Does the Border Force Act Inhibit Free Speech and Media Communication?

2017 CAMLA Essay Competition Winner, Jade Standaloft considers the restrictions on free expression imposed on the refugee regime in Australia under the Border Force Act 2015 (Cth) and how they may be reduced.

Since the return to offshore processing in 2012, the Australian refugee regime has been an area of increasing tension, where an influx of domestic legislation and policy changes frequently conflict with international obligations. Despite this, refugee issues continue to thrive in an environment where refugee policy has simultaneously been hyper-mediated as a key election issue and changeable policy tool, and the subject of escalating secrecy regarding the ways the processing regime is managed.

The *Border Force Act 2015* (Cth) (*BFA*) imposes strict secrecy provisions upon employees working in offshore detention centres including potential criminal sanctions for the communication of concerns to the media. The media is a key figure in the operation of representative democracy,[1] and plays a fundamental role in influencing public opinion. Restrictions such as those in the BFA threaten this role.

The essay will first consider the role of media in shaping democratic decisions. Secondly, it will examine domestic restrictions on media and free expression within the present refugee regime, through the *BFA*. Finally, it will examine how the influence of restrictions might be lessened or completely subverted, by the role of whistle-blower legislation or the application of the implied freedom of political communication.

1. Role of the media and current restrictions

The media plays a key role in connecting the public to the government, acting as important sources of information, entertainment and education. It therefore wields enormous power in the modern democracy.[2]

Further, the media is a valuable tool in providing decision makers with access to their constituents. It is a significant avenue along which community standards or expectations can be ascertained.[3] Representative democracy is intended, in its best form, to comply with the will of the majority and legislate in accordance with societal values.

The media therefore has the power to dictate public focus through the presentation of some topics as concerns and others as irrelevant, giving it immense power in shaping the political agendas of the public.[4] This means that restriction on content available to the media inevitably influences the way in which it shapes views of the public, and by extension, the communication of the public with its representative government.[5] While it is clear that access to all information will not necessarily make certain topics – such as offshore processing – immediately part of the political agenda, without this access there are no avenues through which the information can be presented meaningfully to the public. Therefore, a scheme of immense secrecy may directly restrict public capacity to make an informed decision about what constitutes acceptable government behaviour.

1.1 Border Force Act 2015

The most prominent restriction on the dissemination of refugee processing information is the introduction of the *BFA*. This legislation imposes strict obligations on all employees working within offshore detention centres in what are the strictest secrecy provisions of the refugee regime to date. For example, section 42 makes it an offence for an 'entrusted person' to make a record or disclose 'protected information'.[6] An 'entrusted person' is defined as any employee, consultant or contractor of the Department, as well as public service employees or anyone else making their services available to the Department.[7] 'Protected information' is widely defined to include any information obtained in the course of employment.[8]

It also specifically outlaws the recording any information unless it is part of an entrusted person's job, or is authorised by law or by

1 David Rolph, Matt Vitins and Judith Bannisher, *Media Law: Cases, Material and Commentary* (Australia Oxford University Press, 2015) 21.

2 Tamara Pallos, 'The effect of the Mass Media on the Practice of Australian Democracy' (1999) 9(1) *Polemic,* 42 43.

3 Fay Lomax Cook et al. 'Media and Agenda Setting: Effects on the Public, Interest Group Leaders, Policy Makers and Policy' (1983) 47(1) *The Public Opinion Quarterly*, 16, 32.

4 Above n 2.

5 Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2010) 36(2) *Monash University Law Review* 123, 128.

6 *Australian Border Force Act 2015* (Cth), s 42.

7 Ibid s 4.

8 Ibid s 4.

an order or direction of a court or tribunal.[9] Violation of these provisions can result in up to two years' imprisonment.[10] Additionally, journalists who request information or records from an entrusted person can be charged with aiding and abetting the commission of the offence under the federal criminal code.[11] While the BFA is silent on any rationale for the secrecy provisions, government officials have cited a desire prevent the leaking of classified information that may comprise the operational security of Border Force officers.[12]

There are some exceptions to the restrictions created by the *BFA*. Disclosure of protected information is allowed if authorised by the Secretary of the Department, if required for work within the Department, or if required by law or court order.[13] Additionally, individuals will not be liable if information has already been made public,[14] or if disclosure for the purposes of preventing or lessening a serious threat to the life or health of an individual.[15] However, the onus for proving these circumstances is on the disclosing individual. Further, these exceptions do not permit disclosure about general conditions within the centre.

2. Exceptions to speech and media restrictions

It has been suggested that the secrecy provisions could be circumvented in two ways by the media; through whistle-blower protection legislation, and through the implied constitutional freedom of political communication.

2.1 Public Interest Disclosure Act 2013 (Cth)

The *Public Interest Disclosure Act 2013* (Cth) (*PIDA*) seeks to protect whistle-blowers from adverse outcomes resulting from disclosure of information. The Australian government has previously said that individuals making disclosures will be protected under the PIDA.[16] Moreover both the Government and the Opposition have argued that the PIDA protections offset any potential risk to safety or integrity of the system under the BFA.[17]

Section 26 of the PIDA permits individuals to make disclosures to authorised representatives of Government concerning matters of suspected or probable illegal conduct or wrongdoing.[18] After such disclosure individuals are authorised to make wider disclosures but only if the internal disclosure has not been adequately dealt with, and only if such disclosure would satisfy public interest requirements. Disclosure is not restricted to internal departments if there is a substantial or imminent danger to health and safety. Finally, the PIDA authorises any disclosure to Australian legal practitioners in relation to section 26.

Therefore, the only avenue for public disclosure (including via the media) under the PIDA is when it is in the public interest and only after disclosure to an authorised representative of Government has failed to address the issue or where there is substantial or immediate danger to health and safety. As some issues within detention centres are long-standing or on-going, it is not clear whether they would qualify as a 'substantial or immediate' risk pursuant to section 26. Mere disagreement with the course of action following internal disclosure is insufficient grounds for public disclosure.[19] It must be a failure to adequately deal with the internal disclosure, not merely a concern for the chosen course of action. It is also restricted to illegal conduct or wrongdoing, which excludes problematic systemic behaviour from the scope of section 26.

Finally, individuals are not permitted to publicly disclose 'intelligence information', which is widely defined in the *PIDA* as including information 'reasonably likely to prejudice Australia's law enforcement interests'.[20] It is likely that the majority of conduct within offshore detentions would fall within the classification of 'sensitive law enforcement' information and could not be disclosed under this exception.

Therefore, the *PIDA*, despite Government assertions, only really has the effect of allowing internal disclosures to authorised persons, and even then, only regarding illegal conduct or similar wrongdoings. This does not appear to provide significant recourse outside the parameters set by the *BFA*, and therefore would not facilitate access to the media, nor even the general public.

2.2 Implied right to freedom of communication about government matters

While Australia does not have a constitutionally enshrined right to free speech, it is nonetheless

9 Ibid s 42.

10 Khanh Hoang, 'Migration law: Of Secrecy and Enforcement: Australian Border Force Act' (2015) 14 *Law Society of NSW Journal*, 78, 78.

11 Ibid 79.

12 *Doorstop Interview with Australian Border Force Commissioner, Roman Quaedvlieg* (1 July 2015) Newsroom <http://newsroom.border.gov.au/releases/d0e3ab05-52b6-47ce-addd-762791fddbfc>.

13 Above n 7, s 44 – 46.

14 Ibid s 49.

15 Ibid s 48.

16 Above n 11, 79.

17 Peter Dutton, 'Inaccurate Media Statements on the ABF ACT', (Media Release, 1 July 2015) 1 < http://www.abc.net.au/mediawatch/transcripts/1524_statement.pdf>

18 *Public Interest Disclosure Act 2013* (Cth) s 26.

19 Ibid s 31.

20 Ibid s 41.

accepted that freedom of speech is essential to the effective operation of representative democracy. Therefore, some limited freedoms have been recognised with regard to governmental matters, and implied into clause 24 of the *Constitution*.[21] Following the High Court decision of *Lange*,[22] this freedom is now well enshrined in Australian law – however, the scope and extent of the implied freedom still requires elaboration.[23]

For the *BFA* to fall within the scope of this implied freedom, it would have to satisfy the two-limb test first set out in *Lange*. First, the law must effectively burden freedom of communication about government or political matters. Secondly, if the law does burden that freedom, is the law reasonably appropriate and adapted to serve a legitimate end which is consistent with the maintenance of representative government?

Regarding the first limb, it would be necessary to establish whether statements regarding conditions in offshore detention would be classified as communication about government or political matters. While there has been some argument for a broad understanding of political content,[24] this wide scope has not been recognised by the High Court. Even without an expansive definition, it is possible that it would be regarded as political communication for two reasons. First, refugee arrivals in Australia have been an ongoing topic of significant legislative intervention and reform in recent years, including three major Acts and five privately sponsored Bills in 2012-2013 alone.[25] Secondly, offshore detention continues to be a major focus of both major political parties. Most recently, in the 2016 election, the boat arrivals were utilised by Labour,[26] Liberal[27] and the Greens[28] as a significant election platform.

The next requirement is whether the *BFA* burdens communication. At its broadest, any law likely be a deterrent to political communication may satisfy this test.[29] Given the *BFA* prevents particular individuals from communicating about these matters with anyone, it is likely that its provisions fall within the first limb of the *Lange* test. It would not be sufficient that employees agreed to the restrictions; freedom of political communication is not an individual right, but rather, a legislative bar, and therefore is not defeated by individual consent.[30] Further, the High Court has recognised that the protection extends to communications relating to international obligations binding on Australia.[31] As a result the limb may be satisfied by discussions of whether the circumstances in offshore detention conform with the expectations on Australia under the Refugee Convention.

Finally, courts have previously construed legislation which imposes criminal liability, and legislation which requires registration or government approval before a person can speak as effectively burdening the implied freedom;[32] both of which the *BFA* does. Therefore, the bar on communications by individuals working within the centres would likely qualify the first test.

The second limb of the test, as modified in *Coleman*,[33] requires that the law be reasonably appropriate and adapted to serve a legitimate end compatible with the maintenance of a representative and responsible government. The inclusion of 'compatible ends' is intended to encourage parliament to expressly identify the object of legislation, and to constrain the pursuit of burdens on the freedom of communication.[34] In the *BFA*, no specific object is expressed beyond the regulation of persons performing work for the Department. Further, it can be evinced from the provisions that there is an intention to prevent disclosures of protected information by entrusted persons. It would therefore be for the court to determine whether this intention is compatible with the maintenance of a representative and responsible government. The claim that the laws are enacted for the purposes of maintaining national security may therefore be relevant.

The complete ban on external communication potentially fails to meet the 'reasonably adapted' test, because of the blanket restriction that it imposes. In *Levy*,

21 *Commonwealth of Australia Constitution Act 1901* (Cth) cl 24.

22 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

23 Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28 *Federal Law Review* 41, 41.

24 *Hogan v Hinch*, (2011) 243 CLR 506, 543-4.

25 Elibritt Karlsen et al, 'Developments in Australian Refugee Law and Policy (2012 to August 2013)' (Research Paper Series, 2014 – 2015, Parliamentary Library, Parliament of Australia, 2015).

26 Bill Shorten, *It's Time for change of direction on immigration policies* (25 July 2015) Labor Herald <https://www.laborherald.com.au/politics/its-time-for-change-of-direction-on-immigration-policies-shorten-speech/>.

27 Caitlyn Gribbin, *Election 2016: Turnbull in damage control after Barnaby Joyce links Asylum Seekers to live exports* (26 May 2016) ABC News <http://www.abc.net.au/news/2016-05-26/barnaby-joyce-downplays-asylum-seeker-live-cattle-comments/7447076>.

28 Rachel Baxendale, *Federal Election 2016: Greens Refugee Policy to Cost 7bn, Dutton's Office Says* (18 May 2016) The Australian <http://www.theaustralian.com.au/federal-election-2016/federal-election-2016-greens-refugee-policy-to-cost-7bn-duttons-office-says/news-story/8f45775d4a5b3efc8d77ec62a5e77f75>.

29 *Monis v The Queen* (2013) 295 ALR 259, 340, 344 – 5.

30 *AA v BB* (2013) 296 ALR 353, 375.

31 *Levy v Victoria* (1997) 189 CLR 576.

32 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, 130.

33 *Coleman v Power* (2004) 220 CLR 1.

34 George Williams and David Hume, *Human Rights Under the Australian Constitution,* (Oxford University Press, 2nd ed, 2013) 202.

a distinction was made between direct and indirect restrictions on communication. It was also noted that law aimed at restricting political communication would only be valid if such law was necessary for the attainment of an overriding public purpose.[35] Again the court would need to decide if factors such as national security justified the restrictions imposed on members of the public. It is possible that the exceptions articulated in sections 44 to 49 of the BFA are sufficiently adapted to justify the restrictions they imposed.

3. Conclusion

The media has a fundamental role in disseminating information to the public and facilitating active participation in representative democracy. The media is a powerful tool; restricting the information available to it will limit the information provided to the public, and restrict citizen agency to instigate change. In a climate where governmental policy is often controversial and potentially at odds with broader international obligations and norms, any attempt to restrict the potential for change should be viewed with alarm.

It must be recognized, however, that the media is also driven largely by profit, not simply by its apparent role as the fourth estate,[36] nor by mere benevolence. The treatment of refugees in Australia was inconsistent with international obligations long before these restrictions were placed on public disclosure, with little opposition in the public sphere; certainly not enough opposition to incite meaningful change to the regime. Further, in an age of developing new media, sustaining public interest for extended periods of time – such as may be necessary to invoke meaningful change of current governmental policies imposed on refugees – is increasingly difficult.[37]

Furthermore, the BFA has not yet been exhaustively tested, and a challenge under existing law, such as the implied freedom of governmental communication may yet establish that its restrictions are invalid. It is also important to note that modifications have been made to exclude doctors from the restrictions, and yet have not led to a rise in media reporting about conditions in detention.

Secrecy provisions such as those employed in the *BFA* further a culturally embedded atmosphere in which it is acceptable for Australia to flagrantly breach its international obligations, so long as the Australian public is not aware that it is doing so. Allowing media access and open communication about incidents occurring in offshore processing centres may not solve the issues with the current regime, but it would mean the Government is held to account and not able to hide behind a veil of self-imposed secrecy.

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35 Above n 31.

36 Jacqueline Ewart, Mark Pearson and Joshua Lessing, 'Anti-Terror Laws and the News Media in Australia since 2001: How Free Expression and National Security Compete in a Liberal Democracy' (2016) 5(1) *Journal of Media Law* 104, 105.

37 Katherine Gelber, 'Freedom of speech and Australian political culture' (2011) 30(1) *University of Queensland Law Journal* 135, 141.

Contributions & Comments

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