# CRIMINALISING THE TRUTH SUPPRESSING THE RIGHT TO KNOW

## THE REPORT INTO THE STATE OF PRESS FREEDOM IN AUSTRALIA IN 2016

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**2016 AUSTRALIAN PRESS FREEDOM REPORT**

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# FOREWORD

"Journalism is not a crime" goes the campaign slogan. It's a message that is so obvious it should be redundant. But with nearly 200 journalists imprisoned around the world in 2015[1] and another 109 slain in targeted killings, bomb attacks or cross-fire incidents[2], the message clearly is being ignored.

In fact in Australia, our Parliament has ruled that journalism is a crime. In recent years it has passed laws that can imprison journalists for up to 10 years for simply doing their job.

New national security laws have focussed not only on fighting terrorism but also silencing voices, punishing truth-tellers, suppressing the public's right to know and criminalising journalism.

Government has been so determined to inoculate itself from embarrassment that it has developed a battery of laws to punish and imprison those who expose the truth, whether they are whistleblowers or journalists.

We have already had years of refusal by the current government to be open about its activities relating to asylum seekers. Requests for information are met with a blanket refusal to discuss "on-water matters". Similarly, questions about what happens in asylum seeker detention centres have been met with silence, obfuscation, and even buck-passing questions to foreign governments. Last year this approach was reinforced by brutal legislation: the *Border Force Act* now carries a two year jail term if "entrusted personnel" disclose "protected" information.

Despite the threats, courageous whistleblowers still get the truth out. But because the government has sought to shroud its asylum seeker policy in secrecy and deny the public's right to know, any news report relying on a confidential source can generate a request to the Australian Federal Police to investigate the leak and prosecute the leaker under section 70 of the *Crimes Act* which criminalises the "unauthorised disclosure" of information by a Commonwealth officer or a person performing services on behalf of the commonwealth. Section 70 has been problematic for years and the Australian Law Reform Commission has called for it to be repealed and replaced.[3]

As we learnt in April this year with the release of information about the AFP's access to the telecommunications data of Guardian Australia journalist Paul Farrell, AFP trawled through the his email records and carried out "subscriber checks" to discover everyone Farrell contacted. Such a process not only seeks to identify the confidential source in question but also threatens to compromise every one of the journalist's sources. The AFP created a 200-page dossier, consisting of 51 documents and more than 800 electronic updates. And yet, the AFP says its investigations "are not about targeting journalists".

More insidious is that some of the leaks recently referred to the AFP for investigation have likely been made by politicians or their staffers. This is particularly true of recent leaks of Cabinet documents and draft Defence White Paper.

In order to further persecute and prosecute whistleblowers, the government has now equipped itself with the two-year mandatory metadata retention laws, and the Journalist Information Warrants that accompany them. Journalists' telecommunications data can be secretly accessed by 21 government agencies.

All this because government is embarrassed: not because a news story is wrong but because it's true and everyone knows it. So press freedom and the public's right to know are being trampled on in a mockery of open and transparent government.

Journalists have an ethical obligation to never reveal the identity of a confidential source so the new warrants simply circumvent that and trawl through journalists' data anyway. Because it's done secretly, punishable by a two-year jail term if that ever becomes public, there is no opportunity for the journalist or their media organisation to protect the information from the eyes of public servants hunting an alleged source. And the only individuals who might stand up for the public interest are former judges … appointed by the prime minister.

Meanwhile, moves continue to suppress information. Responding to the Home Insulation Program disaster of 2009, senior public servants are now openly seeking to lock-up their deliberative advice, and put it out of the reach. Answering journalists' requests for information has become too burdensome they say, the Act is "pernicious", and prudent "risk management" demands that the safest path is to suppress information from prying eyes.

The greatest shame in Australia's declining standards of press freedom is impunity that surrounds the murder of our colleagues Juanita Nielsen, The Balibo Five and Roger East — all 40 years ago. Add to them Tony Joyce (1980) and Paul Moran (2003). Nine journalists whose killers are literally getting away with murder because of a lack of political will, inadequate or non-existent investigations and mealy-mouthed excuses.

In just a few short years, Australia has fallen from being a bastion of press freedom to a country that has passed a raft of national security laws that allow government agencies to pursue journalists and their sources and criminalises legitimate journalism in the public interest. Increasingly, governments are denying the public's right to know and moves are underway to deny information from becoming public.

There is a great deal of effort being expended by government to avoid scrutiny. And it's getting worse. These attacks undermine democracy and, once started, it is very hard to turn back the tide.

**Paul Murphy**
**CEO, MEAA**

Paul Murphy
CEO, MEAA
PHOTO: MATHEW LYNN

# MEDIA GOT COMPLACENT

Media outlets have not done enough about the threats to press freedom. **Laurie Oakes** gave this address to the Melbourne Press Freedom Dinner on September 25, 2015.

As concern over terrorism grew last year, Tony Abbott told us: "The delicate balance between freedom and security may have to shift". Well, the balance between press freedom and security certainly shifted. Tonight I want to make a number of points about that.

I want to argue that we in the Australian media have been somewhat apathetic on the press freedom front, not vigilant enough or as willing to fight as we should have been. I also want to say something about our new Prime Minister and his attitude. And finally, I want to talk about the need to bring the public along with us in the press freedom cause.

It was Indonesian troops who murdered the Balibo five 40 years ago, but the response of the Australian Government was shameful. It lied and covered up, feigning ignorance about what had happened to them.

I remember the late Bill Pinwill, who was press secretary to the Defence Minister Bill Morrison at the time of the deaths, telling me about an intelligence document he'd seen very soon afterwards. It quoted an intercepted Indonesian communication referring to the bodies.

Bill was almost certainly committing a crime in talking to me, but he was shocked — both by the deaths and, I assume, by a decision to throw a cloak of secrecy over the whole matter. The Australian Government pretended it knew nothing about the fate of the journalists. It denied for years receiving the kind of intelligence Bill had seen in the minister's office.

Gough Whitlam, and Malcolm Fraser after him, would both have considered themselves strong believers in press freedom. But governments have competing priorities and — especially when national security is involved — the press freedom issue is rarely at the top of their list.

That was the case in 1975. It's the case now. The current struggle, if that's the right word, involves Australian law and domestic politics, so the lives of journalists are not at risk. But it's important, nevertheless.

For the last couple of years — until 10 days ago — we had an ex-journalist as Prime Minister (Tony Abbott) and an ex-journalist as Communications Minister (Malcolm Turnbull). Yet that period saw a number of pieces of legislation, primarily security-related, that clearly have the potential to inhibit public interest reporting.

Some of the legislation was a direct threat to journalists themselves. Other measures threatened sources, or made it more difficult to protect the identity of confidential sources. Attack sources and you attack journalism.

In the case of Peter Greste and his Al-Jazeera colleagues, the Australian government did speak up, very loudly, about press freedom. As well as taking a strong public position it intervened directly with the Egyptian authorities, seeking to have the charges dropped, and then trying to secure pardons. Pressure from the Australian government was certainly vital in getting Peter home. It helped in freeing his colleagues last Wednesday.

But the government's domestic actions, I suggest, were less helpful. If we hope to influence other countries on this issue, we need to set an example.

The slogan we've used in our support for Peter and his two colleagues is: "Journalism is not a crime". It's a good slogan. But it's surely less effective than it would be if the Australian government was not, at the same time, introducing "a serious criminal offence, punishable by gaol, for journalists doing their job".

That description of one of the new security measures — "a serious criminal offence, punishable by gaol, for journalists doing their job" — comes from a submission to the Independent National Security Legislation Monitor from a coalition of media organisations (the Australia's Right To Know industry group) including News Corp, Fairfax Media, AAP, the ABC, commercial free-to-air TV networks, Sky News, and half a dozen other major companies, plus MEAA.

The Independent National Security Legislation Monitor is looking at any impact on journalists in the operation of section 35P of the *Asio Act* — the new section concerning disclosure of information relating to Special Intelligence Operations, or SIOs … essentially, undercover operations involving security agents. The 35P offence carries a five-year gaol term, double that for "reckless" unauthorised disclosure.

This was the first in the series of measures that is my focus tonight. Basically, there were three tranches of major amendments to security legislation. Each of them impacted on journalism and press freedom in some way.

Laurie Oakes addressing the Melbourne Press Freedom Australia Dinner 2015.
PHOTO: MATHEW LYNN

One of several concerns with the second tranche, known as the *Foreign Fighters Bill* and rushed through parliament with unseemly haste, was that the wording, particularly dealing with a new offence of "advocating terrorism", might catch up legitimate areas of speech and advocacy. MEAA expressed the fear that it could also encompass news stories that reported on banned advocacy.

The third tranche everyone certainly knows about. That was the biggie — the *Data Retention Bill* requiring telecommunication companies to keep metadata for at least two years so that it can be accessed by a variety of agencies, including security organisations and the police.

The government keeps claiming the other measures are not directed at journalists. With this one, though, we had a parliamentary committee confirming that one of its purposes was the pursuit of journalists' confidential sources.

We tend to sit back and blame the Government for infringements on press freedom. A point I want to make tonight, though, is that we should also blame ourselves. I think we'd got complacent. When the former Labor Government tried to impose new regulations on the media, the threat was obvious and we jumped up and down. This more recent stuff has been less obvious and cloaked by the need to counter terrorism. So the initial reaction to section 35P was muted. Some in the media even welcomed it.

It's obvious that no responsible journalist would want to blow an undercover ASIO operation. We'd all agree that ASIO officers who penetrate a terrorist cell, say, should have legal protection. But this law covers all aspects of a Special Intelligence Operation for all time. That's extraordinary. And there clearly could be occasions when reporting matters connected to an SIO would be in the public interest as long as ASIO agents and legitimate security operations were not endangered.

What if there's a major bungle that could be exposed without endangering an operation? When it's over, perhaps? Our security agencies have been involved in some spectacular stuff-ups in the past. The Dr Haneef affair comes to mind. And the notorious ASIS exercise involving armed trainees running amok in a Melbourne hotel. Or what if there's corruption? Or gross incompetence? Or an attempt to pervert the course of justice? Under this law, no one can report it.

And anyway, as the submission from the media organisations points out, because SIOs are, by definition, covert, a journalist might receive information without knowing it relates to such an operation. This uncertainty, the submission from the coalition of media organisations says, will expose journalists to an unacceptable level of risk and consequently have a chilling effect on the reportage of all intelligence and national security material.

There are ways these problems could have been handled while still achieving the objectives of the legislation. The Australia's Right to Know submission contains suggestions. An exemption, for example, if a disclosure is "made in good faith in a report or commentary published about a matter of public interest by a person engaged in a professional capacity as a journalist where the report or commentary does not disclose, directly or by inference, the identity of a security officer".

If the government was fair dinkum in its claims that 35P is not directed at journalists, it's very hard to see why an exemption of that kind would not be acceptable. But we didn't take up the issue at the start, and once the law is on the statute books winding it back becomes a very difficult proposition.

If we'd gone into battle earlier, seriously and united, we might have got somewhere. We were too slow to recognise the threat. Too late, and probably too polite, in pushing back.

It's easy to understand why that happened. In the context of a heightened terrorism threat, people involved in the media are as anxious as anyone else about the need to safeguard the public. But, to quote Anthony Whealy QC, a former Supreme Court judge who presided over a number of major terrorism trials and was then commissioned by the government to review anti-terrorism laws: "The worst time to push through legislation of this kind, and to push it through urgently, is when there is a supposed air of panic around the place."

In such a climate the risk increases that proposed measures don't get proper consideration. Including by the media. Even when they affect the media. Even when they impact on press freedom.

I'm going to take *The Australian* to task here. Specifically over an editorial that appeared in that

ASIO headquarters, Canberra.
PHOTO: JAMILA TODERAS
COURTESY: FAIRFAX PHOTOS



newspaper on September 29 last year (2014). I've got a personal interest, as you'll see.

The editorial contained the assertion that *The Australian* "supports freedom-of-speech campaigns and has long advocated the principle that the public has a right to know what their government is doing and why." That's true. The Oz has done that. It's why this incident stands out.

In the editorial, the paper criticised journalists who were arguing the press freedom cause. The editorial said: "*The Guardian*'s Katharine Murphy, the ABC's Mark Colvin and News Corp Australia columnist Laurie Oakes, among others, believe the counter-terrorism laws passed by the Senate last week are excessive." There was then a sneering reference to Katharine having been enthusiastically praised by "the usual suspects on Twitter".

The editorial quoted me as arguing that "fighting terrorism is obviously important" but "accountability journalism is important too". It said: "He [Oakes] made a sweeping statement that journalists could go to gaol simply for 'holding those in authority to account'."

The kicker was that I could have been singing from the same songbook as the Greens. When *The Australian* compares you to the Greens you know you're really in bad odour.

The threat of terror in Australia was genuine, the paper said. New laws were needed to deal with it, and journalists should understand this. True enough. But concerns about the impact on journalism were dismissed with a sentence. "We do not believe that our investigative reporters, including those who regularly write on defence and security matters, will have their work significantly affected by these new laws."

Well, as it turned out, a number of those reporters disagreed. The Oz's foreign editor Greg Sheridan was soon on *Q&A* calling it "a very bad law" and "a very significant misjudgement and over-reach" by the government. Cameron Stewart, *The Australian*'s associate editor specialising in investigative journalism in the national security and defence fields, told *Media Watch*: "I think these new provisions will undermine the ability of journalists to keep the government accountable on issues of national security." And: "Australians will know less than they deserve about what is happening inside security agencies at a time when they are more powerful than ever before."

In a piece published in *The Australian* a few weeks after the editorial, Stewart described a story he had written in 2012 that would have left him open to a gaol sentence under the new laws. It concerned a raid that had to be brought forward because of an embarrassing mistake involving an ASIO informer and a lost phone. Stewart wrote: "My piece did not harm the operation but it did tell the real story as opposed to the sanitised government version."

As I've already mentioned, News Corp, which owns the Oz, is now one of the media organisations that have joined forces to try to have section 35P changed, with a submission describing it in almost exactly the same terms that attracted the ire of the paper when I'd used them. To quote that submission again: "The introduction of a serious criminal offence, punishable by gaol, for journalists doing their job, does not offer a balance between national security concerns and the importance of public interest reporting by the media and journalists."

I wish *The Australian* had been saying that, I wish *all* of us had been saying that, when the proposal first reared its head. I was as guilty as anyone else. My column didn't appear until section 35P was already approved by parliament. The problem was we were alarmed but not alert. Alarmed by the terrorism threat, but not alert to the potential impact of counter-measures on press freedom.

The concluding sentence of *The Australian*'s editorial said: "It is incumbent upon government to find the right balance." But these things can't just be left to governments. If we're to achieve a proper balance, it's also incumbent on journalists and publishers and broadcasters to fight for the press freedom side of the argument.

It's not going to be given due weight by governments of any stripe otherwise. I repeat, press freedom, transparency etc are rarely high on their list of priorities.

You can see that from what's happened with the Freedom of Information system. There's been a steady retreat by politicians and bureaucrats from the freer flow of information that briefly gave cause for optimism following (former senator) John Faulkner's reforms in 2009 and 2010. The retreat started under the Labor government. And it had nothing to do with security — merely old habits reasserting themselves.

John Faulkner as Special Minister of State was a true believer in government transparency, and introduced reforms to the FoI system that unequivocally conveyed a presumption in favour of disclosure. When Faulkner went, so did enthusiasm for his approach.

A key reform was the appointment of an Australian Information Commissioner to review access refusals, publish FoI guidelines for agencies to follow, and act as a kind of champion of open government. We get an idea of what happened to that from a 2013 paper by Professor John McMillan, the first Information Commissioner and, in any meaningful respect, the last one as well.

When an event was organised to mark the 30th anniversary of FoI in Australia, no minister attended or made any contribution. Legislation to entirely exempt the parliamentary departments from the FoI Act was rushed through parliament, even though this was contrary to a submission from those departments. The government stopped responding to key reports from the Information Commissioner. It ignored a suggestion that ministerial appointment diaries be published on the web. Australia did not join the International Open Government Partnership formed in September 2011 and which now has 64 member countries. And so on.

And when the Coalition came to office? It announced the abolition of the Office of the Information Commissioner in its first budget. The Senate blocked that, so the government effectively defunded the office. McMillan, largely stripped of staff, spent his last eight months in the job working from home. A disgrace.

And the media were pretty much silent throughout.

That's partly because these things happen gradually. It's the slippery slope process. The slippery slope was involved with section 35P of the *Asio Act* too.

When we belatedly started to make a fuss about it, the government's response was to say: "What are you on about? This is not new. Much the same provision is in the *Crimes Act* to protect AFP officers who go under cover."

And it was. Inserted in 2010 by the Labor Government. Making it a criminal offence to disclose information relating to what's termed a "controlled operation". And, like section 35P, it included jail sentences.

There was no media exemption there for public interest reporting either. The same concerns apply as with the *ASIO Act* amendment. The Australia's Right to Know coalition is now arguing for changes to this legislation, too. But it doesn't seem to have rung any press freedom alarm bells when it went through parliament. Not that I recall, anyway. The media either missed it or didn't think it was worth complaining about. That allowed the precedent to be set.

Which brings us to the matter of the dreaded metadata. Specifically the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill*. That, too, was defended by the government on the basis that there's nothing new to see here.

Metadata had been available to law enforcement bodies and some other agencies for years. Tony Abbott said this hadn't worried him when he was a journalist. The only change was that law enforcement agencies wanted mandatory retention of metadata for two years because telecommunications companies had less and less need to retain it for their own purposes, such as billing customers.

But there had been change, of course. Gradual but massive change. At the start it was just which landline phone called which other landline phone. But with the internet and digital technology — computers, mobile phones, emails, text messaging, GPS and the rest — the amount of metadata grew. Mobile phones became tracking devices. Metadata made it easy to work out not only who you called and received calls from but who you met and where and when. So easy that it was no longer necessary to drag journalists before a court and demand they reveal a source. The metadata told all.

It was the slippery slope again, though in this case caused by technology rather than changes to the law. But there wasn't much resistance until the metadata retention proposal emerged in parliamentary committee hearings under Labor before the change of government. Even then, there was no great sense of urgency on the part of the media.

It's clear in retrospect that we should have been alarmed and trying to get some kind of protection for journalists and their sources much earlier. It's been obvious for a very long time that the metadata threat to journalists' confidential sources is the big press freedom issue of the internet age. We didn't really need to wait for the metadata retention legislation as a catalyst. We only had to look at what was happening overseas, particularly in the US, to see what was coming in Australia.

When the media eventually took up the cudgels, we didn't get much — but we got something. The politicians were pushed into introducing a requirement for Journalist Information Warrants before a journalist's metadata can be accessed for the purpose of identifying a source.

Many in the industry, including MEAA, think this is pretty meaningless because Journalist Information Warrants won't be contestable by journalists or media organisations. Those targeted won't even know about the warrant application. The whole process will be secret, with the threat of two years in the pokey for anyone revealing the existence of a warrant.

There will be Public Interest Advocates — lawyers appointed by the government — able to contest warrant applications, but they won't be standing in the shoes of journalists or media organisations. In fact, the Attorney-General's Department says candidly that there will be times when the advocates will support issuing a warrant.

In a letter to the Attorney-General's Department, declining to co-operate in the development of

Dr Muhammed Haneef being driven out of the Brisbane watch house in a police vehicle, July 2007.
PHOTO: EDDIE SAFARIK
COURTESY: FAIRFAX PHOTOS

the scheme, MEAA said: "The warrant system merely imposes a hurdle before government can use journalists' metadata to identify journalists' confidential sources." That's probably pretty accurate.

But I belong to the school that thinks something is better than nothing. That a hurdle is better than no hurdle. There is now a process, with the possibility of some restraint, where before it was open slather. Public interest at least gets a look in now. It might be only a small improvement, but it's an improvement all the same.

Basically, though, we can't turn back the technological tide. After introducing the metadata retention legislation into the house, Malcolm Turnbull advised journalists dealing with confidential sources that from now on they'd be wise to use encrypted messaging applications and take care not to leave an electronic trail. When a minister starts telling you how to get around his own law it's a bit odd. He's right, though. We have to change our behaviour. It's either forward to encrypted messaging applications or back to typewriters and signalling sources by moving pot plants around on our balconies.

This is probably the appropriate point to talk about our new Prime Minister. As everyone knows, he was a journalist before he was a lawyer, before he was a founder of an internet company, before he was a merchant banker, before he was a politician. He got his first job in journalism when, as a law student at Sydney University, he moonlighted as state political roundsman for the Nine Network.

There's a story from that period that some would say shows he hasn't changed much. After reporting state politics for a short while, the brash young Malcolm went to see Sam Chisholm, who ran the Nine Network, and said: "Sam, how about I do a show called Turnbull at Ten?" "Great idea, son," Sam replied. "Do you think Ten would be interested?"

With a Turnbull government I hope we'll see a change from the "whose side are you on?" view of journalism. He did say at the opening of the war correspondents' memorial that democracy depends vitally on a free and courageous press. He told a fellow MP in the house earlier this year: "The work journalists do is as important as anything the honourable member and I do — or any of our colleagues do." I'm not sure how that went down

with some in the chamber. But he seemed to be serious.

One reason I'm cautiously optimistic about what Turnbull's elevation might mean in terms of the press freedom issue is that he understands the fundamental importance of clause 3 of MEAA's *Journalist Code of Ethics*: "Where confidences are accepted, respect them in all circumstances." The new PM refers to the protection of confidential sources as "the journalist's job", an "obligation" and a "duty". He accepted that it was an important consideration in the data retention debate at a time when other ministers were calling it a red herring.

Then there is the concern Mr Turnbull expressed about metadata collection and retention laws when they were proposed by the former Labor government before he was bound by a Cabinet decision to implement them himself. In his 2012 Alfred Deakin Lecture, the then shadow minister for communications said he had "very grave misgivings about the proposal". He described it as a "sweeping and intrusive new power" which would have a "chilling effect on free speech".

I also take some hope from Mr Turnbull's leading role in the *Spycatcher* trial. Tony Abbott, although he'd also worked as a journalist for a while, came down heavily on the side of the security agencies in this sort of discussion. He was disinclined to question them. Mr Turnbull, on the other hand, has good reason to be suspicious of the spooks.

For anyone who doesn't remember, as a young solicitor Mr Turnbull took on the Thatcher Government on behalf of a former British intelligence officer, Peter Wright, who'd moved to Tasmania and written a book about Soviet penetration of MI5. Wright's former employers wanted it banned. The British Cabinet secretary, Sir Robert Armstrong, was sent out here by the intelligence establishment in London basically to lie to the Australian courts.

In his book, *The Spycatcher Trial*, Mr Turnbull writes that it was in the public interest for Wright's book to be published because it revealed evidence of crimes and other unlawful acts committed by the British Security Service. That's directly relevant to the argument over section 35P of the *ASIO Act*.

The sensational case brought Mr Turnbull international fame. He emerged from it convinced that the British spies had manipulated the British politicians. I think it's unlikely he's forgotten that lesson. I hope he hasn't.

I'm not suggesting a Turnbull government will be keen to revisit the security legislation brought down during the Abbott prime ministership, though that would be nice. What I am suggesting is that his instincts may augur well for when matters involving press freedom arise in future. As they will.

But, like any politician when it comes to this issue, he'll have to be watched.

Now, there's one more matter I want to talk about.

More than 30 years ago I read Tom Stoppard's play, *Night and Day*. It's about a number of things, including colonialism. But it's also about journalism. And there are some great quotes. For example: "No matter how imperfect things are, if you've got a free press everything is correctable, and without it everything is concealable." And: "A free press, free expression — it's the last line of defence for all the other freedoms." I've quoted those lines often.

But now Stoppard has modified that all-or-nothing view on press freedom. In a newspaper article after the phone hacking scandal and the Leveson inquiry in Britain he wrote: "A free press needs to be a respected press." He said his changed attitude disappointed some of his old Fleet Street acquaintances. I suspect it might disappoint some people here tonight.

But I think he's right. A free press does need to be a respected press.

That's because, if we're going to safeguard the utmost freedom to report, if we're going to win political arguments like those I've been discussing, we need the public behind us. Most of us in this room, most people in the media, probably assume we've got that public support. But have we?

We've seen survey after survey, poll after poll, showing a deep — and deepening — lack of trust in the media. In light of that, what basis do we have for assuming there is widespread public sympathy when it comes to press freedom questions?

The only way to guarantee it is to start winning back respect. Rebuilding trust. That obviously involves lifting our game. But trying to project a more positive picture of what we do and why, the significance of journalism — that wouldn't be a bad idea either.

Thank you.

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Laurie Oakes is the Nine Network's political editor.

# TALKING PRESS FREEDOM

**Prime Minister Malcolm Turnbull at the dedication of the War Correspondents Memorial, Canberra — September 23, 2015**

"Let me deal with the greatest role of … all journalists, and that is to stand up to the powerful — to hold up the truth to power … Our democracy depends not just on the politicians, not just on the judges, it depends on the armed services defending our freedoms but it depends vitally on a free press; on a free and courageous press; on free and courageous correspondents who are not cowed by governments and by big vested interests."

Malcolm Turnbull and journalist Peter Greste at the Australian War Correspondents Memorial in Canberra.
PHOTO: ANDREW MEARES
COURTESY: FAIRFAX PHOTOS

**Senator Nick Xenophon following a Senate Estimates hearing on the operation of the Independent National Security Legislation Monitor — October 22, 2015** "We now have national security laws on steroids with a watchdog that's been muzzled and chained through a lack of resources. Roger Gyles is the last line of defence against the abuse of press freedom but it seems he has been given the resources equivalent of a water pistol. The fact that the monitor hasn't even looked at these sweeping metadata laws is a shocking indictment on the lack of resources his office has."[5]

**Whistleblower Edward Snowden on police pursuing journalist data — October 17, 2016** "Police in developed democracies don't pore over journalists' private activities to hunt down confidential sources. The Australian Federal Police are defending such operations as perfectly legal, but that's really the problem, isn't it? Sometimes the scandal is not what law was broken, but what the law allows."[6]

**Geoffrey King, director — Committee to Protect Journalists' Technology Program on police pursuing journalist data — October 17, 2016** "This should not be happening. But it is the inevitable result of mandatory data retention and mass surveillance, which is neither necessary nor proportional to any threat. It doesn't line up with the values that we all adhere to, [or] to good counter terrorism strategy, and it certainly doesn't line up with a free and open society where journalists can do their jobs."

# THE YEAR IN AUSTRALIAN MEDIA LAW

**By Peter Bartlett**

## Journalist Sources

The Melbourne *Age* continues to defend a number of applications to have sources revealed in court. The shield laws are certainly having a positive effect.

The most notable application is that of *Madafferi v Age*, the facts of which demonstrate the need for journalist sources to only be revealed where the public interest demands disclosure.

Madafferi sought disclosure of the source of information published about him in The Age Newspaper. That application was successfully resisted on the basis that the defence of qualified privilege and the Lange defence was likely to apply and the applicant also failed to demonstrate what tenable causes of action could be brought against the sources.

This may be lauded as a victory for investigative journalism throughout Australia. Unfortunately, the person whom Madafferi suggested was the source was later found shot dead in Carlton on March 15, 2016. The police investigation is still on foot.

In Britain, a media law barrister, Gavin Miller QC, has warned that the *Investigatory Powers Bill*, currently before Parliament, has the potential to be used routinely by police to identify confidential contacts.

With the current political emphasis on terrorism and organised crime in Australia, we may witness similar incursions on the freedom of the press without the protection of the *European Convention on Human Rights*, which mandates the right to freedom of expression and information (article 10).

## Injunctions

Permanent and interim injunctions continue to represent the greatest threat to media freedom. Fortunately, Australian courts generally express reluctance to grant an injunction except in exceptional circumstances (*ABC v O'Neil*). Justice Campbell said of injunctions that they are a "jealously guarded and confined remedy in this particular area of legal discourse" (*Grygiel v ABC*).

However, Justice Campbell's opinion may be a lone wolf, particularly in New South Wales. In 2015, there were three successful applications for injunctions heard by the Supreme Court in defamation proceedings, one of which was granted by Justice Campbell. Interestingly, two of those cases were brought by members of the legal profession (*Munsie v Dowling* [2015] NSWSC 808; *Goldsmith v Gosh* [2015] NSWSC 631).

Perhaps most notably, in *Konidaris v Google Australia*, Justice McCallum ordered the take-down of a blog "published" by the respondent which was alleged to have made defamatory statements to the effect that he was involved in a sex scandal despite being a high-level celibate priest. Injunctive relief was granted despite Google Australia asserting that it was its American counterpart which had the authority to remove the material (the injunction was later revoked by consent).

## Privacy

One of the greatest privacy debates facing state governments at the moment is the question of how to combat the increasing frequency with which so-called "revenge porn" is being posted on social media sites. New South Wales could be the first state to legislate for a civil remedy for cases where people are the victims of gross breaches of privacy. A state parliamentary committee has recommended changes to the law to allow civil proceedings if a person's privacy has been invaded intentionally or recklessly.

*The Age* has also recently published a story about private Facebook groups being used to display revenge porn postings. One such site, Melbourne's Men's Society, had 7000 members (4500 awaiting approval) until it was shut down on April 15, 2016. Other private groups, such as Melbourne Blokes Trade, are still in operation but, surprisingly, Facebook ruled the page wasn't breaching any of its community guidelines.

As a result of the absence of personal privacy protection in Australia we are deferring to large social-media corporations the important role of regulating online freedom of expression. Facebook and similar corporations have filled the legislative gap in becoming the gatekeeper for what may and may not be published on line, without any recourse to natural justice or objective standards.

Sometimes, however, corporations seek to effectively defend an individual's right to privacy.

A court in California recently ordered that Apple was to provide reasonable technical assistance to the FBI in helping them unlock an iPhone which belonged to an alleged terrorist. Apple opposed the order, but the hearing has not been heard because the FBI has announced that they may have a way to



unlock the phone with Apple's support. Previously, the FBI had contended that Apple alone could unlock the phone.

Despite this, we cannot expect corporations to regulate and enforce breaches of privacy, especially when the needs of their business must take precedence.

Recently, defamation has also been used to further some privacy objectives. In the case of *Fairfax Media v Pedavali* [2015] NSWCA 237 the identification requirement for the tort of defamation was satisfied despite the plaintiff not being named or pictured in the article. The court held that where there is sufficient information for the reader to be able to identify the plaintiff and there is an implicit invitation from the publisher for the reader to ascertain the identity of the individual, the identity requirement will be satisfied.

Gina Rinehart presently has a claim in the NSW Supreme Court where she is trying to argue that Australia has a tort of privacy.

## Defences

Despite achieving near uniformity in 2005, there are still a number of differences between the application of defamation law, particularly between New South Wales and Victoria. For instance, alternative pleading defences are still available in an attenuated form in Victoria (Hore-Lacey defence) while they have been effectively ousted in New South Wales. Justice McCallum has recently expressed a desire for such a schism to be resolved in the High Court so as to make cases cheaper, more efficient and consistent.

The defence of contextual truth has also been the subject of judicial scrutiny in the past year. Since the controversial decision of *Fairfax v Kermode* in 2011, the defence of contextual truth has been limited to imputations arising from the publication that were not pleaded by the plaintiff. Dr Matt Collins QC notes that this has made the defence largely redundant, as a skilled lawyer is able to include all imputations arising from the publication, regardless of their truth, in their pleadings to avoid a defence of contextual truth.

However, the 2015 case of *Fairfax v Zeccola* has, in this author's opinion, caused a slight change to the way in which contextual truth may be pleaded. It is still the law that imputations relied upon to support a defence of contextual truth must be different in substance. But following this ruling, contextual truth imputations no longer need to be different in kind.

The difference between substance and kind is elucidated by Ipp JA in *Fairfax v Jones*:
*Same words may be capable of bearing a broad defamatory meaning and a narrow defamatory meaning* [and that] *if a plaintiff sues for defamation, relying only on a narrow meaning of the words, the broad meaning will ordinarily be 'another meaning' within the meaning of the phrase in s 16(1) of the Defamation Act 1974 (NSW)* (contextual truth defence).

This seems like a fairly weak attempt to re-invest some power in the contextual truth defence, as it is difficult to see how a skilled lawyer could not draft imputations to include the broad and narrow meanings given by the same or a similar phrase and similarly resist the defence of contextual truth.

## Juries

Defamation remains the only civil cause of action in which a jury is still employed to determine the questions of fact. Plaintiffs are sometimes reluctant to go before a jury. Jury trials increase the cost and length of defamation proceedings. Because defamation proceedings are most frequently brought against a widely publicised publication (e.g. newspaper article etc.) there is also a risk that a jury member will have subconsciously been swayed by the contents of that article. The law of sub-judice contempt does little to ameliorate this harm, as it is also costly and timely to enforce.

Furthermore, being able to elect a jury can lead to strategically motivated litigation practices. For instance, politicians consistently choose to be tried by a judge as opposed to a jury, as they tend to present badly to members of the public whilst in the witness box. We saw this in the *Hockey* case last year, whose application was brought in the Federal Court where juries are no longer available.

However, a ruling from last year has put some (moderate) constraints on the parties' prerogative to elect a jury. In *Chel v Fairfax* the plaintiff, who had initially elected a trial by jury was prohibited from proceedings with a judge alone after the jury had been constituted. The election confers a right to a jury trial on other party.

This will require litigants to consider even more forensically the choice about whether to elect a jury, as their decision is likely to be binding.

## Conclusion

The future will see an increase in huge dumps of interesting material into journalists' laps. The Unaoil and Panama Papers cases are the first of many.

This is a positive development for the public right to know.

The challenge for the media is to decide whether to give full details of what it intends to publish to the subject and thereby risk an injunction for breach of confidentiality.

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# THE MAIN NATIONAL SECURITY LAWS AFFECTING JOURNALISTS AND SOURCES

By **Mark Pearson** with research assistance from **Virginia Leighton-Jackson**.
This article was first published on Journlaw on February 15 2016[7].

Among more than 50 national security laws and amendments[8] passed in Australia since the terror attacks of September 11, 2001[9], these four stand out as presenting the greatest threat to journalists[10].

## ASIO Act 1979

Section 25A focuses on ASIO powers and access to computer networks, with one warrant now covering an entire computer network using third party computers to access target systems.

Section 34 gives ASIO powers to seek "questioning" warrants and "questioning and detention" warrants (detention for up to seven days) with five years' jail possible for any revelation of the existence of the warrant itself or of any operation related to the warrant for up to two years after the warrant has expired.

There are no public interest or media exemptions to the requirement, although disclosures of operational information by anyone other than the subject of a warrant or their lawyer requires the discloser to have shown "recklessness" (s. 34ZS (3)).

Section 35P provides for up to five years in jail for "unauthorised" disclosure of information related to a "special intelligence operation" and up to 10 years if the disclosure "endangers the health or safety" of anyone or will "prejudice the effective conduct of a special intelligence operation".

Amendments partially exempting "outsiders" (journalists) were proposed in 2016[11] but grave concerns remained over the impacts on journalists for "reckless" disclosure that might endanger safety and jeopardise an operation and the implications for their sources.

Section 92 provides for 10 years imprisonment for anyone who identifies an ASIO officer or affiliate (or anyone connected with them) other than any who have been identified in parliament (such as the director-general). Former ASIO employees and affiliates can be identified if they have consented in writing or have generally made that fact known.

## Crimes Act 1914 (Cth)

Section 3ZQT makes it an offence to disclose the fact that someone has been given notice by the Australian Federal Police (AFP) to produce documents related to a serious terrorism offence. Journalists could face up to two years in prison for doing so.

## Telecommunications (Interception and Access) Act 1979

After amendments in 2015, the act requires telecommunications providers to retain customers' phone and computer metadata for two years so they can be accessed by criminal law enforcement agencies (state and commonwealth) on the issue of a warrant.

Information required to be stored includes: subscriber/ account information, the source and destination of a communication, the date, time and duration of a communication or connection to a service.

A Journalist Information Warrant scheme was designed to prohibit the disclosure of journalists' confidential sources without special precautions.

These require approval of the minister, who may act on the advice of a Public Interest Advocate, though the processes are secret and disclosure of the details of any warrant for telecommunications data can incur imprisonment for two years.

## National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

National security has long been cited as one of the exceptions to the principle of open justice, but new laws give judges and magistrates more reason to close a court in a terrorism trial. The NSI Act allows for evidence to be suppressed in court hearings if it contains disclosures prejudicial to national security.

Part 3 of the act allows prosecutors and courts to use national security information in criminal proceedings while preventing the broader disclosure of such information, sometimes even to the defendant.

Section 29 gives courts the power to decide whether to close the court for such matters.

## Other laws to consider when covering a national security story:

### Discrimination and vilification laws

Laws apply at state, territory and commonwealth levels prohibiting racial and religious discrimination and the vilification of people because of their race, religion, or other factors. They vary in their scope and application, with debate over whether the law against offensive behaviour because of race, colour or national or ethnic origin in Section 18C


Attorney-General George Brandis.
PHOTO: ALEX ELLINGHAUSEN COURTESY: FAIRFAX PHOTOS

the *Racial Discrimination Act (Clth)* would apply to discriminatory media coverage of Muslims. All media codes of practice and ethical codes counsel against discriminatory or vilifying coverage. Social media comment moderation presents special challenges.

### Defamation

If you are about to publish something damaging to someone's reputation, ensure you work carefully within one of the main defences — truth (evidence to prove both the facts and their defamatory meaning), honest opinion / fair comment (based on true provable facts on a matter of legitimate public interest), or fair report (a fair and accurate report of a court case, parliament or another protected public occasion or document).

### Contempt of court

The sub judice period (limiting prejudicial coverage about a suspect) starts from the moment someone has been arrested or charged. From that instant you should take legal advice before publishing anything other than what has been stated in open court, with special care to avoid any material giving an assumption of guilt (or even innocence), visual identification of the accused if their identification might be at issue, witness accounts, character background, confessions or prior charges or convictions. You can also face contempt charges over refusing to reveal a source or provide your data or notes when ordered to do so, thus techniques for source protection are paramount.

### Suppression orders

Courts have special powers to issue suppression orders in national security cases. These might prohibit identification of certain people, restrict coverage of certain parts of a hearing, or even ban coverage of the total proceedings.

Reporters and bloggers have been fined and jailed for breaching such suppression orders.

***Disclaimer**: While I write about media law and ethics, nothing here should be construed as legal advice. I am an academic, not a lawyer. My only advice is that you consult a lawyer before taking any legal risks.*

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# 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 scrutiny of government agencies.

At the heart of the legislation is a sustained attack on people's 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".[12]

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 have 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 had 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 Independent National Security Legislation Monitor Roger Gyles QC for consideration. MEAA,

AFP Commissioner Andrew Colvin, former prime minister Tony Abbott, ASIO Director-General of Security Duncan Lewis and Attorney-General Senator George Brandis during a briefing at the AFP Operations Coordination Centre in Canberra.
PHOTO: ALEX ELLINGHAUSEN
COURTESY: FAIRFAX PHOTOS

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[13], Gyles said he was not satisfied that s35P contains 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 but amendments to the Act have yet to be drafted.

### 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.

Because of this, 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.[14]

### Ongoing concerns with the ASIO's powers

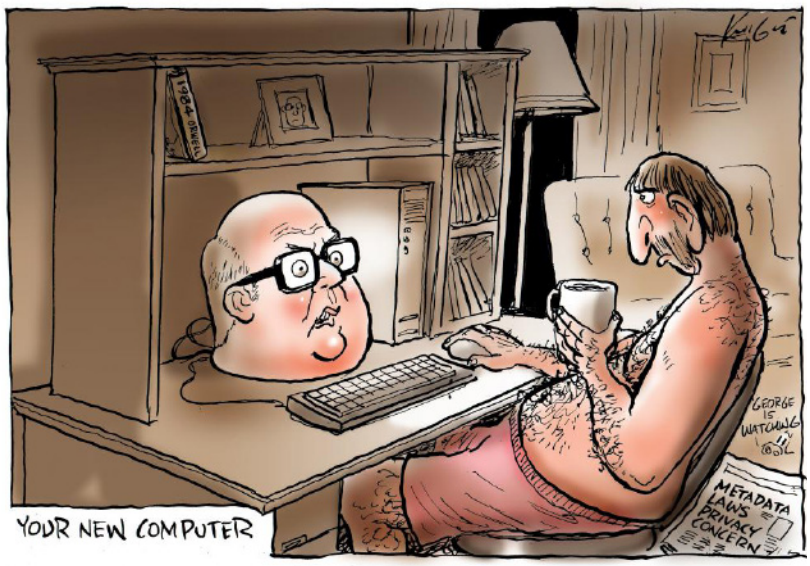
Overall, the *ASIO Act* continues to be loaded with assaults on press freedom. Since 9/11 MEAA has regularly expressed concerns about ASIO and the powers that it has been granted under the act.

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.

Cartoon by Mark Knight



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."[15]

## Journalist Information Warrants

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.

Since October 13, 2015 telecommunications companies have been required 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.

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.


Cartoon by Jon Kudelka

- 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.

### 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

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

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 (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 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[16] that Prime Minister Turnbull had already appointed two Public Interest Advocates.

It appears that former Supreme Court judges Kevin Duggan and John Muir[17] have no particular media experience to argue the public interest. Nor do they have particular experience in media law or defamation[18].

"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."[19]

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

# MEAA refuses to assist the government attack press freedom

### MEAA's response to an invitation from the Attorney-General's Department to help it draft regulations for Public Interest Advocates, September 9, 2015

We acknowledge receipt of your letter of September 4, 2015 regarding the "Public Interest Advocate" proposals under the "Journalist Information Warrant" scheme amendments to the *Telecommunications (Interception and Access Act 1979 (TIA Act)* passed by the parliament in March this year.

### MEAA's *Journalist Code of Ethics*

You would be aware from MEAA's submissions to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) inquiry into the bill when it was introduced to the parliament that all of MEAA's journalist members, numbering about 6000 across a breadth of media outlets and platforms, are bound by MEAA's *Journalist Code of Ethics*. The code was created in 1944 and has been revised and amended several times since.

Clause 3 of the code 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.**"

This key principle is a bedrock position for the craft of journalism in our society. It is a principle that is recognised, understood and acknowledged the world over: journalists do not reveal the identity of a confidential source. Despite numerous legal proceedings, threats, fines and jail terms, journalists maintain this crucial ethical obligation and responsibility. To do otherwise is unthinkable, not least because it would destroy the reputation of the journalist and the essential trust journalists must have with their sources and their audience, but it would also have a chilling effect on public interest journalism because it would inevitably lead to sources of information drying up if the source cannot be certain that their identity would remain confidential. It would expose sources to immense danger.

Confidential sources including whistleblowers play a vital role in our society. They are courageous individuals who seek to expose fraud, corruption, dishonesty, illegal activities and threats to public health and safety.

The role of the fourth estate is also vital to the functioning of a healthy democracy. It is MEAA's belief that any government legislation that seeks to attack the ability of the fourth estate to do its job of scrutinising the powerful, informing the community and ensuring the public's right to know, is an attack on democracy itself.

If a law seeks to go after journalists' sources then that law is also going after journalism.

You will recall that the report of the PJCIS released on February 27, 2015[20] stated in recommendation 27 that the act be amended to include new procedures that specifically dealt with the authorising access to journalists' telecommunications data "for the purpose of determining the identity of a journalist's sources".

MEAA acknowledges that the act prior to the amendments had allowed a variety of law enforcement and other bodies to access telecommunications data. Indeed, in discussions with representatives of the Minister for Communications, the Attorney–General's Department and with Australian Federal Police Commissioner Andrew Colvin stated that over the past 18 months the AFP had received 13 referrals seeking investigation of unauthorised disclosure of information. Media reports suggest that at least eight of those referrals related to legitimate news stories on asylum seeker matters.

However, recommendation 27 was the first time that it had been expressly admitted that journalists' telecommunications data would be accessed for the specific purpose of identifying their sources.

This admission clearly indicates that the legislation represents an outrageous deliberate assault on press freedom in this country by using journalist's telecommunications data to pursue confidential sources.

### The introduction of the Journalist Information Warrant scheme

You will recall that on Wednesday, March 18, 2015 the government and the opposition announced a deal to create Journalist Information Warrants as an amendment[21] to the bill (contained in Division 4C).

At no time did the PJCIS, the government or the opposition, consult MEAA about the Journalist Information Warrant scheme despite the fact that the scheme will clearly have a crucial impact on MEAA's 6000 journalist members who are bound to observe MEAA's *Journalist Code of Ethics*.

MEAA's view about the scheme was stated on March 19: "The introduction of a warrant requirement to access journalists' metadata ignores the key obligation of ethical journalism the world over: journalists cannot allow the identity of their confidential sources to be



revealed. Warrants may allow a judge to determine which journalists the government agencies can pursue for their metadata. But journalists don't get to choose — their ethical obligation is to protect the identity of a source in all cases. The warrant system merely imposes a hurdle before government can use journalists' metadata to identify journalists' confidential sources."

### The intent of the Journalist Information Warrant scheme and the role of Public Interest Advocates

The intent of the scheme was presumably to provide a safeguard in the legislation after media organisations including MEAA raised numerous press freedom concerns. However, it should have been clear from the outset that, because the intent remains in the legislation to circumvent the ethical obligations of journalists, the Journalist Information Warrant scheme and the Public Interest Advocate proposal fail to provide any meaningful safeguard at all.

MEAA believes it does so in the following ways:

- By operating in secret, the entire warrant application process and the granting of an authorisation takes place without the knowledge of the journalist whose telecommunications data is being sought and whose confidential sources are to be discovered should that data be accessed. A journalist will never know if their telecommunications data has been compromised or to what extent their relationships with their sources have been discovered, which could expose the journalist to criminal prosecution under measures announced as part of the government's amendments to national security laws. The repercussions of the discovery of a journalist's confidential sources could ruin the career of the journalist, and have grave implications for any other stories they may be working on.
- The imposition of a two–year jail term for the disclosure of the existence of a warrant further threatens journalists who may discover that their telecommunications data has been accessed, their sources are being pursued and their journalism has been compromised.
- It denies any opportunity for the journalist or their media organisation to represent themselves or to have their position heard. They are unable to defend their journalism and the need to maintain the confidentiality of the source.
- It confuses legitimate "public interest journalism" with the alleged public interest in the pursuit of sources and whistleblowers.
- There is no transparency or reporting mechanisms relating to the operations of the scheme.
- There is an inconsistency in allowing ASIO and others to by–pass the warrant scheme entirely.

We are also concerned by the notes in your letter that the government would consider allowing agencies to apply in exigent circumstances without the need for approval of the advocate — a move that again undermines the "safeguards" presumably intended when the scheme was first considered.

We again wish to state that, as you say "the role of the Public Interest Advocate will be to make submissions in the public interest, rather than to stand in the shoes of the journalist, their employer or their source" and that there would be occasion where the advocate would support the issuing of a warrant, denies any opportunity for the journalist, the media employer, the source of even the journalism that has resulted to ever make the case in their own defence.

MEAA believes the advocate must argue for the public interest in not providing access to a journalist's data and that the advocate's argument must be supported by some degree of representation from the journalist or media employer.

### Summary

MEAA maintains that because the aim of the scheme is to circumvent journalists' ethical obligations to their confidential sources, the Journalist Information Warrant scheme and the creation of Prime Minister-appointed Public Interest Advocates are an attack on press freedom in Australia.

The inability of journalists and media organisations to state their case for their journalism and their sources; the secrecy surrounding the operation of the scheme; the jail terms that apply to the disclosure and non–disclosure of the existence of a warrant; the appointment of advocates approved by the government to allow the government to access journalists' telecommunications data for the stated purpose of identifying confidential sources — these all represent an assault on public interest journalism, freedom of expression, and the right to information.

As such, MEAA cannot co-operate in the development of any aspect of a scheme that represents such as egregious assault on press freedom in this country.

# Despite changes, terror law will still curb press freedom

**By Keiran Hardy**

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The government [has] published a report from Roger Gyles[23], the Independent National Security Legislation Monitor, on the controversial Section 35P[24] of the *ASIO Act*.[25]

Attorney-General George Brandis intends to introduce amendments[26] to the act that incorporate Gyles' recommendations. This will go some way to making it more difficult to prosecute journalists under Section 35P. But, ultimately, the proposed changes will do little to reduce its significant impact on press freedom. Section 35P, introduced in 2014, gives immunity to ASIO officers who engage in unlawful conduct during the course of specially approved undercover operations. It also provides for five years imprisonment for anyone who discloses any information that relates to a Special Intelligence Operation (SIO). An aggravated offence, punishable by 10 years imprisonment, is available where such disclosure endangers health or safety or prejudices the operation.

The section has attracted significant controversy[27] due to its impact on press freedom. Journalists face five years in jail for reporting any information that relates to an SIO, or twice that penalty if the disclosure would cause harm — even if the information would reveal that ASIO officers engaged in unlawful or inhumane conduct outside an operation's scope. Because of this, the offence is likely to have a wider chilling effect[28] on media organisations' ability to report on national security issues.

## What changes have been recommended?

The major recommended structural change is to redesign Section 35P so that it targets two different categories of people: "insiders" and "outsiders". This would mean that the offences in the section currently will apply only to intelligence employees or contractors. The offences amended version will apply to journalists and any other individual.

The change to the main offence in Section 35P means it will only apply when "outsiders" make a reckless disclosure that endangers health or safety or prejudices an SIO. Recklessness means the person is aware of a substantial risk of those circumstances arising and chooses to publish the information anyway. This will make it more difficult to prosecute journalists compared to the offence as it stands. However, it does not address the major issue with the offence — that Section 35P does not provide any scope for journalists to disclose information in the public interest. It may be that a journalist is aware of a substantial risk that disclosing information may prejudice an SIO, but believes in good conscience that the public should be informed about some unlawful or inhumane conduct in which ASIO officers are involved — such as torturing or blackmailing a suspect. No change is to be made to the fault requirements for intelligence employees or contractors. Section 35P as applied to "insiders" will therefore be superfluous. Several other serious offences already apply to intelligence employees and contractors who disclose information obtained during the course of their employment.

Gyles also recommended the offences include an exemption for "outsiders" who disclose information that has already been disclosed by others. This exemption will have little practical effect. It is unlikely it would ever be in the public interest to prosecute a journalist for re-reporting information already in the public domain.

The government has indicated this exemption will only apply to those who take reasonable steps[29] to ensure the secondary publication is not likely to cause harm. To avoid conviction, it will not be enough for a journalist to show that the information was already in the public domain. A journalist would also need to demonstrate that positive steps to avoid a risk of harm were taken prior to disclosure.

## Still more that could be done

Gyles recognised that a defence for disclosing information in the public interest would be a useful addition to the offence, but considered this no longer necessary given the higher fault requirement to be introduced. This is emphatically not the case. The higher fault requirement will require only that a journalist or other "outsider" was reckless in disclosing material that leads to a risk of harm. This will not provide any greater scope for journalists to prove ASIO officers engaged in unlawful conduct.

Until a public interest exemption is included in Section 35P, the offence will continue to have a significant impact on press freedom and a chilling effect on media organisations' ability to report on ASIO's activities. Such an exemption could be drafted narrowly[30] to allow the reporting by professional media organisations of significant unlawful activity, corruption or other serious misconduct in which ASIO officers are involved. This would strike an appropriate balance between protecting the SIO regime's secrecy while allowing journalists to report responsibly on issues of public importance.

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AFP Commissioner Andrew Colvin.
PHOTO: ALEX ELLINGHAUSEN
COURTESY: FAIRFAX PHOTOS

# THE AUSTRALIAN FEDERAL POLICE

MEAA has observed a general lack of acknowledgement and understanding of the principles of press freedom in a variety of areas where the AFP is involved. These include:

- The harassment of a television journalist reporting on Anzac Day;
- The targeting of journalists as the AFP investigates government leaks; and
- The impunity surrounding the pursuit of the killers of journalists.

Regarding the first issue, MEAA wrote to AFP Commissioner Andrew Colvin on April 29, 2015 expressing concern at events in Canberra on Anzac Day when a journalist from the NITV/SBS network was told by AFP members that he was misusing a Commonwealth asset while using camera equipment owned by the network which was being used to legitimately report an event in the public interest.

Vision[31] of the discussion between the reporter and the AFP officers shows an AFP officer requesting the reporter immediately provide him with footage of an incident that had taken place. The reporter responds that he will do so, but at a later time. MEAA believes this is a reasonable response as the reporter should be given the opportunity to consult with his editor/producer. The AFP officer then mistakenly advises a superior who has joined the discussion that the NITV reporter "refuses to speak to me" which was clearly not the case.

The officers then begin to question the use of NITV equipment in reporting the event.

A third officer joins in, asking if the camera being used by the television reporter is a Commonwealth asset. The reporter confirms that it is owned by SBS. This third officer then says: "So that's being used for a private purpose." The senior officer adds: "It would appear so, wouldn't it?" The third officer continues: "That would appear to be a misuse of a Commonwealth asset. It is. It's a Commonwealth asset."

The reporter again explains he works for NITV television news and was covering an Indigenous march for an Indigenous news service. The third officer then says: "Which would make you a Commonwealth employee … *ergo*, would you be behaving in contravention of the common … what's the word for it …?"

The NITV reporter then requested the identification of the officers.

The third officer subsequently again says that a Commonwealth asset "is being used for private, personal purposes". The third officer then goes on to explain what he believes the role of the media should be.

MEAA believes the attitude, comments and conclusions reached by the AFP officers indicate a poor attitude towards media and journalists carrying out their duties.

MEAA requested the AFP investigate the incident, view the vision taken by the journalist and publicly report its findings and any outcomes of its investigation. MEAA also requested the AFP ensure that its members are trained in the rights and responsibilities of journalists to ensure that AFP personnel understand the role of the media in a healthy democracy to ensure that assaults on press freedom do not take place.

On May 11, 2015, AFP Professional Standards requested a copy of the MEAA letter to Commissioner Colvin. On July 27, 2015 AFP Professional Standards advised MEAA that it had completed its investigation.

On October 9, 2015, AFP wrote again to say that one AFP member had been found to have breached the AFP Code of Conduct by demonstrating discourteous behaviour towards the journalist but separate conduct issues raised against two other AFP members were not established.

On the second issue regarding the AFP's engagement with press freedom, on Thursday, April 14, 2016, the AFP issued a "fact check"[32] after MEAA issued a statement regarding the disclosure that the AFP had secretly sought to identify a journalist's confidential sources by trawling through a journalist's metadata. The fact check stated that its investigations "are not about targeting journalists".

MEAA contends that the AFP has indeed been targeting journalists as the AFP had already been found to have compiled a 200-page redacted dossier[33] on the journalist in order to identify the confidential source relating to a legitimate news story on asylum seeker policy. The dossier[34] was heavily redacted but was made up of 51 documents: operational centre meeting minutes, file notes, interview records, an investigation plan and what appeared to be a list of suspects and possible offences they may have committed. Over the course of the investigation "an AFP officer logged more than 800 electronic updates on the investigation file".[35]

A single news story had led to the Department of Immigration demanding the AFP initiate a massive investigation that generated an extraordinary


Greg Shackleton paints the word "Australia" on the outer wall of the shop in Balibo, facing the road to Batugade.
COURTESY: FAIRFAX PHOTOS



paper trail. It was all done without the journalist's knowledge. At no stage was the public interest in the journalist's new story considered, or the journalist's ethical obligations to protect the identity of confidential sources for this and any other stories the journalist was working on.

The journalist subsequently applied under the *Privacy Act* to discover what was contained in the redacted information. It was subsequently revealed by the Privacy Commissioner that the AFP had conducted investigations of the journalist's email and other "subscriber checks" on the journalist and an examination of the metadata associated with some electronic files. A subscriber check is a request to telecommunications companies for access to information they may hold on a particular person under the *Telecommunications (Interception and Access) Act 1979*.

It is important to note that this information was gathered before the introduced of mandatory metadata retention and the introduction of the flawed Journalist Information Warrant scheme which allows for journalists' metadata to be accessed in secret after a warrant has been secretly granted. Prime Minister-appointed Public Interest Advocates, former judges with no media experience, are meant to consider arguing the public interest but they "do not stand in the shoes" of the journalist or their media employer and, as the entire warrant process is secret, there is no one to protect the confidential source.

In this case, MEAA acknowledges that the AFP was acting on a referral from the Immigration Department. But what is at stake is that the AFP has ignored the privacy of a journalist in order to examine the journalist's metadata in the hunt for a confidential source who may have leaked information to the journalist. In the process, the journalist's telecommunications data has been trawled through and, the journalist believes, a list of multiple suspects has been drawn up — which in itself may be of concern if the AFP's suspicions are wrong for the AFP may be tainting perfectly innocent relationships.

There appears to be no understanding of the rights of the journalist to their privacy, or of the journalist's ethical obligation to protect the identity of a confidential source. The AFP's targeting of the journalist is an outrageous assault on press freedom.

The journalist in question is certainly not alone — how many journalists have had their privacy invaded in such a fashion under the older legislation that did require a warrant? And, under the new laws, will we ever learn how many Journalist Information Warrants have been sought, how many denied and how many granted, as the new system becomes operational? Will we ever learn what arguments were put up by warrant applicants and what counter-arguments were put up by the Public Interest Advocates? And will we ever learn why a warrant was granted or denied by a government-appointed judge or government-appointed member of the Administrative Appeals Tribunal?

What is also particularly galling about the example outlined above is that it is possible that the leakers in question may be senior politicians or their staffers, trying to score political points by leaking the information. Take other instances recently referred to the AFP: a report in *The Australian* on a draft of the Defence White Paper was referred to the AFP for investigation by Prime Minister Turnbull.[36] A Cabinet leak on draft proposals asylum seeker policy, reported by Fairfax Media, also triggered an AFP investigation[37].

Are politicians playing political games of chicken, and blithely putting journalists' privacy and the principles of press freedom at risk?

The third issue of concern relates to the impunity surrounding the murder of journalists and the failure of investigations to bring the killers to justice. It is now 40 years since six journalists were murdered in East Timor. While it took decades for a coronial inquest to be held into the murder of the Balibo Five, it took a subsequent five-year investigation by the AFP say that it was abandoning its investigation due to "insufficient evidence to prove an offence". The inquest had named individuals who it believed had not only ordered the killings but also those who allegedly had taken part in slaying the journalists.

After five years, the AFP said it had neither sought any co-operation from Indonesia nor had it interacted with the Indonesian National Police.[38]

MEAA has also raised the murder of Roger East in East Timor in 1975. As MEAA has said in previous press freedom reports: "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."

Regarding the murder of Paul Moran in northern Iraq in 2003, the AFP responded to a letter on April 15, 2015 saying that there was insufficient information available to justify an investigation under section 115 of the *Criminal Code Act 1995 Harming Australians* and the AFP would not take further action.

This despite the individual most likely responsible for training and perhaps even directly ordering the attack that killed Paul being well known to authorities in Norway.

# IMPUNITY

## Juanita Nielsen

Last year 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 King's 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.

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.[39]

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.[40]

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."

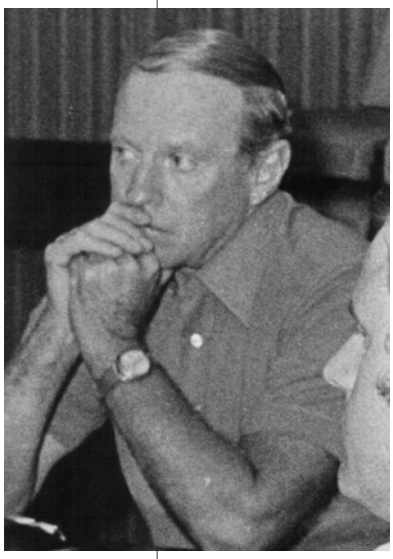
## The Balibo Five and Roger East

Last year 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


Juanita Nielsen (right) and the memorial to Juanita Nielsen (far right)



(From left)
Gary Cunningham, Malcolm Rennie, Greg Shackleton, Tony Stewart and Brian Peters

Roger East (above)

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

Yunus Yosfiah rose to be a major general in the Indonesian army and is reportedly its most decorated solider. He is also a former minister of information in the Indonesian government. In February 2007 he unsuccessfully contested the election for party chairmanship of the United Development Party (PPP).

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[41] 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".[42]

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.[43]

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".[44]

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."[45]

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."[46]
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 will honour the memory of the Balibo Five and Roger East with a new scholarship in their name. It 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."

It is expected that the first scholarship will be awarded some time in 2016.[47]

## 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.[48] 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'."

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 at the *Charlie Hebdo* office, 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".[49]

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.

Krekar reportedly still faces being extradited to Italy to face terror charges there.[50]

## 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.

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]

Paul Moran (left) Tony Joyce (above)
COURTESY: ABC

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.

A security guard patrols the Manus Island processing centre.
PHOTO: KATE GERAGHTY. COURTESY: FAIRFAX PHOTOS

# ASYLUM SEEKERS

The *Australian Border Force Bill 2016* was introduced to parliament on February 25, 2015 and passed both houses with bi-partisan support on May 14. The purpose of the legislation was: "to establish the role of the Australian Border Force Commissioner, to enable the operation of the Australian Border Force, and introduce provisions to support the management of a professional and disciplined workforce that exercises its powers and functions with the highest standards of integrity".[54]

Section 42 of the legislation pertains to secrecy provisions that provide for a penalty of two years imprisonment if an "entrusted person" makes a record of, or discloses, protected information[55]. An entrusted person is an employee or specified persons whose services are made available to Department of Immigration and Border Protection "(such as contractors, consultants, employees of State, Territory and other Commonwealth agencies and authorities), collectively known as Immigration and Border Protection (IBP) workers".[56]

While section 48 of the act allows for disclosures where there is a serious threat to the life and health of an individual, it is clear that many health sector professionals are concerned that they face imprisonment if they speak out about conditions inside asylum seeker detention centres.[57]

Their fears reflect how the flow of information relative to this area of government policy has been compromised in recent years.

As MEAA has said many times before, the militarisation of customs and immigration under Operation Sovereign Borders allowed the government to shroud all activities about the asylum boats problem in secrecy by using defence wartime security methods to shut down any information about what was going on. In short, it placed the media and the Australian community beyond its reach and allowed the government to simply refuse to engage on any exchange of information.

The result was that the media is being approached by confidential sources willing to break down this refusal in an effort to keep the public informed.

Minister for Immigration and Border Protection Peter Dutton.
PHOTO: ANDREW MEARES COURTESY FAIRFAX PHOTOS

Media organisations are therefore reporting legitimate news stories based on leaks from whistleblowers. The leaks, in turn, incensed the government because it had lost absolute control over its ability to contain information.

The response from the Department of Immigration is to request the Australian Federal Police go hunting for the source. And that leads to the AFP trawling through journalists' telecommunications data citing the need to investigate breaches of the much-criticised section 70 of the *Crimes Act* which criminalises the "unauthorised disclosure" of information by a Commonwealth officer, and those performing services on behalf of the government.

And that's the space where press freedom and a peacetime news blackout collide: at stake is the public's right to know what governments do in our name, the role of whistleblowers in seeking to expose corruption, fraud, dishonesty, threats to public health and safety, and illegality, and the privacy of journalists and their ethical obligation to protect the identity of confidential sources (journalist privilege).

In October 2015 Nauruan police conducted two raids on staff employed by Save The Children on the island allegedly to find journalists' sources used in news about the island's detention centre.[58] "Laptops, personal phones, desktop computers and other devices were seized after searches of the Save the Children recreation office and the welfare tent at the centre."[59]

MEAA contends that whistleblowers seek to reveal alleged human rights abuses on Manus Island and Nauru but the Australian public is being kept in ignorance of what is really being done in their name.

MEAA responded to the news of the raids: "It is not justifiable in any circumstances to thwart legitimate public interest reporting on suspected infringement of the human rights of a refugee or asylum seeker. On the contrary, the public has a right to know how Australia's obligations under Australian and international legal instruments are being met."

"MEAA urges the Australian government to lift the veil of secrecy so that the media can freely and legitimately speak to sources without fear of prosecution or harassment and report matters in the public interest so that our communities can make their own minds up about what the government is doing in our name."[60]

## Journalists must continue to resist and protest

**Journalists reporting on asylum issues have noisily resisted efforts at government control of their reporting. But they have to stay defiant; they have to keep resisting, writes Ben Doherty writes.**

"On-water operations", "matters of national security", "stopping the boats": shibboleths trotted out almost daily as though they were, alone, self-evident justifications for secrecy and sophistry, as though no questions could ever be reasonably asked when these watchwords are invoked.

This is the point that Australian debate on asylum has reached. But it's a nadir not reached overnight.

Australia has, over years, witnessed a relentless deterioration of press freedoms in the reportage of asylum, each restriction establishing a "new normal", so that the latest erosion of press freedom is seen as another mere incremental infringement, rather than the egregious breach it is.

Beginning with the introduction of mandatory detention under Labor in 1992, when those arriving by boat were first locked away (the initial 273-day time limit[61] on detention was abandoned in 1994, the average time in detention now is 464 days[62]), the direction of government policy has been consistently towards restriction, control, and isolation, and towards stopping the press from freely reporting a matter of genuine public interest.

In 2001, in the wake of the children overboard affair — when the government accused asylum seekers of throwing their children into the sea despite knowing it didn't happen — Defence Minister Peter Reith issued a diktat to the defence forces that they were to allow "no personalising or humanising images"[63] to be taken of asylum seekers on boats, lest they find their way into the public domain.

When the weekly briefings on Operation Sovereign Borders in 2014 elicited nothing but bellicose refusals to answer, a journalist asked then Prime Minister Tony Abbott[64]: "Scott Morrison's press conference today descended into even more farce than usual. How long are these Friday briefings going to continue and is it acceptable for the government to be keeping information from the Australian people about what's happening on our borders?"

"The important thing is to stop the boats," the Prime Minister responded, as though "that's the important thing".

And in February this year, the Secretary of the Department of Immigration and Border Protection Michael Pezzullo railed against journalism[65] that criticised government policy, calling it "advocacy" and "pamphleteering". (The *ad hominem* approach is common. Minister Peter Dutton has, separately, accused Fairfax of waging a "jihad"[66], the ABC of "peddling misinformation"[67], and *The Guardian* of being "discredited"[68].)

Secretary Pezzullo told a Senate estimates hearing "bring on 11pm"[69] so his department could escape the scrutiny of the parliament — "where we are a little bit more visible and observable"[70] — and get back to working away in secret, prosecuting policies that the public, to the department's mind, doesn't have a right to know.

Every one of these assaults on press freedom, and dozens of others like it, has been noisily resisted by the profession of journalism in Australia.

But it is a struggle neither won nor lost at this point. And journalists must continue to resist and protest, because the trend remains dangerous, undemocratic, and in the direction of concealment.

In a democracy, people have a right to know what is being done with their money, and in their name. Their governments do not have the option of doing things in secret and telling its voting public: "trust us, we're the government".

It is an extraordinary position for an elected government to tell its citizens: *you have no right to know*. That is almost a definition of fascism.

But that is the position that has been arrived at by both major parties in this country, that what happens in Australia's detention centres, onshore and off, is no business of the Australian people.

The government's attitude to genuine media inquiry on matters of asylum is overtly hostile, and a politicised public service has been infected by this attitude.

The massive machinery of the department's media room does not exist to answer journalists' questions and assist in the dissemination of information of public interest. It exists to deny, and to obfuscate.

Those working in the media room are not at fault. They are bright, friendly, and genuinely try to assist with enquiries, but anytime a query gets vaguely uncomfortable, it is (often after a delay of days or weeks) referred to the minister's office — a black hole of silence, or the source a few partisan "lines" of only oblique reference to the query.

The Secretary of the Department of Immigration and Border Protection, Michael Pezzullo.
PHOTO: ROHAN THOMSON
COURTESY: FAIRFAX PHOTOS

Such a system leads to governments that believe they can, essentially, get away with anything. They can find a pliant media organisation when they have something they want to promote; they can ignore questions they don't want to answer.

But journalism's loyalty is to truth. It is a journalist's job to ask awkward questions, to be a nuisance, and to be — when occasion demands it — confrontational.

That is journalism's most fundamental role. Journalism doesn't exist to be a friend to power, an ally to, or a tool of, the status quo. Journalists excited by having the prime minister's mobile phone number, or by being favoured with a "drop" are missing the profession's true calling, and doing their audience a disservice.

Journalism's greater vocation, surely, must be to hold that power to account, and to give voice to those who have none.

In a world predicated upon nationality and bounded territoriality, those forcibly displaced from their homes are among the most disenfranchised, vulnerable, and voiceless.

The department and the minister regularly rail against what they regard as inaccurate reporting. Mistakes do happen[71]. Journalists are fallible. They won't always get it right. Every effort should be made — and in most cases *is* made — to report accurately. Journalists get much more right than they do wrong.

Where mistakes do happen, it is regrettable. Errors must be declared and corrected, honestly and openly. But a world of occasional errors that are acknowledged and fixed is far preferable to a landscape of supine obedience, where the government line is the only, unquestionable, truth.

And the government must recognise also that they are, in large part, responsible for journalists flying in the dark with their reporting. Mistakes are bound to be more prevalent when information on a key public policy is deliberately restricted.

When Christmas Island, Manus Island and Nauru are completely off-limits to any level of media scrutiny, journalists are reliant on unofficial sources — the resourceful detainees themselves, whistleblowers, and departmental staff who feel obliged to speak out — to understand what is happening within.

And the government seeks to further continue to close off these avenues of information. No one has yet been prosecuted under the *Border Force Act*, but the legislation has already been dangerously effective in its chilling effect, in warding off people who might otherwise have felt they needed to draw public attention to a failing of the system.

A law under which doctors, child welfare workers, security guards, and teachers can be jailed for speaking out on a matter of conscience (and they *can* all be jailed[72], despite government protestations to the contrary) is anathema to a free society.

For years, Australian journalists have noisily and proudly resisted political efforts to restrict them in their work. But they must continue to oppose the suppression of free reportage, on issues of asylum and all others.

Sunlight has forever been the best disinfectant, and journalists must rage, rage against the dying of that light.

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Ben Doherty is Guardian Australia's immigration correspondent

# SUPPRESSING THE RIGHT TO KNOW

The relationship between those who have information and those who want access to it has always been a fraught one.

In Australia, we are seeing extraordinary restrictions on the flow of information about what governments do in our name. Unlike the wars of 50 and 75 years ago, much of the news, sounds and vision, from the battlefields of Iraq and Afghanistan are provided through the filter of Australian Defence Force public relations. Likewise, the activities of the Customs Service and the Department of Immigration and Border Protection have been militarised into the quasi-wartime Operation Sovereign Borders allowing senior defence force personnel to stand alongside politicians and bluntly refuse to reveal anything about "on-water matters". And when journalists write news stories about those matters, the department sools the Australian Federal Police on to the journalist's metadata in order to find and prosecute the source under section 70 of the *Crimes Act*.

The conditions inside asylum seeker detention centres are kept from view, with spurious reasons such as needing to protect the identity of asylum seekers (who are not given the opportunity to determine for themselves if they wish to speak to the media or not). Government controls include insisting the media sign a deed that undermines editorial independence. Offshore detention centres allow the relevant governments to refuse visas (or price them at outrageous levels) or simply deny media access. And now the *Border Force Act* applies penalties of two years jail for an "entrusted person" who discloses "protected" information.

The relationship between the public service and journalists, when it comes to freedom of information, is also fraught. For the public service, it distils to two key concerns: the administrative burden of devoting limited resources to freedom of information applications, and the fear that the advice they give may come back to haunt them either by getting themselves or their ministers into strife.

Disturbingly, public servants are increasingly seeking to restrict the information available to the public. Perhaps gun-shy at a series of scandals, public servants want to rewrite the *FoI Act* to exempt from release the deliberative advice they provide their ministers. Or to put it another way: they want to suppress information.
The fallout over the pink batts disaster, the Home Insulation Program of 2009, which resulted in the loss of four lives, led to a Royal Commission. In the midst of castigating those responsible for administering the program, the Royal Commission report made it clear that "it is an obligation of public servants that they provide the political executive with advice that is frank and fearless. It falls to the political executive to make the most important and difficult of decisions, and to suffer the harsh consequences at the ballot box, in the party room or in parliament itself if those decisions are unpopular, clearly wrong or otherwise imprudent."[73]

The report added: "Pursuant to section 13(2) of *Public Service Act*, an APS employee must act with care and diligence in connection with his/her employment. It is apparent that this did not always happen."

One subsequent review of the public service was carried out by Professor Peter Shergold, a leading academic and a former secretary of the Department of Prime Minister and Cabinet, in response to terms of reference from Environment Minister Greg Hunt. Shergold undertook "an independent review of government processes for implementing large programs and projects, including the roles of ministers and public servants". His report, completed in August 2015 and released in February 2016, had a no nonsense title: *Learning from Failure: why large government policy initiatives have gone so badly wrong in the past and how the chances of success in the future can be improved*.[74]

The Shergold review aims to examine the role of risk management and leadership in the public service; how the public service should provide advice, and particularly "deliberative" advice to government; and the need to learn from failure and mistakes.

It should be of concern that Shergold wants the *FoI Act* to be amended to allow public servants' deliberative advice to be granted the status of Cabinet documents and be exempted under the act.

In his report, Shergold contends: "The Commonwealth's FoI laws now present a significant barrier to frank written advice. The Commonwealth laws have had the unintended consequence of constraining the content, form and mode of advice presented to ministers. Ironically, application of the revised public interest test has now had the unforeseen effect of lowering standards of public administration and, as a consequence, undermining the public interest in good policy. The public interest is certainly not served by having no public record of how and why decisions were made. Nor is there much benefit in gaining access to written advice that has purposefully been prepared to appear innocuous when released under FoI …

"There would … be value in widening the current exemption for Cabinet documents to make it clear that it includes drafts, early advice and other preliminary material that may not ultimately be submitted to Cabinet, but which is of such

Professor Peter Shergold.
PHOTO: LOUIE DOUVIS
COURTESY FAIRFAX PHOTOS

close proximity that its release could impair the confidentiality of Cabinet processes," he says.[75]

Shergold's recommendations, in the wake of the pink batts crisis, are two-fold: stop the over-reliance on providing advice orally and, instead, put it in writing. But then lock-up that written deliberative advice by making it confidential.

Shergold explains it this way: "Where there is a risk of advice being made public, sensitive topics are less likely to be the subject of full and frank written briefing. This increases the risk that decisions will be made on partial information, feebly presented. It means that there will be an incomplete record of the decision-making process."[76]

Such a view doesn't say much for the rigour of public service argument nor of the willingness of advisers to back their view.

In his report's recommendation A.2, he says: "Whilst acknowledging the value of frank and fearless oral discussions, the Australian Public Service Commissioner should issue a Direction that significant advice also be provided to ministers in writing. Ministers should insist on receiving frank written advice from the APS, noting that it is generally their decision whether to accept or reject all or part of the advice."

But then in recommendation A.3 he says: "The *Freedom of Information Act* should be amended to ensure that advice and opinion provided to support the deliberative processes of government policy formulation remain confidential."

MEAA has always argued that open and transparent government should mean that that the default position of information should be freedom of access. The vast bulk of information generated by government should be subject to scrutiny and evaluation. Restrictions on information are anathema to democracy and by extension to the principles of press freedom.

The Shergold review is part of a broader push among senior public servants who are becoming increasingly bold about suppressing information that may previously have been available to the public or that should be available to the public, including to journalists. Shergold expanded on his push for confidentiality of deliberative documents to an Institute of Public Administration Australia ACT lunchtime forum on April 11, 2016.[77] He shared the stage with Martin Parkinson, the current secretary of the Department of Prime Minister and Cabinet; the Australian Public Service Commissioner John Lloyd; the secretary of the Department of Environment Gordon de Brouwer; and the secretary of the Industry, Innovation and Science Department Glenys Beauchamp (who is also president of the ACT branch of the Institute of Public Administration Australia).

During the forum, a member of the audience (a public servant, not a journalist) asked Shergold: "If openness and transparency are necessary for ensuring accountability and stimulating innovation … I'm interested in exploring the conclusion … that the advice and opinion of the public service provided to support government policy formulation should remain confidential …

"Surely moving to a basis where our advice is open by default would make public servants more accountable for providing fulsome, robust, innovative and evidence-based policy advice. It would also ensure that ministers remain accountable to the public for the decisions they make and for clearly explaining those decisions."

Shergold responded: "It is very controversial to sit here and say that I think we need to rethink the *FoI Act* in order to ensure that deliberative documents

are protected. I do so only because I am absolutely convinced that it is the foundation of good public administration and good public outcomes. In many ways, I think publicly collected information should be more widely disseminated … What I am talking about is that one element.

"I suppose the epiphany for me where I thought: 'this is going wrong' was once I had left the public service and I saw the fact that the incoming government briefs that had been prepared for governments and oppositions were now being made public. In my view that is not helpful. And my guess is that if that continued the form in which those incoming government briefs were written in the future would change. One of the dangers is not just that ministers would prefer oral advice on sensitive issues; it's that public servants, worried that the documents may become public, will tend to write anodyne advice."

The secretary of the Department of Environment, Gordon de Brouwer added: "The *FoI Act* has a sense in it of public disclosure … But it also provides for the use of exemptions from release of freedom of information under specific guidelines. My own sense is that we haven't made proper use of those exemptions from freedom of information. They really do relate to the sensitivity of deliberative material and deliberative processes of government. When you are working closely with government, unless your most intimate advice is … confidential and written, it won't be persuasive. My own personal view is … that all substantive advice should be in writing but it needs to be then provided in that private, trusted way with a minister and with the government."[78]

Glenys Beauchamp added her concerns were particularly the use of the *FoI Act* by journalists. "We, as public servants in this contest of ideas, if we can't raise ideas early on in the process and make sure that information is protected, then we are not going to be as frank and fearless as we possibly could. With the media cycle as it is, 24/7, with the hint of something happening within government it becomes automatically public policy. Whereas early in the public policy process, of course there should be a contest of ideas and those ideas should be tossed around within government, across government, with politicians and the like.

"And I think that we would be in a much better position, and I know as secretary of my department, I'd be in a much better position to manage that process. Whereas when I look at some of the FoI requests at the moment, most of them are from journalists looking for a story which I think is, not misusing the *FoI Act*, but is that its original intent? So I think it would be good to get that balance back there,"[79] she said.

In Shergold's report, APS Commissioner John Lloyd is quoted as saying: "FoI laws are very pernicious. I think they have gone beyond what they intended to do and I think they make us a bit over cautious and make some of the advice more circumspect than it should be, and I hope the government will address that and perhaps reassess the extent of some of those FoI laws".[80]

The forum concluded with comments from Dr Martin Parkinson, current secretary of the Department of Prime Minister and Cabinet. "I think Peter is absolutely spot on when he said the *FoI Act* does not afford sufficient protection to public servants to (give the best possible advice in writing). As leaders we need … to use exemptions appropriately. But I would support going further and advocating changes to FoI laws to protect the deliberative process. Not to reduce our accountability or to protect us from stuff-ups we have made. But to enhance the capacity to give frank and fearless advice."[81]

MEAA believes that the proper response to an event such as the Home Insulation Program scandal should be to ensure that information is made available, accessible and public. Government actions should be subject to consultation, consideration, scrutiny and debate. However, the reflexive response of these most senior Australian Public Service leaders appears to be to close ranks, hunker down and keep information hidden from view.

Dr Martin Parkinson.
PHOTO: JOSH ROBENSTONE
COURTESY: FAIRFAX PHOTOS

The comments being made by these senior public servants is deeply disturbing. It suggests a mindset is evolving that believes some aspects of risk management should involve minimising the risk of exposure; that the public and journalists in particular are not entitled to seek information; and that deliberations of government on matters of public policy are best kept suppressed. This is wrong. It is not in keeping with a healthy functioning democracy.

MEAA believes that government should be open, transparent, responsive, responsible and accountable. To do otherwise may set some minds at ease but it is not good government.


# FREEDOM OF INFORMATION

As already discussed in the chapter Suppressing the right to know, MEAA has concerns over the mounting opposition in senior Australian Public Services ranks to the principles freedom of information.

There has been a long-standing antipathy among some public servants towards the *FoI Act* — due in part to a lack of resources dedicated to meeting FoI applications but also a general fear of what exposure of information may mean. This opposition is becoming increasingly public to the extent that FoI laws are being described as "pernicious".

The lack of resolute determination by government to support the principles of freedom of information don't help. The current government's determination to keep much of the operations of its asylum seeker policies hidden and to curtail anyone seeking to find out more and to punish anyone who seeks to break out of the news blackout doesn't suggest a government that is willing to embrace freedom of information.

The current government has already signalled that it has a less than robust approach to freedom of information. On October 2, 2014, the government introduced the *Freedom of Information Amendment (New Arrangements) Bill 2014*. The bill proposed the closure of the Office of the Australian Information Commissioner on December 31, 2014.

Due to the inability to get the bill passed in the Parliament, the OAIC remains open — albeit in greatly straitened circumstances with the former Information Commissioner Professor John McMillan working from home with the assistance of some staff in the Sydney office[82]. Privacy Commissioner Timothy Pilgrim has now taken on the role of acting Information Commissioner.

The *Canberra Times* published an op-ed on the issue: "This messy saga raises a number of issues. One concerns the constitutional propriety of the government's actions in defunding the OAIC while the office still remained a legal entity with statutory obligations. Three former justices of the Victorian Supreme Court, Tim Smith, David Harper and Stephen Charles, wrote in *The Canberra Times* (in May and June this year) that the action was unconstitutional. They argued the government was in breach of its obligation under section 61 of the constitution to execute and maintain the constitution and the laws of the Commonwealth.

"To deny a statutory authority the means of exercising its obligations was tantamount to failing to execute a law. In addition, by trying to do away with the OAIC without legal authority, the government was usurping the constitutional role of parliament, which has the sole right to legislate."[83]

The newspaper added: "More significant is what happens to the information commissioner's function to report generally on government policies in relation to information, including the disclosure and accessibility of government information. This function casts the commissioner in the role of public champion of open government, a role which McMillan performed, for example, by monitoring agencies' administration of FoI and generally advocating a more proactive approach to disclosing information. The claim that the Attorney-General's Department can adequately cover for this function is disingenuous. Expecting the attorney-general to act as a champion of open government is asking the fox to act as the defender of hens."[84]

At Estimates hearings in early February 2016, Attorney-General George Brandis said the government still intends to abolish the OAIC but he acknowledged that the Senate continues to block the plan.

## Little intent behind the promise

**By Peter Timmins**

On the transparent, open and accountable government front, it's that familiar story six months into the Turnbull era. Hope and disappointment.

On his first day in office, hopes were raised when Prime Minister Turnbull said we "need an open government, an open government that recognises that there is an enormous sum of wisdom both within our colleagues in this building and, of course, further afield."[85]

The statement was reminiscent of the Liberal Party promise before the 2013 election to "restore accountability and improve transparency measures to be more accountable to you".

At the time of writing, just ahead of the federal budget and the commencement of the real election campaign, there are still few markers of serious intent that the federal government intends to put the dark Abbott days behind.

### Dark days for transparency

As Prime Minister, Tony Abbott said nothing about the importance of open transparent and accountable government. The silence was a message in itself, suggesting his government was prepared to wear an obsession with secrecy as a badge of honour. The tone at the top in the Abbott government was set by Immigration Minister Morrison and his department: on-water, on Manus, Nauru and in Canberra.

The preference for closed, not open, government was made clear in the 2014 budget when Attorney-General Brandis announced that the independent statutory office established in 2010 and charged with leading and advocating the cause for transparent, open government, was to be abolished. In the meantime, until parliament passed the necessary legislation, the budget for FoI functions was reduced and no funds were allocated for information policy functions for the Office of the Australian Information Commissioner.

Finance Minister Mathias Cormann spent two years publicly prevaricating about whether the government would follow Labor's lead in May 2013 to join the Open Government Partnership. The OGP is an international initiative involving more than 60 governments to promote democratic reforms through improved transparency, open government, citizen engagement and use of technology.

Prime Minister Abbott was not enthused about signing up to such a reform agenda.

Public servants, experts at reading between the lines, stood shoulder to shoulder with ministers in the bunker. Almost universally, government agencies were refused access to the incoming government briefs prepared for ministers in the new government, a complete about-face from the trend in 2010 and 2013 to release significant parts of the briefs that informed debate and discussion about the state of the nation.

Public Service Commissioner John Lloyd went on the public record describing freedom of information laws as "very pernicious". Treasury Secretary John Fraser confirmed publicly that public servants don't put candid advice down on paper, in his view, because of freedom of information legislation. "It's a pity," he said.

But it's more than that: a raft of rules and guidance encourage written advice that is "frank, honest, timely and based on the best available evidence". FoI applicants came up with the usual mixed bag of results but too often experienced the runaround and encountered familiar brick walls.

Ministers, for example, refused access to appointment diaries, claiming either the work involved in processing requests would divert


Finance Minister Mathias Cormann.
PHOTO: NIC WALKER
COURTESY: FAIRFAX PHOTOS

their office from other duties, or that adverse consequences would follow disclosure.

By late 2014 the Office of Australian Information Commissioner was defunded to the extent that it closed its Canberra office and operated with one commissioner, not the three positions established by an act of parliament to carry out FoI, privacy and information policy functions.

While acknowledging that some agencies "gamed" the system, the office undertook one own-motion investigation into the way an agency dealt with its freedom of information responsibilities in the two years of the Abbott government.

### A new era, same, same or different?

Against this backdrop, and after six months in office and now in the lead-up to what appears to be a certain July election, how goes the early Turnbull promise of open, transparent government?

Things were off to a promising start when the new Prime Minister took ministerial responsibility for public data policy, Gov 2.0 and related matters, and appointed a Minister Assisting for Digital Transformation. We have been talking seriously since about freeing up access to government data sets to promote economic and social development, with an occasional reference to how more, better published government data could improve transparency and accountability as well.

The Productivity Commission has been asked to undertake a 12-month public inquiry to investigate ways to improve the availability and use of public and private sector data.

As Gov 2.0 is "the use of technology to encourage a more open, transparent and engaging form of government, where the public has a greater role in forming policy and has improved access to government information" the intersection with Freedom of Information and the Office of Australian Information Commissioner is obvious.

Responsibility for those areas remains with the Attorney General. To date there are no encouraging indications of new directions there.

Thirty months after Attorney-General Brandis introduced the bill to abolish the Office of Australian Information Commissioner into the Senate, a bill never brought on for debate because there is no majority in favour, it has disappeared


Attorney-General Senator George Brandis departs the ABC studio after an interview at Parliament House in Canberra.
PHOTO: ALEX ELLINGHAUSEN, COURTESY: FAIRFAX PHOTOS.

only because parliament was prorogued on 15 April and no move was made on the two sitting days since to reintroduce it. That may be the end of this drawn out saga but, so far, the attorney-general isn't saying.

The statutory review of the Freedom of information Act completed by Dr Allan Hawke in early 2013 has hardly been mentioned since the Coalition was elected. Hawke recommended a comprehensive review of the kind he was unable to undertake.

Senior public service leaders continue to talk down right to information with no hint that ministers bring them into line. Public Service Commissioner Lloyd, when quizzed in a Senate Committee hearing in February on his "very pernicious" remark, replied: "My view is that the FoI laws have extended beyond perhaps what I understood to be the original intention, which was particularly to allow our citizens to have access to information about their affairs that governments were holding …"

He seems unaware that the purpose and objects of the act are, and have been, since 1982 about open, transparent and accountable government.

Another former public service leader Dr Peter Shergold, in a report for the government on lessons from the Pink Batts Royal Commission, continued a campaign he has been running for years to argue for more watertight limitations on access to advice provided by the public service.

Dr Shergold argues this is essential to ensure frank, candid written advice. The Royal Commission, in criticising the quality of advice provided by the public servants involved, made no mention of the need for added protections from disclosure.

Dr Shergold was supported publicly by the current head of the Prime Minister's Department Dr Martin Parkinson sending another message sure to register throughout the public service.

Allan Hawke, the last person to look into this, concluded no additional protections were warranted. The attorney-general, despite a number of opportunities provided during debate in the Senate, has not sought to defend the government's FoI record. Senator Brandis is appealing to the Federal Court of Australia a tribunal finding that refusal by his office to process an application for entries in his appointments diary for eight months in 2013-14 was not justified.

In November the Prime Minister wrote to the international secretariat of the Open Government Partnership advising that the Australian Government will finalise its membership by developing a two-year plan of reform commitments consistent with the goals of the partnership. Those goals are to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance. The Prime Minister said the goals align with "Australia's long and proud tradition of open and transparent government".

The Prime Minister's recommitment to the Open Government Partnership now comprising 68 other countries was followed by a consultation of sorts, led by his department about what should be included in the first two-year national action plan.

It's been a low-key affair thus far. Apart from his letter to the international secretariat the Prime Minister has not said anything publicly on the subject. Neither has any minister or senior public service leader.

As a result, public awareness of the opportunity the initiative presents to participate in developing reform proposals to democratic practices is very limited.

There is also a gulf between what government agencies appear to think should be in the plan and the commitments suggested by the relatively few involved from outside government. High on their list are reforms to access to information law and practice, a national integrity commission, political donations, lobbying and whistleblower protection.

Government officials prefer relatively minor suggestions within the confines of existing policy. Ministers are nowhere to be seen. Final steps for concluding the plan are unclear but there are troubling signs that the concept of joint ownership inherent in the very idea of "partnership" is not well understood within government.

With a Cabinet sign off necessary, an OGP July deadline, and a caretaker period from mid-May likely to delay decisions that would commit a new government, Australia's rediscovered open government ambitions may at best be deferred until after the election.

At worst, with the exception of public data, it could be that the Turnbull approach to transparency and accountability is same, same, not all that different.

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Peter Timmins is a lawyer who writes the Open and Shut Blog and is convener of the Australian Open Government Partnership Network. Both MEAA and the Australian Press Council are members of the Network: www.opengovernment.org.au

# SHIELD LAWS AND CONFIDENTIAL SOURCES

Australia still fails to adopt uniform national shield laws to protect journalist privilege and, in 2015, the glaring omission to enact such a defence was there for all to see. South Australia, the Northern Territory and Queensland 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 taking the ethical position, 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.

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 and their media employer may be based in jurisdiction with a shield law.


## Australia's attacks on journalists are about politics, not national security

**By Paul Farrell**

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The Australian Federal Police has this week admitted[89] that it sought access to my metadata in pursuit of my sources. In a submission to the Privacy Commissioner, it revealed it had sought "subscriber checks" and other forms of email checks relating to me as part of one of its investigations.

What's most extraordinary is that it was entirely lawful for the AFP to access my phone and email records. And that's a real problem for journalists and their sources in Australia.

It's become a sadly normal reality that journalists' sources can be targeted in Australia in an effort to hunt down whistleblowers. Over the years, under both Labor and Coalition governments, sensitive stories by journalists that embarrassed or shamed governments have often been referred to the AFP.

And almost always it's about politics. It's not about national security. It's about stopping embarrassing leaks that tell uncomfortable truths about power in Australia.

Quite recently *The Australian*'s[90] Greg Sheridan had his expose about the draft Defence White

A nine-kilometre incursion into Indonesian waters by Customs vessel the Ocean Protector sparked an AFP investigation.
PHOTO COURTESY: ABC

Paper referred to the AFP for investigation. Last year the source of a story by Fairfax Media's Michael Gordon[91] about radical reforms to citizenship laws were also subject of a referral to the AFP[92]. Has the AFP also sought to access their phone and email records?

The answer is unclear, but it's certainly possible. However, this is the first time the AFP has ever made such an admission in Australia. They've acknowledged generally that they made requests for journalists' metadata in the past — and said they were rare — but never in a specific case. There are strict laws that prohibit the disclosure of information about such requests under the *Telecommunications (Interception and Access) Act 1979*.

The AFP's investigation into my sources arose from a news report into the government's asylum seeker policies and Australia's unlawful incursions into Indonesian waters[93]. I requested access to files held by the AFP in this investigation and then complained to the Privacy Commissioner about the lack of details the AFP released in these files. The AFP's admission was disclosed in the course of that privacy complaint.

From the AFP's point of view, it has done nothing wrong. As it has indicated in its statement[94], it has sought to undertake investigations within the scope of the law. It has "sought to identify the source of the disclosure, and then determine whether they had the appropriate authority to release that information".

As I've mentioned before[95], the offence that relates to "unauthorised disclosures" of information by Commonwealth officers is exceptionally broad. There are no public interest considerations or requirements to demonstrate harm from disclosures. It can apply to all and sundry.

There are very limited avenues of appeal to resolve these kinds of privacy violations and interferences with press freedom. Australia has no broad constitutional framework like the US that protects freedom of the press. It has no regional human rights framework like EU nations that can be drawn into domestic law in the way that has been done in Britain.

A complaint could be lodged with the Commonwealth Ombudsman about the conduct of the AFP, but it's hard to see what grounds such a complaint could be based on if the AFP was operating within the law.

Another complaint could be initiated with the Privacy Commissioner but it would be limited to the narrow grounds of review set out in the Australian privacy principles, which have broad exemptions for the activities of law enforcement agencies.

It's not right and it shouldn't be normal. But unless the law changes, these kind of investigations will continue.

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Paul Farrell is a reporter for Guardian Australia.

# DEFAMATION

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

In July 2015, ARTK has sent a briefing note and draft proposals to the NSW premier and NSW attorney-general on areas to look at to update the law (particularly in relation to digital publishing), to bring it in line with international best practice and remove areas where the uniform laws have not proved successful or where it is inconsistent or does not work as intended. Another aim is to ensure that criminal defamation is repealed and removed from the statutes.

The aim is to use NSW as a template for a broader discussion among all the jurisdictions so that the uniform defamation legislation can be updated with the aim of a proposal being presented to the Law, Crime and Community Safety Council (LCCSC) made up of the federal, state and territory attorneys-general.

It is understood that the NSW attorney-general's office will engage with the other jurisdictions to prepare recommendations for reform at the next six-monthly meeting of the LCCSC.

Joe Hockey arrives at the NSW Supreme Court in Queens Square Sydney for the defamation case against Fairfax Media.
PHOTO: BEN RUSHTON
COURTESY: FAIRFAX PHOTOS

## The Hockey case

**By Joseph Fernandez**

How did former federal treasurer Joe Hockey's *Treasurer for Sale* defamation case against Fairfax Media even get to court when the judge said the claim "possibly, may not have involved a trial at all"?[96] The action involved three proceedings heard together against *The Sydney Morning Herald*, *The Age*, and *The Canberra Times*. The articles concerned said Hockey was providing "privileged access" to a "select group" in return for donations to the Liberal Party via the North Sydney Forum (NSF), a "secretive" fundraising body.[97]

Some might say Hockey won the case. Justice White, however, bluntly noted that Hockey "failed on the matters which were the real core of his claim" and that had he "sued only on the *SMH* poster and the two tweets of *The Age*, the proceedings would have been much more confined"[98].

It was "not a good outcome" for Hockey.[99] A pyrrhic victory.[100] Perhaps even a spectacular flop if, as reported, he could have been left about $650,000 out of pocket.[101]

Hockey's main claims were against articles written by two senior journalists Sean Nicholls and Mark Kenny and these claims failed.[102] His claims succeeded in respect of "three matters only" — against the *SMH* poster promoting the newspaper's print edition and two tweets published by *The Age*.[103]

The judge emphasised Hockey's limited success: "It is pertinent that Mr Hockey succeeded with respect to only one of the five publications on which he sued the *SMH* and on only two of the seven publications on which he sued *The Age*, and that he failed altogether in his claim against *The Canberra Times*"[104] and had "partial success" against *SMH* and *The Age*.[105]

The judge gave other pointers to Hockey's failure:

- it was "not wrong or inappropriate" to characterise NSF members' access to Hockey as being "privileged";[106]
- Nicholls' article "did not convey an imputation of corruption";[107]
- many of Nicholls' sources were "reliable and reasonably viewed by [Fairfax Media] as being of integrity" and his research was "detailed and not superficial";[108]
- Nicholls had engaged in "a laborious task of examining" the Liberal Party's Disclosure Returns;[109]
- this was not a case in which it "should have been obvious to [Fairfax Media] that they would fail";[110]
- it was "reasonably open" to Fairfax Media to



conclude that the poster and tweets were not defamatory;[111]
- Hockey's reliance on the two *Age* tweets "appeared to be in the nature of a 'tack on' to his principal claims" — a case of "the tail wagging the dog";[112] and
- at the trial the poster and the tweets received only minimal attention[113].

With this much, according to the judge, in Fairfax Media's favour how did the case go the full gamut, perhaps costing the company "about $1.35 million"?[114] A key answer lies in how courts determine whether a defamatory meaning or imputation is conveyed. This is generally a complainant's main hurdle. The other two hurdles are easier to cross — showing that the complainant was identified and that the matter was published. Cases are often conducted as though they will be won or lost "after long and exhausting battles over particulars of meaning".[115] In defamation ascertaining the meaning of the words is a "fundamental question".[116] The "determinative issue is how the ordinary, reasonable reader would understand the matter."[117]

The "ordinary, reasonable person"[118] — the hypothetical referee with a jumble of characteristics — is the master of meaning. They are right-thinking people generally;[119] ordinary folk;[120] the person on the Bondi tram;[121] or on the Bourke Street tram;[122] or on the Clapham bus.[123] The relevance of many of the characterisations is doubtful going on recent High court decisions.[124]

In the present case, a key argument concerned whether Hockey was involved in bribery or corruption. Fairfax Media denied that the articles suggested this.[125] It also did not intend to convey such imputations.[126] Unfortunately in defamation the publisher's intention is irrelevant.[127] The court, however, found other difficulties with the respondent's case e.g. malice;[128] a failure to consider the reasonableness of the choice of words;[129] and inadequate steps to get Hockey's response[130].

The judge found "some force" in Fairfax Media's submission that easy access to the article by Twitter followers meant that if the tweets had any impact on them, "they are likely to have used the hyperlink to read more"[131] — and thus presumably understood the publisher's context of the words *Treasurer for Sale*. The court held, however, that the easier access was not enough to conclude that all readers would do so.[132]

The case highlights a nagging quirk of defamation trials — evidence does not play its usual trial role.

In identifying defamatory meaning, evidence of recipients' understandings on natural and ordinary meaning is inadmissible.[133] The court resorts to assumption, conjecture and imprecise terms.

The court extensively uses terms such as *would*, *could*, *some*, *I think*, *likely/unlikely*, *may* etc. Much subjectivity creeps in. Reservations have been expressed about the "ordinary, reasonable person test". One former High Court judge suggested that it would be "preferable to drop this fiction altogether" and that judges "should not hide behind their pretended reliance on the fictitious reasonable recipient of the alleged defamatory material, attributing to such a person the outcome that the judges actually determine for themselves".[134]

The process has also been criticised on the ground that "[g]iven that the same words can reasonably mean different things to different people, this reductive approach to language contributes to the artificiality of the tort."[135]

The Hockey case struck at the heart of Australian debate on political donations. Australian Press Council chair David Weisbrot called for reform "as a high priority" because the "current law seriously inhibits investigative reporting and robust political debate".[136] The then human rights commissioner Tim Wilson wanted a higher test for suing based on "explicit harm and material loss".[137]

Defamation law's insidious reach is not fully appreciated. There is a "high level of defamation litigation in Australia."[138] Former editor-in-chief of *The Age* Andrew Holden called defamation the "most direct threat we face every day … [it is] used far too often in an attempt to hinder or shut down journalism."[139]

The last major review of defamation law was in 1979.[140] Another review more than a decade ago brought uniform defamation law. A review to meet contemporary needs is overdue. The threshold to sue is "rather low" and there is "no special barrier" to action by public figures.[141] Also, plaintiffs generally are not obliged to produce evidence that defamatory matter has "adversely affected them".[142]

The bar should be raised for politicians who wish to sue e.g. by requiring them to show serious harm to their reputation.[143] Elected representatives should be limited to suing for defamation only "in the most egregious cases".[144] They are amply equipped to counter the attacks on their reputation through their easy access to the "greatest "bully pit of all, parliamentary privilege".[145]

Politicians are in a powerful position to deliver on reform. But then, why would they invite stricter public scrutiny?

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# WHISTLEBLOWER PROTECTION

Those who get caught out by the revelations of a whistleblower often react with embarrassment. But hopefully there is sufficient understanding to realise that the wrong that has been exposed must be righted.

It is interesting to contrast how the private sector has responded to a spate of whistleblower revelations in recent years (often enabled by government seeking to improve the powers of the corporate watchdog and increase the funding for additional resources to allow the watchdog to vigorously regulate the private sector) and the government response when dealing with whistleblowers from within it's own ranks.

## Private sector

In recent years, a spate of important news stories have been written thanks to the courageous efforts of whistleblowers: live baiting in the greyhound industry, widespread wage abuse among 7-Eleven franchises, 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 kickbacks and facilitation payments at Leighton International.

Journalists have been approached by these whistleblowers and the subsequent news stories have been duly recognised as important pieces of high quality journalism.

The sources for these stories are brave people who undertook enormous risks to bring to light instances of fraud, dishonesty, illegality and corruption. Their determination has brought positive changes. But often at considerable cost to themselves.

A June 2014 paper[146] provides a 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.

"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."[147]

Given the spate of whistleblower incidents recently, particularly in the banking and finance industry, this situation needs to be urgently remedied. MEAA welcomes 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"[148].

MEAA, as a member of the Australia's Right To Know group, took the view that disclosures to the media should be protected where:
"(a) the employee honestly believes, on reasonable grounds, that it is in the public interest that the material be disclosed; and
(b) the employee honestly believes, on reasonable grounds that the material is substantially true; and
(c) the employee honestly believes on reasonable grounds either that:

i. to make the disclosure through internal channels is likely to be futile or result in the whistleblower [or any other person] being victimised; or
ii. the disclosure is of such a serious nature that it should be brought to the immediate attention of the public."[149]

## Public sector

While there is generally adequate legislated protection for public sector whistleblowers there is little to commend government for when it comes taking action to protect whistleblowers. Indeed, the current government seems determined to attack whistleblowers, due in part to have been exposed or embarrassed by leaks or where there has been a tear in the shroud of secrecy it imposes on its asylum seeker policies.

As MEAA pointed out in its 2015 press freedom report: *When you are going after whistleblowers, you are going after journalism*. The attitude of the current government is to ruthlessly persecute and prosecute whistleblowers within its ranks (provide that the leakers aren't politicians, of course) and to use the whistleblowers confidential relationships with journalists in order to do so.

The *Public Interest Disclosure Act 2013*[150]commenced operation on January 15, 2014 replacing the



1999 legislation and creating a commonwealth government public interest disclosure scheme to encourage public officials to report suspected wrongdoing in the Australian public sector[151].

The act has now been in operation for two years. The act establishes a framework to facilitate the disclosure and investigation of wrongdoing and maladministration in the commonwealth public sector.

Former integrity commissioner and head of the Australian Law Enforcement Integrity Commission, Phillip Moss, will conduct an independent review of the act. The review is "an opportunity to gather information and views on whether the act is operating as intended and whether it could be improved."

Disappointingly, several government agencies have made submissions to the Moss review seeking to narrow the definition of disclosable conduct in the act.[152] Under the legislation, whistleblowers are encouraged to raise their concerns using internal disclosures but there are also opportunities to go to the public and/or media in certain circumstances.

Several agencies say there is unnecessary duplication with pre-existing internal complaints and anti-corruption mechanisms and that this leads to unnecessary replacement or complication of processes rather than the system complementing each other.[153]

There are ongoing concerns that the act fails to offer adequate protections for whistleblowers. MEAA believes the act was a significant step forward that could be used as a template for uniform whistleblower laws in other jurisdictions. But the act still contains flaws[154]. The failure of the proposed legislation to protect people making disclosures about the conduct of politicians elevates them above what should be legitimate transparent scrutiny of their activities.

Similarly, whistleblowers are not protected when it comes to information regarding intelligence agencies and the use of intelligence information with a significant "carve-out" from the legislation. An examination of the whistleblower protection rules in G20 countries notes that this aspect of the Australian situation is not best practice. "This carve-out would likely cover not just military and intelligence services but also federal police. This is problematic as these sectors are not immune from corruption, like any other sector."[155] The "ring-fencing" of intelligence agencies beyond the reach of citizens who seek to expose wrongdoing undermines the quest for transparency and unnecessarily endangers whistleblowers.

"Conversely, while disclosures to the media may qualify for protection federally (other than in most intelligence matters) and in some state jurisdictions, in other states public servants who blow the whistle to the media are still subject to criminal or disciplinary penalties," the G20 comparison says.[156]

This is now a particularly acute concern given the introduction of 10-year jail terms for unauthorised disclosures of information as introduced in the government's first tranche of national security laws relating to amendments loaded into section 35P of the *ASIO Act*. Subsequent amendments toughened the legislation further by imposing a "recklessness" test.

Media concerns were meant to be assuaged by a "public interest test" to be applied by the Commonwealth Director of Public Prosecutions before considering whether to pursue a prosecution.

MEAA has stated that it does not believe the CDPP, a government official charged with prosecuting criminal offences, is best placed to determine what is in the public's interest or can act with sufficient independence and understanding of the vital role of whistleblowers and journalism in a healthy functioning democracy.

> 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, as well as fraud, and corruption.

The government's attitude is telling when it comes to whistleblower protection. Attorney-General George Brandis has admitted that section 35P: "applies generally to all citizens. It was primarily, in fact, to deal with a [whistleblower Edward] Snowden-type situation."[157] MEAA continues to be concerned about the attitude of Australian politicians to whistleblower Edward Snowden. Snowden's revelations exposed the illegal misuse of the data being collected by NSA surveillance.

On January 22, 2014, Foreign Minister Julie Bishop told the Alliance 21 conference in Washington DC: "… a grave new challenge to our irreplaceable intelligence efforts arose from the actions of one Edward Snowden, who continues to shamefully betray his nation while skulking in Russia. This represents unprecedented treachery — he's no hero."[158]

On January 29, 2014 then prime minister Tony Abbott said in a radio interview: "This gentleman Snowden, or this individual Snowden, who has betrayed his country and in the process has badly, badly damaged other countries that are friends of the United States …"[159]

On February 11, 2014 Attorney-General Brandis, speaking in the Senate, said of Edward Snowden: "… through his criminal dishonesty and his treachery to his country, [he] has put lives, including Australian lives, at risk."[160]

The third tranche of national security laws, dealing with the formalisation of a data retention scheme to retain metadata for two years also has serious implications for whistleblowers. The Parliamentary Joint Committee on Intelligence and Security's advisory report into the data retention bill confirmed, for the first time, that the government's data retention scheme would be used to hunt down whistleblowers. The report's recommendation 27 stated the Commonwealth Ombudsman and the Inspector General of Intelligence and Security be copied when an authorisation is issued seeking to determine "the identity of a journalist's sources".

On March 17, 2015 the Australian Federal Police confirmed: "that over the past 18 months, the AFP has received 13 referrals relating to the alleged unauthorised disclosure of commonwealth information in breach of section 70 of the *Crimes Act* … In the overwhelming majority of these investigations, no need was identified to conduct a metadata telecommunications inquiry on a journalist."[161]

The admission by the attorney-general regarding the real intent of section 35P, the introduction of the recklessness test, the stated intent of using journalist's metadata to identify their sources and the pattern of government agencies referring alleged unauthorised disclosures of information to the AFP indicate that the government intends to wage war against whistleblowers. The comments by the Prime Minister, the foreign minister and the attorney-general suggests they have been seriously spooked by the revelations made by Edward Snowden and that the government does not intend certain types of information to leak out, regardless of whether that information is in the public interest.

The secrecy that descended on Australia's customs and immigration activities when they were militarised as part of Operation Sovereign Borders and the refusal to discuss "on-water matters" as MEAA reported on in last year's press freedom report, effectively denies the right of the Australian people to know what our government is doing in our name. That secrecy led to brave whistleblowers allegedly contacting journalists, seeking to expose what is being done by government agencies that repeatedly refused to comment on their activities by using a military cover for their operations.

When whistleblowers are seen as the "enemy",



and the legislative weapons of counter-terrorism are unleashed upon them, democracy is the loser. Whistleblowers seek to expose misconduct, alleged dishonest or illegal activity, violations of the law, and threats to public health and safety.

The failures within the *Public Interest Disclosure Act 2013* generally and the specific investigations seeking to identify whistleblowers for having disclosed information on asylum seeker policy and the creation of penalties for the disclosure of "protected information" by "entrusted" persons as contained in the new Border Force Act are not the hallmarks of open and accountable government.

In light of the government's determined push to crackdown on whistleblowers and pursue them under section 70 of the *Crimes Act*, MEAA notes the report by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye to the UN general assembly: "States have responded to the problem of hidden wrongdoing with laws to protect those who take steps to report it. However, individuals who report alleged wrongdoing are still subjected to harassment, intimidation, investigation, prosecution and other forms of retaliation. All too often, states and organisations implement the protections only in part or fail to hold accountable those who retaliate against whistle-blowers. [162]

"Moreover, beyond law, the right to information also requires a bedrock of social and organisational norms that promote the reporting of wrongdoing or other information in the public interest. The strengthening of such norms requires training at all levels of organisations, supportive policies and statements from political and corporate leaders, international civil servants, the courts and others, and accountability in cases of reprisals."

Kaye recommends that UN member states define the term "whistleblower" more broadly, and that laws should default to examining the allegations of wrongdoing and not seek to question the whistleblower's motivations at the time of the disclosure — their motivations "should also be immaterial to an assessment of his or her protected status". Kaye also says public interest information should be disclosed: "Whistleblowing does not always involve specific individual wrongdoing, but it may uncover hidden information that the public has a legitimate interest in knowing."

Kaye also says that internal disclosure mechanism should be robust but in their absence, public disclosure should be promoted and protected. "When working properly, internal mechanisms provide a way for someone who perceives wrongdoing to seek a competent authority's investigation … However, internal mechanisms present potential whistleblowers with serious risks. They often lack strong measures of confidentiality and independence from the organisation in which they are embedded, putting whistleblowers at risk of retaliation. Many mechanisms are widely perceived as ineffective, so that the risk of retaliation may appear too great in the face of low odds of success … When whistle-blowers reasonably perceive that an internal process lacks effective redress and protection, they should have access to two other permissible avenues of disclosure."

Kaye's report also says whistleblowers should be guaranteed confidentiality and the possibility of anonymity. "Whistleblowers must be protected from the threat or imposition of retaliation, remedies should be made available to targets and penalties should be imposed on those who retaliate."

These are valuable lessons for Australia's law makers as they review the *Public Interest Disclosure Act 2013* and the role of whistleblowers in Australian society, particularly when government seeks to keep so much legitimate public interest information away from the public's scrutiny.

Kaye's report also deals with national security issues. In light of the government's comments on Edward Snowden, Kaye's words are worth repeating: "Institutions that operate in national security, such as institutions of defence, diplomacy, internal security and law enforcement, and intelligence, may have a greater claim not to disclose information than other public bodies, but they have no greater claim to hide instances of wrongdoing or other information where the value of disclosure outweighs the harm to the institution.

"Yet whistleblower protections are often weak, or simply unavailable, in the area of national security and intelligence. Those who disclose wrongdoing in national security institutions are often subject to retaliation, such as job loss or transfer, denial or revocation of security clearance, and investigation, prosecution and harsh sentencing, and they lack redress because of legal doctrines that support an infrastructure of secrecy.

"Whistleblowing's main function thus loses all force, and while the lack of protection ultimately denies members of the public access to critical information about their Government, national security institutions also lose a tool of accountability," Kaye says.

# SUPPRESSION ORDERS

Past press freedom reports have been alarmed at the number of suppression orders being issued in some legal jurisdictions and also the sheer breadth of their suppression in preventing what can and can't be reported in the public interest. Victorian courts have earned the reputation for being particularly excessive in their use of such orders.

Fairfax Media reported that Victorian courts are still issuing hundreds of suppression orders a year, including blanket bans on information which prevent media organisations from even reporting that a case is underway, despite new legislation in 2013 called the *Open Courts Act*.[163] *The Age* reported that the findings had prompted calls for a government-funded Office of the Open Courts Advocate to argue in courts against the suppression of information.

The newspaper said that a Fairfax Media investigation in conjunction with the University of Melbourne has found "judges and magistrates have issued at least 383 suppression orders, plus almost 50 interim orders, since the act came into effect on December 1, 2013".[164] The Victorian State Parliament had passed the 2013 act to try to bring them under control and to "strengthen and promote the principles of open justice and free communication of information".

"But the new analysis shows that, in the first year of its operation, 254 orders were imposed — 35 in the Supreme Court, 102 in the County Court and 117 in the Magistrates Court. This was similar to the number issued before the act."[165]

The newspaper quoted University of Melbourne researcher Jason Bosland, who said there were several worrying aspects; the most concerning was the increase in the number of blanket bans. "What's unbelievable is that 37 per cent of the suppression orders are complete blanket bans — you can't publish anything about those proceedings at all. The wording is: "no report of the publication of the whole or any part of the proceedings". In terms of scope, a blanket ban is the most extreme type of order and should only be made in truly exceptional circumstances."[166] Some orders applied even broader

Victorian Chief Justice Marilyn Warren.
PHOTO: JAMES BODDINGTON COURTESY: FAIRFAX PHOTOS]

strictures, with the example from the Magistrates' Court, where several orders had been issued that didn't say what was to be suppressed, with the space in the order left blank. "A County Court order from 2014 issued a 'prohibition on publication of any information of any kind relating to this matter'. However, since the name of the defendant was also suppressed, it was difficult for the media to tell what it could not report," the newspaper said.[167]

The research found that the most common reason given for the issuing of a suppression order was to protect "the administration of justice". More than 200 were made on that basis, while 189 were made to protect the safety of witnesses and only four to protect national security.

Bosland said judges and magistrates were using the "administration of justice" ground broadly, suppressing evidence deemed so embarrassing that it might affect a witness's willingness to give evidence if it were to be published. "This is an expansion which has really taken off over the past few years … and you don't want broad and open-ended categories of exceptions that didn't exist before, because this will erode the fundamental protection that open justice gives the whole system."

*The Age* reported that: "Of 28 of the orders that analysed, including nine in the Supreme Court — 7 per cent of the total — did not specify what grounds they were granted on at all, even though the legislation requires it. The study shows that 62 suppression orders were granted by the courts by themselves, 51 after a motion by the prosecution and 47 when the defence asked for it. Very often, the prosecution and defence agree to suppress information, and there is nobody to argue against them."

The Chief Justice of Victoria, Marilyn Warren, responded to *The Age* article in writing, saying: "The argument by *The Age* undermines confidence in, and respect for, the judiciary. No suppression order issued in Victoria's Supreme Court is made without a valid reason. They are certainly never issued on "relatively weak grounds" or "for good measure", as has been suggested by *The Age*.

"The principle of open justice is fundamental to the proper administration of justice, which is reinforced by every judge in every court and tribunal in Australia. But Parliament has recognised that there are circumstances where restrictions must be placed on what can be disclosed about a case.

"Suppression orders are most commonly issued to protect the safety of people involved in criminal trials, such as witnesses, victims and informants. They are also made to protect national security and ensure that people charged with criminal offences who are yet to face court can receive a fair trial before an impartial jury.

"Most orders do not prevent reporting of the trial altogether, but rather delay the publication of the suppressed information until the conclusion of the proceedings or associated case. Media organisations have a right to apply, at any time, to have a suppression order reviewed, varied or revoked. Yet they rarely do," Warren wrote.[168]

She went on to say that to further strengthen public confidence in the process, the Supreme Court will soon utilise a 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.[169]

"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. The Victorian Supreme Court figures are certainly on par with our New South Wales counterpart, however," Warren said.[170]

# MEDIA REGULATION

The Turnbull Government's media reform agenda has stalled with the expectation of an election in mid-2016.

The latest package of media reforms dates to 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[171]. "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[172]. 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[173]. 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.[174] 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.[175]

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.

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.[176] "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


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

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.*[177]

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".[178]

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".[179]

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.

# STAR CHAMBERS

The Turnbull Government wants to re-establish the Australian Building and Construction Commission — a body that may have star-chamber-like powers. It is possible that a reconstituted ABCC may also be permitted to access metadata.

As MEAA has said before, one of the more bizarre aspects of the failure of the shield law regime in Australia is how the legal principle at the root of the shield law — recognising journalist privilege in terms of journalists' ethical obligation to never reveal the identity of a confidential source — inexplicably stops short when it comes to anti-corruption bodies.

Politicians, who have drafted and voted for shield laws in their respective jurisdictions, presumably recognise that journalists are caught in an appalling situation when a court seeks to compel them to reveal a confidential source.

The politicians know that the journalists have an ethical obligation not to do so. Hence the shield laws aim is to acknowledge this ethical obligation and attempt to protect journalists from the consequences of observing that obligation. Why then do the same politicians draft laws to create anti-corruption bodies, granting extraordinary star-chamber-like powers of secrecy, coercion and compulsion that ignores the intent of the journalists' shield law?

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

Employment Minister Michaelia Cash.
PHOTO: ANDREW MEARES
COURTESY: FAIRFAX PHOTOS

The journalist is ordered by the star chamber to appear. Failure to do so incurs a fine or a jail term or both. The journalist must appear in secret — only the journalist's lawyer can know they have been ordered to appear. If the journalist tells anyone aside from a lawyer that they have been called to appear, they face a fine, a jail term or both.

The journalist can be compelled to produce documents, notes and recordings. Failure to do so can incur a fine or a jail term or both. If the journalist respectfully refuses to divulge information from a confidential source, or refuses to identify a confidential source — as they are ethically obligated to do — the journalist faces a fine, a jail term or both[180].

This situation has been faced by up to a dozen MEAA members in recent years. They have been invited to not only appear in secret, but to present all notes, recordings and documents relating to an interview.

Caught in an ethical nightmare, the journalists who have been called to appear and produce their work before a star chamber have been unable to inform their editor or even their professional association about their predicament. They have been unable to seek advice about their professional and ethical responsibilities. To do so could immediately lead to a fine or a jail term or both. And, of course, they cannot even tell their family.

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

The data retention scheme introduced by the government has limited the number of government agencies who can access metadata, including journalist's metadata when seeking to identify a source, to 21 bodies, reduced from 80. But those agencies include the Australian Taxation Office, the competition watchdog and the corporate regulator. And the core group of 21 may be expanded in future.

The prescribed agencies[181] include star chambers such as Victoria's Independent Broad-based Anti-corruption Commission and the NSW Independent Commission Against Corruption *et al* — both of whom refuse to recognise the shield laws that operate in those respective states.

In short, the star chambers can either compel a journalist to hand over information while blithely disregarding the journalist's ethical obligation to confidential sources. The alternative is to simply seek, in secret, a journalist information warrant under the new data retention scheme to trawl through the journalist's metadata and use that to identify exactly who has had contact with the journalist.

MEAA is concerned that the proposed recreation of the Australian Building and Construction Commission may add another star chamber to the already dangerous mix, and that not all will order to coerce and compel be included, but also a denial of the right to silence on pain of a fine or imprisonment or both, and the refusal to inform anyone that you have been called to appear aside from a lawyer.

The added concern is that the ABCC may be added to the current 21 government agencies already permitted to access, in secret, journalists' telecommunications data in the hunt for confidential sources.


Rally by staff at The Age protesting at planned cuts to 120 editorial positions - March 2016]

# REDUNDANCIES

Two key forces are contributing to the wave of redundancies in the media: the first is the ongoing shakeout of the digital transformation — the fragmentation of audiences and advertisers, the collapse of traditional revenue streams and the response from media employers to cut costs ruthlessly with no heed to maintaining quality journalism or delivering what their audiences want.

The second is political decision-making. Budget cuts, and an "efficiency" review imposed on the ABC and SBS despite an election eve promise by Tony Abbott, have been the rare occasion where dozens of media jobs have been lost for no apparent economic reason. Instead, the cancellation of the Australia Network contract, the slashing of funding as a "down payment" on further cuts combined to strangle the two public broadcasters.

### Public broadcasting

Some $487 million has been cut from the ABC in the last two federal budgets. The result: about 400 job losses.

As MEAA has said before, the end result is the loss of programming, the redirection of scarce resources, and the departure of some of the most experienced, skilful and qualified journalists in the country. Given the amount of vitriol directed at the public broadcasters by politicians in the past, it is hard not to surmise that there is to some extent, a degree of political payback involved in the decisions to break an election promise and slash the funding of two cherished Australians institutions.

MEAA and the other ABC staff union, the CPSU, have launched a campaign in conjunction with community organisations seeking to restore funding at the ABC

### Fairfax Media

Since 2011, Fairfax has used regular redundancy rounds to cut almost 800 jobs from its editorial staff across the country. About 420 of those jobs came from the metro daily newspaper divisions, more than 300 have been lost from its regional newspapers, and more jobs have gone from the local community newspapers. And those numbers don't include attrition — where people who have resigned from the company have not been replaced.

As a result, the company has lost a wealth of skill and experience. For the editorial staff that



remain, their workload has massively intensified, particularly as they are required to constantly write, produce and develop stories for a variety of media platforms. And yet, Fairfax journalists continue to be recognised for their award-winning work.

On Thursday, March 17, 2016, Fairfax announced yet another redundancy round. This time the cuts would be savage: 120 full-time equivalent positions from news and business sections of the metro daily newspapers in Sydney and Melbourne. That's about one-fifth of the newsroom staff. The company told its journalists that it wanted to reduce the number of news stories they generate from 9000 a month to just 6000 a month — thus delivering less news to the audience it seeks to serve.

In response, Fairfax editorial workers across Sydney, Melbourne, Canberra, Perth, Brisbane, Newcastle and Wollongong walked out in protest, and revived the Fair Go Fairfax campaign, seeking public support for the fight to maintain quality journalism at Fairfax and save journalists jobs.

Within 48 hours more than 10,000 individuals had signed the #FairGoFairfax petition. Journalists at rival news organisations, realising that an important point had been reached in the common struggle to keep delivering quality journalism to our communities, sent messages of support.

Subsequent proposals from MEAA members managed to save 20 jobs but, at the time of writing, the company intends to continue with 100 job cuts. Management refused to make any cuts to executive salaries.

Fairfax has also been making journalists redundant as it rolls out its News Now system at the regional mastheads that come under its Australian Community Media division. In March 2016 it closed or merged mastheads from *The Canberra Times* and elsewhere in the ACT with the loss of 10 editorial positions. In October 2015, eight journalists jobs were lost from *The Launceston Examiner* and *The Burnie Advocate*.

In September 2015 the company announced that three iconic mastheads, including the 110-year old *Wagin Argus*, would close with around 21 FTE positions be culled. The subbing centre based in Mandurah would also close.

A month earlier it was the turn of regional NSW with 46 jobs gone in the Hunter Valley — the *Newcastle Herald* newsroom bore the brunt of the reductions, going from 61 full-time equivalent positions to just 24 — a loss of 37 FTE positions.

In July 2015 Fairfax cut 22 editorial jobs as it rolled out NewsNow operating model in regional South Australia.

There were drastic cuts in the Illawarra and south coast NSW in June 2015 as 47 journalists, photographers and commercial staff were made redundant as part of a plan to "revitalise" regional newspapers and allow staff to "adopt more efficient ways of working". That same month, the Fairfax Community Newspapers arm in NSW announced a plan to cut 37 full-time-equivalent positions and close offices.

And in March 2015, 62 jobs were lost from the Fairfax Victorian regional business.

### News Corporation

In November 2015 News Corporation announced it would be making 55 full-time-equivalent positions redundant before Christmas. The company confirmed it would commence immediately and this would not be a voluntary process.

MEAA believes that many more News Corp staff have been "tapped on the shoulder" and "encouraged" to leave over the past 12 months.

### The *West Australian* and The *Sunday Times*

Staff have been briefed on the likelihood that the News Corporation's masthead *The Sunday Times* (which also operates the online masthead PerthNow) will be sold to Kerry Stokes' Seven West Media group, which operates *The West Australian* newspaper. It's believed the deal will take place in the next financial year. The sale would mean Seven West has a monopoly on the major newspapers in the state; Seven West also owns the Seven Network, Yahoo7 and Pacific Magazines.

### Summary

Aside from these job losses, there is a gradual loss of editorial positions taking place at media outlets around the country, not to mention masthead and newsroom closures, programming cuts, relocations and slashed resources.

Job losses in the media industry are press freedom issues. Not least for the sake of the audience journalists work for. When there are fewer "boots on the ground" there are fewer stories that people need to know. There is less scrutiny of the powerful, less information and entertainment, and a dangerous decline in the ability to respond in times of trouble, disaster and hardship, let alone invigorate democracy.

Our communities are the ultimate losers by these job losses.

# PUBLIC BROADCASTING

In the months leading up to the 2016 Federal Budget, MEAA as well as other unions and community groups, were campaigning for the restoration of funding for the ABC. MEAA believes the harsh cuts inflicted on the public broadcasters, particularly the ABC, are unsustainable, and is campaigning for funding to be restored. MEAA believes Communications Minister Mitch Fifield, Treasurer Scott Morrison, and Prime Minister Malcolm Turnbull, must accept that this national institution is too important to be allowed to wither under the weight of a thousand cuts.

## A massive broken promise

*Edited comments by MEAA CEO Paul Murphy for This Working Life, April 6, 2016*[182]

Public broadcasting in Australia, but particularly the ABC, has been gutted in the past couple of years by a succession of major funding cuts that began in late-2014. These cuts have totalled almost half a billion dollars — about half of that has been from the axing of the Australia Network, the international TV broadcasting arm of the ABC; but the other half ($254 million, to be precise) has come straight out of the ABC's annual operating budget from government. This represents one of the worst broken promises in recent Australian history.

On the eve of the 2013 election, Tony Abbott did a live cross from Penrith football stadium with *SBS World News*[183] and under questioning gave this now infamous quote: "No cuts to education, no cuts to health, no change to pensions, no change to the GST and no cuts to the ABC or SBS".

The cuts to the ABC have had a significant impact on its staff and operations. About 400 jobs have been lost, including many prominent journalists, the popular state-based *7.30* programs have been axed, television production in Adelaide has been terminated, offices in some regional centres have been closed and, most recently, there have been changes to regional radio programming — all in the name of saving money.

It is not as if the ABC is inefficient. Since 1985, government funding of the ABC has failed to keep pace with inflation and in real terms the ABC receives about $200 million less a year — or 23 per cent less — than it did then.

Addressing the National Press Club on February 24, 2016, ABC managing director Mark Scott said the ABC also had about 2000 more staff a few decades ago than it does now. "Not only was it a bigger organisation, its share of GDP and slice of the overall government budget was much bigger. It was 0.14 per cent of GDP 30 years ago — today it's 0.05 per cent," he said[184].

"The ABC's share of government expenditure is effectively at its lowest level in decades now and the per capita spend on public broadcasting is significantly lower than many other nations, and dramatically lower than the BBC." And yet, the expectations from the ABC today are greater than ever.

Three decades ago, the ABC consisted primarily of a TV channel, local radio stations, a few national networks, and that was about it.

Today, with a much-reduced budget, the ABC is delivering content across four digital TV channels, four national radio networks, local radio from 56 locations around Australia, six digital radio stations, programming on demand through iView, and a plethora of services to computers and mobile devices.

We demand and expect that the ABC delivers this suite of services and content to us wherever we are, whenever we want it.

The ABC also fulfils a crucial cultural role as a platform for the Australian story to be told: apart from the thousands of hours of news and current affairs it produces each year, the ABC is the leading commissioner and producer of first release Australian content, including 75 hours of drama and 127 hours of children's programming in 2014-15.

When the ABC is required to do so much more with less, it's inevitable the cracks start to show.

The rate of technological progress has far outstripped the funding made available by successive federal governments. That means it's getting progressively harder to maintain a strong ABC now and for the next generation of Australians.

The ABC's "make-do" solutions to the chronic massive underfunding crisis are clearly unsustainable.

Funding for the ABC and SBS is provided under a three-year agreement. This is meant to provide certainty so the broadcasters can plan for three years knowing that their budgets are secure. The cuts of the past two years to the ABC breached that agreement and now it is crunch time for the ABC.

If it does not receive a significant restoration of funding and certainty for the next three years, then it is inevitable that more cuts to programming, content, jobs and services will need to be made. Interviewed on *Media Watch* in late March this year[185], Scott warned as much as 10 per cent of

Community rally in Sydney opposing federal Budget cuts to the ABC

the news budget was at stake from this year's negotiations. Either that, or the ABC will need to look to alternative funding sources — such as commercial advertising.

Incoming managing director Michelle Guthrie has already flagged that possibility.

We have a small window of opportunity to influence negotiations for a new three-year funding agreement that are currently taking place between the Turnbull government and the ABC board.

It will take more than this year's budget to fix the funding crisis at the ABC but we need to raise the pressure now on the political establishment in Canberra to make sustainable funding for the ABC an issue they can't ignore — not just in this year's budget, but in the future, whoever is in government.

Hands Off Our ABC[186] — the public community campaign run by the two unions who represent ABC employees, MEAA and the Community and Public Sector Union (CPSU) — has made it simple to send an email directly to your member of the House of Representatives and state senators with this message.

At his National Press Club speech, Mark Scott also floated the idea of a merger of the ABC and SBS as a solution to the funding crisis. He said this would unlock further efficiencies and free up funds that can then be spent on content and programming.

That's debatable, but the one thing that a merger would guarantee would be more job losses. With the ABC and SBS already cut to the bone, this discussion of a merger is nothing more than a distraction from the real issues of underfunding faced by both public broadcasters.

It papers over the real issue that public broadcasting in this country is underfunded for the digital age and is naïve to say the least.

### Editorial independence is paramount

Sustainable funding is not the only issue at stake for the ABC. The Hands Off Our ABC campaign also wants to see the editorial and programming independence of the ABC fully respected and protected from any governmental interference.

We want to keep ABC television, radio and websites 100 per cent commercial free, and curtail the outsourcing and privatisation by stealth of the public broadcaster.

And lastly, as a publicly owned institution and model employer, the ABC has a responsibility to provide secure jobs, whole of industry training and model working conditions. At a time when commercial media is under financial pressure and being forced to cut back more and more, strong and independent public broadcasting has never been more important.

Poll after poll shows that the ABC continues to be not only Australia's most trusted source of news and information, but its most trusted institution after the High Court.

It is also arguably Australia's most important cultural institution, reflecting the values and spirit of our nation through locally-commissioned and produced drama, comedy, and music.

While the cuts to the ABC have been most closely associated with Tony Abbott's broken promise, we shouldn't forget that the Communications Minister at the time was Malcolm Turnbull.

# PRESS FREEDOM AND AUSTRALIANS ABROAD

## Alan Morison

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

The pair were charged with criminal defamation in April 17, 2014, under articles 326 and 328 of the Thai Criminal Code. The charges carry a maximum penalty of two years imprisonment and a fine of up to 200,000 Baht ($A8120 at the time). They were also charged with violation of article 14(1) of the Computer Crimes Act, which carries a maximum penalty of five years imprisonment and a fine of up to 100,000 Baht ($A4060).

The charges followed the reproduction on Phuketwan.com of a single paragraph from a Reuters special report on Rohingya boat-people published in July 2013. Reuters subsequently won a Pulitzer Prize for the investigation in 2014. Morison is editor of the Phuketwan.com and Sidasathian had worked with Reuters on its award-winning report.

On April 17, 2014 the two journalists presented themselves to the court, an application for bail was made, and the pair spent five hours in the cells as prisoners of the court[187]. The *Bangkok Post* later editorialised: "In the Phuketwan case, it is hard to escape the conclusion that those pursuing it are looking increasingly misguided and vindictive, especially in the face of international recognition for the Reuters report. The navy has been its own worst enemy in this case. Attempting to silence media outlets with defamation lawsuits will never win any public relations battles …"[188]

The imposition of a military junta has made the position for the two journalists even more precarious given that Thailand has effectively descended into a nation ruled by a junta that has cracked down hard on the media. On April 1, the junta issued Order No 3/2558 which invokes Section 44 of the Interim Constitution of the Kingdom of Thailand (2014), effectively replacing martial law which has been in place in the country since May 20, 2014 when the military took over in a coup d'état.

Under Article 44, coup leader Prayuth Chan-ocha has the power to make any order in the name of national security while some Thai media have referred to the new order as "the dictator law". Human Rights Watch has described the move as

Australian journalist Alan Morison and his colleague Chutima Sidasathian.



"Thailand's deepening descent into dictatorship". Section 44 gives full powers to the head of the NCPO to respond to any act which undermines public peace and order or national security which means authorities have the power to ban any news report, sale and distribution of books, publications and other medium that the NCPO deem as a "security threat". Any person not complying with the article will be punished with maximum of one year imprisonment, or a fine of 200,000 baht maximum, or both.
The International Federation of Journalists has said: "On outward appearance this gives the impression of a positive change in Thailand, but reading between the lines and certainly internally it will be business as usual for the military junta with strong ramifications on the country's media and press freedom.[189]
On April 16 2015, Human Rights Watch said Thai authorities should drop the criminal proceedings against Morison and Sidasathian.[190]

On July 14, the pair faced a three-day trial at the Phuket Provincial Court. During the final two days, the prosecution did not attend leaving all defence evidence unchallenged.

MEAA and the International Federation of Journalists sent Australian barrister and MEAA member Mark Plunkett to be a trial observer. Plunkett monitored the procedures of the trial each day, reporting back on proceedings.

On September 1, 2015 Morison and Sidasathian were cleared of the criminal defamation charges.

Following the verdict, Plunkett said: "This is a timely reminder to call for a repeal of pernicious criminal defamation and computer crimes law that threaten the freedom of speech for all people in Thailand but are directed at stifling the freedom of news media by threatening and intimidation all journalists reporting on news in Thailand. The prosecution of journalists and threatening lengthy goal terms in and outside of Thailand for reporting the news is a grotesque oppression that stifles the development of Thailand."[191]

MEAA said: "This was a vitally important case. The use of criminal defamation laws to muzzle the media and stifle free expression is a real threat to public interest journalism. Alan Morison and Chutima Sidasathian should be applauded for their courageous news stories highlighting the plight of the Rohingya people.

"Instead, their lives and their work were thrown into upheaval for two years during this case, as the Royal Thai Navy undertook a heavy handed assault on journalism in a case based on the navy's inaccurate translation of a Reuters news story, a single paragraph of which was republished by the journalists' website Phuketwan.com. The fact that the navy didn't pursue Reuters but chose instead to go after these two journalists is indicative of a frightening attempt to intimidate, harass and silence local news media.

"Thankfully for journalists across Thailand and throughout the Asia-Pacific region, Alan Morison and Chutima Sidasathian were determined to take a stand for press freedom and the public's right to know despite the prospect of seven years' jail in a Thai prison. For that, we should all be grateful," MEAA said.[192]

MEAA is extremely grateful for Plunkett's expertise and advice during this process.

Phuketwan.com shut down on December 31, 2015. On January 15, 2016 the window available for the Royal Thai Navy to lodge an appeal closed.

## ABC crew in Malaysia

An ABC crew, reporter Linton Besser and cameraman Louie Eroglu, were arrested by Malaysian police in Kuching, Sarawak, on Saturday, March 12, 2016 while working on a *Four Corners* investigation. The pair had been trying to question Prime Minister Najib Razak when they were detained by police. [193]

They were allowed to leave before later being arrested and questioned for six hours in a police station. Their passports were taken, and later returned, and they were told not to leave the country while their case was under investigation.

Police alleged they had crossed a police line and ignoring police instructions while trying to question Mr Najib. The ABC journalists deny this. The charge carries a two-year jail term.

In the early morning of Tuesday, March 15, 2016, three hours before the pair were due to appear in court, their lawyer told them the police had dropped the charges, they were free to leave, and the pair flew out of the country.


Nicky Hagar with his book Dirty Politics
BY COLIN PEACOCK, RADIO NZ 'MEDIAWATCH

# PRESS FREEDOM IN NEW ZEALAND

**By Colin Peacock**

On World Press Freedom Day in 2013, Australia's Reporters Without Borders representative Mark Pearson told us we should be wary of threats to media freedom, even though New Zealand had just appeared in the top 10 of its annual press freedom index.

If today's technologies had been available in 1975, he warned, The Washington Post's Watergate scoop may not have sent the light of day. Metadata tracking is now relatively routine, CCTV is widespread and smartphones double as "self-surveillance devices" for unwary journalists working on sensitive stories, he told us.

In New Zealand, all this seemed a bit of distant threat at the time, but a scoop published shortly before ended up showing us it wasn't.

Fairfax Media political reporter Andrea Vance revealed an unreleased report about dozens of New Zealanders illegally spied upon by the national spy agency, the GCSB. An investigation into this leak ordered by the Prime Minister John Key's office asked for details of Vance's movements round Parliament and details of her phone calls from her press gallery office. Barely hesitating, Parliamentary Services handed over this private and sensitive data. She's not the only journalist to have felt the heavy hand of a state agency intrusion since then, though some journalists pushed back in 2015.

The New Zealand Defence Force reached a settlement with freelance foreign correspondent Jon Stephenson — and apologised to him — after he sued the NZDF chief for defamation. Back in 2011, a statement issued in the chief's name cast doubt on the accuracy of Jon Stephenson's reporting from Afghanistan — effectively claiming part of Stephenson's eye-opening (and award-winning) report on what our troops were doing there was made up.

At the time the PM backed the defence force and told reporters Stephenson lacked credibility, but when the case got to court, the NZDF admitted its press statement was wrong. The jury couldn't agree on a verdict and the defamation trial was abandoned, but the NZDF only settled on the verge of another trial with the risk of an award of significant damages.

The *New Zealand Herald* later used the *Official Information Act* to reveal that hundreds of thousands of dollars of public money had been spent defending the case (not including the confidential sum of the settlement) even though their position was so weak. Defence defending the indefensible, you could say…

Another freelancer also won a settlement recently after suing the Prime Minister for defamation. The PM accused camera operator Bradley Ambrose of "News of the World" tactics when his microphone recorded a conversation during a "photo-opp" conversation with another political party leader in the run-up to an election. Ambrose maintained the recording was inadvertent, but the PM called in the police to investigate. The police executed search warrants in several newsrooms in a bid to find the recording.

While both these cases were a "win" for journalists in the end, both dragged on for more than



two years and they were unnecessarily stressful and expensive. As the agreed settlements were confidential, New Zealanders will never know the full cost to the public. And unlike the PM and the NZDF, neither of the journalists who had to go to court to defend their professional reputation could dip into the public purse.

Another independent journalist has also won a legal battle this past year after police raided his home.

In 2014, Nicky Hager's explosive *Dirty Politics* lifted the lid on politically inspired chicanery which linked politicians and their staffers, bloggers and lobbyists. The book was based on hacked private email and social media messages belonging to one of New Zealand's leading attack bloggers, Cameron Slater.

After publication, police responded swiftly and strongly to his complaint about the hacked data. Even though Hager was only classed as a witness at the time — and not a suspect — his papers, computers, and other devices belonging to him and his daughter were seized in a 10-hour raid carried out in his absence.

The raid swept up confidential stuff relating to Hager's other investigations, but nothing relating to Slater's complaint. Hager's computers were cloned, and during the judicial review of the raid, the court heard they were accessed at least five times in spite of assurances they wouldn't be.

Police investigators even asked several companies including Google and Air New Zealand for Nick Hager's personal data. In the absence of a warrant, they all declined the police request, with the exception of Westpac which handed over details of Hager's transactions.

Eventually a judge ruled the police raid was unlawful. The seized property was returned to Hager and computer drives with copies of his electronic data were destroyed in his presence. Legal action against the NZ Police and Westpac is ongoing.

The police were responding to complaints laid with them about Nicky Hager and Darren Ambrose but their searches proved ineffective, unnecessary — and in Hager's case, unlawful.

One of the things revealed in Mr Hager's book was the manipulation of our *Official Information Act*.

Government ministries and state agencies are obliged to respond to reasonable requests within 20 days or notify requesters of the appropriate grounds for withholding it. *Dirty Politics* detailed cases of information of genuine public interest withheld for political purposes, and some cases where information damaging to political opponents was released rapidly.
Journalist Megan Hunt researched the "gaming" of the OIA and found it running from the Prime Minister's officer right down to a small regional health board.

"It is naïve to expect everyone using the OIA will follow the rules all the time, however Kiwis should never give up pushing for the accountability and transparency the legislation embodies," she said. When the Prime Minister candidly admitted his ministers sometimes choose to release information when it suited them — clearly, that's against both the spirit and the letter of the act — the Chief Ombudsman (whose office was dealing with a huge backlog of journalists' complaints about withheld information) ordered a review of compliance.

Journalists were disappointed when the Chief Ombudsman — due to retire soon after — found no clear evidence of political manipulation by ministers or public servants in her report late last year. But the incoming Chief Ombudsman Peter Boshier, a former judge, recently said he is "putting government agencies on notice" and promised to publish tables ranking the time it takes ministries to respond to requests.

"We'll be assessing this in a very clinical fashion … and I'll be fairly robust about this," he says. Journalists here will be hoping he lives up to his promise.

Finally, intrusions on New Zealand media freedom in 2015 weren't always suffered by journalists.

The president of New Zealand's Association of Scientists warned that a proposed code of conduct covering state-employed scientists who comment on issues in the media could amount to a gag. A survey of its members had already revealed concern about the constraints, risks and disincentives that scientists face in relation to speaking publicly, especially on sensitive issues which may involve political or commercial interests.

Last November, police apologised to leading academic researcher Dr Jarrod Gilbert after he was banned from accessing data critical to his research on gangs. Police deemed him unfit to conduct research because of his "affiliations" with them. This also revealed a contract which had to be signed by all academics wanting access to police data. It gave police officers the power to challenge research that showed "negative results" and even the power to veto publication.

The NZ Police has since said that the contract will be changed to protect the independence of academic research. It's interesting what a little exposure in the media can achieve, once someone asks the right question or blows the whistle loudly enough.

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Colin Peacock, producer and presenter – Mediawatch, Radio NZ

# PRESS FREEDOM IN THE ASIA-PACIFIC

## 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 to aggressive controls placed on freedom of expression.

Across the region, freedom to express continues to be limited in a variety of ways. Constitutional guarantees established to protect independent media were weakened by contradictory laws aimed at silencing oppositional voices or control views deemed as potentially undermining to state security.

In no other country was this more evident in than China, which comes as no real surprise.

What was not anticipated, however, was that this negative trend would flow through to countries which have come to pride themselves as beacons of freedom and democracy such as India, Indonesia, Thailand and Pakistan.

Other vulnerable and emerging democracies like Bangladesh, Cambodia, Myanmar and the Maldives had the screws were tightened ever further.

While globally most media endured a major contraction, that experience was not evenly shared in the Asia-Pacific. Both Pakistan and Myanmar witnessed a period of tremendous growth as new media markets and operations opened up.

But, at the other end, older and more established media in Japan, Republic of Korea, Australia and New Zealand experienced massive job shedding. More broadly, it is clear is that more and more journalists and media workers are being forced out of long-term contracts covered by collective agreements into freelance and consultant type contracts.

The Asia-Pacific region remains the deadliest in the world with 541 journalists killed between 1990 and 2015[194] (around the world in that time, the IFJ says a total of 2297 journalists and media staff were killed).

The Philippines was the second deadliest country in the world, coming in behind Syria. Most notable is the fact that the Philippines has been a peace-time country over the past 25 years of record taking.

## Philippines

The Philippines remains the deadliest country for journalists in the Asia Pacific region, topping the regional tally in 2015, as well as coming second in the global tally for the past 25 years. Since May 2015, six journalists have been killed.

Impunity continues to thrive across the country, with minimal prosecutions for murders. This is most brutally evidenced in the 2009 Ampatuan Massacre of 58 people, including 32 journalists. To date, not a single conviction has been secured.

As the country moves to the Presidential elections on May 9, the safety of the country's media has become a serious concern for the IFJ and its affiliate the National Union of Journalists of the Philippines. Election campaigns are notoriously dangerous for the media in the Philippines, which is often afflicted with press freedom violations. To try to overcome these challenges, the IFJ and NUJP have been hosting a series of workshops and briefings across the Philippines, to better equip the media for the upcoming period of instability.

While impunity remains a key challenge for the media in the Philippines, there have been wins in the past year — most notably, in the murder case of Gerry Ortega. In September 2015, the alleged masterminds behind his murder, the Reyes brothers, were arrested in Thailand, where they have been since fleeing the Philippines prior to their arrest in 2013. The brothers were arrested and deported to the Philippines, where they remain in police custody. The case had another win in March 2016, when Arturo "Nonoy" Regalado, he former aide of Palawan governor Joel Reyes was found guilty beyond reasonable doubt for Ortega's murder. Regalado was sentenced to sentenced *reclusion perpetua*, which carries a minimum jail term of 20 years and one day and a maximum term of 40 years.

## Thailand

The situation for press freedom in Thailand continues to deteriorate under the ruling military junta. Local and foreign journalists came into the firing line in 2015 with the tightening of media visas and stories cut from local publications of foreign outlets.

In a win for press freedom, on September 1 Thai journalist Chutima Sidasathian and Australian journalist Alan Morrison were acquitted of all the criminal defamation charges that were brought against them by the Royal Thai Navy. In the ruling the judge, His Honour Justice Chaipthawat Chaya-ananphat, said that it inappropriate for authorities to use the *Computer Crimes Act* as a way of punishing journalists for defamation as this law relates to hacking and malicious software.

In March 2016, charges against Hong Kong

Murdered Philippines journalist Gerry Ortega

journalist Anthony Kwan were dropped, which was seen as another win for press freedom. Kwan was arrested in August as he tried to board a flight from Bangkok to Hong Kong. He was arrested for carrying a bullet-proof vest in his luggage. According to the Thai *Arms Act*, it is illegal to carry such items without a weapons license. While the dropping of charges was seen as a win, the situation for local journalists remains concerning as they are still forbidden to carry safety gear, including bullet-proof vests.

The military junta continues to extend its power over the media through laws and directives. In early 2016, the Thai junta-appointed Constitution Drafting Committee released the draft constitution for comments from stakeholders. A two-week window was granted for comments and the committee was expected to deliver the revised charter by the end of March. Although no revised charter has been shared with the public, Thai legal processes says a constitutional referendum will be held in July, 2016 to vote on the new constitution.

Under the draft constitution that was shared in February there were several aspects that strongly curtailed press freedom and free expression. According to the Southeast Asian Press Alliance, there were several concerns for the media, including:

- reduced editorial independence for journalists in state-owned media (Section 35, paragraph 6);
- the possibility of more state control over the media through subsidies (Section 35, paragraph 5);
- the state and the existing National Broadcasting and Telecommunication Commission (NBTC) will direct and control the distribution of broadcast frequencies. The current NBTC will no longer be considered as an independent regulatory body as the state will have to order its re-establishment following the passage of the draft constitution (Section 56, paragraph 1 and 3 and Section 265); and
- the inclusion of "national interest" and "security of state" rather than only public interest as factors in broadcast frequency regulation (Section 56, paragraph 1 and 3 and Section 265).

## China

Since the inauguration of President Xi Jinping in 2013, the press freedom situation in China has steadily worsened. The current status of press freedom and freedom of expression in China is deplorable.

In the 2016 IFJ China Press Freedom Report, *China's Great Media Wall: The Fight for Freedom,* the IFJ noted that 51 journalists and media workers are currently detained or jailed in China, with the oldest case dating back to 2008.[195]

The number of jailed and detained journalists and media workers is illustrative of the tightening grip that the Chinese government has over the media and press freedom.

Its ultimate target, as always, was to preserve its power in the mainland, extend its influence over Hong Kong and Macau, and tightly manage perceptions of its relationship with Taiwan. The law, the administration, the bureaucracy and the government-owned media were its weapons. Propaganda, censorship, surveillance, intimidation, detention without trial, sabotage of the internet, brutality in the field, and televised "confessions" were its ammunition.

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.

China's constitution guarantees human rights in accordance with international standards, including the right to a free press, but these protections are routinely ignored. The laws built upon this foundation both violate those rights and distort the legal process so that the rule of law is compromised and there is almost no government accountability.

Last year's new National Security Law is full of vague definitions and requires Hong Kong, Macau and Taiwan to maintain China's "national sovereignty and territorial integrity". The controversial anti-terrorism law was passed unanimously by the National People's Congress, despite international criticisms of the law, which is full of vague definitions and states that no persons or news media are allowed to report on terrorist activities attack unless they received a pre-approval from the counter-terrorism agency.

Telecommunications and internet providers also have to "provide technical support and assistance including decryption". The Criminal Law was amended to introduce severe punishments for people involved in the internet coverage of matters of public importance, such as disasters, epidemics or security alerts.

New laws under discussion — the draft Cyber Security Law and draft Overseas Non-Governmental Organisations Management Law — are designed to strengthen the powers of the party.

## South Asia

While significant wins were made in **Pakistan** for impunity, including key arrests and the establishment of tribunals to investigate journalist killings in Balochistan and Peshawar, the situation in other South Asian nations was not as positive. From May 1, 2015 to the mid-April 2016, seven journalists have been killed.

**India** suffered one of its worst years, with six journalists killed and numerous press freedom

violations across the country. Chhattisgarh has become the hotbed for India's deteriorating press freedom, with a spike in killings, attacks and even threats from government ministers. The IFJ, along with its affiliates have continued to monitor the situation in India, which included writing to President Modi on International Day to End Impunity for Crimes against Journalists in November, 2015.

**Bangladesh** continues to struggle with press freedom and freedom of expression. Since February 2015, six "secular" bloggers have been killed, hacked to death in broad daylight. Each murder has been linked to the bloggers' writings, with extremists claiming responsibility.

The IFJ, along with the international community, have condemned the killings, calling on the government to guarantee press freedom and freedom of expression.

However, in early 2016, press freedom took another hit, as two prominent editors were charged with sedition in relation to their writings. Mahfuz Anam was arrested in February, with more than three dozen cases brought against him. In April, pro-opposition editor, Shafik Rehman was charged with sedition.

**Afghanistan** continues to face a deteriorating press freedom situation as international military and aid support withdraws from the country.

The Taliban continues to intimidate and threaten the media, which culminated in the devastating attack on a minibus in Kabul in January 2016, which killed seven TOLO TV media workers and injured dozens more. The attack came months after threats were made against news outlets, particularly TOLO TV for its "negative reporting" of Taliban activities.

Following the deadly attack, the media in Afghanistan banded together and said they would no longer report on the Taliban and that any attack on the media was a war crime.

While the situation in South Asia looks grim, there are stories to celebrate. In **Sri Lanka,** the press has entered a period of rebuilding after the election of President Sirisena in January 2015. The election of Sirisena saw the end to the Rajapaksa regime, and ultimately an end to the war on journalism that Rajapaksa and his government had waged.

The changes in Sri Lanka have been evident through the return of several media workers and journalists exiled during the Rajapaksa years and the reopening of the investigation into the disappearance of political cartoonist Prageeth Eknaligoda. Several arrests have been made into Prageeth's disappearance and the trial is currently in the courts.

# 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.

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, the EPMU, which also supports the fund.

The main fundraising activities are the annual Press Freedom Australia dinners, and associated auctions and raffle ticket sales in Sydney and Melbourne, and at the gala presentation dinner for the annual Walkley Awards for Excellence in Journalism. In 2014 and again in 2015, Japan's public broadcasting union Nipporo also made contributions to the fund.

In 2015 MSSF supported several key projects and activities conducted by the IFJ Asia-Pacific.

## 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.

MSSF also supports the IFJ's China Press Freedom project, which is co-funded with the National Endowment for Democracy (NED). The project

MSSF supported a three-day trauma and safety workshop in Kathmandu, Nepal (above).
PHOTO UJJWAL ACHARYA

works to promote and support press freedom in China, strengthening the media community in an increasingly difficult working environment.

Through the project, the IFJ hosts its China project co-ordinator, who regularly monitors the situation and press freedom violations, hosts a two-day workshop on a range of themes, including digital security, journalist safety and press freedom, and publishes the annual China Press Freedom Report.[196]

## 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.**

MSSF supports the education of children whose journalist parents have been killed in Nepal and the Philippines (left)

# THE WAY FORWARD

It didn't take long to get here: refusing to release information or just plain suppressing, hunting whistleblowers who embarrass the government, jail terms for journalists, police secretly trawling through metadata …

It's not a good look for a country claiming to be a healthy functioning democracy. But there is a way out of this mess. Before anything happens, there needs to be a national conversation on press freedom in Australia. As MEAA has reported this year, and in past press freedom reports, it's easy for politicians and public servants to make all the right noises about protecting press freedom. But their actions show that press freedom is poorly understood in the Parliament as well as the Australian Public Service.

If we are to truly have open and transparent government then politicians and those who work for them must recognise and respect, protect and promote the public's right to know and the role that journalists have in making that happen. Australia should be a champion of freedom of expression rather than a country that is steadily using laws to erode this universal human right. Once these core values are acknowledged then next steps can be undertaken.

MEAA believes the work of the Independent National Security Legislation Monitor as well as other individuals that should have a say in national security laws, need to be properly resourced in order to undertake a comprehensive review of the spate of national security laws that have been passed since 9/11. MEAA is dissatisfied with the INSLM's review of s35P of the *ASIO Act* because, aside from some semantic changes, the basic fact remained unchanged: journalists could still face between five years and 10 years jail for simply doing their jobs.

Next should come recognition that journalists have an ethical obligation to protect the identity of their confidential sources. To seek to circumvent that obligation by accessing journalists' own telecommunication data, in secret, without providing them or their employers any opportunity to challenge this invasion of their privacy is outrageous. And placing a determinant of whether a Journalist Information Warrant will be issued on the secret arguments mounted by Prime Minister-appointed Public Interest Advocates with no media experience or understanding of the public interest in a particular news story is absurd. Journalists and their employers are best placed to argue the public interest — that's why the story was written in the first place.

The over-rigorous pursuit of journalists' sources because of a government embarrassment must also be overcome. Politicians can't be the most notorious leakers of government information on the one hand while passing laws to pursue leakers and the journalists to whom they leak to on the other. The Australian Federal Police generating a 200-page dossier on a journalist in relation to a single, legitimate, news story is a ridiculous waste of resources. It is high time that section 70 of the *Crimes Act* be repealed. That section criminalises the unauthorised disclosure of information by a Commonwealth officer, and those performing services on behalf of the Commonwealth.

The Australian Law Reform Commission recommended it should be repealed in 2011[197] arguing that the current "the 'catch-all' nature of the provision is seriously out of step with public policy developments in Australia and internationally" and instead, stating "that only disclosures of information that genuinely required protection, and which were likely to be harmful, should attract criminal sanctions"[198].

The Australian Public Service must come to grips with the realities of freedom of information. Stung by the criticisms arising out of the Home Insulation Program should not lead to a suppression of information; in fact, the contrary is called for — information should be open to scrutiny, debate, consultation, contribution … and better government. Hiding deliberative advice is a retrograde step. Public servants should be given the resources to comply with FoI requests quickly and completely.

The principles of open government should extend to all areas, including the operations of the Australian Defence Force and the Department of Immigration and Border Protection rather than using war-time terminology to impose military-style restrictions of activities that are clearly in the public interest. News and information should be freely available and not filtered by public affairs personnel. The judiciary has a role to play in considering carefully how, when and why suppression orders are issued and to take greater note of the public interest when requests for suppression are made.

Finally, journalists' lives need to be valued. Impunity over the killing of journalists is a global crisis — and, shamefully, Australia's record is a significant contributor to the problem. Over the past 40 years, nine Australian journalists have been killed and, in not a single instance, has anyone been charged with their murder. Rather than lead by example, Australia's record on the killing of journalists is tainted by a lack of political will, inadequate or non-existent investigations and mealy mouthed excuses.

If the killers of nine Australian journalists are allowed to literally get away with murder, what does that say about Australian authorities' attitudes to press freedom?



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