

Why Australia needs a Media Freedom Act

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During the campaign to release three Al Jazeera journalists from prison in Egypt, journalists, politicians, diplomats, human rights campaigners and the public united to criticize what was widely seen as an assault on press freedom. The US president Barack Obama publicly called for the trio's release, and when they were convicted and sentenced to seven years, Australia's then foreign minister Julie Bishop declared:

We understand that Egypt has been through some very difficult times ... but this kind of verdict does nothing to support Egypt's claim to be on a transition to democracy...Freedom of the press is fundamental to a democracy and we consider this verdict part of a broader attempt to muzzle the media freedom that upholds democracies around the world (Safi, 2014).

The trio (including author Peter Greste) had been arrested, tried and convicted on terrorism charges. The Egyptian government insisted it respected press freedom (and pointed to new provisions in its own constitution that appeared to guarantee it), but argued that it had a responsibility to protect its own people from extremist militants determined to destroy the state. On paper, the laws used to lock up the trio were not particularly onerous or unusual. They were charged with "aiding and abetting a terrorist organization", "advocating terrorist ideology", "financing terrorism", and "broadcasting false news with intent to undermine national security". When he was challenged about why Egypt was locking up so many journalists, the Egyptian interior minister, Mohamed Ibrahim Moustafa, scoffed, declaring, "We don't have journalists in prison. Only terrorists."

As outrageous as the case of the Al Jazeera three appeared at the time, human rights groups say it is merely one example of a much more troubling global trend. According to the most recent analysis by the advocacy group, Freedom House, "media freedom has been deteriorating around the world over the past decade, with new forms of repression taking hold in open societies and authoritarian states alike" (Repucci, 2019). As Freedom House argues, while these assaults are a problem for journalists, "their impact on the state of democracy is what makes them truly dangerous."

What of Australia? How does our country fare in that world-wide deterioration? It was a question that University of Queensland researchers began answering in 2018. An early review of

literature on the state of press freedom in Australia found very little academic work. However, it did unearth a paper from 2009 by the law scholar Lawrence McNamara (McNamara, 2009), who studied the impact of a raft of national security legislation passed in the wake of the 9/11 attacks.

McNamara found that while there was a great deal of concern about the way the laws *could* affect the work of journalists, he could find no measurable impact. As unremarkable as that study was at the time, it has since become a useful baseline for further research into the effect of legislation passed in the intervening decade.

Our research involved two phases, the first examining the complex and intricate web of legislation itself. Law scholar, Dr Rebecca Ananian-Welsh, unpicked the most draconian of the 82 laws national security passed since 9/11, to map and understand the ways they affected journalists. While many of those laws intrude on civil liberties and on press freedom in particular, Ananian-Welsh found there were two broad areas of concern: enhanced data surveillance powers and a suite of secrecy offences introduced in late 2018.

The most infamous example of surveillance powers is the metadata retention scheme of 2015. That gives more than 20 government agencies (not just the security services) the right to access almost any Australian's metadata without a warrant. Recall that "metadata" is not the content of communications, but the information *about* the communications. It includes phone numbers you text and call, the time and place you make those calls, information about the websites you visit, the location data on your mobile phone and so on. The CIA says that by triangulating the various bits of apparently innocuous information, it can learn so much from metadata alone, that it does not *need* to know the contents of your communication (Cole, 2014). Under the metadata retention laws, the only exception to warrant-free access is journalists, but hearings for 'Journalist Information Warrants' take place in secret, with no information available on the numbers involved or how they actually function (that kind of data is classified). Thus, there is no information as to whether those hearings offer any measure of protection for either journalists or their sources (MEAA, 2017).

To get around that problem, journalists and others have been using encrypted communications. But in a kind of arms race counter-strike, the government responded with the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018, which effectively compels the telecoms companies to help the security services hack into any communications. Ananian-Welsh says "this could include covertly installing weaknesses and vulnerabilities in specific devices, circumventing passwords or allowing encrypted communications to be decrypted" (Ananian-Welsh, 2019).

None of this would be a problem for press freedom if the laws included robust exclusions for journalists and their sources, publishing stories that avoided revealing genuinely damaging national security information, and genuinely exposed stories in the public interest. But the laws have been drafted so loosely that they criminalize journalism that in the past would have been considered both legitimate and necessary.

And what of the new secrecy bills? In 2018, the government introduced a suite of toughened counter espionage laws, that it said was designed to prevent foreign powers intervening in local elections and political decisions. Commonwealth officers who leak classified information 'likely to cause harm to Australia's interests' face seven years in prison, and if the information is security classified or if the person held a security classification, then they may have committed an 'aggravated offence', punishable by up to 10 years behind bars. On the face of it, there is nothing wrong with wanting the tools to stop civil servants from passing state secrets to Australia's enemies, but the new laws go much further. The phrase, 'likely to harm Australia's interests' is so

vague that anybody leaking information about, say, Australian agents bugging the offices of a weaker neighbour in trade negotiations, becomes guilty of spying (see the Witness K case, in which an ASIS agent revealed such Australian tactics in talks with East Timor) (Knaus, 2019).

Once again, this would not be a problem if the law acknowledged the role that journalism plays in keeping the system honest. But it does not. Instead, the law exposes journalists and their sources to overbearing investigation; it makes it impossible for journalists to protect their sources (one of the most fundamental tenets of public interest reporting); and it criminalizes reporting that is more likely to embarrass politicians than damage Australia's interests.

This is not a hypothetical problem. When we began our research, it became clear that it is not necessary to throw journalists and their sources in prison for the law to make its impact. Using McNamara (2009) as a starting point, University of Queensland researchers went into newsrooms to speak to reporters, editors and lawyers to find out how things have changed in the decade since this research was published. While it is impossible to quantify stories that haven't been told, what the researchers learned should be troubling to anybody concerned about the health of our democracy.

In the decade since McNamara published his study, the chilling effect on Australian journalism has advanced. ABC Editorial Policy Manager, Mark Maley, says national security laws have transformed the way his journalists interact with their sources.

The consequences of being outed as a source are potentially criminal. It is our responsibility to tell them the way they have contacted us has compromised any possibility of keeping their identity confidential. There are stories that should have been told and have not been told because of a combination of the ASIO Act, the Espionage and Foreign Interference Act and metadata laws. That's the chilling effect in practice (Maley, 2019).

Across the more than 40 interviews we conducted the story was the same – the chilling effect is real. Journalists and the news organisations that employ them are operating under increasingly challenging conditions.

Then came the raids by Australian Federal Police in June 2019 that appeared to confirm all that we had suspected. On two consecutive days, AFP agents executed search warrants on journalists from two news organizations looking for evidence of their sources concerning two separate stories. In the first, News Corp journalist Anneka Smethurst had exposed the way civil servants were considering expanding the powers of Australia's international electronic eavesdropping agency, the Australian Signals Directorate, so that it could snoop on ordinary Australians. Whether it is appropriate or not to make such a change is beside the point. What the story exposed was a secret conversation that should have been taking place in the open so that we could all be involved. Nobody has pointed to any information that genuinely damaged national security, and the story was clearly in the public interest, yet the police went after her and her sources.

The very next day, AFP agents raided the ABC's headquarters in Sydney, looking for evidence of the sources for the 'Afghan Files' – a series of documents that alleged Australian Special Forces had been involved in war crimes in Afghanistan. Once again, nothing was revealed that damaged national security (beyond the reputation of our military), and there was a clear public interest in knowing what our soldiers have been doing in our names. With both stories under investigation, something appears to be wrong.

In response to the subsequent public outcry, the government announced an inquiry into press freedom and national security by the Parliamentary Joint Committee on Intelligence and Security, while the Senate also set up its own second inquiry. In doing so, the government seemed to acknowledge a problem worthy of serious investigation.

In their submissions, several groups recommended a series of tweaks to existing legislation, all admirable suggestions that are likely to have a significant impact on the way each law works, but with so many laws on the books, those alone won't achieve the desired result. Nobody is talking about reforming the Defence Act or the Criminal Code, for example. Yet in going after the ABC journalists, the police obtained a warrant to investigate whether one of them had, "unlawfully obtained military information, contrary to section 73A (2) of the Defence Act 1903" and whether they had "dishonestly received stolen property ... contrary to section 132.1 of the Criminal Code Act 1995" (Lyons, 2019). With that kind of creative use of the law, it is almost impossible to pick through every statute, reforming each in a way that protects press freedom.

The ultimate aim is to free legitimate journalism from overbearing legislation, so it is able to perform its 'fourth estate' function effectively, while stopping reporters from revealing a narrowly defined set of genuinely damaging information. If that is the case, what is required is a broad statement of principle that, in Ananian-Welsh's (2019) words, "filters down through all the loopholes of the entire legal code". In other words, it requires a Media Freedom Act.

Such an act would set out in law the role that the media plays in our democracy. It would acknowledge its vital watchdog function, enshrining it in our legal code. The system hasn't always been pretty or edifying, but has been effective in exposing corruption and abuses of power. Such a statute would act as a restraint on legislators from passing laws that either directly or indirectly intrude on press freedom without a clear justification. It would compel legislators to include clear protections for legitimate journalism whenever there is a risk of it being curtailed; and it would act as a benchmark for the judiciary, forcing judges to consider the public interest and press freedom whenever they are hearing cases involving the media, regardless of whether a specific law actually includes defences for the press.

A Media Freedom Act is not the perfect solution. That would be a constitutional amendment, similar to the First Amendment in the United States. The latter has not only helped protect journalism throughout the American legal code; it has established a culture of openness and transparency at all levels of government that even Donald Trump has not been able to shut down. The First Amendment guarantees freedom of expression, association, religion and the press. Those principles are hard wired into the DNA of US law, in ways that unarguably strengthen its democracy. In particular, it has framed the relationship between government and the media, ensuring a degree of press oversight that is non-existent in Australia.

Perhaps counter-intuitively, this *is* a matter of national security. If the job of our security agencies and our government is about anything at all, it must surely be to protect our system of democracy that has made us one of the safest, most prosperous and most stable countries on the planet. Undoubtedly, we need to make sure that our security services have the tools they need to deal with rapidly evolving threats. But if, in trying to keep us physically safe, our legislators do violence to one of the key pillars of our democratic system, then national security is not served.

Author bios

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