

AUSTRALIA'S RIGHT TO KNOW



Report of the Independent Audit into the State of Free Speech in Australia

31st October 2007

Report Chaired by Irene Moss, AO

**The Independent Audit
of the State of Media Freedom in Australia**

IRENE MOSS, AO

31 October 2007

Australia's Right to Know Coalition
c/- John Hartigan
Chairman and Chief Executive Officer
News Limited
2 Holt Street,
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Dear Mr Hartigan

It is with pleasure that I publish the results of the audit for your coalition partners.

The audit reviewed legislation and practices related to free speech as it particularly affects the media in Australia today.

While difficult to generalise on the state of media freedom because of the diversity and spectrum of matters examined, if necessary to do so the audit would broadly conclude that free speech and media freedom are being whittled away by gradual and sometimes almost imperceptible degrees.

This observation accords with many of the suspicions and statements aired in public addresses by journalists and media chiefs of late, prompted by recent world rankings of media watchdog groups. Lower rankings for Australia resulted from some high-profile matters such as the introduction of tough anti-terrorism legislation and a couple of court cases.

One high-profile case was on the use of a conclusive ministerial certificate to block an FOI application on bracket creep, and another highlighted the need for shield laws to protect journalists from criminal conviction and the inadequate protection of the alleged whistleblower concerned. These rankings have prompted a closer examination of these and other areas of concern.

The audit's examination and resulting observations should ring alarm bells for those who value free speech in a democracy.

While Australia is generally accepted as a land of freedom and compares well internationally on many fronts on civil rights, this should not be taken for granted.

What the audit can observe is that many of the mechanisms that are so vital to a well-functioning democracy are beginning to wear thin. Their functioning in many areas is flawed and not well maintained.

We point to areas of general access to information where governments should be more open and accountable, the growing use of spin and the raising of barriers to mask information rather than reveal it - showing that the free flow of information is not just an issue of law and regulation, but one of a growing culture of secrecy and mutual mistrust.

Our research bears out the coalition's claim at the launch of your campaign that 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.

Freedom of Information laws and regulatory tools that are meant to facilitate the flow of information do not serve the public well on matters of government accountability.

The audit also looked at the many barriers to getting access to information in courts and found the area wanting.

Institutionalised support for whistleblowers, important for exposing corruption or maladministration, is either non-existent or flawed and administration of these laws is carried out with very little leadership commitment.

Shield laws are still not in a state to give adequate protection for journalists.

Compounding this deteriorating state of affairs, often legislation on an issue - be it about whistleblowers, FOI, privacy, access to court documents or other information - is inconsistent or lacking in uniformity from one jurisdiction to another. This inconsistency in legislation is found not only in its substance but also in its implementation processes. Even within jurisdictions the administration of suppression orders or conflicts in complying with privacy laws are evident.

Naturally, media organisations find this environment particularly difficult as it frustrates their role of providing information. This is clearly unsatisfactory and unless addressed will only contribute to the continuing backward slide towards a less informed society.

On the other side of the ledger, the audit did not examine how well the media performs or how well journalists adhere to their codes of conduct. That was not in the audit's brief, but the audit is only too well aware of criticisms levelled at the media for bias or inaccurate reporting.

However, quality of media performance should be irrelevant to governments' commitment to accountability and openness. It should be irrelevant to how well governments administer mechanisms which facilitate free flow of information and transparency. Two wrongs don't make a right.

I should record that in view of the time and resources available we have not been able to explore every area affecting free speech and media freedom. In the report we identify the subjects we have not covered. In some cases, further research may be warranted.

The related areas we explore resulted from talks on key areas of concern with the coalition.

Each particular topic presented specific areas of concern, some serious, some less so, some difficult to assess because of the difficulty, if not impossibility, of obtaining relevant information in that area.

It is difficult to make historical comparisons of the state of free speech and media freedoms in Australia given a lack of comparable data. However this audit will provide an historical starting point for future comparisons and that is important if we aspire to improve. It will then require courageous leadership from all sides: the media needs to be more responsible, governments and institutions need to be more open.

Finally, I would like to acknowledge the work of and thank the rest of the audit team—Peter Timmins, Jane Deamer, Geoff Briot, Erin Tennant, Alison Larsen and Johanna Dickson. My thanks also go to the coalition partners, journalists, lawyers, academics and others who provided us with submissions, comments and documents and some law firms for their research.

Yours truly

Irene Moss AO
Chair
Independent Audit into the State of Media Freedom in Australia

INDEPENDENT AUDIT OF THE STATE OF MEDIA FREEDOM IN AUSTRALIA

EXECUTIVE SUMMARY

There are no executive summaries for chapters 1, 2 and 3. Those chapters are of a summary nature themselves.

Chapter 4: Access to information

Government policy documents at all levels commit to providing information as widely as possible. However, honouring that commitment is subject to the government's discretion. Unfortunately there is mounting evidence that the lure of political advantage increasingly trumps principles of democratic transparency when governments decide to withhold or bias the release of information.

Some types of information require protection from disclosure. As well as privacy and commercial interests, information of potential security significance also needs protection. Governments strictly limit documents on security grounds: policy "is to keep security classified information to the necessary minimum". But over-classification limits information available to the public. It also imposes unnecessary, costly administrative arrangements and may bring security procedures into disrepute if classification is unwarranted. In a report in 2000, the Australian National Audit Office found that all organisations it audited incorrectly classified files, with over-classification the most common fault.

Public interest immunity

Public interest immunity has been relied on by government agencies, under both the common law and statute law, to refuse to provide documents or give evidence in court on the basis that it would be contrary to the public interest to do so. The claim is also made by governments on occasions to refuse to release documents to or answer questions from MPs. Claims to public interest immunity differ in the way courts and parliaments treat them.

Public interest immunity claims also extend to the functions of governments. One way of ensuring accountability of government is scrutiny and review by upper houses of Parliament (except in Queensland and the territories which do not have upper houses) of legislation, appropriation Bills and large government contracts, to use a few examples. Much of this is done on the floor of the house or in committees, in which the major parties and independents take part. This process also helps the greater flow of information through Parliament to the public, usually with the media as the vehicle.

But the practice of the Federal Government, particularly since it gained control of both houses of Parliament, has been roundly criticised.

Journalists' experiences

Overwhelmingly journalists complain they are denied access to information, particularly background information on government decisions. They say the flow of information is controlled, largely because of the centralisation of the source of government information. In what now appears to be the majority of cases, public servants are prohibited from giving journalists information directly. Journalists are either referred to the department's media section or the minister's office. Their experiences and comments provide a telling account of the flow of information from governments at all levels. This audit sets out comments from journalists across the country. Save for some slight editing, the words are reproduced verbatim.

News conferences

Canberra journalists say the news conference system has become worse under the Howard Government. Gallery journalists complain that conferences—now conducted in the US Presidential style—are short and do not allow free-ranging questions. The politician will say what he/she wants to say and not allow questions or provide only trivial answers. The media is usually given short notice, allowing journalists little time to research and prepare questions. Some journalists say certain media representatives are selected, rather than all being given the opportunity to attend. This style of conference allows the politician to side-step important issues by giving “soft” answers. In the words of one, the present type of conferences is “... not submitting yourself to scrutiny”. One senior journalist described it as “government by announcement”.

Talkback radio

Canberra-based journalists complain of the trend of the Prime Minister to use talkback radio to their detriment. These broadcasts allow politicians to make political statements without close questioning by political journalists. One journalist described them as easy avenues to reach a mass audience without facing “more difficult or less convenient questions on the national agenda”.

Spin

Journalists contributing submissions to this audit say that government PR staff all too often try to block or frustrate, rather than facilitate, their inquiries. Directing all inquiries through ministers' offices, restricting the government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to respond to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.

Chapter 5: Protecting whistleblowers and journalists' sources

No current legislation defines the terms “whistleblower” or “whistleblowing”, but eight Acts and three Bills across Australia deal with the subject.

Whistleblowing law in Australia varies widely between the nine jurisdictions—federal, six states and two territories. The types of disclosers and the nature of disclosures vary; the level and forms of protection vary; and the type and severity of penalties for reprisals, including breaches of employer obligations, vary.

There is significant inconsistency in whether a law applies to the public and/or private sector.

The limited scope of the whistleblower legislation has been criticised. Comprehensive application to all sectors needs debate. A clear public sector focus may be appropriate.

There is significant inconsistency in the types of wrongdoing about which disclosures can be made that trigger the relevant legislation. In some circumstances the conduct about which a disclosure is made is too general and outside the realm of whistleblowing. In other cases such conduct is too narrowly defined, for example, only unlawful behaviour. Only three laws (South Australia, Queensland and Western Australia) take a comprehensive approach to identifying the public sector wrongdoing that qualifies disclosures.

There are significant gaps in the nature and extent of protection provided. Whistleblowers need to be relieved of potential liability for their disclosure, such as the risk of disciplinary or criminal prosecution for unauthorised disclosure of information or civil action such as defamation. Damages are only available through employment, anti-discrimination or EEO tribunals. Only three jurisdictions provide injunction or compensation remedies for potentially or actually aggrieved whistleblowers.

The Federal Parliament has traditionally lacked a general power to implement comprehensive whistleblower legislation. It has used the corporations power to provide for protection in specific private sector areas. However, it does not lack power to legislate to protect its own employees and contractors.

It might be appropriate to have a single national legislative regime dealing with all aspects of whistleblowing (public and private). The two states (Queensland and South Australia) which have tried have produced unsatisfactory results.

A key issue arises from the distinction between leaks in general and the sub-class of leaks that are public interest disclosures (PIDs). In short, it is logical that if there is a public interest in such disclosures then their messengers should be encouraged and protected rather than shot at.

A strong case can be made for uniform public interest disclosure legislation. A new-model federal law should at least protect whistleblowers who disclose to the media after making a reasonable attempt to have the matter dealt with internally, or where such a course was impractical.

Journalists in Australia are inadequately served by shield legislation and the common law in relation to their ability to protect the identity of their sources.

Particularly in relation to the new shield provision in the Commonwealth *Evidence Act*, since any unauthorised communication of information remains criminalised even where it is a PID, this exception seems bound to apply in nearly all cases of leaks of information to journalists. Hence the privilege apparently offered is a sham.

Improving Australian shield laws will be to little effect in relation to government information if the sources whose identity those laws are designed to protect face exposure through a conjunction of political forces. That conjunction, at least at Commonwealth level, involves a dogged refusal to provide substantial legislative protection to whistleblowers together with a relentless determination to track down the source of disclosures which the aforementioned refusal ensures remain “unauthorised”. That determination was perhaps best expressed by the Secretary of the Prime Minister’s Department, Peter Shergold, who was quoted as saying “if some people seem surprised that I have called in the police to deal with leaks, they shouldn’t be—I always have and I always will”.

There are in essence two approaches to shield legislation and the guidance it provides the judiciary. The first rests on the presumption that disclosure of journalists’ sources is necessary unless there is some case made out to resist disclosure. In short, the onus is on the journalist. The alternative is that disclosure of sources is not necessary and a case must be made out on the basis of some compelling public interest as to why the presumption against disclosure should be overturned.

Clearly Australia has a long way to go before its legislation embodies the desirable second alternative.

There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge only on strictly limited grounds of compelling public interest.

Chapter 6: Freedom of information

FOI laws work effectively and reasonably consistently when they are used to provide access to personal information about the applicant. A range of factors limit their effectiveness in ensuring access to documents relevant to government accountability—the very reason they were set up in the first place.

No government, federal, state or territory, has taken sustained measures to deal with an enduring “culture of secrecy” still evident in many agencies. There are few visible, consistent advocates of open government principles, within government systems and leadership on FOI is lacking.

FOI performance is patchy across all governments. In some agencies applications are managed in a professional manner and decisions on access reflect the law, its spirit and intent. In other cases the FOI process involves delay, high cost, and what could be seen to be obstruction, often suggesting attempts to protect politically sensitive information.

Delay:

- Some requests can take months or even years to resolve despite the fact that a limited statutory deadline applies to the processing of applications.
- A request in April 2005 to the Department of Defence for documents on Australia's position regarding rendition is still awaiting a determination.
- An application was made for the results of public opinion surveys carried out for the Department of Employment and Workplace Relations to assess the success of about \$32 million spent advertising the WorkChoices law. The department deferred access until later this year, presumably after the election. The reason for the delay was that a government committee wanted to see all the results of the surveys together. The department decided to withhold them all until such time. Using this argument, no results of any surveys ever need be released provided the government claims to have plans to conduct further surveys.
- In 2005-2006, 25 per cent of applications to federal agencies for non-personal documents took longer than 90 days to process, three times longer than the statutory time of 30 days. The Victorian Ombudsman reported only 56 per cent of decisions by government departments in 2003 were made within the statutory time of 45 days. Nearly 21 per cent of decisions took more than 90 days. Over 40 per cent of requests being handled by Victoria Police at any time during the period covered by the Ombudsman's review were taking more than 45 days.

High cost:

- 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.
- Decision making time chargeable to the applicant can run to hundreds of hours and thousands of dollars in charges. Included in an estimate of fees of \$12,718 for access to documents about the effect of global warming on the Great Barrier Reef are charges for 538.95 hours for making a decision on the status of the documents.

Federal – State Differences

Associate Professor Anne Twomey of the University of Sydney School of Law carried out research on the *Australia Acts* 1986. The Acts were passed by all Australian parliaments to sever residual links with the United Kingdom. She reported:

The Commonwealth was a completely different story [from other jurisdictions involved]. After a bureaucratic process of meetings, submissions, reports, consultations, vettings, demands for ASIO security clearances, and scandalous delays lasting almost three years, only a small proportion of the Commonwealth's documents, described by officials as 'the innocuous ones',

were released by the Commonwealth Attorney-General's Department. The Prime Minister's own department still has not managed to release a document after three years. Access to legal opinions was also formally denied by the Attorney-General's Department, despite the fact that they were more than 20 years old. In contrast, the states, the United Kingdom and the Special Committee of Solicitors-General released their legal opinions.

The existence of powers in the Federal Act for the issue of conclusive or ministerial certificates, and limited rights of review of the decision to issue a certificate, is inconsistent with the scheme of the legislation.

Common Problems

Claims that FOI is achieving its intended purpose, including opening government activities to scrutiny and criticism, are not substantiated by the evidence.

In the federal arena in particular, FOI is marked by a high degree of legal technicality which dominates considerations about whether disclosure is in the public interest, or may demonstrate harm to an essential public interest.

There are inadequacies in the design of the laws; too much scope for interpretation of exemption provisions in ways that lead to refusal of access to documents about matters of public interest and concern; cost barriers to access; and slow review processes that often fail to provide cost-effective resolution of complaints.

Given the original objectives of FOI, there is a need for clarification about the extent to which advice to government should be based on notions of confidentiality. While some confidentiality about some advice in some circumstances may be appropriate, blanket claims seem counter to the objective of informing public debate, and accountability for government decisions.

Chapter 7: Anti-terrorism and sedition

Australian anti-terrorism laws have been designed to significantly reduce the judicial watch on the executive power inherent in their operation. Even where such oversight is permitted, the laws restrict the media's ability to report and curtail the ability of people to communicate with journalists and others. While we discern general acceptance (including among media organisations) that threats from terrorism require a solid response, the essential issue is the extent to which it is reasonable to sacrifice basic freedoms in the cause of defending them.

The effect of anti-terrorism legislation means we are almost certainly unaware of the number of cases in which the legislation has been applied and the extent to which reporting on them has been prevented.

At least seven federal Acts provide for substantial penalties for those who breach their provisions.

The *Criminal Code Act 1995* defines a "terrorist act" in section 100.1. The definition is broad. Vagueness in this area always invites the apprehension (if not ultimately the

reality) of abuse in those, including the news media, potentially affected by the legislation.

The *Australian Security Intelligence Organisation Act 1979* provides for the issue of warrants to question and detain people (clearly including journalists) where it is reasonably believed the warrant “*will substantially assist the collection of intelligence that is important in relation to a terrorism offence*”. Again, this is a broad definition, characterised by vagueness.

The obvious problems with section 9A of the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* relate to the vagueness of the phrases “indirectly counsels or urges” and “indirectly provides instruction”.

An example: Following clearance by the AFP, the DPP and the Classification Board, of eight books seized from Muslim bookshops, the federal Attorney-General, Philip Ruddock, in July 2006 referred the books to the Classification Review Board. It refused classification of two books on the basis that they promoted “jihad” and incited terrorism. The other six were given unrestricted classification. These were the first two books banned in Australia since 1973.

Once tried in relation to terrorism, the urge to ban can spill into other areas. In January 2007, after approval of Dr Phillip Nitschke’s euthanasia manual *The Peaceful Pill Handbook*, the Attorney-General referred it to the Classification Review Board. This resulted in the book being banned at the end of February 2007.

Sedition

The last prosecution for sedition in Australia was in 1960 when Brian Cooper was sentenced to two months’ jail with hard labour for urging the natives of Papua New Guinea to demand independence from Australia. This followed the two previous cases, both in NSW—an unsuccessful prosecution in 1953 and the sentencing in 1950 of William Burns to six months’ jail for writing seditious articles.

The *Anti-Terrorism Act (No. 2) 2005* repealed most of the existing sedition provisions of the *Crimes Act 1914* and replaced them with new provisions. These new provisions have been widely criticised, especially in submissions to the Australian Law Reform Commission review in 2006. Dr Ben Saul of the Gilbert+Tobin Centre of Public Law at UNSW submitted that there was no case for “modernising” sedition law because of a history of its manipulative use against legitimate political opponents; the prosecution of trivial statements which lack any real connection to violence; its propensity to unjustifiably interfere with freedom of expression and opinion; its historically vague, uncertain and unpredictable scope; its modern redundancy in light of many overlapping (but more precisely framed) offences; its disuse over many decades; and widespread public unease about—and considerable ridicule of—sedition offences.

The principal problems with the provisions have been identified as:

- the imprecision of the key verb “to urge”;
- it is no longer necessary to prove an intention to promote ill-will and hostility to establish seditious intent;
- there is no requirement that the person “urging” have any particular intention, such as in the previous *Crimes Act*;
- violence need not be violence incited within the Australian community—it would suffice that the urging occurred to a group of a different nationality or political opinion to use force against any other person in any other place, the effect of which would “threaten” the peace of the Commonwealth;
- the urging need only be to engage in conduct that provides assistance to a (vaguely defined) organisation engaged in armed hostilities against the Australian Defence Force. This could extend to verbal support for insurgent groups who might encounter the ADF in their country;
- inciting terrorism is unlawful under pre-existing law. This indicates these provisions will extend to the murkier concept of “indirect urging” as well as condoning or justifying terrorism or even abstract opinions about that conduct;
- section 80.4 extends the geographical reach of the provisions via the *Criminal Code* so any “offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia”. It covers any person of any citizenship or residence. There is no foreign law defence. It in effect creates a universal jurisdiction.

Chapter 8: The justice system

Despite its explicit acceptance by governments, the judiciary, the media and the public, the principle of open justice has been eroded over recent years.

A main contributor has been the threat of terrorism. However, limits on access by the media to court documents and information and an increase in suppression orders (particularly in the lower courts) are examples of where the principle is seen as threatened.

Journalists report not only difficulty getting access to court documents and information, but also a lack of clear guidelines on such access. They sometimes report a virtual capriciousness by some members of the judiciary and court officers when deciding whether to allow access.

There is no uniform approach to the rules of access—even within a jurisdiction. For example, the Victorian Supreme Court has a clear practice but the Magistrates’ Courts do not. One Magistrate’s Court may make access easier, but a court in a nearby suburb may make it extremely hard. It often depends on the attitude of the magistrate or registry staff.

In the jurisdictions with media liaison officers the system appears to work more efficiently and more predictably.

There is also lack of uniformity about rules relating to the identification of children, whether they are accused of crime, victims of crime or witnesses. Nor is there

uniformity on the naming of the accused in cases involving children, which could identify the child or children involved.

Across all jurisdictions there are problems with suppression orders. Sometimes there is even difficulty in getting clear information on whether a suppression or pseudonym order has been made and the reasons and legal bases for making it.

Courts appear to be making suppression orders far more often. The scope, precision and duration of the orders is sometimes not given or not easily found out. Different practices and methods across jurisdictions for informing the media that a suppression order has been made or amended sometimes expose the media unnecessarily to an inadvertent breach of the order.

There is confusion about the standing of media organisations to appear in relation to the making of, amending of or appeal against suppression orders.

The lack of uniformity in the legislation and rules and practices in relation to both access to court information and suppression orders poses added problems for media organisations which operate across borders and creates anomalies from one jurisdiction to the next.

Chapter 9: Privacy and defamation

Privacy

Media organisations and journalists recognise privacy as a value to be respected.

It is a right recognised in both international and Australian law and both it and freedom of expression are important in a democratic society.

The concept of privacy is still evolving in the light of technological changes that present new challenges about intrusions into private life.

Even without these challenges, Australia's privacy laws are complex and confusing, with large areas of overlap, gaps and inconsistencies. They have been referred to the Australian Law Reform Commission, which should give an opportunity for analysis, discussion and debate about how best to regulate, particularly in areas associated with personal information. A final report is due in March 2008.

Proposals for some changes to aspects of the system of regulation of the media concerning compliance with privacy requirements are currently the subject of public consultation. A proposal for a law on breach of privacy is also at the discussion stage. The cause of action proposed is not directed solely towards the media, but deals with a range of invasions of privacy.

Media organisations have made or are making submissions to both the Australian and NSW Law Reform Commissions arguing that the case has not been made out for a new law on invasion of privacy, either in NSW or more broadly in Australia.

They submit that the case for such a law has not been made, that the introduction of a statutory right to privacy "would substantially alter the balance by placing

fundamental restraints on the media's role in upholding freedom of communication", and that existing privacy and publication laws adequately protect privacy rights.

Confusion and uncertainty about the operation of privacy laws has led to claims that information in certain circumstances cannot be disclosed "because of the *Privacy Act*" (BOTPA).

While BOTPA may be a myth, frequent resort to this mistaken justification for refusal of access to information strongly supports the need for reform and simplification of the laws. The myth has been reality many times when privacy laws have been cited as reasons for refusing access to information, the disclosure of which would arguably be in the public interest.

The Australian and NSW LRCs have acknowledged the importance of freedom of expression and the need to retain a right to publication in the public interest.

Defamation

Defamation law provides important protection against damage to reputation. The uniform laws now in place are a significant improvement in balancing freedom of expression and the right to reputation. Evidence suggests a reduction in the writs issued against media organisations since the laws came into effect in January 2006.

However, some have expressed the view that the reforms did not go far enough. The Australian Society of Authors, for instance, says:

Australia's authors suffer more than most from censorship because we cannot afford to defend our legal rights, truncated as they are. Not one book in a thousand earns the author and publisher enough to cover the average cost of defending a defamation suit, \$140,000.

And to the disappointment of some, Australian defamation law contains no "public figure" test of the kind available in the United States.

Australia also appears to lag behind other countries in ensuring protection against liability where matter has been published in the public interest after reasonable precautions have been taken by the publisher.

It has been suggested that it is still too early to tell whether the uniform laws, in practice, represent a better balance of the rights and interests of individuals and others who write and publish. Much will depend on the approach taken by the courts.