

FREEDOM OF THE PRESS AND FREEDOM OF SPEECH IN AUSTRALIA

Captain Phillip, on arrival in Australia in 1788, made no declaration of the freedom of the press nor any declaration of freedom of speech for the new colony.

There were no speeches as the fleet landed in Botany Bay with words such as contained in the US Declaration of Independence, just over 10 years earlier “We hold those truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness...”. Nor those contained in the First Amendment to the US Constitution “Congress shall make no law ... abridging the freedom of speech, infringing on the freedom of the press”. And there was no Thomas Jefferson in the fleet declaring (1787):

“The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”

First and foremost Australia was a penal colony where criminals were sent. The English Colonial Office, which was responsible for the administration of the new colony, did not favour an independent press stirring up trouble.

It would be a mistake, however, to consider that Captain Phillip and the others aboard the first fleet and the fleets which quickly followed did not believe in a free press or freedom of speech. It was a practical question of when and how this freedom could be introduced into a penal colony. It was explained by Sir Francis Forbes, the first Chief Justice of the Supreme Court of New South Wales. Writing extra-judicially of the colony, he said in ...:

“... A free press is not quite fitted to a servile population; it is excellent, indispensable in a free state because of its tendency to counteract that eternal propensity of our social natures to make slaves or dupes of one another, but for that reason perhaps, it is not suited to a state of society, where one half of the community are worked in chains by the other; the direct tendency of the press is, in short, to equalise mankind; and the direct policy of our little state is only an enlarged prison discipline; the first is to set all free; the last to hold one half in servitude ... An unrestrained press is not politic or perhaps safe in a land where one half of the people are convicts, who have been free men; yet I must not leave out of the account that the other half of the people are free, and that, as an abstract right, they are consequently entitled, as of birthright, to the laws and institutes of the parent state.”

It might be said, at least in a mechanical sense, that freedom of the press arrived in Australia in 1824 amongst the luggage on board the ship Alfred. Then a practising barrister, Robert Wardell (who, before his departure had also been the editor of the Statesman newspaper in England), arrived in Australia with his own printing press.

It was not long before the press was at work printing the colony's first independent newspaper. It was aptly named "The Australian" and was first published in Sydney on Thursday 14 October 1824. Wardell was the first editor and sole proprietor. He recognised the need for profitability by charging one shilling for the paper when it then cost ten shillings a week to rent a house in Macquarie Street, Sydney (that would mean instead of charging \$1.50 today for its successor, today's Australian, the price would be in excess of \$50).

Wardell noted in his first editorial that:

"A free press is the most legitimate, and, at the same time, the most powerful weapon that can be employed to annihilate such [individual] influence, frustrate the designs of tyranny, and restrain the arm of oppression."

He went on to state in words, that Thomas Jefferson would have been proud, that the new newspaper would be:

"Independent, yet consistent – free, yet not licentious – equally unmoved by favours and by fear – we shall pursue our labours without either a sycophantic approval of, or a systematic opposition to, acts of authority, merely because they emanate from government."

Those words foretold of future battles with Governor Darling and were typified by the decision of Wardell not to seek the consent of the Governor to publish the newspaper. Wardell was made of stern and independent stuff and intended to make his voice heard. Thus began a line of independent strong minded editors who defended the freedom of the press with all their strength.

The freedom, however, was not established simply by the arrival of the printing press, rather it emerged incrementally on a court case by court case basis from the ensuing legal battles between the editors and the Government, aided by the requirement that any legislation by the newly established Legislative Council required a certificate from Chief Justice Forbes to the effect that the proposed legislation was not repugnant to, and was consistent with the laws of England. Hand to hand warfare has been and remains the hallmark of obtaining and maintaining freedom of the press in Australia. The Chief Justice played a critical role in both theatres of war, the court cases and the necessity for such a certificate.

For example, not soon after *The Australian* was first published the Governor sought to impose a requirement that all newspapers must be licensed and therefore subject to the possibility of losing the licence at his discretion; a scenario not unheard of today.

Forbes refused to give the certificate and wrote:

“By the laws of England, the right of printing and publishing belongs of common right to all His Majesty’s subjects, and may be freely exercised like any other lawful trade or occupation.... To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and to make him the arbitrary and infallible judge of all controverted points in learning, religion and government By the laws of England, then, every free man has a right of using the common trade of printing and publishing a newspaper; by the proposed Bill, this right is confined to such persons only as the Governor may deem proper. By the laws of England the liberty of the press is regarded as a constitutional privilege, which liberty consists in exemption from previous restraint; by the proposed Bill, a preliminary license is required, which is to destroy the freedom of the press and to place it at the discretion of the government.”

After this direct attempt to control the press failed, Governor Darling sought to do so indirectly by seeking to impose a stamp duty on newspapers which would have made it unprofitable to publish. The Chief Justice described this as an attempt to silence newspapers “by secret and disguised means”, and it failed.

In the courts the battles raged fiercely, criminal and civil libels against newspaper editors were common. Indeed within five years Sydney had become the world centre of defamation litigation; (thus displaying the tendencies of early Australians to treat as a sport anything which involved a contest).

The libel cases were heard before a judge and a jury of seven. The jury consisted entirely of military officers, whose Commander in Chief was the Governor to whom they owed their promotion. In simple terms, the jury were employed fulltime by the plaintiff.

In 1827 Wardell was charged with seditious libel by the Governor for criticising government policy. Chief Justice Forbes summed up to the military jury and the case ended in a hung jury. So did another case against Wardell later in the year. The fact that a jury of military men refused to enter a guilty verdict to an action brought by their commander is extraordinary, and a practical confirmation of the recognition by Australians of the need for public criticism, not matter of whom.

Wardell, like other journalists at the time, was not only at risk of being financially ruined by a successful civil libel action against him or of being jailed for criminal libel, but also of being challenged to a duel.

When Wardell wrote an article critical of Colonel Henry Dumaresq (the Governor's brother-in-law and personal assistant) he was challenged by him to a duel. The two met in a field at Homebush. Each fired three shots at the other, all of which missed; Wardell then apologised for what he wrote. Honour having been satisfied, the parties rode back to Sydney for breakfast.

Duelling was at the time an early form of alternative dispute resolution (but in terms of the modern day mediator hardly guaranteeing a win-win result for each party).

Edward Hall, the first editor of the other Sydney newspaper, called the Monitor (first published a year after The Australian), was jailed in 1829 for criminal libel in respect of an article he wrote critical of the policies of Governor Darling. Unfazed, he continued to be the editor and write the paper whilst in jail.

Freedom of the press, freedom of speech, freedom to converse, is not limited to talking about "serious matters" nor matters which find favour with the majority nor an outspoken minority; but includes chatting about the childest, the crude, the crass or the critical, as well as matters which no one else may have the slightest interest in or be in any agreement. Nor is it precondition to talking or, for that matter, writing, privately or publicly that the speaker or writer has legally admissible evidence to prove what he says or writes, or even know what he is talking or writing about (when did you last see a spectator shouting to the referee that he had missed a particular player breaking such and such rule whilst holding up the relevant page of the rule book? For that matter, have you ever seen a spectator with a rule book?). If it were otherwise nearly all conversations, whether in the pub or at a sporting event or otherwise, would consist of a series of grunts.

Imagine a world in which it was illegal to talk or write about anything other than a "serious matter" or a matter of "public concern", such as the problems with the Australian manufacturing industry. Our communications would be controlled by the person who determined what was a "serious matter" or matter of "public concern". We would be like the man who proudly proclaimed his freedom by declaring that he decided all the important things in his life but omitted to say that it was his wife who decided what was important.

Today, nearly 200 years after the first publication of the Australian newspaper, freedom of speech and freedom of the press remain under attack. This time the battle is the proposal of the Australian Government to pass a new law to make it illegal to talk or write the truth about another person where it "invades" that person's privacy.

The Government, in announcing the proposal, referred to the 2008 Report of the Australian Law Reform Commission which recommended such legislation.

That Commission liaised with the NSW Law Commission which in its 2009 Report attached a Bill detailing the new law. The Bill contained the following operative part:

“74 Invasion of privacy actionable

- (1) An individual has a cause of action against a person under this Part if that person’s conduct invades the individual’s privacy.
- (2) An individual’s privacy is invaded for the purposes of an action under this Part if the conduct of another person invaded the privacy that the individual was reasonably entitled to expect in all of the circumstances having regard to any relevant public interest (including the interest of the public in being informed about matters of public concern).”

This legislative cause of action contains the emotive words “invasion of privacy” and then papers over the problems with the action by use of the words “privacy which the individual was reasonably entitled to expect in all the circumstances having regard to any relevant public interest”. That is not an objective test, but a subjective delegation to the courts.

It is revealing that the Bill contains no express reference to freedom of the press or freedom of speech. The closest the Bill gets is to state that the protection of the privacy of individuals must be balanced against other important interests “(including the interest of the public being informed about matters of public concern)”. But freedom of speech and freedom on the press are not limited to informing the public about matters of public concern. The Bill displays a fundamental misunderstanding of those freedoms and a desire to marginalise them.

To test the proposed law let it be assumed that two mothers, Jane and Mary, were having a coffee and Jane asked Mary whether she was aware that the headmaster of the local school had a domestic violence order taken out against him.

By informing Mary of this, Jane may have invaded the headmaster’s privacy and be liable to damages and an injunction. The proposed law applies to Jane even though:

- She only told Mary in private and no-one else.
- She only told Mary the truth.

- She acted bona fide in making the disclosure.
- She did not obtain the information confidentially.
- The information may have been originally made public.
- It is uncertain and subjective whether the headmaster could have reasonably expected the information to be disclosed in all the circumstances, including any public interest.

The Bill will not only operate as a defacto censor of an individual's freedom of speech but also of the freedom of the press.

Take the example of Dr Patel, the surgeon at Bundaberg Hospital in Queensland who was found guilty of manslaughter of three patients and sentenced to seven years jail. The courage of Toni Hoffman, the nurse who stood up and sounded the alarm about Dr Patel would have come to naught without the publication of the story by The Courier-Mail and the skill of the journalist involved, Hedley Thomas.

The investigations and reporting by the Courier-Mail forced a Government inquiry and an investigation into the Queensland hospital system and ultimately to the prosecution of Dr Patel.

What would the Courier-Mail have done if Dr Patel had, right at the beginning, obtained an injunction against publishing his record as a surgeon in the USA. Whilst it is easy to see the position in hindsight, at the time without the evidence from the Commissions of Inquiry, the newspaper was on risky legal grounds even under the existing law. With the proposed new legislative remedy for "invading" a person's privacy the story may never have been published and Dr Patel may still be operating at Bundaberg Hospital.

It was only by reason of the investigation by a Government Inquiry hearing over 100 witnesses and examining thousands of pages of exhibits that the truth about Dr Patel came out. No newspaper had or has the time, power or resources to reach such a conclusion before publishing. The Courier-Mail had to form a judgment and take the risk of defamation and a loss of reputation for the newspaper (from time to time the press will get it wrong but you do not measure the success of Roger Federer by counting up the times he hit the ball into the net).

It is suggested that if the Australian Government is serious in proceeding in this area of privacy, it should start by analysing the leading newspapers for the last 3 years and identifying the articles it considers invade a person's privacy and would be prohibited by the proposed law.

These articles should be identified so that the community can see what the Government wants to prohibit publication. This is also critical to see who will be within and those to be expressly exempt from the proposed legislation. Presumably the Government and its agencies will be exempted and excluded from the operation of the new law.

What is at stake is not only the freedom of the press but the freedom of each of us to converse without censorship and without the need for a royal commission to determine whether we can say what we want to say.

None of us want our privacy invaded, but we also want to live in an open and free community with other individuals who want the same thing.

The initial issue is whether Australia should enact into legislation a cause of action for breach of privacy and, if so, with or without enactment of the other rights, i.e. freedom of expression, freedom of the press, and a priority listing of rights. Or, alternatively, whether the common law should be allowed to develop incrementally.

The New Zealand Law Reform Commission in its 2010 Report rejected a legislative cause of action in favour of the development by the courts of the common law. The High Court of Australia has not ruled out the existence of a privacy remedy; such judicial development would allow the courts to deal with each case and develop incrementally the law as it is needed.

This battle, like those of the 1820's will only be won by critically testing the proposed law and whether there is substantial evidence that the law is necessary, that those sought to be exempt from the law should be exempt, and that the operation of the law will not extend beyond which is necessary.

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