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Australia's Right to Know

On Monday, 21 October 2019, a coalition of media organisations - AAP, ABC, Australian Community Media, ASTRA, Bauer Media Group, Community Broadcasting Association of Australia, Commercial Radio Australia, Daily Mail Australia, FreeTV, the Media Entertainment and Arts Alliance (MEAA), News Corp Australia, Nine, Prime Media Group, SBC, Seven West Media, Sky News, Ten, Guardian Australia and WIN Network - launched a major campaign agitating for legal changes restricting the media's ability to report freely on matters in the public interest. On that day, consumers of newspapers woke to newsstands filled with competing publications, each of which with a front page filled with redactions. The media had had enough.

Eli Fisher, co-editor, sits down with some of the individuals at the forefront of Australian investigative reporting and press freedom. Unlike his interviewees, Eli has not won any Walkleys; but, after his segue in introducing Andrew Stewart on page 3, he is pretty confident that next year won't be his year either.

FISHER: Thank you all for speaking with us about this important campaign, and the issues surrounding it. First, for each of you, what does the latest campaign mean to you, and why is it so important right now?

FERGUSON: The campaign highlights how important it is to fix our system to help get stories that are in the public interest out. Defamation laws, weak whistleblowing protections and restrictive freedom of information requests are just a few of the battles we regularly face when trying to expose wrongdoing. The media isn't above the law but the pendulum has swung too far and is making it hard to do our job. I exposed an aggressive debt collection culture at the ATO in 2018 with the help of a whistleblower, Richard Boyle, who is now facing 66 charges, equivalent to 161 years, if found guilty. This has had a chilling effect on whistleblowers coming forward. This campaign has included

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Editors' Note

What an enormous year it has been!

This year, two thousand and nineteen years into this common era of ours, has brought us in the media and communications space a seemingly endless (the year is actually shortly to end) buffet of intrigues. We had orders suppressing the publication of 's trial details, the allegedly contemptuous alleged failure to comply with which led 36 media organisations and journalists to be brought before a Court for a pretty serious talking to. This year gave us the ACCC's final report in its **digital platforms** inquiry, and subsequent consultation and the Government's response. It brought us **Voller**, and its appeal. It brought us **Hanson-Young** and **Leyonhjelm** with all its stop-shagging-men-ness. It brought us an appeal of the **Rush** record damages award, and the introduction of **abhorrent violent material** laws. It brought us long-awaited **defamation reform** (discussions), and **ACCC v Google**. Our sports lawyers are barely catching their breath following a **Folau-ARU** settlement, when it was announced that **Russia** has been banned from international competitions for doping. Nice news for Essendon, I suppose.

Our **AFP** raided Our **ABC**'s offices and the home of News' investigative journalist **Annika Smethurst**. The journalists didn't like that much, and asked the judges of High Court to weigh in. We talk about it within.

This edition, we bring you such generous gifts. We're basically Santa, except we do it all year round. Minters' **Tess Maguire** discusses the ACCC's digital platforms final report. **Cheng Vuong** the winner of CAMLA's **Essay Prize** competition presents his paper on defamation law and the search engine exception. **Drs Derek Wilding** and **Karen Lee** (we got you a couple of PhD authors this time, you're welcome) discuss their recent study into self-regulation in the communications sector.

Dr Martyn Taylor (we're turning into The Conversation) gives an annual wrap-up of CAMLA's year, and **Katherine Sessions** tells us about the activities of the CAMLA Young Lawyers. **Chief Justice Bathurst** gives you his Honour's timely thoughts on open justice, for those unlucky enough to have missed his Honour's recent presentation at the CAMLA seminar (and for those who wish to relive it, we're inclusive like that). Marque's **Sophie Ciufo** and **Hannah Marshall** talk to us about publishing laws in a social media context. **Claire Roberts** of Eight Selborne Chambers gets us up to speed on the Royals and the right to privacy, commenting on the recent claim by **Prince Harry** and **Rachel Zane**.

And I have a bit of a sit-down to discuss the **Australia's Right To Know** campaign with a couple of friends who could give just about anyone some serious professional insecurities. Human Rights Commissioner **Ed Santow**; Head of the litigation team at the ABC, **Grant McAvaney;** superstar legal affairs reporter for the SMH **Michaela Whitbourn**; Head of Policy and Government Affairs at News Corp, **Georgia-Kate Schubert**; Baker McKenzie media guru **Andrew Stewart**; and investigative reporting royalty **Adele Ferguson** and **Nick McKenzie** come around to chat all things press freedom. Roping Michaela, Adele and Nick into this is *not* a crass ploy to score a Walkley nod for the CLB (but they've never written anything and not received a Walkley for it, so wait and see how this plays out).

Many thanks to **Cath Hill** for, well, everything, and to **Michael Ritchie** at MKR Productions for making us look so good.

On behalf of all of us at CAMLA, we wish you a safe and relaxing holiday, and a successful and happy new year in 2020! See you then!

Ash and Eli

Boyle's revelations, which were in the public interest. Hopefully the campaign will put pressure on governments to about change.

SANTOW: It's a good time to ask how effective are Australia's human rights protections. Since 2001, few if any countries have passed more counter-terrorism and national security laws than Australia. Those laws have progressively increased the powers of our police and security agencies and created a raft of new offences for people who receive or might have received information that falls within a broad understanding of 'national security'.

Australia now has several laws that make whistleblowing in the public interest more difficult and dangerous. We have been assured that such powers would be used sparingly. But the AFP raids have shown that when our security and law enforcement agencies are given new powers, they can, and do, use them. It is of course legitimate for the government to take steps that are necessary and reasonable—even robust—to protect us from genuine threats to national security. But national security cannot simply be used as a trump card to justify all measures restricting a free press and freedom of expression more generally. In particular, adequate protections for journalists and their sources are essential to foster informed public debate, including about matters affecting fundamental human rights.

McKENZIE: It's vital because the public is being denied information they need to know about to hold politicians, government agencies and other powerful interests to account. Our jobs as journalists are about serving the public interest and this campaign is aimed at empowering our ability to do this.

McAVANEY: The campaign is of significant personal and professional importance to me (and of course the ABC). Having spent much of my legal career acting for media defendants, I am well aware that any and all media regulation requires careful consideration of rights or freedoms that might compete with free speech – privacy, reputation, national security and fair trials are but four examples. But more often than not when you look at the hundreds of legal examples where these interests are purportedly balanced, often the 'importance of a free media' takes the form of often-echoed starting-position rhetoric that then gives away to something else; put another way, the law as a whole tends to take a 'well it's just this once' kind of

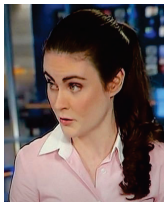
attitude in so many legal areas that the law chips away at media protections and undermines the utility of the role the media serves in a democratic society.

The campaign has I believe, presented an opportunity for the media as a whole to unite and present to the public the importance of protections for the media and its sources (whether whistleblowers or otherwise) so that it is a topic which is front of mind for all Australians. We don't want this opportunity to be eventually lost to yet another passing news cycle as thoughts about the AFP raids fade into memory. Full respect to the News Limited/Fairfax redacted front page campaign – a total stroke of brilliance. More than anything, I hope that the campaign will lead to meaningful reforms to protect investigative journalism on our shores; you only need to see the political reform that has followed the outcomes of shows such as *Four Corners* over the years to see that an open media ensuring our government bodies remain transparent and accountable is a completely non-bipartisan issue.

WHITBOURN: The ARTK campaign is about the growing culture of secrecy in Australia that makes it difficult for stories in the public interest to be told. That includes the raft of national security laws that criminalise the conduct of some people seeking to act as whistleblowers, as well as the recipients of that information. Non-publication orders also prevent people knowing what happened in many court proceedings across the country. This is not to say that the public's right to know trumps all other interests. There are many cases where it is quite legitimate for non-publication orders to be made, but there are some cases where media outlets have to fight ill-conceived suppression orders at great expense in order to report on matters that are squarely in the public interest.

STEWART: The regulation of media is complex and it is necessary for governments to take into account divergent interests. It is also difficult to enact legislation to appropriately balance those interests. However, as the State seeks greater powers of investigation, it is critical that the media be able to fulfil its critical function of critiquing and, where necessary in the public interest, exposing executive conduct. But what we've seen in the last few months, with the raids on Annika Smethurst's home and the ABC offices, is the clearest indication of how unbearable the legal position has become for the media. There have been approximately 75 national security and counter terrorism laws passed since 2001, more than in any other Western country. We have also witnessed an exponential growth in the use of specific suppression orders, particularly in Victoria. With each individual restriction - often, minor and obscure to the voting public - the burden on the media grows. Some of these will of course be sensible, but so much of this increased regulation of the press and of public discourse happens without meaningful scrutiny. It is to be hoped that for this action there is an equal and opposite reaction, and that the raids on both the ABC and News will be a watershed moment for the better. It is important for us all to retain perspective and that what is central to these issues is balance: one series of rights against another. Unfortunately, especially from the perspective of the media, right now things do not feel balance. The ARTK campaign seems to be gaining some real traction and shedding light on the range of restrictions that make it difficult for the media to perform their important role.

Adele Ferguson is a journalist with The Age, the SMH and the AFR. Her investigations have focused on serious corporate wrongdoing, including scandals at the banks, which helped lead to a royal commission into financial services, wage fraud scandals at 7-Eleven, Domino's and Caltex and misconduct at retirement villages. She has won eight Walkley Awards, including a Gold Walkley, two Gold Quill Awards, two Gold Kennedy Awards, a Logie and the Graham Perkin Journalist of the Year award. This year, she was awarded a member of the Order of Australia.



Michaela Whitbourn is a legal affairs reporter at the Sydney Morning Herald, having previously reported on NSW politics at the AFR. Prior to that, she practised as a lawyer, both within the Courts system and in private practice at what is now King & Wood Mallesons.

Nick McKenzie is an Australian investigative journalist, writing for The Age, the SMH and the AFR. He has won seven Walkley Awards and two Gold Quill Awards. In 2010, with his colleague Richard Baker, Nick was awarded the prestigious George Munster Prize for Independent Journalism, and in 2017, the two of them won won the Graham Perkin Journalist of the Year award.

Speaking of Baker & McKenzie, **Andrew Stewart** is a partner at Baker McKenzie, where he heads the Australian Media & Content Group and serves as a member of the Global Media Steering Committee. He advises a range of traditional and new media clients, in respect of what they can and cannot publish.

Grant McAvaney is a senior media and entertainment lawyer with extensive litigation and commercial law experience. Grant heads the litigation team at the ABC. He has just returned to this position after spending 18 months as the CEO of the Australian Copyright Council where he remains as the Company Secretary. Prior to joining the ABC the first time, Grant held positions as both a Partner of Minter Ellison, and Senior Legal Counsel of Ninemsn.

Edward Santow has been Human Rights Commissioner at the Australian Human Rights Commission since August 2016. Here he leads the Commission's work on a range of human rights issues, including in respect of freedom of expression and counter-terrorism and national security. Edward previously served as the chief executive of the Public Interest Advocacy Centre.

Georgia-Kate Schubert is the Head of Policy and Government Affairs at News Corp Australia, a role she has had for over seven years. GK leads Australia's Right To Know (ARTK) coalition of media companies. She is quick to declare that she is not and has never been a lawyer.

SCHUBERT: For many years ARTK has put well-formed arguments to governments across Australia – including the Federal Government – about the impact that laws that restrict news reporting have on the Australian public's right to know. Unfortunately, the smog of secrecy continues to permeate all levels of government across Australia and we are all impacted. The AFP raids on the home of News Corp journalist Annika Smethurst and the ABC headquarters on sequential days in June was the straw that broke the camel's back.

As the campaign and subsequent editorial coverage has clearly shown, this issue is not limited to national security matters. It's about the unnecessary limitations that laws place on reporting what the public has the right to know. Some of the matters ARTK is pursuing are the ability for survivors of sexual assaults to choose to tell their stories without having to apply to a Court to seek permission (TAS and NT); open justice – or the lack of it – is a big issue in NSW as CAMLA members know; Queensland still does not have a journalist shield law; the start point of the Federal Court regarding juries in defamation matters is no; the number of suppression orders remains sky high in Victoria and disproportionately high in SA on a per capita basis; in Victoria there is significant number of journalists facing contempt charges; and, at the Commonwealth level there's the list of recommendations for law reform presented to the Government by CEOs at the National Press Club event in June. That list includes contestable hearings before a higher authority for any warrant associated with a journalist or media company in their professional capacity, exemptions from laws that criminalise journalists doing their jobs starting with those offences introduced over the last seven years, better protections for Commonwealth public sector whistleblowers, a properly functioning FOI Act and limiting documents that can be stamped secret. Updating defamation laws is hugely important. There's many many more but I will pause there for now.

FISHER: How, most gravely, has the current state of the law affected your work? Can you give us examples of the sorts of important pieces that have been restricted, which have particularly bothered you?

STEWART: If I look at other common law countries, I feel that Australia is falling behind in the protection of speech in the public interests. An inflexible approach to qualified privilege is at the heart of the problem. The talked-about reforms may assist but, as ever, the Courts will be the crucible. The current laws do not enable, let alone protect, speech that is in all our interests. That is before we begin to look at the more difficult issues of protection at the fundamental endeavour of investigative journalism.

WHITBOURN: The country's uniform defamation laws pose probably the greatest threat, day to day, to our ability to report on matters in the public interest. Journalists are not above the law and should rigorously fact-check stories, as we do. The ARTK campaign is not about eroding journalists' accountability. But Australia's defamation laws are out of step with developments in other countries, including the broader public interest defence that already exists in the UK, and it can make it hard for us to defend legitimate reports. I think about those restrictions every time I receive a tip about a high profile individual. It does not stop me reporting those cases, but it does make my job much harder in ways that do not serve the public interest.

McKENZIE: The combination of crippling defamation laws, broken FOI laws and a pervasive culture of secrecy and, on occasion, source witchunts have combined to make it harder to practise journalism in any time in my almost two decades reporting. I've had my phones tapped, I've been called to secret coercive hearings, I've been raided - and on all these occasions, there was never a suggestion I wasn't doing my job properly or responsibly. It was about agencies trying to find the source of information about something that had been reported that had embarrassed a government or agency. While this behaviour slows or stalls investigative journalism, it doesn't cripple reporting like defamation proceedings. These are heavily weighted to the plaintiff, regardless of the merit of the claim, are can be used to stop important reporting.

SCHUBERT: The Foreign Influence Transparency Scheme law, as it was originally introduced to Parliament, was burdened with multiple, material unintended consequences that would have had insurmountable impact on businesses it applied to – in that case not just news reporting. I point this out to illustrate it's not just laws on the statute books but laws as they pass through the Parliamentary process that require vigilance. Many laws look benign from the title, but on closer inspection there's clauses that prohibit or restrict information disclosure or conduct that is the usual part of reporting. Most recently we saw this in the Commonwealth's agriculture protection bill. There are still concerns with that law and how it may be applied, particularly in light of the recent decision in NSW about liability for third party comments on publisher's Facebook pages.

FERGUSON: Many of my stories have come about thanks to whistleblowers who take a huge risk coming forward. Recent events including raids and the charges facing ATO whistleblower Richard Boyle have discouraged people from coming forward and speaking out. I have had some stories collapse when the whistleblower got cold feet and withdrew. Corporate and public sector whistleblowing laws need to be improved and we need a separate agency set up to assess their claims..

McAVANEY: Firstly, when it comes to incredibly important investigative pieces (especially those in the form of long-form content), the inconsistent State/Territory legal approaches to maintaining a public interest defence for the use of surveillance devices

makes outing wrongdoing incredibly difficult. Couple that with what I see as technical absurdities that repeatedly arise in the context of defamation cases, and you can quickly see that we have a legal system that works against the outing of dishonesty, malfeasance, and improper conduct by those who should be accountable. Secondly, our journalists have reported experiencing many whistleblowers pulling out of stories, scared off because of the fear of raids and prosecution. The intimidation that journalists and whistleblowers feel as a result of laws that largely promote and protect the tracing of their activities by investigative bodies, and the apparent willingness of authorities and regulatory bodies to use those laws, has a direct impact on the ability to defend a matter – certainly, the media also needs (whether in defamation matters or otherwise) witnesses who can give supporting evidence without fear of reprisal or prosecution. It's hard to blame whistleblowers for being scared away.

FISHER: Restricting freedom of the press is often justified by other competing priorities - for example, national security, the administration of justice or the protection of an individual's good reputation. Which laws are frustrating your freedom to get important information to the public in the most unjustifiable ways?

SCHUBERT: Perhaps I could peel the onion a different way, from a policy perspective. News media organisations report the news. They curate and apply an editorial process to what is published and broadcast: on TV, radio and in print, and on the digital properties of those companies. Governments are making laws – like the abhorrent violent material law passed in response to the Christchurch terror attack – that apply to content online. The AVM offence does not differentiate between user generated content uploaded to platforms and material used in news reporting by professional news media organisations. This is an emerging issue, and one to keep an eye on.

McAVANEY: Let me quote an American lawyer who, at a conference I attended recently, posed the following question to UK and Australian lawyers: "do you guys still have the problem of courts rewriting your stories after the fact?" In real terms, the law as it relates to the capacity of certain alleged defamatory meanings to arise can often prove incredibly difficult when it comes to crafting news and current affairs stories. While I accept that intention should be largely irrelevant when it comes to considering what a story may mean, the technical and at-times artificial cross-referencing process involved with arguments about alleged defamatory imputations only serves to increase the chance that a media organisation is expected to defend meanings completely outside of what were intended; that difficulty is only further heightened by the fact that in the new popular choice for defamation claims, the Federal Court, juries do not form part of the process and a recently issued practice notice now requires any defence to be filed within 28 days of service of the Statement of Claim and *prior* to the first case management hearing. The closest thing to a 'public interest' defence in Australia, the defence of qualified privilege, has been repeatedly shown up as a weak, theoretical defence at best. Without serious reform, free discussion of serious matters, particularly by way of long-form investigative content, is going to be harmed significantly.

At the risk of talking for too long, I would just quickly add that the ability to protect sources – both legally and practically – should be of paramount importance. Not only will that require strengthening of the laws nationally, but some serious practical issues need careful consideration as well. For instance, some tech companies well-versed in the issue take the view that the only way to truly protect sources is to make initial contact with a burner phone and burner computer, that should then be destroyed without any further contact being made via machines again. That is worrying, to say the least.

FERGUSON: Whistleblower laws as they offer few protections and no rewards and draconian defamation laws, which are expensive and out of date. I am also finding that freedom of information requests are getting harder as the default position is to deny on the basis it isn't in the public interest or redact most of the information which makes it virtually useless. I feel that sometimes this is being abused.

STEWART: The current defamation laws are probably the greatest issue. As a central part of the media's efforts to obtain meaningful reform in 2005, it is disheartening to seek to assist journalists to get their stories to the public in ways that are meaningful, especially when stories are clearly in the public interest. I have personally felt the extreme frustration of clever, well-researched journalists work diligently to research a story, particularly in the #metoo area, only for me to be part of a decision-making process which prevents the story from seeing the light of day. There are many dark corners for the well-resourced to hide, and they do.

WHITBOURN: Australia's defamation laws pose the single greatest obstacle to reporting on matters in the public interest. Many experts have observed that the balance appears to have tipped in favour of protecting individuals' reputations at the expense of freedom of speech. In November the Council of Attorneys-General approved draft amendments to the country's uniform national defamation laws that are said to redress that imbalance, and submissions on those proposals are open until January 24, 2020. Those changes include a new public interest style defence modelled on the law in New Zealand, but it is not clear to me or to media law experts that this defence will provide more protection to journalists than the existing defence of qualified privilege. The latter has not been of assistance to media outlets in defending public interest reports.

My ability to inform readers about matters in court in real time can also be affected by a range of factors including non-publication orders and the speed with which applications made by me to access court documents can be processed by court staff. The latter seems quite banal, but if courts are under-resourced and cannot deal in a timely manner with applications for court documents, I can only report part of the story and that doesn't serve the public or the parties particularly well.

FISHER: Let's talk about the AFP raids. What effect, if any, did it have on how you operate, on your workplace, and how whisteblowers and other informants deal with you?

FERGUSON: It certainly had a chilling effect on informants coming forward. There is a lot more fear around, that is for sure.

McKENZIE: Several of my sources, including people overseas, suddenly became concerned they might be targeted or exposed. It had the effect of making people more hesitant about exposing important public interest information— information whose reporting would not jeapordise national security but rather inform the national debate.

SCHUBERT: It's undeniable that it has and will continue to have a chilling effect on whistleblowers and reporting. Most concerningly is that we will never know the stories that won't be told as a result, what will remain secret that should be told.

FISHER: Adele and Nick, you are experienced in investigative reporting into corporate wrongdoing. How do efforts to intimidate reporters digging around the corporate world compare to efforts by governments to restrict or discourage reporters digging around the political world?

McKENZIE: The corporates tend to be more ruthless using the law to shut down reporting, issuing breach of confidence actions or defamation actions. If money is no object, a company can frustrate a report via baseless legal claims that also work to warn off other media companies.

FERGUSON: The corporate world tends to hire expensive external PR companies who conduct sophisticated smear campaigns. This can be against myself, whistleblowers, the victims, all aimed at diverting attention from the misconduct. Threats of millions of dollars of advertising being pulled is another lever some of them use as well as expensive law suits. I have been spied on and recently a senior executive in a financial services institution was overheard at a pub making physical threats against me.

FISHER: Edward, did the Human Rights Commission hold a view about the AFP raids on journalists? And how do you think those developments, and the subsequent legal challenge, position Australia internationally in terms of protecting free speech and journalists?

SANTOW: The Commission was deeply concerned about the AFP raids. The journalists involved in these raids were reporting on important issues that go to the heart of our liberal democracy.

National security may sometimes be a legitimate ground for limiting our human rights, but overreach in the name of national security is not. Protecting national security shouldn't mean journalists face severe criminal penalties for reporting matters that are genuinely in the public interest.

When Parliament fails to strike the right balance on national security and human rights, harm to individuals cannot be later undone.

Australia is unusual among liberal democratic countries in missing key checks and balances, such as a national human rights act or charter, to stop such national security laws from over-reaching.

FISHER: Do laws need to be changed in light of the AFP raids? What sort of protections would you like to see?

McKENZIE: I'd like to see agencies use their discretion when contemplating a raid to consider if a raid will be targeting responsible and public interest reporting. I'm not saying journalists should be above the law. But I think if active consideration was given to the critical role of the press, and the impact raids would have on responsible reporting, 99 times out of 100 police would decide not to raid. If some sort of legislative protection can aid this, then that would be useful.

SANTOW: Since 2001, the Australian Parliament has continued to expand coercive powers and criminal laws said to be directed towards the protection of national security. For example, on the last parliamentary sitting day of 2018, the so-called 'encryption bill' was passed. It dramatically increased the power of Australia's intelligence and law enforcement agencies to access the private communications of ordinary Australians, with implications for our right to privacy, freedom of expression and media freedom.

There have even been media reports that the Government had been considering an expansion of powers to allow the Australian Signals Directorate to obtain information covertly against Australians.

I'd like to see a comprehensive review of Australia's national security laws, instead of the creation of yet more government legislation to keep up with the rapid development of communications technology.

It's time to take a step back and fully review the inter-relationship of the existing laws and whether all those laws go absolutely further than they need to in impacting on our basic human rights.

SCHUBERT: ARTK has set out a clear set of asks. We are seeking contestable warrants to a higher authority, exemptions from the laws passed that criminalise journalists for doing their jobs – there's a list of those we are pursuing, adequate protections for public sector whistleblowers, and properly functioning FOI regime, limitations and clear rules about what can be stamped secret, and

updating defamation laws. The first five of those are inter-related and are all necessary. There's already a process well underway for updating defamation laws. ARTK is optimistic that CAG process will meet the timeframe to have amending legislation ready by the middle of 2020.

WHITBOURN: I am keen to see the result of the ABC's Federal Court challenge to the raid on its Sydney premises and the High Court challenge mounted by News Corp journalist Annika Smethurst and her employer to the raid on her Canberra home, and whether the courts find that the implied freedom of political communication does act as a handbrake on any of these powers. I would also be supportive of a review of national security laws, including the desirability of stronger public interest protections for journalists.

McAVANEY: Yes. I appreciate that legislative change is not always an easy process, but as ARTK has made clear, those changes are all manageable without adversely affecting Australia's ability to protect itself. Specifically in relation to search warrants, there is no doubt that the laws need to be tweaked to allow proper discussion of relevant factors such as source protection, public interest, and national security – but *prior* to the execution of a search warrant. It is simply not enough to argue that the current system is fine because aggrieved parties may, for instance, commence proceedings challenging a search warrant after the event. The damage is done; actions will have already been taken by authorities with huge investigative powers that strike fear in the heart of whistleblowers and stress and anxiety to journalists who have just been doing their job (and doing that job very well!).

FERGUSON: I want to see changes to corporate and public sector whistleblower laws. The corporate sector whistleblower protections were recently changed but they don't go far enough. I want changes to defamation laws in line with the UK and I want the Attorney General to intervene and use his powers to stop the prosecution of ATO whistleblower Richard Boyle.

FISHER: Beyond those changes, what sorts of legal reforms do you think are necessary, if any, to ensure that the press is freer to perform its important duties? Let's start with FOI, whistleblowers and secrecy.

SCHUBERT: Those are all part of the ARTK law reform ask. It should be emphasised that law reform in those areas is required to change the culture of secrecy. Without law reform the risks and incentives for behavioural change across government is limited and unlikely to be long-term.

McKENZIE: Much reform is needed. FOI is broken and those deciding what to release are no longer acting within the spirit or intent of the law. Whistleblowers need far stronger legislative protection to protect them from the fall out caused by coming forward and to reward them - even financially - for doing so. I think we need a cultural change across government to encourage more accountability. The new commissioner of the AFP has recently endorsed such an approach but the proof will be in the pudding. More than anything else, we need a major overhaul of defamation. It is killing the media in Australia.

SANTOW: A good starting point would be to ensure that 'outsiders', including journalists, are not liable under secrecy offence provisions unless it's proved that their disclosures have led to concrete harms to our security interests. That is, harm should be an element of secrecy offences insofar as they apply to people who aren't employed in our security and law enforcement agencies.

Secondly, there should be robust defences available for disclosures that are genuinely in the public interest – and especially where those disclosures reveal violations of human rights.

STEWART: I agree with the point GK makes, that the laws are in many respects secondary to the culture of the government wielding them. Law reform is one thing, but it's a cultural reform within government that is most essential. Here are some findings from a study by the Guardian Australia from early this year, which really highlight the issue. FOI refusals are at their highest level since records began in 2010-11; more than 2000 FOI requests have taken more than 3 months longer than the statutory timeframe to respond (often rendering any produced documents irrelevant by the time they are released, if they are; FOI teams have shrunk in at least 20 government departments or agencies, and the OAIC is operating with two-thirds of the 100 staff minimum needed to do its job. These are failures not only in respect of the Government's abiding by FOI law: they are failures reflecting a Government's questionable commitment to abide by the spirit of FOI laws too. Cultural and political change are why the ARTK campaign is so important.

WHITBOURN: FOI applications can be expensive, time-consuming and ultimately fruitless. I would like to see a comprehensive review of the FOI system and whether government agencies are frustrating the objects of laws designed to enhance the public's access to information.

McAVANEY: Other than some of the reforms I've mentioned already, I think we need to look at broad protections for whistleblowers. This is a slight oversimplification, but at the moment the protections for whistleblowers in Australia do not apply to everyone, do not apply to telling the world at large, do not apply to outing all kinds of wrongdoing, and are inconsistent between the States/Territories. Protections need strengthening: just look at the example of ATO whistleblower Richard Boyle who assisted a joint Fairfax/*Four Corners* investigation and has been charged as a result, notwithstanding that the program itself, which looked at

alleged heavy-handed enforcement practices against small businesses and individuals, leading to the Senate Economics Legislation Committee resolving to conduct an Inquiry into the performance of the Inspector-General of Taxation statutory office.

From a national security perspective, there appears to be a problem in the way documents are classified that hinders reporting significantly. I would suggest examination of the information that government and bureaucrats consider 'secret' and whether it matches up with community expectations.

FERGUSON: I would also like to see an overhaul of the FOI system as it is being abused by government agencies.

FISHER: And defamation law reform? ARTK is concerned to adapt defamation law to the digital era. What sort of changes are you keen to see implemented? What involvement are you having with the defamation law reform currently underway?

WHITBOURN: Defamation law reform is something of a hobby horse for me. I write on the topic fairly regularly, including the high volume of cases in Sydney, and am also tracking the current reform process. I fear that the current process may result only in tweaks to the *Defamation Act 2005* rather than the root and branch reform that is required. But I welcome the proposal to adopt the "serious harm" threshold that already exists in the UK to weed out trivial cases before they proceed to the time and expense of a trial. That would be particularly useful for litigants in person, so it's not a reform I would advocate as a solution to the problems encountered by the media in defending major investigative reports in the public interest. I would also like to see a broader public interest defence introduced in Australia, but I am not optimistic that this will eventuate. The current proposal modelled on New Zealand law may not be the answer.

McKENZIE: The police raids on media organisations have rightly sparked a debate about the role of a free press in a democracy and what limits might be drawn around the powers of security agencies. But Australia's defamation laws pose a more immediate, daily threat to everyone's free speech.

Most Australians would find it hard to believe that a judge could remove the right to plead truth as a defence in a defamation case. Yet that is what happened in the Federal Court in Wing v The Australian Broadcasting Corporation.

People would also be surprised to learn that under Australian defamation law what must be defended is not the ordinary meaning of the words in a story but the imputations crafted by the plaintiff's lawyers. This means that defendants must play on the field marked out by the plaintiff and must seek to prove the truth of an imputation that the plaintiff argues arises, rather than what was in fact reported. All of this is built on a foundation of laws that presume all publications that are defamatory are false and place the burden of proof on the defendant.

It is little wonder then that Australia has been described as having the worst defamation laws in the free world.

I do not believe the media is above the law and am not arguing for special media laws. But it is time to insert a public interest defence of "reasonable belief" into the law to restore some balance to those who want a robust public debate around matters of national importance. The proposed change will not prevent someone who has been wronged from seeking redress in court but it will allow the public, Parliamentarians, and the media to debate without fear of being dragged into a punitive legal fight against a cashed up opponent.

FERGUSON: I agree with Michaela. We need to see Australia come into line with the UK as our defamation laws are stifling journalism. Anyone with deep pockets can abuse the system and it works in their favour. This shouldn't be allowed to happen. Too many stories are killed or watered down due to our costly defamation laws, which is not in the public interest.

STEWART: As I mentioned above, having been directly involved in the 2005 reforms, it is disappointing to see the lack of progress in Australia compared, for example, to the UK. Qualified privilege is alive and kicking there but remains a defence of last resort in Australia. Also, in 2005, the digital age was almost a toddler, still looking for its feet. Now it is a fully-grown adult, with defamation law suffering the growing pains. The law has not kept up, while businesses have come and gone and some have become gargantuan. So you can imagine that the uniform defamation laws were not drafted with social media as a central consideration. And this year's Voller judgment demonstrates that the Courts are still struggling to apply these laws to the current framework. What would I like to see enacted? A UK-style single-publication rule is a no-brainer. That would mean that the statutory limitation period commences from the date of upload rather than the date of download. There should also be a UK-style serious harm threshold. Most of all, I would like Santa to deliver my clients the best Christmas present of all: a workable public interest defence. Without it, the media remains at peril.

SCHUBERT: ARTK has made a number of submissions to the review. There's two key streams of work to update defamation laws. The first is to update the laws to be fit for purpose in the digital age which requires a single publication rule and a serious harm test. The second is to fix the parts of the existing law that, after 14 years of road-testing, are not fit for purpose. A number of the defences fit into this category including qualified privilege and contextual truth. We are hopeful that the timeline set out by the CAG working group, being

led by NSW, will be met. That would mean that amending legislation will be drafted and ready to go by mid 2020. By that time we will have blown the candles out on the 15th birthday cake of the current law. That's long enough. I should say we are also seeking a two-year review mechanism be built in so anything that is still not working can be triaged quickly and not wait another 15 years for amendment.

McAVANEY: Georgia-Kate and the ARTK continue to fly the flag for the ABC's interests in defamation law. If Australia wants a stronger responsible media, then in my view we need at the very least to see reform by way of the introduction of the single publication rule, serious harm test, righting the wrongs that have developed over the years when it comes to variant and contextual imputations, and introduce an *actual* fully-functioning public interest test that works in practice.

FISHER: What's the response you have been hearing from Government in relation to the ARTK campaign? Is there support for the changes being sought?

SCHUBERT: The PJCIS reports on 16 December. We will see what the Committee reports, and how the Government responds.During and since the campaign, members of the community have been coming forward with their stories of secrecy and governments hiding things from the people. Pink batts and kerosene baths are the types of things people have a right to know about.

McAVANEY: I try to make it a habit not to add extraneous information when Georgia-Kate has already given a helpful answer.

WHITBOURN: My understanding is that media executives involved in the campaign have been buoyed by recent discussions with the government, but talks are ongoing.

McKENZIE: I've been heartened by interactions with Attorney-General Porter and Mark Dreyfus but the feds can only do so much. I think it is a big ask for COAG backing of reforms given the difficulty getting states to all come on board and the desire of so many politicians to have a weak press. The debate is heartening but I'm not holding my breath.

FERGUSON: There has been a lot of talk but no action as yet.

STEWART: So far we have heard that a single-publication rule and a serious harm threshold are likely, as will be a NZ-style public interest defence. So far so good. Further reforms related to digital platforms, an issue I will be watching very closely, is still being negotiated. We are expecting draft proposals for public comment by early 2020 and new laws to be introduced in the middle of next year.

FISHER: Is anything short of a federal Human Rights Act that expressly protects free speech going to be inadequate?

SANTOW: Australia's current human rights framework is inadequate and needs an overhaul. At a federal level, we have a number of anti-discrimination laws, but these don't include protection of all human rights. We would welcome better protection for freedom of expression. It's important to remember that freedom of expression is protected along with a range of other human rights in international law, and these rights are interrelated.

The Commission has been calling for a human rights charter since our inception. Mid-next year, the Commission will release a roadmap for national human rights reform and we are currently consulting on this as part of our 'National Conversation on Human Rights' project (you can read the discussion paper for the project here: https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law)

McKENZIE: I think plenty can be achieved by discrete legislative reform. We can't make perfect the enemy of better.

FERGUSON: A Federal Human Rights Act that expresses proection for free speech would be hugely welcome but there are other things we can do to help get stories that are in the public interest told. They include an overhaul of our whistleblowing laws, including a reward system, an independent agency, improved defamation laws and a better freedom of information system.

STEWART: Probably not. Smaller measures of progress are desirable in the interim. But it should be a source of national embarrassment that Australia does not have express protections for such basic liberties as free speech and freedom of the press. In the current climate, both domestically and abroad, it is clear why we cannot rely on the Government to behave sensibly in relation to regulating the media and free speech.

WHITBOURN: I think express protection for free speech is desirable but a range of other changes could be made that would assist public interest journalism. A major overhaul of our defamation laws is one such change, but I am not holding my breath.

McAVANEY: There is plenty that can be done, and reasonably quickly, to improve the position to existing legislation.

SCHUBERT: ARTK is trying to achieve meaningful change, and put the public's right to know, upfront – rather than at the end – of what we think we can change now. The Australian public cannot continue to be kept in the dark.

FISHER: Thanks everyone for talking with us. On behalf of our readers, I am very grateful for all your insights. You can go back now to fighting corruption and preserving our freedoms.