[redacted]

The Chilling Effect

[redacted]

The Report into the [redacted] State of Press Freedom [redacted] in Australia in 2017 [redacted]

[redacted]

CONTENTS

2017 AUSTRALIAN PRESS FREEDOM REPORT

Editor: Mike Dobbie

Thanks to:
Michael Bachelard
Peter Bartlett
Paul Farrell
Adele Ferguson
Joseph M. Fernandez
Alexandra Hearne
Padraic Murphy
Colin Peacock
Virginia Peters
David Rolph
Peter Timmins
Sam White

MEAA thanks all the contributors to this report.
Design by Louise Summerton, Magnesium Media

Approved by Paul Murphy, Media, Entertainment & Arts Alliance
245 Chalmers Street, Redfern, NSW 2016

FOREWORD

February 28 2017 is an extraordinary example of Australian lawmakers' confused approach to press freedom. On that day, a parliamentary committee, after inquiring into "freedom of speech" over nearly four months, admitted that it was unable come up with a definitive plan on what to do about section 18C of *Racial Discrimination Act*. Instead, it offered no less than six options – including doing nothing.

On the same day, the Director-General of Asio told another parliamentary committee that his agency is spying on journalists and media organisations using Journalist Information Warrants to secretly trawl through their telecommunications data in the hunt for whistleblowers and confidential sources.

Such is the nature of press freedom's political battleground in Australia: lots of talk about freedom of speech in the midst of an actual legislated assault on press freedom.

For it is the parliament that created Journalist Information Warrants, as part of the introduction of mandatory two-year metadata retention. The parliament has now legitimatised the government secretly using metadata to pursue whistleblowers who reveal government stuff-ups.

The parliament has also introduced prison terms for reporting on Asio special intelligence operations. A subsequent inquiry recommended modest changes albeit not removing the prison terms. It was believed these changes would "protect" journalists. But the lawmakers' confused approach to press freedom struck again. Thanks to a Senator's suggestion, this "protection" with its prison term penalties is to be extended to journalists reporting on Australian Federal Police operations.

While lawmakers' efforts have focussed on criminalising legitimate public interest journalism and going after whistleblowers, long-standing press freedom concerns continue to be ignored.

There is a dire need to reform of Australia's uniform national defamation legislation that allows people to be paid tens of thousands of dollars damages for hurt feelings without ever having to demonstrate they have a reputation, let alone one that has been damaged. The regime was meant to be reviewed in 2011. That review was revived in 2015. It is still stalled.

Meanwhile, Queensland, South Australia and the Northern Territory continue to refuse to introduce shield laws for journalists who face jail terms for refusing to name their confidential sources (as their ethics requires). In the era of borderless publishing and jurisdiction shopping, it is only a matter of time before someone decides to use the courts to pursue a journalist who will then cop a fine, a jail term or both plus a conviction for contempt of court for maintaining their ethical obligation.

The area of court reporting is becomingly increasingly frustrating for journalists in Victoria and South Australia with the ongoing over-use of suppression orders that are made in astonishing numbers compared to the relative lack of orders needed in other jurisdictions. Despite Victoria trying to reform the system in 2013, the problem is as out of control as ever. MEAA believes reform is needed not just at a state level but also nationally so that the media's responsibility to report on the courts in the public interest is maintained without judges acting as editors, as censors, and even – way outside their responsibilities – as determiners of what is in the public interest.

Media organisations are also not helpful even when it's in their own best interest. The sheer scale of redundancies that have taken, and continue to take, place at leading media houses demonstrates that media outlets are still engaging in the time-worn failed exercise of slashing staff in order to achieve cost-savings rather than investing in smarter solutions. There is a limit to more being done with less.

Audiences will not invest with time or money in media that does not deliver consistent, high quality journalism. Removing layers and layers of editorial staff may provide a short-term redress for the bottom line but the damage to the masthead and to audience's expectations is long-term.

But more insidious, is the gender gap that exists in media outlets. As Women in Media, a MEAA initiative, discovered in its *Mates Over Merit* report, there is an entrenched gender pay gap of 23.3 per cent between the pay of men and women working in Australian media.

In the survey produced for the report, almost half of the respondents (48%) said they'd experienced intimidation, abuse or sexual harassment in the workplace. A quarter of the women who'd taken maternity leave said they'd been discriminated against upon return to work.
A staggering 41 per cent of women working in the media say they have been harassed, bullied or trolled on social media, while engaging with audiences; and several were silenced, or changed career. Only 16 per cent of respondents were aware of their employer's strategies to deal with threats.

There is clearly a problem that media organisations must address – for there can be no press freedom if journalists exist in conditions of corruption, poverty or fear.

Finally, our lawmakers and their law-enforcement agencies have been woeful in ensuring justice for murdered Australian journalists. Nine of our colleagues have been killed and those responsible for their deaths are getting away with their murder. There is ample evidence for investigations and for the laying of charges.

The champions of press freedom need to do more than cloak themselves in glib phrases. Genuine roll back of laws that undermine press freedom is vital if genuine democracy in Australia is to function.

Paul Murphy
CEO, MEAA

Paul Murphy CEO, MEAA

IN THEIR OWN WORDS

International Federation of Journalists – "There can be no press freedom if journalists exist in conditions of corruption, poverty or fear."

David Kaye, UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, October 13, 2015 – "It's very common for a state to say 'this is national security and therefore there's no right to either publish this information or disclose it'. So both the person who discloses the information and the source can be subject to all sorts of sanctions, sometimes criminal. Those are having a real chilling effect, certainly on sources, and probably to a certain extent on the journalists as well."

US presidential candidate Donald Trump, February 26, 2016 – "I'll tell you what, I think the media is among the most dishonest groups of people I've ever met. They're terrible… I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money."

Russian President Vladimir Putin, June 7, 2016 – "There can't be a situation where some governments talk about freedom of information when they like what they are hearing, yet immediately decry information they don't like as propaganda of a political group or foreign state… Information should be objective from all viewpoints and should not be subjected to any repressive actions with the goal of correcting it."

Philippines President Rodrigo Duterte, June 30, 2016 – "Just because you're a journalist, you are not exempted from assassination if you're a son of a bitch."

Senators Pauline Hanson, Brian Burston and Malcolm Roberts in the Senate at Parliament House in Canberra.
PHOTO: ALEX ELLINGHAUSEN, COURTESY FAIRFAX PHOTOS

Resources Minister Matt Canavan, December 22, 2016 – "Those reports have been nothing but fake news."

President-Elect Donald Trump, January 11, 2017 – "You are fake news."

Queensland Senator Pauline Hanson, January 18, 2017 – "That probably is fake news."

Treasurer Scott Morrison, February 6, 2017 – "I will leave the fake news to others."

Turkey's President Recep Tayyip Erdogan, February 16, 2017 – "The press freedom in Turkey is more than it is in most Western countries."

President Donald Trump, February 16, 2017 – "Tomorrow they'll say Donald Trump rants and raves at the press. I'm not ranting and raving; I'm just telling you. You know, you're dishonest people. But… but I'm not ranting and raving. I love this. I'm having a good time doing it. But tomorrow the headlines are going to be Donald Trump rants and raves. I'm not ranting and raving."
The next day – "The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!"

Former *Washington Post* reporter Carl Bernstein, February 19, 2017 – "Trump's attacks on the American press as enemies of the American people are more treacherous than Richard Nixon's attacks on the press... It is a demagogue statement… Trump is out there on his own leading a demagogic attack on the institutions of free democracy including the press."

Cambodian Prime Minister Hun Sen, February 27, 2017 – "Donald Trump understands that [journalists] are an anarchic group."

Cai Mingzhao, president Xinhua News Agency, February 21, 2017– "As long as the news media stick to the correct political direction and play their part, they will make great progress on the initiative of serving the nation's economic development and helping maintain a stable political environment."

Tasmanian senator Eric Abetz, March 21, 2017 – "Freedom of speech is a fundamental virtue underpinning the very fabric of Australian society."
Two days later – "New ABC Chairman must end biased fake news fetish."

NSW Senator Brian Burston, April 10, 2017 – "Look out ABC. I am coming after you and your disgraceful journalist… "

THE LAW

The year in Australian media law

By Peter Bartlett and Sam White

Defamation

A *Uniform Defamation Law* came into operation in 2005 after some 30 years of lobbying. The law was a total compromise, needing the agreement of every state and territory and the Commonwealth.

It only came about because every state and territory had Labor governments and the Commonwealth had a strong and determined Liberal Attorney-General.

After some 12 years of operation, it is clear that the *Defamation Act* is in urgent need of amendments. Again, we see most state and territory governments with Labor governments. Can we reach consensus as to the reform we badly need?

As leading media QC Matt Collins points out "as soon as a publisher is found to have made a factual error and no matter how minor, in practical terms, the plaintiff succeeds". He adds that it is relatively easy for a defamation plaintiff to establish that he has been defamed. It is then up to the defendant to establish that even though the plaintiff has been defamed and has suffered loss, the plaintiff should not be awarded damages.

That is a huge hurdle for a defendant, and one that is rarely achieved.

Mainstream media

Over the last 12 months, there have been a surprising number of defamation actions that have proceeded to judgment.

- Malcolm Weatherup v Nationwide News – more than $100,000 to a retired journalist accused of being "habitually intoxicated", Queensland.
- Sean Carolan v Fairfax Media and Peter FitzSimons – $300,000 to a personal trainer accused of injecting football players with a banned substance and being involved with organised crime, NSW.
- Raelene Hardie v The Herald & Weekly Times and Andrew Rule – $250,000 to a strip-club owner, Victoria.
- Hanza Cheikho v Nationwide News (No. 4) – $100,000 to a Muslim man who took part in the 2012 Hyde Park protests, NSW.
- Lili Chel v Fairfax Media and Vanda Carson – a damages hearing is pending for a Kings Cross nightclub owner, NSW.

There have also been some positive results for the media:

- Stephen Dank v Nationwide News – Dank was awarded $0 damages, NSW.
- Graeme Cowper v Fairfax Media; Cowper v ABC – Cowper, the former NAB financial adviser, withdrew after a two week trial, NSW.
- Don Voelte v ABC – former CEO of 7 Group Holdings's defamation claim failed before a jury.
- Nicholas Di Girolamo v Fairfax Media – Di Girolamo (lawyer to the Obeids) withdrew his action, NSW.
- Poniatowska v Channel 7 Sydney – *Today Tonight* succeeded on its pleaded defences (truth and fair comment). The plaintiff had initially been found to have acted fraudulently in relation to Centrelink payments, SA.
- Father Fleming v Advertiser – News – defences (truth, contextual truth) relating to sexual misconduct were upheld, SA.
- Natalie O'Brien v ABC – defences relating to fair comment, honest opinion and a matter of public interest upheld against a former Fairfax journalist accused of engaging in "trickery and behaving irresponsibly", NSW. O'Brien is appealing this decision.

In spite of some of these outcomes, don't get the idea that the defamation field is balanced. It is heavily weighted in favour of plaintiffs. The vast majority of cases are settled, not on the merits of the claim, but on a purely commercial basis. The cost of going to judgments is just too great.

Defamation trials are in many ways a lottery with the scales tilted against the defendants. Media defendants will only take an action to judgment if they believe they have a really strong case or if the plaintiff is too greedy in negotiations.

Social media

Another trend we are noticing is the number of defamation claims that relate to social media:

Facebook:

- Heather Reid v Stan Dukic – $180,000 for "irrational and ranting posts", ACT.
- Kenneth Rothe v David Scott – $150,000 for an accusation of paedophilia, NSW.
- Kelly v Levick – $10,000 for an accusation of being a "money crazed bitch" by her husband, Queensland.

Courts in different Australian jurisdictions have interpreted defamation in different ways on various issues.

Other actions:

- Gratten v Porter – $170,000 after the defendant telephoned a school alleging sexual misconduct, Queensland.
- Dr Janice Duffy v Google Inc (No. 2) – $100,000 following search results and hyperlinks suggesting she was a "psychic stalker", SA.
- Douglas v McLernon - $700,000 to three Perth businessmen defamed on the internet, WA.
- Dodds v McDonald – $150,000 – a Queensland barrister's website accused the Victorian Police office of "executing" a 15 year old boy.
- Maras v Lesses – $75,000 after defamatory posts in a newsletter saw two members of the Greek Orthodox community in South Australia in Court.

It is clear from our experience that some of the negative trends we are observing could be slowed by considering the following amendments to the *Uniform Defamation Act*:

1. A serious harm test. Far too often our defamation law is used to intimidate the publishers, which has a chilling effect on free speech. The tort of defamation was developed for fine, upstanding citizens who are wrongly defamed. In furtherance of this a threshold test, like the test that has been introduced in the UK, would take us back toward where we should be.

2. A single publication rule. It is absurd that the *Uniform Defamation Act* has a 12 month limitation period for hard copy publications, but in practicality no limitation period for online publications. The reason is that every time a person downloads an online publication, it is considered a new publication for defamation purposes so the limitation period resets. In contrast to this, Britain has introduced a single publication rule, with a one year limitation period.

3. Rules to limit a plaintiff to one set of proceedings in relation to the same or similar defamatory imputations against all defendants. Too often we see plaintiffs suing several corporate entities for substantially similar (if not identical) articles that have been syndicated across various news websites. These publishers are effectively owned by the same parent company. This tactic that is used by plaintiffs subverts the purpose of the cap on damages contained in the *Defamation Act*, as it allows a plaintiff to succeed against multiple defendants with damages able to be awarded up to that cap multiple times. This is especially relevant to News Ltd and Fairfax Media, where the same or similar articles are syndicated and published in various newspapers and online sites.

Courts in different Australian jurisdictions have interpreted the Act in different ways on various issues including the assessment of damages and the defence of contextual truth.

There is also the vexed issue of the role of the Lange case's "political discussion" defence. It appears that courts around the country have basically killed this defence off, which is a tragedy for freedom of speech in this country.

The cap on damages is indexed. It is now nearly $400,000. A leading plaintiff defamation SC recently observed that the cap is now "pretty reasonable". That suggests to me that the cap is now too high.

Suppression orders

As Jason Bosland from Melbourne University recently wrote "… open justice is increasingly being undermined in Victoria due to the inappropriate use of suppression orders by the Courts".

Jason is correct. Victoria has an *Open Courts Act* that is aimed at promoting the openness of our courts. The practical application of the Act, however, could better be described as facilitating the closing of our courts.

Few applications adhere to the notice requirements of the legislation, which means that the media is not given the opportunity to be heard and to act as a contradictor. Not only is this a breach of the legislative provisions, but it also more fundamentally deprives the open reporting of matters before our courts.

Orders are often drafted far more widely than is necessary to achieve their stated purpose. In many instances, orders do not comply with other the legislative requirements to specify precisely what is being suppressed and for how long the order is in effect.

By far the most fundamental problem we have observed is with the application of the grounds for making suppression orders that are clearly defined in the Act. While the grounds set out in the Act describe situations that should be reserved for exceptional circumstances, too often we see orders made in cases where a proper ground has not been adequately demonstrated.

Orders are most often made to avoid a real and substantial risk of prejudice to the proper administration of justice. However, in reality, many of these orders are being made in circumstances where the risk of jury prejudice could not be considered to be "real and substantial". This includes an order that was made to avoid a risk that a juror would conduct his/her own internet searches about an accused, which would clearly be breach that juror's obligations under the *Juries Act*.

Any risk of a juror intentionally breaching those obligations cannot be characterised as a "real and substantial" risk. It is too simple for judges and magistrates to exercise their discretion in making suppression orders whilst only paying lip service to the requirements of the Act.

Retired Mr Justice Vincent has been asked to review the suppression order legislation in Victoria. It is hoped that he will produce a report pointing out the problem in Victoria that does not appear to exist elsewhere in Australia.

Source protection

Since shield laws have been introduced in most states and territories, applications for disclosure of sources have largely failed.

However, the long running attempt by businesswoman, Helen Liu, to require *The Age*, Nick McKenzie, Richard Baker and Phillip Dowling, to disclose sources continues.

The High Court recently refused the newspaper's leave to appeal the New South Wales Court of Appeal's decision compelling disclosure of sources. Watch this space.

Peter Bartlett is a partner and Sam White is a lawyer with law firm Minter Ellison

DEFAMATION

The uniform national defamation law regime commenced operation in January 2006 by agreement among the states at the Council of Australian Governments (COAG).

Only the states are signatories to this COAG agreement, the federal government is not a signatory. Any changes to the law must be agreed by all of the states.

The regime does not have a review clause. However, in 2011, after five years of operation the NSW Department of Justice undertook a review of the defamation laws. That review was not concluded and not presented to the NSW Government.

MEAA, as a member of the Australia's Right To Know (ARTK) industry lobbying group, supports an ARTK campaign for a review of the operation of Australia's uniform defamation law regime.

In July 2015 ARTK called for the law to be updated so that it could rectify problems that had become evident after almost 10 years of operation and also to reflect changes made in Britain when that country's law was updated to reflect the impact of digital publishing.

ARTK's aim was to bring the law in line with international best practice and remove areas where the uniform laws have not proved successful or where it is inconsistent or do not work as intended.

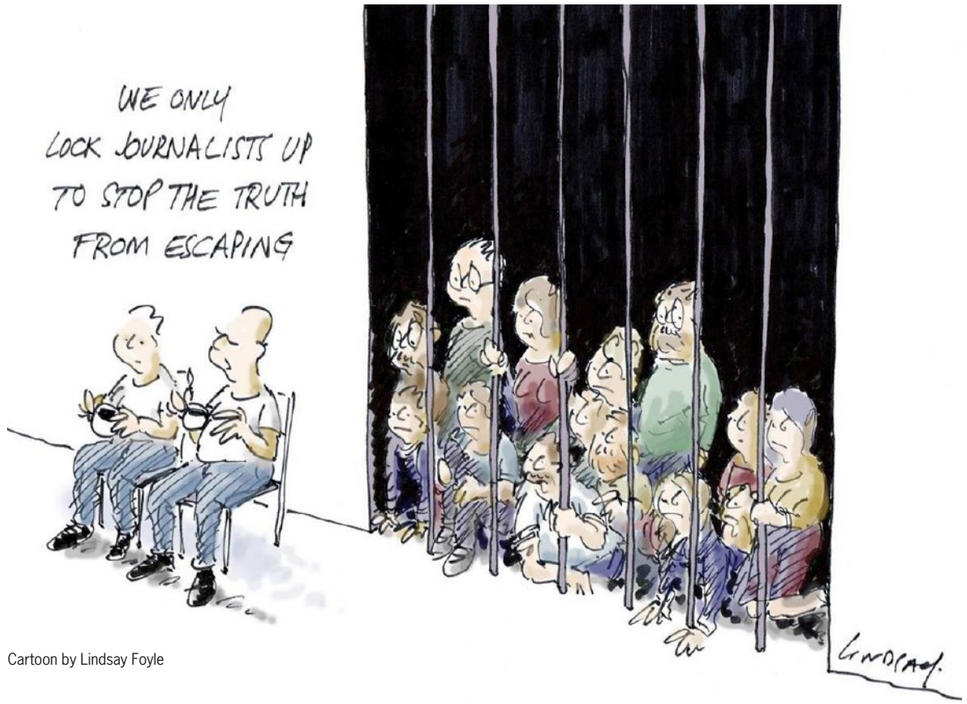
Another aim was to ensure that criminal defamation is repealed and removed from the statutes.

At the end of 2015, the meeting of the various attorneys-general that makes up COAG's Law Crime and Community Safety Council (LCCSC) the issue of a uniform defamation law review and update was being discussed "below the line".

The NSW Government was tasked with finalising its 2011 review; NSW would be used a template for a broader discussion among all the jurisdictions so that the uniform defamation legislation could be updated.

The aim was for the review to be presented to the NSW attorney-general which would then result in a cabinet paper being presented to the NSW Cabinet sometime in 2016. The paper would be expected to recommend issues to be further considered by the Defamation Working Group (DWG) which consists of officials from all jurisdictions. The DWG would then make recommendations to the LCCSCC. It was anticipated that the LCCSC would then create a mechanism of public consultations.

There appears to have been no further progress.



Cartoon by Lindsay Foyle

Bully for you, chilly for me

By Michael Bachelard

A very noisy section of the commentariat believes that the biggest threat to free speech in Australia is anti-discrimination law, particularly the "offend and insult" provision, section 18C.

They are wrong. A far bigger threat is defamation law.

Yes, it's a threat to the media, and to investigative journalism particularly. But it's also a threat to ordinary people simply posting their views on social media. And it's high time we pressured politicians to scrap and re-write this archaic law or, at least, to extensively amend it.

The National Uniform Defamation Law has not been updated since 2005 when, after years of wrangling, all states and territories agreed to amend their own laws to be consistent with each other. That was a big step forward. It put a cap on most payouts and enshrined various defences, including honest opinion and a "reasonableness" defence for stories of public importance.

The legislation has not been revisited by politicians since then, but the judges have been active. Their decisions have shot the Act full of holes. Matt Collins QC, the man who literally wrote the textbook, describes the law now as "Frankenstein's monster".

One defence that's virtually no longer available to Australian journalists is honest opinion.

Celebrated British restaurant reviewer A. A. Gill was lauded on his death last year for his acerbic writing, including the take-down of the beloved Paris bistro L'Ami Louis. Its pate, he said, was like "pressed liposuction".

In Australia, by contrast, Matthew Evans, then a restaurant reviewer for *The Sydney Morning Herald* visited a chic new Darling Harbour eatery in 2003 and gave it nine out of 20. The proprietors sued. Eleven years later, in 2014, after excursions to the High Court, the *SMH* paid out more than $600,000 to the restaurant's offended proprietors, plus undisclosed costs. By then, the restaurant was long closed.

If L'Ami Louis had been in Australia, not France, A. A. Gill would have been forced to give a lukewarm review, at worst, and three-and-a-half stars, or cop a massive payout.

The "reasonableness" defence purports to allow journalist to make errors in a story as a whole but to escape a finding of defamation if they've acted reasonably to establish the truth. That defence, too, has been made virtually impossible to win.

"As soon as a publisher is found to have made a factual error and no matter how minor, in practical terms, the plaintiff succeeds," Collins said. "In any case involving a media defendant... it's [you must prove] truth or nothing."

"So what?" I hear you say. "Surely journalists should write the truth."

We should, or at least try to.

But that's not exactly what we're talking about. Say a reporter hears from a series of unrelated whistleblowers that a politician is taking bribes. One whistleblower is on the record, and named. The other three are anonymous.

The journalist has some circumstantial evidence: the politician's record of decision-making, the sudden appearance of a $1.7 million property in his investment portfolio, photographs of him with the alleged briber at a party fundraiser.

The politician denies it and says nothing further. After weeks of investigation, the newspaper and its highly paid lawyers confer then, bravely, decide to publish. The politician sues.

Discovery, pre-trial arguments and adjournments mean that it's 12 months before the first interlocutory hearing. One of the whistleblowers has died, and the other has got cold feet and decided she cannot give evidence. The politician believes he has identified the other off-the-record witness and is threatening his job. He too drops out.

Two years down the track, only the resolute on-record witness is left.

He is only able to give evidence for parts of the story. The judge has accepted the "imputations" that the politician's lawyer has argued the article raises, even though those words are never used in the publication itself.

So the newspaper is required to prove to the satisfaction of a court, two years after the story was written, that the imputations drawn by the politician's lawyer are literally true. It decides the risk of costs is too high, and one or two minor errors of fact mean the judge (or jury) will be unsympathetic. It cuts its losses and settles, paying $300,000. The politician installs an Olympic-sized pool.

Five years later, the Independent Broad-Based Anti-Corruption Commission finds he was corrupt.

Easier, then, to never write the story in the first place.

The effect is felt in newsrooms – in my newsroom – every single working day.

"There are important, high profile stories that don't get told because of the chilling effect of defamation law, and the high cost of actions," Collins says.

Richard Ackland of the Gazette of Law and Journalism, says: "It's a racket. You start sending nasty letters and pleadings to newspaper lawyers and they respond: 'How much is this going to cost'?"

So what is needed? At the very least some amendments.

- First would be to adopt the very first section of the new British defamation law, in which a plaintiff cannot even get a claim accepted without proving that they have a reputation, and that the publication has caused "serious harm" to it.
- Second would be to reinstate "reasonableness" as a defence, and to insist that courts recognise, as Collins argues, that "reasonableness is not perfection".
- Third would be what's known as the "single publication rule". Under the current law, plaintiffs have a year after publication to lodge a writ. But courts have decided that, since everything is now online, there is, effectively, no time limit on how long a defendant might wait to make a claim. Australia is virtually alone in the world on this.
- Fourth would be to stop defamation law being decided on the "imputations" that the court decides can be drawn from a publication. Why not just ask if these words, as published, defamed that person?
- Fifth would be to address the problem of the internet: who is the publisher? As NSW Justice Judith Gibson wrote in 2015, "Social media and online publication not only require reconsideration of almost every aspect of defamation law from publication to defences to quantum of damages, but appear to be contributing to the rise in the number of litigants in person, as most persons suing and being sued are ordinary members of the community."

These are just the most basic reforms.

Unfortunately, in the current political environment, while the loudest mouths in the Australian media are busy tilting at the 18C windmill, a much bigger threat to their and everyone else's free speech is being virtually ignored.

Michael Bachelard is investigations editor at The Age. This article first appeared in *The Walkley Magazine – Inside the Media in Australia and New Zealand.*

Social media and defamation law pose threats to free speech

By David Rolph

Recent discussion about freedom of speech in Australia has focused almost exclusively on section 18C of the *Racial Discrimination Act*. For some politicians and commentators, 18C is the greatest challenge to freedom of speech in Australia and the reform or repeal of this section will reinstate freedom of speech.

There are many challenges to freedom of speech in Australia beyond 18C, for example defamation law. Defamation law applies to all speech, whereas 18C applies only to speech relating to race, colour or national or ethnic origin.

The pervasive application of defamation law to all communication creates real risks of liability for publishers. Large media companies are used to managing those risks. But defamation law applies to all publishers, large and small. Now, through social media, private individuals can become publishers on a large scale.

A significant reason that defamation law poses a risk to free speech is that it is relatively easy to sue for defamation and relatively difficult to defend such a claim. All a plaintiff will need to demonstrate is that the defendant published material that identified the plaintiff, directly or indirectly, and that it was disparaging of their reputation.

In many cases, proving publication and identification is straightforward, so the only real issue is whether what has been published is disparaging of the person's reputation. Once this has been established, the law presumes the plaintiff's reputation has been damaged and that what has been published is false.

It is then for the publisher to establish a defence. The publisher may prove that what has been published is substantially accurate, or may claim that it is fair comment or honest opinion (but the comment or opinion must be based on accurately stated facts), or may be privileged. Truth, comment and privilege are the major defences to defamation.

One of the main criticisms of 18C is that it inhibits people from speaking freely about issues touching on race. In essence, this criticism is that 18C "chills" speech.

The ability of the law to inhibit or "chill" speech is not unique to 18C. The "chilling effect" of defamation law is well-known. Precisely because it is easier to sue, than to be sued, for defamation, the "chilling effect" of defamation law is significant.

Defamation claims based on social media publications by private individuals are increasingly being litigated in Australia. In 2013, a man was ordered to pay[1] A$105,000 damages to a music teacher at his former school over a series of defamatory tweets and Facebook posts. In 2014, four men were ordered to pay combined damages[2] of $340,000 to a fellow poker player, arising out of allegations of theft made in Facebook posts. In the former case, Judge Elkaim emphasised that:

… when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.

More defamation cases arising out of social media can be anticipated. Indeed, the cases that make it to court represent only a fraction of the concerns about defamatory publications on social media. Many cases settle before they reach court and still more are resolved by correspondence before any claim is even commenced in court.

There are several ways in which defamation law might be reformed in Australia that could promote freedom of speech, particularly for everyday communication.

Currently, plaintiffs suing for defamation in Australia do not have to demonstrate that they suffered a minimum level of harm at the outset of their claims. Publication to one other person is sufficient for a claim in defamation, and damage to reputation is presumed. Defamation law is arguably engaged at too low a level in Australia.

English courts have developed two doctrines to deal with low-level defamation claims. It is worth considering whether these should be adopted in Australia.

The first is the principle of proportionality. This allows a defamation claim to be stayed where the cost of the matter making its way through the court would be grossly disproportionate to clearing the plaintiff's reputation. A court would view such a claim as an abuse of process.

There has been some judicial support for this principle in Australia, most notably Justice McCallum in Bleyer v Google Inc[3], but there has also been judicial criticism and resistance.

The other English development is the requirement that a plaintiff prove a level of serious or substantial harm to reputation before being allowed to litigate.

Australian law does have a defence of triviality, but it is difficult to establish because of the terms of the legislation. It also only applies after the plaintiff has established the defendant's liability. By contrast, the threshold requirement of serious or substantial harm can stop trivial defamation claims before they start.

More defamation cases arising out of social media can be anticipated

Another way in which the balance between the protection of reputation and freedom of speech online could be effectively recalibrated is by developing alternative remedies for defamation.

Notwithstanding previous attempts at defamation law reform, it remains the case that an award of damages is still the principal remedy for defamation. Yet people who have had their reputations damaged would probably prefer a swift correction or retraction, or to have the material taken down, or have a right of reply, than commencing a claim for damages.

Currently, people can negotiate these remedies by threatening to sue, or suing, and hoping they can secure these remedies as part of a settlement. Australian law has no effective small claims dispute resolution system for defamation in the way that it does for other small claims, such as debts. More effective and more accessible remedies are another aspect of defamation law reform worth exploring.

The discussion about freedom of speech in Australia recently has been unduly narrow. Every Australian has an interest in freedom of speech, not only about issues of race. Every Australian also has an interest in the protection of their reputation.

It is time to widen the focus of the treatment of free speech under Australian law. Defamation law is an obvious area in need of reform on this front.

David Rolph is associate professor of media law at the University of Sydney.This September 15 2016 article was sourced from The Conversation.

A defamation law case study

By Virginia Peters

One defamation case that refuses to resolve is Moran v Virginia Peters and the publisher of her book *Have You Seen Simone? The Story of an Unsolved Murder*.

Moran claims the literary work of 300 pages, which earned Peters a doctorate from London University, bears the meaning that he is guilty of murdering his girlfriend Simone Strobel, in Lismore, NSW, in 2005.

Peters and her publisher are pleading the so-called Polly Peck defence (available in Western Australia) of justification to the lesser imputation that there are reasonable grounds to suspect Moran of murder.

In March 2016, Moran made an application for a judge alone trial in which only the book's meaning would be assessed. He argued that Peters' preference for a jury was unreasonable because "ordinary, reasonable readers" might not understand the importance of his claims to privilege and rights to remain silent on issues critical to the case.

Moran also raised concern over his ability to obtain a fair trial due to extensive pre-trial publicity, as well as the sheer volume of internet articles generated by his name, at the time numbering 472,000 search results.

The judge dismissed the application and ordered costs against him.

In an unusual twist, Moran subsequently refused to provide certain documents to Peters in the usual document discovery process, stating his documents may tend to incriminate him, and he now claims privilege in respect of them. These documents are most relevant to Peters' defence. She also argues it is unfair for Moran to complain that she has defamed him by inferring he murdered Simone Strobel (an allegation Peters denies) while withholding documents from evidence which he himself says may incriminate him of murder.

At a directions hearing in December 2016, Moran requested the judge order mediation, while Peters and her publisher pursued access to the allegedly privileged documents. The judge ordered mediation take place and deferred the issue of access.

Nonetheless, the contest in relation to the documents caught the interest of the NSW police, and in February this year the NSW police executed an extra-territorial search warrant seizing the documents in raids on two WA properties, including Moran's lawyers' offices.

It is understood Moran is now contesting the right of the police to have access to the documents.

The case first appeared before the WA Supreme Court in June 2014, when Moran failed in an injunction to stop distribution of the book. Citing public interest in freedom of speech, and the important role of the media in solving crime, Kenneth Martin J described Moran's case as "arguable… but not strong".

The judge also found that there was a significant body of credible fact providing reasonable grounds for suspicion of Moran. Undeterred, Moran continued to pursue a final injunction and damages against Peters and her publisher.

It has generally been held by the courts that a plaintiff's inability to pay a costs order (should he or she lose) is not of itself a sufficient ground for seeking security for costs.

Despite Moran claiming impecuniosity, in February 2015 the court ordered he pay $500,000 security to protect the defendants should their defence be successful.

A trial date is yet to be set.

Virginia Peters is the author of *Have You Seen Simone? The Story of an Unsolved Murder*

The "freedom of speech" inquiry

The Media section of MEAA made a submission[5] to the Parliamentary Joint Committee on Human Rights' Inquiry into the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) and related procedures under the *Australian Human Rights Commission Act 1986* (Cth).

The government labelled this as an inquiry into "freedom of speech in Australia"[6]. In fact, the inquiry's focus was extremely narrow: the committee was asked by Attorney-General George Brandis to focus on only two matters:

- "whether the operation of Part IIA of the *Racial Discrimination Act 1975* (Cth) (including sections 18C and 18D) impose unreasonable restrictions on freedom of speech; and
- whether the complaints-handling procedures of the Australian Human Rights Commission should be reformed."

MEAA is concerned at the rise of hate speech in Australia.

When Part IIA was introduced into the *Racial Discrimination Act in 1995* it was long before the widespread use of digital technology. Now there are a multitude of platforms available for the widespread dissemination of opinions and messages of all kinds. Social media platforms enable those engaging in hate speech to spread their message, call others together who share their views and to use these platforms to target and discriminate against individuals and groups on the basis of race.

MEAA Media believes hate speech is antithetical to ethical journalism, and in particular to MEAA's *Journalist Code of Ethics*[7].

However, MEAA Media believes that the use of the words "insult" and "offend" have led to confusion over the intent of Part IIA. As part of its submission, MEAA Media recommended that Part IIA should seek to address widespread concerns at the rise of hate speech concomitant with the need for changes to the Act.

MEAA Media believes that replacing "insult" and "offend" with "vilify" would add a practical solution to concerns with section 18C while also ensuring the Act continues to make illegal all racially discriminatory hate speech.

Unreasonable restrictions on freedom of speech

MEAA Media believes freedom of speech, perhaps better described as freedom of expression, is increasingly under threat.

As the leading industry advocate for Australia's journalists, MEAA Media believes that press freedom in Australia is under assault from various attacks, not least by laws voted on by the Australian Parliament.

MEAA Media believes that while refining the legal tests used in s18C and reviewing the adequacy of the exception protections in s18D were worth considering, there are many more significant threats to free speech that also deserve urgent attention, such as:

- the persecution and prosecution of whistleblowers in the public and private sectors;
- the threat of up to 10 years jail for journalists and whistleblowers contained in s35P of the *Asio Act*;
- the star chamber powers of anti-corruption bodies that bypass journalist shield laws (journalist privilege); that allow the bodies to operate in secret free from public scrutiny; that deny the right to silence; and that can compel and coerce the production of journalists' notes and recordings;
- the use of Journalist Information Warrants to secretly access journalists' and media organisations' telecommunications data in an effort to discover journalists' confidential sources as well as the creation of Public Interest Advocates who operate in secret and who have no experience in or of the media;
- the use of defamation, contempt of court and suppression orders to intimidate or muzzle legitimate reporting of matters in the public interest usually when matters are before the court concerning powerful interests;
- the views of senior members of the Australian Public Service that government information should be suppressed, that freedom of information has become "very pernicious"[8] and that the processes of government decision making should be kept hidden; and
- the refusal of government ministers, departments and their agents to provide access to information or refusing to answer questions based on spurious "operational" grounds.

MEAA Media members are left to ponder the apparent limitations of the Parliament's free speech "agenda".

MEAA Media believes the Committee's "inquiry into two matters regarding freedom of speech in Australia" should not operate in isolation of the other threats to freedom of speech in Australia. MEAA Media urged the Committee to consider holding an inquiry into the raft of issues that have arisen in recent years that threaten and undermine freedom of speech.

MEAA Media believes it is evident that the interpretation of "insult" and "offend" in s18C has become confusing. Despite the passage of 20 years, there has been a growing concern, albeit from a limited number of decided cases, that the intent of the law is not producing adequate outcomes in part because the interpretation and understanding is so confused and that, consequently, the operation of s18C has become bogged down in "incoherent case law" and poor oversight of the mechanics of the Act.

Importantly, the purpose of the original legislation to provide "a civil remedy in relation to acts done otherwise than in private which may be offensive to people and which are done because of the race, colour or national or ethnic origin of those people" has become lost amid a highly charged political debate that has lost sight of other threats to freedom of speech.

MEAA Media believes that a balance needs to be struck between making hate speech unlawful while protecting and preserving freedom of speech. Based on the explanatory memorandum to the 1995 amendments to the Act it could be concluded that the amendments were seeking to prevent hate speech, i.e. vilification on the basis of race. It is less clear why the words "insult" and "offend" were introduced.

MEAA Media believes that it is unlikely a journalist would seek to "vilify" on the basis of race whereas a complainant could be "offended" or "insulted" by legitimate public interest journalism.

Every day vigorous journalism provokes. At times, it can offend or insult. That is the nature of public debate. But because vigorous journalism is provocative, or because it can offend or insult at one time, that does not mean it intends to vilify.

If such journalism does intend to vilify on the particular basis of race then it deserves to be condemned, particularly as it is outside what is considered ethical journalism.

MEAA Media believes that it makes sense for consideration be given to remove the words "insult" and "offend" in s18C and, instead, replace them with "vilify", which would help to target the specific intent that s18C wishes to identify and make unlawful.

Such an amendment would clarify the behaviour that s18C seeks to identify and penalise and would go some considerable way to targeting the hate speech that the 1995 amendments sought to eradicate: "The Bill is intended to prevent people from seriously undermining tolerance within society by inciting racial hatred or threatening violence against individuals or groups because of their race, colour or national or ethnic origin".

Parliament House, Canberra.
PHOTO: MELISSA ADAMS, COURTESY FAIRFAX PHOTOS]

With regard to s18D, MEAA Media also supports consideration being given to the manner in which "good faith" is examined and determined by the courts and the Commission. It is possible that this may also apply to the requirement in section 18D that potentially offending conduct was done "reasonably" in addition to the good faith requirements. In other respects, MEAA Media believes that there is no change required to s18D.

While the inquiry's terms of reference specified the processes of handling complaints by the Australian Human Rights Commission, MEAA Media, made several observations. Complaints by the public about the media should be addressed swiftly and comprehensively.

MEAA Media noted that in recent years, following its internal reorganisation and reform, the Australian Press Council's complaint handling processes had improved dramatically, allowing for a fast resolution to complaints. But MEAA Media added that media outlets should take appropriate measures to speedily and thoroughly deal with complaints from the public and to do so publicly. Too often the public turns to a third party without first raising a complaint with the specific media outlet that has published or broadcast the item in question.

MEAA Media said that media outlets must be willing to be held accountable for their failings by the consumers who put their trust, and their time and money, into supporting the media outlet. Only after a complaint has been dealt with, and only if there is no satisfaction, should a member of the public feel so aggrieved that they wish to take their complaint to a third party such as a media self-regulatory body like the Australian Press Council or Free TV Australia, or MEAA if there is an ethics complaint about a MEAA Media member; or to the Australian Human Rights Commission in relation to an alleged breach of the *Racial Discrimination Act*. A prompt resolution of such a complaint is vital.

Ideally, the AHRC should be appropriately resourced to ensure that in principle determinations are made about a case's merits within the shortest possible time of its receipt. For a complaint to linger for any length of time when it is abundantly clear that it will fail only raises false hope and confusion for all parties to the complaint, and bogs down the AHRC in needless details. In respect of complaints that the Commission has disallowed through the Commission finding that s18D will likely apply, only if the complainant wishes to challenge and appeal against the application of s18D should the complaint be dealt with by the Commission.

In response to specific questions posed in the inquiry's full terms of reference, MEAA Media stated:

- S18C could be amended by removing the words "insult" and "offend" and replacing them with "vilify"; and S18D does not need to be amended;
- The complaint processes of the AHRC could be improved to allow complaints that are subject to the exemptions set out in s18D to be rejected as soon as possible;
- A more efficient approach to complaints handling, in concert with other bodies that investigate complaints, is required so that complaints are dealt with promptly, openly and transparently, with minimum cost to the parties involved.

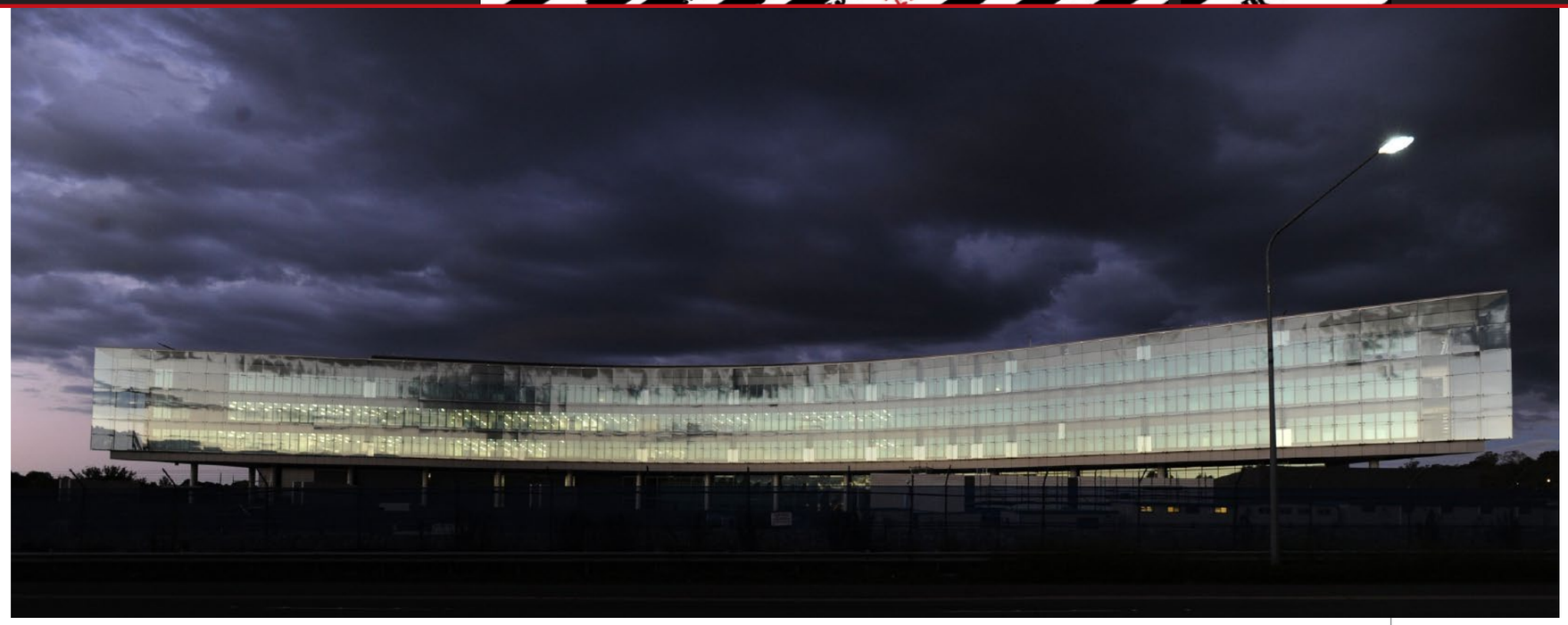
MEAA attended the inquiry's public hearings in Canberra on February 17, 2017. The Parliamentary Joint Committee on Human Rights' report was released on February 28 and offered up a series of options for amendment to the Act.

On March 21 the Government announced it would seek to remove the words "insult", "offend" and "humiliate" and replace them with "harass". It also said it would insert a "reasonable person" test, make complainants liable for costs, especially if the action is dismissed as trivial, and change the way the Australian Human Rights Commission processes and rejects complaints.

On March 23, during the discussion on the Government's proposed amendments, MEAA Media said[9] it only supported legislation in line with its submission, and did not see reform of 18C as "an urgent free speech priority".

"Legislation to overhaul defamation or to limit the use of suppression orders, for example, would be a more significant boost to free speech in this country." MEAA Media backed measures to knock out spurious complaints earlier in the process, saying "any measure to promote speedier handling of complaints will benefit everyone".

On March 28 the amendments were tabled in the Senate. At a late night sitting of the Senate on Thursday March 30 the amendments to section 18C were rejected – the government lost the vote 28 to 31. The following day some amendments to change the Commission's processes passed.



Twilight over the ASIO building in Canberra. PHOTO COURTESY FAIRFAX PHOTOS

NATIONAL SECURITY LAWS

Australia's raft of national security laws were created in response to the threat of terrorist incidents. In the process, the laws have been framed to deliberately undermine press freedom in Australia by seeking to control the flow of information, persecute and prosecute whistleblowers, criminalise journalists for their journalism in the public interest, and minimise legitimate scrutiny and reporting of government agencies.

At the heart of the legislation is a sustained attack on the right to freedom of expression and opinion, the right to privacy, and the right to access information – especially information about what governments do in our name.

Politicians have failed to comprehend the depth and seriousness of the press freedom and freedom of expression implications of the legislation they have created – despite the numerous statements, submissions by MEAA and other media groups, including the joint media organisations that make up the Australia's Right To Know lobby group (of which MEAA is a member).

Section 35P

The first of several tranches of new national security was the *National Security Legislation Amendment Bill (No. 1) 2014* introduced in July 2014. There was an initial muted reaction from some media organisations as the legislation seemed to merely seek to update the *Asio Act*.

But it quickly became clear that this legislation, and the next two tranches that followed it, represented the greatest assault on press freedom in peacetime. It was described as "a terrible piece of legislation that fundamentally alters the balance of power between the media and the government".[10]

A new section, 35P, was introduced to the *Asio Act*. It provided jail terms of five or 10 years for the unauthorised disclosure of information about an Asio "special intelligence operation". It was an offence for disclosures to be made by "any person". Journalists would be caught up as "persons who are recipients of unauthorised disclosure of information should they engage in any subsequent disclosure".

It applied to all such operations in perpetuity, so that journalists could never report on an SIO, no matter how historic the operation, nor if any criminal activities or harm to public safety had taken place.

As Attorney-General George Brandis made clear, the new provision while applying generally to "all citizens" was "primarily, in fact, to deal with a [whistleblower Edward] Snowden-type situation."

Indeed, the second-reading speech for the bill alluded to the whistleblowing of Chelsea Manning and Edward Snowden: "As recent, high-profile international events demonstrate, in the wrong hands, classified or sensitive information is capable of global dissemination at the click of a button. Unauthorised disclosures on the scale now possible in the online environment can have devastating consequences for a country's international relationships and intelligence capabilities."

Brandis, Foreign Minister Julie Bishop and former prime minister Tony Abbott had all labelled Edward Snowden a "traitor" while ignoring the Snowden revelations of widespread illegal activity by intelligence agencies including thousands of breaches of privacy rules and appalling misuse of private information. Snowden's whistleblowing came to light through legitimate journalism making the public aware of what governments have been doing in the name of the people. It would be difficult to dispute the public interest has been well served by these disclosures.

But section 35P not only targets whistleblowers but also the journalists who work with them.

Combined with other amendments to the *Asio Act* and coupled with metadata retention, it enables government agencies to secretly identify journalists' confidential sources and prosecute both the journalist and the whistleblower for legitimate public interest journalism.
The subsequent outcry did bring about some changes to the bill. Last minute amendments required the director of public prosecutions to consider the public interest before proceeding with any charges. And Attorney-General Brandis required the DPP to consult the attorney-general of the day before any prosecution of a journalist could occur. But another change had a sting in the tail: a "recklessness" test would be applied for wilful disclosure of information, with the penalty at the upper-end of the scale.

Of course, these so-called "safeguards" would only come about after publication, i.e. after the alleged offence had been done. An added issue is that because an SIO is secret, it's entirely possible a journalist could publish a news story without knowing the operation has been a designated an SIO and without knowing they were committing an offence.

The s35P inquiry

The issue of s35P and its impact on journalists was referred by former prime minister Abbott to the former Independent National Security Legislation Monitor (INSLM) Roger Gyles QC for consideration. MEAA, through the Australia's Right To Know lobby group, participated in a joint submission to Gyles' inquiry and appeared at the public hearing as well as provided answers to additional questions.

In his report released on February 2 2016[11], Gyles said he was not satisfied that s35P contained adequate safeguards for protecting the rights of individuals.

Gyles found three flaws with the law:

- the absence of an "express harm requirement for breach… by a journalist or other third party",
- the use of "recklessness" in the aggravated offence, and
- the prohibition of disclosure of information that is already in the public domain.

Gyles said: "There is no particular reason to distinguish information about SIOs from other information as far as ASIO insiders are concerned. No public domain defence is available … The position of outsiders such as journalists is different. Imposing criminal liability for republishing something in the public domain needs to be justified."

Gyles made recommendations for changes to be made. Gyles found that s35P created uncertainty for journalists as to what could be published about ASIO without fear of prosecution. "The so-called chilling effect is exacerbated because it also applies in relation to disclosures made to editors for the purpose of discussion for publication."

Gyles also found that journalists would be prohibited from publishing "anywhere at any time" information relating to a special intelligence operation, "regardless of whether it has any, or any continuing, operational significance and even if it discloses reprehensible conduct by ASIO insiders".

Gyles recommended that s35P be redrafted to create two classes of individual:

- "insiders" who belong to Asio, and
- third-party "outsiders" which would include journalists.

The penalties, however, would essentially remain unchanged: a basic offence would still attract a penalty of five years imprisonment while an aggravated offence attracts 10 years jail time.

More specifically, under Gyles' new classifications, for insiders the basic offence would remain unchanged from the current s35P but, for outsiders, there would be the proviso that any disclosure of information would have to include the additional physical element of endangering the health or safety of any person, or prejudicing the effective conduct of an SIO. The recklessness test would remain: an aggravated offence for outsiders would be the knowledge that disclosure would endanger health and safety or harm the conduct of an operation.

Gyles recommended the defence of prior publication be available. The defence requires the defendant satisfy the court that the information in question had previously been published (and that the defendant had not been directly or indirectly involved in the prior publication) and that the defendant had reasonable grounds to believe that the second publication was not damaging. Just how and when such information could get into the public domain is unclear.

Gyles' recommendations were accepted by the Turnbull government.

MEAA's view on INSLM Gyles' recommendations

The recommendations by the Independent National Security Legislation Monitor for amendments to section 35P of the *Asio Act* still mean Australian journalists face jail terms for legitimate public interest journalism.

MEAA believes the INSLM's recommendations are unsatisfactory because the fact remains that s35P is still capable of criminalising legitimate journalism in the public interest and is still capable of locking up journalists for years in prison for simply doing their job.

MEAA believes the findings of the report by Roger Gyles QC confirm that the spate of national security laws passed by the parliament over the two years had clearly been rushed without proper consideration of their implications.

MEAA believes there needs to be a complete rethink of these laws in light of their impact on freedom of expression and, in particular, press freedom.

MEAA said: "The monitor's report, while welcome, has not changed the fundamental intent of section 35P which is to intimidate whistleblowers and journalists. Section 35P seeks to stifle or punish legitimate public interest journalism.

"What's worse is that the monitor's recommendations create a 'game of chicken' for journalists. The defence of 'prior publication' only operates once the information in question has been published by a journalist. Any journalist seeking to be the first to publish a legitimate news story would face prosecution while any subsequent story written after that point would be defensible – but only if the second publication was 'not damaging' and the defendant was not involved in the original publication.

"The aim remains: to shoot the messenger. A journalist faces the full brunt of the law and a possible jail term for writing the first news story. That clearly has a chilling effect on legitimate investigative journalism."

MEAA also has concerns about the nature of determining what a "special intelligence operation" is and how journalists can publish legitimate news stories about such an operation not knowing that the activity is a designated SIO that falls under section 35P.

MEAA was also disappointed that the INSLM had also decided to take no action on the definition of "journalist" which is outdated in terms of the way information that could be subject to section 35P could be published.

MEAA added: "The monitor's office should be properly resourced to conduct an immediate urgent review of all of Australia's national security laws so that a proper balance can be implemented that allows the intelligence and security services to do their job but not at the expense of Australian democracy or press freedom.[12]

The INSLM changes are enacted

In September 2016, the Government tabled the amendments to s35P in the Parliament as part of the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016*. According to the Explanatory Memorandum, the amendments would introduce new "protections" requiring "disclosure of information made by members of the community, except those who received the relevant information in their capacity as an entrusted person, will only constitute an offence if the information will endanger the health or safety of a person or prejudice the effective conduct of a special intelligence operation (SIO).

The amendments will also include a defence of prior publication available only to persons who did not receive the relevant information in their capacity as an entrusted person".

The memorandum went on to explain:
"Although the Bill contains four new offences to replace the two existing offences in section 35P, its effect is to increase the burden on the prosecution in relation to 'outsider' offences. The Bill retains the existing offences for ASIO insiders, and introduces additional elements that must be proven before an 'outsider' can be convicted of an offence.

Existing section 35P contains two offences for the unauthorised disclosure of information relating to an SIO, which apply regardless of whether or not a person holds a position of trust in relation to ASIO information. The basic offence applies when the person is reckless as to whether the information disclosed relates to an SIO. The aggravated offence applies when the person also intended to endanger the health or safety of any person or prejudice the effective conduct of an SIO, or the person knows that disclosure will endanger the health or safety of any person or prejudice the effective conduct of an SIO.

Following the INSLM report, section 35P has been amended to create separate offences for 'insiders' (persons who came to the knowledge or into the possession of relevant information in their capacity as an entrusted person) and 'outsiders' (persons to whom the information came to their knowledge or into their possession other than in the person's capacity as an entrusted person). While this results in an increased number of offences, this simply reflects the fact that outsiders will be subject to separate offences and will no longer be held to the same, stricter, standard as ASIO insiders.

The insiders offences are identical to those in existing section 35P. The basic offence contains no harm requirement, and the aggravated offence applies where a person intends to cause harm, or the disclosure will in fact cause harm.

For the new 'outsider' offences, the basic offence will contain an additional harm requirement. The basic offence will require the person to be reckless as to whether the disclosure will endanger a person's health or safety, or compromise the effective conduct of an SIO. A person will not commit an offence if the information they disclose is completely harmless. The aggravated offence will require either knowledge or intention in relation to the harm. This is consistent with the INSLM's recommendations and reflects the higher standard of conduct that insiders should be held to in relation to their use, handling and disclosure of sensitive information.

Penalties of five and 10 years imprisonment are not so significant that they would constitute arbitrary detention or cruel, inhuman or degrading treatment or punishment, or an unlawful restriction on the freedom of movement. Persons participating in an SIO do so on explicit and strict conditions that are additional to any other obligations applying to an ASIO affiliate or employee, and they are potentially subject to greater risks should information pertaining to an SIO be disclosed. The penalties implement a gradation consistent with established principles of Commonwealth criminal law policy, as documented in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers. The Guide provides that a heavier maximum penalty is appropriate where the consequences of an offence are particularly dangerous or damaging.

The maximum penalty of five years imprisonment applying to each basic offence and the maximum penalty of 10 years imprisonment for each aggravated offence reflects an appropriate gradation. These penalties reflect an appropriate gradation with offences relating to unauthorised dealing in sections 18A and 18B, which carry a maximum three-year penalty. The unauthorised disclosure of information regarding an SIO is considered more culpable than the unauthorised dealing with information pertaining to ASIO's statutory functions.

The penalty of up to 10 years imprisonment applying to the aggravated offence maintains parity with the penalty applying to the offence of unauthorised communication in section 18 of the ASIO Act. The heavier penalty is appropriate considering the greater level of harm, with the aggravated offence requiring either the intention to jeopardise a person's safety or prejudice the effective conduct of an SIO, or the actual compromise of a person's safety or prejudice to the SIO."

The Explanatory Memorandum also went on to explain the defence of "prior publication".

"The new defence set out under subsection 35P(3A) specifies that the outsider offences (subsections 35P(2) and (2A)) will not apply to a person disclosing information, if the information has already been communicated or made available to the public (prior publication) and the person was not involved, directly or indirectly, in the prior publication. The defendant will bear the evidential burden and must adduce or point to evidence that suggests that the defendant believed, on reasonable grounds, that the disclosure would not endanger the health or safety of any person or prejudice the effective conduct of an SIO. Whether a belief is on reasonable grounds will depend, to an extent, on the nature, extent and place of the prior publication.

The defence available under subsection 35P(3A) seeks to strike a balance between freedom of expression on the one hand, and recognition that further dissemination of harmful information

could cause additional harm on the other hand. Before disclosing information that has already been published, a person must form a reasonable view that the subsequent disclosure will not cause additional harm. This is because in some cases, even where information is considered to have been published and in the public domain, subsequent disclosure will still result in harm. For instance, this would be the case where information is brought into the public domain inadvertently – such as where a classified document or information relating to an SIO is revealed as a result of technical or administration errors. Where steps are quickly taken to reverse the publication, subsequent mass disclosure of that information is likely to bring that information to the attention of a much greater number of people and could result in considerable new or additional harm.

MEAA believes the core issue remains – public interest journalism has been criminalised because journalists could face lengthy imprisonment for reporting a legitimate news story.

The amendments passed both houses on November 22, 2017.

Penalty to be extended to the AFP

Subsequently, NSW Senator David Leyonhjelm proposed extending s35P penalties to operations conducted by the Australian Federal Police.

While the senator believes this is a matter of bringing the AFP legislation into line with the Asio law, MEAA believes his suggestion is unhelpful in that it merely further extends the ability of the government to criminalise public interest journalism in relation to not one but two government agencies.

In February it was reported Attorney-General George Brandis had accepted the suggestion and was drafting amendments to bring it about.

A new INSLM

On February 24, 2017, the Prime Minister announced Dr James Renwick SC had been appointed the new acting Independent National Security Legislation Monitor, replacing Roger Gyles QC. Gyles was INSLM from August 20 2015 to October 31 2016 – barely 14 months of what should have been a two-year term (Gyles' predecessor served three years). The role is part-time. Gyles' departure coincided with his office losing two advisers who had been seconded from the Department of the Prime Minister and Cabinet.

Gyles final annual report complained of lack of resources: "More work is needed in conjunction with the Attorney–General and the Department of the Prime Minister and Cabinet to develop the office of the INSLM to the point where it has the capacity to satisfactorily support the Monitor in carrying out the statutory duties and functions of the Monitor.

"An effective ongoing office is also necessary to ensure the seamless departure of one Monitor, and replacement with another so as to avoid the administrative problems that I encountered after my appointment that were outlined in my last annual report," Gyles wrote.

During his tenure, four security legislation monitoring investigation reports were completed:

- questioning and detention powers in relation to terrorism (released February 2017),
- amendments to *Foreign Fighters Bill* (May 2016),
- the impact on journalists of section 35P of the *Asio Act* (February 2016),
- control order safeguards (January 2016).

Renwick has been appointed for an initial period of 12 months "while preparatory arrangements for his permanent appointment are made" because it is expected it could take that long before he is sufficiently security-cleared to take up the INSLM role.

Ongoing concerns with the ASIO's powers

Overall, the *Asio Act* continues to be loaded with assaults on press freedom. Since 9/11 MEAA has regularly expressed concerns about ASIO and the powers that it has been granted under the act.

Section 92 of the *Asio Act* provides a penalty of 10 years imprisonment for someone publishing, broadcasting or making public the identification of an ASIO officer.

By contrast, under s35K of the act, Asio officers engaged in a "special intelligence operation" are granted immunity provided they didn't kill, torture, sexually assault or seriously injure someone, or substantially damage property, and that they haven't induced anyone to commit an offence.

Of course, the real issue here is that if an Asio officer does any of these things, a journalist cannot report that fact without facing imprisonment under section 35P.

As MEAA said a decade ago in our second *State of Press Freedom in Australia* annual report in 2006: "It is simply unacceptable that any journalist be threatened with imprisonment for publishing something in the public interest – especially in Australia where the right to inform and be informed is a cornerstone of our democracy. If a journalist did violate the laws, it is entirely possible that, under the very same laws, their arrest could be withheld from public debate."[13]

Journalist Information Warrants

On Friday April 28 2017 Australian Federal Police Commissioner Andrew Colvin revealed that an AFP officer had illegally accessed a journalist's telecommunications data without seeking or being granted a Journalist Information Warrant – a breach of the *Telecommunications Interception Act* which had been passed by the Parliament 18 months earlier.

Colvin said the breach had occurred "within our professional standards regime; our internal investigations area". Colvin said the officer had "sought… gained and was provided access" to about a week's worth of a journalist's telecommunications data – the records were in relation to calls made earlier in 2017: one phone number to another phone number. The breach occurred while AFP officers were hunting for the journalist's confidential sources relating to a news story that involved a "leak" to the journalist. Colvin said there was no suggestion the journalist had committed an offence.

Colvin said that the AFP had notified the Commonwealth Ombudsman of the breach on Wednesday April 26 – Colvin did not disclose when the AFP became aware its personnel had broken the law. Several officers had seen the data. Colvin said the breach was a "human error" and that no disciplinary action would be taken against his officers.

The journalist whose telecommunications data had been accessed had not been informed of the breach.

The Ombudsman would subsequently launch "audit" of the breach". The data that had been gathered had been destroyed, Colvin said, and the AFP would be conducting a review. The leak investigation at the heart of the breach was ongoing.

Responding to the AFP's breach of the Act, MEAA CEO Paul Murphy said "It's another demonstration that the AFP does not understand the sensitivities here, the vital importance of protecting journalists' confidential sources. It's an absolute disgrace. Despite all of the requirements put in place before a Journalist Information Warrant can be granted, the system has failed. It's breathtaking the admission from the AFP. There is absolutely no respect for: the public interest, whistleblowers coming forward, investigative journalists being able to do their work. There is no respect for journalists' essential need to protect their confidential sources. The AFP itself did not even know it had to go through the process of a Journalist Information Warrant application. It is beyond belief."

"The parliament needs to revisit this legislation. It was cloaked in "national security" [when it was introduced] but all the instances we have seen of the AFP seeking to access journalists' metadata have nothing to do with national security. They only have something to do with stories that embarrass the government and an attempt to track down whistleblowers."

"This is an attack on press freedom. It demonstrates that there is very little understanding of the press freedom concerns that we have been raising with politicians and law enforcement officials for several years now. The use of journalist's metadata to identify confidential sources is an attempt to go after whistleblowers and others who reveal government stuff ups. This latest example shows that an over-zealous and cavalier approach to individual's metadata is undermining the right to privacy and the right of journalists to work with their confidential sources. This breach has been revealed just days before UNESCO World Press Freedom Day and that should be the opportunity for Australia's lawmakers to do more than just talk about freedom of speech but to ensure that press freedom is properly protected and promoted."

The introduction of mandatory metadata retention contained in amendments to the *Telecommunications (Interception and Access) Act 1979* was passed by the parliament with bipartisan support. The amendments require telecommunications companies and internet service providers to collect and retain your telecommunications data.

From October 13, 2015 telecommunications companies were given 18 months to develop plans to retain the telecommunications data of their customers for two years in order to enable at least 21 government agencies to access the data in secret. On Thursday April 13 2017, all telecommunications companies were required to retain the data.

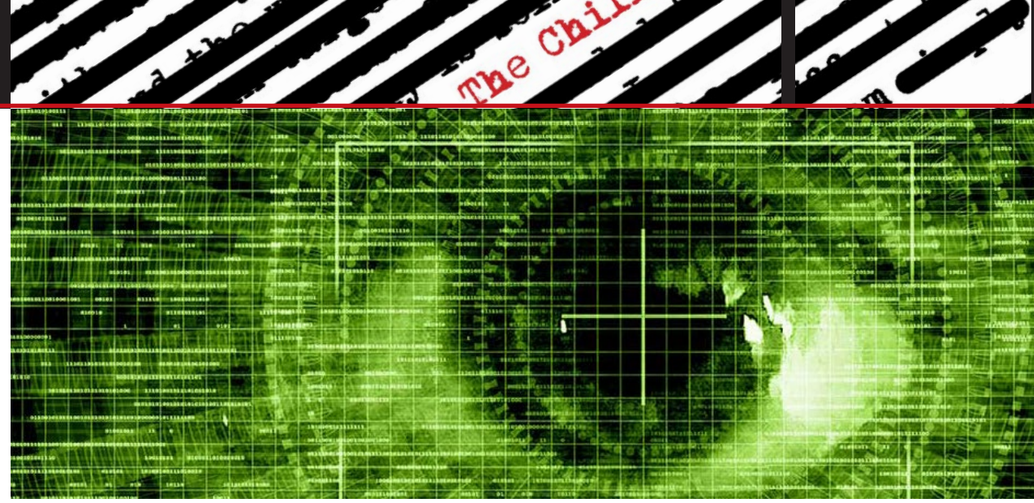
The regime is a particular concern for journalists who are ethically obliged to protect the identity of confidential sources. MEAA's *Journalist Code of Ethics* requires confidences to be respected in all circumstances.

The new regime secretly circumvents these ethical obligations and allows government agencies to identify and pursue a journalist's sources (without the journalist's knowledge); including whistleblowers who seek to expose instances of fraud, dishonesty, corruption and threats to public health and safety.

MEAA and media organisations have repeatedly warned politicians of the threat to press freedom in these laws. At the last minute, parliament created a so-called "safeguard" – the Journalist Information Warrant scheme and, as part of the scheme, a new office was created: the Public Interest Advocate.

However, the scheme is no safeguard at all; it is merely cosmetic dressing that demonstrates a failure to understand or deal with the press freedom threat contained in the legislation:

- The Journalist Information Warrant scheme was introduced without consultation.



- It will operate entirely in secret with the threat of a two-year jail term for reporting the existence of a Journalist Information Warrant.

- Public Interest Advocates will be appointed by the Prime Minister. Advocates will not even represent the specific interests of journalists and media groups who must protect the confidentiality of sources.

- There is no reporting or monitoring of how the warrants will operate.

- Journalists and media organisations will never know how much of their data has been accessed nor how many sources and news stories have been compromised.

At the time when the legislation passed in the parliament MEAA said: "These laws are a massive over-reach by the government and its agencies. They make every citizen a suspect, seek to intimidate and silence whistleblowers, and crush public interest journalism. We ask the Prime Minister to urgently review this and the earlier tranches of national security legislation, to restore a proper balance between free speech and security."

In the case of journalists and their journalism, it is clear that the amendment to the act has nothing to do with being a counter-terrorism measure; it is designed to pursue whistleblowers by using journalists' relationships with confidential sources to track them down.

The Journalist Information Warrant scheme is a threat to journalism.

On February 28, 2017 the Director-General of Asio told a Senate Estimates hearing that Asio had been granted "a small number" of Journalist Information Warrants.

What metadata is retained?

In the year 2013-2014, before the recent amendments, there were more than 334,000 authorisations granted to 77 government agencies allowing them to access telecommunications data.

The new scheme, for the most part, is warrantless (the exception are the Journalist Information Warrants). Access is currently limited to 21 government agencies but this can be expanded. This is what they can get access to:

- Your account details.

- Phone: the phone number of the call or SMS; the time and date of those communications; the duration of the calls; your location, and the device and/or mobile tower used to send or receive the call or SMS.

- Internet: the time, date, sender and recipient of your emails; the device used; the duration of your connection; your IP address; possibly the destination IP address (if your carrier retains that information); your upload and download volumes; your location.

Journalist Information Warrants will be required if a government agency wants to access a journalist's telecommunications data or their employer's telecommunications data for the express purpose of identifying a journalist's source.

A government agency must apply to a judge of the Federal Court or a member of the Administrative Appeals Tribunal (AAT) (known as the issuing authority) for the warrant.

The 21 government agencies include the anti-corruption bodies that already have star-chamber powers, as well as Border Force, the Australian Securities and Investments Commission and the Australian Crime Commission, and state and federal law police forces. ASIO doesn't have to front a court or tribunal; it can apply for a Journalist Information Warrant directly to the attorney-general.

A "journalist" is defined as "working in a professional capacity", i.e. having "regular employment, adherence to enforceable ethical standards and membership of a professional body".

Journalists left in the dark

A journalist can never challenge a Journalist Information Warrant. Everything about Journalist Information Warrants is secret. Even if someone should discover a warrant has been issued, reporting its existence will result in a two years jail.

In short, journalists and their media employers will never know if a warrant has been sought for their telecommunications data and will never know if a warrant has been granted or refused. Not even their telecommunications company will be told a warrant has been issued; the data will be accessed without the telco that retains it having to confirm that a warrant has been issued.

Public Interest Advocates

The Journalist Information Warrant amendment also created Public Interest Advocates. Appointed by the Prime Minister of the day, they will be people with a legal, not a media, background and with high level security clearance.

They cannot be commonwealth or state/territory employees (or office holders if there is an apparent conflict of interest). A question arises about whether any role in engaging in defamation matters or suppression orders would disqualify them.

A Public Interest Advocate will be required to submit all facts and considerations against the issuing of a Journalist Information Warrant. Importantly, the advocates do not "stand in the shoes" of the journalist or media organisation to argue the public interest as a journalist or media employer might. They are not a "safeguard" for journalists, they do not "act for journalists".

Indeed, Attorney-General George Brandis is of the view that a Public Interest Advocate will not play the role of a "contradictor" but will play the role of an *amicus curiae* ("friend of the court" who offers information to assist the court but who is not solicited by any party).

The role of the advocate (as stated in Regulation 9 (2)(a)(i) is to "place before the issuing authority all facts and considerations which support a conclusion that a Journalist Information Warrant should not be issued". How this can be reasonably done without any reference to the journalist or their media organisation is a concern.

If the chosen Public Interest Advocate is unable to appear or make a submission to the issuing authority, an alternate PIA will be found.

The Journalist Information Warrant allowing access to a journalist's or media organisation's telecommunication data will be issued if "the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of journalists' source".

All of those appearing before the Federal Court judge or the AAT member will be appointed by the government or Prime Minister. There is no one to argue in defence of the public interest from the media's perspective or from the confidential source's perspective.

How it will work

Government agencies will approach an issuing authority (or the attorney-general in the case of Asio and the Director-General of Security in an emergency if the minister is unavailable) to seek access to a journalist's telecommunications data for the purpose of identifying a confidential source.

A Public Interest Advocate (PIA) will be appointed to the matter within seven days. The advocate will determine whether to make a submission or attend a hearing, or will advise whether they are unable to do so.

Warrants could still be granted without a Public Interest Advocate's submission or attendance but if they are unable to do the work it's likely another Prime Minister-appointed PIA will be found. The government agency's relevant minister or the issuing authority may also seek additional information from the agency about why the warrant is sought.

A Journalist Information Warrant remains in force for up to six months. Its scope can include the entire cache of your telecommunications data that has been retained over two years – in one giant "fishing expedition" trawling through the journalist's metadata in the hunt for sources, thereby exposing every source.

Neither the journalist nor their media employer will ever know

- how much telecommunications data has been accessed,

- how many sources and how many news stories have been compromised, and

- whether a warrant has up to six months left to run or when it will expire.

Perhaps the only time a journalist will know something happened is when their confidential source is being prosecuted.

Public Interest Advocates appointed

In January 2016, it took a request under Freedom of Information to reveal[14] that Prime Minister Turnbull had already appointed two Public Interest Advocates.

It appears that former Supreme Court judges Kevin Duggan and John Muir[15] have no particular media experience to argue the public interest. Nor do they have particular experience in media law or defamation[16].

"The office of the Attorney-General George Brandis defended the appointments in a written statement provided to the ABC. A spokesman said Justices Duggan and Muir are experienced in complex legal reasoning and well placed to consider and make submissions on competing public interest arguments."[17]

The concern is that none of the parties affected by their legal reasoning will ever learn how persuasively or competently they argued.

At least 21 government agencies can secretly apply for a Journalist Information Warrant

Asio spies on journalists

Estimates hearing before the Legal and Constitutional Affairs Legislation Committee, February 28 2017 - Hansard[18]

South Australian Senator Nick Xenophon: I think that Senator John Faulkner, an esteemed former minister in this place, a former Minister for Defence and Special Minister of State, amongst others, once said that with increased powers for security agencies come increased responsibility and the need for increased accountability.

My questions are in that vein. They relate to specific questions I asked at the estimates hearing on 18 October 2016:

1. Have any journalist information warrants been requested by ASIO within the last 12 months? If so, how many?

2. Have any journalist information warrants been granted to ASIO within the last 12 months? If so, how many?

The response to the question on notice that was provided subsequently was: for reasons of national security ASIO does not comment on operations or investigations.

If I could emphasise, Mr Lewis, I am not actually asking about the nature or the identity in any way of the journalists or indeed of the media organisations or what the warrants relate to; it is just a raw number of the number of journalist information warrants. Could you comment on that, because we might go to issues of public interest immunity after your response. I am at a loss to understand how national security would in any way be compromised by simply knowing the absolute numbers of warrants requested and journalist information warrants actually granted.

Duncan Lewis, Director-General of security at the Australian Security and Intelligence Organisation (Asio): Yes, I too reflect on Senator Faulkner and his comments that, when there are increased powers and increased authorities for intrusion, there need to be corresponding and equal and opposite oversights and accountabilities. That certainly is something that is driven home within our organisation. I think any officer in our organisation would be able to quote that particular sentiment back to you.

With regard to your question, we did respond in writing to your question last year. You have presented basically the same question again, and the answer does not vary. We have given you a considered answer. I would draw your attention, however, to the fact that our classified report is tabled each year. You are aware that we produce two reports. There is an unclassified report and then there is a classified report. Indeed, in the classified report there is something of an answer to your question, but I am not prepared to discuss it in this environment. I will not talk about the numbers. I mentioned in my opening statement that we do not concern ourselves with classes of people. I understand perfectly your question about the journalists. We have given you an answer in writing, and I have nothing further to add than that, other than to make the observation that our classified report from last year may go some way to providing an answer. It does. There is a mandatory reporting requirement for us under that arrangement.

Xenophon: Sure. But my understanding is that I do not have access to the classified report. I think that, unless I am on the joint standing committee, it is not a report that I have access to. Is that right? I am not aware of that, and it is not in the public domain. Can I just explore this. I know that you say you have nothing further to add, but, in the Prime Minister's second reading speech, in relation to amendments to the act, he said:

Last year, a major Australian ISP reduced the period from which it keeps IP address allocation records from many years to three months. In the 12 months prior to that decision, the Australian Security Intelligence Organisation (ASIO) obtained these records in relation to at least 10 national security investigations, including counter-terrorism and cybersecurity investigations. If those investigations took place today, vital intelligence and evidence simply may not exist.

That was in support of a piece of legislation about the need for metadata preservation. The Prime Minister himself actually referred to a certain number of cases where ASIO obtained those records. No less than the Prime Minister made reference to that on *Hansard* in his second reading speech.

Lewis: If I might interrupt, that was not about a class of people. You are asking about a class of people. I am just not prepared to go there.

Xenophon: But the class of people that I am referring to, respectfully, Mr Lewis, relates to a class of people prescribed in the legislation—that is, the journalist information warrants. They are referred to specifically. I am not asking you to break down how many of those journalists work for News Corp, Fairfax, the Guardian or whatever. Is it fair to say that journalist information warrants are specifically referred to in the legislation?

Lewis: Yes, they are.

Xenophon: Section 182A[19] [of the *Telecommunications (Interception and Access) Act 1979*], in particular. What I am trying to establish is: can you at least advise me in sufficient detail, to establish your claim, how telling me a number will in any way jeopardise national security?

Senator Nick Xenophon.
PHOTO: ALEX ELLINGHAUSEN
COURTESY FAIRFAX PHOTOS

Lewis: Yes, I can answer that very promptly. The number is small. Because of the small nature of the number, it would be very easy to start identifying who and what cases were involved. I am just not prepared to go to the issue of numbers when it could clearly point to the nature of an investigation that is underway.

Xenophon: I apologise if I have not made my question clear. I do not want to know the nature of the investigation. I do not want to know what it is about. I just want to know how many journalist information warrants have been issued pursuant to section 182A of the act—just the actual number.

Not who is involved, which organisation or what the matter is about. Just the mere number of journalist information warrants. Perhaps I did not make that clear earlier. If I did not, I apologise. I am trying to understand a raw number—if it is one, two, 10, 20—to get an idea of how many journalist information warrants have been requested by ASIO in a particular period and how many have actually been granted to ASIO within a particular period.

Lewis: Your question is very clear to me.

Xenophon: Sometimes they are not.

Lewis: It has been very succinctly put. I cannot and I will not in the public setting provide the number of investigations into a class of person—journalist. The numbers, as I said, are small. A simple exercise in deduction would start to throw light on investigations that are actually underway.

Xenophon:
How so? Maybe I am missing something. When I traversed this issue with the AFP, eventually the AFP did provide me with details.

Lewis: The AFP operates under a very different legislative framework.

Xenophon: I know that. I am not suggesting you are anything like the AFP. I am just saying that another law enforcement agency was willing to provide details in relation to that. I am not saying that, just because they did it, you should. Am I missing something here? How does simply telling us the number of journalist information warrants requested and how many have been granted under the same act—because we are talking about the same piece of legislation—compromise national security?

Lewis: I think you are missing something, with respect.

Xenophon: Please tell me what I am missing.

Lewis: Because the numbers are so small, were I to give you a number, it would be very easy for some deductive work to be done on who was and who

was not under investigation. The people under investigation are not necessarily ignorant of the fact that they are being investigated. It is in our classified report. I cannot and I will not give it to you in an open forum.

Xenophon: Can we just explore the reasoning for this. Perhaps I am missing something. Let us say, hypothetically, the number is two. Only two journalist information warrants have been issued. I am not saying that is the figure, and I know you will not confirm or deny.

Lewis: I will not get into hypotheticals. I will not do that.

Xenophon: You have already alluded to it being a small number. How would a small number of warrants either being requested or granted to ASIO in respect of journalist information warrants somehow identify or tend to identify any particular journalist or media organisation?

Lewis: I just said: through a process of deduction. It will and can, so I am not prepared to go there. I cannot say anything more.

Xenophon: How would the process of deduction work?

Lewis: I cannot comment. If you do not see the connection between a very small number and the fact that you can start deducing who is and who is not being investigated then I am sorry, but that is the point I am trying to make and I cannot go any further than that.

Xenophon: But if it was the case there was a class of 10 journalists—obviously there is not—or a certain number, say, 100 journalists who could be subject to these warrants—in Australia it would probably be a few thousand—and there was a very small number of warrants being sought or issued, how could people deduce from a very small number, from a very large pool the identity of those that you have sought or obtained warrants for?

Lewis: You are talking hypotheticals again. I am not going to answer that.

Xenophon: But the journalist would have no idea. If you tell us that there are a certain number of warrants issued, how would a journalist have any idea whether that particular journalist was subject to it?

Lewis: It is an operational matter. I am not going to discuss it.

Xenophon: I had better read up on deductive reasoning because I have missed something there but thank you for your time.

Lewis: I am sorry but I cannot help. It is in the classified report.

Xenophon: Which I cannot see.

Lewis: If there are mechanisms by which you can get to see that then I would welcome that.

ASIO deputy Director-General Heather Cook: I have an addition to that. If we start the breaking down numbers for this category of warrant—I understand you are asking about something very specific—we would be setting a precedent for then responding to questions around other categories of our warranted activity, and the cumulative effect of that would also reveal information about our capacity and capability, and that would not be information we would want in the public domain. So I guess it is looking at the extent to which breaking down numbers and specifics around one category of warrant, whether that is about the journalist information warrants, then requires us to continue to reveal the breakdown of other categories of warranted activity that we may be engaged in. It is just another element of why there is an operational—

Xenophon: My final question on this is: are these decisions subject to FoI? Presumably you are not exempt from FoI laws, or are you?

Lewis: Yes.

Xenophon: You are exempt?

Attorney-General Senator George Brandis: ASIO is an exempt agency.

Lewis: IGIS is the process by which such things are pursued for the intelligence agencies.

Tasmanian Senator Nick McKim: What is IGIS?

Xenophon: IGIS is the Inspector-General of Intelligence and Security.

McKim: If you will indulge me slightly, Senator Xenophon is many things but stupid he ain't. I am going to put on the record I struggle to follow the logic behind your argument here, Mr Lewis, so, for what it is worth, I have listened very closely and I am not sure how disclosing the number could, by deduction, lead to the identification of the subject of an investigation. I will leave it at that because it was not my intent to raise that and you have been very clear.

Victorian Senator Derryn Hinch: If there were two journos, they would probably both know who they were. I see the logic.

Suppression orders

Victoria and South Australia continue to be the two legal jurisdictions with a remarkable propensity to make suppression orders designed to prevent some or all aspects of court cases being reported in the media. While the media would not wish to report anything that would improperly affect a court case, the sheer weight of orders being made in these two states suggests something is awry.

MEAA made a submission to the current review of Victoria's *Open Courts Act 2013* and the review's consideration of whether the Act strikes the right balance between people's privacy, fair court proceedings and the public's right to know. MEAA believes the Act, intended to address concerns that suppression orders were being made too frequently, has failed to achieve its aims.

MEAA believes Victoria's review being conducted by former Victorian Supreme Court appeal judge Frank Vincent should first consider the changing media environment and the impact that is having on court reporting. Media organisations have been confronted by enormous pressures. Due to the disruption caused by digital technology, media outlets are faced with declining revenues to fund editorial content.

Regular rounds of redundancies and other cost-cutting programs have dramatically reduced editorial resources and staff. While some new and niche media outlets have emerged, they operate with far fewer staff than metropolitan daily newspapers.

This media environment is putting dire pressure on the media as it tries to fulfil its role in a healthy functioning democracy:

- across the board, there are far fewer journalist "boots on the ground" to report on issues in the public interest. Fewer reporters means less coverage of important issues, less time and opportunity to report, and a decline in the ability to properly scrutinise and pursue legitimate issues;
- the journalists who remain behind after the redundancy rounds have seen their workload intensify to the point where not only are they having to do more, but new technology means they must also now file stories for a multitude of publishing platforms throughout the day as well as personally promote those stories on social media to push web traffic to their employer's online news web site;
- the spate of redundancies has also seen the most senior and experienced journalists, who are also usually the most highly remunerated, pushed out of media companies by their employers, only to be replaced by less experienced journalists who may not be as highly trained and/or mentored as their predecessors;

The media's major concerns with suppression orders have been their prevalence in Victoria. PHOTO: PAT SCALA, COURTESY FAIRFAX PHOTOS

- the competitive pressures that arise from digital technology have led to additional problems: the "rush to be first" with the news is a critical commercial imperative, and this, coupled with fewer production staff (sub-editors) to check news stories before they are published, means there are fewer checks and balances available in newsrooms; and
- media companies have fewer financial resources to fund a legal challenge to ensure a public interest news story is published or to defend themselves should an action be brought against a journalist and the media outlet.

These challenges are expected to exacerbate as the financial pressures continue to erode the way the media has traditionally functioned. Yet the expectation continues that the fourth estate must play its crucial role in a healthy functioning democracy.

There is no doubt that, despite the best intentions, the media's reporting on the courts has suffered due to the pressures outlined above. Fewer experienced journalists are available; they are working under intense pressure to file stories while needing to be aware of the existence of court orders and, at times, operating under the intimidation of defamation actions and subpoenas that threaten their journalism and their sources.

MEAA believes that given this media environment will not necessarily ease, it is important that the courts and the media seek ways to work together in the public interest, to improve the ability to report on the courts, and for the court system to function with the public interest in mind.

Conflict between the media and courts

MEAA is concerned that for some time the courts have displayed a lack of understanding of the role of the media and disdain for the media's concerns about the suppression order system. It is also

The courts are presuming they are the sole determiners of what is in the public interest.
PHOTO: ERIN JONASSON, COURTESY FAIRFAX PHOTOS]

apparent that many judicial officers operate under a presumption that it is the courts that should determine what is in the public interest.

In a speech delivered to the Melbourne Club on Friday November 13, 2009 (prior to the *Open Courts Act*), former Victorian Supreme Court Justice Betty King boasted that she was "probably responsible for the majority of suppression orders imposed in Victoria in the last three years"[20] and that for every worthy media report there were equally reports that were "inaccurate, salacious, mischievous, morally indefensible and just plain prurient".[21]

As recently as October 2015, Victorian Chief Justice Marilyn Warren[22] (who will leave office in October 2017) wrote about the media's challenging of suppression orders:

It needs to be remembered that the media has its own interests here: it wants to attract readers, viewers and online participants. Crime sells.

MEAA believes these remarks traduce the media to purely commercial entities while failing to acknowledge the public's right to know. MEAA also believes the Chief Justice's comments fail to acknowledge the difficulties of the media's current operating environment, as outlined above.

The narrow view expressed by the Chief Justice may go some way to explain some of the difficulties the media confronts with the suppression orders issued by Victorian courts.

Too many orders

The media's major concerns with suppression orders have been their prevalence in Victoria. It was hoped that the Act would remedy this propensity of the Victorian courts to make suppression orders so readily. However, a news story in *The Age* in October 2015[23] stated:

Victorian courts are still issuing hundreds of suppression orders a year, including blanket bans on information [that] prevent media organisations from even reporting that a case is underway, despite new legislation in 2013 called the "Open Courts Act".

The findings have prompted calls for a government-funded "Office of the Open Courts Advocate" to argue in courts against the suppression of information.

In the financially straitened times that media organisations now find themselves, it is unreasonable to expect media outlets to constantly present themselves to the court in order to challenge each and every suppression order which are currently (as at February 2017) averaging "almost one a day for the court year"[24].

In November 2016 *The Age* editorialised:
"… simply challenging suppression orders is not as easy as it sounds. One reason is the sheer number of such orders being issued – 254 across the Supreme Court, the County Court and the Magistrates Court in the year following the passage of the Open Courts Act in December 2013, which was supposed to limit the number." [25]

The newspaper went on to say:
On top of this, the Victorian Civil and Administrative Tribunal and the Coroner's Court also use suppression orders regularly "in the public interest" to stop publication of evidence.

And having lawyers appear in court on our behalf is not cheap. We do challenge some, ***but expecting us to challenge the daily procession of suppression orders is increasingly unrealistic****.*[26] [MEAA emphasis]

In response, Chief Justice Warren noted in the article cited above:
Victoria is the only state that maintains a database of all suppression orders issued – so it is therefore difficult to compare the number of orders made here against other Australian jurisdictions.[27]

Despite this, the Chief Justice went on to claim:
The Victorian Supreme Court figures are certainly on par with our New South Wales counterpart, however[28].

If that is so, then that is a concern. In March 2013 the *Gazette of Law and Journalism* reported a 1000 per cent increase in the number of court suppression orders in NSW since 2008[29].

There is evidence that the *Open Courts Act* has failed to reduce the number of orders being issued by Victorian courts. In his paper *Two Years of Suppression under the Open Courts Act 2013 (Vic)*[30], Melbourne Law School senior lecturer and deputy director of the Centre for Media and Communications Law at the University of Melbourne Jason Bosland noted:
"What is apparent… is that the overall number of regular suppression order made by the courts per year has remained relatively stable… despite the introduction of the *OC Act*."

In short, the Act is failing to make the operation of the courts more "open".

Indeed, it is interesting to note the comments made by Justice Simon Whelan to the Melbourne Press Club[31] in July 2015. He noted that the introduction of the *Open Court Act* had not led to judges issuing fewer suppression orders:
"In Victoria we know how many orders we make and the number has not gone down. We really want to have a situation where we make very few orders… we could have less than we do… There is a problem about orders being made in relation to matters that are already addressed by legislation or the sub judice rule.

Bosland goes on to note that under the Act, 63 per cent of proceedings-only orders are "blanket bans" – the most extreme form of proceedings-only suppression orders that can be made by a court – mainly made in the Magistrate's Court. Bosland states: "The data on the scope of the orders of orders is significant. It indicates that the *OC Act* has had no overall effect whatsoever in narrowing the scope of orders made by the courts… Furthermore given the extreme nature of such orders… it must be pointed out that it is highly improbable... that such a large proportion of blanket-ban orders in the dataset could be justified."[32]

It should also be noted that the Act operates on a presumption of open court. Section 28 of the Act states: "To strengthen and promote the principle of open justice, there is a presumption in favour of hearing a proceeding in open court to which a court or tribunal must have regard in determining whether to make any order, including an order under this Part that the whole or any part of a proceeding be heard in closed court or closed tribunal; or that only specified persons or classes of persons may be present during the whole or any part of a proceeding."

MEAA's recommendations

A MEAA Media member and senior court reporter with a daily newspaper, commented as recently as February 2017:
Another day, another suppression with no notice to media. It's become standard practice to ignore Open Courts.

MEAA recommends that consideration be given to improving the speed of notifications to news media outlets, with the possibility of some confirmation of receipt so that all parties are assured the media has been advised of the making of an order and that the order has been acknowledged.

MEAA also recommended that ways be sought to allow the notification system to provide initial necessary information that allows the media to readily identify persons and issues surrounding each suppression order, with the full details of the order to be included in depth in the .pdf document but that the database utilise a "search" function to allow media outlets to quickly identify and locate persons and issues included in the suppression order.

MEAA also expressed concern that the courts are presuming they are the sole determiners of what is in the public interest. This is not so, and the Act does not say this is a role for the courts (except for matters before the Coroners Court – see below).

Indeed, the comments of former Justice Betty King cited earlier including her noting that she had "stopped" a television current affairs news story because: "The educational content of this program is, in my view, non-existent. The public interest in having it played is, in my view, equally non-existent."[33] Judges should not be making decisions to make a suppression order to stop a news program on the grounds that they consider its content is not educational and not in the public interest.

Section 4 of the Act says there is "a presumption in favour of disclosure of information to which a court or tribunal must have regard in determining whether to make a suppression order".

Under s18(2)(b) only the Coroners Court may make a proceeding suppression order or under s30(3) may make a closed court order if disclosure would be contrary to the public interest. MEAA contends that this exception is illogical and wrong and should be denied to the Coroners Court to ensure consistency throughout the Act.

As mentioned above, Bosland notes 63 per cent of proceedings-only orders are blanket bans, up 11 per cent from an earlier Bosland study that examined the making of suppression orders in Victoria prior to the *Open Courts Act*.

Bosland notes that "administration of justice" and "personal safety grounds" are the most frequently relied on for the making of suppression orders. But Bosland also notes that 31 orders in his dataset "did not specify the relevant statutory ground or grounds upon which they were made despite this being mandatory requirement of the *OC Act*".[34]

He adds: "Notably, 73 per cent of orders (354/486) merely repeated the statutory grounds… Specifying the purpose in this manner fails to meet the requirement in s13(2) and is therefore inadequate. This is because s13(2) requires that *both* the purpose of an order *and* the grounds upon which it is made be specified in the order."[35]

MEAA recommended that both the purpose and the grounds for the making of any suppression order must be clearly set out. Consideration should be given to ensure that the purpose and grounds are clear, specific and apply directly to reasoning for the making of an order. Vague, repetitive and non-specific grounds should be deemed inadequate.

Section 13 of the Act requires that "a suppression order must specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made; and the order does not apply to any more information than is necessary to achieve the purpose for which the order is made; and it is readily apparent from the terms of the order what information is subject to the order. A suppression order must specify the purpose of the order; and in the case of a proceeding suppression order… must specify the applicable ground or grounds on which it is made."

It is clear that orders are being made that do not meet the requirements of section 13. *The Age* editorial cited earlier also examined the scope of the suppression orders being issued in such copious numbers:
"… many of the orders – 37 per cent on our analysis last year – prevented reporting of any aspect of a case at all. As well, 9 per cent were still being issued without end dates (contrary to the terms of the Open Courts Act*) and 7 per cent did not specify on what grounds they were granted."*[36]

MEAA believes that some orders are excessive in their scope and are unclear as to why they were made. MEAA recommended that the exact specifications of an order and the reasons behind a suppression order as well as its scope and timeframe must be satisfactorily stated and accepted before any order can be made and that these arguments be included as part of the notification system.

MEAA also noted the situation that arose in the Melbourne Magistrate's Court in 2013 where a suppression order was made that prohibited the publication of any information that might identify a particular witness "in any media outlet, newspaper, radio, television or internet or any other publication for a period of 999 months". As MEAA's annual report into the state of press freedom in Australia noted: "Towards the end of the 21st century, one of our descendants can apply to the court to lift that order."[37]

Section 12(3) of the Act, states: "If the period for which a suppression order operates is specified by reference to a future event that may not occur, the order must also specify a period from the date of the order (not exceeding 5 years) at the end of which the order expires unless sooner revoked." This appears to have led to courts lazily making orders to last for five years without justifying why that time frame has been chosen.

Bosland notes that a significant number of orders "did not contain an appropriate temporal limitation". Several orders, particularly those issued in the County and Supreme Courts, were made to operate for a period of exactly five years.

Bosland says: "This is a curious result because in terms of necessity of duration, there is nothing significant about a five-year period of operation that would explain the prevalence of such orders… It appears that it came only be attributed to the wording in s12."[38]

MEAA recommended that suppression orders should be made for narrower time frames, not utilising timeframes of months or years (this to be determined by what the court determines as being practical). A narrower time frame should be the default and these time frames can only be extended by a subsequent application to the court, so that the emphasis is always on the disclosure of information at the earliest opportunity rather than ongoing suppression of information with little or no regard to the requirement to inform the public

The need for an independent contradictor

As the then Attorney-General said during the second reading of the Open Courts Bill in June 2013:
Free reporting by the media of what is happening in Victoria's courts is vital to the community's right to know.[39]

Specifically, section 11 of the Bill:
requires the court or tribunal to take reasonable steps to ensure that relevant news media organisations are notified of an application for a suppression order where notice is given under clause 10.

The intention is that ***because news media organisations are more likely to act as a contradictor to such applications, that this will provide courts and tribunals with the benefit of a contradictor making arguments in favour of the principle of open justice and disclosure of information*** *both in relation to whether the order should be made and, if made, its scope and duration.*[40] [MEAA emphasis]

MEAA believes the second paragraph exposes a flaw in the thinking behind the Act.

The belief that "news media organisations are more likely to act as a contradictor" and that that would benefit the courts in providing them with someone to make arguments in favour of open justice and disclosure of information exposes a failure of section 4 of the Act:
To strengthen and promote the principles of open justice and free communication of information, there is a presumption in favour of disclosure of information to which a court or tribunal must have regard in determining whether to make a suppression order.

The news media should not be required to constantly monitor, analyse and consider potential and possible action about court cases that the media may believe are newsworthy and worth reporting. It should not be up to the news media to alone play the role of contradictor.

This responsibility assumed by the Act to be imposed on the media doubtless requires all news media organisation to not only be mindful of all applications for suppression order but to also have

Outgoing Chief Justice of the Victorian Supreme Court Marilyn Warren. She will leave office in October 2017.
PHOTO: ANGELA WYLIE, COURTESY FAIRFAX PHOTOS

legal advice "on tap" to be able to assess and advise on whether a review of an order should be sought, and for news media to then fund legal actions to seek a review of an order.

In essence, the underlying belief of the Act is that the news media should be expected to act on suppression orders at every opportunity.

This is unreasonable. It is not a role that news media organisations should be expected to perform, particularly as their resources are already stretched in running their day-to-day business operations in the current tough environment for media businesses. The media should not be considered a judicial functionary – which is the underlying intention of the Act.

There is also a clear failing of the Act in its expectation that media organisations can litigate every order they oppose. The changed media environment means such resources are not available. And that means that the public's right to know is being eroded.

The attitude of judges outlined in their unhelpful remarks cited above also suggests that even the courts themselves believe the media should always present itself in order before a court to oppose an order without understanding that the media is being swamped with suppression orders and is incapable of mounting expensive legal challenges to them. The judge's own perspective is that the media is the contradictor.

It is interesting to note that the Chief Justice indirectly acknowledged this problem, when she said: To further strengthen public confidence in the process, the Supreme Court will soon utilise a generous service of the Victorian Bar, where barristers will appear – free of charge – when requested by a judge, to make submissions on public interest grounds, in the absence of any other contradictors such as the media. This is an initiative of the courts themselves together with the Victorian Bar, one of the state's most highly respected independent legal bodies.

This "service" amply demonstrates the confused perspective: if the media doesn't turn up to play contradictor, a barrister will appear when requested by a judge. The Chief Justice's point again demonstrates that this is about trying to create a stop-gap remedy rather than deal with the media's legitimate concerns about the number of suppression orders being issued and the inability of the media to cope with challenging every one.

A wiser course would be the creation of an Office of the Open Courts Advocate to argue the public interest during the making of an order.

MEAA recommended the creation of an Office of the Open Courts Advocate to argue the public interest in suppression order considerations – in advance of the issuing of the order and at any subsequent review of an order. The Advocate should play the role of contradictor and fill the gap formerly occupied by media lawyers representing media outlets – to argue for the public interest. This does not mean that media outlets will be frozen out from such debate. The media should always be afforded the opportunity to argue its position.

MEAA also suggested training in the role of the media and how professional journalists work as well as consideration of public interest matters from the media's perspective may assist the courts and tribunals to better manage the consideration of suppression order applications.

MEAA also believed it was important to have a round table of representatives of the state government, the courts and the media meet to examine ways to improve relations for the best outcomes for the operation and reporting of the courts.

There is also scope for a national discussion of the suppression order issue. MEAA recommended the Law, Crime and Community Safety Council of the Council of Australian Governments seek a way to develop a uniform national approach to suppression orders so that the current massive imbalance in the issuing of orders can be addressed.

Disorder in the court

By Padraic Murphy

Anybody who thinks Victoria has a free press has rocks in their head.

Courts are supposed to be open and free for anyone to report on. It's bedrock principle, so it is often claimed, of liberal democracies. But in the Garden State, magistrates and judges are increasingly playing the role of editor, even censor, and hiding material from the public.

One court earlier this year banned publication about a sex-offending footy player because he might be ridiculed in the locker room.

Another court hid the identity of a Queensland drug trafficker to protect his children – but not yours.

Last year, a magistrate told an offender not to apply for bail if he wanted to keep out of the papers, warning him reporters were present.

Many in the community would be unaware there is a cannibal secreted in a secure facility who wants to be let out; unaware because the court won't let the story be told.

The list is endless. Suppression orders rain down so heavily from Victorian courts nobody can keep up. Many are defective. Sometimes they are issued in the wrong name or are opaque about what it is the courts want suppressed. Often they have no end date, as required by the legislation.

The *Open Courts Act* of 2013 was supposed to cut the suppressions and stop Victoria's courts remorseless drift towards secrecy. Instead it has provided lawyers with a handy cheat sheet about how to frame requests for court-enforced secrecy.

Courts now issue hundreds of suppressions a year, and they usually go unchallenged, partly because media organisations can't afford to send a lawyer along every time the Office of Public Prosecutions or defence try it on.

There is meant to be a three day notice period, but the slippery nature of the legislation means lawyers abuse it.

Notices are jammed in at last minute. Courts claim reporters can object, but what a joke: you'd have to be a pretty confident reporter to stand up in court and clash with a judicial officer about rights they're supposed to administer.

One Supreme Court Judge as recently as last month complained about no longer being able to trust journalists, and another colleague was told not to interrupt and thrown out of a court after meekly raising concerns about a suppression.

Courts now issue hundreds of suppressions a year

Judges increasingly laud the reporters they grew up with, with no appreciation of the reporters now in their court rooms.

To be sure, reporters occasionally make mistakes that result in aborted trials, but then again so do courtroom blunders.

The treatment of Yahoo!7 reporter Krystal Johnston is a case in point. The court exhibited rare vigour against a tyro reporter when its point could have been better made: news corporations, train your staff.

Victorian judges like to claim they are only interested in protecting trials. But increasingly courts are flexing their muscles, bringing reporters to heel, and in an era of stretched media resources, suppressing information that really should be in the public domain.

The community pays for courts and bears the costs of most trials.

All court reporters recognise there are times when suppressions are needed, but lawyers abusing the system is increasingly turning Victorian courts into a chummy club where vital information is kept from the community – you – who pays for it.

So what's the solution?

Make lawyers and courts obey both the letter and the spirit of the *Open Courts Act* and accept that when unpleasant facts emerge that they are not the arbiters of knowledge.

Padraic Murphy is a court reporter for the *Herald Sun*. This article first appeared in *The Walkley Magazine – Inside the Media in Australia and New Zealand*.

SAFETY

Impunity

On October 7 2016, the Unesco Director-General issued a report on the Safety of Journalists and the Danger of Impunity. The report offers an overview of the killings of journalists condemned by the Director-General in 2014-2015.

It also provides an analysis of a decade of killings of journalists, media workers and social media producers between 1 January 2006 and 31 December 2015.

Unesco recorded 827 killings of journalists over the course of 10 years. (By comparison, the International Federation of Journalists reported that at least 2297 journalists and media workers were killed in targeted assassinations, cross-fire incidents and bomb attacks in the 25 years from 1990.) There were additional concerns such as kidnappings, arbitrary detention, torture, intimidation and harassment, both offline and online, and seizure or destruction of material.

Unesco has been engaged in documenting and campaigning for journalist safety since 2012 when it led the implementation of the UN Plan of Action on the Safety of Journalists and the Issue of Impunity. This was the first systematic UN-wide plan that aims to work toward the creation of a free and safe environment for journalists and media workers, including social media producers producing journalism, in both conflict and non-conflict situations.

Australia has nine unresolved cases of journalists being killed with impunity. All but one of the cases involved a journalist working in a conflict zone overseas. The sole domestic case, of Juanita Nielsen, remains unsolved despite considerable attempts by police forces to find her body and to bring homicide charges against her murderers.

Courtesy: International Freedom of Expression Exchange

The remaining eight cases, the bulk of which date back to the Indonesian invasion of East Timor in 1975, are a sorry tale of ongoing government indifference, and a lack of will to investigate the murder of Australian journalists.

The impunity surrounding the murder of journalists is a growing global issue. For Australia to join the ranks of nations that treats journalist lives so chiefly should be a source of shame, particularly as the Unesco report shows that many other countries have stepped up their efforts to stamp out impunity and bring the killers of journalists to justice.

The same cannot be said of Australia which for more than 40 years now has sat on its hands and done nothing to bring to justice the killers of the Balibo Five – to the point of taking no action despite a coronial inquest naming the alleged perpetrators, including the naming of a former Indonesian Government minister, and an Australian Federal Police investigation that didn't even speak to its Indonesian counterparts nor seek any co-operation from Indonesia .

It need not be that way. There is evidence to conduct investigations and possibly bring charges against those allegedly involved in the killing of the Balibo Five and Paul Moran. Investigations may also bring to light information, long-hidden, about the murders of Roger East and Tony Joyce – if the government and the Australian Federal Police are willing to put the resources into these cases.

To do nothing, as has been the case to date, means that their killers are getting away with murder and sends a signal from no less than the Australian Government and its agencies that the lives of Australian journalists count for less than other Australians.

Juanita Nielsen

The year 2015 marked the 40th anniversary of the disappearance of Sydney journalist and editor Juanita Nielsen, on July 4, 1975. Nielsen was the owner and publisher of *NOW* magazine. She had strongly campaigned against the development of Victoria Street in Potts Point, in the electorate of Wentworth, where she lived and worked.

As recently as August 2014, NSW Police forensics dug up the basement of a former Kings Cross nightclub in an attempt to locate her remains but were unsuccessful. While there have been convictions over her abduction, no formal homicide charges have been brought and her remains have never been found.


Juanita Nielsen

On September 30, 2015, MEAA wrote to Prime Minister Malcolm Turnbull as part of an International Federation of Journalists global campaign urging UN member states to sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearances.[41]

Enforced disappearances, abductions and the vanishing of media workers is a reality in too many countries in the Asia-Pacific region – and Australia is not immune as demonstrated in the case of Nielsen.[42]

In 2010, the convention came into effect with the aim to prevent enforced disappearances, uncover the truth when they do happen, and make sure survivors and victims' families receive justice and reparation. So far 94 states have signed the convention and 44 have ratified. Most countries in the Asia-Pacific, and Australia is one of them, have not signed let alone ratified the convention.

MEAA urged the Prime Minister to consider signing and ratifying the convention as a way of sending a strong signal that Australia and will "prevent enforced disappearances and combat impunity for the crime of enforced disappearance".

MEAA's letter was referred to Attorney-General George Brandis whose chief of staff responded on February 9, 2016: "The Government appreciates the concerns you have about enforced disappearances. An act of enforced disappearance is a grave breach of human rights. The tragedy surrounding Ms Nielsen's case is well known to Sydneysiders.

"However, the Australian Government considers that Australia's laws and policies are generally consistent with obligations in the convention and that existing criminal offences in relation to elements of enforced disappearance (such as abduction or torture) are adequate. Additionally, Australia already has international human rights obligations prohibiting conduct covering enforced disappearance. Accordingly, Australia is not intending to become a party to the convention at this time."

The Balibo Five and Roger East

The year 2015 marked the 40th anniversary of the murder of Brian Peters, Malcolm Rennie, Tony Stewart, Gary Cunningham and Greg Shackleton who were murdered by Indonesian forces in Balibo, East Timor, on October 16, 1975.

On November 16, 2007, NSW Deputy Coroner Dorelle Pinch brought down a finding in her inquest into the death of Peters. Pinch 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

The Balibo Five, from left to right - Gary Cunningham, died aged 27; Brian Peters, died aged 24; Malcolm Rennie, died aged 29; Greg Shackleton, died aged 29; Tony Stewart, died aged 21. Far right, Roger East, died aged 53.
PHOTO: COURTESY BALIBO HOUSE TRUST

The Balibo House

Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah."

In the more than 40 years since this incident Yunus Yosfiah has not lived in obscurity. He rose to be a major general in the Indonesian army and is reportedly its most decorated solider. He was commander of the Armed Forces Command and Staff College (with the rank of Major General) and Chief of Staff of the Armed Forces Social and Political (with the rank of Lieutenant General). He was chairman of the Armed Forces Faction in the Indonesian National Assembly. He retired from the army in 1999.

He is also a former minister of information in the Indonesian government of President Bacharuddin Jusuf Habibie. A biographical description of his work at this time states: "His actions in removing restrictions on the media and other forms of communication, such as the abolition of the press Publishing business license (this license) and guarantee freedom of the press, has been described as 'one of the major breakthroughs of the Habibie government'."

In February 2007 Yosfiah unsuccessfully contested the election for party chairmanship of the United Development Party (PPP).

In 2017 Yosfiah has been frequently mentioned in press reports regarding his involvement as chairman of mobile top-up company Mi1 Global Indonesia, a business being reviewed by the Indonesian Financial Services Authority.

And yet despite his prominence in public life in Indonesia, the Australian Federal Police has not pursued the 2007 coronial finding which named him as allegedly having ordered the death of Brian Peters and his four colleagues. Indeed, the AFP appears to have done little to conduct any investigation in Indonesia or with Indonesia authorities.

Almost two years after the coronial finding, on September 9, 2009, the Australian Federal Police announced that it would conduct a war crimes investigation into the deaths of the five journalists.

Little was ever known about how the investigation was being conducted, what lines of questioning were being pursued, what evidence had been gathered or whether the families were being kept informed of the AFP's progress.

Then on October 13, 2014, three days before the anniversary of the murder of the Balibo Five, it was reported[43] that the AFP has taken seven months to respond to a February 2014 question from Senator Nick Xenophon. "… It took the federal police seven months to advise the Senate that 'an active investigation' into the murder of the Balibo Five was ongoing. The AFP says the investigation has 'multiple phases' and results are still forthcoming from inquiries overseas."

The AFP had "not sought any co-operation from Indonesia and has not interacted with the Indonesian National Police".[44]

The AFP said "the ongoing nature of the investigation made it inappropriate to elaborate on what international inquiries had been made. But it did reveal that members of the families of the victims were last updated on developments in the investigation in June 2013," the news report said.[45]

Just six days later, on October 21, 2014 the Australian Federal Police announced it was abandoning its five-year investigation due to "insufficient evidence to prove an offence".[46]

MEAA said at the time: "This is an outrageous decision. It means that those who murdered our colleagues are literally getting away with murder. Last week, the AFP admitted that over the course of its five-year investigation it had neither sought any co-operation from Indonesia nor had it interacted with the Indonesian National Police.

The NSW coroner named the alleged perpetrators involved in murdering the Balibo Five in 2007. Seven years later the AFP has achieved nothing. It makes a mockery of the coronial inquest for so little to have been done in all that time. This shameful failure means that the killers of the Balibo Five can sleep easy, comforted that they will never be pursued for their war crimes, never brought to justice and will never be punished for the murder of five civilians.

"Impunity has won out over justice."[47]

In a letter to MEAA on April 15, 2015, the AFP's Deputy Commissioner Operations Leanne Close said: "As stated by the AFP Commissioner during the last Senate Estimates hearing on November 20, 2014 the AFP has now completed an extensive review of the investigation into the deaths of the 'Balibo Five'. It has been determined there is insufficient evidence to support providing a brief of evidence to the office of the Commonwealth Director of Public Prosecutions for consideration for prosecution under Australian law."

On October 15, 2015, the son of Gary Cunningham, John Milkins, said he wanted more information about why the AFP had decided to close the investigation. "I would be pleased to see it reopened. I feel it was closed without an explanation to the Australian public." Milkins added: "We don't think that story's finished. I think perhaps the government would like the book to be completely closed but I think there are many chapters still to write, there are many unknowns."[48]

Roger East was a freelance journalist on assignment for Australian Associated Press when he 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.

However, given the unwillingness to pursue the killers of the Balibo Five, MEAA does not hold out great hope that Australian authorities will put in the effort to investigate East's death. Again, it is a case of impunity where, literally, Roger's killers are getting away with murder.

On the 40th anniversary of the killings, a moving dawn service was held at the new War Correspondents' Memorial in Canberra, attended by Greg Shackleton's widow, Shirley, Tony Stewart's brother, Paul, and Gary Cunningham's son, John Milkins.

Senior Press Gallery correspondents from the Seven and Nine networks also paid tribute, while Walkley Trustees chairman Quentin Dempster represented MEAA.

The service also remembered Roger East.

Later that day at the St Kilda Botanical Gardens in Melbourne, members of the Stewart family planted a tree in memory of 21-year-old Tony Stewart.

Veteran television journalist and newsreader Mal Walden spoke movingly of his friendship with the three Melbourne-based Channel Seven reporters who he last saw a week before their deaths.

Walden recalled a frantic phone call from Greg Shackleton's mother on the night of October 15, in which she described premonition of her son's death. And he described the emotional scenes in the Seven newsroom the next day when a message came through that their three colleagues had been killed.

MEAA continues to call for a full and proper war crimes investigation. "The five journalists were upholding their profession's finest traditions in reporting to the rest of the world the threat of invasion of East Timor.

"The 2007 coronial inquest found that the five journalists were deliberately murdered by members of the Indonesian special forces under instructions from high command, but four decades later no-one has faced justice — an appalling example of impunity over the killing of journalists. Quite literally, those responsible have got away with murder for 40 years."

MEAA has honoured the memory of the Balibo Five and Roger East with a new fellowship in their name, in conjunction with Union Aid Abroad-APHEDA with MEAA providing the bulk of the funding and additional funds being received from the Fairfax Media More Than Words workplace giving program, and private donations. The fellowship will sponsor travel, study expenses and living costs for East Timorese journalists to develop skills and training in Australia.

It is anticipated that their studies would be short courses at major Australian journalism schools, and MEAA will also seek to facilitate short work placements in print or broadcast newsrooms.
"We believe a practical program like this is the most appropriate way for our union to honour and commemorate the Balibo Five and Roger East," MEAA said.

"A little over a decade since East Timor became an independent sovereign state, press freedom is still fragile and there are few formal structures to develop journalism skills. By providing a scholarship for journalists from East Timor to study and spend time with experienced Australian journalists, we hope that we can help build a strong free press there."

In 2016 four journalists from East Timor became the inaugural recipients of the Balibo Five-Roger East Fellowship. The four were chosen from six separate applications assessed by a selection panel in Australia.
The inaugural recipients of funding are:

- **Maria Zevonia F. Vieira**, an independent film and radio documentary maker with a particular interest in land ownership, gender-based violence and youth unemployment/violence.

- **Jose Belo, Cristovão Alexandre da Costa, and Teodorico Aleixo Fernandes da Conceição**, who will work together as an team investigating corruption and governance issues. Belo, a veteran investigative journalist and editor, will mentor the two younger journalists as well as produce his own work.

MEAA chief executive Paul Murphy said all the applications were of a high quality and representative of the diversity of journalism in East Timor. "Selecting the first recipients of the fellowship has been eye-opening about the range of journalism in Timor-Leste," he said.

"In choosing these recipients, the selection panel was mindful of the need to encourage independent investigative journalism that would report on elements of Timorese society that may otherwise remain in the dark. They also chose to support projects involving younger journalists who are still in the early stages of their careers."

Kate Lee, executive director of Union Aid Abroad-APHEDA, said: "Independence in journalism is essential everywhere – for a democratic civil society to flourish. For 30 years, the Australian union movement has supported this principle, via its own international organisation, Union Aid Abroad. We are proud to continue this tradition in this important Timor initiative".

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.

Krekar had been imprisoned in Norway, guilty of four counts of intimidation under aggravating circumstances. He was released from prison on or around January 20, 2015. It was revealed that he would be sent into internal "exile" to the village of Kyrksaeteroera on the coast, south-west of Trondheim.[49] Krekar would have to report regularly to police and would stay in a refugee centre.

On February 10, 2015 MEAA wrote to Justice Minister Michael Keenan and AFP Commissioner Andrew Colvin once more, stating: "We are deeply concerned that if those responsible for killing Paul are not brought to justice then they are getting away with murder.

"You would be aware that the United Nations General Assembly has adopted Resolution A/RES/68/163 which urges member states to: 'do their utmost to prevent violence against journalists and media workers, to ensure accountability through the conduct of impartial, speedy and effective investigations into all alleged violence against journalists and media workers falling within their jurisdiction and to bring the perpetrators of such crimes to justice and ensure that victims have access to appropriate remedies'."


Paul Moran

On April 15, 2015, the AFP's Deputy Commissioner Operations Leanne Close replied to MEAA's letter saying that there was insufficient information available to justify an investigation under section 115 of the *Criminal Code Act 1995 (Harming Australians)* and that despite the new information on Krekar's movements, AFP would not be taking any further action.

On February 20, 2015, in the aftermath of the massacre in Paris of journalists, editorial and office staff at the *Charlie Hebdo* magazine, it was reported that Krekar had been arrested for saying in an interview that when a cartoonist "tramples on our dignity, our principles and our faith, he must die". It is believed Krekar was subsequently arrested on a charge of "incitement".[50]

Krekar was arrested in prison in Norway on November 11 "in a coordinated police swoop on Islamist militants planning attacks." The raids across Europe targeted Krekar and 14 other Iraqi Kurds and one non-Kurd. Authorities allege the men were involved in Rawti Shax – a group spun-off from Ansar al-Islam, that has alleged links to ISIL. Authorities allege it is a jihadist network led by Krekar. Investigators claim Krekar pledged allegiance to ISIL in 2014.

In mid-March 2016 Norwegian media said Krekar had been released from jail after a court found him not guilty of making threats. His lawyer said Krekar will seek compensation.

On November 23, 2016 the Norwegian Police Security Service arrested Krekar in order to secure his extradition to Italy. But on November 25 it was reported that Italy had withdrawn its extradition claim, and Krekar was released.

Norwegian Prime Minister Erna Solberg, who was the target of death threats made six years earlier by Krekar, said her country had to accept the Italian decision if though no explanation for the withdrawal had been given.

However, in mid-March 2017 a court in the Italian south-Tyrol town of Bolzano was adjourned until October 23, 2017 and it is expected that charges will be laid against Krekar who still resides in Norway and five other individuals involving telephone conversations. It has been alleged by the Italian prosecutor that some of the suspects in the case are seeking to overthrow the government of Iraqi Kurdistan and replace it with a theocratic state based on sharia law.

Tony Joyce

ABC foreign correspondent Tony Joyce arrived in Lusaka in November 21, 1979 to report on an escalating conflict between Zambia and Zimbabwe. While travelling by taxi with cameraman New Zealander Derek McKendry to film a bridge that had been destroyed during recent fighting, Zambian soldiers stopped their vehicle and arrested the two journalists.

The pair were seated in a police car when a suspected political officer with the militia reached in through the car's open door, raised a pistol and shot Joyce in the head.


Tony Joyce

Joyce was evacuated to London, but never regained consciousness. He died on February 3, 1980. He was 33 and was survived by his wife Monica and son Daniel.[51]

Zambia's President Kenneth Kaunda later alleged that Joyce and McKendry were fired at because they had been mistaken for white "Rhodesian commandos" who had crossed the border. McKendry was never asked by the Zambians to identify the gunman and he was even locked up for refusing to support a story that the shooting was a battlefield incident.[52]

There exist serious allegations that the Australian Government never sought justice for his murder.

Political reporter Peter Bowers is quoted from an ABC interview in 1981: "The Prime Minister (Malcolm Fraser) is a party to the cover-up to the extent he is no longer pressing the Australian position and demanding an inquiry [by the Zambians]. Not only that, but he went into parliament and made excuses for the Zambian authorities failing to find out what had really happened. Clearly Mr Fraser has seen it to be in the national interest to no longer press cover-up of a crime in Zambia, to turn a blind eye, to connive. Why? Because he is obviously concerned it could affect his personal relationship with Kaunda [as well as] his whole black-African strategy which is one of his strongest commitments in the international arena."[53]

MEAA hopes that, despite the passage of time, efforts can be made to properly investigate this incident with a view to determining if the perpetrators can be brought to justice.

GOVERNMENT

Asylum seekers

MEAA is calling for the Turnbull Government to resettle in Australia **Behrouz Boochani**, **Mehdi Savari**, and **'Eaten Fish'**, respectively a journalist, an actor and a cartoonist who have been detained for several years at the Manus Island Regional Processing Centre, operated on behalf of the Australian government.

MEAA regards these three men, who each fled Iran separately and have sought asylum in Australia, as professional colleagues who can make a meaningful contribution if resettled in Australia.

Boochani, Savari and Eaten Fish are among 900 other refugees, migrants and asylum-seekers detained on Manus Island as victims of the Australian Government's cruel policy of deterrence and indefinite offshore detention for those who seek refuge in Australia by sea.

They each sought refuge from Iran so they could freely express themselves without fear of persecution or harm, but instead their freedom has been further suppressed in detention.

On February 3, 2017, more than 100 journalists, actors, writers and cartoonists joined MEAA in writing to the Prime Minister and Immigration Minister requesting that Boochani, Savari and Eaten Fish be resettled in Australia as soon as possible.

Cartoon by Lindsay Foyle

*WE, the undersigned, write as journalists, writers, cartoonists and performers to urge you to allow our colleagues **Behrouz Boochani**, **Mehdi Savari**, and **'Eaten Fish'** to be resettled in Australia.*

All three men have sought protection as refugees from Iran and are currently detained at the Manus Island Regional Processing Centre in Papua New Guinea which is operated on behalf of the Australian Government.

Well into the fourth year of their ordeal on Manus Island, and with delays and uncertainties in relation to any US resettlement deal, the three men remain in limbo. To varying degrees, the years of detention have severely impacted their mental and physical health.

- ***Behrouz Boochani**, 33, is a Kurdish journalist. He has worked as a journalist and editor for several Iranian newspapers. On February 17, 2013, the Islamic Revolutionary Guards Corps ransacked his offices in Ilam and arrested 11 of Boochani's colleagues. Six were imprisoned. He has courageously continued to work as a journalist while in detention, and is a regular contributor to publications in Australia and overseas, often reporting on the situation and conditions on Manus Island. He has been recognised as a refugee and we urge you to allow him to reside in Australia to resume his career as a journalist. Boochani is a Main Case of PEN International, and has been recognised as a detained journalist by Reporters Without Borders. (RSF)*

- ***Mehdi Savari**, 31, is an Ahwazi Arab performer. As an actor, he has worked with numerous theatre troupes in many cities and villages in Iran, and performed for audiences in open public places. He was also well-known as the host of a satirical children's TV show before fleeing Iran. Mehdi is a person of short stature and has met with severe discrimination over his life. His dwarfism has been exacerbated by the conditions and his treatment on Manus Island over the last three years, and he continues to suffer a range of physical ailments and indignities, as well as regular bouts of depression and chronic pain. As he has also been recognised as a refugee, we urge you to facilitate his resettlement in Australia. We also refer you to a resolution passed by the International Federation of Actors congress in Sao Paulo, Brazil, in September calling for his release from detention.*

- ***Eaten Fish**, 24, is a cartoonist and artist who prefers to be known by his nom-de-plume. He has recently received Cartoonists' Rights Network International's 2016 award for Courage in Editorial Cartooning. His application for refugee status has not been assessed. Since he was detained at Manus Island, he has been diagnosed with mental illnesses which have been compounded by his incarceration. We urge you to allow him to live in Australia until the final status of his claim can be determined.*

As journalists, cartoonists, writers and performers, we are aware that the rights we enjoy are matched by a responsibility to challenge and confront tyranny and wrongdoing, to bear witness and uphold truth, and to reflect our society, even if sometimes unfavourably. We are privileged that in Australia we are able to pursue these ends without fear of persecution or threat to our personal liberty.

We believe that to continue to detain these three individuals without charge or trial undermines freedom of expression and the right to seek asylum. All three have courageously continued to practice their vocations on Manus Island despite their incarceration. We urge you to allow them to be resettled in Australia so that they can live, work and contribute to Australian society.

MEAA is joined in this letter by the International Federation of Journalists, the International Federation of Actors, Reporters Without Borders, the Cartoonists' Rights Network International, PEN International and members of the global network of the International Freedom of Expression Exchange.

Government muddles its way through to hide details of boat turnbacks

By Paul Farrell

It has been three years since the Australian government began turning back asylum seeker vessels at sea, and in that three years it has done everything it can to keep those missions secret.

When the operations began in November 2013 under then immigration minister Scott Morrison, there was widespread criticism of the policy. Australia was criticised for potentially endangering asylum seekers[54], not providing an opportunity for their claims to be heard properly, and for the secrecy around it.

In a press conferences replete with Australian flags[55], Morrison proclaimed that there would no discussion of "on water matters". On a weekly basis journalists would front up to these press conferences only to be met with an almost prayer-like chant: "I won't comment on operational matters."

But could the government legitimately claim these operations should be kept from the public?

In January 2014 I sought access under freedom of information laws to a series of documents about the turnbacks. When the government refused the request, I appealed the decision to the Office of the Australian Information Commissioner.

The former information commissioner John McMillan ruled almost entirely in the government's favour[56]. He found only a small part of one document should be released.

It was a slim win for transparency, but a greater win for the government.

But surprisingly the government appealed almost immediately[57] to the Administrative Appeals Tribunal, where it has been heard over the last 18 months.

The government has argued[58] these documents are a matter of national security, could damage international relations and affect future turnback operations. We argued that disclosing three-year-old ships' logs and policy documents could not harm national security, and that questions remained about the lawfulness of the operations.

Given the government's decision to appeal, you would assume the documents were incredibly significant. As it turned out, the government was not quite as bothered about them as it initially indicated.

After a few months of deliberating, the department decided to release parts of the very document the information commissioner had ruled should be disclosed. And not just that – even parts of the 14 documents McMillan ruled should be kept secret have now been released.

For the first time we can see Morrison's initial order to commence turnbacks[59]. We can see the government's advice on how and when[60] it should execute turnbacks, including how close Australian vessels should get to Indonesia. And the sketchy, handwritten details of the officers on board Australia's vessels have been set out for the first time; their scrawls that say: "permission granted to launch", referring to the orange lifeboats the government used to return asylum seekers to Indonesia.

These documents are critical to Australia. They are the official record of one of the most important and divisive issues of our time. And they should be public.

But following their release, AAT deputy president Dennis Cowdroy ruled in the government's favour. He found that many of the remaining documents, if released, would jeopardise the security of the Commonwealth[61].

The documents, Cowdroy wrote, "could be used by people smugglers to subvert or otherwise render useless the methods adopted... to prevent people smuggling operations and thereby render vulnerable the integrity of the Australian Borders against the influx of illegal entrants".

He was persuaded that it would be contrary to the public interest to release the documents on the basis that they "comprise sensitive documents relating to maritime operations for the protection of Australia's national borders, and thereby, the interests of the security of the Commonwealth, which is the public interest".

This decision is likely to be invoked by the government in future cases where its opaque asylum seeker policies are at risk of public exposure. The court proceedings are likely to have cost the taxpayer well over $100,000.

But for all the government's drum-beating about national security, it twice accidentally disclosed details it was trying to protect[62] during the course of the proceedings.

The Australian government solicitor's staff failed to properly redact several parts of the documents that set out how the turnbacks had occurred, exposing some of the details the government was seeking to hide.

A subsequent order by the tribunal prohibited their publication.

Litigation is not the only measure the government has taken to keep these operations secret. Many of these documents relate to the period when Australian vessels entered Indonesian waters[63], breaching the government's stated policy.

When I reported on the Ocean Protector's role in these incursions in 2014[64], the now head of the immigration department, Michael Pezzullo, referred the story to the Australian federal police for investigation. This prompted a hunt for my sources[65] by the AFP, in which my phone and email records were accessed without a warrant.

The story was also referred to the Australian Commission for Law Enforcement Integrity. The government tried to suggest public interest journalism was a corruption matter, within the commission's powers to investigate. A file note released under FOI[66] by the commission said the agency declined to investigate following the AFP's investigation.

There is still a lot that the government is trying to keep secret about Australia's actions on the high seas.

Paul Farrell is a reporter for Guardian Australia. This story[67] was first published by the Guardian on April 3 2017.

Manus Regional Processing Centre on Los Negros Island, Manus Province, Papua New Guinea.
PHOTO: ANDREW MEARES, COURTESY FAIRFAX PHOTOS

Freedom of Information

In August 2016 MEAA wrote to Finance Minister Senator Mathias Cormann over press freedom concerns arising from the tender of the ASIC Registry database.

While MEAA acknowledged the objective of the tender is broadly to improve the overall operation of the Registry including upgrading its IT platform and technology, MEAA members are concerned that the outsourcing of the Registry could lead to issues over accessing, and the cost of accessing, information contained in the Registry.

MEAA noted that current charges to access information in the ASIC Registry are already high by world standards – any further increase in charges would be deleterious to the principles of freedom of access to government information. MEAA further notes that, as freelance journalists are increasingly providing editorial content for media outlets, higher access charges would be particularly harmful to them given that they would likely have to fund searches of ASIC databases from their own pockets and they lack the resources of a large media employer.

In the 2014 federal Budget, the government announced it would put the Australian Securities and Investments Commission Registry out to tender. The Registry is a searchable database containing information about companies, business names, company directors, banned and disqualified individuals, and numerous documents. It is a vital tool for journalists, allowing them to properly scrutinise businesses.

However, even before the tender, journalists have been complaining that the current charges to access information in the ASIC Registry are already high by world standards. It's feared that putting the Registry out to tender may lead to increases in charges – which would undermine to the principles of freedom of access to government information.

MEAA is also concerned that, as freelance journalists are increasingly providing editorial content for media outlets, higher access charges would be particularly harmful to them given that they would likely have to fund searches of ASIC databases from their own pockets and they lack the resources of a large media employer.

It's clear that the media needs to be able to scrutinise business as part of its role in a healthy functioning democracy.

MEAA warned: "Any restrictions placed on the ability to access information contained in the Registry, including an increase in any fees and charges for that access, would be of deep concern to journalists and media organisations. It would also be of concern if private sector entities were placed in a position of a conflict of interest regarding their operation of the Registry; particularly given that the Government has assured the community that the Government will retain ownership of the Registry's data."

MEAA wants the Government to ensure that any legislative and regulatory changes, plus the contractual arrangements, will include cast-iron assurances that journalists and media organisations, as well as members of the community, will be able to access all the information contained by the Registry as they do now, and without any marked increase in the fees and charges currently applied for access.

In December 2016 the Government abandoned the plan to commercialise the registry because the bids it had received did not deliver a financial net benefit to the Government.

Finance Minister Senator Mathias Cormann.
PHOTO: ALEX ELLINGHAUSEN, COURTESY FAIRFAX PHOTOS

The quest for open, transparent government

By Peter Timmins

A year ago the first Turnbull government report card on access to government information was a mixture of hope and disappointment.

The year since saw more of the same.

The OAIC lives

On the hope front the government backed off plans to abolish the independent watchdog, the Office of Australian Information Commissioner after holding the office in the firing line for two years. After five short terms acting in the role Privacy Commissioner Timothy Pilgrim in September was given a long term appointment as Information Commissioner.

But resources and funding are scarce

On the down side the dual appointment of the Information Commissioner/Privacy Commissioner and the decision to not fill the position of Freedom of Information Commissioner, vacant since January 2015, means one person is responsible for functions that the Parliament assigned to three.

Government funding for the OAIC in 2016-17, $9.3 million, is $1.3 million less than the sum allocated in 2013-14 before the attempt to abolish the office.

The information policy functions of the office are not funded, privacy functions have been expanded and own motion investigations into agency practices and compliance seem to be a thing of the past. The OAIC has conducted two own motion investigations of agency FOI practices in six years, the most recent more than two years ago.

Open Government Partnership a plus

Another positive development was the ongoing commitment to the Open Government Partnership, an international initiative that the Turnbull government belatedly joined in November 2015.

Seventy five countries including Australia have signed an Open Government Declaration that states: "Governments collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities. We commit to promoting increased access to information and disclosure about governmental activities at every level of government. We commit to increasing our efforts to systematically collect and publish data on government spending and performance for essential public services and activities. We commit to pro-actively provide high-value information, including raw data, in a timely manner, in formats that the public can easily locate, understand and use, and in formats that facilitate reuse. We commit to providing access to effective remedies when information or the corresponding records are improperly withheld, including through effective oversight of the recourse process. We recognize the importance of open standards to promote civil society access to public data, as well as to facilitate the interoperability of government information systems. We commit to seeking feedback from the public to identify the information of greatest value to them, and pledge to take such feedback into account to the maximum extent possible." https://www.opengovpartnership.org/about/open-government-declaration

Prime Minister Malcolm Turnbull.
PHOTO: ANDREW MEARES, COURTESY FAIRFAX PHOTOS

After a start–stop-start process impacted by the two month election campaign at year-end 2016 the government completed another OGP requirement signing on to a national action plan containing 15 concrete commitments that cover a range of transparency, anti-corruption, integrity and citizen participation initiatives.

One is to develop **"Information management and access laws fit for the 21st Century":**
"Australia will ensure our information access laws, policies and practices are modern and appropriate for the digital information age. ***As part of this, we will*** *consider and consult on options to develop a simpler and more coherent framework for managing and accessing government information that better reflects the digital era, including the Freedom of Information Act 1982 (FOI Act), the Archives Act 1983 (Archives Act) and, where relevant, the Privacy Act 1988 (with primary focus on the Archives Act and FOI Act), which is supported by efficient and effective policies and practice."*

A network of organisations and individuals including the MEAA is actively involved in holding the government to the Open Government Declaration and seeking to ensure that action to give effect to the 'fit for the 21st century

commitment includes a comprehensive review of law and practice that identifies and addresses the many shortcomings in the current system.

Mixed record for applicants

Meanwhile at the sharp end FOI applicants had the usual mixed experiences. FOI contributed to ground-breaking stories, for example:

- producing details [68]of the Attorney General's stoush with Solicitor General Justin Gleeson;
- revealing[69] then Senator Bob Day's financial arrangements for his electoral office;
- how[70] millions of dollars are flowing from Australia to European tax havens; and
- that the Prime Minister and ministerial colleagues were told wind power wasn't to blame[71] for South Australia's blackout.

On the other hand, the more common experience of journalists was delay, high and sometimes questionable charges, overuse of exemptions and some evidence that agencies were "gaming" the system.

Wickr messages between the Prime Minister and Kevin Rudd concerning his intended candidacy for Secretary General of the United Nations "went missing"[72].

The government fought hard and spent thousands of dollars seeking to resist disclosure of a letter written to Deputy Prime Minister Barnaby Joyce in which the Secretary of the Department of Agriculture told him he no longer had confidence in the Minister's ability to resolve integrity matters. The Information Commissioner had ruled[73] the letter was not exempt. The department eventually conceded and released the letter [74]on the steps of the Federal Court.

The 'Diary wars'

Access to information about who ministers meet in the course of their ministerial duties-information that in NSW Queensland and many other jurisdictions is published as a matter of routine – proved troublesome.

The Attorney-General Senator Brandis, the minister responsible for the *Freedom of Information Act*, in seeking to avoid processing a request for some entries in his appointments diary for three months in the lead-up to the 2014 Budget argued an interpretation of the law before the Administrative Appeals Tribunal and the Federal Court of Australia that both rejected.

Six months after the Federal Court decision that there were no grounds to refuse to process the application by Shadow Attorney General Dreyfus the Attorney General's office hadn't completed the task and only released[75] an edited version after talk of contempt of court proceedings. The process had taken three years.

Talk about "tone at the top"!

The Brandis episode wasn't the end of the Diary Wars either. The Information Commissioner had to rule on whether entries in the Prime Minister's Appointments Diary were exempt. He found[76] the arguments against disclosure were unpersuasive and that many entries should be released. The Prime Minister's Office is appealing[77] the decision.

And a journalist had to seek a further ruling[78] from the commissioner that Communications and Arts Minister Mitch Fifield's diary entries for a three month period in 2015 were not exempt.

On it goes …

There is an easier way of course, in line with the spirit and intent of the FOI act – simply publish appointment diaries.

The public is entitled to know who ministers meet in carrying out their duties.

By their deeds you shall know them

Hope springs eternal, so all eyes on that Open Government Partnership commitment to take things in the right direction in the year ahead.

As Attorney General Brandis then in opposition said[79] in 2009:

"The true measure of the openness and transparency of a government is found in its attitudes and actions when it comes to freedom of information. Legislative amendments, when there is need for them, are fine, but governments with their control over the information in their possession can always find ways to work the legislation to slow or control disclosure. That is the practice we are seeing now under the Rudd government, whose heroic proclamations of commitment to freedom of information are falsified by the objective evidence of their practice."

Peter Timmins writes the Open and Shut blog www.foi-privacy.blogspot.com.au and is Interim Convener of the Australian Open Government Partnership Network www.opengovernment.org.au

Media regulation

The Turnbull Government reintroduced its media reform legislation to the Parliament in September 2016. Communications Minister Senator Mitch Fifield said: "The media reform package is substantially unchanged from that introduced in March this year (2016). The package will result in major changes to the regulations governing the control and ownership of Australia's traditional media outlets and the provision of local television content in regional Australia."

The Government's package will repeal media ownership and control rules that prevent:

- a person from controlling commercial television licences whose combined licence area populations reach more than 75 per cent of the Australian population (known as the "reach rule"); and

- a person from controlling more than two of the three regulated forms of media (commercial radio, commercial television and associated newspapers) in one commercial radio licence area (known as the "two out of three rule").

The Government said its reform package will also "strengthen local content obligations on regional commercial television licensees following a change in control, such as a merger, that results in them being part of a group whose combined licence area populations reach more than 75 per cent of the Australian population".

The Government says it is maintaining other diversity rules including the "five/four" rule, the "one-to-a-market" rule and the "two-to-a-market" rule. The Australian Competition and Consumer Commission will retain its powers to scrutinise mergers and acquisitions and is in the process of updating its media merger guidance accordingly.

In February 2017, Fifield blamed Labor for stalling on the legislation after the package passed the House of Representatives but stalled in the Senate where it will need cross-bench support to pass.

This latest package of media reforms dates from March 9, 2014 when the then 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[80]. "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.

The idea did not gain traction because of concerns from Turnbull's Coalition colleagues who feared that local content could be reduced[81]. 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.

A year later, and Minister Turnbull was again airing the possibility of changes to media ownership laws[82]. Reports say that the Abbott government is considering scrapping the "two-out-of-three" rule preventing media organisations from owning more than two platforms among radio, TV and print. The reports also suggest the government will also scrap the "reach" rule which prevents the creation of television networks that could broadcast to more than 75 per cent of the population — this effectively prevents regional broadcasters from being bought by national broadcasters.

Finally, on March 1, 2016, the government tabled its media reform legislation.[83] Under the reforms, the government would repeal two media control and ownership rules in the *Broadcasting Services Act 1992* that currently prevent a person from controlling:

- commercial television licences that collectively reach in excess of 75 per cent of the Australian population (the "75 per cent audience reach rule"); and

- more than two of the three regulated forms of media (commercial radio, commercial TV and associated newspapers) in the one commercial radio licence area (the two-out-of-three rule).

A third option was the government would also introduce changes that it says would "protect and enhance the amount of local television content in regional Australia as well as introducing an incentive for local content to be filmed in the local area".

The government plans to maintain other diversity rules including the "five/four" rule, the "one-to-a-market" rule or the "two-to-a-market" rule. Changes to the anti-siphoning list are not part of this package.[84]

MEAA made a submission to the Senate Environment and Communications Legislation Committee's inquiry into the *Broadcasting Legislation Amendment (Media Reform) Bill* 2016 and also appeared at its public hearings.

MEAA believes the bill avoids advancing comprehensive and integrated reforms in favour of select changes that will have a modest, if not harmful, effect. "It is frustrating that current unregulated content providers and potential future rivals will be unable to gain any insight into the future regulation of our media market from this bill," MEAA said.

Senator Mitch Fifield, Minister for Communications and the Arts.
PHOTO: ANDREW MEARES, COURTESY FAIRFAX PHOTOS

To be clear, MEAA supports the removal of the 75 per cent reach rule which has been entirely superseded by digital technology and the streaming practices of a range of media (and other) organisations. MEAA also supports the extension of local content requirements following trigger events.[85] "This is a necessary and desirable change," MEAA said.

But MEAA is concerned that the two-out-of-three rule would be removed without broader consideration being given to the need to identify and enforce the terms upon which *all* media organisations may provide services to the Australian market and provide consumers with greater choice.

MEAA is concerned that the bill's dominant focus is on relieving the regulatory burden on currently regulated entities. The benefit the bill seeks to provide to these entities is the ability to consolidate and achieve broader scales of operation and efficiencies in service delivery.

In an already heavily concentrated Australian media-market, MEAA thinks this approach undermines the public policy benefits of media diversity. While MEAA favours a genuine levelling of the playing field, fewer voices will do a disservice to the Australian community.

MEAA supports a broader approach to media reform that draws on the observations and recommendations of the Convergence Review. In particular, we support a single, platform-neutral "converged" regulator oversighting a common regulatory regime.

MEAA recalled that the Convergence Review had proposed a targeted and refined approach to reforming media ownership rules. This approach was based on a "minimum number of owners" rule and also included a public interest test replacing a suite of rules, including the two now earmarked for termination by the Bill.

MEAA is concerned that the government has not fully considered how diversity will be fostered under a partially–reformed media system.

"It is well and good to assert that the internet will deliver more media organisations due to the relative ease with which digital content can be delivered, but no real contemplation has occurred concerning the type and scale of these new entrants and whether they will compete with major organisations or occupy niche interest areas," MEAA said.

The Department of Communications' own June 2014 Policy Background Paper on Media Control and Ownership acknowledged that digital technologies would erode "the historic delineations between traditional and new media". It nonetheless made the important qualification that:

More broadly, the proliferation of online sources of news content does not necessarily equate to a proliferation of independent sources of news, current affairs and analysis. Indeed, the internet has, to date at least, tended to give existing players a vehicle to maintain or actually increase their influence. This pattern can be seen in Australia where to date, the established media outlets have tended to dominate the online news space.[86]

This observation gives MEAA considerable pause for thought when assessing the need to dispense with regulations in their entirety.

MEAA believes the other rules geared towards national and regional media diversity are also being compromised. The Department of Communications' 2014 media background paper also reported that 72 licence areas in regional Australia were "at or below the minimum floor in terms of voices".[87]

MEAA does not agree with Communications Minister Fifield's assertion that "even with two out of three removed and consolidation occurring, there would still be significant ownership diversity amongst sources of news".[88]

MEAA supports comprehensive media reform over a process that simply relaxes conditions for long-standing media companies. Some minimum conditions based on reasonable thresholds of economic activity or revenue must be established for all players – old and new – to ensure market equality. MEAA is also wary that leaving a regulatory vacuum for any length of time may condition media companies to resist the future implementation of new arrangements.

Media diversity requires policing to ensure the public interest is met. It is not necessarily a natural consequence of technological advancement.

MEAA believes the Turnbull Government should defer abolition of the two-out-of-three rule until plausible laws are drafted to encourage media diversity in the digital age. The effect of doing otherwise will be greater consolidation and fewer voices in media organisations of scale.

The concentration of media ownership in Australia remains one of the highest in the world[89].

CONFIDENTIAL SOURCES

The past 12 months have amply demonstrated the urgent need for laws to protect both journalists and their confidential sources.

In May, in the second week of the federal election campaign, Australian Federal Police embarked on raids in pursuit of a whistleblower that was the source of sensitive documents leaked to the media. The offices and home of a Labor staffer in Melbourne were searched on the evening of May 19 as AFP officers executed warrants as part of an investigation into the source of leaks about the National Broadband Network which have been published in recent months.

There is no doubt that the news stories resulting from the leaks were in the public interest. But the danger for the leaker is significant. First, under section 70 of the Commonwealth *Crimes Act* a Commonwealth "officer" faces two years in prison if they publish or communicate, "without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was his or her duty not to disclose.

Then under section 79 of the Commonwealth *Crimes Act*, which deals with the leaking of "official secrets", the leaker faces imprisonment for two years if they are convicted of communicating a "a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than a person to whom he or she is authorised to communicate it; or a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his or her duty to communicate it". (It's a seven year prison term if it can be proved the leak prejudiced the defence or security of the Commonwealth.)

For the journalist, the penalty is also two years because under section 79 they are deemed to have been "receiving" the information.

MEAA chief executive officer Paul Murphy said the NBN raids are a disturbing new twist in pursuit of whistleblowers and legitimate public interest journalism. "The raids are a heavy-handed and over-the-top response to media stories which have embarrassed the government. Once again, the government wants to shoot the messenger rather than address the issues raised by journalists in their reporting."

Following the publication of various news stories about the NBN, *The Sydney Morning Herald*, *The Australian Financial Review*, *The Australian*, the ABC and the Delimiter website were all named in search warrants.

The AFP has asserted it had acted lawfully in executing the warrants and that there has been no government interference in the timing of the raids during the election campaign.

But MEAA argues that the problem lay with the law itself when police search warrants can be used to pursue legitimate whistleblowers.

Murphy said: "Both major parties have voted to bring into force legislation which has complete disregard for the public interest and instead targets whistleblowers and journalists. As Edward Snowden recently commented, specifically about the situation in Australia, 'Sometimes the scandal is what the law allows'."

MEAA added that the AFP also needs to be open about whether journalists' metadata has been accessed without their knowledge. "The access of journalists' phone and internet records potentially puts them inadvertently in breach of the MEAA *Journalists Code of Ethics* and its obligation to protect confidential sources," Murphy said.

"The answers given by [AFP] Commissioner Colvin to these questions were completely unsatisfactory. We were told that it was necessary to pass the metadata retention laws for national security purposes, but I am sure most Australians would be appalled to learn that the metadata laws are being used in this way."

MEAA highlighted the issue during the election campaign by launching its own #vote4pressfreedom platform, to remind people of the importance of press freedom in a healthy functioning democracy, and put a spotlight on recent changes that are constraining press freedom in Australia.

These changes include the metadata retention laws, which allow government agencies to secretly pursue journalists' confidential sources, such as whistleblowers; and section 35P of the *Asio Act*, which has jail terms of up to 10 years for legitimate public interest reporting on Asio special intelligence operations.

Murphy said: "The most recent laws passed the Parliament with bipartisan support. Nothing will change unless journalists and the supporters of press freedom raise the volume.

"Australia was once a bastion of press freedom and freedom of expression but now governments are pursuing journalists and their sources, criminalising legitimate journalism in the public interest and denying the public's right to know with pressure mounting to further deny information from becoming public," he said.

"There is a great deal of effort being expended by government to avoid legitimate scrutiny. And it's getting worse. These attacks on press freedom undermine democracy."

Another legitimate public interest news story involved another Government-owned agency: Centrelink. In January 2017 leaks disclosed damaging information about the agency's debt-recovery system which led to low-income and vulnerable people being incorrectly issued with debt notices that were sometimes wildly inaccurate in their debt assumptions or completely false. The notices placed an immense burden on people already facing difficulties.

More than one whistleblower had sought out journalists to tell the story of the new, error-ridden system and the toll it was having on Centrelink "clients" and staff. The Department of Human Services had responded by sending a memo to staff, reminding them that the improper leaking of information could result in disciplinary action or constitute a criminal offence. Even the memo was subsequently leaked. Independent MP Andrew Wilkie alleged that Centrelink staff who ask too many questions about the debt recovery system were being "managed" out of debt recovery units.

South Australian Senator Nick Xenophon said he would seek to draft amendments to decriminalise leaks from the public service (he had already made a similar statement in relation to the NBN leaks story). "I think it just highlights the need to amend section 70 and 79 of the Crimes Act, which makes it a crime for a public servant to leak information, or for a journalist or third party to receive it," he told Guardian Australia[90]. "Sections 70 and 79 of the Crimes Act are currently about protecting government from embarrassment, rather than from the public being informed of maladministration or malfeasance in government."

Shield laws

Australia still fails to adopt uniform national shield laws for journalists. Queensland, South Australia, the Northern Territory remain the only jurisdictions without shield law protection in their respective evidence acts.

Shield laws aim to protect journalists from being fined, jailed, or both, for contempt of court should the journalist uphold their ethical obligation to protect the identity of a confidential source.

Journalists, bound by their ethics, are obliged to never reveal the source's identity but increasingly, powerful people are demanding a court compel the journalist to do so. By maintaining their ethical obligation, the journalist faces the wrath of the judge and a possible contempt of court charge. Aside from the prison time and a fine, the journalist would also have a criminal conviction that could impede their ability to do their work.

In most jurisdictions, legislators have worked to remedy the situation in acknowledgment of the ethical obligations of journalists towards their sources. But the message hasn't got through to every lawmaker.

MEAA has consistently called for all jurisdictions to adopt a national shield law regime, modelled on the uniform national defamation laws that have operated successfully for the past decade. The shield laws would have to be uniform across all jurisdictions because there are glaring gaps across those states that do recognise journalist privilege, not least because the shield can stop glaringly short in certain circumstances leaving the journalist exposed.

The failure of some states and territories to adopt shield laws also opens the risk of jurisdiction shopping where, thanks to digital publishing, a plaintiff can issue a subpoena in a jurisdiction without shield laws, and once again exposing the journalist to a contempt action even though they are their media employer may be based in jurisdiction with a shield law.

In early February 2017 MEAA wrote to Queensland Attorney-General Yvette D'Ath and Northern Territory Attorney-General Natasha Fyles to seek a meeting to discuss MEAA's concerns about the lack of a shield law in those jurisdictions and to urge their support for the matter to be raised at the next meeting of Law, Crime and Community Safety Council of the Council of Australian Governments. No response from either attorney-general has been received.

In July 2016, South Australian Attorney-General and Deputy Premier John Rau maintained[91] his intransigence to introducing a shield law for journalists in that state.

"Borderless" digital publishing makes it highly likely that, regardless of where the journalist or their employer is located, a court action can be lodged in a state that does not have shield law protection and the journalist may face contempt of court penalties for maintaining their ethical obligation. In short, every journalist is at risk of being dragged into a court action in one of the three jurisdictions that fail to protect journalists and their sources. The fact that lawmakers are so reluctant to even discuss the issue that has already been remedied at a Commonwealth level as well as in most states should be condemned as an egregious assault on press freedom.

The threats to journalist sources are very real

By Joseph M. Fernandez

The threats to leakers, whistleblowers and journalists' confidential sources remain worrisome.

While statutory and other rules forbid the leaking of "confidential" information, the leakers and their sympathisers include a stellar cast. In the US, White House leaks have been coming "at a seemingly record pace";[92] and the *I-love-Wikileaks* President's pre-election penchant for leaks has faded.[93]

In Australia, former prime ministers have been implicated as leakers, among them Kevin Rudd[94] and Tony Abbott.[95] One study showed that official sources, including politicians and legislators, make up "a significant portion" of journalists' confidential sources.[96]

Leaks to the media "are vital for democracy".[97]

Whistleblowers and journalists working with confidential sources, however, continue to experience undue difficulty. Protections are haphazard and inadequate. Conflicting laws aggravate the mayhem. While one law advocates the release of public interest information, another does the opposite.

For example, under Freedom of Information legislation, employees have "pro-disclosure obligations" in line with the principle underlying the Act – access to documents should be granted wherever possible.[98]

Section 70 of the Commonwealth *Crimes Act 1914*, however, takes an "absurdly draconian" approach.[99] It forbids a Commonwealth officer from communicating *any* fact or document, which they have a duty not to disclose without authorisation. Offenders face up to two years imprisonment. That section catches anything "from the highest cabinet secrets or the number of paperclips used in a local Centrelink office".[100]

Two events over the past year illustrate the perils facing journalists and whistleblowers.

NBN Co leak

Last August the Australian Federal Police conducted raids, including on Parliament House, to find the source of leaks on the NBN Co. The raid "reached the point of absurdity" when AFP officers reportedly even invoked "national security" to stop the filming of a briefing unrelated to national security.[101]

The leaks "were squarely in the public interest".[102]

The Opposition claimed the "whole investigation was about covering up" the Prime Minister's incompetent administration of the NBN and its rollout and its costs.[103]

The raid warrant "also targeted journalists".[104]

The message to potential whistleblowers from the AFP investigation was "deliberately, chilling: there's no safe place for you to go".[105]

A Senate Privileges Committee subsequently found that the seized materials "warrants protection" and that "improper interference" with a senator's duties had occurred.[106] The committee stopped short of a finding of contempt of parliament.

Centrelink leak

Following leaks from Centrelink about failures in the "robo-debt" campaign the Department of Human Services sent its 36,000 staff a warning.[107] Department general manager of People Services Adrian Hudson warned staff that they risked "committing a criminal offence" if they leaked externally in breach of whistleblower law.[108]

The debt collection campaign is under a parliamentary inquiry, which has heard that the campaign affected "at least 200,000 people around the country" and caused "extensive distress and suffering" in the community.[109] What better occasion to warn Centrelink employees of the critical difference between disclosures made under whistleblower law (*Public Interest Disclosure Act 2013*) and the criminal leaking of information, as Mr Hudson did: "There are very limited circumstances where you can make a disclosure externally".[110]

Freedom of informed expression

The ability to criticise government and participate effectively in government, as a former High Court Chief Justice observed, "depends on the provision of adequate information".[111] In the area of political speech, the scope of discussion is extremely broad and refers to "all speech relevant to the development of public opinion on the whole range of issues" that citizens should think about.[112]

A nagging scourge, however, is the obstruction of the flow of information needed for informed speech and the fortunes that ride on the charity of those controlling its release, or on the existence of an enforceable duty to release that information.

Erosion of journalist-source protections

Leaks are a media staple and are intricately woven into journalist-confidential source relationships. They have gained some recognition in established democracies as deserving of legal protection. Australian parliaments have broadly acknowledged the merits of journalist-source protection and have prescribed statutory protections in six of the nine jurisdictions.[113]

The statutory recognition of "journalists' privilege" or "shield law", however, has been steadily undermined over the years.

ASIO, for instance, has confirmed that it has "obtained access to journalists' phone or web records".[114]

As major Australian media organisations have noted, the three tranches of 2014–2015 national security laws contain provisions that "unjustifiably interfere with freedom of speech" including "emasculating the confidentiality of sources; exacerbating the lack of protection for whistleblowers including by potentially witch-hunting sources of "unauthorised" leaks; and criminalising journalists for discharging their roles in a democracy." [115]

These assaults make it "increasingly difficult for news gathering and reporting in the public interest" and undermines democracy.[116]

Words don't match actions

Our senior leaders proclaim they support transparency and information flow.

Malcolm Turnbull when he was Communications Minister promised "increased transparency" at NBN Co.[117]

Opposition Leader Bill Shorten, in the wake of the NBC Co raids, said if he became Prime Minister: "Labor is absolutely in the market to start strengthening whistleblower protection".[118]

Independent Senator Nick Xenophon, who for years has talked about overhauling secrecy law, is planning to act. He proposes to have a draft bill ready by the second half of this year with provisions that place an onus on Commonwealth officers to disclose information unless it has been established that that there is an essential public interest to be protected by maintaining the secrecy of certain information.[119]

On top of that, the proposed provisions will ensure that criminal penalties only apply to unauthorised disclosures of information in situations where there is an overwhelming public interest in preventing disclosure, and the consequences of disclosure would harm national security or public safety.

His preferred approach is one that the Gibbs Committee recommended 26 years ago.[120] He would repeal the "catch-all" provisions of sections 70 and 79(3) of the *Crimes Act* and replace it with provisions imposing criminal sanctions for disclosing certain types of information.[121]

Such a move has been repeatedly suggested. In 2017 the Australian Law Reform Commission reminded of its suggestion in 2009 that there "needs to be adequate protection for individuals who make public interest disclosures to third parties, such as the media".[122]

In its 2009 report the commission recommended that specific secrecy offences be "only warranted where they are necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions."[123]

Concrete action is long overdue.

Associate Professor Joseph Fernandez heads the journalism department at Curtin University and teaches Media Law.

Whistleblower protection

A whistleblower is a person who exposes any kind of information or activity that is deemed illegal, unethical, or not correct within an organisation that is either private or public. The information of alleged wrongdoing can be classified in many ways: violation of company policy/rules, law, regulation, or threat to public interest/national security or health and safety, as well as fraud, corruption and dishonesty.

In February 2017 MEAA made a make a submission to the Joint Parliamentary Committee on Corporations and Financial Services inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

In the submission MEAA said it believed it is important to acknowledge and examine the nexus between whistleblowers and journalists. Journalists have a duty in a healthy democracy to scrutinise the powerful, including government and business, so that society can be informed about itself. Journalists report in the public interest.

Journalists rely on sources for news stories. The relationship between a source and a journalist is one of trust. A confidential source has to be assured that they can trust the journalist to never reveal their identity. It is an obligation on journalists everywhere to protect the identity of confidential sources.

A whistleblower, as a good citizen performing a civic duty, seeks to bring to light wrongdoing: fraud, corruption and other forms of illegal activity; dishonesty and other unethical practices; threats to the public health and safety; and threats to the public interest.

Whistleblowers may seek to expose this information or activity by reporting it to industry regulators, government and law enforcement agencies, or through the media. But by exposing wrongdoing they also face the prospect of retaliation, so that the act of whistleblowing is done often at great personal risk.

Whistleblowing in the news

In recent years, vitally important public interest journalism has been written thanks to the courageous efforts of whistleblowers in the private sector. They deal with the exposure and revelations of live baiting in the greyhound industry, systematic wage fraud at 7-Eleven, rogue planners at Commonwealth Financial Planning, CommInsure avoiding payouts to sick and dying people, the mis-selling of financial products by Westpac, poor practices at NAB's financial planning arm, insider trading at IOOF, allegations of compliance failures at Origin Energy's oil and gas fields – all very large

corporate citizens who have a civic duty to uphold.

Internationally, there have also been important news stories that involved whistleblowers exposing wrongdoing: the LuxLeaks scandal, the Panama Papers, the Unaoil expose and the allegations of kickbacks and facilitation payments at Leighton International.

Far too often, private sector whistleblowers who have acted in the public interest have been persecuted as a result due to a lack of acknowledgement of their vital role, effectively retribution by their employer or by the tacit failures of the industry they work in.[124]

There must be an understanding that the wrong that has been exposed must be righted and that the citizen who exposed the wrong should be praised and not punished.

Ethical journalism and whistleblowers

Under MEAA's rules, all members of MEAA Media are bound by MEAA's *Journalist Code of Ethics*.[125] It is a requirement of the *Fair Work (Registered Organisations) Act 2009* that MEAA's rules are registered with the Fair Work Commission.

Only MEAA Media members can be investigated by MEAA's National Ethics Panel for alleged breaches of the Code.

The Code was first developed in 1944. The code was reviewed and updated in 1984 and subject to a major review between 1994 and 1999 leading to the current MEAA *Journalist Code of Ethics* being instituted in February 1999[126].

Aside from this requirement on individual journalists who are MEAA members, the Code is acknowledged by many media outlets across Australia as part of their codes of practice/conduct for editorial employees.

Clause 3 of the MEAA *Journalist Code of Ethics* states:

"*3. 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***."[127]

The price being paid

MEAA member and Fairfax Media journalist Adele Ferguson has written important news stories exposing appalling conduct by corporations. Those stories have been written thanks to the courage of whistleblowers who have sought to expose wrongdoing. As Ferguson says:

Some of the country's biggest scandals – Commonwealth Bank, National Australia Bank, Macquarie, IOOF and 7-Eleven – would not have come to light without the brave contribution of whistleblowers. They all paid a heavy price.[128]

Ferguson has documented how the whistleblowers have been persecuted for speaking out. Aside from the very great stress they faced, they have been subjected to the most appalling witch hunts, and extraordinary cover-ups have been undertaken to either hush-up or minimise the exposure of the corporate wrongdoing.[129]

Rather than supporting whistleblowers, corporations have sought to categorise them as "leakers" who should be subjected to at least suspicion, if not outright intimidation and even whisper campaigns, often with the corporation using its massive resources to fund "unimaginably underhand back channel techniques" – many of which have also sought to intimidate, harass and muzzle the journalist reporting on the whistleblower's allegation of corporate wrongdoing.[130]

Many whistleblowers have been sacked or forced to leave their job; some have received death threats, been diagnosed with post-traumatic stress disorder and have had their names and reputations tarnished within the industry, effectively preventing them from finding employment in the same field. The effect on the individual whistleblower and their family can be far-reaching. And all for doing what a good citizen should do and is encouraged to do.

Unless whistleblowers can be afforded some substantial degree of protection, encouragement and support, "very few will go ahead and pay the high personal price to do the right thing under the current system".[131]

Journalists can also pay a high price for their reporting. Their news stories may be the subject of defamation actions in an effort to punish or silence future stories. These court actions may cause the journalist and media employer immense legal costs to defend – all for having told the truth in the public interest.

The journalists may also be subpoenaed to reveal the identity of their sources for the news story and, because Australia lacks uniform national shield laws, the prosecution can be undertaken in a jurisdiction that does not offer journalist privilege protections in its Evidence Act – with the result that an ethical journalist, maintaining their ethical obligation to never reveal the identity of a confidential source, faces the prospect of being convicted for contempt of court and of being fined, jailed, or both, as well as having to carry a criminal conviction for simply doing their job.

The contrast between public and private whistleblowing protections

A June 2014 paper[132] provides an important comparison of Australia's whistleblower protection rules for the public and private sectors. The report found: "In the private sector, legislative protection is considerably weaker. The primary provisions are contained in Part 9.4AAA of the federal *Corporations Act 2001*… However the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection. These provisions have been subject of widespread criticism and are the focus of a federal parliamentary committee inquiry into, among other matters, the protections afforded by the Australian Securities and Investments Commission to corporate and private whistleblowers.[133]

"Other limited protections provisions exist for whistleblowers who assist regulators in identifying breaches of industry-specific legislation such as the federal *Banking Act 1959*, *Life Insurance Act 1995*, *Superannuation Industry (Supervision) Act 1993* and *Insurance Act 1973*, but these types of protections are also typically vague and ill-defined, with no agency tasked with direct responsibility to implement them."[134]

Given the spate of whistleblower incidents recently, particularly in the banking and finance industry, this situation needs to be urgently remedied.

MEAA welcomed that the Senate Economics Committee "has called for private sector laws to be placed on a par with those protecting public sector whistleblowers, which were substantially bolstered in recent years. Australia's laws also lag behind those of other OECD countries, including the US and UK"[135].

Disclosures to the media

In its submission MEAA said disclosures to the media should be protected where:

1. the whistleblower honestly believes on reasonable grounds that it is in the public interest that the material be disclosed;

2. the whistleblower honestly believes on reasonable grounds that the material is substantially true;

3. the whistleblower honestly believes on reasonable grounds either that:

   i. to make an internal disclosure is likely to be futile or result in victimisation of the whistleblower; or

   ii. the disclosure is of such a serious nature that it should be immediately brought to public attention.

Recommendations

In response to questions raised in the December 2016 discussion paper *Review of tax and corporate whistleblower protections in Australia*, MEAA made several recommendations including allowing all types of interested parties who could become whistleblowers be included in the Corporations Act. "Consideration should be given to allow all interested parties to bring to light any wrongdoing. These categories should be expanded to include spouses and families and also shareholders.
The aim, in short, should be to provide for the maximum possibility of legitimate whistleblowing

CBA whistleblower Jeff Morris.
PHOTO: BRENDAN ESPOSITO, COURTESY FAIRFAX PHOTOS

opportunities to bring to light wrongdoing which, in turn, should allow whistleblowers to be afforded proper protections.

MEAA recommended consideration should be given to consolidating all public and private sector whistleblower legislation[136] to improve the *Public Interest Disclosure Act* which is still less than perfect, while also eliminating the private sector's sub-standard regulation and protection of whistleblowing.[137]

MEAA also recommended that anonymous disclosures should be protected and penalties imposed for any deliberate or accidental breach or disclosure of the identity of an anonymous whistleblower. "Mechanisms should be created to allow disclosures to be made that ensure anonymity and that allow disclosures to be made without any reference to the corporation, its officers or employees."

MEAA added that whistleblowers should be able to make disclosures to a reliable investigatory body and that disclosures to the company's auditor or nominated persons within a company be removed. "The nature of whistleblowing is the exposure of wrongdoing and it is not suitable for company officers, employees or nominees to be involved because past experience suggests that whistleblowers are particularly vulnerable to retaliation in these cases. "

MEAA also recommended the creation of a federal corruption watchdog, or an independent statutory office or Public Interest Disclosure Panel[138] with broad-based membership and full powers to investigate whistleblower claims. Whistleblowers need an advocate and a body they can trust.

Whistleblowers need more protection

By Adele Ferguson

"I blew the whistle on 7-Eleven because I saw the stark repudiation of the Australian 'Fair Go' in one of Australia's largest retailers, and I saw that nobody within the company wanted to do anything about it," the 7-Eleven whistleblower wrote in a submission to a parliamentary joint inquiry into whistleblowers.

"I came forward via the media because I felt I had no other viable outlet to ensure that these injustices would be quickly, fairly and transparently followed up," he said.

"I wanted to make the wrongdoing at 7-Eleven known to authorities long before the scandal was publicly uncovered by Adele Ferguson and her team, but the current legal framework for corporate whistleblower protection in Australia made it seemingly impossible for me to do so through ASIC and be confident that it would be seriously followed up, if at all."

The 7-Eleven wage scandal hit the headlines in August 2015, exposing systemic exploitation of vulnerable workers and a business model that was seriously flawed and pushed franchisees to exploit their workers. Since the media investigation, 7-Eleven has paid out $75 million in back pay and estimates suggest the payout could reach $150 million, making it the biggest wage fraud scandal in corporate history.

When you think of the big exposes of the past few years – the CBA financial planning scandal, the Panama Papers, Unaoil, LuxLeaks, the Reserve Bank's Securency imbroglio and the CommInsure life insurance scandal, where the insurer put profit before people – it is obvious that none would have come to light without a whistleblower.

In all cases, the whistleblowers put everything on the line: job, financial security, marriage and so much more.

They are extraordinary people.

Sally McDow is one such person.

In early 2015, McDow, a lawyer and a highly experienced senior compliance manager at Origin Energy, became a whistleblower. She told senior management about significant and dangerous compliance breaches, a deliberate cover-up by management and potential breaches of the *Corporations Act*.

Quite a charge sheet.
In a statement of claim filed in the Federal Court, she alleges management covered it up. Origin is fighting the claims.

McDow says that when she spoke up, the bullying and intimidation began. She was yelled and sworn at, and had books slammed on her desk. She was monitored on the amount of time she spent in the company bathroom and questioned on why she needed to satisfy her thirst with a drink of water.

A whispering campaign began. It became common knowledge that she was a whistleblower. Towards the end of the year she was made redundant, along with 600 other workers. Origin said they were trimming the workforce. McDow alleges it was because she was a whistleblower.

Unemployed, with young children to support, she went job hunting. In one interview, she was told she wasn't the "right" fit for the company. A comment was made regarding her whistleblowing history. She was flabbergasted. She hadn't mentioned she was a whistleblower, so how did they know?

The same thing happened when she applied to a recruitment agency in Brisbane. She was told she was virtually unemployable in the city because of her status as a whistleblower. She was advised to change her name.

Sadly, it is tactic 101 to discredit the whistleblower and try and detract attention from the main game: misconduct.

Jeff Morris, the whistleblower at CBA, says that since going public in June 2013, he has been contacted at least once a month by company insiders asking for advice about reporting corporate misconduct.

"When I explain the potential cost to them – the loss of not just their job but also their career, due to vindictive back channel smear campaigns; the lack of any effective protection or compensation, let alone rewards – most walk away," he says.

The recent expose of pizza giant Domino's widespread underpayment of workers resulted in attacks on some of the franchisees quoted in the story. A senior representative at Domino's went on ABC radio and called any franchisee who had spoken to the media a criminal and blackmailer. It was a surprising outburst, but shows the high stakes games being played.

The franchisees I quoted had already left Domino's so they had nothing to gain. There was no blackmail and they weren't criminals. They weren't underpaying workers, but they wanted to explain how hard it was running a Domino's. Yet their credibility was attacked.

A parliamentary joint committee is conducting an inquiry into whistleblowers, with a report and set of recommendations due on June 30. It is chaired by Steve Irons MP and panel members include senators John Williams, Nick Xenophon, Deborah O'Neill and Peter Whish-Wilson.

The terms of reference are wide and include assessing the various compensation arrangements available in other countries, such as the bounty systems used in the US, and in what circumstances public interest disclosures to third parties or the media should attract protection. It will look at whether the current laws are adequate.

They clearly aren't.

Under the Corporations Law, whistleblowers must be working at the company and must reveal their identity to the person or authority they are making the disclosure to. If not, they can't meet the definition of a whistleblower and won't be protected.

In addition, current legislation does not provide additional protection for documents that contain whistleblower information, including information that might reveal a whistleblower's identity.

The hope is that the parliamentary inquiry will overhaul the law and create an environment more protective and celebratory of whistleblowers.

This would mean broadening the definition of a whistleblower and removing the outdated requirement for "good faith" as opposed to honest belief on reasonable grounds. They should also be properly compensated for the risks they take, in the same way that the US model rewards whistleblowers.

At the end of the day whistleblowers are the unsung heroes, who give much but mostly cop a vicious, underserved kick in the teeth in return.

Unless they come forward, we will be none the wiser about egregious corporate misconduct, some of which results in compensation to the victims. Their reward is often job loss and a reputation as a snitch that precludes them from other jobs.

As journalists we must protect the identity of whistleblowers at all costs. We should also celebrate their bravery. For those willing to go public, we must be prepared for the smear campaign and do everything we can to bat it off.

A world authority on whistleblowing, AJ Brown, Professor of Public Policy and Law at Griffith University, put it succinctly in *International Handbook on Whistleblowing,* which he co-authored in 2014.

"In the modern age of institutions, whistleblowing is now established as one of the most important processes – if not the single most important process – by which governments and corporations are kept accountable to the societies they are meant to serve and service."

Adele Ferguson is a Gold Walkley-winning senior business writer and columnist for Fairfax newspapers *The Age*, *The Sydney Morning Herald* and *The Australian Financial Review*. This article originally appeared in *The Walkley Magazine – Inside the Media in Australia and New Zealand*.

THE INDUSTRY

Gender

A blokey culture that rewards "mates over merit", tolerates sexual harassment and abuse, pays lip service to work-family balance, and perpetuates the gender pay gap has been exposed by a landmark survey of women in the Australian media.

According to the survey by Women in Media, a mentoring, networking and advocacy group initiated by MEAA, and report in *Mates Over Merit*:

- Discrimination remains rife, with policies "on paper, not in practice": Only 11% of respondents rated them "very effective".
- 41% of women said they'd been harassed, bullied or trolled on social media, while engaging with audiences; several were silenced, or changed career.
- Only 16% of respondents were aware of their employer's strategies to deal with threats.
- Almost half (48%) said they'd experienced intimidation, abuse or sexual harassment in the workplace.
- A quarter of the women who'd taken maternity leave said they'd been discriminated against, upon return to work. Some said they'd been put on the 'mummy track'. One in three (34%) said they didn't feel confident to speak up about discrimination.
- There's evidence of an entrenched gender pay gap (reinforced by research from the Workplace Gender Equality Agency of a 23.3% gap in the sector).

"Progress towards equality for women in media is disappointingly slow," Tracey Spicer, national convenor of Women in Media, said. "While there are more women than ever before working in the industry, they still dominate the lower paid, less powerful positions."

"The media is often called a mirror of society. But it is failing to reflect our diversity."

Katelin McInerney, director of MEAA's Media section, said the union would use these findings to work with media employers to "fully harness the incredible potential of their female workforce".

Strategies include audits and action on the gender pay gap; improved procedures to deal with social media harassment; and anti-discrimination policies to be put into practice.

"Outdated attitudes and ineffective policies are holding women back from making their fullest and most creative contribution to the media landscape, at a time when innovation, diversity and new ways of thinking are desperately needed to help our industry transition and meet the challenges of a new digital era," McInerney said. "While we have secured some improvements, media companies have been slow to adopt pay transparency, superannuation during parental leave, and dedicated family violence leave."

The survey was developed by the national steering committee of Women in Media and researcher Beverley Uther, and conducted by iSentia. It collected data from 1054 Australian journalists between September and December 2015, with 91.8 per cent of the respondents being women.

This data was collected via a national online survey of around 1000 women in media at the end of 2015. Respondents believe discrimination remains rife in the industry. "Mates over merit" was a frequently expressed sentiment. Many noted the declining number of women "as you go up the food chain". For those with a long career, the issue of ageism is of increasing concern. Despite policies to prevent discrimination, barely half of respondents rate them positively: only 11 per cent said they were "very effective".

There is evidence of a significant gender pay gap in the survey data, reinforced by research from the Workplace Gender Equality Agency revealing a 23.3 per cent gap in Information, Media and Telecommunications.*

In an industry impacted by the 24-hour news cycle, flexible work is often "on paper, not in practice", because of a culture of "presenteeism". According to WGEA data, media employers with more than 100 staff offer better primary and secondary carer leave than much of the private sector.

Despite these benefits, one quarter of women who've taken maternity leave have experienced discrimination returning to work.

Engaging with audiences online is part of the job. Sadly, 41 per cent of respondents have experienced harassment, bullying and trolling on social media, from mild instances to death threats and stalking.

WOMEN IN MEDIA
A MEAA Initiative

Several women say they have been silenced, or changed career, because of this harassment.

The full survey is available for download at http://womeninmedia.net/[139]

Meanwhile, International Federation of Journalists' affiliates across the world have called for global action against gender-based violence as reports of attacks on women journalists soar.

On November 25 journalists unions took part in meetings, protests, training sessions and marches to demand an end to attacks on women journalists and for action to tackle the impunity which allows perpetrators to go unpunished.

To mark the UN Day for the Elimination of Violence Against Women and Girls, the IFJ established the campaign for an International Labour Organisation Convention to stop gender-based violence at work.

Recent studies show that almost 65 per cent of women media workers have experienced intimidation, threats or abuse in relation to their work, nearly a quarter have experienced acts of physical violence at work.

While many attacks happen in the field most happen in the office and almost half are carried out by a boss or supervisor.
Incidents of sexual violence, sexual harassment and online abuse are continuing to hit the headlines and yet little action is taken – 70 per cent of women media workers claim their organisations are not taking action to protect their security or safety.

IFJ President Philippe Leruth said: "Violence against women remains one of the most widespread and tolerated violations of human rights and its perpetrators continue to enjoy impunity while its victims face losing their job, having their careers ruined, being silenced or worst of all killed.

"The IFJ and its affiliates will commit to vigorously campaign for a new ILO Convention to help stop the violence and tackle impunity. We will also back affiliates who seek to take legal action against perpetrators, and support those who seek to negotiate safety and security policies and campaign for the rights of women media workers to be respected".

On March 30 2017 the South Asia Media Solidarity Network (SAMSN) and the IFJ, representing unions and press freedom organisations in the region, began a campaign called Byte Back to call for strong action to stop cyber-bullying and online harassment of women journalists. The campaign calls for journalists of all genders; their unions; media houses; moderators of social media platforms; the public and governments to take firm steps towards ensuring women's rightful place in the digital world, without harassment, abuse and cyber-violence.

Redundancies

In November 2016 **News Corp Australia** announced it would cut $40 million in costs after the company experienced an 11 per cent decline in advertising revenue. The latest cuts come after the Australian operations had already slashed costs by 5 per cent in the second half of fiscal 2016.

MEAA believes that News Corp editorial staff had made enormous sacrifices in a cooperative effort to improve efficiencies and productivity in the business. "Far too often these sacrifices have been made with little or no recognition or recompense from management. MEAA calls on the company to provide assurances that any redundancies will be on a voluntary basis."

MEAA noted that the company has said the latest cuts are "to allow for continued investment in quality journalism". MEAA said: "The company's decision to pursue a more digitally-focused approach must recognise that editorial staff are working harder, over more hours, filing for multiple platforms, and are utilising an extraordinarily diverse set of skills in response to the digital transformation taking place in the industry.

"News Corp has benefited greatly from these sacrifices. News Corp must accept that genuine investment in quality journalism must not trample on editorial staff who are the engine room of News Corp's products," MEAA said.

While the company has maintained a program of "tapping people on the shoulder" to steadily reduce job numbers, on April 11 the company announced in a newsroom meeting that it would be making the majority of the photographers and sub-editors working on its Australian tabloid newspapers redundant.

MEAA condemned the cuts to front-line editorial staff. In some cities, up to two-thirds of the photographic staff would be cut. Staff were told redundant photographers would be able to freelance back for News Corp, and provide content as freelancers via photographic contractors Getty and AAP.

Management also flagged significant changes to work practices with earlier deadlines, greater copy sharing across cities and mastheads, and journalists taking up more responsibility for production elements and proofing their own work, which has journalists concerned about already stretched news gathering resources and maintaining the editorial standards of their mastheads.

MEAA's Media section director Katelin McInerney said: "The job redundancies that will result, which will only serve to strip vital editorial talent from the company's mastheads, harm the very products that News Corp's audiences value and end up being self-defeating because of the damage they do.

"These are mastheads that pride themselves on being newspapers of the people and a voice for the communities they serve – these cuts serve no-one.

"News Corp readers and the communities that these journalists serve deserve better. Once again it is front line editorial staff in already stretched newsrooms - the very people audiences rely on to tell their stories – who are bearing the brunt of these short-sighted cuts for short-term shareholder gains," McInerney said.

"Time and time again we have seen that cuts to front line media staff ultimately do not deliver the kinds of savings for media companies that get them out of the woods," she said.

"Cutting the very staff who tell the stories of our society's marginalised and vulnerable – particularly those photojournalists who create the images we, as audiences, rely on to cut to the heart of an issue in a powerful, compelling and instantaneous way – has proved an ultimately futile stop-gap measure for news companies," McInerney said.

MEAA called on News Corp not to abandon the long-term investment it has made in photographic journalism, and to work with their staff and the union to build a robust and sustainable news business for News Corp, which invests in the people telling the stories.

At the end of March 2017, News Corp announced it would make 10 staff redundant at the *Gold Coast Bulletin*. MEAA members condemned the company's handling of the announcement and the lack of early consultation with staff around the changes. Staff were read a script of the announcement by editorial management, and told the editor (a major decision maker) would be unavailable due to his leaving the country for three weeks on a holiday.

In September 2016, the Australian Competition and Consumer Commission decided to allow the sale of News Corp Australia's *Sunday Times* and PerthNow web site to Kerry Stokes' Seven West Media (SWM), owner of *The West Australian*.

As MEAA's Western Australian Media section committee outlined in its submission to the ACCC, the sale will "make Perth a 'one-newspaper' town. By its very nature, the sale will lessen competition. We believe readers will suffer from a reduction in the quality of content, perhaps in both print publications, if staffing levels are reduced and journalists, photographers and artists have to do more with less (something that is already happening across the media industry). The proposed transaction [will] create business and media power in WA that is not replicated in any other part of Australia."

ABC managing director Michelle Guthrie. PHOTO: PETER BRAIG, COURTESY FAIRFAX PHOTOS

MEAA is concerned the sale has put incredible power in the hands of one mogul, Kerry Stokes, whose business interests in WA extend far beyond the media. SWM shareholders and senior executives are also heavily involved in the Perth business scene at large and in dealings with the State Government. These dealings not only involve the customary regulatory approval and lobbying that is normal business practice, but also include attempts to acquire significant assets or significant contractual benefits through those dealings with the State Government. There is an obviously greater potential for problems in objectively reporting or analysing these business activities, especially involving government, when that same group controls all the daily newspapers in town.

MEAA's WA regional director Tiffany Venning said: "While members (at *The Sunday Times*) are not surprised, they are deeply disappointed with the decision. Given that there were already 37 editorial jobs lost at ***The West Australian*** prior to this transaction being approved, there is considerable concern for staff at *The Sunday Times* and PerthNow." The 37 jobs lost were made up of 25 voluntary redundancies and 12 forced redundancies.

MEAA wrote to both companies calling on them to engage in close consultation with editorial employees and their union.

MEAA urged Seven West Media to urgently adopt a charter of editorial independence across all its media business and to explore opportunities for staff to be redeployed to other editorial areas. Following the sale, of T*he Sunday Times* which had an editorial staff of 54, 12 did not apply

for a position at the merged business, and took redundancy. A further 10-12 were not given a position. Four were redeployed within News. The balance of about 26 stayed to work with the new owners. The change in ownership also led to the loss of 100 printing positions in November 2016.

In March 2017, **ABC** managing director Michelle Guthrie unveiled plans to cut 200 jobs from the national public broadcaster, and create a $50 million content fund. Her public announcements, which MEAA described as being "light on detail and short on specifics", suggested that the bulk of the jobs to be lost would be among middle management with part of the savings to be redirected to creating 80 new positions in regional areas.

But just hours after Guthrie's announcement to staff that the restructure would free up more resources for content, production staff began being tapped on the shoulder for redundancy. A head count of 42 positions had been earmarked for redundancy. The jobs to be lost were in key production and operational support roles for television news and current affairs programs. MEAA called Guthrie to immediately explain how job cuts in key technical support roles will not impact on the ABC's news services.

MEAA Media director McInerney said: "These cuts to cameras, editing and other production support areas fly in the face of assurances made to staff at lunchtime yesterday that the redundancies would be concentrated in back office management," McInerney.

"The restructure was spun as good news, with $50 million to be allocated to a new content fund, including new positions in regional Australia. But now it seems Guthrie is robbing Peter to pay Paul.

"News and current affairs staff at the ABC are already overworked and have generated considerable efficiency gains while continuing to produce world-class content. Their dedication to the job is second to none," McInerney said.

"While management says no editorial positions will be affected, these cuts to production and operations staff cannot avoid having an impact on the delivery of quality news and current affairs to the Australian public."

MEAA noted that the large number of redundancies announced were the result of a series of funding cuts to the ABC by the Coalition government. Since 2014, the ABC has endured more than $250 million in budget reductions.

"It was very disappointing to hear Michelle Guthrie refuse to stand up for ABC funding during last week's Estimates hearings in Canberra," McInerney said. "If the managing director of the ABC won't champion the public broadcaster to government, who will?"

In May 2016 the ABC axed its Fact Check unit and made other editorial positions redundant – the inevitable result of funding cuts in the federal Budget. ABC management said 14 positions were to be cut from the Perth, Brisbane, Sydney, and Melbourne newsrooms.

The cuts are the result of the ABC's enhanced newsgathering budget being cut by $18.6 million over the next three years.

MEAA CEO Paul Murphy said: "As we had warned, these cuts – on top of the more than $250 million which was cut in 2014 and 2015 – will place news services at the ABC under extreme pressure. The timing for this decision could not be worse: in the lead up to the federal election, when strong journalism to independently scrutinise politicians' claims and counter-claims is needed.

"It is disturbing that even after these cuts, the director of ABC News, Gaven Morris, has warned of more challenges to continue delivering original and investigative journalism and local and regional newsgathering," Murphy said.

While MEAA acknowledged that externally imposed budget cuts are behind the job losses, a fairer process could – and should – have been extended to the area's facing cuts. A voluntary round would have allowed affected staff to make personal choices around exiting the organisation, as is practised by organisations such as News Corp and Fairfax.

In early April 2017 **Fairfax Media** announced a series of proposals to realise $30 million in cuts to the editorial budget and also released a "mission statement".

MEAA members in the Fairfax Sydney and Melbourne newsrooms strongly condemned the $30 million cut, urging the company to engage in genuine consultation with staff about ways to achieve savings while not cutting jobs.

MEAA Media section director Katelin McInerney said members on the floor were invested in the future of the Fairfax mastheads and the independence of their journalism. "The Fairfax brand of independent journalism is attracting a record number of subscribers and readers because these journalists deliver the kind of fearless and objective journalism audiences in a post-truth world are so reliant upon," she said.

"MEAA members in these newsrooms are committed to the delivery of fearless and objective journalism. That is why they are calling on the new leadership team at Fairfax to work with journalists at the coal face to find better ways to deliver that news, and find smarter sustainable ways to achieve savings. They reject the old lazy targeting of the very people the company relies upon; the people whose talent, skills and story-telling innovation are the key to the future success of the Fairfax brand of journalism," McInerney said.

The meetings also roundly rejected the comments made in the company's "mission statement", arguing against management attempts to impose ideological direction and to interfere with masthead independence and their fair and fearless journalism.

"The Fairfax motto 'Independent. Always' and the dedication of Fairfax journalists to that motto underpins public trust in Fairfax – they believe any departure from that would be a betrayal of the trust audiences put in them," McInerney said.

Previously, in April 2016, Fairfax had cut about 100 full-time equivalent positions in its metropolitan daily News and Business divisions in Sydney and Melbourne. About 20 jobs have been saved thanks to the intervention of MEAA members arguing for smarter cost-cutting options to be considered. Fairfax management exempted its executives from making sacrifices while rejecting many of the cost-saving initiatives suggested by staff that would have saved crucial editorial positions and maintained its ability to continue delivering high quality journalism.

Staff had earlier presented management with a job savings plan that included executive wage freezes, cuts to executive salaries and a reduction in the size of the board. These ideas were rejected by Fairfax management which claimed some of the cost savings were "outside the scope" of its cost savings "proposal".

MEAA Media director McInerney said: "The loss of these jobs will severely affect Fairfax's news gathering and reporting capability meaning that the real losers will be readers. It is not sustainable to expect the same output with 100 fewer journalists. Something has to give and it will be quality.

"The company has largely rejected sensible and creative alternative cost saving proposals put forward by its journalists – the people who best know and understand the business. The journalists are angry that the company has ruled out any reductions of executive bonuses and salaries. Collectively, the top four execs and the board earned almost $6.5 million last year," McInerney said.

Fairfax Media CEO Greg Hywood. PHOTO: JANIE BARRETT, COURTESY FAIRFAX PHOTOS

News Corp co-chairman Lachlan Murdoch. He also owns about 8 per cent of Network Ten. PHOTO: MICHAEL CLAYTON-JONES, COURTESY FAIRFAX PHOTOS

"The outcome of the consultation process with the company is highly unsatisfactory. The lack of clarity about how and where the redundancies will be achieved only deepens the concerns of journalists who worry about how their newsrooms will operate in future," she said.

In November 2016 Fairfax Media effectively merged its Melbourne-based **Metro Media Publishing** division with its Domain business while, at the same time, switching the editorial focus of MMP's nine *Weekly Review* community newspaper mastheads from local reporting to lifestyle stories. The decision to abandon local reporting led to the loss of 16 permanent positions and six casuals.

MEAA has good reason to believe that the f orced redundancies at MMP were part of a deliberate strategy by the company to "de-unionise" its workforce.
MEAA condemned the deliberate targeting of union members and the poor way in which MMP management handled the entire process, which greatly added to the distress of the affected workers.

MEAA said: "Under the current management, T*he Weekly Review* has now all but abandoned grassroots local reporting, and that is a great loss for the communities in which they are distributed.
We all understand that real estate and property advertising is the main source of revenue for the MMP newspapers, and it has always been that way for suburban newspapers. But we reject the way in which MMP has abandoned independent local journalism in pursuing its current strategy."

MEAA Media director McInerney said: "Local audiences are entitled to local news. Fairfax intends to strip out its local content from its suburban newspapers and instead drop in national stories. By removing local editorial staff, Fairfax is stripping these titles of the necessary 'boots on the ground' that are needed to scrutinise and report on local issues that are important to the local community.

"In the process, Fairfax is making redundant loyal and dedicated editorial employees, many of them who joined MMP because it is a training ground and stepping stone for a career in journalism. This is a short-sighted cost saving measure that only goes to weaken the quality of journalism these newspapers produce. It is a move that treats both the audience and the journalists with disdain and contempt," McInerney said.

The cash-strapped **Network Ten** was facing significant cost-cutting arising from the network's debts, including a $200 million debt with the Commonwealth Bank.

MEAA understand Network Ten will likely meet with staff to discuss the outcome of its meeting with its bankers and the options the company is considering.

THE ASIA-PACIFIC

Press freedom in New Zealand

By Colin Peacock

New Zealand appears on the Reporters Without Borders world map of press freedom as one of the cream-coloured countries. Not quite pure white, but as close as you can get.

Others include the Netherlands, Norway, Finland and Denmark – the only countries rated higher than New Zealand for press freedom in 2016. It is certainly comforting to be in the company of progressive northern European democracies.

The New Zealand's Media Freedom Committee's most recent action was highlighting a clause in the *Outer Space and High-altitude Activities Bill* that would make it an offence to take a photo or make any record of a rocket or spacecraft that crashes here.

If that's our most pressing restriction on media freedom right now, all would appear to be well in Aotearoa – the Land of the Long White Cloud.

However, there are darker clouds on the horizon.

For a start, it hasn't it always been as quiet in recent years so there's no room for complacency.

After Australia's Asio confirmed in parliamentary hearings this year it had been granted warrants to access reporters' metadata, political reporter Felix Marwick put the question to New Zealand's Security Intelligence Service (SIS) in March 2017.

The SIS did not confirm nor deny whether it sought warrants for surveillance of New Zealand journalists and authors.

2017 is election year again, and New Zealand journalists were the subjects of police investigations in the wake of poisonous election campaigns in 2011 and 2014.

Camera operator Bradley Ambrose was investigated by police after his remote microphone recorded a conversation between the PM John Key and another political party leader during the campaign in 2011.

It was far from the first time a leader's candid comments had been caught by a "hot mic" at a political photo opportunity. (Think Gordon Brown and "that bigoted woman" on the campaign trail in Britain a while back).

But rather than move on, John Key subsequently griped about "*News of The World* tactics" and complained to the police. Newsrooms were subsequently searched by police officers looking for the recording and Bradley Ambrose pursued a defamation claim against John Key.

Investigative reporter and author Nicky Hager had his home raided in 2014 by police officers looking for the identity of the source of the leaked emails at the heart of his lid-lifting book *Dirty Politics*. The book revealed connections between lobbyists, partisan bloggers and cabinet ministers and their staff. It also shone a light on senior politicians operating against both the spirit and the letter of our once ground-breaking freedom of information law.

In spite of the fact that Nicky Hager claimed journalistic privilege at the earliest opportunity, the Police – using the recently beefed-up Search and Surveillance Act – seized and copied documents and computers, including those belonging to his daughter. They also asked private companies – including Google – for his phone, travel and banking records.

In 2013, foreign correspondent Jon Stephenson sued the head of the NZ Defence Force for defamation in a gruelling High Court trial after the force tried to undermine an award-winning article lifting the lid on what NZ troops were up to in Afghanistan.

Also in 2013, political reporter Andrea Vance's phone calls and movements around Parliament were tracked by NZ's Parliamentary Services during an investigation into the leak of a report which revealed dozens of New Zealanders had been under surveillance by the national spy agency the GCSB – illegally as it turned out.

Pushback brings results

In all these cases, there were consequences for the people and institutions that overreached and compromised press freedom without good reason.

The Defence Force eventually settled with Jon Stephenson in 2015 and apologised for the misleading claims. In March 2016, PM John Key reached a confidential settlement with Bradley Ambrose before his defamation case got to court. The head of New Zealand's parliamentary service quit after the Andrea Vance investigation, and apologised for the unwarranted intrusion on her privacy.

A judge eventually ruled the police raid on raid Nicky Hager's home was unlawful and the police have since apologised. That sorry episode has at least clarified the application

of the principle of journalistic privilege under the law for journalists obliged to keep sources confidential.

In December 2016, Police confirmed damages will be paid to Nicky Hager's daughter and the Privacy Commissioner censured Westpac for releasing more than 10 months worth of his bank records to the police. Nicky Hager's own legal action against the police and Westpac is ongoing.

If 2016 was quiet on the media freedom front, it was perhaps because these journalists and their supporters pushed back in all of these cases.

In 2016 the outfit which represents the media's mutual interests – the New Zealand Media Freedom Committee – was not often called into action to rail against incursions into the freedom of the press.

TV reporter Heather Du Plessis Allan was investigated by police and had her home and newsroom raided in 2016 after a TV expose showing how easy it was buy firearms online without a licence. She had used the name of a police officer without permission for the transaction which is against the law, but the subterfuge exposed a loophole which could allow people to bypass important restrictions on buying guns.

But that was the only case in 2016 where the police investigated a reporter. She and her employers received a warning but were not prosecuted.

In May the Media Freedom Committee's chair praised the newly appointed Chief Ombudsman for tackling a longstanding bugbear of the news media – non-compliance with, and interference in, the operation of the Official Information Act 1982.

Former judge Peter Boshier pledged to hurry up and name and shame government departments and chain-dragging civil servants who were slowing down the release of official information. A $500,000 "fighting fund" was established to help clear the logjam which means some journalists have been waiting several years for official information they should have had in 20 working days.

In a book published in 2016, former NZ Herald editor Gavin Ellis argued New Zealanders had become blase about "the protracted war between the public's right to know and political or bureaucratic self-interest."

"It is a war largely ignored by a general public that is either indifferent or perhaps beguiled by the belief that we live in a free country," he wrote in *Complacent Nation*.

When former PM-turned constitutional lawyer Geoffrey Palmer published a proposed new constitution for New Zealand in 2016, he suggested an independent body to stop political meddling with the Official Information Act be written into it.

A law change which came into effect in July 2016 gave media a small win – greater scope to report on the sensitive yet important topic of suicide.

The *Coroner's Act* 2006 restricted reporting of individual suicides. The media could not make public the details of any self-inflicted death. A tweak of the law now means a death can be reported as a *suspected* suicide before the coroner has ruled on a case.

In a submission to a government review of the effects of digital-age convergence, The NZ Media Freedom Committee said: "For a free press to properly function in a democracy, regulation should be light-handed."

They got their wish. New Zealand's current government remains steadfastly hands-off.

In Britain and Australia, the News Corp phone hacking scandal fallout prompted state-backed inquiries into media ethics and accountability that left media organisations fending off demands for tighter regulation – and even the creation of new watchdogs with greater powers to punish the media.

But any concerns that the wild west of cyberspace needed a new sheriff went unheeded in New Zealand.

In 2016, the industry-funded self-regulatory NZ Press Council was given jurisdiction over online output of news media while the state-backed Broadcasting Standards Authority's remit has been extended to cover the online on-demand streaming services.

Own worst enemy?

In other cases of complaints about press freedom under attack in 2016, the media themselves were the problem.

In April, *Newshub* unreservedly apologised to the Reserve Bank of New Zealand after one of its reporters, who has never been publicly named, broke "lock-up" embargo rules and passed news of an interest rate change to colleagues more than an hour early.

The potentially market-shifting information ended up in the hands of a blogger before the official announcement.

The Reserve Bank called an immediate end to allowing journalists early access to crucial documents and banned parent company MediaWorks' journalists from attending press conferences.

Former New Zealand Prime Minister John Key.
PHOTO COURTESY FAIRFAX PHOTOS

The NZ Media Freedom Committee said the Reserve Bank's response was "disproportionate and contrary to the public interest," noting that Newshub had acknowledged fault and improved its own processes in response".

MediaWorks had claimed it had notified the Reserve Bank as soon as it identified the source of the breach.

However, the Reserve Bank meeting minutes later revealed MediaWorks had to be prompted to admit the breach.

In August, Fairfax Media NZ said it was "a great day for press freedom" when the High Court dismissed an injunction on Fairfax Media's planned coverage of the Rio Olympics.

They argued the holders of the exclusive TV rights were imposing unfair restrictions on posting online video and, along with rival news publisher NZME, cancelled plans to send reporters to Rio.

But the other party in the dispute was another local media company: pay-TV operator Sky TV.

The Olympics are long over, but this dispute may yet be settled in court. It's never a good look for one media company to be claiming a win for press freedom against another.

But two other rival media companies who want to get together to form one has also sparked worries about media freedom in New Zealand.

By the time you read this, New Zealand's competition watchdog – the Commerce Commission – is due to have decided whether to give a green light to a proposed merger of Fairfax Media NZ and NMZE.

The two companies dominate the national newspaper business. Their news websites and apps command by far the biggest audiences for local news online. They argue a merger is the only way to create a sustainable business that can covering news nationwide, whilst also competing with other media and online titans like Facebook and Google.

But it would also mean one team of journalists and editors covering news, business, politics and sport – instead of two. Would it be duplication or diversity that is eliminated?

Opponents of the merger have pointed out the concentration in media ownership in New Zealand was already greater than almost anywhere outside China – where media freedom as we know does not exist.

The potential danger of concentrating editorial control even further are obvious, especially in a small country like New Zealand.

Colin Peacock is the presenter of RNZ's (Radio New Zealand) "Mediawatch" program.

Press freedom in the Asia-Pacific

By the International Federation of Journalists Asia-Pacific

Few could downplay the pressure and intensity of the media scene in the Asia-Pacific. It is vibrant in terms of the sheer number and diversity of media outlets and the passion of its journalists, but also incredibly challenged when it comes to safety and aggressive controls placed on freedom of expression.

Across the region, journalist killings continue to wreak havoc on the media community. Since April 2016, 18 journalists and media workers have been killed in the Asia Pacific.

However controls across the Asia Pacific continue to develop, with a growth in online controls and surveillance under the guise of national security rampant across China, India and Pakistan.

China has fast become a nation under surveillance, with the world's toughest laws on data privacy, surveillance and metadata.

Governments and policy makers across the region are making it increasingly difficult for journalists to operate, impeding on press freedom.

In **Indonesia**, blasphemy charges have been levelled against media houses and journalists, raising serious questions about press freedom in the Muslim-majority nation.

In **Pakistan**, newspapers have been forced to shut by local authorities, while complaints from the National Government to Facebook have seen content removed which threatens national security.

In **Vanuatu**, the long-awaited Right to Information Act was legislated in November 2016, and implementation began in early 2017. The implementation process will take five years, but has been heralded as a success in Vanuatu. The media continues to grow and develop in Vanuatu, adapting to change with the growth of digital media.

Thailand's press freedom continued to weaken in 2016 under the military junta which are increasingly strengthen their control of the media through repressive legislation. In early 2017, the National Reform Steering Assembly (NRSA) media reform panel pushed through the controversial media regulation bill, which has been labelled a form of state control. Part of the bill will include the establishment of a "national media profession council" that will be empowered to penalise media outlets that violate the code of conduct. The media bill is the latest step by the military junta to control and stifle the media. Since the coup in 2014, the media has been under attack, with media houses shut down and journalists arrested.

In **Timor Leste,** although criminal defamation was made illegal, in 2016, two journalists, Oki Raimundos and Lourenco Vincente continued their fight against the Timor Leste Prime Minister's defamation charges. The Prime Minister brought charges against the journalists for a story published in 2015. The journalists, and the publication the *Timor Post*, issued an apology and correction the day after the story and the error was published as per the guidelines of the TImor Leste Media Law. Oki and Lourenco remain on bail in Timor Leste as the case is processed through the courts. The IFJ and several international media organisations, including CPJ, Freedom House and SEAJU have pushed for the charges to be dropped.

There were great hopes for press freedom in **Myanmar** following the elections in 2015. Since then, the media has experienced a more friendly environment, but challenges remain. Executives from Eleven Media Group were jailed after the media outlet published a report involving Yangon Chief Minister Phyo Min Thien. After two bail requests were denied, the Eleven Media Group decided to publish an apology for running the story. Criminal defamation also remains legal under the Penal Code and can lead to 15 years imprisonment. In early 2017, the editor of *Myanmar Now* had criminal defamation charges brought against him by Buddhist monk over a Facebook post.

While there is cause for concern across the region, there positive changes happening across the board. In July 2016, **Sri Lanka** passed RTI (right to information) legislation after years of campaigning from press freedom bodies.

After strong campaigning from media unions, minimum wage was implemented in **Nepal** in 2016.

And in **India**, after 10 months in detention, Chhattisgargh journalist Sandesh Yadav was released in early 2017.

Philippines

With the election of President Duterte in 2016, there was an opportunity for change in the Philippines. Under the newly elected President, the first executive order that was passed guaranteed Freedom of Information, however, the situation for journalists quickly deteriorated.

With the launch of Duterte's war on drugs, the media was caught trying to report on the situation but remain safe.

A protest against the murder of bloggers in Bangladesh]

Impunity continues to thrive across the country, with the Philippines remaining one of the deadliest countries for journalists in the world. To-date not a single person has been prosecuted for the single deadliest attack on journalists in history, the Ampatuan Massacre, which saw 32 journalists among the 58 people killed.

In 2016, there were small wins for impunity in the Philippines. In June, Dennis Lumikid was convicted of the 2010 murder of Desiderio Camangyan. Lumikid, a local police officer as sentenced to a maximum of 40 years imprisonment for the murder of Mati City broadcaster, Desiderio Camangyan on June 4, 2010. Camangyan was a blocktimer for a program on Sunrise FM. He was hosting a local singing contest in a village in Manay, Davao Oriental in the southern Philippines when he was killed.

China

The situation in China continues to deteriorate, as the government increases its control and suppression of press freedom. In 2016, the use of "forced" televised confessions continued, with journalists forced to confess for their "crimes", which often secured a quick release or lesser sentence. However, more concerning was the rise of "forced abductions" at the hands of authorities.

In 2016, the IFJ recorded 68 media workers who were detained in China, which was an increase from 51 in 2015. The increasing suppression of the media in China is evident by the changing and evolving tactics of the authorities.

The result was that 1.3 billion people – close to 20 per cent of the world's population – were denied their full rights to information, free expression and a free press.

Under the guise of national security, legal constraints have extended into the online realm, further restricted access to information for the Chinese people.

South Asia

India has continued to suffer through some of its worst years for journalists, with five journalists killed and numerous press freedom violations across the country. Political instability in Kashmir saw the press shut down for several days, while the internet was shut down for several weeks. Online harassment of journalists, particularly women, continued to weaken freedom of expression across the country.

Press freedom in **Bangladesh** and the **Maldives**

continues to be hampered with attacks from state and non-state actors. In the **Maldives** legal challenges from the government and MPs have left journalists imprisoned and facing lengthy legal processes. In **Bangladesh**, while the killing of secular bloggers has stopped, the press remains vigilant and on high alert.

Afghanistan saw one of the deadliest years in 2016, with 13 media workers killed. Attacks against the media at the hands of Taliban are becoming an all-to regular occurrence in Afghanistan. Radio stations were bombed, media owners were stalked, threatened and attacked and female media workers also face cultural pressures. Yet the media community continues to work and share the news and stories for the country.

Sri Lanka continued to strengthen in 2016, building on the steps made in 2015. The Right to Information was legislated in July 2016, after years of campaigning and advocacy. Impunity wins have continued in 2016, with further investigations and arrests made in the disappearance of Prageeth Eknaligoda and the murder of Lasantha Wickremetunge.

There remain challenges for journalists, evident in the attack on a journalists by a navy commander in last 2016, but the media continue to campaign for change and ensure the press in Sri Lanka becomes a strong element of the country's democracy.

MEAA is an affiliated member of the International Federation of Journalists and hosts its Asia-Pacific office at MEAA's national office in Sydney.

The CEO of Myanmar's Eleven Media Group entering court

The Media Safety and Solidarity Fund

A MEAA initiative established in 2005, 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. It is a unique and tangible product of strong inter-regional comradeship.

It is administered through the Asia-Pacific office of the International Federation of Journalists in collaboration with MEAA and the MSSF board.

The fund trustees direct the International Federation of Journalists Asia-Pacific office to implement projects to be funded by MSSF. The fund's trustees are Stuart Washington, the national MEAA Media section president; the two national MEAA Media vice-presidents Gina McColl and Michael Janda; two MEAA Media federal councillors, Ben Butler and Alana Schetzer; and Brent Edwards representing New Zealand's journalists' union, E tü, which also supports the fund.

The main fundraising activities of the fund are from MEAA members as a result of enterprise bargaining agreement negotiations, the Press Freedom Australia dinners, auctions and raffles; and the presentation dinner for the annual Walkley Awards for Excellence in Journalism. New Zealand's journalists' union, E tü also supports the fund. In 2014 and again in 2015 Japan's public broadcasting union Nipporo also made contributions to the fund.

In 2016, the MSSF continued to support a number of key projects and activities conducted by the IFJ Asia-Pacific. It supports the IFJ's human rights and safety program which monitors, campaigns and advocates for press freedom and safety in the region. It also offers immediate support to journalists across the Asia Pacific.

In 2016-17 the MSSF supported 26 children in Nepal and 62 children in the Philippines. In addition, the MSSF has provided support to the son of Fijian journalist Sitiveni Moce who died in 2015.

Press freedom

MSSF supports the human rights and safety program, which monitors press freedom and journalist safety issues in the region, and offers immediate emergency support to endangered journalists facing threats or harm across the Asia-Pacific.

The MSSF also supports the IFJ's China Press Freedom project, which is co-funded by the National Endowment for Democracy (NED). The project aims to promote and support press freedom in China, by strengthening the capacity of the media community to act as watchdogs. The project supports a China project coordinator, regularly media monitoring and reporting on press freedom violations. The project also included two workshops on safety, activism, negotiation and digital security, as well as the production of the annual China Press Freedom Report[140] and the digital security handbook.

Some of the 30 Nepalese children, who have lost a journalist parent, who are being educated with the help of the Media Safety and Solidarity Fund, with International Federation of Journalists staff

Supporting the children of slain journalists

In 2015 MSSF continued its vital support for the education of children in Nepal and the Philippines whose parents have been killed for their work in the media.

During 2015-16 MSSF supported 30 children in Nepal. Another 85 students were supported in the Philippines (18 are at elementary school, 35 are at high school and 33 are in college). Twenty-eight of these are the children of journalists slain in the November 23, 2009 Ampatuan Massacre in southern Mindanao. This was the worst slaughter of members of the media – 58 people were murdered, 32 of them journalists and their killers have yet to be convicted.

In early April 2016, a three-day vacation camp was organised for the students in Nepal. The camp provided them with opportunity to meet each other and share their experiences.

During the camp, the students were also provided with trauma counselling following the devastating earthquake that hit Nepal in April and May in 2015.

In addition, MSSF has provided support to the son of Fijian journalist Sitiveni Moce who died in 2015 from injuries and later paralysis sustained in an assault by coup supporters in 2006.

MSSF also provided support to Uma KC, a graduate of the Nepal Children's Education Fund to assist her journalism work in Nepal.

Rebuilding after natural disaster

Following the devastating earthquakes in Nepal in April and May 2015, MSSF provided $A14,000 to the IFJ affiliate, the Federation of Nepali Journalists, to assist with recovering and rebuilding media infrastructure after the earthquake.

As part of the support package, MSSF supported a three-day trauma and safety workshop in Kathmandu, Nepal, which was held in February 2016. The workshop was run by DART International and included a train-the-trainer component, with the aim that the journalists would gain the skills to share their knowledge and train their colleagues.

The workshop was an important part of MSSF's support, to ensure the media would play an important role in rebuilding Nepal.

MSSF also provided financial support to the Media Association blong Vanuatu (MAV) following devastating Tropical Cyclone Pam that hit the island chain in March 2015. The support focused on assisting the media get back to work after the disaster and rebuilding media houses.

The Media Safety and Solidarity Fund remains one of the few examples of inter-regional support and cooperation among journalists across the globe.

THE FUTURE

The way forward

By Mike Dobbie

It says: "Rope. Tree. Journalist. Some assembly required." When this t-shirt re-appeared at a Trump rally last November, there were reports that it had been quickly withdrawn from sale. Not so. For just $29 plus shipping it can still be yours via a San Francisco-based online design outlet.

It seems like it's been open season on journalists for years. More than 3000 have been slain in targeted killings and cross-fire incidents since 1990; 93 killed just last year. Increasingly, impunity reigns so that the killers literally get away with murder.

Indeed, Australian law enforcement agencies have demonstrated they are not prepared to vigorously investigate crimes against our colleagues. Nine Australian journalists have been murdered in the past 42 years and still not a single killer has been brought to justice.

Now it seems it is open season on journalism itself. Scrutinising the powerful, reporting the truth and informing our communities – these are all being mocked and assaulted by those who seek to deceive for their own ends.

Journalism is being criminalised. The act of reporting in the public interest can lead to imprisonment. We know that's the case in Turkey, in Egypt, in China… Add Australia to the list.

Australia's parliament passed section 35P of the *Asio Act* with bipartisan support, allowing for imprisonment for five or 10 years for a journalist reporting on a "special intelligence operation" – but because SIOs are secret, a journalist wouldn't necessarily know if an operation was an SIO.

Any journalist "recklessly" publishing a legitimate news story could still face lengthy jail time.

After MEAA and others spoke out, the Independent National Security Legislation Monitor, Roger Gyles (who later quit his post 14 months into a two-year term), made a modest recommendation since enacted: a defence of prior publication. But there has been no change to the penalties. Any journalist "recklessly" publishing a legitimate news story could still face lengthy jail time.

So being first with breaking news can get you up to 10 years in the slammer. How's that for a "chilling effect" on journalism?

Now Attorney-General Brandis is considering extending Gyles' recommendation to Australian Federal Police "controlled operations". So will journalists face jail for being first to reveal a botched AFP investigation?

Section 79 of the Commonwealth *Crimes Act* provides jail terms of six months to seven years for "receiving" a leaked official document ("any sketch, plan, photograph, model, cipher, note, document, article or information"). Multiple AFP raids about NBN leaks are not unknown.

Meanwhile, in February 2017 Asio Director-General Duncan Lewis hinted that the first Journalist Information Warrants to be issued under the new metadata retention laws (an odd own goal: disclosure of the existence of a warrant is punishable with two years' jail). These warrants allow 21 government agencies to trawl through two years' worth of journalists' and media organisations' telecommunications data in order to discover our sources. It's all done without our knowledge, so we'll never know how many contacts and news stories have been compromised.

Are we now being spied on because of our journalism?

The government still refuses to reveal what goes on at sea under the military veneer of "Operation Sovereign Borders" or what takes places in asylum-seeker detention centres. While health professionals were exempted in October, other "entrusted persons" face two years' jail for revealing the truth.

While there are some whistleblower protections available in the public sector through the flawed *Public Interest Disclosure Act 2013*, Fairfax Media's reports show that private sector whistleblowers are routinely harassed, threatened and punished in revenge for having exposed corporate fraud, illegality, dishonesty and threats to public health and safety. Journalists must stand up to protect our sources, who risk so much in order for the truth to be told. MEAA has made a submission to the parliamentary inquiry.

Defamation laws continue to be used to harass, intimidate, muzzle and punish journalists and media outlets. The uniform defamation regime is used to assuage the hurt feelings of the rich and powerful, who don't have to prove their reputations have been harmed in order to win massive payouts.

The ongoing failure of lawmakers in Queensland, South Australia and the Northern Territory to introduce shield laws allows plaintiffs to subpoena a journalist to compel them to cough up the identity of a confidential source. If the journalist maintains their ethical obligation to always protect the source's identity, they risk a fine, imprisonment or both, plus a criminal conviction for contempt of court.

If the outrageous use of suppression orders is any guide, the courts aren't of a mind to do the fourth estate any favours. In Victoria, an average of two suppression orders are issued every working day. Fortunately, Victoria is reviewing its *Open Courts Act 2013*, which has failed miserably to rein in judges who suppress information on spurious grounds for periods of up to five years (MEAA's submission to the review notes that judges regularly fail to meet the requirements of the Act).

With fake news on everyone's lips, it's worth remembering the Pizzagate incident when a man entered a restaurant in Washington DC with an assault rifle because he wanted to "self-investigate" fake news websites' claims that a paedophile ring was being run from its basement by Bill and Hillary Clinton. The allegation was false. The three shots he fired were real. The gunman later said: "The intel on this wasn't 100 per cent."

So this is where we are now. The public's right to know is mocked and blocked. Governments either enable attacks on press freedom or initiate them. Some 259 journalists were imprisoned last year. Our colleagues are killed for doing their job and, in death, are denied justice. Legitimate news organisations are described as purveyors of fake news and enemies of the people. Armed vigilantes "self-investigate" by packing an assault rifle.

If that's where we are, where do we want to be? Clearly practising journalism can be a life or death issue in many countries of the world. The violent threats and attacks on the media, the willingness to allege "fake news" in the face of unpalatable facts, the willingness to believe conspiracy theories promulgated by those seeking to gain from telling lies, all contribute to undermining press freedom.

But increasingly, lawmakers are enacting laws that criminalise legitimate journalism in the public interest while wrapping themselves up in claims that they are true champions of freedom of speech. The earnest efforts to be seen as a free speech advocate is burst easily enough by looking at legislation voting records.

If politicians truly want to demonstrate that they are free speech champions, then they should act like it.

What is needed is a determined effort to roll back the laws that impede the media from doing its job. Government must accept that it has to be open and transparent and subject to the media's scrutiny. If the lack of trust for journalists is at record lows, politicians must admit they have contributed to that perspective by their own actions.

Too often national security has been the catch-all defence of a battery of new laws that, instead of making us safer, are being used to erode press freedom, muzzle the media and trample on the public's right to know. There is no demonstrable reason for why these new laws must go after legitimate public interest journalism – indeed, it makes a mockery of the democracy the new laws seek to defend.

Governments have expended extraordinary efforts to cloud their policies toward asylum seekers. First, behind a pompous need for military secrecy followed by passing the responsibility to foreign governments growing wealthier off Australian taxpayer-funded offshore detention centres. And finally, enacting legislation to jail any "entrusted persons" who dare reveal what goes on in our name. Only governments with something to hide need fear scrutiny. It's about time the Australian public were allowed to discover what goes on.

The desire to hide from scrutiny seems to have also infected our courts with their over-use of suppression orders. Courts in Victoria and South Australia must abandon their desire to shut down the media and operate as their counterparts in other states do.

Defamation in Australia must be reviewed, not least because the media now operates digitally and the law does not. Defamation has become a money bank for those with hurt feelings to win large payouts from the media, rather than providing a sensible and practical solution for those with genuine reputations that may have been damaged.

The remaining hold-out governments that refuse to enact shield laws for journalists must join with the rest of the country before a disaster occurs – because their refusal places every journalist in danger.

The media often does not help itself when it comes to press freedom. There is no doubt that the industry is beset by turmoil triggered by

Finally, the lives of Australian journalists must be respected. For more than 40 years to go by since the deaths of our colleagues in East Timor and the disappearance of Juanita Nielsen, with no justice is inexcusable. And that fact that two more journalists have been killed with no charges brought against the perpetrators is even more crushing. The failure of governments and their agencies to pursue the killers of journalists enables impunity to reign, cheapens life, and signals that journalists' lives are not worth as much as others in our community.

From there it is just a small step to:

Rope. Tree. Journalist.

Mike Dobbie is the communications manager for MEAA Media. Part of this article first appeared in *The Walkley Magazine – Inside the Media in Australia and New Zealand*.

REFERENCES

1 https://www.caselaw.nsw.gov.au/decision/54a63cd93004de94513db98f
2 https://www.caselaw.nsw.gov.au/decision/54a63ffd3004de94513dc96d
3 https://www.caselaw.nsw.gov.au/decision/54a63dab3004de94513dc033
4 https://theconversation.com/social-media-and-defamation-law-pose-threats-to-free-speech-and-its-time-for-reform-64864
5 https://www.meaa.org/mediaroom/meaa-media-and-s18c/
6 http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia
7 https://www.meaa.org/meaa-media/code-of-ethics/
8 https://pressfreedom.org.au/suppressing-the-right-to-know-7278302f9b7
9 http://www.theaustralian.com.au/national-affairs/indigenous/warren-mundine-leads-the-call-to-amend-racehate-laws/news-story/3414216cdc1bcf01f926d1d0d766edca
10 Greg Sheriden, The Australian, October 9 2014 http://www.theaustralian.com.au/national-affairs/opinion/limits-on-media-are-a-blow-to-the-peoples-right-to-know/story-e6frgd0x-1227084257012
11 https://www.dpmc.gov.au/pmc/publication/report-impact-journalists-section-35p-asio-act
12 https://www.meaa.org/mediaroom/asio-redraft-signals-need-for-rethink/
13 https://www.meaa.org/resource-package/press-freedom-report-2006/
14 http://www.abc.net.au/news/2016-01-25/ex-judges-appointed-to-defend-journalists/7112256
15 http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-appoints-exjudges-to-defend-journalists-under-data-retention-laws-20160124-gmczxg.html
16 http://www.crikey.com.au/2016/01/25/meet-the-judges-turnbull-trusts-to-secretly-advocate-for-journos-sources/
17 http://www.abc.net.au/news/2016-01-25/ex-judges-appointed-to-defend-journalists/7112256
18 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=COMMITTEES;id=committees%2Festimate%2F6aee39c2-452e-44fb-87dd-7e3638a03b83%2F0012;orderBy=priority,doc_date-rev;query=Dataset%3Aestimate;rec=3;resCount=Default
19 http://www.austlii.edu.au/au/legis/cth/consol_act/taaa1979410/s182a.html
20 http://mlsv.org.au/wp-content/uploads/2013/09/Justice-Betty-King-Underbelly.pdf
21 ibid
22 http://www.smh.com.au/comment/valid-reasons-for-suppression-orders-victoria-chief-justice-20151017-gkbkvu.html
23 http://www.theage.com.au/victoria/court-suppression-orders-still-issued-in-their-hundreds-in-victoria-20151010-gk611a.html
24 https://twitter.com/s_deery/status/826975219378032640
25 Editorial http://www.theage.com.au/comment/the-age-editorial/suppression-orders-restricting-the-publics-right-to-know-20161111-gsnac0.html
26 ibid
27 http://www.smh.com.au/comment/valid-reasons-for-suppression-orders-victoria-chief-justice-20151017-gkbkvu.html
28 ibid
29 http://glj.com.au/
30 Two Years of Suppression under the Open Courts Act 2013 (Vic), Jason Bosland, Sydney Law Review, 2017
31 http://www.abc.net.au/news/2015-07-09/suppression-orders-being-issued-far-too-often-in-victoria/6608438
32 Two Years of Suppression under the Open Courts Act 2013 (Vic), Jason Bosland, Sydney Law Review, 2017
33 http://mlsv.org.au/wp-content/uploads/2013/09/Justice-Betty-King-Underbelly.pdf
34 ibid
35 ibid
36 http://www.theage.com.au/comment/the-age-editorial/suppression-orders-restricting-the-publics-right-to-know-20161111-gsnac0.html
37 https://www.meaa.org/resource-package/press-freedom-report-2013/
38 Two Years of Suppression under the Open Courts Act 2013 (Vic), Jason Bosland, Sydney Law Review, 2017
39 http://www.legislation.vic.gov.au/domino/web_notes/ldms/pubpdocs_arch.nsf/5da7442d8f61e92bca256de50013d008/ca2570ce0018ac6dca257b9600097bb7!OpenDocument
40 ibid
41 "Without a Trace", IFJ global campaign on missing media workers, September 2015, http://www.ifj.org/missing/
42 ibid http://www.ifj.org/missing/case-file-01/
43 Philip Dorling, "AFP fails to question Jakarta in Balibo Five investigation", The Sydney Morning Herald, October 13 2014 http://www.smh.com.au/national/afp-fails-to-question-jakarta-in-balibo-five-investigation-20141013-115ayu.html
44 ibid
45 ibid
46 Helen Davidson, "Balibo Five: police drop investigation into killings of Australian journalists", Guardian Australia, October 21 2014, http://www.theguardian.com/australia-news/2014/oct/21/balibo-five-police-drop-investigation-into-killings-australian-journalists
47 "AFP fails Balibo Five, impunity wins", October 22 2015 http://www.alliance.org.au/afp-fails-the-balibo-five-impunity-wins
48 Sara Evringham, "Balibo Five: Relative of one of the victims calls for AFP to reopen war crimes investigation", October 16 2015, ABC online http://www.abc.net.au/news/2015-10-16/balibo-five-relatives-call-for-investigation-to-be-reopened/6859058
49 Agence-France-Presse, "Norway banishes Islamist preacher to remote village after prison release" The Guardian, February 3 2015 http://www.theguardian.com/world/2015/feb/02/norway-banishes-islamist-preacher-to-remote-village-after-prison-release
50 "Norwegian Islamist Mullah Krekar arrested for Charlie Hebdo comments", March 3 2015, http://www.news.com.au/world/norwegian-islamist-mullah-krekar-arrested-for-charlie-hebdo-comments/story-fndir2ev-1227245521379
51 http://www.abc.net.au/corp/memorial/tonyjoyce.htm
52 http://www.smh.com.au/comment/tony-joyce-truth-the-casualty-in-the-unsolved-murder-of-australian-journalist-20150730-gio4sk.html
53 ibid
54 https://www.theguardian.com/world/2014/may/07/asylum-seeker-lifeboats-stripped-of-their-safety-equipment
55 https://www.theguardian.com/commentisfree/2014/jan/15/without-press-briefings-how-can-journalists-hold-morrison-to-account
56 https://www.theguardian.com/australia-news/2015/jul/20/details-about-asylum-seeker-turnbacks-to-remain-secret-commissioner-rules
57 https://www.theguardian.com/australia-news/2015/sep/02/immigration-head-launches-legal-bid-to-keep-boat-turnback-document-secret
58 https://www.theguardian.com/australia-news/2016/aug/09/sovereign-borders-chief-argues-hiding-asylum-seeker-boat-turnbacks-essential-for-security
59 https://www.scribd.com/document/343466812/20131118-MIBP-Letter-Attachment-B-to-Authority-to-Commence-Turnback-Operations-15154420
60 https://www.scribd.com/document/343466970/Documents-Released-to-Mr-Farrell-8-August-2016
61 https://www.theguardian.com/australia-news/2017/apr/03/details-of-australias-asylum-seeker-turnback-operations-released-in-foi-battle
62 https://www.theguardian.com/australia-news/2016/aug/08/documents-immigration-secret-asylum-seeker-boats-accidentally-released-guardian-australia
63 https://www.theguardian.com/world/2014/feb/19/australian-vessels-unintentionally-entered-indonesian-waters-six-times
64 https://www.theguardian.com/world/2014/apr/17/australian-ship-went-far-deeper-into-indonesian-waters-than-disclosed
65 https://www.theguardian.com/world/2016/apr/14/federal-police-admit-seeking-access-to-reporters-metadata-without-warrant
66 https://www.scribd.com/document/343581825/File-Note-CIN-557-Redacted-Copy-FARRELL-FOI-Request-417
67 https://www.theguardian.com/australia-news/2017/apr/03/australias-government-muddles-its-way-through-to-hide-details-of-boat-turnbacks
68 http://www.smh.com.au/federal-p stories litics/political-news/foi-documents-suggest-attorneygeneral-george-brandis-misled-parliament-20160922-grlsh0.html
69 http://www.theaustralian.com.au/national-affairs/bob-day-sold-office-but-benefit-remained/news-story/8701407c0dc007dfc86eab551db53ac0
70 http://www.theaustralian.com.au/national-affairs/foreign-affairs/millions-flow-to-european-money-havens/news-story/c825defcb7591de9c5a1d506dba31789
71 http://www.smh.com.au/federal-politics/political-news/pm-and-ministers-were-told-wind-not-to-blame-for-sa-blackout-20170212-guaxf0.html
72 https://www.crikey.com.au/2017/02/21/rudd-turnbull-un-wickr-chats-go-missing/
73 http://www.austlii.edu.au/au/cases/cth/AICmr/2016/16.html
74 http://www.abc.net.au/news/2016-10-25/barnaby-joyce-relationship-with-former-agriculture-head-revealed/7962142
75 http://www.smh.com.au/federal-politics/political-news/george-brandis-finally-releases-ministerial-diary-after-threeyear-legal-battle-20170319-gv1cm6.html
76 http://www.austlii.edu.au/au/cases/cth/AICmr/2016/84.html
77 http://www.theaustralian.com.au/news/nation/turnbull-appeals-ruling-opening-his-diary-to-public-view/news-story/63e9734a71ef9a30f70db96b096e2c29
78 http://www.austlii.edu.au/au/cases/cth/AICmr/2017/9.html
79 http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22s702%22%20Dataset%3Ahansardr,hansards%20Title%3A%22second%20reading%22;rec=1
80 Cross-media ownership rules due for review, says Communications Minister Malcolm Turnbull, abc.net.au/news, March 9, 2014 http://www.abc.net.au/news/2014-03-09/cross-media-ownership-rules-due-for-rethink-malcolm-turnbull/5308550
81 Cross-media ownership: Malcolm Turnbull says local content would not suffer under proposed changes, abc.net.au/news/, March 10, 2014 http://www.abc.net.au/news/2014-03-10/cross-media-ownership-laws-malcolm-turnbull-john-williams/5309526
82 Matthew Knott, "Malcolm Turnbull moves to scrap key media ownership restrictions", The Sydney Morning Herald, March 14 2015 http://www.smh.com.au/federal-politics/political-news/malcolm-turnbull-moves-to-scrap-key-media-ownership-restrictions-20150313-143leg.html
83 http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r5635_first-reps/toc_pdf/16038b01.pdf;fileType=application%2Fpdf
84 https://www.communications.gov.au/what-we-do/television/media/updating-australias-media-laws
85 A trigger event occurs where, as a result of a change of control of a commercial television licence, the audience reach exceeds 75% of the Australian population.
86 Policy Background Paper, Media Control and Ownership, Department of Communications', June 2014, p.p. 35-36
87 ibid
88 Minister for Communications, Senator Mitch Fifield, National Press Club Address, Canberra, 16 March 2016.
89 https://theconversation.com/factcheck-is-australias-level-of-media-ownership-concentration-one-of-the-highest-in-the-world-68437
90 https://www.theguardian.com/australia-news/2017/jan/19/nick-xenophon-pushes-to-decriminalise-public-service-leaks-after-centrelink-scandal?utm_source=dlvr.it&utm_medium=twitter
91 http://www.adelaidenow.com.au/news/south-australia/public-interest-disclosure-bill-to-replace-whistleblowers-laws-as-wanted-by-icac-but-wont-have-disclosure-protection/news-story/e38eef64bba95c7f035588c21e3b8552
92 Trevor Timm. (2017, 14 February). Flynn resignation shows leaks under Trump are working. Keep 'em coming. Columbia Journalism Review: http://www.cjr.org/first_person/michael-flynn-trump-leaks.php
93 Michael D Shear. (2017, 15 February). After election, Trump's professed love for leaks quickly faded. The New York Times: https://www.nytimes.com/2017/02/15/us/politics/leaks-donald-trump.html?_r=0
94 Emma Griffiths. (2015, 23 June). The Killing Season: Kevin Rudd all but confirms he was behind leak that damaged Julia Gillard. ABC News: http://www.abc.net.au/news/2015-06-23/kevin-rudd-all-but-confirms-he-was-behind-julia-gillard-leak/6564862
95 Peter Van Onselen. (2016, 26 March). No wrecking, no undermining and no sniping: no kidding, Abbott? The Australian: http://www.theaustralian.com.au/opinion/columnists/peter-van-onselen/no-wrecking-no-undermining-and-no-sniping-no-kidding-abbott/news-story/2f18ce7bae63f873d53763a04def3518
96 Joseph M Fernandez. (2015). Asia Pacific Media Educator. 25(2) 305–318, p. 316.
97 Trevor Timm, above fn.
98 Australian Public Service Commission. APS Values and Code of Conduct in Practice, para 4.5.3: http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice
99 Media Watch. (2016, 23 May). Secrecy laws here to stay? ABC Television quoting Professor AJ Brown: http://www.abc.net.au/mediawatch/transcripts/s4467708.htms
100 Philip Dorling. (2015, 17 March). Security laws bring us closer to the day when journalists will be jailed for reporting. The Sydney Morning Herald: http://www.smh.com.au/federal-politics/political-opinion/security-laws-bring-us-closer-to-the-day-when-journalists-will-be-jailed-for-reporting-20150317-1m0zc6.html
101 Bernard Keane and Josh Taylor. (2016, 24 August). Police pursue journalists in Parliament House NBN raid. Crikey.com: https://www.crikey.com.au/2016/08/24/australian-federal-police-nbn-raid-on-parliament-house-over-leaks/
102 Michael Bachelard. (2016, 20 May). NBN leaks were of public interest, so why the late night police raids? The Sydney Morning Herald: http://www.smh.com.au/federal-politics/federal-election-2016/nbn-leaks-were-of-public-interest-so-why-the-late-night-police-raids-20160520-gozkqh.html
103 Stephen Conroy. (2016, 24 August). AFP NBN Co raids an 'absolute abuse of process': Stephen Conroy.' Interview with Michael Brissenden on ABC AM: http://www.abc.net.au/am/content/2016/s4525456.htm
104 Bernard Keane and Josh Taylor, above fn.
105 Bernard Keane. (2016, 26 August). Free speech? It's getting savaged, and the 18C crowd are silent. Crikey.com: https://www.crikey.com.au/2016/08/26/free-speech-its-getting-savaged-and-the-white-men-are-silent/
106 Senate Committee of Privileges. (2017, 28 March). Search Warrants and the Senate. 164th Report, paras 3.37–3.38 and 3.47: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Documents_seized/Final_Report
107 Noel Towell. (2017, 18 January). Robo-debt: Centrelink workers threatened with prosecution as bosses try to stem the leaks. The Canberra Times: http://www.canberratimes.com.au/national/public-service/robodebt-centrelink-workers-threatened-with-prosecution-as-bosses-try-to-stem-the-leaks-20170118-gttjvk.html
108 Pat McGrath. (2017, 18 January). Centrelink staff warned over leaks amid debt recovery row. ABC News: http://www.abc.net.au/news/2017-01-18/centrelink-warns-staff-may-be-committing-criminal-act-by-leaking/8191068
109 Senate Community Affairs References Committee. (2017, 8 March). Better Management of the Social Welfare System Initiative. (Hansard, Dr Cassandra Goldie), pp. 1–2.
110 Adrian Hudson. (2017, 17 January). From the General Manager, People Services: Pubic interest disclosures and 'leaking' are not the same thing. (Email to Centrelink staff) via Pat McGrath. (2017, 18 January). Centrelink staff warned over leaks amid debt recovery row. ABC News: http://www.abc.net.au/news/2017-01-18/centrelink-warns-staff-may-be-committing-criminal-act-by-leaking/8191068
111 Anthony Mason. (2000). The relationship between freedom of expression and freedom of information. (Chapter). In Jack Beatson and Yvonne Cripps, Freedom of expression and freedom of information: Essays in honour of Sir David Williams. Oxford: Oxford University Press, pp. 230-1.
112 Theophanous v Herald and Weekly Times Ltd (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ) citing free speech scholar Professor Eric Barendt.
113 Joseph M Fernandez. (2014). Chaos reigns and shields fail. Secrecy and Surveillance: The Report into the State of Press Freedom in Australia in 2014. Sydney: Media Alliance, pp. 24–29.
114 Paul Farrell. (2017, 28 February). ASIO given access to journalists' phone and web records. The Guardian (Australia): https://www.theguardian.com/australia-news/2017/feb/28/asio-spy-agency-access-to-journalists-phone-web-records-metadata
115 Joint Media Organisations. (2016, 9 June). Statutory review of the Public Interest Disclosure Act 2013. Submission to Commonwealth Government's Statutory Review of the Public Interest Disclosure Act 2013: https://www.dpmc.gov.au/sites/default/files/files/pmc/pid-submissions/submission-Joint-Media-Organisations.pdf
116 Joint Media Organisations, above fn.
117 Mark Gregory. (2016, 26 May). Turnbull Government acts on leaks to hide the mess of its NBN. Independent Australia: https://independentaustralia.net/politics/politics-display/turnbull-government-acts-on-leaks-to-hide-the-mess-of-its-nbn,9030
118 Nick Butterly. (2016 25 May). The West Australian, p. 11.
119 Senator Nick Xenophon. (2017, 27 March). Email correspondence with author.
120 Gibbs Committee. (1991, December). Review of Commonwealth Criminal Law – Final Report.
121 Senator Nick Xenophon, above fn.
122 Australian Law Reform Commission. (2009). Secrecy Laws and Open Government in Australia. Report No 112, para 7.125; cited in Australian Law Reform Commission. (2017, 10 February). Submission: http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions
123 Australian Law Reform Commission. (2009). Secrecy Laws and Open Government in Australia. Report No 112, Recommendation 8–1.
124 http://www.walkleys.com/whistleblowers-need-more-protection-adele-fergusons-speech-at-the-press-freedom-australia-dinner-2016/ and http://www.theage.com.au/business/energy/chilling-tale-of-origin-energy-whistleblower-20170124-gtxuhz.html
125 https://www.meaa.org/meaa-media/code-of-ethics/
126 https://www.meaa.org/faqs-meaa-journalist-code-of-ethics/
127 https://www.meaa.org/meaa-media/code-of-ethics/ MEAA emphasis
128 http://www.theage.com.au/business/energy/chilling-tale-of-origin-energy-whistleblower-20170124-gtxuhz.html
129 http://www.walkleys.com/whistleblowers-need-more-protection-adele-fergusons-speech-at-the-press-freedom-australia-dinner-2016/
130 ibid
131 ibid
132 http://transparency.org.au/wp-content/uploads/2014/06/Action-Plan-June-2014-Whistleblower-Protection-Rules-G20-Countries.pdf
133 ibid
134 ibid
135 http://www.smh.com.au/business/workplace-relations/calls-for-reform-to-weak-whistleblower-protections-20160421-gobnnp.html
136 The UK's Public Interest Disclosure Act protects most workers in the public, private and voluntary sectors. The Act protects workers from detrimental treatment or victimisation from their employer if, in the public interest, they blow the whistle on wrongdoing.
137 As MEAA has previously highlighted, Part 9.4AAA of the Corporations Act 2001 is inadequate for whistleblowers. The wrong-doing covered in the part is unclear, anonymous complaints are not protected, there are no requirements for internal company procedures, there is no oversight agency and compensatory mechanisms are ill-defined or do not exist. ASIC is ill-equipped to regulate or prosecute private sector whistleblowing matters.
138 As proposed by Liberty Victoria.
139 http://womeninmedia.net/
140 http://www.ifj.org/nc/news-single-view/backpid/33/article/report-released-strangling-the-media-china-tightens-its-grip/


MEDIA ENTERTAINMENT & ARTS
ALLIANCE

IFJ
FIJ
FIP