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Media freedom in Australia: rhetoric versus reality

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Abstract

For some decades Australia has positioned itself as an exemplar of media freedom in the Asia-Pacific region. It has funded aid programs to train Pacific island journalists and government officials in the values of transparency and free and responsible reporting. Its political leaders have sometimes been critical of restrictions placed upon the media in other Asia-Pacific countries. However, advocates of press freedom have found troubling signs of growing government restrictions on the media in Australia in the new millennium. Despite some positive developments in the areas of defamation and confidentiality, there have been increasing shackles placed on reporters as Australian governments at federal and state levels have ramped up laws of privacy, anti-terrorism and sedition and clamped down on releases under Freedom of Information laws. This paper maps that landscape and assesses whether Australia's downgraded press freedom status by international bodies like Freedom House and Reporters Sans Frontieres is justified.

Introduction

Australia has long portrayed itself as a model of media freedom in the Asia-Pacific region. Its regional aid programs have reinforced this diplomatic rhetoric with the funding of Australian Agency for International Development (AusAID) initiatives in the Pacific island nations to encourage press freedom and government transparency (AusAID, 2003). To a considerable extent its self-image has been justified, and this has been supported by international organisations such as Freedom House rating Australian media as "Free" in all 26 of its annual surveys of media freedom to date (Freedom House, 2007). Unlike some of its Asia-Pacific neighbours, Australia does not impose licensing on its newspapers or registration of its journalists and it has not used the ancient action of seditious libel against reporters in recent decades. In 2006 it introduced near-uniform defamation laws in its eight states and territories, simplifying the processes and limiting the damages plaintiffs might claim against media

defendants. However, on the other side of the ledger its courts have jailed four journalists since 1986 for contempt of court and, in the new millennium, Australia has clamped down on media freedom in a range of areas, including privacy laws, anti-terrorism provisions and Freedom of Information restrictions (Pearson, 2007). These developments have prompted Freedom House and Reporters Sans Frontieres to downgrade Australia's international press freedom rankings to a point where neighbouring New Zealand sits well above it on their international league tables. Australia's own journalists' union – the Media, Entertainment and Arts Alliance – and the Australian Press Council have been vocal in their criticisms of new restrictions by governments at all levels of Australia's federal system. This paper reviews the changes to media laws since 2000 and questions whether Australia's international rhetoric on media freedom is out of step with its domestic actions.

Evidence of Australia's public position on press freedom

Australia has often been at odds with some of its Asia-Pacific neighbours in attitudes to press systems and their accommodation of media freedoms. Most notable were former prime minister Paul Keating's verbal stouches with former Malaysian president Mahathir Mohamad and Singapore prime minister Lee Kwan Yu in the early 1990s, which stemmed in part from the latters' roles as proponents of "Asian values" under which they rejected so-called Western notions like media freedom as an ingredient of participatory democracy. These Asian values were, as Jain (2007, p. 27) noted, constructed against such "Western values". As Loo and Hirst (1995, p. 107) explained, the media in the respective countries reflected their different press and cultural systems in their coverage of the diplomatic fallout from the series of insults. They wrote:

> The philosophical and structural nature of the Malaysian and Australian press are as divergent as Keating and Dr Mahathir are in their idiosyncrasies. (p. 115).

Australia's current Foreign Minister, Alexander Downer, openly dismissed the use of Asian values as an excuse for restrictions on media freedom in a speech to the Media and Democracy in Asia Conference in Sydney in 2000. He said freedom of expression was a fundamental human right encapsulated by Article 19 of the Universal Declaration of Human Rights and said there should not be exceptions in Asia on cultural grounds:

> Cultural differences are real, and to be appreciated. But they can never be used as an excuse to deny the existence or importance of fundamental human rights. The citizens of Asia - in every country, and throughout history - have proven, often at great personal cost, that they treasure their right to freedom of expression, and the freedoms of the media used to express them (Downer, 2000).

He went on to sing the praises of a free media in the region, stating there were "lessons other countries can learn from Australia":

> (T)he experience of countries in Asia over the past two decades - and in particular in the varied responses to the East Asian economic crisis - has proven beyond question the value of a free and independent media. Those countries where the media have been able to exercise effective scrutiny and criticism of government have been the most resilient and adaptable (Downer, 2000).

Such public statements by key Australian political figures are founded upon a belief that Australia has a high level of media freedom. So too is the Australian Government's funding of free press and government transparency projects in developing countries throughout the region through AusAID. An example was the Pacific Media and Communications Facility funded for $1.5 million over the 2004-6 period. An AusAID background paper claimed the facility aimed to:

> strengthen the capacity of media organisations, individuals and community groups to provide balanced media coverage, boost good governance, and strengthen civil society. This will build on the successes of previous Pacific Media Initiative activities, which included customised media training on key good governance issues for media practitioners, government departments and NGOs, aiming to strengthen their ability to articulate and debate public policy issues in an accurate and balanced manner (AusAID 2003, p. 4).

Australian politicians also talk up the nation's free press credentials on the rare occasions they actually broach the subject. Pearson and Galvin (2004) analysed the text of Australian parliamentary Hansard in the decade to 2004 and found the expressions "freedom of the press" and "press freedom" had been used in a mere 78 of more than 180,000 addresses by politicians to either House of the national parliament. We found that one of the more frequent occasions of those rare mentions was when politicians were positioning Australia as a role model on media freedom to less democratic nations. In various speeches the parliamentarians spoke against restrictions on press freedom in other countries, including China, Vietnam, Iran, Iraq, Indonesia and Burma. In the transition to Chinese rule in Hong Kong, former National Party leader Ian Sinclair was at pains to impress upon China the important role of a free press in a democratic society, as exemplified by Australia. He described it as a "benchmark" criterion:

> The concern that we have lies in a number of criteria which I call the benchmarks. One is the freedom of the press. The Fourth Estate is absolutely vital to society. There has to be a capacity for the media to comment without

> fear or favour. … The media plays a vital role in a free society, and the people of China should not feel apprehensive about having a free press in Hong Kong. It is going to be very important that the freedom of the press is preserved (Sinclair, quoted in Pearson and Galvin, 2004).

Pearson and Galvin revealed that the lead-up to the Coalition forces' invasion of Iraq in March 2003, the reference to press freedom was used by parliamentarians from both sides of politics when referring to that regime's record of intimidation of the media. In 2003, Labor Senator Peter Cook ranked freedom of the press with the separation of powers as fundamental democratic structures that were lacking in Iraq as it faced a new system of government. Australia's democratic toleration of a free and critical media was positioned as the example for Iraq to follow. Pearson and Galvin (2004) concluded the number and variety of countries mentioned by parliamentarians in the context of press freedom indicated that they saw press freedom as an international issue and one that Australia has the right to pronounce upon "as a beacon to less democratic countries".

Thus, the Australian Government has by both words and deeds positioned itself as an exemplar of media freedom as a tool of good governance and transparency in the region. Sadly, its actions on the domestic front have sometimes failed to match its international rhetoric.

Evidence of the real state of press freedom in Australia

Despite it talking up its own stance on media freedom on the world stage, international press freedom agencies have ranked Australia below some of its Asia-Pacific neighbours in their annual surveys in recent years. Reporters Without Borders (RSF) ranked it only 35th out of 168 countries surveyed for its 2006 annual index of press freedom. New Zealand, at 19, was the highest ranked country in the Asia-Pacific region, with European nations occupying the top 15 places (RSF, 2006). The annual survey by the non-partisan, US-based pro-democracy organisation Freedom House has taken on a certain authority now it has been published for 26 consecutive years using a developed survey methodology. Numerical values contribute to classifications of countries according to whether their media are given the status "free", "partly free" or "not free". Other scores for legal, political and economic environments contribute to a nation's total rating on a scale of 100 (Karlekar, 2006, p. xxi). In fact, in Freedom House's categories, Austrralia's score out of 30 amongst countries with a 'free' media status has been eroded gradually from single figures since the body started assigning such ratings, as follows: 1994 – 9; 1995 – 7; 1996 – 8; 1997-2002 – 10; 2003-2004 – 14; 2005 – 18; and 2006 – 19. (Freedom House, 2007). While categorised as 'Free' (it was rated at 19

of the 30 free rating groups), Australia was criticised for its revitalisation of sedition laws and contempt charges against two Melbourne journalists and was ranked 31 on the full international table of 194 countries, again well behind neighbouring New Zealand at 10. (Only the top 73 countries were afforded 'Free' status.)

There have also been voices of criticism from within Australia's borders. Two of the leading media bodies – the Australian Press Council (APC) and the Media, Entertainment and Arts Alliance (MEAA) – released reports in 2006 lamenting new threats to media freedom within Australia. The APC's report suggested the moves for legislative restrictions on the media did not appear to be party-political:

> The trend would appear to be away from the free flow of information towards more restrictions and secrecy, with governments of all colours trying to use their control of information to set the agenda. In this regard the current federal government would appear to be the trendsetter (Herman and Pearson, 2006).

The report proceeded to identify numerous examples of actual or proposed media clampdowns by governments, in the areas of anti-terrorism, border protection, official classification of materials, media management techniques, state government laws, attacks on government whistleblowers, freedom of information restrictions, contempt of parliament changes, concentration of media ownership, court suppression orders, court document access, contempt of court, mental health reportage, alternative dispute resolution, privacy, defamation, confidentiality and privilege (Herman and Pearson, 2006).

Both the APC and the MEAA welcomed the move to near-uniform defamation laws across all eight state and territory jurisdictions along with recommended reforms to a quasi-privilege for journalists' confidentiality as generally positive developments, but the MEAA federal secretary Chris Warren described it as being "like two steps backwards for every step forward" (MEAA, 2006, p. 3). However, he wrote that "these bright points have to be seen against a much darker backdrop of continued attacks on press freedom". He listed major setbacks as the Howard Government's obstructionist attitude to Freedom of Information applications, the reinvigoration of ancient sedition laws, anti-terrorism measures including the increase of security forces' powers to tap journalists' communications and restrictions on reporting misuse of security force powers (MEAA, 2006, p. 3).

In May 2007 several of Australia's leading media organisations joined forces to launch a new free expression campaign titled Australia's Right to Know. Launching the initiative, News Ltd chief executive John Hartigan listed numerous examples of the erosion of media freedoms in Australia and said the group would commission an audit of restrictions, issue a green paper

on the need for reform, and recruit a chairman to lead their efforts in lobbying governments to lift restrictions (Merritt, 2007c, p. 3).

The reports from both the MEAA and the APC list in detail the measures Australian governments have taken to restrict free and open reportage in the recent past which are starkly at odds with the self-image Australian politicians portray about the state of media freedom. This paper does not have space to deal with each in detail. Instead, it takes up three main areas to demonstrate this gulf between rhetoric and reality: new privacy provisions, restrictions in the name of national security, and government measures to keep its own files secret.

Defamation and Privacy

New national near-uniform defamation laws came into effect in all eight Australian states and territories in 2006, limiting the quantum of damages and in many ways making it easier for media outlets to defend defamation actions. While most of the reforms were positive for journalists, two stood out as presenting potential hurdles to investigative journalism. One was the adoption of the NSW version of the qualified privilege defence, a provision with a long history of failure for media defendants because, while not requiring the full truth of important allegations, it required their actions to be "reasonable". In Queensland and Tasmania it replaced previous statutory defences under which some of the nation's most important investigative reporting had been undertaken, particularly the exposure of corruption in the Queensland Government in the late 1980s which led to the jailing of three ministers and the state's police commissioner (Pearson, 2007, p. 218).

The new laws also did away with privacy provisions that had applied in four of those jurisdictions for at least the previous three decades. In NSW, the Australian Capital Territory, Queensland and Tasmania, defendants had to prove defamatory matter was "in the public interest" or "to the public benefit" before they could justify their publications, even if they could prove it was truthful. The wording was designed to prevent highly personal (though truthful) matters being published when they bore no relation to an individual's public role or duty. The reforms made truth alone a defence in all Australian jurisdictions, prompting veiled threats in mid-2006 by state and territory attorneys-general that if media organisations used the new defences to pursue blatant privacy breaches they might face new privacy laws (Pearson 2006).

The development took on momentum in April 2006 when the NSW Attorney-General Bob Debus asked the NSW Law Reform Commission to a new statutory tort of privacy (NSWLRC, 2006). In 2007, NSW Law Reform commissioner Michael Tilbury was reported

linking the move for a new statutory cause of action for privacy with the "weakening of privacy protection in defamation law" (Merritt, 2007a, p. 13). A judge would decide who was at fault in privacy litigation by balancing the competing interests in privacy and the free flow of information. Merritt (2007a, p. 13) reported that Mr Tilbury hoped such legislation would be replicated in other states.

The development coincided with the release of a privacy issues paper by the NSWLRC's sister body at the national level, the Australian Law Reform Commission (ALRC 2006a). The document threw the whole media exemption to national data protection legislation up for review by raising the following questions:

> Question 5-10: Should acts and practices of media organisations in the course of journalism be exempt from the operation of the *Privacy Act*? If so:
>
> (a) what should be the scope of the exemption; and,
>
> (b) does s 7B(4) of the *Privacy Act* strike an appropriate balance between the free flow of information to the public and the protection of personal information?
>
> Question 5-11: Should the terms 'in the course of journalism', 'news', 'current affairs' and 'documentary' be defined in the *Privacy Act*? If so, how should they be defined? Are there other terms that would be more appropriate?
>
> Question 5-12: If the media exemption is retained, how should journalistic acts and practices be regulated? (ALRC 2006a, p. 267)

These references by both State and Commonwealth governments to their respective law reform bodies followed indications the Australian courts were warming to the notion of a new tort of privacy. While Australian courts are not locked into privacy obligations through international agreements like the British and Europeans, and have not yet developed a tort of privacy as the New Zealanders have (see Hosking's case), they have still looked to international developments for precedent. As in Britain, where celebrities have famously won such actions (see Douglas and Campbell cases) plaintiffs in Australia have sometimes turned to breach of confidence claims to provide redress. The Lenah Game Meats case (2001) represented the turning point, with the High Court refusing to rule out a potential privacy tort. It involved substantial disagreement among the High Court justices and a reluctance to progress a privacy tort in a case where the facts and pleadings did not provide a comfortable fit. Significantly, however, three of the seven justices spoke against a 70-year precedent in saying the 1937 Victoria Park Racing case would not prevent a future court from developing a privacy tort, partly because modern conditions demanded a different outcome. In 2003, a

Queensland District Court judge ruled in the Grosse case that there was indeed a right to privacy when he held the privacy of the former Sunshine Coast mayor Alison Grosse had been invaded by an ex-lover who continued to harass her after their affair had ended. As a District Court case this was an inferior court decision, and superior courts had not yet formulated a new tort when this paper was written. Decisions of the Victorian Supreme Court (Giller's case) and the Federal Court (Kalaba's case), both in 2004, were dismissive of a new breach of privacy action, although judges in both cases left the door open for its development at a later date.

Nevertheless, the Australian Law Reform Commission put the issue back on the national agenda in 2006 in its *Issues Paper 31 Review of Privacy* with the questions:

> Should a cause of action for breach of privacy be recognised by the courts or the legislature in Australia? If so, and if legislation is preferred, what should be the recognised elements of the cause of action, and the defences? Where should the cause of action be located? For example, should the cause of action be located in state and territory legislation or federal legislation? If it should be located in federal legislation, should it be in the *Privacy Act* or elsewhere? (ALRC 2006a: 53)

The commission's inquiry is due to continue into 2008 and its outcome might well dampen the media's joy at getting uniform national defamation laws if those very reforms can be blamed for the development of privacy restrictions by the courts or by state or federal legislators.

In April 2007 a Victorian County Court judge ruled in Jane Doe's case there was an actionable right to privacy when she upheld a civil suit brought against the Australian Broadcasting Corporation and two of its journalists by a woman named on ABC radio as the victim of a sexual assault. Although the journalists had already been convicted on a criminal charge of identifying her, Judge Felicity Hampel ruled the defendants had breached a statutory duty not to identify the sexual assault victim, that they owed her a duty of care not to cause her psychiatric injury by publishing her identity, that they had breached her confidence by doing so, and that they had also breached her privacy which, the judge ruled, was an actionable wrong. She awarded damages of $234,190. The case is subject to appeal.

Anti-terrorism and sedition laws

Media restrictions in the name of national security flowed from the attacks on the World Trade Center in New York in September 2001. After the 9/11 attacks and the Bali bombings in 2002, the Australian Government introduced legislation containing provisions for the arrest

and detention of citizens (including journalists) who might have information on terrorists and terrorism activity, and which render as criminal communication by people with detainees, their families and lawyers. This was contained in the *ASIO Legislation Amendment (Terrorism) Act 2003*, which involved amendments to the *Australian Security Intelligence Organisation Act 1979*. Despite a combined media submission by several competing major groups, the legislation, allowing anyone over the age of 16 to be detained for up to seven days for questioning (s. 34HC) by ASIO, was passed in 2003.

At 6 June 2006, the Australian Parliamentary Library's Terrorism Law Directory (Library 2006) listed 31 counter-terrorism Acts passed by the Australian Parliament since September 2001, with four Bills introduced during 2006 still progressing through the legislative process. It registered eighteen parliamentary committee reports into proposed legislation over that period. The directory listed 26 federal Acts and six Regulations related to terrorism already in force before 11 September 2001. Of course, not all of this counter-terrorism legislation affects the work of journalists and media organisations.

However, many of the changes had the potential to affect journalists in their reporting of terrorism-related stories, in the following ways:

- leaving reporters exposed to new detention and questioning regimes;
- exposing journalists to new surveillance techniques;
- seizure of journalists' notes and computer archives;
- exposing journalists' confidential sources to identification;
- closing certain court proceedings, thus leaving matters unreportable;
- suppressing certain details related to terrorism matters and exposing journalists to fines and jail if they report them;
- restricting journalists' movement in certain areas where news might be
- happening;
- exposing journalists to new risks by merely associating or communicating with some sources; and
- exposing journalists to criminal charges if they publish some statements deemed to be inciting or encouraging terrorism.

Media organisations and representative bodies, including the Australian Press Council and the journalists' union, the Media, Entertainment and Arts Alliance (MEAA), drafted submissions

to parliamentary committees examining the legislative proposals and some of their concerns were addressed, while most were not.

The journalist's union (the MEAA) detailed most of the major issues of concern to journalists in its press freedom reports in 2005 and 2006. In its 2005 report (MEAA 2005), it listed the *ASIO Legislation Amendment Act 2003* as the law of main concern to journalists because of its effective limits on any media exposure of any active operation by the national security force under warrant for up to two years, 'even if the operation is in violation of international human rights conventions'. The Act lists two offences for individuals who disclose 'operational information' relating to the enforcement of an ASIO warrant, punishable by five years' imprisonment. The first (s. 34VAA) prevents disclosure of any information relating to such a warrant for 28 days after its issue.

While it is designed to stop those questioned talking to other terrorists, as the MEAA points out (p. 5) it also 'stops those who have been questioned by ASIO and/or their lawyers from talking to the media'.

The second offence under s. 34VAA(2) extends the ban on the disclosure of operational information for a further two years after the expiry of an ASIO warrant. As the MEAA points out (2005: 5), new warrants can be issued making the gag effectively indefinite. This also carries a five-year jail sentence.

Other items of anti-terrorism legislation of concern to media advocates were:

- The *Criminal Code Amendment (Terrorist Organisations) Bill 2003* and the *Anti-Terrorism Bill (no. 2) 2004* prohibiting 'association' with terrorist organisations, with the potential to impede journalists trying to report on such groups;
- amendments to the *Telecommunications (Interception) Act 1979*, enacted in 2004 and 2006, allowing enforcement agencies to obtain warrants to access stored communications such as sms, mms, email and voicemail messages held by journalists which might jeopardise the identity of their confidential sources.

In its 2006 report, the MEAA suggested journalists now needed to assume their conversations with sources on terrorism stories would be intercepted as one of the 2006 amendments allowed phone tapping of third parties to suspected terrorist plots.

The *National Security Information (Criminal Proceedings) Act 2004* allows prosecutors and courts to use national security information in criminal proceedings while preventing broader disclosure of such information including, in some circumstances, disclosure to the defendant. The legislation gives courts the discretion to decide whether to hold proceedings *in camera* and requires the publication of reasons for such a decision.

The *Anti-Terrorism Act (No. 2) 2005* prompted the harshest criticism from press freedom and civil rights bodies. Most controversially, the updated legislation on sedition offences that had been dormant for more than half a century prompted stringent protests from media groups. The sedition laws were modernised by being replaced with a suite of five offences prohibiting individuals from 'urging' others to use 'force or violence' in certain contexts, with a specific 'good faith' defence (ALRC 2006b). In response to the public objections to the sedition provisions, and a recommendation from a Senate committee that they be dropped, Attorney-General Philip Ruddock took the unusual step of agreeing that the sedition laws would be subject to a review *after* the legislation had been passed. The Australian Law Reform Commission embarked on that process and in July 2006 it handed down its report on the new sedition laws (ALRC 2006b), recommending that the government drop the 'red rag' term 'sedition' from federal laws. But by late March 2007, the Australian Government was yet to implement any of the ALRC's recommendations (Sorensen, 2007).

From mid-2006, the first evidence began to surface of the impact of these laws upon the media and other researchers. Federal police served search warrants on a journalist from *The Age* newspaper in Melbourne, Ian Munro, and upon the ABC's *Four Corners* programs demanding their notes and tapes of interviews with an alleged terrorist seeking new evidence after the individual had just won an appeal against his conviction (Burrow, 2006).

Then an academic who had been awarded an $829 000 Australian Research Council grant was forced to change his research design after being warned by Attorney-General Ruddock that his proposed interviews with international terrorist leaders would leave him in contravention of the anti-terror laws banning association with terrorists (Edwards and Stewart 2006).

Sorensen (2007) detailed other examples of the new security laws limiting free expression, including:

- A visiting artist questioned by security agents while videotaping around Canberra, allegedly told their name would be added to a list of terrorism suspects.
- University staff questioned about the source of an exhibition's funding after a complaint about so-called 'treasonous' images of the prime minister, attorney-general and immigration minister with their lips sewn together (as a satire on refugee detention centres).
- Government agents raiding a Melbourne publishing house to 'cleanse' their files of several pages of a book written by former intelligence analyst Andrew Wilkie.

- Australian Federal Police seizure of eight books and a film from western Sydney Muslim bookshops and attempts to lay sedition and incitement to violence charges. Two of the books were later banned, despite objections from the NSW Council of Civil Liberties.

Merritt (2007a, p. 13) noted two of the nation's largest terrorism trials had been cloaked in secrecy including extended sessions in closed court because of the new laws. After a large-scale Sydney terror trial was closed to the media, usual competitors News Limited, Fairfax Media and the Australian Broadcasting Corporation joined forces to oppose moves to close to public scrutiny the trial of 13 Melbourne men allegedly part of a terror cell. In late March the Federal Government won orders for a large part of the proceedings to be held in camera.

In short, the Australian Government had shown it was quite prepared to sacrifice media freedom in its tightening of national security measures in the new era of terrorism. As Pearson and Busst (2006) suggested, its actions in this regard were far harsher than those of neighbouring Pacific nations.

Government secrecy: Freedom of (or from?) Information and whistleblower prosecutions

> "Freedom of information always seems a great idea when you are in Opposition but less so when you are in Government." – Australian Minister for Foreign Affairs, Alexander Downer, addressing the Pacific Area Newspaper Publisher's Association on the Gold Coast, Australia, August 28, 2006. (McNicoll, 2006).

A landmark High Court freedom of information decision in 2006 known as the Treasury case (*McKinnon v. Secretary, Department of Treasury*), sent a chilling message to journalists trying to access government documents. All State and Territory governments had introduced Freedom of Information legislation since the Victorian and Commonwealth Governments paved the way in 1982 and 1985.

While the laws were premised on the principle that there was a strong public interest in the administrative decisions of governments and quasi-governmental bodies being as transparent and as open as possible, there were recognised exceptions to such openness, particularly decisions involving private and commercially sensitive matters and the protection of emergency services and security information. Applications could also be costly. Dissatisfaction with the laws reached a high point in 2006 when the High Court upheld the federal government's power to prevent Treasury documents being released to *The Australian*'s FOI editor, Michael McKinnon (Treasury Case, 2006). The case centred on the

Federal Treasurer's use of a so-called 'conclusive certificate', a power allowing federal ministers to nominate that the release of certain documents or parts of documents would be contrary to the public interest.

McKinnon had applied to the federal Department of the Treasury for documents related to the extent and impact of 'bracket creep' (the phenomenon where a taxpayer moves into higher tax brackets when their income rises to keep pace with inflation) and the use, abuse and impact of the First Home Owners Scheme (a government payment to purchasers of their first residential property). The department listed 40 documents relevant to the bracket creep matter, with all but one claimed to be exempt from FOI release and 47 related to the First Home Owners Scheme, of which most were claimed to be wholly or partially exempt. McKinnon applied firstly for an internal review of the exemptions and then applied to the Administrative Appeals Tribunal, the next stage in the appeal process. Before the applications for review were listed for hearing, the Treasurer, Peter Costello, used powers under s. 36(3) to sign so-called 'conclusive certificates' stating the disclosure of 36 of the 40 bracket creep documents and 13 of the 47 First Home Owners Scheme documents would be 'contrary to the public interest' for a range of specified reasons. He claimed disclosure would compromise confidentiality and candour among public servants advising ministers and that the documents were only 'provisional' and their disclosure would be likely to mislead the public. McKinnon appealed to the High Court against decisions by the Tribunal and then the Full Court of the Federal Court, claiming there were not reasonable grounds for the Treasurer's claim that disclosure of the documents would be contrary to the public interest. The High Court dismissed his appeal by a 3–2 majority, holding that the Tribunal had gone through the proper process of considering the documents and the Treasurer's grounds supporting non-disclosure. The minority decision (Chief Justice Gleeson and Justice Kirby) argued that the Tribunal should have considered other facets of the public interest. They wrote: 'Looking only at a facet of the public interest is a necessarily incomplete way of looking at the public interest' (para. 16). The 'principal object of the FOI' is to allow a general right of access, 'limited only by exceptions and exemptions necessary for the protection of essential public interests' (para. 19).

The Australian Press Council conducted a study into the operations of FOI legislation in Australia in 2002, and identified five key devices governments used to impede FOI requests:

- Many requests were obstructed on the grounds that they would unreasonably divert an agency's resources.
- Time delays discouraged FOI requests.
- Costs of filing applications were prohibitive.

- Too many exemptions greatly reduced the amount of information available.
- Arbitrary decisions by FOI officers on classification of documents often stymied requests.

The NSW Ombudsman (2006) conducted a comprehensive audit of FOI reporting for the 2004–05 period and his findings supported the Press Council's findings. Most importantly, he identified 'a significant and disturbing downward trend in matters where it is reported that documents were disclosed in full' over a 10-year period (NSW Ombudsman 2006: 5). His records showed that in 1995–96 full disclosure was granted in 81 per cent of NSW FOI determinations, by 2001–02 this had decreased to 63 per cent and in 2004–05 was down to only 55 per cent of determinations (a 26 per cent drop over the ten years). NSW agencies' use of exemption clauses had almost quadrupled over the ten-year period, increasing from just 10 per cent of determinations in 1995–96 to about 35 per cent in 2004–05. He found that New South Wales had the poorest record approving the full release of documents in response to FOI requests.

The Commonwealth Government's growing culture of secrecy was revealed in the release of 2005-2006 FOI figures (Merritt, 2007b, p. 14). The government refused wholly or in part almost half (46.3 per cent) of requests for non-personal information (that is, requests by individuals other than those referred to in the documents, such as journalists). The agencies in the most sensitive (and newsworthy) areas were also the slowest in responding. The report showed more than one third (36%) of requests to the Department of Prime Minister and Cabinet took more than 90 days to elicit a response (Merritt, 2007b, p. 14).

Herman and Pearson (2006: 73) reported in the Australian Press Council's report *State of the News Print Media in Australia* that both the Victorian and Queensland governments had appalling records with FOI processing and exemption protocols and concluded that both the law and practice were in need of urgent reform.

Murdoch University academic Johan Lidberg (2005: 31) conducted an international comparison of FOI regimes for his doctoral thesis and actually filed similar FOI requests in five countries: Sweden, Australia, United States, South Africa and Thailand. He found only two of twelve requests in four countries generated any information and found Australia was the worst case in the study. Australia's rhetoric projected 'an image of a mature functioning FOI system', but the FOI regime was 'close to completely dysfunctional from a user's perspective', Lidberg wrote.

Commonwealth Government secrecy measures are two-pronged. FOI refusals are one element. The other is the widespread clampdown on leaks to the media by federal public servants, known to corruption bodies as 'whistleblowers' and to journalists as confidential

sources. Two prominent leaks in 2004 and 2005 led to newspaper disclosure of important matters of public interest but also led to criminal charges against the public servants involved and, in one case, to contempt charges being laid against two journalists which were still pending in March 2007.

In the first, the *Herald Sun* newspaper in Melbourne published an article in early 2004 by reporters Michael Harvey and Gerard McManus about the federal government's cuts to war veterans' entitlements, based upon so-called 'secret documents', 'secret papers', 'confidential documents', ministerial 'speaking notes' and another report not available publicly. The journalists refused on ethical grounds to reveal the source of the material to Federal Police officers who were investigating the alleged leaking of information by a public servant. In mid-2004 Desmond Patrick Kelly was charged under s70(1) of the Crimes Act for having communicated confidential information to an unauthorised person. The journalists appeared in the Victorian County Court on 23 August 2005 and answered questions about the documents and a phone number, but refused to answer questions about the source of their information, despite directions from the judge that they do so. They were charged with contempt of court and in March 2007 that case was still proceeding through the courts. The public servant, Mr Kelly, was convicted of the leaking offence without the evidence of the journalists on the basis of telephone records showing calls to the press gallery and Mr Harvey's mobile phone number, along with some admissions of fact and circumstantial evidence. He was given a non-custodial sentence and appealed to the Victorian Court of Appeal where his conviction was overturned.

In the second case, former Customs officer Allan Kessing was convicted in March 2007 of leaking two classified reports in 2005, an action that led to a $200 million overhaul of Australia's aviation security (Kearney, 2007, p. 5). The reports exposed security problems at Sydney airport, including organised crime operations, surveillance shortcomings, and security lapses. Mr Kessing was awaiting sentence, which could be a jail term, as this paper was submitted. Both convictions exposed the shortcomings of a lack of a public interest defence in the federal Crimes Act for such whistleblowers, the lack of any whistleblower legislation at a federal level, and major inconsistencies among the state and territory jurisdictions which did have such protective legislation (Kearney, 2007, p. 5). More alarmingly, they revealed a determination by the Australian government to pursue public servants who leak information, despite the clear public benefit gained by such secrets being revealed to the media and the general public.

Conclusion and recommendations

Most agree that absolute media freedom is unachievable even in the most democratic states. There will always be other rights and privileges that impact upon it and compromise it if we are to have those same democracies operating at their optimum level. Media freedom will always have to give some ground to individuals' rights to a fair trial, their reputations, privacy, confidentiality and national security. It is a question of balance of course, but there is strong evidence Australia's rhetoric about media freedom and transparency has placed itself at a more liberal position on those scales than its actions have deserved. The record of Australian governments – at both state and federal levels – in this millennium reveals concerted attempts to erode media freedoms through proposals for new privacy laws, a raft of anti-terror legislation, the frustration of Freedom of Information applications, and the pursuit of whistleblowers. One measure of the decline has been the gradual downgrading of Australia's ranking in independent international press freedom surveys. The more sobering evidence has been the mounting body of legislation and criminal cases where government bodies have demonstrated time and again their commitment to secrecy over the free flow of important public information.

What can or should be done about it? To my mind, the problem necessitates at least two remedial strategies. For a start, politicians themselves cannot be relied upon to defend media freedoms. As many critics have noted, Australian governments at all levels, and of all political persuasions, have been jointly responsible for the erosion of free expression over recent years. The onus falls to the media themselves to remind governments of their obligations to free expression in a modern democratic society, particularly if they are going to boast about their record in this regard in the international diplomatic arena. The recent initiative by industry leaders to form Australia's Right to Know campaign as a research and lobbying tool is a welcome start.

The second element needs to be a public education campaign about the value of free expression, and particularly a free media, in a properly functioning democratic society. We can call this a new 'media freedom literacy', and again the media organisations, their representative groups, and journalism educators can play a role here. For decades newspapers have run Newspapers In Education initiatives, which seemed to be much more about building circulation than about imparting the core value of press freedom in a democracy. School children, and university journalism students, need better understanding of the value of truth over image and substance over spin, media truth-telling in history, media freedom as the right of the citizenry, the difference between journalism and infotainment, and the importance of both media freedom and responsibility. This will give them a working literacy in the domain of media freedom, and improve democracy in the process. As a fringe benefit, it will allow

them to decide for themselves whether governments are being hypocritical when they boast about their free expression record while introducing new laws to restrict their domestic media.

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Professor Mark Pearson (BA, DipEd, MLitt, LLM, PhD) has combined careers in teaching and journalism, culminating in his present position as Head of Journalism at Bond University and Co-Director of the Centre for New Media Research and Education. His fields of expertise and research interests include journalism practice, media law and online journalism. As well as teaching in the journalism program at Bond University he also hosts regular training courses for working journalists throughout Australia and the Pacific region and was guest lecturer in 2005 and 2006 at Oxford University's Media Law Advocates Training Programme.

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