A Free Press: National Security, Suppression Orders & Bolt

By Sam Dickfos for CMN228: The Writer and the Law

A free press is one of the fundamental elements of any functioning democracy. Countries such as the United States and France have constitutional rights to freedom of speech, legally protecting journalists from inequitable restrictions in their reporting of events. While Australia does not have freedom of speech within the Constitution or legislation, the High Court of Australia established an implied freedom of political communication. However, because there is no legislative protection for freedom of the press, there have been instances where the Australian media has faced restrictions imposed by the legislature and judiciary. These restrictions have mostly concerned how journalists can report specific matters or if they are permitted to. The Abbott Government's *National Security Legislation Amendment Act (No. 1) 2014* has been criticised by elements of the media for a provision outlining the penalty of imprisonment for disclosing a 'special intelligence operation'. The effectiveness of suppression orders issued by courts to the media has also been the subject of debate for several years, with concerns raised about their necessity and scope in some cases. Lastly, the polarising Andrew Bolt case where Bolt was found to have contravened racial discrimination laws demonstrates another conflict between free speech and legislative power. Evidently, free speech and freedom of the press are highly contested political issues.

Since the terrorist attacks on September 11, 2001, governments around the world have been working to ensure an attack of that magnitude never occurs again. A more modern threat has been the rise of the Islamic State and its propensity to persuade 'lone wolf' attacks in Western countries through its Internet propaganda, prompting the former Abbott Government to impose new rules around the reporting of intelligence operations. Australia's terror threat level was raised to 'high' in September 2014, meaning an attack was 'likely' (Griffiths 2014, np). Roberts (2006) says in an environment of heightened fear of potential threat, citizens find it difficult to oppose further state powers. The Abbott government implemented a suite of amendments to Australia's national security laws, including the *National Security Legislation Amendment Act (No. 1) 2014*, which introduced a new provision, 35P, concerning the disclosure of 'special intelligence operations'. This Act was passed into law on 1 October 2014.

According to the Act, if the information surrounding a special intelligence operation conducted by the Australian Security Intelligence Organisation (ASIO) is disclosed without authorisation, the penalty is imprisonment of five years (National Security Legislation Amendment Act [No. 1] 2014). That penalty is raised to ten years in prison if the information is deemed to deliberately endanger the safety of any person (National Security Legislation Amendment Act [No. 1] 2014). In the second reading of the Bill to the Senate, Attorney-General George Brandis (2014a) defended accusations from Liberal Democratic Senator David Leyonhjelm about an overuse of government power within the legislation, saying, 'freedom must be secured and particularly at a time when those who would destroy our freedoms are active, blatant and among us'. Asked on the ABC's *Q&A* program whether the

new provision was aimed at journalists reporting what a whistleblower has relayed to them in an Edward Snowden-type circumstance, Brandis (2014b) said a journalist could not be prosecuted for disclosing information from a whistleblower under the new rules. Despite this, a string of critics from the media have spoken out against the legislation.

The main arguments against the *National Security Legislation Amendment Act (No. 1)* have concerned the inclusion of section 35P. Media commentator Jonathan Holmes (2014) says journalists will not be protected from imprisonment for publishing the information a whistleblower has supplied because whistleblowers often do it in an anonymous fashion, meaning journalists will be the first to publish said information, and would consequently face the full impact of the new law. The Parliamentary Joint Committee on Intelligence and Security held an inquiry into the legislation, receiving submissions from numerous sources, including industry representative the Media, Entertainment and Arts Alliance (MEAA) (Commonwealth of Australia 2014). In its submission, the MEAA stated its opposition to section 35P by saying:

> MEAA is concerned that this amendment would capture legitimate reporting by journalists and media organisations of activities in the public interest. In doing so, it would criminalise journalists and journalism (MEAA 2014, p.6).

The Joint Committee (2014) made several recommendations—including a requirement that the Commonwealth Director of Public Prosecutions take the public interest into account before commencing any legal action against an individual who may have breached section 35P—all of which were approved by the government. But lawyer Michael Bradley (2014) disputes the effectiveness of the public interest requirement and argues journalists will have to be 'extraordinarily brave' to report on matters of intelligence whistleblowing. 'The reality is that journalists who value their physical freedom will be scared off from reporting on intelligence operations,' Bradley (2014) states. The legislature is not the only body that can impose these sorts of restrictions on journalists, with the judiciary proving another pertinent example.

Reporting court cases can be a rewarding experience for many journalists. Conversely, it can be a legal minefield of restrictions surrounding what can and cannot be reported. The primary mechanism of restriction imposed on journalists is the issuing of a suppression order by a judicial officer. Suppression orders have traditionally been utilised to suppress the names of vulnerable individuals associated with a court case, such as minors, mental health patients and parties to Family Court litigation (Pearson & Fernandez 2015). Additionally, suppression orders are used when a case is 'sub judice', where the publishing of certain pieces of information, such as the criminal history of the accused, is deemed inappropriate due to its prejudicial nature. A recent example of this is the case of *The Queen v Hinch (No 2)* [2013] VSC 554, involving radio broadcaster Derryn Hinch's publishing of—the then accused killer of Jill Meagher—Adrian Ernest Bayley's criminal history on his *Human Headline* blog, in violation of a Victorian Supreme Court suppression order. Hinch refused to pay the $100,000 fine and subsequently spent 50 days in prison.

Governments can request suppression orders be issued for the purposes of national security or the national interest. In July 2014, the Wikileaks website published the details of a Victorian Supreme Court suppression order regarding a case involving international leaders involved in significant bribery allegations (Dorling 2014). Justice Hollingworth, who issued the suppression order, was forced to revoke it because of Wikileaks' breach (McKenzie and Baker 2015). Deputy director of the Centre for Media and Communications Law at Melbourne University, Jason Bosland (2014), writing for *The Age*, was critical of the over-hyped media reporting of this particular case, saying 'some balance and perspective' was needed in the discussion of the issue. The case reignited debate about the suitability of Australia's suppression order system, especially in Victoria. A study conducted by the University of Sydney Law Review journal found that from 2008-2012, Victorian courts disseminated 1501 suppression orders, vastly exceeding other Australian jurisdictions, with this number rising rapidly (Bosland & Bagnall 2013). Innes (2012, p. 82) says suppression orders are 'churned out' without an adequate system of notification. Pearson & Fernandez (2015) argue a national notification system is required because different laws about suppression orders apply across Australia's nine jurisdictions, which can be a legal trap for reporters from other jurisdictions reporting on a court case.

In 2009, Andrew Bolt was sued for published articles in the *Herald Sun* newspaper and his online blog that lamented fair-skinned Aboriginal people receiving prizes and scholarships designed for Indigenous Australians. Bolt was accused of breaching section 18C of the *Racial Discrimination Act 1975*, which prohibits acts that are 'reasonably likely' to 'offend, insult, humiliate or intimidate another person or a group of people' based on race. In the summary judgment, Justice Bromberg said Bolt and the *Herald* and *Weekly Times* had breached section 18C and they were subsequently ordered to issue apologies for the offending material. Justice Bromberg also chastised Bolt for several unchecked errors in the 'facts' he had presented.

This case was highly controversial and provoked a contentious discussion about freedom of speech in Australia. Many within the Australian media, particularly from the conservative side, were outraged about an apparent eroding of freedom of speech in Australia. The Institute of Public Affairs (IPA) published a book on the matter calling the Bolt case 'a political attack on a prominent conservative through the courts' (Berg, cited in Gelber and McNamara 2013, p. 475). Janet Albrechtsen (2011) wrote in *The Australian* that there should be cause for concern that the Racial Discrimination Act could 'censor' free expression. Professor of Institutional Economics at RMIT University Sinclair Davidson (2011) contended cases such as Bolt's were best left to personal morality and should not be the subject of law. Gelber & McNamara (2013) argue that the Bolt case highlights how a negative outcome for a defendant in a racial vilification case does not mean ill-informed views are not propagated by sections of the media, contradicting the legislation's objective.

Freedom of speech and freedom of the press frequently encounter a conflict with legislative and judicial powers that have the practical effect of restricting certain types of reporting. National security legislation such as the *National Security Legislation Amendment Act*

impedes journalists' right to report information received from a whistleblower due to the threat of imprisonment. Suppression orders are being issued at high rates, especially in Victoria, with no established national notification system. Racial discrimination laws prevent opinion pieces such as Andrew Bolt's from being free from punishment. If recent history is anything to go by, this debate will continue on.

List of References

Albrechtsen, J 2011, 'The real injury is to free speech', *The Australian*, 26 October, viewed 2 October 2015, < http://www.theaustralian.com.au/opinion/columnists/the-real-injury-is-to-free-speech/story-e6frg7bo-1226176630195>.

Bosland, J 2014, 'Wikileaks publication sparks sensational claims about Victoria's suppression orders', *The Age*, 8 August, viewed 2 October 2015, <http://www.theage.com.au/comment/wikileaks-publication-sparks-sensational-claims-about-victorias-suppression-orders-20140806-100x57.html>.

Bosland, J & Bagnall, A 2013, 'An empirical analysis of suppression orders in the Victorian courts: 2008-2012', *Sydney Law Review*, vol. 35, no. 4, pp. 671-702, viewed 8 August 2015, <http://sydney.edu.au/law/slr/slr_35/slr35_4/Bosland_Bagnall.pdf>.

Bradley, M 2014, 'Press freedom sidelined in pursuit of security', *The Drum*, 23 September, viewed 2 October 2015, <http://www.abc.net.au/news/2014-09-23/bradley-press-freedom-sidelined-in-pursuit-of-security/5761364>.

Brandis, G 2014a, *National Security Legislation Amendment Bill (No. 1) 2014 second reading speech*, Commonwealth of Australia, viewed 2 October 2015, <http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/381f44a1-fb0b-4400-8e8c-97e98d79f489/0009/hansard_frag.pdf;fileType=application%2Fpdf>.

Brandis, G 2014b, *Q&A*, transcript, Australian Broadcasting Corporation, 3 November, viewed 2 October 2015, <http://www.abc.net.au/tv/qanda/txt/s4096883.htm>.

Commonwealth of Australia 2014, *Advisory report on the National Security Legislation Amendment Bill (No. 1) 2014*, Parliamentary Joint Committee on Intelligence and Security, viewed 1 November 2015, <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Report1>.

Davidson, S 2011, 'Bolt is guilty, but the law is wrong – let the markets deal with racial discrimination', *The Conversation*, 28 September, viewed 12 August 2015, <http://theconversation.com/bolt-is-guilty-but-the-law-is-wrong-let-the-markets-deal-with-racial-discrimination-3600>.

Dorling, P 2014, 'Wikileaks publishes "unprecedented" secret Australian court suppression order', *The Age*, 30 July, viewed 2 October 2015, <http://www.theage.com.au/national/wikileaks-publishes-unprecedented-secret-australian-court-suppression-order-20140729-zyc6m.html>.

Gelber, K & McNamara, L 2013, 'Freedom of speech and racial vilification in Australia: "The Bolt case" in public discourse', *Australian Journal of Political Science*, vol. 48, no. 4, pp. 470-484, viewed 2 October 2015, <http://dx.doi.org/10.1080/10361146.2013.842540>.

Griffiths, E 2014, 'Terrorism threat: Australian alert level raised to high; terrorist attack likely but not imminent', *ABC News*, 13 September, viewed 2 October 2015,

<http://www.abc.net.au/news/2014-09-12/australia-increases-terrorism-threat-level/5739466>.

Holmes, J 2014, 'Press freedom: George Brandis is talking plain rubbish', *The Age*, 5 November, viewed 2 October 2015, < http://www.theage.com.au/comment/press-freedom-george-brandis-is-talking-plain-rubbish-20141104-11gfvr.html>.

Innes, P 2012, 'Suppression orders: the more things change, the more they stay the same', in P Keyzer, J Johnston & M Pearson (eds), *The courts and the media: challenges in the era of digital and social media*, Halstead Press, Ultimo, pp. 82-86.

McKenzie, N & Baker, R 2015, 'Wikileaks attacked by judge over corruption case', *The Sydney Morning Herald*, 14 July, viewed 2 October 2015, <http://www.smh.com.au/national/wikileaks-attacked-by-judge-over-corruption-case-20150714-gic594.html>.

Media, Entertainment and Arts Alliance (MEAA) 2014, *Media, Entertainment & Arts Alliance (MEAA) submission to the Parliamentary Joint Committee on Intelligence and Security inquiry into the National Security Legislation Amendment Bill (No. 1) 2014*, MEAA, viewed 5 August 2015, <http://alliance.org.au/documents/MEAA_submission_PJCIS_inquiry_National_Security_Legislation_Amendment_Bill_2014.pdf>.

Parliamentary Joint Committee on Security and Intelligence, 2014, *Advisory report on the National Security Legislation Amendment Bill (No. 1) 2014*, Commonwealth of Australia, viewed 2 October 2015, <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/National_Security_Amendment_Bill_2014/Report1>.

Pearson, M & Fernandez, JM 2015, '4. Censorship in Australia', *Pacific Journalism Review*, vol. 21, no. 1, pp. 40-60, viewed 6 August 2015, <http://yc4xn7uy3r.search.serialssolutions.com/?genre=article&isbn=&issn=10239499&title=Pacific%20Journalism%20Review&volume=21&issue=1&date=20150501&atitle=4%20.%20Censorship%20in%20Australia.&aulast=PEARSON,%20MARK&spage=40&sid=EBSCO:Supplemental%20Index&pid=>.

Roberts, A 2006, *Blacked out: government secrecy in the information age*, Cambridge University Press, New York.

Cases:
Eatock v Bolt (2011) FCA 1103

The Queen v Hinch (No 2) [2013] VSC 554

Legislation:
National Security Legislation Amendment Act (No.1) 2014 (Commonwealth)

Racial Discrimination Act 1975 (Commonwealth)