GOING AFTER WHISTLEBLOWERS, GOING AFTER JOURNALISM

THE REPORT INTO THE STATE OF PRESS FREEDOM IN AUSTRALIA IN 2015

MEAA MEDIA, ENTERTAINMENT & ARTS ALLIANCE

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THE WALKLEY FOUNDATION

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2015 AUSTRALIAN PRESS FREEDOM REPORT

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FOREWORD

This has been a dire 12 months for the state of press freedom in Australia — for journalists, for the communities we serve and for sources that trust us to tell their stories.

On October 30 last year, Attorney-General George Brandis admitted that the controversial section 35P of the Government's first tranche of national security laws was written with the aim of targeting whistleblowers. "It was primarily, in fact, to deal with a Snowden-type situation," he said. Whistleblower Edward Snowden had worked with journalists to reveal US government officials had routinely and deliberately broken the law1.

On February 27 this year, the report of Parliament's Joint Committee on Intelligence and Security revealed that targeting whistleblowers was one of the aims of its metadata retention scheme. Recommendation 27 of the committee's report said journalists' metadata would be accessed "for the purpose of determining the identity of a journalist's sources".

Public interest journalism relies on whistleblowers, the confidential sources that provide crucial information to journalists — sometimes placing both at great risk.

It is a well-known ethical principle of journalism that journalists do not reveal their confidential sources. It's a principle that is vigorously defended because it is the only way many vital stories in the public interest can ever be told. Whistleblowers turn to journalists to help expose misconduct, illegality, fraud, threats to health and safety, and corruption. Our communities are the better for their courageous efforts to ensure the public's right to know.

If the identity of whistleblowers can be revealed then that has a chilling effect on public interest journalism; sources needing anonymity cannot rely on their contact with a journalist being kept secret. When that happens, we all lose.

The politicians who ignored press freedom concerns about the raft of national security laws failed to understand how confidential sources and public interest journalism are linked.

If you are going after whistleblowers, you are going after journalism.

And even when they did register the concerns for press freedom, their solutions failed miserably. Take the so-called "safeguard" of journalist information warrants introduced as an amendment to the data retention scheme. The journalist information warrant will operate in secret on pain of a two-year jail term. It relies on "public interest advocates" appointed by the government. It will still allow a journalists' metadata to be accessed to identify a journalist's sources, and the journalist and their media organisation will never know access was granted. Nor will they be able to argue the public interest in protecting the identity of a whistleblower.

In short, the three tranches of national security legislation passed by the Parliament represent a colossal failure to stand up for press freedom, freedom of expression, privacy, freedom to access information and the public's right to know.

As this 2015 report into the state of press freedom in Australia shows, press freedom has been under assault in many other areas. South Australia continues to reject attempts to introduce a shield law, thus exposing journalists throughout Australia to the prospect of plaintiffs going "jurisdiction shopping".

Tasmania briefly considered breaking away from the uniform national defamation scheme to reintroduce the prospect of corporations suing for damages.

Freedom of information law reform continues to linger in limbo due to successive governments' inaction and a lack of courage in embracing sensible remedies that ensure the public can benefit from truly open government.

And while we are all delighted at the release and homecoming of Peter Greste from his Cairo prison, the re-trial of Peter and his colleagues goes on. MEAA is also awaiting the fate of Australian journalist Alan Morison who faces up to seven years in a Thai jail for reprinting a paragraph from a Reuters news report.

This year marks the 40th anniversary of the murder of our colleagues Brian Peters, Malcolm Rennie, Tony Stewart, Gary Cunningham and Greg Shackleton in Balibo and Roger East in Dili in East Timor. MEAA is disappointed that the AFP spent five years on examining these war crimes only to abandon their investigation without seeking any co-operation from Indonesia and "without any interaction with their counterparts, the Indonesian National Police. The result is that impunity has triumphed and the killers of the Balibo Five and Roger East have literally got away with murder.

It can only be hoped that over the coming year, greater effort will be made by governments, politicians, government agencies and those who like to talk about championing press freedom to turn away from repressing freedom of expression and actually respect and promote it.

Paul Murphy
CEO
MEAA

Paul Murphy
CEO
MEAA

THERE IS NO NEUTRAL TURF, NO SAFE GROUND

Peter Greste — an excerpt from his address to the National Press Club, Canberra, on March 26 2015

We need to understand that freedom of speech is being threatened in ways that we haven't seen for a generation. Rarely have so many of us been imprisoned, beaten up, intimidated or murdered in the course of our duties. According to a count by the Committee to Protect Journalists, last year 60 were killed on the job or because of their work. That number is slightly down from the 70 who were killed the year before.

And here's a statistic that obviously interests me; at the end of last year, the number of journalists imprisoned for their work stood at 220, with China, Iran, Eritrea and Egypt topping the list of the jailers.

Another group, Freedom House, has produced a map of press freedom across the globe. Purple marks the countries where press is not free and there is a vast stain that spreads across Asia, through the Middle East and down into Northern and Central Africa. The yellow patches that mark a partly free press spread across most of Latin Africa, West Africa, East Africa and a few corners of South East Asia.

Depressingly, Freedom House reckons that the green bits, the bits that cover Western Europe, North America and Australasia cover only 14 per cent of the world's population —14 per cent of the world's population who enjoy a truly free press.

Now, here's one more statistic that has me worried. Of those journalists put in prison, two thirds are there because of anti-state charges such as terrorism or subversion, just as the three of us were in Egypt. That fact is troubling because it seems to confirm what I've suspected for a while now — that the atrociously named War on Terror is, itself, a part of the problem.

Throughout most of the past four decades, wars have been dominated by struggles over tangible things like territory or resources or ethnicity. Even some of the conflicts over competing political ideologies like Colombia's civil war between leftist rebels and a right wing government were, in truth, struggle for control of resources.

Those of us who have covered messy conflicts like Colombia, or other local wars like the battle for resources in Eastern Congo or political and ethnic power in South Sudan, will know that the biggest risk comes from random bits of flying metal or a drunk soldier at a checkpoint, rather than any attack aimed specifically at journalists. It's risky, of course, but the dangers are usually incidental. They come from working in an inherently violent environment, rather than in any place particularly hostile to journalists.

Of course, propaganda is as old as war itself and warring factions have always sought to control the narrative but, in these wars over stuff, the target has generally been the message rather than the messenger.

But this brings me back to the War on Terror, a conflict that is, by its very nature, indefinable with no clear physical or ideological boundaries and with a title that, frankly, means everything and nothing — or rather it means what any of the groups involved really want it to mean.

In a way that we haven't seen in a generation, this is a struggle over an "ism". It's a battle between competing world views much more than it is over a fight for land or resources and, in this struggle, the message is as much a weapon as any gun. Witness the way that Islamic State has used YouTube to recruit its supporters and terrify its opponents.

Now, the trouble for us journalists is that in this conflict there is no neutral turf, no safe ground from which to report.

As much as we abhor and condemn the executions by Islamic State of the American journalists Steven Sotloff and James Foley, it was George W. Bush who set the ground rules in the wake of 9/11 when he declared that you're either with us or you're with the terrorists.

That single statement made it impossible for reporters to hold to the principles of balance and fairness without being accused of acting as an agent for the enemy.

Since the War on Terror began, governments across the globe have used the T-word as an excuse for all sorts of attacks on human rights and press freedoms. It almost feels like a kind of globalised McCarthyism where simply invoking terrorism is enough, in some cases, to get away, literally, with murder.

I don't mean to minimise the risks of terrorism; I know that this is a very live issue here in Australia at the moment, and nor do I want to blame governments alone. The Islamic State executions are simply the latest and most shocking examples of the problem on the other side of the ledger but, in this new world, to simply ask questions about the conflict or to seriously investigate either extremism or the government's handling of it is to make yourself a target. In the view of both sides, if you cross the lines in pursuit of our most fundamental principles of balance, of accuracy, of fairness, you effectively join the enemy.

Mural by Hego of Peter Greste on the front of the MEAA offices in Sydney

In effect, what it has done is to make the media the battleground.

Now, for me, this is personal. As you know, I've just come out of 400 days in an Egyptian prison cell. There is something that often struck me as particularly tragic and ironic, given that I was accused of collaborating with Islamist extremists, something most of you may not know, is that I was in Somalia in 2005 when my producer Kate Peyton was gunned down. She was murdered by Islamist extremists.

In prison, I often thought about what we had done to upset the government and, in a way, I might not have minded being in prison so much if we genuinely had pushed the boundaries. I've done that plenty of times in places where my own radar was much more finely tuned, when I was far more aware of where those boundaries lay — of what might upset a government or a warlord and of what their response might be and what I could legitimately get away with.

But, in Egypt, we were quite deliberately playing with a very straight bat indeed. I had only been there two weeks before our arrest, so I wasn't in any position to probe the edges. I was simply treading water. My work was, I have to admit, rather routine. It was certainly nothing special. But the trouble is that Egypt is the most polarised society I've ever seen in a place that isn't in civil war.

I remember barely six months before our arrest, the Muslim Brotherhood had formed the first legitimately elected government in the nation's history. They remained the single largest and best organised political force. So, in the pursuit of balance and fairness, it made sense to pick up the phone and to talk to them — but it seems that act alone made us targets of the government.

Now, I'm not denying for a moment that there were other more complex political forces at play. Plenty has been said about the messy relationship between Qatar and Egypt and Al Jazeera's role in it all, but whatever those forces were, we were charged with — and imprisoned for — simply crossing that very specific political boundary.

At this point I would like to remind you that we, all three of us, me included, are still on trial. My colleagues, Mohamed Fahmy and Baher Mohamed were last night, or yesterday afternoon, in court before yet another hearing in our re-trial and I remained a named defendant in the case. So far, the case does seem to be moving in the right direction but, given our experience the last time around, we are still deeply concerned about where all of this might be heading. And again, because our trial is ongoing, I really can't comment any further, except to say that we must not let up this fight for

justice until both of them, and all of those who are convicted in absentia, have been fully vindicated and are free of the charges.

And, in a case that's become emblematic of press freedom, anything less would be not just a travesty but would set a terrible precedent for this kind of debate and for governments that are considering draconian legislation everywhere.

Now, I'm not going to suggest here that Australia is anywhere near that situation. In fact, every time I come home, I'm struck by how extraordinarily lucky we are on just about every level imaginable. But what concerns me is that we should take great care to defend those things which have helped keep our society genuinely stable and truly free.

There is, of course, a very vigorous debate about the metadata legislation. I really don't want to get too involved in that here, but in the arguments about the detail, I think we risk losing track of some of the higher principles involved. Remember, the media is the fourth estate, the fourth pillar of a healthy functioning democracy alongside the executive, the legislature and the judiciary. The more you weaken any one of those, the more you destabilise the whole lot.

During my work in more authoritarian places, I've often noticed that in the relationship between the government and the media, there is a sliding scale that defines the way power is distributed. If you take power away from one, then you give it, by definition, to the other.

In the current environment it is all too easy and too tempting for governments to use the War on Terror as a convenient excuse for dragging that slider to the right, to claim more power in the interests of national security, trading off the media's oversight role in the process. Even if we wanted to live in a police state, history suggests that we can never really truly deal with terrorism.

Perversely, the best way to tackle extremism of any sort is to keep an open, accountable society with a free media, able to do its job, interrogating not just governments, but those whose opinions tend to drift off into the political extremes.

Now, anybody who has heard me before will know that I'm fond of quoting Albert Camus who rather famously said: "A free press can, of course, be both good and bad, but a press that is not free can never be anything but bad".

While Australia and other governments have been locked in this debate, we've also been turning it over in our own minds. In particular, Baher and I often discussed it in our cell and Baher came up with an idea that we have begun to take very, very seriously indeed.

What we wanted to do was to find a way to help protect journalists that might transcend state boundaries and he suggested some kind of universal media freedom charter — the kind of document that carries no legal weight, but carries the kind of moral authority of the human rights charter. It would set a gold standard defining the relationship between governments and the media. It would set out the responsibilities of each and the boundaries in the way that the relationship is supposed to work. It could be used as a kind of benchmark by which both of us could be measured. Crucially it would stand independently of national jurisdictions and free of the partisan domestic politics that so often scuppers these kinds of initiatives.

If we get enough media groups and governments to sign on to the set of principles, it would be a tool that could be used to guide policy and to hold others to account. This idea is still very much in its infancy. We are still canvassing support and ideas and looking for supporters amongst the media, governments and human rights groups, but I would like to take this opportunity to invite the Australian media — everyone here — to join the conversation, to help us with ideas and contacts so that we can draft something that really has the capacity to work.

I know that there is quite a deal of cynicism about this, and last night we had a rather vigorous discussion about whether this was the right approach or not.

The debate is still open, but I think it is a debate that we need to have and I think it is an idea that really has the potential to have some influence. This is important. We expect it will be controversial, but it seems clear that something has to be done to tackle the assaults on media freedom in general, and the hundreds of journalists being killed, imprisoned, tortured and intimidated all over the world.

Ladies and gentlemen, thank you.

Peter Greste is an Australian journalist. On December 29 2013, he and two other Al Jazeera English journalists, Mohamed Fadel Fahmy and Baher Mohammad, were arrested by Egyptian authorities. On June 23 2014, Greste and his colleagues were found guilty by the court of spreading false news and aiding the banned Muslim Brotherhood although there was no evidence that they had done anything other than report responsibly. Greste was sentenced to seven years jail. On February 1 2015, a month after a re-trial was announced and after 400 days of detention, Greste was deported. His colleagues were released on bail on February 12 2015. Their re-trial is ongoing.

PRESS FREEDOM ALERTS

In the past 12 months, MEAA has issued and participated in the following submissions and representations:

February 27 2014 — MEAA submission to the Senate Legal and Constitutional Affairs References Committee — comprehensive revision of *Telecommunications (Interception and Access) Act 1979*
June 19 2014 — Joint Media Organisations' letter to South Australian Attorney-General John Rau re: *Surveillance Devices Bill 2014*
July 23 2014 — Joint Media Organisations' letter to South Australian Attorney-General John Rau re: *Surveillance Devices Bill 2014*
August 6 2014 — Joint Media Organisations' submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *National Security Amendment Bill (No 1) 2014*
August 6 2014 — MEAA submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *National Security Amendment Bill (No 1) 2014*
October 3 2014 — Joint Media Organisations' submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*
October 3 2014 — MEAA submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*
October 10 2014 — Joint Media Organisations' letter to Attorney-General George Brandis re *FOI Amendment (New Arrangements) Bill 2014*
October 14 2014 — MEAA letter to South Australian Attorney-General John Rau re: *Evidence (Protection for Journalists) Amendment Bill 2014*
October 16 2014 — Joint Media Organisations' letter to South Australian Shadow Attorney-General Vickie Chapman re: *Surveillance Devices Bill 2014*
October 28 2014 — Joint Media Organisations' letter to South Australian Premier Jay Wetherill re: *Evidence (Protections for Journalists) Amendment Bill 2014*
November 6 2014 — Joint Media Organisations' submission to Senate Legal and Constitutional Affairs Legislation Committee inquiry into the provisions of the *Freedom of Information Amendment (New Arrangements) Bill 2014*
November 7 2014 — Joint Media Organisations' submission to the Parliamentary Joint Committee on Intelligence and Security inquiry *Counter-Terrorism Legislation Amendment Bill (No.1) 2014*
December 19 2014 — Joint Media Organisations' submission to the NSW Government review of the *Government Information (Public Access) Act 2009*
January 19 2015 — MEAA submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*
January 20 2015 — Joint Media Organisations' submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*
January 29 2015 — MEAA letter to Tasmanian Attorney-General Dr Vanessa Goodwin re: proposed amendments to Tasmania's defamation laws
January 29 2015 — MEAA submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Independent National Security Legislation Monitor (Improved Oversight and Resourcing) Bill 2014
February 4 2015 — MEAA letter to Hon Robert Borsak MLC, chair of the NSW Legislative Council Select Committee on the conduct and progress of the Ombudsman's inquiry into "Operation Prospect"
February 10 2015 — MEAA letter to Justice Minister Michael Keenan and AFP Commissioner Andrew Colvin re: release of Mullah Krekar from Norwegian prison and pursuit of war crimes investigation over alleged involvement in the murder of ABC cameraman Paul Moran in 2003
February 16 2015 — MEAA letter to David Kaye, United Nations' Special Rapporteur for the Promotion and protection of the right to freedom of opinion and expression on the threats to press freedom, freedom of opinion and freedom of expression contained in Australia's national security laws
February 17 2015 — Joint media organisations letter to Parliamentary Joint Committee on Intelligence and Security inquiry re *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*
March 13 2015 — Joint Media Organisations submission to Australian Law Reform Commission's Issues Paper — *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws*
March 31 2015 — Joint media organisations' submission to the Senate Committee on Rural and Regional Affairs and Transport inquiry into the *Criminal Code Amendment (Animal Protection) Bill*
April 22 2015 — Joint Media Organisations submission to the Independent National Security Legislation Monitor inquiry into section 35P of the *ASIO Act*

TALK IS CHEAP

Prime Minister Tony Abbott made a National Security statement at AFP headquarters in Canberra on Monday 23 February 2015.
PHOTO: ANDREW MEARES – FAIRFAX SYNDICATION

Prime Minister Tony Abbott on the role of Australian journalists to President al-Sisi of Egypt — June 23 2014

"I did make the point that Peter Greste was an Australian journalist and I assured him, as a former journalist myself, that Peter Greste would have been *reporting* the Muslim Brotherhood, not supporting the Muslim Brotherhood, because that's what Australian journalists do."[3]

Politicians like to talk about press freedom. They like to talk about the importance of press freedom as a vital element of a healthy functioning democracy. However, over the past 12 months their actions have spoken louder.

There has been plenty of opportunity to speak long and strong about press freedom with Peter Greste being sentenced to seven years jail in Egypt for simply doing his job; with the beheadings of journalists Steven Sotloff, James Foley and Kenji Goto by Islamic State, and with the terrorist attack on the staff of *Charlie Hebdo*.

As Greste observed: "Journalists are no longer on the front line; we are the front line. Rarely have so many of us been imprisoned, beaten up, intimidated or murdered in the course of our duties."[2]

But when it comes to actions, politicians have shown themselves to be anything but the champions of press freedom they claim to be.

Between mid-2014 and April 2015, when the discussions surrounding the three tranches of national security laws were at their height, serious press freedom issues were raised. These included the jailing of journalists for up to 10 years for simply doing their job (like Greste), the accessing of journalists' metadata in order to hunt down whistleblowers, the monitoring, and even tampering with, the computer networks of media organisations, and designating journalists as "persons of interest" under the *ASIO Act*.

So here's what Government and Opposition politicians said about press freedom, remembering that the three national security laws were passed with bipartisan support.

Tony Abbott on free speech — July 17 2014
"News that endangers the security of our country frankly shouldn't be fit to print and I'd ask for a sense of responsibility, a sense of national interest as well as simply of commercial interest, a sense of the long-term best interests of the country as well as the short-term best interests of creating sensation to be present right across our country including in the media."[4]

Senator Cory Bernardi on the government's national security laws — July 17 2014
"Let's go back to first principles. One, I think the Australian public, and right around the world, are right to be suspicious of government and their snooping ability, if I can put it like that … Look at what's happened in Germany, with the NSA in America, across Europe there's been a lot of discussion in this area. Secondly, I think we're right to advocate for freedom of the press. We need to make sure the press are free to report within the constraints of what is in, I'd say, the national interest. We all know that there are things the press don't report because of security concerns. We have to be reliant on that. People have gone to jail to protect their sources before[…]." [5]

Shadow Attorney-General Mark Dreyfus on section 35P — August 7 2014
"The national security legislation Senator Brandis has recently introduced into the Senate contains a new provision, s35P, which makes it an offence punishable by up to 10 years imprisonment for anyone to disclose information about certain undercover operations declared by ASIO to be 'special intelligence operations'. As has been pointed out, this could apply to journalists, even when they did not know that information relates to such an operation. There are no exemptions … It is clear to me, however, that the proposed s35P as currently drafted is not necessary. It is an unprecedented overreach of government power which poses a real threat to the freedom of the press … The Government must amend the legislation to remove this threat to freedom of speech and freedom of the press. Labor will oppose it in its current form. We will not tolerate legislation which exposes journalists to criminal sanction for doing their important work. Work that is vital toupholding the public's right to know."[6]

Tony Abbott statement on freedom — September 22 2014
"Regrettably, for some time to come, the delicate balance between freedom and security may have to shift."[7]

Attorney-General George Brandis on the intent of s35P — October 30 2014
"There has been a lot of public discussion about the effect of section 35P which was passed recently as part of the first tranche of counter-terrorism legislation. Almost all of that public commentary was wrong. In particular, the suggestion that section 35P was directed to journalists or somehow constituted a constraint on the freedom of the press is simply wrong. That provision applies generally to all citizens. It was primarily, in fact, to deal with a [whistleblower Edward] Snowden-type situation. There is no possibility, no practical or foreseeable possibility, that in our liberal democracy a journalist would ever be prosecuted for doing their job. Therefore, I have today decided to take advantage of the powers available to me under section 8 of the *Commonwealth Director of Public Prosecutions Act* to give a direction to the Commonwealth Director of Public Prosecutions that in the event the director had, as brief, to consider the prosecution of a journalist under section 35P, or under either of the two analogous provisions which I have mentioned, he is required to consult me and no such prosecution could occur without the consent of the Attorney-General of the day."[8]

Attorney-General George Brandis.
PHOTO: ANDREW MEARES – FAIRFAX SYNDICATION

George Brandis on s35P — November 3 2014

"This is not a law about journalists. It is a general law. This is no more a law about journalists than a law about drink driving is a law about journalists. It's a law that applies to everyone and what it says is that if you disclose a covert operation, then you're breaking the law and if you do so with the intention of causing risk to the life of a person, then you are at the aggravated end of that offence and you can be jailed for up — you are liable to a penalty of imprisonment for up to 10 years … There's a public interest test in the prosecution policy that has been published by the Director of Public Prosecutions last week, which sets this out, the public interest issues that would influence his discretion to prosecute a journalist and, as I've said, the Attorney-General's own judgment as to the democratically accountable officer, so as to take personal and public responsibility for a decision to allow such a prosecution to proceed."[9]

Opposition Leader Bill Shorten
PHOTO: ANDREW MEARES – FAIRFAX SYNDICATION

Tony Abbott responding to the *Charlie Hebdo* massacre — January 9 2015
"…Two things here; first of all we don't engage in self-censorship as a result of this kind of attack; second, and even more important, we should not stop being ourselves because of this kind of attack. If we do engage in self-censorship, if we do change the way we live and the way we think, that gives terrorists a victory."[10]

Tony Abbott on press freedom in a letter to Bill Shorten — March 16 2015
"The principle of freedom of the press is fundamental to our democracy, a proposition about which I myself, as a former working journalist need no reminding."

Tony Abbott on metadata — March 18 2015
"In the days when I was a journalist there were no metadata protections for journalists. And if any agency, including the RSPCA or the local council, wanted my metadata they could have just gone and got it on authorisation. So, look, I was perfectly comfortable as a journalist. I believe that Australian police and security agencies operate in a fair and reasonable and responsible manner. And this is an unprecedented additional level of protection for journalists and I'm pleased that we are able to offer it."[12]

Assistant Minister Jamie Briggs to Crikey politics editor Bernard Keane — April 4 2015
"Oh Bernard, you can do better than that. I'll check your metadata, I'm sure I'll find something better!!"[13]

Opposition Leader Bill Shorten on metadata — March 16 2015

JOURNALIST: Given that the new metadata regime is being phased in over two years, would you consider insisting on changes regarding journalist sources before you pass the whole bill?

SHORTEN: […]We are prepared, and I've said this to the Prime Minister directly, that if concerns about press freedom are not dealt with, then we would seek to move an amendment in the Senate.

JOURNALIST: But would you insist on an amendment?

SHORTEN: […] again I reiterate to Prime Minister and the Government, this issue of press freedom is a fundamental issue in our country — the ability of media outlets to be able to protect their sources is fundamental to your ability to operate. I'm hopeful that the Government will see the sense of what we and many others are saying.[…]

JOURNALIST: Do you have any indication as to what that amendment would entail? Are you looking at exemptions or warrants?

SHORTEN: Well they're the two models. One is just a blanket exemption, another option is setting a higher standard of proof to justify any measures which might be taken to investigate data including a warrant. But I understand very clearly that it has to be a satisfactory safeguard to assure the media that they're able to do their job and talk to their sources without fear of retaliation. This is the test.

JOURNALIST: You're not sure which of those Labor prefers?

SHORTEN: We've got experts who will be giving evidence. We of course take very carefully the views of the media […][11]

THE YEAR IN AUSTRALIAN MEDIA LAW

Despite the uniform defamation laws reform of 2006 aiming to bring some common sense to Australia's defamation law, the system is still complicated, unwieldy and still in need of reform. **Peter Bartlett** examines the current state of defamation and other areas of media law

Defamation

Over the past 12 months, the judiciary has made life very difficult for the media and, in particular, in the following areas:

- the potential liability of internet search engines is not settled;
- the procedures followed by courts in the states and territories differs;
- the qualified privilege provisions;
- the political discussion defence; and, more recently,
- the offer of amends provisions;
- the cap on damages (presently $366,000) operates as a cap or a scale; and
- the contextual truth defence has been made far too complex by the courts. Justice McCallum of the NSW Supreme Court went so far as to say that the defences application had departed from the intended purpose of the law.

There appears to have been an increase in the number of defamation actions being issued, perhaps encouraged by some rather generous awards from the courts. Many actions are settled on a commercial basis, the pro thinkers being fully aware of the costs being incurred by the plaintiffs lawyers. To be fair, many of the settlements recognise the risks that the publisher faces.

Judge Gibson from the NSW District Court has been critical of the "sheer awfulness" of the *Uniform Defamation Act*, which she says has "no understanding of the internet".

There have been a surprising number of high profile plaintiffs led by Joe Hockey.

Online

There has been a very significant increase in the number of actions arising from social media and online publications generally.

Judge Judith Gibson from the NSW District Court delivered an impressive paper ("From McLibel to e-Libel") at the March 2015 NSW state convention. The Judge noted:

- reports of a steep rise in social media and internet cases;
- a significant increase in the number of litigants appearing in person;
- challenges for the judiciary in dealing with litigants in person, in dealing with novel defamation law issues arising from online publications, including the quantum of damages;
- "The uniform legislation, drafted at a time when even the internet's possibilities were only beginning to be understood is struggling to maintain the necessary tension between freedom of speech and protection of reputation."

Joe Hockey arrives at the court for his defamation case against Fairfax Media
PHOTO BY BEN RUSHTON - FAIRFAX SYNDICATION

Stay of proceedings: proportionality

In *Bleyer v Google*, McCallum J held that proceedings could be stayed when the extent of the publication and the potential damages were not justified by the costs of litigation. That decision has been applied in two subsequent cases. Judge Gibson describes the decision as the most important defamation judgment in 2014. A big statement. It is clearly a very important decision.

Costs

So many times these days the media defendant arrives at a mediation to be told the plaintiff's costs are $100,000 plus and that is the starting point if there is to be a settlement. There are so many cases where the media defendant has good legal arguments to take a claim to trial, but the risks of a loss and a costs order against them makes it not commercially sensible. They recognise the risks. They know the result of a defamation trial is a lottery.

In these circumstances, is a settlement simply commercially sensible or is it an attack on freedom of speech?

Settlement

There are some settlements where both parties believe that the terms are reasonable and justifiable. One such case was the recent settlement with Abu Bakar Alam, a young Muslim student incorrectly labelled a "teenage terrorist". It was a terrible error, one of the worst I have seen.

Fairfax acted promptly, pulled the material offline, and apologised to Alam. There were direct communications between Fairfax and the Alam family and through lawyers. The matter was reasonably promptly settled with Fairfax making a donation to Alam's mosque, publishing an article by Alam describing what it is like in this environment to grow up in Australia as a Muslim, writing to the Afghan community, publishing a further apology, and paying damages.

Security for costs

Schwartz Publishing has been granted $500,000 security for costs in a defamation action. The claim followed the publication of the book *Have you seen Simone? — The story of an unsolved murder*.

The publishers relied on the plaintiff's unemployment, no property assets, the fact that he was not an Australian citizen and the fact that he was being represented by well-known lawyers. While the decision is welcome and will be closely examined by media defendants, it is a touch surprising.

An application by the defendants in *Mallegowda v Amit Sood & Anor* for $500,000-$600,000 security for costs, was rejected by Judge Gibson in the NSW District Court. The judge thought that the defendants were, in fact, seeking an order for recovery of their past solicitor client costs.

Damages

When the *Uniform Defamation Act* was introduced in 2005, the cap on damages was $250,000. The cap is adjusted each year in line with average weekly earnings rather than inflation. It has been pointed out that the cap has increased 46 per cent to $366,000, whereas the Consumer Price Index has only increased 25 per cent.

There is no court consensus as to how damages in a defamation case should be assessed. One would have thought that you would look at the cap, assess the seriousness of the libel and assess the damages as a proportion. That was not the view taken by the Victoria Supreme Court in *Cripps v Vakras*. The judge looked at the seriousness of the libel in his view and awarded $450,000 which included aggravated damages.

Cripps v Vakras — $450,000
($100,000 aggravated damages)
Pedavoli v Fairfax Media —
$350,000 — hard copy and online
Polias v Ryall — $340,000 (Facebook and gossip)
North Coast Children's Home Inc v Martin —
$250,000
Tassone v Kirkham — $176,408.81
Fisher v Channel Seven Sydney — $125,000
(*Today Tonight*)
Visscher v Maritime Union of Australia — $90,000
Graham v Powell — $80,000

It is interesting that the vast majority of damages awards are in NSW.

Appeals

Appeal courts were kept very busy in the last 12 months. Media defendants have done surprisingly well. The NSW Court of Appeal refused leave to appeal to both Greens Councillor Katie Milne and property developer Bob Ell after Ell was awarded $15,000 damages in his defamation claim. No cost orders were made at first instance or an appeal.

The Victorian Court of Appeal refused leave to appeal to CFMEU official John Setka after Tony Abbott's Hore-Lacey defence was upheld.

While Born Brands Pty Ltd had some success in the NSW Court of Appeal against Nine Network, it lost the appeal and was ordered to pay costs.

Stephen Dank (well known to ASADA) lost his appeal in the NSW Court of Appeal against Cronulla Sutherland District Rugby League Football Club and a News Limited reporter.

The Victorian Court of Appeal dismissed three appeals by the Lower Murray Urban and Rural Water Corporation after it lost three defamation actions and was ordered to pay $70,000 damages and costs.

The Queensland Court of Appeal also dismissed an appeal brought by a doctor against NBN Limited.

Andrew Holt had his appeal against a modest award of damages ($4500) against TCN Channel Nine, dismissed.

The NSW Court of Appeal declined to allow Dr Frederick Toben to amend his Statement of Claim against Senator Christine Milne, to add misleading and deceptive conduct.

Muslim community spokesperson Keysar Trad had his defamation claim against Harbour Radio Pty Ltd dismissed by the NSW Court of Appeal.

Nationwide News failed in its bid to have three imputations struck out in the NSW Court of Appeal. The plaintiff is Darren Hibbert.

The South Australian Full Court struck out an appeal by Derick Sands against the State of South Australia and media organisations.

Publication

There have been several recent actions where plaintiffs have pleaded that the posters outside newsagents are a separate publication for defamation purposes. Joe Hockey is one of those plaintiffs.

In the Jneid case in Western Australia the Court held that a front page of *The West Australian*, displayed in a glass box, was a separate publication. The result is that a front page can carry a defamatory imputation without any reference to the actual article.

Offer of Amends

The *Uniform Defamation Act* includes provisions to encourage defendants to negotiate and settle defamation claims. Where the defendant makes an offer of amends under the Act they can plead a defence being the plaintiff's failure to accept a reasonable offer.

The provision has rarely been relied on in the past. You are unlikely to see it relied on too much in the future.

In *Pedavoli v Fairfax Media*, Fairfax relied on an offer of $50,000. Justice McCallum increased that figure to $350,000. Fairfax had wrongly identified the plaintiff as allegedly having sex with students. The judge was critical of the reach and prominence of the apology Fairfax had offered. In particular, she was critical of the offered apology not reaching Twitter followers and being on the SMH tablet app.

Tasmania sought to break away from the Uniform Defamation Act

Tasmania looked at amending the *Uniform Defamation Act* in that state to allow corporations to sue. The state and territory borders are irrelevant to the media. Any amendments to the *Uniform Act* need to be introduced throughout the country. That makes any amendment difficult.

The need for reform

Australia's defamation laws are far too complex. They are also in need of reform. Note should be taken of the welcome amendments to British laws. A plaintiff in Britain now needs to show that the defamatory publication "has caused or is likely to cause serious harm to the reputation of the claimant".

Britain also introduced a single publication rule. In Australia we have a one year limitation period for hard copy publications. There is a new publication for defamation purposes every time an online publication is downloaded. Thus there is basically no limitation period for online. We need a single publication rule.

Journalist sources

The data retention legislation has passed Federal Parliament. Amendments were added to the legislation to make it more difficult for the authorities to access journalists metadata but many argue that it does not go far enough.

As *The Age*'s Nick McKenzie says, journalists need to adopt some rather extraordinary methods to protect their sources.

Fairfax has faced at least eight separate applications for disclosure of sources over recent years. Fairfax has been successful in avoiding seven of them, although some needed the appeal courts.

The one outstanding claim is that brought by Helen Liu. Following the publication of a number of articles in 2010, Liu sought the disclosure of sources. Justice McCallum in the NSW Supreme Court ordered disclosure and Fairfax unsuccessfully appealed. In March 2015, following a Fairfax application, the Judge ordered, subject to an argument on costs, that if Fairfax undertook not to rely on the defence of qualified privilege in any defamation action brought by Liu, her earlier order would be stayed.

Liu had issued defamation proceedings in February 2011 but has not as yet served them.

Suppression orders

They continue to be a problem, especially in Victoria.

One Victorian County Court Judge made an order preventing the publication of a reference to Adrian Bayley or Jill Meagher. Any commentator writing about violence against women would be tempted to mention the high profile murder of Jill Meagher

by Bayley. To make an order preventing any mention of them was like trying stop a waterfall. Predictably the order was breached at least seven times, inadvertently, and the police were asked to investigate the breaches.

In the past and in many cases the DPP has written to the media warning them that there were further pending trials. The jury would also be queried about their independence, warned not to access the internet, and warned that it was actually an offence to do so.

The lack of effectiveness of suppression orders in the internet age was also illustrated in a recent case. The Victoria Supreme Court suppressed the names of high profile political figures in Asia. WikiLeaks published the order in full on its site. Publishers ,including online publishers in Asia, then published articles about the political figures in their country who had been named. All of these publications are outside the jurisdiction of the court, but accessible in Australia online.

In Victoria and NSW there is an efficient system whereby the courts notify designated editorial staff and media lawyers of each suppression order. The difficulty sometimes arises where a contributor prepares material for publication, unaware of the suppression order. It should be picked up before publication, but sometimes it isn't. With so many suppression orders, every now and then one sneaks through. The media needs to be diligent.

Crime Reporting

This is a minefield at the best of times with defence counsel looking at opportunities to seek a suppression order or a "take-down" order. In addition, the courts and the DPP examine any potential breach of a suppression order.

Over the years, the media has played a video or otherwise published a suspect's record of interview with the police, after conviction. Unbeknown to most, an amendment was added to the Victorian Crimes Act in 2010 making this an offence. Respected award winning *Sunday Herald Sun* editor Jill Baker, and Stephen Rill, were charged with a breach of the section. The charges did not proceed, but the case alerted the media to the added risk.

The media now has to seek court approval to publish this material.

Contempt

Victorian Police and the Victorian DPP are investigating whether contempt proceedings should be taken over alleged breaches of Adrian Bayley suppression orders and more recent publications. One would hope that no proceedings are taken.

There have been a number of findings of contempt over the last 12 months though.

The NSW Supreme Court found a woman who published abusive and defamatory material online about the mayor of the Gold Coast to "exact revenge", after he successfully defended proceedings, to be in contempt.

The NSW Supreme Court also found a blogger who publishes a website "Kangaroo Court of Australia" in contempt. The blogger had intentionally breached more publication orders. The contempt charges were brought by Seven West Media head Kerry Stokes.

In Perth, the Supreme Court found that a reporter who sent offensive emails to the court and the plaintiff in defamation proceedings, was not in contempt. While the judge was critical of the emails, he did not feel that they went so far as to seek to dissuade the plaintiff from prosecuting the action. The judge did accept that the emails could potentially be relied on in an argument for aggravated damages in the defamation claim.

Privacy

The Australian Law Reform Commission, as expected, recommended a statutory tort of serious invasion of privacy. It is clear that the current Federal Attorney General has no interest in introducing such a reform.

Since the Google case in Spain, the European Union has embraced "the right to be forgotten". This allows people to approach search engines and request material to be taken down. I regard it as an attempt to rewrite history.

Conclusion

At a time when the rivers of gold have disappeared for traditional media, the number of aggressive defamation actions has increased. The judiciary has added to the confusion. This is a challenging time for the media, but at least it recognises the risks. Evidence suggests that many active in social media do not. They will pay the price.

Peter Bartlett is a partner with law firm Minter Ellison

COUNTER-TERROR AND NATIONAL SECURITY

CARTOON BY GREG SMITH

On July 16 2014 the Government introduced the *National Security Legislation Amendment Bill (No. 1) 2014*, the first of three tranches of major amendments to Australia's national security legislation.

There was an initial muted reaction from some media organisations as the legislation seemed to merely seek to update the *ASIO Act*. But it quickly became clear that this legislation, and the next two tranches that followed it, represented the greatest assault on press freedom in peacetime. It was described as "a terrible piece of legislation that fundamentally alters the balance of power between the media and the government".[14]

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

Of greatest concern is that politicians failed to comprehend the depth and seriousness of the press freedom and freedom of expression implications of the legislation they had created and were voting on — despite the numerous statements, submissions by MEAA and other media groups including the joint media organisations that make up the Australia's Right To Know lobby group (of which MEAA is a member).

Not until the third tranche was on the verge of being voted on did politicians respond to the many press freedom concerns raised by myriad groups. Only then did they begin discussing specific, although ultimately futile, attempts to acknowledge and deal with these concerns with amendments that fell far short of what was required in order to protect and promote press freedom and freedom of expression.

The primary threat to press freedom

There is a common thread to press freedom contained in all three tranches of the new national security laws: an undermining of the principle that journalists have an ethical obligation to never reveal the identity of a confidential source. The national security laws seek to go after journalists' sources and even use journalists' metadata to do so.

In doing so, the changes introduced in these new Commonwealth laws effectively nullify the intent of the shield laws enacted just four years previously in the Commonwealth *Evidence Act (Journalist Privilege) 2011*.

Since 1944 all of MEAA's members working as journalists have operated under MEAA's *Journalist Code of Ethics*.[15] To this day, all MEAA Media section members, currently some 6000 professional journalists, are bound by the code.

The code states: "Respect for truth and the public's right to information are fundamental principles of journalism. Journalists describe society to itself. They convey information, ideas and opinions, a privileged role. They search, disclose, record, question, entertain, suggest and remember. They inform citizens and animate democracy. They give a practical form to freedom of expression. Many journalists work in private enterprise, but all have these public responsibilities. They scrutinise power, but also exercise it, and should be accountable. Accountability engenders trust. Without trust, journalists do not fulfil their public responsibilities. MEAA members engaged in journalism commit themselves to Honesty, Fairness, Independence and Respect for the rights of others."

Clause 3 of MEAA's *Journalist Code of Ethics* outlines the ethical obligations of journalists towards

their sources. It details the principle of journalist privilege relating to the anonymity of a confidential source: "3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. **Where confidences are accepted, respect them in all circumstances**".

This key principle is a bedrock position for the craft of journalism in our society.

It is a principle, recognised, understood and acknowledged the world over.

In short, journalists must never allow the identity of a confidential source to be revealed.

Despite numerous legal proceedings, threats, fines and jail terms, journalists will always maintain this crucial ethical obligation and responsibility. To do otherwise is unthinkable, not least because it would destroy the reputation of the journalist and the essential trust journalists must have with their sources, and with their audience.

Crucially, it would inevitably have a chilling effect on public interest journalism as sources of information would dry up if they cannot be certain that their identity and the information they pass on to a journalist would remain confidential. It would expose sources to immense danger.

As a result, courts come into conflict with journalists when directing them to reveal a source. Journalists have frequently been punished by the court for their refusal to do so; usually by being found to be in contempt of the court, resulting in fines, jail terms or both — and criminal convictions that harm the journalist long after the incident, not just in their private life but also in their working life.

In response to the legal pressures applied to journalists, seeking to compel them to reveal their confidential sources and break their ethical obligation, journalists and their unions have been lobbying for "shield laws" — laws that would allow journalists to be shielded from contempt of court proceedings if they are called upon to reveal a confidential source.

Shield laws are foremost an acknowledgement, acceptance and understanding that journalists are ethically obliged to never reveal a confidential source and, despite threats of jail terms, fines and criminal convictions, journalists will continue to protect the identity of a source and will also protect the source's information if that could identify the source were it to be revealed.

In Australia, shield laws have been enacted in most jurisdictions. The federal shield law is contained in the *Evidence Act (Journalist Privilege) 2011*. Only Queensland, South Australia and the Northern Territory currently do not have a shield law.

In MEAA's 2014 state of press freedom report entitled *Secrecy and Surveillance*, Peter Bartlett, partner with law firm Minter Ellison, wrote: "The federal government and the state and territory governments of New South Wales, Victoria, Western Australia and the Australian Capital Territory have amended their respective *Evidence Acts* to introduce shield laws. These laws are a win for the protection of free speech in Australia and reinforce the long-standing argument of journalists that they have to protect the confidentiality of their sources.

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

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

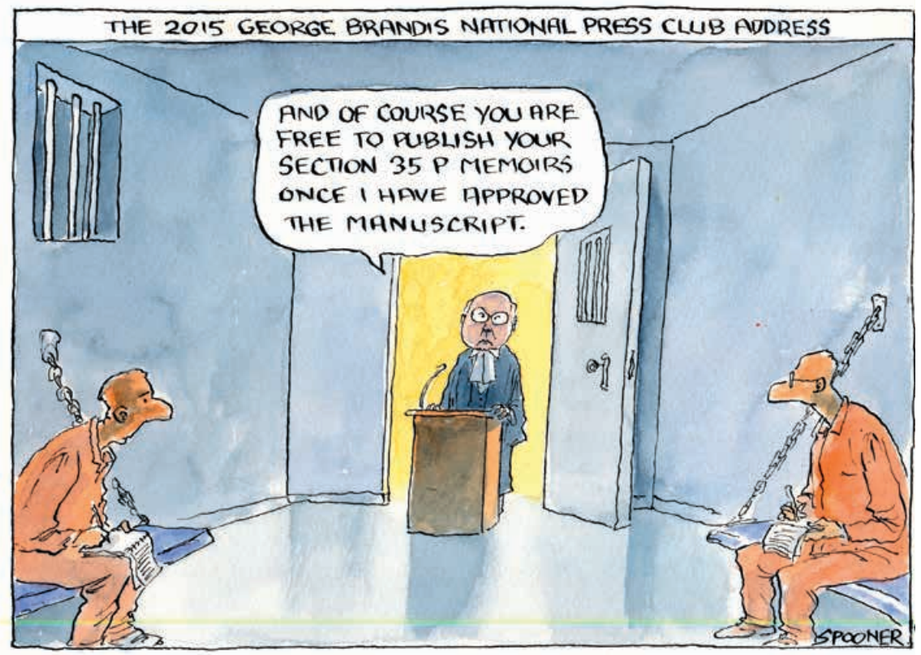
"There is still room for improvement. The legislation lacks uniformity, with the multiple jurisdictions diverging on important issues such as the definition of a journalist and whether the law covers subpoenas.

"In a technological era where national publication is ubiquitous, certainty is more important than ever in ensuring the freedom of the press," Bartlett wrote.[16]

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

MEAA wrote to new federal Attorney-General George Brandis on September 25 2013 seeking a meeting to discuss several issues including shield laws. No response was received.

MEAA believes the three tranches of national security law erode and nullify shield laws and the vital role they play in protecting confidential sources.



CARTOON BY JOHN SPOONER

The first tranche and section 35P

Barely two and a half months elapsed from the time the *National Security Legislation Amendment Bill (No 1) 2014* was tabled in the Senate on July 16 2014 to when it was finally passed in the House of Representatives on October 1 2014. The Parliamentary Joint Committee on Intelligence and Security held its inquiry and handed down its advisory report on September 17 2014 (MEAA appeared at the committee's public hearing on August 18 2014).

The day after tabling, MEAA wrote to Attorney-General George Brandis, Shadow Attorney-General Mark Dreyfus, Greens Senator Scott Ludlum, Independent Senator Nick Xenophon and Palmer United Palmer MP Clive Palmer noting our concerns with the Bill.

MEAA stated it was particularly concerned over the Bill's section 35P relating to "Unauthorised disclosure of information". The section set out the penalties to be applied to a person disclosing information about a "special intelligence operation". The penalties in the Bill are jail terms of between five and 10 years.

The Bill's Explanatory Memorandum made it clear that the offences in section 35P would apply to "disclosures by any person" and "persons who are recipients of unauthorised disclosure of information, should they engage in any subsequent disclosure".

MEAA said it was concerned that the amendment would capture legitimate public interest journalism. In doing so, it would criminalise journalists and journalism that performs a vital role in a healthy democracy of scrutinising government and its agencies.

MEAA noted that the second reading speech for the Bill said: "As recent, high-profile international events demonstrate, in the wrong hands, classified or sensitive information is capable of global dissemination at the click of a button. Unauthorised disclosures on the scale now possible in the online environment can have devastating consequences for a country's international relationships and intelligence capabilities."

It is clear that this element of the Bill was alluding to the whistleblowing by Chelsea Manning and Edward Snowden. But what it failed to acknowledge is that the Snowden and WikiLeaks revelations, made in the public interest, exposed widespread illegal activity by intelligence agencies and other arms of government. The revelations also exposed thousands of breaches of privacy rules and appalling misuse of private information.

In the case of Snowden's whistleblowing, the public became aware of widespread metadata capture, usage and sharing by the government agencies of several nations. In both whistleblowing examples, legitimate journalism played a crucial role in making the public aware of what governments have been doing in the name of the people.

It would be difficult to dispute that the public interest has been well served by these disclosures and that people have felt, rightly, that governments and their agencies should be subject to increased reform, scrutiny and monitoring of their activities.

The second reading speech also stated: "In addition, the Bill introduces new maximum penalties of 10 years' imprisonment for existing offences involving unauthorised communication of intelligence-related information, which at two years' imprisonment [in the original Act] are disproportionately low. The higher maximum penalties better reflect the gravity of such wrongdoing by persons to whom this information is entrusted."

MEAA said these harsher penalties, increased five-fold from what was in the original Act, could be used to intimidate, harass and silence the legitimate journalistic scrutiny and reporting on the activities of governments and their agencies.

As MEAA has noted in our press freedom reports before, there is a serious disconnect between penalties in some areas of counter-terror legislation and the penalties handed down to journalists. For example, the *Anti- Terrorism Act* stipulates that an ASIO official who knowingly contravenes a condition or restriction of a warrant faces a two-year jail term. But if a journalist publishes information on this abuse of power by the ASIO official, the journalist risks a five-year jail term — more than double the penalty imposed on the person who commits the original offence.

MEAA stated that the penalties outlined in the new Bill were unfairly weighted against legitimate reporting by journalists of events in the public interest. Journalists reporting legitimate news stories in the public interest should never be punished for doing their job — whether they are doing that job in Egypt like our colleague Peter Greste or in Australia.

As Prime Minister Tony Abbott, a former journalist, said in relation to the Greste case: "Peter Greste would have been *reporting* the Muslim Brotherhood, not supporting the Muslim Brotherhood. Because that's what Australian journalists do." That distinction, about the work that journalists actually do, needed to be considered and understood by the Australian Parliament just as it needed to be considered and understood by the Egyptian Government.

Elsewhere in the Bill, journalists and their employers could be determined to be a "third party" if they interviewed "persons of interest" to ASIO. Imagine, for example, the case of Australian barrister Bernard Collaery and his allegations that ASIO agents raided his Canberra office and seized electronic and paper files relating to the alleged bugging of the Timor Leste's government's Cabinet offices during negotiations for a treaty relating to the Timor Gap. In its submission, MEAA asked whether the journalists who interviewed Collaery about this story, or any other story, would therefore be considered a "third party" under the new Bill and, as a "third party" would they be subjected to the additional powers of surveillance, investigation and punishment?

Also of grave concern was the Bill's new definition of "computer" (to include a computer system, or a network). This far broader definition, while updating the original Act to allow for technological change, also handed extraordinary broader powers for surveillance to ASIO. As a result, it has very grave implications for people and organisations designated "third parties".

As a third party, a journalist's computer and the computer network of the journalist's employer could be subjected to extraordinary access. The Bill would enable ASIO to: "obtain intelligence from a number of computers (including a computer network) under a single computer access warrant, including computers at a specified location or those which are associated with a specified person" and the Bill's amendments also alter "the current limitation on disruption of a target computer".

"Disruption" could mean the addition, copying, altering or deletion of data if ASIO deems it necessary. And this could happen to a third party's computer and/or communications in transit.

For journalists needing to protect confidential sources, and for media organisations operating computer networks involving stories being prepared for broadcast or publication, this represents an appalling threat to press freedom and seriously undermines the journalist's ethical obligations. The intrusion of surveillance software, devices and other technologies on media organisations with the additional powers to monitor, alter, copy, or disrupt are an outrageous threat to press freedom by the state.

If a journalist's ability to respect and maintain confidences is eroded then the trust between sources and journalists, and between journalism and the audience, is lost.

MEAA also noted that generally the flurry of anti-terror legislation introduced in Australia over the past decade has led to an erosion of freedoms and protections. But increasingly, safeguards were being removed from Australia's surveillance and law enforcement laws at the same time that surveillance and law enforcement powers are being increased. In short, Australia's legal framework was subject to increased susceptibility that those powers could be misused due to lack of independent oversight.

Specifically, MEAA expressed concern that crucial

Journalists from ABC Sydney, the Adelaide Messenger, the Gold Coast Bulletin and Sunraysia Daily show their support for MEAA's 30 Days of Press Freedom campaign in the lead-up to UNESCO World Press Freedom Day May 3 2015.

safeguards were being abandoned under the Bill. For instance, the use of surveillance devices would no longer need to be authorised through the application and granting of a warrant. There were "new provisions providing for the use of a listening device, an optical surveillance device and a tracking device without a warrant". There were also new provisions on raids (including access to third party premises).

Given media organisations have been subjected to police raids on occasion in the past, the changes being sought also represented a threat to press freedom. Too often, raids by law enforcement agencies were conducted that not only disrupted entire media businesses but also were merely "fishing expeditions" for information — police and other agencies trawling through individual and corporate files and systems that would unnecessarily expose the safety of confidential sources and the information they had passed on to journalists.

The February 2014 raid by almost 40 armed AFP offices on Seven West's media offices, or the 2008 raid by 27 fraud squad officers on *The Sunday Times*, are cases in point of a heavy-handed approach that can be applied by authorities who fail to appreciate the press freedom implications, and the journalist-confidential source concerns, that are paramount in a democracy.

The Bill also proposed amendments that would enable warrants to be varied; facilitate the Director-General of Security to authorise a "class" of persons able to execute warrants rather than specifically listing the responsible individuals; authorise access to third party premises, and the use of force to carry out all the activities set out in the warrant, not just on entry.

MEAA expressed its concern these powers could be misused against journalists and media organisations by permitting their homes and workplaces to be subjected to extraordinary powers of surveillance and search permitted under the Bill without typical and proper safeguards, protections and monitoring.

Late amendments were included in the Bill. A "recklessness" test would be applied — an additional threat to press freedom in that it could be used to prosecute media organisations for publishing or broadcasting information "recklessly".

This move was countered by a requirement that the Commonwealth Director of Public Prosecutions (DPP) would have to "consider the public interest in the commencement or continuation of a prosecution". This amendment was meant to assuage the media organisations speaking out against the Bill. However, MEAA believes that

the definition of what is in the public interest as determined by the DPP may differ greatly from what is considered in the public interest by journalists, media organisations and the public they serve. A "public interest test" at the heart of such extraordinary powers that threaten press freedom, freedom of information and the freedom to access information as well as the public's right to know should not be in the hands of a prosecutor mounting a case against journalists and media organisations, and particularly not a prosecutor appointed by government.

In another late amendment, journalists now face 10-years' jail if they identify an ASIO officer. MEAA noted that ASIO has increasingly been able to inoculate itself from scrutiny as its powers are increased. The amendment means that any wrongdoing by an ASIO officer could result in two years' jail, but if a journalist reported the officer's abuse of power, a story that would surely be in the public interest, then the journalist faces five times that penalty.

The Bill, with these last minute amendments included, was passed in the House of Representatives on October 1 2014. MEAA said at the time: "This Bill has been rushed through in undue haste without proper discussion or debate of the implications it has in denying long-held freedoms in Australia. In a healthy functioning democracy this assault on the public's right to know and the penalties applied to the media for scrutinising power must be condemned. The Bill muzzles the media from doing its job.

"It criminalises legitimate journalist reporting of matters in the public interest. It overturns the public's right to know. It persecutes and prosecutes whistleblowers and journalists who are dealing with whistleblowers. It imposes ludicrous penalties of up to 10 years' jail on journalists. It imposes outrageous surveillance on journalists and the computer networks of their media employers. It treats every Australian as a threat and denies their rights of access to information and freedom of expression."

In short, MEAA believes the government has rushed the first tranche of legislation, ignoring the warnings of media organisations and MEAA. The parliament passed legislation that hands extraordinary powers to the government and its spy agencies while conveniently preventing legitimate scrutiny of those powers. At a time when the parliament should be defending and promoting freedoms in our society it chose to strip them away.

MEAA urged the parliament to rethink the government's rushed counter-terrorism measures and allow them to be fully and properly debated with a careful consultation process to ensure that, in the rush to provide ASIO with new powers; cherished and long-defended liberties were not undermined.

"At the very least there must be a sunset clause on these extraordinary powers; an improved and rigorous process of independent oversight and review; an understanding that denying the public the right to know what governments do in our name is an appalling assault on democracy; and protections in place to ensure journalists and the media are not treated as criminals for doing their job.

"The outcome of this legislation for journalists is two-fold: a muzzle has been applied to the media that will have a chilling effect on legitimate journalism while at the same time journalists will be compelled to resort to the tools and techniques of espionage to protect their news sources and stories from being interfered with by the government and its agencies.

"Those two outcomes are not healthy in any democracy. But they are even more galling when the government responsible claims to be implementing these in order to protect our freedoms and our way of life," MEAA said.

Caroline Jones, national patron of Women in Media, and Tracey Spicer, convenor of Women in Media NSW, support the 30 Days of Press Freedom campaign. Women in Media is a MEAA initiative.

The second tranche and the definition of advocacy

The *Counter- Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* was introduced in the Senate on September 24 2014. It was passed by the Parliament on October 30 2014.

MEAA again noted that the second tranche had been introduced in great haste, with the Parliamentary Joint Committee on Intelligence and Security (PJCIS) holding its inquiry and subsequently tabling its advisory report barely 16 days after the Bill was tabled. There appeared an urgency to have the Bill passed by the Parliament in order to implement measures in response to Australians travelling overseas to fight in war zones.

But, by being rushed through the parliament, there were insufficient opportunities for considered discussion and debate.

Among a vast range of measures being introduced in response to the urgency of the situation discussed above, the Bill also sought to extend sunset clauses in existing counter-terror legislation for a further decade.

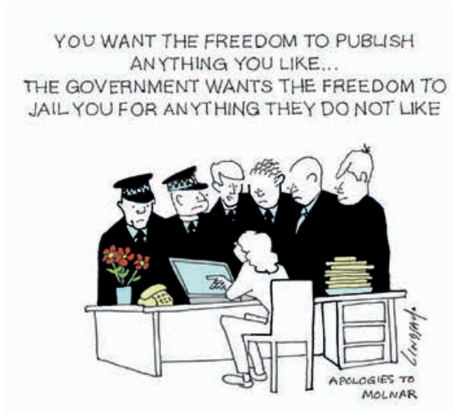
MEAA was also concerned by the new offence of advocating for terrorism and believes that this new offence, coupled with the problematic definition of "terrorist act" has the potential to infringe on freedom of expression and particularly the role of journalists who receive leaked documents.

In its submission to the PJCIS inquiry, MEAA stated: "Past errors by government agencies when it comes to wielding their power should mean that current actions must not go unreported or unchecked; and should mean that powers that have been granted should be subject to review. The application of sunset clauses on various elements of counter-terror legislation regime is recognition that they are an extraordinary and exceptional response, to operate over a defined time frame, subject to review. "*The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* seeks to extend some of these powers beyond their expiry dates:

- the *Criminal Code's* Division 104 relating to control and preventative detention orders beyond the current sunset date of December 2015;
- the *Crimes Act*'s Part IAA, Division 3A stop, search and seizure powers relating to terrorism offences beyond the current sunset date of December 2015; and
- powers relating to questioning and detention warrants in Division 3 of the *Australian Security Intelligence Organisation 1979 (ASIO Act)* beyond the current sunset date of July 2016."

MEAA stated that sunset clauses in Australia's counter-terror legislation regime must be allowed to operate as the law originally intended and scheduled, without extension, and that prior to the expiration of each sunset clause the law should be extensively reviewed and reconsidered by the parliament with appropriate consultation and involvement by the public.

MEAA also raised concerns over the definition of "terrorist act" and the new offence in the Bill of "advocating terrorism". MEAA said it had always believed that the definition of "terrorist act" in s100.1 of the *Criminal Code* had been excessively broad and poorly defined. The effect of this is that legitimate areas of free speech and advocacy may be caught as "terrorism".



CARTOON BY LINDSAY FOYLE

MEAA said: "This is not an unreasonable fear. We should remember that our colleague Australian journalist Peter Greste is currently jailed in Egypt on charges of spreading fabricated news and aiding the Muslim Brotherhood which had been designated a terrorist organisation by Egyptian authorities."

MEAA noted that the Criminal Code allows general advocacy activities to fall outside the definition of a terrorist act. As the Law Council noted in 2012 in its submission to COAG's Counter-Terrorism Review Committee: "Actions that take place as a result of advocacy, protest, dissent or industrial action, and are not intended to cause serious harm that is physical harm to a person; cause a person's death; endanger the life of a person other than the person taking the action; or create a serious risk to the health or safety of the public or a section of the public, fall outside the definition of a 'terrorist act'."

But the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* sought to establish a new offence in Subdivision C of Division 80 of the *Criminal Code*. The Bill's Explanatory Memorandum said: "A person commits an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence and the person is reckless as to whether another person will engage in a terrorist act or commit a terrorist offence." This new offence would be punishable by up to five years' jail.

MEAA explained that it was concerned the definition of "advocacy" could now be used to constrain free speech. For journalists, it could also capture reporting of legitimate news stories that reported on banned advocacy (the very offence for which Peter Greste has been jailed for in Egypt).

The Law Council had warned in its 2012 submission that just such an over-reach was possible: "Whilst the exemption of actions that take place as a result of advocacy, protest, dissent or industrial action

from the definition of 'terrorist act' is arguably a safeguard against misuse of the terrorism powers, the use of this safeguard is untested. Concerns had been raised that similar safeguards in the context of 'move on' powers have not been effective. It has been suggested that guidelines should be developed to govern the investigation and prosecution of 'Issues Motivated Groups' which emphasise the importance of respecting the right to peaceful protest, association and freedom of expression and draw a distinction between the activities of such groups and terrorist groups."

MEAA also noted that "promotion" would criminalise generally accepted definitions of freedom of expression. And because the terrorism definition extends to actions against foreign governments, it would capture advocates of even legitimate actions against foreign oppressive regimes. The new offence contained in the second tranche could also capture journalists reporting on foreign powers using documents that have been leaked to them.

Under section 100.1(1) of the Criminal Code, a "terrorist act" includes, among other things, seriously interfering with, or seriously disrupting or destroying an electronic system including and information, telecommunications or financial system et al. Journalists are often handed information by a source as the basis of a news story. Most leaked documents that are given to journalists by whistleblowers and other sources, are leaks that originate from "interfering" with a computer system.

Although there have been no prosecution of whistleblowers under this provision, there have been examples of state-based laws concerning unauthorised access (analogous to interfering) to computer systems used against whistleblowers and against journalists reporting in the public interest.

Given the treatment of whistleblowers overseas, it would be an easy step for authorities to prosecute whistleblowers — even those in areas far removed from national security — under this provision. Under the new offence of advocating terrorism, journalists could also be caught for counselling, promoting, encouraging or urging a whistleblower to leak a document. Indeed, the provision is drawn so widely, that urging leaking of documents in general terms may fall within this clause.

In response, MEAA recommended that, insofar as it affected journalists, "terrorist act" should have been redefined to bring it into line with internationally accepted norms and existing definitions.

The second tranche also raised concerns relating to how journalists go about their work in the public interest. Amendments sought to the *Crimes Act 1914* Division 8 Section 3ZZHA relating to unauthorised disclosure of information created an offence of unauthorised disclosure of information relating to delayed notification search warrants. Under the Bill, a delayed notification search warrant must be executed within 30 days of issue, with notice to be given to an occupier within six months of execution. An extension of time could be granted on more than one occasion, provided that the extension is not by more than six months at a time. An extension beyond 18 months may be provided with the Minister's approval.

Where it became problematic was the creation of the offence of unauthorised disclosure of information relating to a delayed notification search warrant; this carried a maximum penalty of two years' imprisonment. The extraordinary possible time lag that could be created between the issuing of a warrant, seemingly endless extensions, and the notification to the occupier would have the potential to impede journalists seeking to report a legitimate news story in the public interest. The creation of the offence would criminalise journalists for doing their job. It also has the potential to threaten whistleblowers, seeking to legitimately expose illegality, misuse, corruption, fraud or health and safety violations.

As such, both journalists and whistleblowers could be subject to jail terms for revealing information in the public interest, particularly any wrongdoing associated with the execution of the warrant. MEAA believed that either this provision relating to unauthorised disclosure should never have been included in the Bill or an exemption should have been introduced to protect legitimate disclosure and reporting that are in the public interest.

Also in the second tranche, amendments were sought to the Criminal Code Act 1995 that would create a new division 119 of Part 5.5. This related to the offence of a person entering, or remaining in, an area in a foreign country and that area is an area "declared" by the Foreign Affairs Minister.

In particular, sub-section 119.2(3) describes conduct that would be classed as being for a legitimate purpose in regard to the new offence, and included: "[For the purpose of] … making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist". MEAA believed the words "in a professional capacity" did not reflect the reality of modern media practice. (It would also be a definition that would be echoed in the amendments to the third tranche of national security laws, when a journalist information warrant would be created to allow government agencies to access journalists' metadata in order to discover the identity of a source — the definition of "professional" journalist has never been adequately explained.)

MEAA stated: "Conflict zones and other 'hostile areas' are locations for legitimate news gathering and reporting in the public interest. There could be several "types" of media practitioner working legitimately in these areas: such as a reporter, photographer, sound recordist, camera operator, documentary maker, a foreign correspondent permanently on overseas assignment for their media organisation; "stringers", or casual employees usually already living in the area, who are employed as required by a media organisation; freelance journalists working as independent contractors, pursuing news stories that they may contribute to media organisations; and writers, authors, bloggers and others seeking to legitimately gather information about the area, conflict or related matter."

Journalists from ABC Adelaide, Guardian Australia, the Mildura Weekly and MMP Star show their support for MEAA's 30 Days of Press Freedom campaign in the lead-up to UNESCO World Press Freedom Day May 3 2015.

MEAA added that other personnel often work alongside these media practitioners including "fixers", interpreters, drivers and personal security/close protection. There may be local people or others familiar with an area, language, ethnicity, religion or in some other capacity.

MEAA argued that the wording: "in a professional capacity as a journalist" was overly proscriptive and hard to define in terms of modern media practice. It also risked being interpreted as excluding some other class of people who would normally be considered as having a legitimate reason to be in the area, working alongside media practitioners. MEAA believes both references to "in a professional capacity" were entirely unnecessary and in meaningless, and should be removed from the Bill.

The Bill was passed by the Parliament on October 30 2014, but there were some last minute amendments that altered some of the more extreme elements. While "advocating terrorism" was still outlawed with a five year jail term, there were changes to the sunset clauses that did not extend them for a full decade but instead, required them to be reviewed during the term of the next parliament.

The third tranche - identifying sources using journalists' metadata

The *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* was introduced in the House of Representatives on the same day the *Foreign Fighters Bill* was passed — October 30 2014. The Data Retention Bill was passed by the Parliament on March 26 2015.
The Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted an inquiry into the Bill which began on November 21 2014 (MEAA appeared at the public hearings on January 30 2015) and its first advisory report was tabled on February 27 2015; it received 204 submissions.

A second PJCIS inquiry, "into the authorisation of access to telecommunications data to identify a journalist's source" was recommended by

the initial inquiry. However, due to bipartisan agreement to amendments that led to the passage of the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* this second inquiry never formally operated and it was concluded.[17]
The Data Retention Bill's Explanatory Memorandum states: "Telecommunications data provides [government law enforcement and surveillance] agencies with an irrefutable method of tracing all telecommunications from end-to-end. It can also be used to demonstrate an association between two or more people, prove that two or more people communicated at a particular time …"

It goes on to explain the scope and scale of the data the Bill is seeking to retain:

- The subscriber of the relevant service and accounts, telecommunications devices and other relevant services relating to the relevant service;
- the source of a communication ("the identifier or combination of identifiers which are used by the service provider to describe the account, service and/or device from which a successful or attempted communication is sent");
- the destination of a communication ("The retention of telecommunications data regarding the destination of a communication (such as telephone numbers and e-mail addresses) is necessary in order to connect a communication of interest to the particular telecommunications service being used to send or receive this communication");
- the date, time and duration of a communication ("time-calibrated information about a communication needs to be sufficiently precise to enable agencies to develop an accurate picture of a particular communication");
- the type of communication (the type of service used, including the type of access network or service or application service — "For example, whether the service or product provided is e-mail, internet access, mobile telephony services or mobile phone text messaging such as Short Message Services (SMS). For application services provided over the top of internet access, examples of service types include Voice over Internet Protocol (VoIP), instant messaging or e-mail. For services that provide access to a network or the internet, examples of service types include symmetric digital subscriber line (ADSL) or frequency division Long- Term Evolution (FD-LTE)"); and
- the location of the line, equipment or telecommunications device — which could include "a series of smaller communications," such as a download. "Examples include cell tower locations and public wireless local area network (WLAN) hotspots." ("Location-based data is valuable for identifying the location of a device at the time of a communication, providing … evidence linking the presence of a device to an event").

As MEAA explained in its submission, such data could also be used to identify that a confidential source, such as a whistleblower seeking to expose illegality, corruption or wrongdoing had communicated with a journalist. This data not only captures the communications between a journalist and a source, it can also capture the fact that information has passed between them.

Once that is known, the other tranches of national security legislation, particularly *National Security Legislation Amendment Bill (No 1) 2014* can be used to jail both the source and the journalist for up to 10 years, plus the information can be used to ensure that the media organisation's computer network is tampered with, not only threatening the news story from ever becoming public but also exposing all the news stories by that media outlet, its journalists and their sources.

MEAA said that the development of a Stasi-like surveillance state that monitors every member of the population with a phone, a computer, an internet browser and an email account is an outrageous attack on personal privacy and freedom. The fact that the surveillance state can then utilise the data it has discovered to pursue and prosecute whistleblowers and the journalists who work with them is an outrageous assault on press freedom and freedom of expression.

The Bill acknowledged this: "… requiring providers of telecommunications services to retain telecommunications data about the communications of its subscribers or users as part of a mandatory dataset may indirectly limit the right to freedom of expression, as some persons may be more reluctant to use telecommunications services to seek, receive and impart information if they know that data about their communications will be stored and may be subject to lawful access."

The Bill then swept these significant concerns aside by stating that: "The Bill limits the extent to which the right to freedom of expression is abrogated by ensuring that only the minimum necessary types and amounts of telecommunications data are retained, and by limiting the range of agencies that may access telecommunications data."

MEAA believes this is not satisfactory. The right to freedom of expression as stated in Article 19 of the *Universal Declaration of Human Rights* is the bedrock on which the fourth estate's activities are based.

Journalists seek to ensure that society is informed about itself by scrutinising the powerful and holding them to account. Excusing the intrusions of the Bill by saying only minimum amounts of data are retained and only a limited number of agencies will be able to access the data is no argument that absolves the Bill from being a very fundamental assault on freedom of expression and press freedom.

CARTOON BY ALAN MOIR

But coupled with the fact that, under the previous tranches of counter-terror laws passed by the Parliament could see journalists jailed for up to 10 years for doing their jobs, freedom of expression has been very seriously undermined. It must also be remembered that the previous tranches also now allow the surveillance state to tamper with computer networks and this means that it can then prevent the story ever getting out or tamper with any other stories it doesn't like. The end product of such overwhelming surveillance is for sources and journalists to use the subterfuge methods of counter-surveillance to avoid, block or bypass the data retention methods being proposed in the Bill.

In short, rather than engaging in normal conversations and normal transmission of data, journalists and their sources will have to use means that avoid any form of detection by law-enforcement agencies, thus nullifying the aims of the Bill. And if law-abiding members of the public can seek these methods out, so too will law-breakers.

And that was the problem with the Bill: by seeking to subject the entire population to overwhelming surveillance, ordinary people will utilise every method possible to evade monitoring and intrusion into their private lives. Journalists doing their jobs will have to resort to the tools of counter-surveillance in order to maintain their ethical obligation to confidential sources.

With the Bill acknowledged that it undermines freedom of expression, it is clear that it threatens press freedom by eroding the ability of journalists to protect the identity and information of their confidential sources. Taken together with the other two tranches of counter-terror laws, the third tranche becomes a very frightening tool that can be used to intimidate the media.

Past experience in the Australian context has shown the real threat and appalling consequences from data retention powers being used against journalists and their confidential sources. Journalists' phone conversations may have been accessed in an effort to uncover their alleged confidential sources in both the pursuit of whistleblower public servant Alan Kessing and the Michael Harvey and Gerard McManus case. Law enforcement officers in both examples could have accessed the phone records of incoming calls made to the journalists in these cases in an effort to identify individuals communicating with them.

In these two examples, lengthy trials took place. Kessing received a nine-month suspended sentence even though the report in *The Australian* led to a much-needed and "beneficial" shake-up of airport security. (Kessing continues to deny being the confidential source.)

In the case of journalists Harvey and McManus, despite an appeals court dismissing charges against a public servant over the story, the two *Herald Sun* Canberra press gallery journalists still received a fine and a criminal conviction — with the conviction preventing one of the journalists from accompanying an Australian Prime Minister on a trip to an APEC meeting in Peru due the PM's aircraft refuelling in the US.

The Kessing and the Harvey and McManus examples were the impetus for the federal Parliament to introduce shield laws in 2011. It is ironic that some of the same politicians who wholeheartedly supported that move also voted for data retention powers that can be used to intimidate, harass and convict journalists and their whistleblower sources.

MEAA believed that if it is easy to trample on international obligations such as freedom of expression then trampling on press freedom also becomes easy. In its submission, MEAA urged the PJCIS to consider the following questions:

- How can the government, and the Parliament that passed the first two tranches of counter-terror laws that have already undermined press freedom, legitimately decry the actions of Egypt in jailing our colleague Australian journalist Peter Greste for seven years for doing his job while, in the next breath, pass laws that will jail Australian journalists for up to 10 years for doing theirs?
- How can the Parliament permit such dramatic assaults on fundamental freedoms that, if enacted, represent such an assault on a healthy, functioning democracy?
- How can the Parliament that so recently enacted laws to protect the identity of confidential sources by acknowledging journalist privilege now pass new laws that attack that principle?

MEAA urged the Parliament to carefully consider the threats to press freedom and media rights contain in the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014*. MEAA noted that all three tranches of national security laws all carried grave implications for journalists seeking to carry out their duties in reporting legitimate news stories in the public interest and for whistleblowers seeking to legitimately shed light on wrongdoing. There are also concerns for freedom of expression and press freedom.

MEAA noted that Prime Minister Abbott had told the Parliament when discussing the introduction of sweeping new counter-terror powers: "The delicate balance between freedom and security may have to shift" but the legislation being pushed through the Parliament represented an attack on fundamental freedoms and, in terms of curtailing the activities of the fourth estate and criminalising journalists and journalism, represented an outrageous assault on Australian democracy.

MEAA's submission added that the effect of the Data Retention Bill was to "assume that all Australians are suspect, all needing to be kept under surveillance, all potentially guilty. Such important legislation affecting, amending and undermining cherished rights and freedoms in Australian society deserves very careful consultation and consideration."

MEAA also commented on the assurances given by Attorney-General George Brandis about the intent of the legislation or about prosecutions of journalists only proceeding with his approval provided no reassurance at all if the legislation that can lock up a journalist for 10 years remained on the statute books. Nor did they provide any assurance that media organisations won't have their computer networks tampered with. No does they provide any assurance that the confidential relationship between a source and a journalist wouldn't be compromised by a government agency.

Journalists from Channel 9 in Adelaide, Herald Sun and Leader newspapers show their support for MEAA's 30 Days of Press Freedom campaign in the lead-up to UNESCO World Press Freedom Day May 3 2015.

In summary, MEAA argued that the data retention legislation must not proceed. MEAA added that should the PJCIS consider otherwise, the committee had to take into consideration the threats to press freedom contained in the three tranches of legislation and should take steps to ensure that the media was protected from further assaults on their ability to do their jobs.

MEAA recommended that the three tranches of national security laws be amended to include a media exemption to ensure that vital press freedoms are protected, understood and observed, and to ensure that journalists can go about their duties.

MEAA also recommended that appropriate checks and balances be introduced to ensure that the national security laws could not be used to impede, threaten, contain or curtail legitimate reporting of matters in the public interest and that journalists and their confidential sources are free to continue to interact and communicate without being subjected to surveillance that would undermine the principles of press freedom.

MEAA further recommended that agencies involved in national security and law enforcement ensure their officers at all levels undergo substantial training in the role of press freedom in ensuring a functioning healthy democracy.

In a final recommendation, MEAA requested that the Independent National Security Legislation Monitor undertake an urgent review of the press freedom implications of Australia's national security law regime with a view to ensuring appropriate safeguards are in place to promote and protect press freedom.

When the PJCIS handed down its report on February 27 2015, the committee had made the astounding recommendation that, even though the Bill was flawed, particularly in terms of its attacks on press freedom, it should still be passed and that a second inquiry should be established to look specifically at the press freedom issues with the aim of addressing them in subsequent amendment to the enacted legislation.

In recommendation 26 of its report PJCIS sought the second inquiry to review the matter further before making a final recommendation to the Parliament in three months. Ironically, this caution and concern about press freedom was not apparent when the Committee and the Parliament rushed through the first two tranches of national security laws in late 2014.

More damning in the report was recommendation 27 which confirmed, for the first time, that one intent of the Bill was to pursue journalists' sources. It recommended the Commonwealth Ombudsman and the Inspector General of Intelligence and Security be copied when an authorisation is issued seeking to determine "the identity of a journalist's sources".

Recommendation 27 suggested the PJCIS would allow government agencies to hunt through journalists' metadata in pursuit of confidential sources, regardless of the outcome of the inquiry sought in recommendation 26. And it also suggested that the PJCIS intended to largely ignore media organisations' requests for a media exemption across all three tranches of national security law in order to safeguard press freedom.

At the time, MEAA said: "It is puzzling how the Committee can on the one hand recognise the seriousness of the issues we have raised but still proceed to recommend the passage of the legislation without those issues being addressed. It is also concerning that in its report the Committee has confirmed that one of the intentions of the Bill is to pursue journalists' sources. It remains our view that this Bill should not be passed but, if it is to be passed, it must include a media exemption."

Overseas experience suggests that data surveillance and access powers are targeting journalists. Earlier this month, Britain's Interception of Communications Commissioner's Office (ICCO) found that police had accessed journalists' phone and email data more than 600 times in three years. The Commissioner said retrieving journalists' data was being used by nearly half of all UK police forces, without proper consideration of the fundamental principle of freedom of expression.

As recommendation 26 hinted at, Britain is now seeking to narrow data surveillance laws to protect journalist sources.

However, even without the data retention Bill, Australian government agencies are actively trawling for journalists' confidential sources. Media reports based on Freedom of Information requests have found that journalists from *The Guardian*, news.com.au and *The West Australian* had been referred to the Australian Federal Police in an effort to identify the sources for stories on asylum seekers.

"Politicians who have voted for these three national security laws are not champions of press freedom or freedom of expression — quite the opposite. They have already introduced measures that will have a chilling effect on journalism. They have muzzled an important arm of a healthy democracy. It is a shameful outcome," MEAA said.

"The failure of the Committee to promote press freedom from the outset and provide genuine recommendations that protect press freedom must be condemned. It is a half-hearted measure to recognise concerns on the one hand and then spend more time reviewing them. It is worse still to then

acknowledge in recommendation 27, openly for the first time, that there is a definite intent to pursue journalists' sources.

"These laws are the greatest assault on press freedom in Australia in peace time. Together, the three tranches represent a sustained attempt by government to control information. In the process, these laws attack freedom of expression, the right to privacy, the right to access information and press freedom," MEAA said.

"These laws can be used to persecute and prosecute whistleblowers and the journalists who work with them. They threaten jail terms of up to 10 years. They have handed the means for intelligence agencies and others to spy on journalists, their media employers and courageous whistleblowers who seek to expose misconduct, illegality and corruption. How can the Parliament that so recently enacted shield laws to protect the identity of confidential sources by acknowledging the principle of journalist privilege, now pass new laws that directly attack that principle?

"MEAA again argues that a media exemption to these laws is needed so that journalists won't be pursued for simply doing their job. This exemption must ensure that whistleblowers can go to journalists, trusting that they can do so safe from harm.

"Unless a media exemption is included across all three tranches, the end result is that journalists and their sources will have to utilise the tools of counter-surveillance to encrypt and protect their relationships to ensure that news and information in the public interest can still be published. That is a result of the political failure to protect press freedom, privacy and freedom of expression," MEAA said.

On February 16 2015 MEAA wrote to the United Nations' Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression David Kaye urging him to investigate the impact of the security laws and their effect on press freedom in Australia.

MEAA also called on the newly appointed Independent National Security Legislation Monitor, former NSW Supreme Court judge Roger Gyles, to undertake an urgent review of the press freedom implications of Australia's national security law regime with a view to ensuring appropriate safeguards are in place to promote and protect press freedom.

On March 16 2015 Prime Minister Tony Abbott made a proposal for government "agencies to obtain a warrant in order to access a journalist's metadata for the purpose of identifying a source".

MEAA said in response that the Prime Minister's plan would still permit an outrageous attack on press freedom and would have a chilling effect on journalism in Australia leading to whistleblowers being fearful that they risk exposure if they seek to reveal instances of wrongdoing, corruption, waste, illegal activity and dishonesty.

MEAA said the lack of understanding of what was at stake required the proposed parliamentary inquiry into press freedom concerns to go ahead in order for the concerns of journalists and media organisations to be heard and acknowledged by MPs.

MEAA CEO Paul Murphy said: "What needs to be understood is that no journalist, anywhere, can ever allow the identity of a confidential source to become known; that is a guiding principle of journalism the world over. It is a principle acknowledged by every Australian journalist in clause 3 of MEAA's *Journalist Code of Ethics*: 'Where confidences are accepted, respect them in all circumstances'."

Murphy added: "Accessing metadata to hunt down journalists' sources, regardless of the procedures used, threatens press freedom and democracy. It means important stories in the public interest can be silenced before they ever become known, and whistleblowers can be persecuted and prosecuted. It means journalists can be jailed for simply doing their job.

"The so-called 'safeguards' recommended by the Parliamentary Committee were no safeguards at all because they still allowed government agencies to hunt down journalists' sources. Similarly, the Prime Minister's proposal also allows those agencies to trawl through a journalist's metadata in order to expose a confidential source. Putting a hurdle like a warrant in the way will not change the outcome: using a journalists' metadata to pursue a whistleblower. Why does the Government not understand that no journalist can breach their fundamental ethical obligation to never allow the identity of a confidential source to be revealed?"

MEAA explained that it had consistently explained this principle of press freedom in every submission to Parliament on the national security laws.

On February 12 2015 MEAA was visited by representatives from the Prime Minister's, Attorney-General's and Communications Minister's offices and the AFP Commissioner Andrew Colvin. During that meeting, the AFP confirmed it has been repeatedly asked to hunt down journalists' sources by accessing journalists' metadata and he confirmed that had done so in at least one case.
MEAA explained the data retention Bill would simply formalise these activities with no regard to the press freedom implications and presumably encourage at least 20 government agencies to go trawling through journalists' metadata.

MEAA again argued its case in a statement on February 16 2015: "Journalists cannot allow the relationship they have with a confidential source to be breached, under any circumstance — that is their ethical responsibility. If the surveillance continues and is formally adopted in the data retention Bill with or without a warrant, then journalists will be forced to use the tools of counter-surveillance such as anonymisation and encryption to protect their sources.

"It remains our fundamental position that this Bill should not be proceed at all and that the press freedom concerns of the previous two tranches of national security laws must be addressed."[18]

The flawed "journalist information warrant" system

By March 19 2015, the Government and the ALP had reached bipartisan agreement to implement a new, entirely secret, system of "journalist information warrants" and the creation of government-appointed "public interest advocates".

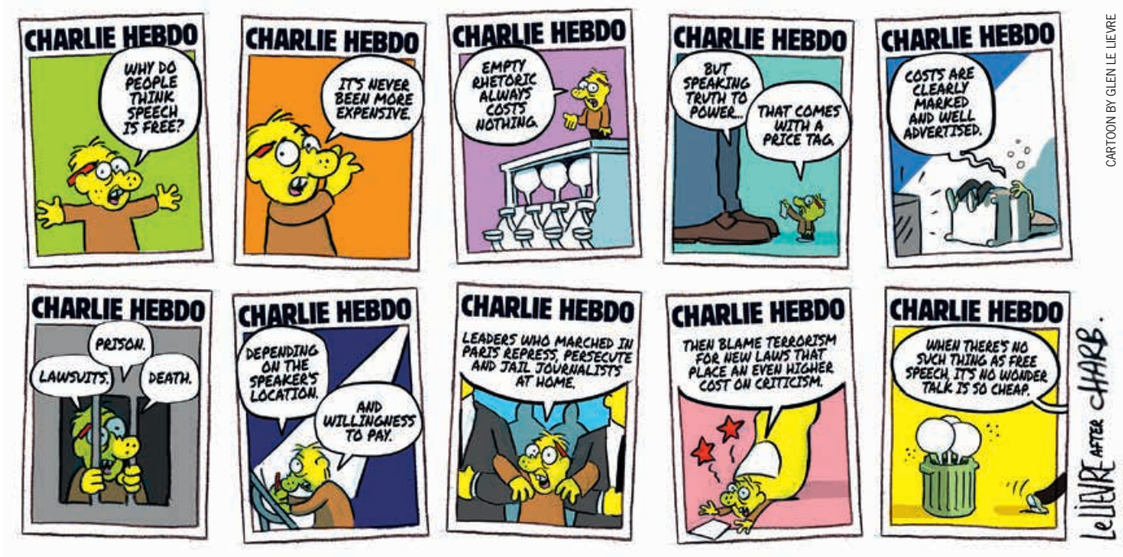
MEAA continues to condemn this bipartisan deal because it still allows access to journalists' metadata while ignoring the key obligation of ethical journalism the world over: journalists cannot allow the identity of their confidential sources to be revealed.

MEAA said of the secret warrant system: "Warrants may allow a judge to determine which journalists the government agencies can pursue for their metadata. But journalists don't get to choose — their ethical obligation is to protect the identity of a source in all cases. And, as has happened in the past, if they are hauled before a judge in a future trial of the alleged source, the journalists' ethical obligation demands that they refuse to confirm the identity of a source, leaving the journalist facing the prospect of a jail term and a fine for contempt of court."

The introduction of "public interest advocates" — persons granted security clearances and therefore approved by the government — will still keep journalists and media organisations in the dark about when government agencies have sought to access, and been granted access, to the metadata of journalists. Determining whether a journalist information warrant will be granted will be left up to a judicial officer or a legal member of the Administrative Appeals Tribunal[19] — i.e. government appointees.

MEAA stated: "Guardian Australia has reported that up to eight referrals to the AFP in 2014 related to news stories about asylum seeker issues by journalists at news.com.au, *The West Australian* and Guardian Australia. Are we to expect a judge would block every one of those referrals because the stories are in the public interest? Will the public ever learn how a list of security-cleared government-approved advocates and the judge who heard their argument came to determine what is or is not in the public interest? When a whistleblower goes on trial will they lose the ability to argue that they acted in the public interest?"[20]

The Australian Federal Police confirmed it had been requested to investigate the sources of news stories and that can include a requirement to access a journalist's metadata.
"The warrant system merely imposes a hurdle



CARTOON BY GLEN LE LIEVRE

before government can use journalists' metadata to identify journalists' confidential sources. Any system with the capacity to go after confidential sources has a chilling effect on journalism because it targets whistleblowers who seek to expose wrongdoing, illegality, dishonesty, fraud, waste and corruption. If you are going after sources then you are going after journalism," MEAA said.

These are the flaws in the journalist information warrant scheme:

- The journalist information warrant is an entirely secret process.
- Indeed, it is so secret that there are two-year jail terms for disclosure, and even non-disclosure, of the existence of a journalist information warrant.
- The Prime Minister appoints public interest advocates who will argue a position when applications for journalist information warrants are sought.
- The advocates will have no contact with either the journalist or the media organisation.
- There is no clear "trigger" for how or when an advocate will be called in.
- An advocate will only be required where the authorising body knows or reasonably believes that it is a journalist whose metadata is involved and the purpose of making the authorisation would be to identify another person known/reasonably believed to be a "source".
- The judicial officers or legal members of the Administrative Appeals Tribunal who will hear and determine journalist information warrant applications are will be government appointed. This means that the parties determining the use of a journalist information warrant: the judge hearing the matter, the government agency seeking the warrant and the public interest advocate supposedly arguing the "public interest" are all government appointees.
- Public interest advocates and judges may have an entirely different view of what is "in the public interest" and there is no independent way of ever verifying how they arrived at their conclusion.
- There is no monitoring or reporting mechanism for the number of times journalist information warrants will be sought, granted, denied.
- There is no monitoring or reporting mechanism for the number and type of metadata utilised under the authorisation, nor the number of journalist relationships that may be examined and possibly compromised.
- The definition of "professional journalist" is entirely unclear and would appear to be a narrower interpretation than that used in the Commonwealth shield laws, thus denying whatever protection a journalist information warrant may offer to a class of journalist which could be consider "not professional". Could this be interpreted to mean freelance journalists who are not regular employees of a news medium? Could it mean bloggers? Could it mean journalists who are writing a book rather than writing for a news medium?
- Journalist information warrants are not required for applications made by ASIO. Instead, a government minister will have to weigh up the public interest before granting access.
- Journalist information warrants nullify the intent of shield laws that aim to protect journalist privilege.

As *The Australian*'s legal affairs editor Chris Merritt wrote when the amendments were passed by the Parliament: "If these changes were intended to provide some form of independent check on the power of the executive to snoop on the work of journalists, they fail miserably. They provide a veneer of independent oversight that might trick people into believing the metadata warrant system is some sort of check on the power of government to meddle with the media.

"If that were the true goal of the people who signed off on these changes, they would have designed a scheme that subjects applications to scrutiny by the normal courts. That has not happened.

"In substance, these amendments reject the principles that underpin the federal shield law supposed to protect journalists' confidential sources. That rejection is so comprehensive that the shield law may as well be repealed. It is a dead letter.

"The rebuttable presumption in favour of protecting confidential sources — which is the core of the shield law — has not been included in the metadata scheme. That might not matter if warrant applications were considered by the regular courts — the ones that enjoy judicial independence … No such safeguard exists for those who agree to become 'issuing authorities' under the metadata warrant system. Judges, magistrates and even part-time members of federal tribunals could all be invited to become 'issuing authorities'.

"The personal nature of these appointments is reinforced by the fact that the government found it necessary to include a special provision that gives issuing authorities immunity from liability."[21]

Gloves on in fight to hide digital fingerprints

Josh Taylor

Are journalists just collateral damage in the ramp-up of the surveillance state, both in Australia and the rest of the world, or are they carefully considered targets? The mandatory data retention legislation introduced by the Australian government late last year has, rightly, been identified as a major threat to the ability for journalists to go about our job.

The legislation requires telecommunications companies to keep logs of the phone calls made, the assigned IP addresses, the mobile device location, email addresses and other identifying data for at least two years.

Law enforcement agencies can then access this data without getting a warrant first. All that is required is an approved officer to sign off on it, and the telco will then hand over all the data they want.

For the average citizen, this is a breach of their privacy; for a journalist it is a massive compromise on our ability to do our jobs. Consider wanting to arrange a meeting with a contact. You can't call them on your phone, you can't SMS them, you can't use your work email address, you can't take your phone to the meeting.

This data is already available today, and has been used to track down the sources of journalists including Laurie Oakes and Nick McKenzie. But the new legislation locks in a guarantee that when the agencies go knocking on doors for that data, the telco will have it.

What can journalists do about it? There is, unfortunately, no way to secure the absolute protection of a source in the digital world. There are, however, steps you can take to minimise the risk that whistleblowers take in leaking information to a journalist.

Internet browsing

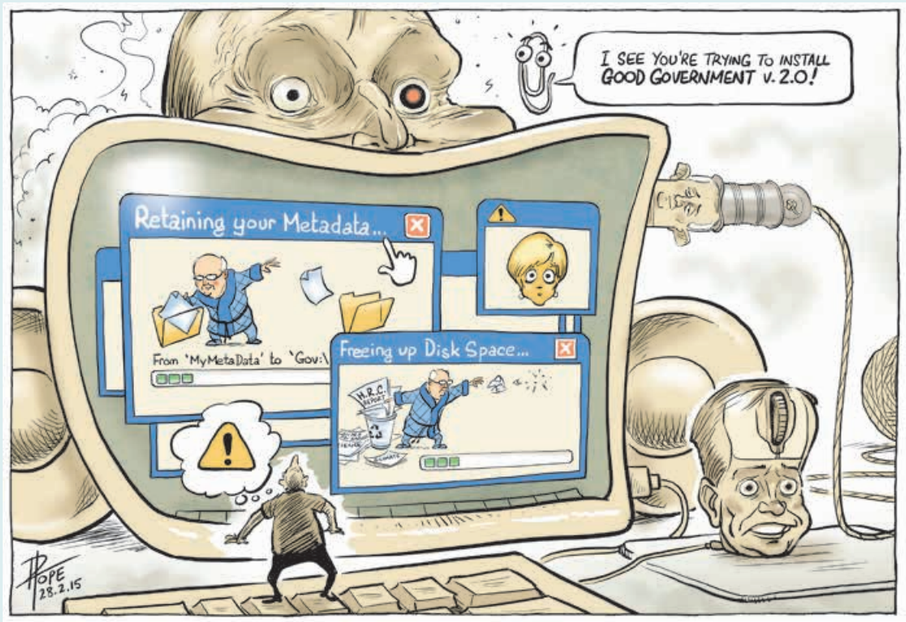
There are a couple of ways to mask how you browse the internet. The simple way is by using a virtual private network (VPN) service. It's not just for watching Netflix anymore. It is a good way to make your IP address appear to be somewhere else, and avoid logging under mandatory data retention.

Using the Tor Browser goes one step further, allowing you to access "dark web" or "deep web" sites that you can't access through a normal web browser.

Law enforcement has managed to crack down on some of the less legal sites, such as the online marketplace Silk Road, but it is more secure than your run-of-the-mill web browser.

Calls

Unfortunately, mandatory data retention means that for journalists, any mobile or fixed line account linked to their name is now compromised. Any source that calls you on a phone linked to your name



CARTOON BY DAVID POPE

will have their number made available to Australian law enforcement if officers ask for it.

Over-the-top voice messaging services such as Skype or WhatsApp are excluded from mandatory data retention but could potentially be captured through other surveillance methods deployed either in Australia or through the US.

In the US, many people use "burner" phones they can use once or twice and then get rid of. This is slightly more difficult in Australia because the government requires registration of SIM cards using ID before the service can be activated. This change was also made due to "national security concerns" in 1997.

Call a source if you have to, but try not to do it from anything with an account linked to your name.

Messaging

SMS isn't safe. The rise of device-side encryption in iMessage is an improvement, and means Apple shouldn't be able to see your messages, but if anyone breaks into your phone, they could.

For short messages, you can always find apps that use Off-the-Record encryption, such as ChatSecure for iOS and Android. Or alternatively, you could follow in the footsteps of our very own communications minister Malcolm Turnbull and use an app like Wickr that destroys messages after a set amount of time.

Email

One of the more absurd aspects of the mandatory data retention legislation is that the government wants ISPs to hold records of emails sent by their users, but ISPs only have the ability to record emails sent by their own services. So joe.smith@iinet.com.au emails will be captured but, by their own admission, joe.smith@gmail.com won't be caught by the scheme.

So, using international email services will be outside the scope of data retention. However, the Edward Snowden leaks have shown that security agencies can get access to emails held by US companies.

Disposable email addresses are also a way to ensure a greater level of anonymity for one-off communications. You can use these one-off emails if sources need to send you a file. But the source should also be sure to use encryption.

Every journalist should also use the PGP — Pretty Good Privacy — email encryption program. This is an encryption method that is a little more complicated to set up, and a little more time consuming, but offers a higher level of encryption for those longer communications with sources.
Journalists can even link to their public key in their emails or in their social media profiles so that sources know exactly how to get in contact with that journalist securely.

To use a cliché, there is no silver bullet, and no way to guarantee that sources will be safe. As well, it relies on your sources knowing how to use the same encryption methods as you, and that will ultimately present the biggest hurdle.

Despite token gestures by the parliament to attempt to protect journalists and their sources, there are still enough gaps and loopholes in the legislation to ring alarm bells over the potential for sources to be compromised by government agencies accessing the data of journalists. The Australian Federal Police has also confirmed it has received 13 referrals to trace the source of leaked Commonwealth information in just the last 18 months.

Sadly, the best way to protect your source online is to take all communications with them offline. Car parks and plain envelopes offer much more protection than Gmail and phone calls.

Josh Taylor is the Sydney-based senior journalist for technology news website ZDNet. This story first appeared in *The Walkley Magazine — Inside the media in Australia and New Zealand*

SHIELD LAWS AND CONFIDENTIAL SOURCES

South Australian Attorney-General John Rau is no fan of shield laws. Back in 2012, he said that his state could not consider the issue of introducing shield laws for journalists because of the creation of the royal commission into child sexual abuse. Despite the existence of shield laws at a Commonwealth level, and in numerous other states and territories, it was beyond the ability of South Australia because: "In light of the current ambiguities on matters related to disclosure, particularly in the context of the forthcoming commonwealth royal commission, it is not appropriate for me to advance any consideration of this matter until issues become more clearly resolved."[22]

Move forward three years and Rau's position is still to vehemently oppose South Australia joining the Commonwealth and the other states and territories in introducing a shield law.

MEAA and other media organisations made numerous attempts to speak to John Rau in the lead-up to a vote on a private members' Bill (known as the John Darley Bill) that that would create a shield law for journalists in South Australia.

On October 10 2014, MEAA wrote, explaining the importance of shield laws in recognising the ethical obligation MEAA has under clause 3 of the MEAA *Journalist Code of Ethics*: "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."[23]

MEAA wrote to Rau: "MEAA believes that the lack of shield laws across all jurisdictions places journalists and their sources under great threat. We have already seen instances of 'jurisdiction shopping' by immensely rich and powerful interests seeking to punish journalists for doing their job. But there is also the overhanging threat that a journalist, bound by their ethical obligation, faces a fine and/or a jail term for refusing to reveal a confidential source. And the journalist also faces the difficulties of working in the future due to a criminal conviction — such as occurred in the Harvey and McManus case. The *Evidence (Protection for Journalists) Amendment Bill 2014* presents the South Australian parliament with an opportunity to join other jurisdictions and remove this threat to press freedom.

The media organisations that are members of the Australia's Right To Know lobby group (which includes MEAA), wrote to Premier Jay Weatherill on October 28 2014: "Keeping a source confidential is fundamental to the ability of journalists to maintain trust with their sources, and to encourage other sources to trust journalists and reveal information in the public interest … A journalist, when pressed by a court of law to reveal the identity of a source, is therefore faced with the ethical dilemma of deciding between breaking the confidence and revealing the identity of the source, or maintaining the anonymity of the source and being charged with contempt of court and facing the ensuing penalties, including fines and jail.

"The protection of the identity of journalists' sources is one of the basic conditions of a free press. It is central to the principles and ethics of journalists and the media organisations that employ them.

PHOTO BY SEBASTIAN COSTANZO – FAIRFAX SYNDICATION

Shield laws provide recognition, at law, that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources. The effect of a shield law is to generally preclude a journalist from being found in contempt of court — and therefore avoiding the subsequent civil or criminal penalties — for refusing to disclose a source to a court or other judicial body" the media organisations said.

The letter went on to cite the cases of journalists convicted, fined and/or jailed for refusing to name a source as well as providing the most recent examples of journalists being subpoenaed to reveal the identity of confidential sources. The letter concluded: "Shield laws and their role in a free press is an important issue that should not be politicised, as demonstrated in other Australian jurisdictions."

On October 30 2014, the South Australian government and the government-aligned independents (Martin Hamilton-Smith and Geoff Brock) voted down the *Evidence (Protections for Journalists) Amendment Bill 2014*.[24]

In voting down the Bill, Rau told the Parliament: "Legislation has been enacted in New Zealand, the Commonwealth, New South Wales, the Australian Capital Territory, Tasmania and Victoria. Western Australia passed its own very distinct legislation in 2012. There are no journalist shield laws in Queensland, the Northern Territory or South Australia."[25]

The Australia's Right To Know lobby group, including MEAA, responded to the Bill being voted down by saying: "There is no reasonable basis for the Weatherill Government not to have passed this law. It is a regrettable state of affairs that the Weatherill Government has politicised this issue. As a result, journalists in South Australia continue to face fines and jail time to maintain the anonymity of a source. This is untenable in a democracy."

South Australian Senator Nick Xenophon wrote during the debate about the Bill: "The trouble with thinking you're the smartest guy in the room is that it can go hand-in-hand with a certain smug arrogance. SA Attorney-General John Rau is a really smart guy — I've known that since my time at law school with him more than 35 years ago. But the reasons he gave to knock back journalists' shield laws don't just smack of smugness and arrogance — they're a body blow to our democracy."[26]

Xenophon went on to say: "In claiming laws to protect journalists from revealing their sources aren't needed because no one has ever been charged, Rau is treating South Australians as mugs. Strong democracies rely on the public making an informed choice every time we step into a polling booth. We can only make an informed choice if we know what is going on. Protecting journalists' sources is critical to safeguarding our right to know, especially when a government stuffs up with our money or with decisions that affect us all.

"Rau saying the Bill (introduced by my colleague John Darley and passed by the Upper House) was somehow "flawed" because no journalist has been prosecuted for refusing to reveal a source is itself flawed. The mere threat of prosecution can itself have a chilling effect on free speech and reporting. Journalists and editors will be wary of running a story, no matter how strongly it's in the public interest, if they could face an indefinite jail term.

"But, more importantly, it will mean that sources, usually public servants risking their careers and jail time, just won't come forward with vital information. So both journalists and potential sources will change their behaviour, and we'll all be the poorer for it.

"I'm gobsmacked that Lower House independents Martin Hamilton-Smith and Geoff Brock bought the government's slithery excuse. Gentlemen, I reckon the attorney-general has played you."

The intent of Australia's three tranches of national security laws has been counter to the intent of the shield laws, enacted federally in 2011 by the *Commonwealth Evidence Act (Journalists Privilege) 2011*. If the shield laws work to protect a journalist from facing a contempt of court charge for refusing to disclose a confidential source, why then does new legislation simply seek to circumvent the shield law by accessing a journalist's metadata to reveal the identity of the source? How can the journalist's ethical obligation be acknowledged and protected in the one instance only to be overridden and ignored in the other?

More bizarre is why the government and opposition amendment to introduce journalist information warrants were seen as some sort of "safeguard" for journalists and, presumably, their confidential sources. Instead, all they have done is mortally wound shield laws. As *The Australian*'s legal affairs editor Chris Merritt wrote immediately when the legislation was passed, shield laws have now become a dead letter and may as well be repealed.[27]

Data retention's threat to shield laws

Joseph Fernandez

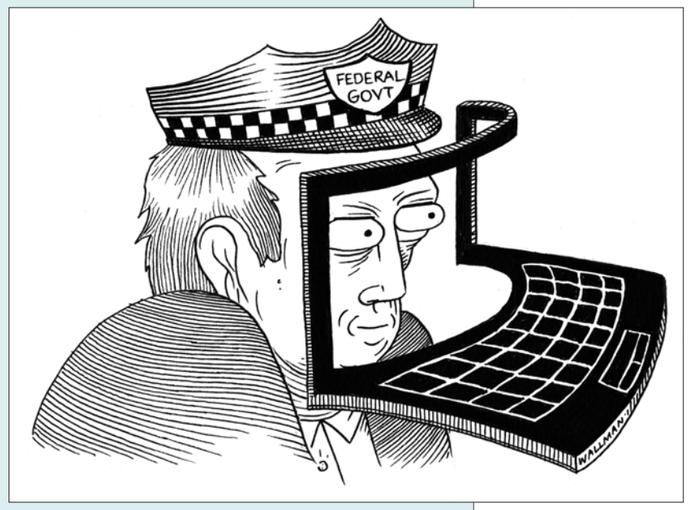


ILLUSTRATION BY SAM WALLMAN

Whither press freedom under the new data retention law? It is status quo if we buy the government's spin. In reality, it is a retrograde and farcical step.

Barely was the ink dry on the passed law (*Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015*)[28] when the Attorney-General Senator George Brandis was scuppering it. "The *first* point about this legislation is that it *changes nothing … nothing is different*," Brandis said.[29] No matter that he thought this do-nothing law would cost industry "between $188 million and $319 million"[30] or, on Prime Minister Tony Abbott's figures, $400 million.[31] A little earlier Communications Minister Malcolm Turnbull gave journalists seven of "a gazillion ways" to circumvent the legislation they were duty-bound to circumvent.[32] As Senator Scott Ludlam said: "Amazing! Tips on how to avoid mandatory data retention by the guy who introduced the Bill".[33]

Turnbull conceded what everyone has been saying — that whistleblower protections are complex and uncertain. So, he counselled, "use whatever means" to protect sources because it is the "responsible" thing for journalists and editors to do because journalists have "a duty to find out what's going on and you've got a duty to protect your sources".[34] Channelling Thomas Jefferson, he would "rather have the free press without the government. I really believe that".[35] In a joint statement, Brandis and Turnbull unabashedly proclaimed "that the right to privacy and the principle of freedom of the press are fundamental to our democracy"[36] and that "[n]o comparable nations will have greater pre-authorisation approval and post-authorisation oversight requirements for journalists".[37] Such effusiveness flies in the face of the terms of the law.

The data retention law is the latest in the government's speech-chilling measures, coming on the heels of the *ASIO Act's* section 35P, providing up to 10 years jail for disclosing information about a "special intelligence operation".[38] The data retention law, passed with Labor support, has shafted freedom of the press ostensibly for national security's sake.[39] It remains oppressive despite the attempt to give its harsh provisions a façade of respectability through a supposed veneer of checks and balances.[40]

The law allows for the issuing of journalist information warrants to access journalists' data if the Director-General of Security asks the minister for it.[41] The minister may grant it if satisfied that the public interest requires it.[42] The minister may consider public interest submissions by a toothless government-appointed public interest advocate performing an essentially ceremonial role.[43] The advocate won't be a journalist's advocate, and will have no obligation and no power to argue forcefully on the journalist's behalf.[44] As Senator Nick Xenophon said, "our public interest advocates will be flying blind".[45] Anyone who reveals whether a journalist information warrant has been, or is being, requested; or whether such a warrant is being made; or whether such a warrant exists could face two years' jail,[46] barring limited exceptions.[47] Unlike in the US, media organisations and journalists will not get advance notice of a quest for their metadata, nor will they be able to argue their case before access is granted.[48]

The data retention law threatens the hard-won statutory shield laws for journalists' confidential sources enacted in six of our nine jurisdictions. But are shield laws "a dead letter"?[49] Funeral rites for shield laws are premature. The data retention law, if Brandis is to be believed, is not about the pursuit of journalists' sources: "This is not what this is about … This has never been about journalists."[50] Shield laws, however, are specifically about journalists and the protection of their sources. It is what parliament ordained. They even called it "journalist's privilege" (for example, the Commonwealth, ACT, New South Wales and Victoria shield laws).[51]

The data retention law will reduce the likelihood of journalists being approached directly to divulge their confidential sources. Journalist Philip Dorling stated that metadata can link a source to a journalist, and reveal much about the journalist's handling of contact with that source, and their knowledge about the nature of any disclosure including, for example, evidence of security precautions and clandestine contact.[52] As Ludlam said: "You do not need to take a journalist to court to find out who they have been talking to; you just find out who they have been

talking to."[53] Information can now be triangulated. The dots can be joined from details such as the time of the call, the parties making the contact, and the time and place it was made.[54]

The data retention law is unlikely to be the end of it. Brandis has warned "we have to try and keep one step ahead of people who try and use technology for malevolent purposes".[55] If the authorities find they are being beaten they will set out to tighten the screws further.

The government's claim that the content of communications remains out of reach is disingenuous. If the dots are present they can be joined and plenty of damage can be wreaked on journalist-source confidentiality. Current journalistic practices in the area of source confidentiality are badly wanting as shown by a recent national survey the author conducted (discussed in the author's article "Secret journos' business", *Walkley Magazine*, Issue 83, March–May 2015). The survey showed the majority of journalists have a poor grasp of shield laws; the terms of confidentiality promises are often unclear; the measures taken to protect sources are poor; and journalists are divided on how to make shield laws more effective.

Many respondents also appeared to be unconcerned about official surveillance, although mainstream media was not yet fully galvanised into opposing the amendments at the time of the survey.[56] The survey highlighted the need for a multi-pronged effort to enhance journalist training and education on source protection; the need to review workplace rules and practices; and the need for legislative reforms to ensure that the shield laws are clear, uniform across the jurisdictions and do the job they aimed to do. The data retention law has heightened the urgency for media action in these areas.

Where to now? Journalists are being warned to take all steps to protect their sources, not just by the communications minister. MEAA has warned members "this new system operates entirely in secret and you will never know if your metadata has been accessed …MEAA urges members to take immediate steps to educate yourself about counter-surveillance tools that allow for anonymisation and encryption of your communications data in order to protect yourself, your sources and your journalism. Be alert to the changing vulnerabilities of these tools".[57] Ludlam has advised: "Encryption is not illegal …Free services like TOR, the onion router, which allow you to use the internet anonymously, completely defeat the purpose of a mandatory data retention scheme … Anonymity is not illegal, circumvention is not illegal and cryptography is not illegal".[58]

The data retention law may reduce the authorities' tendency to pursue journalists directly — if journalists and sources ignore warnings to conceal their contact with each other. Where no footprints of such contact are available journalists may find themselves being pursued for disclosure. And, unless the public interest so overwhelmingly demands disclosure — as in extreme cases where life and limb is at stake and journalists themselves volunteer disclosure in the public interest — journalists may "pretty much tell them to stuff off" (as one respondent said in the shield laws study) and the stage could be set for the pursuit of the journalist's source. Open defiance, at the risk of serious penalties in the face of a demand for disclosure, may be bold and laudable, if not foolhardy. It is not the way in which journalists, in an environment espousing democratic values, should be operating. MEAA's CEO Paul Murphy has warned: "Any system with the capacity to go after confidential sources has a chilling effect on journalism because it targets whistleblowers who seek to expose wrongdoing, illegality, dishonesty, fraud, waste and corruption. If you are going after sources then you are going after journalism."[59]

The data retention law spells an unprecedented change for the dynamics of journalist-source interaction. It turns the clock back notwithstanding Brandis' claim that nothing has changed. Things have changed, remarkably. As Senator David Leyonhjelm said: "It is the state that requires watching, not the people … This is bad law — law that compromises our rights and freedoms, treats us all as criminals-in-waiting, and invites abuse and overreach."[60]

It is time to revamp shield laws to ensure that they provide journalists the cover that they need in order to perform their rightful role of holding power to account. Alongside this the weaknesses in whistleblower protection must be plugged.

Associate Professor Joseph Fernandez is the head of the journalism department at Curtin University and is the author of *Media Law in Australia — Principles, Pitfalls and Potentials* (2014). For a convenient summary of the nation's shield law position see Joseph M. Fernandez, 'Chaos reigns as shield fail' in MEAA's 2014 Press Freedom Report, *Secrecy and Surveillance: The Report into the State of Press Freedom in Australia in 2014*, 24–25; and 'Overview of journalists' shield laws in Australia', 26–29.

MEDIA ACCESS TO ASYLUM SEEKERS

When governments hide immigration policy outcomes behind excuses of military expediency, something has gone horribly wrong with open government. MEAA raised its concerns about the excuse of "on-water matters" used to deflect any questioning about the militarisation of customs and immigration policy in detail in last year's press freedom report.[61]

If the attitude itself wasn't bad enough, it was the government response to stories that did manage to make it into the media which really cast a pall over the entire issue. On January 22, Guardian Australia revealed that eight journalists had been referred to the Australian Federal Police for investigation over the sources of information in stories they had written about asylum seekers.[62]

In short, government agencies were urging the AFP to find sources of stories because the Australian government refused to be honest and open about its immigration activities. Government agencies were quite willing to see the AFP used to hunt down the journalists' sources —using the AFP's powers to trawl through the journalists' records in order to find the source.

Government efforts to control information had transformed into government efforts to prosecute those who revealed matters in the public interest. Government actions displayed a disregard for press freedom, journalist privilege and journalist shield laws. Open government had made way for near paranoia. Government was going after whistleblowers. And that meant going after journalism.

Agencies included the Department of Defence, the Australian Customs and Border Protection Service and the Department of Immigration and Border Protection. The media organisations involved included Guardian Australia, news.com.au and *The West Australian* newspaper.

As Guardian Australia's Paul Farrell commented in an opinion piece accompanying his story revealing the referrals to the AFP: "This is a move that should alarm all citizens. It's not an attack on any particular news outlet. It's an attack on those who have reported on matters of significant public interest in the increasingly secretive area of asylum seeker policy … These kind of attacks severely damage the confidence between reporters and their sources and pose a grave threat to effective and responsible journalism. When the federal police go knocking on the doors of a reporter's sources, sources will soon dry up. People will be scared. And that is exactly the point".[63]

A year later and the obfuscation by government over releasing information relating to the treatment of asylum seekers continues.[64] Instead of relying on the Australian Defence Force to parry political questions, it uses the excuse of foreign governments as a way to deflect direct inquiries. The end result is just the same — a complete lack of information about what the Australian government is doing in our name.

So politicised have the efforts to contain and control information become, that even independent players are subject to threats, intimidation and harassment on a scale that makes a mockery of open, honest government.

A view of the Nauru detention centre
PHOTO: ANGELA WYLIE - FAIRFAX SYNDICATION

Shrouded in secrecy

Paul Farrell

Journalists shouldn't need to hide in the shadows to do their job, but that is the growing reality of public interest journalism in Australia.

When Operation Sovereign Borders was introduced in 2013 by then immigration minister Scott Morrison it was met with derision from many reporters[65]. It was an immigration policy of extraordinary secrecy, focused on curbing the flow of information about what the government was doing on the high seas with asylum seeker vessels.

The immigration minister's refusal to answer questions about these kinds of operations was only the beginning. The last 12 months have presented far greater risks for reporting — and disclosing information — about the government's "on water matters".

Hostility from governments in an area of sensitive policy is not new. Journalists shouldn't expect the government to hand feed them information. Reporting can, and should be, an adversarial craft, as long as it is done fairly.

But, it also shouldn't be expected that the government will refer stories on matters of public interest to the Australian Federal Police — which is exactly what has happened in the last 18 months in the area of the federal government's asylum seeker policies.

In documents released under freedom of information laws[66], eight separate referrals to the AFP were sent from the immigration department, defence and customs relating to journalists' stories from Guardian Australia, news.com.au and *The West Australian*. The intention was clear: to hunt down the reporters' sources with a view to prosecuting them if necessary. Some of these investigations remain ongoing.

All of these referrals present substantial difficulties for reporters, in an era where surveillance of phone and web records is growing more and more sophisticated and ubiquitous.

Journalists' phone logs have always been easily accessible. But the federal government's data retention laws will compound some of these risks[67], by giving an even broader data set to draw on, that can disclose more about sources' and reporters' locations and web data that could be used to determine — or at least severely narrow down — the identity of a source. While a warrant will now be necessary to access a journalists' phone and web data, no further warrant is required once that is done and all further information about sources is freely accessible.

These risks have no easy solution. But it is forcing journalists to be far more adept at understanding how to conceal their digital wakes. It makes them reluctant to use their phones, or to accept tip-offs through emails, for fear of jeopardising a potential source. First contact can often prove the most fatal, so encouraging sources to use services like Securedrop[68], or other more secure forms of communication, are growing more common. More and more journalists are learning how to use Tor, OTR Chat, PGP email or the Tails operating system to help conceal their activities.

Suspected sources of information have also been subject to other forms of pressure. In 2014 the then immigration minister Scott Morrison removed 10 Save the Children workers from Nauru after allegations emerged in an incident report suggesting they had been encouraging asylum seekers to self-harm. The allegations were also referred to the AFP and the investigation was also widened[69] to other staff members to encompass Save the Children whistleblowers who made submissions to the Australian Human Rights Commission inquiry into children in detention.

A review conducted by former integrity commissioner Phillip Moss[70] found the allegations could not be substantiated. He recommended the department review its decision to remove the workers.

And it has not just been limited to whistleblowing; other means of information access have also dried up. Freedom of information requests relating to asylum seeker turnback activities have been repeatedly knocked back[71] by both the defence department and customs. In an extraordinary move, the exemption largely relied upon by both departments was national security. These requests are now the subject of an ongoing appeal, which has been delayed further by another measure of the federal government — the dismantling of the Office of the Australian Information Commissioner.

Information from any kind of official source remains oblique. The Immigration Minister Peter Dutton consistently refuses to answer basic questions about immigration policy.

Media access to detention facilities is exceedingly difficult. Under the previous Labor government a few journalists were able to gain access to detention centres, after signing a deed of agreement with the immigration department.

No journalists have been granted access to mainland or offshore facilities since the Coalition Government came to power. Although a few advocacy organisations were able to see parts of Manus Island, many have also been blocked from inspecting

Immigration Minister Peter Dutton.
PHOTO BY ANDREW MEARES, FAIRFAX SYNDICATION

facilities. Even the Shadow Immigration Minister Richard Marles was recently bumped off a flight to Nauru[72], after the Labor party chose to support an upcoming Senate inquiry into allegations of sexual assault at the centre.

There are also other steps being taken to deter journalists from attempting to gain access to detention centres. Guardian Australia's Ben Doherty recently sought a visa for Papua New Guinea[73]. It was an immense surprise when he came across a poster that had been placed around the Manus Island centre — with what could only be described as a mug shot — with the words "DO NOT EXCHANGE ANY INFORMATION WITH THIS MAN".

All of these measures show a secretive attitude to government that in the last 12 months has made the reporting environment increasingly more difficult. It has forced reporters to adapt their work practices to combat an increasingly aggressive response from government to any form of information that is sanctioned for release.

Many journalists — just like many Australians — differ in their views of the policies towards immigration and asylum seeker policies. But what they should all agree on is that the public has a right to be fully informed about those policies, and to make up their own minds about them.

The real question for Australian journalists is just how far into the shadows they are willing to go.

Paul Farrell is a reporter with Guardian Australia covering immigration and national security.

WHISTLEBLOWER PROTECTION

As MEAA noted in last year's press freedom report, the *Public Interest Disclosure Act 2013*[74] commenced operation on January 15 2014. The new act replaced the 1999 legislation and created a commonwealth government public interest disclosure scheme to encourage public officials to report suspected wrongdoing in the Australian public sector[75].

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the *PID Act* and monitoring its operation, "providing guidance and advice to people who are thinking about making a disclosure of wrongdoing"[76]. The Ombudsman will also provide information, resources and guidance to Australian government agencies, commonwealth companies and public authorities responsible for managing and responding to public interest disclosures.

MEAA believes the new act is a significant step forward that could be used as a template for uniform whistleblower laws in other jurisdictions. However, the act still contains flaws[77]. The failure of the proposed legislation to protect people making disclosures about the conduct of politicians elevates them above what should be legitimate transparent scrutiny of their activities.

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

This is now a particularly acute concern given the introduction of 10 year jail terms for unauthorised disclosures of information as introduced in the government's first tranche of national security laws relating to amendments loaded into section 35P of the *ASIO Act*. Subsequent amendments toughened the legislation further by imposing a "recklessness" test. Media concerns were meant to be assuaged by a "public interest test" to be applied by the Commonwealth Director of Public Prosecutions before considering whether to pursue a prosecution. MEAA has stated that it does not believe the Commowealth DPP, a government official charged with prosecuting criminal offences, is best placed to determine what is in the public's interest or can act with sufficient independence and understanding of the vital role of whistleblowers and journalism in a healthy functioning democracy.

The government's attitude is telling when it comes to whistleblower protection. Attorney-General George Brandis has admitted that section 35P: "applies generally to all citizens. It was primarily, in fact, to deal with a [whistleblower Edward] Snowden-type situation."[78] MEAA continues to be concerned about the attitude of Australian politicians to whistleblower Edward Snowden. Snowden's revelations exposed the illegal misuse of the data being collected by NSA surveillance.

On January 22 2014, Foreign Minister Julie Bishop told the Alliance 21 conference in Washington DC: "… a grave new challenge to our irreplaceable intelligence efforts arose from the actions of one Edward Snowden, who continues to shamefully betray his nation while skulking in Russia. This represents unprecedented treachery — he's no hero".[79]

On January 29 2014 Prime Minister Tony Abbott said in a radio interview: "This gentleman Snowden, or this individual Snowden, who has betrayed his country and in the process has badly, badly damaged other countries that are friends of the United States …"[80]

On February 11 2014 Attorney-General Brandis, speaking in the Senate, said of Edward Snowden: "…through his criminal dishonesty and his treachery to his country, [he] has put lives, including Australian lives, at risk".[81]

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

On March 17 2015 the Australian Federal Police confirmed: "that over the past 18 months, the AFP has received 13 referrals relating to the alleged unauthorised disclosure of commonwealth information in breach of section 70 of the *Crimes Act* … In the overwhelming majority of these investigations, no need was identified to conduct a metadata telecommunications inquiry on a journalist".[82]

This admission gels with a report in Guardian Australia that eight journalists had been referred to the Australian Federal Police over stories written about the government's asylum seeker policies.[83] The report said that over the past 12 months, federal government agencies had referred stories by journalists from Guardian Australia, news.com.au and *The West Australian* to the AFP for their reporting on the government's asylum seeker operations.

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

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

When whistleblowers are seen as the "enemy", and the legislative weapons of counter-terrorism are unleashed upon them, democracy is the loser. Whistleblowers seek to expose misconduct, alleged dishonest or illegal activity, violations of the law, threats to the public interest.

The failures within the *Public Interest Disclosure Act 2013* and the assault on whistleblowers in the past 18 months are not hallmarks of open government.

PHOTO BY ANDREW QUILTY – FAIRFAX SYNDICATION

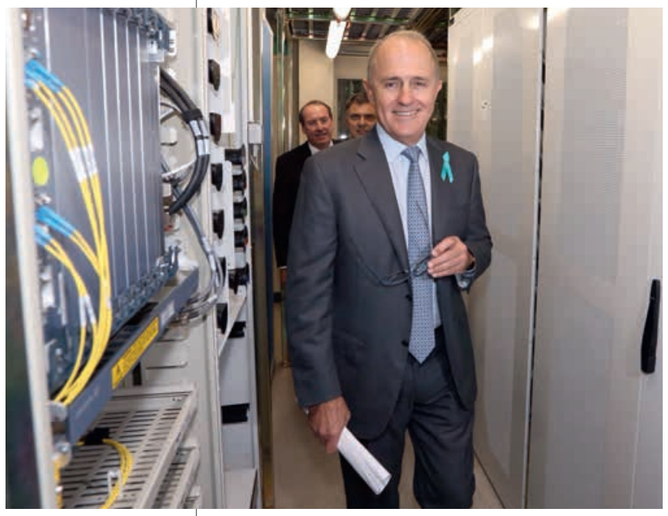
MEDIA REGULATION

On March 9 2014 Communications Minister Malcolm Turnbull said that the government was considering changes to the media ownership laws to reflect changes in the industry due to the rise of the internet[84]. "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[85]. But Turnbull argued content was not the same as ownership, adding that different levels of content related to business models. However, some Coalition MPs supported a Senate inquiry to examine any proposed changes.

A year later, and Minister Turnbull is again airing the possibility of changes to media ownership laws[86]. Reports say that the Abbott government is considering scrapping the "two-out-of-three" rule preventing media organisations from owning more than two platforms among radio, TV and print. The reports also suggest the government will also scrap the "reach" rule which prevents the creation of television networks that could broadcast to more than 75 per cent of the population — this effectively prevents regional broadcasters from being bought by national broadcasters.

Communications minister Malcolm Turnbull
PHOTO ANDREW MEARES – FAIRFAX SYNDICATION



Turnbull has not flagged any changes to anti-siphoning rules.

MEAA has always made its position on the need for media reform very clear, particularly due to the transformative nature of the digital revolution and the resulting convergence that is taking place. While there is an opportunity to examine media laws to reflect the changes wrought by new technology, any moves that would concentrate Australia's limited media ownership would have dire consequences.

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

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

It is encouraging that the digital revolution has seen the arrival of small online news businesses, either as spin-offs from overseas operations (like Daily Mail Online Australia and Guardian Australia) and new local voices (The Conversation, Crikey — albeit now 15 years old, *et al*).

Two years ago, MEAA called for an enhanced press council, a "news media council", that would cover all news media regardless of the platform. It would hear complaints and develop standards for media outlets to run alongside the MEAA's *Journalist Code of Ethics*. The complaints panel would comprise a minority of representatives of media outlets, augmented by public members and independent journalists to ensure industry knowledge is balanced by community expectations.

Convergence amid the rise of new digital players has made that need more pressing still and MEAA urgently calls on media organisations to work together to form their own body that is platform agnostic, in order to ensure the industry regulates itself rather than ever succumbing to the spectre of regulation imposed by government.

FREEDOM OF INFORMATION

Freedom of information continues to be storm-tossed by a mixture of overzealous and hasty decision making and impractical solutions that fail to provide comprehensive solutions. In short, at the commonwealth level, successive governments have not performed well when it comes to both ensuring the freedom of information regime operates efficiently and that reforms are properly considered and implemented.

A glance at the recent history of commonwealth freedom of information measures is necessary. On October 29 2012 the federal government announced[87] a review of the operation of the *Freedom of Information Act 1982* and the *Australian Information Act 2010* which would be undertaken by Dr Allan Hawke AC, a former senior Australian government public servant. The review would consider whether the laws continue to provide an effective framework for access to government information. The review's report was tabled on August 2 2013[88].

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

- The effectiveness of the Office of the Australian Information Commissioner,
- The two-tier system of merits review,
- The operation of the FoI exemptions,
- The coverage of agencies subject to FoI law,
- The effectiveness of the FoI fees and charges scheme, and
- Minimising regulatory and administrative burden, including costs[89].

In a joint submission to the Hawke Review[90] MEAA and other media organisations expressed concern that journalists are continuously encountering barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making.
In the submission, the organisations urged the federal government to adequately resource the management of FoI requests and reviews of decisions — within existing budgets.

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

The media organisations' Hawke Review submission also stated that the Office of the Australian Information Commissioner (OAIC) was failing in its core purpose of providing an independent merits review mechanism. The submission recommended that time frames and time lines must be introduced into the review and appeals process and that applicants be allowed to access alternative means of review at an early stage, including to the Administrative Appeals Tribunal.

In the federal budget on May 13 2014, it was announced that the government would de-fund the OAIC, to be implemented as of 31 December 2014.[91] Responding to the decision, the OAIC said: "The *FoI Act* will be administered jointly: by the Attorney-General's Department (advice, guidelines, annual reporting), the Administrative Appeals Tribunal (merits review) and the Commonwealth Ombudsman (complaints). The information policy advice function currently discharged by the OAIC will cease."

However, delays in passing the relevant legislation to bring these changes about, contained in the *Freedom of Information Amendment (New Arrangements) Bill 2014*, have meant that the OAIC has remained operational, albeit it with transitional arrangements for FoI matters. FoI complaints would now be referred to the Commonwealth Ombudsman. The OAIC continues to administer other statutory elements of the *Freedom of Information Act 1982* including extension of time applications. The OAIC also continues to administer the *Privacy Act 1988*.

On October 10 2014, MEAA participated in a joint media organisations submission organised by the Australia's Right To Know lobby group in response to the *Freedom of Information Amendment (New Arrangements) Bill 2014* which had been introduced in the House of Representatives on October 2 2014.

The signatories to the submission said that while they supported the streamlining of processes regarding FoI functions generally, they were concerned that if the bill did not pass, and the OAIC became defunct, Australians would be without a functioning appeal mechanism regarding FoI decisions for the first time since inception of the *FoI Act*.

The submission said: "A key issue arising from the bill is the requirement that an applicant seek an internal review of a decision before a right of appeal to the Administrative Appeals Tribunal (AAT) arises, except in the case of decisions made by the minister or the head of an agency.

CARTOON BY GREG SMITH

The submission referenced the earlier media organisations' Hawke Review submission, again noting that the lack of a direct right of appeal to the AAT effectively places the agency in the position of judge and jury, contrary to the processes of natural justice.

"Data included in the OAIC Annual Report 2012-2013 advises that 48 per cent of internal appeals result in agencies reaffirming the original decision. The experience of the media organisations and their journalists suggests that in the case of politically sensitive documents, an agency is far more likely to reaffirm its original decision upon internal review. The media organisations believe that applicants should have a direct right of appeal to the AAT following a decision to refuse an FoI request by an agency."

The submission concluded: "We also note that the government is yet to provide a response to the Hawke Report into Commonwealth FoI. While the media organisations do not support many recommendations from the Hawke Report, we strongly support the proposal for a comprehensive review of the *FoI Act* and its operations. We believe that such a review should be conducted by a broadly based expert panel, including media representatives, and should be announced in early 2015."

On December 19 2014, MEAA joined with other media organisations in an Australia's Right To Know lobby group submission on the NSW review of the state's *Government Information (Public Access) Act 2009* (the GIPA Act).
The submission noted that costs and charges remain one of the major constraints to the media's effective use of the GIPA Act. The media organisations recommended two changes regarding fees and charges:

- Similar to the Commonwealth *FOI Act*, all agencies should be required to accept applications online and there should be no application fee for requests lodged by media. In addition, applicants should have the option of the provision of decisions and documents by email. The submission noted that this reform had been among the most significant and important in improving access to the commonwealth act since it was adopted.

- Section 66 of the *GIPA Act* states: "An applicant is entitled to a 50 per cent reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally." This submission recommended the section be amended so an applicant can be entitled to a 100 per cent reduction in processing charges on the basis that release of the information is the public interest. The term 'special benefit' has proven to be difficult to define and too high a hurdle. Any information released under GIPA is information that was not going to be released by government as a matter of course. Therefore information released under GIPA plays a valuable role in informing the public about government, and should be available at less cost to applicants.

The submission also remarked on the power of the Australian Information Commissioner to conduct reviews.

Under Section 92 of the *GIPA Act* "the Information Commissioner may make such recommendations to the agency about the decision as the Information Commissioner thinks appropriate". Similarly, Section 92 provides "the Information Commissioner may recommend that the agency reconsider the decision that is the subject of the Information Commissioner's review and make a new decision as if the decision reviewed had not been made".

This power for the NSW Information Commissioner to recommend can be contrasted to the existing power of the Office of the Australia Information Commissioner under the Commonwealth FoI Act. Under Section 55K of the Commonwealth Act, the Information Commissioner "must make a decision in writing: (a) affirming the IC reviewable decision; or (b) varying the IC reviewable decision; or (c) setting aside the IC reviewable decision making a decision in substitution for that decision".

The media organisations recommended that the NSW Information Commissioner be empowered to make decisions affirming, varying or setting aside reviewable decision as well as being able to make new decisions. The failure to provide this power leaves agencies with the ability to ignore recommendations of NSW Information Commissioner, which we do not think is appropriate. Independent umpires cannot have credibility when they can recommend a binding resolution.

The media organisations' submission also said that any review of the *GIPA Act* must take into account revelations about politicians, donors and the political process. It noted that the NSW Independent Commission Against Corruption continues to undertake investigations involving these activities and that "the extent of accountability, openness and transparency faced by the elected representatives of the NSW Parliament must be addressed by this review of the *GIPA Act*".

The submission also said the application of the act as it related to the NSW Parliament and to electoral offices should be clarified and improved, particularly with relation to donors to any party or politician.

In summary, MEAA continues to be concerned that there is a growing gap between the intent of FoI laws across the country and the practical application of these laws, both in terms of the enabling legislation and the operation of the laws across the various jurisdictions (federal, state and the territories). A common complaint is that FoI requests often become log jammed in the office of the relevant minister[92].

As exemplified by the NSW example, there is a considerable need for the FoI regime in each state to be thoroughly revamped. FoI should not be a political plaything, championed in opposition only to be curtailed in government.

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

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

MEAA continues to believe that uniform, nationwide freedom of information reforms are necessary to ensure that the noble words of intent about access to information are matched by actual deeds.

STAR CHAMBERS

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

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

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

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

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

The journalist can be compelled to produce documents, notes and recordings. Failure to do so can incur a fine or a jail term or both. If the journalist respectfully refuses to divulge information from a confidential source, or refuses to identify a confidential source — as they are ethically obligated to do — the journalist faces a fine, a jail term or both[93].

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

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

The data retention scheme introduced by the government has limited the number of government agencies who can access metadata, including journalist's metadata when seeking to identify a source, to 20 bodies, reduced from 80. But those agencies include the Tax Office, the competition watchdog and the corporate regulator. And the core group of 20 may be expanded in future.

The prescribed agencies[94] include star chambers such as Victoria's Independent Broad-based Anti-corruption Commission and the NSW Independent Commission Against Corruption *et al* — both of whom refuse to recognise the shield laws that operate in those respective states. In short, the star chambers can either compel a journalist to hand over information while blithely disregarding the journalist's ethical obligation to confidential sources. The alternative is to simply seek, in secret, a journalist information warrant under the new data retention scheme to trawl through the journalist's metadata and use that to identify exactly who has had contact with the journalist.

Operation Prospect

On February 4 2015, MEAA wrote to Robert Borsak MLC, chair of the NSW Legislative Council's Select Committee on the conduct and progress of the NSW Ombudsman's inquiry into Operation Prospect.[95] MEAA stated that it was deeply disturbed at reports by the select committee's inquiry that journalists[96] have been approached to reveal documents and information sources for news stories on matters related to the operation.[97]

Journalist Neil Mercer, in his submission to the inquiry, reveals that he was summonsed to appear, in secret, before the Ombudsman and that he was repeatedly asked to reveal the source of documents, which documents he had seen, and which documents were in his possession. Mercer believes his phone records had also been searched and cross-referenced.

Journalist Steve Barrett, in the submission produced by his lawyers, stated that a warrant naming him was sought for the use of a listening device. Barrett believes the use of the device was to intimidate him in an effort to curtail his and others reporting on various matters.

PHOTO BY PAT SCALA – FAIRFAX SYNDICATION

MEAA believes that these instances of spying on journalists and pressuring them to reveal their sources (done in secret using star chamber-type powers) are appalling attacks on press freedom. The aim appears to have been to use journalists to find out what they know and who the source of the information was. The second example, according to the journalist, was a clumsy threat aimed at intimidating the journalist by bugging his conversations and undermining his ability to work with sources confidentially.

In the letter, MEAA said that it welcomes the move by legal jurisdictions, including NSW, to embrace the concept of journalist privilege by legislating to create a "shield law" that aims to protect the journalist from breaching their code of ethics and identifying a confidential source. However, MEAA is appalled that NSW continues to embrace the principle of journalist privilege only to deny the principles when it comes to the star-chamber-type powers exercised by the state's investigatory and anti-corruption bodies.

The NSW *Evidence Act 1995* is clear that a journalist, having made the promise of confidentiality, cannot be compelled to answer any question or produce any document that would disclose the identity or enable that identity to be ascertained. As such, the NSW Act replicates the commonwealth's *Evidence Act 1995*. This principle generally applies to all proceedings in a NSW courts but not to star chambers. That the principle is not acknowledged by the state's Ombudsman and that listening devices can be used to spy on journalists and their communications with confidential sources is an outrageous undermining of press freedom in NSW.

MEAA called on the committee to take steps to ensure that press freedoms are preserved and respected by every government agency in NSW and that the principles of journalist privilege enshrined in NSW law are entrenched so that no agency can misuse star chamber-type powers to try to spy on or muzzle reporting in the public interest. The vital work of whistleblowers and the fourth estate in holding government, government agents and the powerful up to legitimate scrutiny must not be undermined by the misuse of power.

REDUNDANCIES

Fairfax photographers protesting cuts that saw up to 30 photographer positions lost.
PHOTO: AAP.

The number of redundancies at media organisations has slowed but not arrested. For the most part, redundancies at media organisations continue to be linked to the digital transformation, the fragmentation of audiences and advertisers, and the subsequent collapse of traditional revenue streams.

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

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

The ABC has so far lost about 250 jobs, the majority from its news division. Another 100 jobs have been flagged to go in the next round of redundancies scheduled for implementation before the end of the financial year.

At Fairfax regional NSW newspapers, some 13 jobs were lost as the company rolled out its NewsNow production platform. The cuts at Fairfax's Victorian regional newspapers bit harder with almost 57 full-time-equivalent positions lost.

MEAA said: "The scale of the cuts will be devastating for the rural mastheads and the communities they serve. When you lose journalists in rural and regional Australia, quality journalism is undermined. Local voices, local issues, local news — all these are lost. Media organisations offer up homogenised fillers where there is less local, and therefore less relevant, news.

"When a masthead loses reporters and photographers there is a direct loss of local news reporting because there are fewer staff on the ground involved in newsgathering and the vital role of scrutinising the powerful and holding them to account; when you lose sub-editors you lose the guardians of quality journalism who help maintain standards and reduce errors."

In May 2014 Fairfax announced it would cut about 70 positions from its metropolitan daily mastheads. The losses equated to 25 full-time-equivalent jobs from editorial production, 30 photographers (while outsourcing photos to Getty Images) and up to 15 positions from the Life Media division.

MEAA said: "This will further erode the ability of the staff who remain to do their jobs without a marked increase in work intensification. It strips a massive loss in skills, experience and knowledge from the group. Fairfax seems incapable of deciding on new production arrangements and sticking with them. The only decision the company seems capable of making is to keep cutting staff.

"When do we reach the point of no return? Why isn't more effort being made to protect and promote editorial quality and utilise smarter ways of working? At what point does Fairfax stop being a news organisation and merely become a commissioning agency that outsources everything it does?"[98]

In April 2015, following the merger of Macquarie Radio and Fairfax Media, about 50 Fairfax Radio staff lost their jobs.

PUBLIC BROADCASTING

In the federal budget announced on May 13 2014 the federal government revealed a cut of $43.5 million over four years in funding for Australia's public broadcasters. The cut was a broken promise and was being inflicted on organisations already starved of funds. The two broadcasters have repeatedly demonstrated that they are efficient managers of their triennial funding.

It was also announced in the budget that the contract for the ABC-operated Australia Network would be cancelled which would have flow-on effects that would harm the ABC's international coverage. Taken together, the two changes announced in the budget cost the ABC about $120 million in funding over four years.

Prime Minister Tony Abbott had made a promise that there would be no cuts to the ABC or SBS on the eve of his election: "No cuts to education, no cuts to health, no change to pensions, no change to the GST and no cuts to the ABC or SBS."[99]

MEAA said at the time of the announcement of the cuts: "That promise has been broken and comes after unprecedented political interference in the editorial independence of public broadcasting in Australia. What is more sinister is that the budget papers say tonight's cuts are just a 'down payment' on even harsher cuts to come out of the efficiency audit currently underway, cuts that will further cripple the broadcasters.

"The cuts will harm the two broadcasters who constantly struggle to meet the demands placed on them to compete with commercial broadcasters in a dynamic media space that is being dramatically transformed by digital technology. You can't hold a public broadcaster together on string and Band-Aids. There is a real cloud now over the ability of the ABC to meet the requirements of its charter in serving regional and rural Australia. SBS, which was starved of funds in recent years, is once again in a desperate position," MEAA said.

On November 20 2014 there was a further cut announced of up to $300 million in funding from the ABC and SBS over the next five years. These cuts to the ABC ($254 million) and SBS ($25 million) led to a significant number of programming cutbacks and job losses. The ABC has lost at least 250 jobs to date with a further 100 flagged to go in another redundancy round to take place before the end of the financial year.

MEAA argues that 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.

"The staff of our public broadcasters have a wealth of knowledge, expertise and experience which must be utilised to minimise the impact of the cuts and to build on the proud tradition of public broadcasting on which generations of Australians have relied, and will continue to rely on in the future," MEAA said at the time of the second round of cuts.

Hundreds attend a protest against funding and job cuts at the ABC.
PHOTO BY JAMES BRICKWOOD – FAIRFAX SYNDICATION

Canberra's cuts bite deep

Quentin Dempster

We need a debate about the role and sustainable future of the taxpayer-funded public broadcasting system in Australia, particularly as the digital revolution is enabling aggressive global players to potentially have smart-TV access to every Australian household through wi-fi video streaming.

The federal government's "efficiency dividend" — in reality a budget cut — will have a massive impact on the ABC's international reach, and on the stories it can tell its audiences.

Australia Plus TV was launched immediately on the closure of the Australia Network on September 29 2014. This network continues to reach audiences across India, Asia and the Pacific through its established arrangements with re-broadcasters. While the number of re-broadcasters has dropped significantly, the remaining partnerships contain all the region's largest subscription television operators in all the key Asia-Pacific territories.

The actual reach (which is assessed through re-broadcaster subscriber numbers) seems to have slightly increased due to a small number of new re-broadcasters coming on board late last year. Our potential reach is now more than 170 million people in the region.

We have re-transmission agreements with subscription-TV companies in India, Thailand, Malaysia, Indonesia, Hong Kong, the Philippines, Japan, South Korea, Papua New Guinea and many of the Pacific Island nations.

The main change to distribution from the previous Australia Network is that Australia Plus TV services are no longer available unencrypted in Asia, which means we have lost untold direct-to-home viewers who had their own satellite dishes and an unknown number of hotels similarly equipped.

The new schedule is based on a repeating six-hour block of mixed-genre programming and is heavy on re-broadcasts of ABC News 24 domestic programs. There is just one 30-minute international news program, presented by Bev O'Connor, broadcast each evening on both Australia Plus and News 24.

The most significant loss is the range of lifestyle, educational and news programs produced specifically for the region and, in many cases, in the languages of the regions.

The Australia Plus brand has had a longer life on digital platforms, having launched at the end of 2013. News content is syndicated to more than 30 third-party sites in Indonesia and China.

Radio Australia has been decimated. Shortwave into Asia has stopped completely. A two-hour morning program goes live into the Pacific on weekdays (*Pacific Beat*) and there are some short news updates throughout the day. The rest of the network streams NewsRadio, LocalRadio, some tripleJ and some Radio National content. RA is still re-broadcast on a network of FM transmitters in Myanmar.

Here are the changes in greater detail:

Radio Australia

The service has been hit hard, with the loss of:

- Phil Kafcaloudes and *Mornings* (two hours of live programming to the Pacific, weekdays)
- Asia Pacific weekdays
- Asia Review weekends
- Reduced daily news bulletins
- Loss of network entirely in western Pacific island nations including the Marshall Islands, Nauru, Marianas, Kiribati and the Cook Islands
- RA shortwave service to Myanmar (via Singapore) shut down at the end of December
- Language services cut to one person per service, resulting in no continuous multilingual news service
- Loss of dedicated language programs to Cambodia, Laos, Myanmar, Vietnam and Papua New Guinea.

Australia Network/Australia Plus

This is no longer a 24-hour channel. Instead it's built around a six-hour block of programming repeated across the day. Further cuts include:

- One-hour nightly new program *The World* reduced to 30 minutes
- *Business Today* weekdays with Whitney Fitzsimmons
- *Pacific Sports 360* — dedicated sports review program for the Pacific
- *Fashion Asia*
- Around 650 re-broadcasters for the Australia Network service reduced to about 50 re-broadcasters in India, Asia and the Pacific, mostly delivered through a limited and encrypted satellite service
- Loss of untold direct-to-home viewers across Asia, particularly in Thailand, who can no longer access our signal straight off the satellite due to encryption.

Asia Pacific News Centre (APNC)

With the loss of APNC correspondents in Delhi, Jakarta, Beijing, the Pacific and Parliament House, Canberra, the total count of journalists and production staff made redundant as a direct result of the termination of the ABC/DFAT contract is 73.

Foreign Correspondent

Reduced to 22 x 30-minute episodes starting in mid-April, resulting in destroyed production momentum and audience confusion.

Catalyst

The ABC's television science show will be severely cut. *Catalyst* will fill the 8pm Tuesday slot for 10 weeks from February and then, with *Foreign Correspondent*, finishes its run. *Catalyst* will come back for 11 more shows, resulting in destroyed production momentum and audience confusion.

Lateline

This program, with its analysis and investigative capacity and live studio/satellite interviews with international geopolitical and economic experts, has been gutted. Its field reporting capacity has been stripped out. While we are expecting it to return in 2015, it will run initially on News 24. In its 25-year history, *Lateline* has been instrumental in holding executive government to account, and its investigative journalists have delivered impactful exposure of immigration blunders, and indigenous and institutional child sexual abuse.

ABC's International Bureaux

London — A rare bright spot. The third reporter there (currently on local hire) will be upgraded. There should be more camera capacity. Currently the long-time editor also shoots pieces to camera and overlay, but management wants to transform that into a full camera/editor position. That may mean the current editor will be terminated and a new locally hired person brought in.

Moscow — The bureau officially closed more than a year ago. A long-time fixer/translator should have been kept on.

Middle East — The ABC has realised belatedly that having all reporting resources in Jerusalem is not wise. A new Arab-world office will be established in Beirut with a reporter, camera and local fixer/Arabic translator. The second Middle East reporter will stay in Jerusalem and become a video journalist with one local producer. We are expecting the office administrator and driver to be sacked.

Nairobi — Has been covered by a video-journalist correspondent and will remain so. Hopefully the reporter has an office, a fixer and some administrative support.

New Delhi — To become a home-based video journalist with a local fixer/translator. The ABC has had a functioning office in Delhi for decades, but now apparently the correspondent is expected to cover all of South Asia — India, Pakistan, Bangladesh and Nepal (that's 1.2 billion people) — from a back bedroom.

Bangkok — Similar to Delhi. A good functioning office will be scrapped and a home-based video journalist plus a local person will be implemented. An excellent cameraman will be offered fewer days per year.

Jakarta — Meant to be a bigger "hub" with a second correspondent and second camera, but with a regional "fire reporter". (Immediate despatch to breaking stories is thought by staff to be better co-ordinated from Bangkok than Jakarta).

Beijing — Also slated as a bigger "hub" with two correspondents and two cameras to cover Japan, Korea and the region as required. This isn't an enhancement, but a replacement of the resources that existed when Australia Network was operating.

Tokyo — A big loser. The office in the main government broadcaster NHK, where the ABC currently gets access to news bulletins and feeds, will be closed down, although rent is cheap. The BBC has apparently spent 15 years trying to get back into the building. New arrangements: home-based video journalist plus local fixer/translator. Under Japanese law it will be very expensive to have locals, including an excellent local camera operator, made redundant. The process of closing down is expected to take most of 2015. The Tokyo decision is viewed by ABC staff and international correspondents as short-sighted.

Port Moresby — Already covered by a home-based video-journalist plus local fixer. Correspondent also has to do administration.

Auckland — Closed, and with it a lot of good South Pacific coverage as well as NZ material. There is now a single correspondent with video capacity, but access to professional TVNZ crews.

Washington, DC — Staff do not believe the claim by news managers that they are creating "major multi-platform hubs" in London and Washington by July 2015. The truth is the Washington, DC bureau is being downsized with one fewer reporter and it is likely to lose its long-time editor (who occasionally shoots footage and interviews). One of two camera operators (an Australian on local-hire conditions) has reportedly been told that his contract is too generous and, to stay, he will have to take a pay cut.

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PRESS FREEDOM AND AUSTRALIANS ABROAD

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

Staff at *The Age* supporting the campaign to free Peter Greste

Peter Greste with his mother and father Lois and Juris Greste.
PHOTO BY JAY CRONAN – FAIRFAX SYNDICATION

Peter Greste

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

MEAA began campaigning for the release of Greste and his colleagues on December 31 2013, writing to the Egyptian Ambassador to Australia and to Foreign Minister Julie Bishop. MEAA subsequently worked closely with the Greste family on numerous campaign activities, rallies, protests, petitions and awareness-raising communications as submissions to the Egyptian and Australian governments.

On June 23 2014, Greste and his colleagues were found guilty by the court of spreading false news and aiding the banned Muslim Brotherhood although there was no evidence that they had done anything other than report responsibly. Greste was sentenced to seven years' jail. [100]

On September 4 2014, MEAA's then federal secretary Christopher Warren participated in an International Federation of Journalists mission to Cairo that met with Prime Minister Ibrahim Mahlab to discuss the imprisonment of the three Al Jazeera journalists.[101]

On February 1 2015, a month after a retrial was announced and after 400 days of detention, Greste was deported. His colleagues were released on bail on February 12 2015.

The retrial of all the defendants in the case, including Greste, is ongoing.

MEAA continues to campaign for the release of all journalists detained in Egypt for their journalism.

Alan Morison

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

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

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

On April 14 2014 Reuters won a Pulitzer Prize for the same story that threatens to put the two Phuketwan.com journalists in jail[102].

On April 17 2014 the two journalists presented themselves to the court, an application for bail was made, and the pair spent five hours in the cells as prisoners of the court[103]. The *Bangkok Post* later editorialised: "In the Phuketwan case, it is hard to escape the conclusion that those pursuing it are looking increasingly misguided and vindictive, especially in the face of international recognition for the Reuters report. The navy has been its own worst enemy in this case. Attempting to silence media outlets with defamation lawsuits will never win any public relations battles …"[104]

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

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

Section 44 gives full powers to the head of the NCPO to respond to any act which undermines public peace and order or national security which means authorities have the power to ban any news report, sale and distribution of books, publications and other medium that the NCPO deem as a "security threat". Any person not complying with the article will be punished with maximum of one year imprisonment, or a fine of 200,000 baht (USD 6,154) maximum, or both.

The International Federation of Journalists has said: "On outward appearance this gives the impression of a positive change in Thailand, but reading between the lines and certainly internally it will be business as usual for the military junta with strong ramifications on the country's media and press freedom.[105]

On April 16 2015, Human Rights Watch said Thai authorities should drop the criminal proceedings against Morison and Sidasathian.[106]

IMPUNITY

MEAA initiated "Getting Away With Murder" — a campaign to highlight cases of impunity involving the murder of Australian journalists.

The campaign is traditionally launched on October 16, the anniversary of the murder of the Balibo Five. It builds in the lead-up to November 2, the newly UN-designated International Day to End Impunity for Crimes Against Journalists. And the campaign continues to November 23 in acknowledgement of the anniversary of the Ampatuan Massacre in the Philippines where 32 journalists were killed — the greatest loss suffered by members of our profession in a single incident.

MEAA launched the Getting Away With Murder campaign on October 16, 2013 — the 38th anniversary of the murder of the Balibo Five[107].

MEAA believes there are three cases outstanding where the killers have not been brought to justice: the Balibo Five in October 1975, Roger East in Dili on December 8 1975 and Paul Moran in northern Iraq on March 22 2003.

MEAA's view is that the ongoing impunity over the killing of these journalists is a stain on the Australian justice system that, if left unchecked, signals that journalists are "fair game" for powerful people who wish to silence the media and prevent stories getting out.

The failure to fully investigate the murder of our colleagues, the failure to bring justice to bear and ensure the murderers are punished does not do Australia any credit when standing up for human rights elsewhere in the world. We should apply the same standards that we demand of others.

The Balibo Five

Later this year will mark the 40th anniversary of the murder of the Balibo Five: Brian Peters, Malcolm Rennie, Tony Stewart, Gary Cunningham and Greg Shackleton who were murdered by Indonesian forces in Balibo, East Timor, on October 16 1975.

On November 16 2007, NSW Deputy Coroner Dorelle Pinch brought down a finding in her inquest into the death of Peters. Pinch found that Peters, in company with the other slain journalists, had "died at Balibo in Timor Leste on 16 October 1975 from wounds sustained when he was shot and/or stabbed deliberately, and not in the heat of battle, by members of the Indonesian Special Forces, including Christoforus da Silva and Captain Yunus Yosfiah on the orders of Captain Yosfiah, to prevent him from revealing that Indonesian Special Forces had participated in the attack on Balibo.

"There is strong circumstantial evidence that those orders emanated from the Head of the Indonesian Special Forces, Major-General Benny Murdani to Colonel Dading Kalbuadi, Special Forces Group Commander in Timor, and then to Captain Yosfiah."

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

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

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

On October 13, 2015, three days before the anniversary of the murder of the Balibo Five, it was reported[108] that the AFP has taken seven months to respond to a February 2014 question from Senator Nick Xenophon. "The AFP made the admission in answers to questions asked by independent Senator Nick Xenophon about the Balibo murder probe at a Senate estimates committee hearing in February [2014]. But it took the federal police seven months to advise the Senate that 'an active investigation' into the murder of the Balibo Five was ongoing.

"The AFP says the investigation has 'multiple phases' and results are still forthcoming from inquiries overseas. But the AFP has not sought any co-operation from Indonesia and has not interacted with the Indonesian National Police. The AFP said the ongoing nature of the investigation made it inappropriate to elaborate on what international inquiries had been made. But it did reveal that members of the families of the victims were last updated on developments in the investigation in June 2013," the news report said.[109]

Just six days later, the Australian Federal Police announced it was abandoning its five-year investigation due to "insufficient evidence to prove an offence".[110]

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

"The NSW Coroner named the alleged perpetrators involved in murdering the Balibo Five in 2007. Seven years later the AFP has achieved nothing. It makes a mockery of the coronial inquest for so little to have been done in all that time. This shameful failure means that the killers of the Balibo Five can sleep easy, comforted that they will never be pursued for their war crimes, never brought to justice and will never be punished for the murder of five civilians. Impunity has won out over justice."[111]

Greg Shackleton paints the word "Australia" on the outer wall of the shop in Balibo, facing the road to Batugade, October 12 1975
PHOTO: FAIRFAX SYNDICATION

Senator Xenophon commented at the time: "I rarely use terms like 'cover-up' because it opens you up to criticism that you are some kind of conspiracy theorist. I am not. What I am is a lawyer and a politician and, coming from those two walks of life, it is apparent to me that something is taking precedence over the rule of law in this matter. Like eight previous Australian governments, this government seems to want us all to forget about the murders …

"The AFP investigation followed a NSW coronial inquest which, effectively, named the suspects, so the federal police had a walk-up start. As a nation, we cannot allow foreign soldiers to arrest, detain and then shoot and stab to death five innocent men, who were simply there to bear witness to an international scandal that's had repercussions for our region for the past four decades.

"Over four decades, the reluctance to bring the murderers to justice is a national disgrace."[112]
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."

Roger East

Later this year will mark the 40th anniversary of the murder of Roger East — 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.

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.[113] 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 movement s, AFP would not be taking any further action.

On February 20 2015, in the aftermath of the massacre at the *Charlie Hebdo* office, it was reported that Krekar had been arrested for saying in an interview saying that when a cartoonist "tramples on our dignity, our principles and our faith, he must die". It is believed Krekar was arrested on a charge of "incitement".[114]

Thailand's Justice Ministry at work

Alan Morison

Chutima Sidasathian and Alan Morison.
CREDIT: PIC SUPPLIED

The letter from the Rights and Liberties Protection Department of the Justice Ministry proved to be a delivery straight from Orwell, with perhaps a touch of Kafka for good measure.

We learned in the official document that our application to have a sum provided through the department to meet bail on the *Computer Crimes Act* and criminal defamation charges brought by the Royal Thai Navy had been rejected. Fair enough, we thought.

Because of the Navy's action, our advertising revenue at Phuketwan had gradually disappeared. But we are not yet quite among the poor and the desperate.

Then at the end came the lines, which my colleague, Chutima Sidasathian, translated from the Thai language. She frowned as she read it:

''The information . . . is false and untrue. The journalists must be correct and recheck their information before publishing the story to make sure there is no danger to others. The reputation of the Royal Thai Navy was damaged and made people look down on the Navy. On the evidence we have, we believe Morison and Khun Chutima did the wrong thing.''

I frowned, too. Although the continuation of our trial was more than six months away, a committee of the Justice Ministry had found us guilty as charged. No evidence had even been presented yet. The first witness had yet to be called. But we had already been determined to be guilty, and by a Justice Ministry committee no less.

Orwell and Kafka, how very nice to meet you both.

We are innocent. We have no intention of becoming the fall guys who take the rap for Reuters. The news agency's journalists won a Pulitzer for a series on the Rohingya exodus from Burma that included the contentious paragraph about ''naval forces'' that we had merely republished, word for word.

Thousands of news agency articles are republished each day around the world. The consequences of us losing this case should be clear to all news outlets, and to every Twitter retweeter.

Earlier in the year, we had complained to the Ombudsman's office on Phuket because we wanted to know why the local police had proceeded with our case without the investigating officer first questioning the Navy captain who lodged the complaint. Such a basic requirement, unfulfilled.

It was an important question, but the Ombudsman's office declined to ask it.

Two visits and hours of questioning at the National Human Rights Commission of Thailand produced, months later, a ruling that because the trial had begun, the commission could make no ruling.

How odd. We hadn't actually asked for a judgement one way or another, just an opinion on whether the draconian *Computer Crimes Act*, in being applied against us, was being used appropriately, or whether it was actually intended for computer hackers and data thieves.

Of course, nothing like this could ever happen in Australia, could it?

And so each day, we go about reporting daily events on Phuket, trying to put to one side the thought of the resumption of the trial in July. There is the ferry boat burning and sinking to cover, the police visiting the beach to seize sunbeds and umbrellas from tourists, the Muslim mass circumcision.

When doubts assail us, we reassure ourselves with the words of Martin Luther King Jr: ''Injustice anywhere is a threat to justice everywhere.''

It's a wise quotation that my colleague and I feel as though we are somehow being forced to endure, to live through.

I am in the fortunate position now where I could apply to reclaim my passport at any time, leave Thailand, and never return. The choice for my colleague is not so easy. She loves Thailand. Her family lives here. Under no circumstances is she becoming a runner.

As she said when the letter arrived from the Rights and Liberties Protection Department of the Justice Ministry last November: ‹›What makes the department able to judge us, before our trial? I am deeply disappointed to see the way my country›s justice system fails to operate fairly.››

The messages from supporters everywhere are encouraging, even from people quite high up in the Thai government.

So we fight on, maintaining our faith in the principle of media freedom, knowing that Martin Luther King got it right. We are innocent. We have done nothing wrong. And we still believe that in the end, justice will prevail, here and everywhere.

Alan Morison is the editor of the online news site phuketwan.com. Along with a colleague Chutima Sidasathian, with criminal defamation in a case. The charges carry penalties of up to seven years in prison. Most of the pair's legal costs are being met by the London-based Media Legal Defence Initiative. A group of more than 10 lawyers have teamed up in Thailand to provide legal counsel. They include the Human Rights Lawyers' Association, iLaw and SR Law. The Andaman Community Rights and Legal Aid Centre is funding bail.

PRESS FREEDOM IN NEW ZEALAND

Brent Edwards

New Zealand journalists are hoping a long-awaited review of the *Official Information Act* will lead to even more government transparency and end a culture of delay and obstruction evident in many government agencies.

Twelve central government agencies will be formally reviewed by the Ombudsman's Office while another 63 agencies and all 27 ministers' offices have been asked to complete a detailed two-part survey covering all aspects of the way they deal with requests under the *Official Information Act* (OIA).

The review, which was announced at the end of last year, has been a long time coming. It was first signalled in December 2012 by Ombudsman David McGee — who has subsequently retired — after he investigated the Ministry of Education's response to a request for information about proposed school closures in Canterbury in the wake of the province's devastating earthquakes.

That report found the ministry had tried to remove requests from the OIA process and there was a suggestion other departments were doing the same thing.

As well, the office had received anecdotal reports that journalists and others had encountered what it called "a variety of approaches" to OIA requests during the previous year which had apparently culminated during and since the 2011 election campaign in the OIA process being circumvented.

The Chief Ombudsman of New Zealand, Beverley Wakem, said this has the potential to erode public confidence in the OIA throughout the core public sector. "The public needs the assurance that both the letter and the spirit of the law are being observed by the custodians of public information," she said. "Our independent review of agencies' OIA practice, combined with greater transparency of OIA processes, should help renew the foundation for that assurance."

While she used diplomatic language to describe the problem, most journalists are blunter about what is happening: many would argue that not only is the spirit of the law being broken, but so too is the letter.

Here is a not untypical response to a request, particularly one made to a minister's office. First, just ignore the request. The onus is then on the journalist to follow up and demand a response.

Busy journalists might let several weeks slip by before they follow up their initial request. Once an office is reminded of the request, it will often plead ignorance and then start the process from the time it gets the second approach. That means considering it over the next 20 working days, as required by the *Official Information Act*.

More often than not, as has been my experience, at the end of 20 days the office will reply saying it needs more time to respond to the request. Then, if you are lucky, you get some information. But generally it is received so late as to be less newsworthy than if the minister's office had responded on time. The same approach is often adopted by government agencies, as they almost inevitably alert their minister to requests they receive. This has been the approach taken under the government's "no surprises" policy, which was first put into effect by the previous Labour government. While it no doubt helps the government's political management of issues, it works against the purpose of the OIA to foster open government.

What will come of the Ombudsman's Office's investigation is unclear. What the legislation needs is more power so that ministers and agencies that routinely break the law actually face a penalty for doing so. And the Ombudsman's Office needs more resources so it can properly investigate complaints about delayed or rejected OIA requests.

At the moment, the government and its agencies know they can get away with abusing the law because the office has neither the power nor the resources to enforce it. An appeal to the Ombudsman's Office can take months, even years, to be settled. By that time the minister's office or agency will grudgingly release the information. But, by a deliberate strategy of delay, they ensure the public effect of its release is much less powerful than had it been released properly under the time frame of the *Official Information Act*.

There is, however, some hope that the Ombudsman's inquiry will have some effect. It is, at least, putting the spotlight on the government's handling of the process. And the office says that, as evidence emerges of problems, a determination will be made on each specific case as to whether it can be addressed properly by the inquiry or whether it requires a stand-alone investigation. It also says any problems that can be resolved during the inquiry will be rectified immediately.

Journalists have long been frustrated by the stonewalling when it comes to Official Information Act requests that seek information an agency or its minister would rather remain secret. At the very least, the Ombudsman Office's inquiry should lead to a renewed commitment to releasing information in the public interest rather than withholding it for political interests.

Brent Edwards is political editor at Radio New Zealand.

PRESS FREEDOM IN THE ASIA-PACIFIC REGION

The International Federation of Journalists Asia-Pacific

Media freedom across the Asia Pacific continues its struggle against censorship pressure, intimidatory tactics by state and other forces, political instability, impediments to access of official information, criminalisation of online speech and a near perfect climate of impunity for attacks and threats against journalists.

Job and wage insecurity blights media across the region, but small gains such as the victory in the long-running Wage Board campaign in India, which saw journalists and unions unite to fight for better wages and working conditions, was a particular bright spot in the last year.

The ongoing battle for access to information continues as media workers in the Philippines, Malaysia and Sri Lanka fight for the introduction of much-needed Freedom of Information (FoI) legislation.

Meanwhile, unions in Indonesia are fighting to increase the minimum wage of journalists as the country's increasingly contractualised industry takes shape.

Among new and emerging challenges, journalists across the region are grappling to adjust to the increasing need for digital security and to adapt to an increasingly cut-throat working environment due to changing media models and political instability.

Malaysia's media continues to struggle under the Sedition Act (1946), which has seen journalists charged and arrested for simply doing their job, including cartoonist Zunar who faced nine charges of sedition, the highest number in Malaysia's history.

The climate of impunity for crimes against journalists is a scourge that few leaders across the Asia Pacific have a handle on. But, while governments turn a blind eye or fail to adequately act, the killings continue unabated and murderers pursue their crimes brazenly confident that little will be done to properly investigate their actions.

The Asia-Pacific region is now the world's deadliest with 39 journalists killed in 2014. Of these, 35 were directly targeted for their work. These grim statistics account for nearly a third of all journalists killed around the world, according to the 2014 IFJ report of media workers killed, *Trail of Violence*.

Philippines

The Philippines remains a prime country of concern across the region. Since May 2014, five journalists have been brutally murdered, bringing the total number of journalists killed since 1986 to 172.

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

Five years on from the single largest slaughter of journalists in history, the 2014 IFJ-NUJP International Solidarity Mission to the Philippines concluded that the country was the "epicentre of impunity" and the flow-on effect of inaction was an ongoing and devastating toll of journalist murders.

The report of the mission called for more action from the Philippines government to end the culture of impunity for crimes against journalists. It made clear recommendations for the government and authorities including: President Aquino acknowledging all acts of violence against media workers; the investigation and prosecution of 54 "priority" unsolved cases of media killings; and the establishment of an independent review of the state witness protection program.

Since the 2009 massacre, a further 36 journalists have died. Under President Aquino little to no action has been taken to change the culture of impunity in the country. Indeed, the government is unwilling to support the media and instead makes remarks and comments that instead insinuate the work of journalists as the reasons for their murders.

In September 2014, during a visit to Belgium, President Aquino said when asked about human rights in the Philippines: "For instance, in the media killings, some who used to work in media died. Did they die because they were investigative journalists? Were they exercising their profession in a responsible manner, living up to journalistic ethics? Or did they perish because of other reasons?"

Thailand

Since the coup d'état in May 2014 that saw the military junta take over Thailand, the country's media has been attacked from all angles. Almost immediately following the coup, martial law was installed and the media came under fierce attack. In the immediate days following, several journalists were detained and 100 websites, 15 television stations and numerous community radio stations were blocked under the guise of 'preserving peace and order'. Some media outlets were shut down and premises were 'guarded' by armed soldiers.

Independent journalist Gao Yu, 71, was arrested in Beijing on April 24, 2014, on charges of illegally obtaining state secrets and sharing them with foreign media. It understood that the leaked document outlined the leadership's plans to aggressively curb civil society and press freedom. Gao was subsequently charged and held in detention until her trial in November, 2014. The closed-door trial lasted four hours, during which the prosecution relied on a recorded confession by Gao which, as she disclosed during her trial, was obtained when police threatened the arrest her son. During the trial, Gao pleaded "not guilty" to the charge. On April 17 2015 she was sentenced to seven years imprisonment.
PHOTO - MIKE CLARKE - AFP

Journalists face challenges with minimal labour laws and the "right to form", which is ultimately weakening their welfare and safety within the workplace and in the field. Media organisations are also treating their employees poorly, which further weakens the ability of journalists and the state of the media.

The end of martial law in early April saw the introduction of order 3/2558 which ultimately gives more power to the military junta to "maintain peace and order". The order invokes Section 44 of the Interim Constitution of the Kingdom of Thailand and gives full powers to the junta leader to respond to any act that undermines public peace and order or national security which means authorities have the power to ban any news report, sale and distribution of books, publications and other medium that the National Council for Peace and Order deem as a "security threat". Any person not complying with the article will be punished with maximum of one year imprisonment, or a fine of 200,000 baht (USD $6150) maximum, or both.

Myanmar

Press Freedom in Myanmar has been on the steady decline over the past 12 months with journalists facing charges of defamation, erroneous reporting and lengthy jail sentences. Ten journalists are serving prison terms and another 20 are awaiting trial. In March 2015, two journalists were charged with defamation, the first since 2011 when President Thein Sein became president. However, they join five other journalists who were jailed in July under Section 5 of the *Emergency Provisions Act* which prohibits spreading of false news.

The continued deterioration of press freedom in Myanmar was further highlighted by the brutal murder of Aung Kyaw Naing in October, 2014. The journalist and activist was murdered by the Burmese Army, however it was not reported until sometime later. When his body was exhumed from the shallow grave, signs of torture were evident including a broken jaw.

China

The situation has steadily grown worse since Xi Jinping became President of China in 2013. The state of press freedom and freedom of expression in China in 2014 was deplorable. Several journalists on the mainland faced criminal charges, or were detained or forced to resign, after they carried out their reporting duties.

Independent journalist Gao Yu made a confession under duress when police threatened to prosecute her son. Her case was a landmark showing how the authorities, on one hand, repeat that China is a country governed by the rule of law while, on the other hand, law enforcement officers violate proper legal procedures. Many prominent lawyers, scholars, and bloggers suffer similar ill treatment.

Online freedom was further restricted when President Xi set up the Central Internet Security and Informatisation Leading Group to focus on cyber security. In the group's first meeting on February 27, Xi said: "Efforts should be made to build our country into a cyber power". These efforts actually limited the freedom of at least 600 million netizens to exercise their right to expression.

Under an anti-pornography campaign, 2200 websites were forced to close and 300 blogs and video channels were shut down. At least 20 million posts were deleted on social media platforms such as forums and WeChat, and hundreds of citizens were detained without charge for posting their opinions.

Press freedom in Hong Kong came under unprecedented pressure. When the Occupy Movement was sparked off on September 28, only a very few print media outlets were able to report the facts, while the rest of the print and television media followed the tone set by the central authorities of China. At least 39 journalists were harassed, detained, assaulted or maliciously accused by Hong Kong police or anti-Occupy Movement demonstrators during the 79 days of the movement. Many reporters and photographers were injured during incidents on the streets. Some media displayed self-censorship, in particular by downplaying a scandal involving Leung Chun-Ying, the Chief Executive of Hong Kong.

In separate incidents, at least four media workers were threatened or brutally assaulted by unidentified assailants. Nevertheless, many journalists continued to defend the right of press freedom and several new independent media groups were established.

Press freedom in Macau did not improve. Journalists were arrested on spurious grounds and two outspoken scholars were "kicked out" of their universities. The local government continued to use the "law" to bar pro-democracy journalists, scholars, politicians and activists from entering the territory.

Sri Lanka

Sri Lanka's media had been held hostage by the former Rajapaksa government for many years with frequent threats, intimidation and killings. The situation is so dire that many journalists have fled the country.

Prior to the presidential elections on January 8 2015 the media was coming under increasing pressure from the government. Non-government organisations were muzzled with the Ministry of Defence and Urban Development issuing a circular preventing all NGOs from "conducting press conferences, workshops, journalism training and dissemination of press releases".

In July, Sunil Jayasekara, a senior journalist and activist received death threats when he was to host a Tamil-journalist workshop. At least five journalist workshops had to be abandoned in 2014 after threats from pro-government groups forced hotels to cancel events, while organisers and participants were threatened and assaulted.

However, January 8 saw a dramatic shift in policy towards press freedom and the media. Within days of Maithripala Sirisena's election as the country's new president, Tamil-news websites that had previously been banned were unblocked, and the Media Minister declared that all exiled journalists were now free to return to Sri Lanka without fear of retribution. The government also announced that it would end intimidation and censorship of the media as well as re-open the investigation into the murder of veteran journalist Lasanatha Wickrematunge.

Pakistan

Pakistan remains the most dangerous country in the world for journalists. 2014 saw the death of 14 journalists in brutal conditions that have left media workers across the country intimidated and frightened.

Some goals have been achieved, with the conviction of the murderers of journalist Wali Khan Babar, only the second conviction of journalist killers in the country's history. More recently, the local government of Balochistan announced it would open two tribunals to investigate the murders of six journalists in the province between 2011 and 2013.

While the positives do show important gains, the figures remain a stark reminder of the challenges the country's media face. With political protests taking place throughout the latter half of 2014, journalists and media crews were reporting attacks almost daily as they tried to cover the news.

In Islamabad in September, the offices of Geo News were attacked by anti-government protesters. In separate attacks, a number of female journalists were accosted and abused as they tried to report. In one case, a woman was chased by protesters and had to hide in a crew's van. Protesters tried to pull her from the van, but were stopped by her male colleagues. In another incident, veteran journalist Sana Mirza was attacked as she did a live-cross from a protest. The footage of her crying on camera is a stark reminder of the dangers women journalists face.

The price of press freedom in the Philippines

Philippa McDonald

Five years ago, 32 journalists were among 58 people shot dead and buried in mass graves in southern Mindanao — the second largest island in the Philippines — as they covered a local candidate filing election papers. This event on 23 November 2014, which is also known as the Maguindanao or Ampatuan massacre after the province and clan involved, involves one of the largest-ever killings of journalists and makes the Philippines one of the most dangerous places in the world to work as one.

As far as an investigation goes, police, soldiers and members of the powerful local clan are alleged to have participated in the killings. So far 108 people have been charged but many are still "wanted" and there are, in all, 197 suspects. A trial that started in 2010 has been mired in delays and accusations of bribes.

Despite the promises that those responsible will be brought to justice, even Philippines Justice Secretary Leila de Lima admits, "I am not going to deny there's no longer a culture of impunity in our country".

According to the International Federation of Journalists (IFJ), five years on the Philippines Government has failed to create a secure environment for journalists, and there have been more journalists killed in the years since the massacre than died on that single day.

Each year, on the anniversary of the massacre, hundreds of journalists and human rights activists stop to remember, and the news media returns to the place where a convoy of primarily local journalists were taken two kilometres off the highway by gunmen, shot multiple times and ploughed into mass graves by backhoes already at the site. Several were shot in the back as they tried to run away, and the bodies of news crews who refused to get out of their vans were found shot and crushed in their vehicles.

Veteran Philippines journalist and photographer Nonoy Espina was the first journalist to arrive to cover the massacre. "All indications are they were executed in groups," he said. "It was pretty cold-blooded murder. At least two of the victims contacted their families as they were waiting to be killed."

He and other journalists were confronted by three large pits filled with bodies and cars. "It was like a birthday cake of death," he said. "Vehicles, bodies, just like a layered cake.
"By the end of the day," he went on, "I thought, 'When is this going to stop?'"

One young woman journalist who didn't want to be named, said it was her first big story. "The authorities were starting to excavate them from the ground, from where we are here," she explains. "Our colleagues, it was heartbreaking … it was my first time to see a massacre like that.

"You had to set aside your emotions and feelings, and all around the families were crying and falling to the ground.

"The challenges of not letting emotions get in the way of impartiality were enormous. The only thing that should be done by journalists here, aside from standing up for what they believe, is to always present a story in balanced way, getting both sides of the story and truthfulness, of course."

But the massacre has left an indelible mark and she still covers the same area where on that day, almost half of the region's journalists were killed: "Every time I go out in the field, I co-ordinate with both sides of politics, the authorities and people I know on the ground.

"I do fear when I'm covering critical situations, but there's always co-ordination. I'm not armed — I wish I was, but I'm not."

At the IFJ's request, an armed escort was promised to accompany a convoy of journalists and families of the murdered journalists for the fifth anniversary of the massacre. There were delays and the much-anticipated escort joined the convoy of white mini vans two kilometres short of our destination.

The chief of police for the Ampatuan region, Senior Inspector Roland De Leon, tells the IFJ a lot has changed since the massacre: "This area is safe; people here are peace-loving citizens. In general here it is peaceful, that is why we escorted you without guns."

"But there's a big gun there …" I politely said, to which the chief of police responded: "It is part of our uniform as police — it is an M16. It is a standard weapon."

General Santos is the nearest big city where journalist Rose Sioco is a police reporter. She covers crime for local radio on a motorbike. "I was assigned to the Coroner's Court where they brought the bodies," she says. "I had some friends there — Morales and Montano …" She cries.

"It's very sad for me, but I never said to myself I will stop this job, because this is my profession.

Geraldine Martinez holds up photos of her husband, broadcaster Alberto Martinez, who was shot and partially paralysed in 2005. Geraldine raised their children alone as Martinez lived in and out of hospital under witness protection. Alberto Martinez died in January 2015. The case to bring his killers to justice has already lasted eight years with no verdict.
PHOTO: JANE WORTHINGTON

"I think this is a big challenge for me to keep doing my job, to tell the people that we will never stop being journalists. I have challenged myself to keep going and remember them."

Abbey Lorenzo was 17 when news broke of the massacre. "The mindset of people changed when the Maguindanao massacre happened," she said. "People said to me, why would you want to be a media practitioner? You will be killed.

"It made me more determined to be a reporter. You are supposed to deliver the news, not be afraid."

Threats, though, are a part of a journalist's working life. Roland Ortillano is stringer for a local TV station. "I got a threat from the family of someone in jail," he says. "They threatened me, not by texting, but by actually tapping me on the shoulder and saying, 'You're too young'."

While the Maguindanao massacre was the largest mass killing of journalists in the world, the Philippines has been a dangerous place for media workers for decades. Broadcaster Alberto Martinez was shot in the back on 10 April 2005 after he was ambushed by two men on motorcycles after his radio show. Half paralysed and in and out of hospital, Martinez survived for another nine-and-a-half years living under witness protection and constantly on the move to various "safe" houses.

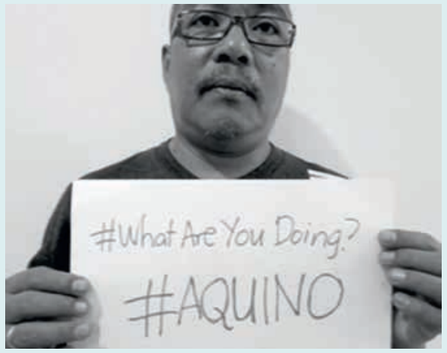
His 41-year-old wife, Geraldine Martinez, was left to bring up her son and daughter and travel long distances for occasional visits.

Two men, including a still-serving soldier, were charged with his attempted murder but have been on bail for the past nine years. But for Alberto Martinez, the wait for justice proved too long; he died on January 17 this year, just a week and half before he was to give evidence in the trial of the men who allegedly shot him.

Less than a month later on February 14, another broadcaster, Maurito Lim, was shot dead. The 71-year-old was renowned for speaking out against the illegal drug trade. And his murder brings the death toll of journalists in the Philippines to 172 since 1986.

Philippa McDonald travelled to the Philippines as part of an IFJ delegation to mark the fifth anniversary of the massacre of 32 journalists at Maguindanao. The mission's full report can be found http://issuu.com/ifjasiapacific/docs/ampatuan_massacre_five_years_on. This article originally appeared in *The Walkley Magazine* — Inside the media in Australia and New Zealand

Five years on from the Ampatuan Massacre



Nonoy Espina
PHOTO: JANE WORTHINGTON

Five years on, it still haunts me — the banality of the evil that happened on November 23 2009. It was cruel, yes, but it was also so … matter of course.

By all indications, those who ordered the bloodbath had no reason to be angry with the victims, except perhaps the kin and supporters of the man who dared challenge the Ampatuan clan. In fact, six of the dead weren't even supposed to be there. They were hapless souls who just wandered into the wrong place at the wrong time.

Many of the 32 media workers who died were well known to the Ampatuan family and a few were even considered "friends".

There could have been more journalists killed had it not been for what now feels like a random roll of the dice.

A photojournalist friend and I, for example, were not with the ill-fated convoy on that day. Just as we heard word that the Ampatuans would make mincemeat of this brash Mangudadatu, who wanted to wrest away their hold on Maguindanao province, we were both coming down with the flu. We decided to rest up for a while and come back to cover what we thought would be another shooting war between two politicians' private armies. (The Ampatuans' private militia was larger and better armed than the regular army.)

This thought would badger me for months after the carnage, a perverted survivor's guilt, popping in at the most unexpected times — "I SHOULD (not could) have been there …"

Colleagues from the region around General Santos City, which lost half its media population to the massacre, say they are still gripped with fear. "The mindset of people changed with the massacre," said one. "People say, 'Why would you keep working, you will be killed'.

"You are not supposed to be afraid to deliver facts and you should not be covering up stories that might affect lives."

Another said: "I'm worried about what will happen to the next generation. I hope our cause will not be stopped by the killing of media. We have that obligation; we have the responsibility to tell the truth. We have to do that".

It is a fear that continues to cloak much of the truth, not only from the people of the region but of the country as well. This fear limits what stories the storytellers are willing to tell and how they tell them. That they continue to strive to tell their stories as fully as they can, despite the perils they face, is a testament to their bravery.

But it would be a mistake to write off Ampatuan as an aberration. It was extreme in its magnitude and savagery, of course, but it was simply the worst example of the reality in so many regions of the Philippines. In these areas, you cross the current tin-pot despot at your own peril because political expediency dictates the central government will turn a blind eye, lest it fall out of grace with its allies.

And so it went, and so it goes …

What is clearly needed is an end to this curse, to this system of governance that breeds so much corruption and so much death.

Five years after the massacre, the really scary thing is that another Ampatuan is almost a certainty. It is only a matter of who and when.

Nonoy Espina is a director of the National Union of Journalists of the Philippines
This is an extract from the IFJ Asia Pacific report *Ampatuan Massacre Five Years On*.[115]

THE MEDIA SAFETY AND SOLIDARITY FUND

The children of slain Nepalese journalists whose education is supported by the Media Safety and Solidarity Fund attending the three-day vacation camp. The camp provides an opportunity for the children and their parents to meet each other, to interact and share their experiences.

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

Established in 2005, the fund is a unique and tangible product of strong inter-regional comradeship.

It is administered through the Asia-Pacific office of the International Federation of Journalists in collaboration with MEAA and the Media Safety and Solidarity board. New Zealand's journalists' union, the EPMU also supports the fund. And, in 2014 and again in 2015, Japan's public broadcasting union Nipporo also made contributions to the fund.

Nepal

Nepal's transition to democracy since a violent coup in 2005 has been nurtured by the hard work of the independent journalism community and journalists' organisations. This transition has come at great personal sacrifice to Nepal's media community, with several journalists killed or disappeared since 2001.

Many children of journalists have lost one of their parents, and their families struggle to sustain their livelihoods. During 2013-2014, the fund supported 31 children of journalists and media workers killed in Nepal in assisting meet their education needs, and 16 mothers received other support.

During the year, a three-day vacation camp was organised for the children and parents to provide an opportunity for them to meet each other, interact and share their experiences.

Sri Lanka

The Media Safety and Solidarity Fund has provided practical in-kind support (such as office rent and a salary for a co-ordinator) for the Free Media Movement in Sri Lanka, to assist with its work promoting freedom of expression.

The fund also supported the education of the two children of disappeared cartoonist Prageeth Eknaligoda.

Philippines

Typhoon Haiyan, which struck on November 2013, was one of the strongest tropical cyclones ever recorded. Up to a dozen journalists were killed

including two radio journalists working to keep their community informed when the storm surge struck Tacloban. The Media Safety and Solidarity Fund provided emergency assistance support for the families affected and journalist colleagues.

The massacre of 32 media personnel, among a group of 58, in the southern Philippines in November 2009, is the world's worst single atrocity committed against the media. The Media Safety and Solidarity Fund has worked closely with the National Union of Journalists of the Philippines (NUJP) over many years to assist in setting up an NUJP Safety Office, which is now supported by the Norwegian journalists' union, Norsk Journalistlag (NJ), with IFJ Asia-Pacific assistance.

During 2013-2014, the fund benefited 33 families of slain colleagues in media with a total of 67 scholars from Luzon, Visayas and Mindanao. Of this number, 25 are children of victims of the Ampatuan Massacre.

China

The fund continues to support a press freedom monitoring project in China. Run by IFJ Asia-Pacific, it is jointly funded by the National Endowment for Democracy. The Hong-Kong based media monitor and project coordinator researches and writes background reports, media statements and a regular monthly e-bulletin in English and Chinese, which are distributed through an international network of China press freedom advocates, journalists and freedom of expression experts developed by the program coordinator.

Safety assistance

The Media Safety and Solidarity Fund has provided trauma and financial assistance to a journalist working as a fixer and translator for several Australian media organisations, following his kidnap, beating and court case to defend charges against him of arms trading.

IF AP Human Rights Advocacy

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

THE WAY FORWARD

It is abundantly clear that, in the rush to push through a new wave of counter-terror laws on top of those that appeared after 9/11, the Parliament has repeatedly assaulted press freedom in this country. The fact that it has done so with nary a thought for the implications of the legislation it has passed with bipartisan support, condemns Australia's politicians. For the only conclusion one can make after such a relentless assault is that either the politicians were fully ignorant of what they were doing, or they were fully complicit in a scheme to deny the freedoms and rights of people in a modern democracy.

How else can the attacks on freedom of expression, the right to privacy, the right to access information, and press freedom be understood?

Most disturbing is the primary target of so many of these assaults: whistleblowers. For the attacks on people seeking to expose illegal activities, wrongdoing, threats to public health and safety, fraud and corruption seem to be very distant from the aims of legislation purportedly drafted as a part of the arsenal of the war on terror.

Ten year jail terms. Surveillance without a warrant. Tampering with and altering computer networks. Trawling through metadata to uncover journalists' sources. Data retention for two years. Secret journalist information warrants. These all combine to treat all Australians as suspects. And they work to frighten whistleblowers, intimidate journalists and threaten media organisations. In essence, these powers have turned the weapons of the war on terror on to us.

Since 9/11, appropriate safeguards over the powers granted to intelligence, surveillance and law enforcement agencies have been abandoned just as those powers have been exponentially increased. Sunset clauses that should have been seen as a trigger for a review have instead been extended. Legal definitions have been altered to broaden powers and offences in new ways.

Journalists are fully aware of the war on terror. All too often, journalists are its victims as the beheading of our colleagues in Syria and the massacre at the Charlie Hebdo offices demonstrate. But, increasingly, journalists are also victims of the heavy-handed counter-terror response by governments seeking to control information and muzzle freedom of expression, as the jailing of our colleague Peter Greste demonstrated.

The role of the fourth estate is to scrutinise the powerful. But the powerful are attacking the fourth estate while at the same time mouthing platitudes about their commitment to press freedom.

"A press freedom violation can be an assassin's bullet, aimed to kill an investigative journalist, and to intimidate and silence his colleagues. It can be the knock on the door from the police, bringing in a reporter to question her on her sources, or put her in jail with or without a proper trial. It can be a restrictive media law ... There can be no press freedom where journalists exist in conditions of corruption, poverty or fear," says the International Federation of Journalists.

Increasingly, Australian journalists are being attacked for simply doing their job. For that to change, powerful people need to do more than just speak about press freedom. They must move to enshrine the principles of press freedom in our laws and throughout our communities, so that the work of journalists, their relationship with their sources, and the ability to tell stories in the public interest are promoted, encouraged and, importantly, protected.
The way forward from this point is a complete, comprehensive review of Australia's counter-terror legislation and a concomitant review of Australia intelligence, surveillance and law enforcement agencies. The aim should be to introduce meaningful media exemptions from the excesses of these laws so that the vital work of public interest journalism can continue unheeded.

There must also be a rethinking of the role of public disclosure, freedom of information, open government and whistleblowers in our society so that these things are not feared, undermined and even attacked but are embraced as a necessary part of a healthy functioning democracy.

To do otherwise means the war on journalism that has become a subset of the war on terror is fought and lost on the home front. And that is too dreadful an outcome to contemplate.

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