



BREAKING:

A report on the erosion of
press freedom in Australia

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GetUp!

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PRESS FREEDOM IN AUSTRALIA

“Freedom of information is the freedom that allows you to verify the existence of all the other freedoms.”

- Win Tin, Burmese journalist.

In June 2019, the Australian Federal Police raided the ABC and the home of a journalist from the Daily Telegraph. These alarming raids were undertaken because of journalists doing their jobs reporting on national security issues in the public interest, in part enabled by whistleblowers inside government agencies.

This was just the latest step in what has been a steady erosion of press freedoms in Australia. Since the terrorist attacks on New York on September 11, 2001, dozens of national security laws have been passed with bipartisan support by Australia's Parliament. Many of these laws have targeted whistleblowers,

journalists working on national security issues, and the privacy of the Australian public. Australians are now among the most heavily surveilled populations in the world.

Law enforcement agencies can access extraordinary amounts of information with scant judicial oversight, and additional safeguards for journalists within these regimes are narrowly framed and routinely bypassed.

Australia already lagged behind when it comes to press freedom. We are the only democracy on the planet that has not enshrined the right to a free press in our constitution or a charter or bill of rights.

We have the most concentrated ownership of media in the developed world. Our defamation laws are less an instrument to address injustice and more a cudgel wielded by the wealthy to silence criticism.

Added to this, the Abbott/Turnbull/Morrison government continues to undermine, attack and defund our ABC. They're teaming up with Pauline Hanson's One Nation and other far right parliamentarians to compel the ABC to give more airtime to fringe views like climate change denial.

Government transparency mechanisms are broken. The abuse of 'commercial in confidence' public interest immunity is routinely used to avoid accountability processes in parliament. Freedom Of Information requests are overly complicated to complete, frequently resisted and often deliver the absolute minimum, providing little or no clarity in response to inquiries in the public interest.

Trust in the government is low. Trust in our public institutions is low. Commercial newsrooms are under heavy pressure from downsizing, mergers and intense cost-cutting. Traditional media revenues have been crushed by the emergence of digital platforms that now dominate advertising. These challenges are not insurmountable, but there is a lot to be done. Press freedom is an essential element of any broader public discussion around a charter or bill of rights for Australia, but there are critical issues we should address immediately. Both GetUp and Digital Rights Watch support a Media Freedom Act which will safeguard journalists, sources and whistleblowers. It will put the public's right to know at the centre of any legislation that impacts journalism, and strengthen public interest protections to stop politicians and government agencies threatening journalists with legal action to silence critical reporting. We need to tilt power away from politicians and back towards the people holding them to account: both the journalists who report and the voting public who decide.

Article 19 of the Universal Declaration of Human Rights

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Joseph Pulitzer said that the press must “always fight for progress and reform, never tolerate injustice or corruption, always fight demagogues of all parties, never belong to any party, always oppose privileged classes and public plunderers, never lack sympathy with the poor, always remain devoted to the public welfare, never be satisfied with merely printing news, always be drastically independent, never be afraid to attack wrong, whether by predatory plutocracy or predatory poverty.”



OUR RIGHT TO A FREE PRESS



The debate around free speech and freedom of the press in Australia is unlike that in any other democracy. This has been the case for decades, and though the motivating issues have changed, the outcomes are familiar.

“Australia is the only democracy in the world that does not protect free speech and freedom of the press through a charter or bill of rights,” - George Williams, constitutional lawyer and dean of the Law School at the University of NSW[1].

In 1970 Australia had what essayist Max Harris called[2] “the world’s severest moral censorship,” a response to the heavy-handed regime that had seen not only hundreds of books banned, but the list of banned books itself. Works by D.H Lawrence, James Joyce, Mary McCarthy and Jackie Collins were among those considered too dangerous for Australian audiences.

Fifty years on, the internet has short-circuited most moral puritanism arguments, and national security sits at the centre of censorship debates still dominated by a deeply conservative approach to free expression.

Elsewhere in the world, the extraordinary revelations made by US National Security Agency whistleblower Edward Snowden created public outcry and led to parliamentary inquiries and legislative change. The German Government was first to respond and, by the end of 2013, Australia’s ‘Five Eyes’ Signals Intelligence partners the US, Canada and the UK had all begun comprehensive review processes to investigate the role and responsibility of their respective intelligence agencies.

Despite Australia’s critical role in some of the highest-profile programs disclosed in the leaks, the involvement of Australian facilities such as Pine Gap[3], and the inclusion of up to 20000 Australian Intelligence files[4] in the leaks, the response from the Australian Parliament was muted.

The Inspector-General of Intelligence and Security responded to the controversy by simply stating that the existing oversight of the Australian Signals Directorate was “sufficient”. The parliamentary committee usually tasked with such issues, the Parliamentary Joint Standing Committee on Intelligence and Security, had yet to be re-established following the September election. Attempts to establish senate inquiries into mass surveillance were blocked by both the major parties. Only a much narrower inquiry into one relevant piece of legislation was finally agreed to by Labor, the Greens and independents.

This continued a pattern of bipartisan agreement on national security matters that has been virtually unshakeable since then Opposition Leader Simon Crean’s principled opposition to the illegal invasion of Iraq. The ongoing consensus has severely limited the activities of accountability mechanisms inside Parliament, and by extension

reporting to the Australian public of the work done by these agencies in their name.

Until the Federal Police raids on journalists earlier this year, recent Australian public debate on free expression had been largely co-opted by those seeking to undermine protections in the Racial Discrimination Act. Former Attorney-General George Brandis’ declaration that “people do have the right to be bigots” is the most notorious example.

This emphasis on whether powerful individual people should be free to inflict whatever they wish, without consideration for the damage that the exclusion of entire groups of people does to public discourse did not serve the Australian public well.

The shock of the media raids harshly demonstrated just how excessive and dangerous surveillance and law enforcement agency powers now are. It mobilised the public and brought together rivals across the media landscape. What we have now is a unique opportunity to address the imbalance of power between the government and those who hold them to account.

LAW ENFORCEMENT AND INTELLIGENCE POWERS



Since the beginning of the War on Terror following the terrorist attacks of September 11, 2001, in the United States, we have witnessed a steady erosion of privacy and press freedoms in Australia in the name of national security. No fewer than 75 pieces of legislation connected to issues of national security have been passed by the Australian Parliament in the 18 years since 9/11.

Many of the powers created in these laws overlap, and many of the protections within these laws are undermined by powers in others. This is particularly evident when it comes to journalism around national security issues. Such journalism cannot be effective without secure communications with sources and whistleblowers.

Law enforcement and security agencies are bypassing the already inadequate safeguards for journalists by targeting their sources, who enjoy no such protections. The agencies have repeatedly failed to even adhere to the inadequate safeguards that are in place, and undermined efforts to improve them. This is discussed in more detail in the Surveillance section.

The raids on News Corp journalist Annika Smethurst and the ABC are the most recent examples of the balance between national security agencies and accountability tipping heavily against the latter, but that imbalance has been building for years.

Government security contractors have long been attempting to silence reporting on Australia's infamous immigration policies. The subcontractor providing security at the Manus Island and Nauru detention centres spied on Greens Senator Sarah Hanson-Young when she inspected the island[5], and hired a private investigator to pursue confidential sources of journalists writing about the conditions of the detention centres[6]. The government refused to confirm what role it had in directing these activities.

Journalists reporting on national security issues face barriers at every turn. If a case in civil or criminal court involves national security information, the government can address the court 'in camera' and request the case be held in a closed session. If the court agrees, its reasons for doing so need only be disclosed to the parties involved and the Attorney-General. Witnesses can be excluded or silenced, and evidence can be suppressed, all in secret. Detailed reporting is virtually impossible, and safeguards ensuring fair judicial processes are invisible at best.

This is the situation Canberra lawyer Bernard Collaery and his client, the ASIS operative turned whistleblower known as Witness K, are facing[7]. If convicted, these men could be sentenced to years in prison for revealing the bugging of the Government of Timor-Leste by Australia during negotiations about resources in the Timor Sea. Neither the operatives that undertook the spying nor those that directed it face justice in Australia.

Human Rights Watch has said the prosecution is likely to have a chilling effect on would-be whistleblowers witnessing government wrongdoing[8].

ASIO operations are even more opaque, with the ASIO Act making it an offence to even disclose the existence of an ASIO Special Intelligence Operation (SIO)[9]. This is a classification ASIO makes itself. The only way a journalist could find out for sure would itself be illegal. Even worse, prosecutions under the ASIO Act reverse a fundamental justice principle and place the onus on the defendant to disprove their guilt.

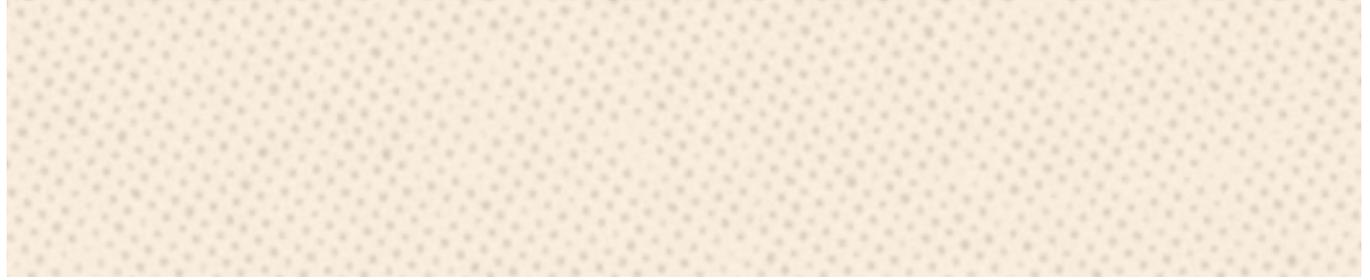
The definition of espionage was expanded in 2018, with inadequate exemptions for journalism done in the public interest. That Bill included penalties of up to 20 years in prison for publishing information that is likely to harm Australia's interests[10]. Those interests are broadly defined and includes information that could in any way prejudice international relations, or the relationships between the federal government and states. The government claimed that provisions in the bill will protect reporting of "fair and accurate" information "in the public interest", two highly subjective terms.

The only good news for journalism is that this Bill brought competing media outlets together to respond. The ABC, News Corp, Fairfax and others joined together to pen a submission to the parliamentary committee reviewing the Bill that outlined the numerous flaws in the legislation[11]. The Bill became law after another bipartisan vote.

This media coalition came together again in the days following the raids on the home of News Corp journalist Annika Smethurst and the ABC's Ultimo office. Both raids were undertaken in the pursuit of whistleblowers who brought critical issues to public attention by sharing information with journalists. Annika Smethurst reported in the Daily Telegraph that the Australian Signals Directorate sought to expand its powers to spy on Australian citizens inside Australia without their knowledge[12]. Smethurst's story swung on correspondence between Defence Secretary Greg Moriarty and Home Affairs secretary Mike Pezzullo, the nation's most powerful bureaucrat. The proposal Smethurst saw granted Home Affairs Minister Peter Dutton and the Defence Minister the power to sign off on digital surveillance of Australian citizens, with no oversight from the Attorney General, or even a warrant.

The report was dismissed at the time, but immediately referred to the Australian Federal Police for investigation—not into the proposal, but the source of the leak. Peter Dutton called the report "nonsense", Mike Pezzullo called it the "worst example of ill-informed reporting regarding home affairs". 13 months later, the AFP raided Smethurst's home before she had left for work that morning[13]. The warrant was to investigate "alleged publishing of information classified as an official secret" and gave the AFP authority to search Smethurst's home, computer and phone. News Corp, dozens of journalists, the National Press Gallery, Digital Rights Watch, the MEAA union, GetUp and politicians across most non-government parties condemned the raids.

The same day, Sydney radio host Ben Fordham revealed he had been contacted by Home Affairs officials seeking to find his source for a story about boats of asylum seekers heading to Australia[14]. Fordham stated on air that there was "not a hope in hell" that he would reveal his sources.



The next day, the AFP raided ABC offices in Sydney. The warrant named reporters Dan Oakes and Sam Clark, and ABC news boss Gaven Morris. The story under investigation was “The Afghan Files”[15], a deep investigation into the activities of Australia’s special forces in the region, including the potential unlawful killings of unarmed men and children. The AFP alleged the publishing of classified material[16]. Tweeting throughout the raid, the head of the ABC’s investigative journalism unit John Lyons reported that officers were going through more than 9000 documents downloaded from ABC computers one at a time[17].

Following the raids, Lyons made the point that the raids would have a chilling effect on ordinary people who witness wrongdoing and look to blow the whistle. “The message to them is approach a journalist at your own peril,”[18]he said.

Attorney General Christian Porter suggested the investigation was targeting “someone who may or may not have made an unauthorised disclosure against the terms of a very well-known provision of the Crimes Act to a third party,”.

The Media, Entertainment and Arts Alliance said the ABC raid represented “a disturbing attempt to intimidate legitimate news journalism that was in the public interest”.

The environment of intimidation has extended beyond journalists and whistleblowers. As part of the same investigation, the AFP forced QANTAS to hand over Daniel Oakes’ private travel information[19].

Christian Porter’s assurances that there was “absolutely no suggestion that any journalist is the subject of the present investigations” was undermined by an AFP document titled “Statement in the matter of R v Daniel Michael Oakes”, suggesting there was a case being built against the reporter as well as the whistleblower. AFP acting commissioner Neil Gaughan did not rule out charging journalists or media organisations.

Some in the government still aren’t satisfied, and continue to pursue even more radical proposals to silence critical reporting.

During a hearing for the PJCIS inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, Home Affairs Secretary Mike Pezzullo—who has previously called journalists “bottom-feeders”—suggested that journalists should “reconnect” with the government to ensure especially younger journalists are exposed to the departments’ spin on a particular point of contention[20].

This idea was expanded by government MPs in the committee, including Chair Andrew Hastie, leading to a suggestion to direct media outlets to speak to the relevant agency to determine if what they were looking to publish wouldn’t harm the national interest, as determined by that agency, if they wished to avoid prosecution for disclosing sensitive material. It is in effect a proposal to grant censorship powers to government agencies.

This isn’t yet the law, or even a proposed bill, but it is an alarming indication of the lengths some in the government are willing to go to to use Australia’s security and intelligence apparatus to limit the scrutiny of the agencies and the government itself.



SURVEILLANCE

It is the power of the government and its agencies to closely monitor potential whistleblowers, journalists, and media organisations that is perhaps the greatest threat to public interest journalism. Maintaining the confidentiality of sources is a fundamental principle of journalism. The United Nations specifically recognises, “journalistic privilege not to disclose information sources.”[21]

There has been an extraordinary expansion of government surveillance powers in recent years. Digital surveillance in Australia has not abated at all in the wake of the Snowden leaks.

The Data Retention Act of 2015 endangers the privacy of everyone in Australia. It mandates that all metadata be retained by telecommunications and internet service providers at their cost for not less than two years. Metadata is every piece of information about a digital communication exchange except the content of the communication itself. That can include time and date, location, the target such as the number dialled or email addressee, the sender such as the email address or number calling from, the size of the message sent, the type of message such as images or text, the device and software being used at either end of the exchange, and the duration of the exchange. Often it is enough information for an investigator to infer the content accurately without needing to see it, especially when the metadata is aggregated and contextualised.

This data can be accessed by a broad range of government agencies without the need for a warrant. Many more agencies use loopholes in the scheme to lodge metadata requests of their own. A recent report suggests that these requests number 350000 every year.[22]

In response to concerns when the legislation was announced that source confidentiality would be threatened by the new scheme, a mechanism for a Journalist Information Warrant was introduced.[23] This safeguard was extraordinarily limited, in that it did not extend to acts of journalism undertaken by anyone other than a professional journalist employed by a media organisation. Sources and whistleblowers were excluded, meaning that all an investigator need do to identify such a source is reverse target the data to see who had been in contact with journalists. Nor were journalists and media organisations able to contest the provision of such warrants. A public interest advocate could argue against the access of a journalists metadata[24] though neither the journalist nor their employer would be made aware of the outcome or even the request.

In one of the earliest reported uses of the metadata retention capability, the Australian Federal Police accessed a journalists metadata without obtaining the warrant[25] required.

The investigator responsible was neither suspended nor disciplined, and the targeted journalist was not informed about the breach.

Since 2015 journalists have been well advised to increase their use of encrypted communications tools such as Signal, utilise Virtual Private Networks (VPNs) when working online, and avoid communicating with sources via unencrypted channels.

The Assistance and Access Act that passed at the end of 2018 changed everything again. The Bill included the expansion of warrants for access to

computers and networks, and gave security agencies the power to force industry personnel to secretly assist agencies in their investigations. A software engineer can be legally compelled to build in a vulnerability to a system or device, without informing their colleagues or customers. That vulnerability could log keystrokes, decrypt encrypted data, circumvent passwords, or serve any other function as dictated by the requesting agency.

Agency powers introduced in the Assistance and Access Bill mean that the journalist information warrant specified in the data retention legislation no longer needs to be obtained[26], according to cybersecurity researcher Riana Pfefferkorn, Associate Director of Surveillance and Cybersecurity at the Stanford Centre for Internet and Society.

“Law enforcement’s powers granted under the Data Retention Act in 2015 were augmented by the new powers the Assistance and Access Act provided at the end of 2018, creating the framework that authorised the federal police in mid-2019 to raid the homes and offices of journalists,” she said. The process that resulted in the Assistance and Access Bill started promisingly. In August of 2018 the government publicly released an exposure draft, an optional step in developing legislation, not often used when drafting national security legislation. Optimism that it would be a consultative and open process diminished when the government announced that submissions in response to the draft were due in less than a month, and vanished entirely when the government introduced a largely unchanged Bill into the House of Representatives less than two weeks after those submissions closed.



Scrutiny of the Bill fell to the Parliamentary Joint Committee on Intelligence and Security (PJCIS), a bipartisan committee where consensus is a point of pride and dissent is rare. The Opposition briefly considered producing the first dissenting committee report in a decade before waving the legislation through unamended, as the politics of the day took precedence[27].

The government has since walked away from assurances that it would support amendments consistent with the recommendations contained in the PJCIS report[28].

The range of surveillance tools and legal mechanisms available to security agencies is now so broad that the meagre safeguards that have accompanied each new bill are rendered all but useless by another.

Digital tools have also enhanced the government’s capacity for physical surveillance. Facial recognition programs are being deployed across the country in combination with more and more video cameras in our cities. Information gathered can be cross-referenced with telephone metadata like location tracking to monitor people more closely than ever before.

Federal funds are enabling cities across the country to ramp up the surveillance of their citizens. Sydney has around 12.35 cameras for every 1000 people[29], a report from British firm Comparitech found, making Sydney the 15th-most surveilled metropolitan city anywhere in the world.

Plans for cameras and facial recognition software in Perth were only uncovered in a tender for federal funding[30], and were well advanced before the public became aware of the initiative. The council did not consultation with community groups about the ‘trial’.

Darwin recently installed more than 130 CCTV cameras with facial recognition capability across the city centre under the Smart Cities and Suburbs grant program[31]. A council representative stated that while facial recognition capabilities were included in the grant application, Darwin City Council would not be using it. They would comply with requests from federal or state agencies if they received them, however. The council did not undertake any public consultations before submitting the grant application.

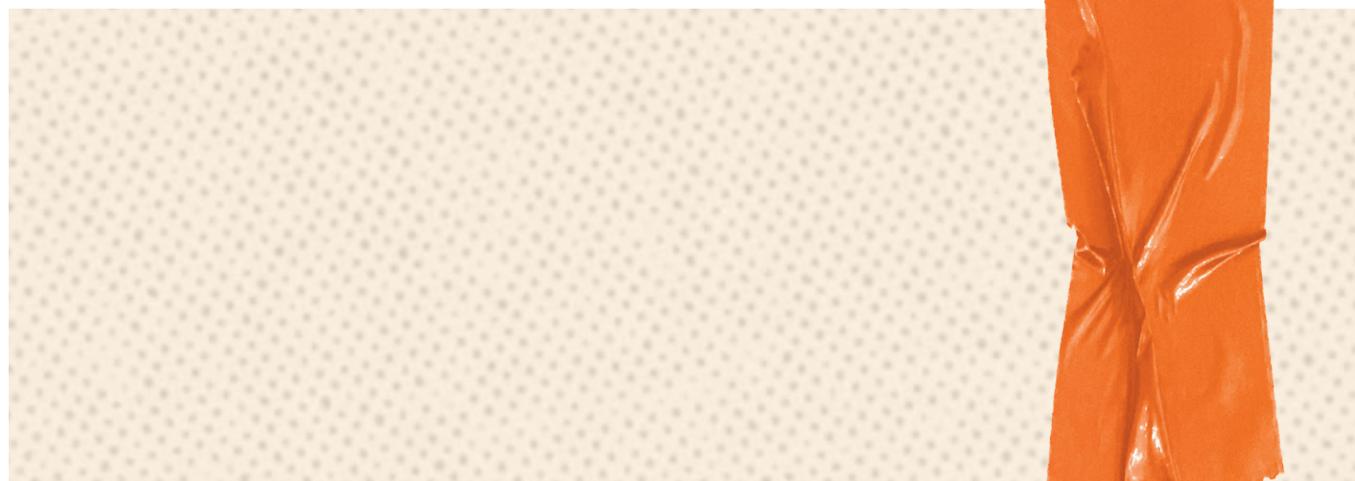
A framework for aggregating biometric data for use by state and federal law enforcement and other agencies has been in development since 2015[32]. “The Capability”—the program’s dystopian nickname—is designed as a one-stop-shop for agencies seeking to identify individuals. Biometric data held and contributed by government agencies includes photographs from driver licences and passports, as well as video footage from government sites, and facial recognition information obtained from any of those cameras. Initially it was hoped that the system would be up and running by mid-2016 with 100 million facial images from databases around Australia.[33] The Council of Australian Governments reached an agreement in 2017[34], with legislation essential to the program not introduced until 2018. It lapsed when the federal election was held and was only reintroduced to Parliament in July 2019.

The Identity-Matching Services Bill “provides for the exchange of identity information between the Commonwealth, state and territory governments by enabling the Department of Home Affairs to collect, use and disclose identification information”. [35] An additional bill essentially does the same for passport information.

A review of the bills has been reopened by the Parliamentary Joint Committee on Intelligence and Security. Civil, Digital and Human Rights groups are reiterating the same warnings they’ve issued since the first proposal became public, with many calling for the initiative to be dropped on the basis that it “effectively hands control of powerful new forms of surveillance to the Department of Home Affairs with virtual carte blanche to collect and use some of the most sensitive personal data” [36], as stated by Human Rights Law Centre Legal Director Emily Howie.

The Australian Human Rights Commission says in its submission to the review that the scheme as written would impact all Australians’ right to privacy, freedom of movement, the right to non-discrimination and the right to a fair trial.[37] Other groups have pointed to insufficient safeguards and oversight in the current proposal.

Submissions to the review closed on September 6th, with hearings scheduled for October. A combined database of driver license, passport, and other identifying photographs from every state and federal government agency connected to an ever-expanding array of video cameras equipped with facial recognition technology may be in the hands of dozens of law enforcement and other agencies across Australia by the end of 2019.





DETENTION OF AUSTRALIAN JOURNALISTS AND PUBLISHERS



The government has played a positive role on a number of occasions when Australian journalists have been detained overseas for their work. Most notably, the government's diplomatic efforts to release Al Jazeera reporter Peter Greste from detention in Egypt played a meaningful role in Mr Greste's eventual freedom.

The obverse example remains the bipartisan silence on the treatment of Australian publisher Julian Assange, both before and since his indictment under the US Espionage Act. The Trump Administration's actions threaten the very basis of national security reporting and the foundational principle of source protection.

An Australian Government genuinely supportive of press freedom would defend it even when it means standing up to powerful allies. Rather than supporting an Australian citizen who is now charged with committing acts of publishing that could see him sentenced to up to 175 years in prison. Amnesty International have warned that if extradited, Assange faces the "risk of serious human rights violations, namely detention conditions, which could violate the prohibition of torture." [38]



FREEDOM OF INFORMATION

In the years Australia has had federal Freedom of Information laws, the regime has not been updated quickly enough to keep pace with technological change, or best practice internationally. As a part of their Transparency Project[39], the Guardian Australia undertook a month-long investigation into the operation of our FOI processes[40] in late 2018 and uncovered some alarming issues.

The Office of the Information Commissioner oversees the operations of FOI. Despite having additional responsibilities added to the offices remit in recent years, staff levels have been gutted under Coalition governments, leaving the office with barely 2/3 of the minimum staff needed to do the job. There has also been a considerable increase in complaints about FOI made to the OAIC, up 72% in the 2017-18 financial year. The office is inadequately equipped to perform some of its most essential functions.

FOI teams have also shrunk in more than 20 government agencies and departments. One avenue for denying an FOI request is a 'practical refusal'; the request itself places too much of a strain on department or agency resources. The use of those refusals exploded by more than 160% in FY 17-18. This problem will only worsen as staffing and funding levels are cut further.

FOI refusals are higher than at any time since records of refusal have been tracked. The Northern Australian Infrastructure Facility refused almost every request it received in FY 17-18, 99.4% of them.

Requests for the most benign documents are regularly denied, as are requests for identical records to those released in previous years, such as the Age journalist Chris Vedelago's request to Airservices Australia for flight records of Crown's VIP planes.[41]

When FOI requests are processed, they often take months longer than the 30 day statutory requirement to be finalised. The delay regularly negates the usefulness of the documents to the reporting work being undertaken. More than 2000 requests were more than 3 months overdue when they were finally completed.

Some redactions on released documents are farcical and render the entire document useless, like the dozens of pages of thick black lines Guardian Australia journalist Christopher Knaus received from Defence in December 2018.[42]

Organisations and individuals making FOI requests must bear the cost of processing the request before receiving the requested documents. The Australian Conservation Foundation paid \$500 to learn that 241 out of 243 relevant pages were determined to be exempt, and the remaining two documents were just partially redacted calendar events.



The systemic issues with Freedom of Information reflect a broader failure of successive governments to commit to openness and transparency. Similar problems beset FOI regimes at state government level around the country as well. In May, 2014, the Abbott government announced its intention to abolish the Office of the Australian Information Commissioner, an action the may have been a world first.[43]

When Malcolm Turnbull deposed Abbott as Prime Minister he overturned the decision to abolish the OAIC. His government's efforts in improving transparency didn't progress far beyond that. Scott Morrison hasn't demonstrated any inclination towards making scrutiny of his government any easier either.



DEFAMATION LAW



Australia's defamation laws are not fit for purpose in the internet age. Prior to 2005, there were major inconsistencies in defamation laws across the states and territories. Broadly uniform laws came into effect at the beginning of 2016 everywhere except the Northern Territory. These laws were based on NSW legislation from 1974.

After the volume of publishing expanded on the web it increased by orders of magnitude as social media use spread across the country. Individual states having responsibility for their respective defamation laws became problematic when digital publications crossed state boundaries.

The Centre for Media Transition at the University of Technology in Sydney reviewed defamation cases from 2013-2017 and found more than half of the cases involved digital publications such as tweets, emails, Facebook posts and news websites.[44]

Existing laws do not adequately protect internet intermediaries such as search engines from liability for third parties' content. The laws addressing dissemination liability are out of step with the way digital media is propagated. This is also true of the hastily drafted Sharing of Abhorrent Violent Material Bill, which does not provide "defences for individuals who may be whistleblowers or media companies who are publishing atrocities that they are trying to draw to the world's attention." [45]

Online material is treated as a new publication each time it is downloaded. This means the one-year time limit on bringing a defamation claim resets any time the material is accessed, exposing digital publications to defamation claims well beyond a year after publication online.

Trivial claims go through the same lengthy process as far more serious matters, which sends costs spiralling upwards. The outcome of such claims often depends on which party can sustain the expenditure of litigation more than the other. People and organisations with wealth and power set the agenda. Truth is only a defence if you can afford it.

Australian defamation law does not have a 'serious harm test'; plaintiffs are not required to prove that a defamatory publication caused, or was likely to cause, serious harm to their reputation. Nor does Australia have

a well-functioning public interest defence. Both of these elements have improved defamation law in the UK[46].

The remedies available for defamation in Australia are also limited. Online take-down orders, corrections, and retractions for all media are not available, and as the Rebel Wilson case demonstrated, the mechanism for determining financial damages is flawed.[47] The prospect of high defamation payouts impact editorial decisions, making news publishers risk averse.[48]

Media reports that use confidential sources can leave a journalist or publication vulnerable to defamation claims when that source or material cannot be present or produced in court, as the defendant is unable to substantiate a truth defence.

A comprehensive national review of defamation law is ongoing and has produced some substantial recommendations. One of the objectives of the review is to "ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance".[49]

The review process aims to prepare jurisdictions to enact changes from mid 2020, at which point it will be in the hands of federal and state parliaments to enact.

TRUTH IS ONLY A DEFENCE IF YOU CAN AFFORD IT



THE AUSTRALIAN MEDIA MARKET



Media ownership in Australia is amongst the most concentrated in the world, limiting the stories and views presented to Australian news consumers. The strength and quality of a democracy relies on a well-informed voting population, and the likelihood that a variety of evidence-based viewpoints are presented to those voters increases with a more diverse media landscape. Fewer voices means more power in the hands of a few. Rather than expanded coverage, the convergence of ownership has meant more work is demanded of fewer journalists. Quality of reporting suffers. Stories that need telling, that journalists or editors want to cover, are given short shrift or lost entirely.

Media revenues have been in decline for years. Advertising revenue once dominated by news mastheads has shifted to the dominant online players. In 2018, the ACCC found that 68% of online advertising spending goes to Google and Facebook.[50] Data from Australia is not available, but a study in the US showed that Google generates substantial revenue through the use of news published by other organisations. It estimated that Google generated US\$4.7 billion from news in 2018[51], almost as much as the entire US news industry itself, without spending a cent on journalism.

The 2017 Senate Select Committee Inquiry on the Future of Public Interest Journalism found media companies across the sector struggling to develop sustainable business models.[52] As the industry has restructured to try to cope with the upheaval, many experienced journalists with a lifetime of skills have been lost to newsrooms around the country through redundancies, and the Media and Entertainment Arts Alliance noted that the remaining employment was increasingly casualised.

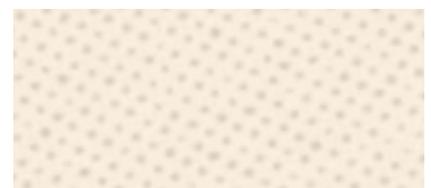
Plunging revenues across the media sector were used to amplify ongoing calls to change or remove restrictions on media ownership. The media reform was pitched as providing public benefit, but as ever the real winners were the media licensees and shareholders.[53] The Turnbull government softened cross-media ownership laws limiting the ownership of newspapers, TV stations, and radio stations in the same market in 2017. This allowed Nine's takeover of Fairfax in 2018,[54] further adding to Australia's media ownership concentration.

Confidence in the assurances Nine made at the time of the takeover that it would uphold the existing Fairfax charter of editorial independence[55] was severely undermined when it hosted a Liberal Party fundraiser at its Sydney headquarters. The event drew widespread condemnation from current and former staff.[56]

News Corp has long dominated the Australian print media landscape, where its titles account for the vast majority of daily circulation. There is more diversity reflected in the online news choices of Australians, though the online news rankings are still dominated by News Corp and other consolidated media groups.[57]

The editorial consistency of News Corp publications is such that it can appear coordinated across the country and influences the national agenda far more than newspaper circulation numbers alone indicate. The fragility of jobs in journalism is often cited as a reason for journalists within News Corp being unwilling to respond publicly when News Corp attacks other media outlets, particularly the ABC.

Trust in media in Australia has eroded in recent years, though the Australian public has more confidence in our public broadcasters than it does in other outlets.[58] When a free press is under attack, such as during the AFP raids, it is essential that Australian media can credibly advocate for itself.



ABC AT RISK

Our national broadcasters play an essential role in Australia's media landscape, providing an alternative voice where no other exists, and services regions that receive minimal if any coverage from commercial outlets.

Stories that would otherwise never be told find a home at the ABC or SBS. We are a more knowledgeable, more forward-thinking nation thanks to the ABC. We understand more about the world we share and the people we share our country with thanks to SBS.

Long a target for conservative hostility, the ABC has been under direct and sustained attack in recent years from media commentators who don't like jokes about dogs,[59] to Coalition MPs responsible for the expenditure of public funds.

After unambiguously stating there would be "no cuts to the ABC or SBS" on the eve of the 2013 election, Prime Minister Tony Abbott took \$35.5 million over 4 years out of the ABC in the 2014-15 budget. Malcolm Turnbull cut a further \$254 million over 5 years, and his government also terminated the Australia Network contract, worth a further \$197 million over 9 years.[60]

Managing Director Mark Scott said that the cuts would "inevitably result in redundancies and a reduction in services," and undermined the ABC's capacity to deliver the international obligation in the charter.[61]

Scott Morrison has continued the pattern of cuts, taking a further \$84 million in the 2018 budget.

The Liberal Party's intentions for the ABC were made clear in 2018 when a vote at the Party's annual council passed almost 2:1 in favour of privatising the ABC. Alarming, nobody at the meeting spoke against the motion, though the incumbent communications minister did offer a tepid response that privatisation was not government policy at the time. [62] The ABC was also targeted at the Queensland LNP state convention earlier this year, with one member calling the ABC, "our enemies." [63]

A senate inquiry earlier this year reported that "the Coalition government has been complicit in the events of 2018 and beyond, by using funding as a lever to exert political influence in the ABC." [64] A dossier of complaints collated by outgoing Managing Director Michelle Guthrie alleged that Chairman Justin Milne sought to sack journalists Emma Albericic and Andrew Probyn over their reporting.

In February 2019, the government announced that it had ignored the recommendations of a recruitment process and appointed Ita Buttrose to the position of ABC Chair. She became the 6th person directly appointed by the government to the ABC board. Some of those previous appointees had been rejected by an independent review panel. [65]

FAIR AND BALANCED LEGISLATION PROPOSAL

The most troubling proposal for the ABC in recent years is the ongoing efforts of Pauline Hanson's One Nation to insert a Fox News slogan into the ABC Charter. One Nation takes exception to the ABC's reporting on its activities and policies. Pauline Hanson announced her intention to boycott the ABC after a Four Corners story raised questions about party finances.[66]

In an appearance on the network in the period after he was first elected, Senator Malcolm Roberts demanded that the ABC provide evidence of human involvement in climate change[67] and is famous for his humiliation on Q&A after confronting Professor Brian Cox.[68]

In 2017, after capitulating to demands from One Nation, the Turnbull government introduced a Bill to 'reform' the ABC. Included in the Bill were demands for additional oversight of changes affecting rural and regional audiences, and some additions to the Charter.[69] The first of these called for a stronger commitment to rural and regional Australia, despite the budget cuts forced on the ABC by the same government. It is the second change that former Media Watch presenter Jonathan Holmes called "its most dangerous demand," legislating a requirement for the ABC to be 'fair' and 'balanced'.[70]

The ABC Act already contains the requirement that the ABC board "ensure that the gathering and presentation ... of news and information is accurate and impartial according to the recognised standards of objective journalism".[71] Additionally ABC editorial guidance documents provide journalists with the tools they need to report with impartiality. [72] Critically, it differentiates between impartiality and balance. Hanson and her conservative colleagues would have you believe that balance is only achieved when 'both sides' of an argument are presented. This notion relies on facts being completely ignored. Impartiality follows the weight of evidence.

Debunked nonsense like climate change denial is not and should not be afforded equal status with evidence-backed objective reality. To do so would undermine the accuracy of, and subsequently the trust in, the journalism done at the ABC.

On too many occasions the ABC is the only source of credible reporting on issues, untarnished by the ideological imperatives that can shape reporting at Nine or News Corp. A lot of this reporting is critical of the government, as any impartial reporting should be when the government so frequently prioritises politics over policy. There is a lot to be gained for the Coalition and One Nation should they succeed in undermining the ABC.

The Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017 lapsed when the 2019 election campaign began, and has not been reintroduced. The Australian Broadcasting Corporation Amendment (Rural and Regional Measures) Bill 2019[73] includes the same measures regarding rural and regional Australia as the previous Bill, but the 'fair' and 'balanced' changes to the charter are not in it.

It is unlikely that either the Coalition or One Nation will give up, and ensuring that the ABS has the necessary resources to do its work without being hobbled by partisan constraints will be an ongoing fight.

HOW DOES AUSTRALIA COMPARE INTERNATIONALLY?

Australia has been a world leader in press freedom at various times in the last century, but the combination of mass surveillance, radically expanded law enforcement and security agency powers, an obsolete defamation framework and some of the most concentrated media ownership on the planet has seen that reputation falter. Our strong public broadcasters have been a model for other nations to emulate but it too is under unprecedented pressure.

Reporters Without Borders releases a World Press Freedom Index every year, and Australia fell out of the top 20 for the first time in 3 years this year. RSF notes that “independent investigative reporters and whistleblowers face draconian legislation” and in particular “laws on terrorism and national security make covering these issues almost impossible”. Our neighbours across the Tasman have been outside the best 10 only once in the 7 year history of the index. Like Australia, RSF suggests the kiwi equivalent to FOI, the Official Information Act, needs some improvement.[74]

Australia has had a Freedom of Information Act since 1982. Only 6 other countries had similar laws at the time, but in the years since Australia's relative position internationally on Access to Information and Right to Information laws has dropped precipitously.

The Centre for Law and Democracy assesses ‘right to information’ laws around the world, and ranks countries in order of the quality of those laws. Its Global Right to Information Rating places Australia 66th, between Rwanda and Honduras.[75] It cites the limited scope of the law, noting that it does not apply to the legislature, and to the judiciary only in a limited way. Critically, defence and intelligence agencies are also excluded.

Media oversight has been less effective than it could be too, especially as some in the media industry cheered on every crackdown right up until one of their colleagues had her door kicked open by the Australian Federal Police.

Reporting on these issues, or the absence of it, shows the danger of such concentrated media ownership. A comprehensive study published in 2016, ‘Who Owns the World's Media?: Media Concentration and Ownership around the World’[76], collated and analysed data on the ownership and concentration of media in 30 countries, including Australia.

Their results showed that Australia's industry was among the most concentrated in the world, and this was before the Nine takeover of Fairfax made it worse.[77] Australia has a high rate of ‘cross-ownership’, one owner controlling channels in more than one medium in the same region, such as a newspaper and a TV station. Australia has the most concentrated newspaper industry of any of the countries studied.

It is Australia's barrage of national security legislation that places us most out of step with the rest of the world. Australia has more national security



laws than any other nation. [78] We are also the only liberal democracy without a charter or bill of rights that would protect press freedom.

Other countries have prepared for the next challenges to privacy and press freedom. The UK has a statutory commissioner to respond to concerns relating to consent, retention and the use of biometric information of the sort that ‘the capability’ will be compiling on a huge scale.

Dr Marcus Smith, a senior lecturer at the Charles Sturt University's Centre for Law and Justice, has stated that such a commissioner

“would be an important step towards ensuring that there is a reasonable and proportionate balance between the need to use available new technology to protect the community from harm, and maintain appropriate standards regarding individual rights.”

This sort of oversight and accountability is absent from many of the national security powers hastily adopted by Australian governments, but the powers themselves exist virtually nowhere else.

WHAT CAN WE DO?

Once the shock and rage in the aftermath of the Federal Police raids settled, attention turned to what measures we need to take to preserve press freedom in Australia. As ABC Managing Director David Anderson said at the National Press Club, “press freedom is a proxy for public freedom.”[79]

Press freedom is just one in a range of rights issues impacting the Australian public. Australia’s recent human rights record is abysmal, and federal and state governments continue to pass legislation that infringes rights.

Actions of federal and state government agencies fly in the face of human rights standards upheld all over the world. From jailing people mentally unfit to stand trial to the ongoing horror of offshore detention of asylum seekers, the abuse of juvenile detainees, and the ongoing national shame that is Australia’s treatment of Aboriginal and Torres Strait Islander people, our governments are failing people.

Former President of the Human Rights Commission Gillian Triggs noted in her final week that Australia’s human rights are, “regressing on almost every front,” and that the Australian government is “ideologically opposed to human rights.”[80]

Many experts agree that Australia needs a human rights charter. Queensland, Victoria and the ACT have passed such a law. There is momentum building in other states. Debate and disagreement on what form such a charter should take federally is ongoing. One plausible avenue is a charter of rights enacted by ordinary legislation. It has a number of advantages over a US style constitutionally entrenched bill, not the least of which is the passage of such a bill into law is a simpler process than constitutional change. It would also enable future parliaments to update the charter as public values progress.[81]

Such a bill has an impact well beyond the courts. It provides a point of focus for legislators to ensure all laws passed by the Parliament are compatible with the charter of rights. It can be used as an instrument to inform and educate the wider community.

THE MEDIA ORGANISATIONS WANT:

- The right to contest applications for warrants on journalists or news organisations prior to any warrant being issued
- Public-sector whistleblowers to be adequately protected
- A new regime that limits which documents can be stamped “secret”
- A properly functioning Freedom of Information regime
- Journalists to be exempted from the national security laws enacted over the past seven years that can put them in jail for just doing their jobs

These requirements match up very well with the mechanism GetUp has advocated for previously.

The events of early April however make securing press freedoms much more urgent. While any worthy human rights charter would include protections for a free press either explicitly or through privacy and free expression provisions, the process of developing a comprehensive charter that encompasses the broad requirements of such a bill and securing enough support to pass both Houses of Parliament will take years.

Parliament needs to act sooner to address the dangers highlighted by the media raids and the pursuit of journalists and whistleblowers. Without press freedom, the pursuit of other freedoms and rights becomes immeasurably more difficult.

In a remarkable display of unity, media organisations formed the Right to Know Coalition to advocate for press freedom in Australia. News Corp, Nine, the ABC, SBS, the Guardian, Bauer Media, AAP, 7 West Media and more organised an event at the National Press Club in Canberra to present a suite of reforms needed in laws pertaining to media in Australia.[82]

A MEDIA FREEDOM ACT



In February of this year, the Alliance for Journalists' Freedom began a campaign for a Media Freedom Act[83].

The Act would act as a yard-stick to measure all our laws against, to protect the watchdog role that journalists play. - Peter Greste, founding director of the Alliance for Journalists' Freedom

The Act is not intended to force the wholesale repeal of national security legislation. It simply ensures that journalists won't have to choose between reporting the truth and going to jail. Nor does the Act address shortcomings in other legislation unrelated to ensuring press freedom. A Media Freedom Act balances press freedom and national security interests, protecting journalists engaged in their work from unwarranted prosecution or civil liability, and upgrades the tools journalists need to do their jobs.

The Act will protect journalists and their sources: Journalists will not be forced to reveal confidential data and sources to politicians or government agencies, either by questioning or surveillance.

Whistleblowers will be protected and all disclosures made in the public interest by whistleblowers to journalists will be protected under the public's right to know.

The public's right to know what is being done in our name must be restored by establishing greater transparency in the issuing of media suppression orders.

A public interest defence will stop politicians and government agencies threatening journalists with legal action to silence critical reporting.

Any applications for warrants on journalists or news organisations will be disclosed to the journalist or organisation, and will be contestable prior to any warrant being issued.

Relevant national security legislation will be amended to protect anyone engaged in legitimate public interest journalism against criminal liability. Such protections hinge on acts of journalism in the public interest, not the status or employer of the journalist.

The MEAA conducts an annual press freedom survey. Unsurprisingly the most recent survey found that national security and metadata retention laws, defamation laws, and excessive court issued non-publication orders are combining to make it harder for Australian journalists to do their jobs.[84]

63% of journalists see the overall health of press freedom in Australia as "poor" or "very poor".

85% say press freedom has worsened over the past decade. Over the coming decade we can and must turn those numbers around.

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David Paris has worked on policy and campaigns in the fields of media, communications and digital rights in the EU, the US and Canada. He has worked in federal and state politics leading social media and digital communications for election campaigns and in parliament.

He has assisted in workshops across the country for journalists to familiarise themselves with tools and techniques to strengthen privacy protections for themselves and their sources. David's last substantial project as a political policy officer was working with Senate offices across the Opposition and Independents to assist in the development and establishment of the Senate Select Committee Inquiry into Public Interest Journalism in May 2017.

Now a director on the board of Digital Rights Watch, David works on press freedom and free expression, surveillance and privacy issues, as well as the emerging challenges brought on by the increasing power of large tech companies.

SCOTT LUDLAM

Scott Ludlam is a freelance writer and activist, and formerly represented Western Australia as a Senator for the Australian Greens. He held the role of Shadow Spokesperson for Communications between 2008 and 2017, and has a keen interest in digital rights, media freedom and checks on unaccountable Government power.

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**DIGITAL
RIGHTS
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