

Freedom of Speech

John Hartigan

In Australia we cherish the freedom to tell it as it is. It's part of our heritage, and now ingrained in our culture: we like our facts unfettered so we can form opinions in our own way, and speak up when things aren't right.

It's what we call freedom, and to a large extent we have it in this country. Compared to corrupt states like Fiji and Zimbabwe, we are indeed a lucky land with generally free speech and a free media. We take it for granted.

But my warning is: don't. There is increasing evidence that we cannot afford to be complacent. Our freedoms are not as robust as they should be. This is not some alarmist or far-off theory. The threats are real, they are already with us and I see them every day.

As a journalist, my perspective on democratic freedom is largely through the prism of the media. Briefly, here's what I see:

- increasing intimidation, including a police raid this year on one of our newsrooms
- journalists — approximately a dozen this year alone — being interrogated in the star chambers of State crime commissions to force them to reveal their confidential sources — or face jail
- journalists' phone and bank records being intercepted to find the sources of their stories
- courts being difficult — and sometimes obstructive — when it comes to releasing information and documents that should be freely available

- unprecedented levels of spin from government, a pervading culture of secrecy and a deep resistance to, and fear of, allowing people to know how they are governed

In my 45 years in journalism it has never been more difficult for a journalist to get and verify a news story than it is today.

Is this a bad thing? I'm aware that some people think the press has too much freedom. Certainly our media is imperfect and its journalism sometimes flawed. By the nature of its role, it can be noisy and brash; by design of the speed at which it operates, it can be inaccurate or even unfair. Although we enjoy generally excellent standards of journalism, the media, like most industries, has room for improvement.

But healthy democracies need informed citizens, and a robust, free press is the baseline for this. As the historian Alexis de Tocqueville said in the 19th century:

To enjoy the inestimable blessings of a free press
it is necessary to tolerate the ills that it engenders.
To believe you can have one without the other is
a delusion.

The media remains our primary source of information about decisions that politicians make on our behalf, how governments spend our taxes and how courts operate and deliver us justice.

Certainly technology has given us access to more and more sources of information. Comment and opinion has become more plentiful with the Internet and the rise of blogging, but the starting point for this information — the news and the facts — hasn't changed. It almost always originates with a journalist in a newsroom, usually working for the traditional media of television, radio and newspapers. Professional journalists employed by companies like News Limited have the time and the resources to research, interrogate and publish. They also have access to the front-row seats at any historical or important event so they can be the eyes and ears for the vast public who cannot be there.

Without journalists there would be plenty of information, as there is now. Governments, big business and political organisations would continue to churn out their press releases,

putting most of it on the web for all to see — but there's the rub. When organisations self-publish, they release only what they want you to see. A democracy requires that someone independent can challenge that information to test that it's right, find the missing bits, unearth the things they're hiding, tell everyone what's really going on. If the media doesn't shine a bright light on those dark corners where corruption and wrongdoing might otherwise fester, who will?

Free people need the opportunity to criticise, debate and challenge what's happening. Information is the tool that allows us to freely make up our own minds, to decide whether politicians should be re-elected, to speak up when we're offended, angry or worried. We can do this individually, but in practice most of us don't have the time. The media does it for us.

But freedom of the press has been increasingly battered and damaged. Our basic rights to information have been chipped away. The creep towards secrecy has been gradual, but it has been constant. The problem is not isolated to one level of government: it is endemic across local, State and Federal arenas and across the political divide. It's been happening relatively unnoticed for several decades, but lately the pace of the slide has increased.

In its independent survey of nations according to their levels of free speech, the French-based organisation Reporters Without Borders put Australia in 28th place in 2008, behind Namibia, Lithuania and the Czech Republic. We trail behind most of Europe and far behind New Zealand in ninth place. I have to ask: what is it about the people of New Zealand that they are so trusted by their government to have information, while Australians are not? It is an appalling indictment on Australia that we are not alongside countries like Canada, Germany or Ireland when it comes to free speech.

As a measure of how anxious the Australian media has become about this, the industry came together in May 2007 to form a coalition called Australia's Right to Know. Its aim is simple: we want reform so this country can be as free as it deserves to be.

The members of the Right to Know coalition include Fairfax, the ABC, SBS, the commercial television and radio networks and News Limited. Although its members are traditional media rivals, the coalition was surprisingly easy to broker; everyone jumped on board quickly and no-one declined the invitation to join. Individually, all of us had struggled against the tide, but overwhelmingly we had failed. We saw no option but to become a united, and hopefully stronger, front.

Together we have commissioned independent research, raised awareness of the erosion of freedom of speech and lobbied governments for reform. None of us is under any illusion that this action will increase ratings, circulation or revenue, because it won't. We're doing it because we all believe passionately that we must.

So how did Australia get into this regrettable situation? For starters, we are unusual among Western democracies in not having any constitutional protection of free speech as they do in the United States, in European Union member countries, Canada and New Zealand. This means there's no guaranteed presumption of free speech. Rather, we have only those freedoms that our politicians allow us to have. They can take them away, and we have no constitutional right to stop them.

We must also understand that it is fairly natural for a government to be secretive. It's easier to face voters if you give them only the nice glossy bits and hide incompetence and mistakes. Secrecy is, by and large, in a government's interest. The problem is, it's not in the interests of the people.

Unfortunately, a government's taste for secrecy is addictive. The desire to hold on to power overwhelms the mandate to be open and accountable to the citizens it serves. Secrecy and spin become the norm. The fear that some information might be embarrassing, or held against them, leads to a default of secrecy that effectively denies Australians of even the most benign, but still useful, information.

I think any consumer of news and current affairs would be astounded by the type of information we cannot get easily, if at all. The list is huge: statistics from hospitals and schools about their standards of care and education; government-commissioned reports about everything from the economy, to the environment and industry. We have struggled in the past to get information about the travel expenses claimed by MPs, or the background to how government contracts have been allocated. Our access to information about crime has been seriously curbed. And right across the board, government-employed workers, from nurses and police officers, to bus drivers and bureaucrats, have been left in no doubt that if they ever talk to the media they will face losing their jobs, and possibly prosecution, even for releasing the simplest and most harmless information. The message is clear: if you don't work for the press office, shut up or else.

Of course, the media should not have open slather to report everything. No-one wants to jeopardise national security by publishing intelligence reports, or to compromise justice by exposing an accused's criminal record during their trial. It serves no-one to identify a rape victim, or an undercover police officer. These are not the issues. At issue is the vast amount of information that rightly belongs to the Australian public, but which is simply not available to them. Secrecy when it is necessary should be in the best interests of the people, not in the interests of a government seeking to avoid pesky scrutiny or embarrassment.

Our governments generally work on the premise that all information is secret unless there's a good reason for it not to be. It should be the other way around: the default being that everything is automatically open and available — unless there is a sound reason why it should not be. This is a very successful model in several countries such as Sweden, without ill-effect.

This has bred a culture of secrecy in the bureaucracy.

Rather than a shifting, vague notion of transparency and openness, the limits on what we have the right to know should be clearly defined and understood. They should be debated, not just imposed without question.

Freedom of information

On a daily basis the media relies on freedom of information laws (FOI) to access information about government.

These laws were introduced by Commonwealth and State and Territory governments in the 1980s in an attempt to make governments more transparent and accountable to the public.

The rationale for the *Freedom of Information Act* was spot on. Speaking in 1976, before the new law was introduced, Prime Minister Malcolm Fraser said:

If the Australian electorate is to make valid judgments on government policy it should have the greatest access to information possible. How can any community progress without continuing and informed and intelligent debate? How can there be debate without information?

Under the *FOI Act*, individuals (including journalists) and companies can apply for copies of documents held by government departments, giving access to information on tax, statistics on government programs, analysis of government policies, advice provided to Ministers, details of politicians' expenses, money spent and to be spent on government programs such as pensions, and so on.

The aim was to allow people to get personal information — for example, tax records about themselves, and to make sure the public either directly or through the media is able to see the mechanics and decision-making of their governments.

Unfortunately 32 years later we are still waiting for that promise to become a reality. Despite good intentions by some, all too often the information sought is either not available, or accessible only after lengthy and costly negotiation with the department holding the information.

Freedom of Information has become an oxymoron: it is not free — in fact, FOI searches can be absurdly expensive — and too often it fails to provide information. FOI has become so difficult that most major newsrooms now employ specialists for it. It is achingly slow — some searches can take years — and even when they succeed, journalists frequently receive documents that are covered in the blocked-out lines of the censor.

Governments tell us that the vast majority of requests for information are met. The Victorian Government, for example, claims 97% of all FOI applications are satisfied. Like the promise that your margarine is 97% fat free, it's really the 3% that counts. The 97% refers to the thousands of requests from private citizens for non-controversial information. The 3% is the bit that really matters: that's where you'll find the information about government policy decisions that politicians don't want us to know about.

Naturally, there are situations where information shouldn't be released under FOI. If it relates to national security or reveals the details of a confidential conversation in the Cabinet room, for instance. But unfortunately, over time, dozens of complex exemptions have sprung up, giving governments an easy excuse to pick and choose which documents are released and which ones are hidden, based on their own needs rather than those of the Australian people.

Like the fact that a \$6 million bonus was to be paid to the private operator of Victoria's speed cameras once a certain number of fines were paid by drivers. It took a lot of effort to extract that information from the Government.

And there's more. Much more. There are dozens of examples of information that journalists have justifiably tried to get under FOI, but which have either failed, or succeeded only after vast expense, or even a court case. Here are just a few:

- which schools have the best or worst records for academic performance or violence
- the bonuses paid to senior public servants
- how much government money is paid to unions
- which pubs and clubs have the highest rates of assault
- which childcare centres have been served warning notices
- details of deals between governments and private third party contractors
- which restaurants have been prosecuted or warned for health breaches
- waiting lists at hospitals
- the results of public opinion surveys about new workplace laws.

If the media can't get hold of this kind of information, chances are the public can't either. This is a travesty for free speech. This kind of information should be available. In fact the public and journalists shouldn't even have to ask for it: our governments should make it available automatically, as they do in other countries.

To a large extent, the problem with FOI is a cultural one. Bureaucrats naturally resist the release of information because it's simpler that way. But it's not fairer that way. Every day in our newsrooms around Australia I see a bizarre game of hide and seek being played out, with many bureaucrats resisting the release of information while journalists try desperately to outsmart them and somehow get the material.

Sometimes the 'game' gets nasty. When there's no legal choice but to release a document under FOI, governments are known to resort to other methods to deter persistent journalists. The *Herald Sun* in Melbourne battled for two years before giving up on its campaign to get information about the travel expenses of Federal politicians. Their FOI request was met with a quote of \$1.25 million in fees and 'decision-making time' for a public servant to get the details for the newspaper.

Another FOI application, for the documents detailing the effect of global warming on the Great Barrier Reef, was met with an estimate that it would take almost 540 hours to make a decision on the status of the documents, at a cost to the applicant of \$12,718. These are not isolated examples.

Another blocking tactic is time. An FOI application to the Queensland Treasurer's department for information relating to Jupiter's Casino was submitted in 1993. The response took a staggering 12 years, arriving in June 2005. In Western Australia, the search for statistics on the number of drug errors at the State's main children's hospital involved a two-year battle, although it was won in the end.

It's not the media who really misses out. It's the people of Australia.

Reforming FOI is a priority for the Right to Know coalition, and fortunately we're making some headway, with governments beginning to realise they need to be more transparent.

During last year's Federal election campaign, Labor identified FOI as being in need of serious reform. In its election document, *Government and Information: Restoring Trust and Integrity*, the party committed to revising the FOI Act and promoting a culture of disclosure and transparency. Led by Senator John Faulkner, Special Minister of State, the Government is working on changes and is expected to bring in new legislation in 2009.

There has also been some success at a local level. Within days of becoming Queensland Premier, Anna Bligh announced her government would review the State's FOI laws. Within a year, her government commissioned a comprehensive review of the laws and practice in Queensland. Led by Dr David Solomon, the review panel recommended a complete overhaul of FOI, and the Government accepted the majority of the recommendations. The Premier has promised new laws in 2009.

Similarly, soon after he became Premier in New South Wales, Nathan Rees also announced his government would review NSW's laws.

So the signs are encouraging, with a number of governments taking steps in the right direction. The real test of success won't be until working journalists see a real and noticeable improvement in the amount of information they can get, and how quickly, easily and cheaply they can access it.

Whistleblowers

A secretive culture in government creates pressure for information to be released in ways other than through official channels, such as bureaucrats leaking to journalists.

As the people closest to the workings of government, public servants are the most likely people to discover cases of maladministration, or in the most extreme cases, corruption, within their ranks. It is clearly in the public interest for a public servant to bring such problems to light, but it has been made difficult and even risky to do so.

Most whistleblowers have already taken their concerns to superiors in their own department, or to a watchdog agency like the Ombudsman or a corruption commission. If this fails a

whistleblower will sometimes turn to someone else as a last resort, usually the media.

But when a government employee does this in Australia, they are usually committing a crime as well as breaching their employment contract. Increasingly, whistleblowers are being hunted down by police or State-based integrity commissions, and charged. They can be jailed. Some lose their life savings or superannuation defending themselves. Others lose their jobs, or are silently ostracised and victimised at work; their careers effectively over.

One might expect this if the whistleblower was a monstrous traitor who was selling top-secret defence information to an enemy. The problem is prosecution and even persecution of whistleblowers happens regardless of whether they are acting in the public interest, or whether their suspicions turn out to be right.

In 2005, *The Australian* published details from an internal Customs report that revealed lax security and drug-smuggling rings at a number of airports, leaving the country vulnerable to terrorism. The report had been ignored by internal officials for two years before it eventually leaked to the newspaper.

Less than a week after the reports in *The Australian*, Federal Cabinet met to discuss it and later announced a \$200 million airport security upgrade. It seems unlikely this would have gone ahead if the Government hadn't been embarrassed by the report and shamed for putting the Australian public at risk for so long.

But what became of the alleged whistleblower whose conscience and desperation led to leaking the report in the interests of public safety? Did the Government thank him for his courage? No. An internal witch hunt was conducted and a Customs official, Allan Kessing, was accused. Despite his denials, Kessing was charged, convicted and sentenced to nine months' jail, later suspended when he put up the money for a good-behaviour bond. He lost his job and is now fighting an appeal, which has cost him his savings.

In another case, Toni Hoffman, a nurse at Bundaberg Hospital in Queensland, repeatedly raised concerns about one

of the medical staff, Dr Jayant Patel, with her employers, the police and the Queensland Coroner. Despite her repeated complaints of his alleged malpractice, life-threatening mistakes and deaths of a number of his patients, Dr Patel, later dubbed 'Dr Death' was allowed to continue working. In despair, Ms Hoffman went to her local Member of Parliament and ultimately the media. Dr Death was later extradited from the United States to face criminal charges.

Toni Hoffman's action to save the lives of future patients in the face of resistance and victimisation at work was a crime. Since then, whistleblowing to a Member of Parliament has been legitimised, but whistleblowing to the media has not.

The cases of Kessing and Hoffman clearly show that whistleblowers sometimes need protection, but sadly this is inadequate. New South Wales has limited protection for public servants who whistleblow to the media, but only after they have failed to get results from internal avenues over a six-month period. Yet as these two recent cases show, six months can be too long, especially when lives are at risk.

In this country the victimisation of public servants who expose serious problems also extends to the journalists who report on maladministration, corruption or merely embarrassing actions or failings within government.

In 2004, two journalists from the Victoria's *Herald Sun* published a story about a secret plan by the Federal Government to deny pension entitlements to war veterans. Their report was 100% correct.

Nevertheless a public servant, Desmond Kelly, was charged with leaking information to the newspaper and convicted. Reporters Michael Harvey and Gerard McManus were called to give evidence in the case and, rightly, refused to disclose the source of their story. They were convicted of contempt of court. Even when Mr Kelly's conviction was quashed on appeal, the journalists were still punished. They were spared jail — just — but were fined \$7000 each and both now have criminal records. The law ignores the fact that their story was in the public interest.

In Western Australia alone this year, six journalists have been hauled before that State's Crime and Corruption Commission and asked to reveal their sources. The heavy-handed Commission has considerable secrecy powers. If a journalist tells their employer or even their family that they have been interviewed by the Commission, they are committing a crime.

In Queensland, Parliament has just passed legislation that will compel journalists to disclose their sources to their corruption commission or face jail if they refuse. There is no legal basis on which the journalist can refuse and avoid prosecution.

Unfortunately, the police are all too ready to raid private homes and news rooms looking for the source of information revealed in the media. And it is no coincidence that the more embarrassing information might be politically, the hotter the pursuit by police to track down and punish the whistleblower and the journalists who publish their concerns.

In September this year, six Australian Federal Police officers raided the Gold Coast home of a public servant suspected of leaking a story about rural Australians possibly losing their TV signals when analog signals are switched off.

And in May, officers of the Major Fraud Squad spent five hours raiding the offices of *The Sunday Times* newspaper in Perth. The 'major fraud' they were investigating? The source of a (true) story that the Western Australian Government planned to spend an extra \$16 million of taxpayers' money on advertising to secure its own re-election.

These are hardly stories that may threaten Australia's national security or the safety of the public!

Again, the victims here are not just the journalists who can be jailed for doing their jobs, or even the public servants who face the same fate if they do the right thing. The biggest victims of these draconian measures are the people of Australia, who are being denied their right to know what's happening. And despite the courage of the few public servants that do come forward, how many others are, understandably, too frightened to do so, even when the information they know is vitally important, and correct?

In both cases, the information should never have needed to ‘leak’ to the media. Instead, the government should be recognising its obligation to inform the public of its workings, and accountable for how it spends taxpayers’ money. Journalists shouldn’t have to fight for this information: the government should be volunteering it.

Still, there is hope. Recently the Commonwealth agreed to review the law in order to promote a greater culture of disclosure in the bureaucracy, but it is early days and we have yet to see anything concrete.

Privacy

We are all entitled to privacy. It serves no-one for personal information to be exposed about our health, private financial affairs, and so on. If there is no legitimate public interest in someone’s affairs, then that information should — and largely does — remain private.

There are extensive laws to protect people’s privacy, and to ensure governments and other organisations do not disclose personal information that they hold about us. The media has no issue with most of these laws.

But privacy has become a minefield for free speech. With emails, online shopping, credit cards, CCTV cameras and mobile devices, we leave a trail of digital crumbs behind us that can allow vast collections of data about our everyday lives. We also publish details about our own and other people’s lives on the web that become permanent, and that we may regret.

With these and other privacy issues in mind, the Australian Law Reform Commission recently reviewed our privacy laws and recommended a new statutory right of privacy that would allow citizens to sue the media for breaches of privacy.

This might sound OK, but when you dig below the surface it is an unnecessary proposal and potentially very dangerous for democracy and free speech.

For starters, it ignores the fact that current media privacy framework is effective and working well. The media is subject

to codes of practice regulating the handling of privacy issues, and to various Federal and State laws protecting privacy, including surveillance and defamation laws. Despite what the ill-informed might say, the media cannot lie or 'say what it likes' about people; nor does it want to.

There are very few complaints, investigations and breach findings against the media for breaches of privacy.

But sometimes public figures, because of their power and their position, should be open to scrutiny by the public and the media. People like Christopher Skase, Alan Bond, Rene Rivkin and others should be exposed when they do the wrong thing, especially when it is with investors' or taxpayers' money.

If a statutory right of privacy was allowed, without a corresponding consideration of the public interest and without the context of any constitutional right to free speech, it would mainly benefit only those public figures who are rich enough to cry 'privacy' when the media threatened to expose their hypocrisy or corruption. Such a law might be a bonanza for lawyers, but it would do nothing to protect ordinary, innocent citizens, or democracy.

While governments can take some steps to protect our privacy, particularly in how others use our personal information collected in databases, we must make our own decisions about how we act. Governments cannot and should not attempt to regulate our behaviour.

Open justice

Along with a transparent government, a robust justice system is fundamental to our democracy. Justice in our courts should not only be done, but should also be seen to be done.

As the English philosopher and legal reformer Jeremy Bentham said in the 19th century:

Publicity is the very soul of justice. It is the ...
surest of all guards against improbity. It keeps the
judge, while trying, under trial.

Reporting of court cases by the media promote public confidence in our courts, and also acts as a deterrent to would-

be criminals. Through openness of our justice system, we can also ensure it is in step with public sentiment.

Australian courts are open to the public, but few people have the time or inclination to listen to proceedings, so journalists report on their behalf. The media brings the courts to the community.

But even this transparency is being undermined. Judges and magistrates are showing an increased tendency to impose suppression orders that prohibit the publication of evidence presented in court. Sometimes they physically close the courts, and it is getting more difficult to access court documents that used to be easily available.

Under various statutes and the common law, judges can suppress certain information about a case if they believe it could prejudice a fair trial or the rights of the plaintiff.

A decade ago there were about a hundred suppression orders around Australia. Today, that number has climbed to more than a thousand in place at any one time.

Some restrictions are legitimate, such as those preventing the naming of sexual assault victims, children, juveniles or protected witnesses. There are also rare occasions where it's necessary to protect information that could threaten national security or public safety if it was released.

However, there is an increased tendency to issue orders for reasons that don't protect the public, or justice. In one case in New South Wales, a court suppressed the name of a well-known director of a public company who was charged for putting prostitution services on his corporate credit card. Should he be allowed to avoid embarrassment in this way when others cannot? I'd argue that part of the deterrent effect of open justice is that publicity shames people who have broken the law.

Courts are also becoming clumsy in their suppression orders, sometimes issuing broad restrictions that effectively conceal far more information than should properly be suppressed. This was particularly a problem in the 'Gangland' trials in Victoria, and in recent terrorism trials.

The problems don't end there. Some orders apply in one State but not in others. This used to be relatively easy for the media to navigate, but in a world where the Internet disregards State borders, information suppressed in one State amounts to an unnecessary national gag.

In some States, courts don't keep proper records of the orders in place, and the systems of notifying journalists of them are, at best, ad hoc, putting journalists and employers at risk of breaking the law by inadvertently reporting suppressed information.

The importance of open justice can be witnessed no more acutely than in the case of Dr Mohamed Haneef. In the aftermath of failed terrorism bombings in the UK last year, Dr Haneef, living and working in Queensland, was linked with the terrorists' plans and detained on terrorism-related offences. Although the Government and its agencies tried to conceal the evidence against him on grounds of protecting national security, it became clear that Dr Haneef had been incorrectly detained when the facts surrounding the case and the processes were exposed by the media. Since then Dr Haneef has been exonerated, an inquiry is being held into the processes of the Government, AFP and other security organisations, and there are calls for regular review of Australia's anti-terrorism legislation.

Justice must take place and it must also be transparent, not conducted behind closed doors. In Dr Haneef's case neither appears to have happened. The price for democracy can be very high. For people like Dr Haneef, it is even higher.

The integrity and independence of courts can only be upheld when they are open to full scrutiny by all of us.

All of these examples raise the question: how healthy is our democracy?

I believe it is relatively healthy but, like most things, it is imperfect, and like all things of great value we need to cherish it, nurture it and protect it.

As a mature democracy we already have the right to choose who governs us, but once we've done so I believe we also have a right to know how they're doing the job. We can

only participate effectively in our democracy if we have the information we need to make informed choices that affect us.

On that basis, our democracy needs a lot of work on many fronts.



John Hartigan heads News Corporation's Australian operations as Chairman and Chief Executive Officer of News Limited. In 2007 he led the formation of Australia's Right to Know, a coalition of 12 media organisations that campaigns for improvements in free speech. He joined News Limited as a reporter in 1970, rising to editor of several newspapers and later to Group Editorial Director, the company's most senior editorial position.