

FREEDOM OF THE PRESS IN THE NEW AUSTRALIAN SECURITY STATE

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The best safeguards we have for our democracy are a robust parliamentary process a free press, and an incorruptible judiciary. If you've got those three things, you've got a free country. If you don't have all of those three things you don't have a fully free country.

– Prime Minister John Howard, 30 October 2005¹

On 14 October 2005, the Chief Minister of the Australian Capital Territory, John Stanhope, published on his official website² a copy of the draft Anti-Terrorism Bill 2005 (Cth) proposed by the Australian government to the states, and intended for general publication after 31 October 2005 and enactment before the end of the year. The copy was labelled 'DRAFT – IN CONFIDENCE', and as soon as news of its publication reached the Prime Minister's office, there were concerted attempts by that office and senior bureaucrats to have it taken down.³ Those attempts failed and, in the days that followed, a chorus of analysis and criticism swelled nationally and internationally, including from former Prime Ministers Malcolm Fraser (Liberal) and Gough Whitlam (Labor), former Chief Justices Brennan and Mason of the High Court, the Law Council of Australia, Human Rights Watch, legal academics, various associations of lawyers, Nobel Laureate novelist J M Coetzee and other cultural identities, community groups, and journalists.

In the parliamentary sphere, there was strong criticism from two of the minor political parties, the Greens and the Australian Democrats, muted reports of uneasiness from within the federal Liberal Party, and belatedly and minimally, criticism from the Australian Labor Party Opposition in the federal Parliament and state Labor governments. Labor Opposition Leader Kim Beazley had initially attacked the laws for not being strong enough, but subsequently

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1 Laurie Oakes, Interview with John Howard (Sunday Program, 30 October 2005) <http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1901.asp> at 7 November 2005.

2 John Stanhope Official Site, *Draft-in-Confidence: Anti-terrorism Bill 2005 (Cth)* (2005), <http://www.chiefminister.act.gov.au/docs/B05PG201_v281.pdf> at 5 November 2005.

3 Michelle Grattan, 'Senate the Stumbling Block to Parliamentary Reform', *The Sun Herald* (Sydney), 23 October 2005, 31.

criticised the 'shoot to kill' provisions, ignoring the larger civil rights issues. Queensland Premier Peter Beattie ignored the substantive civil rights issues, but queried the constitutional validity of the proposals. Labor was reportedly keen to prevent a wedge from being driven between the Federal leadership and the state Labor premiers, who supported the contents of the Bill except for the 'shoot to kill' provisions.⁴ At the time of writing, the final draft of the Bill has not been tabled in Parliament, but the debate about constitutionality has mainly focused on the role of the judiciary in approving preventative detention. There has been some comment from journalists in the press about the chilling effect of the sedition provisions. The Media Entertainment and Arts Alliance (the journalists' trade union) on 3 November 2005 issued a statement on the secrecy and disclosure provisions, which are the main focus of this article.⁵

The unfolding debate was a textbook example of the role of the media in a liberal democracy,⁶ facilitating rational and critical debate within the public sphere of the threatened depredations of governments, both state and federal, against the democratic rights of the citizenry. From this perspective, the citizenry couldn't depend on their parliamentary representatives (with the exception of the few minor party MPs and John Stanhope) and had to mobilise themselves within the public sphere to attempt to defend their rights. The free flow of information, in spite of government attempts to prevent it, was essential to the debate, as was the media's ability and willingness to take up the issue.

Most of the discussion and criticism of this Bill, and the post-2001 raft of anti-terrorism legislation more generally, in academic journals and the media, has focused on the civil rights of individuals who may become enmeshed with police and security forces under its provisions. In this article, I want to consider the impact of the legislation on the rights of Australians to the democratic and participatory functioning of a public sphere, where citizens collectively have the right and ability to be informed about the actions of the government, to debate their merits and form opinions, and to hold the government accountable. The role of the media in this process is central and poses challenges for the conduct of journalists, which is my focus in this article.

Though I will concentrate on several specific provisions of the legislation, there are over 80 different laws dealing with threats of terrorism in both state and federal jurisdictions. These laws have to be seen as a rapidly developing whole. They are, as yet, largely untested in case law, and their provisions may reinforce but also potentially contradict each other. From the point of view of the state, the citizenry and potential terrorists, they comprise an apparatus of control whose intersecting provisions constitute the legal terrain where threats to both the physical safety and civil rights of Australians will be mounted and contested.

4 David Humphries, 'Voters Say Yes to Terror Australis', *The Sydney Morning Herald* (Sydney), 25 October 2005, 1.

5 Alliance Online, *Anti-terror Legislation Threatens Freedom of Expression* (2005) <<http://www.alliance.org.au/content/view/108/76/>> at 5 November 2005.

6 See, eg, Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (1989); John Keane, *The Media and Democracy* (1991).

Within this terrain, the scope for journalists and their media outlets to pursue their role will be of central importance to the nature of democracy in this country.

Precisely what might occur in the Australian context was illustrated in Britain in the wake of the bombings on the London Underground on 7 July 2005. On 22 July 2005, Brazilian Jean Charles de Menezes was surveilled as he left his home and followed by security forces to a train station. After he entered the station, he was apprehended by police, one of whom pinioned his arms while another fired seven bullets into his head. Police immediately confiscated the closed-circuit video recording of the incident, and later claimed that the closed-circuit television system had failed to operate at the time of the shooting, despite the fact that it functioned normally both before and after the incident. Police sources were quoted in the media asserting that Menezes was wearing a bulky jacket that could have concealed a bomb, that he failed to buy a ticket and leaped over the ticket turnstiles, and that he attempted to flee when security forces hailed him. All of these claims were subsequently shown to be false. Menezes was the victim of an authorised police killing with no extenuating circumstances beyond a heightened level of anxiety and trepidation on the part of the security forces. Whatever the personal ramifications of the tragedy for the officers involved, it was evident to all that British police were prepared to lie and perhaps destroy evidence in order to evade accountability for the killing.

If similar events had happened in Australia and the Australian Security Intelligence Organisation ('ASIO') had been operationally involved under a warrant, then under s 34VAA of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') any disclosure of 'operational information' about this incident could have been punished by five years imprisonment. This type of penalty is guaranteed to make journalists, editors and publishers think long and hard before publication. Moreover, the scrutiny of police action in the London case could have been severely punished in Australia under this legislation. What has been described by politicians and police in London as a 'tragic mistake', and by civil liberties commentators and some journalists as an 'extra-judicial execution',⁷ in the Australian situation could also have become a 'disappearance' on the 1980s Argentine model.

The proposed secrecy provisions relating to preventative detention by the Australian Federal Police, and the existing provisions applying to warrants and operational information by ASIO, effectively create a secret police whose actions are beyond public discussion and scrutiny. Some commentators and journalists have defended these developments. For example, Patrick Walters, National Security Editor for *The Australian*, in an article headlined 'Why You Won't be Locked Up',⁸ reported comments on the proposed Anti-Terrorism Bill 2005 (Cth) by former Liberal Prime Minister Malcolm Fraser: 'These are powers ... [which] should not exist in any democratic country', and by former Chief Justice of the High Court Sir Anthony Mason: 'Neither ASIO nor the Attorney-General is a

7 Brian Toohey, 'Read With Care: Seditious Material', *The Australian Financial Review* (Sydney), 22 October 2005, 63.

8 Patrick Walters, 'Why You Won't be Locked Up', *The Weekend Australian* (Sydney), 22–23 October 2005, 19.

suitable guardian of individual rights'. Nonetheless, Walters went on to reassure readers that '[t]he fears of many Australians that basic freedoms in Australia would be sharply eroded [by ASIO in exercising its post-2003 powers] have been misplaced'.⁹ He suggested, perhaps with tongue in cheek, that '[t]he essential challenge for our police forces flowing from the proposed terror laws will be to retain the trust and confidence of the community in the exercise of their new powers'.¹⁰ The demographic dimension of the divisive politics underpinning the new legislation are implied by the 'you' of the headline. *The Australian* is punting that its target readership will not be of interest to the security forces – that 'you' won't be locked up, but 'they' might be.

The capacity and willingness of the various Australian intelligence, security and police forces to assess a situation correctly and act with respect for legal rights has come into some doubt in recent times. Consider, for example, flawed allegations about weapons of mass destruction in the lead-up to the 2003 invasion of Iraq, Cornelia Rau's detention, Vivian Alvarez Solon's deportation, the deportation of Scott Parkin, and recent suggestions from the Commonwealth Ombudsman that a number of people may have been wrongfully held in immigration detention for up to seven years.¹¹ Looking back to the 1970s, then federal Attorney-General Lionel Murphy was moved to raid ASIO offices in order to get access to information he believed was being wrongfully denied him,¹² and various states disbanded their police forces' Special Branches because of their widespread reputations for bumbling incompetence and politically prejudiced assessments. The recently re-published autobiography of journalist Wilfred Burchett,¹³ contains intelligence assessments of Burchett that make hilarious reading. In Victoria, the discredited files of the Special Branch were ordered destroyed, but despite repeated assurances to that effect by the Police Commissioner, the Police Minister and the shadow Police Minister, it emerged that the files had in fact been secreted away for future reference.¹⁴

None of the foregoing argument is intended to suggest that Australia doesn't face a very serious security threat from terrorist violence, probably exacerbated by our military offensives in Iraq and Afghanistan.¹⁵ This may well require a highly skilled police response based on excellent intelligence, and there are certainly competent and honest members of the intelligence and security forces. I do mean to suggest that Australians have no contemporary or historical basis for confidence that their security and intelligence forces won't, from time to time, accommodate political pressures and prejudice in their activities, or make

9 Ibid.

10 Ibid.

11 Lee Glendinning, 'Held Seven Years by Mistake: It Gets Worse,' *The Sydney Morning Herald* (Sydney), 26 October 2005, 1.

12 Jocelyne Scutt (ed), *Lionel Murphy: A Radical Judge* (1987).

13 George Burchett and Nick Shimmin (eds), *Memoirs of a Rebel Journalist: The Autobiography of Wilfred Burchett* (2005).

14 Gary Hughes and Gerard Ryle, 'The Secret Police', *The Age* (Melbourne), 6 October 1997, 6; 7 October 1997, 1, 6, 7; 9 October 1997, 1; 10 October 1997, 2; 16 December 1997, 1.

15 For research relating to this potential, see Robert Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism* (2005).

grievous mistakes and try to cover them up. The best way to minimise these aberrations is to maintain a healthy scepticism, exercised through public scrutiny and accountability.

Interestingly, in his 2005 review of the impact of the British anti-terrorism laws, Lord Carlile acknowledged the need for journalists and publishers to be able to pursue their professions in the interests of both public safety and the democratic process, although he does endorse most of the restrictions otherwise imposed by the legislation.¹⁶ To date, no such acknowledgement has been forthcoming from Australian official sources.

The secrecy provisions of the current and proposed legislation seriously inhibit the capacity of the Australian media, and through them the public, to learn about and scrutinise the performance of governments and their agencies in protecting our lives, our well-being and our democratic civil rights. But they are not the worst of it. A far more insidious threat resides in s 34G of the *ASIO Act*, which already confers powers on ASIO to require journalists to answer questions and provide any requested documents. These powers effectively turn journalists into police agents, and destroy any professional standing they might have in dealing with communities alleged to be linked to 'terrorism' ('source communities') because any such source talking to a journalist will have to assume they are talking to ASIO.

Under s 34 of the *ASIO Act*, ASIO can seek the approval of the federal Attorney-General and an 'issuing authority' (a federal magistrate or judge) for the issue of a warrant for the detention and questioning of any person if there are reasonable grounds for believing that the warrant will substantially assist the collection of important intelligence relating to a 'terrorism offence'. A 'terrorism offence' is defined very broadly and 'clearly catches actions that fall outside an "intuitive" definition of terrorism, and certainly criminalises actions that fall far short of the catastrophic attacks that motivated the legislative changes'.¹⁷ There are no provisions for exemptions for professional confidences under the Act, and clearly journalists are included. The penalties for refusing to answer questions, falsely answering questions, refusing to supply any document or thing, or destroying any requested document or thing, are all five years imprisonment. The evidentiary burden of proof lies with the defendant.

In order to do their job, journalists have to engage with communities, including business people, sports people, politicians, trade unionists, and so on. They have to become knowledgeable about the personalities and activities of those communities, and in the process become privy to a lot of information, much of which will be private, off the record, gossip, benign or malicious. Most of this information will never be further explored or published, but it forms an essential context that enables journalists to do their job, and depends on the community accepting the journalist as a bona fide, independent and fair receiver

16 Lord Carlile of Berriew, *Lord Carlile Report on Terrorism Bill* (2005) <<http://www.timesonline.co.uk/article/0,,22989-1822736,00.html>> at 5 November 2005, [16], [18], [21]–[28], [38], [72]–[75], [81], [87].

17 Sarah Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' (2004) 27 *University of New South Wales Law Journal* 428, 432.

and analyst of information. To be perceived as a police agent, willingly or unwillingly, fatally compromises that relationship with source communities, which consequently become isolated from the media.

Most journalists and potential sources will flee from a relationship that is inherently untrustworthy and liable to provoke police interest with potentially severe outcomes. Most journalists will not want to know about the detailed life and issues within communities under suspicion, because they might come to be seen by ASIO as a line of access to information about such communities, and would thus be forced to compromise their professional integrity under threat of imprisonment. Similarly, communities will avoid contact with the media, who will be seen as potential police informers, and so they will withdraw from participation in public life. Communities themselves will fracture, dividing those considered under suspicion and those seeking to avoid any suspicion.¹⁸ In effect, communities will become criminalised by the potential for information to be compulsorily passed to police, and journalists will become the agents of that process. Based on recent indications, the major Australian communities at risk are the Islamic and Arabic communities, and the anti-globalisation and anti-war protest movements.

Because journalists are so knowledgeable of their rounds and source communities, there is a long history of their ranks being infiltrated by security services,¹⁹ but when so revealed, this has permanently discredited the journalists involved. Under current legislation in Britain and Australia, all journalists are potentially compromised unless they are prepared to risk five years imprisonment.

Until 2003 in Australia, journalists, like other citizens, were not generally obliged to assist police in their inquiries. Under subpoena, they may be required to answer questions or supply documents to a court, but in that context they have an opportunity to present dissenting arguments and negotiate an outcome. In circumstances where journalists have given a commitment to keeping a source confidential, their code of ethics requires that the agreement be honoured in all circumstances.²⁰ Australian courts and some legal commentators²¹ have been reluctant to recognise this claim of privilege, though judges and litigators have often been wary of turning recalcitrant journalists into popular martyrs on the altar of press freedom.²²

Since 2001, the 'war on terror' has seen a bitter re-examination of these issues in the UK and US, notably in the BBC case involving Andrew Gilligan and

18 Michael McKenna, 'Solace in the "Wives Club"', *The Australian* (Sydney), 24 October 2005, 4.

19 For example, for a discussion of infiltration of Middle Eastern news bureaus by British Intelligence forces, see Richard Fletcher, 'British Propaganda since World War II' (1982) 4(2) *Media, Culture and Society*, 97–109.

20 Alliance Online, *Media Alliance Code of Ethics* <<http://www.alliance.org.au/hot/ethicscode.htm>> at 5 November 2005. See also Paul Chadwick, 'Creating Codes: Journalism Self-regulation' in Julianne Schultz (ed), *Not Just Another Business: Journals, Citizens and the Media* (1994) 167, 167–87.

21 Roger Magnusson, 'Media Rites (and the public's right to know)' (1999) March–April *The Australian Quarterly*, 34–41.

22 For a discussion of the issues surrounding confidentiality of sources, see Wendy Bacon and Chris Nash, 'Confidential Sources and the Public Right to Know' (1999) 21(2) *Australian Journalism Review* 1.

David Kelly, in the US Newsweek case involving allegations of desecration of the Koran at Camp Delta in Guantanamo Bay, Cuba, and more recently in the continuing controversy surrounding Judith Miller and her use of White House sources at *The New York Times*. All sides in these debates have acknowledged the right and need for journalists to protect confidential sources: in each case it is the implementation of the principle that has been contested, and whether the journalists have followed acceptable procedures in relation to their sources. *The New York Times* has been so affected by this issue that it has since reviewed its procedures.²³

Instructively, it was in the 1960s and 1970s in the US that significant developments occurred in the protection of source confidentiality. Several key cases involved the FBI seeking access to reporters' records of dealings with the Black Panther Party, an armed militant organisation established to protect black communities from racist attacks.²⁴ These cases expanded the judicial recognition of the confidentiality privilege and led to the enactment in many jurisdictions of so-called 'shield laws', some of which are quite extensive. In Australia, there has been limited protection offered under legislation in NSW,²⁵ but to my knowledge they have never been invoked, and certainly wouldn't offer any protection to the current anti-terror legislation.

Reportedly, the constitutional validity of some of the provisions of the proposed Anti-terrorism Bill 2005 (Cth) has been questioned by the Solicitors-General of three states and the ACT, and also by the Deputy Leader of the Federal Liberal Party, Peter Costello.²⁶ Their concerns go to the separation of powers in the preventative detention provisions. There has been no discussion at all of whether the High Court's limited recognition of an implied right to freedom of political communication might apply to any of the secrecy or disclosure provisions. Given the timid interpretation of this right in case law since it was first recognised,²⁷ neither the press nor the public should hope for developments along the lines of the 1970s US Supreme Court interpretations mentioned above.²⁸

As many have pointed out, recently including George Williams,²⁹ Australia's lack of a Bill of Rights places us in a unique position against all other liberal

23 'Confidential News Sources', *The New York Times* (New York), 25 October 2004, <<http://www.nytc.com/company-properties-times-sources.html>> at 10 November 2005.

24 For a discussion of the key case *Branzburg vs Hayes*, 408 US 665 (1973) and its subsequent interpretation, see Bill Kenworthy, *Branzburg v Hayes, Reporters' Privilege and Circuit Courts* (2005) <<http://www.firstamendmentcenter.org/analysis.aspx?id=15525>> at 5 November 2005.

25 The Media Entertainment and Arts Alliance is supporting moves to extend the NSW provisions to other states, see Christopher Warren, 'Confidentiality of Sources' (2005) <<http://www.alliance.org.au/content/view/95/52/>> at 5 November 2005.

26 Louise Dodson et al, 'Costello Adds to Howard's Terror Woes', *The Sydney Morning Herald* (Sydney), 27 October 2005, 1.

27 Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (2000).

28 For a general discussion of freedom of the press in Australia from the perspective of journalism, see Chris Nash, *Freedom of the Press in Australia* (2004) <<http://democratic.audit.anu.edu.au/Nashpaper.pdf>> at 5 November 2005.

29 George Williams, 'Essential Liberties are Lost in Imitation', *The Sydney Morning Herald* (Sydney), 27 October 2005, 13.

democracies. In comparison, Williams lauds the British legislative protections afforded by the *Human Rights Act 1998* (UK) c 42, invoking the overriding application of the *European Charter of Human Rights* ('ECHR') to British legislation. However, as Joseph points out, Britain is the only European country to have derogated from the ECHR in its anti-terror legislation.³⁰

In Australia, only the ACT has taken the parliamentary approach to protecting civil rights, through its *Human Rights Act 2004* (ACT) ('*Human Rights Act*'). Since the Chief Minister John Stanhope first publicised the draft Anti-terrorism Bill 2005 (Cth), he has sought and received, at the time of writing, two sets of advice on its consistency with the *Human Rights Act*.³¹ Both advices pointed out potential inconsistencies, though both confined themselves to the issues of individual rights, and not the larger social context of freedom of communication and the press.

The preparedness of the Federal Government to override legislative protections of human rights was amply illustrated in the *Native Title Amendment Act 1998* (Cth), when the application of the *Racial Discrimination Act 1975* (Cth) was specifically excluded so that the property rights of Australians could be treated differently according to race.³² As a result, Australia is the only liberal democracy that has been negatively reported on by the UN Committee for the Elimination of Racial Discrimination.³³ If the current existing and proposed legislation survives challenges in the Senate and High Court, it may also be scrutinised by various international human rights authorities, with potentially similar outcomes.

It is apparent that Australian governments are quite happy to endure international condemnation and isolation on the issue of human rights, and therefore parliamentary protection of human rights will be ineffective. The only effective protection will come from entrenched constitutional provisions, whose history of support in Australia does not give reason for hope in the short term.³⁴

Given the political sensitivities of the current environment on terrorism, it is likely, at least in the short-term, that governments and security forces will tread warily in the implementation of their powers, as Walters suggests above.³⁵ The Scott Parkin case, however, suggests that ASIO and the government will also have a weather eye cocked for political expediency,³⁶ which in turn may harden

30 Joseph, above n 17, 447 ff.

31 Letter from Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to John Stanhope, 18 October 2005 <http://www.chiefminister.act.gov.au/docs/Stanhope_advice_20051018.pdf> at 5 November 2005; Letter from Richard Refshauge to John Stanhope, 20 October 2005 <<http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf>> at 5 November 2005.

32 Ed Wensing, *Comparing Native Title and Anglo-Australian Land Law: Two Different Timelines, Two Different Cultures and Two Different Laws*, Australia Institute Discussion Paper No 25 (1999) 24 ff.

33 Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, 66th sess, CERD/C/AUS/CO/14, 2005, <<http://www.ohchr.org/english/bodies/cerd/docs/CERD.C.AUS.CO.14.pdf>> at 5 November 2005.

34 George Williams, *A Bill of Rights for Australia* (2000); Bacon and Nash, above n 22.

35 Walters, above n 8.

36 For comprehensive documentation of the case, including media coverage, see Source Watch: Centre for Media and Democracy, *Australia Revokes Scott Parkin's Visa*, <http://www.sourcewatch.org/index.php?title=Australia_Revokes_Scott_Parkin's_Visa> at 5 November 2005.

cynicism into dissent in key communities, leading to campaigns of civil disobedience that may well include journalists. Contemporary experience in the US, and historically in Australia, demonstrates that journalists have been prepared to go to prison in defence of their professional ethics, though to date not for years at a time. If and when a confrontation occurs along these lines, it is likely to be monitored by an international audience made up of human rights groups such as Human Rights Watch, the International Federation of Journalists, Reporters sans Frontières and various United Nations authorities. It may also involve journalists who are closer to the dissident communities than most of the mainstream press, and who publish via the internet. The politics of such confrontations will undoubtedly be very divisive, and if the refugee/immigration debate post-Tampa in 2001 is any indication, with scant concern for human rights by either of the main political parties as they scramble for electoral advantage.

However, there is reason for optimism in the extensive community opposition and organisation of an underground sanctuary movement for refugees in Australia since 2001, and for many years in Europe and North America. It may be that a similar up-swell of community concern and action is starting to occur around the anti-terrorism proposals, and if so, journalists will be called upon to protect the rights and responsibilities that are integral to the democratic process.

A final word might go in passing to the sedition provisions of the proposed Anti-terrorism Bill 2005 (Cth), under sch 7. They have been revived from 1914 legislation, perhaps as a playful indulgence by the Attorney-General of the monarchist proclivities of the Prime Minister, and they criminalise having

- (a) the intention to effect the following purposes:
- (b) to bring the Sovereign into hatred or contempt;
- (c) to urge disaffection against the following:
 - (i) the Constitution;
 - (ii) the Government of the Commonwealth;
 - (iii) either House of the Parliament

There is a defence of 'good faith' under the proposed s 80.3, but they are such a fundamental affront to freedom of expression that whether any self-respecting writer, comedian, dramatist, journalist, academic or citizen would consider invoking it is another question. Arguably, given the manifest failings of the *Australian Constitution* in protecting civil rights, the lack of concern for democratic rights in the government that has produced this legislation, and the failure of most parliamentarians to consider their impact on the democratic process, any contempt would be thoroughly deserved.