SECRECY AND SURVEILLANCE

THE REPORT INTO THE STATE OF PRESS FREEDOM IN AUSTRALIA IN 2014

MEAA MEDIA ENTERTAINMENT & ARTS ALLIANCE

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THE WALKLEY FOUNDATION

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2014 AUSTRALIAN PRESS FREEDOM REPORT

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FOREWORD

A year ago, the press freedom debate in Australia centred on protecting confidential sources. Up to seven MEAA members were facing court action brought, in the main, by the rich and powerful going on fishing expeditions to find out the sources for various news stories, and what other information those sources may have passed on to the journalists.

Thankfully, many of these legal threats abated. But the core issue remains: the shield laws designed to protect journalists observing their obligation, under MEAA's *Journalist Code of Ethics*, to not reveal confidential sources have failed. Shield laws are not uniform across the country and they still require enormous legal expense before they come into effect.

Over the past year, the threats to press freedom have become more insidious. Revelations by whistleblower Edward Snowden suggest that metadata surveillance will make it increasingly difficult for journalists and confidential sources to safely interact without the source's identity, and the story itself, being compromised.

Journalists are also faced with barriers to the free flow of information, when the military and the government decide to tell the public absolutely nothing, and instead engage in stonewalling.

And then there's miner-turned-politician Clive Palmer, who in February had a journalist ejected from a press conference because the mining tycoon turned politician doesn't "recognise" the publication the journalist works for – *The Australian* newspaper. The old principle of "one in, all in" applies and if anyone seeks to eject a journalist from a press conference then the remaining media should deem the press conference concluded and depart.

Snowden's leaks in June last year, which confirmed the extent of metadata surveillance, have had important implications for press freedom. Snowden revealed that the US National Security Agency (NSA) stores the online metadata (transactional information) from the phone calls and emails of millions of internet users.

For journalists wanting to contact confidential sources, receive information from them, store it and prepare a new story using that information – that presents a massive threat to their ability to protect the identity of their source and get the story out.

The change in government has also led to a change in the flow of information in Australia, particularly with regard to Operation Sovereign Borders, the militarisation of Customs and immigration activities. Now there's a point-blank refusal to discuss what Customs and the Australian Defence Force are doing in our name.

It seems public servants don't care much for the public's right to know.

The attack on asylum seekers at the detention centre on Manus Island in February is also shrouded in mystery. Media access to detention centres remains problematic, and governments in Australia, PNG and Nauru are not particularly cooperative.

In recent months the assaults on press freedom have stepped up. The Australian Federal Police sent more than 30 of its officers to raid several offices of Seven West in the hunt for documents pertaining to a deal to pay Schapelle Corby's family for an interview.

The government has turned its attention to public broadcasting, demonstrating an extraordinary degree of government interference in editorial independence. This has been coupled with new moves that threaten to slash the budget of the ABC and SBS.

When it comes to press freedom the biggest battles are often fought by courageous individuals for principles that assist and protect us all. The plight of Australian journalists Peter Greste and Alan Morison are a case in point – as are the many journalists imprisoned or threatened because of their journalism. They need all the support we can give them.

Christopher Warren
Federal secretary
MEAA

Christopher Warren
Federal secretary
MEAA

THE YEAR IN AUSTRALIAN MEDIA LAW

Peter Bartlett

Another interesting 12 months for the media. Landmark cases, new legislation and a changing online environment are all forcing the media to adapt in order to remain competitive.

Defamation

Defamation online is growing with social media, websites, blogs and discussion threads all allowing the instant dissemination of defamatory material to millions. Recent decisions indicate that the award of significant damages is no longer confined to traditional media. In fact, the online area is arising as the new battleground for defamation, laying claim to some of Australia's most generous awards of damages for reputational loss.

We saw *Gluyos v John Best Junior,* where the plaintiff was awarded $50,000 against an undefended American defendant whose comments were downloaded and read in Victoria. *Bushara v Nobananas Pty Ltd* and *David Jeffrey & Anor v Virginia Giles* were also awarded $37,500 and $20,000 respectively.

A further two judgments arose from defamatory e-mails. The claim in *Enders v Erbas & Associates Pty Ltd* failed, whereby an employee sought damages for an e-mail that criticised their taking of sick-days. *Stanton v Fell* involved an e-mail implying a medical practitioner was not competent to supervise trainees. Both were held in favour of the defendant. Two judgments followed publication in both *Naurdin – Dovey v Naudin & Ors* ($65,000) and *Perkins v Floradale Productions* ($25,000).

There were mixed results for mainstream media. The long-running matter of *McMahon v John Fairfax Publications* resulted in a judgment of $300,000. Harbour Radio Pty Ltd and Ray Hadley were ordered to pay $280,000 and costs to Kim Ahmed. Fairfax also went down in the long-running *Gacic* case, being ordered to pay $160,000 to each of the three plaintiffs over a restaurant review.

Fairfax did far better against Shift 2 Neutral Pty Ltd, obtaining judgment for the defendant. Nine Network also had a victory over Born Brands Pty Ltd.

Room for reform in Defamation

The *Uniform Defamation Act* came into operation in 2005, prior to the introduction of Facebook, Twitter and the explosion in online publications. It is time for us to review the Act, especially since the commendable amendments in Britain's *Defamation Act 2013* which emphasises just how far behind Australia remains when it comes to defamation.

Currently in Australia, there is no limitation period for online publication and plaintiffs are able to issue multiple actions over similar articles in search of multiple caps on damages. This has been remedied under the new British legislation with the introduction of a single publication rule with a one-year limitation period being introduced.

Recent decisions in Australian courts have held Google and Yahoo to be publishers, while Britain introduces a new defence for website operators. The new Act puts a stop to libel tourism by introducing a public interest test that aims to prevent the likes of Russian oligarchs and Saudi billionaires from issuing in Britain. This is a fate Australia may yet face if we fail to heed the warning signs. Also of interest, trial by jury has been abolished.

The online environment

Defamation and Social Media

Social Media has not avoided our defamation laws. In *Mickle v Farley* a youth who posted defamatory statements on Twitter and Facebook was ordered to pay $105,000 plus costs. The judge observed: "That when defamatory publications are made on social media it is common knowledge that they are spread. They are spread early by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effort that stems the use of this type of communication."

This was one of the first social media cases decided. There are many in the pipeline and many to come. People will learn the hard way that social media is not like the telephone. There is a lasting record of what was ported.

Take down Orders

All mainstream media now publish and broadcast online. In addition we have a vast number of purely online publishers, bloggers and users of social media. A growing problem has been the number of applications to the courts to seek the taking down of historical online articles. The question has been raised whether an online publisher is in contempt for having available online an article that is in breach of a later suppression order that is arguably prejudicial to the fair trial of someone subsequently charged with an offence.

CARTOON BY LINDSAY FOYLE

Britain's Law Commissioner is looking at this in its contempt of court reference.

The NSW Court of Appeal in *Ibrahim* and the Victoria Court of Appeal in *Mokbel* have looked at these issues. They have 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 foreign websites).

Internet research by Jurors

Britain's Law Commission has recommended that jurors who carry out internet research during trials they are sitting on should face prosecution rather than contempt proceedings. As in Australia, judges in Britain give directions to the jury not to access the internet. Unlike many Australian jurisdictions, Britain does not have a law making it an offence for a juror to access the internet.

We made a submission to the Law Commission. It is pleasing that they see merit in the laws adopted downunder.

Constitution - Freedom of Speech

Kirby J observed in *ABC v Lenah Game Meats Pty Ltd*: "This Court has held that an implication arose from the constitution that no law may be enacted that would unduly prevent discussion of governmental and political matters relevant to the representative democracy of the Commonwealth."

However, as recently as August 2013, the Federal Circuit Court of Australia confirmed that the right to political expression in Australia is by no means unlimited. In *Banerji v Bowles*, a public servant used an anonymous Twitter account to make regular tweets that criticised federal policies and both Government and opposition frontbenchers. Facing the prospect of having her employment terminated, Banerji applied to the Court seeking orders to prevent termination on the grounds that her tweets were protected by the constitutional right to freedom of political communication. Judge Warwick Neville held that the right is "not unbridled or unfettered" and "does not provide a licence to breach a contract of employment".

While this implied freedom of political communication may restrict legislative power, this decision bolsters a long line of case law weakening the defence. The right is not absolute. It does not confer personal rights on individuals. A media defendant would be foolish to have any confidence in approaching a court hoping to rely on the implied freedom.

Suppression Orders

This is an area we have complained about for a long time. We have referred to Victoria as being the suppression order capital of Australia.

Jason Bosland, a senior lecturer from the University of Melbourne, has done a lot of work analysing the orders made. He says that there were 1502

suppression orders over a five-year period. There was a substantial rise in the number between 2008 and 2011.

A total of 851 suppression orders had no limit as to time. This means that if a journalist wants to seek to vary the order they had no limit as to time and they have to try and get all interested parties back into court if they want to vary the order. They could well be ordered to pay all parties' costs.

Half of the orders made were blanket orders on reporting the whole of the proceedings. Bosland felt that since the NSW *Court Suppression and Non Publication Orders Act*, suppression orders were on the rise in NSW. Hopefully the NSW Court of Appeal decisions in *Rinehart v Walker* and *Fairfax v Ibrahim* will reduce the number of suppression orders in that state. In *Rinehart v Walker*, Chief Justice Tom Bathurst and Justice Ruth McColl emphasised the importance of open justice and noted that suppression orders "should only be made in exceptional circumstances".

Also of interest, in April 2014 we saw the Victorian Police Commissioner obtain an interim order restraining the *Herald Sun* from publishing any information that would identify a lawyer, identified only as "Lawyer X". Victoria Police then sought to extend that order to encompass all media. This decision to restrain the *Herald Sun* and then move to seek a wider order on all media is basically unprecedented in Australia.

Open Courts Act 2013

The *Open Courts Act* came into effect in Victoria on 1 December 2013, consolidating non publication and court orders under a single Act. The Act has three positive impacts on the media. Firstly, it creates a general presumption in favour of disclosure of information and of holding hearings in open court, providing that orders can only be made in specified limited circumstances where there is a strong a valid reason for doing so. Secondly, News Media are to receive notice of an application from the court therefore ensuring the standing of the media to argue against and review suppression orders. Thirdly, the duration of a suppression order must be specified.

It will be interesting to see if this Act results in a fall in the number of suppression orders made in Victoria. I must say I have not noticed a drop. Furthermore, I don't see the Media being notified in all cases.

A positive development

The Court can make an order with extra territorial effect. It prevents the media from publishing in the hard-copy paper in other states, in breach of a suppression order in Victoria. The reality is that this practice has largely gone out of use as most articles appear online and are thus published in each jurisdiction. That said, a number of papers recently published a Rolf Harris article in breach of a British suppression order. *The Age* newspaper published on page one a warning to readers not to quote the article on social media as they themselves could be in contempt of the British court. The penalties for breaching a suppression order a frightening - $84,000 or up to 5 years jail for an individual and about $420,000 for the company.

As Bosland says: "You can legislate all you like, but unless judges are going to modify their behaviour and ensure that orders are properly drafted and reflect what was actually ordered, then the legislation could have minimal impact."

Open Justice

In Victoria journalists and the public can access and inspect the court file unless there are specific orders prohibiting access.

In NSW access to the file can only be granted to people other than the lawyers or parties involved for information on the discretion of judicial officers and registrars. This can lead to selective material being released.

ACMA

The Federal Court has found that the Australian Communications and Media Authority should not have made a finding against 2 Day FM following the prank call to the hospital ward for the Duchess of Cambridge. In particular the Full Court found that ACMA was not authorised to find that 2 Day had committed a criminal offence.

Costs

A large number of defamation actions are being issued against the media all over Australia. Few of them get to court. The main reason is because of the high legal costs involved in preparing and taking a claim to trial. The media is often faced with the difficult commercial decision of paying a plaintiff more than they think warranted or facing the lottery of a trial.

A significant problem for a media defendant in any Mediation is the significant legal quantum of legal costs incurred by the plaintiff, which the plaintiff sees as the starting point in any negotiation.

Whistleblowers

The *Commonwealth Public Interest Disclosure Act* came into force on January 15 2014. It provides whistleblower protection for Commonwealth public servants. The legislation was supported by the then Labor Government and then opposition. The legislation is complex.

The history of whistleblowers in Australia is not a happy one. Hopefully this legislation and that

existing in the states and territories will be more effective in protecting the whistleblower.

Shield Laws

Australia has seen significant legislative amendments to the laws of evidence, as numerous jurisdictions move to establish a presumption that journalists and their employers are entitled to keep the identity of their sources confidential.

The federal government and the state and territory governments of New South Wales, Victoria, Western Australia and the Australian Capital Territory have amended their respective Evidence Acts to introduce shield laws. These laws are a win for the protection of free speech in Australia and reinforce the long-standing argument of journalists that they have to protect the confidentiality of their sources.

However, it is important to note that these protections are not absolute. In all jurisdictions, the journalist must have promised anonymity to the source in order for the protection to be utilised. A court will also be able to decide against the applicant if it finds the public interest in disclosure outweighs any likely adverse impact on the informant or the ability for the news media to access sources of facts. Furthermore, state legislation defines "journalist" narrowly as someone "engaged in the profession or occupation of journalism", essentially excluding amateur bloggers from being covered by the protections.

Regardless of these new provisions, journalists are increasingly having the confidentiality of their sources challenged in our courts. Last year, Gina Rinehart's company Hancock Prospecting issued subpoenas against journalist Steve Pennells and his employer Western Australia Newspapers. This is one of the first instances in which a court has had the opportunity to consider the new legislation. In a huge win for the media, Justice Janine Pritchard found that in considering the new shield laws, an order of disclosure would *"constitute a breach of a fundamental ethical obligation"*.

I have personally represented the media in eight cases in the last 18 months. We have successfully avoided seven applications, with one still pending.

There is still room for improvement. The legislation lacks uniformity, with the multiple jurisdictions diverging on important issues such as the definition of a journalist and whether the law covers subpoenas. In a technological era where national publication is ubiquitous, certainty is more important than ever in ensuring the freedom of the press.

Discrimination

We have all heard a lot about the Andrew Bolt case and the Federal Government's proposals to amend the Racial Discrimination Act. I will not get into those issues here.

However, I will say that in my experience many complaints made under the Act against the media have little or no merit. The regulator should dismiss frivolous complaints without requiring the media to go to great lengths to explain why they are frivolous or by forcing them into mediation or even court. All of this requires the media to go to significant expense.

That said, we need anti-discrimination legislation to cover appropriate cases.

Media Regulation

The reforms proposed by the then Minister for Communications Stephen Conroy, were withdrawn. Tensions rose during the debate. Then News Ltd CEO Kim Williams saw the proposals as going to the heart of freedom of speech. The *Daily Telegraph* showed Stephen Conroy as Joseph Stalin.

The managing director of Fairfax Media, Greg Hywood, said that "for the first time in Australian history outside of wartime, there will be political oversight over the conduct of journalism in this country".

So with the reforms withdrawn, the proposed Public Interest Media Advocate will not rule over the Australian Press Council. The big stick of a media organisation losing the media exemption under the *Privacy Act* will not hang over the media.

Privacy

March 2014 saw the release of an Australian Law Reform Commission Discussion paper on whether Australia should allow individuals to sue for invasion of privacy.
The Report recommends that a claim for "serious invasion of privacy" should be introduced. It is the most impressive Report to come out of the ALRC on this subject.

However, many questions of interpretation are left to the courts. Celebrities, the wealthy and those with things to hide would take advantage of such a new law. Applications for injunctions to prevent publication would be common. The financial exposure for the media in legal costs and damages would be significant.

The reality is that the number of complaints to the Australian Press Council, the Australian Communications and Media Authority and the number of court cases where plaintiffs allege a breach of privacy, do not justify such a new law.

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ANTI-TERROR AND NATIONAL SECURITY

In early June 2013, Britain's *Guardian* newspaper began revealing information provided by Edward Snowden, a 29-year-old former technical assistant for the CIA, about activities of the US National Security Agency (NSA). Snowden had spent four years at the NSA working for contractors Booz Allen Hamilton and Dell[1].

Snowden's revelations about data surveillance by the NSA and other intelligence agencies have implications for press freedom – particularly how journalists do their job and how they interact with sources. The articles themselves provoked significant assaults on press freedom including intimidation of journalists and their families.

The revelations demonstrate how far a variety of freedoms have been subsumed by governments equipping themselves with extraordinary anti-terror capabilities. While some will argue that the innocent have nothing to fear from government surveillance of our activities on such an unprecedented scale, the illegal misuse of the NSA's surveillance material suggests that unfettered government intrusion into the private lives of citizens is fraught with risk – particularly when governments seek to mask their activities behind a claimed need for secrecy.

MEAA believes it is important that journalists understand the implications of the Snowden revelations and what they mean for themselves and for their work.

The articles published in *The Guardian* explained that the NSA stores the online metadata (transactional information) from the phone calls and emails of millions of users – the NSA metadata repository is codenamed "Marina". The information gathered includes the device used, locations and the activities taking place.

Metadata from phone calls includes the duration of the call, the numbers it was between and when it happened. Metadata from emails includes the sender and the recipient and the time but not the subject or the content[2]. The *Guardian* wrote: "Metadata provides a record of almost anything a user does online, from browsing history – such as map searches and websites visited – to account details, email activity, and even some account passwords. This can be used to build a detailed picture of an individual's life[3]."

An introductory guide to the data capture explained: "The Marina metadata application tracks a user's browser experience, gathers contact information/content and develops summaries of target," the analysts' guide explains. "This tool offers the ability to export the data in a variety of formats, as well as create various charts to assist in pattern-of-life development." The guide goes on to explain Marina's unique capability: "Of the more distinguishing features, Marina has the ability to look back on the last 365 days' worth of DNI metadata seen by the Sigint collection system, **regardless** whether or not it was tasked for collection." [Emphasis in original.][4]

The *New York Times* reported[5] that in November 2010 the NSA began analysing its collection of metadata to create sophisticated graphs of some Americans' social connections that can identify their associates, their locations at certain times, their traveling companions and other personal information". Much of the NSA's activities relating to data surveillance have been illegal.

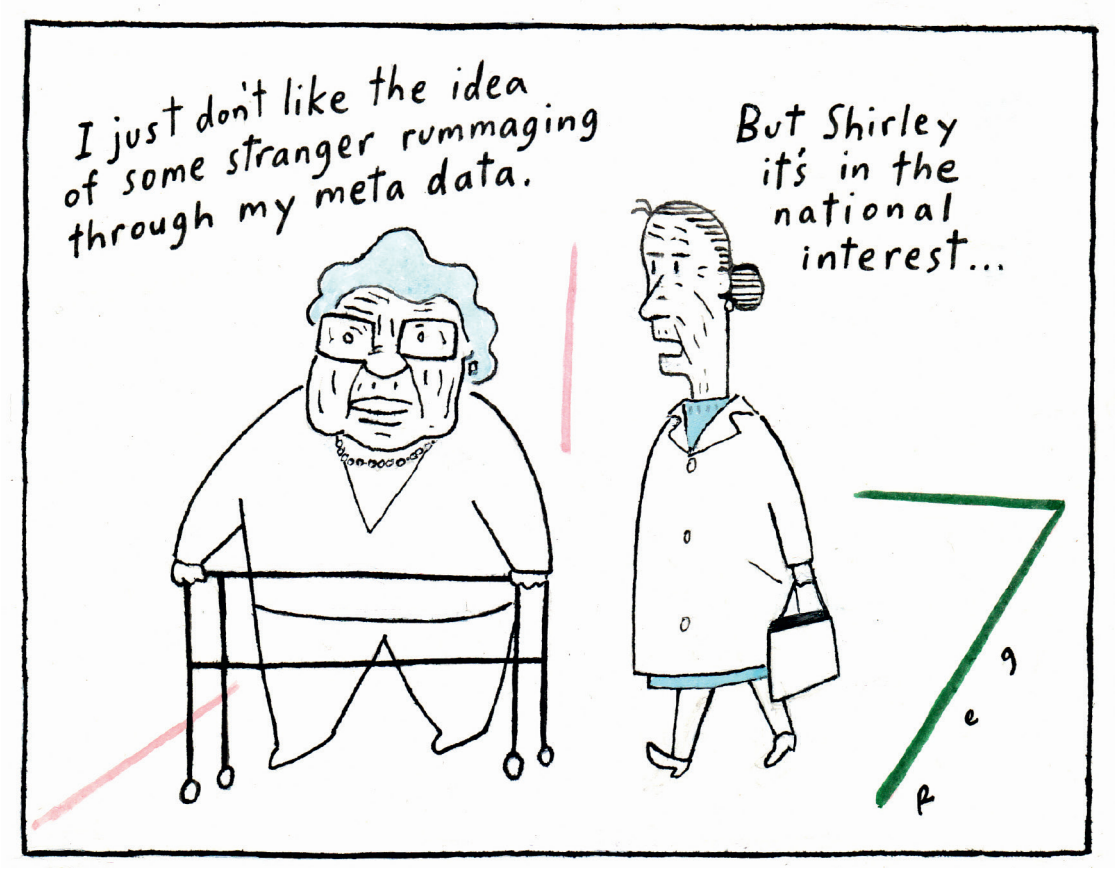
What is Prism?

While Marina is the NSA's repository of metadata, collecting data from a variety of sources, Prism is the program that sources the user data of corporations through legally compelled "partnerships". Snowden revealed the existence of Prism for the first time.

Prism collects material including search history, the content of emails, file transfers and live chats. The NSA collects data from companies including: Microsoft (since 2007), Yahoo (2008), Google (2009), Facebook (2009), PalTalk (2009), YouTube (2010), AOL (2011) Skype (2011), and Apple (2012)[6].

According to *The Guardian*, Prism "facilitates extensive, in-depth surveillance on live communications and stored information. The law allows for the targeting of any customers of participating firms who live outside the US, or those Americans whose communications include people outside the US. It also opens the possibility of communications made entirely within the US being collected without warrants… Companies are legally obliged to comply with requests for users' communications under US law, but the Prism program allows the intelligence services direct access to the companies' servers. The NSA document notes the operations have 'assistance of communications providers in the US'."[7]

Prism and the enabling legislation that surrounds it allow the NSA to obtain a variety of data: email, video and voice chat, videos, photos, voice-over-IP (Skype, for example) chats, file transfers, social networking details, and more[8]. It's suggested



CARTOON BY REG LYNCH

that Prism was implemented to get around the US *Foreign Intelligence Surveillance Act 1978* (Fisa) that required warrants to be issued by a Fisa Court to gather physical and electronic surveillance. The NSA noted in a presentation about the advantages of Prism that: "the US has a "home-field advantage" due to housing much of the internet's architecture. But the presentation claimed "Fisa constraints restricted our home-field advantage" because Fisa required individual warrants and confirmations that both the sender and receiver of a communication were outside the US."[9]

Since Snowden's revelations

There have been attempts to calm concerns about the gathering of metadata. The NSA announced that it: "touches" 1.6% of daily internet traffic – an estimate which is not believed to include large-scale internet taps operated by GCHQ, the NSA's UK counterpart. The document cites figures from a major tech provider that the internet carries 1826 petabytes of information a day. One petabyte, according to tech website Gizmodo, is equivalent to more than 13 years of HDTV video. In its foreign intelligence mission, NSA touches about 1.6% of that... Of the 1.6% of the data, only 0.025% is selected for review.

However journalism professor and internet commentator Jeff Jarvis noted: "[By] very rough, beer-soaked-napkin numbers, the NSA's 1.6% of net traffic would be half of the communication on the net. That's one helluva lot of 'touching'."[10]

Britain and surveillance

Britain's Government Communications Headquarters (GCHQ) is the equivalent of the NSA. It operates an equivalent to Prism called Tempora. "…The two of them together have cable- and network-tapping capabilities collectively called Upstream, which have the ability to intercept anything that travels over the internet. This data is fed into a database called XKeyscore, which allows analysts to extract information "in real time", i.e. immediately, from a gigantic amount of hoovered-up data."[11]

The Guardian wrote: "What this adds up to is a new thing in human history: with a couple of clicks of a mouse, an agent of the state can target your home phone, or your mobile, or your email, or your passport number, or any of your credit card numbers, or your address, or any of your log-ins to a web service. Using that "selector", the state can get access to all the content of your communications, via any of those channels; can gather information about anyone you communicate with, can get a full picture of all your internet use, can track your location online and offline. It can, in essence, know everything about you, including – thanks to the ability to look at your internet searches – what's on your mind… Bear in mind also

that these documents were widely circulated: out of the 4.9 million Americans with access to classified information, 480,000 private contractors in the US had the "top-secret" security clearance issued to Snowden. If hundreds of thousands of people had access to these secrets, how secure were they? The NSA and GCHQ had no idea that Snowden had this material, and apparently still don't know exactly what is in it – which is one reason they've been panicking and freaking out.[12]

David Miranda

David Miranda, the partner of [now former] *Guardian* journalist Glenn Greenwald was detained at Heathrow Airport while in transit for nine hours on August 9. All his devices, computers and documents were seized. It seems the sole reason for this action is because he is Greenwald's partner. Miranda was detained under schedule 7 of Britain's terror laws, which give enormous discretion to stop, search and question people who have no connection with "terror".

As *Guardian* editor Alan Rusbridger explained schedule 7: "Suspects have no right to legal representation and may have their property confiscated for up to seven days. Under this measure – uniquely crafted for ports and airport transit areas – there are none of the checks and balances that apply once someone is in Britain proper. There is no need to arrest or charge anyone and there is no protection for journalists or their material. A transit lounge in Heathrow is a dangerous place to be. Miranda's professional status – much hand-wringing about whether or not he's a proper "journalist" – is largely irrelevant in these circumstances. Increasingly, the question about who deserves protection should be less "is this a journalist?" than "is the publication of this material in the public interest?"[13]

Rusbridger went on: "The state that is building such a formidable apparatus of surveillance will do its best to prevent journalists from reporting on it. Most journalists can see that. But I wonder how many have truly understood the absolute threat to journalism implicit in the idea of total surveillance, when or if it comes – and, increasingly, it looks like "when".

"We are not there yet, but it may not be long before it will be impossible for journalists to have confidential sources. Most reporting – indeed, most human life in 2013 – leaves too much of a digital fingerprint. Those colleagues who denigrate Snowden or say reporters should trust the state to know best (many of them in the UK, oddly, on the right) may one day have a cruel awakening. One day it will be their reporting, their cause, under attack. But at least reporters now know to stay away from Heathrow transit lounges," Rusbridger said.[14]

CARTOON BY ROD EMMERSON

Greenwald talked about the broad threat to journalists implied by the British authorities' detaining of Miranda: "It's bad enough to prosecute and imprison sources. It's worse still to imprison journalists who report the truth. But to start detaining the family members and loved ones of journalists is simply despotic."[15]

What we know

Crikey summarised what the Snowden revelations mean[16]. Summarising its findings, it said much of the internet-wide surveillance conducted by the NSA has been illegal and that the vast powers granted the NSA have been abused by individuals. The surveillance is not confined to anti-terrorism or national security requirements – the NSA has spied on US allies in the EU and the United Nations and Britain spied on delegates to a G20 meeting. Corporations used by people every day are complicit in the surveillance and receive millions of dollars from the US government to offset compliance costs. Senior officials and politicians have lied about NSA surveillance. The NSA does not have effective control of its data. Governments have responded to the revelations and reporting by using national security legislation to pursue journalists, accusing them of "wanton publication". Snowden is accused of being a traitor.

Australia and data retention

As reported in *Technology Spectator*: "Australia so far has seemed the lucky country. Most of our public experience regarding digital privacy and policy complexity has been centred on Internet filtering and censorship. There was also last year's controversy over the proposed Data Retention plan, which would allow the web and telecommunications data of all Australians to be stored and monitored for two years. That initiative, which was headed for a parliamentary inquiry, has stalled."[17]

The data retention scheme, initiated in the early days of the first Rudd Government, was foiled, in part, due to relentless questioning seeking to learn more about the plans for the scheme, as *Crikey's* Bernard Keane explained: "It was the leaking of news about data retention consultations, the willingness of the media (including *The Australian*) to seek documents and the determination of Scott Ludlam to pursue the issue in the Senate, that forced AGD to propose a more public process than the one they had previously pursued. It also spooked the government into inactivity on the issue. It's possible that if other departments hadn't been too concerned about AGD's initial cabinet submission in June 2010, the proposal could have slipped through and been endorsed by the government. But once that opportunity was missed, the growing public focus on data retention was critical to stopping it – for now."[18]

On June 24 (just days after the Snowden revelations first appeared) Parliament's joint committee on intelligence and security committee decided it would not endorse the data retention scheme[19]. *Crikey's* Bernard Keane wrote: "Parliament's joint committee on intelligence and security has failed to endorse a data retention regime as part of its response to a slate of proposed national security reforms, instead laying the groundwork for a limited scheme if a government should decide to implement one. The committee…was asked to consider 44 national security reforms by then-attorney-general Nicola Roxon in May last year, initially with a tight deadline that was later extended to the end of 2012 to reflect the extent and range of the proposals under consideration. After repeated criticisms of the Attorney-General's Department about the lack of detail in the proposals, particularly around data retention, by committee members, the committee missed its end-of-year deadline as it grappled with a long list of complex technical, legal, national security and privacy issues… On data retention, the committee was unable to resolve internal disputes over whether a data retention regime was required. It concluded: 'There is a diversity of views within the Committee as to whether there should be a mandatory data retention regime. This is ultimately a decision for Government'."[20]

The Attorney-General's Department has sought the power to "break into anonymisation and encryption software like Tor to better spy on Australians".[21] As MEAA has outlined in several annual reports into the state of press freedom in Australia, the department wrote the anti-terror laws in the aftermath of 9/11 that imposed sweeping powers to prevent journalists from doing their jobs and punishments if journalists overstepped the mark. In more than 10 years, those laws have not been relaxed.

Australia shares data

Crikey reported that, in 2001, less than a month after the 9/11 attacks, Telstra was compelled to strike a deal with the US Federal Bureau of Investigation and the US Department of Justice to give them surveillance access to the undersea cables owned by its subsidiary Reach. The document shows Telstra, at that stage majority-owned by the Australian Government, and its partner Pacific Century Cyber Works (now PCCW), then controlled by Hong Kong businessman Richard Li, agreed to provide the FBI with around-the-clock access to Reach's cables to spy on communications going into and out of the United States.[22]

The agreement required the parties to, *inter alia*:

- Share customer billing data;
- Store telecommunications and internet communications and comply with preservation requests;

- Provide stored metadata including billing data and subscriber data about US customers;
- Not comply with foreign privacy laws that would require mandatory destruction of stored data;
- Keep the surveillance confidential
- Provide an annual compliance report that would not be subjected to Freedom of Information requests.

MEAA's position

The revelations by Edward Snowden; the treatment of whistleblowers such as Chelsea Manning and the threats made to Edward Snowden; and the detaining of David Miranda are causes of grave concern for journalists.

The manner journalists can work with their confidential sources, protect the confidential nature of their sources and the information they provide; work on their stories without intimidation and publish important information in the public interest have all been undermined by the events above.

MEAA believes its members must:

- Understand the issues at stake from the rise of data surveillance.
- Continue to investigate government and corporate actions to carry out surveillance of individuals and bring those stories to light.
- Campaign against data surveillance, data retention and data sharing. Campaign for amended anti-terror laws that do not infringe on press freedom.
- Educate themselves about smarter ways of working to ensure they protect their sources, their sources' information. This includes communicating with sources, storing information and publishing outside the reach of authorities while ensuring the public's right to know.
- Understand how the laws in other countries may affect them, their families, friends, colleagues and their work as journalists. This includes travelling overseas.
- Campaign for uniform national shield laws that acknowledge and protect journalist privilege.

MEAA believes that this new information about how metadata is captured through the use of our phones, computers, camera, web browsers and emails, has undermined public confidence. There are also serious implications for journalists in how they do their work.

On November 28 2013, MEAA's national media section committee of senior elected official holders, in relation to the rise of metadata surveillance, determined that "the manner journalists can work with their confidential sources, protect the confidential nature of their source and the information they provide; work on their stories without intimidation and publish important information in the public interest have all been undermined".

On December 10 2013, MEAA wrote to Prime Minister Tony Abbott, Opposition Leader Bill Shorten, Greens Leader Senator Christine Milne, Palmer United Party Leader Clive Palmer and Independent Senator Nick Xenophon noting that the final report of the Council of Australian Governments Review of Counter-Terrorism Legislation was tabled in Parliament on May 14 2013, three weeks *before* the extent of metadata surveillance conducted by the US National Security Agency, some of it illegal, was revealed by Edward Snowden.

MEAA wrote: "Given that the COAG review of our counter-terrorism laws mentioned above took place *before* the latest surveillance revelations came to light, and that it attracted little input from the community, we believe it is time to conduct a root-and-branch examination of Australia's anti-terror laws in light of the surveillance revelations. With regard to our members' own concerns, we believe such a review must examine invasions of privacy by government and the need to ensure press freedom in Australia. We look forward to hearing from you regarding the need for a timely review of our laws in light of this new information".

As yet, none of the politicians have responded to MEAA's suggestion for a review.

In late February 2014, MEAA made a submission to the Senate Legal and Constitutional Affairs References Committee's comprehensive revision of *Telecommunications (Interception Access) Act* 1979[23]. MEAA urged the Committee to rethink any attempts to relax the Act 1979, saying that the Committee should think carefully about the changed environment that now exists in terms of telecommunications and the misuse of intercepted/captured private information.

Wriggling in the surveillance net

Bernard Keane

On June 5 2013, our view of the internet began to change significantly. It was the day that Glenn Greenwald's first articles on mass surveillance by the United States National Security Agency (NSA) appeared in *The Guardian*.

In what might be the most important act of whistleblowing in history, Edward Snowden, a private contractor who worked for the NSA, revealed to the media the extent to which the Obama administration had established a vast surveillance state that monitors internet and telecommunications traffic in the US and throughout the world.

The US government, with allies including the UK and even Australia, is engaged in mass surveillance on a global basis. Claims that once looked like the absurdities of conspiracy theorists are now confirmed by hard evidence and even the admissions of those who have constructed this panopticon.

The revelations, via Greenwald and other journalists such as Laura Poitras at *The New York Times* and Barton Gellman at *The Washington Post*, are still continuing months later. While non-experts may find the detail of surveillance, encryption and data retention difficult to keep up with, some key themes have emerged from Snowden's revelations.

First, much of the surveillance conducted by the NSA has been illegal, even under the extraordinarily broad terms allowed by US Congress through the Patriot Act (the author of that Act, Congressman Jim Sensenbrenner, plans to introduce a bill to curb NSA surveillance). The illegality has been confirmed[24] by the NSA itself in leaked internal audits. It has even been confirmed by the court that normally acts as a rubber stamp for surveillance, the Foreign Intelligence Surveillance Court, which stopped the NSA from continuing to collect tens of thousands of purely domestic emails a year.

Moreover, this vast and previously secret power has been abused by individuals and the US government. The NSA has admitted that its agents have used the vast surveillance apparatus to stalk "love interests"[25]. Even so, the NSA only knows about the cases where stalkers within the NSA voluntarily reported themselves.

And the NSA's surveillance is not confined to terrorism or national security. French and Spanish media reported that the NSA had recorded millions of phone calls in those countries (the NSA insists they had been provided with that material by agencies from those countries). According to *Der Spiegel*, the NSA had access to German chancellor Angela Merkel's phone for a decade; it has spied on US allies in the EU and on the United Nations, on the Brazilian president, the Brazilian mining industry and the Mexican president as well as up to 35 other international leaders. It looks more like a list of the US's economic competitors than terrorist threats. The NSA's surveillance network was even used to spy on New Zealand resident Kim Dotcom[26], the copyright industry's enemy number one but not, even in its view, a terrorist.

This demonstrates that once a mass surveillance

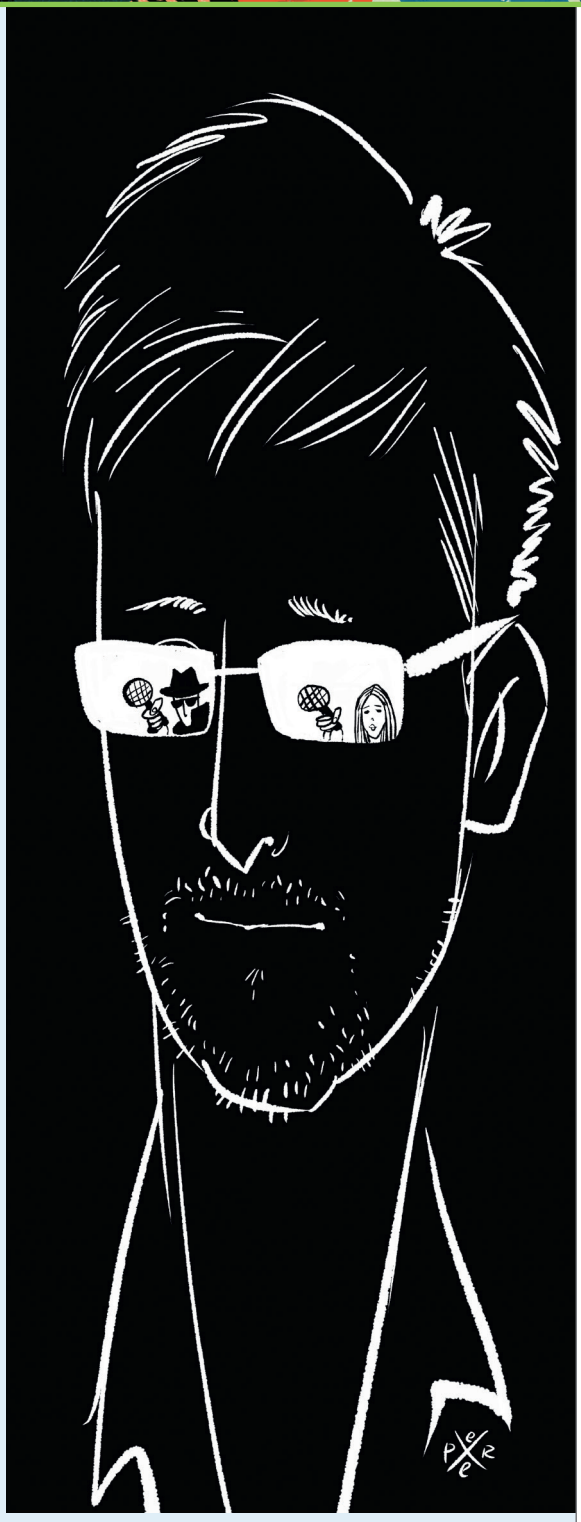


ILLUSTRATION BY PETER SHEEHAN

apparatus is established and used in secret, the temptation to use it for purposes other than national security will prove too great...

We have also seen the most senior officials and politicians lie about NSA surveillance. The head of the NSA, General Keith Alexander, lied about holding data on US citizens[27]. National Director of Intelligence James Clapper perjured himself before Congress[28]. President Barack Obama's carefully parsed claim that "no-one is listening to your calls" was proven to be wrong[29] by the NSA's own audit, which revealed thousands of domestic US calls a year are intercepted by the NSA.

The response of governments to Snowden's whistleblowing has been to pursue him through national security legislation. Snowden has been forced to seek asylum in Russia (with the US Secretary of State John Kerry making a public promise that Snowden would not be executed or tortured if extradited).

Whistleblowers have been repeatedly prosecuted under the Espionage Act. US journalists in other instances have been subpoenaed and spied on to track down whistleblowers, often for stories that embarrassed governments but did not include any national security information.

Such examples are intended to send a message: embarrass governments and you will be punished. Chelsea [formerly Bradley] Manning was sentenced to 35 years in jail for revealing US war crimes and embarrassing the US with the release of non-secret diplomatic and military material. The partner of journalist Glenn Greenwald was stopped by British authorities at Heathrow airport under UK anti-terrorism laws, detained and robbed of his possessions. American journalist Barrett Brown remains in prison facing charges that could carry prison terms totalling more than 100 years for sharing an internet link[30] to material hacked from security firm Stratfor (and no, he didn't do the hacking).

And in a moment of high farce, *The Guardian* was forced to go through the theatre of destroying IT devices at the request of the UK government, despite all parties understanding it would not affect the newspaper's reportage – demonstrating that the default setting of the surveillance state is always toward absurdity.

This aggressive pursuit of whistleblowers and journalists stands in contrast to the willingness of governments to leak secrets for their own political purposes. Secrecy and the rule of law are for everyone else, not for governments, which routinely leak national security-related information for their own political purposes, even to Hollywood, and even when they damage national security.

We learnt from Snowden's revelations that Australia forms a component of this vast surveillance state as part of its role in the Anglophone "five eyes" intelligence network.

We also learnt this year from the Australian Federal Police (AFP) that journalists and even MPs and senators who release material from whistleblowers and leakers can expect to have their telephone data handed over as police try to track down their sources.

But in other respects, the surveillance story in Australia has been a happier one. In June 2013, the federal parliament's Joint Committee on Intelligence and Security declined to recommend that the government establish a data retention regime, something the agencies and the federal Attorney-General's Department had been pushing for since the former Labor government was elected in 2007.

This was the result of politicians on all sides of the ideological divide being willing to seriously engage on the balance between basic rights and national security.

It's important to understand that data retention *is* mass surveillance. It is not, as claimed by security and law enforcement agencies, a mere extension of analog-era information-gathering powers into the digital realm. Retention, even of metadata alone, enables 24-hour physical tracking of users via their mobile phone location. And retention of all data allows the establishment of patterns of interaction among users, even those not targeted for operational purposes that traditional wiretaps could never provide.

In some ways, the content of communications is less important than the metadata that agencies want to retain. As the AFP admitted in relation to journalists and politicians, their phone records' metadata can lead police straight to their sources.

Apart from its direct effects, mass surveillance creates suspicion. IT companies in the US are now learning about the price of surveillance as customers discover that their cloud provider or Apple, Microsoft, Facebook and Google have facilitated the systemic breach of their privacy (but were prohibited from revealing it by US government gag orders). All products or services from American IT or communications companies must now be assumed to enable US government surveillance of users. *Caveat emptor*.

Your smartphone, as Julian Assange likes to note, was a surveillance device that also made calls. Now there's an iPhone that takes your fingerprint (and, by the way, you can change a stolen credit card number, but it is somewhat harder to change a stolen fingerprint).

It is also particularly concerning that we do not know how extensive the NSA's disruption of encryption has been. This is not an arcane issue for IT specialists: if encryption is undermined it provides the tools of tomorrow for criminals. This is true whether the undermining occurs through demands that IT companies provide a backdoor into a product (backed with a gag order), or by such serious corruption of industry encryption standards that the standards body has to publicly denounce its own NSA-approved standards[31]. Once you undermine encryption, you undermine it for everyone – banks, businesses, journalists and other governments – as well as for terrorists and paedophiles.

Who can you trust online now? How do you know someone you work with, another member of a political party or activist group, a friend, an MP, has not had their phone or IT equipment accessed by intelligence agencies? What new encryption product can you trust to actually protect you if you want to communicate privately?

Mass surveillance corrodes citizens' trust in governments as well as their trust in the companies they purchase from and the people they communicate with. A small but telling reference in the encryption reports[32] was that the NSA refers to ordinary users of encryption products – that is, all of us – as "adversaries". This is the logic of the surveillance state – once everyone is under surveillance, everyone is a suspect.

If you're a whistleblower or confidential source, how do you know that a journalist, who may rather go to jail than reveal your name, doesn't have poor IT hygiene and will be easily monitored by the government, or leave phone records that lead them to your door?

Mass surveillance, as free software activist Richard Stallman has pointed out, is ultimately incompatible with a free press since it will effectively deter any whistleblower or non-government approved source from speaking to the media.

But the media still has a key role to play. It has the distribution platforms to inform citizens of the remorseless growth of surveillance and its abuse, and remains, even in an increasingly fragile commercial environment, the key institution demanding greater transparency from governments. The media can challenge government attempts to block Freedom of Information requests; political journalists should directly scrutinise government representatives, and reporters should dig through publicly available information and supplement it with their own probing.

To do this effectively, however, journalists, editors and producers need to change their working habits. They need to achieve a working knowledge of basic encryption, surveillance techniques and IT hygiene so that whistleblowers and other sources can contact them with confidence that it will not be straightforward to identify them or access journalists' records.

Journalists must understand that they are automatically surveillance targets in everything they do, and use effectively encrypted IT and communications and information storage as a default, as well as avoiding using systems that are easily accessible. They also need the judgment to know when electronic communications should be abandoned altogether.

They need to be permanently sceptical of any unevidenced assertion that the needs of national security outweigh the need for disclosure, transparency and accountability, or justify industrial-scale invasions of privacy. Journalists should *never* be apologists for state secrecy and surveillance.

And they need to understand that free speech, a free press and ultimately democracy itself are threatened by mass surveillance, particularly mass surveillance conducted in secret. In a surveillance state, the media can never effectively play the watchdog role that remains its ultimate civic justification.

The world, the internet and the media have been changed by the revelations of whistleblower Edward Snowden. Australian journalists need to work hard to preserve what freedom from surveillance we have left.

Bernard Keane is Crikey's political editor. He is the author of *The War on the Internet* (2011).
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MEDIA REGULATION

Malcolm Turnbull.
PHOTO FAIRFAX SYNDICATION/
ROB HOMER, *THE AGE*

On March 9 2014 Communications Minister Malcolm Turnbull said that the government was considering changes to the media ownership laws to reflect changes in the industry due to the rise of the internet[33]. "Why do we have a rule that prevents one of the national networks acquiring 100 per cent coverage, why is there a rule that says today that you can't own print, television and radio in the same market? Shouldn't that just be a matter for the ACCC [Australian Competition and Consumer Commission]?" he said.

His comments sparked concern from his Coalition colleagues who feared that local content could be reduced[34]. But Turnbull argued content was not the same as ownership, adding that different levels of content related to business models. However, some Coalition MPs supported a Senate inquiry to examine any proposed changes.

MEAA 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. While there is an opportunity to examine media laws to reflect the changes wrought by new technology, any moves that would further concentrate media ownership would have dire consequences.

MEAA believes more voices ensure a national debate that is balanced by a wide range of dissenting views. Communities should have access to local news that keeps them informed and entertained. Any changes to media ownership must protect news diversity, particularly in rural and regional Australia. MEAA believes that any changes to the law should both protect and encourage the creation of genuine new content and encourage new players to enter the Australian media marketplace.

MEAA believes that an examination of media ownership could also present an opportunity to modernise the system of regulation to recognise the changing structure of the news media.

A year ago, MEAA 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 MEAA's *Journalist Code of Ethics*. 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.

FREEDOM OF INFORMATION

Scott Morrison.
PHOTO FAIRFAX SYNDICATION JAMES ALCOCK, THE SUN-HERALD]

On October 29, 2012 the federal government announced[35] 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's report was tabled on August 2 2013[36].

The review made 40 recommendations, covering a wide range of aspects of freedom of information (FoI) law, including:

- The effectiveness of the Office of the Australian Information Commissioner
- The two-tier system of merits review
- The operation of the FoI exemptions
- The coverage of agencies subject to FoI law
- The effectiveness of the FoI fees and charges scheme, and
- Minimising regulatory and administrative burden, including costs[37].

In a joint submission to the Hawke review[38] with several media organisations, MEAA and others had expressed concern 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 then, MEAA 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[39].

There is also a considerable need for the FoI regime in each state to be thoroughly revamped. FoI should not be a political plaything, championed in Opposition only to be curtailed in Government. As MEAA has said before, 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.

MEAA continue to believe 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.

FoI expert Peter Timmins cites examples of how politicians are keen to exclude themselves from scrutiny when it comes to freedom of information over the activities of parliament and politician's expenses in particular[40].

There are ongoing concerns over the silence surrounding government and the reluctance of public servants to release information in accord not only with the intent of freedom of information laws but also in keeping with the public's right to know[41].

Secrecy amid a flawed watchdog

Michael McKinnon

The riveting display of incompetence and corruption involving politicians and bureaucrats at two major inquiries can only strengthen support for effective laws for right of access to information.

As the inquiries into the NSW Obeid corruption scandal and the Commonwealth home insulation scheme inquiries have shown politicians and senior public servants will ignore right and wrong in pursuit of the spoils from political power or to meet deadlines from political leaders. And short of an inquiry, the public will never know because the government controls the information.

Freedom of Information laws, around since the 1770s, recognise that neither elected representatives nor bureaucrats will stand up and admit government policies are failing or corruption and mismanagement are a problem. Senior bureaucrats hold their jobs at a minister's whim and politicians never want the public to hear how a much-trumpeted policy is simply not working or even dangerous.

Unfortunately, the new Abbott Government appears to have embraced secrecy with the same fervour as the Rudd Gillard predecessor adopted it to hide the fruits of its leadership-inspired chaotic incompetence. The Commission of Audit should be released publicly so Australians can be informed about the economic challenges facing the nation rather than stage-managed as part of the budget. Stopping release of incoming government briefs, ignoring travel rorts and the muzzling of ministers by the PM's office have all contributed to a perception of Abbott Government secrecy.

The undisputed leader of the pack is Immigration Minister Scott Morrison as an April 8 2014 decision from his department illustrates. Information about illegal arrivals by Sri Lankans including statistics about ethnicity, age and sex and voluntary and involuntary removals was sought under Freedom of Information. This information used to be routinely released.

The agency has advised that the information sought is exempt because "the Hon Scott Morrison MP has made a claim of public interest immunity against" and the minister has stated: "Information about the arrival of ventures, in breach of communications protocols established by Commander JATF, including the timing of arrival, the composition of passengers including ethnicity, sex and age may be used by people smugglers…"

The almost unprecedented decision is pure nonsense. The information does not engage any privilege of the Parliament. The Commander JATF is not a member of Parliament and nor do his communications protocols have anything to do with parliamentary privilege. Of course, the decision letter contained no findings of fact nor refers to any evidence but the minister is on safe ground because of a major flaw with the Commonwealth's FoI system – the Office of the Australian Information Commissioner (OAIC).

Supposedly set up as a watchdog on FoI, the OAIC at least admits its flaws.

As last year's Press Freedom Report noted the OAIC's own annual report showed 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. A year later the 2012-13 report notes: "...on 30 June 2013 the OAIC had on hand 447 reviews (up 25.2 per cent) and 75 complaints (the same as a year earlier). Of those matters on hand, 105 IC reviews (23.5 per cent) and two complaints (2.7 per cent) were more than 12 months old. This level of delay has a detrimental effect on the FoI system."

As the 2012-13 report also states, a key performance indicator for the OAIC is for "80 per cent of IC reviews to be completed within six months" but only "25.2 per cent of IC reviews finalised within six months".

In a speech at the Australian National University on November 15 last year, Australian Information Commissioner Professor John McMillan noted "new FoI complaints were not being allocated to a case officer until 196 days after receipt and IC review applications until 228 days after receipt".

A timely appeals process is absolutely crucial to good FoI and on that basis, and after three years in the job, the Australian Information Commissioner Professor John McMillan should consider resigning and let someone else have a go.

Also of concern is that 95 of the 419 information commissioner reviews noted in the 2012-13 report were simply withdrawn, 33 ended because of "lack of cooperation" and nine ended because of "lost contact".

Journalists appealing a bad FoI decision know that it will take at least 228 days before the OAIC will even start a review or investigation and wait another a year or so before a result. Journalists are not historians and with every media organisation facing dwindling resources, it becomes easier to move on to the next yarn particularly as information dates so it is no longer newsworthy.

To some extent, the many failings of the Rudd Gillard Government became old news after the change at the ballot box but those flaws should have been exposed in office by a vigorous and timely FoI system.

While the Office of the Australian Information Commissioner continues to lose credibility because of the extraordinary delays in dealing with appeals, it is also failing through its decisions on appeal. Another 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.

It was hoped that last year's review of the FoI Act by former public servant Dr Allan Hawke would address the failings of the FoI system but its first recommendation "that a comprehensive review of the FoI Act be undertaken" meant improvements were always unlikely – why do anything at all if another review is needed anyway? The then Attorney-General Mark Dreyfus did nothing about the report and will regret his inaction as the ALP tries to use FoI in opposition.

The new Attorney-General, George Brandis, told me that he had welcomed Dr Hawke's report on the Review of the Freedom of Information Act 1982 and the Australian Information Commissioner Act 2010.

"The Review made 40 recommendations to streamline FoI procedures, reduce complexity and increase the effectiveness and efficiency of Australian Government agencies and the Office of the Australian Information Commissioner in managing FoI workload," he said. "The Government is currently examining the report with the aim of supporting initiatives that are designed to promote and encourage positive outcomes for both FoI applicants and agencies."

The greatest need for change, argued in the Australia's Right To Know submission to the Hawke review, would be to give applicants a right of appeal to the Administrative Appeals Tribunal from internal review as well as the existing appeal option to the OAIC. This would also ease pressure on the OAIC resources and remove the odious power given Professor McMillan to decide even when an applicant wants to go straight to the AAT whether they should or instead endure the wait at the OAIC.

This is preferable to the OAIC approach as it argued in its submission to the Hawke review that "the grounds on which the information commissioner can decide not to undertake a review" should be broadening. Although one way to improve appeals is to stop as many as possible.

As noted, the decisions by the OAIC are already leading to greater secrecy and the appeals process is simply unfair.

In a decision involving *The Australian* journalist David Crowe (Crowe and the Department of Treasury (2013) AICmr 69 (29 August 2013)[42], Professor McMillan found 2010 incoming government briefs (the blue book) should remain secret.

Professor McMilllan received three affidavits from Treasury from Mr Barry Sterland (Acting Deputy Secretary, Department of the Prime Minister and Cabinet), Dr David Gruen (Executive Director, Macroeconomic Group, Department of the Treasury) and Professor Patrick Weller (Director, Centre for Governance and Public Policy, Griffith University).

His judgement notes that the affidavits provided "great assistance in deciding this review" and all argued against release mainly based on the view that "release of deliberative advice in incoming government briefs for unsuccessful parties could potentially impair the relations of the relevant Department with either or both the government of the day and future potential governments".

"Public servants must be able to give unvarnished frank advice and tell the ministers, whether new or returning, the real circumstances," the judgement noted. Dr Gruen said: "The relationship between Treasury and the government will be adversely affected if briefings intended for the Opposition, had they been elected to Government, are made publicly available. Were this to happen, in the future Treasury would be likely to prepare briefs with bland material, the release of which would not cause concern."

As Crowe notes the decision was largely based on the views of two public servants and an academics. At no stage, did he have a chance to cross-examine or question these witnesses – a fundamental right in any appeal system.

"The Information Commissioner is helping government keep information secret. I would get a letter now and again and find out about a bunch of bureaucrats talking to other bureaucrats about how to keep things secret," he said.

This is not new argument for secrecy. 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.

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. This case does not appear to have been considered by Prof McMillan in the Crowe decision.

Sadly, the Crowe decision is now being used as precedent by agencies across the Commonwealth and will increasingly bolster government secrecy. For example, in a February 14 decision, BJ and the Australian Taxation Office (2014) AICmr 22 (26 February 2014) release was refused with the OAIC citing the Crowe decision.

This raises yet another problem. How can any applicant be comfortable about being forced to appeal to the OAIC against a decision replete with OAIC previous decisions?

Mr Brandis, in responding to the Hawke review, can improve FoI in Australia very easily by a minor change to the FoI Act allowing direct appeal to the AAT. Not only would it provide a valuable benchmark for the OAIC's performance but ensure that affidavits from public servants aren't accepted without at least some question from applicant on the other side.

Michael McKinnon is the Freedom of Information editor for the ABC and has held the same role at the Seven Network and *The Australian*. He has received a Walkley award for Leadership in Journalism in recognition of his work in FoI.

SHIELD LAWS AND CONFIDENTIAL SOURCES

George Brandis.
PHOTO FAIRFAX SYNDICATION – ANDREW MEARES, *THE SYDNEY MORNING HERALD*

On August 6 2013, the Western Australian Supreme Court dismissed an attempt by mining magnate Gina Rinehart to force Steve Pennells, a senior journalist with *The West Australian*, to divulge his confidential sources. The case was a test for that state's shield laws. Justice Janine Pritchard determined: "…in my view the operation of the shield laws is a factor sufficient of itself to warrant the conclusion that the subpoena is oppressive and an abuse of process"[43].

Senior Fairfax journalist Adele Ferguson, like Pennells, was also waiting to hear on the outcome of an order in a case also launched by Rinehart that demanded Ferguson reveal information given to her by a confidential source. On March 15 2014, Justice Pritchard ordered Rinehart's company Hancock Prospecting to pay the legal costs incurred by Ferguson. Justice Pritchard also gave Ferguson the right to apply for any special costs orders relating to the costs due to the "unusual difficulty, complexity and importance of the matter" in relation to the state's journalist shield laws and the "novel and complex legal questions". A year had passed since Rinehart's company had subpoenaed Ferguson to produce recordings, texts, notes and emails.

The Pennells and Ferguson cases, despite their welcome outcome, clearly demonstrate Australia's patchy and disparate journalist shield laws fail to do their job. MEAA believes the two West Australian decisions underscore the urgent need to fully acknowledge and respect journalist privilege in relation to the journalists' ethical requirement to refuse to disclose their confidential sources. It is a principle that still needs to be properly enshrined in Australian law.

Clause 3 of the MEAA *Journalist Code of Ethics* 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**[44]."

At the heart of the problem are the differences in the shield laws themselves (in those jurisdictions where they exist). Why do the laws fall short in not only the definitions of who and what; some laws cover subpoenas and some do not; and the shield is only available after lengthy, stressful and very expensive court procedures? It's important to note that the two individual journalists had been subpoenaed by Australia's richest individual.

MEAA 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. Legislation passed by parliaments must ensure that courts protect and defend press freedom from those who would muzzle genuine news stories or impede the public's right to know.

The relentless pursuit of journalists in expensive legal actions must cease. Shield laws clearly fail if a journalist is still required to engage in protracted court procedures before the "shield" – for what it's worth as a "shield" – comes into effect. No costs,

like those in the Rinehart case, would need to be ordered if shield laws properly acknowledged journalist privilege, the unchanging ethical obligation to respect confidences in all circumstances, at the outset and thus prevented unnecessary legal procedures.

MEAA wrote to new Attorney-General George Brandis on September 25 seeking a meeting to discuss several issues including shield laws. No response was received.

A year ago, MEAA called on federal, territory and state Attorneys-General to introduce uniform shield laws to ensure that powerful people cannot go jurisdiction shopping; and to properly protect journalist privilege through consistent, uniform legislation in every jurisdiction. The matter was due to be discussed in October 2013 by the Attorneys-General. It was not discussed.

MEAA is still waiting to hear if the matter will ever be properly addressed and a sensible remedy found.

There is another case involving confidential sources that is still before the courts. Peter Bartlett and Amanda Jolson of law firm Minter Ellison have written: "Three respected investigative reporters employed by Fairfax Media, Nick McKenzie, Richard Baker and Philip Dorling, are facing two applications by businesswoman Helen Liu to disclose documents that would reveal information about their confidential sources for a series of stories published in *The Age* on the relationship between the Chinese-Australian businesswoman and federal Labor MP Joel Fitzgibbon. NSW Supreme Court judge Lucy McCallum ordered the journalists to disclose their sources and held that a journalist's pledge to keep a confidential source "*is not a right or an end in itself*" and could be overridden "*in the interests of justice*". This decision was upheld on appeal to the Court of Appeal. The High Court refused the journalists' application for special leave to appeal from the Court of Appeal's decision… The NSW Shield laws were not in operation at the time of publication."

Snarled in Gina's net

Adele Ferguson

We don't know how many days the man had lurked outside our house. My husband first noticed him on March 7 2013, pacing up and down the street. A few days earlier we had a different visitor asking if an Adele Ferguson lived at this address.

After what seemed like an eternity, the man finally asked for me. I was interstate for work so he left a message that he wanted to arrange a time to serve me with a "personal" subpoena. No other details were forthcoming. He wouldn't even tell Fairfax lawyers who he was representing, only to say it was not business related.

Almost a week after the man was spotted outside our house I was formally served with a subpoena at the office of Fairfax lawyers Minter Ellison. The subpoena *was* work related. Gina Rinehart – one of the world's richest women, the biggest shareholder in the company I work for and one of the most litigious people around – was behind it.

Interestingly, the subpoena was drawn up a few days after I wrote a series of controversial articles in *The Sydney Morning Herald* and *The Age* that contained email exchanges between Rinehart and her daughter Hope discussing a settlement.

Other bombshell emails revealed that Hope's husband had not resigned from the board of a listed company willingly, contrary to an ASX statement, but had been forced. The company's executive director said in a private email that we published: "We are getting serious heat from HPPL [Rinehart's company] on the board position and they will soon have it all over the media, which I can't afford, and I hope you understand I have enjoyed having your support and as a director and friend and hope you understand – I just don't want Mineral Resources caught up in a bloodbath, Chris."

The month earlier, I had signed over my book rights to a production company to make a six-hour mini-series based on Rinehart.

In the weeks following the subpoena, a lot of time was spent with the lawyers trying to work out the shield laws in Western Australia, where the subpoena was issued. The experience was extremely unsettling for my family and me. I felt isolated and picked on, and very nervous about what might happen. Being backed by Fairfax and represented by Peter Bartlett at Minter Ellison gave me some solace.

Unfortunately, it is an experience that is becoming more common for journalists. In 2013, unprecedented numbers of subpoenas were served on journalists. All up, there were seven separate applications for disclosure of sources. I took the lion's share: besides Rinehart's subpoena, I was served with two others arising from unrelated stories.

But Rinehart vying for a board seat on Fairfax Media added to the strangeness and stress – and many sleepless nights. With the rivers of advertising gold drying up, journalists are becoming more conscious than ever of the cost of defending legal actions brought by the biggest and the best litigants.

Gina Rinhart.
PHOTO FAIRFAX SYNDICATION – ANDREW MEARES, *THE SYDNEY MORNING HERALD*

As difficult and surreal as it was, I couldn't have got through it without the camaraderie and support of my colleagues, people I had never met, and journalists in other organisations. Garry Linnell went on the front foot and defended me. It was a huge relief to get the official backing of Fairfax Media, because although the subpoena spanned 18 months of source requests, which ultimately covered my many newspaper articles and book, the subpoena targeted me as a book author, for whom the protection of the shield laws is even more tenuous than for journalists.

But with colleagues including Mark Hawthorne and Ben Butler, who wrote a series of stories and rallied the troops to support me, I felt I wasn't going to be hung out to dry. Support came from other media outlets including *The Australian*, which ran a front-page story. TV and radio stations, particularly Eddie McGuire, put out the message about the flimsy protection of journalists when it comes to protecting sources. Liberal MP Malcolm Turnbull proved a great ally when he publicly expressed support, as did Greens politician David Shoebridge.

Journalist Miles Heffernan, whom I had never met, campaigned about my plight by setting up a petition on www.change.org. He wrote to lawyers, politicians and the media and collected more than 38,000 signatures to send to Rinehart.

At Fairfax, a separate petition was organised and a letter was written to the Fairfax board expressing support. Activist group Get Up posted a YouTube video in which they reworked the singer Adele's song *Someone like You*, fronting it with my face and changing the lyrics to "Someone Else to Sue".

Every time I did an interview, I was asked if I would go to jail if I had to. The answer was "of course". It was a chilling reminder of the seriousness of what can happen in Australia when a journalist is simply doing their job and abiding by the journalist code to protect sources and confidential source material – at all costs. It is a protection that isn't enshrined in law.

It was an experience I shared with Western Australian journalist Steve Pennells, who was going through his own private hell after being served a subpoena by Rinehart. Pennells was a great support – I hope he feels the same about me. Pennells won his lengthy and expensive case. Mine is all but over. We are waiting for the judge to sign off on legal costs, and then it will be time to celebrate.

But the celebration will be short lived, as there is still that serious issue of shield laws and how they need to be toughened and unified across the states to protect other journalists from being dragged through the courts ostensibly to reveal sources, which everyone knows they will never do. It is a bullying tactic to stop journalists writing about the subject at hand. It made me determined not to be bullied but to keep writing and to this end I wrote a major story in *Good Weekend*.

It is the thin edge of the wedge. If journalists did not keep their confidentiality agreements, the flow of information from whistleblowers would stop and the truth would not get out. Democracy would be the loser.

It is something MEAA has been campaigning to change. It has called on federal, territory and state attorneys-general to introduce uniform shield laws to ensure that powerful people cannot go "jurisdiction shopping" and to properly protect journalist privilege. Let's hope someone listens.

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Chaos reigns as shields fail

Joseph M Fernandez

Statutory shield law covering journalists' confidential sources in Australia is in disarray with three jurisdictions yet to legislate in this area. The ones who have legislated have adopted a variety of approaches. Queensland does not have shield law and it is not currently under consideration.[45] In South Australia, following the introduction of a Private Member's Bill,[46] the Shadow Attorney-General Stephen Wade introduced a shield law Bill.[47] Both Bills lapsed due to prorogation of Parliament last December. In introducing his Bill, Wade said it "would be one of the best examples" of shield law in the country.[48]

Initial optimism that the longstanding journalists' cry for a statutory shield which was answered through the 2007 initiative has since been undermined by recent events indicating that the current shield is not a reliable refuge for journalists working with confidential sources.

Current shield laws speak in many tongues, causing anxiety and confusion as to who is protected, when, how and in what circumstances.

The then Commonwealth Attorney-General, when introducing statutory shield law in 2007, deemed it a privilege that was "too important an issue to wait".[49] There is some way to go, however, to end the oppressive pursuits of journalists' confidential sources.[50]

Former Commonwealth Attorney-General Mark Dreyfus noted that recent instances of the pursuit of journalists' confidential sources "have highlighted the inadequacy of protections".[51] He committed to putting "harmonising and strengthening protections for journalists" on the agenda of the national Attorneys-General grouping, the Standing Council on Law and Justice.[52]

No joy there thus far under Attorney-General George Brandis – "there is no greater friend of journalist shield laws than me"[53] – whose various public comments have avoided a full-scale reform commitment that goes beyond saying that uniformity seems, in principle, to be "a desirable thing".[54]

The present state of Australian shield law shown in the accompanying table highlights the key potpourri of provisions and raises many questions, some of which are discussed here.

First, are current shield laws any good before forums that MEAA and others have referred to as "star chambers" – the anti-corruption and similar bodies armed with coercive powers of secrecy, compulsion to disclose and denial of the right to silence in their respective governing statutes?[55] Corruption watchdogs have notoriously sweeping powers that can apply to journalists. The New South Wales corruption watchdog can require a person summoned to answer questions or produce documents.[56]A person served with a summons is not excused from answering any question or producing any document on any ground of privilege or on the "ground of a duty of secrecy" or any other ground of privilege.[57] In Victoria, the Act governing the Victorian corruption watchdog declares plainly that the journalist privilege does not apply.[58] The powers of the watchdogs and inquiry bodies can be so severe as to stop the person summoned from telling anyone other than a lawyer that they have been summoned.[59] Thus, even a family member can be excluded from being informed of the summons served on the journalist. These powers have been used against journalists.

Other bodies with similar evidence-taking powers can also leave journalists exposed to penalties for refusing to disclose confidential sources.[60] The Fair Work Commission is not bound by the rules of evidence and procedure.[61] It can require journalists "to provide copies of documents or records, or to provide any other information to the FWC".[62] Royal Commissions too have powers to summon a person to give evidence and produce documents and compel compliance through fines and prison terms.[63] It may recognise a reasonable excuse for non-compliance, however, if such an excuse is recognised in a court of law.[64]

The idea that journalists' confidential sources must be protected has been recognised at common law in limited circumstances, well before the introduction of statutory shields, for example, through the "newspaper rule" and during pre-trial discovery procedures.[65] Source protection provisions have also been available in some statutes long before the introduction of the more recent statutory shields, for example, in the *Privacy Act* and in the *Broadcasting Services Act*.[66]

The second contentious area concerns the person potentially entitled to claim shield law protection. The existing statutory provisions differ significantly as to who is covered. At one end, the protection is limited to professional journalists. At the other end, the protection embraces a much broader group. The scope of coverage is designed, for example, by defining the terms "journalist" and "news medium". The Commonwealth legislation allows for a broad definition by describing a "journalist" as a person engaged and active in news publication and a "news medium" as "any medium" for

disseminating news and comment.[67] Such a broad definition means that those who use new media or social media – for example, Twitter, Facebook and YouTube – to publish news would qualify for protection as "they too deserve protection".[68]

On the other hand, the Victorian legislation takes a much narrower view by limiting the protection to those who are engaged in the journalism "profession" and who publish information or comment in a "news medium" and do so as a "significant" part of their professional activity and are "regularly published in a news medium".[69] On top of that, the court must take into account whether the journalist concerned is "accountable to comply (through a complaints process) with recognised journalistic or media professional standards or codes of practice".[70] Such codes would include the MEAA *Journalist Code of Ethics* and the Australian Press Council's *Statement of Principles*.

The Tasmanian legislation makes no reference to "journalist" or "news medium" and refers only a "protected confidence" and "protected identity information".[71] It must be a communication made "in confidence" to a confidant and given in the course of a relationship where the confidant was acting in a "professional capacity".[72] That leaves open the question of who exactly will qualify for protection and when they will qualify. That legislation also allows for the confidentiality obligation to be inferred.[73] Thus, the nature and the circumstance of the communication, without an explicit promise, can create the obligation of confidentiality between the journalist and the source. The privilege is lost in the event of misconduct, which can come about through an unauthorised release of government information by public servants.[74]

The grounds for reservations among legislators as to who should be covered includes Attorney-General George Brandis' view that the wider the coverage "the more reluctant will judges be" to protect confidential sources.[75] His fear also is that such a privilege would provide a "carte blanche to anyone who wanted to publish anything anywhere" including to anyone who "publishes material on the internet or contributes to a blog".[76] Or, as another legislator put it – it might even protect people "who can sometimes just be lunatics or people with very passionate agendas to push".[77]

A third area of difficulty concerns preliminary discoveries. Journalists can easily find themselves in the crossfire between litigants seeking redress and a third party, who may be the journalist's confidential source, from whom the litigant is seeking redress. In such situations the court can order the journalist to reveal the source during the pre-trial "discovery" stage provided for in various Rules of Court.[78] It is settled in law that disclosure will be ordered if it is "necessary in the interests of justice".[79]

In a recent case that went all the way to the High Court, journalists from *The Age* were ordered to disclose their confidential sources.[80] In that case entrepreneur Helen Liu was after the journalists' source who she claimed had provided the journalists with false and defamatory information they used in their articles about her.[81]

A similar attempt at preliminary discovery of journalist Steve Pennells' confidential sources, made by mining magnate Gina Rinehart's company, failed thanks to the court's view that the operation of the Western Australia Shield Laws was "sufficient of itself" to find the subpoena seeking disclosure "oppressive and an abuse of process".[82] This finding by Justice Janine Pritchard came despite a "curious omission" in the Western Australia Shield Law – it did not contain a provision like *Evidence Act 1995* (NSW), s 131A, which expressly allows for an objection to the production of documents under a subpoena.[83] In the court's view, such an omission could significantly weaken the Shield Law's protection if not altogether render it useless.[84]

Other problems presented by the current legislative framework include whether the presumption regarding disclosure favours the journalist as is the case in most jurisdictions, unlike Tasmania where judicial discretion prevails; the identification of the range of factors that the court may take into account in deciding whether to apply the shield; and whether the shield is akin to a legal privilege as afforded to lawyers and doctors. Not all the current shield laws refer to the present protection for journalists' confidential sources as "journalist privilege". This protection needs to be properly defined and entrenched as a privilege, if for no other reason, at least to dispel any doubt such as has been previously expressed by judges who appear to question the very existence of the privilege.[85]

There is no longer any doubt – in fact, it has been deemed to be "common sense" and "readily accepted by the High Court" – that the protection of journalists' sources is "valuable and desirable because it tends to expose corruption and malpractice".[86] What is needed now is legislative fortitude to deliver on an effective shield law.

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Overview of journalists' shield laws in Australia

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

		Commonwealth *Evidence Act 1995*	**ACT** *Evidence Act 2011*[87]	**NSW** *Evidence Act 1995*
1	**Who's not required to disclose?**	• **journalist** and **employer**: s 126H(1).	• same as Commonwealth: s 126K(1).	• same as Commonwealth: s 126K(1).
2	**Presumption of non-disclosure or judicial discretion**	• **Presumption of non-disclosure**: s 126H(1).	• same as Commonwealth: s 126K(1).	• same as Commonwealth: s 126K(1).
3	**Scope of protection**	• Not compellable to answer any question or produce any document that would disclose the identity or enable that identity to be ascertained: s 126H(1).	• same as Commonwealth: s 126K(1).	• same as Commonwealth: s 126K(1).
4	**Is promise of confidentiality required?**	**Yes**: s 126H(1).	• same as Commonwealth: s 126K(1).	• same as Commonwealth: s 126K(1).
5	**Definitions**	• ***journalist***: person **engaged and active** in news publication who may be given information by an informant expecting it to be published in a news medium: s 126G(1). • ***informant***: person who gives information to a journalist in the normal course of the journalist's work expecting that it may be published in a news medium: s 126G(1). • ***news medium***: medium for disseminating news and observations on news to the public: s 126G(1).	• *journalist*: same as Commonwealth: s 126J. • *informant*: same as Commonwealth: s 126J. • *news medium*: same as Commonwealth: s 126J.	• *journalist*: person engaged in the **profession/occupation** of journalism in connection with publishing information in a news medium: s 126J. • *informant*: same as Commonwealth: s 126J. • *news medium*: • same as Commonwealth: s 126J.
6	**Loss of protection/ court's discretion to refuse protection**	• **Court may refuse** the protection if, having regard to issues in that proceeding, the **public interest in disclosure** of informant's identity outweighs any likely adverse effect of disclosure on the informant or others and the public interest in the news media's ability to convey facts and opinion and to access sources of facts: s 126H(2)(a)–(b). • Court has discretion to impose terms and conditions on the order to disclose: s 126H(3).	• Refusal of protection – same as Commonwealth: s 126K(2)(a)–(b). • Discretion to set terms and conditions – same as Commonwealth: s 126K(3).	• Refusal of protection – same as Commonwealth: s 126K(2)(a)–(b). • Discretion to set terms and conditions – same as Commonwealth: s 126K(3).

	Tasmania *Evidence Act 2001*	**Victoria** *Evidence Act 2008*	**Western Australia** *Evidence Act 1906*
	• **Does not say** journalist/employer; appears to cover them: s 126B.	• same as Commonwealth: s 126K(1).	• similar to Commonwealth: s 20I.
	• **Judicial discretion**: s 126B(1).	• same as Commonwealth: s 126K(1).	• similar to Commonwealth: s 20I.
	• Court **may direct** that evidence not be taken if it would disclose: a '**protected confidence**'; or '**document** recording a protected confidence'; or '**protected identity** information': s 126B(1)(a)–(c). • Court **must direct** that evidence **not be taken if** it is likely that '**harm**' would/might be caused directly/indirectly to a protected confider; and the nature and extent of harm outweighs the desirability of the evidence being given: s 126B(3)(a)–(b). • "Harm" defined in s 126A without specific reference to journalist.	• similar to Commonwealth: s 126K(1).	• similar to Commonwealth: s 20I.
	• Confidentiality obligation can be **express or implied**: s 126A(1), see heading 5 below. • Must be a *protected confidence*, *protected identity* or document recording a protected confidence: see definitions below: s 126A(1).	• same as Commonwealth: s 126K(1).	• same as Commonwealth: s 20I.
	• No reference to *journalist*, *news medium* etc. • *protected confidence*: communication in confidence to a "confidant" in the course of a relationship where confidant was acting in a professional capacity; and confidant had an **express/implied obligation** not to disclose its contents, whether or not the obligation arises under the law or can be inferred from the relationship: s. 126A(1). • *protected identity information*: information about, or enabling identification of, the person who made a protected confidence: s 126A(1).	• *journalist*: person engaged in the **profession/occupation** of journalism in connection with publishing information, comment, opinion or analysis in a news medium: s 126J(1). • **guidance on definition of "journalist"**: court must consider: (i) whether a significant proportion of the person's professional activity involves collecting and preparing news/current affairs or commenting/analysing news/current affairs in a news medium; (ii) whether the person's news/current affairs information, opinion or analysis of news/current affairs is regularly published in a news medium; (iii) whether in respect of these outputs the person is **accountable to comply** (through a complaints process) with recognised journalistic or media **professional standards or codes** of practice: s 126J(2). • *informant*: same as Commonwealth: s 126J(1). • *news medium*: same as Commonwealth: s 126J(1).	• *journalist*: same as NSW: s 20G. • *informant*: same as Commonwealth: s 20G. • *news medium*: same as Commonwealth: s 20G.
	Loss of protection – privilege may be lost in event of **misconduct**, if communication was made in furtherance of a fraud, an offence or act that attracts a civil penalty: s 126D(1).	• Refusal of protection – same as Commonwealth: s 126K(2)(a)–(b). • Discretion to set terms and conditions – same as Commonwealth: s 126K(3).	• Refusal of protection – similar to Commonwealth: s 20J(1) and (2)(a)–(b). • Loss of protection – privilege may be lost in the event of **misconduct** by journalist or informant: s 20J(3)(j).

Overview of journalists' shield laws in Australia (continued)

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

		Commonwealth *Evidence Act 1995*	**ACT** *Evidence Act 2011*[87]	**NSW** *Evidence Act 1995*
7	**Proceedings/ forums covered**	• Covers **all federal or ACT court proceedings** and all proceedings in any other Australian court for an offence against Commonwealth law i.e. covers all Commonwealth offence prosecutions in a Commonwealth, State or Territory court, including bail, sentencing, interlocutory and chamber proceedings: ss 4(1) and 131B. • "federal court" means the High Court or any other court created by Parliament (other than Supreme Court of a Territory) and includes "a person or body (other than a court or magistrate of a State/Territory) that in exercising Commonwealth power is required to apply the laws of evidence": s 4(1) Note 2 and *Dictionary*. • Non-disclosure presumption covers court processes and court orders that require disclosure, including a summons or subpoena to produce documents or give evidence; pre-trial discovery; non-party discovery; interrogatories and a notice to produce: s 131A(2). • Applies at trial and pre-trial stages of judicial proceedings: s 131B.	Commonwealth provision applies to ACT: *Evidence Act 1995* (Cth), ss 4(1) and 131B. • "**ACT court**" means the Supreme Court of the ACT or any other court of the ACT, and includes a person or body that is required to apply the laws of evidence: *Evidence Act 1995* (Cth), s 4(1) Note 2 and *Dictionary*.	• Generally applies to all proceedings in a **NSW court**, including bail, sentencing, interlocutory and chamber proceedings: s 4(1). • "NSW court"' means Supreme Court, or any other court created by Parliament and includes any person or body (other than a court) that, in exercising a function under NSW law, is required to apply the laws of evidence: *Evidence Act 1995* (NSW) – *Dictionary*. • Non-disclosure presumption covers court processes and court orders, including a summons or subpoena to produce documents or give evidence; pre-trial discovery; non-party discovery; interrogatories and a notice to produce: s 131A.
8	**Is it called a "Privilege"?**	Division is entitled "Journalists' Privilege": Part 3.10 Div 1A	Division is entitled "Journalist Privilege": Part 3.10 Div 1C	Division is entitled "Journalist Privilege": Part 3.10 Div 1C
9	**Factors court may take into account**	Not listed in detail: see heading 6 above.	Not listed in detail: see heading 6 above.	Not listed in detail: see heading 6 above.

	Tasmania *Evidence Act 2001*	**Victoria** *Evidence Act 2008*	**Western Australia** *Evidence Act 1906*
	• Generally applies to all proceedings in a **Tasmanian court**, including bail, sentencing, interlocutory and chamber proceedings: s 4(1).	• Generally applies to all proceedings in a **Victorian court**, including bail, sentencing, interlocutory and chamber proceedings: s 4(1). • 'Victorian court' includes persons or bodies required to apply the laws of evidence: s 4(1) Notes. Means Supreme Court or any other court created by Parliament and includes any person or body (other than a court) that, in exercising a function under Victorian law, is required to apply the laws of evidence: *Evidence Act 2008* (Vic), Sched 2 – *Dictionary*.	• Applies to **every legal proceeding except** where otherwise intended: s 4. • The protection provisions apply to a "**person acting judicially**" in any proceeding even if the law by which the person has authority to hear, receive, and examine evidence provides that this Act does not apply to the proceeding: s 20H(3). • Protection **does not cover** proceedings in either House of Parliament, parliamentary committees with power to receive and examine evidence (see definition of "person acting judicially"): s 20G.
	No reference to "journalist".	Division is entitled "Journalist Privilege": Part 3.10 Div 1C.	Terms used are "Professional Confidential Relationship" and "Protection Provisions (Journalists)".
	Listed in s 126B(4)(a)–(j) but list not closed: • probative value of the evidence: (a); • importance of the evidence: (b); • nature/gravity of the offence; cause of action/ defence/nature of subject of proceeding: (c); • availability of any other evidence in relation to the protected confidence/information: (d); • likely effect of taking the evidence, including the likelihood of harm, and the nature and extent of the harm that would be caused to the protected confider: (e); • the means available to the court to limit the harm if the evidence is taken: (f); • if it is a criminal proceeding whether the party seeking the evidence is a defendant or prosecutor: (g); • whether the substance of the protected information has already been disclosed: (h); • the public interest in preserving confidentiality of the protected confidence or the source identity: (i and j).	Not listed in detail: see heading 6 above.	Listed in s 20J(3)(a)–(j) but list not closed: • probative value of the evidence: (a); • importance of the evidence: (b); • nature/gravity of the offence; cause of action/ defence/nature of subject of proceeding: (c); • availability of any other evidence in relation to the protected confidence/information: (d); • likely effect of taking the evidence, including the likelihood of harm, and the nature and extent of the harm that would be caused to the protected confider/others: (e); • the means available to the court to limit the harm if the evidence is taken: (f); • the likely effect of the evidence in relation to a prosecution that is in progress; or an investigation into whether an offence has been committed: (g); • whether the substance of the protected information has already been disclosed: (h); • the risk to national or State security: (i); • whether there was misconduct by the journalist or the informant in relation to obtaining, communicating or using the information: (j).

Source: Associate Professor Joseph M Fernandez

STAR CHAMBERS

One of the more bizarre aspects of the failure of the shield law regime in Australia is how the legal concept inexplicably stops short when it comes to anti-corruption bodies. Politicians, who have drafted and voted for shield laws in their respective jurisdictions, presumably recognise that journalists are caught in an appalling situation when a court seeks to compel them to reveal a confidential source. The politicians know that the journalists have an ethical obligation not to do so. Hence the shield laws aim is to acknowledge this ethical obligation and attempt to protect journalists from the consequences of observing that obligation. Why then do the same politicians draft laws to create anti-corruption bodies, granting extraordinary star-chamber-like powers of secrecy, coercion and compulsion that ignores the intent of the journalists' shield law?

As MEAA has recorded in past press freedom reports, MEAA members have been called to appear before a grab-bag of anti-corruption bodies – not because they have done anything wrong – but because the star chamber wants to go on a fishing expedition to find the source of a story or extract information from the journalist so that the star chamber can pursue its investigations.

The journalist is ordered by the star chamber to appear. Failure to do so incurs a fine or a jail term or both. The journalist must appear in secret – only the journalist's lawyer can know they have been ordered to appear. If the journalist tells anyone aside from a lawyer that they have been called to appear, they face a fine, a jail term or both. The journalist can be compelled to produce documents, notes and recordings. Failure to do so can incur a fine or a jail term or both. If the journalist respectfully refuses to divulge information from a confidential source, or refuses to identify a confidential source – as they are ethically obligated to do – the journalist faces a fine, a jail term or both[88].

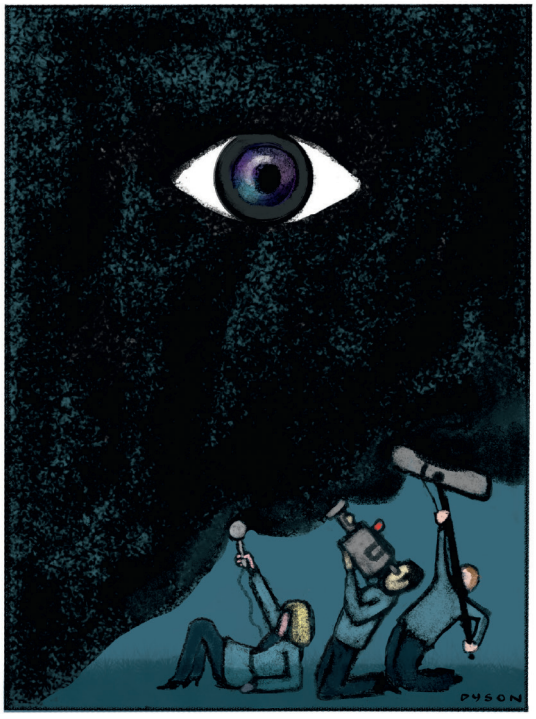

ILLUSTRATION BY ANDREW DYSON

This situation has been faced by up to a dozen MEAA members in recent years. Caught in an ethical nightmare, they have been unable to inform their editor or even their professional association, about their predicament. They have been unable to seek advice about their professional and ethical responsibilities. To do so could immediately lead to a fine or a jail term or both. And, of course, they cannot even tell their family.

MEAA questions why the concept of journalist privilege which is at the heart of the shield laws enacted in various jurisdictions across the country suddenly evaporates when it comes to star chambers who do not wish to investigate the journalist for wrongdoing, merely find out what they know and how they came to know it.

MEAA has in past press freedom reports cited the Victoria's Office of Police Integrity and Local Government Inspectorate, as well as the Commonwealth's Australian Building and Construction Commission as star chambers that have sought information from journalists using star chamber powers of secrecy, coercion and compulsion[89]. On April 16 2014 the body that took over the work of these two organisations, Victoria's Independent Broad-based Anti-Corruption Commission, admitted it was incapable of performing its role due, in the main, to the legislation that created it. This should be an opportunity to start again and draft new legislation. MEAA would argue that it would also be a good opportunity to think carefully about the star chamber powers granted to such a body that can override journalist shield laws and entrap journalists who are ethically obligated to act professionally with respect to their confidential sources.

WHISTLEBLOWER PROTECTION

The *Public Disclosure Bill* 2013[90]commenced on January 15 2014. The new Act replaces the 1999 legislation and creates a Commonwealth government public interest disclosure scheme to encourage public officials to report suspected wrongdoing in the Australian public sector[91].

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the PID Act and monitoring its operation, "providing guidance and advice to people who are thinking about making a disclosure of wrongdoing"[92]. The Ombudsman will also provide information, resources and guidance to Australian Government agencies, Commonwealth companies and public authorities responsible for managing and responding to public interest disclosures.

MEAA believes the new Act is a significant step forward that could be used as a template for uniform whistleblower laws in other jurisdictions. However, the Act still contains flaws[93]. The failure of the proposed legislation to protect people making disclosures about the conduct of politicians elevates them 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 of the University of Melbourne, said in 2013 when the Act was first introduced: "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."[94]

MEAA 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.

Meanwhile, MEAA is concerned at repeated statements by Australian politicians about whistleblower Edward Snowden. Snowden's revelations exposed the illegal misuse of the data being collected by NSA surveillance.

On January 22 2014, Foreign Minister Julie Bishop told the Alliance 21 conference in Washington DC: "… a grave new challenge to our irreplaceable intelligence efforts arose from the actions of one Edward Snowden, who continues to shamefully betray his nation while skulking in Russia. This represents unprecedented treachery – he's no hero."[95]

On January 29 2014 Prime Minister Tony Abbott said in a radio interview: "This gentleman Snowden, or this individual Snowden, who has betrayed his country and in the process has badly, badly damaged other countries that are friends of the United States…"[96]

On February 11, Attorney-General Senator George Brandis, speaking in the Senate, said of Edward Snowden: "…through his criminal dishonesty and his treachery to his country, [he] has put lives, including Australian lives, at risk".[97]

New act still flawed

Dr Suelette Dreyfus

In June 2013, during the last few hours of Julian Gillard's term as Prime Minister, an important milestone in transparency legislation quietly slid through its final hurdle in the Australian Senate. A small coterie of "good governance" types moved from watching the *Public Interest Disclosure Act 2013* (Cth)[98] *(PIDA)* pass into law to the public café at Parliament House to share a bottle of bubbly and take some selfies for posterity.

PIDA marks an important step on the long road to better transparency and proper legal protections for Commonwealth Government employees and contractors who reveal serious wrongdoing. Yet, while *PIDA* is much better than the scant protections previously in place, it still has major flaws. Government whistleblowers – and journalists who interact with them – need to understand these pitfalls.

Many of *PIDA*'s strengths could benefit society as a whole in a good governance sense, but not necessarily help journalists get the juiciest stories. In other words, don't assume your government sources are now somehow automatically protected if their leak is clearly in the public interest.

PIDA does steer whistleblowers to internal reporting channels. However, in an under-reported but highly important step, the law provides for the first time a protected way to get stories of serious wrongdoing to the broader public via the media and other external channels. This was not previously protected at a Commonwealth level.

The better whistleblowing environment promised by *PIDA* includes these improvements:

- It is now possible for a whistleblower to "go external" – such as turning to a journalist – and be protected. Whistleblowers must disclose internally **first** in order to get this protection (unless the disclosure is an "emergency disclosure" per Section 26(1)(c)(item 3) – which is very restrictive). They must also believe on reasonable grounds that an investigation into their disclosure was inadequate. Alternatively they may believe that the response to the investigation was inadequate, or that the investigation didn't happen in a 90-day time limit.

- The disclosure must also not be, on balance, against the public interest, nor must more information than is reasonably necessary be disclosed. Further, the disclosure can't include intelligence information nor be about conduct relating to an intelligence agency.

- Employees no longer have to hunt around in long-forgotten basement corridors to find their department's "disclosure officer". Rather, they can disclose directly to their supervisors. (This is the pattern that research shows most whistleblowing cases follow anyway).

- Penalties for reprisals against whistleblowers are now tougher – up to two years in prison. Of course, proving reprisal can be a difficult task for a whistleblower. However the stiffer prison time punishment may give pause to bullying bosses.

- New levels of protecting the anonymity of whistleblowers have been added, including the protection of any "identifying information", which must not be released without the consent of the whistleblower (Sections 20 and 21), subject to criminal and civil sanctions.

- One of the key mechanisms of the new protection for whistleblowers is the *Fair Work Act 2009* (Cth)[99]. Employees who disclose wrongdoing will be able to seek remedies if they have suffered adverse action against them or have been unfairly dismissed. They will have access to the Fair Work Tribunal to enforce these rights. This is useful since whistleblowers often are fired or threatened with dismissal.

- *PIDA* improves the landscape for whistleblowers on the issue of costs being awarded against a discloser. When whistleblowers seek to enforce their rights under *PIDA*, the cost of the action only has to be paid by the whistleblower if the action is brought vexatiously. This is true even if the whistleblower loses. Financial costs are almost always a major problem for whistleblowers (in many countries, not just Australia), so this is an important step forward. It reduces the barriers to actually going through with a disclosure.

- A new watchdog layer has joined the whistleblower checks and balances, with the Commonwealth Ombudsman's Office now playing a substantial oversight role regarding departments' handling of complaints. Until now, whistleblowers found themselves at the mercy of the particular vagaries of their own departments. With the Ombudsman watching over the shoulders of each department via an expanded role under *PIDA*, there is much more incentive for a department to deal with whistleblower complaints and not sweep them under the carpet as they previously might have done.

Australia's shiny new whistleblower protection legislation needed a lot of work before it hit the floor of Parliament for the final pass-through in June 2013. Some 73 amendments went into the document in the few weeks before it finally passed.

Andrew Wilkie.
PHOTO FAIRFAX SYNDICATION – ALEX ELLINGHAUSEN, *THE CANBERRA TIMES*

The fact that so much of it needed a major tune-up led to some political compromises:

- *PIDA* doesn't provide protections for disclosure against politicians on matters of public policy (omitted from Section 29 and Section 69 and expressly excluded by Section 31). It would be hard to find a more self-serving bit of recent legislation than this, and the Labor politicians who insisted on this section should be publicly named and shamed. Not only is this section laughable, it is dangerous since clearly politicians and public policy are two areas where there is the greatest potential risk or wrongdoing. Worse, it might allow serious wrongdoing to be classified as "public policy" in some manner – thereby excluding it from the Act. Imagine scenarios where a public policy may be fine, but its implementation may be corrupt. It's possible that the wrongdoers will have "a get out of jail free" card from this legislation by claiming it's all under the "public policy" category exclusion.

- *PIDA forces an internal disclosure first in all circumstances*, unless the disclosure fits within the very narrow category of an "emergency disclosure" in Section 26(1)(c)(item 3). This is unreasonable given that it may be a line manager or other boss who is the perpetrator of the corruption. This also destroys any chance of proper anonymity for the whistleblower. Moreover, there are clearly circumstances which legitimise external disclosure in situations that would not satisfy *PIDA*'s restrictive emergency disclosure provisions.

- *The threshold to obtain protection for turning to a journalist or other "external" is too high*. The test should be a fair objective standard ("where a discloser has a reasonable belief that the response was not adequate"). *PIDA* has a harder legal test, namely that the discloser believes on reasonable grounds there's been bad conduct (Section 26(1)(c)(item 2).This has the potential to discourage disclosers from coming forward.

- *There is no explicit protection for making a disclosure to a Commonwealth MP, with a lowered threshold – the test is the same as a disclosure to a journalist.* A special protection for whistleblowing to an MP, plainly a sensible step, is being debated in Britain.

- *PIDA has a gigantic hole in coverage of intelligence and law enforcement agencies*. Section 33 of the Act excludes "intelligence conduct" from protections. Similarly, Section 26(1)(c)(item 2) excludes "intelligence information" (as defined in Section 41) in making external disclosures. It was as if the intelligence agencies just asked for a blank cheque by the then-Attorney General – and got it. The implication here is that intelligence and law enforcement agencies are somehow immune from corruption or wrongdoing, and that those with security clearances can always be trusted to investigate themselves. History shows that the more powerful and secretive an organisation is, the more likely corruption is to flourish inside it. J. Edgar Hoover's FBI is a case in point.

This *PIDA* section excluding intelligence conduct and information doesn't evaluate the

whistleblowing in this area by things such as whether exposed information might cause harm to the public, or genuinely endanger national security. It's just a big sign reading "Nothing to see here. Move along".

Tasmanian independent MP and former national security whistleblower Andrew Wilkie originally drafted his own Private Member's whistleblowing Bill. While the Bill did not get up, it was important in the efforts of "integrity in government" sorts to push Labor into keeping its commitment to present a halfway decent Bill of its own.

The Wilkie Bill is a very valuable as a point of comparison to illustrate where *PIDA* fails the public in the intelligence arena. *PIDA* crudely carves out "intelligence conduct" as an unsorted lump. The Wilkie Bill nuances information by whether its disclosure would really affects a person's safety, or jeopardise a lawful intelligence or law enforcement operation in a way that affects a person's safety. The test for disclosure to a journalist of this sort of sensitive information is harder, although not impossible. Further it only protects *lawful* intelligence or law enforcement operations. Unlawful actions are fair game, as they should be.

Disclosure of the WikiLeaks "Collateral Murder" video, showing the US military gunning down Reuters staff, a Good Samaritan and his children, would likely not be protected under *PIDA* but probably would be under Wilkie's Bill. The damning video was falsely claimed to have classified status in Chelsea [formerly Bradley] Manning's US whistleblower court case, even though it turned out not to be classified. The revelations showed shocking wrongdoing and were clearly in the public interest. Thus it's a good litmus test.

The Wilkie Bill provides a better standard of what transparency legislation should be in this delicate area – and *PIDA* falls short. Fortunately, even as PIDA finally passed into law, the government committed to a review of the legislation, due by the middle of 2015. Hopefully this will provide a chance to fill at least some gaps in *PIDA*.

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Protect the source

Richard Baker

In September 2008, I walked from the brown-brick toilet block that was the old *Age* newspaper building in Melbourne and over to a nondescript cafe on the other side of Little Lonsdale Street. Seated at a table inside was a man who, according to the mutual friend who arranged the meeting, had a hell of a story to tell.

Polite and self-contained, the man spoke of his work for the Reserve Bank of Australia's currency printing company, Securency. He accused the company's top executives of being involved in rampant bribery across Asia and Africa to secure banknote supply contracts with central banks.

He certainly got my attention. However, he was not a comfortable leaker and made it clear that contacting *The Age* was his last resort after the federal police chose not to act on the information he had provided to it months earlier.

It took months and many meetings to win the confidence of the Securency whistleblower and to convince him to divulge enough material for me and my colleague, Nick McKenzie, to verify his claims and dig further. To win his trust we had to agree to protect his identity.

By May 2009, we had enough information to publish a front-page story revealing the massive commission payments made by the Reserve Bank's note-printing subsidiaries to tax haven bank accounts belonging to allegedly corrupt middlemen.

It took the RBA just hours to refer the story to the federal police. This time the federal police had no choice but to investigate.

The story prompted other insiders within the RBA to contact us and once more the slow dance between journalist and whistleblower began. Over the next two years we learned how, back in 2007, the RBA had received explicit information through an internal whistleblower about its companies' exposure to foreign bribery, but chose not to report it to federal police and instead opted to handle things internally.

Five and a half years after my first meeting with the Securency whistleblower in the coffee shop, both RBA firms have been charged with foreign bribery in Vietnam, Malaysia, Indonesia and Nepal. Several former executives have been committed to stand trial in what is Australia's first foreign bribery prosecution. RBA governor Glenn Stevens, his former deputy Ric Battellino and other senior figures have appeared before a parliamentary committee to explain their actions.

None of this would have happened if it were not for whistleblowers. When it comes to illegality and corruption in government agencies, the combination of whistleblowers and journalists is almost always required in order for wrongdoing to be exposed and

change to occur. Without that combination, the temptation to cover up and spare embarrassment is too great.

The two key RBA whistleblowers, former Securency sales executive James Shelton and former Note Printing Australia company secretary Brian Hood, became important federal police witnesses and have spent days in court being cross-examined by lawyers for the accused. Hood was forced out of his job after providing evidence of bribery to senior RBA figures. Both men last year agreed to allow *The Age* to report their roles as whistleblowers.

My perception of whistleblowing is that it is a battle of heart versus head. The heart encourages a whistleblower to do what is morally right and act to expose corruption or malpractice, regardless of the consequences. The head urges caution and warns of the potential for stress, isolation, job loss, litigation, prosecution and, in extreme cases, death.

Despite the risks, I have been fortunate over the years to witness the heart triumph over the head more often than not. The chance to right a wrong and ensure that those in positions of authority are held to account is a powerful motivation for whistleblowers, as it is for journalists.

After 15 years as a journalist at *The Age* and nine in its investigative team, rarely, if ever, do I recall an important story happening without the involvement of a person or people with inside knowledge.

Despite improved protections for whistleblowers in last year's federal *Public Interest Disclosure Bill*, exposing wrongdoing in a government agency by contacting the media remains a risky proposition. The legislation affords protection for whistleblowers to report concerns to their own agency or the Commonwealth Ombudsman (or the Inspector-General of Intelligence and Security, if the matter relates to intelligence issues).

But it is less clear about the legality of contact with journalists, yet both common sense and experience suggest that allowing agencies to investigate themselves is likely to lead to less than transparent outcomes.

When a journalist is contacted by a whistleblower with what sounds like an amazing story, I would encourage the reporter to quickly dismiss those thoughts about the glory of a big scoop (be honest, we all have them) and focus on what will become an important and complicated relationship.

These people are placing their trust in you to look after them. It could take months for them to agree to give you a document that backs up their story. In most cases it is likely that a whistleblower will require you to protect their identity at all costs.

The protection of confidential sources is a fundamental principle of journalism and something not to be taken on lightly. The promise to protect the identity of sources can lead to a journalist facing conviction for contempt of court and possible jail. The stress, strain and expense of years in court are immense. But it is part of the job and you just have to roll with it.

So how do we as journalists go about protecting our sources? Obviously you do not go around talking about who your confidential source is and you fight any legal attempts to force source disclosure. You take extreme care with notebooks. If electronic surveillance is an issue you avoid mobile phone or email contact. You try to organise face-to-face meetings in safe locations.

All this takes time, and time is something that clashes with the media landscape we now work in, where news is constantly being updated and stories disappear from websites within hours.

In recent months, the public has become more aware of the immense electronic surveillance capabilities of the Australian and US intelligence agencies via Edward Snowden's disclosure of National Security Agency material.

It has made me think how much attention Australia's major newspaper and online publishers, TV networks and the ABC pay to the security of their internal and external communications.

Each day, journalists at *The Age, The Australian*, the Seven Network and the ABC, for example, invite members of the public to "tip us off". Most often the direct email addresses or Twitter handles for individual journalists are provided as the points of contact.

While I have no doubt that the vast majority of Australian journalists do everything they can to uphold any promises given to a confidential source, I wonder whether the nation's major media outlets could be doing more to protect the security of their electronic communications.

The corporate email addresses provided by many journalists as points of contact to the public have few, if any, security features. Surely this must dampen the desire of potential public service or military whistleblowers to make contact in this fashion.

With journalist numbers around the country shrinking, public relations and corporate communications ranks swelling and on-going government secrecy about matters of national importance, the need for whistleblowers is as great as it has ever been.

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This article first appeared in *The Walkley Magazine – Inside the media in Australia and New Zealand*

PRIVACY

On March 31, the Australian Law Reform Commission issued a discussion paper as part of its inquiry *Serious Invasions of Privacy in the Digital Era*[100]. One proposal was for the creation of a privacy tort in response to intrusions on a plaintiff's private affairs or the misuse or disclosure of private information. A threshold test would have been included to ensure various elements had to be met before any claim could proceed.

At the beginning of April 2014 Attorney-General George Brandis released a brief statement: "The government has made it clear on numerous occasions that it does not support a tort of privacy."[101]

Coincidentally, the South Australian Law Reform Institute produced an issue paper *Too Much information – a statutory cause of action for invasion of privacy*. MEAA responded that a statutory cause of action for invasion of privacy would dangerously undermine freedom of expression, the public' right to know and the ability of the media to scrutinise and hold the powerful to account, particularly as a right to freedom of expression is not specifically recognised or protected in Australian law.

MEAA remains concerned about the considerable privacy implications of the widespread use of metadata surveillance by intelligence agencies – as outlined in a separate chapter of this report. The ALRC inquiry's terms of reference preclude it from examining this type of privacy intrusion. However, MEAA believes these assaults on individual privacy, sometimes with the cooperation (willing and unwilling) of commercial entities, are of immense concern to MEAA members due to the serious press freedom implications. MEAA believes that this level of surveillance undermines the crucial relationships journalists have with their confidential sources and the ability to share and store newsworthy data securely.

All quiet on the water front

From the outset Operation Sovereign Borders, the militarisation of immigration and border protection, held press conferences where information was withheld. It has applied military secrecy on activities of civilian law enforcement. The government-imposed silence on an issue of significant public interest has been extraordinary with particular disdain shown for the role of the media and, by extension, the public's right to know.

"Frankly, we do not give a damn about the media cycle and what is going to be said on morning radio and *Q&A* and all the rest of it. For us that is just the ephemeral."

– Michael Pezzullo, chief executive officer of the Australian Customs and Border Protection Service to a Senate hearing, January 31 2014[107]

"It would not be in our national interest or the public interest to disclose this information."

– Minister for Immigration and Border Protection Scott Morrison to a Senate hearing, January 31 2014[108]

"**Journalist:** [Indistinct] …the overnight incident, what's become of that boat of asylum seekers?
Angus Campbell: I will not comment further in relation to on-water matters. Thank you.
Journalist: General, this is of great public interest [indistinct]…
Angus Campbell: [Interrupts] I will not comment further in relation to on-water matters.

MEDIA ACCESS TO ASYLUM SEEKERS

The silence[102] shrouding much of Australia's involvement in the asylum seeker and detention centres issue is a considerable press freedom concern. Over several years, MEAA has regularly sought improved media access to detention centres and to asylum seekers. The issue has been of immense public interest for more than a decade (since the Tampa incident in August 2001) and therefore should be reported by the media as a legitimate element of the public's right to know.

More recently, MEAA has complained about the lack of information flow, with particular regard to the media briefings about Operation Sovereign Borders following the militarisation of customs and immigration activities. MEAA is also concerned at impediments Australian journalists face in reporting on asylum seekers detained in Papua New Guinea and Nauru at Australian expense.

MEAA believes the silence surrounding the activities of Australian vessels and personnel in contact with asylum seekers and boats is at odds with the public's right to know.

On September 23 2013, MEAA expressed concern over the new protocol for announcing events involving asylum seeker boat arrivals in Australian waters. MEAA said that both the federal government and the military commander of "Operation Sovereign Borders" have overstepped the need to limit information to a weekly briefing and their refusal to respond to questions by citing "operational reasons".

CARTOON BY RON TANDBERG

MEAA said: "Curbing the free flow of information in a peace-time pursuit of border control is a heavy-handed approach. The decision to hold weekly briefings and to cease issuing announcements in 'real time' is an unnecessary and out-dated view to managing issues of immense public interest. Putting customs and immigration operations under military command, and citing 'operational reasons' for not being forthcoming, impedes legitimate scrutiny of government policy."[103]

Journalist: Have they been…
Angus Campbell: I will not comment further in relation to on-water matters.
Journalist: Minister…
Angus Campbell: I think we dealt with that question.
…
Journalist: General, can you confirm it was *HMAS Ballarat* that took part in the overnight operation?
Angus Campbell: As I've indicated earlier, I will not discuss further on-water operations."

– Lt Gen. Angus Campbell, Commander – Operation Sovereign Borders Joint Agency Taskforce, eighth weekly briefing on Operation Sovereign Borders, Sydney, November 8 2013[109].

"I think it's very important that we respect the professionalism of the defence forces. I think it's very important that we don't drag men and women in uniform into party political controversy. But it's also very important that, at the right time and in the right place, senior Defence chiefs are there to provide information and that's what's happened under this Government. From time to time, we've had General Campbell there to provide information. His role in those Operation Sovereign Borders announcements has evolved but nevertheless I think it's perfectly appropriate for a senior Defence chief to be offering information and at times explanations as to exactly what's happening."

– Prime Minister Tony Abbott, press conference, April 4 2014[110]

Operation Sovereign Borders Commander, Lieutenant General Angus Campbell and Minister for Immigration and Border Protection, Scott Morrison giving their briefing on Operation Sovereign Borders in Sydney on November 8 2013.

On January 13 2014 MEAA wrote to Nauru's President[104] to complain about a sudden leap in the cost of journalist visas from $200 to $8000, and noted that using outrageously high government charges to restrict legitimate access to a story of great public interest is a threat to press freedom.

On January 14 2014, it was reported that the Immigration Department was blocking the release of a list of ministerial briefings[105].

On February 4 MEAA wrote to Immigration and Border Protection Minister Scott Morrison[106] seeking a meeting to discuss the near blanket imposition of the public interest immunity about customs and immigration activities and particularly the ADF in its border protection duties. We also asked the Minister to intervene regarding the escalation of Nauru's journalist visa fees.

MEAA has not heard back from the Minister.

Gaining access to detention centres in Australia has been a press freedom concern for some years, but with responsibility for the offshore detention centres now shared between foreign government and corporations contracted to run the centres, media access is virtually impossible except under the extraordinary circumstances of the Manus Island incident in February 2014 that led to the murder of detainee Reza Barati and injuries to another 76 detainees.

In the face of the silence from the Federal Government with regard to "on-water" incidents involving Customs and Australian Defence Force vessels and personnel, and the difficulty journalists face in accessing asylum seekers in detention centres, MEAA believes that it is largely up to Australian media outlets to make representations on behalf of their journalists.

With that in mind, on February 6 MEAA wrote to the Australia's Right To Know lobby group. Some 14 media organisations, including MEAA, are members of Australia's Right To Know. They include print, online and broadcast media groups.

MEAA has worked with Australia's Right To Know previously on the issue of asylum seekers. In July 2011, MEAA, behalf of Australia's Right To Know, had written to then Minister for Immigration, Chris Bowen, and then Minister for Home Affairs, Brendan O'Connor, calling on them to re-examine the guidelines under which journalists are allowed access to asylum seeker detention centres and detainees, and to review the policy for releasing footage of incoming asylum seeker vessels.

In our February 6 letter to Australia's Right To Know, MEAA wrote urging the lobby group to join in pressing for a meeting with the Minister Morrison and Communications Minister Turnbull to explore ways to improve information flow between governments and journalists on the asylum seeker and detention centre issue with the aim of ensuring the public's right to know. MEAA said we believed "a comprehensive industry approach may help in getting some movement in this area".

MEAA has not heard back from any Australia's Right To Know member.

Rocking the boats

David Marr

So young, yet the Abbott government has already made a lasting contribution to the language: "on-water operations" – as in, "things Australia does out in the Indian Ocean that we won't talk about even though lives are at risk, the navy has stuffed up and we've angered the only great power in our neighbourhood."

It needed to be honed. At first, immigration minister Scott Morrison used to block questions with the clumsy "operational issues at sea" until the military man on the team, Lieutenant General Angus Campbell, came out with the phrase in its final, elegant form.

"My comments will be confined to activities… relating to the off-water reception and processing of illegal maritime arrivals under the control of the Department of Immigration and Border Protection," he told the fifth joint press conference of the Morrison era on October 18 last year. "I will not discuss current or potential future on-water operations."

Campbell has held that line at every outing since. He stands there in full uniform giving scraps of information that were once automatically posted on a website. It's solemn theatre designed to suggest Operation Sovereign Borders (who got a fat fee for thinking up that name?) requires military-grade secrecy.

On-water matters that can't be discussed even include the number of refugee boats rescued on their way to Christmas Island. Every customer left alive can tell the people smugglers how, when and why they were fished from the sea. But Australians must know nothing. Why?

I had a go at Campbell's press conference the day that *The Australian* reported the navy was withdrawing from the Indonesian search and rescue zone. The general refused to confirm or deny the story, but I thought I detected a note of exasperation.

Me: "This would be a dramatic development if for the first time in over a dozen years the Australian Navy withdrew from the Indonesian search and rescue zone, a dramatic development… for people smugglers to worry about. Wouldn't you want them to know if this is happening? Wouldn't it be in the interests of the government that they know?"

Campbell: "As I said David, I'm not going to comment on what goes on in the water. I take your point, the headline in *The Australian* was a message that may well deter people who would otherwise travel by boat, but I am not going to offer that kind of commentary on what we do on the water."

And that's the way it's been ever since: a general and a minister standing there refusing to answer basic questions about the most controversial, deeply political maritime operation conducted by this country since John Howard blocked the *Tampa* in 2001.

Back then there was a news blackout, too. No military could be interviewed. All questions were routed through the office of Peter Reith, the Minister for Defence. No reporters or cameras were allowed on ships at sea.

But there are some differences today. Except for a few outliers like the *Daily Telegraph*'s Tim Blair who welcome the secrecy, journalists are mocking the government for refusing to answer questions. Morrison has become a figure of fun – grim but comic, as he blocks and mangles the truth.

This time round it's so much harder to keep the secrets of the blockade. Morrison's spin on the Manus Island riot didn't last more than a day. After the deadly riot of February 17, there were too many Australians employed in the camp who were too horrified to stay silent. And asylum seekers returned to Indonesia by the navy are available for interview.

But the rules of the game are: no matter what's revealed, Morrison and the military pretend all remains secret. In a way it takes guts. You have to stand there refusing to address questions which any day might be answered by *Guardian Australia*, News Limited, Fairfax or the ABC.

The chief of the Defence Force, David Hurley, refused to admit at Senate estimates in late February that Australia owns any of those unsinkable orange lifeboats that have washed up on Indonesia's islands; refused to say what flag they might be flying; refused to acknowledge they are being deployed to send refugees back to Indonesia; and refused even to concede Australia is conducting push-back operations.

Four days later Michael Bachelard published in the Fairfax press a superb account of the latest on-water operation that forced 28 asylum seekers back to Java. They spoke of being picked up at sea by Customs, stripped of their phones and held below deck where they staged a hunger strike for days before being transferred to an orange lifeboat and pointed to an island on the horizon.

Poor Hurley.

A combination of press heckling, fine reporting and dramatic developments compelled Morrison to abandon his strategy of holding press conferences – with military escort – only once a week. In 2014 he continues his regular solo appearances on Ray Hadley's 2GB *Morning Show*, but he now responds to events like any other minister.

He holds doorstops. He calls press conferences. His flaks don't return calls, don't answer emails, don't supply promised material and don't respond to the protests of the press. And after the mayhem on Manus, the minister showed a depthless capacity for getting it wrong.

Journalist: "Refugee advocates have said that people in Mike compound saw mobs of 30 to 40 strong police and local PNG people coming through with weapons. Are you going to be investigating that, even if they tell you that in fact there were no PNG or locals involved in the attack?"

Morrison: "Well it's not just G4S [the firm that provides security at the Manus Island detention centre], my statement early today made it very clear there were no PNG police inside the centre last night. …"

An asylum seeker on Manus Island holds aloft a picture of slain asylum seeker Reza Berati.
PHOTO BY EOIN BLACKWELL, AP IMAGE.

Morrison may never recover from that gaffe and the hunger he showed in those early days to vilify the dead and wounded asylum seekers on Manus. Again, strong reporting left him looking a fool. How he must have wished in retrospect that those rampaging PNG officers and their dogs were somehow or other on water.

But the secrecy surrounding Operation Sovereign Borders can't be broken down by mockery and good reporting alone. It needs something more: a united and public campaign from media proprietors demanding the government give timely, accurate reports of the operation – on and off water – to stop the boats.

There was such a campaign once: the Australia's Right To Know coalition of proprietors and the Media, Entertainment & Arts Alliance (MEAA) formed in the last years of the Howard government which for a while galvanised attention on problems that still face us today. But it petered out in the Labor years – and not because government under Labor was an open book.

It's time to revive the Right To Know. Journalists will report and mock, but the union and the proprietors need to insist. MEAA wrote to its partners in the coalition in early February in the hope that "a comprehensive industry approach may help in getting some movement in this area". A month later, not a single media outlet had replied.

Yet the rhetoric *The Oz* used when we were all fighting for the Right To Know still looks good today: "Australia has nothing to fear from transparency, openness and access to information, except that the workings of government, and our journalism, will improve."

David Marr writes for *The Guardian* and *The Saturday Paper*
This article first appeared in *The Walkley Magazine – Inside the media in Australia and New Zealand*

SUPPRESSION ORDERS

PHOTO BY KEN IRWIN, FAIRFAX SYNDICATION

MEAA remains concerned about the excessive use of non-publication orders across various legal jurisdictions. While statistics suggest that there may have been an easing in the issuing of orders in recent years, there is still a concern that the judiciary is too willing to muzzle the media and shroud the operation of the justice system with a veil of secrecy.

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.

Research has been conducted into the issuing of suppression orders in Victoria which has been the standout overachiever in suppressing the media's reporting. The University of Melbourne Law School's paper "An Empirical Analysis of Suppression Orders in the Victorian Courts 2008-2012[111]", written by Jason Bosland and Ashleigh Bagnall and published in the *The Sydney Law Review* still makes lamentable reading.

The pair found that in the five years to 2012, 1501 suppression orders had been issued by Victorian courts: rising steadily from 217 issued in 2008 (from 25th February), followed by 316 (2009), 298 (2010), a staggering 360 (2011) and 310 (2012). The Victorian Supreme Court was responsible for 281 orders over the five years, the County Court 670 and the Magistrates' Court 550.

About half the orders supressed reporting of the whole proceedings. Some 851 suppression orders had no time limit which meant that the parties would have to return to the court in order to get any variation made to the order.

There has been an attempt to achieve greater uniformity across jurisdictions and respond to concerns that suppression orders were being made too often in some states"[112]. The Standing Committee of Attorneys-General had established a working group to develop draft model legislation which has already been implemented federally and in New South Wales – the *Court Suppression and Non Publication Orders Act* 2010 which came into effect on 1 July 2011.

In Victoria, the *Open Courts Act* 2013[113] which came into effect on December 1 2013 includes a presumption in favour of disclosure, take steps to ensure that media organisations have some notice in which to prepare a response to a suppression order application, aim to apply a time period for the suppression, spells out the scope of the order including why it has been made and confining the order to achieving the intended outcome and permits a court or tribunal to review the order it has made.

MEAA hopes the reforms that are underway will introduce a fair and reasonable balance in the use of suppression orders so that the workings of the judicial system and the public's right to know can operate without excessive misuse of the powers to suppress information.

REDUNDANCIES

Over the past 12 months, while the number of redundancies decreased, there are still signs that many media organisations continue to struggle in the wake of the enormous changes taking place due to the digital transformation.

During calendar 2013, MEAA believes up to 500 editorial jobs have gone from across the industry. By comparison in the latter half of 2012, about 1000 jobs were lost from mainstream media[114].

At the two big publishing groups in 2013, there was another round of redundancies with about 65 jobs lost at News Corp Australia. At Fairfax, about 50 jobs went from the metro dailies plus another 13 full-time from the financial and business reporting group.

There were about 50 redundancies at AAP (50 from Pagemasters as a result of the "offshoring" of Fairfax sub-editing to New Zealand and a further 25 from AAP newsrooms). Bauer magazines also experienced redundancies as a result of titles closures and the relocation of the motoring division to Melbourne. APN made about 20 positions redundant.

MEAA is working with researchers from Latrobe University, the University of Canberra, University of Sydney and Swinburne University of Technology on "New Beats"[115], a plan to track the paths of journalists who have been made redundant. Over the three years, the project will follow careers of journalists who became redundant in 2012.

PHOTO BY MICHELLE MOSSOP, FAIRFAX SYNDICATION

Early results of the study suggest the media industry has lost a wealth of experience, skills and wisdom due to the wave of redundancies[116]. "While our study includes journalists from all media platforms, it came as no surprise that 94% of our respondents had left print jobs, and most (90%) of those took a voluntary redundancy package.

"What the survey dramatically showed, however, is how much journalistic experience has been walking out the door: the average age of the cohort is 49; more than half have departed from senior roles; and they have spent an average of just over 25 years working as journalists.

"The exodus of such a large number of experienced journalists shows that this issue matters to non-journalists as much as it does to those in the industry. With so many experienced journalists leaving, what sort of media is left for us as readers and audiences?"

The early findings[117] raise other concerns: "The findings highlight how harrowing the redundancy experience has been. For many, the decision to take a redundancy package was a tough one that was precipitated by stressful and more intense working conditions, as well as concerns about the future of the industry. Many also felt angry and frustrated with the way management handled the process. 'Despite the redundancy process being voluntary, I experienced powerful feelings of rejection, which spread into my other relationships, particularly with my teenage children,' said one respondent.

"More than a quarter of all surveyed said that redundancy had had a negative impact on their professional identity. As one respondent explained, panic set in immediately after the leaving the newspaper along with a loss of identity and purpose. 'My routine had been shattered. I had to find a way to motivate myself.' For another, 'the hardest thing has been adjusting to life outside a newsroom'."[118]

PUBLIC BROADCASTING

In late 2013 and early in 2014, several Government politicians launched a series of extraordinary political attacks that could be perceived as attempts to undermine the editorial independence of the Australian Broadcasting Corporation.

Section 78 of the *Australian Broadcasting Corporation Act* 1983 sets out the powers granted to the relevant Minister to give directions to the corporation – these are related to matters that are deemed to be in the national interest – these directions have to subsequently be explained to both Houses of Parliament[119]. Subsection (6) then states: "Except as provided by this section, or as expressly provided by a provision of another Act, the corporation is not subject to direction by or on behalf of the Government of the Commonwealth."

On November 29, Communications Minister Malcolm Turnbull told a Liberal Party function that he had contacted the ABC's managing director Mark Scott on November 25 and again on November 28 to tell him that it was an error of judgment for the ABC to join *The Guardian Australia* to publish claims Australia tapped the phones of Indonesian President Susilo Bambang Yudhoyono and his wife[120]. "Making themselves a sort of amplification service for *The Guardian* wasn't the best exercise in judgment," Turnbull said. Turnbull also told the function why he had not gone public earlier with his concerns: "As Communications Minister, you don't want to be lecturing the… public broadcasters that you are responsible for."

On January 29, Prime Minister Tony Abbott participated in an interview with 2GB's Ray Hadley:[121]

"Prime Minister: Look, I can understand your frustration, Ray because at times there seems to be a double standard in large swathes of our national life and I can understand the frustration that you feel. I want the ABC to be a straight, news gathering and news reporting organisation and a lot of people feel at the moment that the ABC instinctively takes everyone's side but Australia's.

Hadley: Are you one of those people?

PM: Well, I was very worried and concerned a few months back when the ABC seemed to delight in broadcasting allegations by a traitor. This gentlemen Snowden, or this individual Snowden, who has betrayed his country and in the process has badly, badly damaged other countries that are friends of the United States and of course the

CARTOON BY JUDY HORACEK

ABC didn't just report what he said they took the lead in advertising what he said…That was a deep concern and I said so at the time. Look, you know if there's credible evidence the ABC, like all other news organisations, is entitled to report it, but you shouldn't leap to be critical of your own country and you certainly ought to be prepared to give the Australian Navy and its hardworking personnel the benefit of the doubt.

….

PM: Well again as I said, I think that there is quite an issue of double standards and I can't promise Ray that it's going to be fixed tomorrow… But I'm conscious of it and as far as I'm concerned, I'll call it as I see it and I think it dismays Australians when the national broadcaster appears to take everyone's side but our own and I think it is a problem.

…

PM: And this is a very fair point and you know. We've got all sorts of things happening which are costing more money; there was the establishment of some fact-checking entity inside the ABC a while back and surely that should just come naturally, to any media organisation.

…

PM: People are working under pressure and they call journalism you know, history's first rough draft and inevitably as we get deeper into it and we find out more, our position develops and deepens

and our understanding of what really happened increases, but again, you would like the national broadcaster to have a rigorous commitment to truth and at least some basic affection for our home team, so to speak."

The following day, January 30 2014, Communications Minister Malcolm Turnbull also announced an efficiency inquiry into the two public broadcasters to be conducted by the former chief financial officer of the commercial media group Seven West Peter Lewis[122]. The broadcasters are already the subject of the Commission of Audit seeking ways to slash government spending and it is reported that there will be cuts to the budgets of both ABC and SBS in the May 2014 federal budget (although the evening before the 2013 federal election Tony Abbott promised: "No cuts to education, no cuts to health, no change to pensions, no change to the GST and no cuts to the ABC or SBS."[123]) The fate of the ABC's Australia Network is also clouded with its contract being reconsidered due to claims by Minister Turnbull that its role had been "overtaken by technology"[124].

Also on January 30 MEAA called on the Prime Minister to declare his support for the ABC and its independence from government[125]. MEAA noted that the ABC is a public broadcaster, independent of government. That independence is eroded away if the public broadcaster is reduced to presenting unbalanced or partisan views, second guesses its reporting through self-censorship or becomes an uncritical mouthpiece of government.

MEAA said: "The Prime Minister's remarks… attack the integrity of the ABC and its journalists. They undermine the independence of the ABC by calling for it to skew its reporting and curb its responsibilities to its audience as set out in its charter.

"The ABC is the most scrutinised media outlet in Australia. It is also the most heavily regulated with a raft of policies in place to cover all its activities. Its operations are open and transparent. It is required to be scrupulously balanced, honest, truthful, independent and accountable. It is repeatedly required to defend itself in a variety of inquiries, hearings and reports. And time and again it is shown to be highly respected and trusted by Australians for the many services it provides. It is a world-class public broadcaster," MEAA said.

MEAA called on the Prime Minister to reassure the ABC, its journalists and the Australian public that his government will not seek to undermine the editorial integrity of this great Australian institution.

Despite this, the political attacks on the ABC continued. On February 3, Treasurer Joe Hockey said in an interview with ABC 612's Steve Austin: "Now you asked me about bias, there have been moments when I have changed channel because I have been frustrated at the ABC. There have been moments when I have clicked on other websites, when I have been upset with the ABC. There have been moments where I have rung Mark Scott to say "this is outrageous". That was before the election, and there was one occasion after the election. But I also recognise that the ABC is not controlled by Members of Parliament, nor should it be. The editorial independence of all the media – whether it be News Limited, Fairfax, the TVs – I think the editorial independence of all the media, including the ABC is something for those organisations."[126]

As reported in *The Australian* on March 12 2014, two independent audits into the ABC's coverage of the federal election campaign and the asylum seeker issue concluded the broadcaster was impartial and its news coverage of asylum seekers was of a high standard[127].

On March 18 Defence Minister David Johnston launched an attack on the ABC, saying he was extremely angry about the ABC's coverage of stories about the Royal Australian Navy's treatment of asylum seekers. Johnson said he had not commented earlier because he needed time to cool off. A week earlier ABC managing director Mark Scott said the initial reporting of asylum seekers' mistreatment claims needed more precise wording, and expressed regret if it led anyone to assume the ABC supported the claims.

In his remarks Johnston said: "The good men and women of the Royal Australian Navy have been maliciously maligned by the ABC and I am very dissatisfied with the weasel words of apology that have been floated around by senior management of the ABC… I am absolutely sick to the stomach that this Australian iconic news agency would attack the Navy in the way that it has… If ever there was an event that justified a detailed inquiry, some reform, an investigation of the ABC, this event is it…"

When asked about reports in other media that morning that included additional claims about the Navy, Johnston responded: "Why would you view the glass half empty at every point? I'm not aware of operational matters; you need to put that to Border Protection Command… On-water matters in this area, as I've tried to explain to you, are a civil public policy outcome."[128]

PRESS FREEDOM AND AUSTRALIANS ABROAD

"As a journalist, I am committed to defending a fundamental freedom of the press that no one in my profession can credibly work without. One that is deemed vital to the proper functioning of any open democracy, including Egypt's."

Peter Greste, Tora Prison, Cairo January 26 2014[129]

"... a free press is in everyone's interests. A free press is in the interests of all countries. A free press will help every country, including Egypt, to be better in the months and years ahead and obviously a free press is not compatible with harassing journalists going about their ordinary business."

Prime Minister Tony Abbott, February 20 2014[130]

Peter Greste
PHOTO AFP – KHALED DESOUKI

MEAA has been actively involved in campaigns on behalf of Australian journalists facing assaults on press freedom overseas.

Peter Greste

On December 29 2013, Australian journalist Peter Greste and three of his Al Jazeera English-channel colleagues were arrested by agents of Egypt's interior ministry. While one of the four was soon released, reporter Greste, Canadian-Egyptian producer Mohamed Fahmy, and Al Jazeera's second producer Egyptian Baher Mohamed were all subsequently charged with joining a terrorist group, aiding a terrorist group, and endangering national security.

MEAA began working on behalf of the imprisoned journalists on December 31 writing to the Egyptian Ambassador in Canberra, the Australian Foreign Minister Julie Bishop, and contacting the headquarters of the International Federation of Journalists in Brussels. On January 23 2014 MEAA members Karen Barlow and Gordon Taylor, both of the Canberra Press Gallery working for the ABC, joined with MEAA's ACT branch secretary Michael White in presenting a petition from MEAA members to the Egyptian Ambassador to Australia Dr Hassan Hanafy Mahmoud El-Laithy[131].

On February 27 2014, a global day of action for the imprisoned journalists included a rally in Sydney's Martin Place. MEAA called on Prime Minister Tony Abbott to intervene to demand the release of journalists detained in Egypt for their journalism. The journalists, mostly working for the Al Jazeera network include Australian Peter Greste.

Speaking at the rally, MEAA federal secretary Christopher Warren said: "We call on Prime Minister Tony Abbott to personally appeal to Field Marshal el-Sisi and demand the release of all the journalists detained in Egyptian prisons for their journalism including our colleague Peter Greste."

Warren noted that in Egypt journalists are being raided, rounded up, detained and put on trial for their journalism. Egypt remains one of the most dangerous countries in the world for journalists. Since June last year, six Egyptian journalists have been murdered in targeted killings and cross-fire incidents. Reporters covering protests in Cairo have been assaulted, their equipment seized, and they have been shot at with live ammunition; 19 journalists were arrested in a single day.

He told the lunchtime crowd attending the rally: "We're here today to show our support for freedom. The freedom of our communities to be informed. The right of people to know what governments do in their name. The freedom of the media to scrutinise the powerful and hold them to account. The freedom to shine a light on the truth. And the freedom of journalists to do their job without fear, without harassment and without intimidation. Journalism is not a crime. Journalism is not terrorism."

Warren said the spate of arrests and brutal assaults are a deliberate attempt to silence journalists, to

muzzle media outlets and prevent them from doing their duty of informing their communities. "Peter Greste and his Al Jazeera colleagues have been imprisoned for their journalism. They have been locked up for 60 days for doing their job. Their work is there for all to see – it is honest, ethical and responsible journalism. Peter Greste and his colleagues are not criminals, they are not terrorists."

Warren said that MEAA "will continue to campaign on behalf of all our journalist colleagues until there is freedom for journalism in Egypt".

MEAA has continued to promote and participate in activities for Greste and the journalists imprisoned in Egypt including assisting the delivery of an Amnesty International Australia petition delivered to Egypt's Consul-General in Sydney on April 10.

On April 22 2014, Greste and his colleagues appeared for the sixth time in court, having been incarcerated for 115 days. Once again their case was adjourned, to May 3, UNESCO World Press Freedom Day.[132]

Alan Morison

On December 23 2013, MEAA leaned that former Fairfax journalist and Walkley Award winner Alan Morison who is now editor of online news site phuketwan.com had been charged, along with a colleague Chutima Sidasathian, with criminal defamation in a case brought by Captain Panlob Komtonlok of the Royal Thai Navy's Third Naval Area Command that oversees the Andaman Sea coast. He accused them of damaging the reputation of the service and of breaching the Computer Crimes Act.

The charges relate to one paragraph carried word-for-word from a Reuters special report on Rohingya boat-people republished in excerpts on *Phuketwan* on July 17 last year. Reuters, and Thai-language news outlets that translated and republished the same paragraph, have not been charged. If convicted of breaching the act, editor of news website Morison and Sidasathian could face maximum jail terms of five and two years respectively and a fine of up to $350.

MEAA issued a statement on their plight on December 24 2013[133], and quoted Morison who told the ABC that Phuketwan and the Thai Royal Navy had a long connection of involvement on the Rohingya issue going back to 2008. Morison described the Navy as a "wonderful organisation" and said he was astonished by the allegations.

Morison said that the Computer Crimes Act was a fairly rare law and has been used recently to curtail human rights and free speech campaigners. "It hasn't been used before by the military, but it has been used by others to try to stifle and silence human rights advocates, in particular in Thailand, so it's a nasty bit of legislation," Morison told the ABC.

On January 2 2014 MEAA wrote to Thai Ambassador to Australia Mr Maris Sangiampongsa[134] noting that the UN Office of the High Commissioner for Human Rights had said: "Criminal prosecution for defamation has a chilling effect on freedom of the press, and international standards are clear that imprisonment is never an appropriate penalty for defamation. The criminal charges against Mr Morison and Ms Chutima could have serious implications on Phuketwan's future operations, possibly compromising its ability to report on issues related to Rohingya asylum seekers to the public."

MEAA is concerned that the RTN's actions aim to punish, in the most excessive manner possible, a Thai publication for reproducing a report from an international news agency. This would have a chilling effect on all journalists and media outlets working in Thailand at a time when press freedom is vital to ensure that the community is fully-informed and that the media can work with confidence in reporting the truth and ensuring the public's right to know.

MEAA also promoted and participated in a protest rally in Melbourne's Bourke Street Mall on March 12. MEAA continues to work with the International Federation of Journalists Asia-Pacific office on this case.

On April 14 Reuters won a Pulitzer Prize for the same story that threatens to put the two Phuketwan.com journalists in jail[135].

On April 17 the two journalists presented themselves to the court, an application for bail was made, and the pair spent five hours in the cells as prisoners of the court[136]. The Bangkok Post later editorialised: "In the Phuketwan case, it is hard to escape the conclusion that those pursuing it are looking increasingly misguided and vindictive, especially in the face of international recognition for the Reuters report. The navy has been its own worst enemy in this case. Attempting to silence media outlets with defamation lawsuits will never win any public relations battles…"[137]

On April 22 it was reported that the Royal Thai Navy was planning a second lawsuit against the Reuters news agency. "This involves national security," said 3rd Navy Fleet Commander, Vice Admiral Tharathorn Khajitsuwan. "We cannot allow anyone to go around freely making false accusations." He told *The Bangkok Post*: "Not only do we refuse to withdraw any lawsuit, but we are processing another suit against Reuters."[138]

Greg Shackelton paints the word "Australia" on the outer wall of the shop in Balibo, facing the road to Batugade, October 1975.
PHOTO FAIRFAX SYNDICATION]

Impunity

MEAA initiated "Getting Away With Murder" – a campaign to highlight cases of impunity involving the murder of Australian journalists in the lead-up to November 23, the anniversary of the Ampatuan Massacre in the Philippines where 32 journalists were killed. MEAA launched the Getting Away With Murder campaign on October 16, 2013 – the 38th anniversary of the murder of the Balibo Five in East Timor[139].

MEAA wrote to Minister for Justice Michael Keenan and Australian Federal Police chief Commissioner Tony Negus[140] demanding that the AFP be properly resourced to carry out war crimes investigations and to deal with impunity cases of Australian journalists murdered overseas.

There are three cases outstanding where the killers have not been brought to justice: the Balibo Five in October 1975, Roger East in Dili on December 8, 1975 and Paul Moran in northern Iraq on March 22, 2003. MEAA said: "The ongoing impunity over the killing of these journalists is a stain on the Australian justice system that, if left unchecked, signals that journalists are "fair game" for powerful people who wish to silence the media and prevent stories getting out. The failure to fully investigate the murder of our colleagues, the failure to bring justice to bear and ensure the murderers are punished does not do Australia any credit when standing up for human rights elsewhere in the world. We should apply the same standards that we demand of others."

The Balibo Five

On September 9 2009, the Australian Federal Police announced that it would conduct a war crimes investigation into the deaths of the Balibo Five. This came after NSW Deputy Coroner Dorelle Pinch's 2007 inquest into Brian Peters' death had found that Peters, in company with the other slain journalists, had "died at Balibo in Timor Leste on 16 October 1975 from wounds sustained when he was shot and/or stabbed deliberately, and not in the heat of battle, by members of the Indonesian Special Forces, including Christoforus da Silva and Captain Yunus Yosfiah on the orders of Captain Yosfiah, to prevent him from revealing that Indonesian Special Forces had participated in the attack on Balibo. There is strong circumstantial evidence that those orders emanated from the Head of the Indonesian Special Forces, Major-General Benny Murdani to Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah."

On May 5 2013, i.e. three and a half years after the AFP investigation began, a report in *The Sydney Morning Herald* suggested that the AFP investigation had stalled and that Mick Turner, the AFP's national coordinator of special references, had written to the families of the slain journalists saying that it was still seeking access to information.

Former Captain, later Lieutenant General, Muhammad Yunus Yosfiah was Indonesia's Minister for Information in 1998 and 1999 and in February 2007 he unsuccessfully contested the election for party chairmanship of the United Development Party (PPP).

In its letter to Keenan and Negus, MEAA said: "It has been six years since the NSW deputy coroner Dorelle Pinch conducted an inquest into the death of Brian Peters and the four journalists killed with him in Balibo in 1975: Tony Stewart, Gary Cunningham, Malcolm Rennie and Greg Shackleton. And it is more than four years since the Australian Federal Police (AFP) announced that it would conduct a war crimes investigation into the deaths of the Balibo Five.

"In May this year it was reported that the investigation had stalled after the AFP wrote to the families of the slain journalists saying that it was still seeking access to information. This is the most appalling examples of impunity when it comes to the murder of Australian journalists and it means that the perpetrators are getting away with murder."

Roger East

Freelance journalist Roger East, while employed by Australian Associated Press, was murdered by the Indonesian military on the Dili wharf on December 8 1975. MEAA believes that in light of the evidence uncovered by the Balibo Five inquest that led to the AFP investigating a war crime, there are sufficient grounds for a similar probe into Roger East's murder and that similarly, despite the passage of time, the individuals who ordered or took part in East's murder may be found and finally brought to justice.

Paul Moran

Paul Moran, a freelance cameraman on assignment with the Australian Broadcasting Corporation to cover the Iraq War, was killed by a suicide bomber on March 22 2003, leaving behind his wife Ivana and their then seven-week-old daughter Tara. Paul was the first media person killed in the 2003 Iraq war. The attack was carried out by the group Ansar al-Islam – a UN-listed terrorist arm of Al-Qaeda. According to US and UN investigations, the man most likely responsible for training and perhaps even directly ordering the terrorist attack is Oslo resident Najmuddin Faraj Ahmad, better known as Mullah Krekar. He has escaped extradition to Iraq or the US because Norway resists deporting anyone to countries that have the death penalty. He is now imprisoned in Norway guilty of four counts of intimidation under aggravating circumstances. He is likely to be released in 2015. MEAA believes the AFP should take every step to investigate the murder of Paul Moran, with the aim of extraditing Krekar to Australia to face justice.

Responses

On October 31 2013 Michael Phelan, AFP's deputy commissioner of operations, replied to MEAA on behalf of Commissioner Negus: "The AFP investigation into the deaths of the 'Balibo Five' is ongoing therefore I will not comment on that matter. I understand you referred a matter to the AFP through the Attorney-General's office in February 2010 requesting the AFP commence an investigation into the death of Mr Moran… As no new information is available, the AFP decision not to investigate the circumstances of Mr Moran's death remains. The AFP is aware of publically available material relating to the circumstances surrounding the death of Mr East in East Timor in 1975. This material is not sufficient for the AFP to commence an investigation into that matter…"

On November 29 2013, MEAA received a response from Justice Minister Keenan. While it echoed the Phelan letter above, Keenan's response added: "The Government treats all allegations of war crimes and crimes against humanity extremely seriously. Australia has legislation which criminalises war crimes and crimes against humanity and for ensuring their proper investigation and prosecution. These offences apply regardless of where the alleged offences were committed, or by whom."

Rami Aysha

On December 5 2013, MEAA wrote to Lebanon's Ambassador to Australia over concerns for the safety and welfare of Rami Aysha, a freelance reporter/producer in Lebanon who had recently made a major contribution to ABC's Four Corners program "Trading Misery" and who was working with the program on another production.

Aysha was on holiday in Thailand with his family and had just learnt that he would be arrested immediately upon his return to Beirut on December 8 after having been tried and convicted *in absentia* and sentenced to six months in prison.

In 2012 Aysha was investigating weapons importation by Hezbollah. He was kidnapped by Hezbollah and badly beaten during that investigation and then handed over to Lebanese military police where his mistreatment continued. He was subsequently charged with involvement in importing weapons, the story he was investigating at the time of his kidnapping.

MEAA called on the Lebanese ambassador to provide guarantees for Aysha's safety upon his return to Beirut and to ensure that proper, open and transparent legal norms were carried out, including the opportunity to contest any charges being made against him, and that Aysha be given access to legal representation.

Aysha returned to Beirut and a trial was conducted. He was awaiting the verdict when, in February 2014, he was kidnapped in the Bakaa Valley with a Danish journalist[141]. The pair were harshly treated and forced to negotiate with their kidnappers for food. The identity of the kidnappers and the reason for the kidnapping is unclear. The pair was subsequently freed on March 6 2014 after almost a month in captivity. Aysha believes that it's possible some of that time they were held in Syria due to the proximity of fighting to where they were being kept. Aysha has since been banned from travelling and he is yet to hear the verdict from his trial in military court. MEAA is seeking to provide emergency assistance to Aysha.

IFJ staff detained

On Wednesday October 30 2013, two Australian staffers with the International Federation of Journalists, the Asia-Pacific Director Jacqueline Park and Asia-Pacific Deputy Director Jane Worthington, were detained without charge in Colombo, Sri Lanka. The pair was confronted by a team of Criminal Investigation Department and immigration officials at a press freedom meeting in Colombo and taken to their hotel where they were held and subjected to lengthy interrogation over two days by CID and immigration officials. Questioned over alleged visa violations and links to local press freedom groups, their passports were confiscated and they were not allowed to leave the country on a planned flight on November 1. A device was inserted into Park's laptop and interrogating officers appeared to download files[142] and the pair were under 24-hour surveillance.

Park and Worthington were not charged with any crime and cooperated fully with authorities at every stage of the lengthy questioning process.

Media reports suggested the Sri Lankan government was alleging Park and Worthington had conducted journalistic activities without obtaining media accreditation. According to the Sri Lankan Government-operated Electronic Travel Authorisation system website, attending workshops is not prohibited under the conditions of the Sri Lankan tourist visa. The IFJ was adamant that no breaches of visa conditions occurred.

AFP and local media reported that Park and Worthington were accused by Sri Lankan Minister of Mass Media and Information Keheliya Rambukwella of engaging in "anti-government activism" in breach of their visa conditions. The IFJ unequivocally denied this allegation.

During questioning by Sri Lankan officials, Park was confronted with an extensive dossier covering in detail her work in Sri Lanka over 15 years. She was subjected to lengthy interrogations of more than 15 hours over the two days focusing on her movements in Sri Lanka and her associations with local media personnel.

The IFJ believed this move by Sri Lankan officials was part of a long term pattern of intimidation and harassment of journalists and directed at journalists inside and outside Sri Lanka to prevent reporting on the realities of life in Sri Lanka in the lead-up to the Commonwealth Heads of Government Meeting (CHOGM) which would take place in Colombo on November 15. Canadian Prime Minister Stephen Harper has declined to attend CHOGM due to concerns about human rights abuses under the Rajapaksa regime.

Park told reporters at Sydney Airport upon her return to Australia: "From the kinds of questions that we had over the two days it was clear it was kind of a witch hunt against the local media, local journalists and media freedom activists who are really trying to create some free space for freedom of expression in Sri Lanka… We know from our work this is not an isolated incident but a pattern of behaviour of intimidation and threats against journalists in Sri Lanka."[143]

The IFJ has worked in Sri Lanka for almost 20 years to protect media rights and promote and foster a culture of ethical, independent, public service journalism. The IFJ had grave concerns about the safety of media personnel inside Sri Lanka arising from this incident.

After three days, Park and Worthington were released[144], their passports were returned and they arrived back in Australia on November 2 2013[145].

Protection for Journalists

On July 17 2013, the United Nations' Security Council held an open debate on the protection of journalists[146], particularly in light of UN Security Council Resolution 1738[147] which was adopted unanimously on December 23 2006 and which relates to the protection of journalists in combat zones.

Australia's Permanent Representative to the United Nations Gary Quinlan told the open debate that journalists brought the humanitarian cost of conflict into stark relief. "News stories and images make the consequences of our inaction harder to ignore." Syria was a tragic illustration of the impact of conflict on journalists... The Security Council could do more to protect journalists in conflict situations, he said, welcoming the fact that the resolution establishing the United Nations Assistance Mission in Somalia (UNSOM) included a reminder to that country's Government of its obligation to protect journalists. The Council could also assist by mandating peacekeeping missions to address the freedom and protection of journalists in their support for rule-of-law institutions, Quinlan said.[148]

On November 26 2013 the Third Committee of the United Nation's General Assembly passed a resolution on the safety of journalists and the issue of impunity, setting November 2 each year as the "International Day to End Impunity for Crimes Against Journalists"[149].

The resolution "condemns unequivocally all attacks and violence against journalists and media workers, such as torture, extrajudicial killings, enforced disappearances and arbitrary detention, as well as intimidation and harassment in both conflict and non-conflict situations". It is the first time the General Assembly has adopted a resolution directly addressing the safety of journalists and the issue of impunity.

November 2 coincides with the day when French journalists Ghislaine Dupont and Claude Verlon were killed by militants in Mali in 2013. It also falls within the three week period each year that media NGOs worldwide have been campaigning against impunity.

The resolution calls on the UN secretary general to report on the progress being made by the UN system in regard to implementing the UN Plan of Action on the Safety of Journalists and the Issue of Impunity.[150]

China visas

Since the *New York Times* reported on the wealth of former Chinese Premier Wen Jiabao's family in October 2012, three of its Beijing-based journalists have been unable to have their visas renewed[151]. Australian journalist with the newspaper, Chris Buckley, was the first affected during Christmas 2012. He was forced to relocate with his family to Hong Kong. The newspaper's Beijing bureau chief Philip Pan has also been waiting on a visa renewal since December 2012 and also works from Hong Kong. On January 30 2014 Austin Ramzy, who was working for *Time* and who was transferring to *The New York Times* in Beijing was forced to leave because Beijing has not issued him with a new visa. Ramzy relocated to Taiwan.

Fiji

The ABC's Pacific correspondent Sean Dorney remains banned from reporting in Fiji after that country's Media Industry Development Authority stated it was unhappy with a recent interview Dorney did with ABC radio program "Pacific Beat" regarding a recent Pacific Island News Association's Media Summit in New Caledonia[152]. PINA became registered as a company in Fiji[153]. MIDA later added that it was not satisfied by the ABC's handling of a complaint against Dorney[154].

Dorney responded: "Not many people in Australia may realise that several weeks ago I became the subject of a major attack on my credibility when the Fiji regime's Media Industry Development Authority, MIDA, wrote to our managing director, Mark Scott, accusing me of being both unprofessional and unethical. My alleged crime was having dared to suggest in an interview on Radio Australia, during the Pacific Islands News Association two yearly conference, that many journalists within the region felt that the media in Fiji was less than totally free. Fiji's prime minister, who has been in control of Fiji since staging a coup in 2006, Rear Admiral Frank Bainimarama – that's his new rank in retirement - brought down a media decree in 2010 that is still in force. Among other things, it provides for significant fines and jail sentences for media people found to be in breach of a wide range of alleged offences, like running stories longer than 50 words without a by-line."[155]

MIDA has established a media monitor for the September elections which it says will ensure that newspapers and radio and television stations do not show bias in the way they report on politics. The ABC reported that MIDA will have the ability to demand a right of reply to all opinion columns, and also wants the code of conduct to extend to foreign journalists working in Fiji and any local journalists working for foreign media outlets. Penalties for journalists and media organisations found guilty of breaching media decree guidelines are fines or jail terms of up to five years.

Nauru

At a time of upheaval in Nauru over conflicts between the executive branch and the judiciary, and with enormous interest in the asylum seeker detention centre on the island, the Nauruan Government decided to increase the cost of journalist visas from $200 to $8000. The money is not refunded if the visa application is unsuccessful.

On January 13 2014, MEAA wrote to Nauru's president and Minister for Foreign Affairs and Trade Baron Waqa saying: "The activities of government should be subject to scrutiny. The role of the media is to scrutinise the powerful and hold them to account for the decisions they make. Those principles apply regardless of borders. It is therefore distressing that the massive rise in the media visa charges comes at a time when there is considerable public interest in your country. It is right and proper that Australian journalists be allowed to report on the Nauru and Australian Governments in relation to asylum seekers housed in detention centres in your country. The Media, Entertainment & Arts Alliance (MEAA) believes the fee of $8000 obstructs many journalists from travelling to Nauru to report on your country and the detention centres especially in the wake of the United Nations High Commissioner for Refugees' report on living conditions at the Nauru detention centre released in November. Using outrageously high government charges to restrict legitimate access to a story of great public interest is a threat to press freedom."[156]

PRESS FREEDOM IN NEW ZEALAND

Rick Neville

New Zealand's Media Freedom Committee (MFC), representing all mainstream media, had an active year, taking up a number of issues across the political and legal spectrum.

The most explosive related to revelations that parliamentary bureaucrats had been monitoring email traffic between a newspaper political journalist, Andrea Vance, and her contacts, as well as tracking her physical movements around the parliament.

The MFC weighed in with swingeing criticisms in its submission to the parliament's privileges committee. It was some consolation to see a report emerge from the committee condemning what had taken place and reaffirming parliament's support for the media's right to have its sources – and movements – protected.

Unrelated to the parliamentary fiasco, about the same time it emerged that the Defence Forces had within their various manuals a 10-year-old order listing investigative journalists as one of three subversive threats, alongside hostile intelligence services and members of subversive organisations. Adding to the furore were allegations from a freelance journalist, Jon Stephenson, that his phone metadata had been accessed by intelligence services while he was reporting in Afghanistan. The journalist had written articles, published in a national Sunday newspaper, critical of New Zealand's crack SAS force.

Copping serious media flak, the defence minister, Jonathon Coleman, agreed that use of the term "subversive threat" to describe investigative journalists was "inappropriate and heavy-handed" and requested the reference be removed. Meanwhile, the head of the defence department said all intelligence records had been reviewed and there was no evidence that Stephenson had been spied on.

Security intelligence issues continued to dominate headlines in 2013, with John Key's National government shrugging off strong criticism from many quarters, including the media, to force through new legislation that boosts the powers of New Zealand's intelligence gathering agency, the Government Communications Security Bureau. Opposition parties have promised a full review of state intelligence agencies if they gain office.

Suicide reporting, cyber bullying

Chaired by *New Zealand Herald* editor-in-chief Tim Murphy, the MFC lodged submissions on a review of the currently strict rules covering reporting of suicides, and proposed new legislation which will attempt to control cyber bullying.

Reporting of suicides has been a bone of contention for many years, with politicians and health professionals stubbornly opposed to any relaxation of the section of the Coroners Act that restricts publication of details about suicide deaths. Their argument is based on avoiding copycat scenarios.

A breakthrough of sorts came early last year when the courts minister, Chester Borrows, agreed to refer the matter to the Law Commission, the government's adviser on law reform, seeking recommendations by March 2014. The Law Commission consulted widely and produced a draft report late last year advocating some improvements. Members of the MFC are hopeful this year will see a more realistic framework emerge which continues to protect the rights of individuals and their families, but takes greater account of the public's right to know and acknowledges the existence of the internet and the impact on what used to be regarded as private information.

As part of a broad review of media regulation which began in 2012, the Law Commission proposed measures to deal with cyber bullying. The Harmful Digital Communications Bill, based on the commission's report, made it into parliament, but with the notable exclusion of a previous section giving media an exemption from the bill's proposed complaints procedure.

That section would have exempted news media from the new complaints jurisdiction, so long as those media were subject to an existing ethical standards body (the Press Council or the Broadcasting Standards Authority). As the legislation now stands, complaints would go before an "approved agency" which could be an individual, organisation, department or Crown entity.

While supporting the intention of the legislation, the MFC agreed with the Law Commission's view that creating a new complaints channel would be confusing for individuals, and pointed out that if the conduct was demonstrably unlawful, court action would still be available against the offender.

Press Council to be strengthened

Until now, the Achilles heel for publishers has been the traditional focus of the Press Council on print media (and member newspaper websites),

and a perceived lack of a complaints channel for users of digital media. Broadcasters faced the same issue, but last year moved to answer their critics by setting up the Online Media Standards Authority (OMSA) to cover complaints against their digital arms, and developing a class of membership for non-mainstream broadcasters, including bloggers.

This was picked up by the Law Commission in researching and writing its 2013 report, *The News Media meets 'New Media'*. This report proposed the merger of the Press Council, the Broadcasting Standards Authority (BSA) and OMSA into a new voluntary standards body which would offer membership to all strands of media, subject to their meeting ethical standards, agreeing to a complaints process and paying a fee. The authority would be established by statute and receive start-up money from the government.

Broadcasters supported the new structure, but the newspaper and magazine publishing groups saw a bogeyman in the shape of the government's involvement (and potential interference). They preferred the status quo, but conceded the Press Council needed to be strengthened.

In the current landscape, broadcasters fund approximately half of the annual NZ$1.4 million cost of the BSA, with the government providing the balance. By contrast, the Press Council exists on a budget less than 20 per cent of that needed to run the BSA – all of it contributed by newspaper and magazine publishers, with a token contribution from the journalists' union, the EPMU.

Funding is at the hub of the various media arguments. For years, many broadcasters have looked enviously at the Press Council, which most agree has done its job well – on the smell of the proverbial oily rag. By contrast, the BSA is a bureaucracy, with a cost structure to match.

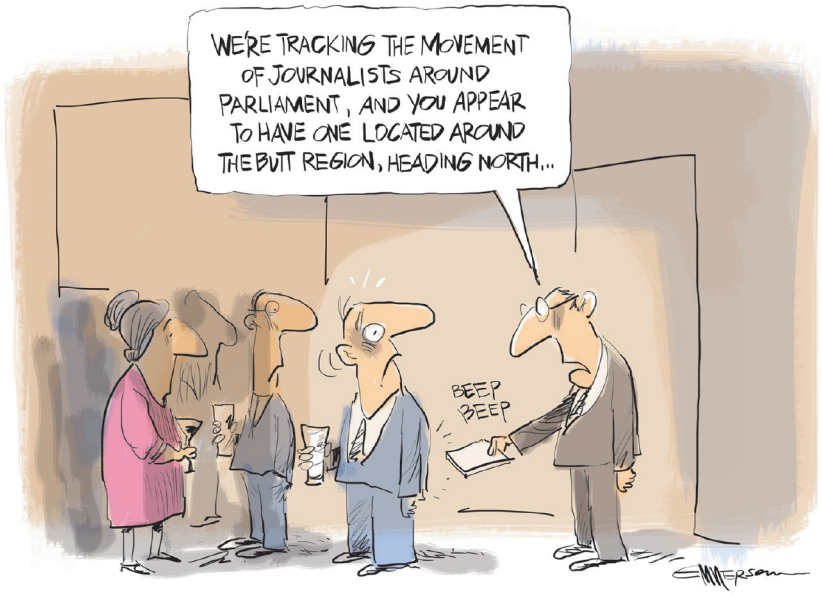
So here we had a situation where the broadcasters were keen to move away from an expensive regulatory environment governed by statute to what they hoped would be a no-frills, low cost set-up, divorced from government and part-funded by print publishers. Meanwhile, the publishers were deciding that the grass definitely was not greener on the other side of the hill.

The government took the publishers' side of the argument, opting against implementing the Law Commission's recommendation, but stressing that it wanted to see media self-regulation continue to improve and expand to cover complaints against digital media.

Knowing they had dodged a bullet, the Newspaper Publishers' Association late last year agreed to a number of measures to strengthen the powers of the Press Council, including giving it the right to censure an offending publication. Members will also be required to do far more to publicise the existence of the Press Council and its complaints processes. Websites will have to set up easy-to-use complaints channels. But the big step will be a new form of membership open to non-newspaper digital media, including bloggers.

Membership will be conditional on the digital media body or individual agreeing to abide by the Press Council's statement of principles (code of ethics), agree to its complaints processes, and pay an annual fee.

The publishers and Press Council aim to have the changes in place by May 1. Until and after then, they'll be telling anyone who'll listen that the Press Council has moved with the times – and there's no longer a problem to fix.



CARTOON BY ROD EMMERSON

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On the public record

Jane Patterson

An inquiry by New Zealand parliament's privileges committee that delved into the unauthorised release of sensitive information, including communications between a minister and a political reporter, has exposed a lack of respect among senior parliamentary staff for the constitutional rules that protect journalists, and their watchdog role.

The controversy began in April 2013 with a front-page story by Fairfax reporter Andrea Vance, who had been given access to a report about the electronic spy agency, the Government Communications Security Bureau (GCSB), a week before it was made public. That report had found the GCSE illegally spied on 85 New Zealanders between 2003 and 2012.

The question was then raised of who had leaked the report to Vance, and in the sights were several ministers from the ruling National Party and its support partners, United Future and ACT New Zealand.

Under pressure to find the leak, Prime Minister John Key appointed a senior public servant, David Henry, to carry out an independent inquiry. The inquiry had broad terms of reference, accompanied by a specific and public directive from Key that all ministers should cooperate fully.

Ultimately, the inquiry could not establish who leaked the report, but it left the clear impression that its main suspect was Peter Dunne, the leader of United Future, who was also revenue minister in Key's government. Using swipe card access records, plus information about email and phone exchanges, the Henry Inquiry found that Dunne had access to the report on the GCSB before it was published, and also had frequent contact with Vance, including discussions about the public release of the report.

Dunne had refused to divulge the full contents of his email exchanges to the Henry Inquiry, releasing only an edited version, and this meant the inquiry was unable to reach any firm conclusion, Henry stated in his report. However, the report also included that Dunne had specifically denied being the source of the leak.

After refusing to cooperate fully with the Henry Inquiry, Dunne found himself in the political wilderness. Under suspicion for the leak, he resigned all his ministerial portfolios.

But soon after the Henry Inquiry report was released in June 2013, information started to trickle out about how the inquiry had obtained its information. It became apparent that the Parliamentary Service, which manages the parliament's facilities, had released to the inquiry sensitive information, including phone, email and swipe card access records, without the express permission of the minister or the journalist. They also failed to notify the Speaker of the House, the minister responsible for the Parliamentary Service, that they were releasing the information.

Vance was angry that her phone records and other confidential details had been shared, and angry about the attitude it revealed. She wrote: "What has got my goat is the casting aside of something us journalists hold very precious: press freedom… Key insists that he 'values the role of the fourth estate'.

"He might well cherish the opportunities it gives him to beam into our living rooms at teatime, but it has become rather obvious that this government has a casual disregard for media's true role as an independent watchdog."

On August 31, a privileges committee inquiry into the Henry Inquiry kicked off. MPs, ministers, the press gallery, officials and David Henry himself were all called before the privileges committee to explain what had happened, and to offer suggestions about how future breaches could be avoided.

The privileges committee inquiry showed there had been a clear failure of communication between the prime minister's office, the Henry Inquiry and Parliamentary Service about what consent was necessary for the release of records and what was actually given.

More disturbing is that the Henry Inquiry and Parliamentary Service took great care when dealing with ministers' information, but threw caution to the winds when handling the journalist's information. The privileges committee was strongly critical of this inconsistency.

The head of the Parliamentary Service, Geoff Thorn, who later resigned, told the inquiry he was very mindful of the need for specific consent when it came to ministers, but he viewed the case of the reporter, Andrea Vance, in the context of a security breach.

The press gallery argued that any security breach was committed by the person who leaked the report, not the journalist who received it.

Releasing its initial report in December, the privileges committee expressed grave concerns about the actions of the Henry Inquiry and Parliamentary Service. As well as noting worrying "failures on many levels" in the way that

information was handled, it revealed that several senior people involved seemed to lack a basic understanding of the fundamental right of the media to operate unhindered in parliament.

"In particular, the unique role of the press in New Zealand's democracy does not seem to have been considered at all," the committee said.

The challenge for the privileges committee now is to come up with a set of procedures to guide how parliamentary information should be handled in the future. It concludes that the current practices, if left unchecked, could weaken New Zealand's representative democracy.

Jane Patterson is Radio New Zealand's chief parliamentary reporter and a former chair of the parliamentary press gallery
This article first appeared in *The Walkley Magazine - Inside the media in Australia and New Zealand*

PRESS FREEDOM IN THE ASIA-PACIFIC

The International Federation of Journalists Asia-Pacific

The Asia-Pacific remains one of the most troubling regions for journalists with increased global attention on its climate of rampant impunity.

Afghanistan

In the lead-up to the 2014 Afghanistan Presidential election on April 5, the Taliban vowed to disrupt the country with a prolonged campaign of violence. Tragically, this threat resulted in the brutal slaying of four prominent journalists and a climate of intimidation and threat for media workers across the country with a marked spike in attacks.

On January 23, 2014, the body of Noor Ahmad Noori, a Busd Radio journalist and former *New York Times* employee, was found in the Karte Lagan area of Helmand. Noori had been kidnapped and hanged before his killers disposed of his body.

Swedish journalist Nils Horner was shot dead in a rare daylight attack in Kabul on March 11 2014 by an unknown gunman. Horner was a highly respected journalist who worked in New York and London during the 1990s. Since 2001, he had covered the Asia region for Swedish public service radio station, Sveriges Radio.

On April 4, tragedy struck more international correspondents when an Afghan police officer shot dead Pulitzer Prize winning AP photographer Anja Neidringhaus and badly injured AP reporter Kathy Gannon. The pair had just arrived at the premises of the district government in a convoy to cover the preparations for the next day's presidential election when the officer opened fire.

In perhaps the most shocking of the attacks, Sardar Ahmad, a 40-year-old senior reporter with the Agence France-Presse (AFP) Kabul bureau, was shot dead along with his wife and two of their three children when four gunmen attacked the Serena Hotel in Kabul on March 20. Sardar's youngest son was the only survivor of the attack.

The two-year-old, Abuzar Ahmad, was shot six times, including once in the skull and was put into an induced coma for a week. Now on the road to recovery, he will be no doubt assisted with support from local and international media shocked by the barbarity of the attack. Sardar's nephew, Turaj Rais was appointed guardian for Abuzar and offered these sentiments to those who had supported the family and had followed the story of young

Filipino journalists carry the coffin of colleague Rubylita Garcia during a "Walk for Justice" near Malacañang Palace in Manila.
PHOTO *THE PHILIPPINE STAR*

Abuzar: "Abuzar is a miracle. He is a strong little man with a heart of a lion. He is recovering at the speed of light. We hope that he will fill the gap in the world of journalism that was created by Sardar's departure."

Cambodia

A brutal murder and a mysterious disappearance in early 2014 have shed light on a worrying increase in threats to media workers in Cambodia, particularly around the reporting of environmental and sensitive political issues.

On February 1, 44-year-old Cambodian journalist Suon Chan was brutally slain by a group of fishermen who attacked him with stones and bamboo sticks as he left his home. Chan had been investigating illegal fishing in his local commune in the lead-up to the attack. Later the same month, on February 14, Canadian filmmaker and journalist Dave Walker disappeared after briefly mentioning to his colleague he would be "back in a while", leaving his guesthouse carrying nothing but a bottle of water. He has not been seen since. Walker, a well-known journalist in Siem Riep, had been filming a documentary tracing Khmer Rouge officials for his own production company Animist Farms Films.

Over recent years in particular, environmental reporting has become an increasingly dangerous profession in the region. In September 2012, Cambodian journalist Hang Serei Odom was murdered after reporting on illegal logging in northern Ratanakiri Province and in April 2012 prominent environmental activist Chut Wutty was shot dead.

China

When China's new leadership team was selected in 2013, it was no surprise that Xi Jinping, a "princeling" of the Communist Party of China, was chosen as President. Unfortunately, under the influence of President Xi's ideology, state policy also regressed to a style reminiscent of the Mao Zedong era with a return to heavy-handed repression of free speech online.

Police, government departments, the judiciary and state-owned media were the first to begin limits to free speech online. In May, just two months after Xi became President, a list of "seven topics that cannot be discussed" was delivered to all members of the party. While the list was not publicly disclosed, it was reported that one of the seven topics was "press freedom".

On August 19, President Xi made a speech during the National Propaganda Work Conference, saying all should "insist that the Party tightly control media, and insist that politicians run newspapers, magazines, electronic media, and online news portals". Under this revived Maoist ideology,

police used different kinds of charges such as "dissemination of rumours", "destroying business reputation", "criminal defamation", "illegally obtaining financial profit", "fabricating false information" and "disrupting public order" to accuse prominent bloggers. In addition, a number of prominent bloggers and journalists were thrust into national spotlight to make televised confessions, without any due legal procedure.

In September 2013, the Supreme People's Court and the Supreme People's Procuratorate, released a new judicial interpretation of the rules on the punishment of online rumours and defamation. This included defamation charges if posted online "rumours" were viewed by more than 5000 internet users or re-posted more than 500 times. The maximum sentence for the offence is three years' jail. In November, the Third Plenary Session of the 18th CPC Central Committee determined to strengthen "guidance" of public opinion and crack down on the internet. The spontaneous communication tool WeChat became a target for official monitoring. Several journalists were warned by their senior managers to stop using it or resign.

Overseas correspondents in China continued to experience challenges. The authorities used the content of reports to determine which foreign correspondents' working visas would be renewed, and harassment and life-threatening incidents continued. Two international media outlets offices were "inspected" by Chinese authorities after they reported negatively on the regime.

Nevertheless, several positive signs emerged in 2013. Journalists at two media outlets took the bold step of defending their rights by holding labour strikes to protest against political interference in editorial independence and extremely low wages. The Chinese judiciary also attempted to "open up" by uploading judgments to the internet and using social media such as microblogs to broadcast a very few criminal cases that were of great public concern, such as the trial of disgraced party leader Bo Xilai. However, these positive developments were so few, compared with the overall repression of press freedom, that observers doubted whether the trend would be sustained.

Fiji

In September 2014, Fiji will go to the polls for a general election for the first time since 2006's coup by Fijian military chief Frank Bainimarama. The ability for local and foreign press to freely provide fair reportage in Fiji remains an ongoing concern with further curbs imposed over the past year. Fiji is currently ranked 107 out of 180 on the Reporters Without Borders Press Freedom Index and recent impositions on press freedom by the Media Industry Development Authority (MIDA) are leading the concerns about the ability for media to provide balanced coverage.

On October 8, 2013, MIDA announced it would extend the registration requirements for foreign media trainers and organisations, and this has since been further extended to freelance journalists.

Earlier, in April 2014, MIDA ruled that Fiji Television was guilty of "hate speech" and could be fined for broadcasting politicians' statements from a public meeting. Then in June 2013, MIDA threatened commercial broadcaster Fiji TV with loss of its broadcasting license if it was seen to give any coverage to the "opposition" and was told that all broadcast content would be closely monitored for 12 months.

In March 2014, MIDA announced that it would set up a media monitoring unit to ensure that "newspapers and radio and television stations do not show bias in the way they report on politics". The unit will oversee local and foreign journalists working in Fiji, with fines and jail terms of up to five years for journalists who "breach media decree guidelines".

Hong Kong

In Hong Kong the situation for media has deteriorated dramatically. Almost every month, journalists or media bosses have been sacked, threatened, harassed or brutally attacked, and companies have taken to suddenly withdrawing advertising, threatening the financial viability of media outlets. While there is no clear evidence of an orchestrated campaign, analysts believe the acts are part of a climate of media suppression and pointed the finger at recent changes to the Hong Kong political environment.

In 2014, a political movement called Occupy Central began to organise protests in Hong Kong's financial district to call on the Central Government of China and the local Hong Kong Government to give Hong Kong people genuine universal suffrage for the Chief Executive election in 2017.

As a result, pro-liberal media outlets and journalists have increasingly become targets. Among them, the former chief editor of *Ming Pao*, Kevin Lau, who was attacked with a meat cleaver. While Hong Kong police arrested two suspects with the assistance of the Mainland police, the Commissioner of Police denied the attack was related to any news reporting. The two suspects were not charged.

India

In India, the largest democracy in the world, the past year has brought mixed results for media. While there were considerable achievements,

Journalists killed - targeted deaths - May 2013 - May 2014

Source: IFJ Asia-Pacific

mainly the Supreme Court decision on the professional security on contracts and wages, there have been downturns in many areas.

In February 2014, the Supreme Court ruled that the legislative protection afforded for journalists' wages and working conditions was in order and consistent with constitutional guarantees on fundamental rights. The decision came in response to a petition filed by some of the biggest publishers in India who were against the new wage scales set in December 2010. While publishers expressed resentment toward the verdict, and journalists are yet to benefit wholly from it, the decision has been hailed as a major victory for India's journalists' rights movement.

The year also brought hugely concerning reports of journalists becoming victims of gang rapes while on assignments. In August 2013 a photojournalist was raped in Mumbai, Maharastra, and another was raped in Mirzapur, Uttar Pradesh, in March 2014. These incidents, along with a rise in gang violence directed at the media, highlight the challenging conditions Indian journalists face. The assailants of the photojournalist were convicted and handed life imprisonment by a court in March 2014. A report by the International Federation of Journalists (IFJ) and the South Asia Media Solidarity Network (SAMSN), *The Stories That Women Journalists Tell,* concluded that women journalists are facing widespread sexual harassment issues in and out of the workplace.

Security continues to be a major concern for journalists especially in the insurgency prone areas – Chhattisgarh and Manipur. Senior journalist Sai Reddy was hacked to death in December 2013 in Chhattisgarh; and news cameraman Rajesh Verma and freelance photojournalist Israr were killed on assignments in mob violence in Uttar Pradesh in September. There were numerous incidents of arbitrary arrests and harassment throughout those regions where journalism is remains a fraught profession.

Amid all this, India also saw closure of magazines and television stations and mass layoffs of journalists and media employees. The Outlook Group closed down Indian editions of three global lifestyle titles in July 2013 without prior information being given to employees, affecting more than 60 journalists. Network 18, which owns a number TV channels, sacked 350 employees in August despite outcry by all major journalists unions.

In the circumstances, the general election to the Indian national parliament, scheduled to take place in seven phases between April and May, is expected to inject much needed life into the media. But the election season, like the two previous, is also

expected to pose a number of ethical challenges, especially in terms of how the media industry deals with the problem of "paid news" – coverage that is directly paid for.

Myanmar

It has been two years since Myanmar's democratic reforms of 2011-12. Since then, the media community has fought for, and achieved, gradual and incremental relaxations of the tight media restrictions that had become a feature of the military junta period. Exiled media groups such as the Irrawaddy, Mizzima and Democratic Voice of Burma returned, international media websites were unblocked and a number of new titles sprouted after the Information Ministry granted permission to privately owned dailies. The government has been commended by international free speech and human rights organisations for taking these important steps, yet significant concerns remain over the actions of authorities in the past 12 months.

Myanmar's draconian *Printers and Publishers Registration Law* of 1962 was replaced on March 4 by two bills that were welcomed by many as the country's first press laws, but were also criticised for being unnecessarily controlling. The dual bills, one drafted by the Ministry of Information and one drafted in concert with the Myanmar Press Council, contain measures that suggested that power of censorship still lies with the country's authorities. The new laws require all media enterprises to register with the government or risk fines and stipulate that journalists may fines and face jail time for "incitement to hatred".

The evolving media landscape has also resulted in new pressures for journalists. Since the abolition of the censorship board there has been a rise in defamation actions against journalists and there is a fear that journalists may turn to self-censorship if they feel they are not adequately protected.

In what was reported to be the largest public gathering in Yangon since the Saffron Revolution, journalists rallied in early January 2014 against the arrest and three-month jail sentence of reporter Khine Khine Aye Cho who was charged with defamation, trespass and use of abusive language – offenses usually punishable by a fine.

Between January 31 and February 2 authorities arrested five *Unity Weekly News* journalists including the newspaper's CEO, U Tin San. The arrests stemmed from a front page report alleging that chemical weapons were being manufactured at a facility in Pauk township, in Myanmar's Magway region, under the orders of former military junta leader Than Shwe. The journalists were charged with violating the 1923 Burma State Secrets Act.

Pakistan

Pakistan remains one of the deadliest countries in the world for journalists and media workers. In both 2012 and 2013, 10 journalists were killed, and the beginning of 2014 marked a concerning escalation in attacks with seven journalists and media staff losing their lives in the first four months. The period also witnessed increased numbers of attacks on media groups and attempted assassinations of journalists.

Despite global calls to the Government of Pakistan to ensure safety of journalists, no tangible signs of improvement have been seen. The situation is likely to worsen with the issuance of a detailed *fatwa* by the proscribed *Tehrik-e-Taliban Pakistan,* declaring media a target and publicising a hit list naming 25 journalists and publishers.

The positive news was the successful prosecution, conviction and punishment of the killers of Karachi journalist Wali Khan Babar. The decision marked the country's first successful prosecution over the killing of a Pakistani journalist. While impunity for the killing of journalists continues to be a constant in Pakistan, the Wali Khan Babar trial brought some relief and sparked hope among the media fraternity that justice could be within reach for other such killings.

To combat the environment of impunity and threat, Government, media owners, media workers, civil society and media support groups came together to form an independent multi-stakeholder coalition called the Pakistan Coalition on Media Safety. The groups drafted a national roadmap for combating impunity and to ensure the safety and security of journalists by promoting safety protocols.

Meanwhile, a Media Commission appointed by the Supreme Court of Pakistan submitted a report with recommendations including a roadmap for comprehensive review and reform to the media laws, and measures to increase safety of journalists. In December 2013, two remaining among four provinces, Punjab and Khyber Pakhtunkhwa, enacted progressive right to information (RTI) laws after a broad consultative process.

Philippines

Aside from war-torn Syria and Iraq, more journalists were killed in the Philippines in 2013 than in any other country in the world. The new year has brought with it the tragic murder of radio journalist Rubylita Garcia, who was shot dead in the front yard of her home witnessed by her son and 10-year-old granddaughter.

The toll of media murders since 1986 in the Philippines now stands at a staggering 161. Despite the horror of this number weighing heavily

on the Philippines, impunity has triumphed – the perpetrators are getting away with murder. Cases have failed to move forward because of sloppy investigation, weak prosecution, and the vulnerability to influencers of the very institutions tasked to deliver justice.

Over four years have passed since the brutal massacre of 58 people, including 32 of our journalist colleagues near Ampatuan Town, Maguindanao, in the southern Philippines. Although most, if not all, the Ampatuans arrested have been arraigned, 93 suspects in the massacre remain at large and free to this day, and four years on no one has been convicted.

The Philippine media has also been protesting the February 2014 Supreme Court decision to uphold the constitutionality of the *Cybercrime Prevention Act* of 2012, a controversial act that criminalises a host of online activities including libel. With these new laws, local and international journalist organisations are concerned that the Aquino administration is extending its attacks on a free Filipino press to the online space.

Sri Lanka

The global call for investigation into the war crimes during the 2009 military offensive against Tamil insurgents has recently pushed Sri Lanka's Rajapaksa regime to new levels of repression. The arrest of human rights advocates Ruki Fernando and Rev. Fr. Praveen Mahesan who were investigating recent human rights violations is just an example of the government's hostility to free speech. The two were given a court order restricting the right to speak after their subsequent release.

Sri Lanka has used direct and indirect means of control over the media, through government advertisement allocations and direct financial leverage. The ever-increasing attacks on media and arbitrary arrests have contributed to the critical situation under which the journalists operate. Websites, mainly those operating from outside the country, remain vigorous but not without questions over ethical standards.

In June 2013, the government attempted to introduce a controversial 3000-word "Code of Media Ethics" to parliament but later backed down. In journalists' circles, this was seen as the prelude to enforcing an intrusive set of norms that could considerably worsen the environment for free journalistic practice, especially since it occurred soon after the *Sri Lanka Press Councils Act* of 1973 was reactivated.

Meanwhile, the pattern of targeted attacks, harassment and intimidation continues. A journalist couple had to seek asylum abroad after facing a persistent pattern of intimidation from unknown harassers. The material they had in their possession pointed to possible corruption, suggesting that powerful elements were seeking to silence them.

Sri Lanka's main journalists' bodies and unions met with the visiting UN High Commissioner for Human Rights, Navaneetham Pillay, when she visited the country in August 2013. They urged her to strongly recommend that a series of steps be undertaken by the Sri Lankan government to improve the climate for free speech in the country. These steps included an end to hostile rhetoric against journalists and the media, the enactment of a right to information law, and ensuring accountability for all past violations.

Late in October, IFJ Asia-Pacific staff visiting Sri Lanka to conduct a series of meetings with local organisations of journalists, were detained by immigration officials, confined to their hotel room and interrogated over the purpose of their visit and the background of IFJ involvement in press freedom campaigns in Sri Lanka. They were returned their passports and allowed to leave the country two days later.

Thailand

Legal threats against journalists and major safety concerns for reporters covering the ongoing political unrest have been the major focus in Thailand.

Street protests and violence in Bangkok has kept media workers on the frontline. Local journalists and international human rights and media organisations have been fighting a piece of Thai legislation that bans the ownership of body armour for local and foreign journalists. According to the Thai law, it is illegal for journalists to obtain body armour such as vests and helmets. While some journalists have been forced to buy inadequate home-made vests in the country, others have attempted to bring items into the country via mail or through airports and had the protective equipment held in customs indefinitely. So far in 2014, six journalists have been seriously injured and hospitalised by explosive devises in Thailand.

Meanwhile, on the scenic tourist island of Phuket a legal attack by the Navy and local prosecutors on two journalists has raised concern in Thailand and abroad. *Phuketwan* editor Alan Morison and his colleague Chutima Sidasathian face up to seven year in prison each after being accused by a Thai Navy captain in December 2013 of "damaging the reputation of the service" and of breaching the Computer Crimes Act. The accusations stemmed from a *Phuketwan* report from July 17 2013 that contained a paragraph carried from a Reuters series that was critical of the Thai Naval authorities in their handling of the Rohingya boat people issue. The Reuters reporting was awarded the Pulitzer Prize for International Reporting on April 14.

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 (IFJ) in collaboration with the MEAA and the Media Safety and Solidarity board. New Zealand's journalists' union, the EPMU, also supports the fund.

Disaster relief – Typhoon Haiyan

Following the Haiyan typhoon in the Philippines in November 2013, the Media Safety and Solidarity Fund pledged $15,000 to the National Union of Journalists of the Philippines, to assist journalists and their families affected by the disaster and to help rebuild local media. This was the focus of fund-raising on the night of the Walkley Awards for Excellence in Journalism in Brisbane 2013 and where about $11,000 was raised on the night.

Support for Free Media Movement

Media freedom continues to be threatened in post-war Sri Lanka where media practitioners continue to face formidable difficulties. Overt measures of coercion are less conspicuous than during the war years but attacks against journalists continue and free speech has fallen victim to the whims of political, military and financial power which is often deployed to silence dissent. Constant harassment of independent media outlets by Sri Lankan government officials and searches without warrants of journalists all serve to stifle media freedom.

The fund has recently begun providing institutional support to the Free Media Movement (FMM) in Sri Lanka to assist with their work in promoting freedom of expression. FMM is the key media union in Sri Lanka. It has been operating without an office, with members using their own resources to carry out its work. This new funding will assist FMM to locate new office space, employ a coordinator and assist with office essentials such

MSSF helps with the education of the children of slain journalists in Nepal.

as a computer and other supplies. This practical assistance will greatly assist the organisation to function as a union and continue to work towards protecting the freedom of expression including initiating court cases against rights violations that are in contravention of the Constitution of Sri Lanka; and raising awareness and campaigning on issues related to freedom of expression, right to information and the rights and role of journalists in a democracy.

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.

During 2012-2013, the fund supported 33 children of journalists and media workers killed in Nepal in assisting to meet their education needs with 30 receiving schooling assistance and three children receiving vocational training. During the year, a three-day vacation camp was organised for the children and parents to provide an opportunity for them to meet each other, interact and share their experiences. It provided children with an exposure to the different parts of the country aiming to build their confidence, knowledge and understanding about the Nepali society and its diversity.

Sri Lanka

The appeal has continued its support for the education of the two children of disappeared cartoonist Prageeth Eknaligoda.

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. 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. The fund has continued its support of children of journalists and media workers killed in the Philippines, including the children of those killed in the 2009 Ampatuan massacre.

China

The MSSF (together with the US funder National Endowment for Democracy) supports a China Press Freedom project administered by the IFJ AP. This project employs a human rights monitor in Hong Kong and releases regular reports on press freedom violations. The annual report on press freedom China in both English and Chinese was released on February 8[157].

IFJ AP Human Rights Advocacy

The MEAA hosts the IFJ Asia-Pacific office. The most high profile work is its human rights advocacy work – press releases, reports, lobbying, coordinating campaigns, coordinating missions and providing hands-on consultation for individual journalists in trouble. To help support the office continue this work, the MSSF has committed to directly funding the IFJ human rights advocacy program.

THE WAY FORWARD

As a rule, governments like secrecy. And as a rule, journalists don't. A journalist's job is to inform the community about what's going on so that society can hold governments to account for the way they govern.

The first six months of the Abbott Government have been remarkable for the secrecy that surrounds a key policy that helped it get elected to office. We have seen the militarisation of customs and immigration, the subsequent imposition of the public interest immunity claim, a lack of openness and transparency in media briefings from the responsible Minister and the military commander of the civilian operation, a refusal to respond to freedom of information applications, and enormous restrictions on media access and information about the operations of local and offshore asylum seeker detention centres paid for by the Australian taxpayer. And that's just Operation Sovereign Borders.

It's not a good start.

MEAA remains hopeful that press freedom issues outlined in this report will begin to be picked up by ministers and championed by them. A good start would be reform of the ridiculously flawed journalist shield laws. MEAA is hopeful that Attorney General George Brandis will follow up on the promise made by his predecessor to address the need for uniform national shield laws so that all jurisdictions come to an agreement about the need to protect journalists who follow their professional ethical obligations never to reveal a confidential source.

It's also hoped that reform will continue at state and federal levels for laws that properly protect whistleblowers and that encourage and facilitate freedom of information in the interests of the public's right to know and honest, open and transparent government.

For too long, federal governments of both persuasions have enacted and implemented heavy-handed anti-terror powers in an effort to curb the rise of domestic terrorism. However, the extraordinary revelations of whistleblower Edward Snowden have served as a wake-up call that individual freedom and privacy have been the victims of such legislative zeal on behalf of government and their intelligence agencies, often in league with multinational corporations who have come to dominate the digital telecommunications we use constantly, every day. The bipartisan determination to maintain such surveillance is of enormous concern and it has clear press-freedom implications for journalists who seek to contact sources, receive information, prepare stories and publish or broadcast them to our communities who have the right to know what governments do in our name.

There are welcome moves to reform the courts and the ludicrous overuse of suppression orders and these developments are to be welcomed and encouraged. The Government has ruled out the creation of a privacy tort which would bind the media and prevent proper scrutiny of individuals.

But disturbingly, politicians have embarked on a series of interventions in the editorial independence of the Australian Broadcasting Corporation. There are also suggestions that Australia's public broadcasters face budget cuts at a time when they are already squeezed for resources, particularly to match the output of commercial organisations, and most noticeably at a time when rural and regional Australia is in sore need of quality independent local news, information and entertainment. And then there is an efficiency audit led by someone with commercial experience who might be in for a shock at how public sector organisations manage on perpetually tight operating budgets and yet still manage to fulfil their legislated obligations to the community. And just to add more political game-play into the mix, yet again the media ownership laws are up for reconsideration which has once again ignited concerns about the provision of local content in a dynamic media market place where small local media providers been severely buffeted by the digital transformation and the loss of advertising dollars seeking bigger audiences.

This press freedom report focusses on the state of press freedom in Australia. But within its pages is a sad catalogue of press freedom assaults in our region and against Australian journalists working overseas. It seems as if journalism itself is under assault, that journalism is being treated a criminal offense and is even being labelled as terrorism.

As journalists we have to fight back against any attempt to undermine press freedom – an attack on a journalist for their journalism one day can quickly escalate into a wholesale campaign of harassment, intimidation and murder. The plight of our journalist colleagues in the Philippines and its culture of impunity over more than 140 journalist killings since 1986 is testament to that.

Wherever our colleagues are, whether it is in Cairo or Phuket, Fiji or Sri Lanka, Perth or Melbourne, as journalists we must continue to campaign to be able to carry out our professional duties. This should not be done in isolation; our communities must be encouraged to join with us because our audience is at the very heart of why we do what we do: respect for the truth and the public's right to know.

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