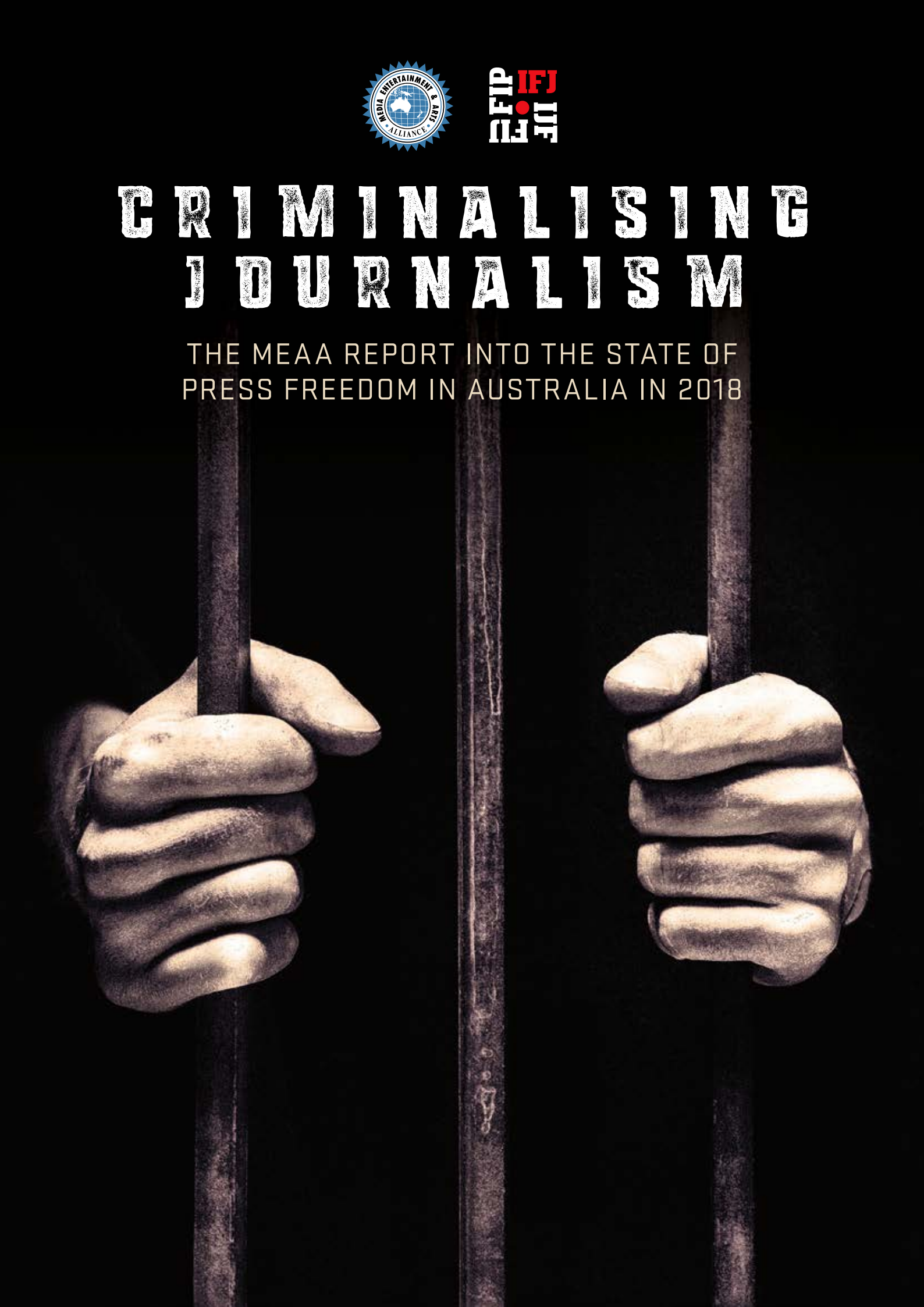
CRIMINALISING JOURNALISM

THE MEAA REPORT INTO THE STATE OF PRESS FREEDOM IN AUSTRALIA IN 2018



2018 MEAA AUSTRALIAN PRESS FREEDOM REPORT

Editor: Mike Dobbie

THANKS TO:
Peter Bartlett
Andrew Fowler
Peter Greste
Alex Hearne
Dean Levitan
Johan Lindberg
Sharon Murdoch
Colin Peacock
Mark Phillips
Adelaide Rosenthal

MEAA thanks all the contributors to this report.

Design:
Louise Summerton
LX9 Design

Cover image:
Mark Evans of BlueskyImage/ Shutterstock.com

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

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FOREWORD

BY PAUL MURPHY, CHIEF EXECUTIVE, MEAA

There's almost universal acceptance of the maxim "Journalism is not a crime". One exception is Australia's parliament – it begs to differ.

Legislating for Australia's national security has drifted a long way from the fight against terrorism. Increasingly, the Parliament passes laws that are about suppressing the public's right to know and criminalising anyone who reveals information the Government would prefer was locked up.

How else can you explain how a draft law could be introduced into the Parliament that would allow for journalists to be locked up for 20 years for reporting information in the public interest? In the name of keeping the people safe, the Government now wants to keep information hidden from view, and punish the whistleblowers who disclose the information and the journalists who work with them.

In an even more egregious example of legislative overreach, under the guise of combating "espionage" and "foreign interference", journalists, editorial production staff, media outlets' legal advisers and even the office receptionist could be locked up for merely handling that information.

The draft law that heralded this appalling new assault on press freedom in Australia, the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* and the *Foreign Influence Transparency Scheme Bill 2017*, was rightly met with a storm of protest, not least from MEAA but also from media outlets, the Law Council of Australia and human rights organisations. Even the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security were quick to identify and condemn adverse consequences of the legislation.

When four United Nations' special rapporteurs (privacy; human rights defenders; freedom of opinion and expression; and protecting human rights while countering terrorism) made submissions protesting aspects of the Bills it was clear the Government had stepped far beyond Australia's obligations under international law and human rights standards.

In the face of such a spectacular own goal, it is reasonable to ask how the Government could draft laws that could attract such opprobrium. After all, the Bills were overseen by the then Attorney-General George Brandis, approved by the Cabinet, and introduced to the House of Representatives by the Prime Minister Malcolm Turnbull, himself a former journalist.

The pushback against the Bills has culminated in journalists and media groups insisting on a media exemption – a move supported by the chair of Transparency International Australia, former NSW Supreme Court judge Anthony Whealy QC.

Sadly, the head of ASIO Duncan Lewis rejected the idea, saying exemptions would leave the door wide open for foreign spies to exploit, adding that it may also increase "the threat to journalists" – a startling claim from the spymaster, given that the Bill seeks to allow the Australian Government to be the one that imprisons journalists, muzzle their journalism and hound their sources.

It is also concerning that the new Attorney-General Christian Porter insisted that the government never intended to jail journalists for simply "receiving documents" – even though that is precisely what the Bill said. Porter added prosecutions of journalists would not proceed without his sign-off. But we've heard such an offer before - his predecessor George Brandis said he wouldn't lock up journalists convicted under the Brandis-designed section 35P

of the *ASIO Act*. And yet, 35P and its penalty of up to 10 years in jail, remains on the statute books.

It must be remembered that these latest "national security amendments" that criminalise legitimate public interest journalism are simply the most recent of an emerging pattern of government attacks on press freedom and freedom of expression, attacks that were initially triggered by 9/11 but which dramatically escalated with the WikiLeaks and Edward Snowden revelations about the levels of government surveillance and scrutiny of their citizens' telecommunications data.

With governments around the world having been embarrassed by these disclosures about what they secretly get up to in the name of their citizens, there has come a response to keep these activities hidden and to tighten control over government information. Simply by declaring something is "secret" government can hide from legitimate scrutiny, intimidate whistleblowers, punish disclosure and muzzle legitimate public interest journalism.

With legislation being drafted offering 20 years jail for journalists, Australia has consciously wandered into the arena populated by serial press freedom abusers. Countries like Egypt, Turkey, China, Myanmar and Cambodia that lock-up journalists who disclose what their governments are up to.

Australia has done so, in part, because media organisations and the community have let it happen. Governments have used the "war on terror" as an excuse to fashion a legislative muzzle on the fourth estate in an effort to fend off legitimate scrutiny. Media organisations have been weakened by digital disruption and have, at times, put up an ineffective opposition to laws that curtail press freedom.

Indeed this year, in the first press freedom survey MEAA has conducted, it appears that journalists are also more relaxed about assaults on press freedom than the community at large. The survey, which was completed by working journalists as well as members of the public, highlighted a division between journalists and their audience about press freedom problems.

From just shy of 1300 completed surveys, almost 21 per cent came from working journalists with the balance from members of the public or non-working retired/unemployed journalists or journalism students. While 72 per cent of the public rated the health of press freedom in Australia as poor or very poor, only 60 per cent of journalists thought so – even though 90 per cent thought press freedom had worsened over the past decade.

Indeed, national security laws ranked first as the most important press freedom issue for journalists (21 per cent) and non-journalists (20 per cent); followed by funding for public broadcasting, government secrecy, freedom of information and defamation. It may be a sign that journalists and their employers have been too complacent about the steady drip of assaults on press freedom, distracted by the other issues besetting the media industry.

Thankfully though, in the past 12 months there has been some good news on the press freedom front.

The Northern Territory Parliament passed shield laws recognising journalist privilege, with the new South Australian Government to follow. That will leave just Queensland as the only jurisdiction still demanding journalists disobey their ethical obligation to never reveal the identity of a confidential source thus facing the threat of a jail term or fine or both for contempt if they fail to do so. There has also been a recognition that the courts, particularly those in Victoria, need to address the use of suppression and non-publication orders if the judicial system is to operate openly and transparently.

Sadly, the highly politicised attacks unleashed on the ABC have continued. The ABC has been fiscally hurt to the extent that it is now struggling to meet its charter obligations, particularly in rural and regional Australia. But in the past 12 months, the political attacks have become more desperate and unhinged, resulting in lengthy inquiries that waste public money that could be spent on adequately funding the increasingly crucial role being played by public broadcasters in providing vital public interest journalism.

Crucial because, as we have also seen, the heavy round of redundancies have continued at the leading media houses – not least at Fairfax which triggered a snap seven-day strike by its journalists when it slashed 125 jobs – that's one in four editorial staff – from its metro newsroom on UNESCO World Press Freedom Day in 2017.

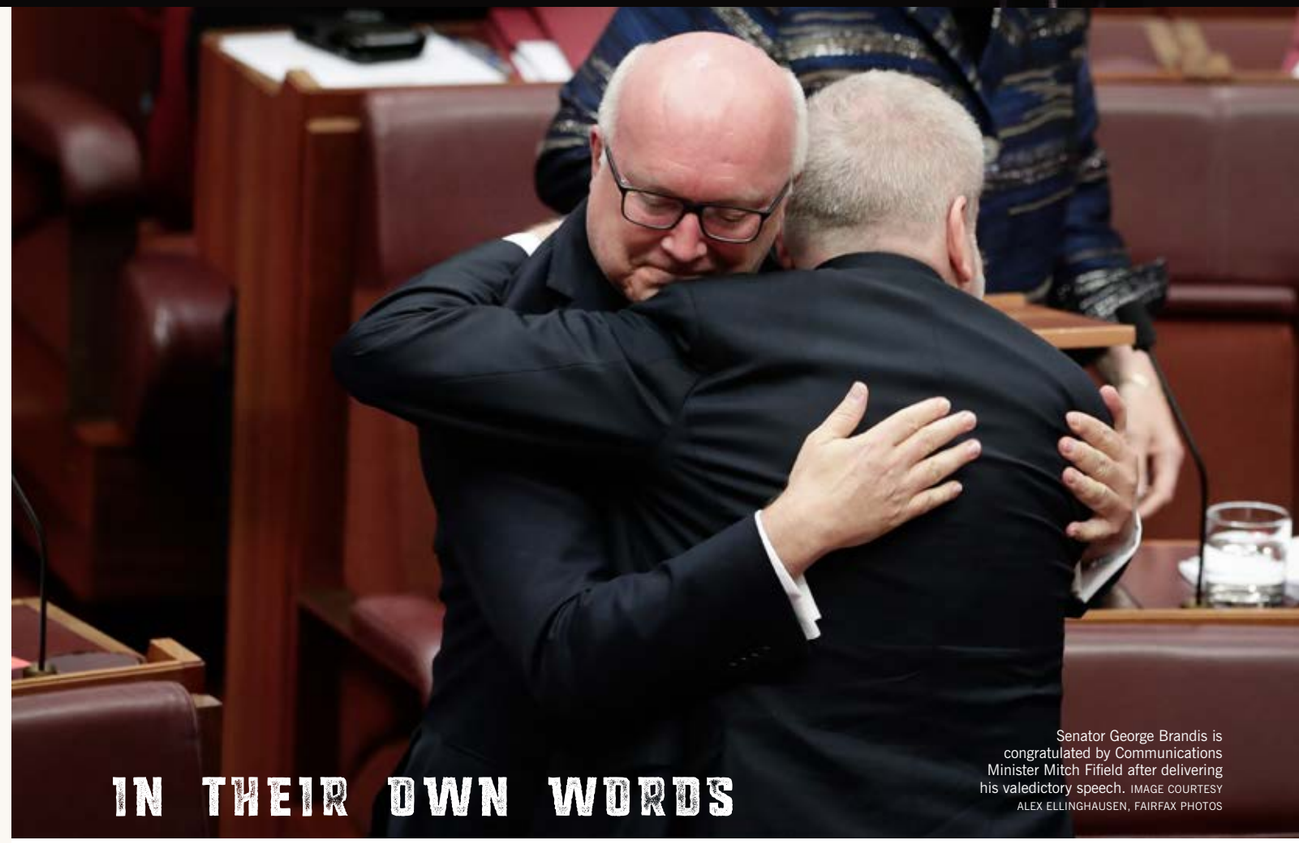
But looking at the long-term, there is still plenty more to be done. A Senate Select Committee inquired into the future of public interest journalism and adopted most of MEAA's recommendations, including the need for reform of Australia's uniform national defamation law regime.

The digital platforms, whose power has done much to cripple media outlets while riding the coat-tails of latter's editorial content, needs to be addressed. So too the other MEAA recommendations for government support for the media industry. There is much work to be done to ensure the media can meet the challenges ahead but, at last, government being forced to listen.

Encouragingly, the combined response by media organisations including MEAA to the government's unjust national security laws has demonstrated that vital press freedom principles are important and must be championed.

Slowly, political leaders may be realising that the fourth estate must be allowed to continue to scrutinise the powerful if we are to continue as a healthy, functioning democracy. To do otherwise would mean Australia drifts into the ranks of a rogues' gallery of press freedom abusers.

Paul Murphy
chief executive
MEAA



Senator George Brandis is congratulated by Communications Minister Mitch Fifield after delivering his valedictory speech. IMAGE COURTESY ALEX ELLINGHAUSEN, FAIRFAX PHOTOS

IN THEIR OWN WORDS

"THERE CAN BE NO PRESS FREEDOM IF JOURNALISTS EXIST IN CONDITIONS OF CORRUPTION, POVERTY OR FEAR." - INTERNATIONAL FEDERATION OF JOURNALISTS

Prime Minister Malcolm Turnbull introducing the Espionage Bill
"I give personal thanks to my Attorney-General, Senator George Brandis, who has applied his Queen's Counsel's mind methodically and creatively to tailor our legislative framework."[1]

MEAA – "The Bill would make it a crime for anyone to 'receive' and 'handle' certain national security information. A journalist in possession of a document classified 'top secret' could face 20 years in jail – even if they never broadcast or publish a story."[2]

Law Council of Australia – "The basic difficulty with the Bill is that many of the offence provisions are broadly drafted to capture a range of benign conduct that may not necessarily amount to harm or prejudice to Australia's interests."[3]

Sydney Criminal Lawyers' blog – "The Bill creates a series of draconian laws that aim not only to penalise Commonwealth officers that leak classified information, but also criminalises all the steps that go into reporting such information to the public."[4]

Transparency International Australia chairman Anthony Whealy – "The law is sufficiently wide to get you and if they're not intending to get you, why not exempt you? Journalists should not have this sort of a law hanging over their head, because when Christian Porter is not the Attorney-General, and it is someone else, he or she might take a very different view… The bigger point is why should a journalist have to go through a criminal trial? There should be an exemption for journalists acting in the public interest, not a defence."[5]

Australian Lawyers Alliance blog – "Whistleblowers revealing dangerous and harmful conditions in offshore detention could be caught by this new law. Reporters revealing misconduct or corruption could be captured. Even reporting on domestic or international politics could contravene the provisions, depending on how the courts interpreted them… What is even more concerning is that this adds yet another layer on existing legislation that can protect the government from embarrassment, rather than from genuine threats."[6]

United Nations rapporteurs' joint communique – "Such extensive criminal prohibitions, coupled with the threat of lengthy custodial sentences and the lack of meaningful defences, are likely to have a disproportionate chilling effect on the work of journalists, whistleblowers, and activists seeking to hold the government accountable to the public."[7]

Attorney-General Christian Porter – "The Prime Minister, in his discussions with me, has made clear the absolute need for this legislation to protect Australia, but also his concerns that the drafting of

From left:

One Nation Senator Pauline Hanson with Senator Brian Burtson left and former Senator Malcolm Roberts right. IMAGE COURTESY ANDREW MEARES, FAIRFAX PHOTOS

Peter Dutton addresses the media. IMAGE COURTESY ALEX ELLINGHAUSEN, FAIRFAX PHOTOS

Maltese investigative journalist Daphne Caruana Galizia was killed by a car bomb

this legislation must clearly match the government's intent not to unnecessarily restrict freedom of communication. There is not, nor has there ever been, any plan… by the government to see journalists going to jail simply for receiving documents and that would not occur under this bill as currently drafted."[8]

Porter – "There has been no intention to unnecessarily restrict appropriate freedoms of the media. Where drafting improvements are identified that strike a better balance, the Government will promote those changes."[9]

Joint Media Organisations' second supplementary submission on the Espionage Bill – "Notwithstanding the amendments, it remains the case that journalists and their support staff continue to risk jail time for simply doing their jobs. This is why we believe that the way in which to deal with this appropriately is to provide an exemption for public interest reporting."[10]

Joint Media Organisations – "The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability. However, unlike some comparable modern democracies, Australia has no laws enshrining these rights… Therefore we do not resile from our long-held recommendation for exemptions for public interest reporting in response to legislation that criminalises journalists for going about their jobs. The lack of such a protection – and the ever-increasing offences that criminalise journalists for doing their jobs – stops the light being shone on issues that the Australian public has a right to know."[11]

ASIO director-general Duncan Lewis – "Broad exemptions for journalists would, in my view, effectively leave a door wide open for foreign spies to exploit, and may have the unintended consequence of increasing the intelligence threat that is faced by our journalists."[12]

Law Council of Australia president Morry Bailes – "The radical altering of the definition of what is national security to include political and economic relations with other nations… is the sort of thing that you might expect a journalist to be reporting on, in the context of ordinary democratic discussions in this country. We don't want the net to be cast so wide that legitimate democratic discussion is going to suffer. We need to think carefully about what's being taken away."[13]

Senator Brian Burston – "I've contacted (Finance Minister) Mathias Cormann and said One Nation wants the ABC funding reduced by $600 million over the forward estimates. If they're not forthcoming in reducing funding to the ABC as part of their budget repair we'll have to seriously consider what budget repair options (we support) that the Liberal Party puts forward. It's about time we apply a little bit of pressure on the government to do something about the left-wing, Marxist ABC."[14]

(Then) Senator Malcolm Roberts – "Their ABC put our diggers' lives at risk so as to execute a political hit on Senator Hanson. The ABC have declared jihad on Aussie diggers. They have a fatwa on Pauline Hanson. Our diggers who were to protect Pauline are the ones who would have shielded the Senators when the bullets and bombs started to fly. It was their lives the ABC recklessly put on the line. The ABC are warped and dangerous. Terrible. Horrible. Sad. The ABC's actions in revealing the Anzac Day visit to diggers shows their willingness to collude with ISIS and other terrorists in identifying Australian targets, including troops. The ABC has for a long time been harbingers of terror apologists. This proves their Jihad sympathy. Just like an ISIS attack, the cowards make their hit and then scuttle away into the sand. Like snakes."[15]

Roger Franklin, online editor, *Quadrant* – "Life isn't fair and death less so. Had there been a shred of justice that blast would have detonated in an Ultimo TV studio. Unlike those young girls in Manchester, their lives snuffed out before they could begin, none of the panel's likely casualties would have represented the slightest reduction in humanity's intelligence, decency, empathy or honesty."[16]

Home Affairs Minister Peter Dutton – "It's a cultural problem at the ABC and the board needs to deal with it… I actually think there is a fundamental problem with the ABC, particularly around *Q&A*… I don't watch it. It is a waste of taxpayers' money…"[17]

Senator Brian Burston – "It's about time we took a stand against the ABC because if it's us and they destroy us, what is it next, the government? They're showing total bias against One Nation."[18]

Senator Pauline Hanson – "Some of the television and radio personalities [at the ABC] wouldn't cut it in the real world of media and would likely end up throwing pots in Nimbin without the ABC providing a safe haven for their pathetic talent."[19]

The Australian – "The change to the *ABC Act* – yet to be brought to parliament – is part of a deal the government did with One Nation in exchange for passing its overhaul of media laws… The One Nation senators have previously offered up examples of topics where they think ABC coverage hasn't been appropriately balanced, including climate change and giving equal time to the views of anti-vaxxers."[20]

Communications Minister Mitch Fifield – "We're simply reinforcing, through legislation, that which is already in the ABC's own editorial policies. It will operate exactly as it does now…"[21]

Fifield – "It would reflect better on the ABC, secure in its more than $1bn of annual funding, if it showed a greater understanding of the challenges faced by its commercial counterparts who earn their revenue rather than receive it from the Treasury."[22]

MEAA – "This Bill is a calculated insult directed at the ABC and its employees. The proposed addition to the *ABC Act* borders on comical, but is unfortunately rooted in a transgressive campaign to undermine the performance and reputation of the nation's most esteemed (and scrutinised) broadcaster. MEAA believes this misleading and dangerous Bill should be withdrawn without further debate."[23]

Craig Kelly MP – "I don't think the national broadcaster is acting in the national interest."[24]

The final blog post of Maltese investigative journalist Daphne Caruana Galizia, 30 minutes before she was killed by a car bomb – "There are crooks everywhere you look now. The situation is desperate."[25]

Slovak police chief Tibor Gaspar on the murder of journalist Jan Kuciak and his partner Martina Kusnirova – "It seems that the most likely version is a motive connected to the investigative work of the journalist."[26]

US President Donald Trump – "#FraudNewsCNN #FNN"[27]

Brandon Griesemer made 22 threatening phone calls to CNN's Atlanta offices – "Fake news… I'm coming to gun you all down… You are going down. I have a gun and I am coming to Georgia right now to go to the CNN headquarters to fucking gun every single last one of you."[28]

Brian Mitchell MP to an ABC reporter – "Go and do your research, maggot!"[29]

ACT Chief Minister Andrew Barr – "I hate journalists. I'm over dealing with the mainstream media as a form of communication with the people of Canberra."[30]

Committee to Protect Journalists – "In its annual prison census, CPJ found 262 journalists behind bars around the world in relation to their work – a new record. The prison census accounts only for journalists in government custody and does not include those who have disappeared or are held captive by non-state groups. These cases are classified as 'missing' or 'abducted'."[31]

International Federation of Journalists (IFJ) – "82 journalists killed in 2017. In the overwhelming majority of these cases, the killers have not been identified and justice for the victims and their families remains as elusive as ever."[32]

IFJ president Philippe Leruth – "The IFJ pays tribute to all our brave colleagues who last year paid the ultimate price to unveil the truth. The IFJ and its affiliates all over the world keep fighting and developing new ideas and initiatives in order to put an end to the safety crisis in media, building stronger trade unions to protect journalists and media workers. There is much that has been done but today we don't forget the continuing challenges we must face together within the profession in terms of the safety and labour rights of our colleagues, notably with the IFJ fight against the scandalous impunity of most journalists' assassins."[33]

UNESCO – "Every year, May 3 is a date which celebrates the fundamental principles of press freedom, to evaluate press freedom around the world, to defend the media from attacks on their independence and to pay tribute to journalists who have lost their lives in the exercise of their profession. It serves as an occasion to inform citizens of violations of press freedom… May 3 acts as a reminder to governments of the need to respect their commitment to press freedom… Just as importantly, World Press Freedom Day is a day of support for media which are targets for the restraint, or abolition, of press freedom. It is also a day of remembrance for those journalists who lost their lives in the pursuit of a story."[34]

ATTITUDES ABOUT PRESS FREEDOM

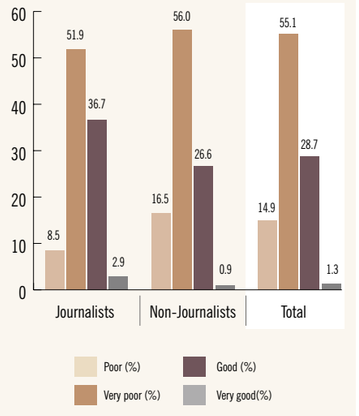
BY MARK PHILLIPS

TWO-THIRDS SAID THEY WERE NOT CONFIDENT THEIR SOURCES COULD BE PROTECTED

The state of press freedom in Australia has deteriorated over the past decade, with the impact of national security laws on journalism the biggest concern, according to a survey of more than 1200 people conducted by MEAA.

But few journalists say their employer is keeping them informed about changes to national security laws which may have an impact on their work, and more than half have no confidence that they could protect sources from being identified through their metadata.

Almost 90 per cent of the 1292 people who completed the online survey believe that press freedom has worsened over the past decade, with just 1.5 per cent saying it had got better.

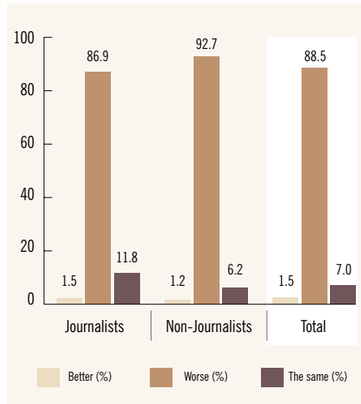


When asked to rate the health of press freedom in Australia in 2018, 70 per cent of respondents rated it as poor or very poor, and just 1.3 per cent rated it as very good.

The survey was conducted online by MEAA between February and April this year. The aim was to collect data on the main concerns about press freedom to help inform MEAA's campaigning on press freedom issues.

It was open to all members of the public, with 270, or a fifth of the respondents (20.9 per cent), identifying as currently working as a journalist or other form of media professional. Another 141 respondents were either retired or unemployed journalists, or studying for a career in journalism.

Of those working in the media, 75.6 per cent had careers of at least 10 years.



Overall, there are negative perceptions about the health of press freedom among both journalists and non-journalists, with a greater level of concern among non-journalists (72.5 per cent compared to 60.4 per cent). Working journalists had a slightly more positive view of changes to press freedom over the past decade; with 11.8 per cent saying it was the same, compared to 6.2 per cent of non-journalists.

TOP 10 PRESS FREEDOM ISSUES:

1. National security laws
2. Funding of public broadcasting
3. Government secrecy
4. Freedom of information
5. Defamation
6. Whistleblower protection
7. Political attacks on journalism
8. Metadata retention
9. Court suppression orders
10. Journalist shield laws

Both journalists and non-journalists identified national security laws as the most important press freedom issue, with roughly one in five of both respondent groups ranking it the top issue.

Second for both groups was funding of public broadcasting, followed by government secrecy.

A separate set of questions only for journalists sought to explore their personal experiences of press freedom issues in recent years.

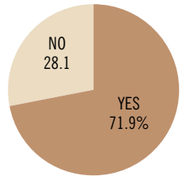
Seventy-two per cent of journalists said Australia's defamation laws made reporting more difficult and, while only 6.3 per cent had received a defamation writ in the past two years, almost a quarter of journalists (24.4 per cent) said they had had a news story spiked within the past 12 months because of fears of defamation action by a person mentioned in the story.

Almost two in five journalists – 36.7 per cent – said information from a confidential source whose identity they had protected had led to the publication or broadcasting of a news story, but only 10 per cent believed legislation was adequate to protect public sector and private sector whistleblowers.

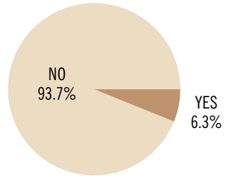
Despite more than two years of laws which allow government agencies to access journalists' computers, mobile phones and other metadata, fewer than half (43.7 per cent) said they or their employer took steps to ensure they did not generate metadata that could identify a confidential source. Close to two-thirds (63.7 per cent) said they were not confident that their sources could be protected from being identified from their metadata.

Similarly, only 26.6 per cent of journalists said their employer kept them informed of changes to national security laws and how they may affect their journalism, although only 16.3 per cent said their reporting had been hindered by national security laws.

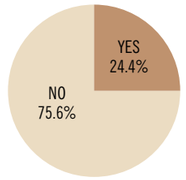
Do you believe Australia's defamation laws make reporting more difficult?



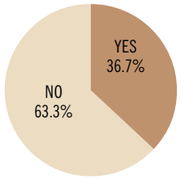
Have you received a defamation writ in the past two years?



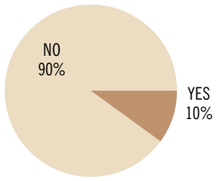
In the past 12 months, have you had a news story spiked because of fears of a defamation action?



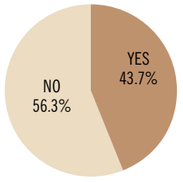
In the past 12 months, did information from a confidential source lead you to publish/broadcast a news story?



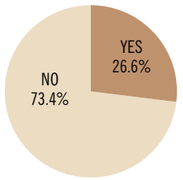
Do you believe legislation in the public and private sector is adequate to protect whistleblowers?



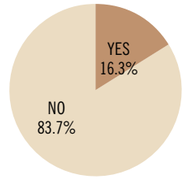
Do you, or your employer, take steps to ensure that you do not generate metadata that could identify a confidential source?



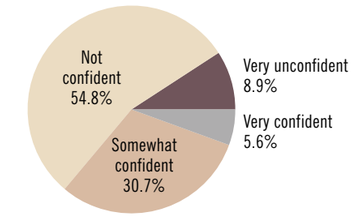
Is your employer keeping you informed of changes to national security laws and how they may affect your journalism?



In the past 12 months, have any of these [national security] laws affected your ability to produce your journalism?



How confident are you that your sources would not be susceptible to being identified [through metadata]?



Concerns about restrictions on court reporting are highest in Victoria, where 25.8 per cent of respondents said they had been impacted by the issue of a suppression or non-publication order by a judge and magistrates, compared to 14.2 per cent in other jurisdictions.

In Victoria, 72.7 per cent of journalists believed judges were actively discouraging reporting of open courts, compared to 52 per cent in other states; and 82.4 per cent of those impacted in Victoria believed the court's decision was excessive, compared to 69 per cent in other states.

Mark Phillips is the MEAA communications director

THE LAW

BY PETER BARTLETT, DEAN LEVITAN AND ADELAIDE ROSENTHAL

Rebel Wilson outside her Supreme Court defamation hearing. IMAGE COURTESY JASON SOUTH, FAIRFAX PHOTOS

The media landscape is fast-changing. Dramatic cultural and social change has provided further impetus for assessing our media laws and how they respond in a changing environment. Several important and high-profile cases, in addition to wide-scale legislative review in the last 12 months, indicate that we are possibly on the cusp of transformative media law change. Below are some of the key changes that have occurred in the past year and how we can expect it to re-shape the media law landscape in the near future.

DEFAMATION LAW REVIEW: TOWARD A FAIRER AND MORE EFFICIENT DEFAMATION REGIME

A parliamentary committee report on the National Uniform Defamation Law (NUDL) has recommended that the Council of Australian Governments (COAG) undertake a national review to reform the laws to ensure they do not thwart public-interest journalism. Attorney-General Christian Porter has conceded that he does not believe that "the balance [is] perfect" in trying to promote responsible journalism and the protection of individuals from reputational harm.

At present, the NUDL is complex, incoherent and substantially stacked against media defendants, thereby stifling public-interest journalism. The Rebel Wilson decision (see below) is a striking reminder of the need for vital defamation law reform in the near future.

Among the reforms, legislators should consider:

- Reversing the onus of proof in relation to the truth defence. This would require plaintiffs to show that what has been published about them is false, rather than defendants fighting to establish that it was unequivocally true. This would provide the space for journalists to more confidently and freely report on important matters of public interest.
- Give force to the qualified privilege defence. At present, the defence is available in theory only and very rarely succeeds at trial.
- Set a time bar on individuals suing over online publications. At present, any material available online is not subject to any time limitations.
- A UK-style "serious harm" test should be introduced.

The NSW Attorney-General Mark Speakman recently said that he was "committed to ensuring that defamation law is reviewed in light of technological change" and the government "intends to complete a review of defamation law".

REVIEW OF THE OPEN COURTS ACT: WHAT CAN BE DONE TO REVERSE SUPPRESSION ORDER NUMBERS?

The Andrews Victorian Government called for submissions to the review of the state's suppression order laws. The *Open Courts Act 2013* (Vic) was introduced to remedy the perceived over-issuing of suppression orders by Victorian courts. By limiting media reporting, this trend of suppression was seen to threaten the "open justice rule". However, the legislation has not caused a notable reduction in suppression orders and now subsequently requires further review.

The *Open Courts Act* made several significant changes to the law.

Firstly, it abrogated the common law powers of inferior courts to make suppression orders so that they now rely exclusively upon statutory powers of suppression.

Secondly, it raised the bar or clarified the grounds on which a suppression order could be made.

Thirdly, it limited the power of inferior courts to make broad suppression orders (relating to material *extraneous* to a proceeding rather than information derived from proceedings).

Fourthly, it abolished the power of inferior courts to make "proceedings-plus" orders – those orders that went beyond proceeding suppression orders or broad suppression orders.

Finally, the Act sought to introduce a statutory presumption of openness as a means of curbing the making of suppression orders.

However, the above reforms were ineffective in reducing suppression numbers. Victoria, in fact has more than double the number of suppression orders made in every other state and territories combined.

To address this issue, the following options may be considered:

- Greater education on existing provisions. The over-issuing of suppression orders can largely be blamed on judges not adhering to the current regime. For example, section 13 of the Act requires that an order not apply to any more information than is necessary to achieve the purpose for which it is made. This provision should mean "blanket bans" are rarely issued – but in reality they make up 37 per cent of suppression orders. Further, time requirements on suppression orders are still not being adhered to in 7 per cent of cases. Greater professional education on the requirements of the *Open Courts Act* would likely address this issue.
- Creation of an Office of the Open Courts Advocate. Given the high volume of suppression order applications, it would be unreasonable to expect the media to turn up and oppose every order. However, having a "contradictor" in the court may greatly reduce the number of orders granted. The creation of an Open Courts Advocate to argue the public interest in suppression order considerations could fulfil this role.
- Tailor-made model orders. There is a trend of judges uncritically adopting past orders as templates for their own. Often these templates are inherently problematic because they are ambiguous, too broad or go beyond the powers of the court. Therefore, it may be beneficial to devise a range of model orders, specially tailored to circumstances where suppression orders can be granted.

The Vincent Review was released by the Government in the last week of March 2018. The report's findings are disappointing. Victoria has more suppression orders made than the rest of the country combined. The report's recommendations will not change this saturation. The *Open Courts Act* should be renamed to reflect the effect it actually has.

REBEL WILSON: A LANDMARK DEFAMATION CASE

The past 12 months has seen a number of defining defamation cases in Australia, yet none more so than *Wilson v Bauer Media Pty Ltd* (Rebel Wilson case).

On September 13, 2017 Justice Dixon handed down the judgement in the Rebel Wilson case in the Supreme Court of Victoria. The plaintiff, actor Rebel Wilson, was awarded more than $4.5 million in damages over a series of articles in 2015 that were found to be defamatory. This represents the largest payout for a defamation case in Australian legal history.

Wilson sued Bauer Media over one print edition article in *Woman's Day* magazine and seven articles on the websites. The articles broadly alleged that Wilson was a serial liar and had lied in relation to her age, her real name and her upbringing.

Wilson brought claims for loss of earnings in the 18 month period from May 2015 to December 2016, resulting in, what she determined, was a gross loss of $6.77 million.

Ultimately, the jury of six established that each of the defendant's publications conveyed defamatory imputations in the terms alleged by the plaintiff and they rejected the defences of justification, triviality and qualified privilege raised by the defendants.

Dixon J concluded that special damages amounted to approximately $3.9 million in the form of the loss of a chance of a new screen role in the period following the release of *Pitch Perfect 2*. Further and perhaps most critically, Dixon J assessed general damages, including aggravated damages, at $650,000. In doing so, Dixon J was prepared to lift the statutory cap of $389,500 that ordinarily applies for non-economic loss.

Dixon J's view is that the cap may be circumvented in circumstances of aggravated damage, which he deemed to exist on three main grounds:

- Bauer Media paid an anonymous source for information without properly investigating the allegations, which was evident from internal emails sent between the Bauer Media journalist and the source of the information;
- it knew the imputations being conveyed to be false and proceeded to publish nonetheless; and
- it then also repeated the offending imputations by repeatedly publishing similar articles with similar imputations in an attempt to keep the information circulating, current and to neutralise Wilson's response to the articles.

Bauer Media's conduct was considered to be malevolent, spiteful, lacking in bona fides, unjustifiable and improper.

In rejecting the ordinary statutory cap on general damages, Dixon J said: "*…only a substantial sum of damages would be adequate to convince the public that Wilson is not a dishonest person and bring home the gravity of the reputational injury… [and] unless substantial damages are awarded there is a real risk that the public… will wrongly conclude that the articles were trivial…*"

The decision in the Rebel Wilson case has profound implications for freedom of speech in Australia. The media fraternity had come to rely on the certainty provided by the $389,500 cap on damages for non-economic loss. Dixon J's willingness to subvert the cap sends a concerning warning to all media publishers, namely that this may be the first of many spiralling and unpredictable defamation payouts.

Such is the high degree of concern shared by media publishers; they joined forces to appeal against the damages amount in the Rebel Wilson case. Among the army of appellants was Channel Nine,

Channel Seven, Fairfax Media and the ABC. However, the Victorian Court of Appeal rejected the media's right to intervene.

The seminal consequences of this decision is the apparent risk that journalists and media publishers will be conscious of the risks of such a high windfall against them before preparing and publishing vital pieces of journalism.

A decision that may serve to stifle free speech and unsettle the integrity of journalism is a decision worth seriously questioning.

Judges like to talk about the scales of justice. Be in no doubt, the scales of justice are tilted in favour of the plaintiff.

SHIELD LAWS INTRODUCED IN THE NORTHERN TERRITORY

The Northern Territory has followed the lead of other Australian states and territories and introduced its own shield law regime.

Shield laws ensure that journalists cannot be forced to reveal the identity of their sources and provide legal protection for those who want to preserve their client's confidentiality. These laws are extremely important as journalists rely on sources to keep business, government, courts and individuals accountable. Often information provided by these sources is given on the condition that their identity will be kept secret. Shield laws serve as a guarantee of this and seek to encourage other sources to come forward with stories of public importance without fear of repercussion.

The Northern Territory's new legislation exists alongside that of the ACT, VIC, NSW, TAS and WA, as well as the overarching Commonwealth statute. In each jurisdiction, there is a presumption that the journalists will not have to give up their sources. This presumption is generally qualified by a provision allowing disclosure of sources where the public interest outweighs any likely adverse effect on the informant. Shield laws have already been successfully relied upon in other states. In WA, journalists Steve Pennels and Adele Ferguson were not required to disclose sources relating to the story on Gina Rinehart whilst in Victoria, similarly, journalists Nick McKenzie and Richard Baker avoided disclosing sources on alleged mafia boss Antonio Madaferri and also on Securrency.

The robustness of the Northern Territory law is yet to be tested. Whether this exception will be broadly applied to silence government whistle blowers remains to be seen.

Given the uncertainty of how this new law will be applied and the lack of consistency across states, calls for a uniform commonwealth regime are compelling. This would clarify confusion surrounding which journalists are protected.

THE JOURNALIST INFORMATION WARRANT REGIME

In 2015, amendments were made to *Telecommunications (Interception and Access) Act 1979* which required telecommunications and internet service providers to collect and retain user data.

This data is able to be accessed by government agencies in some circumstances.

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 Journalist Information Warrant is required. The warrant will be granted where the Minister believes that the public interest in issuing the warrant outweighs the public interest in protecting the confidentiality of the source. If this warrant is granted, it remains secret and the journalist is unable to challenge it. Further, the warrant can last up to six months and grants access to data up to two years old.

This regime on its own threatens the privacy and liberty of journalists and their sources. However, coupled with the proposed *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, this danger is magnified.

Under the Bill, journalists could be jailed just for receiving or handling documents that might harm Australia's national interests. It is expected that if these laws pass, the ability of government agencies to obtain a Journalist Information Warrant will be made significantly easier. Where a government agency can claim that a warrant is in the public interest due to national security reasons, it likely that the Minister will prioritise this over protecting the source's identity. If the new legislation prescribes that merely receiving documents (as opposed to publishing them) constitutes a threat to national security, the conduct for which a warrant can be granted in response to is significantly broadened.

#METOO: LOOKING FORWARD

The #MeToo movement has brought about an emerging trend of women speaking out against the sexual harassment or sexual misconduct that they have been subjected to. We should be supporting women who have the courage to speak out. Unfortunately, however, Australia's defamation laws can be used by men to threaten to institute proceedings against women who make allegations against them and the publishers who disseminate the allegations. This may have the effect of suppressing both the articles exposing the sexual misconduct and thwarting the movement of women who are courageously coming forward to tell their stories.

In December 2017, Geoffrey Rush filed defamation proceedings against *The Daily Telegraph*, which published allegations that Rush behaved inappropriately towards a female cast member in a Sydney Theatre Company play. Rush stated that he was taking the action "in order to redress the slurs, innuendo and hyperbole that they have created around my standing in the entertainment industry and in the greater community."

Then, in another high profile defamation case, actor Craig McLachlan issued proceedings in early 2018 against Fairfax Media, the ABC and his former co-star Christie Whelan Browne, who is one of the women who accused McLachlan of sexual harassment. We also saw the Chris Gayle case proceed to trial and allegations against the Melbourne Lord Mayor.

We should all be alert to the risk that high profile cases, such as the ones mentioned, do not serve to silence more women from speaking out if and when they face sexual harassment.

CHOOSING A COURT

Plaintiffs have traditionally done pretty well in Australia's Supreme Courts, especially NSW. However, despite that, there are an increasing number of defamation cases being issued in the Federal Court (23 last year).

Some think the reason is that these plaintiffs wish to avoid going before a jury.

Peter Bartlett is a partner; Dean Levitan is a lawyer and Adelaide Rosenthal is a graduate with law firm Minter Ellison

SUPPRESSION ORDERS

The Victorian Supreme Court. Image courtesy Cathryn Tremain, Fairfax Photos

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

Thankfully, a review of the Victorian problem may finally have listened to the concerns of MEAA and other media organisations. While it is hoped that the recommendations of the review will go in some way to provide a remedy, they may also act as a template for a national approach. In a modern digital media environment, media organisations and journalists must be able scrutinise and report legitimate news stories about the judicial branch of government without fear of lengthy, expensive court battles.

On March 1, 2017 MEAA made a submission to the review conducted by Judge Frank Vincent of Victoria's *Open Courts Act 2013* and the review's consideration of whether the Act strikes the right balance between people's privacy, fair court proceedings and the public's right to know. MEAA believes the Act, intended to address concerns that suppression orders were being made too frequently, has failed to achieve its aims.

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

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

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

- Across the board, there are far fewer journalist "boots on the ground" to report on issues in the public interest. Fewer reporters means less coverage of important issues, less time and opportunity to report, and a decline in the ability to properly scrutinise and pursue legitimate issues;
- The journalists who remain behind after the redundancy rounds have seen their workload intensify to the point where not only are they having to do more, but new technology means they must also now file stories for a multitude of publishing platforms throughout the day as well as personally promote those stories on social media to push web traffic to their employer's online news web site;
- The spate of redundancies has also seen the most senior and experienced journalists, who are also usually the most highly remunerated, pushed out of media companies by their employers, only to be replaced by less experienced journalists who may not be as highly trained and/or mentored as their predecessors;
- The competitive pressures that arise from digital technology have led to additional problems: the "rush to be first" with the news is a critical commercial imperative, and this, coupled with fewer production staff (sub-editors) to check news stories before they are published, means there are fewer checks and balances available in newsrooms; and
- Media companies have fewer financial resources to fund a legal challenge to ensure a public interest news story is published or to defend themselves should an action be brought against a journalist and the media outlet.

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

There is no doubt that, despite the best intentions, the media's reporting on the courts has suffered due to the pressures outlined above. Fewer experienced journalists are available; they are working under intense pressure to file stories while needing to be aware of the existence of

court orders and, at times, operating under the intimidation of defamation actions and subpoenas that threaten their journalism and their sources.

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

CONFLICT BETWEEN THE MEDIA AND COURTS

MEAA is concerned that for some time the courts have displayed a lack of understanding of the role of the media and disdain for the media's concerns about the suppression order system. It is also apparent that many judicial officers operate under a presumption that it is the courts that should determine what is in the public interest.

In a speech delivered to the Melbourne Club on Friday November 13, 2009 (prior to the *Open Courts Act*), former Victorian Supreme Court Justice Betty King boasted that she was "probably responsible for the majority of suppression orders imposed in Victoria in the last three years"[35] and that for every worthy media report there were equally reports that were "inaccurate, salacious, mischievous, morally indefensible and just plain prurient".[36]

As recently as October 2015, Victorian Chief Justice Marilyn Warren[37] (who left office in October 2017) wrote about the media's challenging of suppression orders:

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

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

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

TOO MANY ORDERS

The media's major concerns with suppression orders have been their prevalence in Victoria. It was hoped that the Act would remedy this propensity of the Victorian courts to make suppression orders so readily. However, a news story in *The Age* in October 2015[38] stated:

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

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

In the financially straitened times that media organisations now find themselves, it is unreasonable to expect them to constantly present themselves to the court in order to challenge each and every suppression order which are currently (as at February 2017) averaging "almost one a day for the court year".[39]

In November 2016 *The Age* editorialised:
"... simply challenging suppression orders is not as easy as it sounds. One reason is the sheer number of such orders being issued – 254 across the Supreme Court, the County Court and the Magistrates Court in the year following the passage of the Open Courts Act in December 2013, which was supposed to limit the number."[40]

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

And having lawyers appear in court on our behalf is not cheap. We do challenge some, ***but expecting us to challenge the daily procession of suppression orders is increasingly unrealistic****.*[41] [MEAA emphasis]

In response, Chief Justice Warren noted in the article cited above:
Victoria is the only state that maintains a database of all suppression orders issued – so it is therefore difficult to compare the number of orders made here against other Australian jurisdictions.[42]

Despite this, the Chief Justice went on to claim:
The Victorian Supreme Court figures are certainly on par with our New South Wales counterpart, however.[43]

If that is so, then that is a concern. In March 2013 the *Gazette of Law and Journalism* reported a 1000 per cent increase in the number of court suppression orders in NSW since 2008.[44]

There is evidence that the Open Courts Act has failed to reduce the number of orders being issued by Victorian courts. In his paper *Two Years of Suppression under the Open Courts Act 2013 (Vic)*[45], Melbourne Law School senior lecturer and deputy director of the Centre for Media and Communications Law at the University of Melbourne Jason Bosland noted: "What is apparent... is that the overall number of regular suppression orders made by the courts per year has remained relatively stable... despite the introduction of the *OC Act*."

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

Indeed, it is interesting to note the comments made by Justice Simon Whelan to the Melbourne Press Club[46] in July 2015. He noted that the introduction of the *Open Court Act* had not led to judges issuing fewer suppression orders:
"In Victoria we know how many orders we make and the number has not gone down. We really want to have a situation where we make very few orders... we could have less than we do... There is a problem about orders being made in relation to matters that are already addressed by legislation or the sub judice rule.

Bosland goes on to note that under the Act, 63 per cent of proceedings-only orders are "blanket bans" – the most extreme form of proceedings-only suppression orders that can be made by a court – mainly made in the Magistrate's Court. Bosland states: "The data on the scope of the orders of orders is significant. It indicates that the *OC Act* has had no overall effect whatsoever in narrowing the scope of orders made by the courts... Furthermore given the extreme nature of such orders... it must be pointed out that it is highly improbable... that such a large proportion of blanket-ban orders in the dataset could be justified."[47]

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

MEAA'S RECOMMENDATIONS

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

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

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

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

Indeed, the comments of former Justice Betty King cited earlier include her noting that she had "stopped" a television current affairs news story because: "The educational content of this program is, in my view, non-existent. The public interest in having it played is, in my view, equally non-existent."[48] Judges should not be making decisions to make a suppression order to stop a news program on the grounds that they consider its content is not educational and not in the public interest.

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

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

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

Bosland notes that "administration of justice" and "personal safety grounds" are the most frequently relied on for the making of suppression orders. But Bosland also notes that 31 orders in his dataset "did not specify the relevant statutory ground or grounds upon which they were made despite this being mandatory requirement of the OC Act".[49]

He adds: "Notably, 73 per cent of orders (354/486) merely repeated the statutory grounds... Specifying the purpose in this manner fails to meet the requirement in s13(2) and is therefore inadequate. This is because s13(2) requires that *both* the purpose of an order *and* the grounds upon which it is made be specified in the order."[50]

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

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

It is clear that orders are being made that do not meet the requirements of section 13. *The Age* editorial cited earlier also examined the scope of the suppression orders being issued in such copious numbers:

"... many of the orders – 37 per cent on our analysis last year – prevented reporting of any aspect of a case at all. As well, 9 per cent were still being issued without end dates (contrary to the terms of the Open Courts Act*) and 7 per cent did not specify on what grounds they were granted."*[51]

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

MEAA also noted the situation that arose in the Melbourne Magistrate's Court in 2013 where a suppression order was made that prohibited the publication of any information that might identify a particular witness "in any media outlet, newspaper, radio, television or internet or any other publication for a period of 999 months". As MEAA's annual report into the state of press freedom in Australia noted: "Towards the end of the 21st century, one of our descendants can apply to the court to lift that order."[52]

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

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

Bosland says: "This is a curious result because in terms of necessity of duration, there is nothing significant about a five-year period of operation that would explain the prevalence of such orders... It appears that it came only be attributed to the wording in s12."[53]

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

THE NEED FOR AN INDEPENDENT CONTRADICTOR

As the then attorney-general said during the second reading of the Open Courts Bill in June 2013:
Free reporting by the media of what is happening in Victoria's courts is vital to the community's right to know.[54]

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

The intention is that ***because news media organisations are more likely to act as a contradictor to such applications, that this will provide courts and tribunals with the benefit of a contradictor making arguments in favour of the principle of open justice and disclosure of information*** *both in relation to whether the order should be made and, if made, its scope and duration.*[55] [MEAA emphasis]

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

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

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

This responsibility assumed by the Act to be imposed on the media doubtless requires all news media organisation to not only be mindful of all applications for suppression order but to also have legal advice "on tap" to be able to assess and advise on whether a review of an order should be sought, and for news media to then fund legal actions to seek a review of an order.

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

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

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

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

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

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

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

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

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

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

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

On March 28, 2018, the Victorian Attorney-General Martin Pakula released the Vincent report and the Government's response to its recommendations.

Defamation law is in need of reform

In the wake of the Senate Select Committee report into the Future of Public Interest Journalism, there are some encouraging indicators that Australian legislators are finally realising that Australia's defamation law is in need of reform.

In its submission to the Committee's inquiry[56], MEAA said defamation actions require media companies to "lawyer up" at enormous expense with the potential for costly damages and costs to be awarded against them. Defamation has evolved into an immense threat to media businesses, and to press freedom itself.

There is a dire need for reform of Australia's uniform national defamation legislation that allows people to be paid tens of thousands of dollars damages for hurt feelings without ever having to demonstrate they have a reputation, let alone one that has been damaged.

The immense cost burden not only has a dire economic effect on media organisations already struggling with profitability in the wake of digital disruption but there is also a considerable "chilling effect" on public interest journalism that intimidates journalists and media organisations from reporting legitimate news stories in the public interest and applying scrutiny to the rich and powerful because they fear their journalism may result in costly, lengthy litigation. When the law can be used to muzzle the media in such a way, both democracy and press freedom have been suppressed.

Leading media lawyer Peter Bartlett, writing in MEAA's 2017 annual report into the state of press freedom in Australia,[57] quoted leading media QC Matt Collins who said "as soon as a publisher is found to have made a factual error and no matter how minor, in practical terms, the plaintiff succeeds". He added that it is relatively easy for a defamation plaintiff to establish that he has been defamed. It is then up to the defendant to establish that even though the plaintiff has been defamed and has suffered loss, the plaintiff should not be awarded damages. That is a huge hurdle for a defendant, and one that is rarely achieved."

The uniform national defamation law regime commenced operation in January 2006 by agreement among the states at the Council of Australian Governments (COAG). Only the states are signatories to this COAG agreement, the federal government is not a signatory. Any changes to the law must be agreed by all of the states.

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

MEAA, as a member of the Australia's Right To Know (ARTK) industry lobbying group, supports an ARTK campaign for a review of the operation of Australia's uniform defamation law regime. In July 2015 ARTK called for the law to be updated so that it could rectify problems that had become evident after almost 10 years of operation and also to reflect changes made in Britain when that country's law was updated to reflect the impact of digital publishing. ARTK's aim was to bring the law in line with international best practice and remove areas where the uniform laws have not proved successful or where they are inconsistent or do not work as intended. Another aim was to ensure that criminal defamation is repealed and removed from the statutes.

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

The NSW Government was tasked with finalising its 2011 review; NSW would be used a template for a broader discussion among all the jurisdictions so that the uniform defamation legislation could be updated. The aim was for the review to be presented to the NSW attorney-general which would then result in a cabinet paper being presented to the NSW Cabinet sometime in 2016. The paper would be expected to recommend issues to be further considered by the Defamation Working Group (DWG) which consists of officials from all jurisdictions. The DWG would then make recommendations to the LCCSC. It was anticipated that the LCCSC would then create a mechanism of public consultations.

There appears to have been no further progress.

MEAA believes it is high time the defamation law regime in Australia was updated. In its submission to the Senate select committee, MEAA urged that the Standing Committee on Law, Crime and Community Safety move swiftly to review and reform the national uniform defamation law regime.

The Senate select committee subsequently reported, noting that:

"Some submitters suggested that some elements of Australia's legal framework had a 'chilling' effect on journalists reporting freely in the public interest. These included: recent reforms to national security legislation; defamation and libel provisions, as well as inconsistency across jurisdictions; shield protection and whistleblower provisions covering journalists and their sources; as well as copyright provisions…

"A significant number of witnesses and submitters stated that Australia's defamation and libel laws played a significant part in curtailing journalists' efforts to pursue public interest stories. This was not necessarily due to the damages awarded for publication of material found to be libellous, but the legal costs of defending defamation cases."

In its recommendations, the committee notes that "the Commonwealth worked closely with the states and territories to develop a uniform set of defamation laws in 2005. The committee notes indications that there appears to be an appetite for COAG [Council of Australian Governments] to review the framework of existing defamation laws, especially considering this framework has been implemented for more than a decade without assessing potential areas that could be improved.

"Given the National Uniform Defamation Law 2005 was agreed in the COAG context and given that it covers the majority of defamation law in Australia, it would be appropriate for the Commonwealth to investigate how it can work through this forum to assist the states and territories to review and reform our defamation laws, or to reinvigorate efforts already underway to do so, to ensure those laws are consistent with a viable, independent public interest journalism sector, work appropriately with whistleblower protection regimes, and generally operate effectively in the digital age.

In recommendation 7, the committee said: "the Commonwealth work with state and territory jurisdictions through the Council of Australian Governments to complete a review of Australian defamation laws, and subsequently develop and implement any recommendations for harmonisation and reform, with a view to promoting appropriate balance between public interest journalism and protection of individuals from reputational harm."[58]

Turkish President Recep Tayyip Erdogan

THE CREEPING CRIMINALISATION OF JOURNALISM

BY PETER GRESTE

The New York-based Committee for the Protection of Journalists (CPJ) is blunt in its assessment of the state of journalism around the world today: "There has never been a more dangerous time to be a journalist," it declares in its #FreeThePress campaign[59].

According to the CPJ's count, by the end of last year, 262 journalists around the world were in prison for their work. That is the highest on record since the organisation began tracking the numbers in 2000.

US-based human rights organisation Freedom House agrees. Its grim headline in the 2017 report is Press Freedom's Dark Horizon.[60] It goes on to say, "global press freedom declined to its lowest point in 13 years in 2016 amid unprecedented threats to journalists and media outlets in major democracies and new moves by authoritarian states to control the media, including beyond their borders."

If we appear to be heading into journalism's long, dark night, when did the sun start to disappear? Although the statistics jump around a little, there appears to be a clear turning point: in 2003, when the numbers of journalists killed and imprisoned started to climb from the historic lows of the late '90s, to the record levels of the present.

Although coincidence is not the same as causation, it seems hard to escape the notion that the War on Terror that President George W. Bush launched after 9/11 had something to do with it. "In this war, either you are with us, or you are with the terrorists," Bush ominously told a historic joint session of Congress soon after the attack on the Twin Towers. For journalists, that stark statement had two devastating implications.

First, the War on Terror presented a binary choice: you are on one side of the line, or the other, making it impossible to exercise genuine balance and neutrality in reporting the conflict – one of the most basic ethical tenets of our craft. Anybody who sought to understand what drove the extremists, or challenged the government's policies in the war, immediately became accused of "promoting terrorist ideology", or of being unpatriotic, or of seeking to legitimise terrorism. At best, it meant being demonised and condemned; at worst, being charged – as my two colleagues and I were in Egypt – with collaborating with terrorists.

And that leads to the second implication: the War on Terror gave politicians the scope to grant governments a host of new "national security" powers and, in the process, redefine "terrorism" so loosely as to include whatever they wanted.

Take Turkey.

In July 2016, a faction within the Turkish Armed Forces called the Peace at Home Movement tried to overthrow the government of President Recep Tayyip Erdogan. The attempted coup failed, and Erdogan accused the exiled Gullen Movement of being behind it. He then declared anybody associated with the movement, and soon after, anybody who challenged the government, of being "terrorists". Erdogan began rounding

US president Barack Obama was "worse than Nixon" for press freedom

up thousands of lawyers, academics and journalists – anybody who dared question the president's legitimacy – as a threat to national security.

In April this year, an Istanbul court issued an arrest warrant for independent journalist Can Dündar on espionage charges, and asked Interpol to issue a warrant of its own. The charges stem from a report Dündar published in the newspaper *Cumhuriyet* while he was editor-in-chief about alleged smuggling of weapons into Syria by Turkey.

Dündar is a recipient of CPJ's International Press Freedom Award and he has lived in exile in Europe since 2016, when a Turkish court sentenced him to seven years for "revealing state secrets". Dündar's case is one of the most prominent in Turkey, but it is by no means extraordinary.

According to the CPJ's figures, Turkey is now the world's most prolific jailer of journalists, with 73 behind bars by the end of 2017 (Freedom House counts slightly more, with 76, while one Turkey-based organisation puts the number at 145). Most are there on charges related to the coup or terrorism more broadly. Thousands more have either been sacked or forced to resign, hundreds have lost their press credentials, and an unknown number have had their passports confiscated. At least 150 media organisations have been forced to close and had their assets seized.

Egypt is the world's third most prolific jailer of journalists with at least 20 currently in prison, again almost all on charges related to terrorism and national security. In January 2014, my two Al Jazeera colleagues and I were charged with aiding a terrorist organisation, being members of a terrorist organisation, and broadcasting false news with intent to undermine national security (I was also charged with financing a terrorist organisation). We were convicted and sentenced to seven years hard labour, though the sentences were later reduced to three years when we appealed and were once again convicted in a retrial.

The closest the prosecution came to providing "evidence" was alleging that because Al Jazeera interviewed members of the Muslim Brotherhood, and we were employees of Al Jazeera, we were therefore part of a conspiracy to support a terrorist movement trying to overthrow the state by force.

Since then, Egypt has tweaked its laws to define terrorism so loosely that anything deemed to be a threat to national stability could be considered as an act of terror. Even "preventing or impeding the public authorities in the performance of their work".[61]

Between January and May last year, Egyptian courts sentenced at least 15 journalists to prison terms ranging from three months to five years on charges related solely to their writing, including defamation and the publication of what the authorities found to be "false information".[62]

Most recently, parliament in Malaysia passed a law against "fake news" punishable with fines of almost $170,000 and up to six years in prison.[63] It is up to the government to define what counts as "fake".

As disturbing as the stories of Turkey, Egypt and Malaysia are, they are consistent with

a much wider trend. Around the world, the CPJ reckons about two-thirds of all journalists in prison are on charges that could generally be described as "anti-state" such as terrorism, sedition, treason and so on, quite deliberately echoing the national security rhetoric – and sometimes the tactics – from more liberal democracies.

Take the United States, and President Barack Obama.

Yes – Obama. For all his claims to championing human rights and democracy, in the opinion of James C. Goodale, Obama was "worse than (President Richard) Nixon" for press freedom. (Though to be fair, Obama was personally and actively involved in the campaign for our release in Egypt.)

Goodale should know. He was *The New York Times* counsel in the paper's 1971 fight with Nixon to publish the Pentagon Papers – the leak of documents showing that previous administrations had lied about the Vietnam War.

In an article published in 2013, Goodale complained about Obama's tendency to use national security legislation to shut down what Goodale regarded as legitimate reporting. In particular, the Obama administration relied on the little-used *Espionage Act* passed in 1917 to prosecute journalists or their sources over stories that were more politically embarrassing than they were damaging to national security. All together Obama put the *Espionage Act* to work eight times – more often than all his predecessors combined – with investigators often trawling through digital communications to find the evidence they needed.

"Until President Obama came into office, no one thought talking or emailing was not protected by the First Amendment," Goodale wrote. "President Obama wants to criminalize the reporting of national security information. This will stop reporters from asking for information that might be classified. Leaks will stop and so will the free flow of information to the public."

Note that phrase: "criminalize the reporting of national security information". In the innocent days before 9/11, it would have been hard to imagine anybody applying it to the United States, much less a seasoned lawyer. But 9/11 has radically changed the landscape, and where the US leads, Australia tends to follow.

Professor George Williams from the University of New South Wales has been tracking national security legislation since al-Qaeda attacked the World Trade Center. Before then, he could find only one law on Australian statutes that referred to "terrorism" – a relatively obscure one from the Northern Territory – but since then, Australian governments have been on something of a legislative spree passing some 70 laws dealing with national security. That is understandable given the perceived threat that terrorism now poses, but according to Williams, many of those laws "frequently included restrictions on freedom of speech through new sedition offences and broader censorship rules".

At least four impose criminal sanctions for journalists, and at least 12 pieces of legislation curb freedom of speech. Others give the authorities extraordinary powers that might be considered legitimate in a time of war, but in a conflict as open ended as the War on Terror, we seem to be stuck with it.

There is the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, which gives a host of government agencies the power to examine the metadata of any Australian without a warrant. The only exception is journalists; those agencies that want to look into a journalist's metadata have to apply to a special magistrate who holds secret hearings to decide whether or not to issue the warrant. With no such protection for a journalist's sources though, it is hard to see why any of the agencies would bother when they can dig around the data of anybody who they think might have been in contact with a reporter.

Section 35P of the *ASIO Act* makes unauthorised disclosure of any "special intelligence operation" (SIO) punishable by up to 10 years in prison. Even the SIO designation is top secret, so any journalist interested in a botched operation – surely a legitimate area of inquiry – could unwittingly find themselves behind bars for a very long time.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* criminalises travel to any region that the minister declares to be a zone where terrorists are active. In their defence, journalists can argue that travel to, say, Afghanistan, was for "legitimate purpose", but the burden to prove legitimacy rests with the reporter; not the prosecutor.

More troubling is the offence of "promoting terrorist ideology"– a crime disturbingly similar to what we were accused of in Egypt. So, interviewing extremists in an attempt to understand what drives young men to join militant groups could break the law.

Earlier this year, the attorney-general's office forced News Corporation website news.com.au to pull a story headlined "Islamic State terror guide encourages luring victims via Gumtree, eBay". The AG's office cited section 9A of the *Classification (Publications, Films and Computer Games) Act* arguing that the story "directly or indirectly" advocated terrorist acts. The Australian Press Council eventually said the story had legitimate public interest and ruled in favour of publishing,[64] but not before it had vanished from the News Corp website.

Most recently, we have seen the government try to pass a raft of laws that claim to protect Australia from foreign interference. At the time of writing, the legislation was still being debated, but media critics complained they have been so widely cast that they seemed to assume any "unauthorised" communication of classified information between a commonwealth civil servant and a journalist was tantamount to espionage.

Together, the laws have led to what Liberal Democrat senator David Leyonhjelm describes as the greatest clampdown on freedom of speech in decades.[65] "Bit by bit they have been chipping away at freedoms. The cumulative effect had been the most significant erosion of rights in recent memory."

This is not to suggest that Australia is about to become Turkey any time soon, but the forces eroding press freedom are largely the same.

It is worth reminding Australians that one of the reasons we live in one of the most stable, prosperous and peaceful nations on the planet, is a system of democracy that includes a robust and largely unfettered press fiercely capable of holding the powerful to account.

Professor Peter Greste is the UNESCO chair in journalism and communication - school of communication and arts at the University of Queensland

WELCOME TO THE MACHINE

EVEN BEFORE THE ESPIONAGE BILL WAS INTRODUCED TO PARLIAMENT, AUSTRALIA WAS ALREADY WELL DOWN THE PATH OF LEGISLATING PRISON TERMS FOR JOURNALISTS REPORTING IN THE PUBLIC INTEREST, AS ANDREW FOWLER EXPLAINS IN THIS EDITED EXTRACT FROM HIS BOOK *SHOOTING THE MESSENGER: CRIMINALISING JOURNALISM*

Just half an hour's drive north-east of Washington DC, the well-paved dual highway passes a forest before a final line of trees gives way to more open ground. On the left, looking like a sprawling shopping complex which has outgrown its site, the National Security Agency (NSA) appears. This is the headquarters of the most powerful intelligence-gathering organisation the world has ever seen.

It is the centre of a network that straddles the Earth. From the spy base at Pine Gap with its array of antennas pointing skywards against the sunset red of the Australian outback, to Menwith Hill on the green undulating farmland of Yorkshire in the north of England, the NSA is connected to satellites circling overhead, and undersea surveillance systems tapping into transcontinental telephone cables.

Nearly every phone call, email or electronically created signal will at some time end up here, or in one of the data storage bases of the NSA's sister agencies in Australia, New Zealand, Canada or the UK. Known as the Five Eyes partnership, the intelligence-sharing agreement has its roots in the days of the British Empire.

If you use a telephone or the internet, nowhere on the planet is safe from the prying ears and eyes of the NSA and its sister agencies. Every mobile phone tower, every email, every payment at the supermarket, every digital transaction adds to the profile the NSA is capable of building on every person on Earth. Huge databases scattered across the world log the digital footsteps and fingerprints of us all.

Throughout the Western liberal democracies new laws have given governments greater powers to eavesdrop on the population and the journalists whose job it is to keep them informed. Those laws, which gave governments such sweeping surveillance powers, were introduced ostensibly to track terrorists and reduce the number of attacks. But detailed analysis suggests the so-called anti-terror surveillance laws have not achieved what governments promised. Instead they have often been more effectively used to track down whistleblowers and criminalise the work of journalists. The notion that the central role of journalism was to disclose secrets which powerful interests wanted kept from the public was being upended, particularly in the important area of national security.

New laws being shaped, both in the US and elsewhere, made illegal that which had been normal journalistic practice and made legal the activities of intelligence agencies which had previously been outlawed. Against sometimes hysterical claims from US politicians, other nations fell in line.

In Australia sweeping laws demanded that the metadata of all phone calls should be held for two years by the telecommunications companies, on behalf of intelligence and police agencies, exposing journalists and their sources to being tracked by the very organisations it is their responsibility to hold to account.

The new laws give virtually no protection to journalists – and in particular their sources. One draconian piece of legislation made it an offence punishable by up to 10 years prison in certain circumstances for a journalist to reveal what the national Australian Security Intelligence Organisation (ASIO) determined was a Special Intelligence Operation (SIO). Since ASIO would neither confirm nor deny an SIO, it was impossible to know if a journalist was about to break the law until the report was broadcast or published.

All this is happening as newspapers across the political spectrum have become weakened by plummeting circulation figures, their owners either unwilling or unable to stand up to governments.

Journalists who see their role as telling truth to power are under extreme pressure as to protect themselves as they attempt to carry out their historically designated role of holding executive authority to account.

Without the US guarantee of freedom of speech and publication, or the European Court of Human Rights rulings supporting the right to protect the identity of sources, Australia is marooned mid-way in a legal version of a choppy Atlantic Ocean. The country might have produced some of the most outspoken proponents of libertarian free speech in Rupert Murdoch and Julian Assange but Australian laws restricting expression are some of the most draconian in the world.

In September 2012 the then attorney-general, Labor's Nicola Roxon, proposed the introduction of a data retention law. In 2015, the Telecommunications (interception and Access) Amendment (Data Retention Act (2015) passed through the Australian Parliament. Telecommunications companies would be forced to store metadata on all Australians for two years. Though Australia's Parliamentary system is based on that of the UK, for Australian journalists there were none of the protections afforded by the European Court of Human Rights.

In an attempt to assuage journalists' fears that their sources were vulnerable to exposure, the government offered what it suggested was a compromise: to get access to journalists' data, security and police agencies would need a Journalist Information Warrant, signed off by a judge. But it would be no normal court: any hearing would be held in secret and the journalist would be kept unaware of the request to look through their metadata. They would be represented, without their knowledge, in the secret court by an advocate appointed by the government. In the event that the journalist became aware they were under investigation, there was another twist to the law. Public disclosure of the existence of a warrant would be punishable by two years' imprisonment.

In the event the application of a Journalists Information Warrant came from ASIO, there would be no judge or public advocate potentially standing in the way, representing the journalist. The signature of the Attorney-General would be sufficient to give the domestic spy agency access to any journalist's metadata.

The US National Security Agency headquarters, Fort Meade, Maryland

Six months earlier, in response to the (Edward) Snowden disclosures, Parliament had passed a law that gave ASIO even more power, as the government responded to the Snowden leaks. The *National Security Legislation Amendment Act (2014)* introduced a three-year prison sentence for intelligence officers who removed or copied classified material without authorisation. If the information was given to a third party, for example a journalist, the officer could face 10 years in prison. And to prevent any outside scrutiny of the intelligence organisation the government rushed through a law which made it extremely difficult for ASIO's actions to be investigated by journalists.

Section 35P of the Act created an offence which makes it a crime, with a possible sentence of five years, to disclose information about a "special intelligence operation" – an SIO. If the disclosure endangered anyone's health or safety – or the effective conduct of an operation – then the maximum sentence increased from five to 10 years.

The all-encompassing nature of the law placed journalists in an impossible legal position. If they reported, even inadvertently, on an SIO, they could be charged. If they tried to check with ASIO, they would also potentially run into trouble: even discussing an SIO would itself be illegal. There was no defence that the public had a right to know about botched ASIO operations. ASIO would only be answerable to the Inspector General of Intelligence, a government-appointed official.

After a strong campaign by newspapers and the electronic media, MEAA and the Walkley Foundation, the government eventually amended the law, introducing a defence of "prior publication". That meant that if another publication had already reported the event, the journalist might be in the clear. In other words the best legal defence was to get beaten to the story.

In early 2017 the Australian government began examining the possibility of including the cover of SIOs to the Australian Federal Police. Already a journalist could be imprisoned for between six months and seven years for "receiving" any "sketch, plan, photograph, model, cipher, note, document article or information" covered by the Official Secrets section of the Crimes Act (1914).

Coupled with the Data Retention Act and the ASIO Amendment Act it would make reporting on significant matters of national security, that much more difficult for journalists, and make whistleblowers that much more wary of speaking out.

Australia, the nation that had passed more counter-terrorism legislation than any other place on earth, now had specific law targeting journalists, a knee-jerk reaction to the Snowden disclosures which had done so much to make the world aware of the dangers of mass surveillance.

Andrew Fowler is an award-winning investigative journalist and a former reporter with the ABC's Foreign Correspondent and its premier investigative TV documentary program Four Corners.

NATIONAL SECURITY POWERS

JOURNALIST INFORMATION WARRANTS

Australian Federal Police Commissioner Andrew Colvin. Image courtesy Andrew Ellinghausen, Fairfax Photos

On April 28, 2017 MEAA issued a statement regarding the revelation an Australian Federal Police officer has been able to access a journalist's telecommunications data without being granted the necessary Journalists Information Warrant.[66]

MEAA has campaigned strongly against the ability of government agencies to access journalists' and media companies' telecommunications data in order to hunt down and identify confidential sources.

MEAA chief executive Paul Murphy said: "Despite all of the requirements put in place before a Journalist Information Warrant can be granted, the system has failed.

"This is an attack on press freedom. It demonstrates that there is very little understanding of the press freedom concerns that we have been raising with politicians and law enforcement officials for several years now," he said.

"The use of journalist's metadata to identify confidential sources is an attempt to go after whistleblowers and others who reveal government stuff ups. This latest example shows that an over-zealous and cavalier approach to individual's metadata is undermining the right to privacy and the right of journalists to work with their confidential sources.

On Thursday April 13, 2017 all telecommunications companies were required to retain the metadata for two years. The regime is a particular concern for journalists who are ethically obliged to protect the identity of confidential sources. Clause 3 of MEAA's *Journalist Code of Ethics* requires confidences to be respected in all circumstances.[67]

The new regime secretly circumvents these ethical obligations and allows 21 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.

On February 28, 2017 the director-general of ASIO told a Senate Estimates hearing that ASIO had been granted "a small number" of Journalist Information Warrants.
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 operates entirely in secret with the threat of a two-year jail term for reporting the existence of a Journalist Information Warrant.
- Public Interest Advocates will be appointed by the Prime Minister. Advocates will not even represent the specific interests of journalists and media groups who must protect the confidentiality of sources.
- There is no reporting or monitoring of how the warrants will operate.
- Journalists and media organisations will never know how much of their data has been accessed nor how many sources and news stories have been compromised.

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

- Your account details.
- Phone: the phone number of the call or SMS; the time and date of those communications; the duration of the calls; your location, and the device and/or mobile tower used to send or receive the call or SMS.
- Internet: the time, date, sender and recipient of your emails; the device used; the duration of your connection; your IP address; possibly the destination IP address (if your carrier retains that information); your upload and download volumes; your location.

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

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 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 or how many of their news stories and their confidential sources' identities have been compromised.

Subsequent to the revelation of the access to a journalist's metadata without a warrant, an audit by the Commonwealth Ombudsman found that Australian Federal Police did not destroy all copies of phone records it obtained unlawfully, without a warrant, for the purpose of identifying the journalist's source.[68]

The ombudsman contradicted AFP commissioner Andrew Colvin's statement in April 2017 that confirmed a breach had occurred within the professional standards unit and that the accessed metadata had been destroyed. An audit of the AFP's records carried out by the ombudsman on May 5, 2017 "identified that not all copies of records containing the unlawfully accessed data had been destroyed by the AFP".[69]

Of particular concern is this statement from the ombudsman's report: "With regards to how the breach was identified, based on our understanding of the events leading up to the voluntary disclosure to our Office, it appears that an external agency initially prompted the AFP to review the relevant investigation, resulting in consideration of the relevant legislative requirements."[70] For the AFP to need an external agency to remind it to comply with the law is disturbing.

The ombudsman found that there were four main contributing factors for the breach:

- At the time of the breach, there was insufficient awareness surrounding Journalist Information Warrant requirements within the Professional Standards Unit (PRS);
- Within PRS, a number of officers did not appear to fully appreciate their responsibilities when exercising metadata powers;
- The AFP relied heavily on manual checks and corporate knowledge as it did not have in place strong system controls for preventing applications that did not meet relevant thresholds from being progressed; and
- Although guidance documents were updated prior to the commencement of the Journalist Information Warrant provisions, they were not effective as a control to prevent this breach.

The failure to destroy the accessed data came down to a lack of technical know-how. The Ombudsman suggested that in future cases, the "AFP, when destroying information, seek assistance from its technical officers to ensure that the information is destroyed from all locations on its systems."

The ombudsman's report states that: "At the time of drafting this report, 190 authorised officers were delegated to issue metadata authorisations. Fifty-four of them could issue metadata authorisations under a Journalist Information Warrant."

The ombudsman recommended: "The AFP should consider the relevant training and experience of officers who may temporarily act in higher positions which have been delegated to issue metadata authorisations. These officers are not subject to mandatory metadata training and would have infrequently, if at all, issued metadata authorisations."

The lack of proper capability, oversight, management and understanding of the requirements of the law, outlined in the Ombudsman's report, is worrying. After all, the legislation is designed for a single purpose: the enable the government to go after whistleblowers after their stories have been told by the media. Its aim is to bypass the ethical obligations of journalists by trawling through their telecommunications data and that of their media employer, to enable a government agency to hunt down, persecute and prosecute a confidential source after a news story has been published or broadcast.

The use of legislation in this attack on press freedom, legislation that was passed by the Parliament with bipartisan support, should be deeply troubling for any advocates of freedom of expression and press freedom.

The bungling application of the law by the national police force so soon after being enacted is more worrying still.

ENCRYPTION

On July 14, 2017 MEAA issued a statement expressing alarm at a government push to force tech companies to break encrypted communications.[71]

"The announcement seems to show scant understanding or consideration of how this might be achieved, or any concern for the potential consequences," MEAA said.

MEAA said it was particularly concerned that on past experience the government and its agencies have little regard for press freedom and there is every likelihood that the powers being sought by the government over encrypted communications will be misused – either to identify a whistleblower or pursue a journalist for a story the government does not like.

MEAA chief executive Paul Murphy said: "For more than 15 years now, we have seen government introducing anti-terror laws that erode press freedom, persecute whistleblowers and attack journalists for simply doing their job.

"Laws that are meant to protect the community and go after terrorists are being used to muzzle the media, cloak the government in secrecy, hunt down and identify journalists' sources, and imprison journalists for up to 10 years for reporting matters in the public interest," he said.

"As recently as April, the Government failed to bring the Australian Federal Police to heel when it revealed that it had illegally accessed a journalist's telecommunications data without a warrant. Even the subsequent investigation by the Commonwealth Ombudsman into how that breach occurred is a secret under the *Telecommunications (Interception and Access) Act*," he said.

"There is real concern that government agencies could once again misuse their powers to go after whistleblowers, to go after journalism. The government must take immediate steps to protect human rights and press freedom before it indulges in granting agencies any more anti-terror powers. There will be appalling consequences if extreme powers such as those being sought by the Prime Minister and Attorney-General are misused to persecute journalists and their sources. After all, that's what happened just three months ago," Murphy said.

ESPIONAGE AND FOREIGN INFLUENCE BILLS

Malcolm Turnbull looks to the press gallery on December 7 2017 - the day he introduced the Espionage Bill legislation. Image courtesy Nick Moir, Fairfax Photos

FIRST PHASE

At 6.04pm on December 7, 2017, two hours before the Australian Parliament rose for its two-month Christmas-New Year break, Prime Minister Malcolm Turnbull – a former journalist – introduced a Bill that provided jail terms of up to 20 years for journalists reporting in the public interest.

The legislation, the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017,* applied the penalty to anyone who "communicates" and "deals" with certain information provided by a Commonwealth officer.

The new penalty for "deals" with information would include anyone who receives, possesses, communicates or records the information. In short, the Espionage Bill punishes people for handling information as well as disclosing information in a news story. It means that journalists, as well editorial, production and office support staff and even a media outlet's legal advisers would be at significant risk of jail time as a result of merely having certain information in their possession in the course of legitimate reporting matters in the public interest.

Even receipt of unsolicited information would put a person in automatic breach. Indeed, if the journalist did receive such information, how could they to know the material was in breach of the law without first possessing, communicating, and dealing with it?

So broad was the Bill that a discussion of unsighted material might place a journalist in breach even without being in possession of a document.

Under the proposed amendments the penalties were increased from the range of six months to seven years jail to a new maximum of 15 years jail for the communicating offence, and a maximum of five years for the dealing offence. But certain security classifications carry an additional five year penalty for each offence.

That wasn't the only Bill introduced that would harm the media. In another breathtaking example of poor drafting, the *Foreign Influence Transparency Scheme Bill 2017* would have an adverse effect on the day-to-day operations of foreign-owned media with Australian operations as well as media outlets that reproduce foreign sourced news, information and entertainment. It would also capture industry bodies making representations to government on behalf of any company in their membership base (and it could be just one member of their membership) that was a company with a foreign principal operating in Australia.

The sweep of this Foreign Influence Bill captures documentary channels on pay television, online newspaper websites and commercial radio stations. It requires them to undertake registration, continuous disclosure of activities that could influence government policy and/or politics, lodging of any documentation in a central register, and subject them to criminal sanctions for noncompliance. (During January through to March the Joint Media Organisations including MEAA made several submissions and appearances at inquiry public hearings regarding the Foreign Influence Bill – the submissions can be found here: https://www.meaa.org/category/mediaroom/submissions/)

The dual assault of both bills led to condemnation from a variety of civil society groups including law societies and human rights bodies. Even Government agencies

such as the Office of the Inspector-General of Intelligence and Security (IGIS), were blind-sided by the Espionage Bill, unaware of what it contained until it was tabled in the Senate. Indeed, the IGIS wasn't even able to discuss the Bill with the Attorney-General's Department until January 30 2018, the day before the IGIS appeared before a Senate hearing into the Bill.

On February 15, three United Nations' special rapporteurs for human rights issued a joint communique condemning the Espionage Bill legislation[72]. David Kaye, the UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression, Fionnuala D. Ní Aoláin, UN special rapporteur on the promotion and protection of human rights while countering terrorism, and Michel Forst, UN special rapporteur on the situation of human rights defender noted that the Bill was "inconsistent with Australia's obligations under article 19 of the *International Covenant on Civil and Political Rights* and related human rights standards." Australia ratified the Covenant in 1980.

In particular, the UN said, "We are gravely concerned that the Bill would impose draconian criminal penalties on expression and access to information that is central to public debate and accountability in a democratic society. For example, several offences under the Bill would not only penalise disclosures of government information in the public interest, but also expose journalists, activists, and academics that merely receive such information to criminal liability.

"Such extensive criminal prohibitions, coupled with the threat of lengthy custodial sentences and the lack of meaningful defences, are likely to have a disproportionate chilling effect on the work of journalists, whistleblowers, and activists seeking to hold the government accountable to the public. We urge the Committee to reconsider the Bill in line with the human rights standards…"

The UN communique went on to note that: "Although article 19(3) [of the Covenant] recognises 'national security' as a legitimate aim, the [UN] Human Rights Council has stressed 'the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression.' In this regard, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has concluded that national security considerations should be 'limited in application to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime, or power group.' Additionally, States should "demonstrate the risk that specific expression poses to a definite interest in national security or public order, that the measure chosen complies with necessity and proportionality and is the least restrictive means to protect the interest, and that any restriction is subject to independent oversight."[73]

In summary, the communique stated: "We are particularly concerned that these restrictions will disproportionately chill the work of media outlets and journalists, particularly those focused on reporting or investigating government affairs. The lack of clarity concerning these restrictions, coupled with the extreme penalties, may also create an environment that unduly deters and penalizes whistleblowers and the reporting of government wrongdoing more generally.

MEAA together with Joint Media Organisations that form Australia's Right to Know industry lobbying group, quickly responded with a submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*.[74] The organisations and MEAA also appeared at the inquiry's public hearings. The submission said:
We note at the outset of this submission that national security amendment laws continue to undermine the ability of the news media to report in the public interest and keep Australians informed about their environment and communities. This Bill is the latest national security Bill that does this and we again bring these important issues to the attention of the Committee.

The proposed legislation criminalises all steps of news reporting, from gathering and researching of information to publication/communication, and applies criminal risk to journalists, other editorial staff and support staff that knows of the information that is now an offence to 'deal' with, hold and communicate.

The Bill is a significant step beyond the existing legislation that applies to Commonwealth officers. This is particularly when it has not been demonstrated that there are "problems" that need to be "fixed". The result is that fair scrutiny and public interest reporting is increasingly difficult and there is a real risk that journalists could go to jail for doing their jobs.

We recommend that a general public interest/news reporting defence be available for all of the relevant provisions in both the secrecy and espionage elements of the Bill. This is the only way to ensure public interest reporting can continue and Australians are informed of what is going on in their country.

The Espionage Bill establishes a range of new secrecy provisions via new definitions (s90.1(1)) and a new Part 5.6 to be inserted into the *Criminal Code Act*. These new offences replace current crimes under section 70 (disclosure of information by Commonwealth officers) and section 79 (official secrets) of the *Crimes Act 1914*.

The submission noted that the new offences apply to all persons, not just Commonwealth officers. This is a significant broadening of the application of the law beyond that encompassed in the legislation that the Bill replaces. Anyone who "communicates" or "deals" with certain information provided by a Commonwealth officer will be in breach of the legislation.

The submission stated that "deals" with information was unnecessarily broad – particularly when applied to the news media – adding that "deals" would include people who receive information, possess information, communicate information or who make a record of it. It would capture people who merely have certain information in their possession – including anyone in a media outlet involved in news reporting and informing the Australian public of matters of public interest. For example, a journalist receiving unsolicited information would be in automatic breach, with the Commonwealth noting that "receives… would include a person being given a classified document by another person".

The submission asked that, if the journalist received such information, how could the journalist determine whether the material is in breach without possessing, communicating, and otherwise dealing with it? A mere discussion of unsighted material might place journalists in breach, notwithstanding that they may then ask

others about the information – with or without being in possession of a document.

The Bill also expands on the forms of information far more broadly than previous legislation, and acts as a barrier to public interest reporting. Existing law applies to disclosure by a Commonwealth official of a "fact or document" that is subject to a pre-existing duty of confidence. But the new Bill applies to "information of any kind, whether true or false and whether in a material form or not, and includes (a) an opinion; and (b) a report of a conversation".

The Bill applies strict liability for communicating or dealing with "security classified information". The submission argues this means the prosecution does not have to prove the information was "inherently harmful".

Section 122.2 of the Bill relates to conduct "causing harm to Australia's interest". The submission responded that these matters include interfering with any process concerning breaking of a Commonwealth law that has a civil penalty, interfering or prejudicing the performance of functions of the AFP, and harming or prejudicing relations between the Commonwealth and a State or territory. "Overall, the ability of the media to report on what may be classified information and/or national security concerns will be more difficult – particularly under the catch-all phrase of 'harm to Australia's interests'," the submission said, adding that even reporting on international trade or Goods and Services Tax distribution could be viewed as adverse under the broad scope of the Bill.

The Bill offered some defences but these were limited to information that is already public and information covered under the *Public Interest Disclosure Act*. The submission found that the defence of news reporting was narrow and subjective, particularly because of its definitions of "public interest" and "fair and accurate reporting" as well as narrow and dated definitions of "journalist" and "news medium".

The Bill also contained an evidentiary burden on identifying sources where journalists would have to explain how they came to possess and deal with and hold the information. "It is quite possible the powers under the TIA Act [*Telecommunications (Interception and Access) Act*] to access the metadata of journalists to identify a source or a whistle-blower – in contravention of the journalist's obligation to protect the identity of a confidential source – may be used to identify sources in these circumstances."

A prior publication defence only served to "intimidate news organisations from being the first to publish by placing all of the burdens on them – leading to a substantial chilling of public interest journalism," the submission said.

The submission recommended that "it should be a defence that the information has already been communicated or made available to the public – regardless of the status of the Commonwealth's authorisation of that information. We note that the penalty is 15 years jail. Once again we note that the risk is that a journalist could go to jail for doing their job is very real, and as a result of reporting in the public interest."

In response to these concerns, on February 2, 2018, the new Attorney-General Christian Porter was reportedly seeking advice on issuing a direction to the Commonwealth Director of Public prosecutions that prosecutions of journalists cannot proceed without his sign-off, replicating a safeguard his predecessor as attorney-general, George Brandis, had put in place for offences relating to reporting on special intelligence operations where section 35P of the *ASIO Act* would lead to jail terms of up to 10 years for journalists.[75]

Shadow attorney general, Mark Dreyfus, said: "Porter's suggestion of a veto power for himself smacks of political interference in the work of the independent DPP and does not give us any satisfaction that the press freedoms will be protected."

By February 7, Porter was reported as saying: "There is not, nor has there ever been, any plan… by the government to see journalists going to jail simply for receiving documents and that would not occur under this Bill as currently drafted."[76] He refused to offer a blanket exemption or defence for journalists and media organisations.

He also stated that it was "inevitable" that the Bill would change.

SECOND PHASE

On February 12, 2018, in light of Attorney-General Christian Porter's refusal to grant a blanket exemption of defence for journalists while acknowledging that the Bill would need to be changed, the Joint Media Organisations prepared a supplementary submission to the committee:

We make this submission following media reports that the Attorney-General has instructed his department to amend Schedule 2 of the Bill to:

- *Improve the clarity of offences that apply to Commonwealth officers, most particularly by narrowing the definition of 'conduct that would cause harm to Australia's interests' and the definition of 'inherently harmful information' – which are the two definitions that would give rise to a Commonwealth officers' liability;*
- *Separate out the offence that would apply to non-Commonwealth officers including journalists and ensure that the offence to apply to non-Commonwealth officers is appropriately narrowed in scope*
- *to only apply to the most serious and dangerous conduct; and*
- *Strengthening the defence for journalists by removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate', ensuring that the defence is available where a journalist reasonably believes that their conduct was in the public interest, and clarifying that the defence is available for editorial and support staff as well as journalists themselves.*

These amendments, in combination with the extension of the definition of computer to computer network, and the ability to add, delete, alter, and now copy data that is not relevant to the security matter (albeit for the purpose of accessing data that is relevant to the security matter and the target) amplifies the risks to the fundamental building blocks of journalism including undermining confidentiality of sources and therefore news gathering.

The supplementary submission also noted that the Bill amended sections of the *ASIO Act* to:

- *Authorise a class of persons able to execute warrants rather than listing individuals (section 24);*
- *Clarify that search warrants, computer access warrants and surveillance device warrants authorise*
- *access to third party premises to execute a warrant (sections 25, 25A and new section 26B); and*
- *Authorise the use of reasonable force at any time during the execution of a warrant, not just on entry (sections 25, 25A, 26A, 26B and 27J).*

The new Federal Attorney General Christian Porter poses for a portrait at the Parliamentary Offices on January 30, 2018 in Sydney.
Image courtesy Dominic Lorrimer, Fairfax Photos

The expansions of these aspects of the ASIO Act, in aggregate, and in addition to matters raised previously in this submission, are of major concern. These amendments increase the risk to all that media organisations encompass, including all employees, information and intellectual property which in turn curtails freedom of speech.

We urge the Parliament to consider this impact of the proposed amendments before proceeding with the Bill.

The supplementary submission noted Porter's comments, saying that they were "an encouraging sign that the Government is willing to examine the Bill – and the others in the package – more closely. However at this time we make no comments on the proposed amendments. Given our initial submission on the Bill it is clear that there are serious flaws in the drafting and the Bill significantly overreaches. We note that other submitters have raised serious concerns with the Bill.

On March 5, 2018 Porter subsequently introduced amendments to the espionage Bill that would give journalists a defence for the offence of dealing with protected information where they "reasonably believe" it is in the public interest to do so. He also created separate offences for non-commonwealth officers, such as journalists, decreasing the prison sentences for them to 10 years and three years (reduced from 15 years and five years).

Porter said: "There has been no intention to unnecessarily restrict appropriate freedoms of the media. Where drafting improvements are identified that strike a better balance, the government will promote those changes." [77]

MEAA chief executive Paul Murphy, responded that while the defence was a "significant improvement" on the earlier version, which required journalists to demonstrate their work was "fair and accurate" it still was "not clear" the defence of reasonable belief was available for both dealing with and communication of information, meaning journalists could still be exposed to 10 years' prison for publication of stories relating to national security.

MEAA and other media organisations continued to call for a proper exemption. "The overriding concern we still have is that media organisations have asked for general media exemption and it's certainly not here in these changes," he said. "The fact that there is a requirement to mount a defence for legitimate reporting is a very serious concern."

A blanket defence or exemption was still needed because the concept of the "public interest" was vague, the classification of documents as "secret" or "top secret" was an administrative decision that could trigger a criminal prosecution, and attempts to mount and prove a defence might reveal information about journalists' sources.

THIRD PHASE

In response to the attorney-general's amendments, on March 14, 2018 the Joint Media Organisations including MEAA made a second supplementary submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* and also appeared at the inquiry's public hearings.

This latest submission stated: *Notwithstanding the amendments it remains the case that journalists and their support staff continue to risk jail time for simply doing their jobs. This is why we believe that the way in which to deal with this appropriately is to provide an exemption for public interest reporting.*

The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a

society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, they are protected under section 12 of the Human Rights Act 1998.

Therefore we do not resile from our long-held recommendation for exemptions for public interest reporting in response to legislation that criminalises journalists for going about their jobs. The lack of such a protection – and the ever-increasing offences that criminalise journalists for doing their jobs – stops the light being shone on issues that the Australian public has a right to know.[78]

The submission went on to recommend that "persons engaged in public interest reporting be exempted from offences in the Bill, including to 'deal' with information. If this is not accepted, then an alternative is that the offence… should only apply to a limited range of activities rather than the full list of activities currently listed under 'deal'… This change would ensure that more passive activities, such as the mere receipt and internal copying of information or an article would not trigger a relevant offence provision under the Act."

The submission also recommended changes to the proposed amendment to the news media defence but reiterated that a proper exemption, rather than a defence, was what was needed.

The submission highlighted the recent news story regarding the ABC reporting on what it called "the Cabinet files" where a wide range of Cabinet documents were found in filing cabinets that were for sold to a member of the public by a second-hand shop where used government furniture is sold off cheaply.[79] The submission stated:

We note here Linda Mottram's recent interview with the attorney-general on ABC Radio National's PM program about the amendments and the Bill. A question was posed to the attorney-general about the recent filing cabinet situation and the penalties that would apply under the Bill.

The attorney-general responded by saying that he didn't think you can make blanket assumptions about penalties, there are a range of defences and it would depend on the circumstances and on the contents of the document, so he couldn't say if the person (the purchaser of the filing cabinet or the journalist) would definitely face this or that charge, and noted in closing that every case is different and it's a very complicated and individualised situation.

We cannot emphasise enough that ***this is why an exemption for public interest reporting is the most appropriate outcome for Australia's democracy when laws – intentionally or unintentionally – criminalise journalists (and associated support personnel)***. [MEAA emphasis added]

Linda Mottram's response illustrated the point: "Which in itself has got to have a chilling effect, doesn't it? Anybody who comes across documents is going to immediately say whoa, hang on a minute, it's complicated as the Minister said and there's possibly 10 years' jail at the end of this."[80]

On March 16 2018, at the final public hearing into the Espionage Bill in Melbourne, MEAA presented a petition to the Parliamentary Joint Committee on Intelligence and Security containing almost 9000 signatures of people opposing proposed new national security legislation. The petition was addressed to Prime Minister Turnbull and Attorney-General Christian Porter.

THE BILL ESTABLISHES NEW SECRECY PROVISIONS, NEW DEFINITIONS AND NEW OFFENCES.

NEW BILL WOULD MAKE AUSTRALIA WORST IN THE FREE WORLD FOR CRIMINALISING JOURNALISM

BY JOHAN LIDBERG

Australia is a world leader in passing the most amendments to existing and new anti-terror and security laws in the liberal democratic world. Since September 11, 2001 it has passed 54 laws.

The latest suggested addition is the Turnbull government's crackdown on foreign interference. The bill has been heavily criticised by Australian Lawyers for Human Rights, Human Rights Watch, and major media organisations for being too heavy-handed and far-reaching in the limits it would place on freedom of expression and several other civil liberties.

The government's own intelligence watchdog, the Inspector-General of Intelligence and Security, argues the bill is so widely worded that its own staff could break the law for handling documents they need to access to do their job.

A case in point is whether the ABC's publication of confidential and secret cabinet documents would be in breach of the proposed bill. Two filing cabinets full of thousands of confidential cabinet documents were given to the ABC by a source who, astonishingly, had bought them for small change at an op-shop in Canberra.

The ABC made an assessment and chose to publish a very limited number of the documents it deemed in the public interest. The ABC has so far clearly acted responsibly, and no documents that could harm Australia's national security were in the first publication.

Some of the published documents are embarrassing for both the current and former Coalition and Labor governments, but that should not stop publication – rather, the opposite.

WHAT THE BILL WOULD MEAN

The Foreign Interference Bill, in its current form, suggests it should be criminal for anyone to "receive" and "handle" certain national security information. It would seem that by just receiving the filing cabinets and assessing what to publish, the ABC staff would be in breach of the provisions suggested in the bill.

The Senate Select Committee into the Future of Public Interest Journalism received evidence that the fragmented nature of current legal provisions concerning whistleblowers and journalistic sources can lead to a great deal of uncertainty

Furthermore, this makes an already heavy-handed whistleblower regime from an international perspective even more draconian. It is sure to lose Australia several places on the Press Freedom Index if implemented as suggested.

The Bill is an overreach in many respects. But one of the worst aspects, from a transparency and accountability point of view, is that it seeks to extend the draconian Section 70 of the *Commonwealth Crimes Act*.

Section 70 makes it a crime, punishable by a maximum of two years in prison, for public servants to communicate or supply information to anyone outside government without permission. The ABC's publication of the cabinet files clearly illustrates that media organisations with ethical and thorough editorial polices are perfectly capable of assessing what to publish.

The bigger picture is that the current Bill is part of a pattern that started after the terrorist attacks in the US on September 11, 2001.

In our forthcoming book, *In The Name of Security – Secrecy, Surveillance and Journalism*, my colleagues and I assess how the anti-terror laws and mass surveillance technologies in the Five Eyes countries (the intelligence alliance comprising Australia, Canada, New Zealand, the United Kingdom and the United States) has impacted on in-depth public interest journalism. We also compare the Five Eyes with several BRICS (Brazil, Russia, India, China and South Africa) countries and the situation in the European Union.

Our main conclusions are that the current fear-driven security environment has made it much harder for investigative journalists to hold governments and security agencies to account. This is partly due to anti-terror and security laws making it harder for whistleblowers to act.

Add to this the truly awesome powers of mass surveillance making it increasingly difficult for investigative journalists to grant anonymity to sources that require it for their own safety, and you end up with a very complex journalist-source situation.

Another important factor in Australia and the UK is that all national security agencies are exempt from Freedom of Information laws. This makes it virtually impossible to independently acquire information from the security branch of government.

The balance between national security and transparency is complex. As citizens, we want to feel safe and know what is being done to keep us safe. In our book, we have labelled this the "trust us" dilemma, meaning governments argue they can't disclose what they are doing security-wise, lest the "bad guys" find out.

That leaves us needing to trust the government's security actions and policies. But the problem is, how can we as citizens decide if we trust the government if we don't have the information on which to base this decision?

There is no easy answer to this question. Political philosopher Giorgio Agamben takes our reasoning one step further when he argues that the liberal democratic world has been in a "state of exception" since September 11. This has granted powers to security agencies that are creeping increasingly closer to those of the totalitarian regimes in Europe in the 1930s.

Agamben traces various states of exception all the way back to Roman times. The pattern is similar through history: governments point to an "other" – often a hard-to-define enemy – as a reason for increased powers to the security apparatus. They are convinced they are doing the right thing.

The problem is that if we don't roll back the strengthened security laws in times of lower threat, we start from a high level next time we enter a "state of exception". This in turn can lead to a never-ending war on real or perceived threats where our cherished democratic civil liberties become part of the collateral damage.

If we allow the "state of exception" to become permanent, we risk allowing the terrorists to win.

Johan Lidberg is associate professor, school of media, film and journalism, Monash University. This February 1, 2018 article was sourced from **The Conversation**[81]

WHISTLEBLOWER PROTECTION

During the year there were some advances in whistleblower protections however, as seen with the expansion of severe penalties in the latest tranche of national security law amendments, there was also a concerted effort by Government to pursue, prosecute and punish whistleblowers who seek to make public examples of illegal activity, fraud, harassment, dishonesty and threats to public health and safety.

The report of the Senate Select Committee into the Future of Public Interest Journalism[82] said the committee had received evidence that the fragmented nature of current legal provisions concerning whistleblowers and journalistic sources, both across sectors and jurisdictions, can lead to a great deal of uncertainty for some journalists pursuing stories. "The committee considers that the Commonwealth should look to harmonising these laws, in part to make it easier for journalists to pursue legitimate stories in the public interest."

The committee noted that the Parliamentary Joint Committee on Corporations and Financial Services (JCCFS) inquiry into whistleblower protections had reported in September 2017. The Senate committee noted that "although the JCCFS report did not consider the effects of current provisions on journalists in great depth, this committee notes and endorses that committee's recommendation that Australia's whistleblower framework should be harmonised across sectors and jurisdictions".

The Senate committee also noted that the 2009 report by the House of Representatives Standing Committee on Legal and Constitutional Affairs had examined the need for a comprehensive scheme for whistleblower protection in the Commonwealth public sector. At the time, the House committee had suggested extending whistleblower protections to the private sector was a matter that should be considered in the future. The Senate committee finally recommended that "the Commonwealth look at ways to expand whistleblower and shield law protections, and to harmonise those laws between the Commonwealth and state and territory jurisdictions, noting the work in this area already underway".
On February 16, 2018 MEAA made a submission to the Senate Standing Committee on Economics Legislation inquiry into the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* which was introduced to the Senate on December 7, 2017.[83]


The Senate Standing Committee on Economics Legislation reported the findings of its inquiry into the Whistleblower Protections Bill on March 23 2018.193 It recommended that the definition of "journalist" be reviewed.

MEAA stated that while the Bill was a promising advance in ensuring that whistleblowers have an avenue to raise their concerns, "the Bill offers an anachronistic view of how journalists and the media operate and this must be remedied before the Bill is enacted".

MEAA was concerned that the Bill defines a journalist as:
a person who is working in a professional capacity as a journalist for any of the following:
(a) a newspaper or magazine;
(b) a radio or television broadcasting service;
(c) an electronic service (including a service provided through the internet) that:
(i) is operated on a commercial basis; and
(ii) is similar to a newspaper, magazine or radio or television broadcast.

"The Bill's definition above appears to exclude electronic services that are not operated on a commercial basis. Many independent freelance journalists self-publish legitimate news stories on the internet without a commercial transaction taking place," MEAA said.

"The Bill's Explanatory Memorandum may go some way to explaining why this antiquated definition has been utilised in the Bill."

MEAA said that "in providing protection to disclosures to a journalist working in professional capacity, the amendments make clear that disclosure to any 'journalistic' or 'media' enterprise is not sufficient. This is intended to ensure that public disclosures on social media or through the provision of material to self-defined journalists are not covered by the protection.

"The Memorandum seems to be overly concerned with applying a rigidly archaic definition of journalist that is not only out-of-step with current practice but which also aims to muzzle legitimate news reporting by journalists of whistleblower concerns. Stifling information flow should not be the aim of legislation intended to afford protections for whistleblowers. Indeed, the opposite is true – if a whistleblower has made contact with a journalist then that contact and the information that has been exchanged should be afforded the same comprehensive protections regardless of the individual platform or the individual journalist selected by the whistleblower," MEAA said.

MEAA explained that the nature of the digital disruption that has transformed the media industry is that an increasing number of journalists are operating in this fashion and to apply the requirement that a web site must operate commercially fails to acknowledge the reality of the way the media has changed.

MEAA called on the committee to note that it had also addressed this issue in its submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*.

"[T]here are various definitions of 'journalist' in Commonwealth legislation including s.126J of the *Evidence Act 1995*:
'Journalist' means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium; and
'News medium' means any medium for the dissemination to the public or a section of the public of news and observations on news."

In its submission, MEAA recommended legislation use a consistent definition of "journalist" and "news medium", and MEAA supports the definitions in the *Evidence Act* as being more suitable to be used in the Whistleblower Protections Bill. MEAA also said that it supported the removal of the requirement that an electronic service would have to operate on a commercial basis. And MEAA expected that the Bill will be redrafted to ensure that protections are available to whistleblowers and journalists with the certain aim of ensuring that whistleblower concerns are brought to light without negative repercussions for either party.

SHIELD LAWS

On November 23, 2017 the Northern Territory's Legislative Assembly referred the *Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill* to the Economic Policy Scrutiny Committee for inquiry.[84] The Bill was a welcome move that would bring the territory into line with most jurisdictions in Australia.

MEAA made a submission to the Committee's inquiry.[85] In the submission MEAA stated that it welcomed that the Bill recognises a fundamental ethical obligation for journalists to protect confidential sources. Clause 3 of the MEAA *Journalist Code of Ethics* states:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

At its core, the Bill provides that a journalist may claim journalist privilege in order to protect a confidential source. This privilege can be waived if a judicial officer is satisfied that it is in the public interest to do so.

MEAA noted that the Bill's Explanatory Note states that "public interest refers to information which could assist and improve society and the wellbeing if its members, as opposed to information which the public may simply find interesting (for example, because it is salacious)".

MEAA also noted that a court or tribunal would be required to consider:
(i) "Any likely adverse effect of requiring disclosure on the informant (and others); and
(ii) "The public interest in the communication of facts and opinion to the public and the ability of journalists to access sources of information."

The Bill also provided safeguards against purported misuse of the privilege in cases where, *inter alia*, the reportage contained unfair and untrue information and/or whether the journalist took reasonable steps to verify the information and use it in a manner that minimised personal harm. "This is, in essence, a good faith provision," MEAA said.

In MEAA's view, the Bill dealt fairly with the definition of "journalist" by not adopting the definition used in other jurisdictions, such as New South Wales, where a journalist is "a person engaged in the profession or occupation of journalism". MEAA believe the formulation used in the territory's Bill is more practical and better accords with modern day practices.

MEAA summed up its submission by saying: "Notwithstanding our concerns


The Northern Territory Legislative Assembly

BORDERLESS DIGITAL PUBLISHING ALLOWS FOR "JURISDICTION SHOPPING"

over a court or tribunal's ability to displace the privilege, MEAA strongly supports the passage of this Bill into law. The Australian legal system remains something of a patchwork when it comes to journalist shield laws."

MEAA commended the Northern Territory Government for advancing this Bill and doing so in a way that provides sound protections for journalists' professional (and essential) use of confidential sources.

MEAA also urge the Northern Territory Government to promote its efforts in all relevant national forums, not least the Standing Committee of Attorneys General (SCAG). "By doing so, your Government can assist in securing nation-wide protection for journalists and improve the content of existing laws, which, in our opinion, too readily permit the displacement of a journalist's privilege."

The Northern Territory's move to enact a journalist shield law leaves Queensland and South Australia as the only jurisdictions refusing to implement a journalist shield law.

This situation has a chilling effect on journalism because borderless digital publishing allows for "jurisdiction shopping" – effectively creating a situation where a subpoena demanding a journalist can be compelled by a court to reveal their confidential sources even though the journalist and their media outlet do not operate or reside in that state. The journalist would then face not only the expense of defending themselves in that state, away from their home base, but also would face the full wrath of a court if they are found guilty of contempt for simply having maintained their ethical obligation to not reveal the identity of their confidential sources.

The change of government in South Australia has also led to movement on shield laws in that state. Under the previous Government there was staunch opposition, most notably from then Attorney-General John Rau, to any attempts to introduce a shield law.

Indeed, on October 30, 2014 the South Australian government and government-aligned independents voted down the *Evidence (Protections for Journalists) Amendment Bill 2014*. In defeating the Bill, Rau had stated: "The Bill before the parliament leans too far towards protecting the interests of journalists and discounts the legitimate public interest in the administration of justice which requires that cases be tried by courts on the relevant admissible evidence."[86] His comments failed to appreciate that those vulnerable to prosecution included whistleblowers seeking to expose corruption, fraud, dishonesty, harassment, and threats to public health and safety.

There was a change of government at the election on March 17, 2018. As part of his party's election platform, then Opposition Leader Steven Marshall committed his Government, if elected, would introduce a shield law by promising: "We will provide journalists and their sources with the protection of effective shield laws."[87]

The policy document stated: "If elected in 2018, a Marshall Liberal Government will ensure shield laws give effective protection to journalists and their sources. Quite simply, people who alert the media to important public issues embody the core values of an open society… If journalists are unable to guarantee privacy to their sources, the public will not reap the benefits of openness, and the public debate will be restricted. The public and journalists are being left behind in South Australia, without consistent protection to both journalists and their sources.
"A Marshall Government's shield laws will provide protection to journalistic sources by enabling suppression of their identities. Our shield laws will encourage an open discussion with and accountability to the public. They will require a source to be identified in court only if the public interest in revealing such information outweighs the potential detriment to the source. This is an important transparency measure.

"Our shield laws will not limit protections to only those in professional media. They will be opened to all contractors or freelancers working to promote debate in the public interest. Our media need our support to comply with their ethical guidelines to protect sources of information which is in the public interest to have revealed. A Marshall Liberal Government will continue to advance the interests of transparency, openness and informed debate through shield laws and other initiatives."

Within two and a half weeks of the election, the new Marshall Government had issued an exposure draft of a shield law Bill. MEAA and other media organisations are examining the exposure draft.

However, even if the every jurisdiction in Australia does, finally, possess a shield law, MEAA notes that there are wide discrepancies and variances in each jurisdiction's shield law.

MEAA again calls for harmonisation of the laws to account for the realities of borderless digital publishing by creating a uniform national shield law regime, along similar lines to the uniform national defamation law regime.

Until that happens, journalists remain vulnerable.

MEAA said the current situation for public interest journalism is an incredibly dangerous one

THE INDUSTRY

PUBLIC INTEREST JOURNALISM

On World Press Freedom Day, May 3, 2017 Fairfax Media announced it would cut one in four journalists from its metropolitan newsrooms in Sydney, Melbourne and Canberra - a loss of 125 journalists. Fairfax journalists across the country decided to take industrial action including voting to go on strike for seven days.

On May 10, as a result of the Fairfax announcement, a Senate select committee was established to inquire and report on the future of public interest journalism.[88]

The committee received 75 submissions including one from MEAA[89], and MEAA also participated in the committee's extensive public hearings which took place in May, July, August and November in Sydney, Melbourne and Canberra.

At the inquiry's first public hearing[90] MEAA said: "We really are at a crossroads for public interest journalism in this country. That has been underlined by the recent announcement from Fairfax Media of yet more savage cuts. The prospect of a foreign private equity takeover of our oldest, and one of our most respected, media organisations should fill anyone who is concerned about the future of public interest journalism in this country with dread.

"MEAA believes the important starting point in this process is one that has been absent from all recent efforts by governments of various persuasions to pursue media reform. That is the essential public policy goal that we should be looking at here, which, surely, is the public interest of having a strong and diverse media landscape in Australia to provide a wide range of reporting, analysis and opinion. That is the starting point."

MEAA went on to say that there should be a debate about what government can and should do to support public interest journalism. "What are the appropriate regulatory settings to achieve that? And, frankly, as we have said before, tinkering around the edges of current media ownership rules is going to do absolutely nothing to achieve that outcome. Today we would like to set out some of our observations of the effects of disruption in the industry over the last six years and the impacts on journalists on their ability to do their job, and offer some preliminary views to you about what the problem is and the types of things the committee might want to look at in the course of its deliberations."

MEAA explained that through its monitoring of redundancy rounds at media organisations since 2011, at least 2500 journalist positions have disappeared at newspapers and broadcasters across the country – probably more. That followed on from about 700 job losses that can be attributed to the impact of the 2008 global financial crisis.

"It is impossible to guess what that number would be in total if you also took into account people who have simply left the industry and not been replaced. That would make the figure even higher.

"The losses initially came in great waves, commencing with subeditors. Subeditors were the first part of the profession that was really heavily targeted in redundancy rounds, but since then we virtually have seen annual redundancy rounds in major media organisations across the country, " MEAA said. "And it is important to remember that, as a result of the budget cuts to our public broadcaster, we have also seen significant redundancies taking place there as well."

MEAA went on to explain that the scale of redundancies has an enormous impact on the ability of media organisations to continue doing their job. Departing staff are not being replaced. Remaining staff have to work harder. Previously core activities are being abandoned. "Everyone just appears to be trying to keep their heads above water and, as we have seen in recent weeks, they are not always succeeding at that."

There has been a concomitant increase in editorial outsourcing to third parties. "Previous employees are now working freelance as independent contractors on lower pay rates, with no job security and fewer benefits than before. As redundancies have increased, the marketplace of these freelance workers has become more crowded and, as costs have been cut, the editorial budgets available to pay for outsourcing have been sliced into smaller and smaller pieces, meaning that freelancers are competing among themselves for increasingly declining rates of pay."

MEAA said that in an increasing number of cases the arrangements we are seeing being put in place amount are little more than sham contracting. "These people are in a very exposed position. As so-called independent contractors they do not have the benefit under our legal framework of being able to collectively bargain. They are heavily exposed in an increasingly crowded marketplace, and it is a major issue for us as a union and a professional association," MEAA told the committee.

MEAA added that the spate of redundancies have meant that newsrooms have shrunk. Specialisation has been replaced by multiskilling. Research, investigation, depth and accuracy are being lost. "In short, the media industry is creaking at the seams trying to fulfil its important public role as part of a healthy, functioning democracy." MEAA acknowledged that the while the bulk of the digital disruption had plagued traditional media businesses that have had to wrestle with the transition to the new technology and the fragmentation and erosion of income streams, digital technology had also opened up opportunities for new players to emerge. While this further damaged traditional media houses, the new media businesses offered a wider choice for consumers.

MEAA said that in Australia, established news brands like the Guardian, Huffington Post and *Daily Mail* have local digital editions produced by Australian journalists, and they have recently been joined by *The New York Times*. Others providing a welcome boost were BuzzFeed and new local entrants like The New Daily and the academic website The Conversation. However, MEAA noted that: "These add important elements to the local media landscape and have contributed, in some cases, extraordinarily valuable additional depth to particular areas of reporting, but none of them have the resources to replace the journalism at scale that we are losing."

MEAA also stated that indicators suggest that the audience is growing with subscriber numbers and readership growing. While the use of print media was declining; digital, web and app readership has been growing and boosting the local audience. However, the fragmentation of advertising revenue continued with many ad dollars going from traditional and digital news media to digital non-news platforms such Google, Facebook, Yahoo, Microsoft and Twitter.

"We have to be gravely concerned at the impact that aggregators and content vehicles like Google and Facebook are having on our media landscape in Australia," MEAA told the committee. "These non-paying entities strip advertising and other revenue from regulated media entities that provide important public interest editorial and entertainment Australian content for Australian audiences. To date, they have made little effort to acknowledge the funding problem and even less to contribute to funding the content from which they benefit enormously."

MEAA was one of several contributors to the inquiry proposing a levy of some sort be applied to these organisations. "With the right spread of revenues from a levy on these aggregators – perhaps through contestable bidding by existing and new media organisations, profit and non-profit – the plurality of news sources may increase across all platforms. While there are questions about how such a system might work, we believe it is important for this committee to look at this as an option and as a possible solution to the circumstances that we find ourselves in… Companies that financially benefit by reproducing but not creating news content should contribute funding towards maintaining and developing journalistic content and endeavours. That is a basic principle that we think would be important to apply.

"Regulators at national and international levels should act with urgency to establish payment mechanisms, whether by a levy or other means, from intermediaries of scale, such as Google and Facebook, which justly compensate authors and publishers for their creative works. Such funds should ensure that a minimum of one per cent of advertising revenues of organisations of scale are devoted to fund journalistic and related content, as a condition of a company's access to each market," MEAA said.

MEAA concluded its remarks by stated that the current situation for public interest journalism is an incredibly dangerous one. "In the absence of action, we face the risk of our media market, already one of the most concentrated in the world, becoming even more so. It is a dangerous fallacy to think that the internet in and of itself will provide diversity. Yes, people have access to more sources of news than ever, but any time you care to look at the Nielsen digital ratings you will find that nearly all of the top 10 positions, the top 10 most visited news sites, are owned by established local media brands. Allowing greater concentration of ownership through mergers will only lead to more job cuts and fewer voices in our media.

"The endless cost cutting we are experiencing is having a real impact on quality at the worst possible time. At a time when we are facing the challenge of malicious parties seeking to distribute fake news, public trust in our media becomes more important than ever. And that public trust is only going to be challenged further by the endless rounds of cost cutting and the resulting impact on quality that people see," MEAA told the committee.

MEAA recommended that the committee must look introduce government support for the media, particularly in the area of tax relief and tax incentives. MEAA said that the system of indirect and direct subsidies that operate in different parts of the world was something that the committee should look at, although MEAA also noted that that the issue of direct government subsidies for private media also presented a major ethical concern.

MEAA's accompanying submission to the inquiry was written with many contributions from MEAA journalists and members of the public, and was endorsed by MEAA's elected National Media Section committee. In the submission MEAA noted: "The digital disruption that has transformed the media has shaken everything we knew about our industry. There is no certainty. The audience is fragmented. That fragmentation has savaged revenue streams whether that revenue comes from advertising, subscriptions, circulation or eyeballs.

"Distribution and production of media has been separated by the internet with social media becoming a useful distribution tool, albeit one that effectively robs revenue. Social media uses news media's editorial content to lure advertising from news media to news 'aggregators'. Media organisations public and private have largely abandoned investing in their product and have resorted to seemingly never ending cost-cutting. At the same time that our industry and its established business models have been under attack, our profession is too," MEAA said.

The submission examined the current state of public interest journalism in Australia and provides many examples of government support for public interest journalism being utilised in other countries including Canada, Ireland, the US, France and others.

MEAA made a series of recommendations to the committee including:

- Restore and increase funding to public broadcasting.
- Tax incentives and other forms of support for rural and regional news outlets.
- More rigorous taxation of news aggregators.
- Consideration of a levy to raise funds from "digital disruptors" to be invested in public interest journalism.
- Consideration of direct and indirect government subsidies to media, with safeguards to protect editorial integrity from being compromised.
- Creation of a media diversity fund.
- Tax deductibility for news subscriptions.
- Industry assistance to retrain and re-educate journalists, along with innovation grants and other forms of assistance to maintain editorial staffing levels.
- Funding for counselling and assistance to media workers as they transition out of secure work.
- Extension of charitable or tax-exempt status to public interest journalism.
- Encourage the establishment of foundations or not-for-profit media outlets.
- Further investigation about how to extend workplace protections and collective bargaining to freelance journalists who work as independent contractors with poorer pay and less job security than permanent staff journalists.
- Defamation law reform.

In summary, MEAA said: "There is no magic bullet to restoring the media to the position it was in just six years ago. Digital disruption has and will continue to reshape the industry. There is no going back.

"But it is true that, unless something urgent and comprehensive is done the media will continue to collapse, redundancies will continue to reduce the number of journalist 'boots on the ground', audiences will become increasingly dissatisfied with media outlets and more susceptible to 'fake news', and the public will become less informed."

"Access to information is a human right. The media plays an essential role as the fourth estate in a healthy, functioning democracy. Government has for decades played a role in the structure and regulation of broadcast media. It is a major advertiser. It is time for government to foster, encourage, promote and support the media so that it can continue to function for all Australians."

The Senate select committee, which was beset by numerous personnel changes due in part to citizenship issues, released its final report on February 5, 2018.[91]

MEAA was encouraged that committee inquiry endorsed many of the recommendations made to it by MEAA. Among the committee's recommendations recommended and supported by MEAA are:

- Ensuring adequate funding for the ABC and SBS to ensure they meet their charter obligations – particularly in rural and regional services and fact-checking capacity;
- Providing surety for funding of the community broadcasting sector including for training and education and the rollout of digital;
- The development and implementation of a framework for tax deductibility status for not-for-profit news media;
- Treasury to model providing tax deductibility for news media subscriptions;
- An Australian Law Reform Commission audit of laws that adversely affect the work of journalists;
- A Council of Australian Governments' review of Australia's defamation law regime;
- Expansion of current whistleblower and journalist shield law provisions.

MEAA chief executive Paul Murphy said: "This is a clear vindication of what MEAA has been saying for many years: government can and should be doing more to support the media industry which is being hurt by the impact of digital technology and draconian laws that muzzle legitimate reporting in the public interest. The Committee has clearly acknowledged the vital role a healthy media industry plays in a strong democracy. The public broadcasters have a crucial role to play – they must be given the funding to ensure they can fulfil their duty under their charters. Commercial media is being adversely affected by the loss of revenue arising from digital disruption.

"In the past six years, thousands of journalist jobs have been lost. The result is that public interest journalism has been dangerously harmed. This report brings Australia in to line with best practice overseas, and demonstrates that there is much that can be done to ensure the media can continue its crucial role as the fourth estate and that journalists can get on with keeping their communities informed," Murphy said.[92]

MEAA said Google and Facebook have become a channel for news media content through which Australian media companies have seen their business models rendered obsolete

DIGITAL PLATFORMS

On December 4, 2017, arising from the Senate Select Committee's inquiry into the Future of Public Interest Journalism, the Australian Competition and Consumer Commission was directed to conduct an inquiry into digital platforms. The inquiry is examining "the effect that digital search engines, social media platforms and other digital content aggregation platforms have on competition in media and advertising services markets. In particular, the inquiry will look at the impact of digital platforms on the supply of news and journalistic content and the implications of this for media content creators, advertisers and consumers."[93]

Specifically, the inquiry's terms of reference noted that it would examine how "platform service providers are exercising market power in commercial dealings with the creators of journalistic content and advertisers; the impact of platform service providers on the level of choice and quality of news and journalistic content to consumers; the impact of platform service providers on media and advertising markets; the impact of longer-term trends, including innovation and technological change, on competition in media and advertising markets; and the impact of information asymmetry between platform service providers, advertisers and consumers and the effect on competition in media and advertising markets."[94]

In response, MEAA's submission to the inquiry[95] made several recommendations: *MEAA believes that effective standards should be established for digital platforms, especially those of scale. We support the following seven measures:*

- *That digital platforms of scale be classified as media companies for regulatory purposes;*
- *In the absence of Australian publishers and content creators being reasonably compensated for use of media content, an access-per-user fee or percentage of revenue charge be levied on digital platforms of scale, such funding to be retained for a contestable Public Interest Journalism Fund;*
- *That an effective "good faith" requirement be included in collective bargaining authorisations under section 88 of the* Competition and Consumer Act *to enable Australian media companies to engage in mutually satisfactory commercial negotiations;*
- *Inserting a mandatory 'public interest' test into section 50 of the Competition and Consumer Act – mergers and acquisitions;*
- *Fast-tracking the Productivity Commission's recommendations for a new Comprehensive Right for consumers to control their data and creation of a new* Data Sharing and Release Act*;*
- *That the Government consider increasing maximum penalties for 'mass' privacy/ data breaches; and*
- *That consumers be provided with plain language information about the extent of algorithm use and advised of safeguards.*

MEAA said that from the perspective of MEAA members, digital platforms enable the spread of their work to a wider audience and greater communication between journalist and media consumer. Journalists are increasingly required to upload content onto social media sites to capture clicks and create an online presence. But Google and Facebook have also become a channel for news media content through which Australian media companies have seen their business models rendered obsolete. "The fundamental cause of this obsolescence has been the free-fall in advertising revenues once relied upon by media companies to produce quality journalism across the breadth of public policy, business, justice, international affairs, sport and matters of general interest."

WITHOUT REGULATORY EFFORT AND MAJOR OPERATIONAL CHANGES, THE MEDIA SECTOR WILL BE FURTHER DIMINISHED

The submission noted that the media sector had lost about 3000 journalist positions since the growth of digital platforms escalated about 10 years ago." Unlike the well-documented slide in the Australian manufacturing sector, consumers cannot continue to purchase equivalent (or substitute) products to those displaced by the decline of the Australian media sector. There will be a loss of local news from regional Australia as it will not be carried by an international publisher."

MEAA said that many of the job losses at Australian media companies came through redundancies, which appeals to more senior journalists who have worked with an employer for many years. This loss of positions and knowledge has had quantitative and qualitative consequences, MEAA said. Newspaper content, whether the number of pages and volume of journalistic content contained therein, is significantly down on five and 10 years ago – a product of the inability of proprietors to cover all areas of consumer interest. The fragmentation of the sector has also pushed an increasing number of journalists into freelance work, which is far less secure and where earnings troughs can be more common than peaks.

"MEAA believes that rampant revenue displacement from media companies to digital providers should lead to an acknowledgement that digital platforms are modern news companies – discussed further on in this submission; it follows that they… must pay for the news and current affairs content."

MEAA also warned that the use of algorithms by these digital platforms is compromising media diversity. "Compartmentalising media consumers instead of valuing their potential breadth of interests is inherently harmful. The result of this mechanised 'tailoring' of content to a user can lead to what has been labelled a 'hivelike' way of living. In a democracy, the risks of confining sources of news information should be clear."

MEAA noted that a key manifestation of errant algorithms is the critical inability of algorithms to discern fake content from verified news information. "Whether this is due to inadequate human attention and/ or a misplaced reliance on technology, it is damaging. It creates confusion and fractures public trust with all news media, not just the disseminators," MEAA said.

The submission also noted that the platforms were making efforts to address the concerns of news media companies. MEAA said that it remains hopeful that the changes embraced by Google and Facebook will see growth in digital subscriptions, but we do not believe that they will restore the abundant losses suffered by media organisations in the last decade. Subscription fees cannot make up for the flight of advertising dollars to digital platforms.

Digital platforms plainly benefit from their carriage of news content. It is disingenuous to assert that the ability of users to access media content on their platforms does not aid their viability and revenue streams.

The viability of Australian media companies is unknown – even the best performing companies can only eek out modest profits after the now serial write-downs in masthead value, job shedding and the systematic culling of expensive public interest journalistic efforts.

The void is now growing larger and cannot be filled by (poorly or non-remunerated) freelance journalists and small online media entities with lower overheads, but a restricted breadth of stories. For journalism to be sustainable and serve a public purpose, funding is necessary.

MEAA has previously called (via the Public Interest Journalism Inquiry) for the Australian Government to provide concessional tax treatments to Australian media companies and subscribers. We have also presented evidence from Europe and elsewhere concerning arms' length direct and indirect government assistance to media companies via contestable funding rounds. We are however wary of how Government funding could itself be manipulated in favour of some, but not all media outlets.

MEAA's strong preference is for Australian media companies to be provided with a merit-based, free market. This can only be restored if the major digital platforms' distortive and unfair dissemination of news content is curtailed or commercially appropriate terms are agreed between publisher/broadcaster and digital platform(s).

We do not say that advertising revenues should be redirected from digital platforms to news media companies; this would constitute punishment of the digital platforms for providing what in many instances are superior advertising mechanism and audience reach.

MEAA's view is that the fruits of these platforms' carriage of news media content they do not produce should be paid for on an access-per-user or levy basis.

Finally, MEAA said that without regulatory effort and major operational changes by digital platforms, the media sector will be further diminished beyond the already very low levels of media diversity and quality content.

The MEAA submission concluded by saying: "The gravest risk of doing nothing is that those who invest in producing public interest and other journalism will not have the means to continue covering the news that impacts public information and discourse. The displacement of conventional media organisations (other than public broadcasters, which face funding challenges of their own) will lead to a dearth of content to upload and draw consumers in.

"Perversely, the last people standing will be those who aided the demise of pre-existing media companies. What quality news content will be left for them to disseminate?" MEAA said.

Striking Fairfax journalists rally outside The Age building in Melbourne after Fairfax announced on UNESCO World Press Freedom Day 2017 that it would cut 1-in-4 editorial positions from its metro newsrooms in Sydney, Melbourne and Canberra

REDUNDANCIES

The spate of redundancies affecting the media industry continued with Fairfax Media announcing on UNESCO World Press Freedom Day, May 3, 2017 that it would cut one in four editorial staff from its metropolitan newsrooms – a loss of 125 jobs out of 500.

The announcement sparked industrial action by Fairfax journalists that included a seven-day strike, in turn generating enormous community support for the journalists and triggering a Senate select committee to be established to inquire into the future of public interest journalism.

Fairfax Media journalists also wrote[96] to the company's board and shareholders about management's plan. The journalists set out the journalists' case for the company to act smarter by investing in quality journalism rather than undermining the company's products by making yet more radical cost-savings cuts by forcing redundancies on editorial staff.

The letter said the Fairfax board of directors' strategy of "cutting the way to profitability" was flawed, adding that Fairfax businesses flourish because of the company's journalism and that, because of this, Fairfax should invest in its journalism because it makes sound business sense. The letter cites the plan to float the Domain business as an example.

"We believe it's demonstrably the case that these businesses will succeed largely because of, not despite, their association with the tremendous journalism at such great titles as *The Age*, *Australian Financial Review* and *The Sydney Morning Herald*.
"It thus makes sense to reinvest a portion of that success in our news-rooms, not necessarily out of a sense of civic duty (though that counts too) but because it makes sound business sense. Fairfax will only prosper in the 21st century if it nourishes the journalism that delivers its valuable audiences and sustains its storied mastheads."

Around the world, journalists expressed their support for the Fairfax journalists.[97] In a particularly poignant gesture, the courageous Journalists' Union of Turkey, which is confronting a government purge of the media that includes the arrest and detention of more than 100 journalists and the closure of dozens of media outlets throwing hundreds of journalists out of work, has offered its support and solidarity to Fairfax journalists.
The global journalists association, the International Federation of Journalists, which represents more than 600,000 journalists in 139 countries, strongly criticised Fairfax management's decision to cut 125 of its journalists to save money. "The IFJ stands in solidarity with the Fairfax staff," the Brussels-based organisation said in a statement. The IFJ general secretary, Anthony Bellanger, said: "On the day that we stand together and celebrate the brave work of journalists across the world, we are now standing in solidarity with our Fairfax colleagues and their continued fight for their jobs. We call on Fairfax management to take immediate steps to remedy the situation, without losing more jobs."

Messages of support from around the world came flooding in. Sharan Burrow, general secretary of the International Trade Union Confederation in Brussels, said: "We were shocked to hear of the unilateral and deeply damaging plan of Fairfax management to cut 125 full-time equivalent jobs, at a time when the world is crying out for quality journalism to combat the lies, distortions and fake news which are driving xenophobic, nationalistic and extremely dangerous political narratives. On behalf of the International Trade Union Confederation, representing 181 million trade union members worldwide, I wish to join with the International Federation of Journalists in expressing our total solidarity with your action. We are witnessing a closing of democratic space around the world, and the exercise of free speech and good journalism are vital to democracy itself. The decision of Fairfax management is wrong and misguided, and the international trade union movement stands with you every step of the way in your campaign to reverse it."
Tim Dawson, president, and Seamus Dooley, acting general secretary, of the National Union of Journalists – UK and Ireland, said: "We learned with great concern of the decision of Fairfax Media to enforce sweeping redundancies at *The Sydney Morning Herald*, *The Age* and *Australian Financial Review*. The axing of 125 jobs will have a devastating impact on the workers and their families. The proposed cuts will severely damage the titles at a time when editorial investment is crucial to retaining audiences. On behalf of NUJ members in the UK and Ireland we extend solidarity to your members and congratulate you on the swift response to the announcement of unilateral action on the part of the company. We wish you will well in your strike action and assure you of our strong support.

Additional statements of support came from journalists' unions in Spain, Belgium, Ukraine, Turkey, Germany, Canada, Tunisia, Switzerland, Russia, Nepal, Thailand, Palestine, Vanuatu, Afghanistan, Sri Lanka, Indonesia, Somalia, France, Italy, India, Malaysia, Pakistan, Ecuador and Morocco.[98]

In April 2017 News Corp announced redundancies at its metropolitan and community titles around the country. Photographic staff and production roles were targeted in the cuts. In some cities, up to two-thirds of the photographic staff would be cut, although exact numbers have not yet been confirmed by the company at all sites. Staff were told redundant photographers would be able to freelance back for News Corp, and provide content as freelancers via photographic contractors Getty and AAP.

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

MEAA's Media section director Katelin McInerney said: "The job redundancies that will result will only serve to strip vital editorial talent from the company's mastheads, harm the very products that News Corp's audiences value and end up being self-defeating because of the damage they do. These are mastheads that pride themselves on being newspapers of the people and a voice for the communities they serve – these cuts serve no-one.

"News Corp readers and the communities that these journalists serve deserve better. Once again it is front line editorial staff in already stretched newsrooms – the very people audiences rely on to tell their stories – who are bearing the brunt of these short-sighted cuts for short-term shareholder gains," McInerney said. "Time and time again we have seen that cuts to front line media staff ultimately do not deliver the kinds of savings for media companies that get them out of the woods," she said.

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

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

In May 2017, the ABC announced the axing of its Fact Check unit (subsequently recreated as a joint venture with RMIT University) and 14 positions to be cut from the Perth, Brisbane, Sydney, and Melbourne newsrooms has been made more painful by yet another deplorable use of targeted redundancies.

WE ARE SHOCKED TO HEAR OF THE PLAN TO CUT 125 JOBS AT A TIME WHEN THE WORLD IS CRYING OUT FOR QUALITY JOURNALISM

NOBODY WINS WHEN EDITORIAL IS UNDER-APPRECIATED IN THIS WAY

The cuts were the result of the ABC's enhanced newsgathering budget being cut by $18.6 million over the next three years.

"As we had warned, these cuts – on top of the more than $250 million which was cut in 2014 and 2015 – will place news services at the ABC under extreme pressure," said MEAA CEO Paul Murphy. "The timing for this decision could not be worse – in the lead-up to the federal election, when strong journalism to independently scrutinise politicians' claims and counter-claims is needed." It is disturbing that even after these cuts, the director of ABC News Gaven Morris has warned of more challenges to continue delivering original and investigative journalism and local and regional newsgathering."

In June 2017 Seven West's division Pacific Magazines announced 11 redundancies and flagged the outsourcing of sub-editing to Pagemasters. MEAA's McInerney said: "Cutting in-house expertise is a short-sighted move that seeks to cut costs while ultimately undermining quality. Sub-editing is a highly developed skill and removing that capability from within your publishing business inevitably comes at a cost. MEAA calls on Pacific Magazines to find smarter solutions that achieve the company's aims while maintaining jobs and upholding quality."

The company announced 11 redundancies as well as other changes that will affect advertising, digital and production staff. MEAA provided assistance and advice to its members at Pacific Magazines during this period.

In November 2017, Isentia announced 30 jobs would be lost as it moved its broadcast monitoring service to the Philippines. Isentia made all 22 full-time, part-time and casual staff in its Melbourne broadcast monitoring arm redundant.

McInerney said workers shouldn't have to pay the price of poor decisions. "The media monitoring service is relied on by politicians, corporations and those in power," she said.

"The continued drive of media companies like Isentia to pursue profits at the cost of local jobs is short-sighted and emblematic of poor business practice. Culling local people who have essential knowledge and expertise only serves to harm the business further, eroding growth opportunities and causing immense damage to the brand. Workers shouldn't have to pay the price of poor decisions that have been made since the company listed on the ASX."[99]

In early November 2017 dozens of suburban newspaper journalists in Sydney and Melbourne were told they would find themselves jobless just weeks before Christmas in yet another round of cost-cutting by the two largest publishers.[100]

MEAA condemned the announcements by Fairfax Media and News Corporation of the axing of up to 31 jobs as yet another example of the companies' failed cost-cutting without any serious consideration of how communities will access local news, information and entertainment if their suburban newspapers are so dramatically savaged.

On November 9 Fairfax announced it was closing six community newspapers in Sydney with the loss of 11 jobs, seven in editorial, and making seven staff redundant at *The Weekly Review* in Melbourne – removing virtually all the employed staff on that masthead in favour of freelance contributors. On November 8, News announced a 20 per cent reduction in editorial staff from its Leader community newspaper group in Melbourne – a loss of 13 positions.

McInerney said: "These decisions are a cruel blow to loyal and hard-working staff in the last few weeks before Christmas. The subsequent massive reduction in resources also means that for those staff that remain behind, their already massive workload will most likely increase to unrealistic levels.

"The move to switch from employed staff to freelance contributors suggests Fairfax will once again use a labour hire firm to farm out work to freelancers in exchange for poor word rates while the firm earns a fee from Fairfax," McInerney said.

"Nobody wins when editorial is under-appreciated in this way. Communities lose a vital public service and the right to be informed of the news and information in their local area. And journalists, both employed and freelance, are left to try to work harder while often earning less. Australia's two largest media companies are failing to invest for the future and are simply falling back on failed cost-cutting formulas that simply do not work," McInerney said.

MEAA assisted staff and worked with members to ensure that the companies' obligations towards staff under the respective enterprise agreements are fully met.

GENDER

On September 22, 2017 MEAA issued a statement saying that it was concerned and deeply frustrated that media companies continue to treat sexual harassment, and those who are brave enough to raise it, with contempt.

MEAA said it regularly deals with media employers who run roughshod over employees' rights when dealing with complaints to protect the company's reputation rather than protect the health and safety of their journalists and employees.

"This was certainly the case in the matter involving a now former Seven Network cadet journalist in Adelaide, whose case highlights the timely need for senior media executives – who are predominantly men – to take direct responsibility for ensuring the toxic culture that allows sexual harassment to be perpetuated, that protects perpetrators and that fails to protect the most vulnerable employees, is stamped out for good."

A survey conducted by Women in Media - an initiative developed by MEAA - and reported in *Mates over Merit*,[101] found that of 1000 participants some 48 per cent of women respondents have experienced intimidation, abuse or sexual harassment in the workplace. One in three women (34 per cent) did not feel confident to speak up about discrimination. The incidence of harassment is somewhat lower among those who have joined the profession in the last five years (37 per cent) but increase with tenure in the industry to nearly 60 per cent.

MEAA Media section director Katelin McInerney said: "When we released *Mates over Merit* in 2016 we called media organisations to put policies into practice. Clearly this incident at Seven shows we are a long way off seeing employers implementing these policies. It is time for media executives to put their money where their mouths are: take a direct leadership approach to stamp out harassment and to support women in then media when they do come forward."

Women in Media's national convener Tracey Spicer said she was "appalled" at the treatment of the cadet by the Seven Network, but she continues to hear from women working in the industry that sexual harassment is still part of the territory and companies are doing little to support women when they come forward.

"We all expect that these kinds of attitudes and reactions from media companies to allegations of sexual harassment have been left in the bad old days of the 1980s and '90s. But our Women in Media research shows that simply isn't the case. Professional women face sexual harassment and discrimination in their workplaces every day, and it is time media executives take direct ownership of the stamping out of this toxic culture that allows harassment to continue and that ensures senior, predominantly male perpetrators continue to be protected.

"It has to end, now. This destroys the lives and livelihoods of hard-working women doing great work and it has to end now," Spicer said.

MEAA said that while there would be some variation in workplace policies, the basic principle is that procedural fairness has to apply. McInerney said: "This is an area of workplace and industrial

knowledge that is generally not well known or understood my employees - and employers often ensure it stays that way in their own interests. Subsequently any policies relating to raising complaints are either hard to find or not enforced.

"If an employee makes a formal complaint to their employer, the employer has an obligation to investigate because there is a work health and safety issue and a duty of care on the employer to ensure the employee works in a safe and healthy environment. If a complaint is made against a member of staff, procedural fairness must also be afforded to them. An employee has the right during this process to be represented by their union or to have a support person present with them when making the complaint and during any subsequent investigations conducted by the employer," McInerney said.

If a formal complaint has been made, the employer is obligated to investigate. Under workplace health and safety legislation, if a hazard is identified the employer is obligated to assess the risk and take measures to mitigate and if the employer does not, then it is potentially negligent so any injury that might result from that exposes the employer to prosecution and other litigation.

If the employer fails to investigate a complaint, union members can contact their union to seek further advice and representation in the matter.

If a colleague makes a complaint against an employee, procedural fairness should apply. If there is an enterprise agreement in place there may be an additional entitlement to representation during disputes or disciplinary meetings.

MEAA has written directly to the Seven Network about various issues relating to employer investigations and sexual harassment in the workplace.

"MEAA believes in order to be afforded procedural fairness you should be notified of the meeting 24 hours in advance; you should be notified about the nature and agenda of the meeting will be and that you should be informed of your right to have a support person or a representative from your union present at that meeting. You should be afforded the opportunity to provide a considered response, particularly if the matter is disciplinary in nature."

Regarding the question of electronically recording the meeting, the relevant legislation varies from state to state. In South Australia you are entitled to record a conversation to protect your legal rights, however in NSW a conversation can only be recorded where the other party consents.

Regarding the employer accessing an employee's emails, McInerney says: "It is difficult to know how prevalent this is. However, your contract of employment and likely various workplace policies will often state that work emails are accessible by your employer at any time, and certainly MEAA's approach – particularly in the media realm – is to assume that: if you are operating on the employer's system, unless there are provisions in place that explicitly prevent your employer accessing your emails set out in your contract or enterprise agreement, the employer has unrestrained access to your work emails."

Sexual harassment in the media has been reported on a number of times in recent years – Louise North's 2012 study reported in *The Australian* on February 27, 2012[102] found that 57 per cent of the 577 female journalists surveyed had experienced sexual harassment.

An earlier MEAA survey through International Federation of Journalists in 1996 found that fewer than 52 per cent of respondents reported experiencing harassment. "While the media often shine a light on gender inequality in other occupations, it has refused to act on its own dirty little secret," North said.

In March 2018 Tracey Spicer announced a cross-industry initiative to combat sexual harassment in workplaces across the spectrum.

NOW is a not-for-profit non-partisan organisation, led by the media and entertainment sector, devoted to ending sexual harassment in all Australian workplaces. It aims to connect survivors of workplace sexual harassment and assault with the right counselling and legal support, as well as fund research and education programs, work with government, business, statutory authorities, unions, community and legal sectors to develop solutions for the future.[103]

On Equal Pay Day, Monday, September 4, MEAA encouraged members to "do your bit to end the gender pay gap in our industry" by taking action and calling on all media employers to take action to close the gender pay gap.[104]

The media industry's gender pay gap is 23.3 per cent for people working in print and publishing and 22.2 per cent (for people in broadcasting. That places the media industry far beyond the national average of 15.6 per cent.

MEAA called on employers to take immediate steps to improve their organisation's action on closing the gender pay and opportunity gap:

- Implement tracking and transparency about the gender pay relationship;
- Create family-friendly workplaces; and
- Dedicate their annual merit budget to fixing the problem of unfair pay.

A 2012 STUDY FOUND 57 PER CENT OF THE 577 FEMALE JOURNALISTS SURVEYED HAD EXPERIENCED SEXUAL HARASSMENT

The Australian Federal Police, the Australian Border Force and the Australian Security Intelligence Organisation will all be under one department.
Image: AFP

THE "SUPER" MINISTRY

On July 19, 2017 MEAA issued a statement about its concerns with the Government's proposal to create a super Home Affairs ministry. Of particular concern was the anticipated concentration of surveillance powers in the new ministry without any adequate external oversight.105

MEAA said it believed the corralling of several government agencies with poor records for observing and respecting press freedom and transparency into one giant bureaucracy, raises profound concerns.

MEAA chief executive Paul Murphy said: "Yesterday's announcement of a super ministry is deeply troubling for press freedom in Australia. Coming on the back of last week's announcement on encryption, the government's appetite for discovering all manner of inconvenient information including that which is plainly in the public interest, shows no sign of being whetted.

"The new Home Affairs ministry doesn't even appear to have the support of a range of national security specialists and key members of the Cabinet. Their concerns have been overridden in the interests of creating a one-stop shop for oppression of public discourse.

"We now have a situation where the militarised Australian Border Force, with its extreme powers to imprison whistleblowers now sits alongside ASIO, with its ability to imprison journalists and their sources for up to 10 years. These two agencies will now sit together with the Australian Federal Police which in April admitted it had illegally accessed a journalist's telecommunications data without a warrant," Murphy said.

"It seems the only law reform the Government is interested in is re-doubling its efforts to punish those who dare speak out in the public interest. The Government seeks utter transparency from its citizens, but is not prepared to demonstrate some if its own," he said.

MEAA's annual reports into the state of press freedom in Australia have catalogued the numerous attacks and threats against journalists and their sources by Australian governments since 2001. "There is completely inadequate oversight of our security agencies. The previous Independent National Security Legislation Monitor (INSLM) resigned less than two years into the three-year position, citing an ongoing lack of resources. It's unclear when the new Monitor will be able to take up the post or whether the resources available to the Monitor will improve," Murphy said.

"As we have a said before: there is real concern that government agencies could once again misuse their powers to go after whistleblowers, to go after journalism. There will be appalling consequences if extreme powers such as those being sought are again misused to persecute journalists and their sources."

PUBLIC BROADCASTING

The Coalition Government's politicised attacks on public broadcasting in Australia have continued during the past 12 months. The attacks continue to undermine the vital role public broadcasting plays in Australian life – particularly in the areas of news and information; weakens public broadcasting at a time when commercial broadcasting is struggling due to the challenges of digital disruption – particularly for audiences in rural, regional and remote Australia; and represent a concerted politically-motivated assault on press freedom in Australia.

The Australian Broadcasting Corporation's Ultimo Centre

PUBLIC INTEREST JOURNALISM

MEAA addressed these concerns in its submission to the Senate select committee on the Future of Public Interest Journalism.[106] MEAA stated that "political decisions have led to dramatic funding cuts to Australia's public broadcasters. The broadcasters have had to cut their cloth to suit. These funding cuts have not been imposed for the same economic imperatives that have led to the editorial cuts at commercial media houses; they have been purely partisan political decisions that can be seen as revenge at worst or constraints at best."

The MEAA submission noted that the ABC consistently ranks as one of Australia's most trusted and respected institutions but it has been undermined in recent years by political attacks on its journalism and a series of funding cuts.

Since 2014, about $270 million has been cut from ABC funding, and ABC base funding has been cut – in real terms – by almost 25 per cent over the past 30 years. These funding cuts have placed enormous stress upon the ABC, which is being asked to do more with less, particularly on digital platforms.

The impact of the cuts can be seen in the constant redundancies being implemented, the axing of popular programs like *Catalyst* on ABC TV and music programs on Radio National, the doubts about the future of ABC Classic FM, and the outsourcing of comedy and drama programming to private producers.

Constant cuts are also negatively affecting the ABC's ability to fund public interest journalism and local newsrooms. Budget cuts in 2014 saw the elimination of the local Friday edition *7.30* program (formerly called *Stateline*), from all states and territories diminishing the in-depth coverage of state politics, health, education and environmental issues.

Deep cuts to reporting staff, field crews, travel budgets and other current affairs programs have also occurred across capital city newsrooms over the last three years. This month the state issues TV program *Australia Wide*, has been eliminated, and plans to downsize influential radio shows *AM, PM* and *The World Today* look likely. International bureaus have also been downscaled over the last decade following the cancellation of Australia Network – with many overseas bureaus manned by single-person video-journalists.

The single biggest contribution that could be made would be the reinstatement of *7.30* state programs. It would answer many of the questions about weekly scrutiny of state matters that are falling by the wayside. This is a space no private media has entered with any rigour. However, the stories picked up in the states and regions through this programming would undoubtedly be followed up by other media organisations. This is not an area where they are competing, despite its importance. If funding could be guaranteed to this sort of programming, the resourcing of state and regional bureaus would need to be strengthened and mandated.

However, at present the ABC looks likely to make more local cuts and continue to centralise its major news and current affairs resources in Sydney, and reinvest savings away from journalism and into entertainment and new digital platforms. This is to the detriment of its state and international coverage across the country.

The increasing use of casualisation and short-term contracts in remaining staff pools is also diminishing the capacity for fearless, investigative public interest journalism.

ABC journalists, editorial and support staff have more than delivered higher productivity in these difficult conditions, continuing to produce high quality and independent news and current affairs content and programming. But this is unsustainable without increased funding.

Public broadcasters increasingly have to fill the gaps left when commercial media outlets withdraw their editorial coverage of key areas. Reducing funding not only has an impact on the editorial resources the broadcasters can bring to bear; it also undermines their charter responsibilities to the Australian community and cripples their ability to meet the demands of technological innovation and development.

Clearly, as the current media environment continues to put pressure on media outlets, the ABC is going to have to play an increased role in the provision of news, information and entertainment as commercial media companies cut back on editorial staff. Funding needs to be restored to the ABC and new funds should be provided to ensure the ABC can provide local news as well as fill the gaps in the provision of regional and remote news where commercial providers have cut back or ceased to exist.

MEAA urged consideration to be given to exploring what is a proper funding level to restore public broadcasting to its previous levels and to ensure that it can at least be one of the all too few voices available to Australian audiences should commercial media continue to contract and abandon traditional reporting areas.

If an agreed funding formula could be found, MEAA said, funding should be quarantined from cuts in future budgets and instead guaranteed and regularly reviewed.

The situation is similar at SBS where there seems to be an assumption that, because it is able to attract some advertising through its hybrid funding model, its needs are now satisfied. But the funding cuts imposed on that broadcaster have also led to dramatic cuts to its resources, capabilities and program offerings.

"And yet there continue to be short-sighted, mainly political, demands that the ABC and SBS should merge – usually a vision that seeks to derive some fiduciary benefit rather than a thorough understanding of what a merger would mean," MEAA said.

MEAA also noted that talk of an ABC-SBS merger is "a distraction from serious issues of underfunding faced by both public broadcasters. MEAA is sceptical that an effective argument could be mounted to bring the two institutions together. Merger efforts tend to have more to do with 'saving the silverware' than improving operations and content offerings."

The rationale for a merger seems to be only about making savings. But this simply papers over the real issue that public broadcasting in this country is underfunded for the digital age. This must be addressed as a matter of priority.

MEAA acknowledged that discussions about transmission costs and platform sharing are good and worthwhile but any savings won't address the underlying funding issue. Plus, what happens when the modest savings from a merger are absorbed? It would be extremely naïve to believe that savings could be reinvested into programming and content rather than taken by the government of the day.

Any financial benefits from a merger would need to be balanced against the likely negative impact on the audiences of the ABC and SBS. Also, staff at the ABC and SBS are still going through a painful period of cost-cutting, programming changes and redundancies, and what is needed is funding restoration, not more uncertainty.

Furthermore, it is clear that the funding cutbacks are having a deleterious effect on how both broadcasters present themselves through their programming to the whole of the nation. The cutbacks have increasingly required management to centralise operations in the Sydney corporate headquarters. State-based programming opportunities have been slashed, the regional presence has been reduced and services for indigenous and multicultural communities have suffered as a result.

The two public broadcasters have become Sydney-centric in the extreme, particularly when compared with their commercial counterparts in TV and radio programming. Both ABC and SBS have a legislated obligation to tell Australian stories, to provide relevant and local coverage to all communities, to enrich our national cultural life, and to provide balance, accuracy and independence to our national debate – regardless of geographic location. Their funding must be increased to allow them to do that.

In the same submission, MEAA also addressed the role public broadcasting has in regional and rural Australia.

RURAL AND REGIONAL AUSTRALIA

The submission also looked at the role of public broadcasting in the regions. It noted that the structural decline in privately funded media has been felt at least as harshly in regional as well as metropolitan areas. Regional television newsrooms have closed or been scaled back as never before.[107] To exacerbate the decline in regional news delivery, the ABC's budget was cut by $254 million from 2014 to 2019.

MEAA said the ABC is a core regional media organisation in Australia – it serves as both a quality and trustworthy news source and as a safety net. "A potent blend of funding cuts and misdirected organisational priorities has seen the ABC's ability to deliver stories of scale and substance to regional communities severely hampered."

Senator Mitch Fifield Minister for Communications and the Arts, Image courtesy Andrew Meares, Fairfax Photos

Inconsistent and reduced regional funding makes it extremely difficult to attract and retain journalists in regional and rural locations and for them to develop familiarity with an area. It follows that the corporation's ability to cover and report stories of regional interest and significance is severely compromised.

The submission said: "There is some opacity to the true number of ABC employees in regional and rural locations and those providing content to those locations. The ABC did report regional employee numbers in 1996 (1029 "regional services" employees), 1999 (1082 in "local and regional services") and as recently as 2008, when it reported 946.5 employees in "radio and regional content". The ABC's 2016 Annual Report included a pie chart that stated that 10.07 per cent of employees worked in regional areas. On current figures, this equates to 421 employees.

"Looking at the figures from another angle, the number of regional and rural employees has been reduced from 25 per cent of employees in 1998 to 10.07 per cent of employees in 2016.[108] It does appear that the number of ABC regional employees has fallen far faster than overall employment levels."

The loss of regional and rural journalism resources was canvassed in 2012's Finkelstein report which noted that, "although most attention is at a national level, often the short-comings in journalistic surveillance and in the richness of the media environment are felt most at local levels, outside the major cities. This is one area, however, where a small investment by government could produce significant improvement. Small regional communities are poorly served for local news and the inquiry is of the view that the situation could be ameliorated with some limited support by the government." [109]

In contemplating the ABC as the recipient of additional funds, the Finkelstein inquiry noted that "the additional funding could be tied to specifically designated functions and conditional upon specific undertakings on its use".[110]

MEAA said it would strongly support such an initiative.

"FAIR AND BALANCED"

On November 16 2017, the Senate referred the *Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017* to the Senate Environment and Communications Legislation Committee for inquiry.[111] The Bill was introduced by the Turnbull Government to satisfy Pauline Hanson's One Nation Party in exchange for the latter's support for the Coalition's package of media reforms.[112]

On December 15, 2017, MEAA made a submission to the inquiry. MEAA stated that the Bill was misleading and dangerous, and should be withdrawn without further debate. [113]

MEAA rejected the inference contained in the Bill inferred that balance and fairness are not present in the ABC's editorial operations.

MEAA noted that the corporation's detailed editorial policies already recognise all necessary professional journalistic standards and that the policies exceed, in scope and length, any other known editorial policies covering Australian media organisations.

MEAA also noted the Bill's introduction came six months after the Fox News Network in the United States abandoned its provocative "fair and balanced" motto, which was surely the inspiration for the attack on the ABC's independence.[114]

The Bill seeks to amend section 8(1)(c) of the *Australian Broadcasting Corporation Act 1983*. The redundancy of the proposed amendment is self-evident: section 8(1)(c) already requires accuracy and impartiality "according to the recognised standards of objective journalism". Elsewhere in the ABC's editorial policies, concepts and duties related to independence, integrity, objectivity, impartiality, together with the need for "fair and honest dealing"[115] are acknowledged and articulated.

ABC managing director Michelle Guthrie has expressed mystification with the purpose of the Bill. She stated at an Estimates hearing held in October 2017 that: "So I query, again, what problem we're trying to solve to add those words into the charter. Frankly, we are concerned about how those words will be read, certainly, by people who choose to take an aggressive view towards achieving a false balance, I guess, not based on the weight of evidence."[116]

MEAA also concurs with the ABC's head of editorial policy Alan Sunderland's commentary on the merits of the Bill. Sunderland's told a Senate estimate's hearing: "Notions of fairness and balance need to be carefully unpacked and explained in order to avoid some of the pernicious issues that can affect journalism around false balance. So I think putting them in the charter in the duties of the board is a combination of unnecessary and potentially misleading. I think that, while those notions can and do exist, they exist in a very carefully described and contextualised way already in our policies, and that's where they belong."[117]

In his commentary for ABC Online on 2 November, 2017, Sunderland noted that: "When it comes to 'balance', we explain very carefully that 'impartiality does not require that every perspective receives equal time', but that one of the hallmarks of good journalism is balance that 'follows the weight of evidence'.

"In short, 'fairness' and 'balance' are not and never have been recognised standards of objective journalism. They can be helpful indicators of impartiality and accuracy, but only if they are put in the right context and used wisely. In other words, if something is 'accurate and impartial' it will always meet the recognised standards of objective journalism. If it is fair and balanced, it might not." [118]

MEAA also noted that the Communications Minister Mitch Fifield has sought to justify the Bill by reference to MEAA's *Journalist Code of Ethics*, which he said "refers to 'fairness' no less than six times."[119]

MEAA's first Code of Ethics was introduced in 1944 by MEAA media's forerunner, the Australian Journalists Association. Neither at that time nor at any point has the Code ever mentioned "balance" as an ethical requirement.

In Clause 1 the Code states, "Do your utmost to give a fair opportunity for reply"[120]. This was added to clause 1 in the late 1990s. The report of the Ethics Review Committee that informed this amendment said about a "right of reply":

"The standard does not go as far as making the giving an opportunity an absolute requirement, because there will be occasions when, despite reasonable efforts made in good faith, the subject of the report cannot be contacted. Or… the subject may have 'gone to ground'."[121]

MEAA noted in its submission that a "right of reply" is not the same as "balance". Balance assumes that multi-faceted discussion is taking place and that, despite the merits of some parts of the discussion and the unworthiness of other parts, each and every side must be given equal measure. "The practice of journalism, through newsgathering and news reporting, does not work that way because facts are not elastic."

MEAA added that the MEAA *Journalist Code of Ethics* makes it clear in that same first clause that MEAA Media's members have an obligation to "report and interpret honestly, striving for accuracy, fairness, and disclosure of all essential facts."

Importantly, MEAA contended that requiring journalists to apply the Bill's notion of balance may compel them to apply a distorting emphasis to irrelevant, non-newsworthy material that is not factually based.

Indeed, a fair and contextual reading of the MEAA *Journalist Code of Ethics* undermines the Minister's observations about the Code's contents, MEAA said in its submission. "In each case where the word "fairness" appears on the Code of Ethics, it has power and certainty. Out of context, as expressed in the proposed legislation – "fair and balanced" – it is at best meaningless and at worst dangerous. It could far too easily be interpreted as a demand that every piece of journalism contain equal amounts of coverage from or about opposing views. That is not objectivity (which is what we all demand of quality journalism). Real objectivity entails presenting, to the best of one's capacity, impartiality rather than artificially determined word counts, sound bites or images."[122]

COMPETITIVE NEUTRALITY OF THE NATIONAL BROADCASTERS INQUIRY

This is another measure promised as part of the media reform package. On March 29, 2018, the Turnbull Government appointed a panel to conduct an inquiry into the competitive neutrality of the two public broadcasters. The Government says the "inquiry will examine whether the ABC and SBS are operating in a manner consistent with the principles of competitive neutrality. These principles provide that government business activities should not enjoy net competitive advantages simply by virtue of their public sector ownership."[123] The panel will consult relevant stakeholders during the Inquiry and be supported by our National Broadcaster Review Taskforce.

Robert Kerr, a consulting economist and former head of staff at the Commonwealth Productivity Commission, will chair the panel which includes former Free TV chief executive Julie Flynn and director and producer Sandra Levy.[124]

The government has told the panel to inquire into the:

- Application of competitive neutrality principles to the business activities of the ABC and SBS, including in operational decision-making and risk management;
- Regulatory obligations for the ABC and SBS compared to those for private sector operators, insofar as this these relate to competitive neutrality principles;
- Adequacy of current compliance and reporting arrangements; and
- Complaints and accountability mechanisms operated by the broadcasters, insofar as they relate to competitive neutrality principles.[125]

SBS said it would fully cooperate with the inquiry. Managing director Michael Ebied noted that "it is difficult to contemplate how a broadcaster the size of SBS that has its commercial operations limited by legislation could be a threat to the business activities of its commercial counterparts, which benefited only recently from changes to media laws and a major reduction of their licence fees."[126]

MEDIA OWNERSHIP

On July 24, 2017 MEAA made a submission to the Australian Competition and Consumer Commission's (ACCC) review of the potential joint bid for interests in Ten Network Holdings by two private companies Birketu and Illyria.

In its submission MEAA noted that there is an understanding and acceptance that the concentration of media ownership in Australia is one of the highest in the world.[127]

The companies that were being review are owned by Bruce Gordon and Lachlan Murdoch respectively.

The ACCC's request for submissions outlined that Murdoch is a key player in US media conglomerate News Corporation. He is an investor through the Murdoch family's 39 per cent investment in News Corp and 21st Century Fox. The ACCC request also recorded his personal links with Ten – he is a former acting chairman; he already owned 7.44 per cent of Ten through Illyria and his family has an interest through News Corporation's stake in Foxtel which is 13.9 per cent of Ten. Murdoch also owns a substantial radio network and 21st Century Fox has a programming deal with Ten. There are other Murdoch investments that also have programming arrangements or opportunities with Ten.

Similarly, the ACCC's request for submissions made clear Gordon's existing investment in Ten, his ownership of the WIN Network and his stake in the Nine Network.

In its submission MEAA stated that the situation outlined in the ACCC's request amply demonstrated that the two potential bidders already enjoy substantial media interests and it would not be satisfactory for Illyria, in particular, to be successful in acquiring a 50 per cent stake in Ten given the extent of the existing media interests of Illyria and Murdoch.

MEAA noted that the parties to the potential transaction had sought consideration of their partnership in circumstances where two existing media ownership laws – two-out-of-three and the reach rule – barred such a transaction occurring.

"It is perhaps a reflection of the parties' assumed strength in the Australian media that such a bold endeavour, plainly aimed at pressuring regulators – would be advanced. We are not aware of a precedent for acquisitions being sought when the law is plainly against such endeavours," MEAA said.

MEAA added that Ten employees, who were anxious to learn of their professional future, may be being compelled into supporting (or not opposing) the first potential takeover offer. "Our members at Ten Network have received no undertakings as to their employment security or the maintenance of quality news media content. This potential deal also does a disservice to the public interest in maintaining plurality in media ownership. Any changes to the two-out-of-three rule will undoubtedly usher in further consolidation."

On August 24, 2017, the ACCC announced it would not oppose the joint bid.[128] However, subsequent to that decision, the CBS Network of the United States made a $41 million takeover offer for the network which was successful.[129]

In a statement, MEAA welcomed the positive intent from CBS and noted that CBS had a pre-existing relationship with Ten. As an investor in Eleven (CBS owns one-third) and long-term program supplier, CBS appeared well-placed to provide continuity and certainty for staff.

MEAA also noted that removing the two out of three ownership rule was not required to ensure the survival of Ten. "Media diversity is vital to the health of our democracy and the national conversation. Ten has endured significant sweeping cuts to its newsgathering capability in recent years. MEAA hopes the prospect of stability at the network will lead to greater investment in news production and editorial staff."[130]

GOVERNMENT MEDIA REFORM PACKAGE

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

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

- A person from controlling commercial television licences whose combined licence area populations reach more than 75 per cent of the Australian population (known as the "reach rule"); and
- A person from controlling more than two of the three regulated forms of media (commercial radio, commercial television and associated newspapers) in one commercial radio licence area (known as the "two-out-of-three rule").

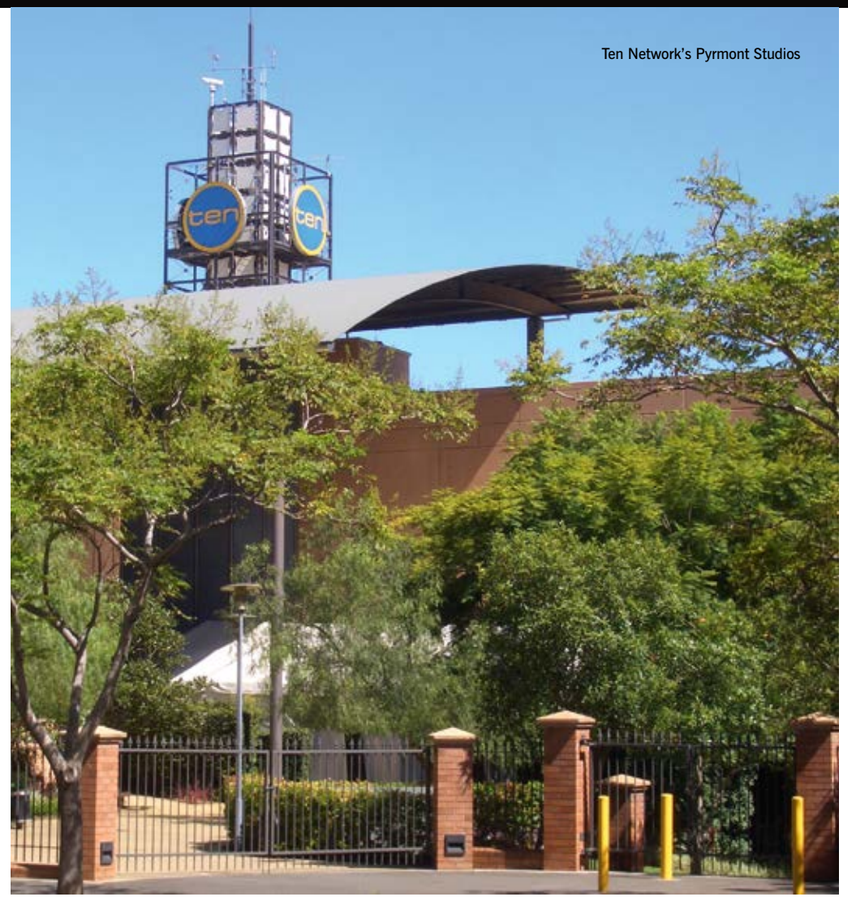
The Government said its reform package would also "strengthen local content obligations on regional commercial television licensees following a change in control, such as a merger, that results in them being part of a group whose combined licence area populations reach more than 75 per cent of the Australian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

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

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

This latest package of media reforms dates from March 9, 2014 when the then Communications Minister Malcolm Turnbull said that the government was considering changes to the media ownership laws to reflect changes in the industry due to the rise of the internet.[131] "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[132]. But Turnbull argued content was not the same as ownership,



Ten Network's Pyrmont Studios

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[133].

Finally, on March 1, 2016 the government tabled its media reform legislation.[134] 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.[135]

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 believed 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 supported 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 supported the extension of local content requirements following trigger events.[136] "This is a necessary and desirable change," MEAA said.

But MEAA was 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 was concerned that the bill's dominant focus was 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 said this approach undermined the public policy benefits of media diversity. While MEAA favours a genuine levelling of the playing field, fewer voices would 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, MEAA supported a single, platform-neutral "converged" regulator oversighting a common regulatory regime.

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

MEAA was 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.[137]

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

MEAA said it believed 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".[138]

MEAA did 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".[139]

MEAA supported 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 said it believed 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.

As debate about the media reform package continued in the Parliament, MEAA issued a statement expressing its concerns.[140] MEAA reiterated its belief that the removal of the two-out-of-three ownership rule will mean an inevitable loss of diversity in the Australian media, says the union for Australian journalists and media workers.

"Throughout this long debate, mergers and acquisitions have been talked about as the inevitable consequence of removing ownership rules. That means fewer owners and it also means fewer journalists after the job losses that follow mergers," MEAA said.

MEAA chief executive Paul Murphy commended the Nick Xenophon Team for attempting to get the Turnbull Government to adopt a jobs and innovation package - positive initiatives and policy changes to genuinely foster increased diversity in our media landscape. "Any initiative to support new investment in journalism is welcome, but it should not come at the price of existing safeguards being removed," he said.

"Australia, which already has one of the highest concentrations of media ownership in the world, is now saying that a plurality of media voices doesn't matter. And history shows that once diversity is lost, you cannot get it back. The structural challenges faced by the Australian media sector will only be slightly stalled by these reforms. As companies amalgamate, more media jobs will be lost and with their loss, public scrutiny will be further reduced."

On October 16, 2017 the media reform package was finally passed in the Parliament with the support of cross-benchers including Pauline Hanson's One Nation Party which successfully won Government support for its plan to impose politicised restraints on the Australian Broadcasting Corporation in return for its vote.[141]

"The Government's grubby deal with One Nation is beneath contempt. Facilitating baseless attacks on our public broadcasters is disgraceful and we will be lobbying Senators to reject any legislation when it is presented," Murphy said.[142]

The measures in the final package include:

- The abolition of broadcast licence fees and replacement with a more modest spectrum charge, providing close to $90 million per annum in ongoing financial relief to metropolitan and regional television and radio broadcasters.
- A substantial reduction in gambling advertising during live sport broadcasts, representing a strong community dividend with the establishment of a clear "safe zone" for families to enjoy live sport.
- Abolition of redundant ownership rules that shackle local media companies and inhibit their ability to achieve the scale necessary to compete with foreign tech giants.
- Retention of diversity protections that ensure multiple controllers of television and radio licences as well as minimum numbers of media voices in all markets. These are the two-to-a-market rule for commercial radio, the one-to-a-market rule for commercial television, the requirement for a minimum of five independent media voices in metropolitan markets and a minimum of four independent media voices in regional markets, and the competition assessments made by the ACCC.
- Higher minimum local content requirements for regional television following trigger events, including introducing minimum requirements in markets across South Australia, Victoria, New South Wales, Western Australia and the Northern Territory for the first time (on October 18, 2017, the Senate referred this issue to the Environment and Communications References Committee for inquiry[143] – MEAA made a submission to the inquiry on February 21, 2018[144]).
- Reforms to anti-siphoning to strengthen local subscription television providers.

The Government said it would also implement a $60 million Regional and Small Publishers Jobs and Innovation package (see below) including:

- A $50 million Regional and Small Publishers Innovation fund;
- A Regional and Small Publishers cadetship program to support 200 cadetships; and
- 60 regional journalism scholarships.

Legislation would be introduced to implement:

- A public register of foreign-owned media assets (this became the *Foreign Influence Transparency Scheme Bill 2017*);
- Proposals to "enhance" the ABC's focus on rural and regional Australia;
- A range of "enhanced" transparency measures for the public broadcasters (this included the Competitive Neutrality of the National Broadcasters Inquiry – see more in the section on public broadcasting above);
- Changes to section 8 of the *ABC Act* to include the words "fair" and "balanced" (this became the *Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017* - see more in the section on public broadcasting above); and
- A community radio package.[145]

THE REGIONAL AND SMALL PUBLISHERS JOB AND INNOVATION PACKAGE

On December 7 2017, the Senate referred the *Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017* to the Senate Environment and Communications Legislation Committee for inquiry.[146] MEAA made a submission to the inquiry on January 7 2018.[147]

MEAA noted that there are three core components of the Government's program:

- The $50 million Regional and Small Publishers Innovation Fund;
- The Regional and Small Publishers Cadetship Program, which will support 200 cadetships, at approximately $40,000 per cadetship; and
- 60 regional journalism scholarships.

MEAA acknowledged the potential benefits of these programs, but maintain our view that these developments are insufficient "compensation" for abandoning the two-out-three media diversity rule.

The proposed fund will provide $16.7 million in grants per year over three years (totalling $50 million) to support eligible publishers to transition and compete more successfully, through in part, better enabling businesses to develop new business models and practices. MEAA understands that grant funds may not be allocated towards salaries, but will be available for initiatives that support the continuation, development, growth and innovation of Australian civic journalism. In the submission, MEAA strongly supported the emphasis on such journalism.

The Government has advised that the types of projects that may receive funding include purchasing/upgrading equipment and software, software development, business activities to drive revenue and readership, and training.

The eligibility criteria for these projects are:

- Annual turnover of not less than $300,000 revenue and not more than $30 million in revenue
- A primary purpose test (of producing civic and public interest journalism with an Australian perspective)
- An Australian residence test (being incorporated under Australian law and having central management in Australia)
- An independence test (not affiliated with a political party, union, superannuation fund, financial institution, non-government organisation or policy lobby group)
- A control test (being an entity that is majority controlled by Australian residents)
- Being a member of the Australian Press Council or having a robust and transparent complaints process, and
- Having in place editorial guidelines, a code of conduct or similar framework relating to the provision of quality journalism.

Grants would be capped at a maximum of $1 million per year for any media group, and at least two thirds of total funding must go to regional publishers and not less than 25 per cent for non-regional publishers.

MEAA supported the fund's administration by the Australian Communications and Media Authority (ACMA) and broadly supported ACMA seeking input on the distribution of grants from an external Advisory Committee comprised of the Australian Press Council, The Walkley Foundation and the Country Press Association. The engagement of independent stakeholders is vital to the effective distribution of these funds.

But regarding the proposed independence test, MEAA said the Bill's use of the word "union" strongly infers a partisan intent by the Bill's sponsors. MEAA stated that if this element of the independence test is maintained, it is essential that the word "union" be replaced with "registered industrial organisation".

MEAA also strongly queried the utility of requiring an entity be "majority controlled by Australian residents". This criterion seems selective and designed to isolate

potential applicants who otherwise fit squarely within the program's objectives.

In the submission MEAA said it strongly believe that the key determinant for grant eligibility should be an entity's capacity to cover and deliver bona fide Australian public interest journalism. "We also query why the term 'Australian residents' was chosen ahead of 'Australian citizens'."

MEAA added that "although we generally support the requirement of fund recipients being a member of the Australian Press Council, we query who will judge whether non-APC members have 'robust and transparent complaints processes".

MEAA also commented on the proposed cadetship program. The Government had advised that "to assist the creation of employment opportunities in regional media and ensure that journalists continue to provide informative and compelling regional news, the Government will support 200 cadetships over two years through the Regional and Small Publishers Cadetship Program'. Of the 100 cadetships available each year (from 2018-19), between 80 and 90 will be for regional publications."

MEAA noted that an employer's eligibility to engage cadets is not subject the revenue thresholds that apply for the Innovation Fund. "We further note that regional media organisations – as compared with (undefined) 'small metropolitan publishers' – will not have to meet the control test, which concerns majority control of a media entity by Australian residents. The absence of this requirement jars with the obligations concerning the Innovation Fund. The reasons for excluding regional employers from this requirement are unclear. It may be that the inconsistency between the programs' eligibility criteria illustrates the undesirability of mandating Australian residency (as a stand-alone concept) in any of these initiatives."

Cadetships under the program would be supported via a wage subsidy of up to $40,000 (GST inclusive) per journalism cadet. MEAA support the principle that employers should provide matched funding as a safeguard for the appointed cadets. Cadetships will be offered for 12 months and would give recent graduates the opportunity to train in multi-platform reporting, as well as workplace-based learning, as the basis for professional (on-the-job) mentoring.

MEAA questioned why the cadetships were of only 12 months' direction. "This departs from the longstanding media industry practice of two-to-three year cadetships (other than for graduates), as acknowledged in numerous industrial agreements that MEAA is a party to. MEAA believes the 12 month cadetship must be reviewed and converted to two years.

MEAA also noted the eligibility criteria are the same for cadetships and restated its concerns about the proposed independence test and the use of the word "union".

MEAA also sought information about how increasing journalism resources, rather than replace existing jobs', would be safeguarded and proposed an ongoing audit and the public dissemination of journalist headcounts at entities receiving program funding through the ACMA annual report.

"It is vital that these initiatives be administered in a manner consistent with national employment laws and standards. To be clear, MEAA assert that cadetships awarded under this program must be of no lesser benefit – in terms of both salary and conditions - than otherwise provided in an employment agreement covering the employer receiving government assistance. Under no circumstances should cadets be engaged as independent contractors," MEAA said.

The package's 60 regional journalism scholarships would be made available over a two year period commencing in 2018–2019, with each scholarship valued at $40,000. The funds will be able to be used by recipients to pay for course related expenses, including tuition fees, accommodation and living costs. Scholarships would be allocated to institutions across the country so that students in every state and territory have an opportunity to apply.

However, MEAA said it was not clear whether the $40,000 per scholarship funding assistance is meant to cover one year, two years or an entire course/period of study or a lesser period. Communications Minister Mitch Fifield's media statement had referred to "$2.4 million over three years" MEAA said, whereas his department's advisory note refers to scholarships being "made available over a two year period".

MEAA said it welcomed that emphasis would be placed on journalism courses capable of providing students with the skills and knowledge necessary to work in multi-platform media environments and data analytical abilities. "This support is, however, tempered by the capacity for scholarship recipients to run into an employment "dead-end" (i.e. no available jobs) at the end of their scholarship. In several respects, this is the most risk-intense of the three programs in terms of sustainable employment outcomes."

MEAA also noted that students would be expected to be either located in regional areas or to have (and be able to demonstrate) a strong connection to a regional area. "We query whether this requirement may distort which applicants receive scholarships and/or curb attraction to the scholarships. By this, we mean that many communications and journalism students study at regional universities, but then either return or relocate to metropolitan areas. In addition, a student from a regional area (thereby satisfying the 'strong connection to a regional area' criterion) may be studying at, for example, the University of Technology Sydney and have little or no intention of practising journalism in their home (or other regional) location(s).

"We believe that the core criteria should be a student's commitment to undertake editorial work (either as an adjunct to their studies or as a clear undertaking) in a regional area immediately after their studies are completed," MEAA said.

Although MEAA was supportive of the general approach of the three strands of Government action, it expressed a concern that short-term assistance programs may, without follow-up, do not much more than temporarily boost the numbers and scope of journalists and journalism.

As this press freedom report was being prepared, the Bill was subject to delays in Parliament, largely related to whether overseas media organisations can benefit from the fund[148], and the legislation may struggle to meet the program's July 1 launch date.[149]

ASYLUM SEEKERS

In February 2017 MEAA launched a campaign, Bring Them Here, to have journalist Behrooz Bouchani, cartoonist Eaten Fish, and a performer released from Manus Island asylum seeker regional processing centre.[150] On December 19, 2017 MEAA was delighted to learn that Eaten Fish had left Manus and was on his way to being resettled in Norway.

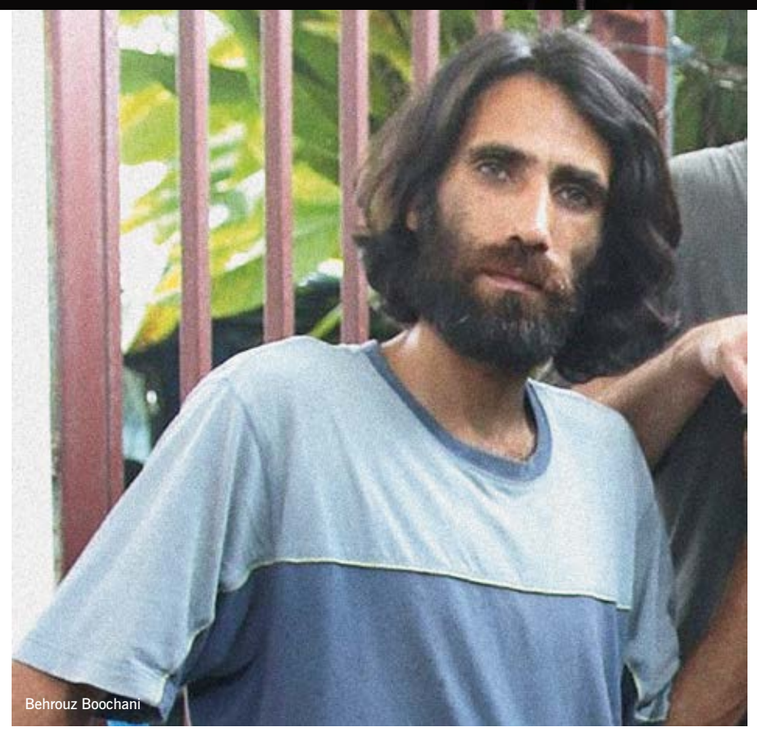
On November 14, 2017 MEAA formally complained to the Australian and PNG prime ministers about the singling out and deliberate targeting by PNG police of Iranian-Kurdish refugee journalist Boochani.[151] He had been detained by PNG police at the Manus regional processing centre.

MEAA believed that comments by PNG police show Boochani was being deliberately targeted for his journalism and his detention in handcuffs amounted to an outrageous attack on press freedom.

Boochani was likely selected for this special treatment because of his journalism reporting on the situation on Manus. The determination of PNG police officers from the outset to find "the journalist" suggests the officers intended to disrupt and muzzle any live reporting of the activities of the PNG police while they conducted their operation inside the centre, and that by getting a working journalist removed from the scene of the police action, media coverage of the event would be minimal.

MEAA chief executive Paul Murphy said: "For years now, a veil of secrecy has cloaked every aspect of the government's asylum seeker policy. The role of the media is to hold the powerful to account and to scrutinise what they do. Behrouz Boochani is a former magazine editor and publisher. His reports for various Australian media outlets have finally given us a glimpse into the conditions on Manus faced by refugees. His reporting has been exemplary and has been recognised with an Amnesty International Australia Media Award.

"The actions and statements of PNG police confirm that Boochani was targeted during the police operation on Manus. That is a clear assault on press freedom," Murphy said.


Behrouz Boochani

In its letter, MEAA has called on the two prime ministers to ensure that those engaged in the outrageous assault on press freedom on Manus Island be reminded of their obligations to protect journalists and working media covering important news stories on Manus Island, and observe their obligations towards freedom of expression and press freedom.

On November 24, MEAA reiterated its support for Boochani.[152] MEAA Chief Executive Paul Murphy said Boochani appeared to have been deliberately targeted by Papua New Guinea police in another crackdown because of his high profile as a journalist reporting from inside the detention centre.

"Behrouz has been one of the main sources of factual information about conditions inside the Manus Island detention centre for the past few years, and his reporting has been published in Australia and internationally," Murphy said.

"His reporting in the finest traditions of journalism has been critical when the Australian and PNG governments have done everything they can to prevent media from having access to the asylum seekers on Manus Island.

"Without Behrouz's courageous reporting at great personal risk, the world would be less informed about the crisis on Manus Island. If, as the case appears to be, he has been targeted and arrested because of his profile and his role as a journalist in an attempt to silence him, this is an egregious attack on press freedom that cannot be let stand.

"We call on the Australian and PNG governments to release him from custody, assure his safety, and not to hinder him from continuing to perform his role as a journalist. We will also be bringing this to the immediate attention of the International Federation of Journalists, the global body for journalists," MEAA said.

Three weeks earlier, Boochani had been awarded the Amnesty International Australian Media Award for his journalism from Manus Island. Earlier in 2017, he had been shortlisted in the journalism category for the 2017 Index on Censorship's Freedom of Expression Awards. Boochani's work has been published in Guardian Australia, and *The Saturday Paper*, among other publications, while his film about life inside the Manus detention centre, *Chauka, Please Tell Us the Time* was screened at the Sydney and London film festivals.

On December 20 2017, Boochani was granted an International Federation of Journalists' press pass which will be delivered to him on Manus Island.

Twitter headquarters in San Francisco

SAFETY

CYBERBULLYING

On September 7, 2017 the Senate asked the Legal and Constitutional Affairs References Committee to inquire into the adequacy of existing offences in the Commonwealth Criminal Code and of state and territory criminal laws to capture cyberbullying.[153] MEAA made a submission to the inquiry on December 21, 2017[154] and appeared at a public hearing in Melbourne on March 7, 2018.

Women in Media, a MEAA networking and mentoring initiative, also made a submission and appeared at a public hearing.[155]

MEAA's submission began by noting its concern at the rise of hate speech in Australia. "For example, when Part IIA was introduced into the *Racial Discrimination Act* in 1995 it was long before the widespread use of digital technology. Now there are a multitude of platforms available for the widespread dissemination of opinions and messages of all kinds."

The development of social media platforms has enabled those engaging in hate speech to spread their message, call others together who share their views and to use these platforms to target and discriminate against individuals and groups.

JOURNALISTS AND SOCIAL MEDIA

MEAA members are required to engage with the public in numerous ways. Initially, this is through contacting sources and recording them for a news story.

The dissemination of news through publishing or broadcasting story is a second method of engagement. In the past, this sometimes gave rise to follow up contact with the audience responding to stories via mail or telephone. It could even be as simple as talkback radio or letters to the editor. But the development of digital social media platforms has introduced a new significant way for journalists and the audience to interact. Social media has allowed individuals to speak directly to journalists.

This change has been embraced by media employers who now insist that their employees use social media platforms to promote and engage with audiences in order to build traffic around digital news stories. Indeed, the number of hits on a news story has become a new and even somewhat oppressive key performance indicator imposed on journalists (on top of demands to file more words, with fewer errors, for immediate publication on the media outlet's web site in advance or publishing or broadcasting on traditional media).

In many cases, journalists are being compelled by their employers to express opinions regarding news events, the news stories they are working on and other news stories by developed by their media employer – all with the aim of interacting with an online audience, driving engagement and building traffic numbers to impress advertisers.

It is the nature of social media that heated discussion takes place, often without reference to facts or objectivity, and often with too great a willingness to allow debate to become personal, abusive and threatening. The fact that many social media users depend upon and even thrive on such abuse, often within the veil of anonymity, leaves many journalists exposed to quite horrifying cyberbullying. Journalists are, by their nature and by the requirements of responsible journalism, accessible to the public. They usually engage openly, using their own names, in order to make social media the tool for increasing audience responsiveness – exactly the sort of increase in "eyeballs" on news stories that media employers demand of their journalist employees.

As outlined above, the nature of journalists' contact with their audience on digital media platforms, including via social media, makes them particularly vulnerable to cyberbullying. As part of their employment they must openly engage with the audience which, in return, may hurl abuse and threats at them – again, often under the protection of anonymity. MEAA welcomes the opportunity to create a response to this growing problem.

HARASSMENT

MEAA noted that the inquiry stemmed in part from the Australian Law Reform Commission June 2014 final report: *Serious Invasions of Privacy in the Digital Age*. In section 15 of the report focussing on harassment, the report recommends action be taken about harassment, defining it this way:

Harassment involves a pattern of behaviour or a course of conduct pursued by an individual with the intention of intimidating and distressing another person…

Harassment involves deliberate conduct. It may be done maliciously, to cause anxiety or distress or other harm, or it may be done for other purposes. Regardless of the intention, harassment will often cause anxiety or distress. Harassment also restricts the ability of an individual to live a free life.

The report recommended the enactment of a harassment tort if a privacy tort is not enacted:

Generally, a new harassment tort should capture a course of conduct that is genuinely oppressive and vexatious, not merely irritating or annoying. The tort should be confined to conduct that is intentionally designed to harm or demean another individual.

A harassment tort should also be the same throughout the country. The states and territories should therefore enact uniform legislation, if the Commonwealth does not have the Constitutional power to enact a harassment tort.

The report acknowledged the role of cyberbullying carried out against children:

At present, Australian law does not provide civil redress to the victims of harassment. There is some protection in defamation law, as well as the torts of battery or trespass to the person where conduct becomes physically threatening or harmful. If bullying or harassment, including cyber-bullying, occurs on school property within school hours, a school may be liable under the law of negligence on the basis of a non-delegable duty of care.

The report did not pay particular attention to the impact of cyberbullying by adults and directed at adults although the report did cite a submission from the Guardian media group concerning how cyberbullying affected journalists:

Guardian News and Media Limited and Guardian Australia submitted that it would be preferable to introduce the new privacy tort than modify existing laws relating to harassment. Their submission raises the concern that a harassment tort does not involve a public interest balancing test, unlike the new privacy tort. Given this, they consider that there is "[s]ignificant potential for an harassment style of action or crime to significantly impact on bona fide journalistic activities".

With regard to criminal remedies for harassment, the report noted the Commonwealth Criminal Code's sections 474.15 (threats to kill or to harm with penalties of imprisonment for 10 or seven years respectively; and proof of actual fear not being necessary) and 474.17 (using a carriage service to menace, harass or cause offence with a penalty of imprisonment for three years). The report noted that there was a general lack of awareness of the relevant provisions and of the penalties that existed and that this had led to very few actions being brought under the Code. It added:

In consultations the ALRC heard concerns raised that state and territory police may be unwilling or unable to enforce criminal offences due to a lack of training and expertise in Commonwealth procedure which often differs significantly from state and territory police procedures.

With reference to cyberbullying per se, the report said: "The Department of Communications outlined three options for reform to s 474.17. First, to retain the existing provision and implement education programs to raise awareness of its potential application. Second, to create a cyber-bullying offence with a civil penalty regime for minors. Third, to create a take-down system and accompanying infringement notice scheme to regulate complaints about online content. The lived experience of many MEAA members working in the media industry is of being regularly subjected to harassment, abuse and threats on social media, where existing laws are not enforced and where there are gaps in the current legislative regime."

THE CRIMINAL CODE

The relevant section 474.17 contained a penalty of up to three years imprisonment. However, as the ALRC report found, there is very little knowledge or understanding of this section of the Code.

MEAA believes that there is a great need for education in the broad community for the harm associated with cyberbullying and the penalties that can arise through section 474.17.

SOCIAL MEDIA COMPANIES CAN DEDICATE CONSIDERABLE EFFORT TO STAMP OUT MISINFORMATION

MEAA also believes that social media platform providers must take responsibility to ensure that their services are not used in such a way as to breach section 474.17. The proliferation of social media platforms and the manner in which they are co-opted to become tools for the dissemination of hate speech and "fake news" means they have a responsibility to police their products in order to ensure they are not being misused as cyberbullying weapons.

SOCIAL MEDIA PLATFORMS

This debate around responsible operation of social media platforms is already somewhat underway as leading social media platforms address the spread of misinformation and "fake news", and interfere in the 2016 US presidential election:

"What they did is wrong and we are not going to stand for it. You know that when we set our minds to something we're going to do it." – Facebook CEO Mark Zuckerberg on the Russian influence on the US presidential campaign.

The acceptance by social media platforms that they have been responsible for spreading untruths and misinformation, and have allowed their products to become tools to hijack and inflame debate through deception and/or abuse, should also lead them to accept that they have a role as the carriers in question that are being harnessed to allow cyberbullies to spread their harassment, menace and abuse.

Facebook plans to double the number of staffers focused on safety and security issues next year to 20,000, up from its current headcount of 10,000, which the social network says includes its "partners".

Social media carriage services must be part of the solution to the cyberbullying problem – both through education of their users, far greater monitoring efforts to identify cyberbullies and take down offending content in an expeditious manner; and cooperation with the authorities to "take down" cyberbullying communications, securing evidence, and ensuring the prosecution of offenders.

Facebook said on Wednesday that it was removing 99 per cent of content related to militant groups Islamic State and al Qaeda before being told of it, as it prepared for a meeting with European authorities on tackling extremist content online.

This will require the substantial cooperation of social media platform companies. But as the US example shows, the social media companies can dedicate considerable effort to stamp out deliberate misinformation campaigns on their platforms. They must also be called to account and respond to cyberbullying which is far more prevalent and easier for them to locate and identify.

"Freedom of expression means little if voices are silenced because people are afraid to speak up. We do not tolerate behaviour that harasses, intimidates, or uses fear to silence another person's voice. If you see something on Twitter that violates these rules, please report it to us. You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability or disease.

"We also do not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories. Examples of what we do not tolerate include, but is not limited to, behaviour that harasses individuals or groups of people with:

- Violent threats;
- Wishes for the physical harm, death, or disease of individuals or groups;
- References to mass murder, violent events, or specific means of violence in which/with which such groups have been the primary targets or victims;
- Behaviour that incites fear about a protected group;
- Repeated and/or or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone."

- Twitter's *Hateful Conduct* policy

A great concern is how many cyberbullies hide behind anonymity in order to mount their attacks. Efforts should be made by social media platforms to "block" cyberbullying offenders where they can be identified by the platform provider. Obviously encryption and other masking techniques can be utilised to obstruct attempts to locate and identify cyberbullies but vastly improved efforts should be made to "take down" offensive communications and block those responsible.

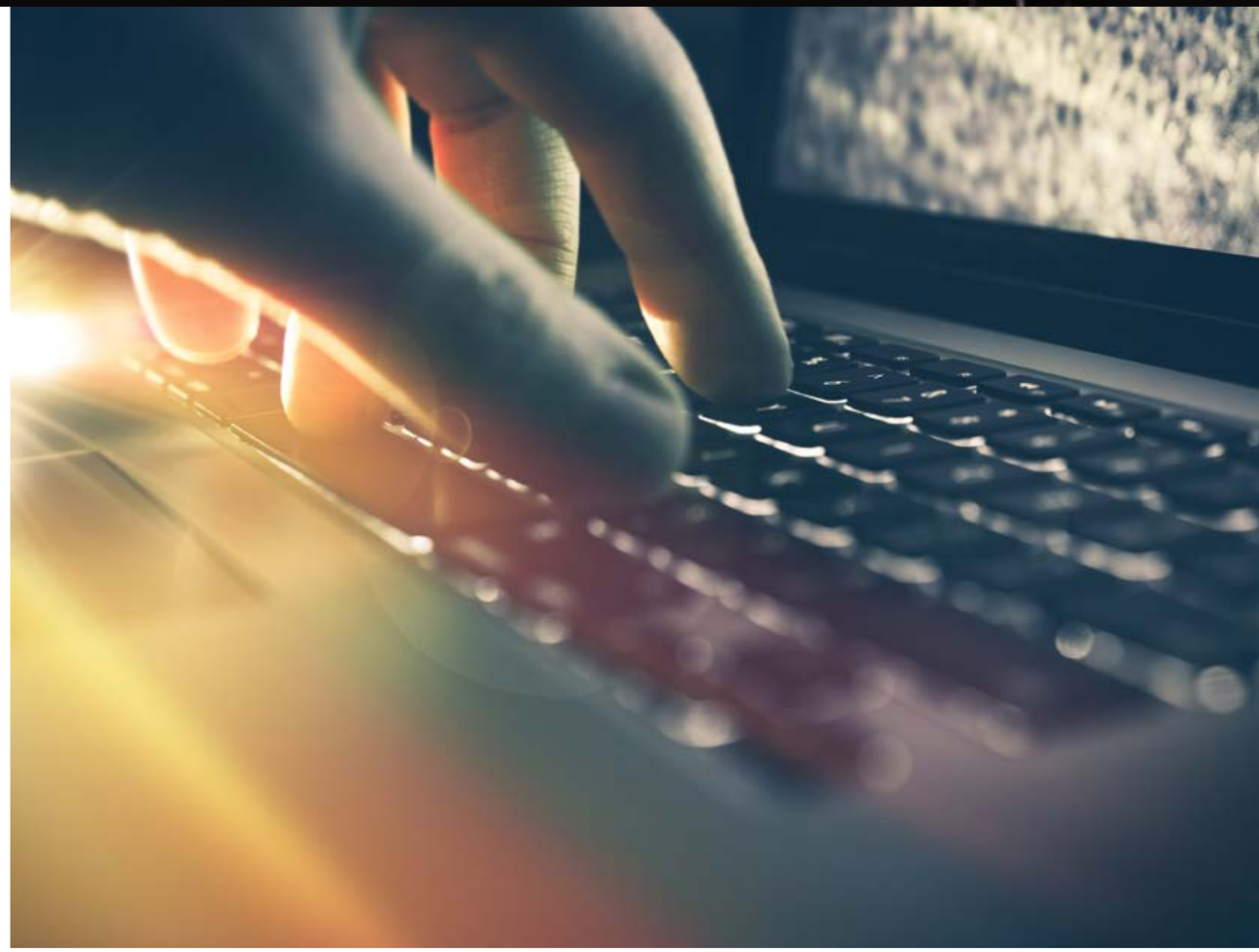
"The consequences for violating our rules vary depending on the severity of the violation and the person's previous record of violations. For example, we may ask someone to remove the offending Tweet before they can Tweet again. For other cases, we may suspend an account." –
Twitter's *Hateful Conduct* policy

The question arises whether merely "taking down" offensive material is sufficient and whether the offences and penalties set out in Australian law are being ignored/side-stepped by social media platforms. There is a considerable body of circumstantial evidence of victims of cyberbullying are dissatisfied with the efforts of social media platforms to take legitimate action to ensure the offending ceases and the perpetrators are punished in some fashion. If the platforms are not willing to monitor and police their product themselves and provide proper protections for victims of cyberbullying then the law of the land should apply.

ENFORCEMENT

Consideration must be given to ensure that the Criminal Code is upheld.

Moreover, there should be an examination of overseas jurisdictions to best inform a robust approach to the problem. New Zealand, for example, has enacted the *Harmful Digital Communications Act* 2015. This Act introduced a civil regime as well as criminal offences with regard to cyber abuse. The Act established a statutory body known as Netsafe to administer the civil regime established under the Act. Under this law, where a digital communication breaches 10 communication principles that are set down in the Act, Netsafe, and failing that the Court system, can order the offending material be taken down, order an abuser to publish a correction and/or apology and order that a victim be given the right of reply. Orders can also be made that content hosts to release the identity of anonymous abusers. The Act imposes fines on individuals who breach any court orders in relation to the civil regime.



Further, the Act criminalises online abuse where a person intendeds a digital communication to cause harm, it would reasonably expect the person in the position of the victim be harmed and the individual suffers serious emotional distress.

Criminal laws against cyber abuse also exist in a number of US jurisdictions. There have been notable efforts in California, Washington, Utah and New York. We point to these statutes as symbolic of the gravity of the issues before the Committee, rather than an endorsement of their discrete contents.

At an Australian State level, many of the current regimes are deficient. For example, in Victoria single incidents of cyberbullying do not constitute a "pattern" of behaviour, and many of the current offences in existing legislation require criminal conduct to occur in a "public space" (which may exclude messages sent by direct message.

State legislative regimes need to be examined so as to ensure existing laws are being enforced and, where there are gaps, these are filled by the introduction of new, more relevant and flexible offences.

EDUCATION

There will need to be considerable effort on the part of enforcement agencies. But an accompanying education campaign must also educate the community at large. There is little understanding of the harm that cyberbullying can do by the broader community and most likely little or no knowledge of the substantial penalties that exist.
Cyberbullying must be clearly defined and understood in order to stamp it out.

Education must also include reporting mechanisms so that the victims of cyberbullying can quickly flag an offender to both the social media platform and enforcement agencies for follow-up action. This should be done in cooperation with the Office of the eSafety Commissioner and the Telecommunications Industry Ombudsman.

MEAA believes that our members, as workers in the media industry, should be able to work free from cyberbullying. MEAA will be stepping up efforts with media employers to ensure employers create and operate policies to protect

their staff, ensure they work in a safe and healthy environment, that training and counselling regarding with dealing with cyberbullying is made available, and that employers take steps to deal with cyberbullies on behalf of their employees.

SUMMARY

It is clear that while section 474.17 exists, and offers penalties for cyberbullying, it does not readily lend itself to enforcement and is not widely known. As a deterrent, it is failing to keep pace with the widespread use of social media and digital technology generally which is being used as the platform and vehicle for the delivery of hate speech. Cyberbullying can be executed in seconds with only a dozen or so characters or an easily-sourced image.

The bullying, abuse, harassment and threats can go on relentlessly from there with the utmost ease and be directed with precision to the intended target's phone, tablet or laptop – at home or at work – 24 hours a day. And because of the nature of social media platforms and the encouragement they give to others to "engage", others can join in so that the abuse can swell and compound as others join the frenzy.

In short, section 474.17 has not kept pace with the rise of offences it seeks to curtail and punish. The tools of cyberbullying are readily available, easily used, allow for anonymous attacks and enable viral assaults.

MEAA believes that while all members of the community are affected by hate speech, and as the ALRC has acknowledged, children can be particularly vulnerable to cyberbullying, journalists are also regularly targeted.

The media of itself is a powerful institution and public interest journalism is vital to a healthy functioning democracy. But the requirements of modern journalism, and the necessity for journalists to engage directly with their audience in order to market/promote their journalism, leaves them particularly exposed to appalling and frequent attacks upon their character, judgment, professionalism and threats to their physical safety.

If journalists are to be compelled to exist as easily identifiable digital individuals on social media platforms in order to perform their job, and have that engagement measured as a key performance indicator for their ongoing employment, then greater care must be taken to protect journalists from cyberbullying. We stress here that if reforms are supported through this inquiry, that special care be taken in defining journalists such that media practitioners not employed by major media outlets are suitably protected.

In an era when threats to journalists are increasing (and not helped by politicians who openly attack journalists and their employers using the phrase "fake news" to describe whatever they do not agree with), and dozens of journalists are murdered, assaulted, imprisoned and harassed because of their journalism, government has a responsibility to uphold, protect and promote press freedom and the vital role of public interest journalism.

The tools to arrest the growth of cyberbullying exist, but additional effort is needed. In this regard, MEAA acknowledges the Law Council of Australia's submission to the Inquiry at points 9 (as to the range of conduct cyberbullying offences should capture), 10 (the need for proportionality and distinctions between children and adult offenders) and 18(a) (that the law be readily known and available, and certain and clear).

MEAA believes efforts must be increased to identify and report instances of cyberbullying, to educate the community about the threats and penalties associated with cyberbullying, to ensure that the law is upheld and obeyed, and where necessary introduce greater legislative protections (at both a Commonwealth and State level) to assist victims of cyberbullying.

This will require a coordinated effort by:

- Government,
- Social media providers,
- Employers, and
- Enforcement and regulatory agencies.

A coordinated response that focuses on education, monitoring, reporting, and enforcement (including penalties as outlined in the Criminal Code) is urgently needed to address this problem.

PUBLIC HEARING AND THE COMMITTEE'S RECOMMENDATIONS

On March 28 2018 the Senate committee released its report. It noted that opinion columnist for Guardian Australia Van Badham, who gave evidence as a witness before the Committee's Melbourne public hearing on March 7, 2018 in her capacity as the Victorian vice-president of the MEAA Media section, had:

Quoted some extremely violent and vulgar tweets she has received following her public journalistic work. She stated that some of the men who sent these communications to her had enough "confidence" to identify themselves with their own names.

She also linked trolling to physically violent incidents that she has also experienced:

…these things are creating a context where violence and harassment is spilling over into real life. Effectively, I have been dehumanised on the internet and represented by these groups of people, sometimes quite deliberately, in a way where they are incited by others towards violence against my person.[156]

The report added that Badham had also said about cyberbulling that:

This problem is "a workplace safety issue that affects women disproportionately…"

and she had also

Referred to a public event she attended with a male colleague, after which she "received 400 rape and death threats", while her male colleague did not receive any.

Badham also argued that social media platforms should be subject to a statutory legal action for, in effect, breaching their duty of care:

"… there has to be a duty of care. Coming from professional media anyway, if a publication, The Guardian, *The Australian*, Fairfax, if any of the major media organisations in this country were facilitating the harassment and abuse of individuals, they would be held accountable. Social media are media corporations. Facebook is effectively a modern newspaper. So is Twitter. It has a pretty loose content policy, but those platforms exist as publication vehicles, and they must take responsibility for the care of participants within that."[157]

EFFORTS MIST BE INCREASE TO IDENTIFY AND REPORT INSTANCES OF CYBERBULLYING

The committee in its report recommended the Australian Government consult state and territory governments, non-government organisations, and other relevant stakeholders, to develop and publicise a clear definition of cyberbullying that recognises the breadth and complexity of the issue.

The inquiry said that Australian governments should approach cyberbullying primarily as a social and public health issue and recommended that Australian governments consider how they can further improve the quality and reach of preventative and early intervention measures, including education initiatives, both by government and non-government organisations, to reduce the incidence of cyberbullying among children and adults.

It rejected calls to increase penalties for cyberbullying offences committed by minors beyond the provisions already in place. But it recommended that committee the Government consider increasing the maximum penalty for using a carriage service to menace, harass, or cause offence under section 474.17 of the *Criminal Code Act 1995* from three years imprisonment to five years imprisonment.

But the committee recommended that Australian governments ensure that:

- The general public has a clear awareness and understanding of how existing criminal offences can be applied to cyberbullying behaviours;
- Law enforcement authorities appropriately investigate and prosecute serious cyberbullying complaints under either state or Commonwealth legislation, coordinate their investigations across jurisdictions where appropriate, and make the process clear for victims of cyberbullying, and ensure consistency exists between state, territory and federal laws in relation to cyberbullying.

In other recommended it suggested that the Government should:

- Ensure that the Office of the eSafety Commissioner is adequately resourced to fulfil all its functions, taking into account the volume of complaints it considers;
- Promote to the public the role of the Office of the eSafety Commissioner, including the cyberbullying complaints scheme;
- Consider improvements to the process by which the Office of the eSafety Commissioner can access relevant data from social media services hosted overseas, including account data, that would assist the eSafety Office to apply the end-user notice scheme, and consider whether amendments to the *Enhancing Online Safety Act 2015* relating to the eSafety Commissioner and the cyberbullying complaints scheme would be beneficial, and in particular, consider expanding the cyberbullying complaints scheme to include complaints by adults;
- Expanding the application of the tier scheme by amending the definitions of "social media service" and "relevant electronic service", and increasing the basic online safety requirements for social media services.

It also recommended the Government "place and maintain" regulatory pressure on social media platforms to both prevent and quickly respond to cyberbullying material on their platforms, including through the use of significant financial penalties where insufficient progress is achieved.

In its comments on this recommendation, it stated:

"The committee acknowledges that the services provided by social media platforms are very often beneficial for individuals and society. However, these platforms are also a primary vehicle for serious cyberbullying. The committee notes that civil penalties for social media platforms are already in place, but the eSafety Commissioner has not yet considered it necessary to apply them.

This is partly due to cooperation from social media platforms. Given this, the committee does not think it is currently necessary to increase the maximum civil penalty that the eSafety Commissioner could apply. However, the committee remains deeply concerned about the continued prevalence of cyberbullying on social media platforms."

The committee also recommended that the Australian Government monitor Germany's Network Enforcement Law and apply useful lessons "from Germany in Australia".

The committee said social media platforms "should play a major role in reducing cyberbullying" adding that it saw merit in a proposal from Maurice Blackburn Lawyers to impose a statutory duty of care on social media platforms to ensure the safety of their users.

The committee recommended the Government legislate to create a duty of care on social media platforms to ensure the safety of their users and consider requiring social media platforms to publish relevant data, including data on user complaints and the platforms' responses, as specified by the eSafety Commissioner and in a format specified by the eSafety Commissioner.

"The eSafety Commissioner's cyberbullying complaints scheme is a safety net and its existence does not reduce the responsibilities of Facebook, Google, Twitter and their ilk. The committee is deeply concerned about cases in which social media platforms appeared to respond inadequately to complaints, and wishes to make it clear that it is up to social media platforms to make their platforms safe environments, reduce the incidence of cyberbullying, and promptly take down or otherwise manage all offending material. The committee considers 'safety by design' a useful principle here."[158]

DETENTION, THREATS AND HARASSMENT

POLICE RAID

On October 25, 2017 Queensland Police raided the offices of the ABC in Brisbane in an attempt to identify the source of leaked Cabinet documents.

MEAA chief executive Paul Murphy said: "The role of the media in a healthy democracy is to scrutinise those in power. The execution of a search warrant to hunt for leaked Cabinet briefing documents is a belated attempt to pursue journalists' sources rather than address the matters raised in the legitimate journalism by two ABC reporters.

"Three stories have been written about deep budget cuts to Queensland's environment department under the LNP Government in 2012. Now, Queensland Police are seeking to find the source of the leak by raiding a newsroom in the hunt for what are presumably journalists' confidential sources," he said.

"MEAA calls on Queensland Police to cease this attack on press freedom and pursue its investigations among Queensland's politicians rather than seek to shoot the messenger and a likely whistleblower that was seeking to reveal important information to the community," Murphy said.[159]

JAMES RICKETSON

James Ricketson is a 69-year-old documentary maker. On June 2, 2017 he was detained by Cambodian authorities after he was photographed flying a drone over a political rally in Phnom Penh[160]. He was detained for six days – well beyond the 72-hour rule under Cambodian law – and on June 8 he was subsequently charged with "receiving or collecting information, processes, objects, documents, computerised data or files, with a view to supplying them to a foreign state or its agents, which are liable to prejudice the national defence".

Documentary maker James Ricketson. Image courtesy change.org

Authorities also seized his laptop and translated documents and emails found on it.

He faces up to 10 years in jail if convicted. He has denied the allegations. He has been denied bail. He has been detained in a cell with 140 other prisoners.

Ricketson was known to be making a documentary about Cambodia's political opposition leader Sam Rainsy. He has previously worked with several child protection bodies in the country as well as blogging about various issues in the region. According to an ABC report: "He has also been a vocal critic of Prime Minister Hun Sen, who has ruled Cambodia for 32 years. In a 2014 blog post, Mr Ricketson compared Mr Sen to the *Star Wars* villain, Darth Vader. He had also blogged about Australia's refugee resettlement policy and staged a one-man sit-in protest at Screen Australia that resulted in a restraining order. In 2014 and 2016, he was convicted in Cambodian courts of defaming two separate child protection organisations."[161]

Ricketson's adopted daughter Roxanne Holmes set up a petition[162] to put pressure on the Australian government to do more to get him out of jail and MEAA has encouraged members and the public to support the campaign. The petition attracted almost 72,000 signatures.

REBECCA HENSCHKE

Rebecca Henschke is an Australian journalist and the bureau chief of BBC Indonesia. She was reportedly expelled from the province of Papua for her social media posts that angered the Indonesian military. The ABC reported: "Authorities said... Henschke was escorted out of the province after her social media posts 'hurt the feelings of soldiers'."[163]

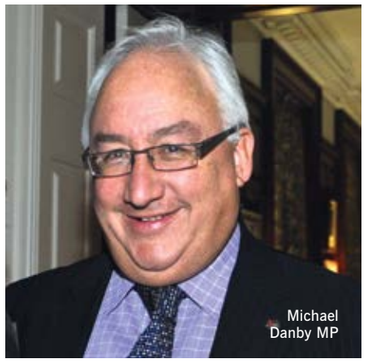
Foreign journalists had been given access to Papua in order to report on a measles and malnutrition crisis near the southern coast town of Agats. Henschke was reportedly detained after she posted several tweets on February 1, 2018. One showed a photo of supplies sitting on a dock and said, "This is the aid coming in for severely malnourished children in Papua – instant noodles, super sweet soft drinks and biscuits." Another said "children in hospital are eating chocolate biscuits and that's it".

An Indonesian military spokesman said: "The tweet is not in line with the truth... What was captured in the photo of the speedboat dock is the supplies from merchants who happened to be in that place."

Henschke was questioned for five hours, held by immigration officials for a further 24 hours before being escorted out of Papua with her BBC colleagues and returning to Jakarta.

The Pacific Freedom Forum said: "Removing BBC journalists from Papua provinces over such a tiny detail is proof that Indonesian security forces are still acting outside the law... Papua people have suffered decades of free-speech loss, to tragic result – half a million documented deaths in half a century. We then have a free-speech farce with Indonesia hosting World Press Freedom Day last year – but officially ignoring Papua. This deportation from Papua just adds to the farce."[164]

SOPHIE MCNEILL



Michael Danby MP

On October 5, 2017, MEAA condemned the use of public funds by Labor MP Michael Danby to publish attack ads, that were inaccurate and inappropriate, targeting ABC Jerusalem correspondent Sophie McNeill.

MEAA noted that McNeill is a three-time winner of a Walkley Award for Excellence in Journalism – winning two of those awards in 2016 for her coverage of wars in Syria and Yemen.

MEAA CEO Paul Murphy said: "It is appalling that a politician can use public money to mount personal attacks against an individual reporter. It is particularly repugnant that those funds are used against a journalist who has reported from some of the most dangerous war zones and been repeatedly recognised by her peers for her outstanding work. This is not how an MP's electorate allowance should be used. Michael Danby should repay the funds to taxpayers."[165]

The ABC issued a statement that said: *The ABC strongly rejects allegations made by Mr Michael Danby MP in a paid advertisement in the* Australian Jewish News *that the coverage by ABC Jerusalem correspondent Sophie McNeill of a series of killings of Palestinians and of Jewish Israelis on 21 July was biased and unbalanced.*

Contrary to Mr Danby's assertion, Ms McNeill gave due prominence to the fatal stabbing attack of the three Israelis with stories on television, radio, News Digital and Twitter. The coverage included graphic accounts of the attack from witnesses and first responders.

This advertisement is part of a pattern of inaccurate and highly inappropriate personal attacks on Ms McNeill by Mr Danby. The ABC has complete confidence in the professionalism of Ms McNeill. Despite unprecedented scrutiny and obvious pre-judgement by Mr Danby and others, her work has been demonstrably accurate and impartial.

All ABC News content is produced in accordance with ABC editorial policies and under the supervision of experienced editorial managers.[166]

MATTHEW ABBOTT

On November 3, 2017, photojournalist Matthew Abbott was detained by immigration officials at Port Moresby Airport after they identified him as having published "disruptive material" about Manus Island.

"It was clear that I was on a list and there was no chance I was getting into the country," he said.[167]

He had been attempting to apply for a tourist visa and was intending to go to the decommissioned Manus Island asylum seeker detention centre to report on conditions when the scanning of his passport triggered an alert to an immigration officer.

The "disruptive material" is believed to refer to an incident that occurred at the detention centre in July 2017 when he photographed the aftermath of an attack on two Afghan refugees. Camp officials attempted to delete the photos from his camera, scanned his passport and warned him not to publish them.

He told Guardian Australia "when it was clear last time that they could not get the photos back off me, they said to me: 'If you publish these photographs you are never going to come back here'. There's a total double standard being applied... journalists that are doing positive work and non-critical work are being allowed in whereas people who are doing critical work are stopped."

MEAA chief executive Paul Murphy said of the incident: "It really is an affront to press freedom and an affront to our rights as Australian citizens to prevent independent media coverage of the situation on Manus Island at any time, but particularly at the moment when there quite clearly is a serious and disturbing situation that is continuing to develop. These things are being done in our name and as citizens we have a right to independent scrutiny of what's happening there."

Murphy said the suggestion that Abbott had been blacklisted because his work was critical of the detention centre regime was particularly concerning. "Any evidence of government control and intervention in determining who gets to report, what can be reported, and when it's reported is absolutely repugnant. It's not something you would expect to see in a liberal democracy."[168]

IMPUNITY

On November 2, 2017 – UNESCO's International Day to End Impunity for Crimes Against Journalists – the global body reported that between 2006 and 2016, 930 journalists were killed for bringing news and information to the public. Over that time, a conviction had been achieved in less than one in 10 cases."[169]

"This impunity emboldens the perpetrators of the crimes and at the same time has a chilling effect on society including journalists themselves. Impunity breeds impunity and feeds into a vicious cycle… These figures do not include the many more journalists who on a daily basis suffer from non-fatal attacks, including torture, enforced disappearances, arbitrary detention, intimidation and harassment in both conflict and non-conflict situations. Furthermore, there are specific risks faced by women journalists including sexual attacks.[170]

"When attacks on journalists remain unpunished, a very negative message is sent that reporting the 'embarrassing truth' or 'unwanted opinions' will get ordinary people in trouble. Furthermore, society loses confidence in its own judiciary system which is meant to protect everyone from attacks on their rights. Perpetrators of crimes against journalists are thus emboldened when they realize they can attack their targets without ever facing justice.

"Society as a whole suffers from impunity. The kind of news that gets 'silenced' is exactly the kind that the public needs to know. Information is quintessential in order to make the best decisions in their lives, be it economic, social or political. This access to reliable and quality information is the very cornerstone of democracy, good governance, and effective institutions."[171]

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

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

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

To do nothing, as has been the case to date, means that their killers are getting away with murder and sends a signal that the Australian Government and its agencies treat the lives of Australian journalists as counting for less than other Australians.

JUANITA NIELSEN


Juanita Nielsen

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

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

THE BALIBO FIVE AND ROGER EAST

Journalists Brian Peters, Malcolm Rennie, Tony Stewart, Gary Cunningham and Greg Shackleton 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 Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah."

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

Two years after the inquest, 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 disclosed 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.

The Balibo Five, from left to right - Gary Cunningham, died aged 27; Brian Peters, died aged 24; Malcolm Rennie, died aged 29; Greg Shackleton, died aged 29; Tony Stewart, died aged 21. Left: Roger East, died aged 53. Photo: courtesy Balibo House Trust

On October 13, 2014, three days before the anniversary of the murder of the Balibo Five, was reported[172] that the AFP took "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." However, the AFP stated that it had "not sought any co-operation from Indonesia and has not interacted with the Indonesian National Police".[173]

Just six days later, on October 21, 2014 the Australian Federal Police announced it was abandoning its five-year investigation due to "insufficient evidence".[174]

MEAA said at the time: "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."[175]

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."[176]

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.

MEAA continues to call for a full and proper war crimes investigation.

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

The 2017 recipients of funding from the fellowship are:

- Maria Pricilia Fonseca Xavier, a journalist and news broadcaster in Tétum and Portuguese at Timor-Leste Television (TVTL).
- Augusto Sarmento Dos Reis, senior sports journalist and online co-ordinator at the *Timor Post* daily newspaper and diariutimorpost.tl website.

THIS SHAMEFUL FAILURE MEANS THE KILLERS OF THE BALIBO FIVE CAN SLEEP EASY

PAUL MORAN


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. 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 in Paris of journalists, editorial and office staff at the *Charlie Hebdo* magazine, it was reported that Krekar had been arrested for saying in an interview that when a cartoonist "tramples on our dignity, our principles and our faith, he must die". It is believed Krekar was subsequently arrested on a charge of "incitement".[177]

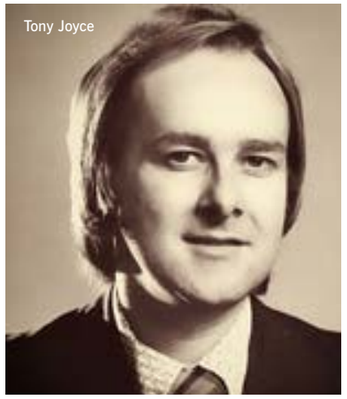
Krekar was arrested in prison in Norway on November 11 "in a coordinated police swoop on Islamist militants planning attacks". The raids across Europe targeted Krekar and 14 other Iraqi Kurds and one non-Kurd. Authorities allege the men were involved in Rawti Shax – a group spun-off from Ansar al-Islam,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

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

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

In mid-January 2018, an anticipated Italian trial of Krekar and five others (including Krekar's son in law) was subsequently delayed again as Krekar and his lawyers had not been notified. Under Italian law, a hearing can take place if the defendant is not present but the delay is believed to have been granted to allow formal notification to be provided to Krekar's lawyers.

TONY JOYCE


Tony Joyce

ABC foreign correspondent Tony Joyce arrived in Lusaka on 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.[178]

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.

THE ASIA-PACIFIC

PRESS FREEDOM IN NEW ZEALAND

BY COLIN PEACOCK

"New Zealanders are too complacent about the continuing erosion of their right to know what the government is doing on their behalf," wrote Gavin Ellis in an anguished essay, *Complacent Nation*, in 2016.

What was the former editor in chief of New Zealand's biggest newspaper - *New Zealand Herald* - worried about? New Zealand ranked fifth in the world in the 2016 Reporters Without Borders press freedom index behind only Finland, Netherlands, Norway and Denmark.

In last year's press freedom report, I noted that the most recent matter worrying New Zealand's Media Freedom Committee was a clause in a proposed law that would make it an offence to record a rocket or spacecraft that might crash here. Not exactly on a par with the worries about laws criminalising journalism on national security grounds in Australia these days…

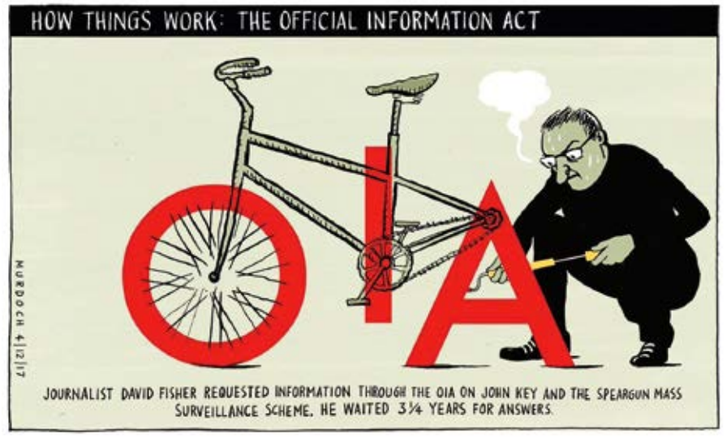
In February this year, global anti-corruption watchdog Transparency International rated New Zealand the least corrupt country in the world – again. Eat that Finland, Netherlands, Norway and Denmark.

Does our relatively free media mirror our relatively benign, uncorrupted society?

Partly.

But Transparency International's New Zealand chair Suzanne Snively echoed Gavin Ellis when she said "complacency (is) our biggest challenge. The prevention of corruption is too often a low priority".

Our complacency was jolted this past year when New Zealand slipped to 13th place in the Reporters Without Borders press freedom index, citing government secrecy and journalists' struggles with the *Official Information Act* (OIA) as the reason for the plunge. "Political risk has become a primary consideration in whether official information requests will be met and successive governments have allowed free speech rights to be overridden," said Reporters Without Borders.



Cartoon by Sharon Murdoch; cartoonist for Stuff (formerly Fairfax Media NZ) @domesticanimal

The chair of New Zealand's Media Freedom Committee at the time, Joanna Norris, agreed. "(There is) consistent and cynical misuse of official information laws which are designed to assist the release of information, but are often used to withhold it," she said.

It's not a new concern.

Using the hashtag #Fix the OIA, Kiwi journalists routinely vent their frustration on social media. Sometimes they share pictures of the heavily redacted documents dotted with black blocks they've received in response to their requests. All too often they've had to wait far too long to get them for reasons that are rarely adequately explained.

Media management plays a big part in this. Delays take the sting out politically sensitive and newsworthy details.

In April 2018, the *New Zealand Herald*'s Matt Nippert revealed the New Zealand Defence Force (NZDF) has spent millions on controversial spy software produced by secretive Silicon Valley firm Palantir. "The Defence Force neither confirms nor denies the existence or non-existence of the information you have requested," it wrote citing national security, when the *Herald* first requested the information last January.

But the NZDF itself reported the relationship with Palantir in its own publication *Army News*. A December 2015 briefing on its website details use of Palantir's analytical tools.

After refusing for more than a year to reveal the extent of links to the company, the *Herald* complained to the Ombudsman and the NZDF was forced to disclose the spending.

Back in 2014, former prime minister John Key said he'd resign if it was proved he had presided over the mass surveillance of New Zealanders.

At an event called The Moment of Truth in the run-up to the election, the US National Security Agency whistleblower Edward Snowden revealed the existence of Project Speargun – a plan to intercept internet traffic in and out of New Zealand. John Key rubbished the claims.

He said he personally put a stop to this "highest form of protection" in March 2013 because it was too intrusive. Investigative reporter David Fisher eventually acquired official documents showing Speargun actually continued after the time Key said he ordered a halt."Speargun wasn't actually stopped until after Key was told in a secret briefing that details were likely to become public because they could be in the trove of secrets taken by NSA whistleblower Edward Snowden," he reported last December.

It took almost three years to get the information he needed. John Key had left politics by the time his story came out.

Toby Manhire of independent news website The Spinoff, hit the nail squarely on the head: "What a shame it would be if the lesson of all this was that all you need do is waste enough time until everyone has something else to worry about."

Another case in point was the "Saudi sheep scandal" in which former foreign minister Murray McCully was accused of improperly using $NZ11.5 million of taxpayers' money to curry favour with a well-connected Saudi businessman. The money was for a sheep farm, but ewes sent by air from New Zealand were dead on arrival.

By the time the details finally emerged this past year via the OIA, the story was as dead as the sheep. Again, the former minister had retired from politics in the interim.

Investigative journalist and author Nicky Hager – who has exposed several political scandals in the past – has also had to rely on the Ombudsman who can compel officials to comply with the OIA. As a result, the NZDF has been forced to admit that the locations of the photographs in the book Hit & Run by Hager and Jon Stephenson published a year ago were accurate, contrary to what it had said at the time.

The NZDF's chief, Lieutenant-General Tim Keating, had cast doubt on the veracity of the whole book – which alleged the SAS botched a raid on two isolated Afghan villages in 2010 and killed civilians – by claiming there were "major inaccuracies" in it, with the main one being the names and location of the villages. (The New Zealand government is likely to launch an official inquiry into the matter shortly)

Sometimes this blatant gaming of the OIA by officials is itself revealed in the documents eventually released using its powers. Transport minister Simon Bridges' office discouraged the release of a report about a proposed rail link to Auckland. The national rail company KiwiRail advised there was no case to withhold it from the public, but emails eventually released under the OIA last June revealed how Bridges' office pushed back against the release all the same.

Reporters of local politics are familiar with this too. The *Local Government Official Information and Meetings Act* requires local bodies to provide information unless there is a sufficiently good reason not to, but resistance for political purposes is commonplace. In March, Radio New Zealand's reporter Tod Niall revealed a letter to Auckland mayor Phil Goff which said the release of information should be delayed so it could be "managed".

The letter was withheld from RNZ for 15 months despite intervention by the Ombudsman. If the idea is to create "news that is so old it is not news any more" as Tod Niall put it, it works. "And that is why it matters," he added.

In the absence of an upper house, New Zealand's *Official Information Act* is an essential check on the power of government – especially the power wielded by 20 cabinet ministers in its executive branch. The Act was hailed as world-leading in 1982, but journalists say it has suffered with each new administration since it became law. Initially applied with gusto and with principle, the next government did so only adequately, the next reluctantly, according to lobbyist and media pundit Matthew Hooton.

After that, the Labour-led government did so "disgracefully" in the early 2000s, he says, while the subsequent National-led government of 2008-2017 "abused it shamelessly".

A new chief Ombudsman seems more willing to force the release of unjustifiably withheld information and address complaints – many of them from journalists – more rapidly. Peter Boshier has also started naming and shaming government departments dragging the chain. He has just launched four investigations into the official information practices of the public sector. The agencies involved are the Ministry for Culture and Heritage, the Ministry for the Environment, the Department of Conservation and Land Information New Zealand.

He says the outcome of the investigations will be released in 2018 "to provide the public with continuing trust and confidence in public sector agencies, and to outline the standards to which government agencies should aspire".

But will Jacinda Ardern's new Labour-led government bring new management to the OIA? It has appointed a minister – former journalist Clare Curran – who says she wants to fix it. With her overlapping responsibilities for media and broadcasting as well as open government and digital services, this is promising.

But before she could get her feet under the table, the new government made a bad start. It is a coalition government formed only after delicate and secret post-election negotiations. Its leaders refused to release a document with directives for new ministers, despite Deputy Prime Minister Winston Peters' promise it would be made public.

Clare Curran's position as a minister is already under scrutiny after the revelation of an "informal meeting" with a Radio New Zealand executive which raised questions about government interference with the public broadcaster. Not a good look for a minister of open government, the pundits pointed out en-masse.

JOURNALISTS CAUGHT IN ELECTION-YEAR CROSSFIRE

In the white heat of election campaigns gone by, politicians have called in the lawyers or even the cops on journalists doing their jobs.

Camera operator Bradley Ambrose was investigated by police – and newsrooms were searched by police officers – after his remote microphone recorded a conversation between Prime Minister John Key and another political party leader in 2011. Ambrose pursued a defamation claim against Key which was settled years later out of court – with an apology.

Investigative reporter and author Nicky Hager had his home raided in the 2014 campaign by police officers wanting the source of the leaked emails at the

THE NEW GOVERNMENT IS EXPLORING IF THE LAW NEEDS TO BE STRENGTHENED TO PROTECT WHISTLEBLOWERS

heart of his lid-lifting book *Dirty Politics*. Using the recently beefed-up *Search and Surveillance Act*, police seized and copied documents and computers, including those belonging to his daughter. They also asked private companiesfor details of his phone, online accounts and his travel and banking records. The raids and breaches of his privacy were eventually deemed unlawful and followed by apologies and out-of-court settlements.

During the 2017 election it was New Zealand First Party leader Winston Peters – now the Deputy PM – who went legal. He launched proceedings for a breach of privacy against two journalists who reported that he had been paid too much superannuation. Peters' tried to get them to hand over several months of their telephone records, documents and notes as part of the proceedings targeting whoever was responsible for leaking the private information at the heart of the story.

Worryingly, New Zealand's watchdog Media Freedom Committee, which represents the country's major news organisations, was caught out. Its chair Joanna Norris had just left the media and replacement had not yet stepped up when the case arose. After a hasty new appointment, the Committee's new chair Miriyana Alexander said journalists had a fundamental right to protect their sources, and should be free to do their job of informing the public without interference and intimidation from politicians. Peters eventually excluded the journalists from his proceedings, which also targeted several politicians.

But it's not the first time Peters has taken legal action against the media and there is at the least a chilling effect from his heavy-handed response. Reporters and their editors who publish stories about Winston Peters which he might not like will know that they could be dragged in to a legal battle which could even make them liable for costs.

In 2017 a new law overhauling powers of spy agencies created a new offence for people passing on classified information on a confidential basis. The changes make it easier to people to make a "protected disclosure" to the Inspector-General of Intelligence and Security. But those who pass information to journalists may face up to five years in jail.

This has yet to be tested, but it will be a brave member of the intelligence services who leaks information on that basis. Journalists will also have the added worry of possible prosecution themselves if pressed to reveal sources.

Journalist can also be jailed for contempt of court if they jeopardise a fair trial. A classic case of freedom of expression versus the right to a fair trial unfolded in 2008 when a chief editor and a senior executive from Fairfax Media were in the dock for publishing details of police raids carried out for the first time under new post-9/11 anti-terror laws. In the end a judge found that publication jeopardised a fair trial for those charged with firearms offences in those raids.

A Bill to tidy up the law on contempt of court is now before Parliament and it could introduce heavy fines for breaches. When the New Zealand Law Commission launched a review of the law last August no reporters turned up. Only a handful of stories signalling the changes were published.

But statutory take-down powers for courts to order temporary removal of potentially prejudicial online material could land the media in hot water. The Law Commission proposed new public interest defence where "the publication was in good faith made as a contribution to or part of a discussion of public affairs or matters of general public interest". That could be in the media's interest, but it's not in the Bill before parliament as it stands.

The new government is also exploring whether the law and procedures to protect whistleblowers at work need to be strengthened. "It is crucial that employees feel safe to report cases of serious misconduct. Anyone who raises issues of serious misconduct or wrongdoing needs to have faith that their role, reputation, and career development will not be jeopardised when speaking up," the State Services Minister has said.

Let's hope any change to the *Protected Disclosures Act 2000* recognises a role for the media and protects people who pass on information to them where the public interest is in play. Victoria University of Wellington professor Michael Macaulay has noted some Australian state governments already support whistleblowers who contact journalists in some situations. For example, the New South Wales government protects people who contact the media if they have not had success having their "honest concerns" properly investigated by a relevant higher authority.

When asked why New Zealand had slipped from its fifth place on the World Press Freedom Index in 2017, the chair of New Zealand's Media Freedom Committee at the time, Joanna Norris, said the accelerating financial woes of the news media were the biggest concern. "(A) challenge which threatens to undermine media freedom is the actual sustainability of professional journalism, which is costly and becomes increasingly hard to support as revenues decline or shift to offshore giants," she said.

Her employer Fairfax Media New Zealand (since rebranded as Stuff) was seeking clearance to merge with NZME (New Zealand Media and Entertainment), the only other major newspaper publisher in New Zealand. Between them, they would corner 90 per cent of the nation's shrinking but still profitable newspaper market. They would have a similar dominance of the audience for New Zealand news online, though the likes of Google and Facebook harvest the bulk of the advertising income from that.

"The debate in relation to the proposed merger between local media companies has been a useful and critical conversation to help New Zealanders understand the role and value of strong New Zealand-based media," Norris said. Without a merger, "journalism at

scale" in New Zealand's regions was at immediate risk, she warned.

Greg Hywood, the chief executive of the Fairfax Media parent company in Australia, was more dramatic. He said it would "become end-game" if the merger was disallowed. "We don't have the capacity of deep pockets of private money to subsidise journalism," said Hywood.

But in May 2017 the Commerce Commission, New Zealand's competition watchdog, declined permission to merge. The Commission said plurality and diversity of opinion would shrink – and that outweighed the economic benefits to the company. The decision was announced on UNESCO World Press Freedom Day, May 3.

The prospective merger partners are challenging the decision – at considerable expense – in the Court of Appeal in June 2018. If they succeed, the two companies may get the extra "runway" they say they need to establish a profitable digital era business model. They insist they remain committed to journalism and publishing, but that model would employ fewer journalists than the two companies do now and accelerate the "revenue diversification" strategies: sidelines in insurance, video-on-demand, retailing broadband and events.

In other words, the single slimmed-down company would dominate daily news in print and online, yet journalism would not be its bread and butter. The word "news" no longer features in the current names of either company. And it is conceivable that before long, another owner – possibly from overseas – could acquire this single company, and it may have no commitment to journalism at all. One worried executive told me this year: "Proper news media companies need to be strong enough to tell governments and other companies to f--- off."

If they are not, the implications for media freedom are obvious.

Colin Peacock is the presenter of RNZ's (Radio New Zealand) "Mediawatch" program.

PRESS FREEDOM IN THE ASIA-PACIFIC

A MOUNTING CRISIS ACROSS THE REGION

BY ALEXANDRA HEARNE

ASIA-PACIFIC

TOTAL KILLED:	**39**
AFGHANISTAN:	22
INDIA:	8
PAKISTAN:	6
PHILIPPINES:	3

While the brutal killing of journalists in the Asia Pacific remains a dire concern for the International Federation of Journalists (IFJ), it is just one of the tools of repression that are increasingly working in overdrive in the region to silence the media. Governments, state actors and radical groups are increasingly targeting the media and journalists, creating a culture of fear and intimidation and restricting the flow of information.

AFGHANISTAN

Impunity is continuing to cripple Afghanistan's media. Since 1994, 73 journalists and media workers have been killed in Afghanistan. In two years, since the Afghan Ministry of Interior Affairs started investigating 172 cases of violation of journalists' rights, there has been no practical action for justice.

The Afghanistan Independent Journalists Association leadership briefing with Shamshad TV managers following a hostage situation in the television company's offices. Image courtesy:AIJA

Over the past 12 months, the situation for the media in Afghanistan has become increasingly precarious with authorities able to do little to protect them. Suicide bombs and attacks are fast becoming a threat to the media as the general safety situation deteriorates.

Rural journalists are also facing growing threats as the Taliban tries to recapture territory in the region, often targeting journalists for their reporting. Since the attack on TOLO News in early 2016, the Taliban has become more brazen, increasing their threats to the media. Radio stations are being attacked and burnt, TV stations have been raided and staff taken hostage, while journalists on assignment have had their vehicles targeted in suicide blasts.

CAMBODIA

The situation in Cambodia over the past 12 months has quickly deteriorated. Hun Sen's government stepped up its attacks on its political opposition, human rights defenders and the country's independent media. It closed down radio stations, forced an independent newspaper to shut under threats of a massive tax bill, expelled US-funded democracy advocates, jailed human rights defenders and journalists and used the courts to dissolve the country's main opposition party.

The final edition of the Cambodia Daily, which ceased publication after over 20 years in September 2017 following the government crackdown on press freedom. Image courtesy Socheata Hean

The ongoing persecution of freedom of expression and the independent media saw at least 18 radio stations forced off the air in August, as local radio stations were forced to stop leasing time to the US-funded Radio Free Asia and Voice of America. It is estimated that as many as 50 jobs were lost immediately.

This was followed up with the closing of *The Cambodia Daily* after 25 years in production. The *Daily* was forced to close after the government hit the outlet with a $US6.3 million tax bill, and 30 days to pay.

The government-led crackdown culminated when the courts dissolved the opposition party, CRNP, jailed the leader for treason and banned 118 members from politics for five years.

It is estimated that at least 100 dissidents, journalists and political activists have fled Cambodia since the crackdown.

CHINA

In 2017, China held the 19th National Congress of the Communist Party, which saw President Xi Jinping re-elected for his second term as leader of the Community Party and President of China.

In the lead-up to the Congress, the government-orchestrated crackdown on the media, free speech and access to information saw the IFJ record more than 200 media violations, including enforced disappearances, televised confessions, online shutdowns, media directives and self-censorship.

There are currently 29 media workers jailed in China, a further nine are in custody, six are on bail and two are on probation, and the status of a further 12 is unknown. The oldest case that the IFJ recorded is that of Ekberjan Jamal, a Xinjiang blogger who was charged with "splittism" in February 2008, and sentenced to 10 years in jail.

The death of Liu Xiaobo in 2017 sparked international outrage. Liu was in jail for "inciting subversion" when he was diagnosed with stage- four liver cancer. He was granted medical parole, but died only weeks after his diagnosis.

INDIA

In the world's largest democracy, the threat to the media is creating a real cause for concern. In September 2017 alone, two journalists were killed. The brutal murder of Gauri Lankesh in her driveway in 2017 saw the country's media community come together and demand action. So far, one person has been arrested in connection with the targeted killing.

Since 2005 more than 75 journalists and media workers have been killed in India. Yet in the past 12 months, the situation for the media across the country is on the decline, particularly for journalists in rural areas and small towns. Job insecurity continued to be an issue, with arbitrary firing and lay-offs in major media outlets across the country.

Internet shutdowns, particularly at times of civil strife and in regions of conflict, are becoming the government's latest tool to suppress the flow of information. In the past 12 months, the internet in India has been shut down more than 80 times. In August, the government ordered the shutdown of 22 social media services in Kashmir for a minimum of one month, in attempts to curb protests and violence in the region.

Online harassment also remains a growing concern for the media, particularly female journalists. Harassment and online trolling are making the online space unsafe, with reports of death and rape threats, intimidation and continued harassment becoming all too regular. For more than two months, Chennai-based freelance journalist Sandhya Ravishankar received threats of violence online and over the phone after the publication of a series of investigative news reports exposing illegal sand mining in the state. After lobbying by the journalist community, she was accorded police protection outside her home.

MALAYSIA

Outdated legislation continues to impede press freedom in Malaysia and acts as the biggest threat to the country's journalists. Political cartoonist Zunar is still facing 43 years in jail under the draconian *Sedition Act* for cartoons that he drew regarding the ongoing 1MBD corruption scandal.

The government's control of the media is making it harder for independent media to flourish in Malaysia. The fact that

publishing licenses must be approved by the government and renewed each year, gives the government unrivalled power over the media, creating a culture of intimidation.

The Malaysian government's attempts to control information through legislation were further evident with the tabling of a new Anti-Fake News Bill in March 2018. Under the new legislation which was tabled in the lead-up to general elections in the second half of 2018, persons found guilty of publishing "fake news" face a maximum of six years in jail. Yet the legislation does not define fake news; instead that is up to the courts to determine.

MALDIVES

Yameen Rasheed was brutally stabbed to death 16 times in the hallway of his apartment complex at 3am on April 23, 2017. Rasheed was an outspoken critic of the government and religious intolerance in the Maldives. He had been receiving death threats, posting them on social media and going to the police for protection. His death is illustrative of the volatile landscape that the country's media operates within.

Over the past 12 months, the situation in the Maldives has become increasingly difficult for dissidents and critics, as the government tries to maintain control. Religious extremism has also had an impact on the media.

In early 2018, the Maldives Supreme Court orders the release of opposition political leaders and reinstates 12 suspended MPs, a decision that was not acknowledged by the government. Four days later on February 5, President Yameen declared a 15-day state of emergency, which was extended for a further 30 days in mid-February.

Since then, the media has been harassed and targeted, most notably Raajje TV. Since February 5, at least six Rajjee TV journalists have been arrested. Hussain Hassan was injured during his arrest on February 16, and officials tried to block him from leaving the Maldives for medical treatment days later. In mid-March MPs called for Raajje TV to be shutdown, although not for the first time had these calls been made.

MYANMAR

Journalists in Myanmar are working in an environment of threats, harassment, intimidation and constraints on their ability to report on events. In the past 12 months, this has been particularly evident with the mass displacement of the Rohingya people in Western Myanmar.

The government-led clampdown on reporting on the Rohingya crisis culminated in the abduction and subsequent arrest of two Reuters journalists, Wa Lone and Kyaw Soe. The pair disappeared on December 12, 2017 following a dinner in Yangon. The following day, the Ministry of Information released a statement saying that the two journalists had been arrested for having documents that related to the unrest in Rakhine state.

The statement said that the pair had been arrested for illegally acquiring information with the intention to share it with foreign media. In January they were officially charged under the *Official Secrets Act* after details emerged that two policemen handed them classified documents linked to the Rohingya refugee crisis. Media reports allege that sensitive records contained in the Myanmar Border Guard document included detailing security force numbers and the amount of ammunition used in a wave of attacks in late August. The *Official Secrets Act* makes it unlawful to acquire and possess classified.

The journalists are still in custody, as two bail applications have been denied.

The arrests of Wa Lone and Kyaw Soe are just part of a wider crackdown against the media. Article 66(d) under the *Myanmar Telecommunications Act* is another key tool in the government's arsenal, which has seen journalists sued for criminal defamation.

Local media in Myanmar estimate at least 60 journalists have been charged under Article 66(d) since Aung Sung Suu Kyi took office in November 2015.


A protest in Bangalore, India following the brutal murder of journalist Gauri Lankesh. Image courtesy Laxmi Murthy

NEPAL

Nepal successfully held local, provincial and general elections in 2017 according to the new Constitution that supposedly ended a decade-long political transition and brought in political and administrative stability. However, it's a testing time for the media and journalists who continue to suffer from attacks and threats, and thereby resort to self-censorship.

During the year, some journalists in Nepal faced threats and attacks for their news about corruption. Many journalists were also arrested for their political opinions ahead of the elections and released without charge.

The biggest challenge to Nepali media, however, was related to laws and regulation. The Chief Justice of the Supreme Court passed an order asking *Kantipur* national daily not to publish further news regarding controversy related to his age. The High Court declined to issue an order to stop the police from forcing the journalists to reveal sources of a news story. *Nagarik* national daily was subject to a strategic lawsuit targeted at stopping them from reporting on a large scale corruption by government appointed head of the state-owned oil corporation.

The new constitution has given the local bodies rights to monitor small community radios and a few of them have passed regulations that threaten media freedom as the local bodies can suspend the broadcast of the radios over the contents.

PHILIPPINES

Since the election of President Rodrigo Duterte in June 2016, the situation for the media in the Philippines, globally recognised as one of the world's most dangerous countries for journalists, has deteriorated.

Since 1990, the IFJ has recorded the murder of at least 155 journalists, making it the deadliest country in the Asia Pacific region. However, the situation over the past 12 months has seen new challenges emerge, including direct threats and harassment from the President.

On May 30, 2017, President Duterte described ABS-CBN and the *Philippine Daily Inquirer* as "sons of whores" and warned them of karmic repercussions for their critical coverage of his deadly drug war.

This was followed in July 2017, during Duterte's State of the Nation Address, where he said that Rappler violated the 1987 Constitution as it was solely owned by Americans.

Six months later, the Philippines Securities and Exchange Commission (SEC) revoked Rappler's registration for allegedly violating the Constitution and the *Anti-Dummy Law*. Rappler has denied the allegations and the case continues to proceed.

The battle between Duterte and Rappler continues on many fronts, with Rappler journalist Pia Randa banned from the Philippines Presidential Palace, Malacanang in February, 2018. Randa, who has covered the presidential beat for many years, and is a member of the Malacanang Press Corps, was also banned from the executive office. The ban against Randa was followed up in March when she was blocked from covering the Go Negosyo 10th Filipina Entrepreneurship Summit at World Trade Center, after she was told the event was off-limits to Rappler.

TIMOR LESTE

In a win for press freedom in 2017, two Timorese journalists, Oki Raimundos and Lourenco Martins had "slanderous denunciation" charges against them dismissed. The verdict came more than 18 months after an article authored by Oki Raimundos was published in the *Timor Post* pertaining to Rui Maria de Araújo, in his former role as advisor to the country's finance minister.

A protest in Timor Leste calling on charges of slanderous denunciation to be dropped against journalists Oki Raimundos and Lourenco Martins. Image courtesy: IFJ

The investigative article from 2015 looked at a government tender for IT services. The story misidentified the company as the eventual winner of the contract, claiming that Araújo had recommended that company. The Post apologised for its error, corrected the story, published Araújo's right of reply on its front page and Martins resigned as editor. However, on January 22, 2016, Araújo filed a case with the public prosecutor under article 285 (1) of Timor Leste's *Penal Code* accusing Oki and the then-editor of the Timor Post of "slanderous denunciation".

Prior to the charges being dismissed, the IFJ and MEAA had advocated on behalf of Oki and Martins to have the charges against them withdrawn (in 2017, Oki was named as one of the applicants of the MEAA-APHEDA Union Aid Abroad Balibo Five-Roger East Fellowship recipients).

Australian barrister and IFJ legal advisor Jim Nolan said: "If the two are convicted this will represent a significant stain on the reputation of democratic East Timor. The case is all the more grave as it involves an article which attacked the Prime Minister. The charges have been instituted at his behest. Any decision will also be an encouragement to authoritarian governments in the region which has been marked by increasing attacks upon the press. Until these charges emerged, Timor Leste was one of the few remaining democracies in the region which enjoyed a free press and where journalists could pursue their craft free from the threat of state prosecution."

MEAA CEO Paul Murphy said: "This legal assault on an individual journalist is an outrageous over-reach. It uses a draconian law to keep pursuing a journalist long after an error has been acknowledged and the record corrected. This law has been condemned by MEAA and many other press freedom groups around the world because it allows the government to pursue, intimidate and silence journalists."

The IFJ said: "We stand with our colleagues in Timor Leste in deploring this campaign against them led by the Prime Minister. Slanderous denunciation or criminal defamation by any other name is a brutal attack on press freedom and an attempt to silence critical voices."

PACIFIC

The media situation in the Pacific differs from the wider Asia Pacific region, in so much that journalists are generally safer and killings are a rarity. However, over the past 12 months, the situation hasn't improved dramatically, and journalists are still facing challenges.

In **Fiji** the status of the country's press freedom is in question and in 2017, it ranked the worst on Reporters' Without Borders Press Freedom Index. While Fiji had improved from the previous year, it was still the worst ranked Pacific nation – a point strongly disputed by the country's leaders. The status of Fiji's media is largely due to the Media Decree of 2010, which continues to stifle press freedom.

In **Vanuatu** the previous 12 months has seen the country start to implement the newly passed Right to Information law. While the law is a positive step for media development in Vanuatu, the media face challenges particularly in regards to working conditions and pay.

Alex Hearne is the IFJ Asia-Pacific office's projects and human rights coordinator

The bodies of some of the 58 people including 32 journalists murdered in the Ampatuan Massacre, southern Philippines, November 23 2009 - the single worst atrocity committed against journalists. Image courtesy Nonoy Espina

JOURNALIST SAFETY

On November 23 2009, on a hilltop in Mindanao in the southern Philippines, 58 people including 32 journalists were murdered in the Ampatuan Massacre.[179] This, the largest single atrocity against journalists, has become the focal point for efforts to end impunity over the killing of journalists and increase protection in international law.

In November 2017 journalists' leaders from around the world backed a call by the International Federation of Journalists (IFJ) for a ground-breaking new United Nations Convention aimed at giving greater protection for journalists and journalism in the face of a tide of violence and threats. (MEAA is an affiliate member union of the IFJ.)

The call comes as figures show the numbers of journalists being violently attacked, threatened, jailed and prevented from working free from fear and harassment continues to grow, while impunity for such crimes is running at over 90 per cent.

Journalists' union leaders representing more than 600,000 media workers across the world endorsed the IFJ's proposed *International Convention on the Safety and Independence of Journalists and Other Media Professionals* at a meeting in Tunisia.[180]

The convention would for the first time establish binding standards creating safeguards specifically for journalists and media workers.

While under international humanitarian and human rights law journalists enjoy the same protections as all other civilians, such laws fail to acknowledge that journalists face greater risks compared to other civilians.

There is a strategic advantage to be gained from targeting the media – those who wish to prevent the dissemination of information and international scrutiny increasingly deliberately target journalists. Journalists' deliberate proximity to any conflict also makes them especially vulnerable; unlike other civilians, journalists do not avoid conflict areas.

While every individual is entitled to the protection of their right to life, personal liberty, security, freedom of expression and an effective remedy when their rights have been infringed, existing general human rights instruments fail to reflect the systemic effect of attacks against journalists on societies.

Unlike most violations, attacks on journalists' life or physical integrity have an impact on the public's right to information, contribute to a decline of democratic control and have a chilling effect on everyone's freedom of expression. Despite this, there is no independent course of action for members of the public or other media workers in cases of violations of the rights of a journalist to lodge an application for the case to be heard in an international procedure.

The current human rights regime also fails to take into account the risks associated with the journalistic profession. While everyone's right to free speech is protected, the exercise of freedom of expression by media professionals is distinct: they are involved in the circulation of information and ideas on a regular basis, with a much wider impact on mass audiences, hence providing a greater incentive to target them by those who wish to censor unfavourable speech.

Journalists are targeted on account of their profession, and a dedicated international instrument would enhance their protection and attach particular stigma to violations, increasing pressure on States to both prevent and punish violations, which is at the core of compliance with international law.

The IFJ believes a new binding international instrument dedicated to the safety of journalists, including a specific enforcement mechanism, would improve the effectiveness of the international response.

THE MEDIA SAFETY AND SOLIDARITY FUND

A MEAA initiative established in 2005, the Media Safety & 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.

The fund trustees direct the International Federation of Journalists Asia-Pacific to implement projects to be funded by the MSSF. The fund's trustees are Marcus Strom, national MEAA Media section president; the two national MEAA Media vice-presidents, Karen Percy and Michael Janda; two MEAA Media federal councillors, Ben Butler and Alana Schetzer; and Brent Edwards representing New Zealand's journalists' union, the E tū, which also supports the fund.

Aside from contributions made by MEAA members as a result of enterprise bargaining agreement negotiations, the other main fundraising activities of the fund are auctions and raffles.

JOURNALIST SAFETY AND HUMAN RIGHTS

In 2017 MSSF supported the work of the IFJ Asia-Pacific's human rights and safety program. Under the program, IFJ AP remained a prominent advocate in the region for press freedom, journalists' rights and safety.

In March 2017, the IFJ AP launched the Byte Back Campaign: Fighting Online Harassment of Journalists calling for strong action to stop cyber bullying and online harassment of women journalists. In May it launched the #JournosAgainstShutdowns campaign raising awareness for internet shutdowns as a press freedom issue.

PRESS FREEDOM

In January 2018, the IFJ launched the 10th *China Press Freedom Report*,[181] reviewing this bleak period for freedom of expression. From the optimism and hope for China leading up to the 2008 Beijing Olympics, where a more free and open media was promised by China's leaders to the world, the IFJ reports that reality on the ground is harshly different, with a continuing and disturbing decline in media freedoms in both Mainland China and Hong Kong.

The IFJ recorded more than 900 media violations between the years 2008 to 2017, more than 30 per cent recorded in the Beijing Municipality alone. There were 250 incidents of censorship; more than 190 arrests, detentions and/or imprisonments; 90 restrictive orders and 80 incidents of harassment and/or threats. IFJ figures indicate there are 38 media workers currently known to be detained in China, including renowned democracy advocate Liu Xiaobo who died in custody.

The IFJ AP continued its campaign for Oki Raimundos and Lourenco Vincente, who were charged with criminal defamation in Timor Leste. On June 2, in a win for press freedom, the charges against the pair were dismissed.

SUPPORTING THE CHILDREN OF SLAIN JOURNALISTS

The MSSF helps fund the education of the children of slain journalists.

In Fiji, MSSF supports Jone Ketebaca, the son of Sitiveni Moce who died in 2015 after he succumbed to injuries sustained when he was attacked by soldiers in 2007.

In Nepal, MSSF supports 23 children with two due to graduate from university at the end of the year. The education program was established in 2010 to help the children of journalists who have been killed since the transition to democracy began in 2005. To date, this financial support has been $181,472 (including administration fees paid to the International Federation of Journalists).

In the Philippines, MSSF supports 68 students – 25 are the children of journalists killed in the 2009 Ampatuan Massacre. At the end of the 2016-17 school year, five children will graduate from university with a range of qualifications including computer science, financial management, engineering and teaching.

The Media Safety and Solidarity Fund remains one of the few examples of inter-regional support and cooperation among journalists across the globe. Please support the work of the fund by making a donation.[182]

The children of slain journalists in the Philippines and Nepal have their education funded by the MSSF. Pictured are three Nepalese children who have benefitted from the MSSF's education support fund. Image courtesy: IFJ

Detained Reuters journalists Wa Lone and Kyaw Soe Oo are escorted by police after a court hearing in Yangon, Myanmar February 28, 2018. Image: Reuters/ Stringer

THE WAY FORWARD

BY MIKE DOBBIE

There is plenty of evidence available to build a case that journalists are being increasingly and deliberately targeted for their journalism. Governments have become more secretive and are enacting laws to prevent legitimate scrutiny of their activities. Whistleblowers are being harassed, intimidated and ultimately arrested and imprisoned for revealing government secrets. And journalists who are sought out by whistleblowers to publish and broadcast the truth so that their communities can discover what governments have been doing in our name, get locked up or, in an increasing number of cases, killed for telling the story.

In its 2017 prison census, the New York-based Committee to Protect Journalists (CPJ) found that 262 journalists were behind bars around the world, the highest number since it began keeping such records in the early 1990s.[183]

"For the second consecutive year more than half of those jailed for their work are behind bars in Turkey, China, and Egypt. The pattern reflects a dismal failure by the international community to address a global crisis in freedom of the press," CPJ said.

"Globally, nearly three-quarters of journalists are jailed on anti-state charges, many under broad and vague terror laws, while the number imprisoned on a charge of "false news", though modest, rose to a record 21," it reported.[184]

Exhibit one. November 21, 2017. "Anisur Rahman, a 33-year-old journalist with *Daily Sangbad* in Roumari upazilla, Rangpur in northern Bangladesh, was arrested under the controversial Section 57 of the *Information and Telecommunication Act*. He was charged with taking a 'screenshot' of a Facebook post involving the president and the prime minister and showing it to the local people. The journalist denied the allegation."[185]

Exhibit two. December 12, 2017. "Two Reuters journalists, Wa Lone and Kyaw Soe Oo, are arrested in Myanmar's main city, Yangon, after being invited to meet police officials over dinner. Myanmar's government says that the journalists face charges under the colonial-era *Official Secrets Act*, which carries a maximum prison sentence of 14 years. The Ministry of Information has cited the police as saying they were 'arrested for possessing important and secret government documents related to Rakhine State and security forces'. The ministry said they had

'illegally acquired information with the intention to share it with foreign media'. The government only announced the arrest of the reporters some 24 hours after they were detained and the two were held at an undisclosed location without contact with families or lawyers for two weeks."[186]

The war on terror has provided the excuse and the opportunity for governments to draft legislation designed to muzzle the media. The media, cowed by allegations of "fake news" from politicians who can't handle the truth and already weakened by the digital disruption that have hammered the industry, have been too slow or too weak to respond.

Of course, having a US president who engages in Twitter warfare on sections of the media he doesn't like doesn't help. And it doesn't take much for blatant attacks on the media to incubate an environment that can make journalism a deadly occupation. Endless tweets decrying "fake news" made against media outlets will eventually lead to repercussions.

Exhibit three. January 9-10, 2018. In a series of 22 threatening phone calls, Brandon Griesemer made a series of increasingly violent threats to staff at CNN's Atlanta headquarters. The threats included: "Fake news… I'm coming to gun you all down… You are going down. I have a gun and I am coming to Georgia right now to go to the CNN headquarters to fucking gun every single last one of you."[187]

Killing journalists is not new. In recent years, the bulk of journalist deaths were the result of wars – such as journalists both foreign and local working in conflict zones where they can be caught in cross-fire.

But there is a disturbing pattern developing around several journalists deaths over the past 12 months. Increasingly, journalists are being deliberately hunted, targeted and murdered because of their journalism. It is almost as if there is a more brazen attitude to killing journalists now that may have something to do with the culture of impunity that surrounds their murder.

Exhibit four. October 16, 2017. "Daphne Caruana Galizia was less than a mile from home when her Peugeot 108 exploded and burst into flames last October, killing her instantly and sending shrapnel into a nearby field. She was 53 and the most famous investigative journalist in Malta. In that tiny country, her scoops consistently made life uncomfortable for the powerful, whether in banks or the Prime Minister's office. Investigators later found that a sophisticated device had been planted on the car and remotely detonated."[188]

Exhibit five. February 25, 2018. September 5, 2017 "Gauri Lankesh, 55, a respected veteran journalist and outspoken critic of Hindu nationalists, was shot dead outside her home in Rajarajeshwarinagar in northern Bengaluru, Karnataka, as she returned from work. Three unidentified gunmen on a motorbike fired at least four shots at her as she entered through the gate of her home. Lankesh died at the scene after receiving gunshots to the head and chest. The gunmen fled the scene."[189]

Exhibit six. February 25, 2018. "Slovak investigative journalist Ján Kuciak and his girlfriend Martina Kušnířova were found shot to death in his house in Velká Mača, some five kilometres from the capital Bratislava. The journalist was shot in the chest with a single bullet, and his partner in the head, according to reports. Police chief Tibor Gašpar said that the murders were 'most likely' linked to the work of the journalist, Reuters reported."[190]

But perhaps there is no greater proof of how journalists are being targeted for death than the revelations that came in April 2018. A US court was told how renowned *Sunday Times* journalist Marie Colvin was hunted using her phone signal. The signal was then used to determine the range for the subsequent rocket barrage that killed her, French freelance photojournalist Remi Ochlik and wounded three others.[191]

Exhibit seven. February 2, 2012. "As part of her reporting, Ms Colvin gave live interviews to the BBC and CNN… The highest levels of the Syrian government, including President Assad's brother, were behind the plan to track the journalist once she entered Syria, the lawsuit claims, using a mobile satellite interception device that could tap broadcast signals and locate their origin as well as an informant on the ground… The former intelligence officer, code named Ulysses, provided a detailed account of how Syrian President Bashar Al-Assad's regime sought to capture or kill journalists and activists… [Ulysses'] account appears to be corroborated by Syrian government documents filed as evidence in the case, which suggest the regime targeted her to silence her reporting on its atrocities."

UNESCO says its World Press Freedom Day, held on May 3 each year, "is a date which celebrates the fundamental principles of press freedom, to evaluate press freedom around the world, to defend the media from attacks on their independence and to pay tribute to journalists who have lost their lives in the exercise of their profession. It serves as an occasion to inform citizens of violations of press freedom… May 3 acts as a reminder to governments of the need to respect their commitment to press freedom…"[192]

The disturbing trends overseas, of governments attacking journalists, jailing them and even killing them for their journalism, should outrage us all. But Australia is also a country where nine journalists have been murdered with impunity and Australian Governments have spent decades doing little if anything to bring those responsible for our colleagues' murders to account.

Now Australia appears to be sending signals that it, too, wants to jail journalists for their work. The growing trend for Australian Governments to hide government activities behind a veil of secrecy, increase existing or impose new penalties for disclosing information, and use telecommunications data to secretly hunt and identify journalists' confidential sources, certainly indicates that legitimate scrutiny of what governments do in our name can and will be punished. And remember, these new laws and penalties, as well as the increased powers of surveillance that go with them, are frequently given bipartisan support as they pass through the Parliament.

The Espionage Bill, if it is allowed to become law without a genuine media exemption, has the potential to make Australia the worst in the western world for criminalising journalism. The Bill is just the latest in a basket of national security law amendments that punish whistleblowers seeking to disclose instances of fraud, dishonesty, corruptions and public health and safety issues, while also threatening journalists with jail for simply doing their job.

With each new tranche of national security laws passed by the Parliament, jail terms for journalists have steadily risen from six months to up to 20 years for those who write news stories revealing the truth and keeping their communities informed. While Governments profess that it was never their

JOURNALISM IS NOT A CRIME... BUT IN AUSTRALIA THERE ARE MANY WORKING HARD TO MAKE IT SO.

Journalist Marie Colvin was killed "in a targeted rocket attack" on a makeshift media centre in the rebel-held city of Homs, the court papers allege. Image: Reuters/ Sunday Times

intention to actually jail journalists, these Bills then become enacted and the penalties remain on the statute books, silently intimidating journalists and threatening to punish anyone who dares reveal the truth – the chilling effect encapsulated.

There are some encouraging signs that Governments may at least be listening to journalists' concerns. The Senate select committee into the future of public interest journalism has made recommendations mostly in line with MEAA's suggestions. Not least of these is backing the MEAA call for a review of Australia's 12 year old uniform national defamation law regime. Consideration has also been given about types of government support that can be offered to the media industry.

The Australian Competition and Consumer Commission has launched an inquiry into the power of digital platforms and the harm they do to media outlets not least in revenue terms, but also in their use of journalistic content. MEAA has made an important, detailed submission to this inquiry.

Victoria has released a significant report seeking to curb its courts' obsession with using suppression and on-publication orders to avoid scrutiny and transparency.

Shield laws for journalists have been enacted in the Northern Territory and soon in South Australia leaving Queensland out in the cold as the only jurisdiction that still thinks it's OK to compel journalists, on threat of contempt of court, to disobey their ethical obligations and reveal the identity of their confidential sources. Hopefully, this will soon be remedied and then the jurisdictions can come together to create a uniform national shield law regime.

The Senate Select Committee also called for the restoration and maintenance of proper funding for public broadcasting, not least to ensure obligations to their rural and regional audiences can be maintained but also to ensure that their fact-checking capability can continue.

The thinking behind these moves is welcome. In many cases, they reverse what had been attacks on press freedom.

It's more difficult to understand why Australian lawmakers continue to be so intent on amending to national security legislation in order to criminalise journalists and journalism.

While their efforts continue, and governments are always reluctant to remove laws from the statute books that would lead to a diminution of their powers, press freedom in Australia and the public's right to know will continue to be hard-pressed. Journalism is not a crime… but in Australia there are many working hard to make it so.

Mike Dobbie is the MEAA Media section's communication manager and editor of MEAA's annual press freedom reports.

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