Press Freedom in Australia

By Nicole Hegarty for CMN228: The Writer and the Law

A contemporary issue of concern, press freedom has been negatively impacted upon by recent legislative amendments. As this essay will show, freedom of the media has been historically sidelined—within an Australian context—through restrictive legislation and political endeavours. It will argue that, while certain restrictions have been required to maintain a civil and ordered society, legislation must not prevent the media from fulfilling its role as the fourth estate. Thanks to the limited security of media freedom, this essay will show that Australian media has been subjected to content restrictions throughout history. Additionally, it will argue that the high risk of incurring financial penalties from defamation suits has limited the freedom of the fourth estate, along with media freedom and source confidentiality being sidelined by recent legislative amendments. Moreover, it will show that increased national security concerns have adversely affected media freedom. For instance, as has been widely reported, the *Australian Border Force Act* 2015 (C'th) has severely reduced the abilities of the media to hold the powerful to account. Finally, this essay will argue that these recent amendments were possible because of the historical decision not to cement press freedom or freedom of speech in the Australian Constitution.

Since its inception, Australian media has been subjected to content restrictions, with limited protection of press freedom. The combination of restraints on the publication of certain materials and the absence of concrete constitutional rights has eventuated in a less-than-free fourth estate (Johnston & Pearson 2008). Since Australia's first newspaper was published in 1803, the freedom of the media has been an area of concern (National Library of Australia 2011). In 1980, the *International Covenant on Civil and Political Rights* was signed and ratified by Australia. Treaties operate differently to acts of parliament. Article 19 of the covenant states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (order public), or of public health or morals (DFAT 1980, p. 7).

Unlike the United States of America, Australia has not embedded these rights in its constitution (Pearson & Fernandez 2015); however, an implied right to freedom of political communication was established in the seminal case *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 (French 2007; Herman 2005). In this case New Zealand's former Prime Minister,

David Lange, had taken the Australian Broadcasting Corporation to court for defamatory comments (French 2007; Walker 1998). Although the court recognised the implied constitutional right to freedom of political communication, due to the nonexistence of explicit constitutional assurance, media freedom was still restricted (Walker 1998). Thus, according to Johnston and Pearson (2008), the freedom of the media to report has been constrained to political communication and has been susceptible to complete disregard. Therefore, the absence of constitutional assurances of media freedom has hindered the abilities of the fourth estate to inform society and prevent future attacks on such freedoms (Johnston & Pearson 2008).

Defamation laws, while necessary to preserve reputations, have interfered with the freedom of the media by subjecting them to considerable financial penalties (MEAA 2015). The need to protect the reputations of individuals is addressed through defamation law (Walker 1998); however, the existence of these laws has impeded on the freedom of the press (MEAA 2015). In 2006 stringent uniform defamation laws were introduced in Australia (MEAA 2015). Queensland's reformed *Defamation Act* 2005 aims to protect the communication of areas of public interest while prescribing processes through which the reputations of the defamed can be rectified (*Defamation Act* 2005 (Qld)). Nevertheless, the media and the courts have held alternate views on what constitutes the public interest. This lack of clarity has heightened the risks surrounding defamation and increased the likelihood of out-of-court settlements (MEAA 2015). Furthermore, the possibilities of loss and financial penalties have had a 'chilling effect' on media professionals and deterred them from arguing their cases in court (MEAA 2015). Conversely, Pearson (2002) says the effects of defamation laws on commercial interests have been an underlying factor of the media's disquiet. A balance between the right to report freely and the preservation of reputations has been called for as a result of continuous threats to the freedom of the media (Wilson 2015; MEAA 2015). Defamation laws have jeopardised the freedom and independence of the media, and have had negative impacts on source confidentiality (French 2007; Whyte 2013).

Recent legislative amendments have further eroded source confidentiality, and by extension, media freedom (MEAA 2015). Source confidentiality has been a ubiquitous issue for journalists who have strived to inform society (Ingham 2008). In 2011, the Commonwealth Government implemented the *Evidence Amendment (Journalists' Privilege) Act* 2011 (C'th). Section 126H of this amendment Act confirmed the ethical and professional duty of a journalist to keep confidences and outlined that journalists were to be exempt from pressure to reveal sources (*Evidence Amendment (Journalists' Privilege) Act* 2011 (C'th); MEAA 2015). However, the purpose of this clause was made void by section 126H, subsection two, which established exemptions to the former clause where source confidentiality was to be outweighed by public interest (*Evidence Amendment (Journalists' Privilege) Act* 2011 (C'th)). The aim of these shield laws, to protect journalists from charges of disobedience contempt, was tested in *Liu v. The Age Company Ltd* (2012) NSWSC 12 and *Hancock Prospecting Pty Ltd v. Hancock* (2013) WASC 290 (Ingham 2008). In the former case, three Fairfax journalists were made to reveal their confidential sources in what Justice McCallum deemed "the interests of justice" (Ralston 2013). Conversely, in *Hancock Prospecting Pty Ltd v. Hancock* (2013) WASC 290,

journalist Steve Pennells was protected from pressure to reveal his sources under Western Australia's shield laws (Weber 2014). Nevertheless, the inconsistent findings of these cases demonstrate the unpredictability of shield law protections for journalists and their confidential sources. Additionally, the recent introduction of the *Telecommunications (Interception and Access) Amendment (Data Retention) Act* 2015 (C'th), which aims to combat terrorist activity, has increased the difficulty of maintaining source confidentiality. This Act has made the two-year storage of metadata mandatory for telecommunications and internet providers, and subjected the entire Australian communications network to potential government investigation under a lone warrant (*Telecommunications (Interception and Access) Amendment (Data Retention) Act* 2015 (C'th); Pearson & Fernandez 2015). Moreover, under section 6V, subsection 182A, any person who has disclosed details concerning "journalist information warrants" are subject to two years' imprisonment, meaning that such investigations are kept secret (*Telecommunications (Interception and Access) Amendment (Data Retention) Act* 2015 (C'th); MEAA 2015; Stewart 2015). Alternatively, according to Stewart (2015), this act has provided journalists with previously non-existent protections. These apparent protections include specified retention periods and the role of the "public interest advocate" in balancing the advantages of source protection against other concerns (Stewart 2015; MEAA 2015; *Telecommunications (Interception and Access) Amendment (Data Retention) Act* 2015). However, in spite of these additional protections under the *Telecommunications (Interception and Access) Amendment (Data Retention) Act* (C'th) and the *Evidence Amendment (Journalists' Privilege) Act* (C'th), it is clear that source confidentiality has remained an issue for journalists (Rolph, cited in Barry 2013). Thus, restrictive legislation has interfered with the ability of journalists to fulfil their pertinent role as members of the fourth estate (MEAA 2015).

The freedom of the media to report has been adversely affected by national security concerns (Barry 2014). In an attempt to combat terrorist activity, the Commonwealth Government enacted the *National Security Legislation Amendment Act (No.1)* 2014 (C'th) (Bradis, cited in MEAA 2015). Under section 35P, subsection 1 of the Act, a person who revealed or published material related to a "special intelligence operation" would have committed an offence punishable by five years' imprisonment (*National Security Legislation Amendment Act (No.1)* 2014 (C'th); Bradley 2014). However, if the person revealed material with the intention of jeopardising, or which did jeopardise, the safety of an individual, then they would be subject to a maximum of ten years' imprisonment (*National Security Legislation Amendment Act (No.1)* 2014 (C'th)). Furthermore, the Act has provided the Australian Security Intelligence Organisation (ASIO) with the power to search the computers of third parties (*National Security Legislation Amendment Act (No.1)* 2014 (C'th)). A journalist who interviewed a person involved in an ASIO investigation would thus be considered a third party, which would threaten the confidentiality of journalists' sources (MEAA 2015). There have been varied responses to this controversial Act; however, as will be shown here, the Act has impeded on the abilities of journalists to fulfil their crucial democratic role. Former Australian Prime Minister Tony Abbott stated, in favour of the Act, that, in order to protect Australians from terrorist activities, the liberties of some would be decreased (Bradley 2014). Australian journalist Peter Greste, who was imprisoned in Egypt for contacting the Muslim Brotherhood (effectively the same offence outlined in Australia's *National Security Legislation Amendment Act (No.1)* 2014)

refuted this claim, stating that an informed citizenry was a higher security against terrorism than secretive legislation (Greste, cited in Rushton 2015; Greste, cited in MEAA 2015). Consequently, in response to increased terrorist activity, the Commonwealth Government has significantly reduced the freedom of the press to report on issues of public interest (Pearson & Busst 2006; MEAA 2014). Hence, the freedom of journalists to report, and by extension the rights of citizens to be informed, have been directly affected under this Act, which created offences for the unauthorised release of information regarding special intelligence operations.

Similarly, additional national security legislation has had further negative implications on the freedom of the media and the extent to which citizens are informed. The *Australian Border Force Act* 2015 (C'th) has had disastrous repercussions on the media's ability to hold the powerful to account. The Act was passed by both houses of parliament in 2015, with the purpose of creating the position of an Australian Border Force Commissioner and increasing secrecy protections (*Australian Border Force Act* 2015 (C'th)). The opportunities for detention workers to disclose concerns related to the wellbeing of asylum seekers have been significantly restricted with the introduction of this Act. Section 42 of the Act established an offence punishable by two years' imprisonment for the leaking or recording of "protected information" (*Australian Border Force Act* 2015 (C'th)). Immigration Minister Peter Dutton articulated the Government's point of view that the aim of section 42 was to restrict "sensitive operational information from unauthorised disclosure" (Dutton, cited in Whyte 2015, p. 1). Murphy, Ward and Donovan (2006) asserted that the central purpose of the media within a liberal democracy was to inform the populace; however, restrictive legislation, such as the *Australian Border Force Act* 2015 (C'th) has prevented the media from exposing institutional wrongdoing.

Extensive legislation and political responses to national security concerns have prevented the media from fulfilling its role as the independent fourth estate. The freedom of the Australian media has also been severely restricted by the absence of explicit constitutional protections. This historical shortfall has eventuated in the need to maintain a civil society; however, members of the fourth estate have been refused the freedom required to fulfil their role of informing that society. Moreover, the freedom of the media to report on matters of public interest and hold the powerful to account has been diminished in favour of national security concerns. Hence, in light of recent legislation, press freedom remains an area of contemporary concern.

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