The assault on freedom of speech

The Andrew Bolt case is just the latest example of the worrying campaign against free expression, says Chris Berg.

In the first editorial of the earliest independent newspaper The Australian (no relation to the current iteration), barrister turned media proprietor Robert Wardell wrote that:

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

Contrast this with what Justice Mordecai Bromberg wrote in his September decision in the case of Pat Etowot v Andrew Bolt and the Herald and Weekly Times: ‘the public deserve to be protected against irresponsible journalism.’

Protected by whom? And who decides what constitutes ‘irresponsible’? The decision in the Bolt case, both the way it was made and the way it was received by those hostile to freedom of expression, is deeply concerning.

The case is doubly concerning because it is just one of many new challenges to freedom of speech. The last six months of Australian politics have underlined that freedom of speech is under threat. Greens Leader Bob Brown has called for licensing of newspapers, or, failing that, for journalists to be licensed individually. Following the Greens’ lead, the Gillard government has initiated a media inquiry with specific remit to increase regulatory oversight over newspaper ‘ethics’—and largely because it is annoyed by the coverage it receives in News Limited papers. Various commentators now openly talk about the government forcing ‘balance’ on controversial political views like climate change.

For many on the left, it seems finding exceptions to freedom of speech is more important than defending the principle.

Freedom of speech is one of our great bulwarks against excessive state power. It is one of the basic individual liberties. Free expression is an essential human right. Considering how close to the heart freedom of speech is to liberty and liberalism, it is absolutely vital that threats against it are countered.

Justice Bromberg recognized that Aboriginality, and race more generally, is a social construct. Australian universities offer entire subjects in Aboriginal identity. Nevertheless, Bromberg found that the columnist Andrew Bolt (who was profiled in the January edition of the IPA Review) had violated Section 18C of the Federal Racial Discrimination Act, which makes it unlawful to ‘offend, insult, humiliate or intimidate’ on the basis of race, skin colour, or national or ethnic origin. The offending columns in question were published in 2009, and discussed the light-skinned individuals with part Aboriginal background who, Bolt claimed, had chosen to identify as indigenous out of a range of possible racial identities.
The Andrew Bolt case shows freedom of speech is under threat.

Certainly, Bolt made some errors, inaccurately tracing the lineage of some of the individuals in question. But they did not sue Bolt for defamation—an ancient common law right and limit to freedom of speech intended to redress reputation damage. They sued under an Act that both had different standards by which to judge the harm and, which uniquely related to offences held by a group.

Justice Bromberg used the existence of Bolt’s errors and a judgment was his to make. When the scarring of the community has been openly hostile since the global financial crisis broke in 2009. The government’s Keynesian stimulus package has been dogged by waste and policy failure—facts which the press has been more than willing to focus on. In response, the government and its supporters have, over the last two years, spent an increasing amount of time complaining about an overly critical media and perceived flaws in political and policy coverage.

Politicians complaining about press coverage is one thing. Quite another if they do something about it. The British News of the World phone hacking scandal provided a pretext. When the scandal was reignited in July this year after it was claimed that News Limited, the owner of Rupert Murdoch—had hacked the phone of a murdered schoolgirl, the resulting media and political frenzy was global.

Despite no suggestion and no evidence to support the claim that such phone hacking had gone on in Australia, Julia Gillard nonetheless claimed that News Limited, the Australian arm, had ‘hard questions to answer’. Exactly what those hard questions were is not clear. The most explicitly designed to restrain specific viewpoints from being expressed, in pursuit of a specific—and, it might as well be said, controversial—goal. There is nothing legally new in the Bolt case. While Justice Bromberg was happy to endorse the social purposes of the Act, he seems to have kept within it. But it is a stark illustration of the still yet unbounded scope of the Racial Discrimination Act.

The Bolt case would be less concerning for freedom of expression if it wasn’t concurrent with an escalating political battle against press freedom.

The problems with the Racial Discrimination Act have been known for a long time. As far back as 1992, the IPA Review published Terry Lane’s critique of the racial discrimination restraints on speech, arguing that ‘it is impossible to see how racial harmony would be encouraged, improved or guaranteed by the imposition of penalties on those who express outrageous views.’ But Justice Bromberg’s decision makes it clear that the Act is explicitly designed to restrain specific viewpoints from being expressed, in pursuit of a specific—and, it might as well be said, controversial—goal. There is nothing legally new in the Bolt case. While Justice Bromberg was happy to endorse the social purposes of the Act, he seems to have kept within it. But it is a stark illustration of the still yet unbounded scope of the Racial Discrimination Act.
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obvious explanation is likely the real one: there were no hard questions. Instead, the Prime Minister saw the British hacking scandal as an opportunity to sully her critics in the media.

Gillard was, at least initially, circumstantial about the policy consequences of her hostility to the press.

But if the relationship between News Limited and the government is fraught, it is nothing compared to the relationship between News Limited and the Greens. Bob Brown has described his press opposition as the ‘hatemedia’ because he believes they are unfair to his party. Since the News of the World scandal he has first hypothesized about imposing a government license for newspapers—a policy which has been absent in the Anglophone since it was found to be tyrannical four centuries ago—and then having the government license individual journalists—presumably to weed out ‘irresponsible’ ones. Wielding their power over Julia Gillard’s office, the Greens pressured the government to instigate a media inquiry. The purpose of the independent media inquiry, which was announced in September, is clear: to impose more government oversight of the press. Lobbying for the inquiry on the ABC’s Q&A, Greens Senator Christine Milne said that, ‘at some stage we had a good inquiry and certainly bias is going to be one of the things that certainly will be looked at’. The independent Rob Oakeshott supported the push for the inquiry because of the ‘absolute rubbish’ that was being written about him.

There is already a series of serious policy reviews being conducted about media reform. No one denies that the challenge of the internet necessitates a rethink of the regulatory settings governing media and telecommunications. The Institute of Public Affairs has long argued that regulations like sport anti-siphoning (which give free to air television first broadcast rights to ‘premium’ sporting events), local content requirements (which impose mandatory minimums on Australian television and broadcast content), ownership restrictions, and much telecommunication regulation make little sense in a digital age where the boundaries between broadcast and media services are being blurred. Nevertheless, the government is already looking into that with a largely unheralded but hugely important Convergence Review, conducted by the Commonwealth Department of Broadband, Communications and the Digital Economy.

But it is clear that the purpose of the independent media inquiry is to regulate the content of newspapers, which constitute the ‘serious’ journalism, this is a breach of freedom of speech in Australia is abuse of freedom of speech.

Disney told the inquiry itself he was concerned about the ‘ecophobia’ of voices on internet comment threads. ‘You can’t have free speech if you can’t hear what’s being said.’ This appears to be more a complaint about vibrant democracy than unethical journalism. Gropping around for a purpose that wasn’t simply an attack on the government’s critics, it heard some extraordinarily illiberal and anti-democratic views, by apparently mainstream people.
These are not the only threats to freedom of speech in Australia today. In the June edition of the IPA Review, I outlined the extraordinary call by the host of the ABC’s Media Watch, Jonathan Holmes, to have the government’s regulator enforce ‘balance’ on a number of climate sceptic radio hosts. In a Media Watch segment in March titled ‘Balancing a hot debate’, Holmes pointed out that hosts like 2GB’s Alan Jones, ABC’s Gary Hardgrave and MTR’s Chris Smith tended to interview climate scientists they agreed with.

Fair enough—but you’d think, in a society which values freedom of expression, that was the prerogative. Nevertheless, Holmes suggested that this contravened the Commercial Radio Australia Code of Practice which insists that broadcasters must ‘present significant viewpoints when dealing with controversial issues of public importance’. This regulation may be on the books, yet it is practically defunct. The left-wing activists GetUp filed a complaint—necessary for the Australian Communications and Media Authority to act—the next day.

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