



ALLIANCE *for*  
JOURNALISTS'  
FREEDOM

*Press Freedom*  
**IN AUSTRALIA**

**WHITE PAPER**  
**MAY 2019**



*With light,* **TRUST**

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## Foreword



**PETER  
GRETE,**  
*Director*

It is easy for Australians to take press freedom for granted. The government does not censor our newspapers; the press is independent; we don't have journalists in prison. And yet as a recent report by the MEAA pointed out, "In Australia, waves of new laws are passed in the name of "national security" but are really designed to intimidate the media, hunt down whistle-blowers, and lock-up information."<sup>1</sup>

In the most recent World Press Freedom Index from Reporters Without Borders, Australia slipped several places, largely because of the new laws that are steadily eroding journalists' ability to investigate governments and protect their sources.<sup>2</sup>

Our research has shown that the legislation is criminalising what used to be considered legitimate journalistic inquiry into the inner workings of government. At the same time, espionage and data retention laws are exposing whistle-blowers to legal sanction at a time when they ought to be protected and honoured. Collectively, the legislation is undermining the very transparency and accountability that has made our democracy one of the strongest in the world.

This White Paper is our answer to that trend.

Australia urgently needs a formal restraint on our legislators to keep them from passing laws that continually chip away at the space for journalists to work in. At the same time, we need a benchmark for the courts to use when they are handling cases involving the press.

By writing the vital principle of press freedom into the DNA of our legislation, we believe a Media Freedom Act strengthens not just the media, but our democracy and all who live and work within it. That is something all Australians ought to support.



**PETER  
WILKINSON,**  
*Chair*

The folks at Gilbert + Tobin have provided the horsepower and the incredible number of pro bono hours to deliver this paper. It's required months of thinking, research, debate and attention to detail. So, an immense thankyou to Danny Gilbert, and to Chris Flynn and his team.

The White Paper is a critical part of the AJF's 2019 strategy to drive a conversation with politicians that will result in legislative reforms to protect journalism. To do that we have deliberately drawn on the wisdom of select journalists, publishers, the legal fraternity, academia, philanthropists and other influencers, each of whom believes that our purpose, explained by my colleague Peter Grete in the adjacent column, is essential for a healthier democracy.

The White Paper contains seven recommendations, headlined by a *Media Freedom Act*, an AJF initiative proposed in February, following a Round Table at the University of Queensland. While the Paper isn't exhaustive (for instance, it doesn't include much needed reforms to Freedom of Information laws to create greater access to the hidden workings of government; that is on our agenda, for later), the seven recommendations do provide the strong framework for the AJF's Purpose of restoring trust in journalism and its role in the democratic process.

I would like to thank the Advisory Board members who have given, or have offered, their advice. And finally I would like to thank the rest of the board. These people are providing the breadth and depth of skills and the group dynamic to deliver on our purpose.

1 Media Entertainment and Arts Alliance (MEAA), 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 3.

2 Reporters Without Borders, World Press Freedom Index (2019), available online at <<https://rsf.org/en/ranking>>.

# The state OF PRESS FREEDOM IN AUSTRALIA

Responsible and representative government is a fundamental part of Australia's political system. The constitutional implied freedom of political communication helps to support this principle by protecting public oversight of the exercise of executive and legislative power.

This principle requires that the executive branch of government be held to account by parliament, and by citizens through elections. To do that, information about governments' performance must flow freely.<sup>3</sup> In a modern representative democracy like Australia, journalists and their sources are essential to making that happen.

Recent changes to the law have chipped away at the fundamental freedoms and protections that allow journalists to do their important work. The pillars supporting Australia's implied freedom of political communication have been significantly eroded. It's had a chilling effect on Australian journalism. In just the last year, Australia's position in the World Press Freedom Index has slipped two places to 21st.<sup>4</sup>

90% of Australians and 85% of Australian journalists think the state of press freedom in Australia has deteriorated in the last decade.

An urgent response is needed to support journalists and the level of press freedom needed for a modern representative democracy like Australia.

Australia has not experienced many political corruption scandals of the magnitude of Watergate and it has never been under a dictatorship. So it is easier in Australia to forget the importance of press freedom, open justice and the principles underlying our democratic process. Australians have not had to experience what a lack of these principles can entail.



We have not had to fully appreciate their importance to the way we live, the way we express ourselves, and the way we inform ourselves. However, this is not something that a representative democracy like Australia should need to test.

That said, where Australia has experienced scandals of this type and scale, such as in Queensland in the 1980s and in the case of the Reserve Bank of Australia (RBA) bribery scandal more recently, investigative journalists have played key roles providing the transparency needed to bring them to light.

<sup>3</sup> Since Australia only enjoys an implied right to political communication following *Lange v The Australian Broadcasting Corporation* 189 CLR 520, statutory responses that support that right are welcomed to support media freedom. However, we understand that the High Court has declined to grant Special Leave to a large number of cases since *Lange's* case that sought to explain or expand the defence. Consequently, a more robust statutory environment to protect press freedom is required to support judges in their decisions.

<sup>4</sup> Reporters Without Borders, World Press Freedom Index (2019), available online at <<https://rsf.org/en/ranking>>.

*Few would deny that it is becoming more common for representatives of the state to publicly attack legitimate news organisations in order to silence or discredit their critics; to erode the freedoms of the press through, for instance, extending the reach of legal sanctions against journalists and whistle-blowers; and to erect bureaucratic and sometimes legal barriers to the free flow of information to the public about governance and the state's administration. Perhaps the most concerning of the direct attacks on journalists is the current US President's repeated characterisation of the media as 'the enemy of the people'.*

— Emeritus Professor Graeme Turner, University of Queensland



## Recommendations for Media Freedom

The AJF makes the following recommendations to improve media freedom in Australia:

- 1 Positive media freedom:** Introduce a Media Freedom Act that positively enshrines the principle of freedom of the press.

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- 2 National Security:** Address press freedom concerns in national security legislation by putting in place an appropriate balance in national security legislation between the imperatives of public accountability of government, and operational secrecy for national security agencies. That balance should recognise the fundamental importance of national security and the protection of certain Commonwealth activities and the identities of certain Commonwealth employees, whilst providing a basis for journalists to investigate and report on government misconduct.

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- 3 Confidentiality:** Protect journalists' confidential data where that data is gathered and held for legitimate journalistic work. Where confidential data is accessed due to national security concerns, the basis for doing so must be able to be objectively tested.

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- 4 Shield Laws:** Enhance and harmonise the shield laws available under State, Territory and Commonwealth Evidence Acts to cover legitimate journalistic work in a uniform way.

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- 5 Whistleblowers:** Enhance whistleblower protections so that:
  - all disclosures made in the public interest by whistleblowers to journalists are protected, regardless of any steps by the organisation subject of the disclosures to address its misconduct; and
  - the concept of 'disclosable conduct' is abolished as a requirement for public sector disclosures.

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- 6 Defamation and the Public Interest:** Introduce a succinct and clearly set-out public interest defence to claims of defamation.

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- 7 Transparency around Suppression Orders:** Establish greater transparency in the issuing and recording of suppression orders.



## Recommendation 1: INTRODUCE A MEDIA FREEDOM ACT

Australia needs a 'Media Freedom Act' to re-balance Australia's national security, data encryption, defamation, whistleblowing and suppression order legislation. This new Act should contain purposive, positive protections for journalists when engaged in legitimate journalistic work, and their sources, from civil suits and law enforcement over-reach.

The Media Freedom Act would operate as a law reform act enshrining press freedom and enhancing protections for journalists through amendments to existing applicable legislation that impacts press freedom. It would do this by introducing measures that:

- enshrine the principle of freedom of the press in legislation;
- subject to reasonable and proportionate limits, enshrine the right to freedom of opinion and expression contained in Article 19 of the *International Covenant on Civil and Political Rights*;
- elevate the status of any offence committed against a journalist by reason of the journalist's work to an aggravated offence;<sup>5</sup>
- amend national security legislation to better protect journalists from criminal liability for legitimate journalistic work (see recommendation 2);
- protect the confidentiality of journalists' notes and source material developed in the course of legitimate journalistic work (see recommendation 3);
- enact shield laws protecting journalists from being forced to reveal their sources by government agencies and in civil and criminal court proceedings where a journalist has engaged in legitimate journalistic work (see recommendation 4); and
- safeguard journalists and their sources through enhanced whistleblower protections (see recommendation 5).

Arguably, the Media Freedom Act could be introduced through Federal legislation under the External Affairs power of the Constitution, giving effect to Art. 19 of the International Covenant on Civil and Political Rights. Alternatively, to the extent necessary with respect to any particular Recommendation that is not ultimately covered by a federal Media Freedom Act, the Commonwealth and State and Territory Governments should engage through the Council of Australian Governments (**COAG**) to harmonise the States' and Territories' collective legislative approaches with respect to that Recommendation.

Separately, COAG should collaborate to:

- introduce a public interest defence to claims of defamation (see recommendation 6); and
- establish more effective oversight of the use of suppression orders (see recommendation 7).



<sup>5</sup> In February 2018 US Democratic Congressman Eric Swalwell introduced a "Journalist Protection Act" to the House of Representatives. According to his website, the Act would make "it a federal crime to intentionally cause bodily injury to a journalist affecting interstate or foreign commerce in the course of reporting or in a manner designed to intimidate him or her from newsgathering for a media organization."

## Recommendation 2:

# STRIKING THE RIGHT BALANCE IN NATIONAL SECURITY LEGISLATION

### Overview

Australia needs laws that respond appropriately to threats to national security posed by terrorism, a rapidly changing global and regional environment, covert foreign interference and malicious use of technology.

Recent tragedies in Christchurch and Sri Lanka, cyber-attacks against Australian parliament systems, and the findings of the Mueller report underscore that need.

However, since September 11, in passing laws to defend our country and institutions against new threats, successive governments have eroded many of the freedoms they sought to defend. The result is a statutory framework that fails to appropriately balance national security legislation and operational secrecy for national security agencies on one hand, and public accountability and transparency of government, on the other hand.

In many cases, each new national security incident is often followed by a blunt, ad hoc legislative response. Rushed legislative reform results in measures that extend well beyond the intended legislative purpose. Examples include:

- the creation of new offences that attribute criminal liability to novel forms of conduct;
- the expansion of existing offences to capture activities that previously fell outside the ambit of prosecution; and
- measures that encroach on certain freedoms of the Australian public.

These changes have dampened legitimate journalist investigation and reporting, as well as journalists' freedom to gather information, publish what they find, and protect their sources.

In some cases, these laws substantially increase the likelihood of imprisonment for journalists that report on national security matters, and their sources. This risk, in turn, deters journalists from investigating and reporting on matters of legitimate concern and public interest.

**“Journalists working in the service of democracy, and their sources, are over-exposed and under-protected.”**

**– Peter Greste and Richard Murray,  
University of Queensland**

Early findings of forthcoming research by University of Queensland's Peter Greste and Richard Murray indicate that journalists feel “a sense of insecurity and foreboding created by Australia's national security legislation”.

According to one senior editorial figure at the ABC:

**“What we are seeing is criminalisation of journalism ... There are stories that are going untold because we are concerned about putting our journalists in harm's way. It is one thing for a journalist to be slapped with a civil suit. If you have a large organisation behind you that can be part of the price of good journalism. It is entirely another thing for someone you are responsible for to be sent to prison for doing journalism.”**

Within the national security framework, the laws with the greatest potential to encroach on journalists' freedoms are:

- the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (**EFI Act**); and
- the Telecommunications and Other Legislation Amendment (**Assistance and Access**) Act 2018 (Assistance and Access Act).

The EFI Act (together with the *Foreign Influence Transparency Scheme Act 2018* (Cth)) is the most comprehensive overhaul of Australia's security and foreign interference laws in recent times. The EFI Act was hurried through before a set of by-elections across the country on 28 July 2018. The measures set out in the Assistance and Access Act are an international world-first. Though radical, the passage of both Acts was rushed by Parliament.

Before it was passed, three independent UN human rights experts condemned the EFI Act for violating freedom of expression, expressing grave concern "that the Bill would impose draconian criminal penalties on expression and access to information that is central to public debate and accountability in a democratic society."<sup>6</sup>

Whilst the EFI Act and the Assistance and Access Act seek to safeguard Australian institutions and the public from real and ongoing threats to national security, the speed with which the bills were pushed through Parliament meant there was little time for MPs to consider and debate their overreach and encroachment upon the right to freedom of expression.

### Remedy

The Media Freedom Act would seek to reach an appropriate balance that recognises the fundamental importance of national security and the protection of certain activities of the Commonwealth and the identities of certain Commonwealth employees, whilst not preventing journalists from investigating and reporting on government misconduct.

It would do this by:

- replacing defences available to journalists for certain national security offences with exceptions from prosecution where the underlying conduct in question relates to legitimate journalistic work; and
- otherwise, positively allowing journalists to report on intelligence and security agency misconduct that does not relate to national security.



6 Comments on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 in response to the call for submissions by the Parliamentary Joint Committee on Intelligence and Security, United Nations' Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, February 15 2018, available at [https://www.ohchr.org/\\_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Opinion/Legislation/OL-AUS-2-2018.pdf&action=default&DefaultItemOpen=1](https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Opinion/Legislation/OL-AUS-2-2018.pdf&action=default&DefaultItemOpen=1).

## (a) Striking the right balance

### Overview

Unlike Australia, jurisdictions with constitutionally enshrined human rights or wide-reaching human rights legislation typically require that national security legislation is balanced against those rights (such as free speech) that it infringes, and that they are subject to legal challenge on that basis.

The United States, for example, provides a general exemption in the first amendment to its Constitution whereby no statute can abridge freedom of the press.

Australia's national security legislation currently fails to strike the necessary balance. The EFI Act criminalises a wide range of political expression, without requiring proof of harm or illegitimate foreign or other interests. The EFI Act's definition of 'national security' is broad and includes not only the defence of the country, but also its 'political' and 'economic' relations with other countries. Consequently, it can potentially encompass any political or economic matter involving something external to Australia.

The EFI Act threatens journalists' sources with imprisonment for speaking-out about matters relating to Australia's national security. This has clear implications for freedom of speech, political communication, journalism and public interest reporting. For instance, under the EFI Act:

- It is a criminal offence to publicly disclose any information relating to a security agency's operations, even if the disclosure reveals misconduct. For example, if an ASIO operative engages in criminal conduct during an operation, any journalist and their source who informs the public of that misconduct may be imprisoned for up to 20 years, regardless of the gravity and circumstances of the crime committed by the ASIO agent.
- The espionage offences will capture journalists working for foreign-owned news agencies (such as the BBC) if they report on a matter that:

- has a security classification (regardless of whether the journalist is aware of the security classification); or
- concerns Australia's national security,
- and are reckless as to the potential for the information to:
  - prejudice Australia's national security; or
  - advantage the national security of another country, unless the Australian Government has already publicised the information.

The EFI Act does not contain scope for any challenge based on the imperatives of public accountability or the right to free speech. It gives no apparent consideration to the protection of journalistic freedom. Its effect is simply to prioritise security concerns ahead of free speech without regard to context or the individual circumstances of the case.

The *Public Interest Disclosure Act 2013* (Cth) (**PIDA**) regulates public interest disclosures in the security and intelligence sector. Designed to encourage disclosure and resolution of misconduct by security agencies confidentially and internally, it undermines the principles of responsible and representative government by prohibiting any public disclosure outside narrow circumstances.

### Remedy

Accountability, proportionality and protection for whistle-blowers and journalists who speak out in the public interest should be protected by legislation that establishes a court process that regulates whistle-blower disclosures to journalists.

This process should be proactively subject to a presumption that misconduct should be disclosed, unless the security agency concerned can establish on the balance of probabilities that the disclosure would pose a risk to national security or the operational effectiveness of the security agency concerned.

If that threshold is satisfied, the court should establish a framework for disclosing the conduct at such time as the risk to national security of disclosing the misconduct has passed.

**(b) Provide 'exceptions' from prosecution for national security offences, rather than merely defences**

**Overview**

The existing defence for 'information communicated ... by persons engaged in business of reporting news ...' (**News Reporting Defence**) applies only in relation to secrecy offences. There is no equivalent News Reporting Defence for espionage or foreign interference offences.

Protecting journalists only through a defence rather than an exception to an offence means that journalists bear the heavy burden of proving that the defence is applicable, and then only after the journalist is charged with the offence. Defending criminal charges in court is costly, time consuming, and highly stressful, even for those who are found innocent.

The risk of having to defend legitimate journalistic conduct against criminal charges deters journalists from engaging in important public interest investigative journalism, stifling them and the media organisations that employ them.

**Remedy**

The existing News Reporting Defence and new protections should operate as exceptions to offences. This ensures that the burden of proving that the exception does not apply will fall on prosecutors. Practically speaking, this would restore the full benefit of the presumption of innocence for journalists. It would also deter law enforcement agencies from seeking to prosecute them without a clear and persuasive case that the journalist in question has engaged in conduct that is illegal.

Importantly, this would also limit the potential for the threat of prosecution to be wielded as a weapon simply to gag journalists.

**(c) Allow journalists to report on intelligence and security agency misconduct that does not impact national security**

**Overview**

Where agencies engage in misconduct in a way that has no bearing on national security, the arguments of protecting sensitive information fall away. In those circumstances, the applicable principles of public accountability should be no different from those applied to any other public or private sector organisation whose conduct affects matters of public interest.

**Remedy**

Where a national security organisation engages in misconduct the disclosure of which poses no immediate risk to national security, journalists and their sources should be allowed to report on that misconduct without threat of prosecution.



## Recommendation 3:

# PROTECT JOURNALISTS' CONFIDENTIAL DATA

### Overview

The recent Assistance and Access Act empowers law enforcement organisations to access telecommunications information and data in a broader range of circumstances than had previously been available.

The passage of the Assistance and Access Act was accelerated so it could pass in the last Parliamentary sitting week of 2018. It gives law enforcement agencies a range of new powers to access journalists' confidential communications with their sources. Although its passage was

accompanied by firm reassurances that the powers would be exercised moderately and with discretion, law enforcement agencies' exercise of similar powers under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) (the **Data Retention Act**) tells a different story.

The relationship of trust between the journalists and their sources is the cornerstone of investigative journalism. These laws cut to the heart of that relationship.

### According to the Communications Alliance:

#### METADATA

retained under the Data Retention Act may be accessed without a warrant by 22 government agencies, including police and intelligence agencies.

Many other agencies have relied on state-based powers to gain access to retained metadata.

**BY LATE 2018 AROUND 1,000 REQUESTS FOR ACCESS TO METADATA WERE RECEIVED**

by telecommunications providers each day.<sup>7</sup>

**57% OF AUSTRALIAN JOURNALISTS SURVEYED**

are either not confident or very unconfident that their sources would not be susceptible to being identified through their metadata.

Source: Media Entertainment and Arts Alliance (MEAA), 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 11. Survey of 1532 people, conducted online by MEAA from February to early April 2019.

<sup>7</sup> <https://www.abc.net.au/news/2018-10-19/authority-creep-has-more-agencies-accessing-your-metadata/10398348>

The Media Entertainment and Arts Alliance expressed concern that the Assistance and Access Act “typifies the sledgehammer to crack a walnut approach that is now commonplace in Government attempts to bolster national security and community safety.”<sup>8</sup> AJF agrees. Under the Act:

- Australian Government agencies may issue ‘notices’ to ‘designated communication providers’ requiring them to assist with criminal law enforcement functions. The definition of ‘designated communication provider’ is intentionally broad, and so captures a wide range of people and entities, from large corporations such as Facebook, to individuals such as technicians conducting installation or repair services. The type of assistance to be provided is also broad, and can include removing electronic protection, providing technical information, formatting information and facilitating access to devices and other things.
- Australian law enforcement agencies can covertly seize and access information through ‘computer access warrants’. A computer access warrant may be applied for and issued if a judicial officer is satisfied that there are reasonable grounds to believe access to data held in a ‘target computer’ (this term is broadly defined and may include more than one computer or system) will assist in obtaining intelligence about a matter relevant to security. These may be issued even where the target individual or organisation is not being investigated for an underlying offence.
- Law enforcement officers may apply for ‘assistance orders’ requiring specified persons to provide information or assistance that is reasonably necessary to allow access to data held in a computer or device subject to a computer access warrant.

These laws significantly undermine journalists’ ability to protect their confidential sources.

Journalists are offered no protection from computer access warrants or assistance orders, so, to the extent they use electronic devices or web-based accounts, can offer sources no assurance of confidentiality. Even before the Assistance and Access Act was introduced, journalists faced significant barriers to protecting their confidential sources. In 2012, a Victorian court ordered journalists reporting on the RBA bribery scandal to reveal their sources. Had their appeal against these orders been unsuccessful, the journalists would have faced imprisonment for contempt. See page 19 for further discussion of the RBA bribery scandal.

Existing law enforcement powers under the Data Retention Act have already been used outside that Act’s framework. In 2017 an AFP investigator accessed a journalist’s call records without a warrant.<sup>9</sup> Rather than reprimanding the investigator for exceeding the powers provided under the Act, the AFP Commissioner asserted that the investigator had no ‘ill will or bad intent’.<sup>10</sup>

Separately, concerns have been raised that developing the de-encryption technology that would be required to comply with these laws makes our communications systems vulnerable to exploitation not only by law enforcement operatives, but also by organised criminals, terrorists, commercial competitors and even social adversaries.

### Remedy

As well as changes necessary to address privacy concerns, this legislation should be amended so that computer access warrants and assistance orders may not be issued to access data obtained by a journalist in the legitimate course of their work, unless the following conditions are satisfied:

- (a) the warrant is required to mitigate the immediate danger to a person’s safety; **and**
- (b) there is no other way to obtain the data.

8 Media Entertainment & Arts Alliance, Submission No 79 to Parliamentary Joint Committee on Intelligence and Security, Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018, 19 October 2018, 1.

9 Luke Royes, *AFP Officer Accessed Journalist’s Call Records in Metadata Breach* (29 April 2017) ABC News < <https://www.abc.net.au/news/2017-04-28/afp-officer-accessed-journalists-call-records-in-metadata-breach/8480804>>; Science Party, Submission to the Department of Home Affairs, Comments on the Assistance and Access Bill (10 September 2018), 4.

10 Ibid.



## Focus

# LAW COUNCIL OF AUSTRALIA (LCA) 2018 PRESIDENT MORRY BAILES ON DATA ENCRYPTION LAWS

*We now have a situation where unprecedented powers to access encrypted communications are now law, even though Parliament knows serious problems exist.*

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*This is what happens when you compromise an established committee process and allow the work of Parliament to be rushed and politicised.*

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*We are deeply troubled that the committee was pushed to produce a report that appears to be incomplete and lacking in reasoning for its recommendations.*

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*It's not just the rights of citizens that are potentially compromised by this outcome, but intelligence agencies and law enforcement that are at risk of acting unlawfully.*

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Source: LCA media release

## Recommendation 4:

# ENHANCE WHISTLE-BLOWER PROTECTIONS

### Overview

Whistle-blower protection laws are designed to prevent the mistreatment of individuals that disclose illegal or improper conduct by organisations in order to hold them accountable. A robust whistle-blower regime is essential to the rule of law, upholding good corporate governance and public integrity in the private sector, and maintaining democratic accountability in the public sector.

Whistle-blower protections available under Australian law include maintenance of confidentiality and protection from criminal and civil proceedings and victimisation at work.<sup>11</sup> In some cases, if an organisation breaches their protection obligations to a whistle-blower, the organisation can be held liable for damages and forced by a court to take or refrain from action.<sup>12</sup>

However, these protections remain inadequate. Although the current statutory framework encourages organisations to avoid misconduct, it is ambivalent to the public's right to know, and the journalist's freedom to report on, that misconduct where it occurs.

### Remedy

The public has a right to information about matters that affect its rights, freedoms and wellbeing. Where there are justifiable exceptions to this, they should be articulated in legislation, with the onus being on establishing why the information should be withheld from the public, rather than the reverse.

Whistle-blower protections should be enhanced so that:

- disclosures made in the public interest by whistle-blowers to journalists are protected, regardless of any steps by the organisation subject of the disclosures to address its misconduct; and
- the concept of 'disclosable conduct' is abolished as a requirement for public sector disclosures.

**(a) Enhance private and public sector whistle-blower protections so that disclosures made in the public interest by whistle-blowers to journalists are protected, regardless of any steps by the organisation the subject of the disclosures to address its misconduct**

This recommendation does not apply to whistle-blower disclosures in the intelligence and national security sectors. In those contexts, the interests of public accountability and national security must be carefully balanced – see recommendation 2.

#### Confidential sources



In the last year, **33% OF AUSTRALIAN JOURNALISTS SURVEYED** published or broadcast a story that originated with information provided by a confidential source.



**92% OF AUSTRALIAN JOURNALISTS SURVEYED** believe legislation in the public and private sector is inadequate to protect whistleblowers.

**Source:** Media Entertainment and Arts Alliance (MEAA), 'The Public's Right to Know: the MEAA Report into the State of Press Freedom in Australia in 2019' (3 May 2019), p 11. Survey of 1532 people, conducted online by MEAA from February to early April 2019.

<sup>11</sup> See *Corporations Act 2001* (Cth), ss 1317AB, 1317AC, 1317AAE; *Public Interest Disclosure Act 2013* (Cth) ss 10, 13 – 16.

<sup>12</sup> See *Corporations Act 2001* (Cth), ss 1317AD, 1317AE.

## Overview

Disclosures to journalists by whistle-blowers in the private sector are only protected in a narrow range of circumstances. Only disclosures of a certain nature, to a narrow class of respondents, are protected. To attract protection, a disclosure must:<sup>13</sup>

- relate to a matter that the whistle-blower has reasonable grounds to suspect concerns 'misconduct, or an improper state of affairs' in relation to a relevant entity;
- relate to an offence or contravention against certain legislation or a matter that represents a danger to the public or the financial system;
- be made by a current or former officer, employee or contractor of the relevant entity;<sup>14</sup> and
- be made to a prescribed Commonwealth authority or a senior person authorised by the relevant entity to receive disclosures of that kind.<sup>15</sup>

Similar criteria apply in the public sector, which are expanded on below at subsection (b).<sup>16</sup>

In the private sector, disclosures to journalists (and also Members of Parliament) only attract protection if they qualify as 'public interest' or 'emergency' disclosures.

Public interest disclosures require the following conditions to be met:<sup>17</sup>

- the discloser has already made the disclosure to the relevant entity;
- at least 90 days have passed since the previous disclosure was made;
- the discloser does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the disclosure relates;

- the discloser has reasonable grounds to believe that the disclosure is in the public interest;
- the entity subject of the disclosure has received written notice of the intention to make the disclosure; and
- the extent of the information disclosed is no greater than is necessary to inform the recipient of the misconduct or improper state of affairs.

The same conditions apply to emergency disclosures. However, the 90-day period since the previous disclosure was made is replaced by a requirement that the discloser has reasonable grounds to believe that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the natural environment.<sup>18</sup>

Similar restrictions apply to the public sector, where disclosures may only be made to a journalist after an initial disclosure has been made, either in an 'emergency' (equivalent to those described above), or where the discloser 'believe[s] on reasonable grounds that the investigation' or 'the response to the investigation was inadequate'.<sup>19</sup>

In the private sector, whistle-blowers remain unprotected if the relevant organisation has taken steps to address the relevant misconduct, even if the steps taken are insincere or ineffective. This is fundamentally at odds with facilitating public accountability of organisations. Arguably, the imperative for accountability is even greater in the public sector, as our system of representative and responsible government depends on public oversight to function.

<sup>13</sup> *Corporations Act 2001* (Cth), s 1317AA.

<sup>14</sup> *Corporations Act 2001* (Cth), s 1317AAA.

<sup>15</sup> *Corporations Act 2001* (Cth), s 1317AA, 1317AAC.

<sup>16</sup> *Public Interest Disclosure Act 2013* (Cth) ss 10, 13–16.

<sup>17</sup> *Corporations Act 2001* (Cth), s 1317AAD(1).

<sup>18</sup> *Corporations Act 2001* (Cth), s 1317AAD(2).

<sup>19</sup> *Public Interest Disclosure Act* (Cth), s 26(C).

## Remedy

The concepts of 'emergency disclosures', 'public interest disclosures', and adequacy in the context of public sector disclosures, should be amended so as to provide whistle-blowers with protection for all public interest disclosures made to journalists.

At present, Australia's private and public sector whistle-blower regimes use the threat of public scrutiny as a tool to motivate companies and governments to avoid misconduct. While these incentives are important, in a healthy democracy, public scrutiny and awareness of corporate and official misconduct is not a means but an end in itself.

Under a functional whistle-blower regime, and in a functioning democracy, institutions should be held publicly accountable for their misconduct, regardless of any steps they may take to address it.

Similarly, whistle-blowers' disclosures to journalists should not be limited to that which is 'no greater than is necessary to inform the recipient of the misconduct' or 'of the substantial and imminent danger'. Disclosures should support journalists to fully investigate the underlying conduct in a manner consistent with responsible journalism and inform the public of the nature, context and extent of the misconduct and impropriety where it occurs.



20 Ibid s 29.

## (b) Abolish the concept of 'disclosable conduct' as a requirement for public sector disclosures.

### Overview

Public sector whistleblowing is regulated by the *Public Interest Disclosure Act 2013 (Cth) (PIDA)*. Disclosures must relate to 'disclosable conduct'.<sup>20</sup> The following conduct is 'disclosable' for the purposes of the PIDA:

- conduct that contravenes an Australian law or a foreign law with an equivalent under the law of the Australian Capital Territory;
- conduct that perverts or attempts to pervert the course of justice;
- conduct engaged in for corrupt purposes;
- maladministration;
- conduct that abuses public trust;
- fabrication, falsification, plagiarism, or deception, in relation to proposing, carrying out or reporting the results of scientific research;
- misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice;
- conduct that results in the wastage of certain money or property;
- conduct that unreasonably results in or increases a risk of danger to health or safety;
- conduct that results in or increases a risk of danger to the environment; and
- conduct listed in relevant regulations.

### Remedy

Although the scope of this definition is wide, restricting the subject matter of public interest disclosures in this way establishes a legislative regime that is inadequately responsive to all forms of misconduct that may arise. The list of disclosable conduct should be abolished so that all public interest disclosures of public sector misconduct are protected. Alternatively, any breach of human rights should be added to the list of disclosable conduct.



## Focus

# RICHARD BOYLE – 161 YEARS’ IMPRISONMENT FOR WHISTLEBLOWING?<sup>21</sup>

Former Australian Tax Office (ATO) official Richard Boyle faces over 160 years’ imprisonment for 66 offences relating to his decision to draw public attention to misconduct at the ATO.

Mr Boyle’s public allegations included claims that the ATO systematically targeted small businesses and used heavy-handed debt collection tactics including the use of ‘standard garnishee’ notices that allow the ATO to seize funds from the bank accounts of taxpayers who had been assessed to owe the ATO money, sometimes without their knowledge.

Mr Boyle claims that before going public, he raised complaints through a 12,000 word disclosure to the ATO about various practices.

Unsatisfied with the results of the internal disclosure process, Mr Boyle decided to go public with his allegations.

His disclosures prompted a joint investigation by The Age, The Sydney Morning Herald and the ABC that led to an inquiry by a bipartisan parliamentary House Standing Committee on Tax and Revenue. The Committee recommended various changes, including the introduction of a new Tax Office charter, an appeals group headed by a second independent commissioner, the transfer of debt-recovery functions into the ATO’s compliance operations and a restructure of compensation processes.

According to the Sydney Morning Herald, ‘The Australian Federal Police raided his home days before he went public and only a month after the ATO offered him a settlement to prevent him from speaking out.’

Charges allege that he tapped and recorded telephone conversations without the consent of all parties and made a record of protected information, and in some cases passed that information to a third party.

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2 Sources: Sydney Morning Herald: <https://www.smh.com.au/politics/federal/the-want-to-cook-him-slowly-ato-whistleblower-faces-six-life-sentences-20190227-p510ll.html>  
<https://www.smh.com.au/business/small-business/ato-whistleblower-faces-six-life-sentences-roughly-the-same-as-ivan-milat-20190226-p510d2.html>



## Focus

# THE RBA BRIBERY SCANDAL



Two subsidiary companies of the RBA, Securrency International Pty Ltd (**Securrency**) and Note Printing Australia Limited (**NPA**) were embroiled in a bribery scandal that was first reported in 2009 by Australian journalists working for *The Age*, Nick McKenzie and Richard Baker.

The journalists' investigation revealed that agents of Securrency and NPA had been bribing officials in Indonesia, Malaysia and Vietnam to maintain lucrative government contracts.<sup>22</sup>

McKenzie and Baker relied on whistleblower information first revealed to them in 2008 by two employees of Securrency and NPA, James Shelton and Brian Hood. Shelton approached the journalists after the AFP failed to act on his complaints to them. The AFP then launched an investigation in 2009. In 2011, the AFP and Commonwealth Director of Public Prosecutions commenced criminal proceedings against Securrency and NPA together with several executives from both companies.

In 2012, the two companies pleaded guilty to bribery charges and received a record-breaking \$21.6 million fine.<sup>23</sup> Various executives were prosecuted between 2011 and 2018, and all proceedings were subject to non-publication orders. In November 2018 the last executive, Christian Boillot, pleaded guilty and the Victorian Supreme Court vacated all non-publication orders.

In 2012, a Victorian Magistrate issued summonses to McKenzie and Baker in relation to bribery proceedings against former NPA Chief Executive John Leckenby. Leckenby pursued the identity of the journalists' sources in relation to his committal hearing on the basis that it was essential that the accused could 'adequately prepare and present their case'.<sup>24</sup> This would have forced the journalists to reveal Shelton and Hood's identities, at a time when the AFP investigation was still ongoing.<sup>25</sup>

The witness summonses were eventually set aside by the Court of Appeal in 2013.<sup>26</sup> It was held that because the only information to be gained from them was the identity of the sources, Leckenby was merely embarking on a 'fishing expedition in the hope that something might turn up as a result of the applicants' appearance in the witness box'.<sup>27</sup>

Both Shelton and Hood lost their jobs for coming forward and endured close to a decade of anxiety and hardship. This was due in part to non-publication orders that prevented the public from knowing the full extent of their whistleblowing and made it difficult for the pair to find employment.<sup>28</sup>

22 Ibid.

23 Richard Baker and Nick McKenzie, 'Seven years and millions of dollars later, Australia's biggest bribery prosecution finally revealed' *The Sydney Morning Herald* (online) 28 November 2018 <<https://www.smh.com.au/business/companies/seven-years-and-millions-of-dollars-later-australia-s-biggest-bribery-prosecution-finally-revealed-20181108-p50eut.html>>.

24 *Criminal Procedure Act 2009*s 97(d).

25 Maris Beck, 'Fairfax pair to fight subpoenas' *The Age* (online) 20 December 2012 <<https://www.theage.com.au/national/victoria/fairfax-pair-to-fight-subpoenas-20121220-2bojn.html>>.

26 Mark Russel, 'Journalists win appeal against order to reveal bribery case sources' *The Sydney Morning Herald* <<https://www.smh.com.au/business/companies/journalists-win-appeal-against-order-to-reveal-bribery-case-sources-20130418-2i31v.html>>.

27 McKenzie and Baker v Magistrates' Court of Victoria and Leckenby (2013) 39 VR 311 [54].

28 Richard Baker and Nick McKenzie, 'How a meeting in a cafe with a journalist prompted Australia's biggest foreign bribery case' *The Sydney Morning Herald* (online) <<https://www.smh.com.au/politics/federal/how-a-meeting-in-a-cafe-with-a-journalist-prompted-australia-s-biggest-foreign-bribery-case-20181127-p50inv.html>>.

## Recommendation 5:

# ENHANCE THE SHIELD LAWS

### Overview

'Shield laws' allow journalists to refuse to disclose information that would lead to the identification of their sources. The Commonwealth and each State and Territory except Queensland and Tasmania have adopted shield laws that offer substantially similar levels of protection.

The *Evidence Act 1995* (Cth) provides a presumption that during court proceedings, if a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer can be compelled to answer questions or produce documents that would disclose the identity of the informant or allow it to be ascertained.<sup>29</sup> This presumption may be overturned if the court decides that the public interest in the disclosure of evidence of the identity of the informant outweighs:

- any likely adverse effect of the disclosure on the informant or any other person; and
- the potential wider impact of a court undermining the arrangement between the journalist and the source on journalists' ability to investigate and report more generally.<sup>30</sup>

### Remedy

Australia's shield laws should be amended so that:

- in civil matters, journalists may refuse to disclose information that would reveal their sources, regardless of public interest or other considerations (except in circumstances where the authority seeking the disclosure can demonstrate that would be likely to materially prejudice national security); and
- in matters relating to law enforcement and national security, journalists be given a right to refuse to disclose information that would identify their sources, unless the authority seeking the disclosure can establish on the balance of probabilities that the disclosure is necessary to protect an immediate threat to a person's safety, and that the relevant threat could not otherwise be averted.

These amendments to Commonwealth and each State and Territory's legislation should be co-ordinated through COAG.

"The consequences of being outed as a source are potentially criminal .... It is our responsibility to tell them the way they have contacted us has compromised any possibility of keeping their identity confidential. There are stories that should have been told and have not been told because of a combination of the ASIO Act, the EFI Act and metadata laws. That's the chilling effect in practice."

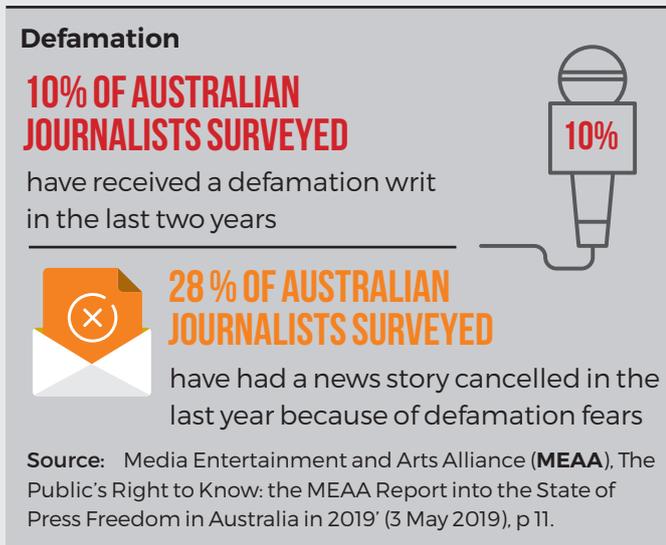
-Mark Maley, ABC News

<sup>29</sup> *Evidence Act 1995* (Cth), s126K(1).

<sup>30</sup> *Evidence Act 1995* (Cth), s126K(2).

## Recommendation 6:

# A PUBLIC INTEREST DEFENCE FOR DEFAMATION PROCEEDINGS



“What is more difficult to measure is the chilling effect that defamation laws may have on stories that are not pursued by journalists or editors. We believe that defamation law reform must be substantial, and must not merely tinker at the edges. We cannot and should not be timid with our recommended reforms.”

-Peter Bartlett and Dean Levitan, MinterEllison

### Overview

When a journalist's work unfairly damages a person's reputation due to failure to take due care when investigating and reporting a story, the victim should have recourse to compensation and a public correction of the record.

However, the right to reputation should be protected in a manner that does not unduly encroach on journalists' ability to report on misconduct by government and other public figures. Currently, Australia's uniform defamation laws impede that accountability. The full extent of the legislative framework's impact is difficult to assess. For example, how can the dampening effect of Australia's defamation laws be measured in respect of stories that are ultimately not pursued by journalists or editors?

The defence of qualified privilege is rarely available to assist journalists and media organisations in defamation actions. Relying on the defence requires a journalist to prove that their conduct in publishing a story was reasonable in the circumstances. Courts have applied such a high standard to this reasonableness test that no journalist has successfully employed it since it was introduced in 2005. The defence has been relied on unsuccessfully in a number of high profile defamation proceedings, including a claim against Fairfax by influential Chinese-Australian businessman Chau Chak Wing. The High Court has also refused to hear a number of cases that have sought to explain or expand defences that may be available based on the constitutional implied freedom of political communication.

The effectiveness of the defence is currently being considered as part of a NSW-led review of Australia's defamation laws.

## Remedy

The law is inadequate to protect journalists who engage in public interest reporting but cannot openly prove the truth of their allegations, which may result from a need to protect sources. In 2013 the UK introduced major defamation reforms to strengthen the defences of truth, honesty and publication on a matter of public interest. Australia's existing defamation legislation should be supplemented by the introduction of a 'public interest defence' modelled on that available under UK defamation legislation. This would make it a defence to an action for defamation for the defendant to show that:

- the statement complained of was on a matter of public interest; and
- having regard to all circumstances of the case, the defendant reasonably believed that publishing the statement complained of was in the public interest.

## TRANSFORMATIVE DEFAMATION REFORMS

In addition to reform by way of a public interest defence, Dr Matt Collins QC suggests other transformative reforms to Australia's defamation laws.<sup>31</sup> These include:

- 1 Introducing legislation that allows complainants to seek a declaration of falsity in relation to the alleged defamatory material that has been published about them. This would offer a more cost-effective alternative to defamation proceedings and would provide complainants with a remedy that serves to restore their damaged reputation. By successfully obtaining a declaration of falsity, the complainant would be in a better position to seek removal of any damaging online content.
- 2 Reforming the existing legislation in such a way that a successful action will require the complainant to prove the falsity of alleged defamatory material. This requirement would not apply in cases where the material cannot be proved to be true or false because it is simply a matter of pure opinion.

<sup>31</sup> Dr Matt Collins discussed the transformative reforms in a paper presented at a Melbourne Law School alumni seminar. A summary is available online at <[http://static11.sqspcdn.com/static/f/556710/28029196/1542690476160/Collins\\_Frankenstein\\_Monster.pdf?token=vtlSbcjRlpxiq3iNDxLiWp6DAs%3D](http://static11.sqspcdn.com/static/f/556710/28029196/1542690476160/Collins_Frankenstein_Monster.pdf?token=vtlSbcjRlpxiq3iNDxLiWp6DAs%3D)>.

## Recommendation 7:

# GREATER TRANSPARENCY IN THE ISSUING AND RECORDING OF SUPPRESSION ORDERS

### Overview

As courts are not always required to maintain records and notify the media of their issuance of suppression orders, the extent of their over-use is difficult to measure. Because of this, available estimates are conservative.

However, even on available data it is clear that suppression orders are over-used by Australian courts.

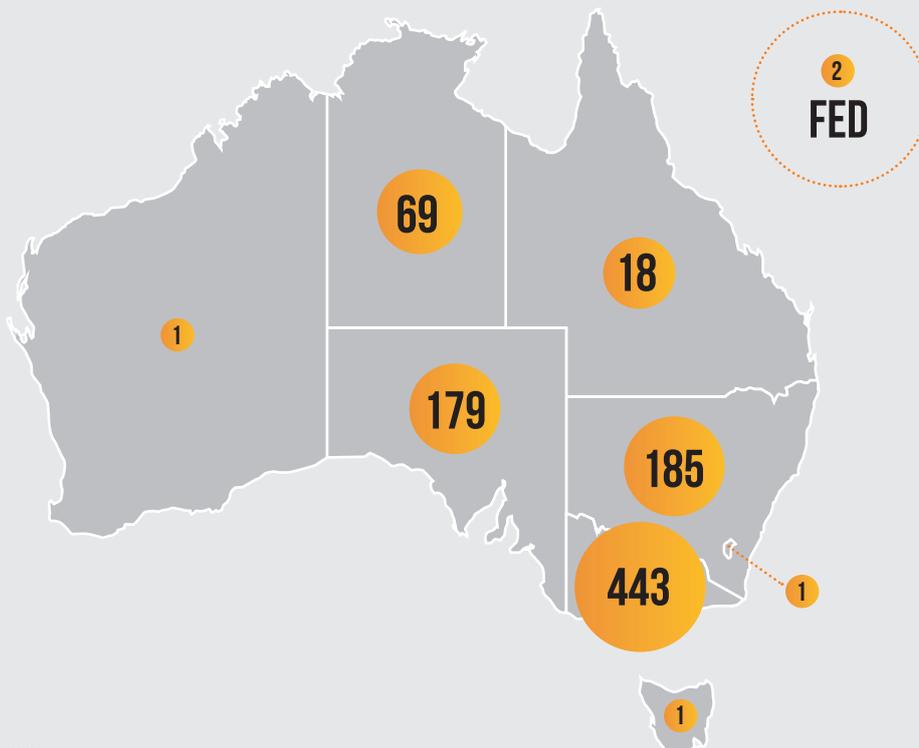
Suppression orders prohibit the disclosure outside the courtroom of information about a legal case. They can play an important role in protecting the identity of victims and witnesses of crimes, and upholding an accused's right to a fair trial by preventing prejudicial pre-trial publicity. However, these imperatives must be balanced with the equally important principles of open justice and transparency to ensure public confidence in the administration of justice in Australia.

Last year, one media lawyer who has attempted to track the use of suppression orders recorded that

Australian courts notified the media of 899 suppression orders, averaging up to 3 orders per business day (see map below). Although this is the most comprehensive record of Australian suppression orders available, it is likely a conservative estimate of the total, because:

- there is no way to assess whether courts are complying with regimes for notifying media of these orders,<sup>32</sup> and there are claims that these regimes are not always followed;<sup>33</sup>
- even if they are complied with, only Victoria and South Australia have regimes where the courts are legally required to notify the media.<sup>34</sup> Therefore the other jurisdictions, where notifying the media is not legally required, are almost certainly under-represented in our source's figures; and
- parties often apply for suppression orders after a hearing has commenced, prompting judges to waive notice requirements in order to avoid delaying proceedings.

### Estimate of Suppression orders notified to media in 2018



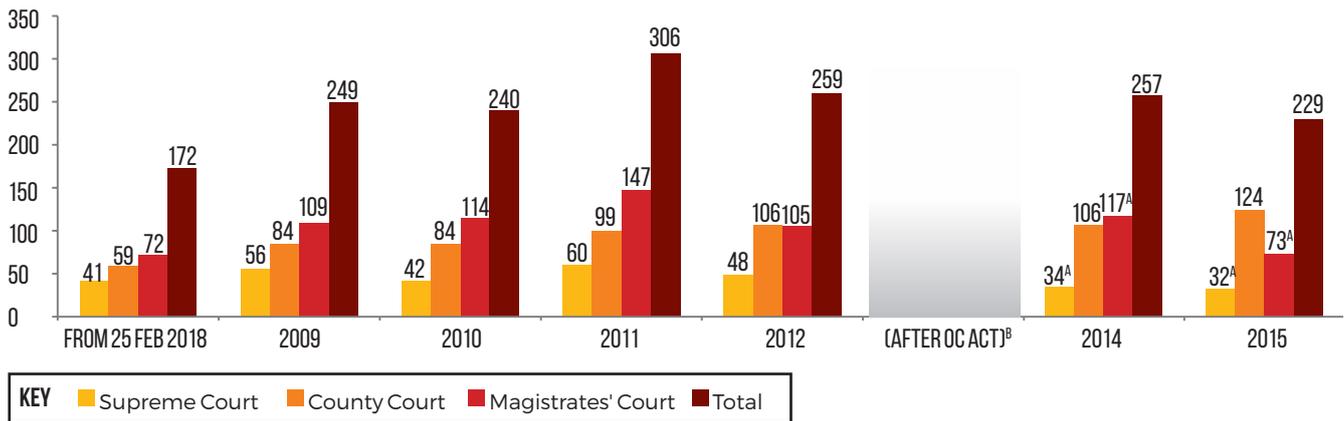
32 See, eg Open Courts Act 2013 (Vic) s11. See also an attempt to evaluate the regime in J Bosland, "Two Years of Suppression under the Open Courts Act 2013 (Vic)" [2017] Sydney Law Review 2.

33 See, eg, S Deery, P Murphy, "Mass of court suppression orders stop Victorian public's right to know" (31 August 2015) the Herald Sun.

34 See Open Courts Act 2013 (Vic) s11; Evidence Act 1929 (SA) s 69A(12).

The only States in which suppression order use has been relatively well-documented are South Australia and Victoria. In Victoria there has been a particularly notable increase in their use.<sup>35</sup> This increase was not ameliorated by the *Open Courts Act 2013* (Vic) (**OC Act**) that was supposed to address their overuse (see graph below). The trend in Victoria may be the case in other States, however due to the difficulty in determining why suppression orders are issued and how they are recorded, it is near impossible to estimate the scale of the problem across Australia.

### Regular Victorian suppression orders by court and year, 2008-15<sup>36</sup>



**Source:** Orders sourced directly from the courts except where indicated.

a: Orders obtained from Fairfax Media and may be incomplete.

b: 2013 was not tracked as the study for 2008-2012 figures was conducted in 2013, and 2014-2015 figures were conducted after the OC Act was introduced.

The uncertainty around the frequency of issued suppression orders, and the reasons for issuing them, is worsened by further uncertainty around who seeks these orders. There is insufficient data to record which parties seek suppression orders in Australia. Yet these figures should be made available in order to understand the extent to which either of the following issues is occurring:

- **the prosecution is over-applying for suppression orders**, especially if despite the defence's objections: this scenario would raise concerns around a government agency such as a prosecutor seeking to suppress what is said about a judicial process, and the executive branch of government's right to control an element of the judiciary. These questions are particularly salient in the case of prosecution-requested suppression orders in criminal matters. They impact how citizens hold the executive branch of government to account in relation to one of our most fundamental values: an individual's liberty.

- **orders are made with the consent of both parties:** in most court decisions, it is appropriate that judges make an order by way of both parties consenting. Australia's adversarial system means that, if the two adversaries agree, there is no longer a reason to dispute. However suppression orders do not concern only the two parties. They are tied to the principle of open justice, which concerns the public at large. Therefore judges should be more vigilant when both parties consent, as in that case neither party is defending the public interest in the right to know about the administration of justice. If judges are frequently granting suppression orders simply due to the consent of both parties, there may be a need to explore whether Australia's judiciary is adequately protecting the open justice principle.

35 See, eg, F Vincent, *Open Courts Act Review* (Victoria, 2017) Department of Justice and Regulation; Bosland, "Two Years of Suppression" above n 25.

36 Adapted from J Bosland, "Two Years of Suppression" above n 25.

The potentially increasing prevalence of suppression orders in certain Australian jurisdictions is even more concerning given the penalties for breaching them include imprisonment and significant fines, as set out in the table below.

### Imprisonment and significant fines

| Jurisdiction | What is the offence?   | What is the penalty?  |   |
|--------------|--|---|---|
|              |  | Imprisonment  | Fine  |
| Cth          | Contravention of an order made by the High Court.  | <ul style="list-style-type: none"> <li>for 12 months; <b>and/or</b></li> </ul>  | <ul style="list-style-type: none"> <li>\$12,600</li> </ul>  |
| NSW          | Conduct that breaches a suppression order or non-publication order.  | <ul style="list-style-type: none"> <li>for 12 months; <b>and/or</b></li> </ul>  | <ul style="list-style-type: none"> <li>\$110,000 (individual)</li> <li>\$550,000 (corporation)</li> </ul>   |
| ACT          | Publication in contravention of a court order.   | <ul style="list-style-type: none"> <li>for 6 months; <b>and/or</b></li> </ul>   | <ul style="list-style-type: none"> <li>\$8000 (individual)</li> <li>\$40,500 (corporation)</li> </ul>       |
| Vic          | Contravention of a proceeding suppression order or interim order.  | <ul style="list-style-type: none"> <li>for 5 years; <b>and/or</b></li> </ul>  | <ul style="list-style-type: none"> <li>\$96,714 (individual)</li> <li>\$483,570 (body corporate)</li> </ul> |
| NT           | Contravention of a non-publication order.  | <ul style="list-style-type: none"> <li>for 12 months; <b>or</b></li> </ul>  | <ul style="list-style-type: none"> <li>Fine: \$6200</li> </ul>  |
| WA           | Contravention of an order made by the court excluding a person, group or all members of the public from a court room, or an order prohibiting or restricting publication.  | <ul style="list-style-type: none"> <li>for 12 months; <b>or</b></li> </ul>  | <ul style="list-style-type: none"> <li>\$12,000 (individual)</li> <li>\$60,000 (corporation)</li> </ul>     |
| SA           | Contravention of a suppression order.  | <ul style="list-style-type: none"> <li>for 2 years; <b>or</b></li> </ul>  | <ul style="list-style-type: none"> <li>\$10,000 (individual)</li> <li>\$120,000 (corporation)</li> </ul>    |
| Qld          | <p>A person commits an offence if a witness identity protection certificate has been given and the person discloses the identity of the witness or where the witness lives.</p> <p>There is an aggravated offence in circumstances where the person commits the offence and intends (or is reckless as to whether) the disclosure endangers or will endanger the health or safety of any person or prejudices or will prejudice the effective conduct of an investigation.</p> | <ul style="list-style-type: none"> <li>Imprisonment for 2 years imprisonment (maximum).</li> <li>Imprisonment for 10 years (maximum) for the aggravated offence.</li> </ul> |   |
| Tas          | Contempt of court for breach of a court order.   | Common law offence with no maximum penalty.   |   |

The severity of the punishment for breaching suppression orders was brought to light in the recent trial of Cardinal Pell. Pell's trial had a blanket ban suppression order – the broadest of orders that prohibits publication of the whole of proceeding, as opposed to one part of it or specific proceeding information.<sup>37</sup> The suppression order's scope was so broad that any journalist that published the number of complainants, the number of charges, the nature of charges, even the fact of the suppression itself, would arguably have breached the order.<sup>38</sup> Reflecting this breadth, the Victorian Director of Public Prosecutions reportedly issued up to 100 show cause notices to media companies that had breached the order, threatening criminal charges of contempt.<sup>39</sup>

Calling into question the efficacy of suppression orders as a tool for preserving confidence in judicial processes in the digital age, Pell's trial was extensively reported overseas on sites that any Australian with an internet connection could access.<sup>40</sup> The overall effectiveness of suppression orders in a modern and open society like Australia should also be further explored.

An individual's liberty before the courts cannot be maintained without the transparency and accountability that court reporting provides. In this way, the judiciary and the media each reaffirms the other as an important institution that upholds that liberty.

## Remedy

AJF is encouraged by the recent focus on over-bearing suppression orders. There have been numerous calls for inquiries into the use of these orders in Australia,<sup>41</sup> and significant, independent reviews of these orders have already occurred.<sup>42</sup> However none of these efforts have improved the ability of the public to understand why, how often and in what circumstances these orders are issued. More transparency across each of Australia's jurisdictions is vital.



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37 Made under, for example, Open Courts Act 2013 (Vic) pt 4 "Broad Suppression Orders".

38 T Clarke, "Suppression kept George Pell conviction out of media to ensure fair trial on other charges" *The West Australian* (26 February 2019) <https://thewest.com.au/news/court-justice/suppression-order-kept-george-pell-conviction-out-of-media-to-ensure-fair-trial-ng-b881117758z>.

39 A Meade, "Up to 100 journalists accused of breaking Pell suppression order face possible jail terms" *The Guardian* (26 February 2019) <https://www.theguardian.com/media/2019/feb/26/dozens-of-journalists-accused-of-breaking-pell-trial-suppression-order-face-possible-jail-terms>.

40 See, for example, Britain's 2011 super-injunction controversy: R Somaiya "British Law used to shush scandal has become one" (26 April 2011) *New York Times* <https://www.nytimes.com/2011/04/27/world/europe/27britain.html>.

41 See, eg, Attorney General "Suppression Orders Set For Major Overhaul" (Media release, 29 March 2018) <https://www.premier.vic.gov.au/wp-content/uploads/2018/03/180329-Suppression-Orders-Set-For-Major-Overhaul.pdf>; "Law Council of Australia calls for inquiry into suppression orders", ABC Radio (27 February 2019) RN Breakfast <https://www.abc.net.au/radionational/programs/breakfast/law-council-calls-for-inquiry-into-suppression-orders/10852398>.

42 See, eg, F Vincent, *Open Courts Act Review (Victoria, 2017) Department of Justice and Regulation; Bosland, "Two Years of Suppression"* above n 25.

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The AJF Board (left to right): Olivia Pirie-Griffiths, Colin Tate, Louisa Graham, Peter Wilkinson, Peter Greste, Chris Flynn.

The Alliance for Journalists' Freedom (**AJF**) was conceived of by three people: lawyer Chris Flynn, journalist Peter Greste, and strategic communications consultant Peter Wilkinson (also a former journalist). Flynn and Wilkinson worked with the Greste family to free Peter from his 400-day incarceration in Egypt. Subsequently, the three recognised the ongoing threats to the freedom of journalists and of the media more broadly across the South East Asian region.

Flynn, Wilkinson and Greste now sit on AJF's board, together with Louisa Graham and Colin Tate. AJF also receives financial support from Google, Facebook, Media Super, Dick Smith, and Conexus, together with material-in-kind support from Gilbert + Tobin, Wilkinson Butler and Conexus, and a strategic alliance with the University of Queensland.



**ALLIANCE** for  
**JOURNALISTS'**  
**FREEDOM**

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