

The Walkley Foundation's Submission to the Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press

July 26, 2019

Executive summary

In this submission, the Walkley Foundation addresses section a) of the Inquiry's terms of reference and shares the experiences of journalists and media organisations that have already been negatively affected by the exercise of law enforcement or intelligence agencies' powers. The exercise of these powers has already had a chilling effect on journalists and whistleblowers, hampering journalists' work to inform the public.

After outlining the context for this inquiry and the Walkley Foundation's role in the industry, this submission examines the impact of journalism and whistleblowers on the national public interest; and collates experiences from leading Australian journalists about how they work with and protect confidential sources and whistleblowers. We have also gathered statements from journalists about how they navigate the tension between serving the public interest and national security concerns. The submission then makes a case for safeguarding a free press for the benefit of Australian democracy and civic life, before concluding with recommendations.

The Walkley Foundation calls for public hearings to provide an opportunity to include greater transparency and trust in this process. The Foundation stands with colleagues in the industry, including the MEAA (Media Entertainment & Arts Alliance), that are part of the [Australia's Right To Know](#) coalition submission and their calls for reforms. The Foundation also stands with the [Alliance for Journalists' Freedom](#) and their call for a Media Freedom Act.

While the Walkley Foundation, and Australian journalists, recognise the inherent tension in balancing national security concerns with protecting press freedom, this is an opportunity to review and reform the laws and processes, to build transparency and trust. Both media and the Government have the responsibility to serve the same goal: the public interest.

Louisa Graham

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The Walkley Foundation

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Introduction

Journalism is a critical pillar of democracy and Australia has a proud history of a robust free press. But national security laws enacted over the past decade now place Australian journalists in a position of heightened exposure, where they could face criminal charges, and be jailed, for doing their jobs. (This includes sections of the *ASIO Act*, *Telecommunications Interception and Access Act*, *Criminal Code Act* and *Crimes Act*—see the [Australia's Right To Know Coalition's submission](#) for more specific analysis and why exemptions for public interest reporting are needed.)

These laws have grown increasingly problematic in the way they criminalise journalists' work. But never has the situation been so intense as in recent weeks, with news of just how much the laws have been exercised to target journalists and their work through raids and the accessing of reporters' communications, metadata and even fingerprints. This doesn't only impact journalists; it affects the public interest. In the words of one journalist, Gold Walkley-winner Adele Ferguson:

"The recent raids have had a chilling effect on all whistleblowers. I am dealing with one at the moment who is not related to defence or national security but he is worried I will be raided and he will be exposed. Some insiders who were talking to me about stories relating to corporations have gone quiet. This is not in our national interest. It is a dangerous time because as a society we need whistleblowers to keep us informed about what is really going on."

In this submission, the Walkley Foundation addresses section a) of the Inquiry's terms of reference and shares the experiences of journalists and media organisations that have already been negatively affected by the exercise of law enforcement or intelligence agencies' powers. The exercise of these powers has already had a chilling effect on journalists and whistleblowers, hampering journalists' work to inform the public. As investigative journalist Linton Besser put it:

"The suite of national security legislation enacted over the past decade makes the core task of investigative journalists—gathering information which is not otherwise publicly available—increasingly difficult. While perhaps not the intent, the effect of these restrictions has been to effectively criminalise public interest reporting; the complexity involved in maintaining relationships with those in positions of direct knowledge of matters of public interest, and the risks posed to both sources and reporters, creates hurdles which are almost impossible to vault."

Others are concerned about the discretion of law enforcement in balancing responsible journalism against the letter of the law. As journalist Nick McKenzie said:

"I do think there is this inbuilt discretion in our system generally that does look after responsible journalism. But the raids make me think ... are these decision makers who can exercise discretion? Is it in the public interest, is it a good use of resources?"

While the Walkley Foundation, and Australian journalists, recognise the inherent tension in balancing national security concerns with protecting press freedom, this is an opportunity to review and reform the laws and processes, to build transparency and trust. Both media and the Government have the responsibility to serve the same goal: the public interest.

About the Walkley Foundation

The Walkley Foundation is at the heart of the Australian media. An independent, non-profit organisation, the Walkley Foundation works with all media organisations and journalists. The Walkley Foundation leads industry conversations and regularly unites industry leaders through round-table discussions and networking events.

The Walkley Awards benchmark excellence and best practice in the craft, showcasing ethical, highly-skilled reporting that has public impact. With a distinguished history of more than 60 years, the Awards are a trusted brand. Their integrity is well-respected by both the industry and the public. The Awards are peer-judged: each year more than one hundred of Australia's senior journalists confer to award the best and most important stories of the year.

Many critical stories throughout the Awards' history would not have happened without the contribution of credible whistleblowers and confidential sources. Much of that culture of award-winning journalism is now at risk under the current national security framework.

The Walkley Foundation also has a role to play in informing the public about the value and importance of journalism. It fulfils this role through public programming, resources and campaigns such as [What Price Would You Pay?](#) which was rolled out nationally in print, online, TV and outdoor advertising throughout May and June 2019.

Strong journalism of integrity has a critical role in our society and underpins a functioning democracy. It informs the public, uncovers corruption, shines a light on injustice, amplifies the voices of the voiceless, and provides checks and balances on those in power. Enabling excellence in journalism builds an informed, open society.

The impact of journalism and whistleblowers

Whistleblower protection laws are essential for democratic accountability, and the public's right to know. However, these protections remain inadequate and these inadequacies inhibit the function of journalists' freedom to report on information that is in the public interest.

We know from experience that award-winning journalism often relies on whistleblowers to uncover and prove ground-breaking stories. This kind of journalism has enormous public impact, can lead to changes in law and policy, can prompt royal commissions and inquiries, and is critically important to a functioning democracy. One of the founding fathers of democracy, Thomas Jefferson, said this in 1787:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.

Of course the Foundation is not arguing for the removal of parliament, but Jefferson's sentiment absolutely underscores how the fundamentally important a free press is to the health of a democracy.

How do journalists protect their sources?

Who better to explain the way journalists work with information from confidential sources and whistleblowers, than journalists themselves? We have gathered anecdotes and experiences from leading Australian journalists:

Adele Ferguson, *The Age*

Adele Ferguson is a fierce [advocate for whistleblowers](#), and has worked with a number of them in a career that has won her eight Walkley Awards covering business, finance and investigative journalism. Her "[Banking Bad](#)" investigation for *Four Corners* was awarded the Gold Walkley and was a decisive factor in the creation of a royal commission looking at the sector.

"From my perspective I couldn't have broken some of my most important stories without whistleblowers and confidential sources. Stories exposing rampant misconduct in financial services companies, systemic wage fraud and retirement village operators putting profit before people.

"In 7-Eleven the whistleblower helped expose the biggest corporate underpayment of wages in the country's history. After the story broke in a joint venture with *The Age*, *SMH* and *Four Corners* the convenience store giant was forced to pay back \$150 million to vulnerable workers. On a broader scale it blew the lid on the dark underbelly of the labour market and resulted in many more wage fraud exposes. This has resulted in law changes, which make our society a better place.

"In the case of bank scandals—the CBA financial planning scandal, the life insurance scandal, forgery and fraud and management cover up at NAB, IOOF and others—only came about because of whistleblowers and confidential sources. They put everything on the line to provide documents to reveal toxic cultures that resulted in large scale financial rip-offs. These stories had a cascade effect that ultimately contributed to a royal commission into banking, which has resulted in hundreds of millions of dollars in compensation payouts

and promises to clean up their act, as well as regulators acknowledging they need to do better to protect consumers. This is for the betterment of society.

“Most whistleblowers I have dealt with have made huge sacrifices. CBA whistleblower Jeff Morris has not been able to get a job. His marriage broke down, he suffered a breakdown and received death threats from a co-worker. CommInsure whistleblower Dr Ben Koh had to leave the industry and battled the bank in legal action before settling. ATO whistleblower Richard Boyle is facing 66 charges that, if found guilty, total 161 years of jail.

“The recent raids have had a chilling effect on all whistleblowers. I am dealing with one at the moment who is not related to defence or national security but he is worried I will be raided and he will be exposed. Some insiders who were talking to me about stories relating to corporations have gone quiet. This is not in our national interest. It is a dangerous time because as a society we need whistleblowers to keep us informed about what is really going on.”

Chris Masters, Journalist & Author

Chris Masters is one of Australia’s best-known investigative journalists. His work has had high level impact: His 1987 exposure of [corruption in Queensland](#) led to a public inquiry and major reform. Masters has won five Walkleys, including the Gold Walkley in 1985 and the Walkley Book Award in 2007.

“I have ridden every bump of the roller coaster with whistleblowers. I remember the dilemma from ‘The Moonlight State’ of a woman living in a country town in genuine fear of her life and coming to a recognition that the ABC had no witness protection program”.

“Equally, for what it’s worth, we can have a lot of problems with whistleblowers who aren’t honest regarding their story and motives. So important protocols for whistleblower management can be shaped by us as well.”

Kate McClymont, *The Sydney Morning Herald*

Kate McClymont is an investigative reporter for *The Sydney Morning Herald*. Her work has exposed corruption and created change. McClymont has won seven Walkley Awards, including the Gold Walkley in 2002, and in 2018 she was part of the Fairfax/ABC team that won two Walkleys for the [Don Burke investigation](#). McClymont’s work has led to Independent Commission Against Corruption (ICAC) investigations, most notably into former NSW Labor politician Eddie Obeid, who she doggedly investigated for years.

“Whistleblowers are vital to investigative journalism and ultimately to a healthy democracy. They are the people at the coalface who have encountered corruption or a cover-up first hand. We rely on them to help us to hold those in power to account. Over the years I and other journalists have steadfastly refused to name our sources. Who would ever trust us again if we gave them up? But because of the recent AFP raids those

guarantees of protection appear to be hollow promises at best. The public's right to know is the biggest loser."

Nick McKenzie, *The Age*

Nick McKenzie has won seven Walkley Awards as an investigative journalist, with stories on bribery in the Reserve Bank of Australia, organised crime, unions and police corruption. His investigations regularly appear in *The Age*, *The Sydney Morning Herald* and *The Australian Financial Review*. He also presents special investigations for ABC *Four Corners*.

McKenzie recalls the impact on him of the ABC raid: "I did an immediate stocktake of what was at my desk because I thought Jesus, am I going to be next? It was in some respects surprising and deeply concerning.

"Given that we do exist in this strange place where our job is to find secret information, sometimes classified information, and to carefully and responsibly tell it to the public, I do understand that there will be this tension between the public interest in my job and the desire of agencies like the AFP and the defence department to stop these sorts of leaks.

"I have been raided by police, I've been the subject of phone tapping interception, I've been hit with summonses from various powerful bodies. I have been in a coercive hearing and I was warned when I wouldn't reveal a source that I would be prosecuted. Even when pressed, I didn't reveal any sources.

"I do think there is this inbuilt discretion in our system generally that does look after responsible journalism. But the raids make me think, is that still there? Are these decision makers who can exercise discretion? Is it in the public interest, is it a good use of resources?"

Anne Davies, *The Guardian*

Anne Davies joined Guardian Australia in 2017, where she reports on business and politics, urban planning, environmental investigations and the changing nature of work. Previously Davies worked for more than 20 years for the *Sydney Morning Herald* in Canberra and Sydney. Davies has won three Walkleys, including the 2002 Gold Walkley with Kate McClymont.

"I think two things have happened. One, in the past, bureaucrats used to be much more helpful in providing background information to journalists. And now they are far less willing to do so. Instead everything gets directed straight through to the media office. That means the quality of reporting is often less informed, because often you're getting information second hand via the media department. And I'm not talking about information that's a leak. There's been a real chilling effect on bureaucrats being prepared to talk to the media.

"The other problem we have is that I've noticed that people who *do* want to expose something are extremely wary about even reaching out. Often they try to do it through intermediaries. Likewise, when we want to speak to someone we're very reluctant to even call them or email them. The whole business of journalism has changed dramatically. There's this great nervousness, even if it's a call that

doesn't involve leaking confidential information—there's just this incredible anxiety about having any trace of a conversation with journalists.

"The raids have really crystallised for us that, while we've always been aware that receiving a document is risky, we've now realised it is actually a real risk. There have been times when people have published documents to support their story; they'll now think very carefully about doing that because you're basically publishing evidence that you've committed a crime. The main reason journalists publish material based on leaks is because it demonstrates that something is not right: it could be a tender that's not being run properly, through to the behaviour of our troops in Afghanistan. All of those things should be scrutinised and while governments and departments may not like it, such exposure often leads to better practice down the track."

Linton Besser, ABC

Linton Besser is the ABC's Europe correspondent based in London. Before this posting he was a reporter for *Four Corners*, and previously worked for Fairfax. Besser has won three Walkley Awards, including two wins in the investigative journalism category.

"Confidential sources have been critical to almost every single investigative story I've published or broadcast. From the tens of millions of tax dollars improperly pocketed under the employment services scheme to the revelation that water theft was undermining the Murray Darling Basin Plan, insiders have been crucial to getting the truth into the public sphere.

"While my colleagues and I have faced summons from investigative agencies, subpoenas during court cases and orders to produce documents, it's primarily our confidential sources who are taking the significant risks in assisting us to reveal information in Australia's interest. But they do so in my experience because they are themselves concerned about the very issues we're trying to illuminate, and they know, or come to realise, they're holding significant pieces of the puzzle.

"True whistleblowers, who are willing to step forward in the knowledge they'll face the glare of public attention, as well as potential recriminations from their employer or associates, are rare. Those who find the courage to do so have a mix of motivations and tolerance for the risks involved.

"For those who go public, their lives change forever. Usually they'll lose their job, often they'll face opprobrium from within their industry, and sometimes their personal lives will suffer. Of course, there are occasions where new opportunities emerge as a result of their act of courage—Andrew Wilkie is a marvellous case in point.

"Even those people who stop short of speaking out, however, can make vital contributions without which many stories in the public interest will never be told. Unfortunately, I've noticed an increasing reluctance of such people to assist.

"After two of my sources for a *Four Corners* investigation were very publicly raided by the AFP a couple of years ago (they had broken no law, and there was no subsequent action taken against them), the word got out. When I contacted a

colleague of theirs some time later, on a completely different subject matter about which they held information about the corruption of a multimillion-dollar federal program, they apologised profusely and declined to even hold a confidential discussion. They were afraid, they said, they too would be raided – whether they leaked to me or not.”

“The truth is, I’m partly reluctant to publicise such cases because I believe this chilling effect is precisely what secretaries of agencies and leaders of other public or private organisations are hoping to achieve.

“Protection of whistleblowers is a complex issue. It’s one of our primary obligations, but it’s not news to any serious journalist that such protection is becoming more and more difficult; in extreme cases, where reporters are investigating defence and intelligence issues, for instance, the measures required to afford meaningful protection are so arduous they require a proper budget and serious forward planning.

“The suite of national security legislation enacted over the past decade makes the core task of investigative journalists—gathering information which is not otherwise publicly available—increasingly difficult. While perhaps not the intent, the effect of these restrictions has been to effectively criminalise public interest reporting; the complexity involved in maintaining relationships with those in positions of direct knowledge of matters of public interest, and the risks posed to both sources and reporters, creates hurdles which are almost impossible to vault.”

Journalists navigating public interest vs national security

Reporting in the public interest, journalists can be faced with stories or sources that the public should be informed about, but which may place them on the wrong side of national security laws. We have gathered anecdotes and experiences from leading Australian journalists:

Paul Farrell, 7.30, ABC

Paul Farrell won the 2017 Walkley Young Australian Journalist of the Year Award for leading *The Guardian*’s [Nauru Files](#) investigation. Paul has worked on a number of major international investigations including the Panama Papers and HSBC Swiss tax files and broken major Australian stories including the sale of Medicare cards on the dark web and the Commonwealth Bank’s loss of 19.8 million account records. He currently is a reporter at 7.30, ABC TV.

“Like many journalists in Australia, a number of my stories have relied on confidential sources and whistleblowers who speak out at great personal risk. In recent years, my interactions with whistleblowers have become increasingly challenging; there is growing fear of retribution due to a number of high-profile prosecutions and criminal investigations, as well as increasingly aggressive secrecy laws. This chilling effect poses serious challenges for getting difficult stories over the line.

“The risks to all journalists and all sources is extremely real. In one instance several years ago I published a story for *The Guardian* outlining the location of one of the vessels [an Australian customs ship] that entered into Indonesian waters during the highly publicised incursions. There was a substantial public benefit that flowed from the story, because it demonstrated there was knowledge on board the vessel that they had entered Indonesian waters, contrary to public representations.

“The story triggered an Australian Federal Police referral for an alleged breach of s 70 of the Crimes Act, as well as a separate referral to the Australian Commission for Law Enforcement Integrity. The AFP allocated 2-5 officers three months to pursue my sources. Diary records from the AFP officers involved indicate they undertook dozens of interviews all around the country in order to pursue my sources. It later transpired these officers had also accessed my phone metadata in their bid to find my sources [NB, all of this information is verifiable, and has been obtained under FOI and privacy laws]. While in this instance the AFP did not attempt to execute a search warrant, that risk was extremely live in my mind at all times.

“The combination of broad general secrecy provisions, no media exemptions relating to search warrants and loose controls on access to journalists' metadata has created an extremely difficult environment for public interest reporting. These measures cumulatively damage and undermine legitimate investigative journalism in a very real way.”

Ross Coulthart, investigative journalist & author

Ross Coulthart is a leading investigative journalist and author who has worked for the Nine and Seven Networks, ABC *Four Corners* and *The Sydney Morning Herald*. He has won five Walkley Awards including the 2018 Gold Walkley with Nick Farrow, for the story “Butcher of Bega” which exposed shocking malpractice by a regional doctor. Coulthart studied law before becoming a journalist and has covered conflicts in East Timor, Iraq and Afghanistan.

“I have directly approached individuals in our intelligence services, whom I know to be former or serving senior officials of DSD/ASD, ASIS, ASIO and ADF and I have had excellent opportunities to check and verify issues with them that have sometimes allowed me to publish a story accurately and fairly represent the truth. The problem seems to be that some officials are so hostile to the media scrutinising their actions that they prefer to use the cudgel rather than a friendly chat. There is a culture problem with allowing journalistic oversight in some agencies.

“The irony is that it is now a legal requirement, with sanction of prison if you fail to do so, to notify the intelligence services in Australia if you are doing a story that possibly touches on one of their secret operations. But if our Police or intelligence services don't tell the truth when media undertake these inquiries then public faith in such a powerful law will be seriously undermined. My experience is that they sometimes do lie... I think that if these operations can be demonstrated to be illegal or morally reprehensible there should be a media defence of public interest.

“What the Government doesn’t seem to realise is that sooner or later truth will out anyway. It’s easier now to steal entire databases and to leak those rather than to go public as a whistleblower. I suspect the [metadata] laws may actually prompt sources to lay low but to instead recklessly leak data, as with Chelsea Manning’s drop of an entire diplomatic cables database to Wikileaks or Edward Snowden’s equally massive digital download of secrets from the National Security Agency. Even the most highly secure data can be breached by folly...which is why every Australian should be asking why we are trusting our Government with massively increased powers to store our metadata.

“I had a bloke ring me some time back who worked in an immigration detention centre. He had a harrowing documented story he wanted to leak to me ... I felt ethically obliged to warn him that no matter what I did to protect him, the record of his call to me would now be stored on a database and lead Government investigators back to him. He chose not to go public. I can’t blame him—and that’s why metadata is killing investigative journalism.”

Cameron Stewart, *The Australian*

Cameron Stewart is currently based in the US as *The Australian*’s correspondent. Previously he covered national security and defence. In 2016 he was approached by a whistleblower and published [a story with national security implications](#). He also shared [what it took to report and publish the story here](#).

“In 2016 I was approached by a whistleblower—Rex Patrick, now a Senator, who had an extraordinary confidential file which had been taken by someone unknown in France from the French submarine builder DCNS (now Naval Group) that was building Australia’s new \$50 billion submarine fleet. Through a series of events, the file ended up on the other side of the world in the hands of Patrick. The file detailed the entire secret combat capability of the six Scorpene-class submarines that French shipbuilder DCNS has designed for the Indian Navy.

“Patrick wanted me to publish the story in The Oz because he believed it highlighted weak security in the French company that Australia was trusting to build our new subs—a genuine public interest story. But in doing so it would have led to a massive search for my source and the danger of legal action against Patrick

“In the case of Patrick I told him straight up that if I published it, I believed the connection would be made between us because he had already arranged our meeting with me electronically (I didn’t know what he had at that point) plus I believed any serious investigation would eventually uncover his identity through other electronic means. So I told him I would not publish the story unless he was willing to eventually admit that he was the source, because I feared he would get hunted down and identified. He thought about it and decided he would go public after my initial series of stories. So we proceeded on that basis.”

Dylan Welch, ABC

Dylan Welch is a reporter for ABC Investigations. A former Afghanistan correspondent for Reuters and a national security and crime reporter for the

Sydney Morning Herald and *The Age*, he was co-nominated for a Walkley Award for investigative reporting in 2011 for stories about the NSW Crime Commission.

“The public should know what is being committed in their name. They are, after all, the real stakeholders. It is my strong belief that the public want more transparency about what intelligence agencies and defence are doing in this area.

“I believe there is a very real concern that the government and its agencies may be seeking to undermine the role of public interest journalism for reasons that relate only to embarrassment. It's hard to see how the Oakes/Clarke reports regarding incidents from five to ten years ago dealing with a war in which we are no longer involved truly undermine Australia's national security—it's my view that they instead are merely a source of keen embarrassment to the Government and Defence.

“MEAA's [code of ethics](#), point 3, states ‘where confidences are accepted, respect them in all circumstances’. The ABC has similar requirements in its Editorial Policies. Journalists should be willing to go to jail to protect whistleblowers because of the risks those people take in providing us information that advances the interests of Australian democracy generally. Unfortunately, the history of this area is that it is the whistleblower that goes to jail, or faces some form of sanction. Being a whistleblower can be career-destroying, life-destroying.

“Journalists will sometimes operate at the outer edge of the law to protect their sources where they believe those sources have important public information to be made public. I see my duty to protect confidential sources as sometimes more important than the expectations placed upon us by the government and the courts.

“In my view there has always been a tacit understanding between journalists and the state regarding journalists pushing the boundaries of what is acceptable in terms of the law in order to further the public interest. In my view that balance or understanding has changed in recent years. I believe that the 2019 AFP media raids are just the tip of the iceberg.

“In the weeks since those raids I’m aware of numerous ABC sources that have pulled out of stories because they think they are at risk because of those raids. It has also caused increased risk to the journalists who now or in the future work with whistleblowers to further the public interest. The Government’s apparently growing appetite—especially in the area of national security—to prosecute whistleblowers and journalists is of major concern.

“In my career I've never seen the kind of pressure on journalists than we've witnessed recently. For me over 15 years, while the legislative expansion is concerning, it is the growing appetite among the agencies and government generally to use their powers to investigate and prosecute sources and journalists that is most concerning.”

Safeguarding a free press for the health of our democracy

A free press is critical to civic engagement and a functioning democracy. A free press implies the absence of interference from an overreaching state. A free press demands an active commitment from government—its preservation may be sought through constitutional or other legal protections.

As the law stands, journalists can be jailed for doing their job in the public interest. Their offices and homes can be raided, without the right to contest the search warrant or recourse. Their communications and metadata can be accessed, and their confidential sources compromised, undermining the journalists' code of ethics and the shield law that is intended to protect the identity of journalists' sources.

The media and the government are two institutions that both face a trust deficit in this age of digital misinformation. Both institutions must establish the community's trust in order to function well, through transparency, accountability and veracity. The fortunes of both institutions are intrinsically linked, and are essential to foster a civically engaged and democratically informed Australian public.

As part of bolstering democracy, the government should take every opportunity to improve and enhance provisions that reinforce freedom of the media, which is a bulwark of democracy. The Walkley Foundation urges the committee and the government to implement processes that prioritise transparency and the public interest.

Recommendations

The Walkley Foundation calls for public hearings to provide an opportunity to include greater transparency and trust in this process.

We stand with our colleagues, including the MEAA (Media Entertainment & Arts Alliance), that are part of the [Australia's Right To Know](#) coalition submission and their calls for reforms, including

- Right to contest warrants
- Whistleblower protections
- Proposed integrity commission
- Limits on which documents can be stamped secret
- FOI reform
- Journalists exempted from national security laws that would put them in jail for doing their jobs
- Defamation law reform

We also stand with the [Alliance for Journalists' Freedom](#) and their call for a Media Freedom Act.

Louisa Graham
Chief Executive, The Walkley Foundation