is the publication by Fairfax of a WikiLeaks article relevant to the president of Indonesia. As a result, a claim was lodged in Jakarta claiming damages of US$1 billion.

The action was a class action taken on behalf of the entire population of Indonesia. Fairfax did not need to defend the merits of the claim as it was able to have the claim struck out as it was not a proper class action known to Indonesian law.

The case does, however, highlight the added dangers in publishing online.

Contempt

A quiet year, although there were cases against the Hobart *Mercury* (fined $10,000) and the *Sunday Tasmanian* (fined $30,000) for disclosing the identity of rape victims.

Conclusion

It has been a challenging year for the media and for its advisers.

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MEDIA REGULATION

On March 12, 2013, the federal government announced a package of media regulation reforms in response to the Convergence Review and the Finkelstein inquiry[1]. Two days later, the legislation for those reforms were released.

The Media Alliance described the proposed changes as sweeping and intrusive[2]. We believed they failed to respond to the changes in the media industry and ignored the convergence issues that the government sought to address in its original inquiry. Worse still, the package sought to involve government in print media as never before and failed to properly address media diversity concerns or encourage new media players.

The Media Alliance has always made its position on the need for media reform very clear, particularly due to the transformative nature of the digital revolution and the convergence taking place.

It was unfortunate that some politicians felt that events in the UK, involving criminal acts by British media and corruption and bribery of public officials, required a response in Australia even though no such activity has taken place in this country. In short, the atmosphere created in Britain was allowed to seep into thinking about media reform in this country[3] – and the subsequent moves to tighten media regulation with a heavy-handed emphasis on improving "media standards" in Australia were unwarranted.

The Media Alliance has always promoted ethical, high-quality journalism. We created the *Journalist Code of Ethics* in 1944. It is now the recognised benchmark across the industry.

The government's package of media reforms failed to take note of the digital transformation sweeping through our industry that has led to the loss of thousands of jobs. Work intensification across a multitude of news platforms has made it more difficult for the journalists who remain.

The Media Alliance believes that despite these immense challenges, the continuing high standard of entries submitted to the Walkley Awards for Excellence demonstrates that Australian journalism at its best is in the very front rank of news journalism around the world.

The Media Alliance responded to the package of media regulation reforms by writing to the seven cross-benchers in the House of Representatives, urging them not to support the package. We expressed our concern that the package failed to address the growing practice by wealthy Australians of using injunctions, defamation and other court actions to prevent proper journalistic investigations and to subject journalists to subpoenas with the threat of prison or fines for maintaining their ethical obligations.

As outlined in the 2012 Press Freedom report[4], in our submissions to the Convergence Review and the Finkelstein inquiry, we suggested:

- Modernising the system of regulation to recognise the changing structure of the news media. We called for an enhanced press council, a "News Media Council", which would cover all news media regardless of the platform. It would hear complaints and develop standards for media outlets to run alongside the Alliance's code of ethics. It would be funded by the media but could accept corporate or government funding for specific projects. The complaints panel would comprise a minority of representatives of media outlets, augmented by public members and independent journalists to ensure industry knowledge is balanced by community expectations.
- Increasing the diversity of media voices. The Media Alliance believes more voices ensure a national debate that is balanced by a wide range of dissenting views. We suggested several ways governments might make funds available to help new ventures develop.

The reform package missed the opportunity to ensure the future health of Australian journalism, and the Media Alliance outlined several areas of concern with the proposed package of reforms.

Public Interest Media Advocate

The Media Alliance does not support the establishment of a Public Interest Media Advocate (PIMA).

1. The PIMA is an unnecessary quasi-government appointment that aims to override the efforts the industry has made to improve self-regulation[5]. The Australian Press Council (APC), of which the Media Alliance is a member, underwent considerable changes in 2012 to ensure proper funding and long-term commitment from print publishers[6] .These efforts have been recognised by several online media businesses who have subsequently joined the APC.
2. PIMA's powers are ill-defined. The PIMA's power to withdraw authorisation from self-regulating bodies is too close to the notion of licensing journalists. Further, the threat to withdraw the privacy exemption for journalists is an attack on press freedom that undermines the ability of journalists to do their job. It is a punishment that, while directed at self-regulatory bodies and their member organisations, actually strikes down individual journalists.
3. There is no need for a further "public interest" test to determine changes of ownership. The existing business regulatory framework (the Foreign Investment Review Board and the Australian Competition & Consumer Commission) is adequate to ensure the public interest is protected without the need to create yet another oversight body. Instead of creating yet more bureaucracy, the absolute priority must be to encourage the maintenance of a plurality of voices.

The Media Alliance believes the PIMA proposal is problematic and requires drastic amendment before it is seriously considered. Having one person appointed by a minister or even by parliament, with ill-defined powers, should not be allowed to become law. If such a structure were created it must have defined powers to oversee a self-regulatory model. The PIMA should at the very least be broadened to include eminent persons, industry representatives and representatives from the journalists' professional association – the Media Alliance.

Furthermore, any reform that does not ensure the protection of a journalist's sources is a wasted opportunity. Currently there are six Media Alliance members, bound by the *Journalist Code of Ethics*, who have been subpoenaed to reveal confidential sources. We will do all in our power to support them as they remain staunchly determined to observe this code.

Adhering to the *Journalist Code of Ethics*, protecting confidential sources and whistleblowers, and providing a rigorous right for redress by the public should be at the heart of any reforms claiming to be to "in the public interest".

Regulation

The Media Alliance believes the package is unclear and unworkable and fails to respond to the convergence issue.

1. Journalists should not be required to fulfil a vague notion of "community standards". Journalists work to the Media Alliance's *Journalist Code of Ethics* which provides guidance and gives legitimacy in the eyes of the community. Clauses relating to source confidentiality, respect for privacy, fairness and accuracy are the responsible and adequate framework.
2. There should be one overarching regulatory body for all news media. This body should have the power to develop specific standards to sit alongside the Alliance's code of ethics. It should have an efficient and transparent complaints-hearing mechanism with sanctions for breaches of conduct.
3. Funding should come from the industry: The "News Media Council" should be funded, as now, by the industry. Supplementary funding could be sought, where appropriate, from corporate or government sources to fund specific projects, such as the development of standards.
4. Exemption from privacy legislation: Respect for privacy is already part of the *Journalist Code of Ethics*. Breaches of privacy, where clearly shown not to have an overwhelming public interest argument in their favour, ought to be subject to sanction by the self-regulatory body.

The charters of the ABC and SBS

The Media Alliance supported the recommended changes to the charters of the ABC and SBS as vital recognition of the changing role of public broadcasters and that their charters should reflect both public broadcasters' development of online operations.

Other points

1. Any abolition of the 75 per cent reach rule must protect regional news diversity. The Media Alliance fears that the resulting mergers would mean that regional communities lose out on their local news services.
2. Local content: The increase in local content broadcast on commercial networks must ensure the creation of genuine new content.

Summary

The federal government's proposed reform package was a missed opportunity[7]. It failed to recognise the real problems confronting the Australian media. More than 1200 jobs were lost in the mainstream news media in 2012 and there have been only a few small ventures emerging in the marketplace.

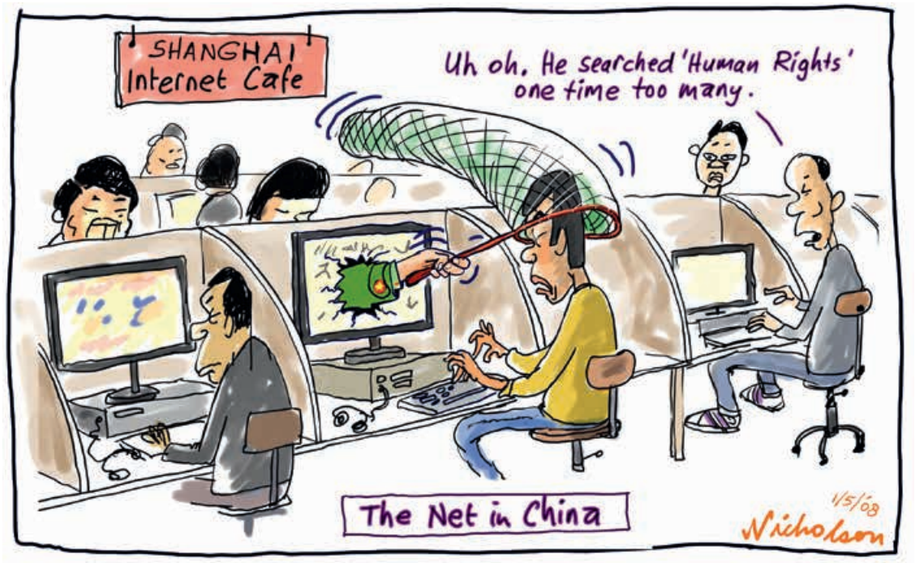
As far as the package's promotion of "fairness" and "balance" was concerned, rather than introduce the heavy hand of regulation, the Media Alliance has consistently argued that a better way would be to promote the entry to the market of new voices to ensure a flourishing diversity of opinion.

Despite being urged to address this by our – and other – submissions to the Finkelstein inquiry and the Convergence Review, the media reforms did not address the urgent need for investment incentives, digital training and support for alternative voices in the media landscape.

There is every reason to believe that a converged News Media Council, with an effective complaints-handling mechanism, a sufficiently high public profile and jurisdiction across all news media platforms, could help to restore any loss of public trust in the industry.

Instead we were given a series of measures that were insufficiently thought through, with an inadequate consultation process, which failed to address real problems in the media and instead offered up the dangerous prospect of government intervention and punishment.

ANTI-TERROR AND NATIONAL SECURITY



CARTOON BY PETER NICHOLSON

On July 9, 2012 the Parliamentary Joint Committee on Intelligence and Security began an inquiry into potential reforms of national security legislation[8]. The committee was asked to consider a package[9] of national security ideas comprising proposals for telecommunications interception reform, telecommunications sector security reform and Australian intelligence community legislation reform. A discussion paper[10] was issued by the federal attorney-general's department that attracted considerable opposition in the media[11].

In August 2012 the Media Alliance made a submission[12] to the inquiry stating concerns that any expansion of telecommunications interception powers and the powers of intelligence agencies as proposed in the inquiry's terms of reference had the potential to threaten press freedom.

The Media Alliance believes efforts should be made to ensure that press freedom, including the confidentiality of journalists' sources and their information, should be protected and guaranteed under any proposed legislative changes being considered.

There is considerable concern about the power of police and intelligence agencies to intercept communications, a concern not given proper consideration in the terms of reference. The Media Alliance believes that substantial efforts must be made to protect and guarantee press freedom by acknowledging a journalist's privilege and the consequent need to protect journalists' confidential sources and information from exposure due to telecommunication interception. A review of the Telecommunications Act is urgently required as part of any constructive reform of national security legislation.

On September 19, 2012, the Committee received a letter[13] from the federal attorney-general clarifying the data retention aspects of the terms of reference by acknowledging the government was not proposing that data retention would apply to the content of communications.

The report of the inquiry has not yet been tabled in federal parliament[14].

On January 23, 2013, the prime minister launched a paper: *Strong and Secure: A Strategy for Australia's National Security*[15].

The Media Alliance, like many other critics[16], remains concerned that many of the proposals outlined in the paper have the potential to threaten press freedom.

Sweeping powers sought to combat the "digital threat"
Bernard Keane

The internet and the need to control what governments claim is a clear and present online danger to national and economic security received sustained attention throughout 2012 in Australia, with significant implications for both online privacy and press freedom.

The chief reason for this was the unusual – and commendable – decision by Nicola Roxon, the then attorney-general, to ask the federal parliament's Joint Committee on Intelligence and Security to conduct a public inquiry into a range of proposals to streamline and increase national security powers for agencies such as ASIO and the Australia Federal Police (AFP). After some initial toing and froing over the deadline, the high-powered committee agreed to report by the end of 2012[17] – a deadline that would be missed.

Typically, national security "reforms" have been pushed through as legislation with no public consultation and brief Senate committee inquiries. In this case, the committee was handed 44 separate national security proposals to consider, and the attorney-general's department prepared a discussion paper[18] to assist the inquiry.

The department's discussion paper, however, turned out an embarrassing mess, with some key reforms only referred to in the vaguest of terms. Multiple clarifications from both the attorney-general [19] and her department [20] were required, while the committee itself complained about the vague nature of the paper.

Most problematic was the controversial proposal to force telecommunications companies to retain Australians' "telecommunications data" – data about our use of the internet and telephony services, which law enforcement and intelligence agencies complain is currently being lost because companies no longer hold such information for billing purposes. The government says it doesn't support the data retention proposal at this point, but is merely seeking views on it.

But data retention, worth an inquiry all on its own, ended up occupying the bulk of the committee's time. Some irony attended its vague description in the discussion paper given that, through the committee's careful probing, we subsequently learnt the attorney-general's department had already prepared draft legislation on data retention after a secret three-year industry consultation process. And even as a clearer definition of data retention was provided by the attorney-general's department, based on the European Union's data retention directive (retention up to two years, but not of content-related data, and not of the sites visited by an IP address), we learnt that some agencies wanted permanent retention, and of citizens' entire internet usage.

But this was only the highest-profile of the 44 proposals; others were similarly concerning. It was proposed that surveillance warrants be extended to social media, although how offshore-based companies could be compelled to comply with Australian law wasn't explained; that ASIO be given the power to plant material on computers subject to its warrants; that current thresholds for surveillance and information gathering be lowered and record-keeping requirements for agencies reduced; and that refusal to provide a password for encrypted IT systems be criminalised.

The justification put forward by the attorney-general's department for many of these proposals was that these weren't extensions of powers per se, but enabled the maintenance of the current telephony-based interception and surveillance framework in the face of evolving technology.

But the analogy at the heart of this claim, between analog-era telecommunications and the internet, was profoundly flawed.

Australians, like citizens around the world, do not use online communications in the same way as they used phones. They did not commit huge amounts of personal information to permanent storage on their analog phone, or leave crucial financial details on the phone. The phone was not their primary tool for interacting with communities that are important to them. Today, personal relationships, recreation, media consumption, political activity, civic participation (including, potentially, voting), economic activity and employment all occur online. Australians live significant portions of their lives online in a way impossible with the analog phone.

Attempts to impose a version of telecommunications interception laws on the internet are not a logical extension of laws to "keep up with technology" but a dramatic extension of surveillance into citizens' lives far beyond that enabled by telecommunications interception.

The attorney-general's department also argued that the retention only of "telecommunications data" rather than "content data" was less threatening to privacy. But traffic data, particularly when it includes data derived from mobile phones that allows geographical tracking, is sufficient to extensively profile an individual citizen, their

habits, relationships, interests and movements. There have already been at least two recorded instances [21] under the European Union data directive where retention of telecommunications data was used to expose journalists' confidential sources.

A recurring aspect of the attorney-general's department's paper was an inability to explain exactly what features of the current laws are problematic – what agencies cannot now do that they wish to be able to do, how the proposals would remedy this, what risks were associated with the proposals and the trade-off between the benefits of greater surveillance and the costs of the personal privacy and civil rights.

Instead, advocates of increases in the powers of security and intelligence agencies invoked the traditional concept of "balance". Roxon declared in September 2012 that she wanted to "strike a balance between ensuring we have the investigative tools needed to protect the community and individual privacy" [22]; the discussion paper on the reform proposals referred several times to the balance "between protecting privacy and enabling agencies to access the information necessary to protect the community".

But this is a "balance" that in Australia only tips one way – in favour of security. Since the September 11 attacks, Australian governments have regularly scaled back citizens' rights and extended state powers via counter-terrorism legislation. In fact, so frequently have governments updated the powers of law enforcement and intelligence agencies that they're now crowding in on one another – the proposals before the Joint Committee on Intelligence and Security came several months prior to the passage of new data retention powers under the government's Cybercrime Act [23], claimed as necessary for Australia to accede to the controversial European Cybercrime Convention.

Not once have governments curtailed or reduced their powers in the name of balance.

But what exactly are we balancing? The discussion paper stated that "[s]ince 2001, four mass casualty attacks within Australia have been disrupted because of the joint work of intelligence and law enforcement agencies. Since 2001, 38 people have been prosecuted in Australia as a result of counter-terrorism operations and 22 people have been convicted of terrorism offences under the Criminal Code Act 1995 …" So, in the view even of bureaucrats urging an extension of surveillance powers, the current surveillance and intelligence-gathering laws have enabled significant operational successes. There is no "low-hanging fruit" in national security; we already have a highly effective regime within which law enforcement and intelligence agencies operate.

The "balance" proposed by the government is between a minuscule additional reduction in national security threats, perhaps calculable in the hundredths of one per cent, and a major extension of state surveillance into the life of every Australian.

The nuances of this important debate, sadly, received minimal mainstream media coverage: outside the IT trade press, *Crikey* and the now-departed Dylan Welch at Fairfax. Data retention – forget about the other proposals – received virtually no attention from journalists. News Limited, normally quick to assail Labor and spot the vaguest threat to free speech, almost entirely ignored the issue.

There was a similarly incurious response from the media around the issue of cybersecurity, which formed a key plank of the government's national security statement in January 2013 and which prompted the establishment of a new "Australian Cyber Security Centre" [24]. That body ostensibly would combine a range of intelligence-gathering, law enforcement and protective functions currently housed in different agencies under one roof, despite the obvious difficulties in combining such highly disparate functions into a single entity. To justify the new focus on cybersecurity, the government repeatedly cited a cybersecurity industry report about the cost to Australia of cybercrime that had been debunked [25] as wildly overstating the costs of cybercrime.

This is not to say that cybercrime – much of which is good old-fashioned crime like fraud and theft dressed as a new threat by the addition of the prefix "cyber" – is not a significant issue for Australian business and governments. But "cybersecurity" has become relentlessly hyped as a justification for ever-increasing government expenditure and extensions of powers to government agencies. In the United States, where threats of a "digital Pearl Harbor" from senior politicians are routine, the Cyber Intelligence Sharing and Protection Act bill, intended to force communications companies to share a citizen's internet usage data with government agencies in the name of cybersecurity, was defeated in Congress in 2012; the Obama White House has since used an executive order to seek to establish the same requirement on a "voluntary basis" [26].

These are not arcane issues debated in the sterile world of online media: they have direct implications for privacy, freedom of speech and the ability of the media to operate free of government restriction or threat. Australian journalists, editors and producers need to realise their interests are at risk as well whenever intelligence and law enforcements agencies demand an extension of their powers to counter the nebulous threat of the internet.

Bernard Keane is Crikey's Canberra correspondent.

FREEDOM OF INFORMATION

CARTOON BY LINDSAY FOYLE

On October 29, 2012 the federal government announced[27] a review of the operation of the *Freedom of Information Act 1982* and the *Australian Information Act 2010* which would be undertaken by Dr Allan Hawke AC, a former senior Australian government public servant. The review would consider whether the laws continue to provide an effective framework for access to government information.

The review had a completion date of April 30, 2013 with the report of the review to be provided to the federal attorney-general for tabling in parliament.

In a joint submission[28] with several media organisations, the Media Alliance and others were concerned that journalists are continuously encountering barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making. In the submission, the organisations urged the federal government to adequately resource the management of Freedom of Information (FoI) requests and reviews of decisions – within existing budgets.

The parties to the submission were disappointed that the inquiry's terms of reference contemplated a watering down of the Australian public's right to know by proposing the reformulation of exemptions to the FoI Act. They opposed the argument that the provision of "frank and fearless advice" is threatened by the existence of FoI, countering that "frank and fearless advice" is exactly the information that should be available to the Australian public. The parties also opposed any extension to the existing Cabinet exemption.

The submission stated that the Office of the Australian Information Commissioner was failing in its core purpose of providing an independent merits review mechanism. The submission recommended that timeframes and timelines must be introduced into the review and appeals process and that applicants be allowed to access alternative means of review at an early stage, including to the Administrative Appeals Tribunal.

Since the submission, the Media Alliance remains concerned that there is a growing gap between the intent of FoI law and the practical application of the law, both in terms of its enabling legislation and its operation across the various jurisdictions (federal, state and the territories). A common complaint is that FoI requests often become log-jammed in the office of the relevant minister[29].

In last year's press freedom report[30] the Media Alliance detailed its concerns with state FoI laws, noting that many of the laws were only a few years old. In Victoria, the former premier Ted Baillieu's adviser on FoI, Don Coulson, came in for particular criticism[31] after claims that many FoI requests were being held up in the Office of the Premier. In March 2013, Coulson departed within days of Baillieu being replaced by new premier Dr Denis Napthine[32].

If the principles of freedom of information are to mean anything, then a degree of uniformity in the operation of the laws is necessary to ensure genuine access to government information. It is also vital that there should be a practical uniformity in how freedom of information operates among the different tiers of government.

Too often, the noble intent of lawmakers of creating legislation to ensure open and transparent government is at best diluted or at worst obfuscated by laws that still shroud areas of government from scrutiny or impede those who wish to inquire about the information held by government in the name of its citizens. Reforms to date have been piecemeal and inconsistent.

The Media Alliance believes that uniform, nationwide freedom of information reforms are necessary to ensure that the noble words of intent about access to information are matched by actual deeds.

The Media Alliance is disturbed by reports that the 2010 FoI reforms initiated by former special minister of state John Faulkner are being baulked at by federal public servants[33] who are questioning whether the changes are delivering "value for money" for the government and complaining about the resources it takes to deal with requests, particularly those requests from journalists. There were also claims that members of the public service still tried to keep information from being released for fear of "the political fallout".

FoI reforms fall short

Michael McKinnon

Given its terms of reference, there was little hope the Gillard government's review of freedom of information (FoI) rules was ever going to lead to greater openness.

Cutting government costs, increased Cabinet secrecy, whether some government agencies should be exempt from the FoI Act and a poor raft of proposed changes to fees and charges were all on the table. All were changes for greater secrecy.

Even worse, the terms of reference included the issue that FoI somehow stopped public servants giving "frank and fearless" advice to their bosses, as it might eventually be made public in a later FoI request.

This gave renewed life to a flawed argument that has haunted FoI laws in Australia since the act came into force in 1982. This argument on "frank and fearless" is supported, at least to some extent, by the new federal attorney-general, Mark Dreyfus.

The FoI review, carried out by eminent former public servant Dr Allan Hawke AC will address the frank and fearless argument and, hopefully, not embrace moves that effectively gut the laws providing every Australian with a legal right of access to government documents.

In 2005, in a case involving the former prime minister John Howard and the then treasurer, Peter Costello, the argument was first raised that documents should be kept secret because release was against the public interest as public servants would be afraid to provide "frank and fearless" advice if such views were made public.

But a submission by Australia's media companies to the Hawke review argues instead that "frank and fearless advice" from public servants is exactly the information that should be available to the Australian public.

Logically, if frank and fearless advice supports the quality of government programs and policies, then a government would use its army of spin doctors to sell its achievements. But if the advice says this policy is a dog and an absolute waste then the public will be better informed – despite any negative political consequences for the government. Even better, the government might change the policy. Stranger things have happened.

A government has the right to make any decision. But if the decision is against the advice of the bureaucracy then the public has a right to know. The flaws in arguing against disclosure in those circumstances were identified in the Administrative Appeals Tribunal judgment in McKinnon v Dept PM & Cabinet V2005/103313. In that case, Deputy President Forgie rejected claims that public servants have a reasonable expectation the documents they prepared would remain confidential. The case also showed that failing to provide frank and fearless advice directly contradicted obligations under the Public Service Act.

Hopefully, the Hawke review will also address a major failing with the reformed FoI Act – the poor performance of some government agencies on FoI and the failings of the new watchdog – the Office of the Australian Information Commissioner.

CARTOON BY CHRIS SLANE

The shadow attorney-general, George Brandis, says the opposition is "very critical" about the way the Gillard government promised sunlight but had "entirely dropped the ball".

"The length of time taken to process some FoI applications shows some agencies are inexplicably very slow and unhelpful," he says.

"No government should be scared of FoI – a culture of disclosure is a discipline for good policy.

"There needs to be exemptions for issues like commercial in confidence and national security, but you have to have a presumption for disclosure."

Senator Brandis cites the case of the Minerals Resource Rent Tax (MRRT) where the government has squandered political capital for a tax that has as yet raised very little money.

"We have been pressing for years for the assumptions, costings and modelling behind the MRRT minerals resource rent tax," he says.

"If those had been produced, as they should have been, then the flaws would have been admitted a lot earlier and perhaps fixed.

"It is a good example of the huge cost governments can pay for hiding things."

The Gillard government's promised Budget surplus, refugee solution and home insulation program are all examples where the release of internal advice about the policies may have caused some short-term pain but saved it from greater eventual damage.

An example of how the truth from FoI can help a government improve policy occurred in February 2003 when *The Australian* obtained health department documents where public servants had given "frank and fearless" advice that the number of GP services being bulk-billed was in freefall, and bureaucrats were unable to predict how far the decline would go.

Within days of publication, the then federal health minister Kay Patterson announced reform plans and there were sustained improvements in bulk-billing rates. It was a good result for the public and also for a Coalition government that fixed an issue of considerable political danger.

Senator Brandis says there are arguments against releasing policy in development but he supports the release of information and data underpinning a policy so the public can judge a policy effectively.

Attorney-General Mark Dreyfus told the press freedom report that he was limited in talking about the review until he saw the Hawke findings and recommendations.

"We introduced significant reforms in 2010 and I don't want to comment until I see the Hawke review itself. It is true, however, that release of draft government documents can lead public debate in the wrong direction.

"What you are interested in is the final policy and the debate needs to be centred there," he says.

This will provide some comfort for politicians intent on ignoring good advice for political reasons. The public would simply never know about the good advice.

Maybe a mining minister, for example, is the best person to choose where leases should be developed, but if he was simply looking after a mate then the release of the department's full and frank advice against the sweetheart deal would help the public make an informed decision (not that any such travesty of good government would happen in Australia).

There is a real cost for poor public policy and FoI is cheap by comparison, because – if effective – it allows the early exposure of policies that do not work.

Another major issue for the Hawke review, raised in a submission by AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, the Media Alliance, News Limited, Sky News and WAN, is the poor performance of the Office of the Australian Information Commissioner (OAIC).

Set up as a watchdog as part of the 2010 reform, one way the OAIC wants to improve its performance is to strip applicants of their rights.

The OAIC's own submission to the Hawke review argues that agencies should have a maximum 40–hour processing ceiling for access requests – too bad if the issue involves complicated public policy and takes longer than that. The OAIC also wants Hawke to consider broadening "the grounds on which the information commissioner can decide not to undertake a review" and broadening "the grounds on which the information commissioner can decide not to investigate a complaint".

So the OAIC wants to do less work. And to stop applicants taking the OAIC to the independent Administrative Appeals Tribunal (AAT), the OAIC also wants appeals to the AAT to be made only on points of law, dramatically lowering the chances of appeals.

The solution is not to make the goal posts so easy that even the OAIC can achieve its aims but to improve the OAIC performance – a common thread in submissions to the Hawke review.

The OAIC's own annual report shows how badly it works. Its target was to finalise 80 per cent of reviews within six months. Only 32.8 per cent of requests were completed in six months in the last reporting year.

Similarly, the Office of the Australian Information Commissioner's 2011-12 annual report shows that in each of the last four reporting years there has been a decrease in the proportion of FoI requests granted in full or in part, and significant delays with non-personal related FoI requests. Indeed some public servants openly admit that the OAIC's backlog allows sensitive FoI requests to be put on the backburner.

Another related problem is that the OAIC has a high rate of review applications being withdrawn or dismissed. In total, between November 1, 2010 and May 31, 2012, some 604 applications for review had been received. Of those, 209 have been dealt with through withdrawal or summary dismissal.

That's why the media companies' submission to the Hawke review has argued applicants should have a right of appeal to the AAT as well as the option of the OAIC, as the OAIC is failing its core purpose of providing a timely and independent merits review mechanism.

Finally, one other problem with the OAIC – foreshadowed by the Australian Law Reform Commission – is the inconsistency of the role of review on the one hand, and the other FoI functions conferred on an information commissioner on the other.

For example, the commissioner has established a series of workshops with information contact officers of departments and agencies under the acronym ICON. It is impossible for the commissioner to hold these regular meetings with agencies and their representatives and to then be accepted as an independent umpire by applicants who seek to question decisions made by those same agencies.

The Hawke review recommendations are unlikely to become law in the life of this parliament, given the time left before the election and the difficulty of securing support in the Senate.

Yet the promise of the reforms of 2010 has not been met and FoI is still a battleground. The OAIC has proven to be more of a problem than a solution to exercising a legal right of access of information. Hawke would do some very useful work mapping out improvements for an act that, if it worked effectively, can only improve the low trust Australians have in their government.

On March 24, 2009, the then special minister of state Senator John Faulkner said in a speech to the Australia's Right to Know (ARTK) Freedom of Speech conference:

"There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy."

Allan Hawke can be well guided by this sentiment in considering how to improve the right of Australians to government information.

Michael McKinnon is the Freedom of Information editor for the Seven Network

SHIELD LAWS AND CONFIDENTIAL SOURCES

By March 2013, at least five members of the Media, Entertainment & Arts Alliance were facing criminal convictions, fines and/or jail terms if they maintained their ethical responsibilities and refused to disclose the identity of their confidential sources. It is unprecedented in Australia that so many journalists are simultaneously in this position[34].

The five are 2012 Gold Walkley winner Steve Pennells of *The West Australian* and Fairfax Media journalists Adele Ferguson, Richard Baker, Nick McKenzie and Philip Dorling.

The court actions against them have been brought by: Gina Rinehart in the case of Ferguson and Pennells; Helen Liu in the case of Baker, McKenzie and Dorling[35]; and defendants in the Securency trial involving Baker and McKenzie. In the latter case, an appeal was successful and the witness summons, described by the appeal judge as a "fishing expedition" was set aside.

A sixth journalist, *The Sydney Morning Herald*'s Paddy Manning, was also subject to a subpoena requiring him to hand over confidential information about a source. A super-injunction was imposed on a report by Manning into the business affairs of mining entrepreneur Nathan Tinkler after he sent an email to Tinkler pre-publication asking certain questions. An agreement between Tinkler and Fairfax Media continues to suppress some details of Manning's report but the super-injunction and the subpoena were lifted.

Any attempt to impede journalists from investigating the business activities of wealthy people and the proper behaviour of public servants means that, ultimately, our communities lose.

The Media Alliance believes no journalist should be punished for doing their job or be treated as a criminal because someone, somewhere, wants to go on a fishing expedition for their confidential sources.

No journalist should be threatened with fines, jail terms or criminal convictions for adhering to the globally accepted values of journalism ethics.

Members of the Media Alliance are bound by the Media Alliance *Journalist Code of Ethics* created in 1944. Clause 3 of the code states: "Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. **Where confidences are accepted, respect them in all circumstances**.[36]"

As the Media Alliance annual press freedom reports have documented, in 2007 fines and criminal convictions were imposed on *Herald Sun* Canberra press gallery journalists and Media Alliance members Michael Harvey and Gerard McManus for refusing to disclose the identity of their source for a story. In response, federal parliament passed the *Evidence Amendment (Journalists' Privilege) Act 2011* that substantially strengthens the position of journalists in maintaining their ethical responsibilities regarding source confidentiality.

The law is qualified. It does not guarantee absolute privilege that would enshrine the right of journalists to never reveal a confidential source – as their code of ethics demands. Instead, the federal law provides a rebuttal presumption against disclosure of the identity of a source.

Since then, shield laws have been introduced in most states – modelled on the federal law's rebuttal presumption but not applied uniformly. In states where the laws have been passed there are variations on definitions of "journalist", "news medium" and other areas[37]. In some cases, there has been a refusal to apply journalist shield laws to anti-corruption bodies with their extraordinary "star chamber" powers of secrecy, coercion and compulsion and denial of the right to silence[38]. This means that the concept of journalist privilege is partly embraced in some instances and wholly ignored in others. State shield laws often don't cover parliamentary proceedings[39].

Some states have lagged in developing shield laws. In 2010 the then Queensland attorney-general believed a national approach to shield laws should be adopted and opted to monitor developments[40]. Tasmania has not enacted shield laws and in November 2012 South Australia decided to defer its shield law legislation[41]. The Northern Territory government is considering journalist shield laws[42].

On Tuesday April 2, 2013 the Media Alliance called on[43] the Standing Council on Law and Justice representing attorneys-general in the federal, state and territory jurisdictions to come together to create a uniform national approach to shield laws for journalists[44].

Such a move is not without precedent: on January 1, 2006 uniform defamation legislation came into force across Australia after decades of complaints about the varied approach of state legislations to the issue. Now, Australia has one piece of legislation to govern its defamation law.

Legislation passed by parliaments must ensure that courts protect and defend press freedom from those who would use their wealth, power and influence to muzzle genuine news stories or impede the public's right to know. The relentless pursuit of journalists in expensive legal actions must cease. Journalists must not be targeted for simply doing their job, nor punished for rigorously maintaining the ethical requirements of their profession.

Adele Ferguson, Nick McKenzie, Steve Pennells and Richard Baker are currently facing court action to reveal their confidential sources.
PHOTO BY NATHAN DYER/THE WEST AUSTRALIAN

Journalists face jail for adhering to ethics

Adele Ferguson, *The Age*

Right now, I am faced with every journalist's most-feared nightmare: comply with a court order to hand over documents that I promised would be kept confidential, or face a jail sentence for contempt of court.

It is a situation forced upon me by Australia's richest person, Gina Rinehart, who is also a major shareholder in the company I work for, Fairfax Media. Rinehart has used her privately held company to subpoena all correspondence between me and her son, John Hancock, to be used in a private family dispute. I would rather go to jail than break my professional code of ethics.

Subpoenaing journalists used to be rare. Now, it is being used by big businesses and the wealthy to trace whistleblowers and the source of leaks.

At stake here is not just imprisonment, or the impact on my family. It is the freedom to offer confidentiality to sources. It is the freedom to report. It is the very cornerstone of our democracy and we need to fight to protect it.

Nick McKenzie and Richard Baker, *The Age*

Until mid-April 2013, we had two separate legal cases hanging over our heads. On Thursday April 18, three judges from the Victorian Court of Appeal set aside a magistrate's order that we take the stand and answer questions as part of a committal hearing involving former Reserve Bank of Australia bank note executives charged with foreign bribery.

Lawyers for one of the accused sought to question us about a source that revealed a major development in the bribery prosecution.

In an important ruling for journalists, Justice David Harper said: "Investigative journalists have a legitimate interest in uncovering the truth about a story such as this, and they serve an important public interest in having the truth revealed."

Our second case involves a third defendant, Phil Dorling. This legal case arises from a series of articles that revealed an association between Joel Fitzgibbon, the former defence minister, and Chinese-Australian businesswoman Helen Liu.

Fitzgibbon and the Labor Party received substantial political donations from Liu and he failed to declare to the Australian parliament that she twice paid for him to travel to China. These articles were clearly in the public interest.

Fitzgibbon has sued *The Age* for defamation. Liu has reserved the right to do so and in the meantime commenced legal action to force the disclosure of the identities of confidential sources that provided *The Age* with information and documents relating to her business affairs and association with Fitzgibbon. The NSW Supreme Court and the NSW Court of Appeal have found in

favour of Liu, and Fairfax has sought special leave to appeal to the High Court.

The use of confidential sources is a vital part of investigative journalism. Whistleblowers and informants are often the only channels to obtain information about dealings that governments, politicians, bureaucrats and business figures would prefer to keep out of the public eye. These exchanges depend on confidentiality.

In this case the sources have expressed strong fears that they will be subject to retribution if Liu learns their identities. Interestingly, the Australian Federal Police have refused to release under FoI law information that they hold relating to Liu on the grounds that to do so would "endanger the life or physical safety" of a confidential source.

One way or another, this case may prove to be a landmark in the freedom of the press and the protection of journalists' sources in Australia.

Paddy Manning

I can't tell you what I've learned about the truth of coal baron Nathan Tinkler's financial position. Fairfax was injuncted in the Victorian Supreme Court in November 2012 on the basis that we had obtained confidential information about Tinkler's loans. The injunction was granted by Justice John Digby and we lost an appeal to have that injunction lifted or narrowed.

A literal reading of the so-called "super-injunction" prevented publication not just of my story but all Fairfax Media reporting of Tinkler's financial position. We have continued to report, risking contempt.

In the end Fairfax settled the night before the trial because its own legal advice was that the law does not allow publication of confidential information. Fairfax also settled because Tinkler agreed to drop an action against us for contempt of court for our continued reporting, and he agreed to withdraw a subpoena seeking production of my notes and identification of my confidential sources – a request I, of course, would never have complied with. My sources remain protected.

I think it would be a great surprise to many working journalists, and to the public at large, that we cannot report confidential information in the public interest. Isn't that our job? This case is a terrible precedent for journalism and highlights vulnerability in media law and a threat to free speech.

Steve Pennells, *The West Australian*

For the past year, *The West Australian* and I have been fighting a very long and expensive legal battle against Gina Rinehart. It has involved several court appearances and numerous legal threats and letters.

Although the stakes are high, the case is very simple. Ms Rinehart wants me to divulge confidential information. In short, she wants emails, text messages, notes, phone records and recordings stretching back more than 18 months.

We have refused.

The potential end result of this decision could lead to me being jailed.

Rinehart's lawyers have shown no sign of backing down. Neither have my bosses at *The West Australian* – and neither have I.

We believe there is a fundamental principle at stake that is worth fighting for, no matter the cost. It is also an issue that every journalists needs to understand because it could happen to them.

Letter of support from Michael Harvey and Gerard McManus

In 2007 *Herald Sun* Canberra press gallery correspondents Michael Harvey and Gerard McManus were given criminal convictions for contempt of court and fined $7000 for refusing to reveal the key source of an article that revealed plans to reject a $500 million boost to war veterans' pensions.

We wish to offer our sincere support to the group of journalists currently facing prospects of contempt of court charges in various jurisdictions around Australia.

Having experienced the pressures and strains involved in extended court proceedings in the course of doing our jobs, we empathise with your plight.

Confidentiality and trust are elemental to doing the work of a journalist and help underpin freedom of the press.

In June 2007 we were convicted for contempt of court before Chief Judge Michael Rozenes in the Victorian County Court.

At no stage did we ever contemplate cooperating with authorities to divulge what we held to be a fundamental journalist's ethical code – that is to respect the wishes of an informant to remain confidential.

We accepted the stain of a criminal conviction in the hope that we might be the last journalists in Australia to be dealt with in this way.

We were pleased the case was the catalyst for law changes around the country that now presumes but does not guarantee journalistic privilege.

Unfortunately, despite these advances in "shield laws" there remain ambiguities and several of you now face a similar predicament.

Until the law is changed to fully recognise journalistic privilege, reporters will be vulnerable to prosecution for refusing to cooperate with authorities and divulge their confidential sources.

We wish you well and offer our fraternal support.

Michael Harvey and Gerard McManus

Jail time for refusing to reveal a source

Tony Barrass

It's Groundhog Day in Australian journalism, with a new push to recalibrate clunky state shield laws and finally build a proper national fortress that legally – and ethically – protects journalists going about their work.

It's quite ridiculous that, in 2013, the Media Alliance has been forced to act because some of the best practitioners of our craft face hefty fines, and in some cases jail, for simply doing their job; that is, informing Australians about the world in which they live.

These five are at the top of their profession and should be applauded for their stubbornness and determination to highlight this Dickensian situation.

But it's really not about them. It's about something much bigger than the individual; it's about fighting for the most important principle on which the very best journalism comfortably sits – trust.

Trust. Relatively small word, bloody big meaning.

It was hammered into me from an early age by my dad, Tom, a life member of the then Australian Journalists' Association, that you always went about your job "without fear or favour" and you never, ever gave up a source.

The trust between reporter and his or her contact was as sacrosanct as that between a confessor and a priest. The fear or favour bit was often hard, particularly if you practised your journalism in small cities where you tended to be well connected after a few short years.

One week you'd be sharing a beer with your best contact, the next you'd be kicking them all over page three. But they were the rules, and good contacts understood that.

It was the same when it came to revealing your sources.

In late 1989, I became the first Australian journalist to be jailed for refusing to reveal a source of information in a court of law.

I had steadfastly refused to answer questions, despite magistrate Peter Thobaven's insistence that I did, about whether the young man charged with disclosing official secrets about the tax affairs of Laurie Connell, the shonk at the heart of the WA Inc. scandal, was in fact the source for my reporting in Perth's *Sunday Times*.

Editor Don Smith decided not to publish the details of Connell's tax receipts, hard copies of which I had been given, but went big on the fact that there was a major security leak inside the Australian Tax Office. We thought we were doing everyone a favour by highlighting the breach.

It was against the *Journalist Code of Ethics* to reveal confidential sources, I told Thobaven politely, again and again. Defence lawyer Richard Utting brilliantly painted me into a corner, and while I thought I handled the court proceeding quite well, Thobaven, grumpy and unpleasant, thought otherwise. Seven days at His Majesty's pleasure will give you time to change your mind, he muttered.

I was taken from the dock, frog-marched into the bowels of the East Perth Lock-Up, deprived of my tie, shoelaces and belt, ordered into the back of a paddy wagon which I shared with three boisterous, angry fellow convicts, driven to one of two maximum security prisons In Western Australia, stripped, searched (I can still hear them barking; "bend over, lift your balls!") and then put into a cell that seemed no bigger than your average shower.

Welcome to Canning Vale, son.

What made it even more unjust was that when the case went to the next level the following year – I then faced five years inside and a $50,000 fine, but by this stage was really pissed off and even more determined – District Court Judge Antoinette Kennedy said that my so-called crime "struck at the heart of the justice system", and slapped me with a $10,000 fine, which, thankfully, was picked up by both Rupert Murdoch and the AJA.

And what about the concept of double jeopardy? I was punished not once but twice for sticking by our principles. Unbelievably, the Tax Office worker was found guilty (without my evidence, so go figure) and received a minor fine.

I have refused to allow my career to be defined by that one incident, but it was my 15 minutes of fame over a terrific 32-year career. I still, occasionally, get embarrassed about the whole scenario, particularly if it's raised by those outside the profession. I'd like a buck for every time the chair next to me has shuffled an inch or so away when it was discovered the ruffian sitting next to them at the dinner party had "done porridge".

But it's not about me, it's about the system; a system that protects the state and demands journalists be punished if they don't play by its silly, archaic rules. That very same system seems determined to again make an example of Pennells, McKenzie, Dorling, Baker and Ferguson.

That's why the system needs urgent attention, and it's up to us to fight hard to make sure we convince the attorneys-general to drag these vitally important shield laws into the 21st century, ensuring a robust democracy and a world in which all Australian journalists can work "without fear or favour".

Tony Barrass is a Perth-based journalist who now runs a small media consultancy business

States create a maze of shield laws

Joseph M Fernandez

On paper, Australian journalists' confidential sources have never been so well shielded. Six of the country's nine jurisdictions have shield laws of varying shapes and sizes[45].

The 2007 conviction of *Herald Sun* journalists Michael Harvey and Gerard McManus for contempt of court for defying an order to disclose the source of their article on federal government cutbacks to war veterans' entitlements provided fresh impetus for statutory shield protection for journalists' confidential sources[46].

The road to shield law, however, has been long and pot-holed. While the *Age*'s invitation to "tip us off, anonymity is guaranteed" [47] may illustrate how shield law can help, it is unclear whether the statutes provide the panacea journalists hoped for.

Two members of the *Age* investigative unit are facing court action for source disclosure. Recent moves for confidential source discovery indicate that the question of effective source protection is alive, and uncertain to boot. Fairfax general counsel Gail Hambly said, "It is certainly a worrying trend"[48].

Is there really a "privilege"? The shield law is referred to as "journalists' privilege" even if only in a statute's section headings in some cases[49]. Some judges have, however, openly questioned the privilege's very existence.

In the Securency case, Victorian magistrate Phillip Goldberg held: "There is no law which protects, that is coded or statute law that protects or creates a rule that recognises journalist privilege[50]." He was partly right. He was speaking in December 2012, and the Victorian shield law only took effect in January 2013[51].

In Western Australia, where *The Sunday Times* is resisting handing over documents, Supreme Court judge Justice John McKechnie said bluntly: "No question of journalist's privilege (if such a thing exists) or protection of sources arises[52]."

More recently Fairfax Media and its journalists Richard Baker, Philip Dorling and Nick McKenzie lost a NSW Supreme Court appeal against property developer Helen Liu's bid for source disclosure[53]. The article, quoting from documents said to be Liu's personal and business records, was about former defence minister Joel Fitzgibbon[54]. Liu argues the documents were forgeries or were falsely attributed and wants to identify the people to sue[55].

In a later case, *Age* journalists Nick McKenzie and Richard Baker are facing court action to reveal their confidential sources to lawyers acting for eight former RBA bank note executives charged with bribery[56]. In the article concerned, McKenzie and Baker stated that an alleged bagman from Indonesia was going to testify against the accused as a prosecution star witness.

The article said under a secret deal between the witness and the Australian government, the witness would "provide the first explicit, first-person witness testimony about the way the RBA bank-note firms Securency and Note Printing Australia allegedly used middlemen to funnel multi-million dollar bribes to overseas officials in return for securing their agreement to purchase Australian polymer bank note technology.[57]"

Victorian Supreme Court judge Justice Michael Sifris dismissed the journalists' application for judicial review of Magistrate Goldberg's decision ordering disclosure[58]. Justice Sifris held that the case was "not about the protection of sources by journalists [but about] whether correct procedures were followed and the law was complied with"[59].

In *The Sunday Times* case referred to above, the Supreme Court ordered the newspaper to hand over documents relating to an article it published containing allegations by (now former) Independent MP Adele Carles against the WA state treasurer Troy Buswell[60], with whom she'd previously had an affair. Buswell wanted documents including handwritten notes, emails, letters and audio recordings that contained comments Carles made to any *Sunday Times* journalist leading to an article claiming that Buswell "dry-humped" a Perth businessman at a social event "allegedly moaning in mock sexual pleasure"[61]. Justice McKechnie did not agree that disclosure "would cause sufficient oppression" to the newspaper[62].

Where the case for protection hinges on law that is not yet applicable, the unavailability of protection retrospectively provides no indication as to how the enacted law will operate.

What is worrying, however, is the judicial indisposition to the spirit of the shield law. That spirit, in essence, is to facilitate the flow of information and enhance transparency and accountability. The media has not so far argued for absolute protection and the "media is not seeking a system of open slather"[63]. When parliament creates a protection and calls it a "journalist privilege", however, there is in fact a journalist privilege, even if it comes with qualifications – as most such privileges do.

In some states the privilege has been created by statute and therefore it exists in fact and by the name "journalist privilege". The courts would be wrong to say no such privilege exists in Australia.

The exercise of judicial discretion will continue to haunt the application of the shield protection.

Where the protection covers a vast spectrum of potential protection claimants, including bloggers and citizen journalists, the greater the likelihood of judicial reservation to apply the shield[64].

Hopefully, we will not need another Harvey/McManus "moment" to fix the law in this area. The arduous trek to uniform defamation law provides salutary lessons.

Associate Professor Fernandez is the head of the journalism department at Curtin University.

Overview of journalists' shield law in Australia

NB. There are no definitive shield laws yet in Queensland, Northern Territory and South Australia.

Jurisdiction and Protection	Exceptions	Definitions	Notes
Commonwealth, *Evidence Act 1995*			
If a *journalist* has promised not to disclose an informant's identity the journalist *and employer* cannot be compelled to *answer any question or produce any document* that would identify the informant: s 126H(1).	Court has discretion to hold that public interest in disclosure is more important than: (a) any harm caused by the disclosure; and (b) the public interest in news media's ability to convey facts and opinion and in their ability to access sources of facts: s 126H(2). Court can impose conditions as it sees fit: s 126H(3).	*Journalist*: a person *engaged and active* in the publication of *news* and who receives information from an *informant* in the expectation that the information may be published in a *news medium*: s 126G(1). *Informant*: a person giving the information to a *journalist* in the *normal course* of the journalist's work for publication in a *news medium*: s 126G(1). *News medium*: any medium for dissemination of *news and observations on news*: s 126G(1).	• ss 126G and 126H appear under heading '*Journalists' privilege*' • Covers journalists in mainstream media; citizen journalists, bloggers and independent media organisations. No reference to *profession or occupation of journalism* unlike e.g. NSW provision below which is narrower. The broader scope is problematic because the practical effect may be to limit the operation of the protection, as a result of law's unintended result of making secret a vast body of information that was not secret before and because of the court's likely reaction to the Evidence Act's extended operation; judges likely to be reluctant to exercise discretion favouring exclusion of evidence.
Australian Capital Territory, *Evidence Act 2011*			
If a *journalist* has promised an *informant* not to disclose her/his identity, the journalist *and employer* cannot be compelled to *answer any question or produce any document* that would identify the informant: s 126K(1)	Court has discretion to hold that public interest in disclosure is more important than: (a) any harm caused by the disclosure on the informant or anyone else; and (b) the public interest in news media's ability to convey facts and opinion and in their ability to access sources of facts: s 126K(2). Court can impose conditions as it sees fit: s 126K(3).	*Journalist*: a person *engaged and active* in the publication of news and who receives information from an informant in the expectation that the information may be published in a *news medium*: s 126J. *Informant*: a person giving the information to a *journalist* in the *normal course* of the journalist's work for publication in a *news medium*: s 126J. *News medium*: a medium for dissemination of *news and observations on news*: s 126J.	• ss 126J and 126K appear under heading '*Journalist privilege*'. • Provisions similar to federal law.
New South Wales, *Evidence Act 1995*			
If a *journalist*, in the course of the journalist's *work*, has promised not to disclose an informant's identity the journalist *and employer* cannot be compelled *to give evidence* that would identify the informant: s 126K(1).	Court has discretion to hold that public interest in disclosure is more important than: (a) any harm caused by the disclosure on the informant or anyone else; and (b) the public interest in news media's ability to convey facts and opinion and in their ability to access sources of facts: s 126K(2). Court can impose conditions as it sees fit: s 126K(3).	*Journalist*: a person *engaged in the profession or occupation of journalism* in connection with the publication of information in a *news medium*: s 126J. *Informant*: a person who gives information to a *journalist in the normal course* of the journalist's work for publication in a *news medium*: s 126J. *News medium*: a medium for the dissemination of news and observations on news: s 126J.	• ss 126J and 126K appear under heading '*Journalists' privilege*'. • Meaning of 'journalist' appears narrower than that of the Commonwealth *Evidence Act* above. The NSW definition of journalist is limited to those who are engaged in the *profession/occupation* and does not extend to those who are *active* in the publication of news.
Victoria, *Evidence Act 2008*			
If a journalist, in the course of the journalist's *work*, has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to give evidence that would disclose the identity of the informant or enable that identity to be ascertained: s 126K(1).	Court has discretion to hold that public interest in disclosure is more important than: (a) any harm caused by the disclosure on the informant or anyone else; and (b) the public interest in news media's ability to convey facts and opinion and in their ability to access sources of facts: s 126K(2). Court can impose conditions as it sees fit: s 126K(3).	*Journalist*: person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a *news medium*: s 126J(1). In deciding who is a '*journalist*' must have regard to: • whether a *significant proportion* of the person's professional activity involves collecting and preparing news or current affairs information; or commenting on or analysing news or current affairs in a news medium: s 126J(2)(a). • whether the news or current affairs information collected and prepared by the person is regularly published in a news medium: s 126J(2)(b). • whether the person's comments or analysis of news or current affairs is regularly published in a news medium: s 126J(2)(c). • whether, in respect of the publication of any information collected or prepared by the person; or any comment or opinion on or analysis of news or current affairs by the person, the person or the publisher is accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice: s 126J(2)(d). *Informant*: person who gives information to a *journalist in the normal course* of the journalist's work in the expectation that the information may be published in a *news medium*: s 126J(1). *News medium*: means a medium for the dissemination to the public or a section of the public of news and observations on news: s 126J(1).	• ss 126J and 126K appear under heading '*Journalist privilege*'; s 126K is entitled '*Journalist privilege relating to identity of informant*'. • Narrow definition of '*journalist*' (see Commonwealth *Evidence Act* above).

Overview of journalists' shield law in Australia

NB. There are no definitive shield laws yet in Queensland, Northern Territory and South Australia.

Jurisdiction and Protection	Exceptions	Definitions	Notes
Western Australia, *Evidence Act 1906*			
If a *journalist* has promised an *informant* not to disclose her/his identity, neither the journalist nor the employer can be compelled to give evidence that would disclose the informant's identity: s 20I. A *court* may direct that evidence not be adduced in a *proceeding* if it finds that to do so would disclose a *protected confidence*; or contents of a *document containing a protected confidence*; or *protected identity information*: s 20C(1). A court *must* give such a direction if it is satisfied that: (a) harm would or might be caused directly or indirectly to the protected confider if the evidence is adduced; and (b) that the nature, extent and likelihood of the harm outweigh the desirability of the evidence being given: s 20C(3). The section contains a long list of matters the court may consider in applying this section and they include: the probative *value and importance* of the evidence in the proceeding; the nature and gravity of the offence, action or defence and the nature of the subject of proceedings; the availability of any other evidence to which the claim for protection relates; the likelihood of *harm* and the extent of such harm to the protected confider *if protection is not provided*; and the *public interest in protecting confidences* and protected identity information: s 20C(4).	Where protection is sought in defamation proceedings concerning the publication of allegedly defamatory matter relying on a protected confidence, the court *must not* apply the above protection provisions *unless the content of the protected confidence is true*: s 20C(5). The section provides a list of situations in which the protection is lost, for example, if the confider has committed an offence or is liable to a civil penalty; the confider has engaged in deceit, dishonesty, inappropriate partiality or a breach of trust; the confider has acted corruptly; and the confider has corruptly taken advantage of her/his own position to obtain a benefit or cause a detriment: s 20E(1). Does not cover parliamentary proceedings, committees, etc. See reference to *person acting judicially* – does not include a member of a House of Parliament or a Committee of the Houses who, by law, has authority to hear, receive and examine evidence: s 20G.	*Journalist*: a person engaged in the *profession or occupation of journalism* in connection with the publication of information in a *news medium*: s 20G. *Confidant*: a person to whom a communication is made in confidence and includes a *journalist* as defined in s 20G: s 20A. *Protected Confidence*: a communication made in confidence in the course of a *relationship* in which the confidant was acting *in a professional capacity*: and, when the confidant was *under an express or implied obligation* not to disclose the communication, *regardless* of whether the obligation arises under law or can be inferred from the relationship: s 20A. *Protected identity information*: information enabling a person to *ascertain the identity* of the person who made a protected confidence: s 20A. *News medium*: means a medium for the dissemination to the public of *news and observations on news*: s 20G. *Informant*: a person who gives information to a *journalist* in the *normal course* of a journalist's work expecting that the information may be published in a *news medium*: s 20G. *Proceeding*: does not include a proceeding before either House of Parliament or a committee of either House in which evidence may be given: s 20G.	• *Journalist* definition similar to NSW definition above, that is, it appears narrower than federal law. • Applies to "any proceeding even if" the law of that proceeding says this shield does not apply: s 20H(3). However, the shield does not extend to parliamentary proceedings and committees – see definition of *person acting judicially*: s 20G.
Tasmania, *Evidence Act 2001*			
The provisions are roughly similar to the WA shield provisions, e.g., s 126B is almost identical to WA's s 20C (see above). However, there is no specific reference to 'journalist' in the Tasmanian Act (unlike WA's s 20I).			

STAR CHAMBERS

The Media Alliance remains deeply concerned at the excessive powers of coercion and compulsion made available to investigatory bodies across Australia. Increasingly, these bodies are being equipped with an arsenal of powers that can be misused on the innocent in a quest to discover information. The threats made to journalists have become intolerable as these star chambers seek to uncover confidential sources and the information from those sources.

The Media Alliance is aware of at least a dozen journalists called before these star chambers. The fact that the subpoena powers of these bodies also demand that the journalist tell no-one that they have been called to appear (the journalist cannot tell their family, their editor or even consult their union for ethical advice) is a grave assault not only on press freedom but an individual's rights.

Sadly, many jurisdictions that recognise the concept of journalist privilege deny the concept when it comes to interrogations by their anti-corruption bodies – meaning that ethical journalists are denied the right to silence and cannot refuse to reveal their confidential sources or the source's information.

The insidious nature of star chambers' powers is best demonstrated by examining an investigation by a Victorian anti-corruption body. Until the resolution of a recent case in Victoria's Magistrates' and County Courts, the Media Alliance has refrained from commenting in detail on areas of concern surrounding activities of the Office of Police Integrity (OPI) during its investigation into the source of a story in *The Australian* on anti-terror raids in Melbourne on August 4, 2008. The OPI has subsequently been subsumed into the Independent Broad-based Anti-corruption Commission (IBAC).

The Media Alliance is disturbed that the OPI had engaged in a contrivance that compelled a journalist to answer questions about a source.

In October 2009 *The Australian* newspaper's associate editor, Cameron Stewart, was subpoenaed to appear before an OPI investigation[65]. At the interview, Stewart was asked to identify the source for the report he wrote on the raid. Stewart, as he is ethically obliged to do as a Media Alliance member bound by the *Journalist Code of Ethics*, responded that he respected the confidentiality sought by his source and indicated that he would be unable to identify or answer any questions regarding his source. The meeting concluded.

Stewart was subsequently called to appear at a second OPI interview one week later. At this interview, OPI investigators handed him a plain piece of paper headed "Deed of Release". The paper was dated September 24, 2009 – one month before Stewart had been called to the interview.

The paper carried the signatures of Stewart's confidential source and had been counter-signed by an OPI investigator.

The typewritten paper repeatedly stated that the source, a serving member of the Victoria Police, was voluntarily releasing Stewart from his ethical obligation to maintain the confidentiality regarding the source's identity and the information the source may have provided.

CARTOON BY JENNY COOPES

The paper put Stewart in a position where he had no grounds or ability to refuse to cooperate with investigators. The Alliance's code of ethics makes it clear that where a source requests confidentiality, and the confidentiality is accepted, it must be respected. But in this instance, the source was clearly directing Stewart to cooperate with investigators.

It is not for journalists to speculate about a source's motives for releasing them from an agreement to maintain confidentiality. A journalist cannot ignore the decision to be released nor can the journalist disobey the law by refusing to cooperate with investigators. If the condition of confidentiality is waived, a journalist loses the privilege protection enshrined in clause 3 of the code.

Stewart has no protection under the code of ethics to continue to suppress information once

he has been released from his ethical obligation. Indeed, once released he is under ethical, moral and legal requirements to cooperate with the law.

Stewart contacted the Media Alliance to seek advice about those aspects of his situation that, at that time, he was legally allowed to reveal. The Media Alliance believes that Stewart's actions have at all times been consistent with his obligations under the code. Stewart's lawyer also made contact with the source's lawyer to confirm that the deed of release was genuine and had been signed voluntarily – confirming that the source was releasing Stewart from the confidentiality of their agreement.

However, the Media Alliance is appalled at the star chamber powers unleashed by the OPI, and the powers that are also entrusted to other anti-corruption star chambers around Australia. These powers have been and can be misused.

Under its powers of secrecy, compulsion and coercion and using the threat of a jail term, a fine or both, the OPI was able to use a subpoena that:

- Compelled the journalist to appear at an interview
- Allowed the journalist to tell only a lawyer about the subpoena
- Refused the right to silence
- Could coerce the journalist to reveal information that could include handing over recordings, notes and documents.

The Media Alliance is disturbed that the OPI used a contrivance in order to get information from a journalist about the source of a story. This is yet another method for investigatory bodies to go on "fishing expeditions" for evidence. The OPI was not investigating the behaviour of the journalist and the journalist had not engaged in any illegal activity.

Anti-corruption bodies have no role to play in media ethics and should not engage or misuse the journalism profession's ethical code in order to coerce information that would ordinarily be subject to a journalist's professional privilege. It would be disturbing if other agencies began using such contrivances in order to further their fishing expeditions and place journalists in ethical quandaries.

Silenced in secret
Cameron Stewart

It was a regular working day in October 2009 when I received the call from Victoria's then police watchdog, the Office of Police Integrity.

The OPI officer on the phone asked for my immediate location. I told him I was sitting at my desk in the office of the Melbourne bureau of *The Australian*, why?

He told me that OPI officers were walking over as we spoke to serve me with a summons to force me to be questioned in the OPI's star chamber about confidential sources.

What's more, he told me that under the terms of the summons I could tell nobody except my lawyers that this was taking place. Not my editors, my colleagues or even my wife or children. Nobody. The punishment under the *Police Integrity Act 2008* for breaking that confidentiality clause was up to a year in prison or a large fine or both.

The confidential summons, issued under section 58 of the *Police Integrity Act 2008*, was being served in relation to an OPI investigation into my sources for a story I had written the previous August about a counter-terror operation in Melbourne called Operation Neath.

Within minutes, two OPI officers were standing outside the offices of *The Australian*. I came out and they handed me the summons to appear in the star chamber the following week. From that moment I was legally gagged.

Sadly, receiving a confidential summons to be coercively questioned is something that has been experienced by at least a dozen journalists around Australia in recent years. The true number may be far higher but it is difficult to tell because these journalists risk significant fines or jail terms if they dare tell anyone other than their lawyer of their experience.

It is a practice that has become more prevalent in recent years as ever more powerful anti-corruption watchdogs become more willing to entangle journalists in their hunt for whistleblowers or others who may choose to leak information into the public domain.

But confidential summons are a blunt and draconian tool. They should only ever be used against journalists in rare and extreme cases – where grave issues of public corruption are being investigated.

Even then, they will rarely achieve any meaningful result because if they relate to questions about confidential sources, the journalist is ethically obliged under clause 3 of the Media Alliance's *Journalist Code of Ethics* not to answer questions.

By using such tactics these watchdogs know they are placing a journalist in a position where they will have to refuse to answer questions and therefore be liable for potential contempt charges and possible jail terms.

Yet increasingly, state and federal police watchdogs are employing confidential summonses against journalists as a tool for fishing expeditions, as they try to uncover minor leaks or even politically embarrassing disclosures that fall far short of serious corruption.

In my case, the OPI's use of a confidential summons placed me at a distinct disadvantage.

Although I was ultimately subjected to a non-sworn interview outside the star chamber, courtesy of a last-minute deal between lawyers, the confidentiality aspect of my summons remained in force.

In my first meeting with the OPI, I told investigators I could not disclose confidential sources because of my ethical obligations as a journalist.

In my second meeting, my formal interview, I was handed a signed "Deed of Release" which had been voluntarily signed by one of the suspects, giving me permission to give evidence to the OPI about my dealings with him.

Because of the confidential nature of the summons, I was still not legally permitted to discuss this highly unusual situation with either my editors or to seek the advice of the Media Alliance regarding my interpretation of the ethics code.

The continued existence of the muzzle meant that for the next three years I was legally barred from revealing the full story about the Deed of Release and the unusual circumstances of the case.

The wielding of confidential summons against journalists by police watchdogs is contrary to the spirit of the new journalist shield laws that have sprung up at state and federal levels in recent years.

Disappointingly, these shield laws do not apply to most police watchdogs, but these watchdogs should still feel a moral obligation to accept the basic philosophy underpinning these shield laws: that confidential sources deserve protection.

For police watchdogs, the issuing of a confidential summons against a journalist has a double benefit. Not only does it compel a journalist to appear for questioning, it also means that the journalist is muzzled when it comes to disclosing his or her treatment by the watchdog.

In my case, I was still muzzled when the OPI issued a second summons to me in September 2011 to give sworn evidence in the Melbourne Magistrates' Court.

OPI officers served this second summons on me by following me as I drove from my home to my son's childcare centre and then confronting me in the childcare centre as I was dropping my son off. The continuing confidentiality clause on my initial summons meant that I was still unable to write in detail about this sort of provocative behaviour until long after the event.

The OPI is a case study of why this press freedom issue matters.

The OPI, which ceased operations last year, was an example of a police watchdog that had lost its way. It bungled large investigations, played politics, leaked information and was so incompetent that it has since been replaced by a broader anti-corruption regime, Victoria's Independent Broad-based Anti-corruption Commission (IBAC).

The OPI abused its powers by slapping confidential summons on a range of investigative journalists for relatively minor investigations.

A *Sunday Age* investigation in late 2001 found that eight former and serving OPI officials believed the OPI had an inconsistent approach to leaks to the media, leaking itself on one occasion and then aggressively pursuing leakers in another.

Journalists are not above the law, but neither should they become playthings for all-powerful police watchdogs.

After all, these watchdogs owe their existence and powers to the courage of both whistleblowers and journalists who exposed the corruption which justified their creation.

The media must, wherever possible, do more to challenge those police watchdogs that seek to use their growing powers to drag journalists into star chambers and then silence them under threat of jail.

Cameron Stewart is an investigative journalist and associate editor of The Australian

Star chambers' chilling effect
Melissa Fyfe

It seemed everyone was angling for a behind-the-scenes deal. As Victoria's Baillieu government shaped its long-awaited corruption-busting body last year, a mile-long queue formed of all sorts of Victorians keen to get some protection from this powerful new body.

Judges wanted a special deal. Lawyers advocated for their client confidentiality. The police felt particularly persecuted, public servants were nervous. Politicians, it later turned out, were busy piecing together their own safety net. But in hindsight, we as journalists – busy reporting these deals and exposing policy flaws – should have been more proactive about what this new organisation would mean to our professional freedoms.

Premier Ted Baillieu's Independent Broad-based Anti-corruption Commission (IBAC) finally limped into existence this January, 18 months after it was due. It covers 250,000 public sector employees, MPs, judges, police, local government and contractors.

While politicians, lawyers and judges locked in many of their protections and professional confidentialities, journalists were left naked before IBAC. The shield laws – which protect reporters from being forced to disclose sources in court proceedings – admirably introduced by Victoria's attorney-general Robert Clark last year – will not be stretched to the star chamber and the special

powers granted to it as the state's new anti-corruption body.

This is an unnerving situation given the experience in recent years of journalists with anti-corruption bodies, such as *The Australian*'s Cameron Stewart with the now defunct Office of Police Integrity. As noted in last year's annual press freedom report, *Kicking at the Cornerstone of Democracy*, a dozen journalists have been served with subpoenas by Australia's corruption-busting agencies, many of which remove the common law right to silence.

Shield laws should apply to journalists facing questions about their sources in anti-corruption bodies, not just because of the special relationship between a journalist and their source – and what that means for a healthier democracy – but, as corruption expert Colleen Lewis points out, much of the work of these corruption bodies is based on issues brought to light by journalists.

Howard Whitton, an expert on anti-corruption bodies and fellow at the National Institute for Governance at the University of Canberra, says IBAC is an investigative body, not a court, and should not have powers greater than a court to compel a journalist to reveal the sources.

It doesn't have to be like this. Last October, the Western Australian parliament passed shield laws that applied in their Corruption and Crime Commission.

So why has Clark baulked at doing the same in Victoria? His reasoning, at least publicly, is based on precedents set in New South Wales and the Commonwealth. He says his shield laws deliver on the Coalition's election commitment to bring south-of-the-border scribblers in line with NSW and the Commonwealth (although this was too late for the current Securency case involving *Age* investigative reporters Nick McKenzie and Richard Baker).

But, says Clark, consistent with NSW and the Commonwealth, shield laws do not extend the privilege to "settings" such as IBAC.

It's a strange line of argument from a government which, in its pre-election policy, promised an anti-corruption body like the NSW Independent Commission Against Corruption (ICAC), and then set off on an entirely unique path, producing a much narrower definition of corruption, excising misconduct in public office from the Victorian IBAC's purview and establishing a strange and complex whistleblower system which gave politicians a special deal.

A journalist called before IBAC who refuses to name a source, can be fined 240 penalty units ($33,801.60), two years in jail or both. You have a right to a lawyer, but no right to silence. If called before IBAC you can tell your lawyer, but no-one else.

In a statement, IBAC said that claims of journalistic privilege could be heard before the Supreme Court, and that the "supervisory role of the court means that (IBAC's) powers are not unconstrained". But IBAC has made it clear journalistic privilege does not apply to its investigations or examinations.

A Victorian government spokesman said that if you do end up in the Supreme Court on a charge of contempt of IBAC, you can try to invoke the shield laws to protect your source, but the laws do not erase the contempt charge.

Labor MP Jill Hennessy warned us last year that we should fight harder to have shield laws at IBAC (we should have listened) and the Victorian ALP moved an amendment to the legislation seeking to have journalist privilege apply as a recognised privilege. "We would do so (again) if we had government," she says.

Her wider point about shield laws and IBAC is an important one. She believes that it will have a chilling effect on public servants. "Public servants will feel less confident in exposing corruption if they know a journalist is going to have to expose them in the IBAC," she says.

Beyond shield laws, how open will IBAC be about its operations? How easy will it be to report on? It's unlikely the IBAC will provide the sort of public airing of dirty laundry that the ICAC has managed with the Eddie Obeid saga. This is partly due, perhaps, to the different nature of Victorian politicians and the murky world of NSW Labor politics. But it is also to do with the narrow definition of corruption IBAC has chosen and the high bar the commission must jump to even start an investigation.

These restrictions on IBAC, revealed by *The Age* in a series of investigative articles last year, have been criticised heavily by some of Australia's top anti-corruption and accountability experts, including Douglas Meagher, QC, one of two key advisers to the government on the commission. Meagher said the government "would be well advised to save its money and abandon the project" (the commission will cost $170 million over four years).

Although both the ICAC and IBAC have a series of guidelines about when hearings should be public or private, the bias in the IBAC legislation is clearly to avoid public hearings. The legislation says the commission's examinations will "generally" be held in private, while public hearings will occur only in exceptional circumstances.

We asked the new commissioner, Stephen O'Bryan, SC, what sort of approach he would take with journalists. He refused to be interviewed. And then did not answer the question.

A new day for anti-corruption fighting may have dawned in Victoria, but hopes for transparency in government agencies are as dark as ever.

Melissa Fyfe is an investigative reporter with The Age

WHISTLEBLOWER PROTECTION

Federal attorney-general Mark Dreyfus introduced the *Public Disclosure Bill 2013*[66] to federal parliament in March this year; a Senate inquiry into the bill is expected to report in June. The bill aims to implement the government's 2010 response to a report by the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector*[67].

The Dreyfus bill has been several years in the making and the Media Alliance believes that the proposal is a significant step forward. The bill represents a vital opportunity for creating good legislation that can be a template for uniform whistleblower laws in other jurisdictions. So it is vital that the Commonwealth bill, when enacted, is the best solution to what has been a thorny issue for public servants and journalists for many years.

The Dreyfus bill has been criticised for several flaws[68]. The failure of the proposed legislation to protect people making disclosures about the conduct of ministers (including the prime minister), the speaker of the House of Representatives and the president of the Senate elevates politicians above what should be legitimate transparent scrutiny of their activities.

Similarly, whistleblowers are not protected when it comes to information regarding intelligence agencies and the use of intelligence information. The "ring-fencing" of intelligence agencies beyond the reach of citizens who seek to expose wrongdoing undermines the quest for transparency and unnecessarily endangers whistleblowers.

As Dr Suelette Dreyfus, research fellow with the department of computing and information systems at the University of Melbourne, said: "Whistleblowing is a core freedom of expression issue. It is critical we properly protect whistleblowers brave enough to step forward. It is not possible to ensure that everyone elected to or employed by government is angelic. But with good whistleblowing laws we can ensure that our collective better angels are watching out for the integrity of our public institutions.[69]"

As the Media Alliance has said before[70] the legislation should establish a clear mechanism for internal and external disclosure of serious maladministration and wrongdoing, including to the media. It should also establish effective compensation and ongoing protection for whistleblowers to ensure they are not penalised and their careers ruined for performing an important public service.

"You wouldn't believe the lengths the OPI are prepared to go to get the identity of my story source."

CARTOON BY PHIL SOMERVILLE

The Alliance believes the legislation must provide certainty to journalists to ensure they will not be compelled to break their code of ethics regarding the identity or information from a confidential source or be exposed to sanctions. Genuine protection must be afforded to whistleblowers, both internal and external, and these protections must be clearly spelt out in any legislation. And proper training should be offered to ensure that the scope and limits of whistleblower laws are fully understood.

As former *Herald Sun* Canberra press gallery correspondent Gerard McManus noted when writing about the convictions he and colleague Michael Harvey received for refusing to disclose a source in 2007: "While the Harvey-McManus case attracted a lot of attention, the real object of the government of the day was to put fear into the public service never to leak to the media. Such an attitude is counter-productive and leads to bad government and cover-ups of mistakes.

"The flipside of a failure to protect whistleblowers is to give cover to incompetent and corrupt public servants and their political masters who oversee their departments. This is neither good for the public service, nor the country.[71]"

The Commonwealth legislation, when enacted, should then be used as the template for a comprehensive overhaul of state whistleblower protection laws.

PRIVACY

The issue of privacy and the media has been debated in great detail for many years, and the matter of a privacy tort has been examined by the Australian Law Reform Commission on several occasions.

Events in Britain in mid-2011 relating to phone hacking by British newspapers and bribery and corruption among public officials focused attention on the media and privacy once again. Despite there being no evidence that any similar activity has ever taken place in the Australian media, the federal government is again considering introducing a statutory cause of action for serious invasion of privacy.

In March 2013 the government's media regulation reform plan announced that the issue of a privacy tort would be sent to the Australian Law Reform Commission for yet another examination[72].

The Media Alliance covered the issue extensively in its press freedom report in 2012[73]. Our position remains unchanged. In November 2011, the Media Alliance held a policy forum with respected Freedom of Information blogger Peter Timmins as moderator. The forum came up with a set of principles to inform and guide any formulation, at law or in legislation, of a right to take action in cases of serious invasion of privacy.

These principles are:

- A statutory or common law right to privacy must be balanced by a concomitant right to freedom of expression or speech. The form this concomitant right should take should be as strong as or equal to the form a right to privacy takes.
- This could take the form of a common law right, a stand-alone statutory right in *sui generis* legislation or within a privacy statute, a Bill of Rights or a constitutional amendment. It must not be a mere passing reference, but must be similarly enshrined as a fundamental competing interest.
- A right to privacy must be restricted to natural persons and not be extended to corporations, companies, other commercial entities, churches or other legal fictions.
- The test for a breach of privacy must be one that is set high. A serious invasion of privacy should include:
  i. the circumstances should be such that there was a reasonable expectation of privacy
  ii. that the invasion of the expected privacy be highly offensive to a person of ordinary sensibilities.
- Ameliorating circumstances should include the interest of the public in allowing and protecting freedom of expression:
  i. the interest of the public to be informed about matters of public concern
  ii. qualified privilege with respect to the fair reporting in the course of the normal expectations of a journalist's work defined by the Alliance's code of ethics
  iii. absolute privilege
  iv. the information was already in the public domain, ie, any right to privacy should be contained to the first publication of material
  v. rebuttal of an untruth.
- An alternative disputes resolution process should be available, administered by an independent body in order to increase access to the general public and avoid expensive court action.
- Effective protections for victims of aggressive paparazzi and stalking.

Australian journalists are bound by clause 13 of the *Journalist Code of Ethics* which reads: "Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude."

Within its package of media regulatory reform proposals, the government also sought to threaten press freedom should the media industry not properly self-regulate. The proposed Public Interest Media Advocate's power to withdraw the privacy exemption for journalists would undermine the ability of journalists to do their job. As a punishment, while it was directed at self-regulatory bodies and their member organisations, it would actually harm individual journalists and have chilling consequences that would lead either to self-censorship or extremely harmful and costly litigation.

The Media Alliance believes that any statutory cause of action for serious invasion of privacy must be first balanced with a concomitant right to freedom of speech. It must only be available to natural persons, not corporations, and must set a very high bar for any complaint. The privacy exemption for journalists must be maintained and protected as necessary for ensuring journalists can legitimately inquire and scrutinise in the public interest without threat or hindrance.

Political parties, privacy and press freedom

In a curious twist to politicians attacking journalists about privacy, in April 2013 three *Age* journalists – Royce Millar, Nick McKenzie and Ben Schneiders – were charged with unauthorised access to restricted data[74]. They are to appear before the Melbourne Magistrates' Court in May.

The charges relate to a story published in *The Age* in November 2010 that reported the Victorian ALP has a database that holds personal information about voters without their permission. The story revealed how the database included details of people's health and finances,

CARTOON BY PHIL SOMERVILLE

"Sunsets just aren't the same since privacy-preservation court orders."

and personal or political beliefs. *The Age* said its reporters were given access to the database by someone who was concerned that inappropriate material was held on it. The reporters were given the user name and password, and understood the source was authorised to access the database.

The database was used by the ALP to tailor phoning and doorknocking of individual voters in key marginal electorates. The system allows searches based variously on people's names, addresses and stance on various political issues. It enables mapping of campaign street walks, giving candidates and campaign volunteers access to profiles on the people they doorknock or phone, including their voting intentions. The Coalition has a database capable of similar profiling of voters.

Victoria Police subsequently began an investigation into whether the manner in which the database was searched breached laws that prohibit the unauthorised access of a computer system.

The Age noted that a 2008 Australian Law Reform Commission report had said it was not convinced that data collection by parties should be exempted from privacy laws.

The Alliance believes most Australians would have been shocked to discover that political parties were exempt from privacy laws and had used this exemption to stockpile information on voters that was often extremely private.

The journalists are members of the Media Alliance and bound by its code of ethics. The Media Alliance is satisfied they accessed the database only for the purposes of the story they published. The three have advised the Media Alliance that they contacted people whose files contained any significant information, advised them of the nature of the information on them stored by the ALP and only published information after having secured the consent of the individuals concerned.

The Media Alliance believes the public has a right to know that these databases exist and has a right to demand that political parties should be covered by privacy laws that regulate what information on people these organisations can or cannot keep.

MEDIA ACCESS TO DETENTION CENTRES

CARTOON BY JON KUDELKA

The "Deed of Agreement" introduced by the Department of Immigration and Citizenship (DIAC)[75] in mid-2011 continues to frustrate media organisations.

The Media Alliance believes the operation of detention centres in Australia and overseas continues to be of considerable public interest, as is the condition and treatment of asylum seekers who are detained. In the interests of transparency, journalists must be allowed access to the centres and must be given every assistance in compiling reports that scrutinise the actions of the government, its agencies and private contractors hired by the government.

DIAC's 19-page Deed of Agreement states: "DIAC is willing to grant to the Media Entity access to immigration detention facilities in a manner that respects the privacy of the detainee clients residing in such facilities, and protects the identities of both the detainee clients and other third parties. The purpose of this Deed is to create a formal legal relationship, based on mutual trust, between DIAC and the Media Entity concerning the Media Entity's visit to the immigration detention facilities. This Deed sets out the arrangements for the Media Entity's visit to an immigration detention centre or immigration detention facility, and sets out the access rules, visitation procedures, media content restrictions, and subsequent editing requirements."

The "media content restrictions" and "subsequent editing requirements" include prohibiting the photographing, filming or any recording of the "Detainee Clients or Protected Parties". The video camera operator is required to "film a short written privacy statement prior to shooting any footage". Media are escorted through the facility at all times by a DIAC representative "who may direct the media to cease collecting or recording on a temporary or permanent basis". A media content review form allows a DIAC representative to review the content collected and records the required edits (the options given are "pixelate", "mute" or "delete", including the specific time codes). The media organisation is reminded that failure to comply with the instruction/agreed action may constitute a breach of the deed.

While the department says that the deeds are well used, with almost every major media outlet having signed deeds and accessed detention centres, the frustrations over basic press freedoms remain. As the Media Alliance has stated in its submission to the department and subsequently, the policy regarding media access to detention centres imposes conditions on journalists that are tantamount to censorship – and that is unacceptable[76].

The Australian Press Council, of which the Media Alliance is a member, wrote to the department in March 2012 urging a change to the media access rules[77]. The council said there should be an exemption to the complete prohibition on interviews if the detainee has given informed consent.

The frustrations among media organisation have increased due to the inability to access the detention centres in Nauru and on Manus Island in Papua New Guinea. The immigration department says media access cannot be granted because it is still in negotiations with the governments of Nauru and Papua New Guinea. In January, a DIAC spokesperson tweeted: "Give it a rest; you've been told nothing occurs fast in this environment. That's the answer. Nothing more; nada, rien"[78].

In February, the Australian Greens accused the federal government of a cover-up by refusing to allow media access to the immigration detention centres on Nauru and Manus Island[79]. Greens Senator Sarah Hanson-Young, who had visited Manus Island, said the ban on photographs and footage of detention facilities should be lifted and asylum seekers and refugees who consent to being interviewed should be allowed to speak freely to the media.

"One of the most disappointing things about the trip was that I was banned from using my camera, banned from using my telephone and I had all those items confiscated from me. I said that I was happy not to take photos of people, just photos of the facilities and, of course, the conditions are so bad that the government did not want that photographic evidence to be shown," she said.

CARTOON BY REG LYNCH

What goes on behind the wire?
Jeff Waters

I'd never really considered trying to get into one of Australia's immigration holding centres until I went to Nauru in November last year. It wasn't because I wouldn't like to capture the human impact of the country's domestic detention centres. Surely the world, let alone the Australian public, should learn more about the experiment going on Down Under. It's surely a fascinating study of how this form of indefinite internment affects the human mind. Surely compelling stories behind the fences would be innumerable.

The reason I hadn't considered applying to enter a detention facility on Australian soil is that I considered it a quite futile effort. The exotic regulations (again, in a global sense) that have been imposed on journalists wishing to enter these places preclude the recording of reality. I wouldn't get those stories. What would be the point?

But then there was Nauru. When I was told about an impending visit there by an Amnesty International team – the first such inspection of the facility by an outside organisation – I contacted my editors and ended up on an overnight flight from Brisbane to the island. I would report on the Amnesty visit, but also to try to get as close as possible to, if not inside, the desolate detention centre.

Shortly before leaving I'd called the Department of Immigration and Citizenship's (DIAC's) communications team. I asked what my chances were of getting inside the Nauru camp, and was left with the rather abrupt impression that such permission was unlikely to be forthcoming. But I knew there'd be the small possibility of a loophole, and it would come in the form of the Nauruan government. You see, this would be a place of detention unlike one on Australian soil, in that it would be administered by the host nation. Indeed, Nauru would ultimately be responsible, under contract, for the actual processing of the asylum seekers, even though it only has a few practising lawyers on the island, let alone enough qualified immigration officials to properly process so many foreigners. Surely if the Nauruan government gave permission for an ABC visit, nothing could stop them from exercising their sovereign right to enforce free media access. At least that was my optimistic theory.

The plane landed at 8am local time. At 10am, I was sitting in a session of the Nauru Supreme Court, which was very small but notable for the effectiveness of its air-conditioning. The case, relating to the conviction of a collection of asylum seekers for rioting, was delayed for hours. The

asylum seekers were refusing to leave their bus and enter the court because they weren't happy with their legal representation. There are so few lawyers available in this population of 10,000 that paralegal officers of the court, who are not qualified lawyers, are the only public legal court advocates available in Nauru. The asylum seekers wanted a proper lawyer. Of course in Australia, they'd have one, but, again, this was Nauru, and Nauruans would administer the law their own way.

The stand-off ended after some time when a Nauruan lawyer stepped up and volunteered to represent the men for their plea hearing. Most of the discussion with the judge centred on the apparently insurmountable difficulty of finding adequate representation for each individual accused man. Would they have to fly lawyers in from Australia, I thought. It was a matter certainly not resolved.

The hearing didn't end, however, until the judge had passed strict non-publication orders. None of the interviews I had recorded through the bus windows, or interactions I'd had with asylum seekers around the court, would be allowed to be broadcast for fear of "identifying individuals" who had clearly given consent to be interviewed. It was the same reason normally given by DIAC to prevent reporting of human stories, but this time it was being imposed by a court.

By this time I was also speaking to various detainees in the centre by telephone. I had arranged to meet a few of them when they were allowed to leave the centre under escort to play football. The detention centre itself is far too small to allow such exercise. But the detainees told me all excursions had been cancelled because of the number of visiting journalists on the island. The restrictions on our ability to uncover conditions in the camp were being tightened further.

But a tiny chink in the armour soon emerged. In a media briefing, in answer to a question about media access to the camp, the Nauruan foreign minister said that access would be allowed "within a week." I had no reason to doubt the minister's sincerity, but I knew the promise was highly unlikely to eventuate given my previous dealings with the Australian department. The statement did, however, give me a hook to start asking for permission formally, which I did with verve. My question to the Australians could now be: "What's the hold-up with negotiations, given the Nauruan government's apparent openness?"

Meanwhile the wet season skies had opened above the island, and great quantities of water were gushing over the crushed coral ground of the centre. Water was flowing through tents, from above and below. I began to suspect the hold-up in permission may very well have had a seasonal cause, as much as anything else.

I went as close as I could, climbing a precarious hill to film the facility from a distance. I did so under climatic conditions as challenging as anything I'd worked in before, and that includes the Arctic, the Sahara, and the roaring forties. How extraordinary it must be to endure such weather under canvas.

On return to Australia, I decided to try a new tactic. In addition to writing to the Nauruan government and Australian department directly, I would start asking in a more public manner, turning to one of DIAC's favourite platforms – social media. DIAC (and/or Nauru) may not allow me into the tent camp, but at least our audience could see the ABC was attempting to show them how the prisoners were being treated, and how their tax dollars were being spent.

Initially DIAC's responses, as given over Twitter, were generally polite, vague and non-specific. They centred on the lack of an agreement by the two governments over permission to film inside the facility.

"These things take time," was the general theme.

So I continued questioning. Why was it taking so long? How could Australia negotiate to set up the camp itself in an extremely short time – convincing a sovereign government to set up a foreign detention facility on communally owned land – yet not sort something so simple as ABC access? Was there a diplomatic impasse? Had we failed in our negotiations? Who was to blame?

After a few weeks of enjoyable Christmas holiday tweeting with a growing number of supporters, it appears I had grown too tiresome for the DIAC media team. "Give it a rest," one of them publicly tweeted. This comment backfired badly for them, with many respondents complaining about the tone DIAC had adopted. Indeed, there were some claims that they'd breached the public service act by responding with such disrespect to a valid request. I don't know about that, and I doubt the Federal Police will be pressing charges. I didn't "give it a rest," though.

My efforts continued into the new year. I may not be allowed to show the world what Australia was doing – whether exemplary or deplorable – but I wouldn't let my attempts go unnoticed.

DIAC still appears not to like my tweets. In one recent response, I was told negotiations were held up because these things are done in "Melanesian time". There was no response when I pointed out that not only was this racial stereotyping, but that Nauru was actually in Micronesia and (not wanting to seem prissy about such things) that was an important distinction for people of that region.

Months down the track, the ABC appears no closer to securing permission to film inside the Nauru or Manus Island camps. Our written and verbal requests for entry to the detention centres have been met with open-ended responses. "Media access protocols are currently being developed between the two governments," said national communications manager Sandi Logan in a recent email.

We continue to ask.

Jeff Waters is Senior Journalist, Victoria with ABC News

SUPPRESSION ORDERS

The excessive use of non-publication orders across various legal jurisdictions continues to indicate a willingness to muzzle the media and shroud the operation of the justice system with a veil of secrecy. The British disease of the super-injunction also appears to have arrived on Australian shores.

Members of the media clearly understand the need to suppress sensitive information in some cases. The widespread take-up of social media and its rapid dissemination of information and opinion are already causing concern in the judiciary. The case of the rape and murder of ABC employee Jill Meagher led to attempts to have images of the accused suppressed, with concerns that non-mainstream media was spreading material that threatened to "contaminate the views of potential jurors" [80].

However, there is no doubt that from 2008, there has been a steady rise in the use of suppression orders, particularly in Victoria. The University of Melbourne Law School's Jason Bosland and Ashley Bagnall are writing a paper to be published in 2013 examining suppression orders. Their research shows that overall, Victoria's Magistrates' Court, the County Court and the Supreme Court have collectively granted an increasing number of suppression orders over five years:

2008 (from mid-Feb) = 217
2009 = 316
2010 = 298
2011 = 359
2012 = 305

The first known use of a super-injunction also took place in Victoria, involving the suppression of a story by *Sydney Morning Herald* business writer Paddy Manning. Fairfax Media's lawyer, Minter Ellison partner Peter Bartlett, described the super-injunction as "a dark episode for freedom of speech"[81]. In late 2012, Manning sent an email to Nathan Tinkler before publication of a story for the paper, asking him to respond to some of the issues raised in the story. Before the story was published and, according to Bartlett, with less than an hour's notice to Fairfax Media in Sydney, Tinkler sought an injunction against Fairfax Media in the Supreme Court of Victoria.

The super-injunction was issued by Justice John Digby last year. Justice Digby found the potential detriment and damage to Tinkler and his companies' reputation outweighed "the public interest in freedom of expression". Bartlett says the injunction went further than Tinkler's own barrister was asking for and prevented Fairfax Media from publishing material that was already in the public arena.

It is uncertain why Tinkler's legal team chose Victoria for the injunction although there has been speculation that the state's penchant for suppression orders may have played a role. Even after a negotiated settlement, some details of the story remain suppressed.

March 14, 2013 - Mining magnate Nathan Tinkler as he arrives at the Supreme Court.
PHOTO AAP IMAGE/JANE DEMPSTER

Suppressed for 999 months

Norrie Ross

When I started work as the *Herald Sun*'s Supreme Court reporter more than 20 years ago, a suppression order was a rather exotic beast, occasionally landing on the doorstep but rarely interrupting the flow of stories from our nicotine-stained press room.

In those days of yore, judges and magistrates – in Victoria at least – were imbued with the notion that proceedings should be open, except in the rarest of cases. The tight-knit group of court reporters from the various media organisations knew the rules and were trusted by those on the bench not to publish material that would prejudice the administration of justice.

We had one judge in the Supreme Court who could issue his version of a suppression order with his eyebrows. Something would be said in court that should not be reported and his piercing gaze turned to the press benches. The judge's prominent eyebrows lowered – and our pens quickly followed. That was all that was required but, like typewriters and disco, it appears those days are gone forever.

The doors of courts in Victoria in 2013 often resemble a Brunswick Street lamp post, as they're plastered with orders banning the media from reporting what goes on inside. For a veteran court reporter it is depressing to see centuries-old traditions of openness being casually tossed aside as judges and magistrates routinely and randomly grant orders restricting what the media can and can't report.

It has reached the point where lawyers, who should be forced to jump through more hoops than a circus lion in order to win an order, come to court with the attitude "seek and ye shall be given".

Suppression orders are frequently vague, badly written, poorly considered and just plain baffling. This leaves journalists working to deadlines scratching their heads about their true scope and intention. Breaching a suppression order is a serious issue for any reporter, with the possibility of a heavy fine or even a jail term for contempt of court. Muddled and confused suppression orders can land late in the day, after the courts are closed, relating to matters that have already been reported online and in hourly radio news bulletins.

An example of the kind of surreal suppression order that infuriates court reporters is one that was recently issued in the Melbourne Magistrates' Court. It prohibited the publication of any information that might identify a particular witness "in any media outlet, newspaper, radio, television or internet or any other publication for a period of 999 months".

Towards the end of the 21st century, one of our descendants can apply to the court to lift that order.

Open justice is so fundamental to our legal system that it should not have to be fought over, as it is in courts not only in Victoria but throughout Australia, nearly every day. *The Sunday Age* reported that in five years from 2005 the number of orders restricting the coverage of legal proceedings in Victorian courts increased by 50 per cent.

When critics voiced concerns, the stock answer was that the spike could be attributed to the long-running and complex series of underworld and terror trials. However, most of these cases have been through the courts and there is no sign that the number of suppression orders has decreased. Quite the reverse, in fact.

South Australia used to be way out in front of the rest of Australia as the "suppression state". But not anymore. Victoria and others decided to join the party.

Sydney lawyer Pat Bateman, in an article in Richard Ackland's *Gazette of Law and Journalism*, reported that in 18 months to July 2011, when the NSW Suppression Orders Act came into force, the state's Supreme Court granted orders in 19 separate cases. In the six months after the legislation came in, the figure rose to orders in 26 cases. This was an act that was designed to consolidate and simplify the law, not to give judges a suppression order roadmap that they could gleefully use to impose even more secrecy in their courtrooms.

Bateman says the act has made it easier to eliminate the distinction between "genuine necessity and mere convenience".

The concept of open justice in Australian courts has its roots deep in the English legal tradition where you were judged openly in public courts by your neighbours. Even the hated Star Chamber, which was used to enforce exclusive rights for the monarchy, heard cases in public.

Lord Hewart's often quoted declaration in 1924 that "it is not merely of some importance but it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" could have been said in Saxon times.

And while we're quoting aphorisms, Jeremy Bentham's declaration 200 years ago that "publicity is the very soul of justice" is one of the best.

It is interesting that the courts of decades and even centuries past placed a higher value on open justice than modern Australian courts. The culture of "suppress, suppress, suppress" means the media is constantly fighting to defend a freedom that was established before the Norman Conquest of England. Imagine the outcry if a judge suddenly declared, "We're not going to bother with the presumption of innocence. It just confuses jurors."

Victorian Supreme Court

However, it would be remiss not to point out that the rush to secrecy is not universally applauded by the judiciary. Victoria's chief justice, Marilyn Warren, is on record as saying there are far too many suppression orders. And NSW's former chief justice, Jim Spigelman (now chair of the ABC), said: "The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability."

Former Victorian Supreme Court judge, Justice Philip Cummins, has made speech after speech condemning the overuse of suppression orders. "[Banning] publication should never be the first resort and should only be made a last resort," he said in a speech to the Melbourne Press Club.

But it's not all bad news. There are some glimmers of hope. Victoria's attorney-general, Robert Clark, has said he will attempt to ensure, through legislation, that the grounds for granting suppression orders are as limited as possible.

The only problem I see with his laudable intention is that the culture of suppression is so entrenched that any wriggle room in the laws will be used by some of those on the bench to continue as normal, under the cover of judicial discretion.

The media is not seeking open slather in the reporting of our courts. There are often strong arguments why the names of children, juveniles, the mentally ill or victims of sexual assault should be suppressed. Blackmail victims or informers are often protected from identification. Names of parties in Family Court proceedings are kept secret and there may be reasons not to name a criminal who lags on his mates. The sub judice rule stops the media from reporting many details of a case once an accused is charged.

Parliament can also qualify the open justice rule in special cases. There is provision in health acts to protect, if necessary, the identities of people with HIV.

There are exceptions to every rule, even one as important as open justice, but they don't make the rule redundant.

A culture of suppression hurts us all. And in the end the biggest victim is the justice system.

Norrie Ross was a courts and law reporter at the Herald Sun *for 23 years. He is now a freelance journalist, law and ethics educator and a member of the Media Alliance Code of Ethics Judiciary Panel.*

Fairfax journalists strike in Melbourne
PHOTO AAP IMAGE/JULIAN SMITH

REDUNDANCIES

The latter half of 2012 was devastating for those involved in Australia's media industry. The Media Alliance believes 1000 jobs were lost in mainstream media – the bulk from the two big print newspaper groups, News Limited and Fairfax Media, and more than 100 jobs were lost at Network Ten.

More recently, the leading capital city television networks have been manoeuvring to swallow up their regional counterparts – a debate that is subject to the 75 per cent reach rule still under examination by parliament – which has grave implications for local news services in regional Australia.

The loss of so many people – their experience, knowledge and skills – is a heavy blow to journalism in Australia. It leaves those that remain with massive responsibilities to try to fill the gap.

If they cannot, then that is a press freedom issue that should concern us all. If the journalistic resources are no longer available to provide the necessary scrutiny of those in power, what does that mean for democracy?

Most of the job losses can be attributed to the enormous financial pressures associated with the digital transformation sweeping through the industry. Audiences now have a wealth of information and entertainment options to choose from. Advertisers are increasingly finding it difficult to find target audiences. Similarly, the ability to source news and information from myriad sources has broken down the dominance of traditional media outlets and is confounding attempts to discover a viable economic model to nurture and sustain quality journalism.

There have been new players emerging. *The Global Mail* and the *Guardian Australia* websites have sprung up. But their modest numbers of bylines don't begin to make up the shortfall of those who have been lost. Other new outlets will certainly emerge to take advantage of the digital opportunities, but how many of these new ventures will survive without an economic model to fund the depth of quality ethical journalism we have enjoyed?

The media reforms announced by the government in March failed to comprehend the scale of the changes taking place in the media industry and the need to encourage investment in journalism that takes full advantage of the opportunities arising out of the digital transformation.

The Media Alliance believes that after two years of inquiries, in an atmosphere of deep cost-cutting and job losses, this was an opportunity lost.

PUBLIC BROADCASTING

Quentin Dempster

The future of the public broadcasters, the ABC and SBS, will be determined by government this year. Firstly through Treasurer Wayne Swan's 2013 budget and then through the outcome of the federal election scheduled for September 14.

Swan and the Gillard government's Cabinet expenditure review committee will set the operational base funding formula for the ABC's triennial funding agreement.

SBS, which was saved from serious financial difficulties in 2012 by an injection of carry-on funding, will be hoping for a more sustainable funding base – given all that it's trying to do in content creation for its diverse audiences and in multi channelling.

The ABC had deferred its triennial funding negotiations for a year because of the federal budgetary constraints while SBS was rescued.

Although Swan has abandoned his commitment to restore the budget to surplus in one year, public broadcasting supporters remain very nervous about our financial prospects in anything more than CPI adjustments.

The Gillard government seemed to have been moved by the massive redundancies in media in 2012, as print outlets and commercial TV downsized to confront declines from advertising revenue.

Unexpectedly, the ABC found itself the beneficiary of a $10 million supplementation to its news budget, and it was bemusing to observe former ABC board member Keith Windschuttle's outrage at this extra funding.

Public broadcasting supporters are opposed to any 'tied' funding from government, including the DFAT contract for Australia Network. To be truly independent, the ABC board must have the capacity and the discretion to direct expenditure in accordance with its published strategic plan.

(Memo Keith: thanks for your support of the principle of untied funding. Be assured we journalists at the ABC cannot be bribed and are pressing the federal government to make it clear that funding must be untied. We don't want any government to override our board's independent discretion through the manipulation of ABC services to try to win political credit points from a mistakenly presumed constituency.)

The $10 million supplementation is going into hiring journalists and producers in clearly flagged regional reporting, rounds, research and fact-checking structures.

We are all hoping that the investment is recurrent and becomes part of the triennial funding appropriation.

To survive the digital revolution that is plugging Australian audiences into global content sources, the ABC and SBS will have to redefine themselves through a commitment to quality and distinctiveness and, in the ABC's case, localism.

While the ABC remains among the most trusted institutions in Australia, audiences are increasingly aware of quality global providers which they can now access with the click of a mouse.

Inside the ABC, the debate is now intense as the broadcaster develops what is known as its converged news-gathering project, with a central editorial command directing resources through radio, TV and online.

The obvious concern is that our journalism can turn into 'churnalism' to meet the relentless demands of digital immediacy and being multi-channel and multi-device.

The ABC needs to develop editorial skills to counter this. We need more specialists, experts in their fields, who can write, report and analyse with authority and wit. That takes years of professional effort, mentoring and talent spotting. It takes a sustainable investment.

While shadow communications minister Malcolm Turnbull told Tony Jones on *Lateline* that an incoming Abbott Coalition government would not cut the ABC's budget, we all remember the Howard government's 1996 breach of its hand-on-heart election commitment to maintain funding in real terms.

Claiming that the ABC must take some pain to refill "Beazley's black hole", the ABC was cut $50 million immediately with the industrial execution of 1000 staff. That government, with the aid of the Murdoch press, then started a war of vilification and abuse of public broadcasters – frightening some into self-censorship and pre-emptive buckling.

Tony Abbott is a man of his word, isn't he? If, as prime minister, Tony Abbott again breaches the Coalition's pre-election commitment to maintain ABC funding in real terms, all public broadcasting supporters will be called on to resist and rally in support.

The dead may be many through any punitive Abbott downsizing at the ABC, but those who survive the purges will have a historic duty to keep the hope of public broadcasting alive in Australia.

The ABC is not the plaything of influence-peddling politicians, no matter who is in power in Canberra. Both Labor and the Coalition have bad records of board stacking and funding intimidation.

Now through arms-length merit selection of ABC directors (Prime Minister Gillard secured Opposition leader Abbott's approval of Jim Spigelman's appointment as chairman after a merit selection process), we are all hoping for a new maturity. The ABC and its audiences deserve no less.

With Google and Apple and YouTube and other global cyber-asters now retrieving substantial revenues from Australians, the debate within our industry should now swing onto domestic content creation investment – through public investment and private entrepreneurship.

Government and competition regulators have a challenge before them and should not sit back as creativity is crushed by more dominant forces.

Australia's unique public broadcasting system can help to keep the creative spirit going while the digital revolution plays out.

Quentin Dempster is an ABC broadcaster.

PRESS FREEDOM AND AUSTRALIANS ABROAD

Increasingly, journalists around the world are being subjected to harassment, threats, intimidation, assaults and murder in an effort to silence them. The Media Alliance remains concerned for Australian journalists working abroad. The Media Alliance believes the Australian government should step up its efforts to engage with foreign governments in situations where Australian journalists are threatened or detained for doing their job and this should be done as promptly as possible when it becomes aware of incidents where journalists are at risk.

Austin Mackell

On February 11, 2012, Australian freelance journalist Austin Mackell, his translator Aliya Alwi and a US student Derek Ludovici drove to the northern Egyptian city of Mahalla al-Kubra to interview well-known trade unionist Kamal el-Fayoumi. On arriving, they were attacked and threatened by a small mob. They were instructed by a police officer to go to a police station for their own protection. Over the next 56 hours, they were held in custody and repeatedly interrogated. During this time, they were allowed minimal communication with the outside world. It was alleged by Egyptian authorities that the three had promised children money if they threw rocks at the Qism El-Tani police station in Mahalla. Mackell was accused of "inciting people to vandalise public property and governmental buildings" – charges that carried a penalty of between five and seven years in prison. All three denied the charges.

After they were released from custody and subjected to a travel ban, the three faced ongoing threats and harassment. Mackell's passport, camera, laptop and external hard drive were confiscated, along with 800 Egyptian pounds kept at his apartment. His flatmate's camera was also confiscated, along with Alwi's mobile phone, and money from both Alwi and Ludovici.

The police released their details to the state media. Consequently, their faces and addresses were featured in the media across Egypt and they were accused of being spies. They were in fear of their lives. Mackell was forced to find safe accommodation and was unable to work without the tools of his profession. He received assistance from the NSW Journalists' Benevolent Fund organised through the Media Alliance, as well as assistance from the Committee to Protect Journalists and the Rory Peck Trust.

Exactly 200 days after they were first detained by the police, charges were dropped against all three and the travel ban against Mackell was lifted. The decision to drop the charges came after intervention by Australia's foreign minister, Bob Carr, and Egypt's ambassador to Australia, Omar Metwally.

In April 2012, ABC TV Canberra news presenter Virginia Haussegger and Mark Kenny, then political editor with *The Advertiser* newspaper, presented a letter from the Media Alliance's Christopher Warren to Ambassador Metwally expressing the Media Alliance's concerns over the charges against Mackell and urging the Egyptian authorities to drop the charges.

Mackell's property was returned allowing him to continue his work as a journalist.

Julian Assange

Julian Assange has been and continues to be a member of the Media Alliance. The Media Alliance is concerned that he continues to face a threat of extradition to the United States to face charges relating to his role as editor-in-chief of WikiLeaks.

The Media Alliance believes that WikiLeaks has shown a courageous and controversial commitment to the finest traditions of journalism: justice through transparency. WikiLeaks applied new technology to penetrate the inner workings of government to reveal an avalanche of inconvenient truths in a global publishing coup. Its revelations, from the way the war on terror was being waged, to diplomatic bastardry, high-level horse-trading and the interference in the domestic affairs of nations, have had an undeniable impact.

As a result of WikiLeaks publishing much of the material it has received, there has been a robust debate inside and outside the media about official secrecy, the public's right to know, and the future of journalism.

Journalism is about the public's right to know, about holding the powerful to account and ensuring the functioning of a healthy democracy. Every day, in Australia and around the world, journalism includes leaked information about political parties, corporate decisions and upcoming government announcements. Many of the leakers are people of high office seeking to exploit some advantage. And then there are crucial and courageous leaks from whistleblowers exposing wrongdoing.

In this new digital environment, journalism continues to do what it has always done: reveal information that is in the public interest in an accurate, timely and responsible fashion. WikiLeaks and Assange tick all these boxes.

As Canberra press gallery veteran Laurie Oakes himself has said in relation to WikiLeaks: "Whether it is a letterbox full of classified cables or a quarter of a million on a CD, the principle is the same."

Paul Moran at work.
PHOTO COURTESY OF THE ABC

It is that principle that explains why several of the world's leading newspapers, among them *The New York Times*, *The Guardian*, *The Sydney Morning Herald* and *The Age*, chose to partner with WikiLeaks in revealing the "Cablegate" leaks.

It is journalism's job to publish those stories that are in the public interest and the public's right to know. The fourth estate ensures that governments are held to account for the actions they pursue in our name. If we believe this about journalism, then the whistleblowers who have provided information to WikiLeaks should be afforded protection and WikiLeaks and its employees, including Assange, should be free to carry on their work.

The Media Alliance believes that an unequivocal statement by the US government that it will not seek to extradite or punish Assange or place any other impediment upon his work is necessary. The Media Alliance believes it is also vital that the Australian government correct past statements suggesting that Assange had broken the law.

Remembering Paul Moran

The Media Alliance remembers Australian Broadcasting Corporation cameraman Paul Moran who was murdered by a suicide bomber 10 years ago while on assignment in Northern Iraq at the start of the 2003 invasion.

Moran, 39, had been filming a story with ABC correspondent Eric Campbell on Kurdish "peshmerga" guerrilla fighters in the village of Sayed Sadiq. He was filming some final images of a group of fighters when a car drove up next to the group, stopped and exploded, killing Paul instantly.

Iraqi terrorist group Ansar al Islam claimed responsibility for the attack. The group's founder, Najmuddin Faraj Ahmad, also known as Mullah Krekar, ordered the attack that killed Paul.

Krekar had lived in Norway as a refugee since 1991. In 2007 he openly taunted the Australian government to come and get him.

Krekar is currently in prison in Norway on four counts of intimidation under aggravating circumstances and is due to be released in 2015. The Media Alliance continues to campaign for the extradition of Krekar from Norway to face possible war crimes charges under section 115 of the *Criminal Code 1995 (Harming Australians)*.

The murder of Paul Moran is an important reminder of the dangers journalists confront. But increasingly, the murder of journalists is being met with impunity as authorities fail to pursue these dreadful attacks with proper investigation and due judicial process to bring the perpetrators to justice. The most important signal any government can send about press freedom is that it will pursue with vigour and proper resources not just the people who pull the trigger, but also those who ordered the killing. To fail to do so means that the killers are literally getting away with murder.

The Media Alliance continues to call on the Australian Federal Police to take every step to bring Mullah Krekar to justice in Australia for his part in ordering the attack that led to the death of our colleague.

No justice for Paul Moran

Eric Campbell

I hate March 22nd. It's the day my cameraman Paul Moran was killed in Iraq and every year as the date nears the flashbacks return. I see the car appearing out of nowhere, the explosion of flames and flying debris and the body of a man I was responsible for lying shattered on the road. I pick over the decisions I made that put us at that spot at the exact moment of a suicide bombing and I feel the sickening shame of surviving.

This year is the 10th anniversary of Paul's murder. I say murder because the target wasn't soldiers, but civilians. We were standing near a group of ordinary villagers when a suicide bomber crashed his car into them and blew it up. Paul was standing in front of me so he took the full force of the blast. That's how I survived.

Ten years on, the man I blame for what happened because he trained and directed the suicide bombers is in prison in Norway for separate crimes. His name is Mullah Krekar, a fanatical Salafist who set up a terrorist training camp in northern Iraq while enjoying political asylum in the West. The Media Alliance is seeking to have him extradited to Australia to be tried for Paul's murder, to show that journalists like other civilians can't be killed with impunity. I doubt it will ever happen. Australian authorities have shown little interest in pursuing the case and it's rarely even mentioned unless there's a peg like an anniversary.

It's a long time since being a journalist gave you any special protection. The obscenity of needing armour to report on conflicts began in Croatia in 1991, when a rumoured bounty on Western journalists forced news crews to don flak jackets and travel in bulletproof vans. It continues to this day. On my first day in a war zone, in Chechnya in 1996, Russian soldiers opened fire on us because they were annoyed we were filming them. I've known journalists in Russia, China, Uzbekistan, Serbia, Kyrgyzstan, Kazakhstan, Belarus and Ukraine who've been beaten, imprisoned, even killed for exposing corruption. One woman, a Russian newspaper editor named Larissa Yudina, was murdered after giving me an interview about a local politician embezzling State funds. The politician, Kirsan Ilyumzhinov, was never charged even though his aides were found guilty of her murder. He remains an international statesman; the president of the world chess federation, FIDE.

The admirable CPJ, the Committee to Protect Journalists, has documented the cases of 150 journalists killed in Iraq since the US invasion. My cameraman Paul Moran was the first. It's impossible to quantify how many journalists have been traumatised.

When I returned from Iraq I was forced to recognise how damaged I was from the conflicts and natural disasters I had covered and the near injuries and threats of violence I'd experienced. Just 10 years ago, many journalists still saw it as unmanly to admit to trauma. Nightmares weren't mentioned, outbursts of anger were self-justified and anxiety was self-medicated with alcohol. But for months after Iraq, I was unable to function. Paul's death had brought to the fore an accumulation of mental hurt. The ABC made me go to trauma counselling. I hated every moment of it. But eventually I learned techniques to stop the waking nightmares, the terrifying flashbacks and the guilt I felt for not being dead.

I've continued to work in dangerous places and often see disturbing things. These days I prepare for them mentally and monitor the feelings they induce. I don't believe I've been traumatised by any assignment since Iraq. I wish I could be as confident about my colleagues.

One issue that's emerged in trauma research is that even tape editors at base have been damaged by what they see, monitoring hours of footage of bombings and tsunamis and wars and earthquakes. The only way to protect staff absolutely is for media groups to cease covering such events.

I wonder if in 10 years time there will still be a discussion about the dangers to journalists in conflict or disaster zones. In an era of declining budgets and expanding outlets it is tempting for media groups to rely exclusively on agency pictures voiced by reporters in their bureau offices or headquarters. Even in the Iraq War, started by the West, the casualties were mainly local hire Arabs taking risks foreign networks were happy to outsource. Their deaths barely rated a mention in the news programs that hired them.

But as someone who regrets every day ever going to Iraq, and who dreads the approach of that wretched anniversary, I believe withdrawing from the business of bearing first hand witness would be the greatest tragedy of all.

Eric Campbell is senior reporter at the Foreign Correspondent program on ABC TV. A former ABC bureau correspondent in Moscow and Beijing, he has reported from more than 70 countries.

PRESS FREEDOM IN NEW ZEALAND

Clare Curran

The fundamental role of the news media is simply to report fair and balanced information to citizens. In doing so the news media acts as a "watchdog" or power check, protecting the rights and interests of citizens. While factors such as entertainment undeniably hold some importance to the news media, it is the watchdog function of the news media that is fundamental to the workings of a democracy.

The democratic functions of the media to educate and inform citizens, and to act as a power check to the state, has been overridden by content that is focused on producing profit.

Democratic functions have therefore fallen on the shoulders of public service broadcasters.

In New Zealand, a shrinking media environment, under-resourced watchdogs such as the Ombudsman, the Office of the Auditor General and the Privacy Commission, and an unrelenting move away from the notion of public media to commercial media in the broadcasting environment have eroded our ability to uphold these fundamental principles.

The ability of the print media to withstand the pressure of the online environment shows the power of disruptive technology on a business model which is rapidly becoming stressed and replaced with news being gathered online. The big question for our print media is how to make that pay. A discussion on this would require another whole piece, but contributes to an environment in which instability and restructuring are the norm and the craft of "good journalism" is under high stress.

A 2010 report by the UK media academic Chris Hanretty ranked New Zealand's TVNZ as 19/36 for perceived independence. Australia's ABC was ranked 5th and the BBC 6th.

Since then the situation has significantly deteriorated. Our only (small) public television broadcaster TVNZ7 was axed by John Key's conservative National government in 2012. The state-owned broadcaster TVNZ had its public service charter removed in 2011 and has been forced to become fully commercial.

New Zealand is now the only country in the OECD (bar Mexico) which does not fund a public television broadcaster.

Our public service radio broadcaster, Radio NZ, has had its funding frozen for more than three years. It has become lonely and increasingly isolated as the beacon of media freedom in a commercialised and cynical media environment.

The past four years have seen the steady decline in the news media's effectiveness to report fair and balanced information on news and current events. Government policy has created a media environment in which the news media cannot function efficiently, increasingly leaving citizens in the dark about decisions that affect their everyday lives.

Market pressures force the news media to focus on 'infotainment' or sensational stories in order to keep costs low and profits high. This has led to an environment where reporting standards continue to slip, leaving significant events and decisions with little or no coverage.

Government policies have also included a deal between TVNZ and Sky TV (Igloo), which essentially maintained Sky TV's monopoly of the pay-TV market, and a failure to reserve spectrum for public service broadcasting after the digital switch over.

The government's support of commercial media and continual disregard for public service content can also be seen in the recent funding decisions of NZ on Air (NZoA) which acts as the government's broadcasting funding mechanism, supporting locally produced free-to-air content across all broadcasting mediums. NZoA's annual statement of intent must be approved by the broadcasting minister and government, which means the government of the day has a direct influence on it.

Recent NZoA funding decisions certainly reflect the government's priorities and ethos regarding the media. TVNZ 2's reality television show *NZ's Got Talent* recently received $1.6 million, and while the show arguably does show young New Zealand talent, it is certainly questionable whether the commercially attractive formulaic program should have been considered for arts and culture funding.

Despite public concern, NZoA recently announced that it would spend another $1.6 million to fund TV3's *The X Factor NZ*, another talent show based on a similar format. Rather than producing cultural content that genuinely would not be produced without funding, NZoA has continued to support major broadcasters through the funding of commercially viable content.

NZoA has based its funding decisions on dividing funds equally between major broadcasters rather than in the interests of the public. While $3.2 million of taxpayers' money has gone to these foreign formatted television shows, which run on prime television at peak times and attract advertising dollars, local current affairs shows and unique locally conceived drama and factual shows are nearly at the brink of extinction.

These decisions made by NZoA reflect the government's stance on a free, fair, and balanced media. NZoA funding is only one example among many in the government's support of commercial broadcasters at the cost of citizens.

TVNZ has recently replaced its long-running

current affairs nightly program *Close Up* with *7 Sharp*, which can at best be described as infotainment rather than investigative journalism.

Perhaps the most bizarre event recently in the New Zealand media is pay-TV provider Sky TV's announcement that it will air a public service channel. Beginning in February, Sky TV is airing Face TV, a public service channel dedicated to screening local and international news and current affairs.

While some could argue that this is an instance of the market filling a gap, this argument is deeply flawed as the channel is behind Sky TV's pay-TV wall and therefore is not accessible to all New Zealanders. This move by Sky TV reflects that New Zealanders not only need but also want public service content, and signals the government's blatant disregard of non-commercial broadcasting in New Zealand.

The New Zealand media truly is in dire straits. Government policy and direction has created a media and political environment that is simply unable to provide the information that citizens need to make informed decisions, leaving dominant powers unquestioned and unchecked. The rights and interests of the citizen are no longer protected. This boils down to whether democratic processes can work without an effective and efficient news media. Perhaps ironically, if the news media had been functioning properly these issues may have already been addressed.

Clare Curran is the MP for Dunedin South and the New Zealand Labour Party spokesperson for broadcasting, communications and IT, disability issues and open government. She has worked as a journalist in Australia and New Zealand and is a member of the New Zealand's journalists' association, the Engineering, Printing and Manufacturing Union.

Information mayhem in Middle Earth

Brent Edwards

New Zealand's Official Information Act is coming under increasing scrutiny as John Key's government continues to block the release of documents it does not want made public. One high-profile case involves the making of the *Hobbit* movies in New Zealand.

In October 2010 the government did a deal with Hollywood studio Warner Bros to ensure the *Hobbit* movies were made in New Zealand. Both Warner Bros and the *Hobbit* director, Sir Peter Jackson, had threatened to shoot the movies elsewhere if the government didn't respond to an attempt by the actors' union, NZ Equity (part of the Media Alliance), to negotiate collective conditions of work on the movie set.

The government agreed to pay another NZ$30 million to keep the films, and changed its industrial law in one day to meet the demands of Jackson and Warner Bros.

Subsequently, a number of news media organisations and the Council of Trade Unions (CTU) requested copies of all documents, including emails, related to the government's handling of the matter. But only a limited amount of information was released, prompting both Radio New Zealand and the CTU to appeal to the Ombudsman's Office.

Ombudsman David McGee released his final decision on the case at the end of January, giving the government until March 1 to release 18 documents it had withheld. But his report also disclosed the lengths to which the government went to delay his investigation. On two occasions the responsible ministers agreed to meet McGee, only to cancel their meetings the morning they were due to meet. The final meeting was due to take place on December 5, nearly six months after ministers had received a draft of the ombudsman's opinion.

As well, McGee's report discloses the views of both New Line Productions and Wingnut Films, which both opposed releasing the information.

New Line said: "Disclosing our negotiations and innermost thinking, including certain strategic decisions, legal and personal opinions, offers from third-party governments and other private information, could damage business relationships we have with others (including those third-party governments that offered us special incentives), as well as impair our ability to effectively negotiate with certain third parties in the future, including the relevant unions."

It also warned that if the information was released it might not consider New Zealand as a destination for future films.

But McGee said while he accepted some of the information might not be helpful to business relationships, he rejected suggestions it was commercially sensitive.

Ironically, given his government had obstructed access to the information for more than two years, Prime Minister Key said he was very relaxed about releasing the information and did not fear any backlash from the Hollywood studios or Sir Peter Jackson.

There was, however, no immediate move by the government to release the information.

At the same time as the ombudsman's opinion was released, the justice minister, Judith Collins, made public the government's response to the Law Commission's review of the Official Information Act. The commission had recommended wide-ranging changes to the law, including bringing parliament under its reach.

But the government is only intending to deal with a limited number of issues from the review – ones that, strangely enough, include those concerns raised during the struggle to access the *Hobbit* information. And the changes the government intends to adopt provide stronger grounds for withholding information because of commercial confidentiality. As well, third parties – such as film studios – will be offered stronger protections under the law.

Key says this has nothing to do with the *Hobbit* episode. But if tougher protections are put in place, much of the *Hobbit* information the ombudsman has ruled should now be made public would be more easily kept from prying eyes. It would weaken the public's right to know what sort of lobbying commercial enterprises use to get concessions or incentives from governments.

In a separate report released in December, McGee also criticised the Ministry of Education for the way it handled Official Information Act requests related to the proposed merger of schools in Christchurch following the devastating earthquakes in 2010 and 2011.

In one case the ministry advised the Christchurch City Council to refuse a request for information on the basis that the information was not held by the council, when in fact the ministry knew it was.

The ministry also advised the applicant to withdraw his official information request, suggesting that if he did so he would get the information more quickly. Ombudsman McGee says the ministry was wrong to give such advice.

Because of this particular case the chief ombudsman, Beverley Wakem, is now conducting an investigation into Official Information Act policy and practice in selected government agencies. That investigation might uncover whether these are isolated instances of obstruction or reflect a wider, more worrying trend within the government of preventing the release of information.

There is also likely to be wider debate about the government's plans to change the Official Information Act.

The question now is: will politicians use this opportunity to open up government to even more public scrutiny or take a step back from the progress made in the last 30 years since the Official Information Act became law?

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

ILLUSTRATION BY ROD EMMERSON

PRESS FREEDOM IN THE ASIA-PACIFIC REGION

Afghanistan

For the first time since 2005, there were no killings of journalists in Afghanistan during the past year. But the country remains dangerous for journalists and the government continues to assert its control over the media. Two radio stations were closed by the authorities in 2012 and at least 12 journalists were arrested or attacked by police in various parts of the country.

On February 26, the council of ministers banned "the use of foreign accents and languages on radio and TV," a decision that follows President Karzai's directive to the information and culture ministry on October 1, 2012 to prosecute media acting against "the national interest."

In June 2012, the Afghan government circulated a draft set of amendments to the media law that would greatly increase the power of the Ministry of Information and Culture to determine the composition of the regulatory bodies envisaged under law. One amendment proposes the minister holding the relevant portfolio would head the High Media Council, which is the guiding hand behind policy. Another proposes that the High Media Council will have greatly expanded powers to set policies and determine their mode of implementation. This body would, in turn, have controlling influence over the Media Violations and Complaints Assessment Council, which is the body tasked with routine regulatory functions.

In the run-up to the 2014 deadline for international troop withdrawals, Afghanistan's press is significantly decreasing. Some estimate that more than 700 journalists lost their jobs by mid-2012 and that news organisations set up by political or religious leaders are most likely to survive.

Burma

Burma has recently undergone a period of dramatic reform. The government started relaxing censorship in July 2011. An amnesty announced by the Burmese government on January 13, 2012 saw the release of imprisoned journalists and bloggers. In that same month, Burma dissolved the press censorship board officially known as Press Scrutiny and Registration Division (PSRD) – pre-publication censorship had applied to everything from newspapers to song lyrics and fiction. It was one of the repressive methods of control used by the military junta.

While pre-press censorship was removed, the government still required newspapers to submit copies for official, post-publication review and several restrictive laws remained in effect, including the 1962 *Printers and Publishers Registration Act and Electronic Act* and the 2000 *Internet Law*.

A draft Press Law Bill (2013), drawn up by the Ministry of Information without input from independent press groups, maintains government control over the media. The bill bans reporting on several vague topics, including any news or commentary critical of the military-drafted 2008 constitution, and allows for six-month prison sentences for failing to register news publications with the government.

In February this year, the Burmese government invited applications to start up private daily papers. Private daily newspapers in Burma were outlawed in 1964 under the military junta run by the late General Ne Win, and privately owned newspapers were nationalised by the military regime.

Now, four papers have been granted permission to operate and recently began publication. However, if passed, the new draft press laws have the potential to strictly control what they are able to report.

In terms of broadcast media, the government had a total monopoly, but in the past year satellite TV has emerged and there is the beginning of other private broadcasters; there are now nine private FM radio stations.

In a regional context, Burma's chairing of the Association of Southeast Asian Nations (ASEAN) in 2014 also provides an excellent opportunity to focus international attention on Burma's human rights situation.

China

Chinese media faced severe restrictions in 2012, continuing the downward trend of press freedom which began after the Beijing Olympic Games in 2008.

Media faced restrictions on reporting several controversial situations in 2012, including the Bo Xilai scandal, the suspicious death of blind activist Li Wangyang, the escape of blind human rights lawyer Chen Guangcheng from a year-long house arrest and his flight to the US consulate in Beijing, and the announcement of the new leadership of the Communist Party at the 18th Communist Party Congress.

Online censorship escalated, and people who posted a message or even disseminated a posted message that went against the official government line were detained for several days.

Xinjiang and Tibet still suffer a complete blackout on the free flow of information. Security has been high in the resource-rich Xianjiang province since 2009, when 200 people died in riots between Uighurs and Han Chinese in the province's capital of Urumqi. There was further violence in 2011 and, according to official local news reports, on February 28, 2012, 13 people were killed by nine attackers armed with knives near the city of Kashgar. Seven of the nine suspects were gunned down by police at the scene, with two others arrested in the city soon afterwards. However, further information on the attacks has yet to be released by the local government, with only selected media outlets allowed to enter into the city to report on the story.

The situation in Tibet is much worse. During 2012, there were more than 80 cases of self-immolation by Tibetans protesting against Chinese rule, according to the International Campaign for Tibet.

No independent media personnel were granted permission to enter the Tibetan zone or freely go to Xinjiang.

Media in Hong Kong faced unprecedented interference and restriction. In the first such case since the handover of Hong Kong to China in 1997, a journalist was penalised after he asked a so-called sensitive question of the President of China.

Overseas correspondents in China also experienced challenges in 2012. Melissa Chan, a correspondent for Al-Jazeera English, who had been reporting sensitive cases of human rights violations in China since 2008, was asked to leave and escorted out of the country in May 2012. The Al-Jazeera English bureau was also suspended. In other instances the authorities used the content of articles to determine which correspondents' working visas would be extended.

The websites for Bloomberg, *Business Week* and *The New York Times* were blocked in China after publishing stories detailing the extensive assets of relatives of the now president Xi Jinping and the former premier Wen Jiabao.

Fiji

Fiji is ranked 117 out of 178 on the Reporters Without Borders press freedom index. Under the state of emergency (in effect since 2009) the government passed several decrees, including The Media Industry Development Decree which enforced strict punishments for journalists and publications that the government deems "irresponsible" and for stories considered capable of "incitement".

According to Fiji's chief censor, Sharon Smith-Johns, "Once the state of emergency is lifted, [the Media Authority] will continue to ensure the media is balanced and accountable in their reporting."

The Media Authority can demand information and documents from journalists, issue fines up to $100,000, and even jail journalists for up to five years.

In January 2012 a new decree granted full exemption from defamation claims for any private or public statements made by the regime's leader, Frank Bainimarama, and his ministers.

In June, Fiji's government threatened commercial broadcaster Fiji TV that any coverage of members of the "opposition" could result in the loss of its broadcasting licence. The station was put on notice that all content would be monitored and will influence the decision regarding the renewal of Fiji TV's 12-year broadcasting licence.

Pakistani media representatives shout slogans against the killing of Malik Mumtaz during a protest in Karachi on February 28, 2013

Pakistan

Ten journalists were killed in Pakistan in 2012 and nine journalists have been killed in the first four months of 2013 – three journalists were killed in separate incidents in one week in March. The safety situation for journalists and media workers, in a country that is deemed one of the most dangerous for journalists, shows no signs of improving.

The situation in the Federally Administered Tribal Areas (FATA), Khyber Pakhtunkhwa and Balochistan is especially dire. Journalists in these regions not only face threats to their physical safety but also lack the security of full-time employment, fair wages, decent working conditions and bargaining power. Other than in the case of the *Wall Street Journal*'s Daniel Pearl, there has not been a single arrest or prosecution of anyone for murdering journalists in Pakistan ever.

In addition to the serious physical threats faced by journalists in Pakistan, reports of journalists' wages being withheld are becoming increasingly common. In some cases, journalists report having wages withheld for up to 11 months in what is becoming a pattern of exploitation of media workers and a serious threat to press freedom.

Philippines

Numerous killings and attacks on journalists have occurred in the Philippines over the past 12 months. As well as these physical attacks, legislative reforms that stifle freedom of expression and a prevailing culture of impunity continue to threaten press freedom.

Four journalists were killed in the Philippines in

2012 beginning with the January 5 killing of Tatak News Nationwide publisher Christopher Guarin in General Santos City in the southern Philippines. He was shot by gunmen while driving his wife and two children home from his office.

Most recently, in March 2013, reporter Jun Valdecantos was shot by unidentified gunmen.

Threats and violence against journalists over the past five years have been mostly directed at local radio station hosts – all of the journalists killed over the past year were radio journalists.

Aside from the physical attacks, legislative reforms that threaten freedom of information – such as the non-passage of a freedom of information bill and the passage of an anti-cybercrime law that criminalises libel on the internet – are contributing to the culture of impunity.

The culture of impunity is demonstrated further with the protracted trials of the Ampatuan Massacre suspects. It is three years since 32 journalists were executed in the southern Philippines – the deadliest single attack against journalists on record. Less than half of the nearly 200 suspects in the massacre have been taken into custody, and only 63 of them have been charged. No-one has been convicted to date. This is despite ongoing claims by the Aquino government that they are committed to pursuing justice for the massacre victims and their families.

Nepal

During the first week of 2013, press freedom advocates in Nepal and around the world welcomed the arrest of five people for the August 2004 murder of Dekendra Thapa in the Dailekh district in far western Nepal. Thapa was a journalist with Radio Nepal and the Kathmandu-based *Nepal Samacharpatra* daily. Following the arrest of one person, an active member of a major political party in Nepal, on January 3, the police arrested four others on the basis of his reported confession.

The victory for justice was short-lived when, days later, the prime minister of Nepal ordered the investigation stopped on the grounds that a crime that occurred during the country's civil war would not come under ordinary criminal jurisdiction and should be left to a Truth and Reconciliation Commission.

Press freedom organisations came together to address an open letter to the prime minister, urging him to let the prosecution proceed, so that the climate of impunity is dispelled. The Supreme Court of Nepal also warned the prime minister that he was doing something unethical.

The investigations are continuing, but at a snail's pace that is interfering with the sense that justice has been served.

According to various indicators published, there has been an overall decline in press freedom in South Asia and Nepal was no exception to the regional rule. Several journalists were attacked and many were murdered in Nepal in 2012. Increasing threats and assaults of journalists and prevailing impunity has served to steer journalists to reporting what is considered favourable of the ruling regime.

Sri Lanka

The peace dividends of post-conflict Sri Lanka have only been seen by a few, who rule the country with authoritarian abandon. Human rights violations and a general lack of law and order has taken over after the civil war ended in 2009. Freedom of expression, journalists and independent newspapers, in particular, have been casualties of this post-conflict mayhem.

At the end of 2012, more than 50 journalists and editors had been forced into exile, and many others had been killed or had disappeared. No-one has been prosecuted for any of the threats, assaults, murders, or disappearances of journalists in Sri Lanka. Impunity reigns.

Many independent newspapers have been cowed into toeing the official line through self-censorship. Only a few online publications remain accessible within Sri Lanka, with many being blocked by the authorities and others having to jump through bureaucratic hoops to retain their right to continue publishing online.

New legislation and administrative rulings curtailing human rights, and especially freedom of expression and the right to information, are being passed in parliament without so much as a whimper from the opposition.

The recent US-sponsored resolution at the UN Human Rights Council was meant to exert pressure on the present regime to respect human rights including freedom of the press, but whether international pressure will actually achieve its end is left to be seen.

Politically manipulated inter-ethnic conflict between the majority Sinhalese and minority Muslim community has also seen a sudden increase. Journalists have been caught in the crossfire while law enforcement authorities watch from the sidelines, paralysed by official sanction of the hooligans.

THE MEDIA SAFETY AND SOLIDARITY FUND

The Media Safety and Solidarity Fund is supported by donations from Australian journalists and media personnel to assist colleagues in the Asia-Pacific region through times of emergency, war and hardship.

Established in 2005, the fund is a unique and tangible product of strong inter-regional comradeship administered through the Asia-Pacific office of the International Federation of Journalists in collaboration with the Media Alliance and the Media Safety and Solidarity Board.

It is entirely funded by journalists to aid their colleagues who work in less privileged circumstances.

Nepal

Nepal's transition to democracy since a violent coup in 2005 has been nurtured by the hard work of the independent journalism community and journalists' organisations.

This transition has come at great personal sacrifice to Nepal's media community, with several journalists killed or disappeared since 2001. Many children of journalists have lost one of their parents and their families struggle to sustain their livelihoods.

The Media Safety and Solidarity Fund was asked to support a long-term program to fund the schooling and educational needs of all children of killed journalists through to adulthood – a projected commitment of at least 20 years.

In 2011–2012, the fund supported 28 children of journalists and media workers killed in Nepal.

Philippines

The massacre of 32 media personnel, among a group of 58, in the southern Philippines on November 23, 2009, is the world's worst single atrocity committed against the media in living memory. The Media Safety and Solidarity Fund has worked closely with the National Union of Journalists of the Philippines (NUJP) over many years to assist in setting up an

NUJP Safety Office, which is now supported by the Norwegian journalists' union, Norsk Journalistlag (NJ), with IFJ Asia-Pacific assistance.

In 2011–2012, this fund supported about 100 children of journalists and media workers killed in the Philippines, including the children of those killed in the 2009 Ampatuan massacre.

Sri Lanka

During 2011–2012, the fund agreed to support the education of the two children of disappeared cartoonist Prageeth Eknaligoda for the next three years. The fund has also established an annual lecture, in support of press freedom in Sri Lanka, to commemorate the life of Lasantha Wickrematunge, a prominent Sri Lankan journalist and human rights activist who was assassinated in January 2009.

Nepal Children's Education Fund.

China

The Fund continues to support a press freedom monitoring project in China. Run by IFJ Asia-Pacific, it is jointly funded by the National Endowment for Democracy.

The Hong-Kong based media monitor and project coordinator researches and writes background reports, media statements and a regular monthly e-bulletin in English and Chinese, which are distributed through an international network of China press freedom advocates, journalists and freedom of expression experts developed by the program coordinator.

Disaster relief

Over the past 12 months, the Appeal has provided one-off grants of disaster relief support to Pakistan, the Philippines, New Zealand and Japan totalling $26,358.

IFJ AP human rights advocacy

The Media, Entertainment & Arts Alliance hosts the International Federation of Journalists' (IFJ) Asia-Pacific office. The IFJ's most high-profile work is its human rights advocacy work – press releases, reports, lobbying, coordinating campaigns, coordinating missions, providing hands-on consultation for individual journalists in trouble. To help support the office continue this work, the Media Safety and Solidarity Fund has committed to directly funding the IFJ's human rights advocacy program.

International News Safety Institute Asia-Pacific

The Media Alliance is affiliated to the International News Safety Institute which promotes safety around the world, particularly through training, advocacy, support and advice. The Asia-Pacific Safety Office is a joint initiative between IFJ-AP, INSI and UNI APRO and the Media Safety and Solidarity Fund – a joint project of the Alliance (Australia) and the EPMU (New Zealand). The Safety office, to be based in Singapore, will strengthen and streamline regional safety support to media workers in particular around issues of safety advocacy, support and training, emergency response, organisational support and alliance building.

Gift and other funds

The Media Alliance has been seeking the capability for tax-deductible registration for the Media Safety and Solidarity Fund. Unfortunately our applications both to register as a cultural organisation with the Office of the Arts and as an international aid organisation with AusAID have both been rejected. As a result, we are examining how to better structure our foundations and the Media Safety and Solidarity Fund to enable them to be individually registered to receive tax-deductible donations.

THE WAY FORWARD

The push for increased media regulation erupted in Australia at the time of the phone-hacking revelations in Britain. Despite there being no suggestion or evidence that any similar activity had taken place in Australia, there was a substantial demand for Australian journalists and their employers to come under increased regulation.

Even though one government inquiry, the Convergence Review, was already under way, a second, the Finkelstein inquiry, was launched to examine the need for increased media regulation. The Media Alliance made submissions to both inquiries.

In our submissions we pointed out the need to recognise how forces stemming from the digital revolution were transforming the media industry and creating upheaval in the mainstream media in particular. We warned that jobs were being lost, the economic model for funding quality journalism was broken, and that there was a need to recognise and understand the implications of convergence.

Subsequently, the government announced its media regulation reform package. The package failed to address the convergence issue and the need to promote diversity and encourage new media voices. Instead, the government proposed that it appoint a Public Interest Media Advocate to oversee the media industry's self-regulation bodies.

Quite rightly, the media reform package failed to go any further.

But what has been galling during this process is the way that attacks on press freedom have been ignored: the increasing number of ethical journalists being subpoenaed in order for them to reveal their confidential sources; new anti-corruption legislation that empowers "star chambers" to use excessive powers of secrecy and coercion to go on fishing expeditions to discover what journalists know; the diluting of shield laws, whistleblower protection and freedom of information legislation; and the increased use of suppression orders to mask matters that should be made public in the judicial system.

The Media Alliance remains committed to the *Journalist Code of Ethics* as the benchmark of proper journalistic behaviour. The code was created by the Media Alliance in 1944 and we believe it continues to be a key tool for ensuring ethical, credible and independent journalism.

Wall graffiti in the Marais district, Paris, taken by SBS video-journalist Amos Roberts.

But we are concerned that governments, for all their noble statements about press freedom, are failing in their duty to protect and enshrine press freedom in law by undermining shield laws, creating obstructions to freedom of expression, threatening whistleblowers and by imposing restrictions on media access.

It is time for government to recognise that the tenets of press freedom are not variables but absolutes. If governments believe in journalist privilege then the shield laws they draft must acknowledge that privilege at all times and in all circumstances. The Media Alliance has called for uniform shield laws to be created around the country and has written to the Standing Council of Law and Justice, consisting of the attorneys-general, to consider creating a national scheme of shield laws just as they did with defamation laws.

It is also time to consider uniform Freedom of Information laws and uniform whistleblower protection laws. These basic elements that promote open, transparent government and encourage scrutiny and honesty should not vary from one border to another, from one jurisdiction to another.

If we are serious about the role of the fourth estate in our society, then it's time for building a strong uniform foundation for press freedom to ensure a healthy, functioning democracy.

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