KICKING AT THE CORNERSTONE OF DEMOCRACY

THE STATE OF PRESS FREEDOM IN AUSTRALIA

the walkley foundation
an alliance initiative★

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2012 Australian Press Freedom Report

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FOREWORD

"It's only by tracking the state of freedom of expression that we can challenge the emerging threats."

A free press is a cornerstone of a democratic society. It checks the powerful and holds them to account. It gives a voice to the powerless. So it's no surprise that governments and their bureaucracies are often uncomfortable with the notion of an independent, aggressive news media that scrutinises their policies and performance.

Early this century, free speech and the freedom of the press to hold the powerful to account was slipping in Australia. That's why, as the voice of Australia's media workers, we launched the annual Press Freedom report in 2005. And because the challenges here are not unique, we joined with our New Zealand colleagues to make this a cross-Tasman venture.

It's only by tracking freedom of expression that we can challenge the emerging threats.

Back in 2007, an audit of free speech conducted by former privacy commissioner Irene Moss on behalf of Australia's Right to Know, a coalition of news organisations including the Media Alliance, found a crying need to reform a "sclerotic" array of secrecy laws and archaic Freedom of Information laws, while there was also an urgent requirement to introduce protection for whistleblowers and the journalists to whom they talked.

The 2007 election brought to power a Labor government which included in its platform a promise to address these restrictions on the freedom of the press in this country.

We applauded when the Rudd government announced new Freedom of Information laws (some states haven't yet joined that party). We were enthusiastic participants in the public hearings that led to new Commonwealth shield laws and urged the states to follow suit. Again, some states are lagging and we use this report to urge them to bring in protection for journalists and their sources.

But so much of this promise seems to have slipped away. The latest world press rankings report from Reporters Without Borders (Reporters Sans Frontières, RSF) finds that Australia has fallen from 18 to 30 on the ladder. The RSF report specifically canvasses two issues as the reasons for this precipitous fall down the rankings: access to Australia's detention centres and the prospect of greater regulation of the press after the Independent Media Inquiry headed by former federal court judge Ray Finkelstein.

The Media Alliance has been at the forefront of the industry's response to both of these issues. With our colleagues in the industry, we have lobbied hard against the restrictive "deed of agreement" that the Department of Immigration and Citizenship (DIAC) requires journalists to sign before they are allowed into detention centres to report on asylum seekers.

It's a fight that continues – in February we coordinated a letter with the signatures of the chief executives of 10 of Australia's biggest media organisations, including my own as federal secretary of the Media Alliance, calling for the deed to be re-examined. I'm hopeful that if we keep up the pressure we will be able to work with DIAC for a better outcome that reflects the profound public interest in this area.

Unlike some of our colleagues in the news industry, we welcomed Stephen Conroy's announcement of an independent inquiry, headed by Ray Finkelstein, into the news media in Australia. While we saw no reason for punitive regulatory measures, we saw an opportunity in the inquiry's terms of reference for a much-needed and long overdue discussion of the health of the news business and any measures that might be introduced that would ensure the continuing health of Australian journalism.

So, like many, we were disappointed to read Finkelstein's report when it was released at the beginning of March. Not only did it fail to fully appreciate the urgency of the crises facing journalism in Australia, despite the stark evidence of rapidly diminishing revenues and falling share prices, but the main thrust of the report was a plan for beefed-up regulation of the news media, which appears to answer ethical problems that are evident in the UK, rather than here in Australia.

Finkelstein's blueprint for an Australian Media Council, funded by the government, compulsory for even the meanest blog and empowered to make decisions about content with no right of appeal, gets dangerously close to a government regulation of journalists. And that will never be acceptable in a society where a free press is a guarantor of real democracy.

However, none of us can be blind to the way in which last year's scandals on Fleet Street have changed the global debate and eroded public support for a free and independent media.

There are, of course, significant reasons why the situation in Australia is different. Not least, the continuing role of the Alliance as an independent, and ethical, voice for all journalists – wherever they work – helps sustain the independence of our craft.

There have been significant developments since our last *Press Freedom Report*. There's still some way to go but we can remain confident that, in Australia and New Zealand at least, the fight to sustain a fair and open system of self-regulation that respects freedom of expression is not over.

Christopher Warren
Federal secretary, Media Alliance

THE YEAR IN THE LAW

Peter Bartlett

This has been a challenging year for the media, with traditional business models thrown into turmoil by new media platforms. There was little cheer for the media on the legal side, either.

While there were not too many defamation claims that went to judgment in the last 12 months, the media did not do too well. The Ten Network went down for $85,000 to Nicole Cornes (former Labor candidate and wife of AFL media personality Graham Cornes), 2UE for $176,296 to former Guantanamo Bay inmate Mamdouh Habib, *Alice Springs News* for $100,000 to real estate agent David Forrest, and Yahoo! for $225,000 to former Yugoslav music promoter Michael Trkulja, for linking a *Herald Sun* article about him being shot in 2004 to a website called "Melbourne Crime". Significant costs were awarded on top of these defamation claims. And after a five-week hearing, *The Australian Financial Review* had a partial loss to former bankrupt solicitor Bryan McMahon.

A cause of action for invasion of privacy

The question of whether Australia should implement a statutory tort for invasion of privacy continues to be debated. In its 2008 report, the Australian Law Reform Commission (ALRC) considered the existing patchwork of privacy protections, and recommended that a statutory cause of action for serious invasions of the privacy of natural persons be introduced by federal legislation. In 2009 and 2010, the New South Wales and Victorian Law Reform Commissions respectively made similar recommendations.

In September 2011, the Department of the Prime Minister and Cabinet released its *Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, and invited submissions to inform its response to the Law Reform's proposals.

The many submissions made to date appear to support the new cause of action proposed. The Victorian privacy commissioner argued that existing privacy laws are fragmented and inadequate to meet the privacy challenges faced by technological developments.

My view remains that the very limited number of complaints to the Australian Press Council and Australian Communications and Media Authority (ACMA) do not warrant a statutory tort. It's like cracking a nut with a sledgehammer.

I found that while the reports from the various law reform commissions contain excellent analyses of the history of privacy law in Australia, and the laws as they stand in the US, UK and Europe, they fail to recognise sufficiently that the US and Europe are in a totally different situation to Australia. The US has a strong constitutional protection of freedom of speech. Europe has the European Convention on Human Rights. The UK has the Human Rights Act. The reports' authors make a huge jump from thorough historical analysis to claim that we need a statutory tort in Australia.

Public discussion and submissions are continuing, but it seems likely a statutory cause of action for invasion of privacy will eventually be introduced here. It's to be hoped any such legislation will balance a person's right to privacy with the broader public interest and the protection of freedom of expression.

In my view, such a law will not be used by the less privileged people in our society. It will be used by those involved in wrongdoing, those with financial muscle or those that seek to use the media one day but want privacy the next day.

The Finkelstein Inquiry

After much anticipation from media stakeholders, Ray Finkelstein QC delivered the *Report of the Independent Inquiry into Media and Media Regulation* in February 2012. It provides a good academic and judicial analysis of the current state of media regulation in Australia. It also includes a detailed analysis of public perception of media performance in recent decades, and reveals the public's somewhat substantial lack of confidence in the Australian media.

When Finkelstein assessed Australia's current assortment of external and self-regulation mechanisms, he concluded they are not enough to keep the media accountable.

His report proposes two key changes. Firstly, it recommends establishing a new body, the News Media Council (NMC), to replace the Australian Press Council and subsume ACMA's functions for standards and complaints. This body would have jurisdiction in relation to news and current affairs coverage on all media platforms. It would be responsible for setting media standards and handling complaints where those standards are alleged to have been breached. Unlike the current Press Council, the NMC would be government-funded, though Finkelstein is emphatic that it should be free from government influence.

While having the NMC would provide a clearer and coherent form of regulation, there's no guarantee the government will implement the proposal. The NMC would require quite substantial government funding. Indeed, the NMC would require an enormous amount of

Panel quiz: (left to right) Chris Young, inquiry chairman Ray Finkelstein QC, Professor Matthew Ricketson and Kristen Walker at the Sydney sessions of the Independent Inquiry into Media Regulation, November 2011
CREDIT: PHOTOGRAPH BY TRACEE LEA, DAILY TELEGRAPH

resources for it were to resolve all the complaints it receives within days, as is proposed. And being funded by the government, as opposed to being funded by the industry, is inevitably going to draw criticism.

Concerns that the NMC would be influenced or pressured by politicians from time to time would be difficult to counter. We have already witnessed the constant criticism of alleged bias at the ABC under the Howard government and, more recently, the Gillard government's criticism of *The Australian* and News Limited generally.

The second key change proposed by Finkelstein is the implementation of a new "right of reply", which would represent one of the modes of redress enforceable by the NMC. Among other things, this aims to redress the cost, complexity and long duration of defamation litigation. While this proposal would have many benefits, it is important to note that it may be limited in the group of individuals who would consider it a useful tool when alleging loss from defamation or unfair reporting.

It will be interesting to see how, if at all, the government responds to the report.

Suppression orders and the Access to Justice (Federal Jurisdiction) Amendment Bill 2011

An increase in the number of suppression orders issued in Victoria in recent years has given rise to talk that orders are being made too frequently, and are coupled with an unclear scope or legal basis. Such orders impinge on the 'fundamental prescript' of open justice. It is clear that the currently wide-ranging law regarding the power to issue suppression orders leaves much to be desired in Victorian and Commonwealth jurisdictions.

In 2010, the Standing Committee of Attorneys-General (SCAG) recommended the uniform implementation of the Court Suppression and Non-Publication Orders Bill 2010 (SCAG Bill) in each jurisdiction. The SCAG Bill provided an even broader scope for courts to issue suppression orders than that which currently exists under Victorian and Commonwealth laws.

For example, suppression had merely to be considered as being "in the public interest" in order to have the requisite legal basis. To date, NSW remains the only jurisdiction to have implemented the model provisions.

However, on November 23, 2011, then federal attorney-general Robert McClelland announced the introduction of the Access to Justice (Federal Jurisdiction) Amendment Bill 2011. This is largely based on the SCAG Bill, but has been amended so the grounds on which suppression orders can be issued are the same as those that currently apply.

This amended bill represents a step in the right direction. It excludes the "public interest" ground for suppression proposed by the SCAG Bill, and requires the court to consider the over-arching public interest in open justice. Overall, it provides greater clarity than current law on the legal grounds, scope and duration of suppression orders, and expressly acknowledges the standing of the media to oppose an order.

Robert McClelland stated that he was confident this Bill would result in suppression orders only being made when they were "clearly justified, and in as narrow terms as necessary to achieve their purpose."

The Bill has been passed by the House of Representatives and is now under review by the Senate.

It is hoped that the Victorian government will take similar steps to better codify the currently broad and unclear law regarding suppression orders there. However, caution should be taken to ensure that the primacy of open justice is upheld, and that any legislative change will not broaden the current scope to suppress court reporting.

Suppression orders and the Rinehart appeal

In late 2011, the NSW Court of Appeal revoked the suppression orders that had been issued regarding a case brought against mining billionaire Gina Rinehart by three of her four children. The case had been instigated in a bid to remove Rinehart as trustee of the multi-billion family trust, and had received substantial media attention.

On September 13, 2011, Justice Paul Brereton had made an order under section 7 of the NSW Court Suppression and Non-Publication Orders Act 2010 prohibiting the disclosure, by publication or otherwise, of any information as to the relief claimed, or any pleading, evidence or argument filed, read or given in, the proceedings.

The decision to revoke this and other interim orders was sound in that it expressly protected the interests of open justice from unnecessary incursions. In this, Chief Justice Tom Bathurst and Justice Ruth McColl emphasised that open justice was "one of the most fundamental aspects of the system of justice in Australia [ensuring] public confidence in the administration of justice". They considered that suppression orders should only be made "in exceptional circumstances", and while noting that there were a number of recognised exceptions to the principle, they decided this case did not fall within those exceptions.

Subsequent attempts by Gina Rinehart to maintain secrecy over the case have also been rightly rejected. The NSW Supreme Court rejected her application in March 2012 when she argued that having aspects of the dispute could endanger the lives of herself, her children and grandchildren. Justice Michael Ball held that any claims of such endangerment were not credible. On March 9, 2012 the High Court also refused to grant Rinehart leave to appeal.

While this saga now seems to have concluded, Rinehart's applications for suppression had two beneficial consequences. First, it is good to see that appropriate conclusions were reached by the courts, and that primacy was given to the need to protect open justice. Second, the heavy media coverage of the issue placed suppression orders on the news agenda, providing good exposure to the public regarding their rights to be informed about court proceedings.

Suppression order: Gina Rinehart at the CHIGM business forum at Burswood Casino, Perth, October 2011. Ms Hancock failed in her attempt to prevent the reporting of details of a legal dispute with her children
PHOTOGRAPH BY RICHARD POLDEN, *THE COURIER-MAIL*

Hogan v Hinch and the implied right to freedom of political communication

In March 2011, the High Court of Australia rejected a challenge by Derryn Hinch regarding the validity of section 42 of the Serious Sex Offenders Monitoring Act 2005 (Vic). This section permits suppression orders to be made under proceedings pertaining to sexual offences, where it is "in the public interest" to do so.

The notoriously outspoken broadcaster had been charged with contravening orders made under that provision, following his well publicised naming of sex offenders on his website and at a rally at Victoria's Parliament House in 2008. Hinch alleged that section 42 was invalid because it infringed constitutional implications such as open justice and the freedom of political communication. The High Court was unanimous in rejecting this on all grounds.

Interestingly, an argument had been raised by a Commonwealth submission that the Lange freedoms of political communications should be limited to communications regarding only federal government or politics. Thankfully, this submission was rejected. Chief Justice French of the High Court concluded that: "The range of matters that may be characterised as 'governmental and political matters' for the purpose of the implied freedom is broad. They are not limited to matters concerning the current functioning of government. They arguably include social and economic features of Australian society. For these are, at the very least, matters potentially within the purview of government."

While the right to freedom of political communication was not considered to be unreasonably burdened in this case by section 42, it is good to see the court rejecting an argument that the already narrow right should be further limited to Commonwealth matters.

Lex Wotton and freedom of speech

The High Court also held that the implied constitutional right to freedom of political communication was not unreasonably burdened by parole restrictions placed on Lex Wotton.

Wotton had been convicted of rioting causing destruction, after he took part in a riot on Palm Island that followed Cameron Doomadgee's death in police custody in 2004. On being released from prison, Wotton faced 22 conditions of his parole that were issued under the Corrective Services Act 2006 (Qld). This included conditions such as a prohibition from attending public meetings on Palm Island without the prior approval of the corrective services officer, and a prohibition from receiving any direct or indirect payment or benefit from the media. On a more general note, the Act makes it a criminal offence for a journalist to interview prisoners, including those on parole.

Bound and gagged: Lex Wotton pictured at Palm Island off Townsville, Queensland after losing his High Court appeal over his parole conditions which prevent him from talking to the media
PHOTOGRAPH BY CAMERON LAIRD, *THE AUSTRALIAN*

The restrictions were essentially a gag order, which prevented Wotton from engaging in his community and being interviewed by, or providing a statement to, the media. While the majority of the High Court did accept that such restrictions and prohibitions burdened the freedom of political communication, it upheld them as reasonable and necessary to serve other ends.

Such a judgment is disappointing in its failure to take the opportunity to enhance our very limited protections for freedom of speech. That Wotton can be prevented from communicating with the media or engaging in public debate, demonstrates just how limited our rights to free speech really are.

Journalists and the criminal law

The strong arm of the law was criticised as being too heavy-handed following the arrest of Ben Grubbs, a journalist with Fairfax, in May 2011.

Ben Grubbs was arrested at a Gold Coast Online Security Conference for having received "tainted material", that is, photos taken from Facebook that were used to demonstrate flaws in Facebook's privacy settings. Grubbs was released after questioning, though his iPad was seized. Grubbs was also advised that the police would be making a complete copy of the information on his iPad – a real concern if any confidential information had been stored on the device. Had any charges been laid, Grubbs faced penalties of up to 20 years' imprisonment.

On another note, charges have been laid against journalist Rahni Sadler, of the Seven Network, and former lawyer Andrew Fraser for communicating with prisoner Bradley Murdoch. In July 2011, Seven broadcast a recorded phone conversation between the notorious prisoner and Fraser. The program, produced by Sadler, raised questions about Murdoch's 2005 conviction for the murder of British backpacker Peter Falconio, and the abduction of Falconio's girlfriend, Joanne Lees.

Charges were laid by Correctional Services on the basis that Murdoch was interviewed without the consent of the executive director of the Northern Territory Corrective Services. The case was adjourned in the Darwin Magistrates Court on February 29, 2012 until April 4, 2012. This will be an interesting case to follow.

Shield laws and the protection of sources

Welcome steps have been taken on both a federal and a state level to recognise that there are circumstances where a confidential source for journalists should be protected. Such legislation is completely justified in that it enables journalists to investigate and publish public interest stories which may otherwise be stymied by fear of prosecution.

The federal parliament passed the Evidence Amendment (Journalists Privilege) Bill 2010 in March 2011, which aims to protect journalists from being forced to reveal confidential sources.

The Greens secured an amendment to extend the definition of "journalist" as "a person who is engaged and active in the publication of news". Notably, this will likely extend the definition, and the protection, to bloggers, citizen journalists and others who disseminate news online.

Cartoon by Chris Slane

Tasmanian Independent MP, Andrew Wilkie, argued that this broader definition was needed so as to "recognise the rapidly changing face of news, news mediums and the people who deliver it."

Victoria, NSW and WA have since announced plans to introduce similar shield laws. Each also plans to create a rebuttable presumption that revealing confidential sources should not be required of journalists in court. However, all states have rejected the broader definition of "journalist" as found in the federal legislation.

While these developments appear positive, journalists are still faced with attempts to identify their sources. Justice Lucy McCallum ordered Fairfax reporters to disclose sources in the Helen Liu case (the decision is under appeal). Gina Rinehart is seeking the disclosure of sources from the *West Australian*.

Andrew Bolt and the Racial Discrimination Act

On September 28, 2011, the Federal Court held that controversial columnist Andrew Bolt had breached section 18 of the Racial Discrimination Act. Nine Aboriginal applicants had brought a class action against Bolt and publisher Herald and Weekly Times, claiming that Bolt had unfairly distinguished them as "fair-skinned" Aborigines who sought advantage such as winning grants, prizes and career opportunities, by identifying themselves as Aboriginal.

In his carefully worded, yet clearly critical, judgment, Justice Mordecai Bromberg found that "fair-skinned Aboriginal people (or some of them) were reasonably likely, in all the circumstances, to have been offended, insulted, humiliated or intimidated by the imputations conveyed in the newspaper articles" published in the *Herald Sun*.

Bolt has declared that this judgment represented a "terrible day for freedom of speech in this country". He wrote that rather than now writing about Aboriginal identity, "[It's] simply safer to stay silent, or write about fluffy puppies instead." The Herald and Weekly Times has announced that it will not appeal against the Federal Court ruling.

We are seeing more complaints against the media under racial discrimination legislation.

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Free speech or vilification?: Columnist Andrew Bolt outside the Federal Court after being found guilty under racial discrimination laws, September 2011
PHOTOGRAPH BY TREVOR PINDER, *HERALD SUN*

JUST WHOSE INTEREST IS IT ANYWAY?

Richard Ackland

Cartoon by Jenny Coopes

"That's for our readers to tell. That will be determined by the number of people that buy the paper." So said the deputy editor of *The Sunday Telegraph*, Helen McCabe, when asked by *Media Watch* in 2009 what was the public interest in her paper publishing those pouty photos of a young Pauline Hanson, in lingerie.

Except, as it expensively transpired, it was not Pauline Hanson.

It's not the first time journalists boldly have conflated the public interest with the circulation of newspapers.

The blurring of the public interest with what journalists and editors calculate is interesting to the public has an elemental appeal.

Five News Limited Sundays stumped up $15,000 between them to buy the snaps from a former soldier, who claimed to have been Hanson's lover in the 1970s.

The case for News Limited didn't improve when *Sunday Herald Sun* columnist Robyn Riley opined, on March 15, 2009: "Public people are public property whether they like it or not. If Ms Hanson expects to be elected at this month's Queensland elections to represent the people in the seat of Beaudesert, then her ideals, opinions, behaviour and beliefs must be scrutinised."

The Seven Network also clutched the public interest to its manly bosom in an effort to justify a story in 2010 about the then NSW minister for transport, David Campbell, visiting for two hours a men-only gay club and steam facility known as Ken's at Kensington.

In fact, a series of public interests were advanced in an effort to justify this invasion of the victim's privacy. They were wheeled out in succession, each one collapsing under the weight of its own stupidity.

At first there was the public interest in the use of a ministerial car to drive from Macquarie Street to Ken's on Anzac Parade. In fact, the use of the car was within the applicable guidelines.

There was the possibility the minister might be blackmailed. That too didn't wash.

Then there was the public interest in the exposure of the minister's hypocrisy because he also wanted to be seen as a good family man. The notion that a person couldn't be a good and loving family man if they visited Ken's at Kensington didn't take long to evaporate completely.

The only public interest, torturously conjured, was a public interest in knowing that Campbell had resigned from the ministry because Seven was about to air its story about him.

The peculiar circularity of that justification appealed to the Australian Communications and Media Authority (ACMA), because that was the basis of its finding that the breach in this instance of the privacy provisions of the commercial TV code of practice was justified "in the public interest".

The Hanson and Campbell cases occupy firm places in journalism's darker corners. Regardless of the special pleading by News Limited editors and columnists and the unfathomable logic of ACMA, few others recognised those two stories lay anywhere close to "the public interest".

It is not always so clear.

At which end of the public interest spectrum lies the story *The Age* and Nationwide News wished to publish in 2006, revealing the identity of AFL players who tested positive at least once to the use of illicit drugs?

The AFL and the AFL Players' Association had a policy where players were allowed to test positive to drugs on two occasions and their names would be kept confidential. If a player tested positive a third time they were reported to the AFL Tribunal, outing them publicly.

The main Melbourne papers wanted to publish the names of players who had tested positive on at least one occasion. Many of those names were already published on blogs and online discussions.

Justice Murray Kellam ruled that publication of this information would not amount to disclosure of an "iniquity", which otherwise would justify a breach of confidence. In any event, he didn't think a public interest defence would be applicable in this case.

Moving further along the spectrometer, how strong is the public interest case for *The Sydney Morning Herald*'s interesting stories about former premier Neville Wran's dementia and the squabble over family money?

Are people who used to be public figures as much public property as real live public figures?

What about the application of dodgy techniques to get news that is in the public interest? The Brits are particularly good at this. Sky News approved the hacking of John Darwin's emails and wound up with a wonderful story. Darwin was known as the "canoe man" who "disappeared" while paddling in the North Sea, so that his wife could cash in his insurance policy.

The email hack revealed that Mrs Darwin was in on the scam and, as she was being investigated for allegedly being part of the deception, Sky passed the information onto the police.

This was a factor in securing her conviction and enabled Sky to run a detailed post-conviction story.

If here the public interest in the disclosure of a crime outweighed the right to privacy where is the cut-off point? Does it become acceptable to hack emails and phone messages of anyone charged with an offence in the expectation of revealing public interest information?

The Sunday Times got an important scalp recently when one of the co-treasurers of the Conservative Party was caught by hidden camera boosting access by wealthy corporate donors to the inner sanctum of No 10 – even with the alluring prospect of meeting Samantha Cameron!

The means involved subterfuge, but the revelation undoubtedly was in the public interest.

At the highest pinnacle of British law, the Supreme Court, there was a valiant attempt in March this year to get to grips with the public interest. The case was *Flood v Times Newspaper* and, thankfully, the judges reinforced the responsible journalism defence in defamation.

The story published in *The Times* in June 2006 concerned information that the Metropolitan Police was investigating allegations that ISC Global, a British security company with wealthy Russian clients, had corruptly paid Gary Flood, a police officer, for access to information about moves by the Kremlin to seek the extradition of Russians living in Britain.

The trial judge found there was a public interest defence for the print version of the story and partly for the online version. The Court of Appeal found that the public interest claim by the paper could not be sustained because the journalists had not acted responsibly.

Times Newspapers appealed and we got some interesting reasons.

The president of the court, Lord Phillips had this to say:

"The public interest is whether, and in what circumstances, it is in the public interest to refer to the fact that accusations have been made, and in particular that accusations have been made to the police, that a named person has committed a criminal offence.

"This issue embraces the question of whether, if it is in the public interest to report the fact of the accusation, it is also in the public interest to report the details of the accusation."

He seems to be saying the public interest is what is in the public interest, and then it becomes a two-step process: the public interest in reporting an accusation against someone and the public interest in going further and reporting many of the details.

Once judges start fiddling around with the public interest you know things are going to get horribly complicated and uncertain.

Happily it ended well for *The Times*, but it does show that the public interest is a far more nuanced concept than simply saying, "public people are public property whether they like it or not".

Ideally, the point at which the public interest and material of interest to the public intersect is the high point of journalism.

In the Finkelstein report into the media, the phrase "public interest" was used 85 times. In each application of the phrase you can be certain that in the hands of journalists, editors, judges or media regulators it would take on a different hue, a different interpretation.

As Humpy Dumpty put it so eloquently to Alice: "When I use a word it means just what I choose it to mean – neither more nor less."

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REGULATION: THE FINKELSTEIN INQUIRY

Goodbye and bad luck: *The News of the World* stopped publishing after more than 150 years in the wake of the phone-hacking scandal

Media in disgrace

In July 2011, the world of journalism was rocked by revelations of widespread phone-hacking by UK journalists employed by the *News of the World* (NOTW), a Sunday tabloid owned by News International, the UK arm of Rupert Murdoch's News Corporation.

The revelations, in *The Guardian* newspaper, included allegations that NOTW journalists had hacked into the mobile phone of Milly Dowler[1], a 13-year-old who had been abducted in 2002 and was subsequently murdered. The journalists' actions caused worldwide revulsion and prompted the establishment of an inquiry into the operations of the British press under Justice Leveson[2].

The following week, the then Greens leader, Senator Bob Brown, called for a similar inquiry in Australia, directly referencing the *News of the World* scandal. This was greeted with a degree of hostility by publishers. News Limited chief executive, John Hartigan (now retired), who the day before had announced an internal audit of all editorial expenses, said there was no evidence that the culture of wrongdoing at his company's UK stablemate had spread to Australia.

Inquiry announced

On September 14, 2011, the federal communications minister, Stephen Conroy, announced that there would be an inquiry into the Australian media, headed by former Federal Court judge Ray Finkelstein QC, assisted by journalism academic and former *Age* reporter Matthew Ricketson. The terms of reference would be as follows:

> *a) The effectiveness of the current media codes of practice in Australia, particularly in light of technological change that is leading to the migration of print media to digital and online platforms*
>
> *b) The impact of this technological change on the business model that has supported the investment by traditional media organisations in quality journalism and the production of news, and how such activities can be supported, and diversity enhanced, in the changed media environment*
>
> *c) Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints*
>
> *d) Any related issues pertaining to the ability of the media to operate according to regulations and codes of practice, and in the public interest.*

The Media Alliance welcomed the announcement. Federal secretary Christopher Warren said: "The Alliance has for some time called for an examination of the impact of technological change on traditional media organisations.

"As we have shown in successive *Future of Journalism* reports, technological change has eroded the traditional business models for journalism, and it is vital that we canvass the ways in which the traditions of quality journalism can be supported and extended into the future.

"The Alliance also welcomes the examination of the ways new media can operate ethically

and in the public interest. Great journalism is ethical journalism, whatever the medium."[3]

The Alliance subsequently made a detailed submission to the inquiry, calling for the expansion of the Australian Press Council into a "one-stop shop" for all media platforms, but concentrating on a discussion of ways in which the health of the news business could be enhanced with government support, including tax breaks.

The Alliance submission can be found at http://www.dbcde.gov.au/__data/assets/pdf_file/0007/142990/Media,_Entertainment_and_Arts_Alliance.pdf and covers:

1. *The twin crises of trust and a breakdown in the business model of journalism*
2. *The business crisis hitting Australian journalism*
3. *The Alliance Journalist Code of Ethics and complaints procedure*
4. *Recommended reforms to the Australian Press Council*
5. *Ways in which governments might help support the health of the Australian news industry.*[4]

The Alliance submission concluded by exhorting the inquiry to take seriously the opportunity for a broad-ranging discussion of ways in which the government could help save the news industry.

> *Journalism is a public good which feeds democracy in Australia and must be maintained and enhanced. It can no longer be in doubt that the business model which has always paid for journalism in this country is broken and despite the efforts of major commercial news organisations to develop new ways to replace the loss of advertising revenues, nothing has developed with a credible chance of success.*
> *This is not the case merely in Australia but in virtually all developed nations. Most Western countries are engaged in discussions about how to save the news industry.*
> *It is time Australia also engaged in those discussions rather than blinding ourselves to the very real prospect that large parts of the news industry may fail in the medium to long term. The Alliance is committed to participating in these discussions, throwing the very considerable weight and expertise of our large membership of working journalists behind any effort to save the news industry and enhance the proud history of journalism in Australia.*

Inquiry hearings

The inquiry sat in Melbourne on November 8 and 9; in Sydney on November 16–18; in Perth on December 6 and again in Melbourne on December 8, hearing testimony from most major media organisations and a number of prominent academics and other interested parties, including the Media Alliance, represented by federal secretary, Christopher Warren, and the Australian Press Council (APC), represented by its chairman, Professor Julian Disney, who appeared twice and delivered a blueprint for reform of the Council.

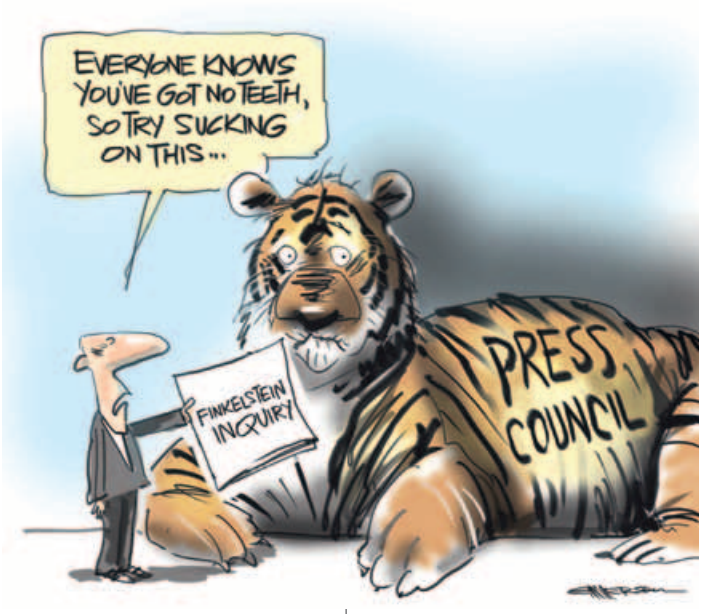
Press Council reform proposals

The APC's plan is for gradual development into a unified media council, comprising two phases: a two- to three-year period of consolidation during which the APC will expand a set of specific standards to complement its mandatory Statement of Principles and its guidelines. The first standard – for reporting of suicide – was completed last year and a second, governing hospital visits, is well advanced.

Once the Standards Project is complete, the APC would aim to develop into a unified "Media Council" (a name has not yet been finalised) which would apply across all media platforms. Membership would be on an "opt-in" basis, but there would be significant "statutory incentives" provided for members as inducements to join. These would include a raft of rights and privileges already available to the news media, such as shield law protections and exemption from the Privacy Act and aspects of the Trade Practices Act, and some new privileges, such as accreditation for major sporting events, Budget lock-ups and government press conferences and briefings.

Extra funding would be sought, both from new members – such as online-only news organisations and broadcasters, plus a quantum of government support and funding from third parties, such as that already provided by the Myer Foundation.

The Council's complaints handling body would move further down the spectrum towards independence from both government and the media organisations, with more public members.



Cartoon by Rod Emmerson

Finkelstein Report published

The report of the Finkelstein Inquiry was handed to Minister Conroy on February 28, and was released publicly on March 2. Its findings were as follows:

- A free press plays an essential part in democracy and no regulation should endanger that role
- A free press is powerful and can affect the political process and can also do harm, sometimes unwarranted to organisations and individuals, so has a responsibility to be fair and accurate and should be publicly accountable for its conduct
- Journalists and media organisations should be guided by codes of ethics regarding fairness, impartiality and independence
- There is no consensus on how accountability should be enforced and the existing framework of regulation and legislation (such as defamation and contempt) are "not sufficient to achieve the degree of accountability desirable in a democracy".

The report recommends the following measures:

- The formation of a new body, the News Media Council, to set journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached
- The council would be wholly government funded, membership would be compulsory for any newspaper, broadcaster or website receiving more than 15,000 "hits" per year
- Beyond a statutory role in setting up the council and providing funding, government should have no role
- The council would have the power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply.

Despite evidence that in some comparable markets, especially the United States, the democratic role of the news media is endangered by the disruption to the business model that has traditionally underpinned journalism, there was insufficient evidence of this in Australia to justify recommending government support. However Finkelstein recommended that one of the functions of the News Media Council would be to chart trends in the industry to see whether there was a serious decline in the production and delivery of quality journalism and "within two years or so" the Productivity Commission be issued with a reference to conduct an inquiry into the health of the news industry and make recommendations on whether there is a need for government support.

The report was roundly criticised by both publishers and the Media Alliance. The Media Alliance issued a statement on March 2 greeting the report as "a huge disappointment which not only fails to understand the way Australia's news media operates but also fails to fully appreciate the severity of the crisis facing journalism"[5].

Convergence Review

As this report went to print, articles in *The Australian* newspaper speculated that the report of the Convergence Review panel would recommend the establishment of a new regulatory body, funded by government and with "power to impose fines and other sanctions on news outlets".

The new body would be a referral panel, sitting alongside the Australian Press Council and headed by a retired judge, which would hear matters involving "grave or consistent" breaches of Press Council standards. The body would be able to apply sanctions against media outlets, whether members of the Press Council or not.

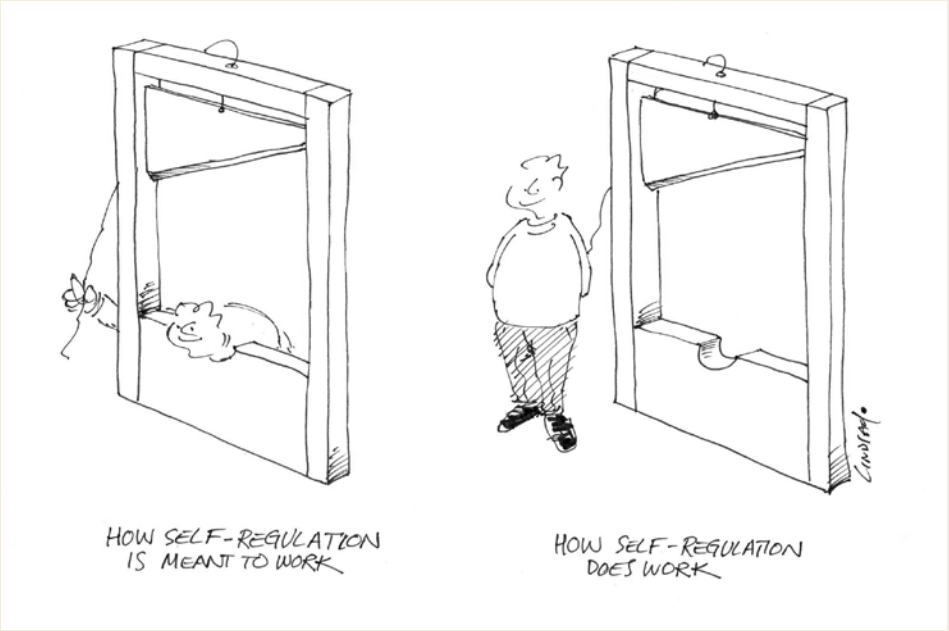
The proposals, if correctly reported, would be similar to a scheme proposed by the Press Council in its submission to the Finkelstein Inquiry, which calls for "referral of exceptionally grave or persistent breaches of its Standards to a special panel which is appointed by the Council, headed by a retired judge, and able to impose fines up to a specified level ".

In 2010 a UK parliamentary committee considered the introduction of fines for serious breaches but concluded that the "case … has not been made", adding that: "A body that was able to impose fines would bear little resemblance to today's PCC [Press Complaints Commisison]. Its work would be slowed down by the involvement of lawyers on all sides and it would find that newspapers would be less likely to admit mistakes and offer ways of resolving complaints."

The Media Alliance thanks Ray Finkelstein QC for the opportunity to express our views both in a submission to the Independent Media Inquiry and at the hearings themselves. Unfortunately, the report of the inquiry, while comprehensive in its scope, is unsatisfactory in its conclusions. The establishment of a News Media Council, as proposed, would risk giving a government funded and appointed body control over media content. The Alliance further believes that the introduction of fines would be a retrograde step which would introduce delays, increase costs and would impact unevenly on different organisations.

GIVING THE PRESS WATCHDOG NEW TEETH

The Press Council has plans to morph into an effective one-stop shop for all media complaints, writes **Julian Disney**



Cartoon by Lindsay Foyle

Early last year the Australian Press Council began a sustained program to strengthen our resources, complaints-handling processes, and the setting and monitoring of standards of media practice. We also increased our focus on online publishing by print publishers over whose websites we already had jurisdiction and by online-only publishers.

A key goal was to strengthen media standards and thus enhance public access to reliable information and to genuine freedom of expression. Another goal was to strengthen the media's credibility when resisting unwarranted interference on its freedom by governments, corporations or other powerful interests.

The Council's program recognised the need for convergent regulation of news media, a key aspect of the Convergence Review established by the Federal Government in 2010. It also foreshadowed the Print Media Inquiry by Ray Finkelstein which the Government established in September 2011, especially the term of reference concerning:

> *Ways of substantially strengthening the independence and effectiveness of the Australian Press Council, including in relation to online publications, and with particular reference to the handling of complaints.*

The Council's submission to the Convergence Review proposed a two-phase approach. First our structures and processes for both print and online media would be strengthened. Then, this model could be drawn on to create an Independent Council with responsibility for all news media. Most (though not all) funding for this Council would be from publishers but the Chair and most members would be chosen independently. This balance is greatly preferable to a regulator which is appointed and fully funded by government or, on the other hand, dominated by publishers.

Our submission to the Finkelstein Inquiry concentrated on the first phase. Detailed proposals aimed at greatly boosting the adequacy and security of our funding arrangements as well as the independence and effectiveness of our work on complaints-handling and standards-setting.

Mr Finkelstein endorsed the general direction, and much of the detail, of the Council's submission but some publishers' evidence led him to believe they would not provide the necessary resources. So he proposed a new body, entirely funded by government and without any direct publisher representation, although broadly similar in other ways to a strengthened Press Council.

At the time of writing, the Convergence Review's report has not been published and the Government's response to it and the Finkelstein Report is unknown. But the Press Council has continued to develop our strengthening program and in early April we announced a major agreement with publishers to strengthen our funding and independence.

The agreement addresses three key areas of concern which we put to the Finkelstein Inquiry and were acknowledged in its Report.

The first key element is that the publishers' core funding for the Council will double from July this year and increase by a further 10 per cent in the following year. Staffing will grow to at least seven of the eight positions we need, and the eighth can be sought through project funding. Complaints will be able to be dealt with more promptly and rigorously. The setting and monitoring standards of media practice will be greatly strengthened, especially as we can now expand our flagship Standards Project with the assistance of an Advisory Panel of eminent Australians.

The second key element is that publishers will have to give four years' notice if they wish to withdraw from the Council. Throughout that period they will remain subject to the Council's jurisdiction to adjudicate on complaints about their publications. Their funding obligations will continue for all but the final year.

This lengthy notice period is fundamentally important for the Council's independence. It greatly reduces our vulnerability to publishers who might wish to withdraw peremptorily because they do not like some of the Council's adjudications. The effect is reinforced by each publisher's obligations being fixed two to three years in advance.

The third key element is that publishers' obligations to provide funding and to comply with our complaints processes will become legally binding. This includes, for example, the requirements to publish our adjudications with due prominence; a matter which has been of great concern to some complainants and ourselves.

One publisher member of the Council, Seven West Media, was unwilling to strengthen our effectiveness in these ways and so decided to withdraw before the four-year notice period took effect. This helped to demonstrate the significance of the agreement to which News, Fairfax and all the other publisher members had agreed.

The new arrangements are crucially important for our growing involvement with online publishing. A number of publishers who operate only online, such as ninemsn and Crikey, have recently expressed interest in joining the Council. The first group will be admitted in the very near future and they will have a key role in our new high-priority work on online standards.

With our new resources and independence, the Press Council is much better-placed to develop structures and processes for print and online media which are suitable for broader adoption as convergent regulation proceeds.

This will strengthen the case for a system of convergent regulation which is sufficiently independent of government and publishers to command public confidence, thereby enhancing freedom of information and expression for the media and the broader community.

But much depends, of course, on the Government's response to the Finkelstein Inquiry and Convergence Review.

Julian Disney, AO, is chair of the Australian Press Council

HOW TO SET FLEET STREET ON THE ROAD TO RESPECTABILITY

After phone-hacking, the mood in the UK is for more effective regulation of the press, writes **Jonathan Este**

Onora O'Neill rather neatly summed up the public mood when she addressed the Reuters Institute for the Study of Journalism last November and made a case for stricter regulation of the press in the UK, arguing that "What is sauce for the political goose is surely also sauce for the media gander".

Baroness O'Neill, a professor of philosophy at Cambridge University and crossbench peer, said that whenever ethical standards within journalism were called into question, editors and other defenders of the fourth estate reached for the public interest defence. But the phone-hacking scandal – and revelations brought to light by various inquiries into the media since – had shown that their understanding of the public interest tended to be heavily coloured by self-interest.

"The evidence to date is that self-regulation has not been effective or ethically adequate, so the burden of proof now lies with those who think that it could be reformed to make it effective or adequate," she said.

O'Neill is just one of a growing number, including many respected editors and media commentators, who believe that in order to regain public trust in the UK, some sort of statutory regulation is now necessary.

After being champions of journalistic ethics and strong supporters of industry self-regulation for more than 40 years, the National Union of Journalists has "reluctantly" come to the conclusion that self-regulation has "failed the test every time," according to NUJ general secretary Michelle Stanistreet.

In the union's submission to the Leveson Inquiry, Stanistreet wrote: "Whilst the NUJ is hugely disappointed that we have reached this point, despite more than 20 years of campaigning for reform of the Press Complaints Commission and press regulation, we now see it as inevitable that there should be some statutory provision for a new regulator."

"Regulation is a way of controlling the balance that must exist between freedom of expression and other universal human rights such as reputation, privacy, fair trial. Freedom of expression is vital to a fair, democratic society and is a right often best manifested by the media on behalf of the individual when subjecting the powerful to scrutiny. To suggest that only self-regulation is capable of doing this balancing act is to fly in the face of clear evidence that self-regulation has failed and that other systems can work extremely well for other industries or in other jurisdictions."

Paul Dacre, the pugnacious editor of *The Daily Mail* has proposed a new certification system for journalists – or "kitemark" as he calls it. Journalists not carrying an accredited card would be barred from covering events such as key government briefings or interviews relating to sporting fixtures.

He also proposed that a new ombudsman for standards should also have the right to recommend a journalist be struck off, just as doctors can be struck off by the General Medical Council, he said. "The public at large would know the journalists carrying such cards are bona fide operators, committed to a set of standards and a body to whom complaints can be made."

This was echoed the views of both the opposition Labour Party's culture spokesman, Ivan Lewis, and Chris Blackhurst, the editor of *The Independent* who famously likened journalists to jockeys: ""The Jockey Club bars jockeys from riding horses – why can't we bar journalists from writing articles," he said. Blackhurst believes that a new regulator should have the power to seize documents and seize computers and act proactively in the way of Britain's General Medical Council, which regulates doctors, or Financial Services Authority, which regulate banking.

The Labour leadership was quick to distance itself from what one observer referred to on Twitter as an "Orwellian" suggestion: ""Ed has always made it clear throughout that we believe in self-regulation," a Labour spokesman said of the Opposition Leader, pointing out that the same could not be said of Prime Minister David Cameron.

Alan Rusbridger of *The Guardian* sits very close to the Australian Press Council's Julian Disney on the idea of incentivizing membership of a new regulatory body: "Potential refuseniks may need incentives – whether carrots or sticks. These could, for instance, be in the form of real economic incentives to participate (and conversely, therefore, disincentives for opting out)," he wrote in a supplementary submission to the Leveson Inquiry lodged in January this year. He went on to add that: "If statute can improve press regulation and press freedom … then let's explore it."

Refuseniks include Richard Desmond, of Northern and Shell, whose daily and Sunday newspapers command a circulation of more than 2.4 million between them. Desmond, not known for the moderation of his attitudes – or his newspapers' – told the Leveson Inquiry the PCC was ineffective and run by the sort of people who wanted to close him down.

Desmond presents the same sort of problem for proponents of self-regulation in Britain as Seven West Media's decision to quit the APC has in Australia. If proprietors won't voluntarily submit to an independent standards body, surely there has to be a way of making them an offer they can't refuse?

Baroness O'Neill believes that it is not so much press "content" that should be regulated as "process": "It seems to me that only a body with a statutory basis could have the necessary powers to call for evidence or sanction, but that such a body could be confined to regulating media *process* and explicitly prohibited from regulating media *content*."

And, hopefully, if you get the ways and means right, the end will be justifiable. Which is a rather neat inversion of the public interest argument.

Jonathan Este is the former director of communications with the Media Alliance and the editor of the Press Freedom Report

SECRECY

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power, than by violent and sudden usurpations."[6]

Addressing the National Information Law Conference in Canberra in March 2011, Justice Susan Kenny, a part-time commissioner with the Australian Law Reform Commission (ALRC) quoted these famous lines from James Madison, often referred to as one of the fathers of the United States' Constitution, to underline the need for reform of Australia's plethora of secrecy laws.

Justice Kenny said: "Secrecy provisions deprive citizens of the information created, collected or received by the Commonwealth on their behalf. They also curtail the freedom of expression of those who have that information."

ALRC: Reform is overdue

It is now nearly four years since the ALRC was asked by former attorney-general, Robert McClelland, to conduct a review of secrecy laws in Australia, a move which resulted in the tabling in federal parliament of a comprehensive report, *Secrecy Laws and Open Government in Australia,* in March 2010[7].

That review of secrecy provisions identified 506 secrecy provisions in 176 pieces of legislation, including 358 distinct criminal offences – an over-reliance on criminal sanctions. The review also highlighted a range of inconsistencies relating to those secrecy provisions, depending on when they were drafted and by whom. For example, the unauthorised disclosure of information relating to the affairs of a person in some cases attracts a low-level fine of $550 and in others a term of imprisonment for two years and a fine of $13,200. Disclosing information about the identity of a person in the national witness protection program carries a maximum penalty of 10 years in prison, but publishing information that discloses the identity of an agent or officer of the Australian Security Intelligence Organisation carries a maximum penalty of imprisonment for one year – even in circumstances where such publication could endanger the life of that agent or officer.

The ALRC report carried more than 60 recommendations, including the repeal of the secrecy provisions in the Crimes Act 1914 (Cth) to be replaced with a general secrecy offence limited to disclosures that clearly harm the public interest. The matters were covered in detail in the Media Alliance press freedom report, Public *Good, Private Matters: The State of Press Freedom in Australia, 2011*[8]

However there has yet to be any indication that the federal government has plans to implement the ALRC's recommendations.

Changing attitudes to government secrecy

In his *Asialink Essay*, published in January 2011 by the University of Melbourne, respected former Australian diplomat John McCarthy charted the changing attitudes to government secrecy in the Western world, from the closed system resulting from World War II and the paranoia of the Cold War era to the "new information world" created by the rise of the internet.[9]

Using the reaction to the WikiLeaks dump of 250,000 diplomatic cables as an example, McCarthy charts a "widening gulf between official and community attitudes" towards the availability of information. His prediction is that, ironically, the effect of the WikiLeaks affair will be "towards less rather than more openness". More information will be kept out of the central communications system, more important discussions will be conducted ("rather comically in this age") by telephone rather than on email. McCarthy puts this down to both a fear of leaks and of Freedom of Information (FoI) laws.

"This climate of inhibition is not in the national interest. A good policy requires all sensible points of view to be reflected, representing different foreign policy and domestic interests… Over the longer term, the test in Australia will be to create an internal culture where greater openness is seen as the avenue to better policy – albeit at the cost of the occasional leak or the odd embarrassing FoI release."

McCarthy concludes that there is a generational shift at work, something also highlighted by community attitudes towards WikiLeaks, whose supporters tended to be younger. He urges an attitudinal change within government to promote a disposition towards freer debate: "It behoves governments in democratic countries to go with the flow and begin to embrace the current towards greater openness with more vigour," he concludes.

Towards more open and accountable government

In its March 2010 report, *Ahead of the Game: Blueprint for Reform of Australian Government Administration*, the Department of Prime Minister and Cabinet (PM&C) laid down principles for the enhancement of democracy in Australia through greater collaboration with the public.[10]

Chapter 4 of the report, "Creating more open government", notes that the Australian Public Service lags behind international peers in the provision of online access to government information and services and in incorporating external advice into the policy development and service design process.

The report sets out a vision: An Australian Public Service that captures ideas and expertise through the transformative effect of technology by:

- Citizens directly communicating their views and expertise to government through multiple channels, including Web 2.0 approaches (for example, online policy forums and blogs)
- Greater disclosure of public sector data and mechanisms to access the data so that citizens can use the data to create helpful information for all, in line with privacy and secrecy principles
- Citizens becoming active participants involved in government, rather than being passive recipients of services and policies.

The strategy for this would be through PM&C and the Department of Finance and Deregulation to develop new mechanisms for collaboration and consultation with the community, including the release of public sector data in line with privacy, copyright and national security laws. There are also plans to further develop the website data.gov.au.

The Media Alliance believes that the criminalisation of information is inimical to good government in a modern democracy. The recommendations of the ALRC report*: Secrecy Laws and Open Government in Australia* should be implemented as a matter of urgency. It is time for the federal government to deliver on its Declaration of Open Government, as pledged by then finance minister Lindsay Tanner: "The Australian government now declares that, in order to promote greater participation in Australia's democracy, it is committed to open government based on a culture of engagement, built on better access to and use of government-held information, and sustained by the innovative use of technology."

Cartoon by Phil Somerville

THE GREAT AUSSIE WHITE-OUT

The public service bureaucracy is still obsessed with keeping secrets, despite Freedom of Information reforms, writes **Christian Kerr**

When the go-go '80s turned into the go-slow '90s and the recession we had to have began to bite, the parties finished for a friend in financial PR – but not before one final bash.

Their largest client's results were due. They were ugly. Very ugly indeed. The company was going under.

Virtually everyone knew, or had guessed it. It was just a matter of the formalities. But there were names and egos involved, so these had to be handled sensitively.

The decision was made. The results would go out on Holy Thursday. There would be no papers the following day and other distractions on the long long-weekend.

A few journos caught a whiff of the plans. They wanted to know what time the results would be dropped. Requests turned to pleading. It was all in vain. The plan was in place.

There were drinks in the office that afternoon. Afternoon turned into evening. And at about nine o'clock we clinked our glasses, pushed the button on the fax machine and sent the news of one of Australia's bigger corporate collapses out into the ether. It was now all a matter for the lawyers and the liquidators.

Why do I start a piece on government secrecy with this story? Well, when I worked in a state premier's office, we handled Freedom of Information (FoI) requests in much the same way. There was no bending of the letter of the law, but the spirit was not necessarily taken into account.

Releases of material to the media were often timed to be as awkward as possible. They occurred after deadline or, better still, after deadline on a Friday. They were factored into the media schedule for the week. On other occasions, their handling seemed more capricious than strategic. And that's what government secrecy appears to be.

I've spent months following the fiasco of the abandoned tender for the Australia Network soft diplomacy television service. Earlier this year I lodged an FoI seeking details of the questions put to the bidders, the ABC and Sky, after they lodged their initial documents.

The department found and released eight pages of relevant documents, but five of these eight were withheld in their entirety and most of the others heavily whited out. Sources close to the tender process suggest that something like only 10 per cent of the questions asked of the bidder were actually released. The rest were refused, according to the department, as it was necessary for "the preservation of the integrity of the government's tender processes".

Yet this was a tender that, in the responsible minister's own words, had been "compromised"; compromised to such an extent that the government had to order both an Australian Federal Police investigation and auditor-general's inquiry. So much for integrity!

Another story I've been tracking involved working through hundreds of pages of ASIO files from the 1960s and 1970s. Many of these are heavily redacted. Many make no sense at all. But I've had help from Sherpas, from the ASIO old boys' network. Not only do they know how to read between the lines – or to read what has been blacked out. In some cases they wrote the original documents.

Some of the redactions amuse them. But they're horrified at some of the references in the handwritten margin notes on the documents. Most of these appear just to be initials or internal references. But my sources say some are so secret they should not see the light of day.

Government knows it has a problem with secrecy. Secrecy engenders suspicion – suspicion of cock-ups, lies and hypocrisy.

The problem has been clear since *The Australian*'s then FoI editor Michael McKinnon chased federal treasurer Peter Costello all the way to the High Court after documents on tax bracket creep. He didn't win, but Costello's response to his actions made it clear enough the Howard government's commitment to smaller government and lower taxes was largely rhetorical.

The two-year-old *Secrecy Laws and Open Government in Australia* report the then attorney-general Robert McClelland asked the Australian Law Reform Commission to undertake in 2008 is yet to bear fruit.

FoI law reform has happened, yet the federal information commissioner, John McMillan, a former commonwealth ombudsman, has warned that Labor's supposed commitment to open government is being undermined by its refusal to adequately resource the oversight of Freedom of Information and privacy laws.

Professor McMillan has complained that the Office of the Australian Information Commissioner only has three quarters of the staff foreshadowed when it was created at the

end of 2010. He has warned the 2.5 per cent efficiency dividend may lead to staff losses.

Then there are the cultural aspects of secrecy, so deeply engrained in the bureaucratic soul.

Last year we saw the risible situation when Lauren Primozic, the acting principal legal officer of the Administrative Law Section in the Legal Services Branch of the Department of Climate Change warned Institute of Public Affairs (IPA) researcher Tim Wilson he could be declared a "vexatious applicant" under Part VIII, Division 1 of the FoI Act for lodging too many applications.

Wilson, in response, admitted he had lodged several hundred applications. But his explanation seemed sound. "The actual number of subject items I am after are small," he wrote back to the department. "The requests are often broken into different parts to ensure documents don't get delayed because of a single issue and hold up the department from providing documents where there are not problems."

He politely ignored the ethical elephant in the room – that it is not a department's place to decide that a citizen is unworthy of receiving information because they have determined he is waging a political campaign.

But it was telling that Primozic's letter to Wilson was leaked to *The Age*, a publication not necessarily in step with the IPA's views on climate change.

The bureaucracy's attitude to the free flow of information remains unchanged. And despite changes in rhetoric and even law, governmental approaches to secrecy still seem to be manipulative and capricious.

Christian Kerr is a political reporter with The Australian

FREEDOM OF INFORMATION

Graphic courtesy of the Seven Network

New fees report threatens to wind back progress

On March 27, 2012, the office of the Australian information commissioner, John McMillan, released the findings of a review of charges under the Freedom of Information (FoI) Act which commenced in October 2011, and involved publication of a discussion paper, consultation with the public and Australian government agencies and advisory committees, and consideration of written submissions.[11]

The key findings and suggestions were as follows:

- Having an administrative access scheme that would allow the release of documents outside FoI, without appeal rights but mostly free of charge and within a 30-day timeframe
- FoI could still be used to obtain documents, but agencies would have the right to impose a $50 application fee – currently there is none – if applicants did not first seek administrative access
- The imposition of a ceiling on the amount of time an agency should be expected to spend on FoI applications: anything likely to take more than 40 hours to process would be rejected.

The Right to Know Coalition, of which the Media Alliance is a member, responded as follows: "Right to Know calls on the government to stand by its commitment to a strong, well-funded Freedom of Information system which promotes open government. While FoI has improved with the new Act, a number of agencies continue to actively work to prevent journalists accessing documents. Having made important gains with the new Act, we do not want to go backwards with the government becoming more secretive.

"Complex applications, often a hallmark of investigative journalism, should not be made more complicated and more expensive.

"The call to redefine FoI to encourage the voluntary release of documents bypassing the FoI regime is particularly disappointing. In an ideal open government where agencies are eager to hand over public documents, such a system may be effective. But with a number of agencies demonstrating they will strongly resist release of documents, it is naive to think a voluntary system will give agencies anything other than a new way to avoid release.

"Agencies should not be given greater opportunity to obfuscate their responsibilities, making it harder for journalists to access government documents the public is entitled to."

Background – could do better

In October 2011, an international survey of Freedom of Information regimes found that Australia, based on the Commonwealth Freedom of Information Act, as amended in 2009 and 2010, came in at number 39 out of 89 countries, scoring 86 points out of a possible 150[12].

The Global Right to Information Rating assessed Australian law as just a little better than Canada with 85 points, but behind the USA 89, New Zealand 93, UK 95, Indonesia 102 and a long way behind the leaders Serbia 135, and India and Slovenia 130.

According to the *Open and Shut* blog[13] by FoI expert Peter Timmins, shortcomings that cost the Australian law points include:

- No constitutional right of access to information
- Exclusions from the act for parliamentary departments, intelligence organisations, a range of other executive government agencies. Private sector bodies in receipt of significant government funding are not covered
- Excessive "wriggle room" on time limits
- Fees not limited to cost of reproduction
- The extent of secrecy provisions in other legislation
- Broadly framed exemptions, with some that contain no harm test. No universal public interest override, for example, for disclosure of information about corrupt conduct
- No sanctions for improper public service employee conduct such as undermining the act or destruction of documents.

The survey was conducted by an international panel of FoI experts, including Johan Lidberg of Monash University, who said that countries which scored more highly than Australia tended to have strong pro-disclosure laws with a default towards publication of government-held information.

"It's also common for those laws to have a really simple request process, including verbal requests, and have a simple appeal system to an information commissioner or ombudsman that's not costly and has no application fees and no processing fees," he told *The Sydney Morning Herald*.[14]

The reform of Australia's FoI regimes has been piecemeal since the then Cabinet secretary and special minister of state, John Faulkner, announced an overhaul of the laws back in March 2009. Launching the reforms at a conference organised by the Right to Know Coalition, Senator Faulkner said: "There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy.

"This has not lifted from Australian governments their responsibilities to safeguard confidentiality, privacy and security. But it has required them to evaluate and define those responsibilities in the democratic arena. Questions of both openness, and confidentiality, have to be treated as different aspects of the same over-riding obligation to act in the public interest."[15]

Criticisms remain

Far from heralding in a new era of accountability and transparency, FoI laws still keep too much government business under wraps. Timmins highlights complaints from the recent round of negotiations for the Trans-Pacific Partnership agreement being held in Melbourne in March, where international observers said that: "decisions [were] being taken without public access to any documents or details".[16]

Timmins notes that the Trans-Pacific Partnership participants forged a four-year confidentiality agreement: "all participants agree that the negotiating texts, proposals of each government, accompanying explanatory material, emails related to the substance of the negotiations, and other information exchanged in the context of the negotiations, is provided and will be held in confidence, unless each participant involved in a communication subsequently agrees to its release."

A challenge to this agreement is being made under Peru's FoI laws. Peru came in at 25 on the global ranking.

At home, recent judgments by the information commissioner, John McMIllan, as reported by *The Australian* reveal some other serious limitations of the FoI Act.[17]

According to the newspaper's FoI editor, Sean Parnell, requests to the prime minister's office for information relating to meetings between the prime minister and various companies and lobby groups, and her correspondence with lobby group Emily's List, were refused on the grounds that they were beyond the reach of the FoI Act in that they did not meet the requirement of "a document that is in the possession of a minister… in his or her capacity as a minister, being a document that relates to the affairs of an agency or of a Department of State".

On appeal, having obtained the documents in question, a diary record on ALP letterhead scheduling the prime minister's meetings during a recent ALP conference and a letter from Emily's List outlining assistance the group had provided to Labor candidates during the 2010 election campaign and commenting on its research and Labor policies, Professor McMIllan ruled that the documents did not refer to any particular agency, department, program or legislation and were therefore not available under the FoI Act.

State-by-state round-up

Jurisdiction	FoI legislation
Commonwealth	Freedom of Information (Removal of Conclusive Certificates and Other Measures) Act 2009, Australian Information Commissioner Act 2010, Freedom of Information Amendment (Reform) Act 2010
New South Wales	Government Information (Public Access) Act 2010
Victoria	Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011 (amends the Freedom of Information Act 1982)
Queensland	Right to Information Act 2009
South Australia	Freedom of Information Act 1991
Western Australia	Freedom of Information Act 1992
Tasmania	Right to Information Act 2009
ACT	Freedom of Information Act 1989
Northern Territory	Information Act 2002

Source: Open and Shut (http://foi-privacy.blogspot.co.uk/)

Commonwealth

As of late last year, the administration of the FoI Act has moved back from the Department of Prime Minister and Cabinet (PM&C) to the office of the federal attorney-general. Confirming the move at a hearing of Senate Estimates committee in October, the deputy secretary (governance) of PM&C, Renee Leon, said the Privacy and Freedom of Information branch would move back to the responsibility of the attorney-general with seven staff, as opposed to the 10 it had at PM&C.

Leon explained that the move to PM&C after the 2007 election had reflected the pressing need for reform of FoI laws: "In the context of that being a significant whole-of-government activity that affects every portfolio, it was thought appropriate that that should be moved to the Department of the Prime Minister and Cabinet while those reforms were undertaken," she said.[18]

NSW

As of March 2012, the Government Information (Public Access) Amendment Bill 2011 was before the NSW Parliament. The objects of the Bill are as follows:

i) to clarify the timing for the recording of information in the disclosure logs of agencies and what can be included in such logs and to enable affected persons who are not access applicants to object to certain information about them being included in such logs, and

(ii) to enable parts of agencies to be treated as separate agencies for the purposes of the principal Act, and

(iii) to confirm that access to open access information is to be provided in a manner that has due regard to copyright issues, and

(iv) to enable an agency to refuse to provide access to government information if the access applicant has already been provided with the information, and

(v) to remove the current requirement to pay a fee for an internal review by an agency following a recommendation by the information commissioner, and

(vi) to confirm that an agency may require proof of identity from an access applicant before providing access to government information if the access application involves certain personal factors about the applicant, and

(vii) to provide that there is no conclusive presumption of overriding public interest against disclosure of a spent conviction to the person convicted, and
(viii) to clarify when an agency is required to consider whether to waive legal professional privilege in connection with an access application, and
(ix) to make certain other minor amendments, amendments in the nature of statute law revision and amendments that provide for savings and transitional matters.

Victoria

On February 29, the Victorian Legislative Council passed the Freedom of Information Amendment (Freedom of Information Commissioner) Bill 2011.

Announcing the legislation in December 2011, the minister responsible for the establishment of an anti-corruption commission, Andrew McIntosh, said this was the most significant change to Victoria's Freedom of Information laws since their introduction almost 30 years ago.

"With this Bill, we are fulfilling one of the Coalition's key election promises," he said. "For the first time, Victorians will have access to an independent umpire if they are dissatisfied with the initial result of a Freedom of Information application."

The Bill provides for the appointment of a Freedom of Information commissioner responsible for reviewing FoI decisions, considering complaints relating to FoI and monitoring professional standards.

The FoI commissioner will be an independent officer of parliament, appointed by the governor in council, and must report to parliament annually through a new joint parliamentary committee, the Accountability and Oversight Committee, also established by this Bill.

The FoI commissioner will assume responsibility for reviews of FoI decisions, substantially replacing the first stage reviews currently conducted internally by agencies. Currently, the government department or agency that decides whether to release information to an applicant is also responsible for reviewing that decision.

The Bill also empowers the FoI commissioner to accept and investigate complaints about FoI administration, to monitor FoI standards, and to advise and educate agencies about FoI generally.

The Labor opposition criticised the Bill, saying the legislation does not allow the commissioner to overturn decisions by a minister or agency chief and that the commissioner would be powerless to examine if a decision to reject a request because the documents might reveal national security or Cabinet secrets was genuine.[19]

Melbourne's *Herald Sun* was also strongly critical of the Bill, calling it "a joke" in its leader column.[20] "The commissioner will have no jurisdiction over ministers or their officers. Given that Premier Ted Baillieu has installed in his office a Freedom of Information adviser, Don Coulson, who personally drags in requests that could be embarrassing, this means the government will actually be less transparent, not more."

South Australia

South Australia has been described as "one of the laggards" in FoI reform, relying as it does on 20-year-old legislation which was criticised by SA Greens MLC Mark Parnell as "an unwieldy, expensive, cumbersome system, that is designed to prevent rather than facilitate access to documents."[21]

SA's ombudsman, Richard Bingham, who is empowered to review FoI decisions, reported a 27 per cent increase in FoI applications from MPs and noted that this increase had meant government agencies often failed to process them in the required timeframe.

He noted: "an ongoing issue is that agencies still often provide inadequate reasoning for refusing access to documents. There is a tendency amongst some agencies to look for the exemption provisions first, rather than the objects of the Act."

Family First MP Robert Brokenshire, who has been a prolific user of FoI legislation, plans to introduce a FoI (Miscellaneous) Amendment Bill which would make it invalid to refuse access to documents because they might embarrass the government, or result in a loss of confidence in government, or could arguably be "misinterpreted". The proposed legislation would also protect FoI officers' independence by guarding them from being directed by ministers and would aim to prevent ministerial interference with FoI requests.

Australian Capital Territory

Plans by the ACT chief minister, Katy Gallagher, to reform the ACT legislation to bring it more into line with the Commonwealth FoI laws stalled when the Bill was halted in the Legislative Assembly last December. The Greens and the Liberal opposition argued that debate should be adjourned because there had not been time for a proper debate and they were unwilling to rush through unsatisfactory legislation.

The Freedom of Information Amendment Bill 2011 aimed to implement a "push" model of publication of information, with:

- A requirement to publish on the internet documents provided under the FoI Act
- The objects clause of the act to clearly state that government-held information is a public resource
- The Bill to distinguish between exempt documents and conditionally exempt documents
- A single public interest test to apply to conditionally exempt documents
- Conclusive certificates issued prior to the 2009 abolition of most powers to issue such a certificate to be revoked.[22]

Western Australia

In WA, the Office of the Information Commissioner received 15,716 requests for information under the Freedom of Information Act 1992 according to the OIC Annual Report 2010-2011.[23] Of these, 14,134 decisions were made: 56.8 per cent granted in full, 32.3 per cent edited, 0.6 per cent deferred and 3 per cent refused.

There were 226 requests for internal review, of which 169 decisions were confirmed and 42 decisions varied and six decisions reversed. A further five requests were withdrawn.

AN UNWELCOME FREEDOM RIDER

Freedom of information requests are all too often subject to unwarranted delays, bureaucratic wrangling and nit-picking refusals, writes **Michael McKinnon**

The reformed FoI Act announced three years ago was to have its own watchdog, the Commonwealth information commissioner. But Seven Network's FoI editor Michael McKinnon has found the watchdog lacks both the ticker and the teeth for the job

When Senator John Faulkner declared the new Freedom of Information (FoI) regime would "increase scrutiny, discussion, comment and review of the government's activities" in May 2009, it seemed at long last the 1982 FoI Act would be strengthened to stop political secrecy against the public interest.

A new FoI Act, largely based on successful Queensland reforms, would follow the abolition of the loathsome conclusive certificates that had allowed ministers to declare "in the public interest" that information should never be released. A News Limited-funded High Court appeal against certificates, McKinnon v Treasury, had failed but was credited as the catalyst for reform promised by Rudd's federal opposition before its 2007 election victory. Optimism was reinforced with the appointment of the impeccably honest Senator Faulkner as the minister responsible for the reform.

Along with a revamped act, the centrepiece of the reform was the new Office of the Australian Information Commissioner (OAIC), which would ensure government agencies would no longer be able to hide the truth unfairly, delay its release or price information at astronomical costs.

A key to the reforms was the view that agencies would proactively publish information, lessening the need for FoI requests. The plan was optimistic and naïve as departmental spin doctors don't breathe without permission from the minister's office, and no minister's office will ever accept negative information going out.

That's why FoI is needed – because the politicians seeking re-election are the same people controlling the information needed by voters to judge performance.

The recent auditor-general's report on the fiasco surrounding the tender for Australia's international news network shows how squalid political motives led to appalling failures in process by the Gillard government. Couple this with opposition leader Tony Abbott's brazen declaration that he will take good politics before good policy any day, and it's clear how little the national interest can matter to poll-driven career politicians.

Effective FoI laws allow the public to find out the truth about public policy and a new OAIC was supposed to champion that aim. This has not happened. The OAIC is a struggling, if not failing.

In an interview with The Age on April 9, the information commissioner, Professor John McMillan, warned that refusal to adequately fund oversight of Freedom of Information legislation was undermining the government's declared commitment to increased transparency and more open government.

The article further stated that: "the OAIC expects to receive as many as 700 FoI review applications in 2011–12. In February, the office had a backlog of more than 340 applications

and this is expected to grow. Applicants for FoI reviews can expect a six-week wait before any response and a delay of six months or longer before a matter is progressed."

The watchdog against government secrecy is itself adding excessive delays to the access to information. But the problems are not limited to the delay.

- The OAIC has failed to ensure a timely appeals process, delivering slow decisions often supporting secrecy. It's also wasting resources on appeals that should be referred to an alternative, far better credentialled system in the Administrative Appeals Tribunal.
- Under a new charges regime, information commissioner Professor John McMillan wants FoI laws to be subordinate to department and ministerial spin doctors, with an appalling provision allowing politicians and their departments to stop any request over 40 hours without appeal on important policy issues.
- Its new charges recommendations aims to stop politicians, media and community organisations investigating complex policy and programs.
- It has failed to investigate agencies refusing to deal with FoI applications until a deluge of complaints finally motivates it, many months late, when information is potentially very out of date.

Seven Network's FoI bureau has analysed 17 published decisions since January 2011 by OAIC. Decisions take too long and, too often, back secrecy. Only one of the 17 decisions took less than 100 days to make. Eighty-two per cent of the decisions took longer than 20 weeks, meaning applicants were left waiting for more than five months in nearly all cases. Seven decisions took more than 200 days to be delivered and two took more than one year.

Professor McMillan, who made two decisions himself in relation to requests by The Australian, took 393 days to decide whether a diary entry relating to a political party function was an official document of a minister. He took 275 days to determine whether a letter to the prime minister from a political organisation is an official document of a minister. These decisions, on whether s 4(1) of the FoI Act applies, should be made quickly.

Seven Network's analysis also shows more than two in three decisions agreed with the original agency decision to keep information secret. Only five of the 17 decisions were set aside and substituted with a different decision, with only one decision wholly in the original applicant's favour.

It is difficult to sympathise with Professor McMillan's complaints about lack of resources when time is spent on these appeals. In state FoI regimes, applicants have a right to appeal to the Administrative Appeals Tribunal, where the state information commissioner can join the matter if they want.

Professor McMillan is on the record as saying he will not allow direct appeals to the Administrative Appeals Tribunal, which he can under Section 54W(b) of the Act. Although the Administrative Appeals Tribunal has decades of experience in FoI matters and is independent, Professor McMillan has deliberately chosen to sideline it – even though the delays in appeals mean the OAIC is clearly failing in a core responsibility.

However, Professor McMillan says the delays currently experienced in relation to some reviews do not amount to a "failure to provide a timely appeal mechanism", and the power to allow appeal direct to the Administrative Appeals Tribunal, can only be exercised when the commissioner is satisfied that the interests of the administration of the FoI Act make it desirable.

Another major failure arises from the OAIC's dangerously naïve view that agencies can be trusted to reveal their errors and mistakes.

In February, Professor McMillan released a report titled "Review of charges under the Freedom of Information Act 1982", with key recommendations that will gut the FoI Act.

Professor McMillan has noted as a key principle that "a legal right of access to documents is important but should supplement other measures adopted by agencies to publish information and make it available on request."

This reasoning is flawed. The FoI Act exists in its own right and should not ever be a "supplement" because governments lie and will always lie to protect their political interests.

Among the charges reforms are recommendations that agencies can charge a $50 application fee if people don't go to departmental spin doctors in the first instance for information, and then only after 30 days can the FoI application be lodged for free. This changes the FoI Act to a Spin Doctors' Access Act. The OAIC should understand that government agencies are there to protect the political interests of politicians or their own agency interests.

This recommendation just adds cost or delay to an applicant.

Even worse, Professor McMillan has recommended that agencies will not have to deal with any application that would take longer than 40 hours to process – and there's no appeal available on that decision.

This unprecedented and appalling recommendation would severely damage the FoI Act. First, any agency can easily inflate charges to stop any politically sensitive request. They have done precisely that for decades. And some of the biggest stories are found hidden among vast

numbers of documents – more than a million documents in the case of the AWB scandal, for example.

The OAIC's justification is that there is a "problem of large and complex applications from specific categories of applicants who use the FoI Act rather than rely on other means to obtain information (such as law firms that use the FoI Act as a form of discovery and members of parliament, journalists, researchers and the media)".

This is an extraordinary view from the OIAC that it is a "problem" that media and politicians are seeking the truth on complex issues when that is precisely what should happen in a democracy.

The charges report produced by the OIAC also recommends that unless an applicant waits for an internal review decision from the same agency that initially refused a request, they will be required to pay $100 for going direct to an information commissioner review. Agencies rarely if ever change their minds on politically sensitive documents and the proposed change just makes it more expensive for applicants.

A good example of how the OIAC has failed to act as an effective watchdog can be found in its recent decision in early April to launch an "own motion" investigation into the Department of Immigration.

In the period March to September 2011, Seven Network lodged a series of FoI applications with the immigration department about refugee and detention centre issues.

The department's response was to fail to process the requests. In response to Seven's complaints, a spokesman for the department secretary said that the secretary "would look" at putting more resources into the area while acknowledging there were problems.

But nothing happened – so on October 21, 2011 and again on December 15, the Seven Network complained in writing to the OIAC.

Finally, on April 5, the OIAC announced its decision to launch an "own motion" investigation into the immigration department's failings. But this process was way too slow and it has allowed the immigration department to snub the legal requirements of the FoI Act.

It also shows that Professor McMillan's view that agencies will voluntarily release information outside of FoI is just wrong. The reality is that some agencies won't release information even under the FoI Act.

Prior to the Act's reform, any government agency failing to meet the 30-day deadline for a decision on a FoI application could be taken direct to the Administrative Appeals Tribunal.

In the vast majority of more than 60 appeals to the Tribunal undertaken by this author, the government departments folded and handed over the documents, often just before the start of hearings.

Once they're in the Tribunal, agencies are forced to finally address the issue of complying with FoI. The fact that agencies now just ignore the FoI Act, and its watchdog, the OIAC, shows the independent watchdog is perceived as toothless. At the very least, agencies know they can just delay and delay until issues become historical. It is a good reason for reintroducing an automatic right of appeal to the Administrative Appeals Tribunal for applicants.

And the answer to deliberate government secrecy is not to weaken the FoI Act as proposed by the OIAC. Instead, the OIAC has to toughen up and take government agencies on in order to change the culture. It also needs the budget support from a government that, like all its predecessors, has an interest in keeping its failings secret.

Michael McKinnon is FOI editor with the Seven Network

AUSTRALIA'S TWO-SPEED FOI

It's become easier for journalists to access government-held information in half of Australia, now we're waiting for the States to catch up, writes **Johan Lidberg**.

Accessing government-held information in Australia became a little easier in 2011, but a two-speed situation has developed. Some jurisdictions are promoting disclosure of information through websites and other means, while others are sticking with their old, restrictive regimes.

Queensland, New South Wales, Tasmania and the Commonwealth have undertaken major reforms and amendments to their Freedom of Information (FoI) laws, bringing these systems closer to international best practice. FoI has even been renamed as RTI – Right To Information – reflecting the move toward pro-active disclosure of information by government agencies.

The changes to the Commonwealth FoI Act came into force in November 2010. The application fee for FoI requests was dropped, and also cancelled were the papal-like 'conclusive certificate' powers granted to ministers, which gave them the right to decide what information was in the public interest to release. But the jury is still out on how much impact the reforms have had on practical information access.

The latest major development in federal FoI is that the Australian information commissioner, Professor John McMillan, released his review into fees and charges – an instrument which had been used by some agencies to block information requests. The report made it clear that the current fee structure was confusing and inconsistent, but that, nonetheless, some sort of fee system was needed to hold off so-called vexatious (unjustified and annoying) requests.

Similar to his fellow Queensland and NSW information commissioners, Professor McMillan sees FoI/RTI requests as a last resort. Most information should be accessed via the pro-active disclosure of information or via what he terms "administrative access". Put simply – you pick up the phone or email an agency and ask for the information bypassing the formal request process. If this works it is clearly a win-win situation. It is cheaper to process and the requestor gets close to instant access.

Tasmania has also passed a new RTI law, but the pro-active disclosure provisions are weaker compared to the other reformed laws.

However the pro-active disclosure and administrative access models hinge on a major change in attitude by public servants and ministers. There are some signs of a shift away from the view that the government *owns* the information, to the idea that it *holds* it on behalf of the public. Facilitating this culture change has been and remains the biggest challenge in reforming information access in Australia. This is long-term work and will most likely take at least a decade.

The FoI laws in Victoria, South Australia, Western Australia, the Northern Territory and the ACT are lagging far behind the reformed systems mentioned above.

Victoria is in the process of passing a bill creating a FoI commissioner, but the bill does not include major reforms to the outdated Victorian FoI law, which will severely hamper the actions of the future commissioner. This again illustrates that promising extensive FoI reform is easy in opposition but much harder to deliver when you are in government.

In a 2011 international comparison of the 89 current FoI/RTI laws globally, Australia's Commonwealth Act came in at number 39 – the middle of the pack.

It is somewhat disappointing that a newly reformed system like Australia's federal FoI law did not rank higher. The downfall for the law was found in the categories 'scope' and 'exemptions and refusals'. The rating found that compared to international best practice, the Australian law had too many blanket exemptions for agencies holding sensitive information.

The prime example is the Australian Security Intelligence Organisation. In best practice laws, such as the US and Sweden, there are no blanket exemptions. It is not very likely that journalists using FoI will get any information from the CIA or the Swedish equivalent, but it is symbolically important that no government agencies are exempt from the goal of openness and transparency. The exclusion of Cabinet notebooks is another example that brings down the Australian score.

However 2011 saw no movement at all in the most challenging areas of independent information access – corporate information. This is noteworthy as actions of big corporations arguably have as much influence (at times more) over our daily lives, as do governments. Access to corporate information remains the final frontier in the information access battle.

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CONFIDENTIAL SOURCES

> **"The public has a right to access... information *which is of public concern... information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information."*[24]**

On February 1, 2012, after nearly 12 months of deliberation, Justice Lucy McCallum in the NSW Supreme Court ordered *The Age* and three of its journalists to reveal their sources for a series of stories about the relationship between businesswoman Helen Liu and the former defence minister, Joel Fitzgibbon, and an alleged payment of $150,000 by Liu to the politician.[25]

The orders were made as part of preliminary discovery in defamation proceedings. Liu has claimed that the story was defamatory and based on a forged document. *The Age* journalists, Richard Baker, Nick McKenzie and Philip Dorling, argued that under the "newspaper rule" they should not have to reveal their sources, as they had promised confidentiality and the subject matter of the story was in the public interest.

Chinese-Australian property developer, Helen Liu (centre), outside the Supreme Court in Sydney where she launched defamation proceedings against Fairfax Media and three of its journalists, February 2011
PHOTOGRAPH BY CAMERON RICHARDSON, *THE AUSTRALIAN*

Justice McCallum ruled that: "I am not persuaded that there is any tangible risk of adverse consequences to the sources in the event that their identity is revealed, beyond the risk of their being sued for defamation and the consequential impact upon their relationship (if any) with the plaintiff."

The Media Alliance issued a statement arguing that Justice McCallum's ruling flew in the face of shield laws enacted by the NSW government in 2011.[26]

"The intent of the attorney-general in introducing this law last year was clear – no journalist should be placed in the position of having to risk his or her liberty, or financial punishment and a criminal record in order to obey their Code of Ethics," said Alliance federal secretary Christopher Warren.

"Australian journalists take their Code very seriously and have demonstrated in the past that they would be willing to go to jail rather than reveal a confidential source.

"The public interest in keeping confidences is also clear: if journalists cannot protect their sources then the sorts of important stories to which these sources generally contribute will dry up and the Australian public will be the poorer. It is a clear free speech issue."

Warren called on the NSW attorney-general, Greg Smith, to intervene: "Parliament has legislated to protect journalists and their sources and the court's final decision must reflect this," he said.

Justice McCallum subsequently issued a 28-day stay on the production order to allow lawyers for the three journalists and *The Age* to prepare an appeal against the ruling. The appeal will be heard this year.

End of the "newspaper rule"?

In a discussion paper for the *Gazette of Law & Journalism*, Melbourne-based media lawyer John-Paul Cashen wrote that the Liu decision would undermine the ability of journalists to protect their sources in defamation cases based on the "newspaper rule".[27]

He speculated that Justice McCallum's judgment – that the defendant journalists had defied their source's wishes in publishing a document they had specifically been asked to keep under wraps, and undermined the relationship of trust between journalist and source on which the relationship of confidentiality is based, and that because of this the "force of the considerations underlying the newspaper rule [were] substantially lessened" – was a dangerous and possibly erroneous conclusion.

"This seems an odd conclusion to draw. The trust a journalist promises to a source is and always has been to protect the source's identity. It goes no further than that. It is not an agreement to respect the source's every wish. It is certainly not an agreement to act as a mouthpiece for the source.

"The Media Alliance Code of Ethics, which in large part governs the journalist's actions in these cases, expressly contemplates that a journalist will question the source's motives."

Background

> *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.*
>
> Media Alliance Journalists' Code of Ethics[28]

The protection of confidential sources is fundamental to journalism's mission to expose official wrongdoing and hold power to account.

Effective source protection was one of the key recommendations of the Independent Audit of Free Speech in Australia, overseen by former privacy commissioner Irene Moss: "There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge only on strictly limited grounds of compelling public interest."[29]

The introduction of effective shield laws was a key part of the Labor Party's election platform in 2007: according to then Labor leader Kevin Rudd and his shadow attorney-general, Joe Ludwig, Labor would "support reasonable changes to current journalist shield laws to protect their sources and ensure that a responsible journalist is never again prosecuted for a story that is 'merely embarrassing' to a government."[30]

Shield laws on the statute books, but who do they protect?

Commonwealth

On March 21, federal parliament passed the Evidence Amendment (Journalists' Privilege) Act 2011[31], which substantially strengthens the position of journalists in maintaining confidentiality by providing for a rebuttable presumption against disclosure of the identity of a journalist's source.

The private member's bill was introduced in October 2010 by Independent MP Andrew Wilkie and co-sponsored by Independent MP Nick Xenophon. It was passed with amendments lodged by Greens senator Scott Ludlum. The key amendment defined a journalist as: "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium".

The broad definition of "a person who is engaged and active in the publication of news" was an amendment by Greens senator Scott Ludlum which received support from the Labor majority. (They rejected a narrower definition by Liberal senator George Brandis: "a person who *in the normal course of that person's work* may be given information by an informant in the expectation that the information may be published in a news medium.")

Senator Ludlum said the amendment was designed to protect bloggers and citizen journalists whose contribution to free speech and accountability could be just as vital as those being paid by a news organisation.

State shield laws

Meanwhile, the New South Wales legislation, which passed both houses on June 16, 2011, defines a journalist as "a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium".

The NSW attorney-general, Greg Smith, told a Budget Estimates committee in October that he had specifically set out to exclude new media organisations, singling out Crikey as an online publication of the sort that "is largely gossip" and should not be afforded shield law protection. [32]

"I am not going to cover bloggers who may represent terrorist organisations or criminal organisations or who may just be ratbags. I am protecting bona fide journalists who actually receive money from a publication that is respected in the community and available to the public generally… I think the problem is that there is very little sanction against those people and very little discipline, whereas a journalist can be sacked if he has a job with the *Sun-Herald* or *Daily Telegraph* or something like that and he or she publishes something that is inappropriate or that has to do with the work of criminals."

Similar definitions of "journalist" appear set to be adopted in legislation introduced in Victoria and Western Australia.

In Western Australia, the Evidence and Public Interest Disclosure Legislation Amendment Bill will amend the Evidence Act 1906 to include shield law provisions and the Public Interest Disclosure Act 2003 to provide whistleblower protection to those who go public as a last resort.[33] As far as journalists' privilege is concerned, it extends the rebuttable presumption against disclosure to protect journalists called in front of the Corruption and Crime Commission.

Victorian shield laws, which have been extensively foreshadowed, have yet to be introduced to that state's parliament.

The Alliance believes that shield laws, along with whistleblower protection, are a fundamental guarantor of transparency and accountability in public life. We agree with the Commonwealth shield law model, which extends protection beyond the narrow definition of "journalist" to effectively protect an act of journalism rather than create an argument about who may or may not be a journalist. Further, the same presumption in favour of a journalist's right to protect his or her sources ought to be extended to the various state anti-corruption watchdogs.

WHISTLEBLOWER PROTECTION

"The message [Toni Hoffman] constantly gets is 'we do not want you in our organisation'. They have treated *her abysmally even though she*... saved lives."
Peter Koutsoukis, solicitor, Maurice Blackburn,
quoted in *The Australian*, December 16, 2011.[34]

When she blew the whistle about her concerns over rogue surgeon Jayant Patel in 2005, nurse Toni Hoffman was hailed as a heroine – a poster girl for public interest disclosures. Facing the opposition of management after her repeated attempts to stop the man they called "Doctor Death" from operating, she took her concerns to award-winning reporter Hedley Thomas.

Only after Thomas aired Hoffman's concerns in *The Australian* did Patel's record come to light and an investigation launched. He was subsequently convicted of three counts of manslaughter and sentenced to seven years in prison.

Seven years on, Hoffman is again a poster girl, this time for the downside of whistleblowing. She has complained of workplace discrimination, "performance management" and says that letters to the then premier of Queensland and the then Queensland Health director-general, Mick Reid, went unanswered.[35] She was even refused a request to take paid leave during Patel's trial and was forced to use her annual leave on days where she was not giving evidence.

Hoffman's plight highlights the continuing need for adequate laws to protect public interest disclosures – such as hers – and provide compensation for those who risk their careers and health to bring serious misconduct and other matters of public interest to light.

Despite promises made by the federal Labor government from their days in opposition, from their election to power in 2007 and repeatedly since (most recently in November 2011), the promised reform has stalled and most observers now believe the current administration has not got the political will to bring effective whistleblower protection to the statute books.

Background

In October 2007, flanked by Joe Ludwig – his shadow attorney-general, then Labor leader Kevin Rudd promised that a Labor victory in the forthcoming election would usher in a new era of openness and accountability in Australia.[36]

Among other election pledges, Rudd promised to provide "best-practice legislation and expansion of protection for public interest disclosure whistleblowers, protecting them from retribution". The move was largely prompted by the experience of former Customs officer Allan Kessing, who had been identified as the source of a leak about lax security in Australia's airports and was convicted of breaching section 70 of the Commonwealth Crimes Act (which the Alliance has repeatedly said should be repealed).

The Dreyfus report

Following the release of the draft report of the "Whistle while they work" project led by Professor A.J. Brown in 2008, the then Cabinet secretary, Senator John Faulkner, announced that the federal government had asked the House of Representatives Standing Committee on Legal and Constitutional Affairs, led by Mark Dreyfus QC, to consider and report by February 28, 2009, on a preferred model for legislation to protect public interest disclosures within the Australian government public sector.

The Dreyfus report, *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector*, recommended that the federal government introduce legislation to enable public interest disclosures and strengthen whistleblower protection within the Commonwealth public sector.

"The Commonwealth is the only Australian jurisdiction that does not have legislation to encourage public interest disclosures," Dreyfus said in a statement.

"While some limited protections are available to whistleblowers employed by Australian Public Service (APS) agencies, evidence to the inquiry indicates that those protections are grossly inadequate.

"The current legal framework and organisational culture discourages public servants from speaking out against what they consider to be illegal or improper conduct in the workplace. People who raise allegations of misconduct could be exposed to serious criminal or civil liability." [37]

However the Dreyfus report stopped short of recommending protection for whistleblowers who took their complaints to the media, except in cases of an immediate threat to public health or safety.

Dreyfus's recommendations came in for a good deal of criticism. Laurie Oakes, whose Gold Walkley Award in 2011 was earned with his handling of leaks of sensitive political material,

Cartoon by Chris Slane

delivered the keynote address at the 2009 Press Freedom dinner and said the report would offer little or no protection for public servants who chose to disclose evidence of wrongdoing to the media.[38]

"I don't believe we're getting anywhere at all when it comes to public servants who take their concerns to the media," he said. "Maybe we're even going backwards… The only circumstances where blowing the whistle via the media would be protected would be where a matter had been disclosed through the internal public service system but had not been acted on within a reasonable time… and then only if the matter threatened 'immediate and serious harm to public health and safety'.

"Most scandals – most government and bureaucratic acts of impropriety, maladministration, wastage of public funds, nepotism, corruption, breaches of public trust – would not qualify. Watergate would not qualify. Deep Throat would end up in clink under the Dreyfus rules."

Public Interest Disclosure Bill, 2010

In March 2010, Faulkner unveiled the government's proposal for a Public Interest Disclosure Bill which appeared to suggest that it had been listening to the media's complaints. The proposed Bill would protect disclosures to the media if:

- (a) the matter disclosed has previously been disclosed to the responsible agency and the integrity agency, or the integrity agency directly, and
  (ii) the disclosure relates to a serious matter, and
  (iii) the disclosure was not acted on in a reasonable time or the discloser has a reasonable belief that the response was not adequate or appropriate, and
  (iv) no more information than is reasonably necessary to make the disclosure is publicly disclosed, and
  (v) the public interest in disclosure outweighs countervailing public interest factors (eg, protection of international relations, national security, Cabinet deliberations, etc)
- OR (b) where:
  (i) the discloser has a reasonable belief that a matter threatens substantial and imminent danger or harm to life or public health and safety, and
  (ii) there are exceptional circumstances explaining why there was no prior disclosure internally (ie, to the responsible agency) or externally (eg, to the Commonwealth Ombudsman) of the serious public interest disclosure.
  Public disclosures will not be protected where the public interest disclosure relates to intelligence-related information or is to a foreign government official.

Reaction was favourable. Professor Brown was quoted by *The Australian* as calling the proposed Bill: "world's best practice", while the president of Whistleblowers Australia, Peter Bennett, said: "It will change the culture of government".[39]

Why are we waiting?

Since then, despite repeated promises, a reported deal with Independent MP Andrew WIlkie that would see public interest disclosure legislation passed and a deadline of June 30, 2011 set, whistleblower reform appears to have stalled.[40]

Gary Gray, the special minister of state, made a brief announcement saying the Bill would be finalised by the end of 2011. Professor Brown, writing in *The Australian*, said: "There is little prospect of these issues being resolved in time for the Bill to be introduced, debated and passed by the present parliament."[41]

As of April 2012, the legislation still has to be introduced into parliament.

In *Flying Foxes, WikiLeaks and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, a paper delivered to an international whistleblowing conference in London in July 2011, Professor Brown speculated as to the reasons why the promised legislation has been delayed: "international political pressure and vacillations in leadership, combined with natural institutional resistance to change, mean that key reforms also hang in the balance".[42]

WikiLeaks

Professor Brown speculates that the Gillard government's reaction to the WikiLeaks affair, which corresponds to the official US reaction in condemning the disclosures as "illegal", has forced the government into an anti-disclosure position in line with the US position. That position effectively categorises WikiLeaks and its co-founder Julian Assange as a "source" rather than a journalist and condemns his actions as illegal.[43]

Brown said the ensuing debate about how to categories Assange and WikiLeaks merely serves to reinforce the need for clear and effective public interest disclosure laws:

> *The lesson of these events for Australian law reform remains that there is no need to go down this road. Whether or not new rules are needed to regulate how and by whom confidential information is published, it is well established that new rules are needed to govern when it may be disclosed without liability to the officials who disclose. This is for the very reason that automatic, blanket prosecution of leakers, irrespective of the public interest in the disclosure, is no longer a sustainable response – as recognised by the Australian government's own policy positions on why public interest disclosure legislation is required.*

Some progress in the states

There are some signs that this message is getting through. In September 2010, the **Queensland** parliament passed the Public Interest Disclosure Act 2010, which allows for public servants to go public with disclosures about serious wrongdoing if they have first taken it to an official authority and that authority has:

- Decided not to investigate or deal with the disclosure, or
- Investigated the disclosure but not recommended the taking of any action, or
- Failed to notify the person, within six months of the disclosure, whether or not the disclosure is being investigated or dealt with.

Reviewing the legislation, Professor Brown pointed to two important factors. First that there is no requirement about how the internal complaint must be made – it can be made by simply speaking to a supervisor or line manager. And the six-month rule does not necessarily condemn a whistleblower to a lengthy wait: "if a supervisor or higher manager simply dismisses a concern, ignores it or tells them not to worry about it".

In **NSW**, the Protected Disclosures Amendment (Public Interest Disclosures) Bill passed all stages in the NSW parliament on October 27, 2010[44]. The amendment sets up new oversight of whistleblower protection by the ombudsman and the Protected Disclosures Steering Committee, with the ombudsman responsible for raising public awareness of the Act, assisting agencies, and monitoring and auditing compliance.

There is a requirement for all public authorities to adopt internal protected disclosures policies and prepare annual reports on their obligations under the Act. It also provides protection for a public official where a disclosure is made with *an honest belief on reasonable grounds* that information shows or tends to show wrongdoing. That protection extends to individuals who are independent contractors of public authorities.[45]

As noted in the previous chapter, in **Western Australia** the Evidence and Public Interest Disclosure Legislation Amendment Bill will provide protection for those who go public as a last resort.

The Alliance believes the federal government should waste no time in setting the standard for all Australian states and territories with a truly comprehensive and effective Public Interest Disclosures Bill. Not only should this establish a clear mechanism for internal and external disclosure of serious maladministration and wrongdoing, including to the media, it should also establish effective compensation and ongoing protection for whistleblowers to ensure they are not penalised and their careers ruined for performing an important public service.

AUSTRALIA'S STAR CHAMBERS

While the [NSW Crime] Commission wants to investigate and know everything about everyone else, it wants the public to know little or nothing about it. Justifying its secretive position and extraordinary powers as necessary to protect us from "them"', it takes only a short time before there is an apprehension that we need protection from it.[46]

Robin Speed, *Sydney Morning Herald*, March 2011

Cartoon by Joanne Brooker

Writing in *The Sydney Morning Herald* last March, the president of the Rule of Law Institute of Australia, Robin Speed, reported the case of journalists Linton Besser and Dylan Welch, who were served subpoenas to produce their mobile phones and SIM cards after they wrote a series of stories critical of the NSW Crime Commission.

Speed highlighted the coercive powers claimed by the plethora of anti-corruption agencies that have sprung up in Australia during the past two decades, and questioned if these powers to investigate corruption justified the chilling effect they undoubtedly have on free speech in Australia.

During the past two years, up to a dozen journalists have been served with similar subpoenas by one or other of these agencies. As noted in the Media Alliance Press Freedom Report 2011, *Progress Under Liberty*, these extrajudicial bodies claim powers that would be almost unthinkable in the court system, including compelling witnesses to attend some hearings without legal representation and removing the common law right to silence. They also ignore the protections bestowed by federal and state shield laws, which allow journalists – or anyone engaged in the gathering and dissemination of news – to refuse to answer questions that might identify their confidential sources.

Quite apart from stripping witnesses of their common law rights, they conflict with the Journalists' Code of Ethics, clause 3 of which reads: "Where confidences are accepted, *respect them in all circumstances*".[47]

As we have noted in this report, there is clearly a strong push, both in Commonwealth and various state jurisdictions, to recognise the importance of source confidentiality to free speech, yet shield laws rarely extend to anti-corruption bodies (the exception appears to be in Western Australia, where the Evidence and Public Interest Disclosure Legislation Amendment Bill looks set to extend protection to the state's anti-corruption body, the Corruption and Crime Commission).

The Media Alliance, among other interested parties, has consistently called for shield law protections to be extended to anti-corruption agencies, with little success. And, as noted elsewhere in this report by award-winning investigative journalists Nick McKenzie and Cameron Stewart, journalists who are serious about protecting the sources of their stories in the face of one of these agencies must now avoid using any means of communication that can be traced, tapped or bugged.

Coercive powers of anti-corruption bodies

Queensland: Crime and Misconduct Commission

The Crime and Misconduct Commission (CMC) has the following powers of investigation to:

- Require a person to produce records or other things relevant to a CMC investigation
- Enter a public sector agency, inspect any record or other thing in those premises, and seize or take copies of any record or thing that is relevant to a CMC investigation
- Apply to a magistrate or judge for a warrant to enter and search other premises
- Apply to the Supreme Court for a surveillance device (note: the CMC does not have the power to use telephone interception devices)
- Summon a person to attend a hearing to give evidence and produce such records or things as are referred to in the summons.

The evidence collected is assessed and, if it is considered to be sufficient, a report is referred to the Director of Public Prosecutions recommending criminal prosecution.

New South Wales: Independent Commission Against Corruption

The Independent Commission Against Corruption (ICAC) has the following powers of investigation. It can:

- Compel the production of documents or other things
- Compel a public authority or public official to provide information
- Enter properties occupied by a public authority or public official to inspect and copy documents
- Apply to an authorised officer for warrants to search properties (section 40(2) of the ICAC Act also gives the ICAC commissioner the power to issue search warrants)
- Use surveillance devices upon application to a judge of the Supreme Court and intercept telephone calls upon application to a member of the Administrative Appeals Tribunal
- Compel witnesses to answer questions at compulsory examinations (private hearings) and public inquiries.

At the conclusion of an investigation, the ICAC may recommend the Director of Public Prosecutions consider prosecution.

Western Australia: Corruption and Crime Commission

The Corruption and Crime Commission (CCC) has powers of investigation to:

- Obtain information from a public authority or officer
- Obtain documents and other things
- Summon witnesses to attend examinations and produce things
- Enter and search public premises without a warrant
- Apply for a search warrant for other premises to a judge of the Supreme Court
- Apply for surveillance device warrants to a judge of the Supreme Court, except for tracking device warrant applications which may be made to a magistrate
- Apply for a telecommunications service interception warrant to members of the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates Court, or to nominated members of the Administrative Appeal Tribunal.

Unlike the ICAC and the CMC, the decision to investigate and the decision to prosecute can both be made by the CCC.

Tasmania: Integrity Commission

Tasmania's Integrity Commission has the power to require or direct a person to:

- Provide the investigator or any person assisting the investigator with any information or explanation that the investigator requires
- Attend and give evidence before the investigator or any person assisting the investigator
- Produce to the investigator or any person assisting the investigator any record, information, material or thing in the custody or possession or under the control of a person.

For the purpose of obtaining any record, information, material or thing under subsection (1), the investigator may:

- Inspect and take copies of or take extracts from any such record, information, material or thing
- Require or direct any person to give such assistance as may be required.

Section 52 of the Integrity Commission Act states that an investigator or any person assisting an investigator who enters premises may exercise any or all of the following powers:

- Search the premises and examine anything on the premises
- Search for any record, information, material or thing relating to the matter to which the investigation relates
- Operate equipment or facilities on the premises for a purpose relevant to the investigation
- Take possession of any record, information, material or thing and retain it for as long as may be necessary to examine it to determine its evidentiary value
- Make copies of any record, information, material or thing or any part of any record, information, material or thing
- Seize and take away any record, information, material or thing or any part of any record, information, material or thing
- Use (free of charge) photocopying equipment on the premises for the purpose of copying any record, information, material or thing
- In respect of any computer or other equipment that the investigator suspects on reasonable grounds may contain any record, information, material or thing, to inspect and gain access to the computer or equipment, and:
  - Download or otherwise obtain any record, information, material or thing
  - Make copies of any record, information, material or thing held in it
  - Seize and take away the computer or equipment or any part of it.
- If any record, information, material or thing found on the premises cannot be conveniently removed, to secure it against interference
- To require or direct any person who is on the premises to do any of the following:
  - State his or her full name, date of birth and address
  - Answer (orally or in writing) questions asked by the investigator relevant to the investigation
  - Produce any record, information, material or thing
  - Operate equipment or facilities on the premises for a purpose relevant to the investigation
  - Provide access (free of charge) to photocopying equipment on the premises the investigator reasonably requires to enable the copying of any record, information, material or thing
  - Give other assistance the investigator reasonably requires to conduct the investigation.
- To do anything else reasonably necessary to obtain information or evidence for the purposes of the investigation.

How are hearings conducted?

Queensland: Crime and Misconduct Commission

The CMC can hold private or public hearings. Generally CMC hearings are not to be open to the public unless holding a public hearing would not be unfair to a person or contrary to the public interest.

Rights and obligations at CMC hearings include:

- The right to legal representation
- A person must not refuse to produce a document or thing
- A person must not refuse to answer questions.

Evidence and procedure:

When conducting a hearing, the presiding officer:

- Must act fairly but quickly and with as little formality and technicality as possible
- Is not bound by the rules of evidence
- May inform themselves of anything in the way they consider appropriate
- May decide the procedures to be followed for the hearing.

New South Wales: Independent Commission Against Corruption

The ICAC can hold private or public hearings. The ICAC Act directs the Commission to consider whether a public hearing would be in the public interest and specifically to take into account the following factors:

- The benefit of exposing to the public and making it aware of corrupt conduct
- The seriousness of the allegation or complaint being investigated
- Any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding a public inquiry)
- Whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

The rights and obligations at ICAC hearings include:

- The Commission may authorise a person giving evidence to be represented by a lawyer
- A person must not refuse to produce a document or thing
- A person must not refuse to answer questions.

The ICAC:
- Must exercise its functions with as little formality and technicality as possible, and hearings shall be conducted with as little emphasis on an adversarial approach as is possible
- Is not bound by the rules of evidence
- May inform itself on any matter in such a manner as it considers appropriate.

Western Australia: Corruption and Crime Commission

The CCC hearings are to be private unless otherwise ordered. The CCC Act provides the hearing may be public if it is in the public interest, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements.
The rights and obligations at CCC hearings include:
- The right to legal representation
- A person must not refuse to produce a document or thing
- A person must not refuse to answer questions.

The Commission:
- Is not bound by the rules of evidence
- Can inform itself on any matter in such manner as it thinks fit.[48]

Tasmania: Integrity Commission

Hearings of the Integrity Commission can be held in private or public. A person required or directed to give evidence or answer questions as part of an investigation may be represented by a legal practitioner or other agent.

Other states

Victoria

Victoria's new Independent Broad-based Anti-corruption Commission (IBAC) has been the subject of much controversy after it was announced that an expert report advising the Coalition government on the body's most controversial aspects would not be made public.

According to the Current Issues Brief released by the Victorian Parliamentary Library Research Service in November 2011, the IBAC will have similar powers to those vested in other states' anti-corruption bodies.[49]

The Bill itself states: "The IBAC has power to do all things that are necessary or convenient to be done for or in connection with, or as incidental to, the achievement of the objects of this Act and the performance of its duties and functions."[50]

It was reported in March 2012 that the IBAC will be up and running by July 2012 and will have the power to use surveillance devices and telephone bugging equipment to observe, listen to, track and monitor suspects.[51]

South Australia

The SA government has announced it will establish an Independent Commission Against Corruption (ICAC), similar to those operating in other states. The new body would have a budget of $32 million over five years and would answer only to state parliament in the form of an annual report.

It will have its own team of investigators and will hold most of its hearings in private.[52]

While acknowledging that state anti-corruption commissions are necessary to maintain probity and transparency in the various police forces and public service, the Alliance is concerned at the sweeping coercive powers claimed by such bodies. The power to enter premises, seize computers, documents and any other "thing", the ability to summon witnesses, deny them legal representation and the right to silence and require them to answer questions and hand over any "thing" (which – in the case of journalists – is likely to include the identity of their confidential sources) puts journalists at odd with their Code of Ethics. Journalists appearing before anti-corruption commissions must be protected by shield laws in order to sustain confidentiality of sources.

ON THE SPOT IN A HARSH CHAMBER

Nick McKenzie and **Cameron Stewart** agree there's a need for anti-corruption and crime agencies, but why are they wasting resources harassing reporters and hunting down whistleblowers?

Why is it that the anti-corruption and crime agencies are targeting reporters and their sources with increasing zealousness? Does it equate to a paradigm shift in the attitude of law enforcement and government agencies toward the media?

Over the past two years, up to a dozen reporters in Australia have been served with subpoenas to give evidence about their sources or had demands to have their phone records checked. They include the authors of this article [Nick McKenzie from *The Age* and Cameron Stewart from *The Australian*], and Linton Besser and Dylan Welch from *The Sydney Morning Herald*, whose sources in the law enforcement community were pursued after the pair published stories that raised questions about the NSW Crime Commission.

The purpose of most of these investigations is to identify the sources of a reporter's stories and have them punished.

The demand on a journalist to appear before a star chamber is never a pleasant experience. In most cases, coercive hearing subpoenas come with a confidentiality clause which prevents a reporter from telling anyone, including their own partners, that they have been hauled in front of one of these agencies. Once before the hearing, if you refuse to divulge a source, you can be charged and jailed. The recent federal shield laws may provide some protection in court cases, but this comfort does not extend to star chamber hearings.

It leaves reporters with a bleak choice: give up a source or be charged with a serious criminal offence.

But the coercive hearing is only one tool in the leak hunter's trade. Advances in technology means an agency may have no need to summons a reporter to a grilling. State-of-the-art tracking of phone calls, phone tapping and email monitoring mean that a source can be discovered without asking any questions of a reporter at all.

Accordingly, it's no longer sufficient for a reporter to simply stay staunch and refuse to name names. To evade this technology, journalists must avoid using any communications that can be tracked and stick to old-fashioned ways of contact: face-to-face meetings, preferably in a place that can't be bugged.

So why are agencies going to such lengths to uncover sources?

Although the industry tends not to readily admit it, there are examples where a journalist's conduct deserves official scrutiny.

Does a journalist, whose trading or publishing of information serves no public interest but leads to the compromising of an important inquiry, deserve protection? What if a public official sold information to a reporter to serve a purely corrupt purpose? It's hard to argue that in such cases, reporters and their sources aren't fair game. The conduct exposed recently in the United Kingdom is a reminder that journalists can and will employ corrupt or unethical methods to get a salacious story, regardless of whether it's in the public interest.

In Australia, the agency most recently in the spotlight over its pursuit of journalist's sources is Victoria's Office of Police Integrity (OPI). The OPI recently spent months scrutinising a case in which it was alleged (apparently incorrectly) that a journalist aired information that served no public interest but which had inadvertently aided the corrupt by undermining an important police probe.

Superficially at least, this seems to be a case worthy of OPI scrutiny.

But for every example such as this one, there are many more where inquiries into journalist-source relationships are about leaks that are manifestly in the public interest.

Justifying these probes, the authorities talk of fighting a culture of leaking and attempting to deter future offenders. Rarely do authorities acknowledge that whistleblowing and the sort of journalism it produces is of vital importance to democracy; that it can lead to reforms or, indeed, the creation of the very anti-corruption agencies that later turn their attention to leakers.

Take the groundbreaking investigative journalism of Chris Masters in the 1980s. Without brave officials prepared to "leak" to Masters, there would have been no Royal Commission and no landmark reform process that cleaned up the Queensland police service and government.

Yet the officials assisting Masters in his corruption exposé were more than likely breaking the law or, at the very least, their employer's regulations.

The OPI would most likely have never have been formed if it wasn't for brave Victorian police risking their careers to speak to reporters about corruption that wasn't being properly investigated.

But the OPI has been one of the most aggressive agencies when it comes to pursuing a reporter's sources. While its investigation into now former deputy commissioner Sir Ken

Jones is still being scrutinised by the Victorian ombudsman, it appears it was started on the basis of allegations (which have never been proven) that Jones was the source of articles that were manifestly in the public interest, but whose publishing compromised no operations.

Leak inquiries have also been ramped up in response to reporting on national security issues, from defence to foreign affairs. Journalists who cover such rounds are routinely in contact with public servants who help disclose mismanagement, misconduct and sometimes corruption within the system.

This has always been so, but in the past it was generally tolerated as an accepted part of the rough and tumble of the democratic process. In recent years, suspected leakers of public interest stories are increasingly viewed as lawbreakers who must be hunted down, rooted out and, if necessary, jailed.

Within the past year, the Defence department in Canberra has, on two separate occasions, ordered a search of phone and email records to try to locate sources for articles written by one of the authors of this article. The offending articles involved the disclosure of a major navy shipbuilding bungle that involved the waste of millions in taxpayer dollars. The other story involved an emergency aboard a submarine, a potentially deadly equipment failure that could have cost lives. Both articles were in the public interest and yet both triggered a secret and sweeping attempt by Defence to locate confidential sources for stories that, a decade ago, would have been begrudgingly shrugged off.

Anecdotally at least, the recent trend does indeed appear to target journalism and whistleblowing that is clearly in the public interest.

It is these cases on which the media needs to take a stand. The arguments is clear: agencies should devote their resources to investigating genuine crime and corruption, rather than whistleblowing and journalism that tells the public something they have a right to know.

Unfortunately, given the competitive and often poisonous nature of Australia's media, a leak inquiry that involves the working of one newspaper often provokes only mirth from another. When media outlets fail to back up each other in important source protection cases, it fuels an environment in which journalists and their sources can be more freely targeted. It weakens us all.

Such advocacy requires careful examination of individual cases and a recognition that journalists are not, and should never be, above the law. But anti-corruption agencies and governments should be left in no doubt that public servants who leak material that's truly in the public interest should not be targeted for investigation without good reason.

Some forward the argument that with the advent of anti-corruption agencies and whistleblower laws, you don't need leakers because now public servants with concerns will have appropriate channels through which to raise their complaint.

But anti-corruption agencies are fallible, prone to politicisation and abuse of power. Sometimes a lack of resources means they can't investigate something that needs to be exposed. Again, the media is needed to keep an eye on such agencies and to pick up on corruption that is not adequately investigated.

It is curious that leak inquiries appear to be increasing at a time when shield laws have been introduced federally, but many gaps remain at the state level.

In Victoria, the debate over the state's new anti-corruption commission has been all but silent on the issue of whether journalists will be allowed to protect sources without fear of prosecution or if the new watchdog will act zealously against leaks, regardless of public interest considerations.

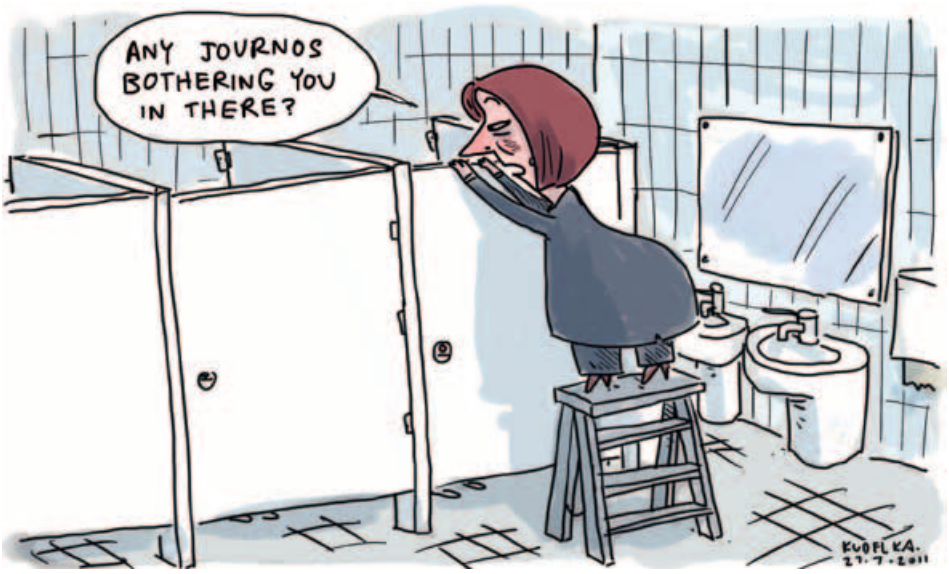
A sensible solution may involve watchdogs adopting an agreed position that they will not investigate journalists unless the case involves grave issues of corruption or national security.

Even then, journalists deserve the protection of shield laws, allowing them to legally refuse demands by these watchdogs to divulge confidential sources unless a judge reverses that right on public interest grounds.

However, for the near future at least, it seems journalists and their sources will remain targets. This is all the more reason for the industry to present a united front, and a strong voice, when a journalist next refuses to answer a subpoena or finds their phone monitored and sources targeted because they have helped to tell the public something they deserve to know.

Nick McKenzie is an award-winning investigative reporter with The Age
Cameron Stewart is an award-winning investigative reporter with The Australian

PRIVACY



Cartoon by Jon Kudelka

Background

In July 2011, in the immediate aftermath of the UK phone hacking scandal, home affairs minister Brendan O'Connor announced that the federal government would release an issues paper to discuss the possible introduction of a statutory cause of action for serious invasion of privacy. In September, the department of Prime Minister and Cabinet (PM&C) released the paper, titled *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*[53]

The issues paper was essentially a digest of the investigations and consultations by the Australian Law Reform Commission (ALRC), the NSW Law Reform Commission (NSWLRC), and the Victorian Law Reform Commission (VLRC), all of which recommended legislation with minor variations.

The issues paper asked several questions:

- Do advances in technology mean that there should be extra protection for individuals' privacy?
- Is there a need for a statutory cause of action for serious invasion of privacy in Australia?
- Should a cause of action be created by statute or through the development of common law?
- How can privacy protection be balanced with free speech and the public's right to know?
- Should the public interest in free speech be built in to the requirements for a cause of action or should it constitute a defence?
- Should any organisations or types of organisations (ie, the news media) be excluded from the ambit of the proposed cause of action?

The government called for submissions or comments by November 4, 2011.

The current state of Australian privacy law

There is no legislated right to privacy in Australia. There is, however, a framework of statutes and laws addressing particular acts and breaches of privacy outlawing phone tapping, misuse of communications services, and regulating the handling of personal information by government and corporations. Some breaches of privacy by the media are currently dealt with by co-regulatory codes of practice in television, radio and print, as well as the Media Alliance's Journalists' Code of Ethics. Under the Common law there has been no clear cause of action for invasion of privacy, until 2001 when the High Court in *ABC v Lenah Game Meats Pty Ltd* cleared the way for the emergence of a tort of privacy. However at the time, then Chief Justice Murray Gleeson warned of the lack of precision of the concept of privacy.

In an address to the Australian Legal Philosophy Students' Association in 2008, Justice Peter Applegarth SC, now with the Queensland Supreme Court, referred to the 2007 matter *Jane Doe v Australian Broadcasting Corporation* as a "simple but bold step" which held that a tort (a civil wrong) of invasion of privacy exists in the common law.

ABC Radio broadcast the identity of a rape victim in breach of a statutory prohibition and was held liable for a breach of statutory duty, for a breach of a duty of care the ABC was found to owe the plaintiff, and also for a breach of confidence.

In his address, "Is nothing private? Privacy and the need for legislative intervention"[54],

Justice Applegarth said that the development of a tort of privacy in Australia was likely to focus on two areas: intrusion on seclusion or solitude, and the public disclosure of private facts.

Both areas are significant for the news media. The first area was examined in *Grosse v Purvis (2003),* with the trial judge noting that there had hitherto been no case in Australia which expressly recognised the civil right of action for invasion of privacy and elucidated, using principles established in US jurisprudence, four categories of tort associated with the notion of privacy:

- Intrusion on the plaintiff's seclusion or solitude, or into his or her private affairs
- Public disclosure of embarrassing private facts about the plaintiff
- Publicity which places the plaintiff in a false light in the public eye
- Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

The judge developed a set of tests for invasion of privacy:

- A willed act by the defendant
- which intrudes upon the privacy or seclusion of the plaintiff,
- in a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities,
- and which causes the plaintiff detriment in the form of mental, psychological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act that he or she is lawfully entitled to do.

In *Doe v Australian Broadcasting Corporation (2007),* the ABC published in its news bulletins information that identified a victim of a sexual assault in breach of the Judicial Proceedings Reports Act 1958. But in addition, the judge held that the ABC was liable to the plaintiff in equity for breach of confidence, and in tort for invasion of privacy.

In the second area, public disclosure of private facts, the development of technology for unauthorised surveillance, the widespread use of cameras and recording equipment and the possibility of a new form of intrusion, "drone journalism" using surveillance technology developed by the US military[55], has created an enhanced danger of invasion of privacy.

In his speech, Justice Applegarth cited the case of Sonny Bill Williams, a rugby league player whose dalliance with a woman in a pub toilet was snapped on a mobile phone. The mobile phone image found its way "on to the internet and into the pages of the Murdoch press".

Victoria and the ACT have introduced Bill of Rights laws which explicitly recognise a right to privacy and reputation, both stating that everyone has the right:

a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily, and
b) not to have his or her reputation unlawfully attacked.

In both cases this legislation has built in a right to freedom of expression. The issues paper does not consider that these pieces of legislation provide adequate privacy protection in the same way as a cause of action would.

Arguments in favour of a cause of action

Gaps in existing protections

As the various law reform commission reports point out, there are presently gaps in the existing patchwork of privacy protections offered in cases of trespass, defamation and breach of confidence. In its submission to the ALRC report, the Office of the Privacy Commissioner stated that:

> *"… a dedicated privacy based cause of action could serve to complement the already existing legislative based protections afforded to individuals and address some gaps that exist both in the common law and legislation."*[56]

Prevention

It is also felt that the existence of a statutory solution for invasion of privacy would have a useful role in preventing privacy breaches. Professor John Burrows, in his address to a 2008 Privacy Forum in Wellington said that the possibility of civil action: "can create a climate of restraint which ensures that serious breaches do not happen in the first place."[57]

International treaty obligations and human rights

Another argument in favour of introducing a statutory cause of action is that it would satisfy Australia's obligation as a signatory to the International Covenant on Civil and Political Rights (ICCPR). Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence.

Arguments against the introduction of a cause of action

Existing laws are adequate and new legislation would cause unnecessary complexity

There are already in existence extensive privacy laws providing data protection and protecting against the use of listening devices and surveillance, and actions available at common law. Some commentators believe that litigants will seek to distinguish the available causes of action arising from the same circumstances in order to maximise the remedies available to them. The practical effect of this could be that parties would be tied up in hearings attempting to determine whether the action is available, having regard to the availability of other perceived causes of action.

An insufficient recognition of free speech

It would be wrong to introduce a cause of action for invasion of privacy without first establishing an accompanying protection for freedom of speech. In looking at privacy, Australia is invariably compared with other countries that already have some kind of protection of free speech, either constitutionally or through a Bill of Rights. Australia currently has no such protection. As News Limited wrote in its submission to the review:

> *The introduction of a cause of action without appropriate recognition of those rights will have an unacceptably adverse effect on the right to freedom of speech and related interests. This is clearly undesirable.*[58]

Alliance submission

In November 2011, as part of the development of the Media Alliance's submission to the review, a policy forum was held with respected Freedom of Information blogger Peter Timmins as moderator. The forum came up with a set of principles to inform and guide any formulation, if there is to be any formulation at law or in legislation, of a right to take action in cases of serious invasion of privacy.

These principles are as follows:

- A statutory or common law right to privacy must be balanced by a concomitant right to freedom of expression or speech. The form in which this concomitant right should take should be as strong as or equal to the form a right to privacy takes.
- This could take the form of a common law right, a stand-alone statutory right in *sui generis* legislation or within a privacy statute, a Bill of Rights or a constitutional amendment. It must not be mere passing reference, must be similarly enshrined and a fundamental competing interest.
- A right to privacy must be restricted to natural persons and not be extended to corporations, companies, other commercial entities, churches or other legal fictions.
- The test for a breach of privacy must be one that is set high. A serious invasion of privacy should include:
  i) the circumstances should be such that there was a reasonable expectation of privacy
  ii) that the invasion of the expected privacy be highly offensive to a person of ordinary sensibilities.
- Ameliorating circumstances should include:
  i) the interest of the public in allowing and protecting freedom of expression
  ii) the interest of the public to be informed about matters of public concern
  iii) qualified privilege with respect to the fair reporting in the course of the normal expectations of a journalist's work defined by the Code of Ethics
  iv) absolute privilege
  v) the information was already in the public domain, ie, any right to privacy should be contained to the first publication of material
  vi) rebuttal of an untruth.
- An alternative disputes resolution process should be available, administered by an independent body in order to increase access to the general public and avoid expensive court action.
- Effective protections for victims of aggressive paparazzi and stalking.

Australian journalists are bound by clause 13 of the Journalists' Code of Ethics which reads: *"Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude."* The Media Alliance believes that any statutory cause of action for serious invasion of privacy must be first balanced with a concomitant right to freedom of speech. It must only be available to natural persons, not corporations, and must set a very high bar for any complaint.

PRIVACY ON PARADE

A legislated right to privacy needs to be balanced with a right to free expression, or celebrity gold diggers will come out to play warns **Mark Pearson**

The right to privacy is a relatively modern legal concept. Until the late 19th century, gentlemen used the strictly codified practice of the duel to settle their disputes over embarrassing exposés of their private lives.

The first celebrity to convert his personal affront into a legal suit was the author of *The Three Musketeers,* Alexandre Dumas père, who in 1867 sued a photographer who had attempted to register copyright of some steamy images of Dumas with the Paris Hilton of the day – 32-year-old actress, Adah Isaacs Menken.

The court held his property rights hadn't been infringed but that Dumas did have a right to privacy and that the photographer had infringed it.

Across the Atlantic in 1890, the top US jurist Samuel D. Warren teamed with future Supreme Court Justice Louis Brandeis to write the seminal *Harvard Law Review* article "The right to privacy" after a newspaper printed the guest list of a party held at the Warren family mansion in Boston.

Warren and Brandeis wrote: "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."

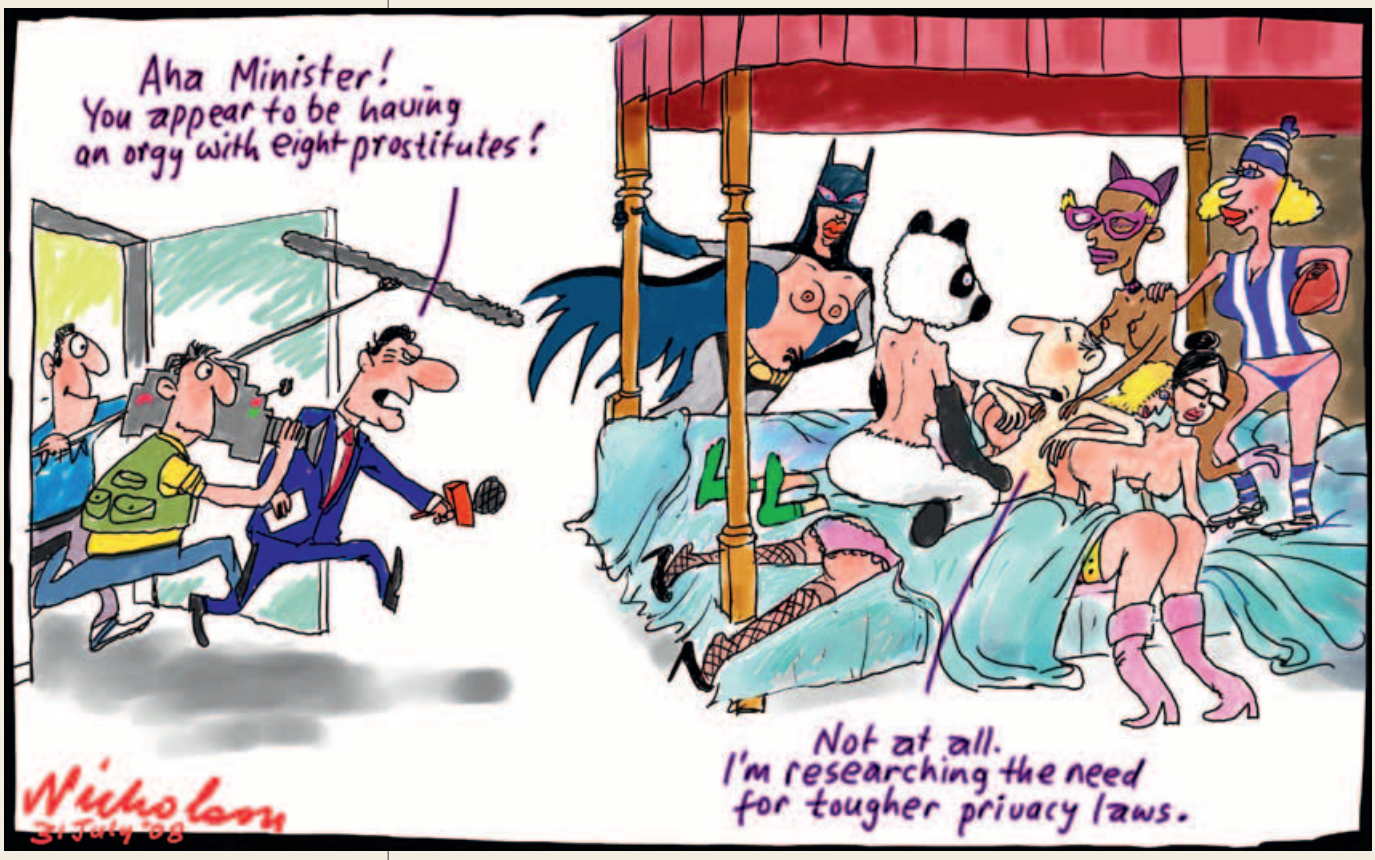
Celebrities, lawyers, paparazzi and the gossip media were there at the birth of the right to privacy – and the same players occupy that terrain today.

While both privacy and free expression are recognised in many national constitutions and in international human rights treaties, Australia is rare among Western democracies in that it has no constitutional or Bill of Rights protection for either.

That distinguishes us from the United States, United Kingdom, Canada and New Zealand which all have constitutional or rights charter requirements that proposed laws must be considered for their potential impact on free expression.

It is one of the main reasons for the complex array of legislation, court decisions and industry codes of practice limiting Australian journalists' intrusion into the affairs of their fellow citizens.

Laws covering defamation, trespass, data protection, surveillance, confidentiality, discrimination, consumer law, stalking, court publishing restrictions, suppression orders



Cartoon by Peter Nicholson

and copyright all have a privacy dimension. The *Privacy Act* controls the collection and storage of private information by corporations and government.

There are very few situations where media intrusion into privacy isn't covered by either one of these laws or the journalists' code of ethics.

Proposals to replace the self-regulated ethics systems with a statutory news media regulator would add yet another layer to the regulation of privacy intrusions.

The crux of the proposed "statutory cause of action for a serious invasion of privacy" is whether a citizen should have the right to sue over a privacy breach and receive an award of damages or an injunction to stop publication.

Over the ditch, Kiwi journalists now have to navigate a judge-made right to privacy that, interestingly, developed from a celebrity suit in which the plaintiffs lost the case.

Mike and Marie Hosking were New Zealand media personalities who had adopted twins and later separated. They asked for their privacy, but a magazine photographer snapped the mother walking the twins in their stroller in a public place. They sued, claiming breach of privacy.

The NZ Court of Appeal invented a new action for breach of privacy, but held that it did not apply in this particular case. The Kiwi privacy invasion test requires "the existence of facts in respect of which there is a reasonable expectation of privacy" and that "publicity given to those private facts that would be considered highly offensive to an objective reasonable person".

But this is set against the backdrop of the New Zealand *Bill of Rights Act* which protects free expression.

Australia's High Court famously left the door open for a possible privacy tort in the ABC v. Lenah Game Meats case in 2001, after animal liberationists had secretly filmed the slaughter of possums in an abattoir in Tasmania and the ABC wanted to broadcast the footage – the fruits of the trespass.

It is hard to quarantine this latest push by the federal government from the *News of the World* scandal in the UK and the Greens-championed Finkelstein inquiry into media regulation.

The government had effectively sat on the Australian Law Reform Commission's proposal for the statutory cause of action for three years before it released its *Issues Paper: A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* last September, in the wake of the phone hacking revelations from London.

Few journalists or their media organisations object to the notion of their fellow citizens' embarrassing private information being kept secret. However, it is in the midst of a breaking story like that involving collar bomb extortion victim Madeleine Pulver, a celebrity scoop like the Sonny Bill Williams toilet tryst images or the case of the fake Pauline Hanson photos that genuine "public interest" gives way to audience gratification and the resulting boost to circulation, ratings or page views.

Free expression is already greatly diminished by this mire of privacy-related laws and regulations without adding a new statutory cause of action for privacy.

But if this latest proposal is advanced further, journalists should insist on:

- a free expression and public interest defence reinforced in the strongest possible terms
- removal of the existing laws it would duplicate
- a strong "offer of amends" defence like that now operating in defamation law and alternative dispute resolution provisions to deter celebrity gold diggers.

Short of a Bill of Rights enshrining the freedom of the press and free expression, these demands amount to the minimum the news media deserve in a Western democracy.

Mark Pearson is professor of journalism at Bond University and Australian correspondent for Reporters Without Borders. He blogs from journlaw.com and tweets from @journlaw

JOURNALISTS ACCESS TO DETENTION CENTRES

Background

In July 2011, the Media Alliance was contacted by a number of members concerned at the difficulty of gaining access to detention centres on the Australian mainland to report on the condition and treatment of asylum seekers, a matter of considerable public interest.

As the ABC's Leigh Sales reported on The Drum website[59], the conditions surrounding asylum seekers in Australia were less transparent even than Guantanamo Bay, where the US military holds what it considers to be some of its most dangerous terrorism suspects.

"How is it possible that the US military can grant media visits to a prison holding the so-called 'worst of the worst' terrorists on the planet, with all the national security and legal minefields that entails, while the Australian government denies access to detention centres holding, in many cases, legitimate asylum seekers who will eventually qualify as refugees?" she asked.

In reply, the Department of Immigration and Citizenship (DIAC) cited privacy issues for the detainees and staff, possible legal complications because claims for refuge are pending, and safety risks for the asylum seekers' families back home if forces there identified the person in detention.

Alliance takes the lead

In a letter to the immigration minister dated July 12[60], Alliance federal secretary Christopher Warren said: "The operation of detention centres in Australia is a subject of considerable public interest, as is the condition and treatment of asylum seekers who are detained there. In the interests of transparency, journalists must be allowed access to these centres and must be given every assistance in compiling their reports."

The Alliance met with the immigration minister, Chris Bowen, and his advisers on August 19 to discuss consultation on a new "deed of agreement"[61] being drawn up by his department, which journalists would be required to sign as a condition of entry to detention centres.

Bowen agreed to widen the department's consultation on the draft deed to include the Alliance, on the basis of strict confidentiality. The Alliance made a detailed, line-by-line submission which criticised the deed as overly restrictive.[62]

DIAC subsequently made the deed public, having paid scant regard to the Alliance's concerns. Alliance federal secretary Christopher Warren criticised the decision to proceed with the policy in a press statement in which he called the deed "tantamount to censorship".[63]

"While the government says it wants to open up detention centres to public scrutiny, this policy will do the reverse," Warren said. "It will, instead, impose conditions on journalists that are tantamount to censorship – and that is unacceptable.

"I can't recall a situation in which Australian journalists have been required to hand over editorial control to an outside party.

"Conditions inside detention centres and the health and morale of detainees are subjects of enormous public interest. These restrictions will effectively prevent journalists from reporting these issues freely. We cannot let this policy stand."

Clear public interest

Following extensive consultation with colleagues in the Right to Know Coalition, the Alliance launched a public petition calling on DIAC to reconsider the restrictions it had imposed on journalists. Adelaide-based freelance journalist, Nigel Hopkins, who had won a Walkley Award for his reporting from Inverbrackie detention centre in South Australia, wrote an article in the March issue of *The Walkley Magazine* urging the government to find a "better way" to allow the public interest reporting of conditions inside detention centres without compromising the privacy or security of asylum seekers.[64]

In February 2012, the Alliance authored a letter to Minister Bowen, which was signed by the chief executives of 10 of Australia's largest media organisations, asking him to rethink the deed of agreement.[65]

"We appreciate that the aim of developing the deed was to allow more journalists into detention centres while protecting individual detainees' privacy and, at the same time, indemnifying the department against the threat of '*sur place*' lawsuits.

"However we consider the deed to be overly restrictive. It is, to our knowledge, unprecedented in the history of our news media, that journalists should be obliged to

Cartoon by Andrew Weldon

submit their photographs, video footage and tape recordings to a government official for scrutiny before publishing. It is certainly unprecedented for journalists to be required to seek approval from a government official for material to be published. This is unacceptable censorship."

It was subsequently revealed that DIAC's access policy had been partly modelled on US military rules governing journalists' access to Guantanamo Bay.[66]

An article in *The Age* newspaper said that Freedom of Information (FoI) searches had revealed that a submission to Minister Bowen, from DIAC's national communications manager, Sandi Logan, had justified the tight restrictions on media access as a way to safeguard the privacy of detainees, prevent publicity that could impact on refugee claims, and manage "risks that during any media visits detainee clients would use the media's presence as an opportunity to protest their continuing detention".

The Alliance believes that the Department of Immigration and Citizenship is sincere in its desire to allow greater access for journalists to detention centres. Certainly, more journalists have been allowed to visit detention centres since the introduction of the DIAC deed of agreement than had been before. However the deed is overly restrictive and hands effective editorial control to government officials. We urge Minister Bowen to rethink the deed in consultation with the Alliance and other media organisations.

THE DETENTION SPAN

The government has introduced restrictive new guidelines governing journalists' access to detention centres. Walkley Award winner **Nigel Hopkins** argues they are unnecessary

It is a little disconcerting for a journalist to find a story he's written being used by opposing parties to support their individual positions, but that's what's happened with my story about the Inverbrackie Detention Facility, which appeared in the winter 2011 edition of the *Adelaide Hills Magazine*.

More unusually, perhaps, both sides are right.

The issue is the way in which the Department of Immigration and Citizenship (DIAC) seeks to control media access to Australia's detention centres. Its tool is a 19-page Deed of Agreement that imposes a set of legal obligations on the media.

The story I wrote was not subject to any such agreement. Nor would there have been any penalties had I written a story that did not comply with DIAC's regard for the privacy of asylum seekers.

To that extent, it supports the Media Alliance's contention that the story was "a perfect example of the way in which a relationship of trust between journalist and the authorities is far preferable to the position of censorship that DIAC is now seeking to impose".

DIAC's national communications manager, Sandi Logan, agreed: "I want to thank you for keeping at us about your intent; your trust and word were key", he emailed after the Walkley Award presentation.

But Logan is also right when he argues that allowing the *Adelaide Hills Magazine* access to Inverbrackie shows DIAC's desire to open up access to the detention centres, albeit through a more formalised and extensive deed of agreement.

Let's go back to the beginning. I live in the Adelaide Hills, some 45km away from the Inverbrackie facility at Woodside. The Adelaide Hills is a fairly loose-limbed community but I'm part of it and I was dismayed, in fact shocked, by the response of some people when the relocation of asylum seekers to Inverbrackie was announced.

It would have been easy to portray them as red-necked racists, but more than anything they were fearful. They hadn't been consulted by DIAC or any other government agency and they'd been given very little information. It was a classic instance of a government "announce and defend" policy, with predictable public resistance.

Instead, I formed the view that they were ill-informed, unworldly – in that they had no idea about the nature of refugees or the circumstances that had led them to such a desperate situation – and most dismaying of all, that they were ungenerous. This was so unlike the response given to the displaced persons housed at Inverbrackie after World War II. Back then, the local community couldn't do enough to make them feel welcome.

I wanted to write a piece showing the human side of Inverbrackie and its refugee residents, and hopefully allay some of the community's fear, but to do that I had to go inside Inverbrackie. Unfortunately the government's position was that unauthorised media access was now rated as a "critical incident" alongside "the use of chemical and biological weapons".

Though that seemed laughable I decided I'd rather enter through the front door as a journalist than adopt some subterfuge as a humanitarian visitor. Instead of going to DIAC's public relations people I directly approached Steve Johnson, DIAC's regional manager of Detention Operations and deputy state director in South Australia, and explained what I wanted to do.

I did this because it was Johnson who had to deal with the mess – and it was Johnson who would most want community tensions eased.

That was on February 3, 2011. I told him I understood he'd have to pass my request on to DIAC's PR people, but I wanted him to do so with a recommendation that I be allowed access. "I think many of us would agree that an urgent goal in gaining community acceptance of the Inverbrackie refugees is that they are 'humanised' – not seen as queue jumpers or economic refugees, or even criminals, but (for the most part) as ordinary people who through extraordinary circumstances find themselves in this situation," I wrote.

I explained that the story would appear in the *Adelaide Hills Magazine*, which circulated directly to the community most concerned about Inverbrackie. I had absolute assurance from both the magazine's proprietor and editor that we would not sensationalise the story, and that we'd respect DIAC's concerns regarding privacy and non-identification of individuals.

The fact that I have on occasions worked in a government communications role, as well as in newspapers, probably helped me empathise with the very defensive bureaucratic response I encountered.

Having passed one deadline and still waiting on approval from DIAC, we decided on May 25 to press on with the story regardless, without Inverbrackie access. We conveyed this

Detention centre: The former army barracks-turned-detention centre at Inverbrackie in South Australia, October 2010
PHOTOGRAPH BY CALUM ROBERTSON, *NORTHERN TERRITORY NEWS*

decision to Johnson, who obviously passed it on to Canberra. The same day he responded that access had been approved, which was most likely at ministerial level.

As far as the story was concerned, I was happy for DIAC to see that portion of the text that resulted from the actual visit to Inverbrackie – about a third of the total article – so they could see I hadn't written a sensational piece that further demonised the detainees. They trusted me to do this – but I was not compelled to do so.

This wasn't what I'd consider common journalistic practice, but I could see that a very defensive bunker mentality existed in Canberra. It was not surprising, given the highly sensitive politics involved and the reasonable desire of any government bureaucrat not to embarrass his minister.

The other two thirds of my article contained considerable criticism of DIAC from the local community. DIAC seems to have worn this with good grace.

DIAC did not have permission to edit my text or change it in any way, other than to correct matters of fact. There was one minor correction to a job title, but no other changes were sought.

However DIAC did want to see the photographs before publication. The photographer had sought to take pictures that did not clearly identify any individuals, but the magazine had to argue the toss over one particularly poignant picture which showed a child's face over the shoulder of his father, who was holding him. It seemed impossible that this child's face could be used to identify his family, who may have been a year or more on the refugee road, but it ended up being pixelated.

Would DIAC's new Deed of Agreement have prevented our story from being written? Possibly not, though it might have imposed penalties or censure measures that we didn't have to face. Would I have signed the agreement? Probably, but had there been any attempt to censor the story we'd not have run it. Instead we'd have left a big hole in the magazine saying "censored" and run a separate story describing what we'd wanted to say but were now unable to do so.

In the current cautious, defensive and highly sensitive political environment I can see why DIAC feels it's necessary to have such a formalised and extensive Deed of Agreement. But it is unfortunate – and in many circumstances there is a better way.

Nigel Hopkins is a freelance feature writer based in the Adelaide Hills. His story on Inverbrackie won the 2011 Walkley for coverage of community and regional affairs

ANTI-TERROR AND NATIONAL SECURITY ARRANGEMENTS

Background

In November 2010, the then federal attorney-general, Robert McClelland, wrote to the Alliance, inter alia, to seek comments on the possible development of "mutually agreed arrangements relating to the publication of sensitive national security and law enforcement information".

The proposal was made following the controversial publication of an article in *The Australian* by award-winning journalist, Cameron Stewart, about Operation Neath, a counter-terrorism operation in Melbourne in August 2009 that resulted in the arrest of five people.

The affair remains subject to legal proceedings, so it is not possible to discuss the matter in detail here, but there had been an arrangement between *The Australian* and the Australian Federal Police (AFP) regarding the timing of publication of the article relating to the arrests.

McClelland wrote: "The media outlet acted responsibly in that matter by engaging with the relevant agencies over the publication of the story."

However he suggested that "to achieve greater clarity and facilitate more systematic arrangements in the future, I would like to explore the possibility of developing a more formal mutually agreed arrangement with the media on the handling of sensitive national security and law enforcement information."

Round table to discuss national security media arrangements

On April 14, 2011, McClelland convened a "round table" comprising representatives of major media organisations, including the Media Alliance, with representatives from the AFP, the attorney-general's department, ASIO, the New South Wales and Victorian police and the national security adviser, Duncan Lewis AO.

The aim was to discuss issues surrounding the publication of sensitive national security and law enforcement information arising from, but not exclusive to, Operation Neath. All sides agreed that while a repeat of the problems associated with Operation Neath would be undesirable, a formal "protocol" would risk having a chilling effect on free speech and would be undesirable for that reason.

In an atmosphere of mutual trust and respect, it was agreed that high-level contact and cooperation would be maintained between media organisations and law enforcement and national security agencies. Each side would provide contact details of a senior executive so that any information regarding national security or a major police operation can be checked to avoid the publication of ill-timed or erroneous information.

A series of over-arching principles was subsequently drawn up by the attorney-general's office.

Overarching principles:

- The overriding importance of preventing harm to the public and operational security and law enforcement personnel.
- The preservation of freedom of speech and editorial independence.
- The requirement for the protection of sensitive security and law enforcement information, including in order for security and law enforcement agencies to effectively conduct their operations.
- The inherent public interest in news relating to security matters.

Points to note:

- A media organisation that calls an agency with potentially sensitive information, seeking clarification or advice, does not wish for that agency to then brief every other media organisation on the basis of that information (in the interest of preserving the commercial value of being the sole media organisation privy to the information). That said, it also needs to be understood there may be circumstances where more than one organisation will be aware of the information, in which case care will need to be taken to record that fact while also maintaining confidentiality.
- There needs to be set parameters regarding access to the contact numbers and the circumstances under which they are used.
- The point of contact within agencies and media organisations must be someone who has been appropriately briefed to effectively deal with the issue at hand. The contact point

Bail denied: Omar Shere from the Somalia Australia Cultural Foundation leaves Melbourne Magistrates Court after a bail hearing for Somali men netted in a raid by Australian Federal Police, August 2009
PHOTOGRAPH BY JASON SOUTH, *THE AGE*

must be able to quickly contact the person with appropriate authority to make decisions, who can then properly engage with their agency/media organisation counterpart.
- The decisions made at the executive level must be communicated effectively to the operational level.
- Media organisations reserve the right to question the information provided by agencies.
- Law enforcement and security agencies will in some circumstances neither confirm nor deny information.
- If there is concern that these arrangements are not being implemented properly, the particular issue should be raised with the federal attorney-general's department.
- The arrangements apply to enquiries from professional journalists. Enquiries received by academics or other interested persons would be treated in accordance with agency policies.

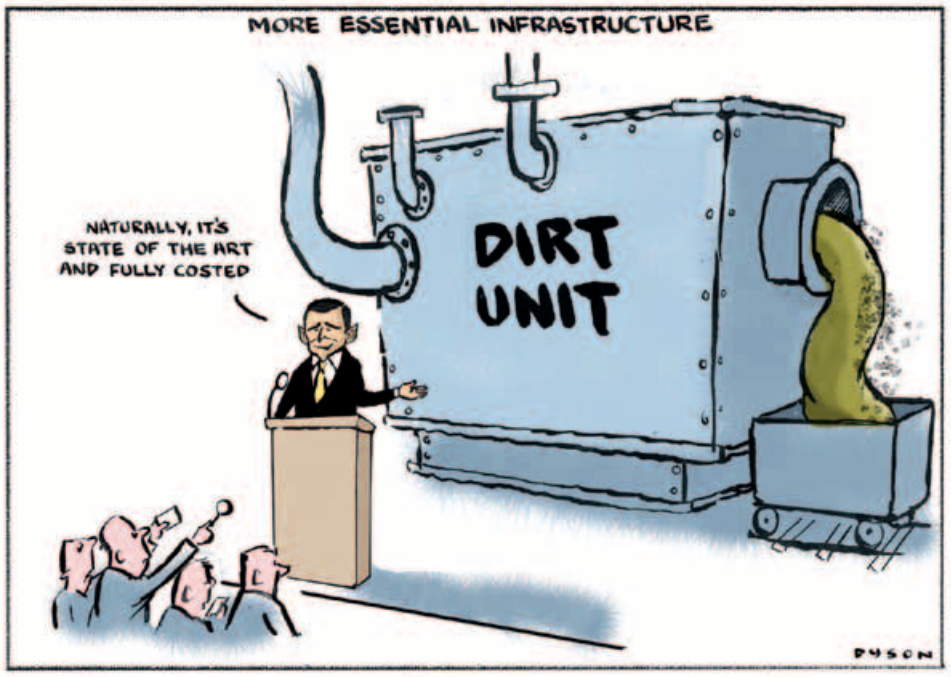
The Alliance congratulates Robert McClelland on a satisfactory outcome on this issue. A more formal "protocol" ran the risk of becoming policy, whereas the agreement outlined above, set in an atmosphere of mutual trust and respect between media and security agencies, will ensure that the public's right to know important information about serious crime and national security is adequately balanced against the obvious priorities of law enforcement and intelligence operations.

SPIN

Everyone sees what you appear to be, few experience what you really are.
Niccolo Machiavelli, *The Prince*

Spin is intensifying. Its significance is growing… People are complaining about something that they once ignored or took for granted because it now dominates our public culture.
Lindsay Tanner, *Sideshow*

It's now a very good day to get out anything we want to bury. Councillors' expenses?
Jo Moore, email to UK department of transport press office, September 11, 2001



Cartoon by Andrew Dyson

The symbiotic relationship between public relations professionals and journalists is nothing particularly new. A 1926 study of the *New York Times* found that on one day, 147 of 256 stories in the paper had been suggested or supplied by PR professionals, while the origin of a further 26 was uncertain.[67]

Australian journalists have also long reported a close relationship with PR professionals and other media managers and it was recently estimated that in Australia, PR professionals and media managers outnumber journalists by three to one.[68]

A joint Crikey-UTS study in 2010 found that at least 55 per cent of the stories in a range of Australian metropolitan and national papers had in some way originated as a suggestion or release from a public relations firm or media manager.[69]

At the time, Chris Mitchell, the editor-in-chief of *The Australian*, told Crikey: "It's pretty easy to march down to the boxes in Canberra and write what Rudd's media office put out rather than chase their own ideas… The tendency to send journalists in the field to basic reporting has been lost in newsrooms."

We have no reason to believe that this has changed. Indeed, there was a recent row between the Labor and Liberal camps in Western Australia, both of whom accused the other of spending too much money on employing media managers.[70]

The WA opposition leader Eric Ripper claimed the Barnett government was employing 458 people in media and communications roles (Or as he put it, as "spin doctors"). The government hit back by claiming Ripper was a hypocrite because of the number of communications professionals Labor had employed when it was in power.

Ray Finkelstein QC, in his report from the Independent Media Inquiry, highlighted the public perception of journalists as being prey to the wiles of spin doctors, as found in a 2004 report which stated that while journalists themselves thought they were adept at "sifting out truth from propaganda or 'public relations spin'", the public actually thought they were not.[71]

Journalists are spinning it for themselves

But it is not only the power of the public relations professional that is threatening to get in the way of free speech. The rise and rise of what has become known as the "opinion cycle", which now dominates the news agenda and is often led by the journalists themselves, is drowning out the facts in favour of the juicy grab or headline.

Writing in *The Walkley Magazine* last year, Lachlan Harris, the former communications director for Kevin Rudd as prime minister, concluded that opinion, not fact, was now driving the news cycle and that every year the number of journalists shrinks and the number of commentators goes up.

"In the opinion cycle what is, or is not, an objectively determinable fact is no longer nearly as important as what accusations are being levelled at you," he wrote. "In the new opinion-based cycle the volume of the accusation, is much more important than the objective weight of any fact. Governments aren't held to account; they are restrained by accusation. The difference is subtle, but the consequences for the process of governing are huge. The capacity of any government, anywhere, to achieve major long-term reform in the opinion cycle remains uncertain."

In an era where any individual can effectively be a publisher, the real value of journalism will increasingly lie in uncovering facts rather than merely repackaging opinion. While it is undoubtedly cheaper to devote space in newspapers, broadcasts and online to opinion-based content (and stories prompted by press releases), it is the resource-heavy, "shoe-leather"-style reporting that produces the kind of public service journalism which upholds and supports democracy. News executives should remain mindful of this.

JOURNALISTS CAN PULL OUT OF THE SPIN CYCLE

It takes two to spin news: the PR and the journalist. But there is evidence that some media organisations are getting off the bus, writes **Matthew Knott**

Journalists love to bag spin doctors. Bewailing the growth of the PR industry is one of our favourite pastimes – rivaled only by breaking news and gossiping about our fellow hacks. The incredible proliferation of spin, we tell ourselves, is a threat to journalism and to democracy.

We're right – but let's not wallow in self-righteous despair. We in the media are key players in the spin cycle, not passive, powerless observers of it. At our best, we disrupt spin; at our worst we encourage it.

As former finance minister Lindsay Tanner argues in his book *Sideshow* (Penguin, $32.95), politicians and other figures of public interest have always engaged in exaggeration, obfuscation and distraction. But something troubling, and significant, is happening in contemporary Australia (indeed, around the developed world).

"Spin is intensifying," he writes. "Whereas once it reflected occasional embellishments and evasions, it now lies at the heart of the political process. People are complaining about something that they once ignored or took for granted because it now dominates our public culture."

The media, Tanner argues, must cop some of the blame for this trend – and he's right.

Spin flourishes when we serve up shallow 'he said, she said' journalism. When we repackage press releases as news. When we fail to fact-check our sources' claims. When we hound and harass people for no public benefit.

"If there was no market demand for this work it wouldn't exist," veteran crisis management consultant Anthony McClellan told me recently. "We exist because the media is ferocious, often unfair and sometimes unethical. Our job is to stand between the client and the 50 journos at the gate–metaphorically speaking but sometimes not."

Hold on a minute, I hear my journalistic comrades protest. Newsrooms are understaffed and under-resourced. We're being asked to do more with less in double the time. Meanwhile, the ranks of PR pros are swelling. This makes us more vulnerable to spin.

It's all true.

But no matter how much we moan and groan, PR professionals are likely to outnumber journalists for the foreseeable future. Crisis management experts will continue to be called in by government and big business when bad news breaks. Wishing them away won't do us any good. The key is to recognise, and embrace, our power to push back.

And here's the good news: there are some promising signs that this is happening.

The head honchos at Brisbane's *Courier-Mail* did something dramatic mid-way through the recent Queensland election campaign: they pulled their reporters off the election campaign buses and diverted them to other stories. Journalists have long whinged about being herded from one stage-managed event to another, handed a press release and told that the leaders will only answer questions on the policy they're announcing. This year, *The Courier-Mail* said enough is enough.

While it may not be desirable for every news organisation to ditch the campaign buses, the *Courier-Mail*'s decision was a reminder that the media doesn't have to swallow spin just because the pollies want us to.

Meanwhile, during the US Republican primaries, *The New York Times* has been running a fact-check sidebar to assess the validity of the candidates' statements. The paper's public editor, Arthur Brisbane, sparked debate in January by asking if reporters should go further and integrate such disclaimers into their stories. For example, when Mitt Romney claimed that Barack Obama had made speeches "apologising for America", should reporters have noted that the president has never used the word 'apologise' in a speech about US policy or history?

Brisbane's idea of journalists becoming "truth vigilantes" provoked much mirth in the Twittersphere, but I think his underlying point is a compelling one. Journalists, quite rightly, cherish the notions of balance and objectivity. But we should still call bullshit when politicians, business people and interest groups indulge in distortion and obfuscation.

In fact, the best reporters already do.

Fairfax economic commentator Ross Gittins has recently done a fine job demolishing dodgy economic modelling reports that are used by groups with vested interests to influence public debate. Dogged reporting by *The Australian*'s Hedley Thomas, questioning the official narrative, forced the Queensland flood inquiry back into session in March. Our best broadcast interviewers refuse to allow politicians to parrot party talking points by pointing out when they are refusing to directly answer questions.

As these examples show, cutting through spin requires experience and leadership. Dealing with the PR industry should be a crucial element of modern-day journalism education – both in universities and professional training programs. In my otherwise excellent journalism degree, which I completed just over a year ago, I learnt a lot about defamation law but little about how to interact with spinners and media advisers.

How do you use a press release effectively? How do you get in touch with decision makers, not just spokespeople? What are the tricks of the trade used by those in the PR game? These are the type of questions up-and-coming journalists need help answering.

Not because PR people are the enemy. Indeed, they often help journalists by suggesting story ideas and putting us in contact with busy decision makers.

But their mission is – and always should be – different to ours. When the media allows spin to thrive, it's the public that suffers. Bring on the age of the truth vigilante.

Matthew Knott is a journalist at The Power Index. *He recently wrote a series of profiles on Australia's most influential spinners and advisers*

DEFAMATION

By **Joseph Fernandez**

Cartoon by Rod Emmerson

Background

Seven years ago a discredited defamation law artifice – the refusal in some jurisdictions to accept truth alone as a defence – was dumped in the move toward national uniform law. That artifice, the *public interest/public benefit* element, was unashamedly a privacy protection device. Now one Australian lawyer grouping wants it restored because of "numerous problems" and one especially – "privacy has been compromised".

This call is among the raft of submissions[72] before the New South Wales attorney-general under the ongoing statutory review of the State's *Defamation Act*. The review can have national ramifications because under the Inter-Governmental Agreement, which promotes uniform defamation law, the Standing Committee of Law and Justice will consider any proposed NSW amendment. A closer look under the surface of the country's "uniform defamation law" (or, rather, "substantially uniform" law) reveals that, although the last reform is largely achieving its objectives and was a dramatic improvement over the status quo, a number of areas need attention.

The NSW Act required a five-year review to determine whether the Act was meeting its policy objectives. A review report was to be tabled in each House of Parliament within 12 months after the end of the five-year period. The review was due for completion by October 26 last year. Given the potential impact of the NSW review on the prevailing Uniform Defamation Acts (UDA) regime in the country, other States and the Territories are watching closely.

Sixteen submissions were made, including one by Australia's Right to Know coalition, a grouping of major media organisations, and whose reform proposals featured in the last *Press Freedom Report*.This report will look at other reform submissions, including those that came after the last report was published. An overview of the reform submissions suggests that while there is general approval of the UDA many aspects require reform.

As the nation's peak legal profession body, the Law Council of Australia observed, however, it is "very important that any amendments to the Act only be undertaken as part of uniform amendments to the national scheme laws." The council, in taking a "national perspective" in its submission, said it would be "a matter of the greatest regret if the achievement of uniformity were to be undone by unilateral changes" in individual Australian jurisdictions. Some of the reform proposals are considered below.

The truth defence and the *public interest*

One UDA bulwark was the introduction of the *truth alone* defence nationwide. That meant abandoning the "public interest" or "public benefit" requirement in four jurisdictions where the truth was not a complete defence. That requirement in NSW, ACT, Queensland and Tasmania severely impaired defendants and was also widely viewed as a de facto privacy protection device. As the Law Council noted, it was "[p]erhaps the biggest stumbling block" to national uniform law then. Not surprisingly, the NSW Bar's call to reinstate that hurdle has drawn a stiff response from the Law Council. In its submission the Council noted the call "with considerable alarm" and said such a move would be "a gravely retrograde step".

The Council said that, aside from undermining national uniformity, the old requirement distorts the law of defamation and is uncertain in scope and application. In its view, in some cases the requirement also outlaws the speaking of the truth not because what is said undermines the plaintiff's deserved reputation but because it infringes the plaintiff's privacy. The Council added that privacy and defamation are two distinct spheres of discourse.

The contextual truth defence

This defence is essentially aimed at giving defendants an escape route by allowing them to defend an action by pleading the imputations *not sued upon* so as to prevent an undeserving plaintiff from succeeding. According to the Law Council the contextual truth defence in section 26 is not achieving its intended objective. One reason is the section is poorly drafted.

The other is a line of court cases that makes it impossible for defendants to plead and justify imputations that have a common sting with the imputations the plaintiff complained about, but are broader than the plaintiff's imputations. The council wants this discrepancy addressed.

FreeTV, in its submission, noted that the section 26 defence placed a limit on the defendant's ability to use the defence. It said the courts have applied the defence inconsistently. It said one court denied the plaintiff's application to plead back the defendant's contextual imputations to prevent a significant injustice to the defendant (*Ahmed v Nationwide News Pty Ltd* [2010] NSWDC 268) while another allowed the plaintiff to do so (*Creighton v Nationwide News Pty Ltd* (No 2) [2010] NSWDC 192). FreeTV said it was "urgent" that section 26 be amended to address errors Simpson J noted in *Kermode v Fairfax Media Publications Pty Ltd* [2010] NSWSC 852.

Fair comment/honest opinion

The "fair comment" defence is based on long-established authority recognising the average punter's right to speak freely on a matter of public interest. This defence is somewhat reflected in the UDA's "honest opinion" defence in section 31. In the Law Council's opinion the section 31 defence is more liberal than its common law counterpart.

One reason is it does not require the opinion to be objectively fair. A second is the material on which an opinion can be based includes material published on occasions of qualified privilege. A third is the publisher is not required to state or indicate the facts upon which an opinion is based. And finally there are distinct defences for employers and principals who publish the opinions of their employees and agents, and for publishers of comments by third-party commentators.

The Council said, however, two aspects of the defence need clarification. One arises from the approach taken by the Victorian Court of Appeal in *Herald & Weekly Times Pty Ltd v Buckley*. In that case the court held that section 31 should be interpreted as if there were a requirement for the facts underpinning the opinion to be stated or indicated by the publisher or otherwise be known to recipients – contrary to the UDA's liberalising approach. So, the fair comment defence would not protect an opinion that "John Smith is the worst player in the national football league" if the relevant facts were not provided or if those facts were not already widely known.

The Council wanted the section clarified so that the facts upon which an opinion is based need not be stated or indicated in the publication, or be otherwise known to recipients. It also wanted the section to protect not just opinions but also the same range of comments protected by the common law defence of fair comment identified in *Clarke v Norton* [1910] VLR 494, that is, anything which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation.

The Council also said "it appears that journalists are being sued more often in their personal capacity" under the UDA than they were under the previous regime as plaintiffs avoided the risk that employers would have a defence under section 31(2). Under that section it is a defence to prove that the matter was an expression of opinion of the defendant's employee or agent. The Council added that because media organisations are vicariously liable for the acts of their employees and agents acting in the course of duty, this phenomenon significantly reduces the effectiveness of the section 31(2) defence.

Juries

Some aspects of the role of juries in the UDA attracted reform suggestions. One concerned the availability or use of juries. FreeTV Australia[75] was concerned about a case in which the District Court overruled the parties' agreement for a jury trial (*Senator Fierravanti-Wells v Channel Seven Sydney Pty Ltd* [2010] NSWDC 143). FreeTV said parties should be allowed to decide how a matter should be heard, with the court only making a contrary order in response to a party's request, so as to preserve the invaluable jury role in deciding on defamatory imputations and that section 21 be amended accordingly.

Two members of the Bench in their submissions, however, voiced reservations about juries in defamation trials. The Chief Judge at Common Law of the NSW Supreme Court Peter McClellan questioned the wisdom of the increased jury role in defamation trials noting that NSW had abolished jury trials in most civil claims as they were seen as "inefficient, costly and unnecessary". He said defamation trials using juries are "likely to be three times [longer] than if conducted as a judge alone trial".

The Chief Judge of the NSW District Court Reg Blanch noted that in cases involving minor damages the cost of a jury trial is "out of all proportion to the damages awarded" and that the courts should have the right to reject jury trials when the interests of justice require it.

The Law Council noted that section 22 requires judges to determine the amount of damages to be awarded, even in jury trials. It said that as judges are not privy to the reasoning of juries, there is a risk that judges would make disproportionately low awards where the jury considers the publication to be seriously defamatory and vice versa.

Cap on damages

One key UDA feature was the "cap" imposed on damages for non-economic loss to end million dollar windfalls. With indexation the current cap is $324,000. Litigation tricks, however, have re-opened the prospect of plaintiff lotteries.

According to the Law Council while the cap in section 35 has largely achieved its intended purpose two aspects need clarification. One is a need to amend section 23 to consolidate multiple proceedings by the same plaintiff where it involves the same matter, irrespective of whether different publishers or different communication media published it.

The other point needing clarification concerns the maximum amount of damages so that it is not computed by tallying up each cause of action or publication. In 2011, Sydney-based liquidator, Andrew Wily, issued seven separate defamation proceedings in relation to a number of articles in the *Sydney Morning Herald* and *The Age* and associated websites.

FreeTV called for a stop to "multiple actions against different defendants" involving the same defamatory matter except with the court's leave. It also wanted the cap to be based on circumstances at the time of publication rather than at the time of judicial determination as the latter situation exposes the defendant to higher damages awards caused by delays in disposing of a case. It said delays could result in "manipulation or gaming of the proceedings."

Communications via the Internet

The Communications Alliance, Australia's primary telecommunications industry body, said "the question of when an online intermediary will be treated as publisher of defamatory content is unsettled" and that this unreasonably burdened publishers and potential plaintiffs. It said that merely indexing defamatory matter or facilitating its dissemination should not amount to publication of the defamatory matter.

The Alliance called for a "safe harbour" so that an online intermediary who merely facilitates dissemination should not be deemed as a publisher of that matter regardless of whether that intermediary is on notice of the allegedly defamatory matter. It also wanted matter to be treated as not defamatory unless "it has caused or is likely to cause substantial harm" to the plaintiff's reputation, as has been proposed in the UK Draft Defamation Bill.

Conclusion

While the Law Council view is that the UDA is "substantially achieving" its objectives the Chief Judge at Common Law in NSW, Justice Peter McClellan thinks otherwise. He said the *Defamation Act 2005* certainly does nothing to dispel views concerning the rigidities and complexity of court adjudication, the length of time it takes and the expense to government and the parties. Justice McClellan said he has "little doubt that the path we have gone down was not the correct one – either from the plaintiff or defendant's viewpoint." He said generally the financial cost of failure would be a greater burden for a plaintiff than a defendant and that it would dissuade many potential plaintiffs from starting proceedings or going to trial.

More recently Ray Finkelstein QC made a similar observation in his report on the media inquiry that he conducted: "A successful plaintiff whose case runs to judgment will often incur costs of $500,000 or more. Only around 50 per cent can be recovered from the defendant."

In the UK a House of Lords report in February 2012 observed that the country's libel laws "can, on occasion, have a discouraging effect on responsible investigative journalism" and called for it to be examined.

Close on the heels of that observation the UK Supreme Court unanimously breathed new life into protection for investigative journalism in *Flood v Times Newspapers Limited* [2012][76] UKSC 11. In that case the defendant newspaper was found not liable in defamation for publishing allegations about police corruption even though the policeman concerned was cleared of any wrongdoing. The court found that although the article was damaging to the plaintiff, it was balanced, those implicated were given the opportunity to comment, and their denials were recorded and that the newspaper's judgment "merits respect".

The UK media views that decision as giving some comfort in what are otherwise gloomy times for journalists amid the Leveson inquiry proceedings following the phone-hacking scandal.

The Media Alliance thanks Associate Professor Joseph Fernandez, head of the journalism department at Curtin University.

SUPPRESSION ORDERS AND ACCESS TO COURT INFORMATION

"A primary objective of the administration of justice is to safeguard the public interest in open justice – [the] principle of open justice one of the most fundamental aspects of the system of justice in Australia – the entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public…

…whether the making of an order is necessary to prevent prejudice to the proper administration of justice – meaning of the word "necessary" – necessary is a strong word – orders under the Act should only be made in exceptional circumstances – necessary does not mean convenient, reasonable or sensible…

Catchwords under Court Suppression and Non-Publication Orders Act 2010 in appeal against non-publication orders, Rinehart v Welker [2011]

"The principle of open justice is deeply entrenched in our law. It rests upon a legitimate concern that, if the operations of the courts are not on public view as far as possible, the administration of justice may be corrupted. A court is 'open' when, at the least, members of the public have a right of admission. From this it may be thought ordinarily to follow that the media, in their various forms, are also entitled to communicate 'to the whole public what the public has a right to hear and see'."[73]

Victorian Court of Appeal said in *Re Applications by Chief Commissioner of Police* [2004] quoted in Rinehart v Welker [2011]

Introduction

The judgment by Chief Justice Tom Bathurst and Justice Ruth McColl in the NSW Court of Appeal, lifting suppression orders granted in *Rinehart v Welker,* has been hailed as a return to the principle of open justice after a year in which new model legislation introduced in New South Wales appeared to be a threat to the public's right to know (and the media's ability to report) about legal proceedings.

In the matter under review, mining magnate Gina Rinehart had sought to suppress details of an application by three of her four children to have her removed as head of the family trust. The decision to lift the suppression orders was subject to an appeal which ended up, after months of argument, being refused by Chief Justice Robert French and Justice Bill Gummow of the High Court.

Addisons Lawyers' media partner, Justine Munsie, who acted for ABC, Fairfax Media and News Limited in their appeal against the suppression orders, said: "I always thought that the media had the correct view that the suppression orders should never have been made, but in a case where there was simply appeal upon appeal, and application upon application, I did worry… It involved a huge amount of time and money to fight the fight to allow the stories to be told."[74]

Background

"It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Lord Hewart CJ from *Rex v Sussex Justices; Ex parte McCarthy*, quoted by then NSW Chief Justice Jim Spigelman in his keynote address to 31st Australian Legal Convention, Canberra, October 1999

Journalism – and the ability of journalists to report freely from court proceedings – is fundamental to the process of open justice. But the principle has been under threat in recent years with the growing use of suppression and non-publication orders in Australia.

Research by Australia's Right to Know Coalition has found that a total of 1077 suppression orders were granted in Australia in 2011, 644 of them in Victoria.

To make matters worse, the way suppression and non-publication orders are made and the public notified differs from state to state – Tasmania and South Australia have no formal notification process, meaning that it is impossible to accurately report the number of orders granted in those states.

These inconsistencies have made it difficult for court reporters to know with any real

Silenced: Derryn Hinch after being sentenced to five months' home imprisonment for breaching a suppression order that prohibited the naming of two sex offenders, July 2011
PHOTOGRAPH BY REBECCA HALLAS, *THE AGE*

certainty what information is subject to a non-publication order, especially in the era of digital media where reports that might previously have been published only in a particular region can now be accessed around the country.

To try to remedy these inconsistencies, reaffirm the principle of open justice and make it easier for the media to properly report legal proceedings, the Standing Committee of Attorneys-General (now the Standing Committee on Law and Justice) developed "model" legislation and has been investigating the development of a national register of suppression orders.

Court Suppression Orders and Access to Justice legislation

The NSW Court Suppression and Non-Publication Orders Act [2011] which was the first introduction of the model legislation developed by SCAG has come in for a great deal of criticism, especially section 8(1) which reads:

(1) A court may make a suppression order or non-publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a state or territory in relation to national or international security

(c) the order is necessary to protect the safety of any person

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

The introduction of the NSW Act has seen an explosion in the making of suppression orders in that state. In the six months since its introduction, there has been an increase in orders from 54 in the prior six months to 114.

The Right to Know Coalition complained that: "it is clear that the introduction of the Act has been seen by members of the judiciary as a licence to make orders rather than them being exceptional in nature, with there being a 100 per cent increase in making of orders in a six-month period."[75]

The key problem was seen as clause sub-section (e), which introduced a "public interest" basis on which to issue a non-publication order.

In November 2011, the then attorney-general, Robert McClelland, made a significant change to the model provisions when he introduced the Access to Justice (Federal Jurisdiction) Amendment Bill 2011.

The Bill omits sub-section 8(1)e with the intent that "the Bill therefore does not broaden the grounds on which suppression orders can be made from those that currently apply".[76]

"I am confident that these reforms will assist courts to appropriately craft suppression orders, so that they are only made when they are clearly justified, and in as narrow terms as

necessary to achieve their purpose, recognising the important role that open justice plays in upholding the rule of law," he said.

In its submission to the Senate Committee considering the Bill, the Right to Know Coalition said there were still significant problems that needed to be addressed: "The fundamental problem with suppression and non-publication orders in Australia is that there are too many unjustifiable and unnecessary orders which act as a gag on the media's ability to report on the justice system. This Bill does not address this problem."

Section 37AG, which specifies grounds for making a suppression order, must include a clause stating that there is "no alternative to the suppression or non-publication order".

However the Bill provides a raft of improvements over current legislation in force in federal and Victorian jurisdictions, as it provides clearer guidelines with respect to:

- The grounds on which suppression orders can be made;
- What information suppression orders can cover;
- How long such orders should last for (the bill requires the court to place a time limit on all orders);
- How broad the orders can be;
- What information the orders should contain (that is, how precise they need to be); and,
- Who can apply to have a suppression order made and who may be heard in opposition – in particular, the standing of the media to intervene is expressly acknowledged.

At a meeting of the Standing Committee on Law and Justice in November 2011, ministers noted that South Australia, Western Australia and Victoria would further consider the suppression orders model bill, including court discretion and mutual recognition of orders, and report back to the Standing Committee on Law and Justice (SCLJ, formerly the Standing Committee of Attorneys-General, SCAG).

A national register of suppression orders

Since 2008, SCAG (now the SCLJ) has been investigating the establishment of a national register of suppression orders in response to long-standing and widespread complaints that journalists are often unaware of what information is subject to non-publication orders. In 2009 SCAG released a proposal for a national register, canvassing two options: a publicly available register and a register with access restricted to authorised persons.

The Alliance believes that while there is merit – in the interests of open justice – in a publicly available register, the media and others whose jobs involve providing access to court information should have access to a register with full details of the information that has been suppressed, together with copies of the actual orders made and details of their scope and time limits.

Naming of deceased children

In February, the Right to Know Coalition, of which the Media Alliance is a member, made a submission to the NSW attorney-general's department regarding the prohibition on the naming of deceased children in criminal proceedings.

Section 15A(4)(b) of the Children (Criminal Proceedings) Act [1987] extends the prohibition on identification of children involved in criminal proceedings to children that are deceased. The child in this situation is usually the victim, and as unfortunately it's not uncommon for a relative of the child to be involved in the crime, the name of the accused is often suppressed as revealing their identity would reveal the identity of the deceased child.

The media is unable to publish full details once criminal proceedings have commenced. While the child and the accused may be identified during the police investigation, once a relative has been charged with an offence, for the duration of the trial and sentencing, the child and the accused cannot be named.

In March 2011, six-year-old Keisha Abrahams went missing from her home in Mt Druitt. Nine months later her mother and stepfather were charged with her murder. Prior to the charges being laid, the event received considerable media coverage, but from the time of the charges being laid until completion of the trial neither Keisha nor the accused could be identified.

While the Abrahams case is a recent example, unfortunately it's not an isolated incident. There have been a number of similar cases in NSW over past few years where the accused (and the victim) have not been identified from the time of charging until the completion of the trial. High-profile cases have been:

- Seven-year-old Shellay Ward who died malnourished and starved in 2007
- The grandchildren in Cowra, a boy aged seven and a girl aged five, who together with their grandmother were murdered by their grandfather in 2008
- Two-year-old Dean Shillingsworth, whose body was found in a suitcase in a duckpond in 2008.

A HEAVY HAND ON JUSTICE

The workings of the justice system should be open and transparent, so why all the suppression orders, ask **Andrea Petrie** and **Adrian Lowe**

There is a question that inspires fear in every court reporter: are there any suppression orders in this case? Finding the answer is often a lot more difficult than you expect and can become a reporter's nightmare.

Suppression orders are often the last thing that judges consider in a case, so they can sometimes be awkwardly worded or ill-considered. Previous orders made in other courts are frequently forgotten and in many cases judges may not even be aware of their existence.

Legal argument about whether an order should be granted tends to take place late in the day, creating all sorts of difficulties in terms of deadlines and obtaining legal representation.

This, along with cutbacks in newsroom budgets, means information that should not be kept from the public often is. It also means that journalists are occasionally forced to present legal submissions against senior and queen's counsels.

The nature of suppression and non-publication orders not only vary in each case, but also on the judicial officer making them. Some judges, with extensive experience in dealing with the media, will question counsel why such orders are necessary. But others will not hesitate in agreeing to make an order prohibiting publication of details in a case, even if it is unnecessary.

Take, for example, the case of a serial paedophile in Victoria. With 18 victims in 25 years, the man was eventually jailed for 26 years. Like all sexual assault cases in the state, the identity of the victims was protected under the Judicial Proceedings Reports Act.

Under this legislation, reporters cannot name or identify anything about a victim of a sexual offence — unless the victim consents. Despite this, in a completely superfluous exercise, the County Court judge hearing the case suppressed the names of the victims. When the prosecutor later pointed out the existence of the Act, the judge was surprised and admitted to having never been made aware of the legislation.

Other judges are inexperienced in criminal matters because they spend most of their time in the civil jurisdiction, which can also create problems regarding media coverage of a court case.

In the trial of Travis Bowling, convicted of the assault of AFL legend Ron Barassi last year, a County Court judge suppressed pre-trial argument, in which it was revealed that Bowling had told a paramedic "Ron got me".

Bowling's defence to the charge was that it was a case of mistaken identity and that he had not even been involved in the melee.

Such orders were already unnecessary considering the laws of *sub judice* which stipulate that no details of the case can be reported close to or during the trial unless they are heard by the jury.

After Bowling had been convicted, media lawyers sought revocation of the order to report the pre-trial argument. But the judge, who thought an application had to be submitted for such an appearance, told the lawyer: "I won't be hearing from you today."

A potentially great story — or at least an important aspect of the overall story — ultimately remained untold because of the judge's ignorance. Within a few days, possibly after learning that such appearances were common, the suppression order was rescinded. But by then, it was no longer a story.

Judicial officers' ignorance can also lead to extraordinary orders being granted, as was the case involving a Victorian businessman accused of tax evasion. The judge made an interim order of suppression to allow him time to create arguments as to why a permanent non-publication order should be granted. This gave him enough time to complete a lucrative property deal, without the buyer being made aware of his financial woes.

While some suppression orders include an expiry date, others do not. Some stipulate that they remain valid until "further order" and, as such, remain in force indefinitely, long after the need to suppress the information has passed. This can create enormous problems for journalists who might mention the story, or aspects of it, years later and unwittingly breach the order.

By law, suppression orders should only be made when they are essential to prevent a threat to justice. Protecting someone's privacy, reputation or business should not be a factor as they are considered to be an unfortunate by-product of our open system of justice. But that does not stop judicial officers granting such orders, as seen in the recent NSW case which put radio broadcaster Derryn Hinch back in the headlines. The order prohibited publication of a sex offender's name because his lawyer successfully argued it might affect his business interests.

Case law has established the necessity test to obtain a non-publication order as being a difficult one. In the *Queen v Robert Scott Pomeroy (2002)*, Justice Bernard Teague of the Victorian Supreme Court ruled: "There can be no doubt that because of the word 'necessary' in Section 19 (of the Supreme Court Act), the bar must be very high. It will be reached only in wholly exceptional circumstances. The requirement of necessity is an integral part of other exceptions

to the open justice principle."

Last year, 1077 non-publication orders were granted across Australia. Of these, 644 – more than half –were issued in Victoria, 41 per cent which suppressed the identity of the accused person, a witness or victim. In 71 per cent of cases, evidence was suppressed.

In New South Wales for the same period, 241 orders were granted, 46 per cent relating to a person's identity, while 43 per cent related to evidence presented in the case. And in South Australia during 2011, 157 suppression orders were issued, 64 per cent relating to identity and 31 per cent, evidence.

For the entire year, just three orders were made in Western Australia and one in Queensland.

The transparent administration of justice is a fundamental principle of our legal system and while some orders for suppression and non-publication are necessary, they should not be made as routinely as they are.

It is encouraging to see a more vigilant attitude being demonstrated by the judiciary in testing the merits of such applications, in Victoria at least.

Andrea Petrie is The Age's *Supreme Court reporter. Adrian Lowe covered courts for* The Age *for three years until earlier this year.*

OPEN FOR JUSTICE

Many reporters believe they get a raw deal when asking for information from court officers, but **Peter Gregory** says Victorian courts usually do what they can to help. Is this a template for other states to follow?

The call would come around 5pm, about an hour after the court registry had closed: "Mate, could you wander over to the Supreme Court and pick up a writ for us? We've heard Harry Smith is suing Bloggs and Co, and we're pretty flat out here."

"Okay. Is this a really good story?"

"What do you mean?"

"It will cost us hundreds of dollars to open up the registry at this time of night. Are we prepared to spend the money?"

"That's okay. We'll get it in the morning."

From memory, *The Age* paid the hundreds of dollars to reopen the court registry only once in 21 years, to search the file of a civil case brought against the then governor-general Peter Hollingworth. The case was later dismissed.

Spend long enough as a court reporter, and others will assume all legal documents are permanently available to you, at any time of day. The truth is different. Some sources kindly leave writs on your desk, or point out cases to chase. But mostly, journalists work through different rules in different courts to get hold of information.

A clerk's attitude might make the difference between getting the document on Friday or Monday. I once benefited because a kind court officer agreed to walk up a flight of stairs to retrieve a file from a colleague's desk. The workmate had been asked to bring the paperwork down one floor so the journalist could search, but was too busy to respond.

Almost everyone in the legal system understands the concept of open justice, but interpretations vary.

The minimalist view says reporters are allowed in court, and they can take notes from special media seats. That's it. If you don't know what judges and lawyers are talking about because you can't get access to their affidavits, tough. Ask them some questions later and be grateful for what you have.

Mercifully, many don't share that view.

At a recent conference in Brisbane, courts media officers spoke about the ways their institutions could legitimately help journalists. Access will never be perfect because judges and lawyers worry that stories in the media will prejudice trials. But Victorian courts were seen as a leader in providing information to the media.

One of the Victorian Supreme Court's objectives stated in its media policy is to ensure full and accurate reporting of the court's activities. Criminal files are off-limits without judicial permission, and so are those marked "confidential". But journalists can access documents tendered and used in court proceedings. They can include transcripts of various parts of

criminal cases, court exhibits and sentencing remarks. In practice, these are usually provided quickly, with a judge's consent.

The rationale? The best way to encourage accurate reporting is to give journalists access to written judgments or sentences when they are delivered.

The Supreme Court registry has two officers who handle media inquiries for civil files and other paperwork. It costs money to print and copy materials from the files, but the media policy says fees can be waived "from time to time". All judgments, sentences and significant Supreme Court rulings are published on the court's website, most on the day of decision. The court also provides audio streaming of sentencing remarks.

The Victorian County Court hears serious criminal cases and civil claims. Its website names its communications manager as the first port of call for journalists' inquiries. One online form says reporters can seek access to documents and exhibits for criminal and appeals files for free. The files are available within three working days of an application being made (good luck with daily, or shorter, deadlines) and will be held for seven. Civil files can be searched for a fee through the court registry. Limited numbers of judgments and sentences are currently published on the court's website.

Magistrates Court reporters cannot search files, but they can obtain documents tendered in court, including charge sheets and hand-up briefs. The latter contain statements and other information on which the prosecution is relying in a criminal case. Reporters can fill in forms to let them use tape recorders in court and seek transcripts.

The Victorian Civil and Administrative Tribunal, which hears a variety of civil cases ranging from fence disputes to human rights complaints, wants all media inquiries directed through its publications and communications manager. It appears the officer advises journalists when archived files are available for inspection, tape recordings of hearings are ready, and decisions can be collected. The VCAT website says a tribunal officer will be present when journalists inspect files from human rights cases. Journalists are also warned that constant CCTV surveillance takes place in and around the file inspection room for document security and integrity. Feel trusted?

Smart journalists will develop professional relationships with communications staff, but avoid depending on them too much.

How many reporters would call to find out when a hearing is listed, when they could find the information on a court website? Or question a court's media representative about information in a judgment, when reading the document would yield the answer? Could someone reporting on a case have actually asked a public information officer to supply a contact, and provide some questions to ask them?

Information access is important to journalists so they can report in the public interest, but they should be more concerned about using it independently.

Peter Gregory lectures in journalism at Monash University. He spent 21 years reporting courts for The Age

COPYRIGHT

Attorney-general orders review of copyright law

Copyright issues continue to raise a threat to press freedom in that the breach of intellectual property rights undermines the business model on which the creation of news content is based.

On March 30, 2012, federal attorney-general Nicola Roxon announced the terms of reference for an inquiry into copyright exceptions in the digital environment and appointed University of Technology Sydney (UTS) Dean of Law, Professor Jill McKeough, as the commissioner in charge of the inquiry.

"The draft terms of reference reflect the fact that technology is constantly evolving and testing the boundaries of copyright law," Roxon said in a statement.[77]

"In our fast-changing, technologically driven world, it's important to ensure our copyright laws are keeping pace with change and able to respond to future challenges."

The draft terms of reference are as follows:

Having regard to:

- *The objective of copyright law to promote the production of original copyright materials*
- *The need for copyright law to provide an appropriate balance between the rights of creators and the rights, interests and expectations of users and the public so as to foster creativity and innovation and promote cultural development*
- *The importance of the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies*
- *Australia's international obligations, including any existing or proposed international obligations.*

I refer to the Australian Law Reform Commission (ALRC) for inquiry and report pursuant to subsection 20(1) of the Australian Law Reform Commission Act 1996 the matter of whether the exceptions in the Copyright Act 1968 are adequate and appropriate in the digital environment.

Amongst other things, the ALRC is to consider whether further exceptions should be provided to:

- *Facilitate legitimate use of copyright works to create and deliver new products and services of public benefit*
- *Allow legitimate non-commercial use of copyright works for uses on the internet such as social networking.*

Scope of reference

In undertaking this reference, the Commission should:

- *Take into account the impact of any proposed legislative solutions on other areas of law and their consistency with Australia's international obligations*
- *Take into account recommendations from related reviews, in particular the government's Convergence Review*
- *Not duplicate work being undertaken on: unauthorised distribution of copyright materials using peer to peer networks; the scope of the safe harbour scheme for ISPs; a review of exceptions in relation to technological protection measures; and increased access to copyright works for blind and visually impaired people.*

Recent decisions affecting copyright

SingTel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2) [1]

A recent decision in the Federal Court highlights the potential problems for rights holders caused by rapid technological development.

Optus has provided a service to its customers (Optus TV Now) where its mobile customers have access to an electronic program guide (EPG) that lists all the programs screening on the free-to-air channels. Users can schedule programs from the EPG to be recorded and stored on Optus's cloud. A user can then play back a recorded program as many times as they want within a 30-day period, after which the recording is automatically deleted.

The company then launched an action under section 202 of the Copyright Act[78], which allows a party to make pre-emptive action if it is threatened, unjustifiably, with an action or proceeding in respect of a copyright infringement.

Justice Steven Rares ruled that Optus users recording free-to-air broadcasts to its cloud were within section 111 of the Copyright Act, which allows for recording broadcasts for replaying at a more convenient time in a private and domestic context. The decision potentially extends the place where such broadcasts can be recorded and stored from devices based in the home (like VCRs and PVRs), to recordings stored in the cloud.

Broadcast rights owners argue that Optus's service – and other similar services such as iiNet's planned streaming service – undermine the value of exclusive rights to sports and other major events.[79]

The Copyright Council argues that "given the present climate in which the cloud is fast

becoming a vehicle for both content storage and delivery, it is important to get some guidance on these issues from the courts."

"It is relevant to bear in mind that this is just part of a copyright continuum. Technological changes have a particular effect on copyright law – from the early days of the photocopier to the home VCR, to MP3s and now cloud-based storage and broadcasting, technological developments will continue to ask questions of the Copyright Act.

"Since its inception, the Copyright Act has adapted to new technologies, be it through the courts or through legislative reform. The TV Now appeal and the forthcoming ALRC review indicate that copyright law is beginning its adaptation to this next phase of technologies, just like it has in the past and will continue to do so in the years to come."

The TV Now case has been appealed and a decision by the Full Federal Court will be forthcoming.

Roadshow Films Pty Ltd & Ors v iiNet Limited

The long-running dispute between a coalition of large film and television studios and internet service provider, iiNet Pty Ltd ended in April 2012 when the High Court handed down a landmark ruling in favour of iiNet.

The Court unanimously held that iiNet had no direct power to prevent its account holders from infringing copyright in the appellants' films.

At issue was the level of knowledge required before an ISP can be found liable for authorising copyright infringements carried out by account holders by priving internet acces. The Court held that the information contained in noticesproviede by the Australian Federation Against Copyright Theft (AFACT) did not provide iiNet with a sufficient basis to take action.[80]

The summary judgement read:

> *"The court observed that iiNet had no direct technical power to prevent its customers from using the BitTorrent system to infringe copyright in the appellants' films. Rather, the extent of iiNet's power to prevent its customers from infringing the appellants' copyright was limited to an indirect power to terminate its contractual relationship with its customers. Further, the court held that the information contained in the AFACT notices, as and when they were served, did not provide iiNet with a reasonable basis for sending warning notices to individual customers containing threats to suspend or terminate those customers' accounts."*[81]

The Copyright Council of Australia noted that while the case has been proceeding, a group of industry players has been working towards the establishment of a code of conduct. "It is hoped that the outcome of the High Court's decision will provide certainty for all concerned, and will provide a basis for the finalisation of the negotiations."

The breach of copyright threatens the basis on which many business models in the creative industries, including the news media, continue to function. Any review of copyright law in Australia must take this into account.

Copyright: David Mills

MEDIA OWNERSHIP

Media pluralism is a necessary condition for freedom of speech and contributes to the development of informed societies where different voices can be heard

Council of Europe, Commissioner for Human Rights

It's The Sun wot won it

The Sun newspaper, owned by Rupert Murdoch's News International, April 1992[82]

Background

Australia has one of the highest concentrations of media ownership in the world, particularly in the newspaper sector, where 98 per cent of the circulation is controlled by the top three companies.[83] Changes to media ownership laws have tended to increase this concentration – when the Howard government relaxed ownership regulations in 2006, a direct consequence was the merger between Fairfax and Rural Press which created the largest newspaper group in the country in terms of its market capitalisation of $9 billion.[84]

Worryingly, for those who argue that a plurality of voices is essential for a healthy democracy, the rapid development of digital media in Australia has not had a discernible effect – according to a 2011 paper by the Centre for Policy Development, all but one of the top 12 news sites in Australia are owned by major existing news outlets.

As existing news companies have expanded into the digital space, there is also a great deal of evidence of re-use of material across titles and platforms in each media group. And as revenues to news organisations have dropped there has been a significant loss of editorial staff, especially in the print sector.[85]

Current media ownership rules

Minimum number of voices (4/5 rule)

Governs newspapers, radio and television: there must be no less than five (5) independent and separately controlled media operators or groups in a metropolitan commercial radio licence area and four (4) in a regional area.

The "2 out of 3 rule"

Governs newspapers, radio and television: a person cannot control more than two (2) out of three (3) specified media platforms – commercial television, commercial radio or an associated newspaper – in a commercial radio licence area.[86]

Convergence review

On December 14, 2010, the minister for Broadband, Communications and the Digital Economy, Stephen Conroy, released draft terms of reference for a comprehensive review of Australia's communications and media regulation. The aim was to modernise existing frameworks to take into account the rapid technological change in the production and consumption of media.

A significant part of this review would be an examination of Australia's media ownership and diversity rules.

On September 19, 2011, the communications department released a suite of detailed discussion papers, including an examination of media diversity, competition and market structure. The paper questioned if Australia's media ownership regulations were effective, given the changing landscape of production, distribution and consumption.[87]

"The cross-media rules have limited scope and do not apply to subscription television, national newspapers, telecommunications companies or online media services. This narrow definition means the rules may not adequately reflect the degree of influence of all mediums or the diversity of voices (or lack thereof) available to consumers.

"The rules are also limited because they are associated with radio licence areas and may not be appropriate for emerging services that are often national in reach, or otherwise transcend licence area borders."

In December 2011, the Convergence Review panel released its interim report which recommended sweeping changes to ownership rules, which it judged were still "necessary to promote a diverse and pluralistic media environment"[88].

The interim report canvassed the following changes:

For local markets, it is recommended that a revised number of voices rule apply to changes in control involving Content Service Enterprises. This new rule will cover entities such as national newspapers, subscription television and online providers where they qualify as a Content Service Enterprise.

Content Service Enterprises may be granted an exemption by the regulator from this rule where there is public benefit in a specific market.

A public interest test for significant media transactions

Current media diversity rules focus only on media platforms associated with broadcasting licence areas. A public interest test should be developed to ensure that diversity considerations are taken into account where Content Service Enterprises with significant influence at a national level are involved in mergers or acquisitions.

Removal of regulation

The new rules provide a comprehensive framework for diversity regulation. With the introduction of these rules, it is recommended that the following regulation be removed:

- 75 per cent audience reach rule: which prevents control of commercial television licences whose combined licence area populations exceed 75 per cent of the population of Australia
- 2 out of 3 rule: which prevents control of any more than two out of:
  1) a commercial radio broadcasting licence
  2) a commercial television broadcasting licence
  3) a newspaper associated with the commercial radio broadcasting licence area
- 2 to a market rule: which prevents control of more than two commercial radio broadcasting licences in the same licence area
- 1 to a market rule: which prevents control of more than one commercial television licence in the same licence area.

Cartoon by David Rowe

Mogul with a megaphone

In his 1979 book, *Wake Up Australia*, mining magnate Lang Hancock wrote that the power of governments "could be broken by obtaining control of the media and then educating the public".[89] His daughter, Gina Rinehart, appears to have taken him at his word. Having been at the forefront of the successful campaign to wreck the Rudd government's plans for a mining rent resources tax, Rinehart has built up a powerful portfolio of media shareholdings. She has a significant voice in the affairs of Network Ten, where her 10 per cent of shares has given her a board seat, and a 13 per cent shareholding in Fairfax, where she covets a board seat.

It has been speculated that Rinehart's influence at Network Ten extended as far as securing the appointment of Andrew Bolt, an outspoken ideologue and climate change sceptic, to run his own talkshow.

There is a great deal of concern at the possibility of Rinehart extending her holding in Fairfax Media and seeking to have a greater influence in the day-to-day affairs of the company's newspapers.

Rinehart launched court action in March 2012 to try to force *The West Australian* newspaper and its senior journalist Steve Pennells to reveal confidential sources behind stories embarrassing to her.[90] This must call into question her commitment to free speech and the public's right to know.

The Alliance believes that diversity of media ownership and a plurality of voices is an essential guarantor of democracy in Australia. We are concerned that Australia has one of the highest concentrations of media ownership in the world, a situation that appears to be getting no better despite the rise of digital media. As part of its convergence review, the government must explore ways in which it can encourage the entry into the market of new and independent voices.

WHY IS OUR NEWS SO LIMITED?

In Australia, a huge amount of power lies in the hands of a small number of players. That's a dangerous situation, says **Paul Barry**

If you think media diversity doesn't matter, try this mental exercise. Imagine an Australia in which the only voices on the radio are Ray Hadley and Alan Jones, ranting about asylum seekers, Ju-Liar and the dangers of a Labor government.

Imagine an Australia where the only columnists in your daily newspaper –harping on about similar themes – are Andrew Bolt and Piers Akerman.

Or, if it scares you more, imagine an Australia where Phillip Adams, Robert Manne and Adele Horin are the only people whose opinions are published in the mainstream media.

We're not yet at that stage in Australia, but media ownership in this country is far more concentrated than anywhere else in the world, and a huge amount of power rests in the hands of one proprietor, Rupert Murdoch, who has shown over many years that he's happy to use it.

As an example, all but one of Murdoch's 175 papers around the world barracked for the invasion of Iraq in 2003, because Murdoch wanted them to. And when Hobart's *Mercury* dared to run anti-war editorials, it was told in no uncertain terms to get back into line.

According to the recent Finkelstein report on Australia's print media, 65 per cent of our national and metropolitan daily papers (by circulation) are now produced by Murdoch's News Limited, while the rest (except in Perth) are published by Fairfax.

Murdoch owns the two big tabloids in Sydney and Melbourne, *The Daily Telegraph* and *Herald Sun*, which are the biggest-selling dailies in Australia. In Brisbane, Adelaide, Hobart, Darwin and most of Queensland, News Limited has a monopoly of the daily market, and his papers are all that you will find on the newsstands.

In every capital city except Canberra, News also owns the biggest-selling (and often the only) Sunday paper. It also owns three of the top eight news websites in the country, in news.com.au, heraldsun.com.au, and telegraph.com.au; respectively, they reach monthly audiences of 2.4 million, 1.75 million and 1.25 million people, according to Nielsen Research.

And finally, News Limited has a major share in Australian Associated Press, which generates much of what gets into our print and broadcast media, and a major share in Sky News, which is beginning to rival the influence of free-to-air stations in its news and political coverage.

So is this a problem? Well, yes. In the United Kingdom, where Rupert is now battling the *News of the World* phone hacking scandal and allegations of corrupt payments to police and public officials by *The Sun*, politicians are complaining that 35 per cent of the national newspaper market gives Murdoch far too much power.

In Australia he has double that, if you include News' 140-odd suburban and regional titles. What's more, most of Murdoch's metropolitan and national dailies here syndicate top news stories, political coverage and columnists, which allows Australia's most powerful right-wing media warrior, Andrew Bolt, to preach to 3 million people a week, right around the nation.

But what makes Murdoch's power far more dangerous is that he uses it to champion his view of the world and advance his commercial interests. He's an interventionist (and often inspirational) proprietor, who takes an intense interest in what his papers say and how they say it. He also likes backing winners in politics – which is what makes him a confidant of prime ministers, presidents and premiers the world over – and he loves his newspapers to run campaigns. He is a player at the highest level. And he wants his papers to play the game, too.

Murdoch's Australian papers made and broke Gough Whitlam in the 1970s, backed Hawke and Keating in the 1980s (to be rewarded with media laws allowing Rupert to buy Melbourne's Herald & Weekly Times), and supported Howard almost to the end.

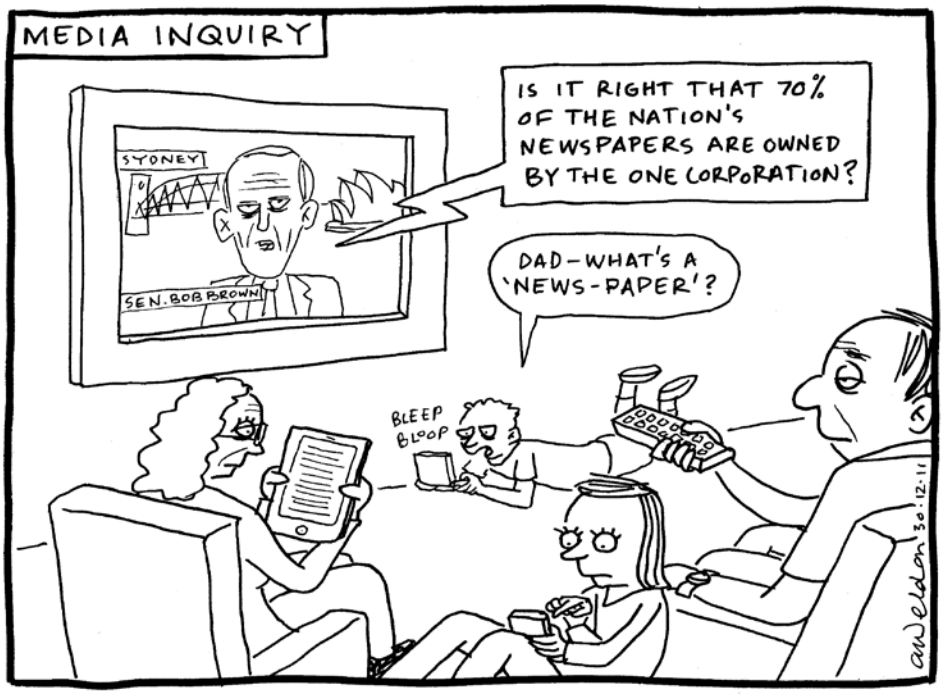
More recently and controversially, *The Australian* and the *Daily Telegraph* have been hammering the Labor government of Rudd and Gillard, with campaigns against the carbon tax, the mining tax, the Greens, the National Broadband Network and the supposedly scandalous waste of the BER's school-building program.

Most worryingly, these campaigns have often been waged through news stories rather than editorials. As Robert Manne put it in his *Quarterly Essay*, "Bad News", journalists at *The Australian* covering the NBN and BER "appear to begin with their editorially determined conclusion and then seek out evidence to support it".

On ABC *Media Watch* in September 2010, I examined what appeared to be a concerted attack by *The Australian* on the Greens, who were helping to keep Gillard in power. In the program, Malcolm Fraser and Bob Brown both accused the Murdoch press of systematic bias, prompting *The Australian*'s editor Chris Mitchell to respond: "We wear Senator Brown's criticism with pride. We believe he and his Green colleagues are hypocrites; that they are bad for the nation; and that they should be destroyed at the ballot box."

Is that something that newspapers should set out to do?

Since then, communications minister Stephen Conroy has accused two Murdoch



Cartoon by Andrew Weldon

newspapers of declaring a "Jihad" against the Gillard government and running a "campaign on regime change".

It's the abuse of media power that makes the high concentration of media ownership in Australia such a concern. But it fits a pattern in the Murdoch media worldwide, as David McKnight argues in his new book, *Rupert Murdoch: An investigation of political power* (Allen & Unwin, $32.99).

"If News owned 70 per cent but was a hands-off organisation with genuinely independent editors, so some papers were for the Iraq War, for example, and others against, then it wouldn't be such a problem," says McKnight. "But when you have a deeply ideological news organisation, which loves to campaign, it becomes toxic to the political process."

It would be fine if other media groups with similar power argued their corner in similar fashion. But they do not. None matches the aggression of the Murdoch papers, and none can command 70 per cent of the audience as he does.

The question is whether anything can now be done about it, or whether Australia just has to live with it. One answer might be to force News to sell some of its national or metropolitan newspapers, thereby reducing its audience reach to, say, 40 per cent. But it is extremely unlikely that any government will ever contemplate doing that.

Another way might be to allow a tougher media regulator to act as a watchdog against bias, as the Australian Communications and Media Authority can do in radio (and has recently done with Alan Jones at 2GB). But that's not likely to happen either. Nor would most journalists support it.

The third and perhaps the only way is for journalists – and their editors or employers – to raise their game and do what we all joined up for, which is to tell the truth to the public and to do our best to be fair.

Is that too naïve? I guess it is. But it's our job to strive for it.

Paul Barry is the editor of The Power Index

PUBLIC CONCERNS: ABC AND SBS

By **Quentin Dempster**

The appointment of James Spigelman AC QC, the former chief justice of the NSW Supreme Court, as the next chairman of the ABC comes at a crucial time for public broadcasting in Australia. He takes up his duties as the Gillard government completes its "convergence review", with a new media regulatory regime for what is called "the digital economy" expected to change the way content can be produced and exploited.

In media, convergence merges broadcasting, telecommunications and broadband/internet to smash national boundaries, empowering domestic audiences to browse and access text, audio and video content from any URL in the world. You can now beam your digital TV at your Wi-Fi modem and watch television from anywhere in the world at no additional cost – even downloading it to a hard drive for more convenient viewing at a later time.

While this is exciting for consumers, it's fraught with danger for Australian content producers. Remember, we would not have a local TV production industry without the 55 per cent local content quota imposed by legislation since the start of television in 1956. The current broadcast licence system imposes news and other content creation obligations on licensees.

Those financiers seeking to claw back the massive debt they took on buying commercial free-to-air TV licences in Australia are pushing the federal government towards what they call "regulatory parity". That could be taken as code for the same regulation for all platforms or simply for no regulation at all.

The interim convergence review recommended that the allocation of a broadcast licence "should no longer be a precondition for the provision of content". The principle underpinning this change is said to be "that individuals and enterprises should be able to communicate freely in a converged environment… If regulatory obligations are to be imposed, they should be imposed consistently, irrespective of the delivery platform."

What do they mean: IF?

Australians at work in the local content industries, and those imagining future careers in the sector, should now be praying to our political and regulatory masters that they do not stuff this up. There are always the ABC and SBS to save local content creation, you might argue, but that only works if they are adequately funded for the task.

Already the ABC has an internal problem sustaining current levels of multiplatform output with already inelastic operational funding. And there has been a dispute about a management strategy to outsource to the commercial TV production sector all drama, all documentary and most features programming. In Tasmania, South Australia and Western Australia, local ABC content creation – including local sports coverage – is being destroyed.

Public broadcasting supporters want a genuine mixed production model where the ABC retains a critical mass of the intellectual property and the archive, instead of surrendering all copyright to vested interests in return for a first-time showing with some repeats.

This model of commissioning content is commercialising ABC TV programming, with co-investors (state and federal screen and film financiers and lotteries funds, etc) only signing up to a program if they consider the business plan to be bankable.

That is why more and more ABC content seems to be mimicking commercial *Underbelly*-style formulaic fare. In one laughable episode of a recent *Underbelly* derivative, a fictionalised tattooed thug was lacerated to death by fake tropical stingers in a Cairns swimming pool. With one or two exceptions audiences are underwhelmed by the ABC's junk outsourced drama. Think *undertainment*.

The ABC has made itself totally reliant on this external funding model, and the ABC board has expressed no concern whatsoever about the de-skilling of the broadcaster and centralising production in Sydney and Melbourne. So much for our commitment to training, finding and developing fresh creative talent.

There needs to be an audit into this external funding model to see exactly to whom the work and the money has gone. There is no transparency in this contentious process and no formal report on the productivity and cost efficiency of the model published in the ABC's annual report to parliament. Why is this so?

Inside the ABC we are expecting substantial staff redundancies unless the broadcaster can persuade the government to increase operational base funding. But with both the federal treasurer, Wayne Swan, and his opposition counterpart, Joe Hockey, outpromising each other in rapid deficit reduction, the pressing needs of the public broadcasters are unlikely to get a look in.

SBS's current funding position is dire. SBS has been interrupting TV programs with incessant low-rent ads, but this strategy has not built the broadcaster into Australia's fourth commercial TV channel. SBS ad revenue 2010–11: $50 million. Audience loyalty: destroyed.

The federal government so far has failed to heed the pleas of SBS supporters to rescue SBS

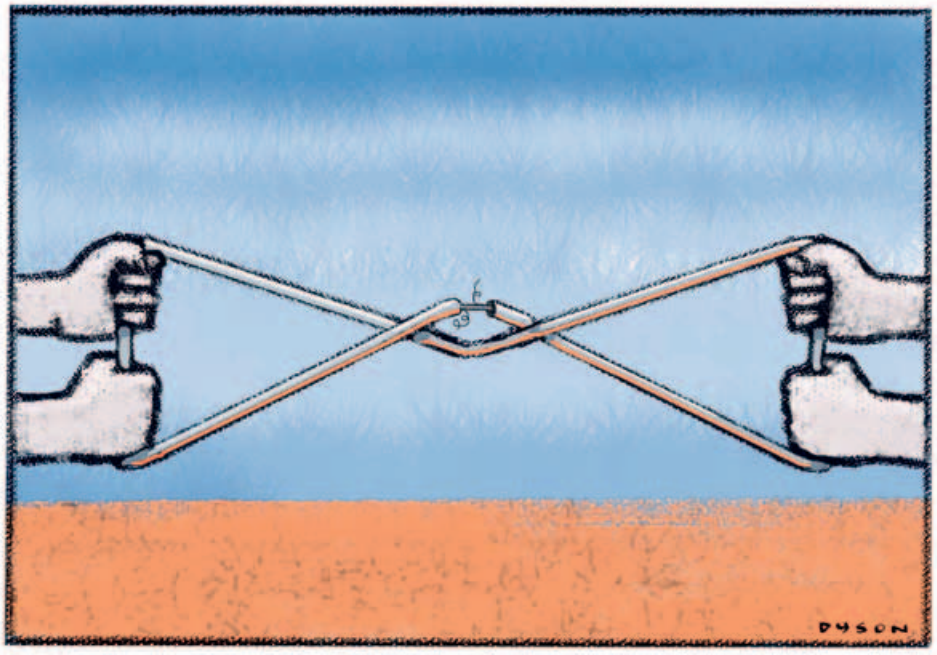


Illustration by Andrew Dyson

from this full-scale commerciality, although the government recently seemed moved to save the broadcaster from insolvency with some carry-on funding.

SBS' chairman, Joe Skrzynski, coincidentally a mate of ABC chairman Spigelman, has been sounding more multicultural as he tries to reaffirm what SBS is here to do: service the inclusive needs of Australia's forever expanding migrant populations.

At the ABC, News management has engaged consultants from the United Kingdom for an objective look at how the ABC gathers its news across platforms: multichannel domestic and international radio, television and online. Management has assured already pressured journalists operating under budget cuts (no overtime, no travel, freelance and casual work cut) that the consultants are not on a cost cutting time-and-motion exercise.

Sounds reassuring.

But there has been free use of the term "platform agnosticism" in their UK nomenclature. Presumably "platform agnosticism" means not believing in any one delivery platform. This may mean that ABC journalism is about to be restructured to meet the immediate and relentless demands of continuous news first and foremost. News programs like the state-based 7pm TV news on ABC 1 may soon be rendered just part of the 24/7 continuum, to be thrown into a continuous roster with the ABC's multichannel News 24 and network radio's NewsRadio and ABC Online.

The big problem is that to be credible as a taxpayer-funded news source in Australia, the ABC must maintain a strong journalistic presence across the regions of Australia. This is primarily achieved in radio, TV being capital city-based. Those of us hoping to enhance localism through TV digital multichannelling have watched cynically as TV and radio go more network, not less. It is undoubtedly cheaper. But what is the ABC for if it cannot exploit digital multichannelling to build services for local/regional audiences?

Public broadcasting supporters will have to be vigilant and belligerent on this point. The ABC already is Sydney-centric, and Sydney-based financial controllers do not seem to be able to see beyond their breath-fogged windows at Harris Street, Ultimo.

So here's a memo to ABC Chairman Jim Spigelman**:** Welcome to the ABC, Mr Chairman. Please ask the managing director to explain how outsourcing all TV production except news and current affairs is cost efficient when production facilities in which taxpayers have invested millions go idle; when half an hour of an outsourced TV satire proves to be more expensive than a high-end drama? Please ask the MD to explain how the relentless demands of multiplatform broadcasting can be sustained without a significant enhancement of operational funds? Please ask the MD to brief you on exactly how you, as chairman, can persuade a government in deficit to adequately fund the ABC given other deserving demands on the public purse.

And a memo to SBS chairman Joe Skrzynski**:** Please make a sincere public apology on behalf of the SBS board to your audiences that you made a monumental mistake in breaking into programs with advertising. Please formally ask the federal government to legislate to amend the *SBS Act* to prohibit advertising on the broadcaster, so that the commercial networks can recover the revenues that you, as a taxpayer-subsidised entity, are filching from them. Wear

a hair shirt as a symbol of your contrition and then go about rebuilding SBS' support base in the now-diverse and growing ethnic communities of Australia. These communities can be powerful allies for a refunding strategy to rebuild SBS.

The ABC and SBS are great national media institutions and content creators and deserve to be supported. SBS's multiple language services are vital to Australia's success as an inclusive multicultural society. Through the digital revolution, both the ABC and SBS have extended their engagement with and value to the tax-paying public. A re-investment above current levels of funding will see the ABC and SBS grow and enhance their creativity and journalism. A pause to that investment will only bring contraction, endless repeats and, in the case of SBS, more galling ads interrupting documentaries, films, news and current affairs programs.

Around 90 per cent of all households are now watching digital broadcasts, and analogue transmission will switch off next year. Accordingly, both the ABC and SBS have a strong case to incorporate their saved analogue transmission costs (2010–11 $95 million in the ABC's case) as part of their annual operational base funding appropriation. Therein lies survival for both broadcasters in the short term.

But the public broadcasters' future is by no means secure. While everyone in the Australian media industry hopes the digital revolution produces more opportunities for content creation, not less, public broadcasting supporters, like their commercial counterparts, will have to fight hard as policy and regulation are fundamentally rewritten.

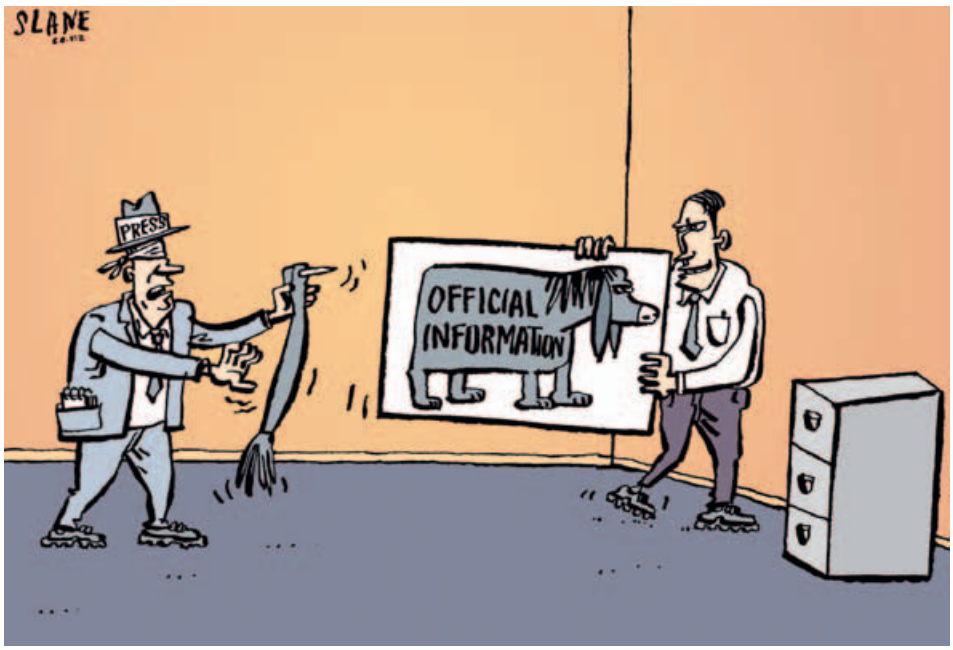
Let our content creation mantra be: THINK GLOBAL… CREATE LOCAL!

And, as a subheading: PLEASE DON'T STUFF THIS UP!

Quentin Dempster is an ABC journalist and ABC staff-elected director "in exile". He is a former chairman of the Walkley Advisory Board

THE YEAR IN NEW ZEALAND MEDIA LAW

By **Ursula Cheer**



Cartoon by Chris Slane

As in previous years, important media law developments have continued to reflect the increasing influence of technology and of the Bill of Rights on New Zealand society and its media in particular.

Regulation of new media

In late 2011, the Law Commission released an important issues paper – *The News Media Meets New Media*. This is part of a year-long investigation looking at "Rights, responsibilities and regulation in the digital age".

After extensive investigation, involving relevant interest groups and expertise from both old and new media, the Commission has suggested that a new form of regulation is needed to cover the spectrum and asks for feedback on its suggestion for a new regulatory body.

It envisages this body being independent of both government and media but with relevant industry and non-industry representatives, with the latter in the majority. The body would help develop codes of practice to guide new and old media, as appropriate. New media would be entitled to privileges and exemptions that old media benefit from if they meet certain criteria and, in return, would be regulated in the same way as old media under the new system.

The Commission seeks input as to whether submission to the power of the regulator should be voluntary, or whether publishers of news content as a business or with a wide audience should have to comply.

The other very interesting suggestion made in the paper is for the establishment of some kind of tribunal or commissioner with power to deal with complaints about harm caused by published speech. This would be a low-level access point which would allow individuals to avoid resorting to the expense, delay and exposure of using the court system. Submissions closed in mid-March 2012 and the Commission will publish a final report later in 2012.

Reporting issues

The very prominent murder trial and conviction of Clayton Weatherston resulted in an appeal based on statements that had been made in the media during the trial. The Court of Appeal acknowledged a "blaze of publicity", in which media had broadcast grisly evidence from Weatherston about how the killing occurred; the man had offered the evidence in an attempt to persuade the jury that he had committed manslaughter rather than murder when he killed his former girlfriend Sophie Elliott.

Weatherston complained specifically about a television interview by the deputy president of the Law Commission and the publication of two back-to-back articles in a national magazine, discussing the law of provocation as a defence to murder.

The trial judge had dealt with the wall-to-wall media coverage by warning and advising the jury, and giving them special direction about ignoring references in the media or anywhere else.

The Court of Appeal found as a fact there had been no unfairness, and expressed great confidence in the robustness and integrity of juries. It did not accept that the jury might have ignored the judge's directions. It also rejected an argument that a speech the trial judge had given at a conference in Australia indicated she thought the media coverage had turned the public against Weatherston.

In 2011, a High Court judge caused surprise when he issued a minute suggesting to media reporting a fraud case that he would withdraw in-court filming rights if they did not cease attempting to interview the accused outside the court. It is not certain the judge had such powers.

Other legal issues continue to trip up some media organisations. A journalist made the mistake of only considering suppression issues when publishing an article about a murder trial which did not identify the accused, but disclosed he was facing another trial for a serious wounding charge. The article was vetted by a number of experienced journalists, including the editor. Following publication, the trial was aborted.

APN, the publisher of the *Hawke's Bay Today*, pleaded guilty to a charge of contempt of court and was fined $26,000 and ordered to pay costs of $14,000. The court noted that while courts must jealously guard fair trial rights, penalties should not be set so high as to chill media court reporting. It was also noted that contempt of this kind does not arise very often in New Zealand, which was a credit to the media.

Suppression issues

The media continues to misreport suppression decisions. In late 2011, reports about a former All Black pleading guilty to assaulting a child suggested the individual only obtained suppression because of his public position. New Zealand had a new Criminal Procedure Act provision but, contrary to some media reports, it did not take effect until March 2012.

The new provision contains a section stating that the fact a defendant is well known, does not, of itself, mean publication of name will result in the extreme hardship required to justify suppression. Media bloggers such as Steven Price have continued to emphasise that the provision will not mean being a celebrity or public figure will never be a factor that can be taken into account. It will just be insufficient on its own.

The media also continues to report details of suppression in a selective manner, suggesting a concerted campaign against such orders. In response, judges now take care to explain why suppression is granted – for example, when the case involving the All Black came back to the court in February 2012 for sentencing, the judge emphasised that suppression was to protect the child, not the sportsman. Other factors were the less serious nature of the offence, the support by the police of the application for permanent suppression and a report by a psychologist confirming the close and loving relationship the child had with his father.

Just prior to the new criminal procedure law taking effect, the Supreme Court declined an appeal against rejection of suppression for a prominent lawyer facing disciplinary charges. The court emphasised that although the likely impact of publicity on a party seeking suppression is always taken into account by the courts, there is no presumptive entitlement to suppression for professional people of high public profile.

Privacy

The Law Commission released its final report for stage 4 of the Privacy Review, dealing with the Privacy Act. The report contains more than 100 recommendations for reform, many of them technical. As media are exempt from the Act while engaged in news-gathering activities, it's interesting to note a recommendation that the definition of "news media" be amended to exclude from that exemption media that are not subject to a code of ethics which deals expressly with privacy and includes a complaints procedure. The government is considering the report.

Prior to the November 2012 election, the NZ prime minister, John Key, referred the matter of an audio recording he said was illegally obtained to the police. Key and a political ally, ACT New Zealand's John Banks, had held a meeting to which media were invited in the week running up to election day. The two men enjoyed a cup of tea in a cafe but, prior to them having discussions, the media was asked to remove themselves to a position outside where they could film but not record the conversation. After the meeting, Key discovered a recording device had been left on the table. A cameraman, Bradley Ambrose, who owned the device, obtained a recording remotely from it, which he later released to a newspaper. Key accused him of deliberately recording the conversation.

The question arose of whether Ambrose had breached a Crimes Act provision prohibiting the intentional interception of a private communication using an interception device. The newspaper refused to release the recording on the basis that it could be breaching a further provision prohibiting disclosure of such communications.

Cartoon by Chris Slane

A media storm erupted, focused on the content of the tape. No mainstream media released it, although hints were reported once another political candidate, New Zealand First's Winston Peters, suggested in a campaign speech that the PM had made derogatory comments about the elderly on the tape. Although the PM's popularity did not diminish, Peters, whose political future had been in doubt, was returned to parliament.

Ambrose meanwhile sought a declaration that the discussion between Banks and Key was not a private one. The judge refused to adjudicate on the grounds that insufficient facts were before her and the police had not completed their investigation.

Following the election, Key continued to refuse to consent to the release of the tape or to stop the police investigation, even though the tape became available on the internet. The outcome of the police investigation is still awaited. Prominent media law bloggers linked to the tape, arguing that the meeting could never have been private, and any media publishing the tape would not be in breach of the criminal law either. The saga has been referred to variously as "Cuppagate" and "A storm in a teacup" – headline heaven!

Suicide

In December 2011, *Reporting Suicide: A resource for the media* was issued by the Media Freedom Committee and the Newspaper Publishers' Association. In New Zealand, if there is reasonable cause to believe that a death was self-inflicted, no person may without a coroner's authority make public before the completion of an inquiry "any particular relating to the manner in which the death occurred". This means that in a case of apparent suicide the media may not, even in a news item and regardless of the public interest of the matter, say *how* the person died unless they have the coroner's permission.

The legislation also provides that if a coroner has found a death to be self-inflicted, the name, address and occupation of the deceased may be reported and the fact that the coroner has found the death to be self-inflicted. The only grounds on which a coroner may authorise the making public of any other particulars of the death are that publication is unlikely to be detrimental to public safety, which is very broad.

As noted in the new guide, ambiguity remains, specifically as to a "particular of a death". Although it appears there is some inclination to more openness in the system, the chief coroner currently considers that the phrase covers the method, the cause of death and the circumstances leading up to the death.

The guide encourages journalists to establish close liaison with regional coroners to ensure that dialogue continues. Some coroners appear more open to release of information than others.

Broadcasting

Steven Price referred in the last summary to an appeal to the Broadcasting Standards Authority (BSA) about two programs on different channels which had been held to breach good taste and decency broadcasting standards. The High Court has now held that the complaint about the raunchiness of an episode of the TVNZ program *Hung* should not have been upheld and the BSA had not taken the context of the program into account sufficiently.

However, it did not uphold the appeal of TV3 in relation to a sleazy episode of the Australian soap, *Home and Away*. The High Court held the BSA had adequately taken into account the New Zealand Bill of Rights in its decision and that the finding had been within its powers.

The court clarified that the BSA is required to take a reasonably formalistic approach to the Bill of Rights and whether any decision by it that limits speech is justified, but this does not require chapter and verse.

In a later decision, the High Court held that the BSA was wrong to uphold a complaint about good taste and decency and children's interests arising from a documentary program about the notorious Aromoana massacre, a mass murder that took place in 1990. In the program, a police officer who had been involved was interviewed and reported verbatim words used by the murderer, which included the words "kill me, fucking kill me!".

The broadcast was on a Sunday at 7.30pm, and the Authority referred to its own research showing public disapproval of use of such words and to a previous decision where it had upheld a complaint about swearing.

The High Court again found that context had not been properly taken into account – here the words were used in a historical narrative. The court also appeared to find that the decision itself was a disproportionate limit on freedom of expression, under the New Zealand Bill of Rights Act.

In a later decision, the BSA itself gave significant prominence to freedom of expression and the Bill of Rights in not upholding a complaint about a documentary giving the film-maker's perspective on the life and death of Jesus Christ. The BSA found that the type of speech involved here was intellectual opinion on a historical and religious topic and was of high value in New Zealand's democratic, tolerant and largely secular society. Such speech would be difficult to restrict.

Accordingly, the topic was not held to be a controversial one requiring balance, but simply one that advanced an alternative viewpoint on historical events. The accuracy standard also did not apply because this was an authorial documentary based a personal opinion and analysis. Fairness was not required to apply to particular religions or faiths, nor did the program discriminate or denigrate Christians.

These decisions illustrate the increasing influence of the Bill of Rights on the broadcasting complaints jurisdiction, which will, I think, make successful good taste and decency complaints a rare thing, depending on the type of speech involved.

During the February 2012 earthquakes in Christchurch, Ken Ring, known as the "Moon Man", advanced a theory predicting other quakes at specific times, based on the position of the moon. TV3, in its current affairs program *Campbell Live*, interviewed Ring, with interviewer John Campbell broadcasting live from Christchurch, while Ring was in a studio elsewhere. Campbell repeatedly and vigorously interrupted Ring, who had difficulty in answering questions put to him and could not outline his own point of view.

The following day, Campbell apologised on air and to Ring personally. Ring was offered a further interview which he was not able to accept. In his apology, Campbell pointed out that his concern was the terror being caused to Christchurch residents by Ring's predictions.

The BSA upheld the complaint on the basis of fairness, as Ring had been treated aggressively and dismissively. However, a complaint of lack of balance for controversial issues was not successful because there had been plenty of balance during the period of interest. No penalty was imposed, in particular because of the fulsome apology.

Controversy at New Zealand on Air

New Zealand on Air, an independent state funding agency for broadcast program production, caused controversy when it announced in January 2012 that it had decided to seek legal advice on whether it had power to control the time of broadcast of program which it funded. The issue arose from a screening by TV3 of a controversial documentary about child poverty which was seen in some quarters as slanted against the governing National party, three days before the November 2011 election.

As funder, the Commission has no power to give directions about editorial content in any particular program. It does have a discretion to make funds available on such terms and conditions as it thinks fit, for broadcast or production of programs. However, use of this discretion to control time of broadcast when the Commission cannot control content would very likely be in breach of the New Zealand Bill of Rights and in breach of administrative law also.

It appeared the concern expressed by the Commission had been advanced by a member with links to the governing National party. Ultimately, the Commission did not pursue the matter and debates about political influence on supposedly independent bodies continued for some time.

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NEW MEDIA, NEW RULES

New media platforms have blurred the divide between print media and broadcasters, and the regulators are just catching up. **Brent Edwards** looks at what may come next for NZ media.

Regulation of the New Zealand news media is in for a shake-up following the Law Commission's report *The News Media Meets New Media*. Submissions on the report closed in March, and it's likely legislation will be developed to put into effect the Commission's final recommendations.

Some in the industry fear it will lead to some form of political control over the news media. Others accept that change is inevitable and that the current system for regulating the media cannot last.

At the moment the print media is regulated by the New Zealand Press Council, while broadcasters are regulated by a statutory body, the Broadcasting Standards Authority. This line between self-regulation and statutory regulation is no longer tenable. But it does not mean an extension of statutory regulation to all news media.

The Law Commission's report concentrates on the change we are all aware has blurred the traditional news media boundaries. Convergence means it is no longer possible to easily separate broadcast media from print media. Broadcasters now carry text on their websites just as print media websites have video and audio posted to their sites.

As the Commission points out, it is further complicated by the fact that many others – not just traditional news media organisations – also engage in journalism, or at least something similar.

The report asked the question: Who are the news media and how should they be regulated? It argues that new media has created a decentralised and democratised model for the generation and dissemination of news and current affairs. But it raises the question of what sort of media organisations should qualify for statutory privileges and exemptions which, at the moment, apply to news media. It also raises questions about the lack of parity between print and broadcasters and between traditional news media and new digital publishers.

The Commission's main recommendation is that a new regulator should be set up covering all news media. It would be set up by law, but be independent of both government and the news industry.

Appointments to the regulator would be made by an independent panel. It would include both public and media representatives, but with the public members making up the majority, as is the case with the Press Council.

Under the Commission's proposal, the regulator would be funded by members and subsidised by the state.

It is the idea of a statutory body and the fact it would be subsidised by the state that has some in the news industry worried. But most appear to accept the need for a new regulator and generally agree with the Commission's recommendation as long as the regulator is absolutely independent.

Other problems then arise. Who would be covered by the new regulator?

The Commission envisages membership could be wide, on the condition that all those covered by the regulator must be governed by codes of ethics. The codes do not need to be the same.

Bloggers, for example, could have their own code, different to the code that might govern traditional media.

The Commission recognises, though, that many bloggers might not want to be covered at all by a code of ethics or the regulator. They could continue to express themselves freely without being constrained by a code or regulation.

Another important question the Commission addresses is whether membership should be voluntary or compulsory. Under the first option, it would be voluntary for any news media organisation to be covered by the regulator. Those who chose not to, though, would not enjoy the legal privileges, such as exemptions from the *Privacy Act*, available to those organisations covered by the regulator.

Under the second option, all media that operate as a business or commercial entity and those providing a general news service to a wide public would have to be members of the new regulatory body. For other media organisations, such as bloggers, membership would be voluntary.

In its submission on the report, the union representing journalists in New Zealand, the EPMU, supports the proposal for a single media regulator. But the union says its support depends on the new regulator having, at the very least, the level of independence from the state as proposed by the Commission.

The union submission argues quite clearly that the new regulator cannot be some amended version of the Broadcasting Standards Authority. The purpose of any change must be to protect and strengthen press freedoms, not undermine or dilute them.

Under the proposal put forward by the Law Commission, print media would lose their current system of self-regulation. In practice, though, the new independent regulator should not impinge on the freedoms newspapers currently enjoy. And broadcasters, who currently do come under a statutory regime, would be in a much better position.

The union also argued that the involvement of working journalists – as distinct from proprietors, managers and editors – must be an essential part of the competence and independence sought by the Commission for the new regulator. This applies not only to representation on the regulatory body, but also to the appointment process.

While there is much to admire in the Commission's report, the debate is only just beginning. Journalists will have to keep a watchful eye to ensure the Commission's commitment to an independent regulator – one which strengthens press freedoms and enhances the status of the news media – is borne out by what finally becomes law.

Brent Edwards is the convener of the EPMU's Print and Media Council

NZ'S MEDIA UNDER ATTACK

Labour MP **David Parker** lists some worrying erosions of press freedom and independence in New Zealand

Media freedoms are absolutely essential to the long-term health of any democracy. New Zealand is no exception. But the freedom and independence of the fourth estate, considered to be the cornerstone of civil liberties, are being undermined in New Zealand.

Production orders and examination orders override the normal right to silence. The production order used by the Serious Fraud Office (SFO) against *The National Business Review* (*NBR*) demanded that *NBR* give up its records, including sources, from its inquiry into the 2010 collapse of South Canterbury Finance, one of New Zealand's largest finance companies.

That collapse cost hundreds of millions of taxpayer dollars, due to the government's retail deposit guarantee. The huge losses led to allegations of improper behaviour by directors of South Canterbury Finance. Serious questions were also raised about government and Treasury incompetence, as they had allowed the size of that risk to grow by hundreds of millions after the Crown guarantee was granted at the time of the GFC. The government had also rejected alternative ways of solving the problem. Handled differently, tens – if not hundreds of millions – may have been saved. *NBR* was right to inquire into what had gone wrong.

The SFO interference in the *NBR* proved beyond doubt that the SFO powers are excessive and undermine the important role of a free media. It issued its order against the *NBR* by internal administrative action, with no outside oversight. It did not have to get a warrant from a judge. Yet even the Security Intelligence Service has judicial oversight!

Refusal by the media to comply with an order from the SFO put the journalist and the media company automatically in breach of the law, and at risk of criminal prosecution and fines. In contrast, police investigating organised crime must get a warrant from a judge, which may be declined.

For the police, any disputed records are to be secured and held by the High Court. A High Court judge then decides if the protection of media freedom means the media records and sources should remain confidential. But what happens in the case of the SFO? The SFO simply keeps any records it takes. The fact that none of these protections exist for the SFO is plainly wrong.

The SFO's abuse of its powers in its dealings with the *NBR* clearly shows that its empowering legislation needs to be tightened by parliament. It is abhorrent that media sources are at risk, because this undermines the media's ability to do what society needs them to do – show up incompetence or corruption.

If the media are not free of undue intrusion by state agencies, they cannot do what the fourth estate is meant to do. If journalists' sources are at risk of exposure, they clam up and will not make the disclosures needed by the media to do its job.

Like all politicians I sometimes bridle at criticisms which are ill-founded, harsh, superficial or unfair. When that happens I do not like it, but I will always defend the right of the media to investigate and criticise without fear or favour, because my sensitivities are less important than the freedom of the media.

We must fiercely defend that right, because informing the public of bungling or corruption

– especially by politicians and government agencies – is essential to stop it happening again.

The refusal of John Key's National government to address this important issue as part of the *Search and Surveillance Bill* currently before parliament is driven by politics, not principle. The justice minister, Judith Collins, who was until recently the SFO minister, alleges that because Labour will not vote for the bill we, in Labour, are soft on crime.

This is but one of a number of worrying events concerning the relationship between the media and the National government:

The list is getting long and more serious:

- SFO use of production orders against *The National Business Review*.
- Calculated refusal of the Nationals to address SFO powers, and media protections, as part of a review of Search and Surveillance Bill, despite media calls for protection.
- The appointment of the National Party, Helensville electorate chairman, Stephen McElrea, to the board of the Broadcasting Commission (aka NZ on Air), and his subsequent attempt to stop the broadcast of a documentary on child poverty prior to the election, and his continuing involvement in funding decisions, such as funding for the documentary on the government's Whānau Ora program to assist deprived families. Helensville is the prime minister's own electorate and he is a close associate of McElrea.
- Use of the police (and the solicitor-general) by the prime minister over the "tea tapes" scandal after that media stunt went wrong during the recent election. A reporter had left behind a recording device after the media was asked to leave an Auckland cafe where John Key was meeting with ACT New Zealand candidate John Banks. The journalist then gave the recording of John Key's conversation to the Herald on Sunday newspaper. The police served warrants on three media outlets and repeatedly used the power of the state, including appearances by the solicitor-general. All to stop publication of what Key said to Banks at the contrived public event, which had been arranged to shoe-horn the conservative ACT party back into parliament.
- The Radio Live show hosted by the prime minister during the 2011 election campaign, with the pretence that it was not political, with taxpayer-paid staff of the prime minister's office drafting correspondence for Radio Live to use with the Electoral Commission.
- The Nationals' attempt to broadly overrule the Supreme Court decision in Hamed (Tuhoe case) concerning evidence gathered illegally in breach of the New Zealand Bill of Rights, rather than the more limited fix agreed by parliament after all other parties rebelled.
- TVNZ's alleged instruction to Fair Go journalists not to pursue items which their advertisers would not like.
- Deferred and preferential payment arrangement for $43 million of frequency fees for one media company (Mediaworks), with the involvement of Steven Joyce, minister for economic development and associate minister for finance.

Undermining of the liberty and independence of the media is very concerning. It strikes at the heart of holding government and democratic institutions to account.

It is no coincidence that countries where media freedoms or independence are undermined have more corruption, more human rights abuses, worse governments, and poorer economies. This in turn undermines public confidence in the very democratic institutions that we should all value and strive to protect.

David Parker is NZ Labour's finance spokesperson and a former attorney-general

PRESS FREEDOM IN THE ASIA-PACIFIC REGION

By **Kate Bice**

Radio journalist Farukh Lega Sultani interviews the spokesman of the International Security Assistance Force in Afghanistan, 2011
PHOTOGRAPH BY MATTHEW CHLOSTA, CREATIVE COMMONS

Afghanistan

An 18-month kidnap saga involving two French journalists and their three Afghan interpreters and assistants ended with their release in June 2011. An Afghan journalist was killed in an insurgent attack that caused mass casualties in the province of Uruzgan in August 2011 and an Iranian cameraman died while filming a pitched battle between NATO forces and Islamic militants in one of Kabul's most protected neighbourhoods. Journalism continues to grow in seriousness and commitment, though the environment of insecurity and the frequent interventions of political actors and the clergy continue to retard the momentum for positive changes.

Burma

Imprisoned journalists and writers were released under a general relaxation of media control. Nine journalists were released in 2011, including blogger and comedian Zarganara and writer and publisher of the *Myanmar Tribune*, Aung Kyaw San. Under a large-scale amnesty in January 2012, 17 more journalists and bloggers were released. They included 13 journalists working for the Burmese exile radio and television station Democratic Voice of Burma (DVB). According to DVB, nine of its reporters remained in prison. Many were subjected to torture in attempts to extract information about other members of the network of undercover video reporters. However, the government continued its close control of the media, tightening access to the internet and pressuring journalists to self-censor.

China

A journalist was killed and others were physically harassed, detained, tortured and silenced through various means in the People's Republic of China.

An investigative journalist, Li Xiang, was stabbed to death and his laptop stolen in Luoyang City, Henan Province, in September 2011, while he was pursuing a story about black market cooking oil, a high profile crime in the area. Local police classified the crime as a robbery, a claim contested by Li's colleagues.

In numerous cases, the authorities used state secrecy laws to harass journalists. Liu Xianbin, of Sichuan, was sentenced to 10 years' imprisonment for "inciting subversion of state power" on the basis of several articles he wrote for overseas media. Ji Xuguang was accused of revealing state secrets while investigating a civil servant who had kidnapped and imprisoned

women for sexual slavery in Luoyang City, Henan Province.

Since the calls for a "Chinese jasmine revolution" spread across China in February 2011, more than 100 people have been detained. Editor Ran Yufei was placed under house arrest. Writer Ye Du was detained, interrogated around the clock and forced to identify journalists he knew on a police list.

A new body, the State Internet Information Office of China, which was established to oversee online media. After it was formed, more than 6000 websites were deemed illegal and ordered to close.

The Central Propaganda Department reportedly issued a 10-point directive ordering that, among other things, reporting of disasters, accidents and extreme events is to be strictly controlled. News media were ordered to cease reporting of the high-speed train collision in Wenzhou in July. Reports of events involving crowds were restricted, including the 5.4 magnitude earthquake in Yunnan Province in March 2011, large-scale labour rights protests in Nanjing in May and protests following the death of an protestor in Inner Mongolia.

Li Xiang (top) of Luoyang City Television was killed in the early hours of September 19, 2011
PHOTOGRAPH COURTESY OF THE INTERNATIONAL FEDERATION OF JOURNALISTS

A number of investigative publications were shut down, and at least 16 journalists were recorded as being forced to leave their workplaces. Two prominent Beijing-based national newspapers were put under the control of the Propaganda Department of Beijing and restricted to reporting on local matters. Journalists believed the changes were in retaliation for the papers' critical reporting of the Wenzhou crash. A system was established for black-listing journalists who commit any one of nine breaches, including making a false report.

Hong Kong and Macau

In Hong Kong, at least five journalists were detained on various questionable grounds. During the visit of China's Vice Premier Li Keqiang in August, reporters, especially photographers and video camera operators, were blocked from recording the event. The government continued the much-criticised practice of holding closed-door briefings rather than media conferences to announce policies.

In Macau, the authorities moved under the Publishing Law and and Audio-Visual Broadcasting Law to establish a press council to receive public complaints. Journalists feared the press council would be answerable to the executive government and would be used to discredit journalists who were critical of government policies.

India

In India, an official notification placing the burden of liability on internet firms for all content posted on their platforms came in for wide criticism. A suit filed in the Delhi High Court by a private citizen sought to impose this form of "intermediary liability" on social media and blog sites. A number of journalists were murdered in 2011 and the early months of 2012, though a connection with the professional work of the victims is yet to be established in several of these cases.

Indonesia

The three men accused of murdering journalist Ridwan Salamun in 2010 were freed in March 2011 after murder charges were downgraded to "persecution". The Tual District Attorney in Maluku Islands province sought only eight-month jail sentences for the accused, who were then acquitted by the court. The three defendants were alleged to have murdered Ridwan while he was covering a clash between villagers. Police reportedly said the men had killed Ridwan in self-defence because he had been carrying a machete. The Press Council said Ridwan was unarmed.

In May, police allegedly attacked two journalists in Surabaya City. The reporters were covering a peaceful but banned protest by Falun Gong followers.

Pacific

The media in the Pacific Island countries operated generally freely, with the exception of Fiji, where both official censorship and self-censorship continued to limit independent reporting. The army's fourth-highest ranking military officer, Lieutenant-Colonel Ratu Tevita Mara, defected to Tonga in May after he was charged with inciting mutiny and making seditious

statements. Fiji-based journalists were among the first to know about the defection, but had to wait more than 24 hours until the military-backed regime "announced" the news at a press conference. Editors were told to stop reporting statements from Ratu Tevita as a matter of "national security".

Felix Chaudhary of *The Fiji Times* was detained for about an hour in February 2011 in an empty building guarded by soldiers along with at least four other civilians. He was told the leader of the 2006 coup, Commodore Frank Bainimarama, was angry about his stories on the sugar industry and the national airline Air Pacific and its subsidiary Pacific Sun, and that in future he should inform Bainimarama before publication of any stories on these two industries.

Pakistan

Pakistan's journalists secured an important breakthrough when a judicial commission was appointed to inquire into the May 2011 killing in Islamabad of Saleem Shahzad, a highly regarded investigative journalist and current affairs commentator. The inquiry report, submitted in January 2012, fails to identify the individuals or agencies responsible for the murder, but locates it within the circumstances of the "war on terror" being waged in Pakistan and its neighbourhood. As such, the inquiry concluded that any of the actors – the Pakistan state, al-Qaeda, the Taliban, or the foreign forces – could have had a role in the killing.

Ethical and regulatory issues remained the focus of public attention, with a reality show in Pakistan being taken off the air after provoking widespread outrage over intrusions into privacy. Cable operators in Pakistan cut off access to BBC World after it aired a documentary held to be overly critical of the Pakistan military and its agencies. Several websites were blocked on grounds that were not clearly specified: from national security compulsions, to religious sensitivities, to pornographic content.

Philippines

It is just over two years since 32 journalists were executed in the southern Philippines province of Maguindanao, the deadliest single attack against journalists on record. Since that time, fewer than half of the nearly 200 suspects in the massacre have been taken into custody, and only 63 of them have been charged. No-one has been convicted to date. Christopher Guarin, publisher of *Tatak News Nationwide,* was shot in General Santos City in January 2011. Romeo Oleo, a radio commentator noted for his exposés, was shot in Iriga City in June 2011. Gerardo Ortega, a radio host who had criticised local corruption, was shot in an alleged contract killing in Puerto Princesa City in January 2011. The Philippines ranks third on the Committee to Protect Journalists' global Impunity Index, which measures the number of journalists killed for their work without justice. Since 1992, 72 journalists have been killed in the Philippines.

Sri Lanka

Post-war reconciliation remained a distant goal despite the findings of a high-powered official commission which recommended far-reaching reforms in the media environment and a process of accountability for crimes against journalists in past years. A campaign by journalists launched in January 2012 around these issues attracted hostile rhetoric from government spokespersons and the state-owned media.

The Sri Lankan government introduced a regulation requiring all websites carrying news and current affairs content on the country to register with the Ministry of Mass Media and Information. While some websites have complied, others have chosen to challenge the regulation through a writ petition in the Supreme Court, under the fundamental rights provisions of the constitution.

Thailand

Wisut "Ae" Tangwittayaporn, the owner and editor of *Inside Phuket* in Thailand's southern island of Phuket, was murdered in January 2012. Police said they believed the shooting was a response to Wisut's reporting on of the illegal issuing of land titles in Phuket. Wisut was also a leading member of the United Front for Democracy Against Dictatorship, popularly known as the "red shirt" movement, whose protests brought Bangkok to a standstill in 2010.

Kate Bice is a program manager with the International Federation of Journalists

REPRESSIVE HABITS DIE HARD IN BURMA

Despite some recent improvements, Burma is still a long way from having a free media says **Natasha Grizncic**

Following Aung San Suu Kyi's electoral victory in April, the Australian government has rewarded Burma for its move toward democratic reform by announcing it will lift travel restrictions on Burmese leaders and other sanctions.

Together with other press freedom achievements since late last year – at least 10 jailed journalists were freed, journalists have been able to set up an independent network unimpeded, and some journalists in exile were granted visas to return to their homeland – you'd think that media freedom was flourishing. But as long as the army holds ultimate power there are no guarantees that these gains won't be reversed.

The leader of Burma's National League for Democracy, Nobel Peace laureate Aung San Suu Kyi has complained her speeches were subject to censorship
PHOTOGRAPH COURTESY OF NEWSPIX

New media law doesn't look promising

The government is drafting a new media law that is meant to replace the old censorship body before the end of this year. A conference in March on the promised media reforms was attended by a host of press freedom organisations, exiled Burmese media and local journalists. But participants left the meetings ambivalent about the government's intentions.

The Committee to Protect Journalist (CPJ) voiced concern that the new media legislation will merely employ different tools of suppression, "similar to the legal restrictions on the press in neighbouring countries like Malaysia, Singapore and Vietnam".

So will the new law prevent threats to the media and allow anyone to publish items on sensitive issues? That's still anybody's guess, as the full text of the draft law has not been made public.

Laws still criminalise dissent

There is still no indication that the regime intends to overturn the various repressive laws on its books.

Key offenders include the Electronics Act, which allows for jail terms for anyone who sends unauthorised information over the internet. Authorities frequently have used the law to repress and imprison journalists, says CPJ.

There is also Section 122 of the Penal Code of Burma 1957, which prohibits any criticism of the government or the state.

The Printers and Publishers Registration Act 1962 establishes the government's controversial censorship arm, the Press Scrutiny and Registration Division (PSRD), and broadcasting censorship board, which approve all press, television, radio and cinema content before it can be published.

Plus, there are big problems with the system in general. The judicial system does not yet act independently or protect the rule of law, and Burma has yet to ratify the International Covenant on Civil and Political Rights.

Censorship prevails

While it's true that pre-publication censorship has been relaxed in recent months (namely around fluffier lifestyle and entertainment stories), a recent International Media Support (IMS) report found that Burma's censorship board still orders the removal of approximately 20 to 25 per cent of articles submitted by newspapers and magazines covering current affairs.

Censorship concerns were underscored when the PSRD banned a critical commentary about the March media reform conference written by veteran journalist Ludu Sein Win. The banned article was later published by *The Irrawaddy*, an exile-run magazine and website.

Even as the conference was underway the Ministry of Mining was bringing a criminal defamation action against Kyaw Min Swe, publisher of *The Voice*, for reporting alleged corruption claims against it.

Election coverage was restricted

The April by-elections in Burma were subject to media restrictions. Ahead of the elections, the PSRD issued a list of "Do's and don'ts for the media covering the by-elections", including a

ban on taking photographs or conducting interviews within 500 metres of a polling station.

In the weeks leading up to the elections, the PSRD summoned and reprimanded the editors of two opposition-aligned newspapers for articles deemed overly critical of the government.

The National League for Democracy's "D-Wave" was warned for publishing a political cartoon that depicted the PSRD as a chain preventing a news publication called "Press Freedom" from reaching clouds labelled "Democratic Sky". Officials called it "harsh, offensive and rude".

The Rakhine Nationalities Development Party's (RNDP) journal was reprimanded for a February 29 article called "From a green military uniform government to a yellow-skirt democracy", which poked fun at the recent transition from a military to a quasi-civilian government.

Even Suu Kyi complained that government officials had censored a segment of one of her campaign speeches before it was aired on state-controlled media. The banned passage was critical of the previous military junta's abuse of laws to repress the population, and violated an Election Commission list of forbidden campaign topics.

"The nine-point list of banned topics has effectively muted critical debate on the campaign trail and as a result blunted any hard-hitting news coverage of the pre-election period," said the CPJ.

Burma still has political prisoners

In January, Burma released more than 300 political prisoners in a presidential amnesty, including high-profile blogger Nay Phone Latt and all the jailed Democratic Voice of Burma journalists. The number of documented political prisoners before the release ranged from 500 to 1500, according to freedom of expression group ARTICLE 19.

Reporters Without Borders (RSF) says at least five of those still locked away are journalists and bloggers (Zaw Tun, Win Saing, Ne Min, Aung Htun and Kaung Myat Hlaing, who's also known as Nat Soe).

The journalists released along with other political prisoners have been paroled, not amnestied, which means they could end up serving their sentence if they are once again arrested.

"Unfortunately, without a free press or freedom of speech, we do not know how many political prisoners remain languishing in Burmese jails. We urge the international community to remember that without free expression, Burma can never be truly free," says ARTICLE 19.

Natasha Grizncic is online editor with IFEX, an organisation dedicated to upholding free speech

PNG'S VOICE BOX WON'T BE MUZZLED

PNG's media isn't about to take threats to its free speech lying down, says **Keith Jackson**

Independence call: Forkorus Yobeisembut, (front), Edison Waromi and other members of the Jayapura 5, speaking to journalists outside the third Papuan Peoples' Congress treason trial on February 8, 2012.
PHOTOGRAPH COURTESY OF WEST PAPUA MEDIA

When Australia quit Papua New Guinea in 1975, it left the newly independent nation a vibrant media with a strong tradition of independence. This was somewhat surprising, given the nervousness with which successive Australian governments had viewed the dissemination of information within the territory, especially with a strongly anti-colonial United Nations criticising its every move there.

But, between the 1950s and 1970s, the robustness of the Australian press had translated effortlessly into Melanesia, and the many Australian journalists who worked in PNG struck up close affinities with their Papua New Guinean counterparts

Today, 37 years after independence, although a little worse for wear in places, PNG by and large maintains a press culture familiar to every Australian journalist: an understanding of what constitutes news, a dedication to telling it quickly and accurately, and a determination to robustly resist pressures to confect or distort it.

The countervailing pressures have arisen as a result of a savagely under-resourced National Broadcasting Corporation, a tendency to elision on the part of *The National* newspaper, owned by the massive Malaysian logging concern, Rimbunan Hijau, and a recent attempt by prime minister Peter O'Neill's new government to intimidate the social media.

But there's been a robust response from Papua New Guineans to these sticky fingers.

As blogger and law student Nou Vada tweeted, "Ideas cant be barred – either by statute or by steel. email pmsmedia@pm.gov.pg and tell them not to fuck with #media #freedom in #png". Quite.

Nou had good reason to be irate. He had just been banned by *The National* newspaper after, in an otherwise unremarkable column on the social media in PNG, he mentioned the name of prominent blogger and *buai* (betel nut) seller Martyn Namorong – who in the last 12 months has developed as the bete noir of the corrupt, lazy, greedy and otherwise anti-social elements of the PNG establishment.

"The Editor informed me that Management had given instructions for the newspaper not to publish anything from me," Nou wrote.

"The stated reason was that I own Edebamona blog. It is also because the Rimbunan Hijau dislikes Martyn Namorong greatly. The writer's lot is not an easy one. The blogger's is just fuck up. Have a nice day, folks."

There is a delightfully Melanesian quality about those sentiments, but losing the ability to earn a few extra kina freelancing for one of the country's only two national newspapers was a blow for the struggling law student.

However it was the prime minister's chief-of-staff, Ben Micah, who sent the pulse of the media racing when (in a statement to *The National*) he said the government would investigate people who spread what he termed "subversive material" on the internet and through mobile phones.

Micah referred to the "recent circulation of anti-government information via text messages on mobile phones, email messages and comments being posted on social network site, Facebook, [designed] to destabilise the government's firm control of the country."

"The military, police and the National Intelligence Organisation and other pro-government civilian networks are monitoring all attempts to destabilise the government's firm control of the country," Micah said. "All patriots and law-abiding citizens are required to be vigilant."

He announced that a monitoring committee would be established to investigate malicious and misleading information through the social media. This, he said, would be regarded as "a serious crime".

Micah also listed six telephone numbers for citizens to call and report "suspicious activity". But when Eoin Blackwell, the AAP correspondent in PNG, called, all six were either disconnected or rang out.

Paul Barker, executive director of the PNG Institute of National Affairs, responded that government attempts to rein in the social media were "chilling and reminiscent of what would happen in a totalitarian state".

He added that anyone feeling aggrieved at the spread of malicious or misleading information already had adequate recourse under law.

Micah's words also drew condemnation from the International Federation of Journalists, which expressed great concern for free speech – a supportive act that did not go unnoticed in PNG.

In a joint statement, the International Federation of Journalists and the Pacific Media Centre said:

"The statement threatens unspecified punishment for those found to be using personal communications technology in a manner deemed illegal and detrimental… It appears to criminalise the personal use of phones, email and social networking websites without a clear legal mandate.

"Policies and laws which attempt to censor or punish those expressing themselves online, or via other communications technologies, violate this core principle of democracy."

PNG was ranked 35th in last year's Press Freedom Index, produced by Reporters Without Borders. Not a bad position for a developing country, behind Australia and New Zealand but ahead of all the Pacific Island nations.

Will Micah's threatened crackdown substantively affect press freedom? Clearly, the answer will lie in the response of Papua New Guinean journalists and the social media and my bet is that they will be neither impressed nor compliant.

Micah, it seems, is attempting to turn back a burgeoning, democratising tide of free information flow.

There's a PNG group on Facebook called "Sharp Talk" with more than 4000 members, who exchange views on political issues. There are probably 70,000 Facebook accounts in PNG. Not that many, perhaps, in a nation of seven million people, but a number that is growing rapidly and relentlessly.

Blogging has emerged as an incisive tool for writers like Martyn Namorong (his *Namorong Report* gets up to 3000 hits a day when the issues are running), who has made connections with journalists in Australia and the United States and who was invited to speak at a conference at Deakin University in April.

Twitter is the medium of choice for rapid information transmission and, like the rest of the social media, its growth in PNG is being spurred by sophisticated mobile telephony, which in a small number of years has transformed communications in this very geographically challenged country.

The PNG government recently advertised for staff for a social media department. But in the past, the government has been notoriously sluggish and unsuccessful in explaining itself to people through the mass media, and there's no reason to expect it to become more efficient in social media.

Indeed, Micah's threats just seem to be galvanising opposition to any crackdown.

Executive officer of the PNG advocacy group Act Now!, Effrey Dademo, says, "Our main aim is to get the mass population of PNG to speak up about what they see is not right."

On the *PNG Attitude* website, university student Gelab Piak issued "a challenge to stand up for freedom of speech and our rights. After the failed attempt to ban journalists, they are now attacking the voicebox of the ordinary people. This is a dent on free speech and free press."

Blogger Emmanuel Narakobi said Micah's threat reminded him of witch-hunts like the attempts in the United States to ferret out communists. "It can appear to be a scary place to go," he said.

Given the strength of opposition to attempts to impose limits on press freedom, it seems most unlikely that any government will be able to muffle the "voice box". But the struggle could get really messy along the way.

Footnote: An official in Peter O'Neill's office belatedly said Micah's view were his own and that the prime minister supports a free and open media.

Keith Jackson is chairman of the Sydney-based public relations firm Jackson Wells. He worked in Papua New Guinea as a teacher and journalist from 1963–76 and publishes the PNG Attitude website at http://asopa.typepad.com/asopa_people/

THE WAY FORWARD

Illustration by Sturt Krygsman

Press freedom is a key guarantor of democracy. And one of the most important guarantors of press freedom is diversity of ownership and a plurality of media voices. So we are cautiously pleased that the recent report from the Convergence Review panel appears to also be taking this key issue seriously, recommending the establishment of safeguards in the form of a minimum number of different voices and a public interest test for mergers and acquisitions.

Our media ownership is among the most concentrated in the world – here the top three newspaper companies control 98 per cent of circulation. We've seen suggestions from the UK of what can happen when any one player has too much power. Any changes to media ownership regulation should be crafted to ensure that it is easier for new voices to emerge than, as has been the case in the recent past, for existing players to capture huge swaths of the market.

When it comes to regulation of the news media, we remain committed to the principle of self-regulation, through a reformed Press Council encompassing all media organisations, whether print, broadcast or online, working to uphold strict ethical standards such as those enshrined in the Journalists' Code of Ethics – it is what makes our journalism ethical, credible and independent. We surrender that at our peril.

As a report card for this government's performance in key areas of free speech, this report is equivocal. Reform appears to have stalled - promises made in 2007, such as real and effective protection for public service whistleblowers, remain unfulfilled and new restrictions have been introduced, such as the restrictive deed of agreement journalists are forced to sign before they can enter detention centres to interview asylum seekers.

Our Freedom of Information regimes have been found wanting when compared with many other countries and too many journalists are still hauled in front of courts and anti-corruption tribunals and put under pressure to reveal their confidential sources.

As a result, Australia is once again slipping down the world press freedom rankings.

The core functions of journalism are to hold governments accountable, speak truth to power and give a voice to the powerless. Only through a strong, independent and diverse news industry are these functions possible.

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