



Media and the rule of law

A CHANGING TERRAIN

By Dr David Blackall and Seth Tenkate

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In recent years, both legislative developments and various court decisions have diminished freedom of speech and of the press in Australia. Without a Bill of Rights or definitive constitutional guarantees protecting such freedoms, we remain vulnerable to further erosions of our civil and human rights.

In 2002, Reporters Without Borders published, for the first time, a worldwide index rating countries according to their respect for press freedom. The index was compiled by asking journalists, researchers and legal experts to answer 50 questions about a range of press freedom violations, including murders or arrests of journalists, censorship, pressure, state monopolies in various fields, punishment of members of the press, and direct regulation of the media. Australia rated a respectable

12th. In the 2007 index, however, Australia had slipped to position 28, behind countries such as Namibia, Jamaica and Slovenia. The report said that the 'Howard government has continued to beef up its arsenal of anti-terror laws, some of which represent a threat to journalists' capacity to protect their sources of information and to freedom of expression'.¹

Freedom House is an independent non-government organisation that supports the expansion of freedoms throughout the world. It has published its own ranking of

press freedom, and, in 2007, Australia ranked 39. In 2004, however, Australia had ranked 18.² The Freedom House report noted that:

'Press freedom in Australia operates by convention rather than by constitutional guarantees. However, in July the state of Victoria introduced a Charter of Human Rights and Responsibilities which includes protection for freedom of expression. In spite of recommendations by the Australian Law Reform Commission, the Anti-terrorism Bill of 2005, which imposes a blanket ban on reporting about people detained under anti-terrorism legislation, has yet to be reformed. Journalists may be charged with sedition and face a seven-year jail sentence for reporting against the actions of the government, police, or judiciary.'³

The *Freedom of the Press Report* also noted a victory for press freedom in Australia, in that the uniform defamation laws recently introduced across the country have capped maximum damages, restricted legal action to one year after publication, barred legal action from large corporations and introduced truth as a complete defence.

With diminishing press freedom in Australia throughout the early years of the 21st century, the Australian media joined forces in 2007 with the Australia's Right to Know campaign, saying 'We have joined together because we are deeply troubled by the state of free speech in Australia.' The CEOs of News Limited, Fairfax, ABC, Channel 7, SBS, AAP, Sky News and Austereo – the original members of the campaign – issued a joint statement:

'This is not a party political issue. All Australian governments – federal and state – and all the opposition parties need to embrace urgent reform to redress the erosion of free speech in this country. Our first priority is to commission a proper independent study of threats to free speech and expression in this country.'⁴

The campaign's major concerns included sedition laws, the tendency of the courts to issue broad suppression orders, the risks rather than protections for journalists and whistleblowers, and increasing restrictions on investigative journalism under tighter interpretation of the freedom of information (FOI) laws when journalists lodge FOI applications. Following the statement's release, the group was joined by APN, *The West Australian* and the journalists' union, the Media Entertainment and Arts Alliance (MEAA).

The Independent Audit into the State of Media Freedom in Australia was put together by Irene Moss AO and released on 31 October 2007. It is a damning assessment of free speech in Australia, stating 'there are about 500 pieces of legislation which, to one degree or another, contain "secrecy" provisions or restrict the freedom of the media to publish certain information'. The courts were not immune to criticism, with the audit finding 'many barriers to getting access to information in courts and found the area wanting'.⁵

The report also pointed out cases where FOI – which is meant to facilitate the flow of information from the government – did not serve the public well on matters of government accountability. Many FOI requests have been stalled by government at various levels; for example:

'The *Herald Sun* abandoned a two-year campaign seeking information about travel of federal politicians after it was quoted a fee of \$1.25 million, which amounted to 32 years of full-time work for a public servant. The Administrative Appeals Tribunal accepted that those named in the list would need to be consulted before disclosure, but the Government was entitled to seek payment for the time spent in consultation and decision-making.'⁶

Governments are now known to outsource sections of operations to corporations, thus rendering FOI impotent and increasing the likelihood of the action for breach of confidence to injunct journalists' reporting on government procedures and policy.

GOVERNMENT RESTRICTIONS OF JOURNALISTIC FREEDOMS

Apart from restricting access to information for journalists, governments can also challenge journalists through the ethics codes. These usually provide some professional justification for journalists to protect their confidential sources from identification. Two major bodies self-regulate the media in Australia, but neither has any real hold over journalists' and newspapers' behaviour as membership is voluntary. The Australian Press Council (APC) has a statement of principles, while the MEAA's Code of Ethics guides the behaviour of journalists and can run contrary to the rule of law (in that it can require journalists to break the law if, for example, it is necessary to do so to protect a source).

For example, clause 3 of the Code of Ethics urges journalists to: 'Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.' This has been expanded from the original clause drafted in the 1940s, which stated that 'In all circumstances, they shall respect all confidences received in the course of their calling.'⁷ The APC's *Statement of Principles* originally stated that the 'Council approves and draws special attention to the Code of Ethics of the Australian Journalists Association'.⁸ This has now been withdrawn; however, at one stage member newspapers were bound by the same rules as journalists, in terms of protecting the identity of confidential sources.

Under Australian law, journalists can currently be forced to reveal identities of sources and be punished for failing to do so via police raids and being held in contempt of court.

THE POLICE RAID

On 18 July 2007, Queensland barrister, Stephen Keim, leaked a transcript to the media of a record of interview by the Australian Federal Police (AFP) with his client, Dr Mohamed Haneef. The source of the information was not revealed in *The Australian*, which published the interview, causing widespread speculation. As reported in *The Australian's* media section the day after the leak: 'Instead of debating the contents of the 142-page transcript ... [media commentators and] critics were carping about the identity of the anonymous sources.'⁹ >>

In a recent worldwide index of respect for press freedom, Australia had slipped behind Namibia, Jamaica and Slovenia.

The transcript of the interview was also displayed on *The Australian's* website, but was removed only hours after being uploaded, with an editor telling the *New York Times* that there had been 'tremendous pressure' from the government to do so.¹⁰

AFP Commissioner, Mick Keelty, called the editor of *The Australian*, Chris Mitchell, on the morning of the leak asking for its source. Keelty said, on ABC Radio AM:

'And if Chris Mitchell, the editor of *The Australian* assures me that it was not the AFP, and he ... I spoke to him earlier this morning and in fact I said to him that if I'm asked publicly today I'll declare his name and the fact that he's provided me with that information, and he was ... he had no difficulty with that.'¹¹

The online publication, *Crikey.com*, was quick to question the move by Mitchell, with Margaret Simons asking:

'What is Mitchell doing entering into this conversation with Keelty, given that almost any discussion of sources is dangerous for journalists, since it necessarily narrows the field of suspects? So the great unasked question at present is why the editor and reporters of *The Australian* aren't having their doors kicked in as we speak. Presumably Mitchell's conversation with Keelty has forestalled any such action.'¹²

Mitchell defended his actions, stating 'You would have to be a moron to think that the leak came from the AFP. They would never leak something like that. I am not going to subject the paper to another search.'¹³ Writing for *The Sydney Morning Herald*, Richard Ackland said, 'The wiser course would have been to say nothing, and the excuse of the editor was not much of a line.'¹⁴

Although it is difficult to find any reference to offices of *The Australian* newspaper being raided by the police, other Australian media organisations have previously been the subject of raids for political purposes. In November 2004, the *National Indigenous Times* was raided by the AFP following 'a complaint from Prime Minister, John Howard's, department'. The paper's editor, Chris Graham, said the officers held a warrant to seize two documents, but left with six in total after being on site for about two hours.¹⁵

The Howard government had been embarrassed by revelations made by the *National Indigenous Times* – also picked up by some major newspapers (that were not raided) – of a government project to restrict welfare benefits to Aborigines. The international press freedom organisation,

International Reporters Without Borders, condemned the police action, saying in a letter to John Howard that the police had 'violated the principle of the protection of sources, which is fundamental to guaranteeing independent investigative journalism. If those responsible for this police raid on a editorial office are not sanctioned, it will be the protection of sources, the cornerstone of press freedom, that is under threat in Australia.'¹⁶

CONTEMPT OF COURT

Journalists can, and have been, charged, fined, and even jailed for contempt of court, for refusing to reveal sources in court cases or inquiries. The MEAA said in a statement on its website that:

'A journalist's obligation to protect the identity of their sources and their willingness to stick to the fundamental journalistic principle, regardless of the penalty, is critical if whistleblowers are to keep talking to journalists. Without this protection, journalist access to information would be further restricted in what is an already tightly media-managed environment. They would have to rely on a stream of constant but shallow press releases, Question Time and other political stunts for information. And as a result, people would know less about what their elected leaders are doing in their name.'¹⁷

On 20 February 2004, the *Herald Sun* newspaper published an article, 'Cabinet's \$500m Rebuff Revealed', about Commonwealth government cutbacks to war veterans' entitlements. The article was based on what it described as 'secret documents seen by the *Herald Sun*', 'secret papers', 'confidential documents', ministerial 'speaking notes' and 'the Clarke Review' (a report not in the public domain). Journalists Michael Harvey and Gerard McManus wrote the article. In March 2004, AFP officers spoke to the journalists about the alleged leaking of information to them by a public servant. Although they answered a number of police questions, they refused – in accordance with their code of ethics – to reveal the source of the documents and information referred to in the article. They also declined to provide a formal statement. The matter came before a chief judge in August 2005. On that occasion, both journalists answered a number of questions about the documents upon which they had relied to prepare the article. However, both refused to answer questions directed at identifying the source of their information, despite directions from the judge that they do so, since they were not excused by any so-called 'journalists' privilege' from answering them.¹⁸

The two journalists were eventually asked to reveal their source for the story at the pre-trial hearing of Desmond Kelly, a 52-year-old public servant who was charged with the leak following an investigation by the AFP. The journalists refused and were charged with contempt of court. They pleaded guilty in Victoria's County Court, and were fined \$7,000 each. In handing down the decision, Chief Judge Michael Rozenes said, 'Courts in Australia and England have made clear statements to the effect that journalists are not above the law and may not, without penalty, expect to be permitted to follow their personal collegiate standards where those

standards conflicts with the law of the land.¹⁹

The APC's executive secretary, Jack Herman, noted, 'The Harvey and McManus case doesn't relate to a serious crime or a threat to national security. Their only real "crime" is holding the government accountable to those who elected it, and pay for it.'²⁰

Tony Barrass, from WA, was the first Australian journalist to be jailed for contempt of court in 1989 for refusing to reveal a source of information. He was also fined \$10,000. 'I find it unbelievable in this day and age that two journalists face imprisonment for exposing government deceit. It seems little has changed in the 15 years since the authorities jailed me for a similar "offence" – that is, doing my job,' he said.²¹

SHIELD LAWS FOR JOURNALISTS

The fines imposed on McManus and Harvey restarted a national debate on the extent of press freedom in Australia, and have raised questions about the federal government's June 2007 laws to shield journalists from prosecution if they uphold their ethical standards in such cases. Writing for *The Australian*, legal affairs editor, Chris Merrit, said: 'The new laws will give judges a regulated discretion to allow journalists to keep the identity of a source confidential. But they are being introduced without uniform backing from the states and without associated protection for whistleblowers in the federal public service.'²²

Up until then, only one Australian jurisdiction had some legal protection for the confidentiality of journalists' sources. In 1997, NSW enacted the *Evidence Amendment (Confidential Communications) Act*, which amended that state's *Evidence Act* 'to allow judges to exclude evidence of confidential communications between professionals and their clients. The court must not order that confidential communication be revealed if there is any likelihood of harm and the nature of this harm outweighs the desirability of having the evidence released.'²³

Following McManus and Harvey pleading guilty to their charges in February 2007, then opposition legal affairs spokesperson, Kelvin Thompson, attacked attorney-general, Phillip Ruddock, saying that despite the government promising protection from the law for journalists in 2005 no laws had been forthcoming. Thompson said:

'Whistleblowing is a legitimate form of action in a democracy and strong legislation is needed to provide protection for whistleblowers in the public sector and the journalists that report it. This Government has displayed an unhealthy determination to pursue even minor and trivial leaks through the criminal courts.'²⁴

Although journalists have limited protection when they refuse to disclose their sources, whistleblowers do not. *The Australian* journalist, Hedley Thomas, was awarded Australia's top journalism prize, the Gold Walkey, for a series of articles he wrote on the detention of Dr Haneef, including the story that leaked the AFP transcript of its interview with the Gold Coast doctor. In accepting the award, Thomas pointed out that, although he was being acknowledged and rewarded by his profession for doing his job, Haneef's lawyers – the whistleblowers – were still facing possible

sanctions. Thomas said:

'Stephen Keim, particularly, risked his career and livelihood to help me see the facts in this case and for that he is still being pursued by the Australian Federal Police who have lodged and have active a formal complaint against him. And I believe that every journalist in this room should understand that the Australian Federal Police and its Commissioner Mr Mick Keelty is still trying to punish Steven Keim for bringing out the truth.'²⁵

Despite providing some protection to journalists, the shield laws have consistently been criticised for their weakness in relying on a regulated exercise of judicial discretion. The federal secretary of the MEAA, Chris Warren, told *The Australian* that, 'It depends on judges having common sense. Until 1989, this was never an issue because judges always did have that common sense. Since then, all these problems have occurred when judges allowed their concerns about the integrity of the judicial system to get in the way of common sense.'²⁶

PRESS FREEDOM

Press freedom is threatened by the inability of the press to obtain or publish information. Australian law ensures that workplace agreements, trade contracts and the like can have confidentiality agreements so strong that absolute silence is assured. Thus, any illegalities, indiscretions or corruption are much more difficult to bring to light due to >>

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PO Box 672, Elsternwick, VIC 3185
 Tel: 03 9576 7491 Fax: 03 9576 7493
 Email: susanw@smartchat.net.au

the threat of legal action over breach of contract. It was legal confidentiality, after all, that prevented certain documents from being submitted to the Cole Inquiry into the Australian Wheat Board's activities in Iraq.

Equally worrying for democracy and press freedom are new provisions relating to disclosure. These prohibit journalists from reporting anything about individuals detained under the preventative detention provisions. These provisions have generally applied to terrorists and to those who pose a risk to national security, but recent trends have seen them applied to animal liberation protesters and conservation activists trying to stop logging, pulp-milling and the like.²⁷ In this context, it is unlawful to disclose 'any information acquired from a detainee, therefore preventing the news media from reporting the detention but also from being informed of the detention'.²⁸ One consequence – perhaps the result of the widespread ignorance of such complex laws – is media timidity and the tendency to avoid certain stories that are likely to draw attention from the authorities.

The Howard government enjoyed little opposition to these 'anti-terrorism' laws, which were enacted on the basis that they were essential for national security at a time when the fear of terrorism was high. Most of these national security-related laws are unlikely to be relaxed, irrespective of the recent change in federal government; allowing the damaging effect on our national psyche and our civil liberties to persist. In 2005, Greens Senators Bob Brown and Kerry Nettle asked the Senate to oppose the Anti-terrorism Bill (No. 2) 2005. They were concerned that detention for reasons other than for prosecuting a criminal offence was unjustifiable, except for extraordinary reasons, which they believed the government had not provided.²⁹ They argued: 'The misuse of intelligence to justify the invasion of Iraq, the deportation of peace activist, Scott Parkin, and bungled police raids relying on ASIO advice reinforce the need for proper regulation of intelligence agencies.'³⁰

Parkin, an American peace activist, had been in Australia on holiday in 2005 and, while here, undertook a number of activities, including teaching peace activism workshops in Melbourne, as well as protesting against Halliburton, a multi-national corporation with offices and interests in Australia. US vice-president, Dick Cheney, had once been employed as a CEO for Halliburton, which has been awarded extensive construction and logistical contracts from the US Defense Department in Iraq, Afghanistan and Kosovo. ASIO deemed Parkin a terrorist threat, and he was arrested and deported. He was not charged with any crime on his return to the US, which suggests that there had never been a US request for extradition. In hindsight, a reasonable person might think that ASIO and the Australian government used Parkin to remind the public of the risk of terrorism – and coincidentally of the considerable risks inherent in being involved in citizen protest and activism.

The previous year, ASIO falsely imprisoned and intimidated Sydney medical student, Izhar ul-Haque, who was charged with receiving terrorist training in Pakistan. Records of interview were inadmissible in court, and so his trial collapsed.

In a properly functioning democracy, significant operational reasons for detaining certain individuals in the absence of public knowledge must be balanced against the public interest and the public's right to know. The reasons for detaining people like Scott Parkin, Dr ul-Haque or Dr Haneef should be a matter of public record. To keep the grounds for such decisions absolutely secret is to increase the potential – indeed, likelihood – of the abuse of power and the consequent undermining of our essential human rights.

The limitations imposed by the new national security laws on journalists' ability to report on such matters therefore have no place in a democracy – especially when there is no defence or protection for those journalists who are charged under such laws, even when it can be proved that a newsworthy detainee has been detained illegally. ■

Notes: **1** Reporters Without Borders, *Freedom of the Press Worldwide in 2007*, 2007 Annual Report. **2** Freedom House, *Freedom of the Press 2004 and Global Press Freedom 2007*. **3** <http://www.freedomhouse.org/uploads/fop/2007/fopdraftreport.pdf>. **4** Joint Statement, *Australia's Right to Know*. **5** Moss, Irene, *Report of the Independent Audit into the State of Free Speech in Australia*, 31 October 2007. **6** *Ibid*, p103. **7** Bowman, David, 'The AJA Code', in Henningham, John, *Issues in Australian Journalism*, p56. **8** *Ibid*, p54. **9** Meade, Amanda, 'War of Words Erupts after Leak', *The Australian*, 19 July 2007. **10** Bonner, Raymond, 'Transcript Shows Doctor Cooperated With Australian Investigators', 19 July 2007, <http://www.nytimes.com/2007/07/19/world/asia/19australia.html>. **11** AM - Wednesday, 18 July, 2007. For transcript, see <http://www.abc.net.au/am/content/2007/s1981358.htm>. **12** Simons, Margaret, 'The Oz, the AFP and the Haneef Leak: What Is Going On?', *Crikey*, Wednesday 18 July 2007. **13** Meade, *Loc cit*. **14** Ackland, Richard, 'A Concoction Registering Well Over The Limit', *The Sydney Morning Herald*, 20 July 2007. **15** <http://www.nit.com.au/story.aspx?id=3805>. **16** http://www.rsf.org/article.php3?id_article=11850. **17** http://www.alliance.org.au/alliance_sections/media_alliance/contempt_for_journalists_2005082690/. **18** *Harvey & Anor v County Court of Victoria & Ors* [2006] VSC 293 (23 August 2006). **19** Brown, Matt, 'Journalists Convicted and Fined for Contempt of Court', *The World Today*, ABC Radio, 25 June 2007. **20** Australian Press Council, *Punishment of Journalists Indicates It's Time To Come Clean*, General Press Release No. 279, June 2007. **21** http://www.alliance.org.au/alliance_sections/media_alliance/contempt_for_journalists_2005082690/. **22** Merritt, Chris, 'Federal Shield Laws Shot Full of Holes', *The Australian*, May 24 2007. **23** Australian Press Council, 'Protection of Sources', in *Press Law in Australia*, October 2007. <http://www.presscouncil.org.au/pcsites/fop/auspres.html#protect>. **24** Kelvin Thomson MP, *Journalist Protection Still Missing*, Media Release, 13 February 2007. **25** <http://www.abc.net.au/news/stories/2007/11/30/2105690.htm?section=entertainment>. **26** Merritt, Chris, 'Proposals Won't Help Journalists', *The Australian*, 8 November 2007. **27** For example, see <http://www.wilderness.org.au/campaigns/corporate/greenwashing/background/>. **28** Australian Press Council Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Anti-Terrorism Bill (No. 2) 2005. **29** Bob Brown and Kerry Nettle, 'Dissenting Report', http://www.aph.gov.au/SEnate/committee/legcon_ctte/terrorism/report/d01.pdf#search=%22Dennis%20Richardson%2C%20senate%20enquiry%20into%20ASIO%20anti-terrorism%20law%22. **30** *Ibid*.

David Blackall is a Senior Lecturer in Journalism at the University of Wollongong. **PHONE** 02 4221 3864 **EMAIL** dblackall@uow.edu.au.

Seth Tenkate is the Australian Lawyers Alliance's Public Affairs Manager. **PHONE** 02 9258 770 **EMAIL** seth@lawyersalliance.com.au