

FREEDOM OF THE PRESS: UNDER THREAT?

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I INTRODUCTION

Freedom of the press is an often-neglected subset of the generally agreed freedom of expression. While freedom of speech is seen as a 'human' right, freedom of the press is frequently perceived as a freedom only for those who own a press. Many people, otherwise very supportive of the liberty and personal freedom, do not seem to regard the freedom of the press as important to them.

This is a dilemma because, in a democracy, where citizens are reliant on the free flow of information about matters of public interest and concern in order to form their own opinions, the freedom of the press to report such matters without let or hindrance is, perhaps, the most basic right of all. The shape of our democracy is determined by the availability of information, free of censorship and 'spin', that informs decision-making.

That is why the High Court ruled unanimously, in *Lange v Australian Broadcasting Corporation*¹ ('*Lange*'), that a freedom of political communication is implied in the very shape of the *Australian Constitution*. That is why the Press Council argues, in the preamble to its Statement of Principles, that in essence the freedom of the press is no more or less than 'the freedom of the people to be informed'.

That is also why the Council has developed a Charter of a Free Press against which to measure proposals that might limit that freedom. The Charter can be found on the Press Council website.² Additionally, as the body that deals with complaints about the press, the Council encourages press responsibility, arguing that a free press needs to also be a responsible press. As long as the press acts responsibly, as is overwhelmingly the case in Australia, there is little argument for restricting press freedom.

Most Australians would probably conclude that things are not too bad on the press freedom front. The media are vibrant, reflect a diversity of viewpoints (although some areas like talkback radio are not all that diverse), and provide a

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1 (1997) 189 CLR 520.

2 Australian Press Council (2005) <<http://www.presscouncil.org.au>> at 14 November 2005.

plethora of information. But go behind the surface and some concerns with press freedom become apparent.

Formerly a top 10 finisher in the international press freedom indices, Australia has in recent years fallen outside the top 40. Press freedom here has been eroded in a variety of areas and there is genuine concern that the trend line is moving towards less freedom rather than more. The chief driving force for this trend is the desire of governments to keep secret matters that should properly be in the public domain.

II PRESS FREEDOM AND GOVERNMENT

Not only are there an increasing number of laws restricting the availability of information, but government practice is limiting the utility of freedom of information laws, which were designed to make available matters of public interest and concern. Additionally, governments are increasingly trying to manage the media, through unattributable background briefings and the increasing use of 'spin'. Indeed, the success of spin in helping governments to set the political agenda has led to a wide variety of institutions imitating these successful media management techniques. Corporations, the police, the courts, the military, intelligence agencies and even universities are among those that regularly use spin.

Governments are secretive by nature, telling us only what they want us to believe. Moreover, in this new world, when the threat of terrorism is both a reason and an excuse for greater secrecy, the clear trend is toward excessive secrecy. Recently, anti-terrorism, ASIO and national security legislation have all had the effect of imposing greater restrictions on ability of the press to report matters. They have done this through definitions of 'national security' that are sometimes far too wide and by reversing the onus of proof so that defendants have to prove they had no knowledge of putative actions. The recently exposed draft of the latest anti-terrorism legislation creates greater jeopardy for journalists by widening definitions of what constitutes 'sedition', while narrowing the bases on which a 'good faith' defence of a fair report can be mounted. And, again, the onus swings onto the defendant to show 'good faith'.

These laws have widened the ambit of the government's ability to suppress documents and information through the use of secrecy provisions, aimed at protecting the national security and defence of the country. But the proposals do not properly limit the ability of Ministers and officials to restrict the release of information. The Press Council has argued that there should be rules, similar to those introduced by President Clinton, that define the circumstances in which the availability of material can be restricted, and that place the onus on the restrictor to justify the suppression.

In order to maintain their secrets, governments will use threat and intimidation, both of the media, and of their informants. The current case involving Melbourne journalists Michael Harvey and Gerard McManus demonstrates this. Harvey and McManus wrote an article that showed how the government was intending to

renege on proposed benefits to war veterans. It was clearly in the public interest that the government's intentions be reported, but it was more than a little embarrassing to Danna Vale, the then Minister for Veterans Affairs, and to the government. One might think that a reasonable response from the government would be to respond publicly, and justify its decision. After all, nobody has suggested that the report was inaccurate.

But the Howard Government's actual response was to check 3000 departmental phone extensions and hundreds of mobile phones and, as a result of these investigations, to charge an official with leaking the information. To bolster that prosecution, the government wants Harvey and McManus to identify an alleged source in court. They have refused to do so, and this has left the judge with no choice but to cite them for contempt, which could see them go to jail for the 'crime' of accurately reporting what a government was doing with tax-payer funds. The official, meanwhile, has been suspended without pay and his trial has been postponed again until early next year (even though he is supposedly innocent until proved guilty). Thus the government can achieve its end, *pour encourager les autres*, through the example of what happens to alleged public-interest whistleblowers and to those who are said to have received their information.

Prime Minister Howard said that the decision to pursue the person who allegedly leaked the information and the journalists arises from a belief that a government should be able to maintain secrecy while arriving at policy decisions. While McManus and Harvey were well-respected journalists, the legal action against them was justified in this case. Yet, this is not a case where privacy of decision-making is at stake: the decision had been made, even down to the brief on the way in which the decision to renege on the \$500 million commitment would be spun to suggest that the government was generously endowing veterans.

Acting to protect themselves from embarrassing revelations, the government cloaks their attempts to restrict information that should be available under the guise of protecting the integrity of the process.

Moreover, the information on the process by which governments arrive at decisions is often vital so that electors know why certain decisions are made. And it is just this kind of material that Freedom of Information laws ('FOI') are meant to expose. This laudable aim is being frustrated by a variety of techniques including time delays and the charging of excessive fees for the service. The system also has a large number of blanket exemptions (Cabinet documents, commercial-in-confidence, privacy, security, etc) and, in some recent cases, officials have added unrealistic requirements for identification of documents required. One recent request from the *Herald* and *Weekly Times*, relating to animal health issues, was held up because, it was claimed, terms such as 'animals' were not adequately defined!

When all of those techniques fail, Ministers still have the option of using 'conclusive certificates' to block access to documents, as Peter Costello and Alexander Downer have demonstrated. *The Australian* sought documents through FOI in a number of areas that would appear to be quintessentially

matters of public interest in how governments arrive at policy, and the effects of that policy. Documents sought included Treasury documents on the effect of bracket creep on incomes and on the possible misuse of the First Home Owners Scheme. The newspaper sought copies of legal advice on the validity of detention without trial of Australian citizens in Camp X-Ray, Guantanamo Bay from the Department of Foreign Affairs and Trade. The validity of the use of conclusive certificates to block the release of documents without adequate reason is currently being tested in the courts.

III PRESS FREEDOM AND PRIVACY

Governments and the courts, acting separately, are moving towards an age of secrecy on the back of privacy legislation, the development of privacy torts and a judiciary that is either unaware or uncaring of the importance of press freedom and transparent justice. The trouble with excessive concentration on privacy is that it reinforces secrecy.

The move towards greater protection of privacy is gathering momentum through every level of government, the courts and in the private sector. Those who argue for more privacy appear to have lost sight of the fact that we live in an open society where there is – or there was – a sense of community and shared ambitions and concerns. But our institutions are building barriers against the spread of information because of excessive fears about invasion of privacy. The Press Council has consistently argued that there needs to be a more sensible balance between laudable concerns with privacy and the public's right to be informed on important matters.

The over-emphasis on privacy is being reflected in irrational reporting restrictions on children, in the closing of courts, in the denial of information regarding people charged with crimes, and in restrictions on photographers. We are not even allowed to have printed copies of the electoral rolls anymore.

There is perhaps a culprit in this over-reactive backlash. Developments such as the proliferation of closed circuit television cameras throughout our cities, the constant mini-cam surveillance of workplaces, the monitoring of the things we do on our office computers and the increasing use of cross-matching between extensive databases have left people with the view that little they do is private.

But, as part of the cost of accepting this level of exposure, they expect governments to exert some control over those areas of life that can be protected from surveillance. The courts and governments are responding to the balance between privacy, security and press freedom by heavily favouring the former.

The High Court has already hinted at a tort of 'breach of privacy' and this has been used by a lower court judge in Queensland to establish a *de facto* tort. Governments are discussing legislation to govern the use of 'surveillance devices' and some definitions are so badly constructed that hearing aids and contact lenses would be classed as 'covert surveillance devices'. Lately the Standing Committee of Attorneys-General, in a discussion paper arising from the pursuit of limits on the publication of exploitative and offensive images on the

Internet, has made proposals that might result in repressive restrictions on taking photos in public places. The ability of photojournalists to record the culture and history of Australia is under threat from such proposals.

IV PRESS FREEDOM AND THE COURTS

Judicial animosity towards the media, reflected in several decisions from the magistrates courts to the High Court, has cut deeply into the media's ability to pursue corruption and villainy. Judges are also creating legal precedent that has the effect of exempting them from the sort of accountability that should have been available under the *Lange* principle of an implied constitutional right of communication on political and governmental matters.

Recent legislative changes in evidence laws in NSW, designed to enhance access to the courts, have had the opposite effect. Like similar moves in other states, governing access to hand-up briefs and other court documents, these changes have placed a greater discretion in the hands of court registries to determine what material, supposedly on the public record, is made available to the press for reporting to the public. In one case that came to the attention of the Press Council, a magistrate complained of the unfairness in a newspaper report on a case he had overseen. It turned out that the imbalance in the story resulted from the court registry not disclosing all the court records to the reporter involved. Part of the material withheld was the magistrate's reasons for the sentence he imposed.

The Supreme Court of Western Australia recently refused to release a transcript of a case heard in open court, but which was aborted by the judge when he realised he had made errors in his summing up. Anyone actually sitting in the Court would have heard the whole case unfold. But requests for transcripts were deemed undesirable and rejected by the Court's acting registrar.

Material that once was routinely available throughout the court system is being systematically locked down to the detriment of the freedom of the press to report on, and maintain, the system of open justice.

The level of suppression orders in almost all court jurisdictions underlines the readiness of judges to subordinate the principle of open justice for their perception of a fair trial. The reality is the two principles are not mutually exclusive.

The media are continually forced, at a cost averaging about \$50 000 for each application, to challenge orders by magistrates and judges that are too broad or imprecise, or just plain unnecessary. More often than not, the challenge is without success.

To indicate the scale of suppression in the court system, the News Limited database presently carries 687 notifications from the past 12 months. This is the number of orders that the various News Limited offices are aware of; the total number is probably closer to 1000, and that equates to about four instances of suppression every sitting day. And there are even suppression orders suppressing mention of suppression orders.

In addition to the sheer volume of such orders, there is the difficulty of finding out if they exist. The Press Council is taking up with the Supreme Court in each state and territory the idea that a database be established in each jurisdiction, onto which can be added the suppression orders extant at any time, and where notification can be made of the withdrawal of such orders. With increasing interstate spread of news outlets, such information is vital. In cases like the Snowtown murder trials and the current ‘gangland’ trials in Melbourne, scores of separate suppression orders may exist and journalists may be unable to find out what they can and cannot report.

A database would enable the press to better understand the restrictions on them. What would be better still would be for the courts to issue fewer suppression orders, and only in the most extreme of cases.

V PRESS FREEDOM AND THE POLICE

There are a myriad of other ways that the freedom to report, which Australians expect for their press, is being subjected to a slow death by a thousand cuts, many of them from unexpected quarters. For example, in the switch from analogue to digital networks for police radio, the monitoring by journalists of normal transmissions has been unduly restricted, limiting the ability of the press to report on incidents of crime, and to act as an overseer of police behaviour in responding to calls. There have been concerns in a number of states with the new regime. In South Australia, for example, the press has access to less than a quarter of all incident codes and in some cases, where they do have access (as in cases such as advice of an escape from custody or a developing siege involving an armed offender), the advice is deliberately delayed. There are cases here where immediate advice, through the media, might seem to be an essential element of safety for those nearby.

VI PRESS FREEDOM AND VILIFICATION

In another example, Victorian laws aimed at restricting the incidence of racial or religious vilification have been used by authorities to prosecute two Christian ministers for allegedly anti-Islamic comments. It does not draw a long bow to see the situation where a journalist, reporting, or commenting on, such statements, might also be dragged before the courts. Every such threat has an effect of limiting the ability of journalists properly and fairly to report matters of importance to the community.

VII PRESS FREEDOM AND THE MESSAGE OF HOPE

This is not to suggest that the outlook is pure doom and gloom. The recent agreement by state and territory Attorneys-General to introduce uniform (and

reformed) defamation laws is a positive step that should lead to increased press freedom. The existence of a variety of regimes, and the complications inherent in a number of them, has enabled the rich and powerful to avoid scrutiny by the use of threats to sue. The Press Council has been working for over a decade to get uniform legislation back on the agenda and to ensure that any proposal for uniform law involved reform to make the law more balanced in its application. The new laws, currently before most state Parliaments, will limit the ability of large corporations to use the threat of defamation to silence community groups protesting their activities.

By creating a uniform defence of the truth of published material, the laws will assist in exposing information that is in the public interest. And by making the action centre on the article as a whole, rather than on a series of 'imputations' developed from the article, and stressing the desirability of early settlements that restore reputation, the law will become much less a tool for smart lawyers, and a means of mulcting funds, and much more a system for redressing wrongs.

Additionally, a proposed Human Rights Bill has been introduced into the public debate. Australia has neither a constitutional Bill of Rights, nor a legislated series of rights. It relies on the High Court's finding of a very limited implied right to political expression in the Constitution. The Press Council supports the introduction of such a Bill, although it would prefer such a Bill to be an overriding law. A legislated guarantee of freedom of expression will provide an underlying assumption of freedom against which proposed legislation can be judged. In the absence of such a guarantee, laws will continue to erode any such freedom.

VIII CONCLUSION

In the current climate there are far too few such pieces of good news. More often the news on the press freedom front is worrying, introducing another potential limit on the ability of the public to be informed of matters that they have a right to know about. The Press Council urges other organisations to adopt its Charter of a Free Press and to support the insertion of a freedom of expression in overriding law.