ALLIANCE *for* JOURNALISTS' FREEDOM

Press Freedom IN AUSTRALIA

WHITE PAPER

NOVEMBER 2024

With light, **TRUST**

CONTENTS

AJF
With light, TRUST

Foreword

In March 2019, as police raided journalists from two news organisations, Australians were forced to confront something few had appreciated: media freedom is fragile. The World Press Freedom Index indicates that Australia has less media freedom than many comparable democracies. While our mobile phone's news apps deliver a firehose of information, they disguise the impact that years of vigorous national security legislation and a creeping culture of secrecy has had on the media's ability to investigate and report on the inner workings of our governments.

This report examines what has happened since the raids, including progress towards reform. It is a timely update to our original White Paper in part warning of security overreach that we, with prescience, published just before the raids. It's a reminder that much work remains to be done. While we recognise the need to keep some government information secret in an increasingly dangerous world, media freedom and the transparency that it brings are just as important to maintaining our democracy.

As the recommendations show, the problems are plain to see, and the fixes are relatively straightforward. All they require is the political will to tackle an issue that is quietly corroding our system of government from within.

We couldn't have produced this without the hundreds of pro bono hours of work of the team from Thomson Geer. We are indebted to the legal firm for the tireless energy and razor sharp legal minds that have helped make what we believe is a compelling case for reform.

THE AJF BOARD

The state
OF PRESS FREEDOM IN AUSTRALIA

Five years ago, the Alliance for Journalists' Freedom published its first White Paper on Press Freedom in Australia. Back then Australia sat at 21st position in the World Press Freedom Index. Now, it has slipped to 39th place.[1]

The developments we track in this report lend detail to the alarming trend that Reporters Without Borders (RSF) identified in its index. While there have been some areas of improvement, far too often the rhetoric supporting press freedom, transparency and accountability has not been matched by government action or meaningful legislative reform.

RSF points to two raids by Australian Federal Police in 2019 as a key indicator of the problems we currently face. In the first incident, AFP agents searched the Canberra home of News Corp political journalist Annika Smethurst, looking for evidence of the source to a story she published a year earlier. The following day, police went to the headquarters of the ABC in Sydney, also with a search warrant, looking for evidence that might identify the source to another unrelated story that exposed allegations of war crimes by Australian soldiers in Afghanistan. In both cases, the stories raised issues clearly in the public interest, and neither appeared to harm national security.

Coincidentally, the two raids came just weeks after the AJF published the original White Paper and appeared to confirm our key findings: that years of creeping national security legislation had exposed journalists' data to intrusive investigation; that legitimate journalistic reporting had become criminalised; and that journalists' sources were exposed to prosecution.

The raids also triggered a wave of soul-searching in government. After an internal review, the police introduced the National Guideline on Sensitive Investigations.[2] The Attorney General issued a Ministerial Directive, requiring his approval before journalists are investigated,[3] and Parliament opened two separate inquiries, one by the powerful Committee on Intelligence and Security, and another by the Senate.

Significantly, both inquiries acknowledged serious problems with press freedom and recommended sweeping reforms. The Senate found a troubling culture of secrecy had permeated the government, while the Intelligence and Security Committee made 16 recommendations. The Morrison Government accepted all but one of them,[4] and committee member Mark Dreyfus (then Shadow Attorney General) signed a note declaring that the recommendations should be regarded as "a bare minimum – a starting point – for reform".

Yet, despite the encouraging talk, by the end of 2024 not one of the recommendations from either committee had been implemented.

[1] Reporters Without Borders, World Press Freedom Index (2024), available online at https://rsf.org/en/country/australia
[2] https://www.afp.gov.au/sites/default/files/2023-08/AFP%20National%20Guideline%20on%20sensitive%20investigations.pdf
[3] https://www.afp.gov.au/sites/default/files/2023-12/MinisterialDirection2023.pdf
[4] https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/FreedomofthePress/Report

This report tracks the changes in press freedom in Australia in the years since our original White Paper. There have been some welcome and much overdue improvements. Parliament has strengthened whistleblower protections, and the Attorney General has recommended changes to secrecy laws.[5] But as our decline in the World Press Freedom Index shows, we have been backsliding against similar countries.

All this appears to confirm a headline in the New York Times. In the wake of the 2019 raids it published a story declaring, "Australia May Well Be the World's Most Secretive Democracy".

To date, we have not experienced a dictatorship, and nor have we lived through authoritarian rule or suffered the abuses of power that others have endured. But we should not need to lose the core of our democracy before we adequately protect it. The AFP raids exposed the fragility of media freedom in Australia, and we now have an important and urgent opportunity to fix it.

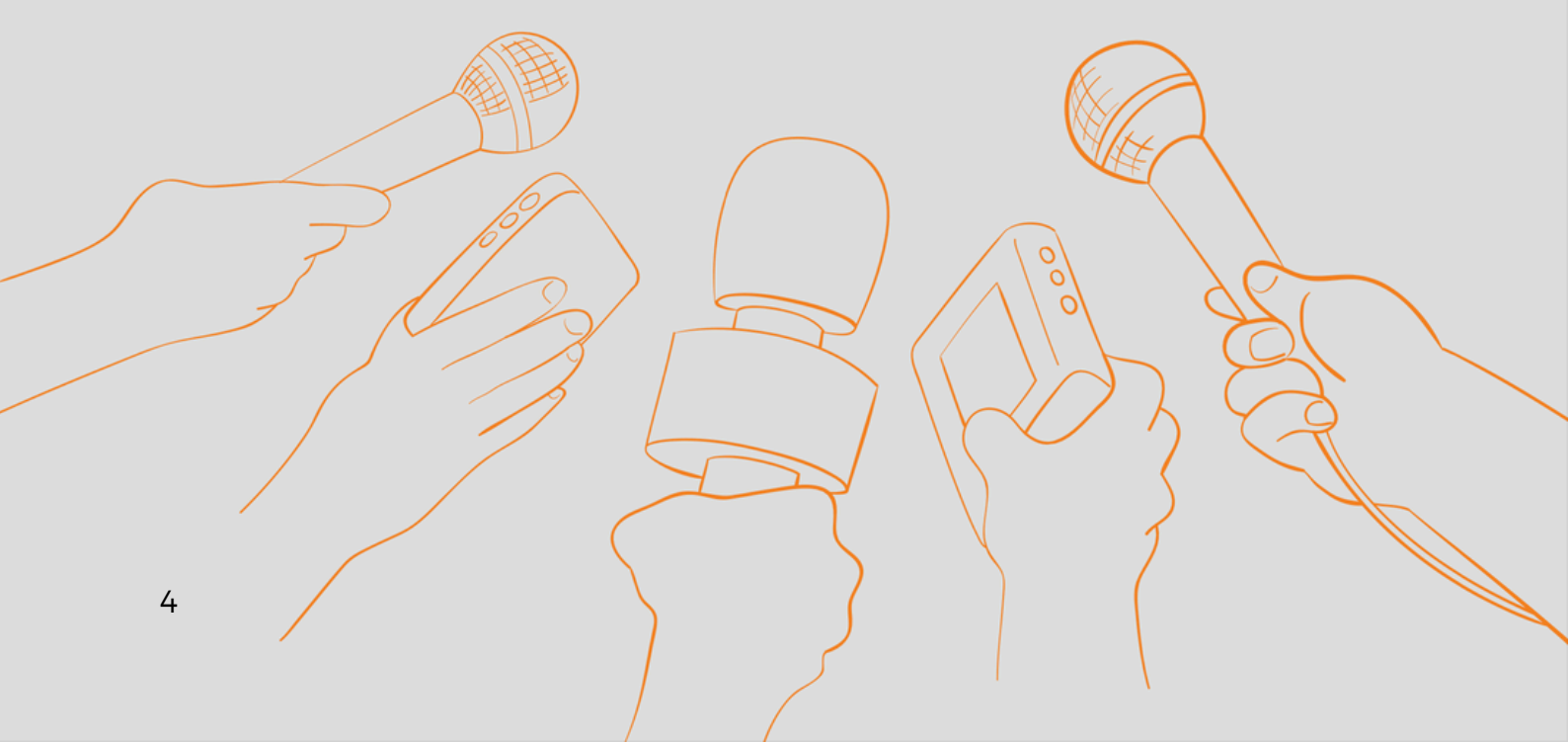
[5] https://www.ag.gov.au/crime/publications/review-secrecy-provisions

"Threats to a free press, which limit the disclosure of misconduct or wrongdoing and the scrutiny and accountability of government that goes with it, are also threats that need to be considered when examining secrecy laws.

“Public scrutiny and protecting essential interests are not mutually exclusive, but some secrecy is always going to be required and this will always have implications for the legitimate activities of the press and others.

“The challenge lies in ensuring an appropriate legal framework that both supports the legitimate activities of the media and civil society groups as an essential element of our democracy, and protects Australia’s national security and other essential interests from espionage, foreign interference and other threats."

- Independent National Security Legislation Monitor Report, June 2024



What we have achieved
IN THE LAST 5 YEARS

In the 2019 white paper, the AJF made seven recommendations to improve media freedom in Australia, some of which have now been achieved. Here we set out the original recommendations, and developments that have occurred in the last five years.

1. **Media Freedom Act:** This was the main recommendation from the original White Paper. Over the last two years, the AJF has drafted a bill, which is now ready for broader consideration. It remains our most important recommendation for reform. Key elements of the proposed law are outlined in the "Recommendations" section below.

2. **National Security:** We recommended updating national security laws to better protect reporting in the public interest without risking genuinely sensitive information. While the Albanese Government has recognised the issue and reviewed secrecy and whistleblower legislation, progress has been slow, and much more needs to be done.

3. **Confidentiality:** We proposed better protections for confidential journalistic materials to safeguard their work and sources. After the AFP raids, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended (among other things) strengthening the Public Interest Advocate system under the Telecommunications (Interception and Access) Act 1979. Although this implicitly acknowledged the problem, the recommendation was criticised as inadequate. It still has not been implemented.

4. **Shield Laws:** We recommended enhancing and standardising shield laws across State, Territory, and Commonwealth levels. In the past five years, Queensland introduced the most robust shield law in the country, and a decision of the Federal Court of Australia has upheld the application of the shield laws to public interest journalism (see Al Muderis v Nine Network Australia Pty Limited, discussed below).

5. **Whistleblowers:** We recommended reforms to whistleblower laws to protect public interest disclosures to journalists, regardless of actions taken on the complaint. We also recommended eliminating the concept of "disclosable conduct." The Albanese Government has reviewed the Public Interest Disclosure Act 2013 (Cth) and improved protections for disclosures and witnesses. However, more reforms are needed to protect journalists as the last resort for whistleblowers (see recommendations below).

6. **Defamation and the Public Interest:** We advocated for a clear public interest defence in defamation cases. In July 2021, most Australian States and Territories introduced this defence along with a requirement that plaintiffs prove the publication caused or is likely to cause 'serious harm' to their reputation. While defamation law still poses challenges for journalists, there has been some improvement.

7. **Transparency and Suppression Orders:** We recommended greater transparency in issuing and recording of suppression orders. Unfortunately this remains a serious concern, with little improvement or consistency across the States and Territories.

Recommendations for
MEDIA FREEDOM IN AUSTRALIA

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

1. **Introduce a Media Freedom Act:** A Media Freedom Act should include:
   - Protect Press Freedom. The AJF's draft legislation ensures that any new Commonwealth laws are reviewed for their impact on media freedom before they are passed. It also requires courts to interpret existing laws in a way that upholds press freedom.
   - Introduce contestable warrants: The draft Act would give journalists and media publishers the right to challenge warrants or search orders related to journalistic material before they are executed. A judge must determine that issuing the warrant is in the public interest.

---

2. **Introduce exemptions to national security offences:** Adjust national security laws to protect journalists from prosecution when reporting on issues of legitimate public interest. Currently, there is a (relatively weak) defence for secrecy offences, but none for espionage or foreign interference. Journalists should be able to investigate government and security agency misconduct without fear of criminal charges.

---

3. **Repeal the journalist information warrant scheme:** The 2015 metadata retention laws allow law enforcement agencies to access journalists' communication data through special Journalist Information Warrants. However, these warrants are kept secret, so journalists may never know if their data has been accessed. The AJF recommends repealing this scheme and ensuring that any access to confidential journalistic data is carefully tested for necessity, especially in matters of national security.

---

4. **Shield Laws:** Improve and standardise shield laws across State, Territory, and Commonwealth Evidence Acts to consistently protect journalists' sources. Queensland has the most comprehensive shield law in Australia, and this should serve as the model for other jurisdictions.

---

5. **Whistleblowers:** All whistleblowers who disclose information to journalists in the public interest should be protected, regardless of whether the organisation acted on the issue. The requirement for "disclosable conduct" in public sector whistleblowing should also be eliminated. And whistleblowers should be allowed to reveal intelligence information to journalists or members of Parliament in cases of serious misconduct or criminal behaviour, when other channels have been exhausted.

---

6. **Transparency around suppression orders and access to court documents:** Improve the transparency around issuing and recording suppression orders. Align state and territory laws on suppression orders and make it easier for journalists to access court documents. Lower courts, in particular, should be better educated on the high standards that must be met before issuing such orders.

---

7. **Harmonise defamation laws:** Australia's defamation laws remain inconsistent across States and Territories. Western Australia and the Northern Territory have not yet implemented the stage 1 reforms, and only New South Wales, the ACT, and Victoria have adopted the stage 2 reforms. Urgent harmonisation is needed to prevent plaintiffs from "forum shopping" for more favourable jurisdictions.

---

8. **Ensure new regulation has adequate journalism exemptions:** Ensure that the journalism exemptions included in the Government's proposed privacy reforms and mis/disinformation legislation introduced into Parliament in September 2024 are broad enough to protect legitimate journalistic work.

Recommendation 1:
INTRODUCE A MEDIA FREEDOM ACT

Purpose of the Media Freedom Bill: **Australia remains the world's only liberal democracy without a Bill of Rights.** That means there is no explicit constitutional or similar legislative protection for media freedom. This has allowed the Government to pass laws that limit the ability of journalists to act as watchdogs on behalf of the public. There is also a patchwork of secrecy provisions that restrict reporting on certain topics. Apart from some limited legislative provisions in Queensland and Victoria, there are no special protections for journalists in relation to warrants.

This AJF's Media Freedom Bill is designed to address those issues.

The Bill requires Australian courts to interpret and apply laws in ways that align with democratic principles, including the public's right to information and the media's role in holding the Government accountable.

As part of this reform, the AJF proposes **amendments to the Human Rights (Parliamentary Scrutiny) Act** 2011 (Cth). This would require the Parliamentary Joint Committee on Human Rights to assess new Commonwealth Bills for their impact on media freedom, ensuring any restrictions are reasonable, proportionate, and in the public interest. The AJF accepts that this offers more protection than currently exists for other human rights (like the right to life and liberty), and while we believe broader human rights reforms are necessary, they are beyond the scope of the AJF or this Bill.

A centrepiece of the Media Freedom Bill is **a "contestable warrants" scheme.** Under the scheme, "member journalists" – those accountable to a set of professional standards – can challenge warrants or search orders related to "journalistic material" before they are issued. This addresses the vulnerability of Australian journalists highlighted by the AFP raids of Annika Smethurst and the Sydney headquarters of the Australian Broadcasting Corporation in June 2019.

In emergency situations, warrants could still be issued without notice, but if an agency fails to follow the procedures in the Bill, the warrant or order would be invalid. Without this consequence, agencies may not comply with the Bill's requirements.

Professional association: While the Media Freedom Bill stands on its own, it also provides an opportunity to establish a professional association for journalists. The AJF and The Ethics Centre have jointly registered a company with ASIC for this, **Journalism Australia** Limited. This association would hold its members accountable to a code of conduct, ensuring that those practicing journalism, even outside traditional media companies, maintain professional standards. This helps distinguish credible journalism from the noise of misinformation online.

This approach protects everyone's right to free speech while encouraging higher professional journalistic standards and giving "member journalists" additional legal protections for their work.

The AJF believes that together, the Media Freedom Bill and the establishment of a professional association will safeguard media freedom, elevate journalism standards, and improve relations between the media, the government, and the public.

Recommendation 2:
NATIONAL SECURITY

In the wake of the terrorist attacks of September 11, 2001, Australia passed more national security laws than any other country on earth. The process was so energetic that some academics described it as 'hyper-legislation'. [6]

The "political pressure to rush counterterrorism laws through Parliament"[7] meant that there was little time for proper scrutiny or to assess if these laws were balanced and proportional.. While the AJF accepts the importance of protecting national security, Parliament needs to consider the hidden impacts on freedom of expression, which ultimately undermine the democracy it is trying to protect.

Over the past five years, there have been four significant reviews of legislation (below) that all recognise the problem of legislative overreach and a damaging culture of secrecy. They also recommended a host of reforms that successive governments have accepted but since ignored.

Inquiries following 2019 AFP raids:
Government's failure to act on recommendations.

After the 2019 AFP raids, two parliamentary inquiries were launched to examine how national security laws were affecting press freedom. One was conducted by the Parliamentary Joint Committee on Intelligence and Security (PJCIS), and the other by the Senate Standing Committees on Environment and Communications.

In August 2020, the PJCIS recommended 16 reforms, and the government accepted all but one. At the time, then Shadow Attorney-General Mark Dreyfus called these reforms "**a bare minimum—a starting point for reform.**"

In 2021, the Senate Committee also released its report, which included 17 additional recommendations. Notably, the committee stated that

> *"over the past two decades, national security has been prioritised over press freedom."*

It also agreed with the Australian Law Reform Commission which, in 2009, said there needed to be a new legislative framework to strike "a fair balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential".[8]

Despite these recommendations, the government has not responded to the Senate Committee's report and has only acted on one of the 16 PJCIS recommendations.

[6] Rebecca Ananian-Welsh, Sarah Kendall and Richard Murray (2021) 'Risk and uncertainty in public interest journalism: The impact of espionage law on press freedom', *Melbourne University law review*, 44(3):764–811.
[7] Kieran Hardy and George Williams (2022) 'Two decades of Australian counterterrorism laws', *Melbourne University law review*, 46(1):34–81 at 816
[8] Australian Law Reform Commission, Secrecy Laws and Open Government in Australia, ALRC Report No. 112, December 2009, p 23.

Attorney-General's Department Review of Commonwealth Secrecy Provisions

On 21 November 2023, the Attorney-General's Department released its review of Commonwealth Secrecy Provisions.

Key recommendations include:

- **establishing principles for how secrecy laws should be developed and applied consistently across the Commonwealth** (Recommendation 1);
- **repealing unnecessary secrecy offences and non-disclosure duties** (Recommendation 2);
- **improving protections for press freedom and for people providing information to Royal Commissions** (Recommendations 7-9).

The Government has not yet implemented any of the recommendations.

INSLM's review of the secrecy offences in Part 5.6 of the Criminal Code Act 1995

On 27 June 2024, the Independent National Security Legislation Monitor (INSLM) tabled his review of secrecy offences in Part 5.6 of the Criminal Code Act 1995. These laws make it a crime to deal with or disclose certain Government information, with penalties of up to 10 years in prison.

While the report addressed many issues related to secrecy, the INSLM recognised the important role journalists play and the risks posed by these laws to their work. Although the report rejected calls for a general public interest defence, it did suggest that the current legal defence for journalists could be revised to function as an exemption rather than a defence.

Some recommendations in the report (such as 1, 8, and 12) were positive steps toward protecting press freedom. However, the AJF believes that failing to fully recast the public interest defence for journalists as an exemption was a missed opportunity for a relatively easy, yet impactful, reform.

Despite these insights, Australia's secrecy laws remain broad, creating a damaging culture that hinders journalists from investigating the government and protecting their sources.

The Government has not yet responded to the INSLM's report or his 15 recommendations.

Overall, the Government should continue to review existing laws and their impact on press freedom and acts on the recommendations of these inquiries. Additionally, new laws should undergo thorough scrutiny and debate to ensure they are necessary and proportionate. Without these steps, the growing culture of secrecy will continue to harm the democracy these laws are meant to protect.

Recommendation 3:

REPEAL THE JOURNALIST INFORMATION WARRANT SCHEME

In 2015, the Government introduced the Journalist Information Warrant (JIW) into the Telecommunications (Interception and Access) Act 1979 (TIA Act). This warrant allows law enforcement agencies to look at the telecommunications data of journalists or their employers, including call records, IP address and other metadata, though it does not include the content of the communications.

The scheme was supposed to give journalists a degree of comfort, by forcing investigators to go through extra hoops to justify examining their data. But the scheme operates entirely in secret, with a two-year prison sentence for merely revealing the existence of a JIW. Additionally, Public Interest Advocates, appointed by the Prime Minister, are required to represent the public interest, but they also operate in secret. They are also not required to defend the specific interests of the journalists or their news outlets.

In recent years, the Commonwealth Ombudsman has pointed out that agencies don't seem to understand the JIW requirements, and don't keep proper records.[9] The Ombudsman found that in 2019-20,Tasmanian Police may have accessed the telecoms data of someone who could have been a journalist, without following the procedures. The Commonwealth Ombudsman did not find a formal breach, but criticised the police for not doing enough to make sure that journalists' data was protected. The police also couldn't provide records to show they'd followed procedures.[10]

While it appears that in practice journalists' telecommunications data is rarely accessed, without proper records, it is impossible to be sure. The scheme also operates in such secrecy that even the journalists will generally have no idea that an agency has accessed their data and exposed their source.[11]

The PJCIS inquiry that followed the AFP raids appeared to recognise the shortcomings of the system and recommended that JIWs should only be available for investigations of serious offences.[12] It also recommended improved record keeping and reporting, and a stronger role for the PIAs. The Government accepted this recommendation,[13] but has done nothing to change the law.

The AJF supports any initiative to limit access to journalists' confidential data, and believes the JIW process should be scrapped entirely.

---

[9] Commonwealth Ombudsman's annual report - Monitoring agency access to stored communications and telecommunications data under Chapters 3 and 4 of the TIA Act, for the period 1 July 2020 to 30 June 2021 covering records from 1 July 2019 to 30 June 2020, page 41

[10] Ibid, page 43

[11] Ombudsman argues against allowing journalists access to their own search warrants (www.theguardian.com)

[12] Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (aph.gov.au)

[13] Australian Government response to the Parliamentary Joint Committee on Intelligence and Security report: Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press, October 2020. Government Response – Parliament of Australia (aph.gov.au)

Recommendation 4:
FURTHER ENHANCE AND HARMONISE SHIELD LAWS

Shield laws, also known as 'journalist's privilege', now exist in every State and Territory. These laws allow journalists to withhold evidence in court proceedings to honour promises to protect confidential sources.

In 2022, Queensland became the last jurisdiction in the Commonwealth to introduce a shield law. The law became one of the most comprehensive in Australia. It not only protects a journalist from being forced to reveal their sources in court proceedings, but also allows them to object to police searches that could expose confidential sources. Then, in August 2024, Queensland jumped even further ahead of the pack, extending the shield to hearings by the Crime and Corruption Commission (**CCC**).[14]

> *"No Queensland journalist should have to endure the years of worry and pressure – simply for doing their job – as I have."*
>
> – Journalist F, quoted in The Courier Mail.[15] The Queensland Court of Appeal upheld a decision which found public interest immunity did not extend to protect a journalist's confidential sources – meaning Journalist F faced committing contempt of court if he did not answer questions by the CCC regarding the identity of his source.[16]

> *Journalists should never be persecuted for simply standing by their Code of Ethics. I am relieved no other journalists will have to go through this harrowing experience, but it has taken too long to make it right."*
>
> – Journalist F, quoted by Nine News[17]

Because shield laws continue to differ across the States and Territories, they create a confusing patchwork. Like Queensland, journalists in Victoria can also invoke privilege during police searches. Queensland remains the only state to expressly extend journalist's privilege to quasi-judicial bodies like the CCC.

> *"The journalist was doing their job, they were protecting the source on a story that had public interest. No worker should have to face the thought of jail for doing their job."*
>
> - Queensland MEAA president Michelle Rae reported in ABC[18]

Nationwide, harmonisation and expansion of shield laws nationwide remains urgent. The protection of journalists' sources should apply uniformly to all stages of legal processes, including police investigations and quasi-judicial bodies.

[14] Crime and Corruption and Other Legislation Amendment Act 2024 (Qld)
[15] https://www.couriermail.com.au/news/queensland/qld-politics/taken-far-too-long-journalist-f-lashes-govt-over-shield-laws/news-story/0afd72878f746680e523302a02c1a90b
[16] *F v Crime and Corruption Commission* [2020] QSC 245; *F v Crime and Corruption Commission* [2021] QCA 244.
[17] https://www.9now.com.au/9news-latest-news/season-2024/clip-cm0ls7k1k000w0gtbtrxxx8ht
[18] https://www.abc.net.au/news/2021-02-20/qld-analysis-the-mysterious-case-of-f-and-threat-to-journalism/13172604

Case Study

Al Muderis v Nine Network & Ors

In December 2023, Justice Robert Bromwich in the Federal Court handed down a ruling with significant implications for the ability of Australian journalists to protect their confidential sources.[19] Before this decision, Federal Court judges had held that journalists had to promise to protect a confidential source before receiving information.[20] The judges also suggested the promise must be explicitly related to the provision of information, as opposed to anything that may be inferred.[21] But in the Al Muderis case, Justice Bromwich questioned both of those requirements.

In October 2022, orthopaedic surgeon Munjed Al Muderis sued investigative journalist Charlotte Grieve, two other journalists and the publishers of The Age, Sydney Morning Herald and 60 Minutes for defamation. In evidence, Ms Grieve argued that she had spoken with several confidential sources, including medical professionals, and invoked the Commonwealth shield law (section 126K of the Evidence Act 1995) to protect their identities. Dr Al Muderis asked the court to order Ms Grieve to reveal her sources so he could test their motives, integrity and reliability.

Justice Bromwich dismissed Dr Al Muderis's application. He found that Ms Grieve had promised each source confidentiality, and held that the public interest in disclosing their identities did not outweigh any potential harm to the sources or the broader impact on journalists' ability to gather information.

[19] Al Muderis v Nine Network Australia Pty Limited [2023] FCA 1623 (Al Muderis)
[20] Ashby v Commonwealth (No 2) (2012) 203 FCR 440; 290 ALR 148; [2012] FCA 766 at [19] and [30]-[32], Ashby J
[21] Kumova v Davison [2021] FCA 753; BC202105836 at [28]–[46], Flick J

Recommendation 5:

ENHANCE WHISTLEBLOWER PROTECTIONS

The media is often the 'whistle-of-last-resort' for anyone with evidence of abuses of power or wrongdoing in Government, its agencies or private corporations. That means journalists should be treated as integral to any comprehensive whistleblower regime.

In February 2019, the Labor Party, then in opposition, promised significant reforms, including:[22]

- A Whistleblower Rewards Scheme
- A Whistleblower Protection Authority
- A single Whistleblowing Act
- A special prosecutor to target corporate criminals.

Despite this, in Government, Labor continued to prosecute several high-profile cases, including David McBride, the source of the ABC's Afghan Files story, and Richard Boyle who exposed aggressive debt collection practices by the ATO.

In 2023, the Human Rights Law Centre published a report, Cost of Courage: Fixing Australia's Whistleblower Protection. It found that under Commonwealth laws, not a single whistleblower had won a judgment.[23] But public support for whistleblowers remains strong with 71 percent of respondents to a poll by Essential Media backing stronger protections. Sixty-eight percent thought whistleblowers should not be prosecuted for public interest disclosures.[24]

While the vast majority of whistleblowers never go to the media, the AJF believes that should always remain an option, with some narrow exceptions for national security, confidentiality or privacy reasons. For that to work though, the AJF believes the relationship between journalists and whistleblowers must be protected similar to lawyer-client relationship. Unless both journalists and their sources are confident that their communications are protected, the media's 'fourth estate' role will be compromised.

[22] https://www.markdreyfus.com/media/media-releases/labor-will-protect-and-reward-banking-whistleblowers-mark-dreyfus-qc-mp/
[23] https://www.hrlc.org.au/news/2023/8/28/report-whistleblower-laws-are-failing
[24] https://www.hrlc.org.au/news/2023/8/28/report-whistleblower-laws-are-failing

Review of Australian Whistleblower Legislation: In 2023, the Australian Government implemented the first stage of reforms to public sector whistleblowing, focussing on disclosures to the National Anti-Corruption Commission. By year's end, the Government finished stage two consultations, and asked for stakeholder and industry views on disclosures made outside the government, including to the media.

External disclosures are what Griffith University describes as the 'third tier' (after internal disclosure, and disclosure to a regulator), and they're treated as best practice worldwide. This includes disclosures to the media, and the AJF believes they should be protected in all but the narrowest of circumstances.

Sometimes whistleblowers cannot safely use internal channels, or those mechanisms may fail to address the issue. In such situations, media disclosures become necessary.

Defence Forces lawyer David McBride first took his evidence of failures of command in the SAS in Afghanistan to his superiors. But when that didn't work, he went to the ABC. Even though the ABC's reporting triggered an important public debate and the Brereton Report into allegations of war crimes in Afghanistan, vindicating much of what McBride revealed, he was still convicted of disclosing classified information. McBride remains the first person to be convicted of any offence in relation to the allegations of war crimes in Afghanistan. Future whistleblower reforms should ensure that cases like McBride's do not happen again.

The AJF supports several key reforms in the second stage of whistleblower legislation:

- **Remove the public interest test:** This unnecessary test discourages transparency and should be eliminated. Other jurisdictions have done so, and Australia should follow suit.
- **Amend restrictions on external disclosures:** Current laws limit disclosures to information "necessary to identify disclosable conduct." Journalists often need additional context to verify claims, even if this supporting information is not published.
- **Introduce safeguards for whistleblowers:**
    - Increase the scope of permissible disclosures, restricting only genuinely sensitive information (e.g., national security, personal data like tax or health records).
    - Protect whistleblowers during the entire process, from gathering evidence to consulting with legal counsel, disclosing wrongdoing and so on.
    - Establish a Whistleblower Protection Authority: This would provide support and guidance throughout the whistleblower process, as recommended by the Joint Parliamentary Committee on Corporations and Financial Services, the Labor Party (in opposition), and the Human Rights Law Centre.

In February 2023, Independent MP Zoe Daniel proposed giving judges the discretion to protect whistleblowers who don't strictly follow procedures. Although this could introduce ambiguity, the AJF supports it as a more flexible approach than rigid rule compliance, especially given the severe consequences of non-compliance.

Ultimately, the AJF believes that a robust federal framework is essential to improving transparency and accountability across both public and private sectors.

Recommendation 6:

ENSURE UNIFORMITY OF AMENDMENTS TO DEFAMATION LAW TO INTRODUCE SERIOUS HARM THRESHOLD AND PUBLIC INTEREST DEFENCE

After years of criticism over Australia's defamation laws, most jurisdictions introduced important amendments on July 1, 2021. These included a "serious harm" threshold for defamation claims and a public interest defence.

Serious harm: Previously, if a statement was found defamatory, damage to a plaintiff's reputation was assumed. Now, plaintiffs must prove that a publication caused—or is likely to cause—serious harm. This new threshold aims to reduce minor, often frivolous claims that can be financially draining for individuals.[25]
To decide if serious harm has occurred, the court will consider all the facts in the case, not just those surrounding the publication.[26] These include:

1. The seriousness of the defamatory meaning.
2. The size of the audience or readership.
3. The plaintiff's prior reputation.
4. Evidence the publication caused the harm.

Since the government introduced the 'serious harm' element, the courts in NSW, Victoria, Queensland and the ACT have struck out several claims, and the number of trivial claims has been reduced. It may also have deterred some defamation suits aimed at small publications.

[25] Hansard (Legislative Assembly, 29 July 2020), page 2867.
[26] *Peros v Nationwide News Pty Ltd & Ors (No 3)* [2024] QSC 192 at [56], Applegarth J

Public interest defence:

In the AJF's 2019 White Paper, we recommended a public interest defence, now introduced in most Australian jurisdictions.

Since the defence is relatively new, it has only been tested a few times. In Russell v Australian Broadcasting Corporation[27] Justice Michael Lee said the focus on the publisher's belief shifts the central question from one of what a "reasonable person" would have done, to whether what the publisher did was reasonable. This allows the court to "trace a respondent's reasoning as it happened and conduct an objective assessment".

The defence will hopefully protect journalists without the need for excessive proof that their view about what was in the public interest was reasonable.

Lack of uniformity:

The laws are inconsistent across the States and Territories. Western Australia and the Northern Territory have not yet introduced the stage 1 reforms (which include the serious harm element, and public interest defence), and only New South Wales, Australian Capital Territory and Victoria have introduced the stage 2 reforms related to the liability of digital intermediaries.

This inconsistency means prospective plaintiffs can go "forum shopping", looking for the easiest place to sue. It also makes it hard for media companies that publish nationally. What is safe to publish in one state might be risky in another. This forces publishers to follow the rules of the states with the weakest protections, like Western Australia and the Northern Territory, where plaintiffs don't have to prove serious harm and the new digital defences don't apply.

Without consistency across all jurisdictions, the goal of these reforms is only partly achieved.

[27] *Russell v Australian Broadcasting Corporation* [2023] FCA 38

Recommendation 7:

IMPROVE TRANSPARENCY OF SUPPRESSION ORDERS, ACCESS TO COURT DOCUMENTS AND UPDATES TO STATUTORY RESTRICTIONS

Suppression orders: Suppression orders prevent the disclosure of specific case details outside the courtroom. While they can protect the identities of victims and witnesses and ensure an accused person's right to a fair trial, these protections must be balanced with open justice and transparency to maintain public confidence in Australia's justice system.

Suppression orders stop people from disclosing certain information about a case outside the courtroom. While they help protect the identity of victims and witnesses, and the right to a fair trial by stopping prejudicial publicity, that must be balanced with the principles of open justice and transparency to maintain public confidence in the justice system.

Courts are not always required to record suppression orders or tell the media when they've been issued. In 2023, one media lawyer[28] who tried to track suppression orders found that Australian courts notified the media of 1,111 of them. This makes it hard to assess their use, but evidence suggests that supprision orders are over-used, and inconsistently applied.

Although this is the most comprehensive record of suppression orders available, the figures are almost certainly conservative. This is because the states vary in how they keep their records, what they require the courts to tell the media, and inconsistencies in how the rules are applied.

The problem is made even worse because:

- **Prosecutors Overusing Orders:** Prosecutors apply for suppression orders that may be unnecessary, or don't oppose them when the defence asks for a suppression order.
- **Lack of Opposition:** When both parties agree on a suppression order, open justice may suffer, as no one represents the public's right to know. Judges should ensure that orders serve open justice, not just agreement between parties.
- **Misinterpretation of orders:** Magistrates and court officials sometimes confuse publication bans with access to court records. The media may still access court documents, even though certain information may be barred from publication.

MASTER COUNT 2023	
AUSTRALIAN CAPITAL TERRITORY	43
FEDERAL/HIGH COURTS	4
NEW SOUTH WALES	133
NORTHERN TERRITORY	52
QUEENSLAND	38[29]
SOUTH AUSTRALIA	308[30]
TASMANIA	12
VICTORIA	521
VICTORIA (EXCLUDING VCAT)	442
WESTERN AUSTRALIA	2
TOTAL (INCLUDING ALL VICTORIAN ORDERS)	1111

[28] Thanks to Gina McWilliams, Senior Legal Counsel at NewCorp Australia.
[29] 10 of these orders were made pursuant to the new regime in Queensland regarding the identity of an accused person in sexual offence proceedings: Criminal Law (Sexual Offences) Act 1978 (Qld), s 7
[30] 3 cases or collections of cases made a major contribution to South Australia's numbers: *R v Alzuain* et al (26); proceedings arising out of Operation Ironside (51); and *R v Polymiadis* (12)

The Federal Court's Justice Michael Lee offered six ways the system could be improved:[31]

1. Collect data on active suppression orders.
2. Align state and territory laws on suppression orders.
3. Standardise rules for accessing court documents.
4. Create a national register of suppression and non-publication orders to help the media comply.
5. Recognise the media's role in checking inappropriate suppression orders.
6. Require judicial officers to explain the reasons and duration of suppression orders.

> *"To anyone interested in open justice, the sobering reality is that because of the number of courts empowered to suppress material, legacy issues, and the lack of any repositories of data, we simply have no idea how many suppression orders have been made by courts, or how many such orders remain extant."*
>
> *"At a time when traditional media is suffering revenue decline and costs pressure, it cannot simply be left to the fourth estate to protect a grundnorm of our justice system on a haphazard basis."*
>
> - Justice Michael Lee, Federal Court of Australia, speech to the Piddington Society on 8 September 2024.

Access to court documents:
Journalists often struggle to access court documents. In New South Wales, the Court Information Act was passed in 2010 but never took effect, leaving the media's right to access court documents unclear.

Access in the Federal Court has been easier, with files of public interest cases available online. However, a rule change in 2023, implemented without consultation, now limits access to documents before the first directions hearing, unless the parties agree to their release prior to that hearing. Journalists argued this undermines open justice, though the Chief Justice said it helps protect sensitive information until a suppression order is requested.

Open justice reviews and campaigns:
Over the past five years, several reviews including those by the Victorian and New South Wales Law Reform Commissions have recommended improvements, but little action has been taken.

Some progress has been made to sexual offence cases. In Tasmania, the Northern Territory and Victoria, the #LetHerSpeak/#LetUsSpeak campaign successfully changed laws to allow survivors to speak publicly. In 2023, Queensland also abolished its law that prevented naming people accused of sexual offences before trial.

[31] https://www.smh.com.au/national/lehrmann-judge-s-six-ideas-to-fix-court-secrecy-20240908-p5k8u4.html

Recommendation 8:
ENSURE NEW REGULATION HAS EFFECTIVE JOURNALISM EXEMPTIONS

Privacy reform:

On 12 September 2024, the Government introduced a Bill[32] containing amendments to the Privacy Act 1988 (Cth) (**Privacy Act**). The Bill includes significant changes that potentially affect media freedom. Most critically, it includes a statutory tort for serious invasions of privacy. This tort applies if:

1. Someone invades a person's privacy or misuses their private information.
2. The person had a reasonable expectation of privacy.
3. The invasion was intentional or reckless.
4. The invasion was serious.

Journalists, their employers, and those helping them professionally are exempt from this tort. Journalists are defined as those who work professionally in journalism and follow a code of practice covering content like news, current affairs, documentaries, and opinions.

The Bill also includes a "public interest" element. If a defendant can prove an invasion of privacy was in the public interest, the plaintiff must show that their right to privacy outweighs the public's need to know, though it's unclear how this will work since it's neither expressed as a defence or exemption in the law.

While the journalism exemption is a positive step, the media has argued that the tort could still harm the free flow of information.[33] Like defamation, in practice, similar torts abroad often only benefit only the wealthy.[34]

A notable example is ZXC v Bloomberg[35] in the UK. Bloomberg News reported that police were investigating a high-level executive. The executive was never charged, and he successfully sued Bloomberg for misusing his private information. Both during the trial and appeal, the courts upheld ZXC's right to privacy during the early stages of a police investigation, limiting British journalists' ability to report on police investigations without first proving an overriding public interest.

The UK's experience shows how privacy laws can hinder investigative journalism. While Australia's new Bill exempts journalists, it raises concerns about how the law defines them, particularly for non-traditional media like podcasts or freelance reporters. The exemption also doesn't cover journalists' sources.

The Bill also proposes criminal penalties for "doxxing" (sharing personal information online to harass or threaten), without requiring proof of intent or malice. This law lacks exemptions for journalists, which could inadvertently penalise them, and should be reviewed.

---

[32] *Privacy and Other Legislation Amendment Bill* 2024 (Cth).
[33] Submissions are available to view here: https://www.ag.gov.au/rights-and-protections/publications/submissions-received-review-privacy-act-1988-issues-paper.
[34] See submissions from Guardian Australia.
[35] *ZXC v Bloomberg LP* [2020] EWCA Civ 611.

> *"In Britain, we are stumbling toward a system in which tabloids can still peek into celebrities' bedrooms but serious journalists cannot report on potential wrongdoing at public companies by powerful people"*
>
> - John Micklethwait, editor-in-chief of Bloomberg News

Proposed mis/disinformation regulation

On 12 September 2024, the Government introduced a Bill aiming to combat online misinformation and disinformation. This Bill allows the Australian Communications and Media Authority (ACMA) to fine digital platforms like X and Facebook up to 5% of their global revenue if they don't control the spread of false information. These platforms must create standards to handle misinformation, which ACMA must approve, or ACMA will create standards for them.

Professional news content such as TV programs or news websites is exempt, but the Bill has been criticised for potentially restricting free speech while targeting false content. It's also unclear if freelancers and smaller digital publishers are included. It is also unclear if the rules covering radio and TV extend to online platforms like podcasts or social media.

> *"Press freedom is not constitutionally guaranteed in this island-continent of 26 million people, but a hyperconcentration of the media combined with growing pressure from the authorities endanger public interest journalism"*
>
> - Reporters Without Borders 2024 World Press Freedom Index

AUTHORS AND ADVISORS

Marlia Saunders
Partner

Samantha McGeoch
Senior Associate

Amelia CausleyTodd
Associate

Isabelle Gwinner
Associate

Sophie Meixner
Associate

OUR PARTNERS

The Myer Foundation

mannifera

Thomson Geer
Lawyers

Gilbert + Tobin

Wilkinson Butler

AJF
With light, TRUST

AJF

With light, TRUST