



# **Reforming Vietnamese media law: with special reference to Australian models**

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## ABBREVIATIONS

AANA	Australian Association of National Advertisers
ABC	Australian Broadcasting Corporation
ACCC	Australian Consumer and Competition Commission
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
ALRC	Australian Law Reform Commission
APC	Australian Press Council
APPs	Australian Privacy Principles
ASB	Advertising Standards Bureau
ASIO	Australian Security Intelligence Organisation
BSA	Broadcasting Services Act 1982 (Cth)
FOI Act	Freedom of Information Act 1982 (Cth)
IPS	Information Publication Scheme
ITU	International Telecommunication Union
MIC	Ministry of Communication and Information
OAIC	Office of the Australian Information Commissioner
ONA	Office of National Assessments
PID Act	Public Interest Disclosure Act 2013 (Cth)
PPC	Provincial People's Committee
SBS	Special Broadcasting Service
VCP	Vietnamese Communist Party
VOV	Voice of Vietnam
VTV	Vietnamese Television

## SUMMARY

The media industry has been developing significantly in Vietnam, especially since 1986, the period of *Doi moi* or *Economic Renovation*. In this thesis, that means that the number of media organizations and media products has grown strongly and that media content has been changing to include a greater range of subject matters. Vietnamese media legislation, however, has not kept up with this development in such a way as to serve the public interest. This project examines Vietnamese media legislation in order to identify and analyse its shortcomings. The study then describes Australian media regulations for the purpose of assessing whether they represent a model that could address the identified shortcomings of Vietnamese media legislation.

Regulations critiqued include the *Vietnamese Press Law 1989*, *Vietnamese Civil Code 2005*, *Vietnamese Criminal Code 1999*, *Vietnamese Denunciation Law 2011*, *Spokesman Regulation 2007*, *Law on Technology Transfer 2006*, *Decree No. 51/2002/NĐ-CP* enacted on 26 April 2002 detailing the Vietnamese Press Law 1989, and *Ordinance No. 30* on the protection of state secrets enacted 28 September 2000. The shortcomings identified are: political interference in media activities limiting freedom of expression and freedom of information; the lack of privacy protection; the absence of provisions defining opposition (as distinct from dissent), government secrets, and defamation; the lack of detail about the right to free access to government-held information; and the lack of complaints and grievances handling processes.

The project asks: how well are freedom of expression and freedom of information protected well in Australia and in Vietnam? Is media ownership regulated in Australia and Vietnam in such a way as to support those freedoms, diverse ownership, diverse content and the development of the media industry? Are complaints and grievances against the media handled well in Australia and Vietnam? Finally, are Australian enforcement processes preferable to those in Vietnam?

To answer these questions, I reviewed legal documents such as laws, documents guiding the implementation of law (degrees, circulars), by-laws and reports of Australian court cases, and consulted secondary literature such as textbooks, monographs, journal articles and law reform reports. I extended that data by conducting a series of semi-structured interviews with a range of key individuals who have an affiliation with media law in both Australia and Vietnam. I then reviewed Australian models to examine whether or not they could inform ways of redressing the deficiencies of Vietnamese media laws.

Through this research I find that Vietnamese media legislation is not well developed and needs to be reformed. Although Australian media law is not perfect, it can provide a range of models for Vietnam. Australian models cannot address all the shortcomings of Vietnamese media legislation. However, Vietnam could benefit from Australian provisions



covering a number of areas including freedom of political communication; the right of access to government-held information; the balancing of free expression and freedom of information with other legitimate interests; definitions of many matters such as opposition and defamation; ownership and control; and complaints and grievances handling. Based on these findings, the project makes recommendations for the reform of Vietnamese media legislation to make it catch up and support the development of the media industry in a way that serves the public interest.

## DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

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Nguyen Thuy Hang

March 2017

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# Chapter 1

## Introduction

This thesis focuses on identifying and analysing the shortcomings of Vietnamese media law, especially in freedom of expression, freedom of information, personal information, defamation, opposition and dissent, ownership, and handling of complaints and grievances. The research then reviews Australian models to find out how these can resolve the problems which Vietnamese media legislation leaves unresolved. Finally, the research provides recommendations for reforming the identified deficiencies of Vietnamese media law based on Australian models.

In this chapter, I first introduce the background to the research. The chapter then explores the aims and objectives of the research before revealing the significance of the research. After that, the chapter gives an overview of the research methodology. The chapter continues with the limitations of the research before reviewing the existing research. Finally, the chapter provides the structure of the thesis.

### 1. Background of the research

In this section I describe the term media and its context in Vietnamese society. The section also provides the circumstances that help explain why I have done this research.

The term 'media' has a variety of interpretations of differing breadth. In 1984, a traditional interpretation expressed by John Donaldson in the English Court of Appeal pointed out that the media comprise 'not only the newspapers but also television and radio'.<sup>1</sup> A recent Australian book defines the term as covering 'any number of methods of communicating with an audience and could include, for example, a slogan on a t-shirt'.<sup>2</sup> In recent times, the concept of the media may consist of newspapers, television, radio, and 'other means of conveying information and ideas including internet, blogs, podcasts, online bulletin boards and discussion lists, computer software, video games and multimedia'.<sup>3</sup>

In Vietnam, under the *Vietnamese Press Law 1989*, the media includes, in addition to print media (newspapers, journals, news bulletins, editions of news agencies), electronic media (radio and television programmes and audio-visual news programmes transmitted by various means) and website news (presented through the Internet).<sup>4</sup>

The social and political background of the Vietnamese media is Marxist-Leninist philosophy.<sup>5</sup> The Vietnamese media are considered simultaneously as an essential means of

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<sup>1</sup> *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 at 989.

<sup>2</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law: Cases, Materials and Commentary* (Oxford University Press, 2010) 3.

<sup>3</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 2.

<sup>4</sup> See, eg, *Vietnamese Press Law 1989 s 1(2)*; the draft of new Press Law, s 3; Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies <<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>5</sup> Heng, Russell Hiang- Khng, 'Media in Vietnam and the structure of its management' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27.

communication for social life, and the mouthpiece of the Vietnamese Communist Party (VCP) and also the means for communication of the state and social organizations and the people's forum.<sup>6</sup> The media affect many facets of society.<sup>7</sup> The media in Vietnam are considered a tool to rally people's participation in implementing the policies and political line of the VCP, to protect the national interest and to encourage citizens to abide by the law. In relation to the economy, the media have contributed to the understanding of urgent economic problems and, to a certain extent, contributed to resolving them.

The media have been developing significantly in Vietnam, especially since 1986, which was the period of Vietnamese economic renovation (*Doi moi*). At that time, the VCP decided to change from a centrally planned economy to a market economy, and the media began to produce more interesting content that attracted readers by discussing and providing a diverse range of information about the economy, technology, sport and news.<sup>8</sup> In recent years, the media have become a forum for people who wish to express their opinions and ideas about various issues. The media also have come to play a role as a responsible watchdog, pointing out problems which may have been overlooked by official inspectors. When there are insufficient avenues for people to disclose their problems or suggestions, the media have become a receptive listener.<sup>9</sup> An active media enhances the atmosphere of democracy in society. Most media institutions have tried to cover new topics and made improvements to formats and styles. The content of the media is easier to understand, and is more interesting and informative, than it was prior to *Doi moi*.<sup>10</sup>

However, Vietnamese media legislation has not met the needs of the current situation or served the public interest in contemporary society.<sup>11</sup> This is reflected in several shortcomings in regulations relevant to the media, such as the *Vietnamese Press Law 1989*, *Vietnamese Civil Code 2005*, *Vietnamese Criminal Code 1999*, *Vietnamese Denunciation Law 2011*, *Spokesman Regulation 2007*, *Law on Technology Transfer 2006*, *Decree No. 51/2002/NĐ-CP*,<sup>12</sup> and *Ordinance No. 30*.<sup>13</sup> The shortcomings relate to many areas, including freedom of expression, freedom of information, protection of personal information, protection of reputation, opposition and dissent, ownership, and complaints and grievances handling. These shortcomings can be summarised as:

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<sup>6</sup> *Vietnamese Press Law 1989* s 1; the draft of new Press Law, s 5(1).

<sup>7</sup> Lam, Chu Van 'Economics-related periodicals' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 60.

<sup>8</sup> Hiang, Russell (ed), *Media fortunes changing times, ASEAN states in transition* (Institute of Southeast Asian Studies, 2002).

<sup>9</sup> See, eg, Lam, Chu Van 'Economics-related periodicals'; Thai, Ho Anh 'Creative writers and the press in Vietnam since renovation' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 55, 56, 60.

<sup>10</sup> Hong, Hoang Thi Minh, Media and civil society in support of good governance and democracy in Vietnam (13 May 2012) <<http://search.proquest.com/docview/211518880?accountid=10910>>.

<sup>11</sup> Ha, Thu, *Boosting the Role of Mass Media* (20 June 2011) Vietnam Chamber of Commerce and Industry <[http://vccinews.com/news\\_detail.asp?news\\_id=23451](http://vccinews.com/news_detail.asp?news_id=23451)>.

<sup>12</sup> Decree No. 51/2002/NĐ-CP enacted on 26 April 2002 detailing the Vietnamese Press Law 1989 and Vietnamese Press Law 1989 amended 1999 (Nghị định số 51/2002/NĐ-CP ngày 26 tháng 4 năm 2002 Quy định chi tiết thi hành Luật Báo chí, Luật sửa đổi, bổ sung một số điều của Luật Báo chí).

<sup>13</sup> *Ordinance No. 30* enacted 28 September 2000 regulating matters relating to the protection of state secrets (Pháp lệnh số 30/2000/PL-UBTVQH10 ngày 28/12/2000 Bảo vệ bí mật Nhà nước).

- there is no provision showing clearly that freedom of expression is protected from state interference;<sup>14</sup>
- freedom of expression has been limited by the interference of the Vietnamese Communist Party and the government;<sup>15</sup>
- there is no provision stipulating clearly the responsibilities of government agencies and government officers in providing information to the media;<sup>16</sup>
- there are no provisions specifying that members of the public have right to access to government-held information;
- no legal documents provide the definition and scope of personal information;
- the absence of rules applying to the collection, storage and use personal information;
- the absence of a provision defining defamation, the grounds for compensation for mental damage and the degree of compensation available in cases of defamation;<sup>17</sup>
- the absence of provisions specifying the requirements for a successful defamation action;
- the organizations or individuals who are under obligation to protect whistleblowers have not enough enforcement power;
- the absence of a provision defining opposition (as distinct from dissent);
- the absence of clarity as to the process applied to handle complaints and grievances against the media;<sup>18</sup>
- the absence of a definition and scope of government or official secrets;
- the absence of a definition of national security;
- the complexity of the provisions covering the protection of official government or official secrets;<sup>19</sup>
- having a prohibition against running more than one type of media is unsuitable in the age of media convergence;<sup>20</sup>
- the flouting of the prohibition against private ownership as private companies have been participating in some stages of media activities, such as by placing advertisements in government media and by issuing media releases.<sup>21</sup>

<sup>14</sup>Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies  
<<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>15</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 2- 5.

<sup>16</sup>*Vietnam in need of media laws: official VNA* (06 January 2011) Vietnewsline  
<<http://vietnewsline.vn/News/Society/Law/14483/Vietnam-in-need-of-media-laws-official.htm>>.

<sup>17</sup>Yên, Hoàng, *Bồi thường xúc phạm danh dự* (05 June 2015) Hanh luật Giai phong < <http://luatgiaiphong.com/tin-tuc-phap-luat/7302-boi-thuong-xuc-pham-danh-du>>.

<sup>18</sup>Templer, Robert, *Vietnam press still hampered by ideology* (17 August 2012) Expanded Academic ASAP  
<<http://go.galegroup.com/ps/i.do?action=interpret&id=GALE%7CA18036314&v=2.1&u=flinders&it=r&p=EAIM&sw=w&authCount=1>>.

<sup>19</sup>*Hoàn thiện pháp luật về bảo vệ bí mật nhà nước* (16 August 2015) Công ty luật TNHH Sài Gòn Minh Luật  
<[http://www.saigonminhluat.com/index.php?option=com\\_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519](http://www.saigonminhluat.com/index.php?option=com_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519)>; Participants 1, 3, 6, 8, 9, 10, 12, 15.

<sup>20</sup>*Sẽ cho phép cơ quan báo chí có nhiều loại hình báo* (7 August 2012) Thu vien Phap luat <<http://thuvienphapluat.vn/tintuc/vn/thoi-su-phap-luat/thoi-su/-14322/se-cho-phep-co-quan-bao-chi-co-nhieu-loai-hinh-bao>>.



In addition, even today, the media in Vietnam is not fully independent as it does not always act separately from the State.<sup>22</sup> Media regulatory bodies always consult with the Vietnamese Communist Party (VCP) before appointing an editor in chief.<sup>23</sup> Editors in chief not only are members of the VCP but also swap positions with officials who come from media regulatory bodies.<sup>24</sup> Media practitioners are, in effect, state functionaries within the party-government establishment. The power and status of media practitioners are calculated based upon party membership, length of time as a member of the VCP and party position held.<sup>25</sup>

The problems mentioned above are some of the causes of difficulties in media regulation activities which in turn limit the growth of the media in ways that would serve the public interest. This statement may seem to be in tension with my earlier statement about how much the media industry have developed since *Doi moi*. However, I will explain this statement when I critique Vietnamese media legislation in chapter 6.

The project asks: are freedom of expression and freedom of information protected well in Australia and Vietnam, and if so, how? Do Australian and Vietnamese laws protect the right to personal information reputation adequately in the balancing against the freedoms mentioned above, and if so, how? Is media ownership regulated in Australia and Vietnam in such a way as to support those freedoms, diverse ownership, diverse content and the development of the media industry, and if so, how? Are complaints and grievances against the media handled well in Australia and Vietnam, and if so, how? Finally, are Australian enforcement processes preferable to those in Vietnam?

## 2. Aims and objectives

### 2.1. The aims of the research

The overarching aim of this research is to advise on options for reform to Vietnamese media legislation, responding to the shortcomings identified and based upon Australian models. The project seeks to shed light on the shortcomings of Vietnamese media laws by examining the way that issues are addressed in Australia. The research pays especial

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<sup>21</sup> *Không cho phép báo chí tư nhân* (24 November 2013) British Broadcasting Corporation <[http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717\\_press\\_law.shtml](http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717_press_law.shtml)>; Hong, Hoang Thi Minh, *Media and civil society in support of good governance and democracy in Vietnam* <<http://search.proquest.com/docview/211518880?accountid=10910>>.

<sup>22</sup> Heng, Russell Hiang-Kheng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies <<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>23</sup> *Thoả thuận bổ nhiệm lãnh đạo cơ quan báo chí in* (15 August 2013) Bo Thông tin và Truyền thông <<http://mic.gov.vn/tthc/bc/cucbc/Trang/Tho%E1%BA%A3thu%E1%BA%ADnb%E1%BB%95nh%E1%BB%87ml%C3%A3nh%C4%91%E1%BA%A1oc%C6%A1quanb%C3%A1och%C3%ADn.aspx>>.

<sup>24</sup> Heng, Russell Hiang-Kheng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies <<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>25</sup> Heng, Russell Hiang-Kheng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies <<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

attention to how freedom of expression and freedom of information are ensured, how media ownership is regulated, how complaints and grievances against the media are handled, and how media regulatory bodies are organized.

## 2.2. The objectives of the research

To achieve the research aims mentioned above, four objectives were identified:

1. To identify the shortcomings of Vietnamese media regulation covering freedom of expression, freedom of information, personal information, protection of reputation, opposition and dissent, ownership, and complaints and grievances handling.

2. To examine the following areas of Australian law which could help to provide solutions for the shortcomings that have been identified in Vietnamese media regulations, such as:

- the protection of freedom of political communication from government interference;
- the statutory guarantee of a right of access to government-held information;
- the means of balancing the protection of privacy, reputation, national security, and public order with freedom of information and freedom of expression;
- the protection of diverse content and ownership;
- processes for handling complaints and grievances against the media.

3. To consider whether Australian models, broadly defined, could help address the shortcomings in Vietnamese media law that were previously identified.

4. To consider whether there would be particular aspects of Australian media law that could not or should not be carried across, or should be modified before being adopted in Vietnam.

## 3. The significance of the research

This study is significant for two key reasons.

Firstly, the Vietnamese legal system was based on the Soviet theory, but key concepts within that theory have now been challenged, for example there is now a concept of the public interest independent of the interests of the state. This suggests that the content of the law also needs to change, and it is appropriate to look to jurisdictions where such concepts also exist, including liberal democracies such as Australia.

Secondly, the media in Vietnam are in a period of strong development.<sup>26</sup> However, this development is taking a form that does not necessarily serve the public interest,

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<sup>26</sup>The Report of the MIC 2014 (Báo cáo tổng kết công tác năm 2014 và phương hướng, nhiệm vụ năm 2015) 21 (<http://baochinhphu.vn/Bo-nganh-tong-ket-nam-2014/Bao-cao-tong-ket-cong-tac-nam-2014-cua-Bo-Thong-tin-va-Truyen-thong/216686.vgp>); Jason Fang, *Truyền thông mới ở Việt Nam đang trong tiến trình phát triển* (04 October 2015) Australia Plus <<http://www.australiaplus.com/vietnamese/2014-04-09/truy%E1%BB%81n-th%C3%B4ng-m%E1%BB%9Bi-%E1%BB%9F-vi%E1%BB%87t-nam-%C4%91ang-trong-ti%E1%BA%BFn-tr%C3%ACnh-ph%C3%A1t-tri%E1%BB%83n/1293560>>; *Thị trường truyền thông Việt Nam đang phát triển mạnh* (04 October 2015)

particularly because Vietnamese law in its current state does not support the media sufficiently in gaining access to, and publishing, information. The study therefore has the important function of providing recommendations for reforming Vietnamese media law to support the development of the media to serve the public interest.

One intended outcome of the study is to address the lack of protection in Vietnamese media laws for freedom of expression from state interference<sup>27</sup> and the absence of an effective, clearly stipulated right to access to information held by the government and of a corresponding responsibility on agencies, organizations and individuals to provide information to the media.<sup>28</sup> The research also seeks to provide a solution to the lack of any provision covering the *process* for accessing government-held information. Confusion as to the process means that members of the public including the media find it very difficult to access information held by government agencies. In particular, the media do not have enough information to publish, especially information relating to government or political matters. These findings will help reduce the mismatch between the development of the media and the needs of the public. The information published therefore would be more related to government-held information than it has been before. In addition, the views or opinions of the public would be published more often than they have been. As a result, the media would develop and better serve the public interest.

Further, improvements to the support for the freedom of political expression would support the role of the media in a democracy. Such provisions would enable the public, including the media, to access the workings and outcomes of the representatives' processes including election processes and processes of enacting important decisions or policies. People therefore would be enabled to discuss and analyse political or government decisions or policies. They would also be enabled to exercise their informed choices as electors. For these reasons, the development of representative government and democratic society would be supported.

Another area the research addresses is the concept, definition and scope of government or official secrets and personal information: these are not currently addressed clearly and in particular there is no clear definition in the *Vietnamese Press Law* of the national interest.<sup>29</sup> There is also no definition of opposition (as distinct from dissent) or defamation, and this is the reason for the confusion surrounding publication decisions, especially when publishing dissenting opinions. As a result, editors in chief who are in confusion choose not to publish information, to make sure that they do not break the law or

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Vietnam Branding <<http://vietnambranding.com/thong-tin/chuyen-de-thuong-hieu/1683/Thi-truong-truyen-thong-Viet-Nam-dang-phat-trien-manh->>.

<sup>27</sup>Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies <[<sup>28</sup>\*Vietnam in need of media laws: official VNA\* \(06 January 2011\) Vietnews online <\[<sup>29</sup>\\*Nhung "Ke ho" cua luat bao chi\\* \\(26 September, 2007\\) Phap luat thanh pho Ho Chi Minh <\\[6\\]\\(http://www.phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm></a>.</p></div><div data-bbox=\\)\]\(http://vietnews online.vn/News/Society/Law/14483/Vietnam-in-need-of-media-laws-official.htm></a>.</p></div><div data-bbox=\)](http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947></a>.</p></div><div data-bbox=)

become subject to complaints and grievances. The result is that the information published is limited and members of the public cannot always express their opinions or views through the media. The outcomes of the study therefore are expected to help the media gain confidence in making decisions about publication, to better express public opinions or views, especially when those relating to political or government matters.

A third intended outcome of the research is to provide a solution to the confusion arising from the insufficient clarity of, and lack of sufficient detail in, provisions relating to the right to complain and the processes for handling complaints and grievances.<sup>30</sup> Complainants, media organizations and media regulatory bodies are all disadvantaged by this confusion. This outcome will help develop clear processes for handling complaints and grievances. Both the media and complainants will benefit from knowing exactly what they have to do, how to do it, and who is authorized to handle the complaint or grievance.

The research also suggests alternatives to the current situation in Vietnam regarding media ownership: it is misleading and confusing to prohibit private media when many private organizations have been running media activities under the media licence of publicly owned organizations.<sup>31</sup> In addition, intervention by the Vietnamese Communist Party (VCP) and the government in media activities, especially in program or publication decisions, has had a chilling effect on publication. The study therefore intends to suggest solutions to allow retain government ownership of the media on the one hand, but to reduce the influence of the government and the VCP on the media on the other hand.

By addressing all of these ways in which Vietnamese media law limits the development of the media industry, the research can help media law to catch up with the development of the media. In doing so, it could guide the development of the industry in such a way as to serve the public interest.

For these reasons, reforming Vietnamese media legislation is an important priority for the Vietnamese government at this time. At the Vietnamese National Conference on the Press which was held in 2010 to discuss the activities of the mass media as well as to set key tasks for the media in the medium term future, Mr Do Quy Doan, Deputy Minister of Information and Communications, stated that the Vietnamese government 'should pay due attention to the building and perfection of regulations and laws on the mass media sector, creating the best conditions for the activities of the mass media sector'.<sup>32</sup> Mr Nguyen Huy Ngat, the director of the Vietnamese Justice Ministry's International Cooperation Department, said that the legal framework for the media must secure the stability of media operations and allow for newly-emerging issues and future developments which are not covered by the current *Press Law*. Mr Nguyen Huy Ngat also argued that the unclear and simplistic regulations of the current

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<sup>30</sup>Participants No 1, 3, 5, 11, 12, 16, 18, 19, 20.

<sup>31</sup> Hong, Hoang Thi Minh, *Media and civil society in support of good governance and democracy in Vietnam* <<http://search.proquest.com/docview/211518880?accountid=10910>>.

<sup>32</sup> Ha, Thu, *Boosting the Role of Mass Media* (20 June 2011) Vietnam Chamber of Commerce and Industry <[http://vccinews.com/news\\_detail.asp?news\\_id=23451](http://vccinews.com/news_detail.asp?news_id=23451)>.

law need to be made clearer and developed in more detail.<sup>33</sup> This research can offer solutions to these problems by offering suggestions for reform of the relevant media legislation based on Australian models.

Thirdly, there has been limited research in Vietnam on media legislation, especially research aiming to find solutions to the shortcomings mentioned above, by reforming Vietnamese media laws based on models from foreign countries. The research therefore is expected to provide solutions for reforming Vietnamese media based on Australian models to help develop the media industry to serve the public interest.

Australian law is of interest to my project because the legislation has been amended to accommodate developments in media technology and industries.<sup>34</sup> A good example is the 'amendments to the [*Broadcasting Services Act* that] have widened its scope to include the regulation of datacasting services and certain aspects of content provided over the internet and mobile devices'.<sup>35</sup> In addition, the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) has attempted to address the processes of convergence by freeing up cross-media acquisitions and leaving 'foreign ownership of the broadcasting media to be entirely regulated by the Government's foreign investment policy'.<sup>36</sup> The Hon Helen Coonan, who was the Minister for Communications, Information Technology and the Arts from 2004 to 2007, described the government's motivation in reforming Australian media legislation as being to make it meet the challenge of a multi-media revolution, so it could support the development of the media industry,<sup>37</sup> describing the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) as 'partly a reflection of the fact that the media environment is dynamic and will continue to change in response to technological innovations and consumer demands'.<sup>38</sup> She stated: 'the reforms mark a logical progression that reflect recent changes and ensure ongoing relevance, while maintaining a workable balance between protecting the public interest and facilitating new opportunities for providers of broadcasting services'.<sup>39</sup> She finally emphasised that the new regulatory framework had been updated in the face of changes to the media industry and it therefore 'allow[ed] for efficiencies of scale and scope by existing industry players and also encourage[d] new entrants, new investment and new services to contribute to diversity in a competitive environment'.<sup>40</sup> This all suggests that Australia may be able to provide a model (or models) for the consideration of how media law can support the development of the media industry.

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<sup>33</sup>*Vietnam in need of media laws: official VNA* (06 January 2011) Vietnewsline <<http://vietnewsline.vn/News/Society/Law/14483/Vietnam-in-need-of-media-laws-official.htm>>.

<sup>34</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012 ) 717.

<sup>35</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 721. Datacasting is subject to regulation under Schedule 6, online services and services delivered over convergent devices relating to offensive content are regulated by Schedule 5 and 7 of the BSA.

<sup>36</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 871, 903.

<sup>37</sup> Coonan, Helen, 'Reforming Australia's media legislation to meet the challenge of a multi-media revolution' (2007) 13(1) *University of New South Wales Law Journal* 18, 18-19.

<sup>38</sup> Coonan, Helen, 'Reforming Australia's media legislation to meet the challenge of a multi-media revolution' (2007) 13(1) *University of New South Wales Law Journal* 18, 23.

<sup>39</sup> Coonan, Helen, 'Reforming Australia's media legislation to meet the challenge of a multi-media revolution' (2007) 13(1) *University of New South Wales Law Journal* 18, 20.

<sup>40</sup> Coonan, Helen, 'Reforming Australia's media legislation to meet the challenge of a multi-media revolution' (2007) 13(1) *University of New South Wales Law Journal* 18, 24.

## 4. Research methodology

The research adopts a multifaceted qualitative research methodology to address the aforementioned objectives. This includes thematic textual analysis and semi-structured interviews.

The first method (thematic textual analysis) enables me to gain an overview of Vietnamese and Australian media regulatory frameworks. It therefore helps me to identify exactly the source of reference documents for the research. In this thesis, I analyse legal documents including laws, by-laws, acts, codes and rules. I also use this method to analyse books, journal articles, research publications, reports, media articles, informal reports and institutional statements. This method is essential to lay the groundwork for identifying the shortcomings or deficiencies of the Vietnamese media law. It also enables me to analyse Australian media law to gain a knowledge of how it deals with the problems which Vietnamese media legislation leaves unresolved. I use this method to identify whether or not Australian models could inform the process of addressing the deficiencies of Vietnamese media laws.

This thesis examines a number of legal documents including: the *Australian Constitution*, *Australian Broadcasting Services Act 1992* (Cth), the *Australian Communications and Media Authority Act 2005* (Cth), the *Australian Broadcasting Corporation Act 1983* (Cth), the *Privacy Act 1988* (Cth), the *Defamation Act 2005* (NSW), the *Criminal Code Act 1995* (Cth), the *Freedom of Information Act 1982* (Cth), the *Public Interest Disclosure Act 2013* (Cth), the *Evidence Act 1995* (Cth), the *Vietnamese Constitution*, the *Vietnamese Press Law 1989*, the *Vietnamese Civil Code 2005*, the *Vietnamese Criminal Code 1999*, the *Vietnamese Denunciation Law 2011*, the *Spokesman Regulation 2007*, the *Law on Technology Transfer 2006*, the *Decree No. 51/2002/NĐ-CP*,<sup>41</sup> and the *Ordinance No. 30*, and the draft of the new law on the media (the draft of new Press Law).<sup>42</sup> I explain why I examine both the current laws and the draft of new Press Law in chapter 4 where I explore Vietnamese media regulation (section 1: An overview of the Vietnamese media regulation system). The study also analyses some self-regulatory rules including the ABC Code of Practice 2014 and the SBS Code of Practice 2014; and Australian cases including *Lange v Australian Broadcasting Corporation* (1997), *Australian Capital Television v Commonwealth* (1992), and *Nationwide News Pty Ltd v Wills* (1992).

However, this method is most suited to theoretical legal research and cannot necessarily tell me how each system works in practice. In order to test, support and deepen the data gathered through the first method, I have also used the method of semi-structured interviews.

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<sup>41</sup> Decree No. 51/2002/NĐ-CP enacted on 26 April 2002 detailing the Vietnamese Press Law 1989 and Vietnamese Press Law 1989 amended 1999 (Nghị định số 51/2002/NĐ-CP ngày 26 tháng 4 năm 2002 Quy định chi tiết thi hành Luật Báo chí, Luật sửa đổi, bổ sung một số điều của Luật Báo chí).

<sup>42</sup> *Dự thảo Luật Báo chí* (23 April 2015) Bộ Thông tin và Truyền thông <<http://mic.gov.vn/layknd/Trang/DuthaoLuatBaochi.aspx>>.

I conducted a series of semi-structured interviews in both Australia and in Vietnam with a range of key individuals who have experience of the practical working of media law. Interviewees had affiliations with the Ministry of Information and Communication of Vietnam, the Department of Information and Communication in some territories in Vietnam, and the Australian Press Council (APC); others were editors, journalists and lawyers. The interviews allowed for further exploration of the legislation, the cases and the self-regulatory measures identified in the analysis. The interviews gave information and opinions about media laws, especially in the protection of freedom of expression and freedom of information, and the protection of competing interests in the balancing with these freedoms including personal information, reputation, national safety, and public order. The interviews also provided information relating to law on media ownership and complaints and grievances handling. Further, the interviews conducted in Vietnam provided a range of perspectives on the shortcomings of, and suggestions for reform of, Vietnamese media laws.

## **5. The limitations of the research**

This research is subject to a number of limitations.

Firstly, the research limits its focus to the deficiencies of Vietnamese media laws and seeks to shed light on the way that problems are resolved in Australia in the following areas: freedom of expression, freedom of information, personal information, protection of reputation, opposition and dissent, ownership, and complaints and grievances handling. It does not provide any detailed critique of Australian media laws except in so far as they may require adjustment for application in Vietnam, and it also does not make any direct comparison between Vietnamese and Australian media legislation.

Secondly, the research has been sponsored by the Vietnamese government, which wanted this research done so that it could learn from Australian experience in reforming Vietnamese media law. The government granted scholarships for many people to do research in different countries in order to find out solutions for reforming Vietnamese media law. This is part of the context which informed the selection of the areas mentioned above, both as to what was excluded and as to what was included.

Thirdly, I have provided only a very basic description of Australian media law and identified some of its more obvious shortcomings. An in-depth analysis would not have been possible within the scope of the project, nor was it necessary for the purpose of identifying models of legal approaches, as distinct from highly detailed recommendations.

Fourthly, only limited reference to secondary material in Vietnam has been possible because there is little research on Vietnamese media legislation.

Finally, conducting interviews with key individuals, particularly high-ranking officials in the Vietnamese Ministry of Information and Communication of Vietnam, the ACMA, APC, AANA and editors in chief is politically sensitive. I therefore could not

interview some people who I consider may have contributed significant expertise. This limitation will be explained further in the methodology chapter.

## 6. The existing research

The need to reform Vietnamese media legislation has long been of concern to the Vietnamese government and to media experts. The Vietnamese Government has authorised the Ministry of Information and Communication (the MIC) to draft a new Press Law to be enacted in 2016.<sup>43</sup> The MIC released the draft of the new Press Law in April 2015.<sup>44</sup> However, it is clear that this draft is simply a combination of the *Vietnamese Press Law 1989*, the *Vietnamese Press Law amendment 1999* and documents which fill in detail in these laws, such as Decree No. 51/2002/NĐ-CP.<sup>45</sup> There are a few changes compared to current laws.<sup>46</sup> In particular, in this draft, provisions covering issues analysed in this research have not changed. The changes provided in the draft focus primarily on: establishment of a financial institution to finance the media;<sup>47</sup> the process of granting licences for the media;<sup>48</sup> the establishment of branches of media outlets;<sup>49</sup> advertising in the media,<sup>50</sup> intellectual property rights to information published in the media;<sup>51</sup> and information identifying the media outlet for all publications.<sup>52</sup> Therefore this thesis presents a detailed critique and analysis of the law that is being updated.

Scholars of Vietnamese media laws have included Russell Hiang- Khng Heng, Ch'ng Kim See, Hoang Thi Minh Hong, Frank Palmos, and Dang Thi Thu Huong.<sup>53</sup> This section reviews and discusses the existing studies relating to Vietnamese media legislation.

All of the studies I discuss in this section were published prior to 2006. (They are, however, still valuable to my study, in particular their discussion relating to media law, because the *Vietnamese Press Law 1989* has not been amended since 1999.) Further, the amendment in 1999 primarily focuses on handling grievances against the media, and there are no studies which focus on this area. In addition, there is no more significant literature from 2006 onwards.

In this section I outline the contribution by various scholars and commentators who have given attention to aspects of the media in Vietnam.

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<sup>43</sup>Resolution No.70/2014/QH13 (Nghị quyết số 70/2014/QH13 của Quốc hội về điều chỉnh chương trình xây dựng luật, pháp lệnh nhiệm kỳ Quốc hội khóa XIII, năm 2014 và chương trình xây dựng luật, pháp lệnh năm 2015); Decision No.1193/QĐ-TTg (Quyết định số 1193/QĐ-TTg ngày 22/7/2014 của Thủ tướng Chính phủ về phân công cơ quan chủ trì soạn thảo và giải pháp bảo đảm chất lượng, thời hạn trình các dự án luật, pháp lệnh, nghị quyết được điều chỉnh trong Chương trình xây dựng luật, pháp lệnh khóa XIII, năm 2014 và Chương trình xây dựng luật, pháp lệnh năm 2015).

<sup>44</sup>Dự thảo Luật Báo chí (23 April 2015) Bộ Thông tin và Truyền thông <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>.

<sup>45</sup>Decree No. 51/2002/NĐ-CP (Nghị định số 51/2002/NĐ-CP ngày 26 tháng 4 năm 2002 Quy định chi tiết thi hành Luật Báo chí, Luật sửa đổi, bổ sung một số điều của Luật Báo chí).

<sup>46</sup>'Luật báo chí 2016' *Bao Dan luat* (online) 02 July 2015 <<http://danluat.thuvienphapluat.vn/luat-bao-chi-2016-130943.aspx>>.

<sup>47</sup>Draft of new Press Law, s 7 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>48</sup>Draft of new Press Law, ss 20-24 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>49</sup>Draft of new Press Law, s 26 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>50</sup>Draft of new Press Law, s 41 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>51</sup>Draft of new Press Law, s 42 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>52</sup>Draft of new Press Law, s 44 (access the draft: <<http://mic.gov.vn/layyknd/Trang/DuthaoLuatBaochi.aspx>>).

<sup>53</sup>Authors' studies will be review below.



## 6.1 Fred S Siebert, Theodore Peterson, and Wilbur Schramm

*Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* was published in 1963.<sup>54</sup> It consists of four essays by three authors: Fred S Siebert, who was the director of the School of Journalism and Communications at the University of Illinois; Theodore Peterson who was Associate Professor of Journalism and Communications at the University of Illinois; and Wilbur Schramm, who had been Dean of the Communications Division of the University of Illinois, and was at the time of the book's publication Professor of Journalism and Communications at Stanford University.<sup>55</sup>

According to Siebert, Peterson and Schramm, there are different press systems which are based upon different theories.<sup>56</sup> These theories include: authoritarian, libertarian, social responsibility, and Soviet communist.<sup>57</sup> In these theories, 'the Soviet Communist Theory is only the development of the much older authoritarian theory, and what we have called the Social Responsibility theory is only the modification of the Libertarian theory'.<sup>58</sup> Therefore there are effectively two theories, or groups of theories.

The authoritarian theory developed in 16<sup>th</sup> and 17<sup>th</sup> century in England, and was still practised in many places at the time of the book's publication. Under the authoritarian philosophy, the function of the media is to serve political goals.<sup>59</sup> Specifically, as an important instrumentality in society, the media should advance the objectives and policies of the state,<sup>60</sup> supporting and advancing the policies of the government in the exercise of its power and preserving the interests of the state.<sup>61</sup>

Under this theory, the media may be under private or public ownership,<sup>62</sup> but they are always forbidden from criticism of political machinery and officials in power.<sup>63</sup> Under authoritarian governments, control of the media was facilitated by the development of 'a legal method of bringing before the courts individuals who were attempting by public argument or

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<sup>54</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963).

<sup>55</sup>*Four Theories of the Press* (25 July 2016) University of Illinois Press<<http://www.press.uillinois.edu/books/catalog/94xbs8ch9780252724213.html>>.

<sup>56</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 2.

<sup>57</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 2.

<sup>58</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 2.

<sup>59</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 26.

<sup>60</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 26.

<sup>61</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

<sup>62</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

<sup>63</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

exhortation to change either the personnel or the practices of the state',<sup>64</sup> of which sedition is an example.<sup>65</sup>

Key to both this theory and that of the Russian-Soviet Communist system discussed below is the identification of the people's interests with those of the state.<sup>66</sup> On this conception, if the media attempted to act as a check on government this was 'merely an attempt to impede the accomplishment of the objectives of the state'.<sup>67</sup> This means freedom of expression is freedom to say what the government agrees to publish. The media are free to publish information which supports the government.

The Soviet Communist theory was developed in the Soviet Union, although some of the same things were done by Nazis and the Italian fascists. Under this theory, the media are required to serve the interest of the state.<sup>68</sup> The media were 'conceived as an instrument to interpret the doctrine, to carry out the policies of the working class or the militant party'.<sup>69</sup> The media's role was to contribute to the success and continuance of the Soviet socialist system, and especially to the dictatorship of the Soviet Communist Party.<sup>70</sup> Under this theory, 'there is not a theory of the state and a theory of communication'.<sup>71</sup> The media therefore should be controlled by the state,<sup>72</sup> but in fact, the Soviet Communist Party had the chief responsibility for control of the press.<sup>73</sup> Based on the theory that 'the press is supposed to belong to the people, whose representative the Party is',<sup>74</sup> the Party was responsible for censorship rather than the government.<sup>75</sup> The media were forbidden from criticism of the Party's objectives though there was some leeway for criticism of the Party's tactics.<sup>76</sup> The media are publicly owned.<sup>77</sup> The authors stated that 'the Soviet Communist Theory is only the development of the much older authoritarian theory'.<sup>78</sup>

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<sup>64</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 23.

<sup>65</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 23.

<sup>66</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 56.

<sup>67</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 56.

<sup>68</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 3.

<sup>69</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 110.

<sup>70</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

<sup>71</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 116.

<sup>72</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 116.

<sup>73</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 131.

<sup>74</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 132.

<sup>75</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 131.

<sup>76</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

<sup>77</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 7.

<sup>78</sup>Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 1.

In the essay on the Soviet Communist theory, Schramm describes the Marxist conception of the press, not as a Fourth Estate independently criticizing the government, but as an instrument to interpret doctrine and to carry out the policies of the working class or the militant party.<sup>79</sup> Perhaps more interestingly, he links that conception to the fact that the government is supposed to wither away, and the press is supposed to belong to the people. A third important conceptual construct is in the inseparable link between freedom and responsibility.

Schramm points out that absolute freedom of expression does not exist in that theory;<sup>80</sup> rather freedom of expression means freedom *within* the allegedly beneficent state.<sup>81</sup> In the Soviet Union no freedom *against* the state could be permitted.<sup>82</sup> The media were used to give information on the policies and laws of the party and the state to the people, to encourage people to support and implement those policies rather than being a forum where people could discuss or express their opinion about political or government matters.<sup>83</sup> Protection against the government does not guarantee that a person who has something to say will actually say it.<sup>84</sup> Facts were not published unless they did not harm the interests of the state.<sup>85</sup> The media owners and media regulatory bodies determined which persons, which facts and which versions of these facts should reach the public.<sup>86</sup>

Schramm discusses the fact that although under the Soviet system the media were state-owned,<sup>87</sup> the government controlled the media also by means of personnel in key positions, directives, review, criticism, and censorship.<sup>88</sup> The Soviet Communist Party had the chief responsibility for control of the press.<sup>89</sup> Based on the theory that ‘the press is supposed to belong to the people, whose representative the Party is’,<sup>90</sup> the Party rather than the government was responsible for censorship.<sup>91</sup>

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<sup>79</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 110.

<sup>80</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 126.

<sup>81</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 127.

<sup>82</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 127.

<sup>83</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 110.

<sup>84</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 111.

<sup>85</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 111.

<sup>86</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 116.

<sup>87</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 140.

<sup>88</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 140.

<sup>89</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 131.

<sup>90</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 132.

<sup>91</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 131.

This publication benefits my research greatly. The authors provide an excellent conceptual framework for understanding all aspects of Vietnamese media law. One of the concepts provided in this publication, the traditional Soviet theory which is the development of the much older authoritarian theory, is used to analyse existing Vietnamese law: for example, in considering how far that law has departed from the classical model described.

## 6.2. Cherian George

Cherian George is an associate professor in the journalism department of Hong Kong Baptist University. She is the author of a book entitled *Freedom From The Press: Journalism and State Power in Singapore* published in 2012.<sup>92</sup>

I consider this book because there are many similarities between Singapore and Vietnam. Both the countries are Asian countries, and both are dominated by one political party which is the most powerful organization in the political system. In addition, the media in these countries are supervised by the political leadership or government<sup>93</sup> and are tightly controlled.<sup>94</sup> Freedom of expression and freedom of information are also limited in both Vietnam and Singapore.<sup>95</sup> Because of these similarities George's analysis will help to inform my analysis of media law and practice in Vietnam, including why and how the Vietnamese government supervises the media, why and how the VCP and the government tightly control the media, and why and how the VCP and the government limit the right to freedom of expression and the right to freedom of information.

George states that Singapore has less press freedom than liberal democracies.<sup>96</sup> She points out that although the media in Singapore are not government-owned,<sup>97</sup> they are 'closely supervised by the political leadership'.<sup>98</sup> In that country, freedom of the press must be 'subordinated to the overriding needs of the integrity of Singapore, and to the primacy of purpose of an elected government'.<sup>99</sup>

The focus of discussion in this book is how the Singapore government has replaced overt censorship with self-censorship by means of 'hegemonic processes' and 'calibrated coercion'. The former concept refers to the masking of political domination by 'consent that has been manufactured through ideological work';<sup>100</sup> the latter is the result of a situation where 'the government has not only ratcheted down its use of force, but also adopted incrementally more open and transparent approaches to governance.'<sup>101</sup> At the same time,

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<sup>92</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012).

<sup>93</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) xii.

<sup>94</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 10, 44.

<sup>95</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 3, 4.

<sup>96</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 4.

<sup>97</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) xii.

<sup>98</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) xii.

<sup>99</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) xiii.

<sup>100</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 5.

<sup>101</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 5.

‘economic disincentives against non-cooperation with the state’<sup>102</sup> have enabled the Singapore government to keep tight control over the media.

George quotes the Singapore government as saying that ‘an elected government is the legitimate voice of the people, while the press is an unelected institution that is ultimately accountable only to its owners’.<sup>103</sup> Although Singapore is a multi-party state, the ruling party has dominated government since 1959. The media in Singapore therefore have no moral authority to challenge the government on equal terms; the media have no right to act as the Fourth Estate.<sup>104</sup> ‘The implications for the press are clear: the media’s primary role is not to champion public opinion but to educate the public’.<sup>105</sup>

In Singapore, to launch a newspaper, a would-be publisher must obtain government permission, which must be renewed annually and can be refused or revoked at any time.<sup>106</sup> Moreover, ‘licensing decisions are wholly at the discretion of the relevant minister’.<sup>107</sup> There is no formal provision in Singapore law for any conditions on the grant or refusal of a licence<sup>108</sup> but the government has power to force a newspaper to close simply because the newspaper supports an opposition party<sup>109</sup> and ‘[t]he only avenue for appeal is to the President’.<sup>110</sup> In Singapore, ‘the government’s powers to lock up journalists and close down newspapers — entirely at its discretion and without having to go through the courts — ring-fence the outer limits of media autonomy’.<sup>111</sup>

In Singapore, under the amended *Newspaper and Printing Presses Act (NPPA)* of 1974, the government could ‘declare any newspaper published outside Singapore to be a newspaper engaging in the domestic politics of the country and impose a cap on the total number of copies that could be sold or distributed in Singapore’.<sup>112</sup> The amendment to the *NPPA* was done to discourage foreign publications from oppositional reporting on Singapore.<sup>113</sup> The media therefore have to choose between publishing what they want on the one hand and their profits on the other.<sup>114</sup>

Under the Singaporean system, government control does not necessarily require government ownership: the media will co-operate with any government if it is in their commercial interest to do so<sup>115</sup> and the Singapore government has some subtle but effective ways of ensuring that this is so. For example, under the *NPPA*, every newspaper company must have two classes of shares: management shares and ordinary shares. Both shares have the same cash value, but the former have 200 times more voting power than the later, ‘to be

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<sup>102</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 4.

<sup>103</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 79.

<sup>104</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 79.

<sup>105</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 86.

<sup>106</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 27.

<sup>107</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 27.

<sup>108</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 27.

<sup>109</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 27.

<sup>110</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 27.

<sup>111</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 29.

<sup>112</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 37.

<sup>113</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 38.

<sup>114</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 39.

<sup>115</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 32.

precise on any resolution relating to the appointment or dismissal of a director or any member of the staff of a newspaper company'.<sup>116</sup> The government is authorized to decide whose shares are to be given supervoting status.<sup>117</sup> Moreover, 'no newspaper company shall refuse to issue or to accept the transfer of management shares to any person who has been granted the written approval of the Minister to purchase or hold the shares except for reasons to be given in writing acceptable to the Minister'.<sup>118</sup>

George also describes the permit system that applies to newspapers and points out that 'a newspaper's permit would not be at risk as long as it cooperated with the government'.<sup>119</sup> Indeed, by taking a government-friendly editorial stance, a company could even turn the licensing system to its advantage<sup>120</sup> as the permit system effectively keeps out potential competitors, thereby assuring monopoly profits.<sup>121</sup> Such co-operation, however, is not necessarily voluntary. Rather, the media comply because they are constantly concerned to protect their profits.

George also points out that 'in a sign of the PAP's [People's Action Party] growing ideological hold on the Singaporean mind, newspapers began to adopt yardsticks for measuring journalistic talent that were strikingly similar to those that the government used when choosing the administrative elite'.<sup>122</sup> As a result, editors and journalists in Singapore are people who know what works for Singapore and how to advance interests of the PAP and the state.<sup>123</sup> For an editor, he/she will be no longer in his/her position if the government no longer has confidence in him/her.<sup>124</sup> Editors are replaced when their publication deviates from the government's preferred script, but not when they work against the interest of the media or the public.<sup>125</sup> If the government believes that a reporter is eroding its political capital, the government will limit that person's right to access to information or, in rare cases, they will be transferred off their beat.<sup>126</sup> According to George's book, the PAP is very clever at 'us[ing] the news media's business model against itself: they exploit journalism's reliance on markets for their sustenance, forcing publishers and professionals to choose between editorial freedom and economic success'.<sup>127</sup>

George's book enables me to identify any similarities or differences between the media regulation systems of Singapore and Vietnam, which in turn may provide some indication of the underlying reasons for any shortcomings of the Vietnamese system, and assist me in evaluating the scope for reforming that system.<sup>128</sup> The knowledge George

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<sup>116</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 31.

<sup>117</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 31.

<sup>118</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 31.

<sup>119</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 32.

<sup>120</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 32.

<sup>121</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 32.

<sup>122</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 34.

<sup>123</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>124</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>125</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>126</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>127</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 26.

<sup>128</sup> Chapter 6, subsection 1.1, section 4.

provides about how the Singapore government, and specifically the ruling party, control the media, including the economic incentives that are part of calibrated coercion, which in turn prompts self-censorship, helps with analysis of existing Vietnamese media matters. For example, it confirms that in certain situations, editors and journalists are unprepared to take any risks and engage in (perhaps excessive) self-censorship.

### 6.3. James Gomez

James Gomez is presently Professor of Communications and Associate Dean (International Affairs), School of Communication Arts, Bangkok University, Thailand. He is the author of a book named *Internet Politics: Surveillance & Intimidation in Singapore* published in 2002.<sup>129</sup> In this publication, Gomez points out that although the Constitution of Singapore provides citizens a right to freedom of speech and expression there are no laws granting access to information, no law spells out the freedoms and rights of the individual, and no law guarantees a free press or free expression. The publication explores the significance of these facts in relation to the Internet.<sup>130</sup> Gomez points out that the government of Singapore uses information technology to extract information from its citizens and as a tool for surveillance, control and governance.<sup>131</sup> Gomez states that the Singaporean government believes that information critical of the government, distributed widely on the internet, can cause dissent and disagreements inside the country which can affect the distribution of political power and policy implementation.<sup>132</sup> The government believes that Internet debate could encourage small groups of online users to challenge the government's authority.<sup>133</sup> The government therefore has chosen to continue to legislate as much as it can to control the political potential of the internet.<sup>134</sup>

This publication provides an insider account on the workings of politics, surveillance and Internet control in the city-state of Singapore. Gomez's analysis in this publication shows how the Singaporean government handles the influx of online information. He has written in detail about Singapore's online restriction and control. Although this publication focusses on the Internet only, it reveals many features of Singaporean media law which are similar to Vietnamese media law such as the absence of any law granting access to information, spelling out freedoms and rights of the individual, or guaranteeing a free press and free expression. The publication therefore helps me to analyse the shortcomings of Vietnamese media law.

### 6.4. Heng, Russell Hiang-Khng

Heng, a Vietnam specialist, is a political scientist and a Senior Fellow at the Institute of Southeast Asian Studies, Singapore. His PhD thesis, submitted at the Australian National University in 1999, was titled *Of the State, For the State, Yet Against the State - The Struggle*

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<sup>129</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002).

<sup>130</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002) 33.

<sup>131</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002) 35, 36.

<sup>132</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002) 38.

<sup>133</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002) 38.

<sup>134</sup> James Gomez, *Internet Politics: Surveillance & Intimidation in Singapore* (Bangkok: Think Centre, 2002) 39.

*Paradigm in Vietnam's Media Politics*. This thesis focuses on the complicated relationship between regulatory bodies in Vietnam, especially between the Vietnamese Communist Party (VCP) and the media.<sup>135</sup> In this thesis, Heng examines the VCP's dominant power over the media.

Heng's thesis provides some knowledge about the structure of Vietnamese media regulatory bodies including the government agencies, the VCP and the owners of media organizations (supervisory organizations, *cac co quan chu quan*). He also examines the complicated relationship between these institutions, especially the VCP and the media.<sup>136</sup> This material is used as a foundation when I discuss the system of media regulatory bodies in Chapter 4 of my thesis. Heng, however, does not explain how media laws structure the media regulatory bodies in Vietnam. He does not give any statement about or suggestions for reform Vietnamese media laws. Further, Heng's thesis focuses on the print media only.<sup>137</sup>

Heng is also interested in the structure of Vietnamese media legislation. However his study, based on his experience as a journalist in Singapore, is of unstructured interviews and free-ranging conversations, and case studies. He does not access Vietnamese media legal documents. In addition, his study focuses on the real relationship between the Vietnamese government, VCP and the media. His discussion on the legal regime therefore is very limited. His discussion stops at providing some general information about the sources of legal documents.<sup>138</sup> Therefore Heng's study provides little benefit in this area.

Heng discusses freedom of expression, pointing out that freedom of expression is limited because the VCP dominates the media.<sup>139</sup> I have benefited from this information as a source of knowledge about how the VCP interferes in freedom of expression and why the VCP can influence the media. However, Heng does not discuss the influence of media laws in the protection of freedom of expression or point out any shortcomings in relevant Vietnamese media legislation. As a political scientist rather than a legal scholar, Heng also does not give any suggestions for reform of Vietnamese media legislation.

In a later publication, a 2001 journal article, 'Media Negotiating the State: In the Name of the Law in Anticipation', Heng examines some legal provisions covering the handling of complaints and grievances (ss 9 and 28 of the *Vietnamese Press Law 1989*) and freedom of information.<sup>140</sup> In this article, Heng argues that ss 9 and 28 are unclear and unfeasible. His arguments focus on the time limit for media organizations to run corrections,

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<sup>135</sup> Russell Hiang-Khng Heng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999) chapter 2.

<sup>136</sup> Russell Hiang-Khng Heng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999) chapter 2.

<sup>137</sup> Russell Hiang-Khng Heng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999)9.

<sup>138</sup> Russell Hiang-Khng Heng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999) 72-77.

<sup>139</sup> Russell Hiang-Khng Heng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999)60.

<sup>140</sup> Heng, Russell Hiang- Khng, 'Media Negotiating the State: In the Name of the Law in Anticipation' (2001) 16(2)Sojourn: Journal of Social Issues in Southeast Asia 213.



and the liability of media organizations for compensation where interests are damaged.<sup>141</sup> Heng also points out that freedom of information and freedom of expression remain limited and the *Vietnamese Press Law 1989* is not really useful to protect these rights.<sup>142</sup> Heng's arguments are still convincing now and they assist my analysis of the provisions in question.

In that study, however, Heng states that the *Vietnamese Press Law 1989* is occasionally helpful to the media in overcoming obstructions in the practice of the rights to freedom of information and freedom of expression,<sup>143</sup> but he does not explain why. Heng also does not give any suggestions for reforming Vietnamese media regulations relating to the issues he discusses. In addition, although the media in this research include print and broadcast media, they exclude online content.<sup>144</sup>

A further publication of Heng's is a conference paper named 'the media in Vietnam and freedom of information - not yet a right: perhaps a growing notion' published in 2000.<sup>145</sup> This paper discusses the improvement of freedom of information in Vietnam over the years, especially since the *Vietnamese Press Law 1989*. In this paper, Heng provides a basic description of the VCP's power over the media. He argues that this power is dominant and complicated.<sup>146</sup> This information is also still correct<sup>147</sup> and it assists me in describing the media regulatory system. It also provides a picture of the Vietnamese media industry including print, broadcast and online media. Heng argues that the Vietnamese legal regime relating to freedom of information lacks clarity and is confusing.<sup>148</sup> From this he deduces that freedom of information in Vietnam 'is not yet a legal right, it is perhaps a rudimentary notion'.<sup>149</sup> Heng's statements in this paper are accurate.<sup>150</sup> They are really useful to my analysis of the provisions covering freedom of information and the development of arguments suggesting reforms to them.

However, Heng's paper is general in that he does not specify how the VCP dominate the media, how media regulations lack clarity, or the respect in which the media regulations affecting freedom of information are not well developed. Heng also does not suggest what the Vietnamese government should do to ensure that freedom of information is realised as a legal right.

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<sup>141</sup> Heng, Russell Hiang- Khng, 'Media Negotiating the State: In the Name of the Law in Anticipation' (2001) 16(2)Sojourn: Journal of Social Issues in Southeast Asia 213, 217.

<sup>142</sup> Heng, Russell Hiang- Khng, 'Media Negotiating the State: In the Name of the Law in Anticipation' (2001) 16(2)Sojourn: Journal of Social Issues in Southeast Asia 213, 225.

<sup>143</sup> Heng, Russell Hiang- Khng, 'Media Negotiating the State: In the Name of the Law in Anticipation' (2001) 16(2)Sojourn: Journal of Social Issues in Southeast Asia 213, 225.

<sup>144</sup> Heng, Russell Hiang- Khng, 'Media Negotiating the State: In the Name of the Law in Anticipation' (2001) 16(2) Sojourn: Journal of Social Issues in Southeast Asia 213, 215.

<sup>145</sup> Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right : perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000).

<sup>146</sup> Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right : perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000), 7-8.

<sup>147</sup> See discussion in Chapter 6 (Critique of Vietnamese media legislation).

<sup>148</sup> Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right : perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000), 11.

<sup>149</sup> Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right : perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000), 16.

<sup>150</sup> See discussion in Chapter 6 (Critique of Vietnamese media legislation).

## 6.5. Ch'ng Kim See

Ch'ng Kim See, Head of the Library at the Institute of Southeast Asian Studies in Singapore, is the author of a journal article titled 'Government information and information about governments in Southeast Asia: a new area? An overview'. This article was published in 2001 in the *International Journal of Special Libraries*. This article focuses on providing government information and official publications (GIOPs) in Southeast Asian countries including Myanmar, Cambodia, Laos, Vietnam, Brunei, Indonesia, the Philippines, Thailand, Malaysia and Singapore. The article examines how GIOPs have been provided in Southeast Asian countries, especially via the internet. It does not discuss Vietnamese media regulations or the relationship between the freedom of information and Vietnamese laws.

In this article, See argues that while the Vietnamese government has been releasing more economic information than it had done prior to becoming a member of the Association of Southeast Asian Nations (ASEAN) in 1995, information relating to the structure of the government, banking activities, road works and water or electricity supply is still rarely published.<sup>151</sup> In addition, 'all most [sic] information published in Vietnam can be deemed GIOPs'.<sup>152</sup> She also states that at that time the Vietnamese government had no policy on publishing GIOPs on websites.<sup>153</sup> She points out that Vietnam does not have a 'government website or any electronic retrieval/storage databases' where people can have access to GIOPs.<sup>154</sup>

This article outlines the improvements there have been in publishing government information generally, especially economic information, in Vietnam since 1995. It is very useful for me when I discuss matters relating to freedom of information. However, the article is inaccurate in so far as it states that 'there has been little apparent evidence of any policy articulation on the way forward for releasing and producing more GIOPs in electronic formats'.<sup>155</sup> Although the internet was first officially accessed in Vietnam on 1 December 1997,<sup>156</sup> the Vietnamese Government had adopted Resolution No 49 in 1993 which stated that the government needed to 'develop and implement immediately a number of state-level projects on information technology including: developing a system of information on administration, economy, science, technology, resources and environment'.<sup>157</sup> In this Resolution, the Vietnamese government had also stated that Vietnam had to construct laws on

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<sup>151</sup>Ch'ng Kim See, 'Government information and information about governments in Southeast Asia: a new area? An overview' (2001) 35(2) *International Journal of Special Libraries* 120, 125.

<sup>152</sup>Ch'ng Kim See, 'Government information and information about governments in Southeast Asia: a new area? An overview' (2001) 35(2) *International Journal of Special Libraries* 120, 122.

<sup>153</sup>Ch'ng Kim See, 'Government information and information about governments in Southeast Asia: a new area? An overview' (2001) 35(2) *International Journal of Special Libraries* 120, 126.

<sup>154</sup>Ch'ng Kim See, 'Government information and information about governments in Southeast Asia: a new area? An overview' (2001) 35(2) *International Journal of Special Libraries* 120, 126.

<sup>155</sup>Ch'ng Kim See, 'Government information and information about governments in Southeast Asia: a new area? An overview' (2001) 35(2) *International Journal of Special Libraries* 120, 126.

<sup>156</sup> See, eg, *Ky niem 15 nam Internet co mat tai Vietnam* (14 August 2013) Hà Nội Mới <<http://hanoimoi.com.vn/Tin-tuc/Cong-nghe/568013/ky-niem-15-nam-internet-co-mat-tai-viet-nam>>; Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998), 20.

<sup>157</sup>*Nghị quyết số 49/CP ngày 04/8/1993pt III s 1* (Nghị quyết số 49/CP ngày 04/8/1993 về phát triển công nghệ thông tin ở nước ta trong những năm 90).

the obligation of state agencies to provide information in electronic formats to the public in order to ensure that everyone can access information.<sup>158</sup> In 1995, the Prime Minister of Vietnam had adopted Decision No 211 which aimed to implement Resolution No 49 mentioned above.<sup>159</sup> They show that although the internet had not been officially accessed in Vietnam, the Vietnamese government had enacted many provisions covering providing GIOPs on the internet.

The article gives general information about the freedom of information in Vietnam without supporting data. Further, the article was published 14 years ago, before Vietnam enacted important legal documents including the *Regulation governing issues relating to spokespersons and providing information to the media (the Spokesman Regulation 2007)*, the *Vietnamese Press Law 1989 amended 1999*, and is therefore limited in relation to contemporary issues.

### 6.6. Hong, Hoang Thi Minh

Hong, Hoang Thi Minh is the Coordinator of Southeast Asia350.org<sup>160</sup> and the author of the 2002 article ‘Media and civil society in support of good governance and democracy in Vietnam’.<sup>161</sup> This article focusses on the relationship between the media and civil society and how the media supports good governance and democracy in Vietnam.<sup>162</sup> In this article, Hong discusses the influence of the Vietnamese economic reform (*Doi moi*) in 1986 on the development of the media, especially the requirements for freedom of information and freedom of expression. She explains that since 1986, when the Vietnamese Communist Party decided to change from a centrally planned economy to a market economy, the democratic rights of the people have increased.<sup>163</sup> The Vietnamese government therefore recognized and accepted that freedom of information and freedom of expression should be protected and expanded.<sup>164</sup> Hong’s study provides useful information about the influence of the economy on the right to freedom of information and freedom of expression. I also have gained knowledge of how the media can support the development of civil society, and this informs my suggestions for reform of related Vietnamese media provisions.

Hong also points how the media have supported good governance and democracy. She argues that people carry out their right to participate in the ‘policy-making process’ through open forums on the media and its relationship to freedom of information and freedom

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<sup>158</sup> Nghị quyết số 49/CP ngày 04/8/1993 pt III s 1 (Nghị quyết số 49/CP ngày 04/8/1993 về phát triển công nghệ thông tin ở nước ta trong những năm 90).

<sup>159</sup> Decision No 211-TTg ngày 07/4/1995 (Quyết định số 211-TTg ngày 07/4/1995 Phê duyệt Chương trình Quốc gia về công nghệ thông tin).

<sup>160</sup> 350.org is an organization involving in movement-changing marches, powerful actions against dirty energy projects, and robust divestment campaigns. Their online campaigns, grassroots organizing, and mass public actions are coordinated by a global network active in over 188 countries. See more information about 350.org in <<http://350.org/2014-report/>>.

<sup>161</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) The Asian Journal Media 24.

<sup>162</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) The Asian Journal Media 24, 24.

<sup>163</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) The Asian Journal Media 24, 24.

<sup>164</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) The Asian Journal Media 24, 24, 25.

of expression.<sup>165</sup> She argues that the media have brought about significant improvements in many facets of social life such as development of the government, the VCP, the economy, and an increased democratic atmosphere.<sup>166</sup> However, according to Hong, the contribution of the media is still limited because freedom of expression and freedom of information are not well protected. She therefore suggests that these rights should be protected and expanded to ensure that the media can support civil society as well as possible.<sup>167</sup> In particular, the Government should provide the media with more information and support them more in gaining access to information.<sup>168</sup> Hong's findings support my arguments when I point out the limitations on freedom of information and freedom of expression. Hong's statements have influenced my suggestions about the protection and expansion of these rights.

However, Hong does not explain the reasons for the limitations on those freedoms. She does not discuss the role of media laws in the protection of freedom of information and freedom of expression, or the relationship between Vietnamese media regulations and the practice of these freedoms. She therefore does not give any suggestions for the reform of Vietnamese media legislation to improve those rights.

Hong briefly discusses media ownership in Vietnam.<sup>169</sup> She argues that having no private media also limits the contribution of the media to the development of governance and democracy.<sup>170</sup> She then suggests that Vietnam should have private media to improve the two-way flow of information (government to public and vice-versa). Private media is seen as a good way to enjoy democracy.<sup>171</sup> This information benefits my discussion of media ownership to suggest that Vietnam should accept private media. In this research, however, Hong does not give any material to support her statements. She also does not suggest how to regulate private media if the government were to permit.

## 6.7. Palmos, Frank

Frank Palmos is an Australian journalist, and the author of a book named *The Vietnam Press: The Unrealised Ambition* published in 1995.<sup>172</sup> In this publication, Palmos considers the regulation of the media by the VCP and the foreign media's right to access information. He points out that at that time the media was tightly controlled by the VCP and access to government-held information was difficult for foreign media.<sup>173</sup> These statements are still

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<sup>165</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 26.

<sup>166</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 25, 26.

<sup>167</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 29.

<sup>168</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 29.

<sup>169</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 29.

<sup>170</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 26.

<sup>171</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asian Journal Media* 24, 29.

<sup>172</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995).

<sup>173</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 13-16.

accurate.<sup>174</sup> This book, however, was published 20 years ago. It therefore does not provide up to date information. For example, Palmos reveals that the VCP ‘use[d] its power to grant licences as the first of the major controls’, and the VCP had meetings every Friday with editors in chief.<sup>175</sup> This information is no longer accurate because the *Vietnamese Press Law 1989* authorizes government and provincial people's committees to grant media licences.<sup>176</sup> The meetings are held every month by the chair of the Ministry of Information and Communication.<sup>177</sup> Further, Palmos does not discuss media regulations. This book therefore does not really benefit me much in my research.

### 6.8. Lam, Chu Van

Lam was editor of *Vietnam Economic Times (Thoi bao kinh te Vietnam)* in 1998 when he authored a chapter, ‘Economics-related periodicals,’ in a collection titled *The mass media in Vietnam* published by the ANU Press.<sup>178</sup> Lam concentrates on the influence of the economy on the media. In a generalised description, he points out how economic development affects the improvement of freedom of information, and how freedom of information has been expanded since 1986. Lam states that the *Vietnamese Press Law 1989* is general and not well developed.<sup>179</sup> However, he does not give any proof to support his statements. He also does not critique any media regulations to point out how they affect freedom of information.

### 6.9. Huong, Dang Thi Thu

Doctor Huong is the Dean of the Faculty of Journalism and Communication, VNU University of Social Sciences and Humanities (*Dai hoc Quoc gia Hanoi, truong Dai hoc Khoa hoc xa hoi va nhan van*). She is the author of a 2006 conference paper named ‘The changes in the Vietnamese Government’s policies and Laws of Journalism and their effects on Journalism after the Economic Renovation 1986’.<sup>180</sup> Huong describes changes in the media, as well as government policy and laws on media activities in Vietnam after 1986. She reveals that economic changes have influenced the government’s media policy. Since 1986, the content of the media has become more diversified, and now includes issues relating to ‘corruption, social problems, bureaucratic conservatism, and negative aspects of an open market society’.<sup>181</sup> Moreover, she argues that information published is no longer one-way communication. The media not only publish information ‘generated by the central

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<sup>174</sup> This will be discussed in chapter 6 (Critique of Vietnamese media legislation).

<sup>175</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995), 8, 11.

<sup>176</sup> *Vietnamese Press Law 1989* ss 17(3), 19.

<sup>177</sup> *Decision No 68/QĐ-BTTTT enacted 17/01/2014* s 6 (Quyết định số 68/QĐ-BTTTT ngày 17/01/2014 Ban hành Quy chế giao ban báo chí ngành Thông tin và Truyền thông).

<sup>178</sup> Lam, Chu Van ‘Economics-related periodicals’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 54.

<sup>179</sup> Lam, Chu Van ‘Economics-related periodicals’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 54, 57.

<sup>180</sup> Huong, Dang Thi Thu, ‘The changes in the Vietnamese Government’s policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986’ (Paper presented at the Media: Policies, Cultures and Futures in the Asia Pacific Region, Curtin University of Technology, Australia, 27 November 2006).

<sup>181</sup> Huong, Dang Thi Thu, ‘The changes in the Vietnamese Government’s policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986’ (Paper presented at the Media: Policies, Cultures and Futures in the Asia Pacific Region, Curtin University of Technology, Australia, 27 November 2006), 11.

government, directed to local authorities, and from the [Vietnamese Communist Party] and Government to the general population<sup>182</sup> but also publish opinions of members of the public, aspirations and complaints.

Huong's paper has helped me to understand how the media have changed in response to the Vietnamese government reducing their funding,<sup>183</sup> and how government media policy has changed.

Huong also discloses some general information about media regulation. However, she does not explain how media legislation supports media development especially in freedom of information and freedom of expression. Although Huong mentions media regulations, she does not discuss any regulations in detail.

### 6.10. Pham Van Duc

Pham Van Duc is a professor and Associate Dean of Vietnam Academy of Social Sciences.<sup>184</sup> He is the author of an article named *Nghiên cứu mô hình chủ nghĩa xã hội ở Việt Nam – một số vấn đề cần quan tâm* (Research the model of Vietnamese socialist system - some concerning issues) which is published on the VCP's website.<sup>185</sup> According to Pham, Vietnam is not really a socialist country. He discusses matters in which Vietnam should take an interest in order to develop into a socialist nation based upon his point of view. In particular, he points out special features of the Vietnamese model of socialism. Firstly, Vietnam took the Soviet Union and Western Europe in the eighteenth and nineteenth centuries as a model when constructing its government, policy and legal regime. Secondly, Vietnam founds its government on certain basic principles: rich people, strong country, democratic government, fair and civilized society.<sup>186</sup> He also describes how Vietnam can achieve such basic matters which include reforming the legal system.

The publication benefits me greatly by explaining the social and historical context of Vietnam's socialist legal system, the place of the VCP in society, politics and the legal system, and the rationale for and method of state control of the media. The discussion and analysis help me to explain the reason why the VCP is more powerful than the government in control of the media, the place of the VCP in society, politics and the legal system, and the rationale for and method of state control of the media.

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<sup>182</sup> Huong, Dang Thi Thu, "The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986" (Paper presented at the Media: Policies, Cultures and Futures in the Asia Pacific Region, Curtin University of Technology, Australia, 27 November 2006), 9.

<sup>183</sup> See discussion in Chapter 3, section 1. Overview of the media in Vietnam.

<sup>184</sup> Giới thiệu về GS.TS Pham Van Duc (20 Dec 2016) Vietnam Academy of Social Sciences <<http://www.vass.gov.vn/noidung/gioithieu/cocautochuc/Pages/bai-viet-cho-canbo.aspx?CanBoID=1&ItemID=9>>.

<sup>185</sup> Phạm Văn Đức, *Nghiên cứu mô hình chủ nghĩa xã hội ở Việt Nam – một số vấn đề cần quan tâm* (18 may 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/sach-chinh-tri/books-0105201511342446/index-110520151127524613.html>>

<sup>186</sup> Phạm Văn Đức, *Nghiên cứu mô hình chủ nghĩa xã hội ở Việt Nam – một số vấn đề cần quan tâm* (18 may 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/sach-chinh-tri/books-0105201511342446/index-110520151127524613.html>>

However, this publication does not discuss whether the key concepts of the Soviet theory on which the Vietnamese legal system was based have now been challenged, and if so how to reform Vietnamese media law.

### **6.11. Conclusion**

The existing literature on Vietnamese media legislation reviewed above has a tendency to discuss how the media have developed over the years, especially since 1986. Some of the studies discuss media laws in a general and descriptive way. They point out some shortcomings of Vietnamese media regulations relating to freedom of expression, freedom of information, media ownership and the system of media regulatory agencies. However, they do not explain how such shortcomings affect the development of the media. They also do not point out how similar shortcomings are dealt with in other countries; or give any suggestions for addressing the shortcomings. Moreover, most studies were conducted before 2000. Therefore, the information provided in these studies may not accurately reflect the current situation. Further, there have not been any comprehensive studies about how overseas experience can assist in reforming Vietnamese media legislation.

Although the studies discussed above provide knowledge which benefits my research, there are no current and comprehensive sources about reforming Vietnamese media legislation. My study therefore relies significantly upon primary sources. The following chapter describes the methodology used to identify the shortcomings of Vietnamese media laws and find out solution for reforming the deficiencies based on Australian experience.

## **7. Thesis overview**

After having two chapters including chapter 1 (Introduction) and chapter 2 (Research design and methodology), this research is conceptualised in a further 6 chapters within three Parts. In Part I, including chapters 3, 4, and 5, the research provides an overview of the media industry and media laws in Vietnam and Australia. Part II, consisting of one chapter named chapter 6, critiques Vietnamese laws in order to give opinions on the deficiencies of Vietnamese media legislation. In part III, made up of chapters 7 and 8, the research first reviews Australian models of media regulation and their applicability to Vietnamese problems. The research then examines whether Australian models, broadly defined, could help address the shortcomings of the Vietnamese media regulation. Finally, the research examines whether there would be particular aspects of Australian law that could not or should not be replicated, and which aspects should be modified before applying to Vietnam. The project proceeds as follows.

### **Chapter 1: Introduction**

This chapter begins with providing the research background before reviewing existing research. The chapter then demonstrates the aims and the objectives of the research and follows with the research questions. After that, the chapter reveals the significance and the

research methodology of the research. Then the chapter identifies the limitations of the research. Finally, the thesis structure is outlined.

#### Chapter 2: Research design and methodology

This chapter provides a detailed description of the methods used to explore the research objectives. The chapter initially explains and justifies the overall methodology for the research before providing the value of qualitative research and grounded theory. Next, the chapter discusses thematic textual analysis. The final section explains the design and procedures for the semi-structured interviews.

### *PART I: OVERVIEW OF THE MEDIA AND MEDIA REGULATION*

#### Chapter 3: Media industry in Vietnam and Australia

This chapter provides information relating to the process of development, position and role of the media, and the current situation in the media industry in both countries, Vietnam and Australia. This chapter includes two sections. Section one provides an overview of the media in Vietnam. Section two provides an overview of the media in Australia.

#### Chapter 4: Vietnamese media regulation

This chapter discusses Vietnamese media laws. The content of the chapter is organized into six sections. Section one sets out an overview of the system of Vietnamese media regulation. Section two describes the system of media regulatory institutions. Section three discusses the balancing of freedom of expression against other competing interests. Section four focusses on the protection of journalists' access to information. Section five outlines media ownership regulation. The final section deals with provisions covering the handling of complaints and grievances.

#### Chapter 5: Australian media regulation

This chapter provides information about Australian media laws. The contents of this chapter are organized in a similar structure to chapter 4 which includes six sections. Section one provides an overview of the system of Australian media content regulation. Section two outlines the system of media regulatory institutions. Section three discusses the balancing of freedom of expression against other legitimate interests. Section four focuses on provisions covering the protection of journalists' access to information. Section five discusses law on media ownership. The final section describes provisions covering the handling of complaints and grievances.

### *PART II: CRITIQUE OF VIETNAMESE MEDIA LEGISLATION*

#### Chapter 6: Critique of Vietnamese media legislation

This chapter critiques Vietnamese media laws to identify the shortcomings of this legal system. The chapter starts with a critique of provisions relating to freedom of information. The critique then examines regulations covering the protection of personal



information before discussing law on protection of reputation. After that, the chapter continues with examining the law on opposition and dissent. Next, the chapter deals with provisions covering media ownership. The chapter ends with discussion regulations relating to the handling of complaints and grievances.

### *PART III: RECOMMENDATIONS FOR REFORMING VIETNAMESE MEDIA LEGISLATION*

#### Chapter 7: Review of Australian models and applicability to Vietnamese problems

This chapter analyses Australian media models for the purpose of broadly assessing whether some or all of them could help address the identified deficiencies of the Vietnamese media legislation. Based on the deficiencies of Vietnamese media legislation pointed out in chapter 6, this chapter reviews Australian models and their applicability to remedy Vietnamese deficiencies in six areas: 1. freedom of expression and freedom of information, 2. personal information, 3. defamation, 4. Opposition and dissent, 5. ownership, and 6. The handling of complaints and grievances.

#### Chapter 8: Specific recommendations for reforming Vietnamese media legislation

This chapter reviews Australian provisions at a more specific level to recommend which of these provisions Vietnam should replicate, which particular provisions should be modified before adopting and how to modify to make them become applicable to Vietnam, and which provisions should not be adopted and why. The contents of this chapter are developed in 6 sections. Section one specifies recommendations for reforming provisions covering freedom of expression and freedom of information. Section two proposes how to redress the shortcomings of provisions covering the protection of personal information. Section three points how to improve provisions regulating the protection of reputation. Section four explores the way to improve law on opposition and dissent. Section five gives suggestions for reforming law on media ownership. Section six suggests how to develop provisions relating to the handling of complaints and grievances.

#### *Conclusion*

The conclusion discloses the key findings of the research and suggestions for future research.

## **8. Conclusion**

This chapter has provided the rationale, significance and the limitations of my research. The chapter also reviews existing research. The research objectives and research methodology have been outlined. The chapter has provided an overview of the research. The thesis now moves on to chapter 2 where I discuss research design and methodology.

## **Chapter 2**

### **Research design and methodology**

#### **1. Introduction**

This chapter discusses the design and implementation of my data collection procedures and shows how the adopted methodology meets the research objectives outlined in my introduction chapter.

As stated in Chapter 1, the overarching aim of my research is to make recommendations for the reform of Vietnamese media legislation based upon Australian models. The research therefore will identify the shortcomings of Vietnamese media law before I review Australian models to understand how they may be adapted to deal with Vietnamese problems and, indeed, whether or not they are applicable to Vietnamese conditions. Thus, it is essential to understand the deficiencies of Vietnamese media legislation and the need to reform it, and to understand the Australian models. To do this, I chose a qualitative approach to give a broad and deep understanding of information derived mainly from direct experience rather than from statistical data.<sup>187</sup> This follows Creswell, who explains qualitative methods as ways of ‘exploring and understanding the meaning individuals or groups ascribe to a social or human problem’.<sup>188</sup> I discuss this in more detail below (see Section 2).

Although I have collected some statistical data from other sources, this was used in a qualitative sense to build the background to my research. Most of my primary data collection used the qualitative method of semi-structured interviews combined with thematic textual analysis and socio-legal policy analysis. In this research, I will give a brief overview of my research methodology and then explore the value of qualitative research.

#### **2. Overview of the Research Methodology**

My research began with reading a wide range of relevant legal texts, books, journal articles, reports and reviews. I carried out this extensive review of the literature before conducting the interviews, to identify the significant issues previously examined by international scholars. In this period, I collected data from written and electronic sources. As I explain in Section 5, I then adopted thematic textual analysis and socio-legal policy analysis methods to identify the major points to explore further in my own research program.

To support and deepen the data gathered through the literature search, I designed and carried out semi-structured interviews with key individuals experienced in the practice of media law. As I discuss in greater detail in Section 6, these provided expert opinions from participants in both Vietnam and Australia. These individual interviews provided me the

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<sup>187</sup> Creswell, John W, *Research design: qualitative, quantitative, and mixed methods approaches* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2009).

<sup>188</sup> Creswell, John W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 246.

opportunity to revisit significant themes and theories I had previously identified, and to gain a deeper and more thorough insight into the principal issues.

### 3. The Value of Qualitative Research

Qualitative research aims to explore people's meanings, definitions and descriptions of events while quantitative research attempts to count and measure things.<sup>189</sup> Based on qualitative methods, researchers can determine how meanings are formed through and in culture.<sup>190</sup> Qualitative approaches are the most important research methods for social science and are widely used to find out what people 'do, know, think and feel'.<sup>191</sup> I have adopted this approach for my study of the law in order to capture deeper explanatory information about reforming media laws. As Webley explains, qualitative research usually gives extensive data, and although much of it is 'descriptive in its initial stages', continual critical thinking and analysis allow the researchers to identify key patterns or themes.<sup>192</sup> Therefore, qualitative methods contribute to the process of understanding, questioning, confirming and creating theory. These methods are essential to my research because they 'contribute to useful evaluation, practical problem solving, real-world decision making, policy analysis, and organizational development'.<sup>193</sup>

Qualitative methods typically collect information from multiple forms of data, including interviews, observations, documents and audio-visual material, rather than depending on a single data source.<sup>194</sup> As Patton reminds us, there is not a 'single, monolithic approach to research and evaluation'.<sup>195</sup> In line with this, and as I mentioned above, I collected data from a range of interviews as well as written and electronic sources, and then adopted textual analysis as the principal tool to understand the data. The following sections will detail the reasons for choosing those methods and the process of implementing them.

### 4. Socio-legal analysis

I have applied socio-legal analysis to demonstrate this approach in action by reviewing a range of key matters relating to the effect law has in social situations, in particular decision making by media employees. I reviewed legal systems, systems of media regulatory bodies, regulation on the right to freedom of information and freedom of expression, provisions on private information, government secrets and the handling of complaints and grievances with a view to understanding the impact they have on the day-to-day practice of media organisations. I reviewed these matters through diverse textual sources

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<sup>189</sup> Minichiello, Victor, Aroni, Rosalie, Hays, Terrence, *In-depth interviewing: principles, techniques, analysis* (Sydney, N.S.W.: Pearson Education Australia, 3<sup>rd</sup>ed, c2008) 8.

<sup>190</sup> Strauss, Anselm and Corbin, Juliet, *Basics of qualitative research: techniques and procedures for developing grounded theory* (London; Thousand Oaks, Calif.: Sage, 3<sup>rd</sup>, 2008) 12.

<sup>191</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2002) 145.

<sup>192</sup> Webley, Lisa, 'Qualitative approaches to empirical research' in Cane, Peter and Kritzer, Herbert (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 947.

<sup>193</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2002) 145.

<sup>194</sup> Creswell, John W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 185.

<sup>195</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2002) 76.

such as text books, journal articles, information published in internet, legal texts and documents and interview data. Under the socio-legal methodology, 'analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation'.<sup>196</sup> According to Schiff, 'the relationship of the law, in its many aspects, to a social situation, should be considered a necessary part of the understanding of that situation'.<sup>197</sup> However, in this research, understanding society better has been only the preliminary aim. I use this method to analyse law and point out its shortcomings with the ultimate aim of suggesting reforms to the law that could lead it to have a better effect upon the social situation.

In this research, I analyse media law as a part of the social system in light of the information gained from interviewees who are lawyers, experts, journalists and officials whose work brings them into contact with the practice of media law. I then analyse those opinions and build them into my study. Relying on that information, I point out the impact law is having on society. I then continue to use this method to suggest solutions for reforming Vietnamese media law based upon Australian experience. I analyse data collected by interview and reading text books, reports or other material to point out which Australian regulation Vietnam should take as a model for reform law while it is should not take others. For example, I use information collected from interviews, text books and articles as the foundation for my argument that information published has not met the needs of society, and that this failure is the result of a lack of assurance in implementing the right to freedom of expression and freedom of information. This analysis in turn informs my suggestions as to how the law should be to guarantee that information published meets the needs of society. Research results are formed based on the basis of synthesis, and analysis, of information gained from different sources which are the parts of the social system.

## 5. Thematic textual analysis

Qualitative research includes analysing texts.<sup>198</sup> As Webley indicates, 'Documentary analysis can provide a wealth of data, ranging from the official to the personal, the text-based and the image based'.<sup>199</sup> In my research, I used thematic textual analysis which is one of the most common forms of qualitative analytic method to analyse documents and also interview transcripts.<sup>200</sup> This method focusses on 'identifying, analysing and reporting patterns (themes) within data'.<sup>201</sup> It goes beyond simply counting phrases or words in a text and moves on to identifying implicit and explicit ideas within the data.<sup>202</sup> Thematic analysis relates

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<sup>196</sup>Schiff, DN 'Socio-legal Theory: Social Structure and Law' (1976) 39 (3) *The Modern Law Review*287.

<sup>197</sup>Schiff, DN 'Socio-legal Theory: Social Structure and Law' (1976) 39 (3) *The Modern Law Review*287.

<sup>198</sup>Charmaz, Kathy, *Constructing grounded theory: a practical guide through qualitative analysis* (London; Thousand Oaks, Calif.: Sage, 2006) 35.

<sup>199</sup> Webley, Lisa, 'Qualitative approaches to empirical research' in Cane, Peter and Kritzer, Herbert (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 938.

<sup>200</sup>Greg Guest, Kathleen M. MacQueen, Emily E. Namey, *Applied thematic analysis* (Thousand Oaks, California: Sage, 2012) 11.

<sup>201</sup>Virginia Braun, Victoria Clarke, *Using thematic analysis in psychology* (2006) 3 (online) Taylor & Francis Online 79.

<sup>202</sup>Greg Guest, Kathleen M. MacQueen, Emily E. Namey, *Applied thematic analysis* (Thousand Oaks, California: Sage, 2012) Introduction.

to phenomenology in that it focuses on the human experience subjectively.<sup>203</sup> In this research, it emphasizes the information collected through reading legal texts, documents and conducting interview.<sup>204</sup> From close readings of text and interview transcripts, I identified expressions, sentences or words that conveyed a clear meaning relevant to my research aims. Following Creswell, I then combined specific segments of related information into subcategories.<sup>205</sup>

### 5.1. Analysis of legal texts and documents

Major sources of data for this study are legal texts, laws, acts, codes and rules. These provided me with data on a variety of areas relating to the media, such as freedom of information, freedom of expression, protection of personal information, protection of personal reputation, opposition and dissent, ownership and the handling of complaints and grievances. I also analysed books, journal articles, research publications, reports, media articles, and what has become known as the grey literature such as informal reports and institutional statements.<sup>206</sup> These documents mainly contain expert opinions or perspectives about media regulations provided.

Scholars have shown that documents are useful for informing and making decisions on how to structure the research. They give us historical knowledge and describe places, events, ideas and relationships to which we cannot have direct personal access.<sup>207</sup> Documentary analysis is particularly appropriate for my research because, as Webley points out, documents provide evidence of policy directions, legislative intention, shortcomings in knowledge or best practice in the legal system, and agendas for change.<sup>208</sup> Also it is fair to say that in any legal research, documents tell researcher what the law says.

Although there are many approaches to analysing texts,<sup>209</sup> I applied thematic analysis to the legal texts and other documents as well as to data sets and interview notes. I scrutinised all information for themes using a form of inductive analysis. In other words, ‘the patterns, themes, and categories of analysis come from the data; they emerge out of the data rather than being imposed on them prior to data collection and analysis’.<sup>210</sup>

Inductive qualitative research is the process of building patterns, categories and themes from the bottom up by organizing the data into increasingly more abstract units of information.<sup>211</sup> According to this process, researchers work back and forth between the

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<sup>203</sup> Greg Guest, Kathleen M. MacQueen, Emily E. Namey, *Applied thematic analysis* (Thousand Oaks, California: Sage, 2012) 12.

<sup>204</sup> Greg Guest, Kathleen M. MacQueen, Emily E. Namey, *Applied thematic analysis* (Thousand Oaks, California: Sage, 2012) 12.

<sup>205</sup> Creswell, J. W., *Educational research: Planning, conducting, and evaluating quantitative and qualitative research* (Pearson Education, 4<sup>th</sup>ed, 2011) figure 8.4, 244.

<sup>206</sup> Bryman, Alan, *Social Research Methods* (Oxford University Press, Incorporated, 2012).

<sup>207</sup> May, Tim, *Social research: issues, methods and process* (Open University, 3<sup>rd</sup>ed, 2001) 157, 158.

<sup>208</sup> Webley, Lisa, 'Qualitative approaches to empirical research' in Cane, Peter and Kritzer, Herbert (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 939.

<sup>209</sup> Webley, Lisa, 'Qualitative approaches to empirical research' in Cane, Peter and Kritzer, Herbert (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 939.

<sup>210</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2002) 453.

<sup>211</sup> See, eg, Lodico, M., Spaulding, D., & Voegtler, K., *Method in educational research: From theory to practice* (San Francisco CA, 2010) 10; Creswell, John W., *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 186.

themes and the database until a comprehensive set of themes has been established.<sup>212</sup> The result of an inductive analysis is the development of categories into a model or framework that acts as a summary of the raw data.<sup>213</sup>

Through this process, I identified a variety of themes, namely: 1. the failure of Vietnamese law to support right to freedom of expression and freedom of information in practice, 2. the failure of Vietnamese law to provide appropriate definitions of key concepts such as opposition and dissent, 3. the failure of Vietnamese law to develop according to the public interest, 4. the deficiencies of Vietnamese provisions covering rights to make, and the process of handling, complaints and grievances, 5. the need to balance legitimate interests such as the rights to personal information and to personal reputation, the right to live in peace, and public order against the right to freedom of expression and freedom of information, 8. the need for media ownership provisions to balance the interests of private media against the public interest, 9. the variety of processes for dealing with complaints and grievances in Australia and the dependence of these on the area of law involved.

Identifying themes in this way helped me to analyse and discuss many key issues, for example, how best to complete provisions covering the protection of freedom of expression and freedom of information in Vietnam; how to improve provisions covering the protection of personal information and personal reputation in Vietnam; how the provisions on the handling of complaints and grievances in Vietnam should be reformed; how best to reduce the influence of the government and the VCP on the media while retaining governorship of the media; whether concepts from Australian media law represent models that could address the identified shortcomings of Vietnamese media law; which Australian models should be replicated in Vietnamese law; which models should be modified before being adopted and how to modify in Vietnamese law; which models should not be adopted and why.

## 5.2. Analysis of interview data

As mentioned above, I also used thematic textual analysis for interview data. This was a process of reading and re-reading interview transcripts, to contribute to the development of themes and subthemes to inform my analysis.<sup>214</sup> As Creswell advises, during the interview stage I analysed data as ‘an ongoing process’.<sup>215</sup> Corbin and Strauss also tell us that ‘Analysis begins after the first day of data gathering’.<sup>216</sup> Analysis occurs simultaneously with data collection and they are not two separate entities of the research process.<sup>217</sup> As Patton argues ‘recording and tracking analytical insights that occur during data collection are part of

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<sup>212</sup> Creswell, John W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 186.

<sup>213</sup> Thomas, Murray R, *Blending Qualitative and Quantitative Research Methods in Theses and Dissertations* (Corwin Press, 2003) 2.

<sup>214</sup> Silverman, David, *Doing qualitative research: A practical handbook* (London: Sage, 3<sup>rd</sup>ed, 2010).

<sup>215</sup> Creswell, John W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 212.

<sup>216</sup> Strauss, Anselm and Corbin, Juliet, *Basics of qualitative research: techniques and procedures for developing grounded theory* (London; Thousand Oaks, Calif.: Sage, 3<sup>rd</sup>, 2008) 144.

<sup>217</sup> Lincoln, Yvonna S, Denzin, Norman K (ed), *The Sage handbook of qualitative research* (Thousand Oaks: Sage Publications, 3<sup>rd</sup>ed, c2005).

fieldwork and the beginning of qualitative analysis'.<sup>218</sup> In this research, I listened to interview recordings and wrote descriptive and analytical notes from them as soon as possible after each interview. Then, I analysed the interview data in more depth when I returned from the field trip and transcribed the interview recordings.

All the methods I discussed above are used smoothly in my thesis. Depending on the actual circumstances, those methods are used at different levels. However, those methods are equal in the implementation of the project objectives. There is no method which is more important than others and no method can replace the others. Interviews helped me gather insights and opinions from individual perceptions and experiences. Thematic textual analysis and socio-legal policy analysis benefitted me in identifying the major points to explore further in my own research. All the methods are used to reach the goal of the research which is to point out the shortcomings of Vietnamese media law, go to examine how Australian law avoids those same shortcomings, and how to reform Vietnamese media law based upon Australian models.

## 6. Interviews

Interviews are a core technique in qualitative research<sup>219</sup> because they provide insights and opinions gathered from individual perceptions and experiences.<sup>220</sup> Interviews allow the researcher to gain a deeper and broader view of situations, people or settings.<sup>221</sup>

As mentioned above, I conducted interviews in both Vietnam and Australia. Through these interviews, I gained essential information from people who work closely with media law. I chose semi-structured, in-depth interviews because this method gives 'access to, and understanding of, activities and events which cannot be observed directly by the researcher'.<sup>222</sup> Semi-structured interviews allowed me to interact with participants thereby generating more relevant data and to follow up many issues which emerged through the conversation. As Patton discusses, semi-structured interviews allow for interview participants to voluntarily share their stories with the interviewer in an open manner and to offer the information which they perceive as important or significant to the topics under discussion.<sup>223</sup>

One-on-one interviews were used in this study because these also encourage participants to share information freely.<sup>224</sup> Further, as Davis notes, direct meetings allow people to consult and talk much more freely about the topics of interest, to explain and

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<sup>218</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif.: Sage Publications, 3<sup>rd</sup>ed, c2002) 436.

<sup>219</sup> Minichiello, Victor, *In-depth interviewing: principles, techniques, analysis* (Pearson Education Australia, 3<sup>rd</sup>, 2008) 46.

<sup>220</sup> Webley, Lisa, 'Qualitative approaches to empirical research' in Cane, Peter and Kritzer, Herbert (ed), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 937.

<sup>221</sup> Minichiello, Victor, *In-depth interviewing: principles, techniques, analysis* (Pearson Education Australia, 3<sup>rd</sup>, 2008) 66.

<sup>222</sup> Minichiello, Victor, *In-depth interviewing: principles, techniques, analysis* (Pearson Education Australia, 3<sup>rd</sup>, 2008) 66.

<sup>223</sup> Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif. : Sage Publications, 3<sup>rd</sup> ed, c2002).

<sup>224</sup> Stokes, David and Bergin, Richard, 'Methodology or "methodolatry"? An evaluation of focus groups and depth interviews' [2006] 9 (1) *Qualitative Market Research: An International Journal*, 26, 37.

amplify their opinions or the reasons behind them, or to reveal nuances which is harder to do in writing.<sup>225</sup>

## 6.1. Recruitment of participants

### *Assessing the Sample Size*

As I discuss below, sample size tends to be small in most qualitative research, especially where in-depth interviewing is used because this is time-intensive. My original research focuses on the experiences and opinions of a small number of individuals with special insight, knowledge, influence or prominence in media law. Although my interviewees were of different genders and ages, I did not need to gather information based upon differences in gender or age because such differences would not cause different opinions about media law. Also I was trying to get information peculiarly in the knowledge of a small group of people, not information about the experiences or opinions of people generally. Nor did I need to conduct a statistical analysis. Therefore I did not need a large number of interview participants.

When planning interviews, I took note of other guidelines for actual sample sizes: Creswell recommends that the sample size for qualitative studies should be between 20 and 30 interviews;<sup>226</sup> Morse indicated that the sample size often lies between 30 and 50;<sup>227</sup> Charmaz suggested that '25 participants are adequate for smaller projects'.<sup>228</sup> In this project, I initially contacted a total of 40 participants divided into 29 in Vietnam and 11 in Australia.

### *Recruitment of participants*

As mentioned above, my project aimed to suggest reforms to Vietnamese media legislation drawing from Australian experience. Therefore, I conducted interviews in both Vietnam and Australia. As a law lecturer since 2005 and an officer of the Vietnamese Department of Information and Communication from 2005, which is authorized to control media activity, I am very familiar with Vietnamese media law and society. My experience and the help of my supervisors, who respectively have expertise in Australian media law and in Southeast Asian social science, enabled me to identify a number of people who were eligible to be interviewed. These individuals were initially personally contacted via email using publicly available contact information to request their participation in the study. When it was requested by the participants, this email was followed up with a phone call prior to conducting the interview.

Interview participants were chosen based on their experience in media law. All participants are familiar with media legislation and most of them have been working over 5

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<sup>225</sup> Davis, I, 'Targeted Consultations' in Opeskin, Brian R and Weisbro, David (ed), *The Promise of Law Reform* (Annandale, N.S.W. : Federation Press, 2005) 156.

<sup>226</sup> Creswell, John W, *Research design: qualitative, quantitative, and mixed methods approaches* (Thousand Oaks, Calif.: Sage Publications, 2<sup>nd</sup> ed, 1998) 64.

<sup>227</sup> Morse, Janice M, 'Designing funded qualitative research' in Denzin, Norman K and Lincoln, Yvonna S (Eds.), *Handbook of qualitative research* (Thousand Oaks : Sage Publications, 2<sup>nd</sup> ed, 1994) 225.

<sup>228</sup> Charmaz, Kathy, *Constructing grounded theory: a practical guide through qualitative analysis* (London; Thousand Oaks, Calif.: Sage, 2006) 114.



years in media institutions, such as the Ministry of Information and Communication of Vietnam, the Department of Information and Communication in some territories in Vietnam, and the Australian Press Council (APC). The Ministry of Information and Communication is the most important institution responsible to the Government for carrying out State management of the media in Vietnam.<sup>229</sup> The Australian Press Council (APC) is the principal body with responsibility for responding to complaints about Australian newspapers, magazines and associated digital outlets. This category includes newspapers, magazines and journals published either in print or on the Internet which are produced regularly and are available to the general public.<sup>230</sup> The remaining participants were editors, journalists and lawyers who have also worked in fields related to media legislation over 5 years and are known as experts in media legislation.

Criticising government action is politically sensitive in Vietnam, especially when it involves criticism of policy or law relating to freedom of expression, freedom of information, or media ownership (which are major parts of my research). This is the reason why I did not approach any NGO people to be interviewed. These people were unlikely to agree to become interviewees in my research because they would worry that they may have trouble with the government if they talk about political or government matters. The heads of NGOs are also not happy to allow their officials take part in interviews because of worrying about the negative effect on the NGOs.

I contacted 40 individuals during preliminary preparation of the fieldwork but the final number of interview participants is smaller, totalling 24 people. This number of participants is sufficient for my study because after conducting 20 interviews in Vietnam and 4 interviews in Australia, I felt that there were no new themes arising from the interviews and many similar points were being consistently raised by interview participants. I recognized that additional interviews would not produce any new data. The number of participants is different in each country because of different organizational structures and media legislation. In addition, more interviews were necessary in Vietnam because of the lack of publications and literature to draw from, as I have discussed in Chapter One.

There were many difficulties which I had to face when I was arranging interviews. Firstly, gaining access to powerful individuals was quite difficult because editors, lawyers and high ranking officers in media institutions are very busy. In Vietnam, many worry that talking about the deficiencies of media legislation may bring them some disadvantage. Many potential participants hesitated to confirm a final time and date for the interview and asked me to contact them some days before the suggested interview time, or changed their appointment while I was on the way to their office or even when I had arrived at their chosen interview location. This was difficult for me when I was on field work with limited time and attempting to balance numerous appointments in the fieldwork diary.

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<sup>229</sup>*Vietnamese Amended Press Law 1989 s 17a (2).*

<sup>230</sup>About the Council (28 January 2013) Australian Press Council <<http://www.presscouncil.org.au/about/>>.

I also experienced difficulties in persuading participants in Vietnam to permit recording, especially when interviewing high ranking officers. Three participants denied permission and some asked me to stop recording when they talked about sensitive issues such as freedom of expression, government security, or media control. It was then difficult for me to take comprehensive written notes, especially when I wanted to examine more closely the participants' opinions. I overcame this by taking quick notes during interviews and then writing them up in more detail as soon as possible after the interview. I also asked participants to repeat any important answers. However, I could not quote some interesting statements because the participants did not allow me to note them.

I adopted several techniques to overcome the unpredictability of my interviews. Firstly, snowball sampling increased the number of interview participants by identifying new contacts. Snowball sampling has been described as 'a method that yields a study sample through referrals made among people who share or know of others who possess some characteristics that are of research interest'.<sup>231</sup> In line with this, when I had established contact with potential participants, I asked them to recommend other individuals who may be of interest to my research and asked them put me in touch with people in their networks. Six of my interviews resulted from this, and allowed me to fill gaps in data caused by the reticence of some interviewees.

Secondly, although I was unable to interview some significant individuals, I followed the advice of Charmaz who stated that an even distribution of interview participants is not the most important premise of sampling.<sup>232</sup> Therefore, I conducted interviews with a wide range of lower-ranking officers of the Vietnamese Department of Information and Communication, who could give me the information.

## 6.2. Interview Participants

Amongst my interviewees, 15 have been working for more than 5 years in institutions authorized to govern media activity in both Australia and Vietnam. Their activities concern study and practice of media law, which gives them deep knowledge about media legislation. The remaining 9 participants were divided among associate editors, journalists and lawyers with 6 participants in Vietnam and 3 in Australia.

The 20 semi-structured interviews in Vietnam collected perceptions and knowledge about the deficiencies of the Vietnamese media legislation; the need to reform and suggestions for reform. They also discussed problems that must be resolved in media regulation, especially in the protection of freedom of information, freedom of expression, the balancing between these freedoms and other interests including right to personal information, personal reputation, national security, and public order. Further, these interviewees pointed

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<sup>231</sup> Biernacki, Patrick and Waldorf, Dan 'Snowball Sampling: Problems and Techniques of Chain Referral Sampling' in Marsden, Peter V (ed), *Sociological Methods & Research* (Beverly Hills: Sage Publications, c1981) 141.

<sup>232</sup> Charmaz, Kathy, *Constructing grounded theory: a practical guide through qualitative analysis* (London; Thousand Oaks, Calif.: Sage, 2006).

the deficiencies of provisions covering media ownership and the handling of complaints and grievances. The four interviews in Australia gathered insightful information about Australian experience in dealing with those problems.

The number of interviews by participants in Vietnam and Australia are presented separately in Table 1 and Table 2.

**Table 1: Number of interviews by participants in Vietnam**

<b>Territory</b>	<b>Number of participants</b>	<b>Participants' working places</b>
Hanoi	3	Ministry of Information and Communication
Ho Chi Minh	2	The Department of Information and Communication
	2	Lawyer
	4	Editor
	2	Journalist
Dong Nai	1	The Department of Information and Communication
Lam Dong	1	The Department of Information and Communication
	2	Journalist
	1	Lawyer
Da Nang	1	The Department of Information and Communication
Can Tho	1	The Department of Information and Communication
<b><i>Total</i></b>	<b><i>20</i></b>	

**Table 2: Number of interviews by participants in Australia**

<b>Place</b>	<b>Number of participants</b>	<b>Participants' working places</b>
Sydney	1	The Australian Press Council
	2	Law firm
Melbourne	1	Law firm
<b>Total</b>	<b>4</b>	

### 6.3. Interview locations

Gaining multiple perspectives, opinions and attitudes cannot be realistically achieved from a single source or location. Therefore, interviews were conducted in different areas in Vietnam and Australia based on the locations of important media industries and regulatory bodies. In Vietnam, interviews were conducted in 7 territories: Hanoi, Ho Chi Minh, Can Tho, Binh Duong, Dong Nai, Da Nang and Lam Dong. The number of 13 participants in both Hanoi and Ho Chi Minh were chosen as the key focus area for important reasons outlined below.

Hanoi is the political centre of Vietnam and most of the media agencies with high-circulation products are located here, especially the Vietnamese Ministry of Information and Communication which is the most important institution authorized to regulate media activities. Further, conducting interviews in Hanoi gave me the chance to discuss the research project with experts in Vietnamese media law. This helped me to obtain critical feedback and assistance before undertaking the wider empirical data collection.

Ho Chi Minh City is the economic centre of Vietnam and the media industry has been developing significantly in this city. Conducting interviews here gave me the opportunity to work closely and make several connections with experts in law at the Law University of Ho Chi Minh City. I also had the opportunity to get the opinions of acquaintances who have been working in the field of media, such as at the Department of Information and Communication of Ho Chi Minh City, some popular media organizations, and law offices that helped me seek a wide range of perspectives about Vietnamese media law.

Within Australia, interviews were conducted by telephone with individuals in Sydney and Melbourne where many media organizations are located, particularly the Australian Communications and Media Authority (ACMA) and the Australian Press Council (APC).<sup>233</sup> Conducting interviews here with key lawyers provided detailed data on Australian media laws which would not have been possible without personal interviews.

<sup>233</sup> The responsibility of the Australian Communications and Media Authority and the Australian Press Council is disclosed in Chapter 5, section 2. The system of media regulation institutions.

## 6.4. Interview questions

Following suggestions made by Creswell, I conducted face-to-face interviews based on open-ended questions which aimed to elicit views and opinions from the participants.<sup>234</sup> Open-ended questions allow interviewees to develop their answers.<sup>235</sup> I used this method to help interviewees feel free to talk about their ideas and experiences. This kind of question also gave me the chance to ask follow up questions about interesting lines of discussion and information raised by interviewees.

Interview questions were developed in December 2012, and all related to the interviewee's experience with and opinion about media law. The interview questions were divided into 3 categories: initial open-ended questions, intermediate questions and ending questions.<sup>236</sup> Initial questions were general and related to the individual's background and work. I then continued with intermediate questions to explore the interviewee's opinions. Based on participants' answers, I also used follow-up questions to gain detailed insight into underlying meaning. At the end of the interview, I asked Vietnamese participants about the need to reform media legislation and about their suggestions for reform.

Although the structure I have outlined above was generally used, as Alan has stated, the interview process is flexible and interview questions may not follow exactly the path outlined on the schedule.<sup>237</sup> Therefore, the order of questions was changed in some cases to make participants feel more comfortable and confident. In some interviews, I omitted some questions based on responses of the participants. This is supported by Fielding and Thomas, who state that 'in conducting interviews, the interviewer asks certain and major questions in the same way each time but is free to alter the sequence and to investigate for more information'.<sup>238</sup>

## 6.5. Interview procedures

Interviews were conducted in Vietnam over 2 months, from March 2013 to May 2013 and over 3 months in Australia, from September to December 2014 when most participants were available and willing to take part. Most interviews in Vietnam took place at the participants' workplaces (18 of 20) while all interviews in Australia were conducted via phone.

The time and venue for the interviews was arranged according to when participants were available and where they felt comfortable. Patton and Silverman point out that this encourages the interviewees to speak more willingly.<sup>239</sup> Of the 24 interview participants, 18

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<sup>234</sup> Creswell, Jonh W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Thousand Oaks, Calif.: Sage Publications, 4<sup>th</sup>ed, 2013) 190.

<sup>235</sup> Gilbert, Nigel (ed), *Researching Social Life* (Thousand Oaks, Calif. : Sage Publications, 1993) 102, 103.

<sup>236</sup> Charmaz, Kathy, *Constructing grounded theory: a practical guide through qualitative analysis* (London ; Thousand Oaks, Calif. : Sage, 2006) 30, 31.

<sup>237</sup> Bryman, Alan, *Social Research Methods* (Oxford University Press, Incorporated, 2012) 438.

<sup>238</sup> Fielding, Nigel & Thomas, Hilary, 'Qualitative interviewing' in Gilbert, Nigel (ed), *Researching Social Life* (Thousand Oaks, Calif. : Sage Publications, 3<sup>rd</sup> ed, 2008) 246.

<sup>239</sup> See, eg, Patton, Michael Quinn, *Qualitative research and evaluation methods* (Thousand Oaks, Calif. : Sage Publications, 3<sup>rd</sup> ed, c2002); Silverman, David, *Doing qualitative research: A practical handbook* (London : Sage, 3<sup>rd</sup> ed, 2010).

chose their offices as the place for the interview, and the other 6 participants preferred to do their interviews via phone.

The interviews varied in length but were usually around 45 minutes. Demographic information about participants was collected at the beginning or completion of interviews. Where needed, I contacted interviewees personally, by phone or email, to clarify any uncertain or unclear information and to validate the information provided.

A digital voice recorder was used for recording most the interviews with the permission of participants. The use of a recording device was preferred as it directly captured the manner of the interview. In addition to the recordings, I also took hand-written notes to jot down key words or ideas during the interviews. Upon completion, all data were transcribed shortly after the interviews into documents for analysis. The procedure of recording and transcribing interviews 'is important for detailed analysis required in qualitative research and to ensure the interviewees' answers are captured in their own terms'.<sup>240</sup> I reviewed each interview by re-listening to the recordings and re-reading the transcripts to check for accuracy. Interviews conducted in Vietnam were translated into English with the help of my principal supervisor after I had returned to Adelaide and by August 2013, I had finished all translation.

## 7. Conclusion

This chapter has explored the methodology for this research project. As explained, I chose to use qualitative methods including a grounded theory approach with inductive analysis. This included a textual analysis of written and online data based on books, journal articles, reports, and reviews before conducting interviews. I then conducted a series of in-depth interviews with individuals who are familiar with media regulation. The combination of research methods described above has deepened my knowledge about the development of the media industry and media regulation in both Vietnam and Australia. By adopting these methods I also identified the underlying deficiencies of Vietnamese media laws and the need to reform them, and understood relevant aspects of Australian media legislation. This enabled me to give suggestions for reforming Vietnamese media legislation. Having described how my research was conducted, in the next chapter I discuss the media industry in both Vietnam and Australia to provide a background and foundation for understanding mass media regulation.

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<sup>240</sup> Bryman, Alan, *Social Research Methods* (Oxford University Press, Incorporated, 2012) 325.

# PART I: OVERVIEW OF MEDIA AND MEDIA REGULATION

## Chapter 3: Media industry in Vietnam and Australia

### Introduction

This chapter provides information about the development and current situation of the media industries in Vietnam and Australia. This knowledge is used as a foundation for my critique of Vietnamese media legislation in chapter 6, my review of Australian models in chapter 7, and suggestions for reforming Vietnamese media legislation in the last chapters. I discuss the media industry in Vietnam before examining the Australian media industry.

### 1. Overview of the media in Vietnam

The media are considered to be the 4<sup>th</sup> pillar of society (the other three being the legislature, the executive and the judiciary).<sup>241</sup> Mass media affects many facets of society.<sup>242</sup> In Vietnam, as elsewhere, this 4<sup>th</sup> pillar has strong power to create public opinion across many social and political arenas.<sup>243</sup> Since 1958, the Vietnamese Communist Party has considered the media to be ‘the collective agitator, propagandist and organiser, an instrument of the party to lead the masses, a sharp weapon in the class struggle against the enemy, and to construct a new life’.<sup>244</sup>

At the end of 1986, the role of the Vietnamese media changed, based on the advent of political and economic liberalisation endorsed by the VCP’s Sixth Congress.<sup>245</sup> When government funding was reduced, media organizations had to raise additional revenue by seeking a broader audience for their publications. For example the media started to publish information about market reforms, thereby raising great public interest in their publications.<sup>246</sup> The inclusion of more diverse and interesting content about the economy, technology, sport and news attracted readers.<sup>247</sup> The media have also increasingly campaigned against corruption.<sup>248</sup>

Since 1986, the role and position of the media have been laid down by legal documents, such as: Directive No 79 enacted in 1986 which allowed the media to write about

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<sup>241</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 4.

<sup>242</sup> Lam, Chu Van ‘Economics-related periodicals’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 60.

<sup>243</sup> Giang Lân, ‘Báo chí quyền lực thứ tư?’, *Việt báo* (online), 14 August 2013 <<http://vietbao.vn/Xa-hoi/Bao-chi-quyen-luc-thu-tu/75339167/157/>>.

<sup>244</sup> *Resolution 60 of the VCP issued on 8 Dec 1958* (Nghị quyết của Bộ Chính trị, số 60-NQ/TW, ngày 8 tháng 12 năm 1958, về công tác báo chí).

<sup>245</sup> Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27.

<sup>246</sup> Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 30.

<sup>247</sup> Hiang, Russell H. K (ed), *Media fortunes changing times, ASEAN states in transition* (Institute of Southeast Asian Studies, 2002).

<sup>248</sup> Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998).

shortcomings which emerged in the activities of the VCP and its members; Secretariat Directive 15 enacted in 1987 which authorised the media to reveal corruption in high-level positions and authorised the chief editor to make decisions regarding what is to be published, and; Secretariat Directive 19 enacted in 1987 which released the media from the obligation to give prominence to unimportant protocol information about senior leaders.<sup>249</sup>

The role of the media in Vietnam now is stipulated in the *Vietnamese Press Law 1989* as ‘the essential means of providing public information in relation to social life. The media is the mouth piece of Party organizations, State bodies and social organizations, and a forum for the people’.<sup>250</sup> In fact, since Doi Moi reforms, the media have been playing an active role as an effective instrument for the government and at the same time a means for the people to express their wishes and concerns, and carry out their democratic rights.<sup>251</sup> In other words, the media not only reports news or gives information to the public, but also reflects the aspirations of people and provides ways of expressing their complaints to the authorities.<sup>252</sup> This is shown in the fact that reporting of ‘several cases of illegal activities among government staff has helped clean up society and has restored and strengthened the trust of the people after so many years of a stagnating economy’.<sup>253</sup> The media have also increasingly reflected the people’s expectations of government and this has helped to determine appropriate directions for the development of economy and society.<sup>254</sup> The media have given people chances to participate in the policy-making process through open forums on TV and radio, and in some newspapers, such as ‘Questions and answers with the audience’, ‘Answers to mail from audiences’, or ‘Questions and answers on Law’.<sup>255</sup>

Newspapers have existed in Vietnam since the French colonial period, which lasted for 87 years, from 1858 to 1945.<sup>256</sup> During that period, newspapers were used to inform colonial officials about the content of French Government legal documents. Therefore, all newspapers were owned by the French colonial government and published in French. The first Vietnamese-owned newspaper was Gia Dinh bao, which was first published in Vietnamese on 15 April 1865 in Sai Gon (Hochiminh City).<sup>257</sup> This published information relating to political, economic, cultural, religious and social issues, as well as Government policies and legal documents.<sup>258</sup> The first Vietnamese radio was the government-owned

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<sup>249</sup> Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 45.

<sup>250</sup> *Vietnamese Press Law 1989* s 1; the draft of new Press Law s 5(1).

<sup>251</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) *The Asia Journal Media* 24, 25.

<sup>252</sup> Chu Van Lam, ‘Economics-related periodicals’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 57.

<sup>253</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) *The Asia Journal Media* 24, 25.

<sup>254</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) *The Asia Journal Media* 24, 25.

<sup>255</sup> Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ [2002] 29 (1) *The Asia Journal Media* 24, 26.

<sup>256</sup> *Thời Pháp thuộc (1858-1945)* (10 June 2015) Lịch sử Việt Nam <[http://www.lichsvietnam.vn/home.php?option=com\\_content&task=view&id=1119&Itemid=5#axzz3cf7tqjdk](http://www.lichsvietnam.vn/home.php?option=com_content&task=view&id=1119&Itemid=5#axzz3cf7tqjdk)>.

<sup>257</sup> *Nguoc qua khu tim hieu to bao dau tien tai Viet Nam* (14 August 2013) Công ty cổ phần truyền thông Việt Nam <<http://kenh14.vn/kham-pha/nguoc-qua-khu-tim-hieu-to-bao-dau-tien-tai-viet-nam-2011062004406969.chn>>.

<sup>258</sup> *Nguoc qua khu tim hieu to bao dau tien tai Viet Nam* (14 August 2013) Công ty cổ phần truyền thông Việt Nam <<http://kenh14.vn/kham-pha/nguoc-qua-khu-tim-hieu-to-bao-dau-tien-tai-viet-nam-2011062004406969.chn>>.



Voice of Vietnam (VOV) broadcast in Hanoi on 7 September 1945.<sup>259</sup> The first Vietnamese television studio was set up by the Democratic Republic of Vietnam in 1968 and the first programme was broadcast in 1970.<sup>260</sup> The internet was first officially accessed on 1 December 1997<sup>261</sup> and the first news website was a magazine named Song Huong (Tap chi Song Huong) published on 6 February 1997.<sup>262</sup> The Literature and Art Association of Hue province is the owner of this website which aims to be a forum to exchange literary and artistic criticisms.

The media in Vietnam was fully government funded from 1975.<sup>263</sup> The funding was reduced in the recession of the late 1970s, and especially after 1986, when the Vietnamese Communist Party (VCP) formally endorsed the Doi Moi economic reforms.<sup>264</sup> After Doi Moi, as I have explained above, full government funding ceased and media owners became responsible for financing their own activities.<sup>265</sup> Media organizations therefore were allowed to expand into other commercial activities and services to create additional sources of income under the provision of the *Vietnamese Press Law 1989 amended 1999* (the *Press Law*).<sup>266</sup> Private media, however, has not been allowed.

Under the *Press Law*, media organizations have been permitted to publish a range of publications and provide a variety of services, which was not the case during the government funding period. Especially since Decision No 219/2005/QĐ-TTg approving the strategy for media development to 2010 was enacted, this wider publication has become common.<sup>267</sup> The strategy allowed media organizations to use multiple finance sources, including advertisements, commercial activities, and community services.<sup>268</sup>

Writing of post-Doi Moi Vietnam, media observer Russell Hiang has argued that 'Being responsible for its own financial well-being increases a publication's independence'.<sup>269</sup> Before 1986, media organizations conducted their activities regardless of profits. As well, information published mostly was one-way communication to the general population, which was produced by the VCP and government. As a result, there was no real competition in the Vietnamese media industry prior to 1999. By contrast, when the government funding was removed and media organizations were permitted to set commercial

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<sup>259</sup> *Moc lịch sử* (14 August 2013) Đài tiếng nói Việt Nam (VOV) <<http://tnvn.gov.vn/moc-lich-su/moc-lich-su-c4-15.aspx>>.

<sup>260</sup> Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 2.

<sup>261</sup> See, eg, 'Ky niem 15 nam Internet co mat tai Vietnam', *Hà Nội Mới* (online), 14 August 2013 <<http://hanoimoi.com.vn/Tin-tuc/Cong-nghes/568013/ky-niem-15-nam-internet-co-mat-tai-viet-nam>>; Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 20.

<sup>262</sup> Nam Phuong, '15 năm báo điện tử Việt Nam: nhìn lại và bước tới', *Bao moi* (online), 23 August 2013 <<http://www.baomoi.com/15-nam-bao-dien-tu-Viet-Nam-nhin-lai-va-buc-toi/76/7964637.epi>>.

<sup>263</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>264</sup> Hiang, Russell H. K (ed), *Media fortunes changing times, Asean state in transition* (Institute of Southeast Asian Studies, 2002).

<sup>265</sup> *Vietnamese Press Law 1989* s 17C(1); the draft of new Press Law s 25.

<sup>266</sup> *Vietnamese Press Law 1989* s 17C (2); the draft of new Press Law s 25.

<sup>267</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>268</sup> The Strategy for media development to 2010 approved by the Decision No 219/2005/QĐ-TTg, Part V, subsection 3.

<sup>269</sup> Hiang, Russell, 'Media in Vietnam and the structure of its management' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 37.

activities and services, media organizations adapted their activity to increase audiences, advertisers, and revenue. Therefore, media organizations have been in competition since this period.<sup>270</sup> More recently, at a conference on defamation law held in Hanoi in March 2010, Peter Connolly, the British Charge D'affaires, stated that '[t]he Vietnamese media has developed rapidly together with the pace of economic prosperity. Several newspapers have revenues of multi-million dollars and significant influence on readers' attitudes and government policies and decisions'.<sup>271</sup>

The media in Vietnam boomed in the 1990s-2000s when the number of its products, and its profits, increased significantly.<sup>272</sup> For example, in February 1995, there were 375 media organizations with total annual circulation of about 360 million publications. By 2005, the numbers had increased to 553 media organizations with a total annual circulation of 600 million publications.<sup>273</sup> The number of media organizations reached 745 in 2010 with total circulation of 1,003 million publications.<sup>274</sup>

Broadcasting in Vietnam has significantly developed since 1984, and especially since 1987 when the government divided the National Radio Station, the National Television Station and the News Agency into three separate organizations, each directly belonging to the government.<sup>275</sup> The Vietnamese national broadcaster, the Voice of Vietnam (VOV) has 64 stations across all provincial areas.<sup>276</sup> The rate of radio broadcasting coverage of VOV increased by 60% over the 20 years from 1986 to 2006 and reached 97% in 2005.<sup>277</sup> Over 10 years, broadcast hours per day of VOV, over all of its stations, grew from 28 hours to 100 hours in 1987, then to 128 hours by 1998. The number of radio channels also increased, from 2 in 1986 to 3 in 1993 and 6 channels in 1998.<sup>278</sup> Until 1984, television was very limited and 'radio remained the main medium of information and entertainment'.<sup>279</sup> In 2006, the rate of Vietnamese households which were able to watch television reached around

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<sup>270</sup> Tran, V.H, *Lịch sử nền báo chí Việt Nam từ khi thành lập* (Hochiminh City, 1995) 150.

<sup>271</sup> *Vietnam: The first conference on defamation law in the media* (31 August 2013) Research and Media network <<http://researchandmedia.ning.com/profiles/blogs/vietnam-the-first-conference>>.

<sup>272</sup> Hiang, Russell H. K (ed), *Media fortunes changing times, Asean state in transition* (Institute of Southeast Asian Studies, 2002).

<sup>273</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>274</sup> Ha, Thu, *Boosting the Role of Mass Media* (20 June 2011) Vietnam Chamber of Commerce and Industry <[http://vccinews.com/news\\_detail.asp?news\\_id=23451](http://vccinews.com/news_detail.asp?news_id=23451)>.

<sup>275</sup> *Moc lịch sử* (21 June 2014) Dai Tieng noi Viet Nam (VOV) <<http://tnvn.gov.vn/moc-lich-su/moc-lich-su-c4-15.aspx>>; Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>276</sup> 'Đài Tiếng nói Việt Nam kỷ niệm 70 năm Ngày thành lập', *Báo Quân đội nhân dân* (online) 07 October 2015 <<http://www.qdnd.vn/qdndsite/vi-vn/61/43/trong-nuoc/dai-tieng-noi-viet-nam-ky-niem-70-nam-ngay-thanh-lap/377005.html>>.

<sup>277</sup> Duy, Dao, *Vuot troi* (17 February 2006) Dai Tieng noi Vietnam <<http://vov.vn/Home/Vuot-troi/20062/25127.vov>>.

<sup>278</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>279</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

85%.<sup>280</sup> This number has continued to increase with 95% in 2007 and nearly 100% in early 2011, with television stations broadcasting in all provinces.<sup>281</sup>

Based on the influence of the modern technology Asymmetric Digital Subscriber Line (ADSL), internet in Vietnam has grown and changed rapidly, especially since 2003. The number of people using the internet rose over 11 times from 3.1 million (3.8% of the population) in 2003 to 31.1 million in September 2012 (around 35.49% of the population).<sup>282</sup> At that time, Vietnam was ranked 4<sup>th</sup> in Southeast Asia in the rate of internet users by International Telecommunication Union (ITU) and was in the group of countries with the highest internet growth rates in the world (with 12.035% growth rate between 2000-2010).<sup>283</sup>

As elsewhere in the world, in Vietnam the development of the internet has affected the pre-existing media industry.<sup>284</sup> Prior to 2001, electronic newspapers were simply a scanned copy of a printed newspaper. Now, however, information published in electronic newspapers is updated promptly and the layout is attractive.<sup>285</sup> The number of total subscribers to online newspapers grew from 7.5 million in 2003 to 12 million in 2013.<sup>286</sup> In line with this, online news has also developed, especially since 2007. The number of electronic newspaper licenses has grown from 6 in 2007 to 70 in 2013. There are also thousands of websites posting news on activities of the Vietnamese Communist Party, and the Government, as well as a range of different associations and enterprises.<sup>287</sup>

Despite the growth of the internet, traditional media (television, radio and newspapers) continue to be popular.<sup>288</sup>

(1) The number of radio and television stations has remained stable with 67 since 2007.<sup>289</sup> Vietnamese national broadcasters including VOV and Vietnamese Television (VTV)

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<sup>280</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>281</sup> Thuy, Thu, *Khai mac Hoi nghi cap cao Bao chi chau A lan thu 8 (Asia Media Summit 2011)* (24 May 2011) Dai Tieng noi Vietnam <<http://www.vov.vn/Home/Khai-mac-Hoi-nghi-cap-cao-Bao-chi-chau-A-lan-thu-8-AMS-8/20115/175905.vov>>.

<sup>282</sup> See, eg, *Thong bao so lieu phat trien Internet Vietnam* (17 August 2012) Trung tam Internet Vietnam-VNNIC <<http://www.thongkeinternet.vn/jsp/trangchu/index.jsp>>; *Bao cao tai nguyen Internet Vietnam 2012* (22 August 2013) Trung tam Internet Vietnam (VNNIC) <<http://vnnic.vn/sites/default/files/tailieu/Sach%20trang%20tai%20nguyen%20Internet%20nam%202012.pdf>>; 'Ky niem 15 nam Internet co mat tai Vietnam', *Hà Nội Mới* (online), 14 August 2013 <<http://hanoimoi.com.vn/Tin-tuc/Cong-nghe/568013/ky-niem-15-nam-internet-co-mat-tai-viet-nam>>; '15 năm Internet Việt Nam qua những con số', *Thời báo kinh tế Việt Nam* (online), 07 March 2015 <<http://vneconomy.vn/cuoc-song-so/15-nam-internet-viet-nam-qua-nhung-con-so-2012120104037915.htm>>.

<sup>283</sup> 'Ky niem 15 nam Internet co mat tai Vietnam', *Hà Nội Mới* (online), 14 August 2013 <<http://hanoimoi.com.vn/Tin-tuc/Cong-nghe/568013/ky-niem-15-nam-internet-co-mat-tai-viet-nam>>.

<sup>284</sup> Thanh Ngan, *Ngành truyền thông trong tương lai: "Ba trong một"* (03 September 2013) BMG International Education.

<sup>285</sup> Nam Phương, '15 năm báo điện tử Việt Nam: nhìn lại và bước tới', *Bao moi* (online), 23 August 2013 <<http://www.baomoi.com/15-nam-bao-dien-tu-Viet-Nam-nhin-lai-va-buoc-toi/76/7964637.epi>>.

<sup>286</sup> The Report on internet statistics of Vietnam 2003, 2013, Vietnamese International Internet Centre (VNNIC).

<sup>287</sup> See, eg, The report of the Ministry of Communication and Information of Vietnam, 2007- 2013; *Tong hop danh sach bao dien tu da duoc cap phep den thang 8/2011* (24 August 2013) Bộ Thông tin và Truyền Thông <<http://mic.gov.vn/solieubaocao/danh sachcapphep/baochi/Trang/Danh%3%A1ch%3%A1c%3%A1c%3%A1o%4%91i%1%BB%87nt%E1%BB%AD%4%91%6%B0%E1%BB%A3cc%E1%BA%A5pph%3%A9p.aspx>>; *Danh sách các Trang thông tin điện tử tổng hợp được cấp phép* (24 August 2013) Bộ Thông tin và Truyền Thông <<http://mic.gov.vn/solieubaocao/danh sachcapphep/baochi/Trang/Danh%3%A1ch%3%A1cTrangth%3%B4ngtin%4%91i%1%BB%87nt%E1%BB%ADt%E1%BB%95ngh%E1%BB%A3p%4%91%6%B0%E1%BB%A3cc%E1%BA%A5pph%3%A9p.aspx>>.

<sup>288</sup> Thanh Ngan, *Ngành truyền thông trong tương lai: "Ba trong một"* (03 September 2013) BMG International Education <<http://www.bmg.edu.vn/vn/bai-viet-hay/quan-he-cong-dong/nganh-truyen-thong-trong-tuong-lai-ba-trong-mot/342/1>>.

<sup>289</sup> The report of the Ministry of Communication and Information of Vietnam, 2007, 2013.

continue to play the most important role.<sup>290</sup> Broadcasting services have used a range of technologies such as cable, analogue, satellite and internet. The rate of radio coverage of VOV reaches 99% and over 200 hours of programming are broadcast per day. This is a higher number than for any other means of information.<sup>291</sup> VTV is the main communication medium in Vietnam.<sup>292</sup> In 2010, the number of families having access to television was 18.17 million from a total of 20.1 million families, or approximately 90%. At the end of 2013, VTV broadcasted 178 free channels, as well as around 148 paid channels including 73 national channels and 75 foreign channels.<sup>293</sup>

(2) The number of print media organizations increased nearly 37% from 621 at the end of 2007 to 838 at the end of 2013. The number of publications also increased approximately 384% from 803 at the end of 2007 to 1,111 at the end of 2013.<sup>294</sup>

This boom in media production has been fed by two key - and overlapping - developments: following the reduction of government funding, media organizations have had the motivation to raise revenue by diversifying their output; and this in turn was made possible by the liberalisation of media regulation, in particular of the subject matters on which the media could publish, to include especially economic affairs and sport. Nevertheless, despite the more competitive environment in the media industry after 1999, all media remain state owned.<sup>295</sup> As well, more than 80% of media organizations still rely totally on government financial support. Approximately 100 out of the 553 media organizations are able to break even financially, and approximately 50 organizations are highly profitable.<sup>296</sup>

In short, the media in Vietnam have changed significantly because of the economic change from a centrally-planned State monopoly to a multi-sectional market. The media have developed significantly and this is reflected in the increased number of media organizations and media publications. The media is no longer only an instrument of the VCP and the government but has also become a people's forum, and the media now takes part in a range of economic activities.<sup>297</sup> Scholars argue that in recent years, the media has positively affected the development of the VCP and the government. The media have played an important role in public education about issues such as health and nutrition, and reducing undesirable

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<sup>290</sup> Thuy, Thu, *Khai mạc Hội nghị cấp cao Báo chí châu Á lan thu 8 (Asia Media Summit 2011)* (24 May 2011) Dai Tieng noi Vietnam <<http://www.vov.vn/Home/Khai-mac-Hoi-nghi-cap-cao-Bao-chi-chau-A-lan-thu-8-AMS-8/20115/175905.vov>>.

<sup>291</sup> See, eg, Chu Mien, *Đài TNVN và Bộ GD-ĐT ký kết hợp tác tuyên truyền* (22 August 2013) Đài tiếng nói Việt Nam (VOV) <<http://vov.vn/Xa-hoi/Dai-TNVN-va-Bo-GDDT-ky-ket-hop-tac-tuyen-truyen/274291.vov>>; Nguyen Long, 'Voice of Vietnam radio: past, present and future prospects' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 67.

<sup>292</sup> See, eg, *Nghiên cứu xây dựng nội dung đào tạo, bồi dưỡng kỹ năng quản lý và kiến thức kỹ thuật về chuyển đổi số hóa truyền dẫn phát sóng phát thanh, truyền hình* (research project in The Ministry of Information and Communication level, 2011), 2; Nguyen Long, 'Voice of Vietnam radio: past, present and future prospects' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 66; Thanh Chung, *41 năm về vàng ngành Truyền hình Việt Nam* (22 August 2013) Đà Tiếng Nói Việt Nam (VOV) <<http://vov.vn/Chinh-tri/41-nam-ve-vang-nganh-Truyen-hinh-Viet-Nam/185364.vov>>.

<sup>293</sup> The report of the Ministry of Communication and Information of Vietnam, 2013.

<sup>294</sup> The report of the Ministry of Communication and Information of Vietnam, 2007, 2013.

<sup>295</sup> Huang, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>296</sup> *The Decision No 219/2005/QĐ-TTg* (Quyết định số 219/2005/QĐ-TTg ngày 09 tháng 09 năm 2005 Phê duyệt Chiến lược phát triển thông tin đến năm 2010).

<sup>297</sup> Huang, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

behaviour such as domestic or family violence, or damage to the environment. The media have contributed to boosting democracy, enhancing international relationships, and strengthening the economic growth and development of the country. Media content has been developed to become increasingly comprehensive to meet the information demands of all social classes.<sup>298</sup>

## 2. Overview of the media industry in Australia

Australia's first newspaper was published in 1803 - the *Sydney Gazette and New South Wales Advertiser* which was the only newspaper circulated in the New South Wales colony.<sup>299</sup> This newspaper published 'shipping news, auction results, crime reports and agricultural notices as well as poems, literature and religious advice'.<sup>300</sup> Radio broadcasting first commenced in Australia in 1919.<sup>301</sup> Television first broadcasted in 1956.<sup>302</sup> Australian internet was first connected to the global system in 1989 when a 56Kb link was established between the University of Hawaii and the University of Melbourne.<sup>303</sup>

The media in Australia can be drawn into three sectors including public, commercial and community.<sup>304</sup>

Public media are services established for cultural and social purposes. The main two providers of this are the Australian Broadcasting Corporation (ABC) established in 1932 and the Special Broadcasting Service (SBS) established in the 1970s.<sup>305</sup> The functions in providing public broadcasting services of these broadcasters are provided in the respective charters set out in the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Services Act 1991* (Cth).<sup>306</sup>

According to the Charter of the Australian Broadcasting Corporation:

(1) The functions of the Corporation are:

- (a) to provide within Australia innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system consisting of national, commercial and community sectors and, without limiting the generality of the foregoing, to provide:

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<sup>298</sup> See, eg, Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' [2002] 29 (1) *The Asia Journal Media* 24, 26; Thu Ha, *Boosting the Role of Mass Media* (20 June 2011) Vietnam Chamber of Commerce and Industry <[http://vccinews.com/news\\_detail.asp?news\\_id=23451](http://vccinews.com/news_detail.asp?news_id=23451)>.

<sup>299</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 55; *The birth of the newspaper in Australia* (09 March 2015) Australian government <<http://www.australia.gov.au/about-australia/australian-story/birth-of-the-newspaper>>.

<sup>300</sup> *The birth of the newspaper in Australia* (09 March 2015) Australian government <<http://www.australia.gov.au/about-australia/australian-story/birth-of-the-newspaper>>.

<sup>301</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 16.

<sup>302</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 16.

<sup>303</sup> *History of the Internet in Australia* (09 March 2015) Cyrius Media Group <<http://www.cyrius.com.au/articles/history-of-the-internet-in-australia>>; *How Australia connected to the internet 25 years ago* (09 March 2015) The Conversation <<http://theconversation.com/how-australia-connected-to-the-internet-25-years-ago-28106>>.

<sup>304</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 6.

<sup>305</sup> See, eg, *ABC history* (09 March 2015) Australian Broadcasting Corporation <<http://about.abc.net.au/who-we-are/abc-history/>>; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 6.

<sup>306</sup> *Australian Broadcasting Corporation Act 1983* (Cth) s 6; *Special Broadcasting Services Act 1991* (Cth) s 6.

- (i) broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and
- (ii) broadcasting programs of an educational nature;
- (b) to transmit to countries outside Australia broadcasting programs of news, current affairs, entertainment and cultural enrichment that will:
  - (i) encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and
  - (ii) enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs; and
- (ba) to provide digital media services; and
- (c) to encourage and promote the musical, dramatic and other performing arts in Australia.

Note: See also section 31AA (Corporation or prescribed companies to be the only providers of Commonwealth-funded international broadcasting services).

(2) In the provision by the Corporation of its broadcasting services within Australia:

- (a) the Corporation shall take account of:
  - (i) the broadcasting services provided by the commercial and community sectors of the Australian broadcasting system;
  - (ii) the standards from time to time determined by the ACMA in respect of broadcasting services;
  - (iii) the responsibility of the Corporation as the provider of an independent national broadcasting service to provide a balance between broadcasting programs of wide appeal and specialized broadcasting programs;
  - (iv) the multicultural character of the Australian community; and
  - (v) in connection with the provision of broadcasting programs of an educational nature—the responsibilities of the States in relation to education; and
- (b) the Corporation shall take all such measures, being measures consistent with the obligations of the Corporation under paragraph (a), as, in the opinion of the Board, will be conducive to the full development by the Corporation of suitable broadcasting programs.
- (3) The functions of the Corporation under subsection (1) and the duties imposed on the Corporation under subsection (2) constitute the Charter of the Corporation.
- (4) Nothing in this section shall be taken to impose on the Corporation a duty that is enforceable by proceedings in a court.<sup>307</sup>

The Charter of the Special Broadcasting Services states:

(1) The principal function of the SBS is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.

(2) The SBS, in performing its principal function, must:

- (a) contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities; and

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<sup>307</sup>*Australian Broadcasting Corporation Act 1983 (Cth) s 6*

(b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and

(c) promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and

(d) contribute to the retention and continuing development of language and other cultural skills; and

(e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and

(f) make use of Australia's diverse creative resources; and

(g) to the extent to which the function relates to radio and television services—contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the Australian Broadcasting Corporation and the community broadcasting sector; and

(h) to the extent to which the function relates to radio and television services—contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression.

(3) The principal function of the SBS under subsection (1) and the duties imposed on the SBS under subsection (2) constitute the Charter of the SBS.

(4) Nothing in this section imposes on the SBS a duty that is enforceable by proceedings in a court.

(5) A subsidiary function of the SBS is to carry on, within or outside Australia, any business or other activity incidental to the fulfilment of the Charter.<sup>308</sup>

Commercial media are services set up to the general public for profitable purposes. Part of the nature of commercial media as a private enterprise is to report and critique the action of the state.<sup>309</sup>

Community media typically refers to services based upon community broadcasting licences allocated by the Australian Communications and Media Authority (ACMA). This service is non-profit and it is set up to serve particular community interests.<sup>310</sup> The guiding principles of community media are provided in the Community Television Code of Practice 2004 and Community Radio Broadcasting Code of Practice 2008, which states:<sup>311</sup>

Community broadcasters are united by six guiding principles. We will work to:

- Promote harmony and diversity and contribute to an inclusive, cohesive and culturally-diverse Australian community
- Pursue the principles of democracy, access and equity, especially for people and issues not adequately represented in other media

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<sup>308</sup> *Special Broadcasting Services Act 1991* (Cth) s 6.

<sup>309</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 11, 12.

<sup>310</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 14, 15.

<sup>311</sup> *Special Broadcasting Services Act 1991* (Cth) s 6.

- Enhance the diversity of programming choices available to the public and present programs that expand the variety of viewpoints broadcast in Australia
- Demonstrate independence in programming as well as in editorial and management decisions
- Support and develop local arts and music
- Increase community involvement in broadcasting.<sup>312</sup>

The development of media technology, especially the internet and the trend towards media convergence, has influenced media delivery platforms.<sup>313</sup> The traditional media (print, radio and television) have exploded into a variety of new forms.<sup>314</sup> Newspapers have published online editions. Radio extends traditional broadcasting into online streaming and podcasting.<sup>315</sup> Subscription, digital and mobile television have emerged as distinct platforms. Television has adopted digital personal video recorders and online television through online streaming and download services to replace video cassette recorders.

The newspaper industry in Australia became increasingly concentrated for a variety of reasons. These include a decline in quantity of both titles and owners from 26 and 21 in 1923 to 14 and 7 in 1960, and the development of high technology radio and television in the second half of the 1960s. The number of daily newspapers declined from 56 in 1984 to 49 in 1992, and all afternoon newspapers closed in the late 1980s because of products and services provided by the internet. Outside the capital cities, the provincial daily press also reduced from 37 to 2 in 2008.<sup>316</sup> Today, except in Sydney and Melbourne, most 'state capitals and major urban and regional centres have only a single daily newspaper'.<sup>317</sup> The number of titles and owners continued to fall over the years, from 14 and 7 in 1960 to 11 and 3 in 2011.<sup>318</sup>

The newspaper industry consists of four major publishers:

(1) News Limited is the largest corporation, controlling '65% of total circulation of metropolitan and national daily newspapers, or 58% of circulation when counting all daily newspapers';

(2) Fairfax Media has '25% of metropolitan and national daily circulation, or 28% of all daily newspaper circulation';

(3) Western Australian Newspapers has '8% of total circulation'; and

<sup>312</sup> Community Radio Broadcasting Code of Practice 2008, Guiding principles.

<sup>313</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 56. Media convergence is 'the phenomenon where digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences': Australian Communications and Media Authority, *Digital Australians—Expectations About Media Content in a Converging Media Environment: Qualitative and Quantitative Research Report* (2011), 7.

<sup>314</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 16.

<sup>315</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 16.

<sup>316</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 56, 57.

<sup>317</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 57.

<sup>318</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 58.



(4) APN News and Media Ltd controls '5% of total daily circulation', but this company owns a lot of provincial daily newspapers in New South Wales and Queensland.<sup>319</sup>

These figures show that the top two companies in Australia's newspaper industry share 86% of the total circulation of daily newspapers. In addition, Australia is the only country where the leading newspaper outlet controls over 50% of total circulation of daily newspapers, compared with 26 countries where it is under 40% (table 3).<sup>320</sup>

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<sup>319</sup>The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 58.

<sup>320</sup>The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 59.

**Table 3: Newspaper concentration—international comparisons**

<i>Country</i>	<b>Share of total daily newspaper circulation held (per cent)</b>		
	<b>Top 1</b>	<b>Top 2</b>	<b>Top 4</b>

		<b>Share of total daily newspaper circulation held (per cent)</b>		
	Australia	58	86	99
nd	Switzerla	45	62	76
	Israel	44	64	91
	Ireland	44	57	70
	Portugal	41	77	94
	France	41	61	82
	Turkey	38	53	78
Africa	South	36	64	96
Kingdom	United	34	54	74
	Taiwan	32	56	96
nds	Netherla	30	58	90
	Brazil	30	52	70
	China	30	51	60
	Sweden	29	45	67
	Canada	28	54	77
	Finland	27	43	57
	Russia	24	47	76
	Korea	24	44	70
	Germany	22	31	41
	India	22	29	42
	Mexico	20	34	56
	Japan	19	35	48
	Spain	18	36	59
	Italy	16	31	43

		<b>Share of total daily newspaper circulation held (per cent)</b>		
United States	United	10	14	22
	Poland	..	..	61

Source: International Media Concentration Research Project, <<http://internationalmedia.pbworks.com>>

Similar to most countries in the world, the development of the internet has significantly affected the media industry in Australia, especially in competition for advertising revenue. The internet's market share has increased dramatically, while the market share of traditional media (television, radio and newspapers) has decreased over the years, especially that of newspapers. A survey of over 2300 people conducted in 2009 showed that time spent online had overtaken time spent watching television, reading newspapers or listening to the radio. At that time, Australians aged over 16 spent an average of 17.6 hours on the internet each week, 13.4 hours watching TV, 9.3 hours listening to radio, 2.5 hours using a mobile phone, and 3.2 hours reading newspapers.<sup>321</sup>

The development of the internet in Australia can be seen through the growth of the number of internet subscribers from 2007 to 2013. The number of all internet subscribers (including corporate subscribers) increased nearly 400%, from 6.43 million at the end of March 2007 to 32 million in June 2013,<sup>322</sup> although the number of Internet Service Providers (ISPs) operating in Australia remained relatively steady over six years with 421 in December 2007 to 419 in June 2013.<sup>323</sup>

As a result of developments in online communication, the media industry is undergoing a restructure.<sup>324</sup> For example, in the advertising market, newspapers have to share the market and compete with other players including television, radio, magazines, and online advertisers. This is illustrated in Figure 1 and 2.<sup>325</sup> The performance of different players in the advertising market shown in Figure 1 reveals that newspapers and television are still the highest two players throughout the period 2001-2010 while the market share of online advertisers had grown noticeably since 2004 to become third highest ranked. As shown in Figure 2, the strong growth of online advertising has had the greatest impact on print advertising which lost market share with newspapers down 12.3 percentage points from 43.4% in 2001 to 31.1% in 2010. By contrast, online advertising gained 16.8 percentage points from 0% in 2001 to 16.8% in 2010.

<sup>321</sup> Nielsen Online Internet and Technology Report, survey 2009.

<sup>322</sup> The ACMA *Communications report 2007, 76; Communications report 2012-2013, 27.*

<sup>323</sup> *Internet Activity, Australia, Dec 2007* (15 June 2014) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/021AF2525B2376A4CA2574C90017BA24?opendocument>>; The ACMA *Communications report 2012-2013, 25.*

<sup>324</sup> The Department of Communications, Media control and ownership POLICY BACKGROUND PAPER No. 3 June 2014, 22, 23; The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 71.

<sup>325</sup> The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 74-76.



Figure 1: Advertising revenue, main media 2001–2010

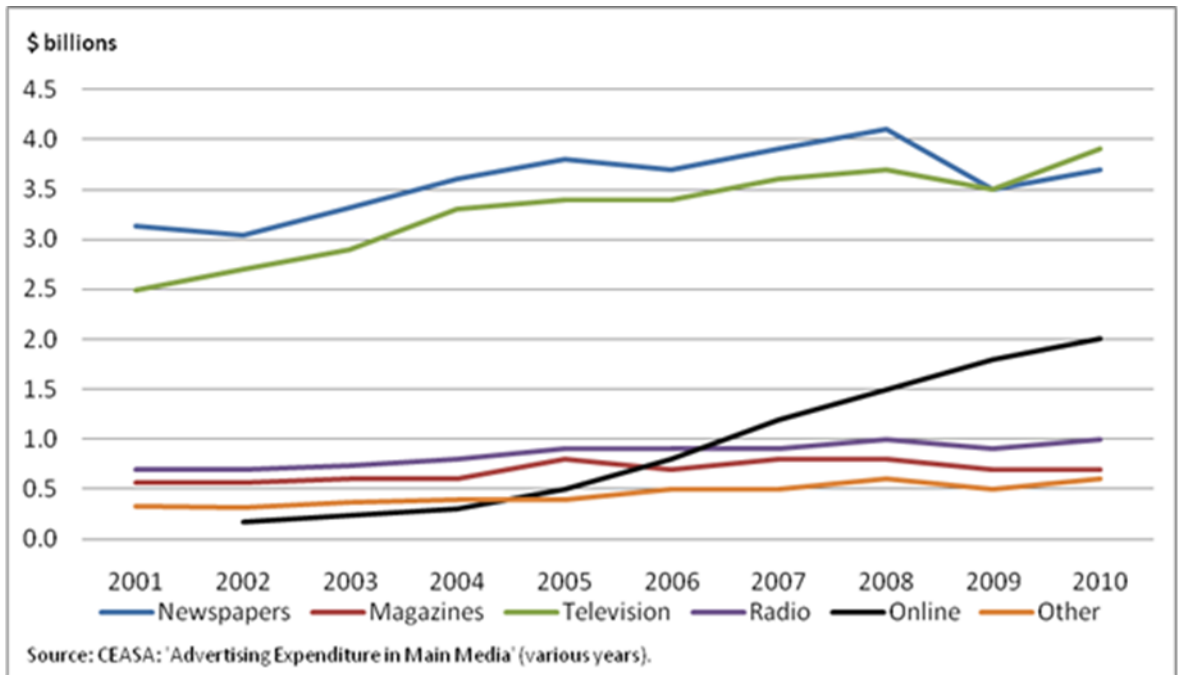
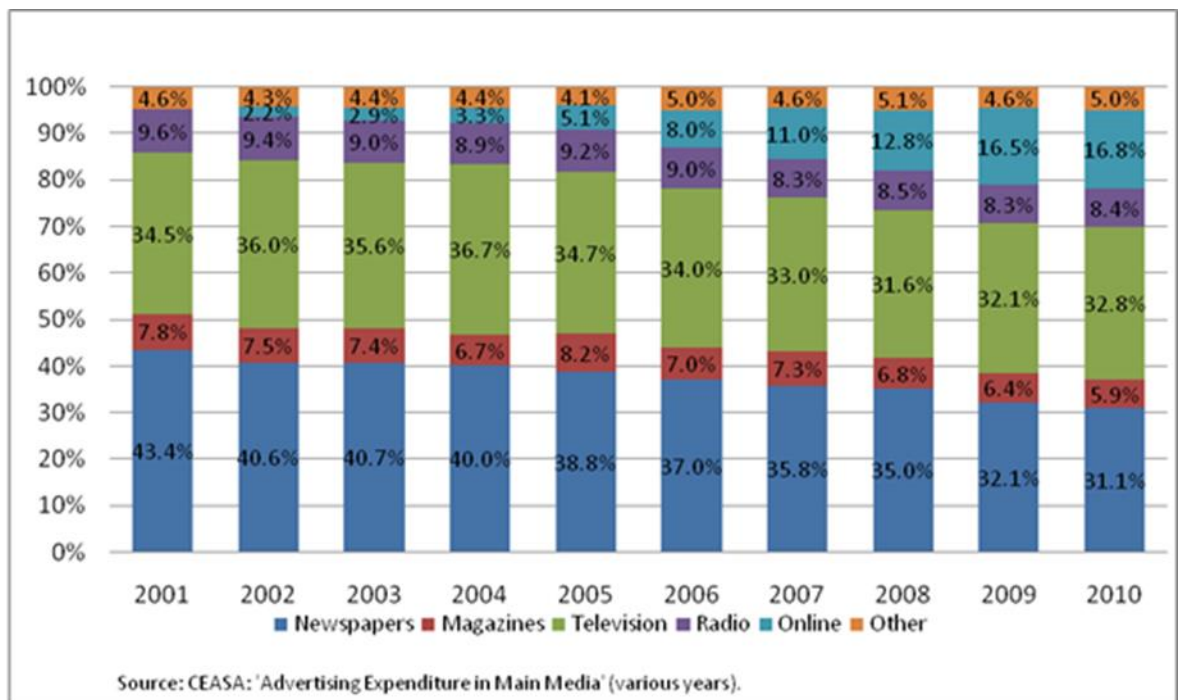


Figure 2: Main media shares of advertising market 2001–2010



Both the number of internet users and the number of people looking for news have been increasing over the years (table 4).<sup>326</sup> As well, Australian readers are gathering their

<sup>326</sup>The Independent report to the Minister for Broadband, Communications and the Digital economy (28 February 2012), *inquiry into the Media and Media Regulation*, 86; Table 3.

information from online sources as well as from newspaper and television,<sup>327</sup> and the internet is now the ‘second most important source of news’.<sup>328</sup>

**Table 4: News and information-related uses of the internet**

	Internet users			Total population		
	2 007	2 009	2 011	2 007	2 009	2 011
<b>Look for:</b>	Per cent			Per cent		
Local news	5 6.8	6 5.8	6 6.1	4 1.2	5 3.0	5 7.4
National news	6 5.7	7 3.3	7 6.4	4 7.7	5 9.1	6 6.3
International news	6 4.1	6 9.9	7 4.7	4 6.5	5 6.3	6 4.8
Weather details	6 2.6	7 3.8	8 1.1	4 5.4	5 9.5	7 0.4

Source: ARC Centre of Excellence for Creative Industries and Innovation, Submission to the Independent Media Inquiry, 2011,

8.

Despite the decrease in market share, radio and television are still competitive information suppliers, particularly in providing news, current affairs, sport reports and special-interest programming.<sup>329</sup> Despite the development of the internet, television and radio remain the preferred services in Australia. Over the five year period from 2009 to 2013, time spent using commercial broadcasting services remained stable (Figures 3 and 4).<sup>330</sup> A survey conducted in 2012 showed that commercial television and internet were the most popular sources of news with 36% and 34% while the number of readers of other traditional media fell (table 5).<sup>331</sup>

<sup>327</sup>The ACMA *Communications report 2013*, 46.

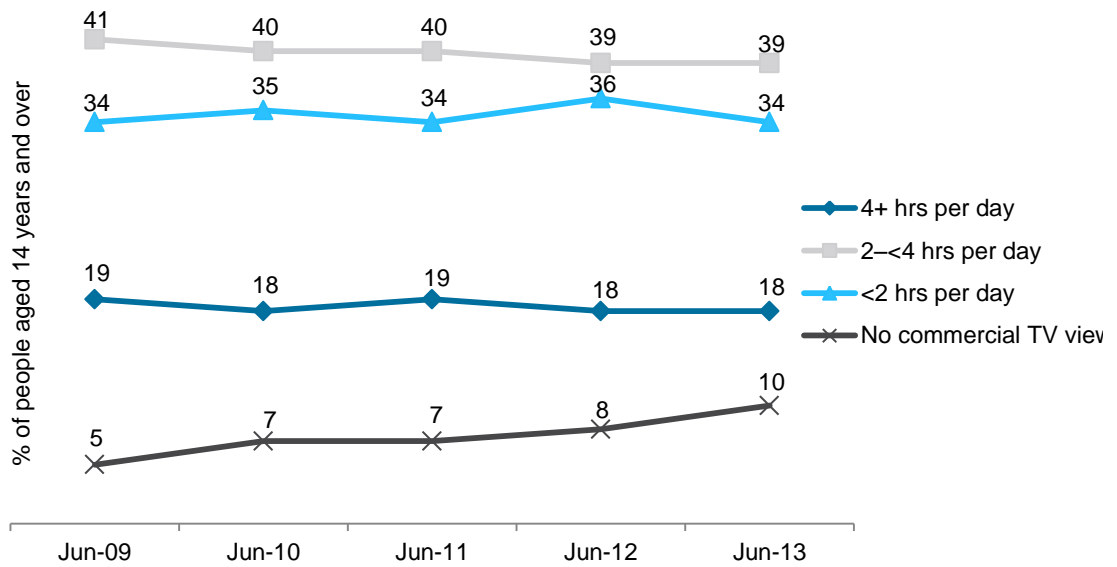
<sup>328</sup>Table 1.2.

<sup>329</sup>The Department of Communications, Media control and ownership POLICY BACKGROUND PAPER No. 3 June 2014, 22; The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 83.

<sup>330</sup>The ACMA *Communications Report 2012–2013*, 43.

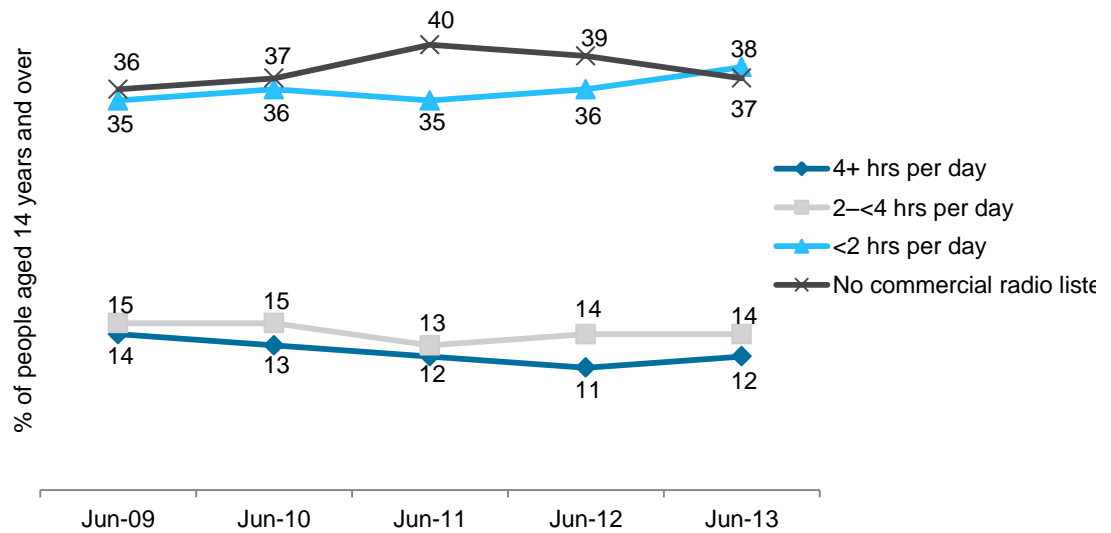
<sup>331</sup>The Department of Communications, Media control and ownership POLICY BACKGROUND PAPER No. 3 June 2014, 24.

**Figure 3: Commercial television viewing on a normal weekday**



Source: Roy Morgan Single Source.

**Figure 4: Commercial radio listening on a normal weekday**



Source: Roy Morgan Single Source.



**Table 5: Main source of news by media platform, 2012**

<b>Medium</b>	<b>Proportion indicating medium as main source of news (per cent)</b>
Commercial television	34
Internet news sites	36
Newspaper printed	11
Subscription TV	3
Radio	8
Magazine printed	1

Source: Nielsen 2013, Australian Connected Consumers 2013, p. 194..

The development of the internet has affected the viability of newspapers.<sup>332</sup> Total circulation declined dramatically—down nearly 38% from 3,525,000 in 1987 to 2,198,000 in 2011; and the number of newspapers sold per 100 people dropped more than 56% from 21.9 in 1987 to 9.7 in 2011 (table 6).<sup>333</sup>

**Table 6: Trends in metropolitan and national newspaper circulation**

<b>Year</b>	<b>No of titles</b>	<b>Total circulation (thousands)</b>	<b>Population (millions)</b>	<b>Newspaper sales per 100 people</b>
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<sup>332</sup> See, eg, Douglas, Jane, 'News media in Australia: A transforming landscape, (2013) 27 (1) *Online currents* 9; The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 55, 71; Newspaper Publishing in Australia: Market Research Report (11 March 2015) IBISWorld<<http://www.ibisworld.com.au/industry/default.aspx?indid=169>>.

<sup>333</sup>The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 69.

<b>Year</b>	<b>No of titles</b>	<b>Total circulation (thousands)</b>	<b>Population (millions)</b>	<b>Newspaper sales per 100 people</b>
1987	18	3525	16.11	21.9
1996	11	2531	17.89	14.1
2000	11	2488	19.17	13.0
2011	11	2198	22.75	9.7

Source: The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 69.

As discussed above, the development of technology, especially the internet, and the trend towards media convergence has changed the Australian media industry. Traditional media now shares its market with new platforms and the competition between them is serious. Yet the newspaper environment is far from competitive<sup>334</sup> because of the concentration of ownership, which is one of the highest in the world.<sup>335</sup> Establishing effective media regulation to address these two dynamics is a challenge for the Australian government. This is particularly so when there is also a need to protect community interests such as public order, privacy information and private reputation, which will be discussed in chapter 6.

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<sup>334</sup>The Report of the Independent Inquiry into the Media and Media Regulation, Feb 2012, 190.

<sup>335</sup> Healey, Justin, *Media Ethics and Regulations* (Thirroul The Spinney Press, 2013) 2, 36.

## Chapter 4

# Media regulation in Vietnam

### Introduction

An overview of media regulation in Vietnam is necessary for insight into the current situation of media law in that country. The overview I provide in this chapter will be the basis for my critique of Vietnamese media law in chapter 6, and is structured in five sections: an overview of the system of Vietnamese media regulation, followed by explanation of the system of media regulatory institutions; discussion about how freedom of communication is balanced against other recognised interests; an examination of media ownership regulation; and discussion of the system for handling complaints and grievances.

### 1. An overview of the Vietnamese media regulation system

This section provides general information about the system of Vietnamese media regulations to provide the background for discussing regulations for each specific media category.

The current system of media regulation in Vietnam is quite complicated. This is reflected in the fact that besides the *Vietnamese Press Law 1989*, there are numerous laws, Ordinances adopted by the Vietnamese Assembly, by-laws such as Decrees enacted by the Vietnamese government, Decisions enacted by the Prime Minister, and Circulars developed by other government bodies including ministries and Provincial People's Committees (PPCs).<sup>336</sup> The complicated nature of the system was remarked upon by many of my Vietnamese interviewees, such as participants No 1, 3, 6, 8, 9, 10, 15, 17.<sup>337</sup> The organization of the Vietnamese government system is explored in section 2 below. As Heng comments, 'this pattern of multiple laws governing each and every arena can overlap and add to an already confusing legal environment by contradicting each other'.<sup>338</sup> As we shall see they do overlap which will be discussed further in chapter 6 where I critique Vietnamese media legislation.

The *Vietnamese Constitution*, the nation's fundamental and supreme law,<sup>339</sup> provides general rules to regulate essential matters relating to all aspects of the government and social life including media activities. In the media sector, the Constitution contains general provisions relating to many issues, such as: the right to freedom of the press, freedom of expression and freedom of information;<sup>340</sup> the right to personal reputation;<sup>341</sup> national

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<sup>336</sup>Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies  
<<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>337</sup>See discussion in chapter 6 where I critique Vietnamese media legislation.

<sup>338</sup>Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies  
<<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>339</sup>*Vietnamese Constitution 2013* s 119(1).

<sup>340</sup>*Vietnamese Constitution 2013* s 25.

security and the public interest;<sup>342</sup> and the right to personal information.<sup>343</sup> Based on the provisions of the *Vietnamese Constitution*, other laws and Ordinances have been specifically enacted to regulate media activities.<sup>344</sup> Laws and Ordinances enacted must accord with the *Constitution*, and conflicting provisions are invalid.<sup>345</sup>

The *Vietnamese Press Law 1989* regulates most media activities relating to many areas such as freedom of information, protection of reputation, ‘opposition’ and dissent,<sup>346</sup> protection of personal information, protection of government or official secrets, ownership, and the handling of complaints and grievances.

As mentioned in chapter 2 (section 4: Research methodology, and section 6: The existing research), the draft of new Press Law does not make any significant changes compared to current laws, especially to provisions relating to matters examined in this study. In addition, the draft was being published to gather opinions and views of the members of the public only at the end of April 2015, when my research was in its final stages. I therefore still examine the current law in this research. However, I have included references to the draft in my footnotes, where appropriate, and refer to the draft when there are any changes.

The media are also governed by other laws and Ordinances. These laws provide detailed descriptions of or instructions on certain activities. For example the *Vietnamese Civil Code 2005* provides provisions covering protection of personal information and reputation. The *Vietnamese Criminal Code 1999* creates the offence of ‘opposition’. The *Vietnamese Law on Information Technology 2006* contains provisions relating to the publication of information held by government agencies on the internet (their websites). Ordinance No. 30 enacted in 2000 governs issues relating to national security and regulates matters relating to the protection of government or official secrets.<sup>347</sup> Provisions relating to media activities in these laws must accord with the *Vietnamese Press Law 1989*. If there is any conflict between these legal documents and the *Vietnamese Press Law 1989*, the latter will be applied.

However, laws and Ordinances still have general application. Therefore, a variety of by-laws including Decrees and Decisions are developed by the Vietnamese government and the Prime Minister to add detail to the provisions of laws and Ordinances. In fact, Decrees and Decisions are commonly applied to regulate media activities. For example, Decree No. 159/2013/NĐ-CP provides further detail on the application of the *Vietnamese Press Law 1989* by imposing an administrative penalty for breaking press and publication

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<sup>341</sup> *Vietnamese Constitution 2013* s 20.

<sup>342</sup> *Vietnamese Constitution 2013* ss 11, 44.

<sup>343</sup> *Vietnamese Constitution 2013* s 21.

<sup>344</sup> In some issues, Vietnam has not enacted Law to regulate, so Ordinances are used to govern. Ordinances and Law have equal value.

<sup>345</sup> *Vietnamese Constitution 2013* s 119(1).

<sup>346</sup> The term ‘opposition’ is explained in sub-section 3.3 below where I discuss law on opposition and dissent.

<sup>347</sup> Ordinance No. 30 enacted in 2000 (Pháp lệnh số 30/2000/PL-UBTVQH10 ngày 28/12/2000 Bảo vệ bí mật Nhà nước).

provisions.<sup>348</sup> The *Spokesman Regulation 2007* regulates the provision of government-held information through representatives of government agencies.<sup>349</sup>

Once again, some Decrees and Decisions are still needed to provide guidance for the implementation of laws. To guide the application of these by-laws when they are not clear, ministries enact Circulars. These legal documents are also important to gain a good understanding of Decrees and Decisions in many cases. For example, Circular No 05/2011/BTTTT gives a guide to the handling of complaints and grievances in the field of information and communication.<sup>350</sup> The following sections will provide detailed analysis of how the *Constitution*, laws, Ordinances, Decrees, Decisions and Circulars govern media activities.

## 2. The system of media regulation institutions in Vietnam

### 2.1. Overview of the Vietnamese government system

This subsection provides a general description of the Vietnamese system of government. This knowledge can provide the basis for a better understanding of my discussion on and critique of Vietnamese media legislation and my recommendations for reforming it in the chapters that follow. Focussing on the aims and scope of the research, the disclosure of this subsection is limited to the structure of the central government.

The Vietnamese government is a particular form of representative democracy.<sup>351</sup> The concept of representation in Vietnam is based on the idea that the Government acts on behalf of the people (whose foundation is the alliance between the working class, the peasantry and the intelligentsia), by representing their beliefs, attitudes and perspectives.<sup>352</sup> Representatives meet in the National Assembly, which is the highest representative body of the People and the highest body of State power of the Socialist Republic of Vietnam.<sup>353</sup> The National Assembly exercises constitutional and legislative powers, decides significant national affairs and exercises supreme control over all activities of the State<sup>354</sup> and over the VCP itself. The *Vietnamese Constitution 2013* states that ‘Organizations and members of the Communist Party of Vietnam shall operate within the framework of the Constitution and law’.<sup>355</sup> As the National Assembly has the right to draw up and amend the Constitution and laws,<sup>356</sup> it also

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<sup>348</sup> Decree No. 159/2013/NĐ-CP (Nghị định số 159/2013/NĐ-CP ngày 12/11/2013 của Chính phủ quy định về xử phạt vi phạm hành chính trong lĩnh vực báo chí, xuất bản).

<sup>349</sup> *Spokesman Regulation 2007* (Quy chế phát ngôn và cung cấp thông tin cho báo chí, Ban hành kèm theo Quyết định số 77/2007/QĐ-TTg ngày 28 tháng 05 năm 2007).

<sup>350</sup> Circular No 05/2011/BTTTT (Thông tư số 05/2011/TT-BTTTT ngày 28 tháng 01 năm 2011 Quy định về giải quyết khiếu nại của người sử dụng dịch vụ trong lĩnh vực thông tin và truyền thông).

<sup>351</sup> *Vietnamese Constitution 2013* ss 2, 6, 7.

<sup>352</sup> *Vietnamese constitution 2013* ss 2, 6; *Tư tưởng Hồ Chí Minh về nhân nước của dân, do dân, vì dân* (06 August 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://hochiminh.vn/news/Pages/news.aspx?ItemID=485>>

<sup>353</sup> *Vietnamese constitution 2013* s 69; *Tư tưởng Hồ Chí Minh về nhân nước của dân, do dân, vì dân* (06 August 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://hochiminh.vn/news/Pages/news.aspx?ItemID=485>>.

<sup>354</sup> *Vietnamese constitution 2013* s 69.

<sup>355</sup> *Vietnamese constitution 2013* s 4(3)

<sup>356</sup> *Vietnamese constitution 2013* s 70.

exercises ultimate control over the Party. The National Assembly performs a number of functions:

- It draws up and amends the Constitution, and makes and amends laws
- It decides on the major objectives, targets, policies and duties of national socioeconomic development
- It decides on the fundamental national financial and monetary policies
- It decides on the State's policies on ethnic minorities and religions
- It elects, suspends and revokes the appointment of a wide range of public officials, such as: the State President and Vice-President, the Chairman of the National Assembly, the Vice-Chairmen of the National Assembly, members of the Standing Committees of the National Assembly.

It decides issues of war and peace, proclaims states of emergency and takes other special measures aimed at ensuring national defence and security.<sup>357</sup>

Under the *Vietnamese Constitution 2013*, democratic society means that the State shall: guarantee and promote the People's right to sovereignty [through their representatives]; recognize, respect, protect and guarantee human rights and citizens' rights; and pursue the goal of a prosperous people and a strong, democratic, equitable and civilized country, in which all people enjoy an abundant, free and happy life and are given conditions for their comprehensive development.<sup>358</sup>

The Constitution also states that all citizens are equal before the law.<sup>359</sup> Vietnamese government is of the People, by the People and for the People.<sup>360</sup> People have the right to participate in the decision-making processes of every organization that makes decisions or takes actions that affect them.<sup>361</sup>

However, the right of Vietnamese citizens to participate in decision-making processes is not a meaningful one. Under the Vietnamese law, Vietnamese citizens cannot directly participate in decision-making processes of the government. They have to carry out such right through their representatives.

Vietnamese democracy therefore is a system of government in which lawfully elected representatives maintain the integrity of a nation state whose citizens, while granted the right to vote, have little or no direct participation in the decision-making process of the government. The Vietnamese Constitution sets out an electoral system for directly choosing representatives that is fair and results in a governing body that represents citizens' votes accurately. The form of democracy in Vietnam is electoral representative democracy where sovereignty is held by the people's representatives including the National Assembly and the People's Councils. Under the Vietnamese Constitution, the people of a locality elect

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<sup>357</sup>*Vietnamese constitution 2013 s 70.*

<sup>358</sup>*Vietnamese constitution 2013 s 3; Tư tưởng Hồ Chí Minh về nhà nước của dân, do dân, vì dân* (06 August 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://hochiminh.vn/news/Pages/news.aspx?ItemID=485>>.

<sup>359</sup>*Vietnamese constitution 2013 s 16.*

<sup>360</sup>*Vietnamese constitution 2013 s 2(1).*

<sup>361</sup>*Vietnamese constitution 2013 s 28; Tư tưởng Hồ Chí Minh về nhà nước của dân, do dân, vì dân* (06 August 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://hochiminh.vn/news/Pages/news.aspx?ItemID=485>>.

recallable representatives into the National Assembly and the members of regional organizations called the People's Councils. These organizations go on to elect the head of the government (prime minister), the head of state (president) and a wide range of public officials.<sup>362</sup> The members of these organizations participate in the decision-making process of the government on behalf of Vietnamese citizens. However, government in Vietnam is a dominant-party system where only one political party (the VCP) can realistically become the government by itself.<sup>363</sup> The VCP is the vanguard of the working class and of the Vietnamese population. It is a perpetual representative of the interests of the working class and of the whole Vietnamese population.<sup>364</sup> 'This Party is closely associated with the People, it shall serve the People, it shall submit to the supervision of the People, and it is accountable to the People for its decisions.'<sup>365</sup> The VCP is the leading force of the State and society.<sup>366</sup>

Vietnamese government is based on a central line system where powers are not divided between a central government and individual states as they are in federal government.

The Vietnamese Constitution provides:

Section 2:

1. The State of the Socialist Republic of Vietnam is a socialist state ruled by law and of the Vietnamese people, by the Vietnamese people and for the Vietnamese people.

2. The Socialist Republic of Vietnam is the country where the Vietnamese people are the masters; all the state power belongs to the Vietnamese people and is based on the alliance of the working class, the peasantry and the intelligentsia.

3. The state power is unified and delegated to state agencies which coordinate with and control one another in the exercise of the legislative, executive and judicial powers.

Section 6:

Vietnamese citizens shall exercise the state power in the form of direct democracy and of representative democracy through the National Assembly, People's Councils and other state agencies.

Section 7:

1. The elections of deputies to the National Assembly and People's Councils must be conducted on the principle of universal, equal, direct and secret suffrage.

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<sup>362</sup>*Vietnamese constitution 2013 ss 7, 70, 79, 113.*

<sup>363</sup>*Vietnamese constitution 2013 s 4(1).*

<sup>364</sup>*Vietnamese constitution 2013 s 4(1).*

<sup>365</sup>*Vietnamese constitution 2013 s 4(2), translate into English by the author of the thesis.*

<sup>366</sup>*Vietnamese constitution 2013 s 4(1).*



2. A National Assembly deputy or a People's Council deputy may be removed from office by the voters or the National Assembly or the People's Council, when he or she is no longer worthy of the confidence of the People.<sup>367</sup>

The Assembly is the most powerful government body, and it is directly chosen by Vietnamese people.<sup>368</sup> The Assembly has legislative power. This body enacts the *Constitution*, laws and Ordinances, and makes important decisions relating to all aspects of the government and social life including national security, the economy, finance, education, and culture. The Assembly has the right to elect and dismiss the President, the Prime Minister, the head of the Supreme Court, and the director of the Supreme Procurator. The Assembly also has the right to operate government activities, for example by questioning the Prime Minister, the head of the Supreme Court, the director of the Supreme Procurator, and ministers about the activities of their offices.<sup>369</sup>

The President is a member of the Assembly and is directly elected by the Assembly. The President represents Vietnam in internal and external relationships.<sup>370</sup>

The government consists of the Prime Minister, the Associate Prime Ministers and the ministers. The government is the highest administrative power body.<sup>371</sup> The Prime Minister is the head of the government and directly elected by the Assembly.<sup>372</sup> The Prime Minister is responsible before the Assembly for the activities of the government.<sup>373</sup> The Associate Prime Ministers and ministers are appointed by the Assembly, on the advice of the Prime Minister.<sup>374</sup> Ministers are the heads of ministries and appointed by the Prime Minister with the Assembly approval to run ministries.<sup>375</sup>

As I discussed above, Vietnam was a French colony for 87 years.<sup>376</sup> It therefore adopted the French court model which is the typical model of civil law.<sup>377</sup> Vietnam is also developing to become a socialist country; therefore it follows the Soviet Union's model which is the typical model of socialist law system.

Civil law systems tend to have independent hierarchies of courts with different subject-matter jurisdiction. Under this model, 'two or more separate sets of courts, each with its own jurisdiction, its own hierarchy of tribunals, its own judiciary, and its own procedure' exist within a nation.<sup>378</sup> Jurisdictions such as civil, labour, administration, economic,

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<sup>367</sup> *Vietnamese Constitution 2013* ss2, 6, 7.

<sup>368</sup> *Vietnamese Constitution 2013* ss 69- 70.

<sup>369</sup> *Vietnamese Constitution 2013* ss 69- 70.

<sup>370</sup> *Vietnamese Constitution 2013* ss 86, 87.

<sup>371</sup> *Vietnamese Constitution 2013* s 94.

<sup>372</sup> *Vietnamese Constitution 2013* s 98.

<sup>373</sup> *Vietnamese Constitution 2013* s 95.

<sup>374</sup> *Vietnamese Constitution 2013* s 98(3).

<sup>375</sup> *Vietnamese Constitution 2013* ss 95(4), 98(3).

<sup>376</sup> See chapter 3, section 1.

<sup>377</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 87.

<sup>378</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 86.

criminal, and marital have become part of the ordinary jurisdiction at every level.<sup>379</sup> This is the case in Vietnam as well, with the existence of a separate system of military tribunals which is organised in two levels to adjudge matters relating to Vietnam's military.<sup>380</sup>

Under the civil law model, the Supreme Court was 'created to provide authoritative answers to questions of interpretation of statutes referred to it'.<sup>381</sup> As David has pointed out, in countries of the Romano-Germanic family (that is, those that follow the civil law tradition), the 'role of judicial decisions is always, or nearly always, hidden behind the screen of an "interpretation" of legislation'.<sup>382</sup> One implication of this is that there will be no legally-binding constitutional review. As Merryman explains: 'civil law fundamentalists have occasionally argued that [courts with power to review legislative action for constitutionality] cannot really be courts or the officials who lead them judges (since courts and judges, properly speaking, merely interpret and apply the law made by the legislature)'.<sup>383</sup>

Similarly, under the Soviet Union's model, '[t]here [was] no review of the constitutionality of legislation'.<sup>384</sup> 'The [prosecution's] only function [was] to exercise "the highest supervision over the strict execution of the laws," not their constitutionality' and the role of courts was therefore similarly constrained.<sup>385</sup> Under this model, 'the courts apart from any review of constitutionality or legality, simply apply the laws, ordinances, decrees, regulations, orders and instructions made in execution of the legislation in force'.<sup>386</sup> Courts' sole function is to interpret state law in order to apply it.<sup>387</sup>

Consistent with these models, Vietnam has no constitutional court and there is no court which is authorized to adjudge matters relating to the Constitution such as whether a law breaches the Constitution. The Supreme Court has power to provide authoritative answers to questions of interpretation of statutes referred to it by ordinary judges.<sup>388</sup> It also exercises summary jurisdiction, and ensures the uniform application of law in trials.<sup>389</sup>

Under the *Law on Organization of People's Courts 2014*, the Supreme People's Court has the right to do the following things:

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<sup>379</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 87.

<sup>381</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 87.

<sup>382</sup> Rene David and John EC Brierley, *Major legal systems in the world today: an introduction to the comparative study of law* (London : Stevens, 1985) 133, 134.

<sup>383</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 90.

<sup>384</sup> Rene David and John EC Brierley, *Major legal systems in the world today: an introduction to the comparative study of law* (London : Stevens, 1985) 262.

<sup>385</sup> Rene David and John EC Brierley, *Major legal systems in the world today: an introduction to the comparative study of law* (London : Stevens, 1985) 262.

<sup>386</sup> Rene David and John EC Brierley, *Major legal systems in the world today: an introduction to the comparative study of law* (London : Stevens, 1985) 263.

<sup>387</sup> Rene David and John EC Brierley, *Major legal systems in the world today: an introduction to the comparative study of law* (London : Stevens, 1985) 263.

<sup>388</sup> [John Henry Merryman](#), *The civil law tradition : an introduction to the legal systems of Europe and Latin America* ( Stanford, Calif : Stanford University Press, 2007), 87; *Law on Organization of People's Courts 2014* s 20.

<sup>389</sup> *Vietnamese constitution 2013* s 104.

- Retry judgments of cases from other Courts;<sup>390</sup>
- Compile a Summary of the court's trial experience to ensure the uniform application of law;<sup>391</sup>
- Training of judges and jurors, and of other functionaries of the People's Court;<sup>392</sup>
- Manage the People's Court and the military courts held under the provisions of the *Law on Organization of People's Courts 2014* and other relevant laws, ensuring the independence of Courts as a whole.<sup>393</sup>

What is missing from the above functions is any role in adjudging the constitutionality of legislation.

The fact that the Supreme Court's role in Vietnam is strictly limited to interpreting legislation and it cannot review legislation for constitutionality represents a serious limitation on its power and prestige. By contrast, Australia's High Court has the power to develop the common law as an ultimate court of appeal for the whole nation, and also to apply common law method in interpreting the Constitution. This gives the Court considerable power and prestige, which has facilitated the Australian system in achieving a good deal in media law, particularly in areas based on common law, such as defamation.

On the other hand, even though the common law and the court's prestige have been important, much of Australian media law is statutory. Since there does not seem to be any particular legal or institutional barrier to the passage of legislation in Vietnam, many of these solutions could in principle work in Vietnam. This matter will be discussed in the following chapter where I describe Australian media regulation and the last chapter where I suggest solutions for reforming Vietnamese media legislation based upon Australian model.

The National Assembly Standing Committee is the permanent organization of the Assembly which consists of the Chairman of the Assembly, the Vice Chairman of the Assembly, and the Commissioners. The Chairman of the Assembly, the Vice Chairman of the Assembly, and the Commissioners are directly appointed by the Assembly and they must not be the members of the government.<sup>394</sup>

The Supreme Procurator is a public official whose power is to decide whether people who are suspected of a crime should be brought to trial. This body is also authorized to operate judicial activities to make sure that these are implemented in accordance with legal requirements.<sup>395</sup> The director of the Supreme Procurator is directly chosen by the Assembly.<sup>396</sup> The organization of the Vietnamese government is summarized in figure 5.

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<sup>390</sup>*Law on Organization of People's Courts 2014* s 20(1), (2).

<sup>391</sup>*Law on Organization of People's Courts 2014* s 20(3).

<sup>392</sup>*Law on Organization of People's Courts 2014* s 20(4).

<sup>393</sup>*Law on Organization of People's Courts 2014* s 20(5).

<sup>394</sup>*Vietnamese Constitution 2013* ss 70(7), 73(3).

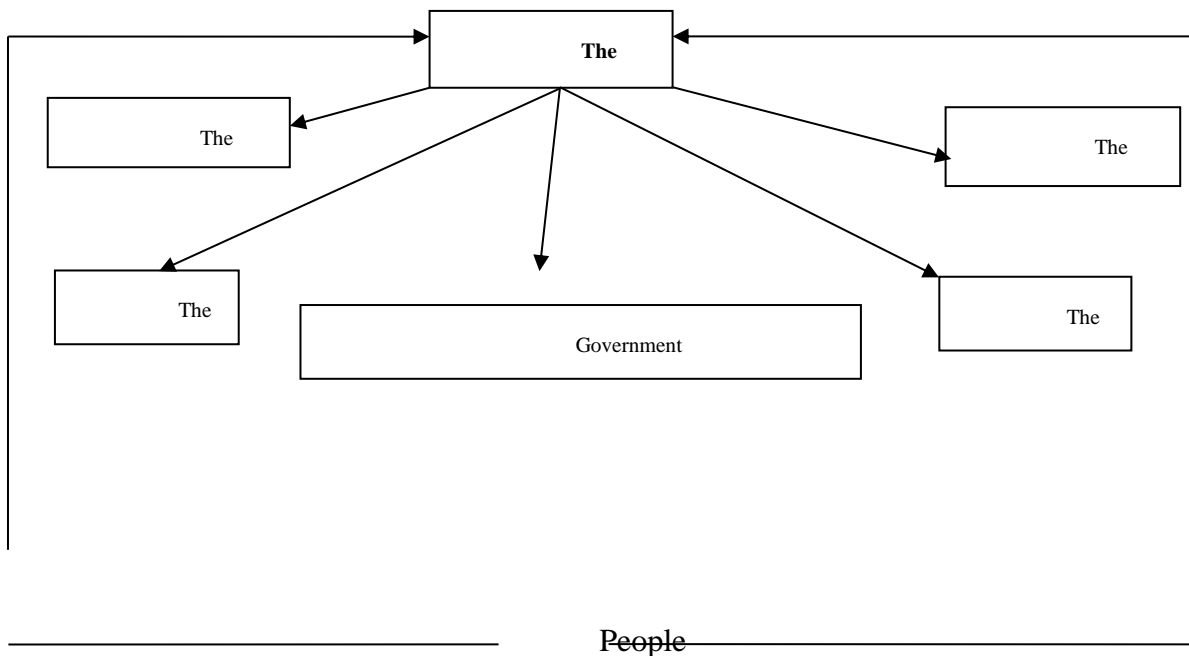
<sup>395</sup>*Vietnamese Constitution 2013* s 107.

<sup>396</sup>*Vietnamese Constitution 2013* s 70(7)

The National Assembly Standing Committee is the permanent organization of the Assembly which consists of the Chairman of the Assembly, the Vice Chairman of the Assembly, and the Commissioners. The Chairman of the Assembly, the Vice Chairman of the Assembly, and the Commissioners are directly appointed by the Assembly and they must not be the members of the government.<sup>397</sup>

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**Figure 5: The structure of the Vietnamese government**



<sup>397</sup>Vietnamese Constitution 2013 ss 70(7), 73(3).

<sup>398</sup>Vietnamese Constitution 2013 s 107.

<sup>399</sup>Vietnamese Constitution 2013 s 70(7)

## 2.2 The system of media regulation institutions in Vietnam

As discussed in section 1, the media are governed through a variety of legal documents. To implement these regulations, a system of authorized organizations is in place which I examine in more detail below. According to the *Vietnamese Press Law 1989*, the media regulatory bodies include: government agencies, media supervisory organizations (*cac co quan chu quan*) and the Vietnamese Journalists Association.<sup>400</sup> The VCP also plays an important role.<sup>401</sup>

When constructing its government, policy and legal regime, Vietnam took as a model the Soviet Union and Western Europe in the eighteenth and nineteenth centuries.<sup>402</sup> These are examples of the ‘highly concentrated model’ which includes a number of key characteristics: first, a unitary public ownership model, and removal all other economic sectors; second, the use of highly concentrated power; third, political power belongs to the proletariat, because the development dynamic of a socialist society is the class struggle between the proletariat and the bourgeoisie.<sup>403</sup> This sets the stage for the VCP to become the centre of society, the single political party and the most powerful institution.<sup>404</sup>

The basic characteristics of the traditional model of the Soviet Communist Theory disclosed by Schramm mentioned above now are in place in the Vietnamese system of media law and regulation. The media are seen as an important instrumentality in society which have to advance the objectives and policies of the state.<sup>405</sup> The media have to serve state interests and are ‘conceived as an instrument to interpret [Marxist] doctrine, to carry out the policies of the working class or the militant party’.<sup>406</sup> The media therefore must be controlled by the state to ensure that the working class has fair access to the channels of communication.<sup>407</sup> Editors are appointed by the government. The media are owned by the government.<sup>408</sup> The profit motive has been removed from publishing and broadcasting. The media are therefore free to carry out their function as instruments of the state and the VCP.<sup>409</sup> The VCP has the chief responsibility for control of the media.<sup>410</sup> The VCP rather than the government is responsible for censorship.<sup>411</sup>

The system of media regulatory bodies will now be discussed in turn.

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<sup>400</sup> *Vietnamese Press Law 1989* ss 12, 16, 17(a); the draft of new Press Law ss 9, 10, 17.

<sup>401</sup> Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27, 34.

<sup>402</sup> Phạm Văn Đức, *Nghiên cứu mô hình chung xã hội ở Việt Nam – một số vấn đề cần quan tâm* (18 may 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/sach-chinh-tri/books-0105201511342446/index-110520151127524613.html>>.

<sup>403</sup> Phạm Văn Đức, *Nghiên cứu mô hình chung xã hội ở Việt Nam – một số vấn đề cần quan tâm* (18 may 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/sach-chinh-tri/books-0105201511342446/index-110520151127524613.html>>.

<sup>404</sup> Phạm Văn Đức, *Nghiên cứu mô hình chung xã hội ở Việt Nam – một số vấn đề cần quan tâm* (18 may 2016) Báo điện tử Đảng Cộng sản Việt Nam <<http://dangcongsan.vn/tu-lieu-van-kien/tu-lieu-ve-dang/sach-chinh-tri/books-0105201511342446/index-110520151127524613.html>>.

<sup>405</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>406</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>407</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>408</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>409</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>410</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>411</sup> Chapter 1, Subsection 6.9. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

### **2.2.1. Government agencies**

The government bodies authorized to regulate the media include: 1. the Ministry of Communication and Information (MIC), 2. ministries, ministerial equivalent bodies and other government bodies, and 3. Provincial People's Committees (PPCs).<sup>412</sup>

The MIC is responsible to the government for implementing the following tasks:

- a. establishing and providing instructions for implementing strategies and plans for development, investment, budget, staff, research and the application of science and technology to the media;
- b. drafting laws, bylaws and policies relating to the media, and providing instructions to government agencies for the implementation of policies on media investment, funding for the media, media organizations and journalists;
- c. granting and revoking media licences, and licences to publish special, additional, supplementary issues or special programs or sub-programs;
- d. granting and revoking journalist cards and monitoring their use;
- e. checking the drafts of all materials lodged by the media prior to their publication and controlling the national store of the materials;
- f. rewarding organizations, individuals, media organizations and journalists for their achievements;
- g. inspecting the implementation of media law by itself or in concert with other institutions and to handle infringements of the *Vietnamese Press Law 1989*;
- h. organizing the provision of information to the media;
- i. regulating media and journalists' activities throughout the country, and media activities relating to foreign issues;
- j. signing international treaties in the field of media;
- k. coordinating with the ministries and ministerial-level agencies to control media in other fields based on government regulations.<sup>413</sup>

The relevant ministries, ministerial equivalent bodies and other government bodies coordinate with the MIC to control media activities within the scope of their respective duties and powers in the following matters:

- a. to perform the functions and tasks of a supervisory organization with the media organizations under their control;
- b. to make planning systems for media under their control;
- c. to control and give direction directly to the media organizations under their control;
- d. to be responsible for solving problems and complaints relating to the media under their control.<sup>414</sup>

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<sup>412</sup>*Vietnamese Press Law 1989* s 17(a); the draft of new Press Law s 9.

<sup>413</sup> Decree No. 51/2002/NĐ-CP enacted on 26 April 2002 detailing the *Vietnamese Press Law 1989* and *Vietnamese Press Law 1989* amended 1999, s 9.1 (Nghị định số 51/2002/NĐ-CP ngày 26 tháng 4 năm 2002 Quy định chi tiết thi hành Luật Báo chí, Luật sửa đổi, bổ sung một số điều của Luật Báo chí).

<sup>414</sup> Decree No. 51/2002/NĐ-CP s 9.2.

The Provincial People's Committees (PPCs) are composed of members directly chosen by provincial Assemblies. The PPCs are administrative power bodies of provinces and cities. These institutions exercise power over media activities within their respective localities in accordance with the powers delegated to them by the government in the following matters:

- (1) to make plans for media development within their respective localities in accordance with the direction of the MIC;
- (2) to inspect local media organizations for the implementation of media law and media policies and to control other media organizations when implementing their media activities based on the authority given by the MIC;
- (3) to inspect, or to coordinate other institutions to inspect, and deal with, infringements of media law within their respective localities.<sup>415</sup>

The tasks and powers of the PPCs over the media sector are directly implemented by the provincial Departments of Information and Communication.<sup>416</sup>

### **2.2.2. Supervisory organizations**

The supervisory organization of a media organization is an organization listed at s 1 of the *Vietnamese Press Law 1989*, and which is named in the documents applying for the of the media organization's licence.<sup>417</sup>

Each media organization is subject to a supervisory authority, whose roles are:

- (1) to determine aims and the main scope of media organizations' publications;
- (2) to direct media organizations in implementing their aims and the scope of publication determined above;
- (3) to appoint, remove or dismiss the editor in chief of any media organization under its authority after discussing the decision with the media control body;
- (4) to inspect the activities of media organizations;
- (5) to support media organizations in implementing their activities;
- (6) to be accountable for any illegal actions undertaken by media organizations under its control.<sup>418</sup>

Supervisory organizations carry out their control in different ways. Some meet regularly to issue official directives to the media and suggest topics for the media; others give orders specifying how topics should be treated or ask to vet content of publications.<sup>419</sup>

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<sup>415</sup>Decree No. 51/2002/NĐ-CP s 10.

<sup>416</sup>Decree No. 51/2002/NĐ-CP s 10.

<sup>417</sup>*Vietnamese Press Law 1989* s 12;the draft of new Press Law s 17.

<sup>418</sup>*Vietnamese Press Law 1989* s 12;the draft of new Press Law s 17(2).

<sup>419</sup>Hiang, Russell, 'Media in Vietnam and the structure of its management' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27, 38.

### 2.2.3. The Vietnamese Journalists Association

The Vietnamese Journalists Association has the right to participate in making policies and regulations relating to the media. This association also has the right to represent journalists to protect their rights and legal benefits.<sup>420</sup>

### 2.2.4. Vietnamese Communist Party

The media in Vietnam is also controlled by the VCP through its Propaganda Department. Hiang said in 1998 that its effect on the media is more powerful than that of State controlled institutions, and this has not changed.<sup>421</sup> The reason why the VCP is able to exercise more power than the government over the media is explained in chapter 3 where I provide the social and historical context, an explanation of Vietnam's socialist legal system and of the place of the Party in society, politics and the legal system, and the rationale for and methods of state control of the media. The power of the VCP over media activities is not disclosed in the *Vietnamese Press Law 1989*, but its authority has been recognised in many important legal documents.<sup>422</sup> In fact, the role of the VCP is also illustrated by the fact that it chairs meetings with the media (usually with editors in chief) or with media control institutions (State authorities) and gives direct guidance on media activities.<sup>423</sup> The important role of the VCP is also reflected in the fact that the MIC has to consult the Propaganda Department before giving an opinion about appointing editors to media supervisory organizations.<sup>424</sup> Moreover, in each media organization there is an institution belonging to the VCP, which is authorized to decide the matters on which the editor in chief is required to seek the organization's opinion before giving a decision.<sup>425</sup>

The contribution of the different institutions mentioned above in regulating media activities is illustrated in the following typical example. A supervisory organization can appoint, remove or dismiss the editor in chief of one of its own media organizations. However, the supervisory organization must discuss its decisions in advance with the government media regulatory body named the MIC if the media organization publishes at the national level, or the PPC where the main office of the media organization is located if the media organization publishes at the provincial level. The processes of appointing, removing

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<sup>420</sup> *Vietnamese Press Law 1989* s 16; the draft of new Press Law, s 10.

<sup>421</sup> Hiang, Russell, 'Media in Vietnam and the structure of its management' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27, 34.

<sup>422</sup> See, eg, Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>; Direction No. 08/CT-TW/1992 (Chỉ thị số 08-CT/TW ngày 31/3/1992 của Bộ Chính trị về Tăng cường sự lãnh đạo và quản lý nhằm nâng cao chất lượng và hiệu quả công tác báo chí - xuất bản); Direction No. 22/CT-TW/1997 (Chỉ thị số 22-CT/TW ngày 17/10/1997 của Bộ Chính trị về tiếp tục đổi mới và tăng cường sự lãnh đạo, quản lý công tác báo chí, xuất bản); Decree No 219/QĐ-TTg/2005 (Quyết định số 219/2005/QĐ-TTg ngày 09 tháng 9 năm 2005 Phe duyệt chiến lược phát triển thông tin đến năm 2010).

<sup>423</sup> *Đánh giá toàn diện về báo chí Việt Nam* (03 September 2013) An ninh Thủ do <<http://www.anninhthudo.vn/Thoi-su/Danh-gia-toan-dien-ve-bao-chi-Viet-Nam/441781.antd>>.

<sup>424</sup> *Thỏa thuận bổ nhiệm lãnh đạo cơ quan báo chí in* (15 August 2013) Bộ Thông tin và Truyền thông <<http://mic.gov.vn/tthc/bc/cucbc/Trang/Tho%E1%BA%A3thu%E1%BA%ADnb%E1%BB%95nh%E1%BB%87ml%C3%A3nh%C4%91%E1%BA%A1oc%C6%A1quanb%C3%A1och%C3%ADin.aspx>>.

<sup>425</sup> Hiang, Russell, 'Media in Vietnam and the structure of its management' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27, 40.



and dismissing editors in chief are provided by by-laws developed by the MIC with the participation of the Vietnamese Journalists Association.

In summary, the media in Vietnam are governed by different institutions. The power of the VCP over the media is dominant, although the Vietnamese law does not provide that power. In fact the media have been strongly influenced by the VCP and this limits the implementation of the protection of freedom of expression which will be discussed in chapter 6.

### **3. The balancing of freedom of expression against other recognised interests**

In this next section, I provide information about freedom of expression in Vietnamese law and the legal constraints that balance this freedom with competing interests.

Freedom of expression is a fundamental right protected by the highest legal document, the *Vietnamese Constitution*. The *Vietnamese Constitution* stipulates that ‘Vietnamese citizens are entitled to freedom of expression and freedom of the press and have a right of access to information’.<sup>426</sup> The right to freedom of expression, however, is not absolute. It must comply with certain limitations provided by laws to ensure that it also takes into consideration the interests of other people, public order and peaceful society.<sup>427</sup> This section examines how Vietnamese laws balance the right to freedom of expression with those other interests including personal information, personal reputation, public order, national security, public interest, and individual interests.

#### **3.1. Protection of private information**

The right to personal information is one of the competing interests whose protection is balanced against the right of members of the public to know. This subsection examines how Vietnamese law protects the right to private information on the one hand, and protects the free flow of information on the other. In this subsection, I focus my discussion on the *Vietnamese Constitution*, the *Vietnamese Civil Code 2005*, and the Decree No.51 where provisions covering personal information are provided.

Private information is protected in the *Vietnamese Constitution*, which states that ‘everyone has the right to inviolability of private life and personal secrets ... The security of information about private life, personal secrets or family secrets shall be guaranteed by law’.<sup>428</sup> As well, the *Vietnamese Civil Code 2005* provides that ‘the collection and publication of information regarding the private life of an individual must have the consent of that person or his/her relatives or representative if that person has died or lost the capacity for civil

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<sup>426</sup>*Vietnamese Constitution 2013* s 25.

<sup>427</sup>Vu Hop Lan, *Tự do ngôn luận, tự do báo chí ở Việt Nam* (14 August 2015) Nhan dan <<http://www.nhandan.com.vn/chinhtri/binh-luan-phe-phan/item/21298702-.html3.1>>.

<sup>428</sup>*Vietnamese Constitution 2013* s 21.

acts'.<sup>429</sup> This means that the media must have permission to publish personal information regardless of whether the publication will negatively affect privacy.

The *Vietnamese Press Law 1989* itself does not prohibit the media from publishing private information without permission. However, Decree No.51 provides that 'the media is not authorized to publish information which negatively affects privacy, or to publish private documents or letters without the permission of the authors or owners'.<sup>430</sup> This means that the media need have permission for publishing personal information only when the publication will negatively affect privacy. In addition, publishing private information which negatively affects privacy without permission is prohibited under Decree No.02. This legal document provides that the media outlet will be fined a sum of money from VND 3,000,000 to 5,000,000 if the media organization publishes private information without permission and the publication negatively affects privacy.<sup>431</sup>

Such contradictions in the law also occur in relation to the use of photographs. For example, the *Vietnamese Civil Code 2005* provides that 'the use of a photograph of an individual must have his or her consent or the consent of his or her relatives if he or she has died (except where publication is for the benefit of the State or public interest)'.<sup>432</sup> By contrast, Decree No. 51 provides that the media is not authorized to publish images of individuals without clear captions nor may it publish images which harm the reputation and honour of the individual.<sup>433</sup> This Decree allows the media to publish images without permission if those photographs are taken at public meetings, group activities, working sessions, performing arts, sport; images of people who are subject to arrest warrants; images taken at public trials; images of people who are convicted of a serious criminal offence.<sup>434</sup>

Vietnamese law does not provide any exemptions which allow freedom of information except the one provided under the *Vietnamese Civil Code 2005* which allows the publication of a photograph of an individual without permission for the government benefit or public interest. The restrictions mentioned above hamper freedom of expression by placing a limitation on the free flow of information. In this sense the protection of individual interests overshadows the public interest in freedom of expression.

### 3.2. Defamation

Personal reputation is another interest that is balanced against freedom of expression. This sub-section describes the regulations governing defamation and related matters. I examine specific provisions including the *Vietnamese Constitution*, the *Vietnamese Press Law 1989*, the *Vietnamese Civil Code 2005* and Decree No. 51/2002/NĐ-CP.

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<sup>429</sup>*Vietnamese Civil Code 2005* s 38.

<sup>430</sup>Decree No. 51/2002/NĐ-CP s 5.4.

<sup>431</sup> Decree No. 02/2011/NĐ-CP enacted on 06 January 2011 regulating on administrative penalty for breaking media activities and publishing provisions, s 7.2(d) (Nghị định số 02/2011/NĐ-CP ngày 06 tháng 01 năm 2011 Quy định xử phạt vi phạm hành chính trong hoạt động báo chí, xuất bản).

<sup>432</sup>*Vietnamese Civil Code 2005* s 31.2.

<sup>433</sup>Decree No. 51/2002/NĐ-CP s 5.3.

<sup>434</sup>Decree No. 51/2002/NĐ-CP s 5.3.

Reputation is protected by laws in Vietnam. The *Vietnamese Constitution* strictly prohibits citizens from damaging another's honour and dignity. The *Constitution* states that "[e]veryone has the right to inviolability of his or her body and to the protection by law of his or her health, honour and dignity; no one shall be subjected to torture, violence, coercion, corporal punishment or any form of treatment harming his or her body and health or offending his or her honour and dignity".<sup>435</sup> The *Constitution* further provides that "[e]veryone has the right to ... protect his or her honour and reputation".<sup>436</sup> Based on constitutional provisions, the *Vietnamese Press Law 1989* prohibits the media from publishing information which is 'untruthful, distorted, slanderous or harmful to the reputation of organizations or citizens'.<sup>437</sup>

According to the *Vietnamese Press Law 1989*, media outlets which publish information have an obligation to recognize when their publications are defamatory. Defamation also can be identified by media regulatory bodies based on the complaints and grievances of the plaintiffs when they have any ground for thinking that the media have published defamatory information relating to them.<sup>438</sup> There are no set guidelines to apply in determining whether the complaint is substantiated.

These contents are detailed in the Decree No. 51/2002/NĐ-CP which provides:

- (1) The media organization has to publish the decision of the media regulatory body which states that the information published is untruthful, distorted, slanderous or harmful to the reputation of organizations or citizens. The media outlet also has to publish an apology.
- (2) When the media organization recognizes that the information published is untruthful, distorted, slanderous or harmful to the reputation of organizations or citizens, the media organization has to publish a correction and an apology and post the correction and the apology to the defamed organization or individual.
- (3) When there are grounds for believing that the information is untruthful, distorted, or slanderous and harmful to them, the media outlet has to publish the statement sent from the organization or individual which expresses their opinion about the information published.<sup>439</sup>

To protect personal reputation, the *Vietnamese Press Law 1989* also provides that in cases of defamation, the media has to publish a correction and apology. Organizations and individuals also have the right to express in writing their opinion about the information published when there are grounds for believing that the information is untruthful, distorted, or slanderous and harmful to them. The correction, apology and any opinion of the organization or individual must be published in a position with the same prominence as the original information within a specified number of days from the date of receipt of the complaint. That

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<sup>435</sup>*Vietnamese Constitution 2013* s 20.

<sup>436</sup>*Vietnamese Constitution 2013* s 21(1).

<sup>437</sup>*Vietnamese Press Law 1989* s 10.4; the draft of new Press Law, s 11(10(d)).

<sup>438</sup>*Vietnamese Press Law 1989* s 9; the draft of new Press Law, s 39.

<sup>439</sup>Decree No. 51/2002/NĐ-CP s 4(1)-(3).

is, ‘five days in the case of daily newspapers, radio and television; within ten days in the case of a weekly newspaper; and in the next edition in the case of a magazine’.<sup>440</sup>

If the media organization refuses to publish the statement, the correction or the apology, the media organization must send written notice to the organizations or individuals to inform them about the reason for its refusal. The media organization also has to make a report to the media control body to explain the reason for its refusal.<sup>441</sup> In this case, the defamed organization or individual has the right to lodge a complaint with the owner of the media or the media control body or to file a suit against the media organization.<sup>442</sup> The process for enforcing the protection of reputation will be discussed detail in section 6(The handling of complaints and grievances).

Reputation is also considered as one of the personal rights protected by the *Civil Code 2005*. When personal rights are infringed, an individual has the right to request the person who committed the infringement, or request the Court to order the person who committed the infringement to terminate the infringement, to publish an apology and correction, and pay compensation for mental damage.<sup>443</sup> The *Civil Code 2005* states:

When the personal rights including personal reputation of a person are damaged, such a person has the right:

- (1) to correct inaccurate information by herself or himself;
- (2) to request the person who committed the infringement or request government agencies (civil courts) to order such person to stop committing the infringement, and to publish an apology and correction;
- (3) to request the person who committed the infringement or request government agencies (civil courts) to order such a person to pay compensation for damage.<sup>444</sup>

The *Civil Code 2005* also states that ‘the person who committed the infringement has to be responsible for paying compensation for damages regardless whether or not he or she intended to commit such infringement’.<sup>445</sup>

The *Civil Code 2005* provides that damage to the plaintiff’s reputation includes the reasonable expenses to limit and overcome the damage, and the loss or reduction of the actual income.<sup>446</sup> The amount of compensation can be defined by agreement between the plaintiff and the defendant.<sup>447</sup> If the plaintiff and the defendant cannot reach agreement or they do not want to discuss the matter, the plaintiff can sue for compensation.<sup>448</sup> Under the *Civil Code 2005*, the defendant not only has to pay compensation for damages named above but also has

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<sup>440</sup>Vietnamese Press Law 1989 s 9; the draft of new Press Law, s 39(5).

<sup>441</sup>Decree No. 51/2002/ND-CP s 4.3.

<sup>442</sup>Vietnamese Press Law 1989 s 9; the draft of new Press Law s 40(1).

<sup>443</sup>Vietnamese Civil Code 2005 ss 25, 604.

<sup>444</sup>Vietnamese Civil Code 2005 s 25(1)-(3).

<sup>445</sup>Vietnamese Civil Code 2005 s 604.

<sup>446</sup>Vietnamese Civil Code 2005 s 611(1).

<sup>447</sup>Vietnamese Civil Code 2005 s 605.

<sup>448</sup>Vietnamese Civil Code 2005 s 607.

to pay an indemnity for damage in the nature of hurt feelings.<sup>449</sup> The indemnity can be negotiated by the plaintiff and the defendant. If it is not discussed by the plaintiff and the defendant, it will be set by the court and it is limited to a maximum of ten months of the minimum income established by the government.<sup>450</sup> The person who is damaged by the infringement also has the right to make the correction and ask that it be published.<sup>451</sup> The media must publish the correction according to s 9 of the *Vietnamese Press Law 1989*. If there is any damage caused by an infringement of honour or reputation, the person or organization committing the infringement has to pay the individual or organization damaged compensation irrespective of whether the infringement was intentional or unintentional.<sup>452</sup>

The *Civil Code 2005* provides:

Section 604: *Grounds giving rise to liability to compensate for damage*

1. A person intentionally or unintentionally harming the life, health, honour, dignity, reputation, property, or other legal rights or interests of an individual, or harming the honour, reputation, or property of a legal entity or other subject, thereby causing damage, must compensate [*for such damage*].

2. Where the law provides that a person causing damage must compensate for such damage even if [*that person*] was not at fault, such provision shall be applied.<sup>453</sup>

Section 605: *Principles of compensation for damage*

1. Damage must be compensated in full and promptly. Unless otherwise provided by law, parties may agree on the amount of compensation; on the form of compensation, which may be money, in kind or the performance of an act; on one-off payment or payment in instalments; and on the method of compensation.

2. The compensation payable by a person having caused damage may be reduced if such damage was caused unintentionally and is very large in comparison to the short-term and long-term financial positions of such person.

3. If the amount of compensation [*determined*] becomes unrealistic, the aggrieved person, or the person having caused damage, has the right to request a court or another authorized State body to change the amount of compensation.<sup>454</sup>

Section 611: *Damage caused by harm to honour, dignity or reputation*

1. Damage caused by harm to the honour, dignity or reputation of an individual or harm to the honour or reputation of a legal entity or another subject shall comprise:

(a) Reasonable costs for mitigating and remedying the damage;

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<sup>449</sup>*Vietnamese Civil Code 2005* s 611(2).

<sup>450</sup>*Vietnamese Civil Code 2005* s 611(2).

<sup>451</sup>*Vietnamese Civil Code 2005* s 25.

<sup>452</sup>*Vietnamese Civil Code 2005* s 604.

<sup>453</sup>*Vietnamese Civil Code 2005* s 604.

<sup>454</sup>*Vietnamese Civil Code 2005* s 605.

(b) Loss of or reduction in actual income.

2. A person causing harm to the honour, dignity or reputation of another person must pay compensation for damage as provided in clause 1 of this article together with another amount of money as compensation for mental suffering of the aggrieved person. The amount of compensation for mental suffering shall be as agreed by the parties; if the parties are not able to agree, [*the maximum sum*] shall not exceed ten (10) months wages at the minimum monthly wage rate provided by the State.<sup>455</sup>

Neither the *Vietnamese Civil Code 2005* nor Decree No. 51/2002/NĐ-CP provides any exemptions which allow freedom of expression.

### 3.3. Opposition and dissent

The exercise of freedom of communication carries with it duties not only to have regard for personal reputation but also to respect national security and public order. This subsection examines how opposition is regulated compared to the protection of freedom of expression. The discussion is based primarily on the *Vietnamese Constitution* and the *Vietnamese Criminal Code 1999*.

Vietnamese law prohibits ‘opposition activities’ but there are other activities which would be commonly recognised as ‘dissent’, and not illegal. The dividing line between the two is unclear, because the law does not provide a definition of ‘opposition’. This is one of the shortcomings of Vietnamese media law which I will discuss in chapter 6 where I provide critique of Vietnamese media law.<sup>456</sup> I then will give recommendations for developing matters of opposition and dissent in chapter 8.<sup>457</sup>

The law against opposition discussed in this section includes provisions found in ss 87-89 of the *Vietnamese Criminal Code 1999*. According to these sections, people are strictly prohibited from the following actions:

- creating hatred between: people and the armed forces including the army and the police, people and the government, people and social organizations; ethnic groups; people of different religions, people of religion and the government, people of religion and social organizations; and people of different nationalities;<sup>458</sup>
- propagating inaccurate or defamatory information about the government; propagating inaccurate information which creates confusion; and making, storing and publishing information which expresses opposition to the government;<sup>459</sup>

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<sup>455</sup>*Vietnamese Civil Code 2005* s 611.

<sup>456</sup>Chapter 6, Section 4. Opposition and dissent.

<sup>457</sup>Chapter 8, Section 4. Regulation of opposition and dissent.

<sup>458</sup>*Vietnamese Criminal Code 1999* s 87.

<sup>459</sup>*Vietnamese Criminal Code 1999* s 88.

- inciting or inducing people to harm national security or public order, or to express opposition to government officers, or to disrupt the action of government agencies or social organizations.<sup>460</sup>

Opposition is strictly prohibited in Vietnam and there is no distinction in Vietnamese laws between dissent and opposition.<sup>461</sup> Section 11 of the *Vietnamese Constitution* stipulates that ‘all schemes and actions which are prejudicial to the independence, sovereignty, unity and territorial integrity, development and defence of Vietnam are liable to severe punishment’.<sup>462</sup> Opposition is considered a most serious crime.<sup>463</sup>

The *Vietnamese Press Law 1989* builds on s 11 of the *Constitution*, with a provision that media organizations are prohibited from publishing information which may incite opposition to the State of the Socialist Republic of Vietnam, or damage national unity, incite violence, disseminate propaganda relating to war, or create hatred between ethnic groups or between people of different nationalities.<sup>464</sup>

The *Vietnamese Criminal Code 1999* does not contain any exemptions which provide publishers immunity against liability for opposition offences in certain circumstances.

#### 4. Protection of journalists’ access to information

This next section describes provisions covering the protection of the right to access government-held information, journalists’ sources, and whistle-blowers.

Freedom of the press and freedom of expression require that journalists’ access to information be protected. If their sources of information are limited in any way, this in turn limits what they can publish. As a result, right to be informed through the media of members of the public is limited.

##### 4.1. Freedom of information

As mentioned above, a right of access to information is provided in the *Vietnamese Constitution*. However, this right is not stated in the *Vietnamese Press Law 1989*. The *Vietnamese Press Law 1989* states that freedom of the press and freedom of expression include:

- (1) the right to be informed through the media of all aspects of domestic and world current affairs;
- (2) the right to contact and provide information to media organizations and journalists; to send news, articles, photographs, and other work to the media without being subjected to censorship by any organization or individual;
- (3) the right to express opinions on domestic and world current affairs;
- (4) the right to express opinions on the process of enacting and conducting the policies of the VCP and the laws of the State; and

<sup>460</sup>*Vietnamese Criminal Code 1999* s 89.

<sup>461</sup> See Chapter 5 to know more about the lack of distinction.

<sup>462</sup>*Vietnamese Constitution 2013* s 11.

<sup>463</sup>*Vietnamese Constitution 2013* s 44.

<sup>464</sup>*Vietnamese Press Law 1989* ss 10.1-10.2; the draft of new Press Law ss 11(1)(a), (b).

(5) the right to provide the media with ideas, comments, petitions, complaints and accusations against VCP organizations, State bodies, social organizations and their members.<sup>465</sup>

Because there is no right for the media to have access to information, it has difficulty in fulfilling the right of the public laid down in the first dot point above. The media cannot have information to publish if they do not have any right of access to information. As a result, the right to be informed through the media mentioned above is not protected in practice.

Although the *Vietnamese Press Law 1989* does not provide the media with any right to access to information, it gives government organizations both a right and obligation to provide information to the media. Section 7 of the *Vietnamese Press Law 1989* states that 'organizations shall have the right and obligation to provide information to the media and to assist the media in providing accurate and up-to-date information'.<sup>466</sup> In addition, the law provides that the media have the right to request relevant government bodies or officials to reply to issues raised by citizens.<sup>467</sup>

Based on the provisions mentioned above, it becomes clear that the scope of freedom of information in Vietnam includes the right to be informed through the media, and the right of the media to access information held by government agencies. Freedom of the press, freedom of expression and freedom of information are interwoven in Vietnamese law.

To ensure that the media can have access to information, journalists are protected from disadvantage when they are conducting their profession. Section 15(dd) of the *Vietnamese Press Law 1989* stipulates that 'no person shall be permitted to threaten or intimidate the life of or do damage to the reputation and dignity of journalists, to destroy or detain facilities or materials, or to prevent journalists from conducting their profession properly and in accordance with law'.<sup>468</sup>

According to s 8 of Decree No. 51/2002/NĐ-CP, journalists' right of access to information takes a number of forms. Journalists have the right to enter the premises of state bodies, organizations, libraries, museums and exhibitions to gather information, look up documentation and carry out their work. Unless the material or document requested falls within the scope of the Ordinance No.30 on Protection of State Secrets as mentioned above,<sup>469</sup> the institutions mentioned above have no right to refuse journalists access to it. Journalists have the right to carry out their activities at sessions of the National Assembly and People's Councils at all levels, congresses and the public meetings, rallies, and receptions of the VCP, State and other institutions by invitation only and the specific provisions of the institutions. Journalists have the right to gather information, to take photos and to make films and recordings at public trials and they are authorized to contact judges and lawyers directly

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<sup>465</sup>*Vietnamese Press Law 1989* s 4; the draft of new Press Law, s 13.

<sup>466</sup>*Vietnamese Press Law 1989* s 7; the draft of new Press Law, s 13(2).

<sup>467</sup>*Vietnamese Press Law 1989* s 8; the draft of new Press Law, s 37(1).

<sup>468</sup>*Vietnamese Press Law 1989* s 15(dd); the draft of new Press Law, s 34(1)(d).

<sup>469</sup>Section 1. The overview of the system of Vietnamese media regulation, Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 (Pháp lệnh số 30/2000/PL-UBTVQH10 ngày 28/12/2000 Bảo vệ bí mật Nhà nước).



to collect information or conduct interviews.<sup>470</sup> In addition, s 8 of the *Vietnamese Press Law 1989* provides that ‘an [e]ditor in chief who is the head of the media organization has the right to ask other organizations or people to give the media answers to the matters published based on a request from a member of the public’.<sup>471</sup>

As stated above, information is collected by journalists and provided by citizens and organizations. Therefore, the *Vietnamese Press Law 1989* gives citizens the right to contact and provide information to media organizations and journalists without being subjected to censorship by any organizations or individuals. However, people providing information to the media have to be responsible for the accuracy of information provided and can be fined if they do not fulfil that responsibility.<sup>472</sup> Providing accurate information to the media is the right and the obligation of all organizations.<sup>473</sup> Individuals and organizations can exercise their right to provide information to the media by holding a press conference but they have to give notice in advance to the government regulatory body and the media conference may only be held when they have agreement in writing from the state agency.<sup>474</sup> Decree No. 51/2002/NĐ-CP defines a press conference as ‘a meeting which is held by an organization or individual to provide information to the media in order to publish information or explain information relating to the organization or individual to members of the public’.<sup>475</sup>

Decree No. 51/2002/NĐ-CP details:

- (1) Every person or organization who wants to hold a press conference has to inform the media regulatory bodies in writing of the press conference at least 24 hours before the press conference. The media regulatory bodies in this section include the MIC and the PPCs;
- (2) The press conference may only be held within 6 hours of the person or organization receiving agreement in writing from the media regulatory body;
- (3) The media regulatory bodies have the right to disagree over a press conference, or to delay or stop a press conference if they have any grounds to think that the press conference is in breach of the law.<sup>476</sup>

In addition, the right to freedom of information is protected under the *Vietnamese Law on Information Technology 2006*.<sup>477</sup> According to this law, government agencies have to ensure that information published on their websites, including information about the structure, functions and policy proposals of the agency, contact details for its officers, and its investment projects, is accurate and up to date.<sup>478</sup> The information published has to be available and free for the public to access.

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<sup>470</sup>Decree No. 51/2002/NĐ-CP s 8.

<sup>471</sup>*Vietnamese Press Law 1989* s 8; the draft of new Press Law, s 37.

<sup>472</sup>*Vietnamese Press Law 1989* s 4(2); the draft of new Press Law, s 13.

<sup>473</sup>*Vietnamese Press Law 1989* s 7.

<sup>474</sup>*Vietnamese Press Law 1989* s 26; Decree No. 51/2002/NĐ-CP s 19; the draft of new Press Law, ss 4(17), 38.

<sup>475</sup>Decree No. 51/2002/NĐ-CP s 1(13).

<sup>476</sup>Decree No. 51/2002/NĐ-CP s 19(1)-(3).

<sup>477</sup>*Vietnamese Law on Information Technology 2006* (Luật Công nghệ Thông tin năm 2006).

<sup>478</sup>*Vietnamese Law on Information Technology 2006* s 28.

The *Vietnamese Law on Information Technology 2006* provides:

(1). Websites of government agencies must meet the following requirements:

- a. They must be convenient for organizations and individuals to access;
- b. They must support organizations and individuals in accessing information published, and using forms provided on the websites;
- c. They must provide accurate information;
- d. Information provided must be up to date;
- e. The websites must observe the law on the protection of government secrets in providing information.

(2). Websites of government agencies must have the following principal information:

- a. The structure, functions, tasks and powers of the agency and of its dependent units;
- b. Legal documents relating to the tasks and powers the agency;
- c. Administrative processes and procedures carried out by the agency; the name of the person responsible for each step of the administrative processes and procedures; and the time limit for handling the administrative procedures;
- d. Information which encourages and supports people in obeying policies and laws on the area regulated by the agency;
- e. The list of official email addresses of dependent units and officials of the agency;
- f. Information about investment projects, auctions, and the procurement of public property;
- g. The list of activities of the agency which are implemented online;
- h. A column which allows members of the public give their feedback on the activities of the agency.

(3). Information provided in websites of government agencies is available for members of the public to access online without any payment.<sup>479</sup>

In order to ensure that the obligation to provide information will be observed by State bodies, the *Regulation governing issues relating to spokespersons and providing information to the media* (the *Spokesman Regulation*) was enacted on 28 May 2007, and states that all State institutions have to appoint a spokesman to provide information to the media.<sup>480</sup> According to the *Spokesman Regulation*, Ministers and Chairmen of Government Offices must provide the media with information about their official activities every month. As well, information published on any government website must be updated regularly.<sup>481</sup> Ministries,

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<sup>479</sup>*Vietnamese Law on Information Technology 2006* s 28(1)-(3).

<sup>480</sup>*Spokesman Regulation* 2007.

<sup>481</sup>*Spokesman Regulation* 2007 s 3(1).

ministerial-level agencies, government agencies, and Provincial People's Committees have to publish information about official activities at least every three months on their website. They must also hold a meeting directly with the media to provide information at least once every 6 months. These institutions have also to provide information to the website of the central government and may provide the media written information when necessary.<sup>482</sup> In addition, institutions must provide the media with information in the case of extraordinary or unexpected events or at the request of media control bodies.<sup>483</sup> All information must be provided promptly and accurately, although there are some cases in which information need not be provided.<sup>484</sup>

To balance the public's right to know with other legitimate interests, the *Spokesman Regulation* provides a numbers of exemptions which allow a spokesman to refuse to provide information to the media. These exemptions include:

- a. Information relating to State secrets or VCP secrets, information affecting national security, and information which is not in the scope of spokesman's authority;
- b. Information on legal cases which are under investigation or have not been judged by courts;
- c. Documents in the process of being drafted, and whose publication, or the collection of public opinion thereon, has not been authorised.<sup>485</sup>

Based on the provisions in the *Vietnamese Constitution* mentioned above, the *Vietnamese Press Law 1989* stipulates that 'citizens have the right to express opinions on domestic and world current affairs; express opinions on how the aims, objectives and policies of the VCP and the laws of the government should be implemented; contribute ideas and comments, submit petitions and complaints and make allegations through the media in respect of organizations belonging to the VCP, government institutions and social organizations and their members'.<sup>486</sup> To ensure that the opinions and statements of members of the public will be published, the *Vietnamese Press Law 1989* provides: 'the media are obliged to publish statements, opinions and views of members of the public. If a media organization refuses to publish such a statement, opinion, or view, it has to state in writing the reason for denying publication and send the answer to the member of the public'.<sup>487</sup>

Section 2 of the *Vietnamese Press Law 1989* states that 'media content shall not be subjected to censorship prior to publishing'.<sup>488</sup> However, s 23 contradicts this because the print media has to submit its products to state agencies before publishing. The *Vietnamese*

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<sup>482</sup>*Spokesman Regulation 2007* s 3(2).

<sup>483</sup>*Spokesman Regulation 2007* s 4.

<sup>484</sup>*Vietnamese Press Law 1989* s 7; the draft of new Press Law, s 37.

<sup>485</sup>*Spokesman Regulation 2007* s 5(3)(a)-(c).

<sup>486</sup>*Vietnamese Press Law 1989* ss 4(3)-4(5); the draft of new Press Law, s 13(3).

<sup>487</sup>*Vietnamese Press Law 1989* s 5; the draft of new Press Law, s 14(2).

<sup>488</sup>*Vietnamese Press Law 1989* s 2; the draft of new Press Law, s 12(4).

*Press Law 1989* calls this process ‘press depository’ (*lưu chiếu báo chí*).<sup>489</sup> These agencies are authorized to store and censor the content of the media products prior to publishing.<sup>490</sup>

Section 23 of the *Vietnamese Press Law 1989* provides: ‘media outlets must submit their publications to the media regulatory bodies before publishing.’<sup>491</sup>

Section 1 of Decree No. 51/2002/NĐ-CP provides:

Press depository is the process of providing media publications to the media regulatory bodies to censor and store. This process has to be implemented by media organizations before publishing their publications.<sup>492</sup>

The press depository process is detailed under the Decree No. 51/2002/NĐ-CP which provides:

- (1) The press depository process is compulsory for all media publications published in Vietnam regardless whether the publications are imported;
- (2) The deadlines for doing press depository are:
  - a. Daily newspapers have to do press depository by 8:00am every day;
  - b. Other newspapers which are not published daily have to do press depository at least 6 hours before publishing;
  - c. Newspapers imported to publish have to do press depository at least 12 hours before publishing;
- (3) Media outlets have to submit their products before publishing to the MIC, the provincial Departments of Information and Communication, and the National Library;

This press depository process is equally applied to republished publications.<sup>493</sup>

Freedom of expression is further limited by the strict prohibitions against publishing information which incites people to oppose the State and damage the unity of the people.<sup>494</sup> It is also an offence to publish information which ‘incites violent behaviour or war, creates hatred among ethnic groups and people who come from different countries, or incites salacious, evil and criminal actions’.<sup>495</sup> Moreover, people and organizations who otherwise are entitled to freedom of expression are prohibited from disclosing ‘secret information of the state including military, security, economic, foreign relations and other secrets stipulated by law’.<sup>496</sup> The *Vietnamese Press Law 1989* also forbids publishing information which is ‘untruthful, distorted, or slanderous or harmful to the reputation of organizations or the reputation and dignity of individuals’.<sup>497</sup>

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<sup>489</sup>*Vietnamese Press Law 1989* s 23; the draft of new Press Law, ss 4(20), 49, 50.

<sup>490</sup> See, eg, *Vietnamese Press Law 1989* s 23; Decree No. 51/2002/NĐ-CP s 1(14).

<sup>491</sup>*Vietnamese Press Law 1989* s 23; the draft of new Press Law, s 49.

<sup>492</sup>Decree No. 51/2002/NĐ-CP s 1(14).

<sup>493</sup>Decree No. 51/2002/NĐ-CP s 16(3).

<sup>494</sup>*Vietnamese Press Law 1989* s 10(1); the draft of new Press Law, s 11(1)(a).

<sup>495</sup>*Vietnamese Press Law 1989* s 10(2); the draft of new Press Law, s 11(1)(b).

<sup>496</sup>*Vietnamese Press Law 1989* s 10(3); the draft of new Press Law, s 11(1)(c).

<sup>497</sup>*Vietnamese Press Law 1989* s 10(4); the draft of new Press Law, s 11(1)(d).

State secrets are defined as information relating to politics, defence, security, foreign relations, economy, science, technology, and other unspecified fields the disclosure of which will cause harm to the State.<sup>498</sup> State secrets are divided into three levels: extreme secret, great secret and secret, based on the degree of importance of the information and the degree of harm to the national or public interest that could come about if the information were published.<sup>499</sup>

Extreme secrets include information relating to national security strategy mobilization plans to deal with war; weapons and means of decisive significance for the national defence capabilities; unpublished policies of the VCP and government; information regarding intelligence and counterintelligence activities; the national reserves strategy; unpublished information relating to national budget and monetary policy; and other unspecified information determined to be kept strictly confidential by the government.<sup>500</sup>

Great secrets include information relating to negotiations and high-level contacts between the government and other countries or international organizations which have not been authorised for publication; activities of military institutions; military maps; the amount of money printed and released; scientific approaches, inventions, utility solutions, trade secrets which have not been authorised for release; plans for export and import which have not been authorised for publication; and other information determined to be kept in secret by the government.<sup>501</sup>

State secrets which do not appear on the lists of extreme secrets and great secrets are classified as secret.<sup>502</sup>

The lists of state secrets classified as extreme and great secret are enacted by the Prime Minister and the list of state secrets classified as secret is enacted by the Ministry of Public Security.<sup>503</sup> Organization heads and chairmen of People's Committees at all levels are authorized to enact rules on the protection of state secrets within the area or issue under their control.<sup>504</sup> All state secrets are enforced in the normal way, like any other criminal law.

Freedom of expression is further limited, for the sake of public order, by the prohibition on the publication by the media of information detailing salacious, evil and grisly killings.<sup>505</sup>

Further, the media is prohibited from publishing information which encourages inappropriate behaviour (such as having a magic treatment rather than going to

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<sup>498</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 1.

<sup>499</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 4.

<sup>500</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 5.

<sup>501</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 6.

<sup>502</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 7.

<sup>503</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 ss 11(2)(c), (d).

<sup>504</sup>Ordinance No. 30 On the protection of state secrets enacted 28 September 2000 s 12.

<sup>505</sup>Decree No. 51/2002/NĐ-CP s 5(2).

see a doctor; or a heavily pregnant woman living and giving birth alone in a temporary accommodation).<sup>506</sup>

The *Vietnamese Criminal Code 1999* provides that any people who use press freedom in a way that interferes with the rights of others, or who use freedom of expression to damage the interests of the state, organizations or individuals, shall be liable to a maximum penalty of 7 years imprisonment.<sup>507</sup>

## 4.2. Protection of sources and whistle-blower protection

Information gathering is essential to the media. However, information cannot be easily collected, especially information concerning matters of public interest, if people feel nervous about being identified. Therefore, this sub-section examines how sources of information and whistle-blowers are protected in the *Vietnamese Press Law 1989* and the *Vietnamese Denunciation Law 2011*. There are four main aspects to the protection.

The media has the right and obligation not to disclose the names of people providing information where it is possible that such disclosure may cause harm to those people. However, the media have to reveal the identity of the person who provided information in response to a request made by the director of the inspectorates or the chief judge of the courts at provincial level when the disclosure is necessary for the investigation and adjudication of a serious offence.<sup>508</sup>

Organizations and individuals have the responsibility to apply necessary measures to prevent damage that may occur to a whistle-blower, and to ensure their safety of life, health, property, honour, dignity, prestige, employment, and confidentiality.<sup>509</sup>

Whistle-blowers are also protected under the *Vietnamese Denunciation Law 2011*. This law prohibits the disclosure of names, addresses, signatures or other information that may reveal their identity.<sup>510</sup> Organizations which receive information provided by a whistle-blower have to take full responsibility for his or her protection.<sup>511</sup> It is an offence to obstruct whistle-blowers in making their accusations, or to make threats or commit offences against them.<sup>512</sup>

In addition, Decree No 76/2012/NĐ-CP provides whistleblowers who are damaged or threatened with damage because of making a denunciation with the right to apply for protection from the organization which receives information from them.<sup>513</sup> In this case, the organization must coordinate with other institutions such as police stations to implement protection of the whistleblower.<sup>514</sup> The protections may include: changing the person's

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<sup>506</sup> Decree No. 51/2002/NĐ-CP s 5(5).

<sup>507</sup> *Vietnamese Criminal Code 1999* s 258.

<sup>508</sup> *Vietnamese Press Law 1989* s 7; the draft of new Press Law, s 36(3).

<sup>509</sup> *Vietnamese Denunciation Law 2011* s 5.

<sup>510</sup> *Vietnamese Denunciation Law 2011* s 8(3).

<sup>511</sup> *Vietnamese Denunciation Law 2011* s 6

<sup>512</sup> *Vietnamese Denunciation Law 2011* ss 8(7), (8).

<sup>513</sup> Decree No 76/2012/NĐ-CP s 14 (Nghị định số 76/2012/NĐ-CP ngày 03/10/2012 Quy định chi tiết thi hành một số điều của Luật tố cáo).

<sup>514</sup> Decree No 76/2012/NĐ-CP s 14 (Nghị định số 76/2012/NĐ-CP ngày 03/10/2012 Quy định chi tiết thi hành một số điều của Luật tố cáo).

identity; changing the living place of the whistleblower; or restricting the whistleblower's movement in certain places or association with certain people.<sup>515</sup>

Decree No 76/2012/NĐ-CP states:

(1) Whistleblowers have the right to ask an organization which receives information from them, or police stations, or other government agencies or officials where the whistleblowers or their relatives are living, studying or working, to protect them or their relatives when there are any grounds for believing that they or their relatives may be harmed because of making a denunciation. The request for protection has to be in writing. In an emergency, the request can be in oral, but after that, the whistleblower has to make it in writing;

(2) The protection for whistleblowers against harm can be applied without the application of the whistleblowers. The government agency which is authorized to handle the denunciation has right to ask police stations, or other government agencies or officials where the whistleblowers or their relatives are living, studying or working, to protect them or their relatives when there are any grounds for believing that they or their relatives may be harmed because of making a denunciation. In this situation, the government agency that has asked for the protection has to inform the whistleblower about the protection;

(3). The government agency which is authorized to handle the denunciation has to ask a police station, or another government agency or official where the whistleblowers or their relatives are living, studying or working, to apply protection immediately for the whistleblowers or their relatives when there are any grounds for believing that they or their relatives are being damaged, or are going to be damaged. The protections include:

a. Arranging people, vehicle, and other tools for the protection of the whistleblowers or their relatives in certain areas such as their houses, offices or schools.

b. Moving the whistleblowers or their relatives to safe areas;

(4). After preventing the harm to the whistleblowers or their relatives, the organization which is authorized to handle the denunciation has to coordinate with other institutions such as police stations, or other government agencies or officials, to apply administrative, civil or criminal punishment to the people who caused the harm;

5. The organization which applies the protection can implement following actions:

a. Limit the whistleblower's or their relatives' freedom to move, contact, work, or study for a certain period of time;

b. Move the whistleblower or his or her relatives to other accommodations, offices, or schools;

c. Apply or suggest applying administrative or criminal punishment to the people who caused the harm or threatened to cause harm to the whistleblowers or their relatives;

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<sup>515</sup> Decree No 76/2012/NĐ-CP s 14 (Nghị định số 76/2012/NĐ-CP ngày 03/10/2012 Quy định chi tiết thi hành một số điều của Luật tố cáo).

d. Applying other protections to prevent damage to the whistleblower or his or her relatives;

e. Changing the identity of the whistleblower or his or her relatives.<sup>516</sup>

## 5. Media ownership regulation

As discussed above, the media significantly influence how people think and behave.<sup>517</sup> Therefore, media ownership is a concern of governments. This section examines how the Vietnamese government regulates media ownership based on the *Vietnamese Press Law 1989* and Decree No. 51/2002/NĐ-CP enacted on 26 April 2002 detailing the *Vietnamese Press Law 1989* and *Vietnamese Amended Press Law 1999*.

Section 1 of the *Vietnamese Press Law 1989* states ‘the media is the mouth piece of the VCP, the government, and the social organizations’.<sup>518</sup> Decree No. 51/2002/NĐ-CP states that: ‘organizations named in s 1 of the Vietnamese Press Law 1989 have right to apply to establish media outlets’.<sup>519</sup> This means, in Vietnam, that only three kinds of institutions have the right to apply to establish a media agency: VCP organizations, government bodies and social organizations.<sup>520</sup>

According to the Vietnamese Law Dictionary, a social organization has the following characteristics:

- (1) it is formed based on the will of the members who have the same interests, class or occupation;
- (2) it governs social activities authorized on its own behalf and, in special cases identified by law, its activities will be conducted on behalf of the state;
- (3) it operates under rules formed by its members or by state regulations; and
- (4) its aim is to protect the legitimate interests of its members and to participate in social and state control.<sup>521</sup>

Based on the provisions mentioned above, individuals and private organizations are not allowed to establish a media agency, but, as we shall see, they in fact take part in media activities in a range of ways that require attention. This will be discussed further in chapter 5 where I critique Vietnamese media laws.

The financing of media organizations can derive from government subsidies, income from commercial activities and voluntary financial assistance received from organizations and individuals.<sup>522</sup> Section 17 of the *Vietnamese Press Law 1989* provides:

- (1). The government develops policies to provide financial assistance to facilitate the development of the media.

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<sup>516</sup> Decree No 76/2012/NĐ-CP s 14(1)-(5).

<sup>517</sup> Chapter 1, section 6. Existing research.

<sup>518</sup> *Vietnamese Press Law 1989* s 1; the draft of new Press Law, s 5(1).

<sup>519</sup> Decree No. 51/2002/NĐ-CP s 6.

<sup>520</sup> *Vietnamese Press Law 1989* s 1; Decree No. 51/2002/NĐ-CP s 6; the draft of new Press Law, s 16.

<sup>521</sup> Ministry of Justice, *Law dictionary* (NXB Tu dien Bach khoa va NXB Tu phap, 2006) 784.

<sup>522</sup> *Vietnamese Press Law 1989* s 17(c); the draft of new Press Law, s 25.



The media supervisory organizations are responsible for funding media organizations.

Media organizations have the right to receive voluntary financial assistance provided by any organizations or individuals;

(2). A media organization may carry out commercial activities and services which are connected with its specialist and professional skills in order to create additional sources of income to re-invest in the development of the media organization. Media organizations shall fulfil their taxation obligations in respect of such commercial activities and services.

Media organizations shall be entitled to preferential treatment with respect to taxes and other fees in connection with their publication and circulation;

(3). Media organizations must implement systems for accounting, statistics, inspection and financial investigation.<sup>523</sup>

In addition, under Vietnamese media law, no one media organization is authorized to own more than one type of media. This means that cross media ownership is prohibited. The *Vietnamese Press Law 1989* states:

‘A media organization is an organization which has only one type of media provided under s 3 of the *Vietnamese Press Law 1989*.’<sup>524</sup>

Section 3 of the *Vietnamese Press Law 1989* provides:

The media provided in this law includes: print media (newspapers, journals, news bulletins, editions of news agencies), electronic media (radio and television programmes and audio-visual news programmes transmitted by various means) and website news (presented through the Internet) published in any languages.<sup>525</sup>

## 6. The handling of complaints and grievances

This last section discusses the provisions of Vietnamese law covering matters relating to complaints and grievances against the media and how they are handled. The discussion is based mainly on the *Vietnamese Press Law 1989* and Circular No 05/2011/BTTTT enacted on 28 January 2011 regulating complaints handling in the field of information and communication.

As disclosed above (3.2. *Defamation*), organizations and individuals have the right to lodge a complaint with the owner of the media or the media regulatory body if they have any ground for thinking that the media has conveyed inaccurate or distorted information about them.<sup>526</sup> Section 9 of the *Vietnamese Press Law 1989* provides:

1. Where the media have published information which is untruthful, distorted, or slanderous and harmful to the reputation of an organization or to the reputation and dignity of

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<sup>523</sup>*Vietnamese Press Law 1989* s 17(c)(1)-(3).

<sup>524</sup>*Vietnamese Press Law 1989* s 11.

<sup>525</sup>*Vietnamese Press Law 1989* s 3; the draft of new Press Law, ss 3, 4(1)-(4).

<sup>526</sup>*Vietnamese Press Law 1989* s 9.

an individual, the media shall publish a correction and an apology to the organization or the individual. Where the media regulatory body makes a decision which states that the information published is untruthful, distorted, slanderous or harmful to the reputation of the organizations or individual, the media organization must publish that finding.

2. Organizations and individuals shall have the right to express in writing their opinions about the information published in the media when there are grounds for believing that the media have published information which is untruthful, distorted, or slanderous and harmful to them. The media organization must publish the opinion of the organization or individual in respect of the earlier publication.

The opinion of such organization or individual must not be offensive to the media organization or to the reputation or dignity of the author.

The media organization must publish the opinion of such organization or individual within the following number of days from the date of receipt of the opinion: within five days in the case of daily newspapers, radio and television; within ten days in the case of a weekly newspaper; and in the next edition in the case of a magazine.

3. The correction and apology and the opinion mentioned above must be published corresponding to the original information published by the media organization.

4. Where the media organization does not publish the correction, apology, or the opinion mentioned above, or the media does not publish such correction, apology, opinion in accordance with the direction conferred by paragraph (3), the organization or individual shall have the right to lodge a complaint with the owner of the media or the media regulatory body, or file a suit against the media organization.<sup>527</sup>

Based on the provisions of Circular No 05/2011/BTTTT, complaints against the media have to be communicated to the media organization within 3 months of the date when the information is published.<sup>528</sup>

The owner of the media organization must resolve the complaint within 20 business days of the date of its receipt.<sup>529</sup> The media owner conducts the complaint resolution based on a process of complaint handling that the organization itself has made and published.<sup>530</sup>

Media regulatory bodies, including the MIC and the Departments of Information and Communications of provinces and cities, are responsible for guiding the settlement of disputes between the media and organizations or individuals.<sup>531</sup> When the media organization does not resolve the complaint or the organization or individual does not consent to the result of the complaint handling made by the media organization, the organization or individual has

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<sup>527</sup>*Vietnamese Press Law 1989* s 9; the draft of new Press Law, ss 39-40.

<sup>528</sup>Circular No 05/2011/BTTTT was enacted on 28 January 2011 regulating on s handling in the field of information and communication s 9(2)(b) (Thông tư số 05/2011/TT-BTTTT ngày 28 tháng 01 năm 2011 Quy định về giải quyết khiếu nại của người sử dụng dịch vụ trong lĩnh vực thông tin và truyền thông).

<sup>529</sup>Circular No 05/2011/BTTTT s 11(2).

<sup>530</sup>Circular No 05/2011/BTTTT s 12(1).

<sup>531</sup>Circular No 05/2011/BTTTT s 5.

the right to make a written request to the media control body for guidance on complaint handling. The request has to be sent to the media control body within 15 business days of the receipt of notification of the outcome of the complaint handling process within the media organization or of the expiry date for resolution of the complaint.<sup>532</sup> This guidance on complaint handling is done at the office of the media control body within 20 business days of the date when the media control body receives the request for complaint resolution guidelines.<sup>533</sup>

Organizations and individuals also have the right to file a suit against the media organization if the media organization does not publish their statements or does not do so properly in accordance with the provisions of the *Vietnamese Press Law 1989 amended 1999*.<sup>534</sup> In this case, civil courts are authorized to resolve the dispute.<sup>535</sup>

## Conclusion

In this chapter I have described in general outline the Vietnamese system of government and the organization of media regulatory bodies. This knowledge is used as foundation for discussion about the media regulation. I have also discussed the protection of freedom of expression and freedom of information, and the balancing between these freedoms and other competing interests. In the next chapter, I explore Australian media law.

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<sup>532</sup>Circular No 05/2011/BTTTT s 13.

<sup>533</sup>Circular No 05/2011/BTTTT ss 18, 19.

<sup>534</sup>*Vietnamese Press Law 1989* s 9; the draft of new Press Law, ss 39-40.

<sup>535</sup>*Vietnamese Civil Procedure Code 2004* s 25(8).

## Chapter 5: Australian media regulation

### Introduction

This chapter provides information about media regulation in Australia, which will be used to inform a critique of Australian media legislation in chapter 6. Based on the content of this chapter, I will assess whether Australian media regulation represents any models that could address some of the shortcomings of Vietnamese media law which I will discuss in chapter 6, and whether there would be any need for adjustments to Australian models before they could be applied in Vietnam.

In this chapter I provide an overview of the system of the Australian media regulation system before describing the system of media regulation institutions. I then discuss the interests other than freedom of expression and freedom of information that are recognized in diverse areas of law and how Australian law provides opportunities to strike a balance between those interests and those freedoms. After that, I discuss regulations covering media ownership and finally the handling of complaints and grievances.

### 1. Overview of the system of Australian media content regulation

The media in Australia are regulated according to the platform over which content is delivered.<sup>536</sup> Broadcasting and datacasting services are licensed and regulated under the *Broadcasting Services Act 1992 (Cth)*.<sup>537</sup> Online services and services delivered over convergent devices are also regulated under the *Broadcasting Services Act 1992 (Cth)* but only in relation to offensive content. Films, magazines and computer games are regulated under the National Classification Scheme; and the print media also have a system of self-regulation. All media, to some extent, are subject to some aspects of general law, such as the *Criminal Code Act* and the *Defamation Acts*.

The provisions of the *Criminal Code Act 1995 (Cth)* to be considered were inserted by a 2005 amending Act under the heading of ‘Sedition’. Now the Act uses titles such as ‘Urging the overthrow of the Constitution or Government by force or violence’ or ‘Urging interference in Parliamentary elections or constitutional referenda by force or violence’.<sup>538</sup> Rather than persistently repeating such long titles, I use the term ‘opposition’ as shorthand for the titles mentioned above. This is helpful because it reflects the term used for similar offences in Vietnam.

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<sup>536</sup> See, eg, Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup>ed, 2012) 717; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 51.

<sup>537</sup> Broadcasting service is a service delivering television or radio programs to people who have equipment appropriate for receiving the service: *Broadcasting Services Act 1992 (Cth)* s 6; Datacasting is a service delivering content in the form of text, data, speech, music or other sounds, visual images, or other form or combination of forms to persons having equipment appropriate for receiving that content: *Broadcasting Services Act 1992 (Cth)* s 6.

<sup>538</sup> *Criminal Code Act 1995 (Cth)* s 80.2.

A broadcasting service delivers television or radio programs to people having equipment suitable to receive the service.<sup>539</sup> Such services are more heavily regulated than other types of media.<sup>540</sup> Broadcasters have to get a licence prior commencing service.<sup>541</sup> These licences contain conditions designed to serve public purposes.<sup>542</sup> By contrast, there are no such controls on operators of print media or online services.

National regulation of broadcasting services, datacasting services and online content is based on the *Broadcasting Services Act 1992 (Cth) (BSA)*, which in turn is based on the legislative power conferred by s 51(v) of the Commonwealth Constitution.<sup>543</sup> The *BSA*'s stated aims include:

- (a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; and
  - (aa) to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services; and
  - (b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
    - (ba) to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience and user needs; and
  - (c) to encourage diversity in control of the more influential broadcasting services; and
  - (e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and
    - (ea) to promote the availability to audiences throughout Australia of television and radio programs about matters of local significance; and
    - (f) to promote the provision of high quality and innovative programming by providers of broadcasting services; and
      - (fa) to promote the provision of high quality and innovative content by providers of datacasting services; and

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<sup>539</sup>*Broadcasting Services Act 1992 (Cth)* s 6.

<sup>540</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 65.

<sup>541</sup>*Broadcasting Services Act 1992 (Cth)* ss 131-135.

<sup>542</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 66.

<sup>543</sup>The Commonwealth Constitution empowers the Commonwealth Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services': *Australian Constitution* s 51 (v).

(g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance; and

(h) to encourage providers of broadcasting services to respect community standards in the provision of program material; and

(ha) to ensure designated content/hosting service providers respect community standards in relation to content; and

(i) to encourage the provision of means for addressing complaints about broadcasting services; and

(j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them; and

(ja) to ensure that international broadcasting services are not provided contrary to Australia's national interest; and

(k) to provide a means for addressing complaints about certain internet content; and

(l) to restrict access to certain internet content that is likely to cause offence to a reasonable adult; and

(m) to protect children from exposure to internet content that is unsuitable for children; and

(n) to ensure the maintenance and, where possible, the development of diversity, including public, community and indigenous broadcasting, in the Australian broadcasting system in the transition to digital broadcasting.<sup>544</sup>

The *BSA* provides for a co-regulatory regime under which 'primary responsibility for ensuring that programs reflect community standards, and for handling complaints about program content, rest with the broadcasters themselves'.<sup>545</sup> The co-regulatory regime is a combination of industry codes of practice, standards determined by the ACMA and licence conditions.<sup>546</sup>

Industry codes of practice are developed by organizations which represent the broadcasting industry sectors. These codes provide guidance relating to classification, protecting children from harmful information, complaints handling and accuracy and fairness in news and current affairs, among other things.<sup>547</sup> Section 123(1) states that the parliament's intention is for this to be done 'in consultation with the Australian Communication and Media

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<sup>544</sup>*Broadcasting Services Act 1992 (Cth)* s 3.

<sup>545</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 72.

<sup>546</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 72.

<sup>547</sup>*Broadcasting Services Act 1992 (Cth)* s 123(2). For example: Commercial Television Industry Code of Practice 2010, Commercial Radio Industry Code of Practice 2004, Community Television Code of Practice 2004, Community Radio Broadcasting Codes of Practice 2008. See section 2 to know more about the ACMA.

Authority (ACMA)' but interestingly such consultation is not included as a requirement for registration of a completed code.<sup>548</sup>

Section 123 of the *Broadcasting Services Act 1992 (Cth)* provides:

(1) It is the intention of the Parliament that radio and television industry groups representing:

- (a) commercial broadcasting licensees; and
- (b) community broadcasting licensees other than providers of services targeted, to a significant extent, to one or more remote Indigenous communities; and
- (ba) community broadcasting licensees whose services are targeted, to a significant extent, to one or more remote Indigenous communities; and
- (c) providers of subscription broadcasting services; and
- (d) providers of subscription narrowcasting services; and
- (e) providers of open narrowcasting services;

develop, in consultation with the ACMA and taking account of any relevant research conducted by the ACMA, codes of practice that are to be applicable to the broadcasting operations of each of those sections of the industry.

(4) If:

- (a) a group representing a particular section of the broadcasting industry develops a code of practice to be observed in the conduct of the broadcasting operations of that section of the industry; and
- (b) the ACMA is satisfied that:
  - (i) the code of practice provides appropriate community safeguards for the matters covered by the code; and
  - (ii) the code is endorsed by a majority of the providers of broadcasting services in that section of the industry; and
  - (iii) members of the public have been given an adequate opportunity to comment on the code;

the ACMA must include that code in the Register of codes of practice.<sup>549</sup>

Standards are determined by the ACMA when there are no codes of practice developed for a particular sector of the broadcasting industry<sup>550</sup> or when a code of practice does not provide appropriate community safeguards.<sup>551</sup> Examples include the Commercial

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<sup>548</sup>Compare *Broadcasting Services Act 1992 (Cth)* s 123(1) with s 123(4).

<sup>549</sup>*Broadcasting Services Act 1992 (Cth)* ss 123(1), (4).

<sup>550</sup>*Broadcasting Services Act 1992 (Cth)* s 125(2).

<sup>551</sup>*Broadcasting Services Act 1992 (Cth)* s 125(1).

Radio Standards 2012, the Broadcasting Services Standard 2005 and the Radio Communications (Short Range Devices) Standards 2014.

The *BSA* provides licence conditions including special licence conditions (minimal conditions)<sup>552</sup> applied to almost all categories of broadcasting as well as specific licence conditions applied to each category of service.<sup>553</sup> For example: the restriction on broadcasting election advertisements immediately before an election;<sup>554</sup> the requirement that political matter broadcast at the request of another person or political party contain an identifying statement;<sup>555</sup> strong restrictions on tobacco advertisements;<sup>556</sup> and the prohibition on using a broadcasting service in the commission of an offence against another Act or a law of a State or Territory.<sup>557</sup>

The *BSA* divides broadcasting services into eight categories,<sup>558</sup> based on their influence over the shaping of community views, and regulates each category to a different level.<sup>559</sup> For example: commercial, community, subscription television and international broadcasting services subject to both minimal and specific conditions<sup>560</sup> but the less influential media, such as subscription radio broadcasting, subscription narrowcasting and open narrowcasting, are subject only to minimal conditions.<sup>561</sup>

## 2. The system of media regulation institutions

### 2.1. Overview of the Australian government system

This subsection provides general knowledge about the organization of the Australian government system. This knowledge is used as foundation for my discussion on media regulation and recommendations for reforming Vietnamese media law in the chapters that follow. Based on the purpose of the thesis, discussion about the Australian government system in this subsection is limited to the Commonwealth government. Australia follows a representative democracy where the Prime Minister is the head of the government and a constitutional monarchy with the monarch (currently Queen Elizabeth II) is the head of the country as a whole.<sup>562</sup> The Australian government system is a federal system. In this country,

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<sup>552</sup> Minimal conditions include conditions set out in Part 2 of Schedule 2 of the *Broadcasting Services Act 1992 (Cth)*.

<sup>553</sup> These conditions do not apply to international broadcasting services and the national broadcasters: *Broadcasting Services Act 1992 (Cth)* sch 2.

<sup>554</sup> From the end of the Wednesday before the polling day until after the election: *Broadcasting Services Act 1992 (Cth)* sch 2 cl 1.

<sup>555</sup> *Broadcasting Services Act 1992 (Cth)* sch 2 clss 3, 3A, 4.

<sup>556</sup> *Broadcasting Services Act 1992 (Cth)* sch 2 clss 7(1)(a), 8(1)(a), 9(1)(a), 10(1)(a), 11(1)(a).

<sup>557</sup> *Broadcasting Services Act 1992 (Cth)* sch 2 cl 7(1)(h).

<sup>558</sup> *Broadcasting Services Act 1992 (Cth)* ss 11, 11A. National Broadcasting Services are primarily governed by their own legislation: *Australian Broadcasting Corporation Act 1983 (Cth)*; *Special Broadcasting Service Act 1991 (Cth)*.

<sup>559</sup> *Broadcasting Services Act 1992 (Cth)* s 4(1).

<sup>560</sup> *Broadcasting Services Act 1992 (Cth)* sch 2 cl 11.

<sup>561</sup> *Broadcasting Services Act 1992 (Cth)*, ss 117, 131-135.

<sup>562</sup> Tom Campbell, Jeffrey Denys Goldsworthy, Adrienne Stone, *Protecting rights without a Bill of Rights : institutional performance and reform in Australia* (Aldershot, Hants, England ; Burlington, VT : Ashgate, 2006) 65; Judith Womersley, Mark Richmond, *AussieData : A concise, user-friendly reference to people, places, events and dates in Australian life from prehistory to the present* (Wakefield Press, 2001) 361; Owen E. Hughes, *Australian politics* (South Yarra, Vic. : Macmillan Education, 3<sup>rd</sup> ed, 1998) 171; *How Government Works* (04 October 2015) Australian government <<http://www.australia.gov.au/about-government/how-government-works>>.



government powers are divided between the Commonwealth and the states.<sup>563</sup> In 1992, Deane and Toohey JJ of the High Court stated that:

There are at least three main general doctrines of government which underlie the Constitution and are implemented by its provisions. One of them is the doctrine or concept of a federal system under which the content of legislative, executive and judicial powers is divided between a central (or Commonwealth) government and regional (or State) governments. Another is the doctrine of a separation of legislative, executive and judicial powers. The fundamental implications of the Constitution to which attention has been directed in past cases have, in the main, been related to one or both of those doctrines. ... [T]he third of those general doctrines of government which underlie the Constitution and form part of its structure ... can conveniently be described as the doctrine of representative government, that is to say, of government by representatives directly or indirectly elected or appointed by, and ultimately responsible to, the people of the Commonwealth. The rational basis of that doctrine is the thesis that all powers of government ultimately belong to, and are derived from, the governed.<sup>564</sup>

The Parliament of the Commonwealth includes the Governor-General, the Senate and the House of Representatives.<sup>565</sup> The Governor-General is appointed by the Queen and is the Queen's Representative in Australia.<sup>566</sup> The Senate is 'composed of senators for each State, directly chosen by the people of the State'.<sup>567</sup> The House of Representatives is 'composed of members directly chosen by the people of the Commonwealth'.<sup>568</sup>

The Parliament has legislative power and is responsible for debating and voting on new laws.<sup>569</sup> The Governor-General may appoint officers who have responsibility for running departments of State of the Commonwealth during the pleasure of the Governor-General. Such officers shall 'be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth'.<sup>570</sup> Section 61 of the Constitution of the Commonwealth of Australia states that '[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative',<sup>571</sup> and s 71 provides that '[t]he judicial power of the Commonwealth belongs

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<sup>563</sup> Dean Jaensch, *The politics of Australia* (South Melbourne : Macmillan Education Australia, 2<sup>nd</sup> ed, 1997) 48; Owen E. Hughes, *Australian politics* (South Yarra, Vic. : Macmillan Education, 3<sup>rd</sup> ed, 1998) 172; *How Government Works* (04 October 2015) Australian government <<http://www.australia.gov.au/about-government/how-government-works>>.

<sup>564</sup> *Nationwide News Pty Ltd v Wills* (1992) 108 ALR681 at 722-723.

<sup>565</sup> *Australian Constitution* s 1; Dean Jaensch, *The politics of Australia* (South Melbourne : Macmillan Education Australia, 2<sup>nd</sup> ed, 1997) 99; Owen E. Hughes, *Australian politics* (South Yarra, Vic. : Macmillan Education, 3<sup>rd</sup> ed, 1998) 170; *How Government Works* (04 October 2015) Australian government <<http://www.australia.gov.au/about-government/how-government-works>>.

<sup>566</sup> *Australian Constitution* s 2.

<sup>567</sup> *Australian Constitution* s 7.

<sup>568</sup> *Australian Constitution* s 24.

<sup>569</sup> *Australian Constitution* ss 1, 51; *How Government Works* (04 October 2015) Australian government <<http://www.australia.gov.au/about-government/how-government-works>>.

<sup>570</sup> *Australian Constitution* s 64.

<sup>571</sup> *Australian Constitution* s 61.

to a Federal Supreme Court, to be called the High Court of Australia'.<sup>572</sup> The High Court is the court of final appeal.<sup>573</sup> The High Court has power to enforce the law (interpret and apply the law), decide cases of special federal significance including challenges to the constitutional validity of laws. The High Court also has power to hear and determine appeals from:

any Justice or Justices exercising the original jurisdiction of the High Court; any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council; the Inter-State Commission, but as to questions of law only.<sup>574</sup>

Further, the High Court has power to review administrative decisions for legality.<sup>575</sup> The Justices of the High Court are appointed by the Governor-General and can be removed only on an address by both Houses of the Parliament, on grounds of proved misbehaviour or incapacity.<sup>576</sup> The organization of the Australian federal government is summarized in figure 6.

The Governor-General appoints Ministers to run government departments.<sup>577</sup> According to s 64 of the Constitution, Ministers must be members of one or other House of the Parliament.<sup>578</sup> By convention, the Governor-General appoints as Prime Minister the leader of the party with a majority of seats in the House of Representatives, and acts on the advice of the Prime Minister in appointing all other Ministers.

To review administrative decisions on the merits, Australian Commonwealth law establishes Administrative Appeals Tribunals (AAT).<sup>579</sup> The members of the AAT are appointed by the Governor-General and include: the President; Deputy Presidents; senior members; and other members.<sup>580</sup>

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<sup>572</sup>*Australian Constitution* s 71.

<sup>573</sup>*Australian Constitution* s 73.

<sup>574</sup>Owen E. Hughes, *Australian politics* (South Yarra, Vic. : Macmillan Education, 3<sup>rd</sup> ed, 1998) 173, referring to *Australian Constitution* ss 73-78.

<sup>575</sup>*Church of Scientology v Woodward* (1982) 154 CLR 25 at 70-71 per Brennan J.

<sup>576</sup>*Australian Constitution* s 72.

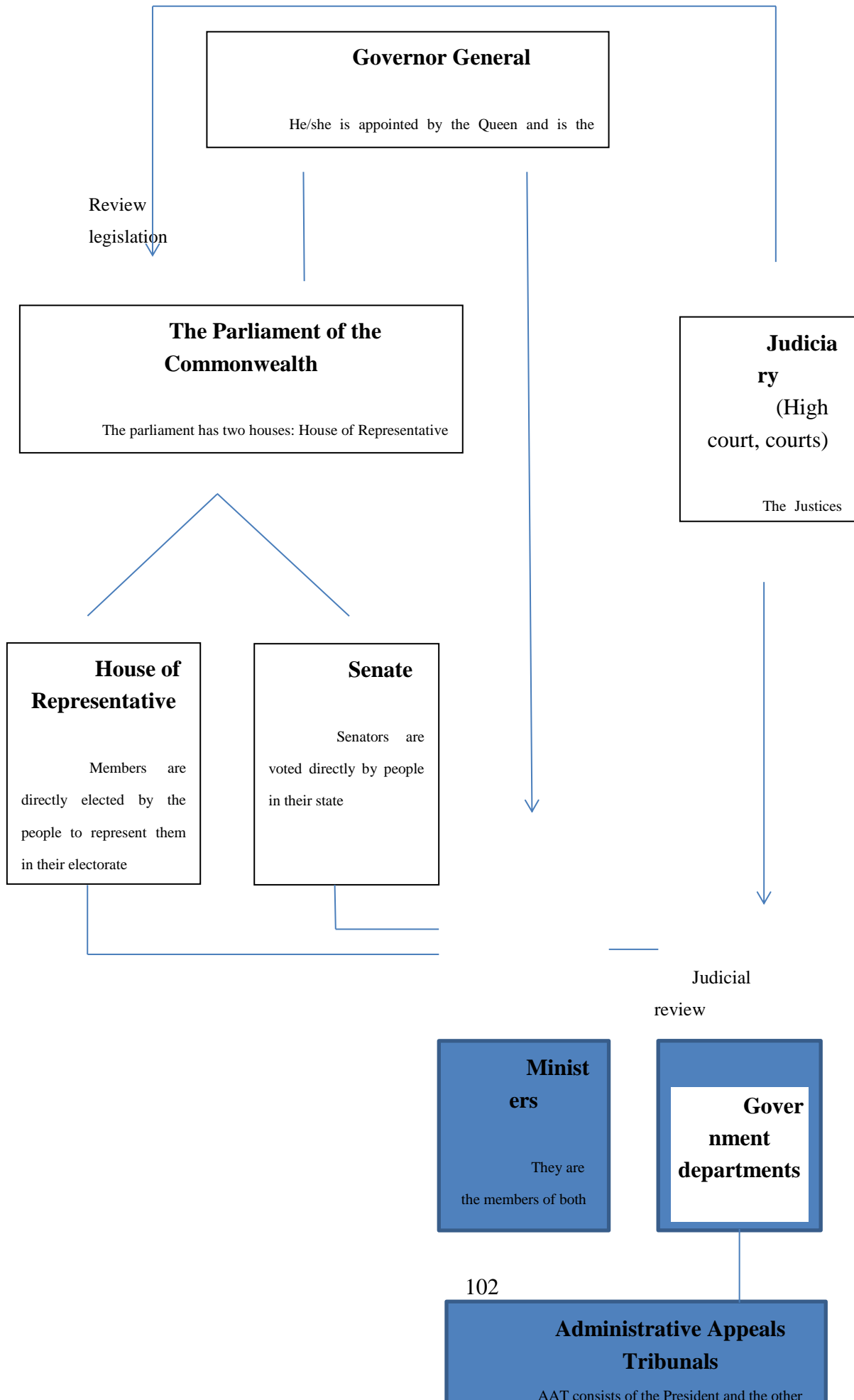
<sup>577</sup>*Australian Constitution* s 64.

<sup>578</sup>*Australian Constitution* s 64.

<sup>579</sup>Matthew Groves and H. P Lee, *Australian Administrative Law* (Cambridge University Press, 2007) 77.

<sup>580</sup>*Administrative Appeals Tribunal Act 1975* (Cth) ss 5A, 6.

Figure 6: The system of the Commonwealth government



## 2.2. The system of media regulation institutions

The Australian media is governed by a range of media-specific institutions, including the Australian Communications and Media Authority (ACMA), the Australian Press Council and the Advertising Standards Bureau. However, other institutions may have power to govern media in certain matters, such as the Foreign Investment Review Board which regulates foreign investment in media companies.<sup>581</sup> In some areas the courts themselves have a direct influence on media activities.

### 2.2.1. The Australian Communication and Media Authority (ACMA)

The ACMA is a government institution which is charged with responsibility under the *BSA* for regulating broadcasting, online content, datacasting, spectrum management and telecommunications.<sup>582</sup> The ACMA has responsibilities provided under the *BSA* and the *Australian Communications and Media Authority Act 2005* (Cth) (ACMA Act).<sup>583</sup> The responsibilities of the ACMA are summarized on the ACMA's webpage as follows:

- managing access to radiofrequency spectrum bands through radiocommunications licence arrangements, and resolving competing demands for that spectrum through price-based allocation methods;
- planning the availability of segments of radiofrequency spectrum bands used by broadcasting services and managing access to that spectrum through broadcasting licence arrangements;
- regulating compliance with the relevant legislation, licence conditions, codes of practice, standards, service guarantees and other safeguards;
- promoting and facilitating industry self-regulatory solutions to emerging issues; where necessary, exercising powers to create delegated legislation, often in the form of standards or service provider rules;
- facilitating the provision of community information to promote informed decisions about communications products and services;
- reporting on matters relating to the communications industry, including its performance;
- representing Australia's communications interests internationally; and
- advising the government on specific matters from time to time.<sup>584</sup>

Moreover, the ACMA has enforcement powers to deal with breaches of the *BSA* including:

- giving an infringement notice, accepting an enforceable undertaking, giving a remedial direction, and suspending or cancelling licences—administrative action

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<sup>581</sup> The Foreign Investment Review Board is authorized to examine proposals by foreign interest for investment in Australia and make recommendations to recommendations to the Treasurer on those proposals: Foreign Investment Review Board (11 June 2014) <<http://www.firb.gov.au/content/default.asp>>.

<sup>582</sup> *Australian Communications and Media Authority Act 2005* (Cth) pt 2 div 2; The ACMA's strategic intent (4 Feb 2015) Australian Communication and Media Authority <<http://www.acma.gov.au/theACMA/About/Corporate/Authority/role-of-the-acma>>.

<sup>583</sup> *Broadcasting Services Act 1992* (Cth) ss 5, 7; *Australian Communications and Media Authority Act 2005* (Cth) ss 8-11.

<sup>584</sup> *About ACMA* (31 Nov 2015) The Australian Communications and Media Authority <[http://www.acma.gov.au/webwr/\\_assets/main/lib100871/chapter%201.pdf](http://www.acma.gov.au/webwr/_assets/main/lib100871/chapter%201.pdf)>.

- instituting civil proceedings to obtain injunctive relief, an order to cease, civil penalty orders, and orders to enforce compliance with an enforceable undertaking—civil litigation
- referral to the Commonwealth Director of Public Prosecutions for prosecution of an offence—criminal.<sup>585</sup>

In addition, the ACMA has power to consult with other individuals or organizations, form consultative committees, conduct investigations and hold hearings, and inform itself of any issue that it thinks fit connected to its broadcasting, content and datacasting functions specified in the *Australian Communications and Media Authority Act 2005* (Cth).<sup>586</sup>

The ACMA also has power to determine standards, as mentioned above,<sup>587</sup> and to regulate commercial media ownership. Moreover, the ACMA has power over the handling of complaints about classification of content broadcast on television or provided on a subscription television service.<sup>588</sup>

The ACMA's powers of regulation have their source in legislation passed by the Commonwealth Parliament. Section 51(v) of the *Australian Constitution* authorizes the Commonwealth Parliament to legislate with respect to 'postal, telegraphic, telephonic, and other like services'<sup>589</sup> and the High Court has held that this power extends to the regulation of broadcasting services.<sup>590</sup> This includes the establishment of services, the choice of people who may make use of such services, the conditions of use, and restrictions on ownership and control.<sup>591</sup> The BSA therefore relies on the power of the Commonwealth Parliament to regulate broadcasting, datacasting services and online content.<sup>592</sup> The extent of Commonwealth power over matters relating to online services has not been considered by the High Court.<sup>593</sup> However, it is likely that online services are covered by s 51(v) either as a 'telephonic' or 'other like service', so federal regulation could validly extend to online communication.<sup>594</sup>

The national broadcasters are the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). These are not subject to the BSA<sup>595</sup> but rather are governed by their own legislation namely the *Australian Broadcasting Corporation Act 1983* (Cth) and the *Special Broadcasting Service Act 1991* (Cth).<sup>596</sup> For this reason, the

<sup>585</sup>*Broadcasting Services Act 1992 (Cth)*-Enforcement Guidelines of the ACMA, 5.2.

<sup>586</sup>*Broadcasting Services Act 1992 (Cth)* s 168 (1).

<sup>587</sup>Section 1.Overview of the system of Australian media content regulation

<sup>588</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 64-65; s the ACMA does not handle (29 September 2015) Australian Communication and Media Authority <<http://www.acma.gov.au/Citizen/Take-action/s/Broadcast-s/s-the-acma-does-not-handle>>.

<sup>589</sup>*Australian Constitution* s 51 (v).

<sup>590</sup>See, eg, *R v Brislan; Ex parte Williams* (1935) 54 CLR 262; *Jones v Commonwealth* [No 2] (1965) 112 CLR 206.

<sup>591</sup>*Jones v Commonwealth* (1966) 112 CLR 206; *Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418.

<sup>592</sup>Overview of the BSA: section 1.

<sup>593</sup>Gilbert + Tobin Centre of Public Law, Submission to the Independent Media Inquiry, 14 November 2011, 3.

<sup>594</sup>Gilbert + Tobin Centre of Public Law, Submission to the Independent Media Inquiry, 14 November 2011, 3.

<sup>595</sup>*Broadcasting Services Act 1992 (Cth)*, s 13(5); 'National broadcasting services do not include subscription broadcasting services or subscription or open narrowcasting services provided by the ABC or the SBS': *Broadcasting Services Act 1992 (Cth)*, s 13(2).

<sup>596</sup>*Broadcasting Services Act 1992 (Cth)* s 13.

enforcement powers of the ACMA under the BSA<sup>597</sup> are limited to certain activities of the ABC and SBS.

Although funded and owned by the government,<sup>598</sup> the ABC and SBS are independent from the government. Based on the functions and duties provided in their respective charters,<sup>599</sup> the ABC and SBS develop codes of practice covering issues such as classification and complaints handling.<sup>600</sup> Although the ABC and SBS have to notify the ACMA of these codes, the ACMA does not play a role in developing or registering these codes.<sup>601</sup> As with the commercial codes of practice, complaints relating to breaches of codes of practice of the ABC and SBS have to be handled by these broadcasters first.<sup>602</sup> The action that can be taken by the ACMA, however, is quite restricted.<sup>603</sup> They aim to encourage the ABC and SBS ‘to comply with the relevant code of practice’.<sup>604</sup> This is done by means of a notice to the ABC and SBS to recommend that they should ‘take action to comply with the relevant code of practice and take such other action’ including ‘broadcasting or otherwise publishing an apology or retraction’.<sup>605</sup> In addition, ‘the ACMA may give the Minister a written report on the matter’ in a case where the ABC or SBS ‘does not take action that the ACMA considers to be appropriate’.<sup>606</sup> Moreover, the ABC develops its own editorial policies based on the experience of its content makers and in accordance with the requirements of current regulations.<sup>607</sup> ‘The Editorial Policies offer a frame of reference as well as, on occasions, a check list of considerations aimed at helping content makers to make difficult judgements for themselves and to explain their reasons for those judgements’.<sup>608</sup>

The ABC is operated by the ABC Board. The Board is responsible for ensuring that the functions of the ABC are implemented efficiently, and the independence and integrity of the ABC are maintained. The Board also has a duty to ensure that the ABC collects and presents information accurately, impartially and according to standards of journalism. The Board has to ensure that the ABC does not breach legislative and legal requirements.<sup>609</sup>

### **2.2.2. The Australian Press Council (APC)**

The APC is a self-regulatory body funded by the media companies themselves. It is a private incorporated association, which has no legislative power over the media.

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<sup>597</sup> *Broadcasting Services Act 1992 (Cth)* s 3.

<sup>598</sup> *Australian Broadcasting Corporation Act 1983 (Cth)* s 67(1); Funding of the Australian Broadcasting Corporation (07 August 2015) Parliament of Australia <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/Publications\\_Archive/archive/fundingabc](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/fundingabc)>.

<sup>599</sup> *Australian Broadcasting Corporation Act 1983 (Cth)* ss 6, 8; *Special Broadcasting Service Act 1991 (Cth)* ss 6, 10.

<sup>600</sup> ABC Code of Practice 2014; SBS Code of Practice 2014.

<sup>601</sup> *Australian Broadcasting Corporation Act 1983 (Cth)* s 8(1)(e); *Special Broadcasting Service Act 1991 (Cth)* s 10(1)(j).

<sup>602</sup> *Broadcasting Services Act 1992 (Cth)* s 150. This step of s handling process also applies to commercial broadcasters.

<sup>603</sup> *Broadcasting Services Act 1992 (Cth)* s 151; See section 6. s handling to know more about this process.

<sup>604</sup> *Broadcasting Services Act 1992 (Cth)* s 152(1)(b).

<sup>605</sup> *Broadcasting Services Act 1992 (Cth)* s 152.

<sup>606</sup> *Broadcasting Services Act 1992 (Cth)* s 153.

<sup>607</sup> *ABC Editorial Policies 2011*.

<sup>608</sup> *About the ABC* (31 August 2015) Australian Broadcasting Corporation <<http://about.abc.net.au/how-the-abc-is-run/what-guides-us/our-editorial-policies/>>.

<sup>609</sup> *Australian Broadcasting Corporation Act 1983 (Cth)*, s 6.

The APC is responsible for promoting good standards of media practice, community access to information of public interest, and freedom of expression through responsible and independent print and digital media, and adherence to high journalistic and editorial standards.<sup>610</sup>

The APC has following powers:

- (a) considering and dealing with complaints and concerns about material in newspapers, magazines, journals and other print media;
- (b) encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- (c) keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- (d) making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- (e) undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues; promoting an understanding of the objects and activities of the association especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.<sup>611</sup>

The print media are also regulated by the Commonwealth but only to a limited extent, because of the constitutional restrictions discussed above, according to which the Commonwealth has no plenary power to regulate print media as such.<sup>612</sup> However, the Commonwealth regulates the print media by imposing ownership and control restrictions as a condition of broadcasting licences. Further, laws enacted under other powers, such as those over interstate and international trade and commerce, taxation, trading and financial corporations, external affairs and the Territories, may affect the print media.<sup>613</sup>

### **2.2.3. The Advertising Standards Bureau (ASB)**

The ASB is a private body which supervises a national system of advertising self-regulation.<sup>614</sup> It handles consumer complaints about advertising on issues such as the use of language, the discriminatory portrayal of people, portrayals of violence, sex, sexuality and nudity, concern for children, health and safety, and marketing of food and beverages to children.<sup>615</sup> The ASB makes its determinations based on appropriate sections of the Code of

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<sup>610</sup>Constitution of the Australian Press Council Inc, section 3(1).

<sup>611</sup>Constitution of the Australian Press Council Inc, section 3 (1).

<sup>612</sup> Gilbert + Tobin Centre of Public Law, Submission to the Independent Media Inquiry, 14 November 2011, 3.

<sup>613</sup>*Australian Constitution* ss 51(i), (ii), (xx), (xxix), 122.

<sup>614</sup>Ad standards (11 June 2014) Advertising Standards Bureau <<http://www.adstandards.com.au/>>.

<sup>615</sup>Determinations summaries (11 June 2014) Advertising Standards Bureau <<http://www.adstandards.com.au/advertisingstandards/determinationsummaries>>.

Ethics, and other Codes relating to food and beverages, advertising and marketing to children, and environmental claims as prescribed by the Australian Association of National Advertisers (AANA).<sup>616</sup> The AANA Code of Ethics aims to ensure that ‘advertisements are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and fair sense of responsibility to competitors’.<sup>617</sup>

#### **2.2.4. The Australian Consumer and Competition Commission (ACCC)**

The ACCC is an independent Commonwealth statutory authority which is authorized to govern matters relating to competition and fair trade in the market place.<sup>618</sup> The ACCC takes actions to ‘improve consumer welfare, protect competition or stop conduct that is anti-competitive or harmful to consumers, and promote the proper functioning of Australian markets’.<sup>619</sup> The role of the ACCC is relevant to resolving matters relating to misleading or deceptive publications.

### **3. The balancing of freedom of expression against other recognised interests**

As Rolph et al have stated, ‘freedom of expression is considered to be essential to a free society and a necessary counterpart to democratic government’.<sup>620</sup> The protection of freedom of expression is not expressly provided in the Australian Commonwealth Constitution.<sup>621</sup> However, the High Court has held that freedom of political communication is implied in the Constitution as an ‘indispensable’ element of representative government.<sup>622</sup> Once again the High Court’s judgment in the case of *Nationwide News Pty Ltd v Wills* helps to explain the relationship between the system of government and the freedom:

In implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control. It provides for the exercise of that ultimate power by two electoral processes. The first is the election of the members of the Parliament in which is vested the legislative power of the Commonwealth and which, under the Cabinet system of government which the Constitution assumes, sustains and directly or indirectly controls the exercise of the executive power which the Constitution formally vests in the Crown. The second is that to which reference has already been made, namely, the amendment of the Constitution itself. Under the Constitution, those ultimate powers which the Constitution reserves to the people of the Commonwealth are exercisable by

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<sup>616</sup>Complaints to the Advertising Standards Board (11 June 2014) Advertising Standards Bureau <<http://www.adstandards.com.au/process/theprocesssteps>>.

<sup>617</sup>AANA Code of Ethics, Objectives.

<sup>618</sup>About the ACCCC (19 June 2014) the Australian Consumer and Competition Commission <<http://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc>>.

<sup>619</sup>About the ACCCC (19 June 2015) the Australian Consumer and Competition Commission <<https://www.accc.gov.au/about-us/australian-competition-consumer-commission/about-the-accc#our-purpose>>.

<sup>620</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 21.

<sup>621</sup> See, eg, Anthony Gray, ‘Racial Vilification and Freedom of Speech in Australia and Elsewhere’ (2012) 41(2) *Common Law World Review* 167, 167-168; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 2012, 4ed) 14; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 21.

<sup>622</sup>*Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; Sorial, Sarah, ‘Sedition and the Question of Freedom of Speech’ (2007) 18(3) *Current Issues in Criminal Justice* 431.



direct vote. ...The people of the Commonwealth would be unable responsibly to discharge and exercise the powers of governmental control which the Constitution reserves to them if each person was an island, unable to communicate with any other person. The actual discharge of the very function of voting in an election or referendum involves communication. An ability to vote intelligently can exist only if the identity of the candidates for election or the content of a proposed law submitted for the decision of the people at a referendum can be communicated to the voter. The ability to cast a fully informed vote in an election of members of the Parliament depends upon the ability to acquire information about the background, qualifications and policies of the candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it. Moreover, the doctrine of representative government which the Constitution incorporates is not concerned merely with electoral processes. As has been said, the central thesis of the doctrine is that the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of governmental power under the Constitution hold them as representatives of the people under a relationship, between representatives and represented, which is a continuing one. The doctrine presupposes an ability of represented and representatives to communicate information, needs, views, explanations and advice. It also presupposes an ability of the people of the Commonwealth as a whole to communicate, among themselves, information and opinions about matters relevant to the exercise and discharge of governmental powers and functions on their behalf. It follows from what has been said above that there is to be discerned in the doctrine of representative government which the Constitution incorporates an implication of freedom of communication of information and opinions about matters relating to the government of the Commonwealth.<sup>623</sup>

The case explains that freedom of political communication is an essential element of representative government. This freedom guarantees that people are able to discuss political and government matters. It provides people with the ability to have a fully informed vote in an election of members of the Parliament which helps people to vote intelligently. Freedom of political communication therefore must be protected, in order to protect the system of representative government. The freedom described is a limited form of freedom of expression.

The freedom of political communication includes freedom to communicate between candidates and electors and right to communicate between electors. As the High Court explained:

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<sup>623</sup>*Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 723- 724.

In so far as the people of the Commonwealth are concerned, that implication of freedom of communication operates at two levels. The first is the level of communication and discussion between the represented and their representatives, that is to say, the level of communication and discussion between the people of the Commonwealth on the one hand and the Parliament and its members and other Commonwealth instrumentalities and institutions on the other....

The second level at which the implication of freedom of communication and discussion operates is the level of communication between the people of the Commonwealth. Inherent in the Constitution's doctrine of representative government is an implication of the freedom of the people of the Commonwealth to communicate information, opinions and ideas about all aspects of the government of the Commonwealth, including the qualifications, conduct and performance of those entrusted (or who seek to be entrusted) with the exercise of any part of the legislative, executive or judicial powers of government which are ultimately derived from the people themselves.<sup>624</sup>

In this case, the High Court also held that the first level, communication between the represented and their representatives enables citizen to 'come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions'.<sup>625</sup> The second level, communication and discussion between the people of the Commonwealth, enables members of the public to free discuss, analyse, and examine political or government matters including the election process.<sup>626</sup>

Freedom of expression is an important human right but it is not absolute.<sup>627</sup> It is widely recognised that the exercise of it carries duties to respect other recognized interests such as personal reputations, national security and public order.<sup>628</sup> There are similar limitations on the Australian freedom of political communication. The High Court in *Lange v Australian Broadcasting Corporation* stated that the protection of the freedom:

is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The freedom of communication required by ss 7 and 24 and reinforced by the sections concerning responsible government and the amendment of the Constitution operates as a restriction on legislative power. However, the freedom will not invalidate a law enacted to satisfy some other legitimate end if the law satisfies two conditions. The first condition is that the object of the law is compatible with the maintenance of the constitutionally

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<sup>624</sup>*Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 725.

<sup>625</sup>*Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 725.

<sup>626</sup>*Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 at 726.

<sup>627</sup>*International Covenant on Civil and Political Rights*, Art 19(3); Williams, George, 'Protecting freedom of speech in Australia' (2014) 39(4) *Alternative Law Journal* 217, 217; Katharine Gelber, 'Freedom of speech and a bill of rights' [2009] *Australian Review of Public Affairs*.

<sup>628</sup> See, eg, Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 2012, 4ed), 2; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 21.

prescribed system of representative and responsible government or the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes. The second is that the law is reasonably appropriate and adapted to achieving that legitimate object or end.<sup>629</sup>

The case law defines conditions when other laws can override freedom of political communication: in order to serve a legitimate purpose that is compatible with maintenance of the system laid down in the Constitution. This case therefore helps balance freedom of political communication with government interest in carrying out their responsibilities under the Constitution. However, the case does not make it immediately clear what ends or purposes would be considered 'legitimate'.

In order to know how Australian media legislation balances freedom of expression against other recognised interests including personal information, personal reputation and national security, this section discusses provisions covering protection of private information, defamation, and opposition.

### 3.1. Protection of private information

The Australian Press Council has noted that '[g]etting the balance between the right of the public to know and the right of citizens to personal privacy has been an on-going problem'.<sup>630</sup> This subsection examines how Australian laws balance the right to privacy with the freedoms of expression and of information.

Australia has no fundamental protection for privacy through a Bill or Charter of Rights. However, the right to privacy is protected through Commonwealth legislative and regulatory provisions.<sup>631</sup> The *Privacy Act 1988* (Cth) is an example.<sup>632</sup> The discussion in this subsection will base on the *Privacy Act 1988* (Cth).

The *Privacy Act 1988* (Cth) protects personal information through rules established to regulate private organizations and government agencies in the collection, storage, and use and disclosure of personal information.<sup>633</sup> Personal information is defined as information or opinion about a person who is identified or reasonably identifiable regardless of 'whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not'.<sup>634</sup> As Leonard explains, '[p]ersonal information will ...include information about an individual whether collected or made available in a personal or business

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<sup>629</sup> *Lange v Australian Broadcasting Corporation* (1997) 145ALR 96 at 108-109.

<sup>630</sup> Balancing information and privacy' (2009) 21(3) *Australian Press Council News* 6.

<sup>631</sup> O'Connor, Claire, 'Privacy and the law : another case for a Bill of Rights' (2013) 35(1) *Law society of SA* 14, 14.

<sup>632</sup> *Privacy Act 1988* (Cth) was amended in 2000 (*Privacy Amendment Act 2000* (Cth) and 2012 (*Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth)). I, however, in this thesis name *Privacy Act 1988* (Cth) for all of them. The *Privacy Act 1988* (Cth) apply to both federal government agencies and private organizations, but the rules for each are different: ALRC, *Review of Australian Privacy Law*, discussion paper 72, September 2007.

<sup>633</sup> Adrienne Muir and Charles Oppenheim, 'National Information Policy developments worldwide IV: copyright, Freedom of Information and data protection' (2002) 28(6) *Journal of Information Science* 467; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 624; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012), 448; Taylor, Andrew, 'Privacy comes to the private sector' (2001) 28(7) *Brief* 5, 5; Costa, Sarah, 'Changes to the Privacy Act' (2014) 41(7) *Brief* 16, 16.

<sup>634</sup> *Privacy Act 1988* (Cth) s 6(1).

context and regardless of whether that information is available for everyone and the subject individual is specifically identified or consented for that information to enter the public domain'.<sup>635</sup>

The Act provides thirteen Australian Privacy Principles (APPs) applied to both government agencies and private organizations.<sup>636</sup> Under these rules, personal information is collected only if the information is necessary for and directly related to the functions or activities of the collecting organization.<sup>637</sup> The rules make separate provision for a separate category of information called 'sensitive information'. This is defined as

- (a) information or an opinion about an individual's:
    - (i) racial or ethnic origin; or
    - (ii) political opinions; or
    - (iii) membership of a political association; or
    - (iv) religious beliefs or affiliations; or
    - (v) philosophical beliefs; or
    - (vi) membership of a professional or trade association; or
    - (vii) membership of a trade union; or
    - (viii) sexual orientation or practices; or
    - (ix) criminal record;that is also personal information; or
  - (b) health information about an individual; or
  - (c) genetic information about an individual that is not otherwise health information;
- or
- (d) biometric information that is to be used for the purpose of automated biometric verification or biometric identification; or
  - (e) biometric templates.<sup>638</sup>

This provision lists personal information which cannot be collected without certain legal conditions, thereby helping to divide personal information into that which can be collected without restriction and that which can be collected only under certain legal

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<sup>635</sup> Leonard, Peter 'Living with Australia's new privacy laws' (2014) 98 *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand* 33, 41.

<sup>636</sup> *Privacy Act 1988* (Cth), as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) sch 1 cl 104; Hagger, Meredith; Liddicoat, Johnathon; Nicol, Dianne and Ries, Nola, 'Time to get serious about privacy policies : the special case of genetic privacy' (2014) 42(1) *Federal Law Review* 149, 150; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 625; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 449.

<sup>637</sup> *Privacy Act 1988* (Cth) sch 1 app 3.

<sup>638</sup> *Privacy Act 1988* (Cth) s 16.

conditions. In this way, the provision helps to balance the right to freedom of information with the right to privacy.

The collection of such information about an individual is not allowed<sup>639</sup> unless:

- the individual consents to the collection of the information and the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities, or one or more of the entity's functions or activities;<sup>640</sup> or
- the collection of the information is required or authorised by or under an Australian law or a court/tribunal order;<sup>641</sup> or
- a permitted general situation<sup>642</sup> exists in relation to the collection of the information by the APP entity;<sup>643</sup> or
- the APP entity is an organization and a permitted health situation<sup>644</sup> exists in relation to the collection of the information by the entity;<sup>645</sup> or
- the APP entity is an enforcement body and the entity reasonably believes that: if the entity is the Immigration Department—the collection of the information is reasonably necessary for, or directly related to, one or more enforcement related activities conducted by, or on behalf of, the entity; or otherwise—the collection of the information is reasonably necessary for, or directly related to, one or more of the entity's functions or activities;<sup>646</sup> or
- the APP entity is a non-profit organization and both of the following apply: the information relates to the activities of the organization; the information relates solely to the members of the organization, or to individuals who have regular contact with the organization in connection with its activities.<sup>647</sup>

The rules also prohibit the collection of personal information by unlawful or unfair means.<sup>648</sup> Personal information may be collected only from the individual, unless 'the individual consents to the collection of the information from someone other than the individual',<sup>649</sup> or the collection is 'required or authorised by or under an Australian law, or a court/tribunal order, to collect the information from someone other than the individual'.<sup>650</sup> The *Privacy Act 1988* (Cth) also forbids an agency from using collected personal information for direct marketing or any purpose other than the primary purpose of its collection,<sup>651</sup> unless:

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<sup>639</sup> For *sensitive information*, see section 6 of the *Privacy Act 1988* (Cth).

<sup>640</sup> *Privacy Act 1988* (Cth) sch 1 app 3.3(a).

<sup>641</sup> *Privacy Act 1988* (Cth) sch 1 app 3.4(a).

<sup>642</sup> For *permitted general situation*, see section 16A of the *Privacy Act 1988* (Cth).

<sup>643</sup> *Privacy Act 1988* (Cth) sch 1 app 3.4(b).

<sup>644</sup> For *permitted general situation*, see section 16A of the *Privacy Act 1988* (Cth).

<sup>645</sup> *Privacy Act 1988* (Cth) sch 1 app 3.4(c).

<sup>646</sup> *Privacy Act 1988* (Cth) sch 1 app 3.4(d).

<sup>647</sup> *Privacy Act 1988* (Cth) sch 1 app 3.4(e).

<sup>648</sup> *Privacy Act 1988* (Cth) sch 1 app 3.

<sup>649</sup> *Privacy Act 1988* (Cth) sch 1 app 3.6(a)(i).

<sup>650</sup> *Privacy Act 1988* (Cth) sch 1 app 3.6(a)(ii).

<sup>651</sup> *Privacy Act 1988* (Cth) sch 1 apps 6-7.

- the organization collected the information from the individual; and the individual would reasonably expect the organization to use or disclose the information for that purpose; and the organization provides a simple means by which the individual may easily request not to receive direct marketing communications from the organization; and the individual has not made such a request to the organization;<sup>652</sup>
- the organization collected the information from the individual and the individual would not reasonably expect the organization to use or disclose the information for that purpose, or someone other than the individual; and either the individual has consented to the use or disclosure of the information for that purpose or it is impracticable to obtain that consent;<sup>653</sup>
- the individual has consented to the use or disclosure of the information for that purpose;<sup>654</sup>
- the organization is a contracted service provider for a Commonwealth contract; and the organization collected the information for the purpose of meeting (directly or indirectly) an obligation under the contract; and the use or disclosure is necessary to meet (directly or indirectly) such an obligation;<sup>655</sup>

These exceptions do not apply to sensitive information about an individual.

This provision names precisely the cases where personal information can be used for direct marketing or any purpose other than the primary purpose of its collection. It helps balance the right to privacy and other interests such as freedom of expression for advertisers, and the interest of the Commonwealth in having its contracts properly performed.

The collecting organization has to take reasonable steps prior to collecting to provide the individual with certain information such as the purpose of the collection, how and which information is collected, how the individual can access and correct the collected information, and how the individual can complain against the agency if it breaches the APPs.<sup>656</sup> The collecting agency is responsible for ensuring that the collected information is accurate, up-to-date, complete, relevant, not misleading and securely stored.<sup>657</sup> Under the *Privacy Act 1988* (Cth), individuals have the right to access their collected personal information and to request agencies holding their personal information to correct the information.<sup>658</sup> In addition, the Act provides individuals the right to complain about breaches of the principles.<sup>659</sup>

To balance the right to personal information with the right to freedom of information, the *Privacy Act 1988* (Cth) provides a number of exemptions including some for journalists.

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<sup>652</sup>*Privacy Act 1988* (Cth) sch 1 app 7.2.

<sup>653</sup>*Privacy Act 1988* (Cth) sch 1 app 7.3.

<sup>654</sup>*Privacy Act 1988* (Cth) sch 1 app 7.4.

<sup>655</sup>*Privacy Act 1988* (Cth) sch 1 app 7.5.

<sup>656</sup>*Privacy Act 1988* (Cth) sch 1 apps 1, 5.

<sup>657</sup>*Privacy Act 1988* (Cth) sch 1 apps10-11.

<sup>658</sup>*Privacy Act 1988* (Cth) sch 1 apps12-13.

<sup>659</sup>*Privacy Act 1988* (Cth) s 36; Addison, Mark 'The Privacy Act: yep - now it applies to you!' (2003) 15(1) *Australian Insolvency Journal* 4, 8; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 630; Taylor, Andrew 'Privacy comes to the private sector' (2001) 28(7)*Brief* 5, 5.

‘An act done or a practice engaged in, by a media organization’<sup>660</sup> is exempt from the *Privacy Act 1988* (Cth) where:

- the act done or the practice is engaged ‘in the course of journalism’;<sup>661</sup> and
- the media organization is publicly committed to observe standards dealing with privacy;<sup>662</sup> and
- the standards have been published in writing.<sup>663</sup>

Small businesses, defined as those which have a maximum annual turnover for the previous financial year of \$3 million,<sup>664</sup> are generally exempt from the operation of the *Privacy Act 1988* (Cth) because they are excluded from the definition of an ‘organization’.<sup>665</sup>

Registered political parties and political representatives engaging in activities connected with elections or participation in ‘another aspect of the political process’ are not subject to the *Privacy Act 1988* (Cth).<sup>666</sup> The *Privacy Act 1988* (Cth) also does not cover personal information which is collected or used for a personal, family or household purpose.<sup>667</sup> Employee records and transfers of information between related bodies corporate are exempt from the operation of the *Privacy Act 1988* (Cth).<sup>668</sup> Certain agencies including the Australian Security Intelligence Organization (ASIO) and the Office of National Assessments (ONA) are also not subject to the *Privacy Act 1988* (Cth).<sup>669</sup> ASIO is a government institution which is established to ‘identify and investigate threats to security, wherever they arise, and to provide advice to protect Australia, its people and its interests’.<sup>670</sup> ONA is an ‘independent body’ that ‘assesses and analyses international political, strategic and economic developments for the Prime Minister and senior ministers in the National Security Committee of Cabinet’.<sup>671</sup>

Both the ABC and SBS are exempt from the operation of the *Privacy Act 1988* (Cth) in relation to programming material and datacast content. This exemption is developed based on the exemption provided in the *FOI Act*. Section 7(1)(c) of the *Privacy Act 1988* (Cth) exempts agencies ‘specified in Division 1 of Part II of Schedule 2 to the *Freedom of Information Act 1982*, other than an act done, or a practice engaged in, in relation to a record in relation to which the agency is exempt from the operation of that Act’.<sup>672</sup> Division 1 of Part II of Schedule 2 to the *Freedom of Information Act 1982* provides agencies exemption in

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<sup>660</sup> A media organization used in the *Privacy Act 1988* (Cth) means an organization which collects, prepares for dissemination, or disseminate to the public material including news, current affairs, information, documentaries; or commentary or opinion on, or analysis of such material: *Privacy Act 1988* (Cth) s 6.

<sup>661</sup> *Privacy Act 1988* (Cth) s 7B(4)(a).

<sup>662</sup> *Privacy Act 1988* (Cth) s 7B(4)(b).

<sup>663</sup> *Privacy Act 1988* (Cth) s 7B(4)(b).

<sup>664</sup> *Privacy Act 1988* (Cth) s 6D(1).

<sup>665</sup> *Privacy Act 1988* (Cth) s 6C.

<sup>666</sup> *Privacy Act 1988* (Cth) ss 6C(1), 7C.

<sup>667</sup> *Privacy Act 1988* (Cth) ss 7B(1), 16E.

<sup>668</sup> *Privacy Act 1988* (Cth) ss 7(1)(ee), 7B(3), 13B(1).

<sup>669</sup> *Privacy Act 1988* (Cth) s 7.

<sup>670</sup> *Overview* (06 August 2015) Australian Security Intelligence Organization <<http://www.asio.gov.au/About-ASIO/Overview.html>>. See the *Australian Security Intelligence Organization Act 1979* (Cth) to know about the functions of the ASIO.

<sup>671</sup> *ONA overview* (06 August 2015) Office of National Assessments <<http://www.ona.gov.au/about-ona.html>>. See the *Office of National Assessments Act 1977* to know about the functions of the ONA.

<sup>672</sup> *Privacy Act 1988* (Cth) s 7(c).

respect of particular documents. This provision provides exemption for ‘Australian Broadcasting Corporation, in relation to its program material and its datacasting content’.<sup>673</sup> The ABC and SBS are exempt from the operation of the *Privacy Act 1988* (Cth) because they are exempt under the *FOI Act*.

### 3.2. Defamation

The law of defamation aims to achieve a balance between the protection of reputation and the promotion of freedom of expression.<sup>674</sup> Dent and Kenyon report that ‘[d]efamation law is commonly said to regulate the publication of material harmful to reputation through balancing two interests — the protection of reputation and the protection of free speech’.<sup>675</sup> This sub-section describes the restrictions imposed in the name of protecting reputation and the exemptions from liability for the damage caused by defamatory publication, to determine how the balance between the right to reputation and freedom of expression is struck. The discussion in the sub-section is primarily based on the *Uniform Acts 2005*.<sup>676</sup>

Defamation developed at common law and was first put in legislative form in Australia in the *Defamation Act 1847* (NSW). After federation, however, the Commonwealth Parliament was not authorized to deal with defamation matters. This power was left to the states so there were different defamation laws in different states and territories in Australia.<sup>677</sup> In 2005- 2006, the national uniform defamation laws were passed by all the state and territory legislatures.<sup>678</sup> However, many basic definitions of defamation, including the elements of the tort, are not addressed directly in the legislation. Therefore, the common law (deriving from the decisions of the various Supreme Courts and the High Court on defamation over the years, especially from the 1990s) has retained its importance.<sup>679</sup> As a result, defamation law in Australia is controlled by a mix of the common law and uniform state and territory legislation.<sup>680</sup> Throughout the discussion that follows, to save space, I will refer only to the provisions of the New South Wales legislation.

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<sup>673</sup> *Freedom of Information Act 1982* (Cth) sch 2 pt2 div 1.

<sup>674</sup> See, eg, Lesley Phippen, ‘Decoding defamation’ (2014) 43(3) *Index on Censorship* 96, 96; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 203; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012), 27; Armstrong, Mark, Lindsay, David and Watterson, Ray, *Media law in Australia* (Oxford University press, 1995)11; Dent, Chris and Kenyon, Andrew T, ‘Defamation law’s chilling effect: a comparative content analysis of Australian and US newspapers’ [2004] 9 (2) *Media and Arts law review* 89, 89.

<sup>675</sup> Dent, Christopher M. and Kenyon, Andrew T, ‘Defamation law’s chilling effect: a comparative content analysis of Australian and US newspapers’ (2004) 9(2) *Media and Arts Law Review* 89, 90.

<sup>676</sup> Despite some remaining differences between the jurisdictions, I use the term ‘the uniform acts’. Specific section numbering from the NSW Act will be referred to as representative of the majority of jurisdictions.

<sup>677</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup>ed, 2012) 28; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 206. *Defamation Act 1974* (NSW); *Wrongs Act 1958* (Vic); *Civil Liability Act 1936* (SA); *Defamation Act 1889* (Qld); *Defamation Act 1957* (Tas); *Defamation Act 1938* (NT); *Defamation Act 1901*(ACT); *Defamation (Amendment) Act 1909* (ACT).

<sup>678</sup> Ryan, Inez, ‘New defamation laws : a guide’ (2006) 18(1) *Australian Press Council News* 1, 1; *Civil Law (Wrongs) Act 2002* (ACT); *Defamation Act 2006* (NT); *Defamation Act 2005* (NSW); *Defamation Act 2005* (Qld); *Defamation Act 2005* (SA); *Defamation Act 2005* (Tas); *Defamation Act 2005* (Vic); *Defamation Act 2005* (WA).

<sup>678</sup> *Defamation Act 2005* (NSW) s25.

<sup>679</sup> Pearson, Mark, *The Journalist’s guide to media law* (Allen & Unwin, 3<sup>rd</sup>ed, 2007) 178-180.

<sup>680</sup> Rodriguez, Andrew, ‘Free political speech and common law qualified privilege in Australia’ (Research Paper A, Flinders University of South Australia, 1998), 3.



Defamation laws provide everyone the right to take action against anyone who publishes defamatory material to protect them from harm to their reputation.<sup>681</sup> In Australia, defamation has been prosecuted as a crime and treated as a tort, but criminal prosecution for defamation is rare.<sup>682</sup>

### **3.2.1. Civil defamation**

Civil defamation is the publication of defamatory matter which affects or tends to damage the reputation of another person.<sup>683</sup> The common law seems to place very substantial restrictions on the free expression of those who wish to discuss the actions of others. In a practical sense, however, these restrictions are lessened by a range of available defences (including under the *Uniform Acts 2005*) which can protect publishers from liability.

For a defamation action to be successful, it must satisfy three elements: the communication has been published to a third person; the communication is about the person complaining of the defamation (the plaintiff); and the communication is defamatory, or carries defamatory imputations.<sup>684</sup>

To resolve a claim for defamation, there are two initial questions regarding defamatory matter which need to be determined. These are firstly, whether or not the matter is able to communicate the alleged imputations to the ordinary, reasonable reader (or listener or viewer); and secondly, whether or not those imputations have the ability to carry a defamatory meaning.<sup>685</sup>

The *Favell v Queensland Newspapers* the High Court explained the process of finding a defamatory imputation in the following terms:

It is well settled that the question as to whether words which are complained of are capable of conveying a defamatory meaning is a question of law, and is therefore one calling for decision by the Court. If the words are so capable then it is a question for the jury to decide as to whether the words do, in fact, convey a defamatory meaning. In deciding whether words are capable of conveying a defamatory meaning the Court will reject those meanings which can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation ... The test of reasonableness guides and directs the Court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense.<sup>686</sup>

Defamatory publications are actionable without proof of actual damage.<sup>687</sup> In addition, the plaintiff is not required to prove that the publication is false,<sup>688</sup> although the

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<sup>681</sup> The Report of the Independent Inquiry into the Media and Media Regulation 2012, 147; Breit, Rhonda, 'Uniform Defamation Laws in Australia: Moving Towards a More 'Reasonable' Privilege?' (2011) 138 *Media International Australia, Incorporating Culture & Policy* 9, 10.

<sup>682</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 207; Potter, Richard, 'Defamation law goes national' (2006) 44(1) *Law Society Journal* 70.

<sup>683</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup>ed, 2012) 27.

<sup>684</sup> Dent, Chris and Kenyon, Andrew T, 'Defamation law's chilling effect: a comparative content analysis of Australian and US newspapers' [2004] 9 (2) *Media and Arts Law Review* 89, 92.

<sup>685</sup> *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at [9] affirming *Jones v Skelton* [1963] SR (NSW) 644 at 650.

<sup>686</sup> *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at [9] affirming *Jones v Skelton* [1963] SR (NSW) 644 at 650.

<sup>687</sup> *Defamation Act 2005* (NSW) s7(2). (Throughout 2005 and into 2006, all the state and territory legislatures in Australia passed a *Defamation Act* in substantially similar form called 'the *Uniform Acts*'.)

truth can be raised by a defendant as a defence.<sup>689</sup> Falsity may be used as a matter which increases the damages to the plaintiff.<sup>690</sup>

The *Uniform Acts 2005* require that '[i]n determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded'.<sup>691</sup> However, Rolph et al state that the assessment of damages for defamation therefore is 'largely a matter of impression' rather than a 'mathematical exercise'.<sup>692</sup> This is because '[i]t is impossible to ascertain exactly how far other people's minds have been affected or to equate damage to reputation to a sum of money'.<sup>693</sup> Further, the Acts limit the amount of damages for non-economic loss available to a successful plaintiff,<sup>694</sup> with an allowance for aggravated damages.<sup>695</sup>

Generally speaking, only natural persons are considered to have the kinds of interests that need protection from defamation law. A corporation cannot claim for reputation damage unless the corporation either is a non-profit organization or has fewer than 10 employees and it is not related to another corporation, and it is not a public body at the time of the publication of defamatory information.<sup>696</sup> Corporation means 'any body corporate or corporation constituted by or under a law of any country (including by exercise of a prerogative right), whether or not a public body'.<sup>697</sup> Public body includes 'a local government body or other governmental or public authority constituted by or under a law of any country'.<sup>698</sup> The employees counted include full-time and part-time employees'.<sup>699</sup> In determining whether a corporation is related to another corporation, s 50 of the *Corporations Act 2001* of the Commonwealth will be applied which states that:

Where a body corporate is:

- (a) a holding company of another body corporate; or
- (b) a subsidiary of another body corporate; or
- (c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.<sup>700</sup>

This provision provides very clear conditions, based on which we can determine whether a corporation can claim for reputational damage. However, this provision cannot

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<sup>688</sup> *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544, 551.

<sup>689</sup> *Defamation Act 2005* (NSW) ss25-26.

<sup>690</sup> *Aldridge v John Fairfax & Sons Ltd* [1984] 2 NSWLR 544, 549; *Waterhouse v Broadcasting Station 2GB Pty Ltd* (1985) 1 NSWLR 58, 77; *Packer v Australian Broadcasting Corporation* (1993) 116 FLR 306, 312.

<sup>691</sup> *Defamation Act 2005* (NSW) s 34.

<sup>692</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 330.

<sup>693</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 113.

<sup>694</sup> *Defamation Act 2005* (NSW) s 35(1).

<sup>695</sup> *Defamation Act 2005* (NSW) s 35(2).

<sup>696</sup> *Defamation Act 2005* (NSW) ss 9 (1)-(2).

<sup>697</sup> *Defamation Act 2005* (NSW) s 9(6).

<sup>698</sup> *Defamation Act 2005* (NSW) s 9(6).

<sup>699</sup> *Defamation Act 2005* (NSW) s 9(3).

<sup>700</sup> *Corporations Act 2001* (Cth) s 50.

help explain why a corporation which has fewer than 10 employees and is not related to another corporation has the right to protect its reputation while others do not have that right.

An unincorporated association such as social, sporting, or charitable club is unable to maintain an action for defamation.<sup>701</sup> Neither can elected bodies, which include elected local authorities and elected local councils.<sup>702</sup>

By contrast, a trade union can bring an action with respect to accusations concerning the way in which it conducts its affairs.<sup>703</sup>

Representatives of deceased persons cannot sue for defamation irrespective of whether the publication was made before or after the defamed person's death.<sup>704</sup> A person who has died since publishing the defamatory matter is not liable for the publication.<sup>705</sup> Every person who contributes to the publication of defamatory matter must be responsible for the publication, regardless of the degree of involvement in it.<sup>706</sup> Liability for publication also extends beyond the author or journalist to include people who contribute to publication such as editors, publishers, printers, proprietors and distributors in the case of printed media; or editors, producers, executive producers and proprietors in the case of a radio or television broadcast.<sup>707</sup> Legal responsibility may also extend to situations where there has been a failure to act to stop a publication by another, such as the failure of a club to delete a defamatory notice attached on one of its noticeboards by a member.<sup>708</sup>

As mentioned above, defamation law aims to balance two interests, namely the protection of reputation and freedom of expression.<sup>709</sup> The *Uniform Acts* aim to ensure that 'the law of defamation does not place unreasonable limits on freedom of expression, particularly in relation to the publication and discussion of matters of public interest and public importance'.<sup>710</sup> Defamation law is also 'said to protect publications on matters of public interest through a range of defences'.<sup>711</sup> In this connection, the *Uniform Acts* provide a numbers of defences to protect people who have published defamatory statements. Those who publish defamatory material are exempted from liability for any damages caused by the publication if they prove that the publication is covered by one of the defences.

The *Uniform Acts* make provision for nine defences:

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<sup>701</sup> *Cother v Jonh Faifax and Sons Pty Ltd* (1974) 64 WN (NSW) 154.

<sup>702</sup> See, eg, *the Uniform Acts 2005*, s9; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 55.

<sup>703</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 55.

<sup>704</sup> *Defamation Act 2005* (NSW) s10.

<sup>705</sup> *Defamation Act 2005* (NSW) s10(b).

<sup>706</sup> *Webb v Bloch* (1928) 41 CLR 331 at 363-364.

<sup>707</sup> *Webb v Bloch* (1928) 41 CLR 331 at 359; *Thiess v TCN Channel Nine Pty Ltd* [1994] 1 Qd R 156, 194.

<sup>708</sup> *Byrne v Deane* [1937] 1 KB 818; *Urbanchich v Drummoyno Municipal Council* (1991) Aust Torts Reports 81-127.

<sup>709</sup> See, eg, Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 203; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 27; Armstrong, Mark, Lindsay, David and Watterson, Ray, *Media law in Australia* (Oxford University press, 1995),11; Dent, Chris and Kenyon, Andrew T, 'Defamation law's chilling effect: a comparative content analysis of Australian and US newspapers' [2004] 9 (2) *Media and Arts law review* 89, 89; Breit, Rhonda, 'Uniform Defamation Laws in Australia: Moving Towards a More 'Reasonable' Privilege?' (2011) 138 *Media International Australia, Incorporating Culture & Policy* 9, 10.

<sup>710</sup> *Defamation Act 2005* (NSW) s 3.

<sup>711</sup> Kenyon, Andrew T and Walker, Sophie, 'The cost of losing the code: Historical protection of public debate in Australian defamation law' (2014) 38(2) *Melbourne University Law Review* 554, 555.

- justification;<sup>712</sup>
- contextual truth;<sup>713</sup>
- absolute privilege;<sup>714</sup>
- publication of public documents;<sup>715</sup>
- fair report of proceedings of public concern;<sup>716</sup>
- qualified privilege;<sup>717</sup>
- honest opinion;<sup>718</sup>
- innocent dissemination;<sup>719</sup> and
- triviality or unlikelihood of harm.<sup>720</sup>

To escape liability for defamation, the defendant bears the burden of establishing the elements of any defence.<sup>721</sup>

The defences help protect people who have published defamatory statements by exempting them from liability for any damages. However, defendants have to meet certain criteria to establish any of the defences. The Acts therefore balance the right to reputation and the protection of other interests such as right to publish and discuss matters of public interest and public importance. In the defence of justification, the defendant need only prove the substantial truth of the publication. 'Substantially true' is defined as 'true in substance or not materially different from the truth'.<sup>722</sup> Based on the meaning of substantial truth, the defence of justification is not defeated because of minor inaccuracies.<sup>723</sup>

To have exemption from defamation based on contextual truth, the defendant must prove two elements. Firstly, 'the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations (contextual imputations) that are substantially true'.<sup>724</sup> Secondly, the reputation of the plaintiff is not further damaged because of the defamatory imputation.<sup>725</sup> Butler and Rodrick comment that '[t]his defence allows a defendant in such a case to raise and justify the more serious imputation in order to establish that the plaintiff's reputation has not actually been damaged as alleged by the plaintiff in seeking to confine the complaint to the less serious imputation selected by him or her'.<sup>726</sup>

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<sup>712</sup>*Defamation Act 2005* (NSW) s 25.

<sup>713</sup>*Defamation Act 2005* (NSW) s 26.

<sup>714</sup>*Defamation Act 2005* (NSW) s 27.

<sup>715</sup>*Defamation Act 2005* (NSW) s 28.

<sup>716</sup>*Defamation Act 2005* (NSW) s 29.

<sup>717</sup>*Defamation Act 2005* (NSW) s 30.

<sup>718</sup>*Defamation Act 2005* (NSW) s 31.

<sup>719</sup>*Defamation Act 2005* (NSW) s 32.

<sup>720</sup>*Defamation Act 2005* (NSW) s 33.

<sup>721</sup>*Defamation Act 2005* (NSW) s 22.

<sup>722</sup>*Civil Law (Wrongs) Act 2002* (ACT) s116; *Defamation Act 2006* (NT) s3; *Defamation Act 2005* (NSW) s4; *Defamation Act 2005* (Qld), sch 5 s4(1); *Defamation Act 2005* (SA) s4; *Defamation Act 2005* (Tas) s4; *Defamation Act 2005* (Vic) s4; *Defamation Act 2005* (WA) s4.

<sup>723</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 281.

<sup>724</sup>*Defamation Act 2005* (NSW) s 26(a).

<sup>725</sup>*Defamation Act 2005* (NSW) s26(b).

<sup>726</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 66.

The defence of absolute privilege requires the defendant to prove that he or she published the defamatory matter on an 'occasion of absolute privilege',<sup>727</sup> for example during court proceedings or in parliament.

To have protection under the defence of fair report of proceeding of public concern, the defendant has to establish two elements. Firstly, the matter published was an earlier published report or it was a fair copy of, summary of or extract from the earlier published report. Secondly, the earlier published report was not, to the defendant's knowledge, unfair.<sup>728</sup>

To get immunity from defamation based on the defence of publication of public documents, the defendant must prove that the matter published is a part of a public document, a fair copy of, summary of or extract from a public document.<sup>729</sup>

To be successful in qualified privilege, the defendant should prove that the readers had an interest in a certain subject and that the defendant published the statement in the course of giving information on that subject, and that the publisher's conduct was reasonable.<sup>730</sup> Unlike the defence of absolute privilege, the defendant may not be immune from the responsibility based on the qualified privilege if the plaintiff proves that 'the publication was actuated by malice'.<sup>731</sup> To determine that there has been malice, the plaintiff must prove that the defendant's purpose was unconnected to the occasion for the privilege and it was the dominant reason for the publication.<sup>732</sup>

The defendant will be protected from responsibility for defamation based upon the defence of honest opinion if the defendant proves three elements. Firstly, the defendant published his/her opinion. Secondly, the opinion related to a matter of public interest. Thirdly, the opinion is based on 'proper material'.<sup>733</sup> Proper material is defined as material that is substantially true or privileged.<sup>734</sup>

To succeed in the innocent dissemination defence, the defendant must meet three requirements. The first is that the defendant published the matter simply in the capacity of a subordinate distributor. The second is that the defendant did not know and did not have capacity to know that the publication contained defamatory matter. The third is that the defendant's lack of knowledge was not because of any negligence.<sup>735</sup>

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<sup>727</sup> *Defamation Act 2005* (NSW) s27. Occasions of absolute privilege is list at section 27 (2) of the *Uniform Acts 2005*.

<sup>728</sup> *Defamation Act 2005* (NSW) s29(2).

<sup>729</sup> *Defamation Act 2005* (NSW) s28(1).

<sup>730</sup> *Defamation Act 2005* (NSW) s30; Breit, Rhonda, 'Uniform Defamation Laws in Australia: Moving Towards a More 'Reasonable' Privilege?' (2011) 138 *Media International Australia, Incorporating Culture & Policy* 9, 11, 12.

<sup>731</sup> *Defamation Act 2005* (NSW) s 22(2); Mark Pearson, Mark Polden, *The Journalist's Guide to Media Law* (Crows Nest, NSW Allen & Unwin, 2015) 265. 'Implied malice' is a term sometimes used at common law to denote a false and defamatory statement: *Roberts v Bass* (2002) 212 CLR 1 at 197.

<sup>732</sup> See, eg, *Roberts v Bass* (2002) 212 CLR 1 at 41; *Horrocks v Lowe* [1975] AC 135 at 149.

<sup>733</sup> *Defamation Act 2005* (NSW) s31.

<sup>734</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 106.

<sup>735</sup> *Defamation Act 2005* (NSW) s32.

To make out the defence of triviality, the defendant must prove that the situation of publication were such that the person defamed is unlikely to suffer harm.<sup>736</sup>

In addition, the *BSA* provides 'internet content hosts' and 'internet service providers' with exemption from liability for defamatory information in certain circumstance when they prove that they are 'not aware of the nature of the internet content'.<sup>737</sup> These exemptions include:

- an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content;<sup>738</sup> or
- an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host;<sup>739</sup> or
- an internet service provider to liability (whether criminal or civil) in respect of carrying particular internet content in a case where the service provider was not aware of the nature of the internet content;<sup>740</sup> or
- an internet service provider to monitor, make inquiries about, or keep records of, internet content carried by the provider.<sup>741</sup>

For the purpose of discussion in chapter 7, I use the term 'internet intermediaries' to replace both internet content hosts and internet service providers. "Internet intermediaries" is a broad term that refers to the entities that enable people to connect to the internet and transmit content. There are a number of different types of intermediaries, including internet access providers, web hosting providers, social media platforms and search engines'.<sup>742</sup> Leonard has explained that '[t]he broad term "internet intermediary" is commonly used to cover the following: carriage service providers, such as Telstra or Optus; content hosts, such as Google or Yahoo!; and search service and application service providers, such as Facebook, Flickr and YouTube'.<sup>743</sup>

### **3.2.2. Criminal defamation**

Civil defamation is regulated by uniform defamation laws while criminal defamation is not, and criminal defamation legislation varies between the states and territories.<sup>744</sup> The definition of criminal defamation in most jurisdictions, however, is similar. A person

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<sup>736</sup>*Defamation Act 2005* (NSW) s33.

<sup>737</sup>*Broadcasting Services Act 1982* (Cth) sch 5 S 91.

<sup>738</sup>*Broadcasting Services Act 1982* (Cth) sch 5 S 91(1)(a).

<sup>739</sup>*Broadcasting Services Act 1982* (Cth) sch 5 S 91(1)(b).

<sup>740</sup>*Broadcasting Services Act 1982* (Cth) sch 5 S 91(1)(c).

<sup>741</sup>*Broadcasting Services Act 1982* (Cth) sch 5 S 91(1)(d).

<sup>742</sup>*Internet Intermediaries: Dilemma of Liability Q and A* (6 October 2014) Article 19 <<http://www.article19.org/resources.php/resource/37243/en/internet-intermediaries:-dilemma-of-liability-q-and-a->>.

<sup>743</sup>Peter Leonard, 'Safe Harbors in Choppy Waters-Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2010) 3 (2) *Journal of International Media and Entertainment Law* 221, 226.

<sup>744</sup>Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 208.

commits an offence of criminal defamation if he/she publishes defamatory information about another living person (victim) in the knowledge that the information is false, or regardless of whether or not the information is false. In addition, the person must intend in publishing the information to seriously harm the victim or any other person, regardless of whether or not such harm has happened.<sup>745</sup>

In contrast to civil liability which comes from defamatory publications which harm personal reputation, criminal liability is a result of publications which have an impact upon the community, such as publications which may endanger the public peace.

It is, however, similar to civil defamation in that most jurisdictions require that the defamatory matter must have been published to a third person at least.<sup>746</sup> In addition, all jurisdictions other than Victoria require that the defamatory matter must relate to a living person.<sup>747</sup> Moreover, the publication is not required to be in permanent form.<sup>748</sup> Also like civil defamation, a criminal defamation prosecution is not required to prove that the publication was false or the defendant knew that the publication was false or the defendant intended to defame.<sup>749</sup> Further, to allow freedom of expression, the same defences apply to criminal defamation as to civil defamation.<sup>750</sup> These defences balance the right to reputation, freedom of expression and public interest in the free flow of information and in the discovery of the truth.

### 3.3. Opposition and dissent

Opposition laws aim to balance between the protection of freedom of expression and national security.<sup>751</sup> This sub-section mainly discusses the *Criminal Code Act 1995* (Cth) to examine how the right to live in a peaceful society or right to freedom from violence is safeguarded in the comparison with the right to freedom of expression.

According to the *Criminal Code Act 1995* (Cth), a person commits an offence if he/she intentionally urges force or violence against the Constitution or the 'Government' or its processes.<sup>752</sup> The 'Government' for these purposes includes the Commonwealth Government, the Government of a State or a Territory; or the legal authority of the Commonwealth Government.<sup>753</sup> The processes of the Government include processes for an

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<sup>745</sup> *Crimes Act 1900* (ACT) s 439(1); *Crimes Act 1900* (NSW) s 529(3); *Criminal Code Act 1899* (Qld) s 365(1); *Criminal Law Consolidation Act 1935* (SA) s 257(1); *Criminal Code Act 1924* (Tas) s 196(1); *Criminal Code* (WA) s 345(1).

<sup>746</sup> *Crimes Act* (ACT) s 439(8); *Crimes Act 1900* (NSW) s 529(11); *Criminal Code* (NT) s 203; *Criminal Code 1899* (Qld) s 365(8); *Criminal Code 1924* (Tas) s 196(7); *Criminal Code 1913* (WA) s 345(7).

<sup>747</sup> *Crimes Act* (ACT) s 439(1); *Crimes Act 1900* (NSW) s 529(3); *Criminal Code* (NT) s 203; *Criminal Code 1899* (Qld) s 365(1); *Criminal Code 1924* (Tas) s 196(1); *Criminal Code 1913* (WA) s 345(1); *Criminal Law Consolidation Act 1935* (SA) s 257(1).

<sup>748</sup> *Wrongs Act 1958* (Vic) s 10.

<sup>749</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 127.

<sup>750</sup> *Crimes Act* (ACT) s 439(2); *Crimes Act 1900* (NSW) s 529(4); *Criminal Code* (NT) s 203; *Criminal Code 1899* (Qld) s 365(3); *Criminal Code 1924* (Tas) s 196(3); *Criminal Code 1913* (WA) s 345(3); *Criminal Law Consolidation Act 1935* (SA) s 257(2).

<sup>751</sup> Connors, Kate, 'Review of federal sedition laws' (2006) 88 *Reform* 60, 62.

<sup>752</sup> *Criminal Code Act 1995* (Cth) s 80.2.

<sup>753</sup> *Criminal Code Act 1995* (Cth) s 80.2(1).

election of a member or members of a House of the Parliament or a referendum.<sup>754</sup> These offences are also extended to recklessness.<sup>755</sup>

Under the *Criminal Code Act 1995* (Cth), intentionally urging another person or group to against a targeted group or a targeted person by using force or violence is also an offence.<sup>756</sup> A targeted group is a group 'distinguished by race, religion, nationality, national or ethnic origin or political opinion'.<sup>757</sup> A targeted person is a person whom the offender believes to be a member of a targeted group.<sup>758</sup>

To protect free expression, the *Criminal Code Act 1995* (Cth) establishes offenders with immunity from responsibility for seditious offences for certain acts done in good faith.<sup>759</sup> Under section 80.3 of the *Criminal Code Act 1995* (Cth), a person is exempted from liability under the above provisions if he/she:

- tries in good faith to show an error done by certain key government officials in any their counsels, policies or actions;<sup>760</sup>
- points out in good faith a mistake or fault with a view to reforming that mistake or fault in a government (of the Commonwealth, a State or a Territory), the Constitution, legislation (of the Commonwealth, a State, a Territory or another country), or the administration of justice (of or in the Commonwealth, a State, a Territory or another country);<sup>761</sup>
- urges in good faith another person to try to lawfully obtain a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country;<sup>762</sup>
- points out in good faith any issues that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters;<sup>763</sup>
- does anything in good faith in connection with an industrial dispute or an industrial matter;<sup>764</sup>
- publishes in good faith a report or commentary about a matter of public interest.<sup>765</sup>

Similarly to the provisions of the *Uniform Acts* on protection of reputation discussed above, s 80.3 provides a range of defences to any person whose publication would otherwise

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<sup>754</sup>*Criminal Code Act 1995* (Cth) s 80.2(3).

<sup>755</sup>*Criminal Code Act 1995* (Cth) ss 80.2 (2), (4).

<sup>756</sup>*Criminal Code Act 1995* (Cth) ss 80.2A, 80.2B.

<sup>757</sup>*Criminal Code Act 1995* (Cth) s 80.2A(1)(c).

<sup>758</sup>*Criminal Code Act 1995* (Cth) s 80.2B(1)(c).

<sup>759</sup>*Criminal Code Act 1995* (Cth) s 80.3.

<sup>760</sup>*Criminal Code Act 1995* (Cth) s 80.3(a).

<sup>761</sup>*Criminal Code Act 1995* (Cth) s 80.3(b).

<sup>762</sup>*Criminal Code Act 1995* (Cth) s 80.3(c).

<sup>763</sup>*Criminal Code Act 1995* (Cth) s 80.3(d).

<sup>764</sup>*Criminal Code Act 1995* (Cth) s 80.3(e).

<sup>765</sup>*Criminal Code Act 1995* (Cth) s 80.3(f).



be a seditious offence. However, the provision also balances the right to freedom of expression with other interests when it names exactly conditions of the exemptions, so no one can use the exemptions to protect an unfair publication which damages the right to live in a peaceful society or the right to freedom from violence.

No definition of 'good faith' is provided in the statute. However, the term has been interpreted in cases relating to the application of the exemptions provided at s 18D of the *Racial Discrimination Act 1975* (Cth). This section states that the provision against offensive behaviour because of race, colour or national or ethnic origin:

does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
  - (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.<sup>766</sup>

This list of the cases where an act can be seen as done reasonably and in good faith could be adopted under the *Criminal Code Act 1995* (Cth) to define whether a seditious publication is made in good faith. Doing so would help reduce the shortcoming of the *Act*. Section 18D of the *Racial Discrimination Act 1975* (Cth) therefore can be examined to become a model for Vietnamese law.

In *Bropho v Human Rights and Equal Opportunity Commission* French J of the Federal Court (as he then was) said that under those provisions, a person will act in good faith if the person is honest, has regard to the public mischief of his/her behaviour and takes due care to minimise or avoid the risk of damage and the degree of damage likely to result from the acts or words when he/she is exercising the right to freedom of expression.<sup>767</sup>

#### 4. Protection of journalists' access to information

Because information published is proportional to information collected, the protection of journalists' right of access to information is important for freedom of expression. This section discusses provisions covering the freedom of information, whistleblower protection and the protection of journalists' sources.

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<sup>766</sup>*Racial Discrimination Act 1975* (Cth) s 18D.

<sup>767</sup>*Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 at 133.

#### 4.1. Freedom of information and official secrets

Similar to free expression, free access to information is ‘the foundation of autonomy, both individual and societal’.<sup>768</sup> The *FOI Act* is developed on the principle of open government.<sup>769</sup> The Act protects the right to freedom of information in two ways, as stated in the current objects clause of the Act: requiring government agencies to publish certain information, and providing members of the public with the right to obtain access to government-held information.<sup>770</sup> Access to government information is an essential requirement for the general population to be informed about democratic processes and exercise their power over the control of government authority.<sup>771</sup> As Paterson points out, ‘the media is unable to carry out its functions without information’.<sup>772</sup> Therefore the enforceable right of access to information held by government that the Australian law provides is of great assistance to the media. On the other hand, to protect essential public and private interests, the Australian government places some restrictions on the right to access government-held information. In some cases access to the document is prevented completely, and in others the government agency may be required to provide an applicant an edited copy of the document from which any exempt matter has been deleted.<sup>773</sup>

Although freedom of information laws have been enacted throughout Australia,<sup>774</sup> this sub-section focusses on the Commonwealth legislation and variations in the states will be noted where appropriate.

Freedom of information (FOI) legislation is concerned primarily with the right to access government-held information.<sup>775</sup> Under Australian freedom of information legislation, every individual is permitted to access unpublished documents which are in the possession of government agencies, and official documents of Ministers, except certain exempt documents.<sup>776</sup> Government information includes documents held by government agencies, documents that are in the agencies' possession, and documents controlled by the agencies. Those documents can be either created by or received in the agencies.<sup>777</sup> Government agencies are defined as departments and prescribed authorities which are bodies established

<sup>768</sup>Alex Byrne, 'Freedom of Access to Information and Freedom of Expression in a Pluralistic World' (1999) 25(4) *IFLA Journal* 223, 231.

<sup>769</sup>Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), 548 [16.4].

<sup>770</sup>*Freedom of Information Act 1982* (Cth) ss 3(1), 11.

<sup>771</sup>See, eg, Murray, Simon, 'Freedom of information reform: does the new public interest test for conditionally exempt documents signal the death of 'the Howard factors'?' (2012) 31(1) *University of Tasmania Law Review* 58, 58; Adrienne Muir and Charles Oppenheim, 'National Information Policy developments worldwide IV: copyright, Freedom of Information and data protection' (2002) 28(6) *Journal of Information Science* 467, 467; Paterson, Moira, 'The media and access to government-held information in a democracy' (2008) 8(1) *Oxford University Commonwealth Law Journal* 3,3.

<sup>772</sup>Paterson, Moira, 'The media and access to government-held information in a democracy' (2008) 8(1) *Oxford University Commonwealth Law Journal* 3, 3.

<sup>773</sup>*Freedom of Information Act 1982* (Cth) s 22.

<sup>774</sup>*Freedom of Information Act 1989* (NSW); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1992* (Qld) (Replaced by the *Right to Information Act 2009* (Qld)); *Freedom of Information 1992* (WA); *Information Act 2002* (NT).

<sup>775</sup>Adrienne Muir and Charles Oppenheim, 'National Information Policy developments worldwide IV: copyright, Freedom of Information and data protection' (2002) 28(6) *Journal of Information Science* 467, 467.

<sup>776</sup>*Freedom of Information Act 1982* (Cth) s11; *Freedom of Information Act 1989* (ACT) s 10; *Freedom of Information Act 1989* (NSW) ss 16, 35; *Information Act 2002* (NT) s 15; *Right to Information Act 2009* (Qld) s 23; *Freedom of Information Act 1991* (SA) s 12; *Freedom of Information Act 1991* (Tas) s 7; *Freedom of Information Act 1982* (Vic) s13; *Freedom of Information 1992* (WA) s 10.

<sup>777</sup>*Freedom of Information Act 1982* (Cth) s 4; *Freedom of Information Act 1989* (NSW) s 6; *Freedom of Information Act 1989* (ACT), Dictionary; *Right to Information Act 2009* (Qld) s 12; *Freedom of Information 1992* (WA), Glossary cl 4; *Freedom of Information Act 1982* (Vic) s5.

for a public purpose.<sup>778</sup> At state level, government bodies also include local government authorities.<sup>779</sup>

Applications for access to documents do not need to be in a specific format or on a special form. However, they must be in writing and disclose that the application is for the purposes of the *FOI Act*. Applications also have to give enough information to enable the officer of the agency or the responsible Minister to identify the documents being sought, as well as providing contact details for sending notices under the Act to the applicant.<sup>780</sup> The ministers and agencies must allow the applicant access to the document in response to a freedom of information request, unless it is an exempt document.<sup>781</sup>

To ensure that the public are well informed, the *FOI Act* also establishes an Information Publication Scheme (IPS) for government bodies. This provision identifies categories of information that government bodies have to publish online and make sure that the material published is accurate, up-to-date and complete.<sup>782</sup> Specified categories of information to be published include: details of the structure and functions of the agency including the agency's decision making powers and other powers which influence members of the public; details of the agency's statutory appointments; the annual reports of the agency; details of consultation arrangements for members of the public to comment on specific policy proposals; and officers' contact details for seeking access to information provided by the agency.<sup>783</sup>

To make sure that agencies follow the *FOI Act* provisions covering publishing information, the Office of the Australian Information Commissioner (OAIC) is authorized to work with agencies to review the operation of IPS of each agency every five years. The OAIC can also publish guidelines about the IPS and may also determine certain kinds of information which need not be published under the IPS. In addition, every person has the right to complain to the Australian Information Commissioner about the IPS management of agencies.<sup>784</sup>

However, freedom of information must be balanced against other interests that are protected by restricting access to information.<sup>785</sup> This is achieved in FOI legislation by means of numerous exemptions. Blackstock and Oppenheim have commented that the exemptions are 'mainly motivated by the need to have protection from the potential harmful effects on national security, as well as on individuals'.<sup>786</sup>

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<sup>778</sup> *Freedom of Information Act 1982* (Cth) s4.

<sup>779</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 719.

<sup>780</sup> *Freedom of Information Act 1982* (Cth) s15(2).

<sup>781</sup> *Freedom of Information Act 1982* (Cth) ss11(A)(3)-(6).

<sup>782</sup> *Freedom of Information Act 1982 amended 2013*(Cth) s7(A).

<sup>783</sup> *Freedom of Information Act 1982* (Cth) s8.

<sup>784</sup> *Freedom of Information Act 1982* (Cth) ss 7(A), 8(F), 9.

<sup>785</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009), 548 [16.6].

<sup>786</sup> Marlene A. Blackstock and Charles Oppenheim, 'Legal issues for information professionals, Part V: Freedom of information' (1999) 25(4) *Journal of Information Science* 249, 250.

The categories of exemptions significantly changed under the *Freedom of Information (Reform) Act 2010 (Cth)*. Particularly, the Act reduced the number of complete exemptions and moved a number of other exemptions into the list of conditional exemptions.<sup>787</sup> The Act also does not apply to any of the information held by certain agencies, regardless of its nature. The agencies include Aboriginal Land Councils and Land Trusts; the Auditor-General; the Australian Secret Intelligence Service; the Australian Security Intelligence Organization; the Inspector-General of Intelligence and Security; the National Workplace Relations Consultative Council; the Office of National Assessments; the Parliamentary Budget Office; the Parliamentary Budget Officer; the Australian Geospatial-Intelligence Organization; the Australian Signals Directorate; and the Defence Intelligence Organization.<sup>788</sup> For agencies which are subject to the *FOI Act*, some documents may be exempted from disclosure which will be discussed below.

There are ten exemptions and 8 conditional exemptions which may be used to deny access to applicants.<sup>789</sup> The *FOI Act* authorizes government agencies to refuse to release material that comes within absolute exemptions.<sup>790</sup> In relation to conditional exemptions, government agencies have the additional power to refuse to confirm the existence of the documents if releasing the information would, on balance, be against the public interest at the relevant time.<sup>791</sup>

The ten exemptions are:

- documents affecting national security, defence or international relations;<sup>792</sup>
- Cabinet documents;<sup>793</sup>
- documents affecting the enforcement of law and the protection of public safety;<sup>794</sup>
- documents to which the secrecy provisions of certain enactments apply;<sup>795</sup>
- documents subject to legal professional privilege and to judicial functions;<sup>796</sup>
- documents containing material obtained in confidence;<sup>797</sup>
- Parliamentary Budget Office documents;<sup>798</sup>
- documents disclosure of which would be contempt of Parliament or contempt of court;<sup>799</sup>

<sup>787</sup> Murray, Simon, 'Freedom of information reform : does the new public interest test for conditionally exempt documents signal the death of 'the Howard factors'?' (2012) 31(1) *University of Tasmania Law Review* 58, 59, 60.

<sup>788</sup> *Freedom of Information Act 1982 (Cth)* s 7, sch 2 pt 1.

<sup>789</sup> *Freedom of Information Act 1982 (Cth)* ss 33-47J.

<sup>790</sup> *Freedom of Information Act 1982 (Cth)* ss 25, 34, 35; *Freedom of Information Act 1989 (ACT)* s 24; *Information Act (NT)* s 60(2); *Right to Information Act 2009 (Qld)* s 55; *Freedom of Information Act 1991 (SA)* s 23(3); *Freedom of Information Act 1982 (Vic)* s 27(2)(b); *Freedom of Information Act 1992 (WA)* s 31.

<sup>791</sup> *Freedom of Information Act 1982 (Cth)* ss 25, 34, 35; *Freedom of Information Act 1989 (ACT)* s 24; *Information Act (NT)* s 60(2); *Right to Information Act 2009 (Qld)* s 55; *Freedom of Information Act 1991 (SA)* s 23(3); *Freedom of Information Act 1982 (Vic)* s 27(2)(b); *Freedom of Information Act 1992 (WA)* s 31.

<sup>792</sup> *Freedom of Information Act 1982 (Cth)* s 33.

<sup>793</sup> *Freedom of Information Act 1982 (Cth)* s 34.

<sup>794</sup> *Freedom of Information Act 1982 (Cth)* s 37.

<sup>795</sup> *Freedom of Information Act 1982 (Cth)* s 38.

<sup>796</sup> *Freedom of Information Act 1982 (Cth)* s 42.

<sup>797</sup> *Freedom of Information Act 1982 (Cth)* s 45.

<sup>798</sup> *Freedom of Information Act 1982 (Cth)* s 45A.

- documents disclosing trade secrets or commercially valuable information;<sup>800</sup> and
- electoral rolls and related documents.<sup>801</sup>

The eight conditional exemptions are:

- documents affecting Commonwealth-State relations;<sup>802</sup>
- internal working documents relating to deliberative processes;<sup>803</sup>
- documents affecting the financial or property interests of the Commonwealth;<sup>804</sup>
- documents concerning certain operations of agencies (which, if revealed, could reasonably be expected to have a substantial negative effect on examination procedures and personnel management operations of the agency);<sup>805</sup>
- documents affecting personal privacy or personal affairs;<sup>806</sup>
- documents affecting business affairs;<sup>807</sup>
- documents contain information relating to research undertaken by Commonwealth Scientific and Industrial Research Organization or the Australian National University;<sup>808</sup> and
- documents affecting the national, state or territory economies.<sup>809</sup>

Similarly to the provisions of the *Uniform Acts* and the *Criminal Code Act 1995 (Cth)*, this provision names absolute and conditional exemptions which help limit unreasonable refusals to supply information. The provision therefore helps balance the right of members of the public to know against other interests such as national security, national defence, public safety, official secrets, business secrets, and private secrets.

All Australian Government agencies are exempted from the operation of the FOI Act in relation to intelligence agency documents and defence intelligence documents.<sup>810</sup> Ministers are subject only to requests for ‘official documents of a minister’ which is defined as ‘a document in a minister’s possession in their capacity as a minister, being a document that relates to the affairs of an agency or Department of State’.<sup>811</sup> This excludes personal documents or documents of political parties, or documents about the Minister’s electoral affairs. In addition, agencies or ministers may refuse to give access to a document if they are

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<sup>799</sup> *Freedom of Information Act 1982* (Cth) s 46.

<sup>800</sup> *Freedom of Information Act 1982* (Cth) s 47.

<sup>801</sup> *Freedom of Information Act 1982* (Cth) s 47A.

<sup>802</sup> *Freedom of Information Act 1982* (Cth) s 47B.

<sup>803</sup> *Freedom of Information Act 1982* (Cth) s 47C.

<sup>804</sup> *Freedom of Information Act 1982* (Cth) s 47D.

<sup>805</sup> *Freedom of Information Act 1982* (Cth) s 47E.

<sup>806</sup> *Freedom of Information Act 1982* (Cth) s 47F.

<sup>807</sup> *Freedom of Information Act 1982* (Cth) s 47G.

<sup>808</sup> *Freedom of Information Act 1982* (Cth) s 47H.

<sup>809</sup> *Freedom of Information Act 1982* (Cth) s 47J.

<sup>810</sup> *Freedom of Information Act 1982* (Cth) ss 7(2A), 7(2C).

<sup>811</sup> *Freedom of Information Act 1982* (Cth) ss 4(1), 11(1B).

satisfied that the work related to processing the application would considerably and unreasonably divert the agency's resources from its other operations.<sup>812</sup>

Further, under the *Criminal Code Act 1995* (Cth), it is an offence if a person communicates or makes available information which concerns the security or defence of the Commonwealth.<sup>813</sup> This prevents people from accessing information created, collected or received by government on their behalf and these provisions also limit the free expression of people holding secret information. The responsibility to keep information secret applies to both Commonwealth officers and third parties including the media in subsequent disclosure of official secrets.<sup>814</sup>

To safeguard the national security and the public safety, the *Criminal Code Act 1995* (Cth) states that it is an offence to communicate or make available information which concerns the defence or security of the Commonwealth, or of another country with the intention of prejudicing the Commonwealth's defence or security, or of giving an advantage to other countries' defence or security.

In addition, publishing matter which might identify officers, agents or staff members of the Australian Security and Intelligence Organization (ASIO) officer or the Australian Secret Intelligence Service without the consent of the relevant Minister or the Director-General of Security is an offence.<sup>815</sup>

As discussed above, people can access government-held information in two ways. Firstly, people can send their requests to government agencies and information will be disclosed based on their request. Secondly, people can access information which is provided through IPS.<sup>816</sup> The right to freedom of information has been expanded, especially since 2010 when the *FOI Act* was amended.<sup>817</sup> The Australian government reduced the barriers to access to information, for example by removing charges, and recasting and narrowing exemptions.<sup>818</sup> In fact, the government has published more information than ever before, especially information relating to policy or decision-making concerning rights and entitlements.<sup>819</sup> These changes provide people greater access to government-held information.<sup>820</sup> However, freedom of information is not absolute. It is balanced against other interests including national security and public interests.

## 4.2. Whistleblower protection

Freedom of information is not the sole source of access to government information. The media also have access to published information that others may wish to keep

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<sup>812</sup>*Freedom of Information Act 1982* (Cth) s 24.

<sup>813</sup>*Criminal Code Act 1995* (Cth) s 91(1).

<sup>814</sup>*Criminal Code Act 1995* (Cth) s 79.

<sup>815</sup>*Australian Security Intelligence Organization Act 1979* (Cth) s 92; *Intelligence Service Act 2001* (Cth) s 41.

<sup>816</sup>McMillan, John, 'Government information - a changing world' (2011) 27(4) *IQ: The RIM Quarterly* 12, 13, 14.

<sup>817</sup>Popple, James, 'The OAIC FOI experiment' (2014) 78 *AIAL Forum* 31, 31.

<sup>818</sup>Popple, James, 'The OAIC FOI experiment' (2014) 78 *AIAL Forum* 31, 31, 32; Timmins, Peter, 'Dusting off the FOI file' (2012) 108 *Precedent* 40, 44.

<sup>819</sup>Timmins, Peter, 'Dusting off the FOI file' (2012) 108 *Precedent* 40, 46.

<sup>820</sup>Popple, James, 'The OAIC FOI experiment' (2014) 78 *AIAL Forum* 31, 32.

confidential including revelations by whistleblowers. As Brown and Latimer have suggested, ‘whistleblowers are important because they can promote an informed society and provide an essential and valuable service to the public by exposing wrongdoing’.<sup>821</sup> Protection of whistleblowers will encourage potential whistleblowers and give them confidence in providing information.<sup>822</sup> For this reason, most States in Australia have enacted some form of whistle-blower protection legislation.<sup>823</sup> However, for reasons of space the discussion will focus on the *Public Interest Disclosure Act 2013* (Cth) (*PID Act*). This sub-section examines how Australian law advantages the media by protecting whistleblowers at the expense of those who would like to keep information secret.

The whistleblower protection scheme aims ‘to protect workers who draw attention to problems they see in the workplace, ranging from corruption and threats to public health and safety, to mismanagement and public wastage’.<sup>824</sup> The *PID Act* encourages and facilitates public officials and former officials (public officials) in making public interest disclosures and protects them against adverse consequences. As well, it aims to ensure that the disclosures will be properly investigated and dealt with.<sup>825</sup>

A public interest disclosure is a disclosure of information concerning suspected or probable illegal conduct or other wrongdoing made by a public official to:<sup>826</sup>

- an authorised internal recipient or a supervisor of the discloser;<sup>827</sup>
- anybody including the media, if an internal disclosure has not been adequately dealt with, and if wider disclosure satisfies the requirements of public interest, or if there is considerable and imminent danger to health or safety;<sup>828</sup> or
- an Australian legal practitioner if ‘the disclosure is made for the purpose of obtaining legal advice, or professional assistance, from the recipient in relation to the discloser having made, or proposing to make, a public interest disclosure’.<sup>829</sup>

The statute provides clear and precise conditions where information provided is defined as a public disclosure, which helps apply protection for any person who makes a public disclosure. This provision therefore helps encourage people in providing information and supports the public’s right to know as well as addressing corruption and other kinds of undesirable behaviour.

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<sup>821</sup> Brown, AJ and Latimer, Paul, ‘In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures’ (2007) 12(2) *Deakin Law Review* 1, 3.

<sup>822</sup> See, eg, Daveson, Stephanie, ‘Whistleblowers’ [2005] *Australian Mining and Petroleum Law Association Yearbook* 128, 129; Brown, AJ and Latimer, Paul, ‘In whose interest? The need for consistency in to whom, and about whom, Australian public interest whistleblowers can make protected disclosures’ (2007) 12(2) *Deakin Law Review* 1, 3; Fox, Richard ‘Protecting the Whistleblower’ (1993) 19(6) *Adelaide Law Review* 137, 137.

<sup>823</sup> *Whistleblowers Protection Act 1993* (SA), *Whistleblowers Protection Act 2001* (Vic), *Public Interest Disclosure Act 2002* (Tas), *Public Interest Disclosure Act 2003* (WA), *Public Interest Disclosure Act 2010* (Qld), *Public Interest Disclosure Act 2012* (ACT).

<sup>824</sup> Mcmillan, John ‘Freedom of information reforms and cultural change’ [2010] *Public Administration Today* 43, 45.

<sup>825</sup> *Public Interest Disclosure Act 2013* (Cth) ss 6, 7(1)(a).

<sup>826</sup> *Public Interest Disclosure Act 2013* (Cth) s 25.

<sup>827</sup> *Public Interest Disclosure Act 2013* (Cth) s 26(c).

<sup>828</sup> *Public Interest Disclosure Act 2013* (Cth) s 26(c).

<sup>829</sup> *Public Interest Disclosure Act 2013* (Cth) s 26(c).

According to the *PID Act*, a person making a public interest disclosure can incur no administrative, civil or criminal liability. No contractual or other remedy, or other right, may be enforced or exercised against the whistleblower based on the disclosure. The whistleblower also has absolute privilege in proceedings for defamation<sup>830</sup> in respect of the disclosure, and the contract to which the whistleblower is a party must not be terminated based upon the reason that the public interest disclosure breaks the contract.<sup>831</sup>

Under the *PID Act*, taking a reprisal or threatening to take a reprisal toward a whistleblower is a criminal offence.<sup>832</sup> A person takes a reprisal if he/she causes any detriment to the person making or proposing to make a public interest disclosure. Detriment means any disadvantage which includes ‘dismissal of an employee; injury of an employee in his or her employment; alteration of an employee’s position to his or her detriment; discrimination between an employee and other employees of the same employer’.<sup>833</sup>

To protect whistleblowers, the *PID Act* gives them the right to apply for protection from the Federal Court or Federal Circuit Court when they are damaged or threatened with damage because of making a public interest disclosure. In this case, the Court may make the following orders:

- an order to require the respondent (the person conducted the reprisal) to pay the applicant (the whistleblower who applied for protection) compensation for loss, damage or injury as a result of the reprisal or threat. If the reprisal is in connection with the respondent’s position as an employee, the compensation can be paid by the respondent, the respondent’s employer or the respondent and the respondent’s employer jointly based on the order of the Court.<sup>834</sup>
- an order granting an injunction which restrains the respondent from taking, or threatening to take, the reprisal; or requires the respondent to do something he or she refused or failed to do before as part of the reprisal.<sup>835</sup>
- an order to ask the respondent to apologize to the applicant for taking, or threatening to take the reprisal; or any other order the Court thinks appropriate.<sup>836</sup>
- an order to reinstate the applicant’s position or a position at a comparable level if the applicant is or was employed in a particular position with the respondent and the reprisal taken wholly or partly consists, or consisted, of the respondent terminating, or purporting to terminate, the applicant’s employment.<sup>837</sup>

The provision names orders corresponding to the requirements which the Court may impose to protect whistleblowers from damage or threatened damage. This provision helps

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<sup>830</sup> See section 3.2. *Defamation* to know more about absolute privilege.

<sup>831</sup> *Public Interest Disclosure Act 2013* (Cth) s 10.

<sup>832</sup> *Public Interest Disclosure Act 2013* (Cth) s 19(1).

<sup>833</sup> *Public Interest Disclosure Act 2013* (Cth) s 13.

<sup>834</sup> *Public Interest Disclosure Act 2013* (Cth) s 14.

<sup>835</sup> *Public Interest Disclosure Act 2013* (Cth) s 15(1)(a).

<sup>836</sup> *Public Interest Disclosure Act 2013* (Cth) ss 15(1)(b), (c).

<sup>837</sup> *Public Interest Disclosure Act 2013* (Cth) s 16.



people feel confident when they make a public disclosure. It therefore encourages people in providing information which benefits the public's right to know as well as addressing undesirable behaviour in the public sector.

In addition, the identity of whistleblowers must be treated in the strictest confidence and no whistleblowers can be individually identifiable. Disclosure or use of identifying information about whistleblowers is illegal.<sup>838</sup> Moreover, a public official or former public official is not required to disclose or provide to a court or tribunal identifying information or a document containing identifying information that he/she has obtained.<sup>839</sup>

However, the whistleblower will be not exempted from legal liability if the disclosure is false or misleading and he or she knows that to be the case,<sup>840</sup> or if the disclosure contravenes a designated publication restriction, and the whistleblower knows that the disclosure contravenes the restriction, and there is no reason which excuses the contravention.<sup>841</sup> A 'designated publication restriction' applies to information identifying persons connected with court proceedings under certain Acts of parliament.<sup>842</sup>

### 4.3. Protection of sources

The media depend not only on information accessed by means of freedom of information and information provided under the cover of public interest disclosure regulations, but also to a large extent on members of the public, for the supply of information of public interest. However, people may be deterred from offering information concerning matters of public interest if there is no guarantee that their identity will be kept confidential. The role of the media as a public watchdog may be undermined and the ability of the media to provide accurate and reliable information may be negatively affected if that information is not forthcoming. This is why protection of confidential sources is thought to be one of the basic conditions for free expression.<sup>843</sup> Yet there can often arise conflict between this interest and the integrity of court proceedings, which can depend on the identification of sources of information, for example so that they can be cross-examined. The protection of freedom of expression in such a case requires that no journalist be made to choose between betraying the source and criminal sanctions associated with failure to co-operate in court proceedings. However, in practice Australian law attempts to strike a balance between the public interest, protecting a source and the benefits to the administration of justice from ordering disclosure of the identity of a source. Stewart and Chesterman commented in 1992 that the media and the courts 'have waged a constant battle in recent years over claims by media organizations to

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<sup>838</sup> *Public Interest Disclosure Act 2013* (Cth) s 20.

<sup>839</sup> *Public Interest Disclosure Act 2013* (Cth) s 21.

<sup>840</sup> *Public Interest Disclosure Act 2013* (Cth) s 11.

<sup>841</sup> *Public Interest Disclosure Act 2013* (Cth) s 11A.

<sup>842</sup> *Public Interest Disclosure Act 2013* (Cth) s 8. The court proceedings mentioned are provided at the *Family Law Act 1975* (Cth)s 121; *Migration Act 1958* (Cth)s 91X; *Child Support (Registration and Collection) Act 1988* (Cth)s 110; *Judiciary Act 1903* (Cth) pt XAA; *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 31, 38L; *Witness Protection Act 1994* (Cth) s 28; *Administrative Appeals Tribunal Act 1975* (Cth)ss 35(2), 35AA; *Australian Crime Commission Act 2002* (Cth) s 25A(9); and the *Law Enforcement Integrity Commissioner Act 2006* (Cth)ss 90, 92.

<sup>843</sup> *Democracy in Australia- Protection of journalists and their sources* (18 May 2014) The Australian Collaboration <<http://www.australiancollaboration.com.au/pdf/Democracy/Protection-of-whistleblowers.pdf>>.

disclose or comment upon matters of public interest<sup>844</sup> and the laws discussed here represent three different outcomes of that battle.

The Northern Territory, Queensland, South Australia, Victoria and Western Australia apply the common law position. This does not recognise any privilege which provides a journalist the right to refuse to reveal the identity of a source of information.<sup>845</sup> However, a unanimous High Court has adopted the view that a journalist should not be compelled to reveal the identity of a source at a trial if justice can be done without identifying the source.<sup>846</sup> Further, some cases suggest that journalists should be forced to reveal the identity of a source where the revelation is essential to the proceedings at hand.<sup>847</sup>

The High Court in the case of *John Fairfax & Sons Ltd v Cojuangco* explained that a journalist should be forced to disclose the identity of a source at a trial in only special circumstances where the trial cannot be done without the identification. The High Court held that s 22 of the *Defamation Act 1974* (NSW) which provides the defence of qualified privilege:

has its origin in the practice of the English common law courts in defamation actions of refusing to order production and inspection of documents or to force a defendant to disclose the source of his information in interlocutory proceedings, in the absence of special circumstances justifying the making of such an order: see *Hennessy v Wright (No 2)* (1888), reported as a note to *Parnell v Walter* (1890) 24 QBD 441 at 445, 449; *Hope v Brash* [1897] 2 QB 188 at 191, 192–3. Initially the practice seems to have been based on the view that the disclosure of the source of information was irrelevant, even in a case in which the plaintiff pleaded express malice in answer to a plea of privilege or fair comment, and that the application for disclosure amounted to a “fishing” expedition: *Hennessy v Wright*, at 448, 449. Subsequently it was recognised that the disclosure of the identity of an informant could be relevant to the issue of malice: *Elliott v Garrett* [1902] 1 KB 870; *Plymouth Mutual Co-operative and Industrial Society Ltd v Traders’ Publishing Association Ltd* [1906] 1 KB 403 at 412–13, 418–19; *Adam v Fisher* (1914) 30 TLR 288 *Lyle-Samuel v Odhams Ltd* [1920] 1 KB 135 at 143–4. This recognition led to the view that it might be more accurate to base the refusal to make an order on the ground that it would be oppressive to compel disclosure before the trial: *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 92. So, the immunity has been described as one “carved out of the general field of relevance”: *South Suburban Co-operative Society v Orum* [1937] 2 KB 690 at 703. It was acknowledged that disclosure could be obtained at the trial of the action itself (*Plymouth Mutual Co-operative*, at 418), although it has been suggested that there is a judicial discretion to disallow questions at the trial directed

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<sup>844</sup> Stewart, Andrew; Chesterman, Michael ‘Confidential Material: The Position of the Media’ (1992) 14(1) *Adelaide Law Review* 1

<sup>845</sup> Northern Territory, Queensland, South Australia, Victoria and Western Australia apply the common law: Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 431.

<sup>846</sup> *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346 at 354–355. See also *Attorney-General v Mulholland* [1963] 2 QB 477 at 489–490 per Denning MR; *Maxwell v Pressdram Ltd* [1987] 1 ALL ER 656; *Nicholls v Director of Public Prosecutions* (1993) 61 SASR 31 at 40 per Legoe ACJ, 51 per Perry J.

<sup>847</sup> *Attorney-General v Mulholland* [1963] 2 QB 477 at 492 per Donovan LJ; *Hancock v Lynch* [1988] VR 173 at 176–178.

to ascertaining the identity of sources of information: *Attorney-General v Mulholland* [1963] 2 QB 477 at 492–3.<sup>848</sup>

The High Court explains why the source of information should be protected under s 22 of the *Defamation Act 1974* (NSW). Such protection helps encourage people in providing information as journalists are able keep their promise to keep the identity of sources confidential.

Donovan LJ in the case of *Attorney-General v Mulholland* commented on:

the need for some residual discretion in the court of trial in a case where a journalist is asked in the course of the trial for the source of his information. While the journalist has no privilege entitling him [sic] as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand—I prefer that expression to the term “necessary”. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer. For these reasons, I think that it would be wrong to hold that a judge is tied hand and foot in such a case as the present and must always order an answer or punish a refusal to give the answer once it is shown that the question is technically admissible.<sup>849</sup>

The case provides journalists with a degree of protection from requests to disclose the source of information they have published, by requiring judges to balance the interests of the trial against those of the journalist and the source. This case therefore helps journalists keep their promise to keep informers’ identity confidential and encourages people in providing information. It therefore supports freedom of information.

Tasmania has enacted a 'judicial discretion model'.<sup>850</sup> This entitles journalists to refuse to identify their sources and authorizes certain courts to exercise discretion to relieve a journalist of the obligation to disclose, or to order a journalist to disclose, a source of information based upon weighing up 'the competing public interests on a case by case basis'.<sup>851</sup>

The interest to be balanced against freedom of expression in these cases is identified in the Commonwealth Act as ‘the public interest in the disclosure of evidence of the identity of the informant’.<sup>852</sup> Section 126H specifically requires courts to consider whether this

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<sup>848</sup> *John Fairfax & Sons Ltd v Cojuangco* (1988) 82ALR 1 at 5.

<sup>849</sup> *Attorney-General v Mulholland* [1963] 1 ALL ER 767 at 773 per Donovan LJ.

<sup>850</sup> *The Evidence Amendment Act 2010* (Tas) inserted ss 126A-126F into the *Evidence Act 2001* (Tas).

<sup>851</sup> See, eg, *The Evidence Amendment Act 2010* (Tas) s128A; Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 430.

<sup>852</sup> *Evidence Amendment (Journalists Privilege) Act 2011* (Cth) ss 128-130

‘outweighs ... the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.’<sup>853</sup>

New South Wales and the Commonwealth have adopted a ‘presumption of non-disclosure model’,<sup>854</sup> and the Australian Capital Territory applies the Commonwealth legislation. This model provides journalists and their employers with a right to refuse to disclose the identity of the sources of information if a journalist has promised that the informant’s identity will not be revealed.<sup>855</sup> However, the law also gives courts the right to overrule the journalist’s privilege when the court is satisfied that the public interest in the disclosure of the informant’s identity is more important compared to competing considerations including the negative effect of the disclosure on any person and the public interest in freedom of expression.<sup>856</sup>

According to the *Evidence Amendment (Journalists Privilege) Act 2011* (Cth), a journalist is ‘a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium’.<sup>857</sup> However in New South Wales, journalist is defined more narrowly as ‘a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium’.<sup>858</sup> News medium means ‘any medium for the dissemination to the public or a section of the public of news and observations on news’.<sup>859</sup> An informant is defined to mean ‘a person who gives information to a journalist in the normal course of the journalist’s work in the expectation that the information may be published in a news medium’.<sup>860</sup>

As discussed above, ‘the practice of keeping anonymous sources confidential is essential for journalists who rely on the trust of informants to gain access to information that is genuinely in the public interest’.<sup>861</sup> Some Australian laws therefore provide journalists with a qualified privilege not to identify a confidential source. The qualified nature of the privilege, however, means that the interest in protecting sources (and, by extension, freedom of expression) is balanced against other public interests where courts are authorized to order journalists to reveal the source of their information in particular cases.

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<sup>853</sup>*Evidence Act 1995* (Cth) s 126H(2).

<sup>854</sup>*Evidence Amendment (Journalist Privilege) Act 2011* (NSW); *Evidence Amendment (Journalists Privilege) Act 2011* (Cth).

<sup>855</sup> *Evidence Amendment (Journalists Privilege) Act 2011* (Cth) s126H(1); *Evidence Act 1995* (NSW) s 126K. See also *Privacy Act 1988* (Cth) s 66(1A); *Broadcasting Services Act 1992* (Cth) s 202(4).

<sup>856</sup>*Evidence Amendment (Journalists Privilege) Act 2011* (Cth) s126H(2).

<sup>857</sup>*Evidence Amendment (Journalists Privilege) Act 2011* (Cth) s126G(1).

<sup>858</sup>*Evidence Act 1995* (NSW), s 126J. The definition of news medium is the same as the Commonwealth definition.

<sup>859</sup>*Evidence Amendment (Journalists Privilege) Act 2011* (Cth) s126G(1).

<sup>860</sup>*Evidence Amendment (Journalists Privilege) Act 2011* (Cth) s126G(1).

<sup>861</sup>Democracy in Australia – Protection of journalists and their sources (04 July 2015) The Australian Collaboration <<http://www.australiancollaboration.com.au/pdf/Democracy/Protection-journalists-sources.pdf>>.

## 5. Media ownership regulation

As is well-known, the media greatly influences political, economic, social, and cultural ideas and action.<sup>862</sup> Thus, governments have an interest in who controls the media, and the Australian government expresses that interest through a policy relating to media ownership and control. This section discusses how Australian media laws currently regulate media ownership. This discussion is mainly based on the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth).

Prior to the enactment of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth), the BSA provided a variety of specific rules to protect diverse ownership of commercial broadcasting services, associated newspapers, and subscription television services.<sup>863</sup> These rules included statutory control rules restricting concentration within a particular medium and diversity rules restricting concentration across different media.<sup>864</sup> For example, no person could have a controlling interest in more than one of a number of traditional media organizations including newspapers, commercial radio, and commercial television in the same licence area.<sup>865</sup> Foreign investment in media was also limited based upon reasons relating to the protection of the national interest and domestic opinion against the influence of foreign owners.<sup>866</sup> Foreign investors were not authorized to control commercial television broadcasting licences, for example.<sup>867</sup> A commercial television broadcasting licensee could not have more than 20% of the directors who are foreign persons.<sup>868</sup> Foreign investors were also not authorized to have 'company interests of more than 20% in a subscription television broadcasting licence'.<sup>869</sup> These restrictions were relaxed when the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) was enacted.<sup>870</sup> This relaxation will be discussed below.

Notwithstanding that media convergence<sup>871</sup> presents significant changes in the ways in which information is gathered and published, most Australian people still get their information through traditional media (television, radio and newspapers), at least as of 2012.<sup>872</sup> In particular, commercial broadcasting services are regarded as 'having the greatest ability to influence community views'.<sup>873</sup> Commercial television and radio broadcasting services therefore are subject to specific ownership and control restrictions under the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth). The control and

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<sup>862</sup> Chapter 2: Literature review.

<sup>863</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 868.

<sup>864</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 126; *Broadcasting Services Act 1992* (Cth) ss 60, 61

<sup>865</sup> *Broadcasting Services Act 1992* (Cth) ss 60, 61.

<sup>866</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 159.

<sup>867</sup> *Broadcasting Services Act 1992* (Cth) s 57.

<sup>868</sup> *Broadcasting Services Act 1992* (Cth) s 58.

<sup>869</sup> *Broadcasting Services Act 1992* (Cth) s 109.

<sup>870</sup> McGill, Ian, 'Cross media mergers under the 2006 amendments to the Broadcasting Services Act 1992' (2007) 13(1) *University of New South Wales Law Journal Forum* 4, 47.

<sup>871</sup> See Chapter 3, section 2 (Overview of the media industry in Australia) to know about media convergence.

<sup>872</sup> The Australian Convergence Review Committee, *the Final Report*, March 2012, 18.

<sup>873</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 872.

ownership of community broadcasting services is regulated through the licensing process.<sup>874</sup> Community Broadcasting Services are services operated for non-profit to provide services for a 'community purpose' and available for free to the general public.<sup>875</sup> Broadcasting licensees are subject to certain restrictions on the ownership of newspapers that are published in English, on at least four days per week, and where at least 50% of the circulation is by way of sale.<sup>876</sup>

The *BSA* includes some complex rules designed to limit the proportion of the broadcast media market controlled by any one person or company based on restriction on audience reach, licence area, datacasting transmitter licence, directorship and transactions.<sup>877</sup>

Under the *BSA*, a person is prohibited from:

- controlling commercial television licences that broadcast to more than 75% of the Australian population (the '75 per cent audience reach' rule),<sup>878</sup>
- controlling more than one commercial television broadcasting licence in the same licence area (the 'one-to-a-market' rule);<sup>879</sup>
- controlling more than two commercial radio licences in the same licence area (the 'two-to-a-market' rule),<sup>880</sup>
- controlling a commercial television broadcasting licence in combination with certain other kinds of licence, in certain conditions.<sup>881</sup>

These limitations on media ownership prevent anyone from dominating the media, with the aim of supporting 'diversity in control of the more influential broadcasting services'<sup>882</sup> This helps to achieve a balance of viewpoints throughout commercial broadcast media. In that sense it aims to provide information to the public that could have the effect of enabling the media to be a forum for members of the public. No one can dominate the media so no one can use the media to serve her/his interest only. This helps balance ownership with other interests such as the rights to freedom of expression and freedom of information.

In addition, the *BSA* does not allow any transaction where, once it is completed, the number of independent and separately controlled media operators or groups is less than five in a metropolitan commercial radio licence area, or less than four in a regional area (the '4/5' rule).<sup>883</sup>

The *BSA* also restricts a person's ability to be a director of a company or companies which are in a position to exercise control of a commercial television broadcasting licence whose combined licence area population is over 75% of Australian population. Likewise, the

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<sup>874</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 871.

<sup>875</sup> *Broadcasting Services Act 1992* (Cth) s 15.

<sup>876</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) ss 61AB, 61AEA.

<sup>877</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) ss 53(1)-53(2), 54, 54A-54B, 56A, 61AA-61AB.

<sup>878</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 53(1).

<sup>879</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 53(2).

<sup>880</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 54.

<sup>881</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) ss 54A-54B.

<sup>882</sup> *Broadcasting Services Act 1992* (Cth), s 3(1)(c).

<sup>883</sup> *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 61AB.

combination of directorships and controls is prohibited so that no person can be a director of two companies controlling commercial television broadcasting licences if each of those licences has the same licence area. A person also cannot be a director or in a position to exercise control of two companies if the companies have the same licence area.<sup>884</sup> In addition, a person must not be a director of a company or companies that are 'in a position to exercise control of more than 2 commercial radio broadcasting licences in the same licence area', or a director of a company or companies that are 'in a position to exercise control of 2 commercial radio broadcasting licences in a licence area and in a position to exercise control of another commercial radio broadcasting licence in the same licence area', or 'in a position to exercise control of 2 commercial radio broadcasting licences in a licence area and a director of a company that is in a position to exercise control of another commercial radio broadcasting licence in the same licence area'.<sup>885</sup>

The rules relating to cross-media acquisitions have been relaxed under the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth). This means that an owner of a newspaper can acquire television or radio stations that publish the same region and vice-versa. However, no one person can control all three types of traditional media platforms in a licence area, namely commercial radio, commercial television and associated newspapers.<sup>886</sup>

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Restrictions on foreign ownership of media outlets come under the Australian government's regulation of foreign investment generally. Since 2006, foreign investment in the media sector has been encouraged in Australia because, according to the Department of the Treasury, overseas capital 'supports existing jobs and creates new jobs, it encourages innovation, it introduces new technologies and skills, it brings access to overseas markets and it promotes competition amongst our industries'.<sup>888</sup> The restrictions on foreign ownership under the *BSA* mentioned above were relaxed under the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth).<sup>889</sup> However, the Australian government also recognizes that foreign investment 'can be contrary to the needs of the Australian community' in certain

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<sup>884</sup>*Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) ss 55-56.

<sup>885</sup>*Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 56.

<sup>886</sup>*Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 61AEA. A newspaper is associated with the licence area if the newspaper is listed in the Associated Newspaper Register: *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 59(2).

<sup>887</sup>*Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 61AEA. A newspaper is associated with the licence area if the newspaper is listed in the Associated Newspaper Register: *Broadcasting Services Amendment (Media ownership) Act 2006* (Cth) s 59(2).

<sup>888</sup>Department of the Treasury, *Australia's foreign Investment Policy* (2011).The Annual Report 2012-13 of Foreign Investment Review Board, 37.

<sup>889</sup>Mcgill, Ian, 'Cross media mergers under the 2006 amendments to the Broadcasting Services Act 1992' (2007) 13(1) *University of New South Wales Law Journal Forum* 4, 47- 48.

circumstances.<sup>890</sup> Therefore, certain proposals by foreign investors including proposals by a foreign person<sup>891</sup> and proposals for investment in sensitive sectors<sup>892</sup> must be notified to the government and require prior approval regardless of the value of the investment.<sup>893</sup> The media is listed as a sensitive sector.<sup>894</sup> For this reason, all individual foreign investment proposals of 5% or more of any one outlet in the media sector are subject to case-by-case examination by the Federal Treasurer to examine whether or not they are contrary to the national interest.<sup>895</sup> There are no definitions of 'national interest' or 'contrary to the national interest' in *FATA*, so the national interest is assessed on a case by case basis. The factors considered when assessing proposals usually include national security, competition, impact on other policies of the government, impact on the community and the economy, and the character of the investor.<sup>896</sup>

## 6. Handling of complaints and grievances

Australian law and regulations provide for a range of methods for handling complaints and grievances. In this section, I discuss a range of structures that have been adopted for this purpose. In some cases I mention a body of law or regulation for the first time, that is, without having discussed the content above. This is because a given structure may be of interest for addressing difficulties identified in Vietnam even if the actual rules applied within that structure do not relate to any area of difficulty. For example, I discuss the self-regulatory body, the Australian Press Council, here even though the rules it administers, regarding standards for print publications, provide little in the way of suggestions for reforming Vietnamese law.

Media outlets want to publish interesting and important material. This material may include information that individuals or organizations dislike because it affects them negatively.<sup>897</sup> The material may also break regulations, licence conditions or standards or codes of practice. To ensure that all people have the right to protect their interests, media law provides people the right to complain against the media. This section examines regulations covering processes for handling complaints and grievances. 'Complaints and grievances' is used as a broad term to cover a range of procedures where an individual or group seeks to enforce rules against, or settle a dispute with, a media outlet.

Responsibility for resolving complaints and grievances about media activities is presently dispersed in Australia depending on the area of law involved. So, below I discuss

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<sup>890</sup> See, eg, Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 904; Healey, Justin, *Media Ethics and Regulations* (Thirroul The Spinney Press, 2013), 34.

<sup>891</sup> Definition of 'foreign person': *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 5.

<sup>892</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 17H; *Foreign Acquisitions and Takeovers Regulations 1989* (Cth), reg 12.

<sup>893</sup> See, eg, Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 904; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 175.

<sup>894</sup> *Foreign Acquisitions and Takeovers Act 1975* (Cth), s 17H; *Foreign Acquisitions and Takeovers Regulations 1989* (Cth), reg 12. The media sector defined includes daily newspapers, television and radio and internet sites that broadcast or represent these form of media: Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 904.

<sup>895</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co 4<sup>th</sup> ed, 2012) 904; Healey, Justin, *Media Ethics and Regulations* (Thirroul The Spinney Press, 2013), 34; The Annual Report 2012-13 of Foreign Investment Review Board, 39.

<sup>896</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 905.

<sup>897</sup> Lesley Phippen, 'Decoding defamation' (2014) 43(3) *Index on Censorship* 96.



the various procedures based on different regulations according to the extent to which they intrude on personal freedom and civil liberties.

The first method is prosecution based on the criminal law, for example as applied to the ‘opposition’ offences under the *Criminal Code Act 1995* (Cth). According to that Act, urging violence is an offence with imprisonment of seven years.<sup>898</sup> It is an indictable offence under the *Crimes Act 1914* (Cth)<sup>899</sup> and subject to a jury trial under the Constitution.<sup>900</sup>

Criminal prosecutions are also used to enforce the whistleblower protection laws, in that a breach of the protections is a criminal offence.

The second method is administrative appeals. According to the constitutional separation of powers doctrine, the High Court and other federal courts are prevented from exercising non-judicial power.<sup>901</sup> It therefore needs to have an organization which is not judicial body but it has power to examine whether a decision is accurate based on consideration of all relevant issues of law, fact, policy and discretion.<sup>902</sup> Australian Commonwealth law therefore establishes Administrative Appeals Tribunals (AAT)<sup>903</sup> to review administrative decisions on the merits. The decisions reviewed include decisions made by ministers, departments and agencies of the Australian Government and, in limited circumstances, decisions of state government and non-government bodies.<sup>904</sup> The AAT does not have a general power to review decisions. It therefore can only review a decision if an Act, regulation or other legislative instrument discloses that the decision can be reviewed by the AAT.<sup>905</sup>

Based on this provision, the AAT has power to review certain decisions relating to freedom of information and defamation discussed above.<sup>906</sup>

The third method is civil court proceedings. For the purpose of this discussion I will focus on defamation.

In most jurisdictions, a plaintiff or a defendant can choose whether a jury is used in defamation proceedings unless the court orders otherwise.<sup>907</sup> The jury will determine ‘whether the defendant has published defamatory matter about the plaintiff and, if so, whether any defence raised by the defendant has been established’.<sup>908</sup> The NSW Act provides that ‘[i]f the jury finds that the defendant has published defamatory matter about the plaintiff

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<sup>898</sup>*Criminal Code Act 1995* (Cth) s 80.2.

<sup>899</sup>*Crimes Act 1914* (Cth) s 4J.

<sup>900</sup>*Australian Constitution* s 80.

<sup>901</sup>Matthew Groves and H. P Lee, *Australian Administrative Law* (Cambridge University Press, 2007) 77.

<sup>902</sup>Matthew Groves and H. P Lee, *Australian Administrative Law* (Cambridge University Press, 2007) 77.

<sup>903</sup>*Administrative Appeals Tribunal Act 1975* (Cth).

<sup>904</sup>*Administrative Appeals Tribunal Act 1975* (Cth) s 25.

<sup>905</sup>*Administrative Appeals Tribunal Act 1975* (Cth) s 25; Matthew Groves and H. P Lee, *Australian Administrative Law* (Cambridge University Press, 2007) 86-88.

<sup>906</sup>*Freedom of Information Act 1982* (Cth), s 57A; *Defamation Act 2005* (NSW).

<sup>907</sup>*Defamation Act 2005* (NSW) s 21(1). Juries in defamation actions have been abolished in three jurisdictions: South Australia, Northern Territory and Australian Capital Territory: *Juries Act 1927* (SA) s 5; *Juries Act* (NT) s 6A; *Supreme Court Act 1933* (ACT) s 22.

<sup>908</sup>*Defamation Act 2005* (NSW) s 22(2).

and that no defence has been established, the judicial officer and not the jury is to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount'.<sup>909</sup>

The *Uniform Acts 2005* provide for an innovative procedure to deal with complaints of defamation that is non-litigious, but carried out in the shadow of court proceedings. The aggrieved person gives the publisher a 'concerns notice', and if, within 28 days of receipt of that notice, a defence has not been served, the publisher may make an offer to make amends to the aggrieved person (the offer can be made by more than one publisher in the same matter).<sup>910</sup>

The offer must contain 'an offer to publish a reasonable correction' and 'an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer'.<sup>911</sup> The offer may include other contents such as an offer to publish an apology, an offer to pay compensation for any economic or non-economic loss of the aggrieved person, or the particulars of any corrections or apologies have been made prior to the date of offer.<sup>912</sup> The apology made by the publisher is not considered as an admission of responsibility.<sup>913</sup>

If an aggrieved person accepts the offer to make amends and the publisher implements the terms of it, the aggrieved person cannot continue defamation proceedings.<sup>914</sup> If the offer to make amends is not accepted, and the plaintiff continues the proceedings, the publisher has a defence to the action for defamatory publication if the offer was reasonable, was made as soon as feasible after receiving a 'concerns notice', and 'at any time before the trial the publisher was ready and willing, on acceptance of the offer by the aggrieved person, to carry out the terms of the offer'.<sup>915</sup>

The next method for the resolution of complaints and grievances is within an administrative and regulatory structure, for example the process used to enforce broadcasting regulations set up under the *BSA* and the various industry codes of practice. There are different procedures depending whether the complaint relates to an offence or a breach of a licence condition or standard; or comes under a code of practice.<sup>916</sup>

In the case of an offence or breach of a licence condition, a member of the public can make a complaint directly to the ACMA or the ACMA can take action directly without waiting for a complaint.<sup>917</sup>

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<sup>909</sup> *Defamation Act 2005* (NSW) s 22 (3).

<sup>910</sup> *Defamation Act 2005* (NSW) ss 13-14.

<sup>911</sup> *Defamation Act 2005* (NSW) ss 15(1)(d)-(f).

<sup>912</sup> *Defamation Act 2005* (NSW) s 15(1)(g).

<sup>913</sup> Ryan, Inez, 'New defamation laws: a guide' (2006) 18(1) *Australian Press Council News* 1, 1.

<sup>914</sup> *Defamation Act 2005* (NSW) s 17(1); Ryan, Inez, 'New defamation laws: a guide' (2006) 18(1) *Australian Press Council News* 1, 6.

<sup>915</sup> *Defamation Act 2005* (NSW) s 18(1). A concerns notice is a notice which informs the publisher of the defamatory information that the aggrieved person considers are or may be carried by the matter: *Defamation Act 2005* (NSW) s 14(2).

<sup>916</sup> See section 1 to know What are licence condition, standard and code of practice.

<sup>917</sup> See, eg, *Australian Broadcasting Services Act 1992* (Cth) ss 147-149; *Make a report or complaint* (11 March 2012) Australian Communications and Media Authority <[http://www.acma.gov.au/WEB/STANDARD/pc=CONTACT\\_COMPLAINTS\\_OVIEW](http://www.acma.gov.au/WEB/STANDARD/pc=CONTACT_COMPLAINTS_OVIEW)>.

However, for a breach of a code of practice, in the first instance, a complaint has to be sent to the provider of the broadcasting service and if there is no response within 60 days, or the complainant is not satisfied with the response, the complainant can take the matter to the ACMA.<sup>918</sup>

Complaints relating to observance of a code of practice developed by the ABC or SBS must be sent first to the corporation concerned and notified to the ACMA. If the complainant does not receive any response from the corporation concerned within 60 days, or the complainant is not satisfied with the response, the complainant can take complaints on these matters to the ACMA.<sup>919</sup> If the ACMA finds the complaint is substantiated, it will make a written notice to recommend the ABC or SBS to 'take action to comply with the relevant code of practice and take such other action in relation to the complaint as is specified in the notice'.<sup>920</sup> Section 152 provides that '[o]ther action may include broadcasting or otherwise publishing an apology or retraction'.<sup>921</sup>

The ACMA does not handle complaints about a station's choice of programming, advertising, the making or scheduling of programs, the licensing of ABC or SBS services, or defamation claims.<sup>922</sup>

The last method for resolution of complaints is based on self-regulatory schemes.

Under the codes of the Australian Association of National Advertisers (AANA), such as the Code of Ethics which is applied to complaints,<sup>923</sup> after receiving a complaint concerning an advertising or marketing communication, the Advertising Standards Bureau will assess the complaint to determine whether it can go to the Advertising Standards Board. If the complaint is accepted, the advertiser or marketer will be notified and a response will be requested. The complaint is then considered by the Board (Advertising Claims Board with competitor complaints under Section 1 of AANA Code of Ethics and Advertising Standards Board with consumer complaints under Section 2 of AANA Code of Ethics) and the advertiser and complainant are advised of the determination. A case report is published after that.<sup>924</sup>

The rules of the APC apply to complaints about newspapers, magazines and journals published either in print or on the Internet. The rules provide that all people have the right to lodge a complaint, irrespective of whether they are identified in the published information or are directly affected by it. Therefore, if a number of complaints are received about the same published information, the APC may decide to accept one of them as representative of the

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<sup>918</sup> See, eg, *Australian Broadcasting Services Act 1992* (Cth) ss 147-149; *Make a report or complaint* (11 March 2012) Australian Communications and Media Authority <[http://www.acma.gov.au/WEB/STANDARD/pc=CONTACT\\_COMPLAINTS\\_OVIEW](http://www.acma.gov.au/WEB/STANDARD/pc=CONTACT_COMPLAINTS_OVIEW)>.

<sup>919</sup> *Australian Broadcasting Services Act 1992* (Cth) s 150.

<sup>920</sup> *Australian Broadcasting Services Act 1992* (Cth) s 152.

<sup>921</sup> *Australian Broadcasting Services Act 1992* (Cth) s 152.

<sup>922</sup> *Complaints the ACMA does not handle* (30 November 2015) Australian Communications and Media Authority <<http://www.acma.gov.au/Citizen/Take-action/Complaints/Broadcast-complaints/complaints-the-acma-does-not-handle>>.

<sup>923</sup> Advertising or marketing communication is information published by or on behalf of an advertiser or marketer for payment to attract people to a product, service, person, organization or line of conduct in a manner calculated to promote or oppose directly or indirectly the product, service, person, organization or line of conduct: AANA Codes of Ethics.

<sup>924</sup> AANA Codes of Ethics.

others but all complainants will be notified of the course of action and of the final result. The APC and Advertising Standards Bureau, however, lack any enforcement powers.<sup>925</sup>

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<sup>925</sup> The Parliament of the Commonwealth of Australia, *In the public interest: Monitoring Australia's media*, Report by the Senate Select Committee on Information Technologies, April 2000, 26; Advertising Standards Bureau, *Review of Operations*, 2008, 4. See Chapter 7, Review of Australian models and applicability to Vietnamese problems, to know about the enforcement powers of the APC.

## PART II: CRITIQUE OF MEDIA LAW AND LEGISLATION

### Chapter 6

#### Critique of Vietnamese media law and legislation

##### Introduction

This chapter critiques Vietnamese media law and legislation as described in Chapter 4. My critique in this chapter has been informed by discussions and interviews with the Vietnamese participants. The critique defines and details deficiencies in the Vietnamese legislation, and will then be used in the next chapter to assess the potential for Australian models to inform recommendations for reforming Vietnamese media legislation. This chapter is organized into 5 sections. Section 1 analyses provisions covering the protection of the right to freedom of information and freedom of expression. Section 2 explores my discussion on provisions relating to the protection of personal information. Section 3 analyses the law on protection of reputation. Section 4 discusses law on opposition and dissent. Section 5 analyses provisions covering ownership. Section 6 examines regulations relating to the handing of complaints and grievances.

##### 1. Freedom of information and freedom of expression

###### 1.1. Freedom of information

As discussed previously, laws relating to the right to freedom of information in Vietnam have been expanded over the years since 1986.<sup>926</sup> Now, the right to freedom of information is protected in the highest legal document, the *Vietnamese Constitution*, and in the *Vietnamese Press Law 1989*.<sup>927</sup>

Freedom of information was extended, especially after the Sixth Congress of the VCP held in 1986, because the VCP decided to widen the scope for the media to criticise government inefficiencies. As I discussed in chapter 3,<sup>928</sup> before 1986, all media organizations were totally dependent on government funding.<sup>929</sup> Prior to 1986, the media focused on the dissemination of policies and strategies from the government and the VCP to local authorities and the general population.<sup>930</sup> In this period, publication of information was one-way communication because the media did not reflect the feedback, wishes or concerns

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<sup>926</sup> Chapter 1, section 1. Background of the research.

<sup>927</sup> Chapter 4, sub-section 4.1. *Freedom of information*.

<sup>928</sup> Chapter 3, section 1. Overview of the media in Vietnam.

<sup>929</sup> See, eg, Heng, Russell H. K. (ed), *Media fortunes changing times, Asean state in transition* (Institute of Southeast Asian Studies, 2002); Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

<sup>930</sup> Huong, Dang Thi Thu, *The changes in the Vietnamese Government's policies and Laws of Journalism and their affects to Journalism after the Economic Renovation 1986* (2008) Curtin University of Technology <[http://www.mediaasiaconference.humanities.curtin.edu.au/call\\_papers.htm](http://www.mediaasiaconference.humanities.curtin.edu.au/call_papers.htm)>.

of the public communicated to the government and the VCP.<sup>931</sup> Many urgent issues within society were not reflected in media coverage because of the tight control and censorship of the VCP and the government.<sup>932</sup> For example, as one observer explained, because of those controls, the media could not influence or change 'the reality of the Vietnamese countryside, where people cling to outdated customs and quarrels, and where dictatorial practices and incompetent management cause tragedy'.<sup>933</sup> As discussed in chapter 3, the freeing-up of the media since 1986 has been achieved through legal reforms such as Directive No 79 enacted in 1986, Secretariat Directive 15 enacted in 1987, and Secretariat Directive 19 enacted in 1987.<sup>934</sup> The *Vietnamese Press Law 1989* confirmed the media's right to freely publish information including that relating to illegal or anti-social activities.<sup>935</sup> These documents have expanded the scope of published information as well as the obligations and rights of editors in chief. Therefore, the right to be informed through the media about all aspects of domestic current affairs is highly protected.

Since 1987, certain information previously not authorized to be published has been available to the public such as news of damage caused by natural disasters and publicity about corruption convictions.<sup>936</sup> The extension of freedom was revealed clearly in the availability of economic information, and in particular the dramatic rise of economics-related periodicals, especially from 1990. Economic issues are now covered more broadly in the media than ever before.<sup>937</sup> As Chu Van Lam explains, the Doi Moi opening of the Vietnamese economy has led to 'more open political policies, [and] has enabled the media to collect information more efficiently, upgrade technical quality, improve content, and disseminate information more quickly. The media... have become a vehicle reflecting the aspirations and requirements of the people'.<sup>938</sup> The right of members of the public to know about political or government matters depends on whether information relating to such matters is published. If the government says that publishing such information will not benefit the government's interest, or will harm that interest, such information will not be published. For example, people do not know how the government disbanded the riots that occurred in 2007 in Vietnam's Central Highlands because under the government's view publishing that information does not benefit the state's interest. As mentioned previously, the Vietnamese legal system was based on the Soviet theory<sup>939</sup> and this example shows how that theory has now been challenged in Vietnam. One of the key concepts of the Soviet theory was that the

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<sup>931</sup>Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' (2002) 29(1) *The Asia Journal Media* 24, 25.

<sup>932</sup> See, eg, Hong, Hoang Thi Minh, 'Media and civil society in support of good governance and democracy in Vietnam' (2002) 29(1) *The Asia Journal Media* 24, 26; Ho Anh Thai, 'Creative writers and the press in Vietnam since renovation' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 58, 59.

<sup>933</sup>Ho Anh Thai, 'Creative writers and the press in Vietnam since renovation' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 58, 62.

<sup>934</sup> Chapter 3, Section 1. Overview of the media in Vietnam

<sup>935</sup> Chapter 4, Section 4.1. *Freedom of information.*

<sup>936</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 2.

<sup>937</sup> Chu Van Lam, 'Economics-related periodicals' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 54, 54.

<sup>938</sup> Chu Van Lam, 'Economics-related periodicals' in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 54, 54.

<sup>939</sup>See chapter 1, section 3.

people's interests and the state's interests are always the same; the changes Chu Van Lam has described represent a departure from Soviet theory because they disclose that the people or the public have an interest that isn't necessarily the same as the state's interest. The conceptual underpinning of the law therefore no longer fits the need of the development.<sup>940</sup>

As I discussed in Chapter 1, Heng has said that Vietnamese media law is quite complicated with numerous laws, Ordinances and Decrees enacted by different government bodies.<sup>941</sup> One of my interviewees, who is one of the most famous lawyers in Vietnam, supported this statement, pointing out that 'in the Vietnamese legal system, media law is the most complicated and not well developed, especially the provisions covering the protection of the right to freedom of information. These provisions have not supported the media in collecting information held by government agencies'.<sup>942</sup> For example, in many cases, the media are not allowed to publish certain information, while in others they have obligations to publish information. Legal clarity is required for the media to proceed with confidence but, as some of my interviewees noted, clarity in Vietnamese media law is lacking.<sup>943</sup> From the advice given by a number of my interviewees, the information published still does not meet the needs of society because the provisions for freedom of expression and freedom of information are not well developed.<sup>944</sup> This is an example of my earlier point that key concepts of the Soviet theory which Vietnamese legal system was based on have now been challenged.<sup>945</sup> The content of the Vietnamese legal system therefore also needs to change and this thesis aims to recommend changes based upon the experiences of a jurisdiction where a different theory applies. As I discussed in chapter 4, Vietnamese media law has a number of general rules on matters such as opposition and dissent but the dividing line between the two is unclear, because the law does not provide a definition of 'opposition'. There are also many legal categories which are overly general and therefore unclear, especially in matters of freedom of press and freedom of expression. This lack of clarity brings about difficulties when it comes to the application of law to fact.

One of my interviewees said that 'Vietnamese media law is more rhetorical than substantive'.<sup>946</sup> The law appears on the surface to protect a right to access to information, and a right to freedom of expression, but on closer inspection there is nothing that has that effect in practice. Although the Constitution guarantees citizens' rights, there are no laws granting access to information, no laws that spell out the rights and freedoms of the individual, and no laws guaranteeing a free press and free expression. This presents strong parallels to the analysis of Singaporean law that I discussed in chapter 1. In that chapter we saw that there, too, the Constitution provides rights of free speech and expression that are not backed up by

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<sup>940</sup>See chapter 1, section 3.

<sup>941</sup>See chapter 4, section 1.

<sup>942</sup>Interview with participants No 17 (Hochiminh, 23 March 2013).

<sup>943</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013).

<sup>944</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 6 (Lamdong, 12 March 2013), No 8 (Hochiminh, 22 March 2013), No 14 (Lamdong, 7 March 2013), No 17 (Hochiminh, 23 March 2013), No 20 (Hochiminh, 23 March 2013).

<sup>945</sup>See chapter 1, section 3.

<sup>946</sup>Interview with participant No 17 (Hochiminh, 23 March 2013).

laws. These shortcomings are found in two systems that are quite different. Although both countries are dominated by one political party which is the most powerful organization in the political system, Vietnam follows Marxist ideology while Singapore does not. In addition, the media in Vietnam are state-owned only while they can be privately-owned in Singapore. However, rights to freedom of expression and freedom of information are limited in both countries where publishers must obtain government permission to publish a newspaper,<sup>947</sup> editors and journalists must be people who know what works for government and how to advance government's interests,<sup>948</sup> and they have to work under the verbal direction of government if they want to keep their job.<sup>949</sup> These problems are more the matters of Asian culture than of a Marxist system as George said that 'Singapore and other Asian countries represent a distinct paradigm based on "Asian values" such as harmony, communitarianism and consensus'.<sup>950</sup>

In particular, the majority of my interviewees argued that the law regarding the protection of government or official secrets is insufficiently clear as to the rights and responsibilities of media operators.<sup>951</sup> The provisions of the *Vietnamese Press Law 1989* and Ordinance No. 30 have not stipulated clearly the concept, definition and scope of government secrets.<sup>952</sup> Therefore, it is difficult for people and organizations who own information and editors in chief to decide exactly whether or not the information has to be kept confidential, especially information relating to political, religious, ethnic and land matters. Because of this deficiency in the law, government agencies refuse to give the media access to information and explain that the information cannot be provided because it falls in the area of government secrets. One of my interviewees stated that 'collecting government-held information depends upon government agencies. If the agencies do not want to provide information, they will say that the information is a government secret'.<sup>953</sup>

Further, my interviewees said that identifying whether or not information is classified as a government or official secret is difficult.<sup>954</sup> Many government institutions are authorized to make lists of secrets and establish rules on the protection of government or official secrets.<sup>955</sup> In fact, all ministerial-level institutions have their own lists of secrets<sup>956</sup> and all

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<sup>947</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 9.

<sup>948</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>949</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 36.

<sup>950</sup>Cherian George, *Freedom From The Press: Journalism and State Power in Singapore* (National University of Singapore Press, 2012) 17.

<sup>951</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 3 (Hochiminh, 21 March 2013), No 6 (Lamdong, 12 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 10 (Hanoi, 22 April 2013), No 12 (Cantho 28 March 2013), No 15 (Hochiminh, 23 March 2013); *Hoàn thiện pháp luật về bảo vệ bí mật nhà nước* (16 August 2015) Công ty luật TNHH Sài Gòn Minh Luật <[http://www.saigonminhluat.com/index.php?option=com\\_content&view=article&id=4794:hoan-thin-phap-luat-v-bo-v-bi-mt-nha-nc&catid=334:hinh-s-to-tung-hinh-s&Itemid=519](http://www.saigonminhluat.com/index.php?option=com_content&view=article&id=4794:hoan-thin-phap-luat-v-bo-v-bi-mt-nha-nc&catid=334:hinh-s-to-tung-hinh-s&Itemid=519)>.

<sup>952</sup>Chapter 4, section 4.1. *Freedom of information*.

<sup>953</sup>Interview with participant No 4 (Cantho, 28 March 2013).

<sup>954</sup>Interview with participants No 2 (Hochiminh, 25 March 2013), No 14 (Lamdong, 7 March 2013), No 19 (Hanoi, 28 April 2013); 'Những "kê hồ" của Luật Báo chí', *BaoPhapluattp.HCM* (online) 30 November 2013 <<http://phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>.

<sup>955</sup>Chapter 4, section 4.1. *Freedom of information*.

<sup>956</sup>List of state secrets in banking sector enacted on 17 December 2007; List of state secrets in industry and trade sector enacted on 18 September 2008; List of state secrets in construction sector enacted on 03 December 2008; List of state secrets in agriculture sector enacted on 27 October 2009; List of state secrets in natural resources and the environment sector enacted on 10 May 2013; List of state secrets in finance sector enacted on 15 October 2013; List of state secrets in inspection sector enacted on 25 June 2004, etc.



provincial governments have their own rules on the protection of secrets.<sup>957</sup> Therefore the rules might conflict, making compliance complicated.<sup>958</sup> Many of my interviewees stated that the complexity of the provisions covering government or official secrets discussed above has prevented spokespersons from having confidence when providing information to the media<sup>959</sup> and it has also prevented editors in chief from having confidence when publishing information.<sup>960</sup> In order to avoid getting into trouble with the government, both spokespersons and editors will refuse to provide or publish information when they do not know exactly whether or not that information is part of official or government secrets. In many cases, when media institutions cannot decide whether information which they want to publish belongs to the protection of government or official secrets, they come to ask media regulatory bodies but receiving a clear, reliable answer from these bodies takes a considerable time. Information published is therefore not up-to-date. One of my interviewees pointed out that ‘in many circumstances, it is impossible for the media to identify whether or not a document belongs to the protection of government or official secrets. Arriving at an understanding of provisions covering the protection and the list of government or official secrets is a hardship both for the media and for media regulatory bodies’.<sup>961</sup> Provisions covering government and official secrets therefore need to be fleshed out to balance national security with the right to freedom of information.<sup>962</sup>

As we saw in chapter 4, Vietnamese media law does not provide any definition of national security. Similar to the deficiency in the provisions covering official secrets, this absence limits the implementation of right to access to government-held information. Many of my interviewees stated that government agencies refuse to provide information not only on the ground that the information is a government secret but also on the ground that publishing the information will harm national security.<sup>963</sup>

There is no provision identifying that providing members of the public including the media information is an obligation of government agencies. So, as a number of my interviewees stated, many government institutions think that providing the media information

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<sup>957</sup> Rules on the protection of state secrets of Hoa Binh province enacted on 07 June 2011, Rules on the protection of state secrets of Thua Thien Hue province enacted on 09 July 2013, Rules on the protection of state secrets of Phu Yen province enacted on 10 July 2013, Rules on the protection of state secrets of Dien Bien province enacted on 14 August 2013, Rules on the protection of state secrets of Quang Binh province enacted on 20 September 2011, Rules on the protection of state secrets of Ho Chi Minh city enacted on 29 August 2008, Rules on the protection of state secrets of Hai Phong city enacted on 19 August 2013, etc.

<sup>958</sup> *Hoàn thiện pháp luật về bảo vệ bí mật nhà nước* (16 August 2015) Công ty luật TNHH Sài Gòn Minh Luật <[http://www.saigonminhluat.com/index.php?option=com\\_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519](http://www.saigonminhluat.com/index.php?option=com_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519)>; Participants 2, 14, 19.

<sup>959</sup> Interview with participants No 4 (Cantho, 28 March 2013), No 5 (Hanoi, 28 April 2013), No 19 (Hanoi, 28 April 2013); ‘Những “kẻ hở” của Luật Báo chí’, *BaoPhapluattp.HCM* (online) 30 November 2013 <<http://phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>.

<sup>960</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 3 (Hochiminh, 21 March 2013), No 6 (Lamdong, 12 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 10 (Hanoi, 22 April 2013), No 12 (Cantho 28 March 2013), No 15 (Hochiminh, 23 March 2013); *Làm rõ ‘vùng cấm’ vàcohội báo tnhân* (04 December 2013) British Broadcasting Corporation <[http://www.bbc.co.uk/vietnamese/vietnam/2013/11/131121\\_vn\\_press\\_freedom\\_and\\_taboos.shtml](http://www.bbc.co.uk/vietnamese/vietnam/2013/11/131121_vn_press_freedom_and_taboos.shtml)>.

<sup>961</sup> Interview with participant No 1 (Lam Dong, 03 March 2013).

<sup>962</sup> *Hoàn thiện pháp luật về bảo vệ bí mật nhà nước* (16 August 2015) Công ty luật TNHH Sài Gòn Minh Luật <[http://www.saigonminhluat.com/index.php?option=com\\_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519](http://www.saigonminhluat.com/index.php?option=com_content&view=article&id=4794:hoan-thin-phap-lut-v-bo-v-bi-mt-nha-ne&catid=334:hinh-s-to-tung-hinh-s&Itemid=519)>.

<sup>963</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 4 (Cantho, 28 March 2013), No 8 (Hochiminh, 22 March 2013), No 14 (Lamdong, 7 March 2013), No 17 (Hochiminh, 23 March 2013).

is their prerogative rather than their obligation.<sup>964</sup> These interviewees said that they have been refused access to information with the reason being given that the agency does not need to publish the information. If these agencies allow the media access to information, they see it as doing the media a favour, the interviewees said.<sup>965</sup> Providing information is a right and not an obligation of government agencies under Vietnamese law, and they are not subject to any sanctions for failing to do so. Therefore, how they do it, what they provide, to whom they provide it, and when they provide it are up to them. One of my interviewees who is a journalist said: ‘government agencies often ask me to provide my contact numbers so they can contact me again to provide information because they are too busy to provide the information at the time I contact them. However, not one agency has ever contacted me. I have always contacted them again and they have said that they are still busy. They tell me that they have my number and will call me when they are ready to provide the information. I then have no information.’<sup>966</sup> All of this suggests that the capacity of media organizations and journalists to collect information will depend at least in part on whether they have good relationship with government bodies or spokesmen.

Moreover, Vietnamese media law does not establish any processes for providing information and making complaints against the decisions of the agencies to refuse access. The media therefore do not know how to apply for access to information or how to complain against the agency when they do not agree with the agency’s refusal of access. Agencies also do not know how to go about allowing the media access to information. As one of my interviewees, a journalist, said, when he wants to have information, he goes and talks to the office of the agency from which he wants that information.<sup>967</sup> If the head of the office is happy, he or she will provide the information soon. If s/he is not happy, s/he will refuse to allow access to the information. The interviewee continued his story, saying that if he still wants to have that information after being refused, he has to ask the head of the office again: ‘please, do me a favour by proving me the information’.<sup>968</sup>

As one of my interview participants stated, ‘having good relationships with spokesmen and organizations is more useful for journalists in collecting information than a good knowledge about media laws’.<sup>969</sup> Nine of my 20 interviewees argued that the Spokesman Regulation provisions’ lack of clarity and detail is the cause of the problem mentioned above.<sup>970</sup> My interviewees also stated that collecting information from government institutions therefore is difficult. The media have little ability to collect information relating to political, religious and ethnic matters; complaints about or disputes

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<sup>964</sup>Interview with participants No 10 (Hanoi, 22 April 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 16 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).

<sup>965</sup>Interview with participants No 10 (Hanoi, 22 April 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 16 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).

<sup>966</sup>Interview with participants No 1 (Lam Dong, 03 March 2013).

<sup>967</sup>Interview with participants No 1 (Lamdong, 3 March 2013).

<sup>968</sup>Interview with participants No 1 (Lamdong, 3 March 2013).

<sup>969</sup>Interview with participant No 15 (Hochiminh, 23 March 2013).

<sup>970</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 6 (Lamdong, 12 March 2013), No 10 (Hanoi, 22 April 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 14 (Lamdong, 7 March 2013), No 15 (Hochiminh, 23 March 2013), No 19 (Hanoi, 28 April 2013).

over issues relating to the land sector; and information about cases that are in litigation, as well as prosecutions by organizations such as courts or investigation institutions.<sup>971</sup> Official spokesmen for organizations play an important role in feeding information to the media, but both the *Vietnamese Press Law 1989* and the *Spokesman Regulation* give spokesmen and organizations the right to refuse to speak or provide information relating to many matters.<sup>972</sup> Difficulties arise because the definition and scope of these matters have not been clearly provided by law. In addition, the punishment for refusing to provide media information is a fine of between VND 200,000 and 500,000.<sup>973</sup> This is low compared to the average income of Vietnamese, which in 2013 was around VND 40,000,000 per person per year.<sup>974</sup> The maximum fine, therefore, is only about 1.25% of the average Vietnamese income, leading to a situation where spokesmen and institutions have refused to provide information, usually without concern about serious repercussions for their refusal. The media's right to have information is not respected.<sup>975</sup> To overcome this problem, journalists often collect information from informal sources. This can lead to inaccurate information, and is one cause of complaints and grievances against the media.<sup>976</sup> One of my interviewees stated that the influence of private relationships upon the provision of information mentioned above creates unfair competition among media organizations in collecting information and has in turn led to anti-social, illegal activities, and corruption.<sup>977</sup>

My interviewees also pointed out that a further limitation on the protection of freedom of information arises from the fact that neither the *Vietnamese Press Law 1989* nor *Decree No. 51* gives detailed provision on the protection of journalists.<sup>978</sup> Although that legislation refers to the concepts of 'threat to damage life', 'intimidating the life of journalists' and 'preventing them from conducting their profession',<sup>979</sup> there is no definition of these terms. Therefore it is difficult to confirm exactly what an action is. Further, there is no provision authorizing punishment for violence against journalists and the level of punishment for other offences against journalists is low considering the seriousness of those offences. The maximum penalty is only 75% of average annual earnings and offenders are not liable to imprisonment.<sup>980</sup> Therefore, the situation Heng describes is still current and my interviewees

<sup>971</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 12 (Cantho 28 March 2013), No 14 (Lamdong, 7 March 2013), No 16 (Hochiminh, 21 March 2013).

<sup>972</sup> Chapter 4, section 4.1. *Freedom of information*.

<sup>973</sup> Chapter 4, section 4.1. *Freedom of information*.

<sup>974</sup> *Tình hình kinh tế - xã hội năm 2013*, Tổng cục thống kê Vietnam < <https://gso.gov.vn/default.aspx?tabid=621&ItemID=13843>>.

<sup>975</sup> See eg, Phuong, M and Linh, N, 'Sửa Luật Báo chí: Căn cứ định quyền miễn trừ cho nhà báo', *BaoPhapluattp.HCM* (online) 24 November 2013 <<http://phapluattp.vn/20091212113022551p0c1013/sua-luat-bao-chi-can-quy-dinh-quyen-mien-tru-cho-nha-bao.htm>>; Stated by a Vietnamese journalist (interview participant 18).

<sup>976</sup> Participant No 9; 'Đánh giá toàn diện về báo chí Việt Nam', *An ninh Thủ do* (online) 30 March 2012 <<http://www.anninhthudo.vn/Thoi-su/Danh-gia-toan-dien-ve-bao-chi-Viet-Nam/441781.antd>>; 'Hội thảo về thực hiện Luật Báo chí', *Baomoi* (online) 10 December 2013 <<http://www.baomoi.com/Hoi-thao-ve-thuc-hien-Luat-Bao-chi/122/3614450.epi>>.

<sup>977</sup> Interview with participant No 15 (Hochiminh, 23 March 2013).

<sup>978</sup> Interview with participants No 2 (Hochiminh, 25 March 2013), No 4 (Cantho, 28 March 2013), No 6 (Lamdong, 12 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013), No 18 (Hochiminh, 21 March 2013).

<sup>979</sup> *Vietnamese Press Law 1989* s 15(4); the draft of new Press Law, s 12(2).

<sup>980</sup> Decree No. 02/2011/NĐ-CP enacted on 06 January 2011 regulating on administrative penalty for breaking media activities and publishing provisions, s 6.

also stated that journalists have been threatened, attacked or captured, and have had their facilities or materials seized or destroyed, in the course of their profession.<sup>981</sup>

In addition, the implementation of protection of whistleblowers is in trouble. The organizations or individuals who are under obligation to protect whistleblowers have insufficient enforcement power. For example, they also have no power to change the identification of the applicant. They also cannot order criminal punishment for the respondent. They therefore have to coordinate with other institutions such as police stations or courts.<sup>982</sup> However, neither the *Vietnamese Denunciation Law 2011* nor the Decree No 76/2012/NĐ-CP specifies how they can do so or what the obligations of other coordinating institutions are. The law and by-law mentioned above also do not provide the process of the implementation of protection methods. The law on the protection of whistleblowers therefore does not encourage people in making public interest disclosures. As one of my interviewees stated: ‘people do not want to come to government agencies to talk about wrongdoing or illegal actions of other people because they do not believe that they and their relatives will be protected from harm on account of exposing wrongdoing. In fact, people expose wrongdoing or illegal actions, but only because such actions damage them or their relatives. These people expose such actions to police stations rather than other agencies’.<sup>983</sup> As a result, the media miss out on access to engaging information they could otherwise publish, and members of the public do not have the benefit of being better informed through the media.

## 1.2. Freedom of expression

Although right to freedom of expression is provided in both the *Vietnamese Constitution* and the *Vietnamese Press Law 1989*, it is not adequately supported in practice. As we saw in Chapter 1, Heng<sup>984</sup> and Palmos<sup>985</sup> have both said that freedom of expression in Vietnam means the media are free to publish information which supports the VCP and the government;<sup>986</sup> and my research bears this out. It is also consistent with the Soviet theory’s concept of the media’s function, where the media have to serve the interest of the state rather than being a forum where people can discuss or express their opinions about political or government matters.<sup>987</sup> One of my interviewees said that ‘in more than 10 years being an editor in chief, I have never given any decision to allow the publication of information relating to disagreements over the policies of the VCP or the government, or political dissent’.<sup>988</sup> The media do not publish information relating to criticism of the policies or

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<sup>981</sup>Interview with participants No 2 (Hochiminh, 25 March 2013), No 4 (Cantho, 28 March 2013), No 6 (Lamdong, 12 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013), No 18 (Hochiminh, 21 March 2013); Hiang, Russell, ‘Media in Vietnam and the structure of its management’ in Marr, David G (ed), *The mass media in Vietnam* (Australian National University, 1998) 27, 44.

<sup>982</sup>*Pháp luật về bảo vệ người tố cáo hiện nay và một số kiến nghị* (26 August 2015) Bộ Tư Pháp <<http://moj.gov.vn/ct/tintuc/Pages/nghien-cuu-trao-doi.aspx?ItemID=4534>>.

<sup>983</sup>Interview with participant No 17 (Hochiminh, 23 March 2013).

<sup>984</sup>Russell Hiang-KhngHeng, *Of the State, For the State, Yet Against the State- The Struggle Paradigm in Vietnam's Media Politics* (PhD thesis, Australian National University, 1999) 60.

<sup>985</sup>Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 13-16.

<sup>986</sup>See chapter 1, section 6.

<sup>987</sup>See chapter 1, section 6.1.

<sup>988</sup>Interview with participant No 8 (Hochiminh, 22 March 2013).

activities of the VCP unless the policies are unfeasible or fail to achieve their objectives.<sup>989</sup> In this respect the Vietnamese system bears similarities to those of both modern Singapore and the Russian-Soviet Communist system mentioned in chapter 1: freedom of the press means the press is free to play a positive role in supporting the overriding needs of the government.

Further, as discussed in chapter 4, Vietnam does not have a constitutional court with the power to strike down laws that breach the *Constitution*.<sup>990</sup> For this reason, it is impossible to enforce constitutional norms against the Assembly. As a result, if there are any laws adopted by the Assembly which unreasonably and inappropriately limit freedom of expression provided in the *Constitution* they remain in force. Many of my interviewees stated that although the right to freedom of expression is provided in the *Constitution*, the Assembly has been quite free to pass laws that limit that freedom.<sup>991</sup>

Freedom of expression is also negatively affected by the intervention of the VCP in the media's publication decisions. According to the *Vietnamese Press Law 1989*, 'the content of the media product shall not be subjected to censorship prior to publishing'<sup>992</sup> and 'the editor in chief of the media is authorized to lead and manage the media in all aspects and is responsible for all activities of the media'.<sup>993</sup> However, as one of my interviewees stated, 'freedom of expression in Vietnam has been limited by government interventions, especially in publishing political, religious and ethnic information or information relating to complaints about or disputes over land ownership'.<sup>994</sup> The situation is similar to George's description of the media in Singapore which I discussed in chapter 1: when editors deviate deliberately or unwittingly from the government's preferred script, officials will signal their displeasure privately through phone calls or in meetings with editors. An editor will be eased out or sidelined when the government does not confidence in him/her.<sup>995</sup> In Vietnam, as a number of my interviewees pointed out, the VCP has usually given compulsory direction and requirements to editors in chief.<sup>996</sup> This is similar to the Soviet system pointed out by Schramm where the government controlled the media by means of directives, review, criticism, and censorship.<sup>997</sup> In addition, every month, media representatives (editors in chief) have to attend a meeting chaired by the MIC to ensure that media organizations will publish information in accordance with the orientation of the VCP and the government.<sup>998</sup> Members of the public do not receive enough of the information they need from the media and the information published by the media is not up-to-date. The media therefore cannot be a forum

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<sup>989</sup> Ha Duong Tuong, 'Bao chi Viet Nam, van hoi moi?' (2006) 9 Tap chi Nghiencuu va Thao luan. Access online: ([http://www.tapchithoidai.org/ThoiDai9/200609\\_HDTuong.htm](http://www.tapchithoidai.org/ThoiDai9/200609_HDTuong.htm)).

<sup>990</sup> Chapter 4, sub-section 2.1. (*Overview of the Vietnamese government system*).

<sup>991</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013).

<sup>992</sup> *Vietnamese Press Law 1989* s 2; the draft of new Press Law, s 12(4).

<sup>993</sup> *Vietnamese Press Law 1989* s 13(3); the draft of new Press Law, s 31.

<sup>994</sup> Interview with participant No 8 (Hochiminh, 22 March 2013).

<sup>995</sup> Chapter 1, subsection 6.7 Cherian George.

<sup>996</sup> Interview with participants No 2 (Hochiminh, 25 March 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 16 (Hochiminh, 21 March 2013), No 17 (Hochiminh, 23 March 2013), No 18 (Hochiminh, 21 March 2013), No 20 (Hochiminh, 23 March 2013).

<sup>997</sup> **Fred S. Siebert**, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 140.

<sup>998</sup> Decision No 68/QĐ-BTTTT enacted 17/01/2014 (Quyết định số 68/QĐ-BTTTT ngày 17/01/2014 Ban hành Quy chế giao ban báo chí ngành Thông tin và Truyền thông), s 6.

for members of the public where people can have accurate and timely information and be free to discuss the matters of life including political or government matters. The VCP is invited to attend the monthly meeting mentioned above. Information published therefore has to comply not only with law but also with guidance given by the VCP and the government. As one journalist stated when interviewed during my research, 'Government dominates media activities quite absolutely so publication of information does not meet the needs of the public and this leads media to lose their role in informing public opinion'.<sup>999</sup> This is consistent with the traditional Soviet theory where the public interest depends on the government's interest. However, now that concept has been destabilised, such a relationship between the government and the media no longer accurately reflects political and social relations.<sup>1000</sup>

In a conference paper named 'The media in Vietnam and freedom of information - not yet a right: perhaps a growing notion', published in 2000, Heng noted that<sup>1001</sup> shortcomings in the law can have a more subtle chilling effect on freedom of expression.<sup>1002</sup> Five of my 20 Vietnamese interviewees stressed that freedom of expression is limited because editors in chief lack clarity and confidence when they are deciding what information to publish.<sup>1003</sup> Provisions covering the protection of competing interests including national security, personal information, government or official secrets, and reputation are not well developed.<sup>1004</sup> Most of them do not provide definitions of the interests protected, and do not develop exemptions or defences to allow freedom of expression. These shortcomings cause the media confusion over and loss of confidence in making publication decisions. In this situation, to avoid prosecution, the media refrain from publishing information, especially information relating to government or political matters.

## 2. Private information

Some of my interviewees stated that the media lack confidence when publishing private information.<sup>1005</sup> Vietnamese laws prohibit the publication of private information without permission of the individual concerned,<sup>1006</sup> but no legal document provides the definition and scope of private information.<sup>1007</sup> For this reason, there are different interpretations of the concept. One of the main interpretations states that 'private information is information known only by some people and it is hidden'.<sup>1008</sup> In this interpretation, the

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<sup>999</sup>Interview with participant No 14 (Lam Dong, 07 March 2013).

<sup>1000</sup>Chapter 1, section 6.

<sup>1001</sup>Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right: perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000), 11.

<sup>1002</sup>Chapter 1, subsection 6.1. Heng, Russell Hiang- Khng; Heng, Russell Hiang- Khng, 'The media in Vietnam and freedom of information - not yet a right: perhaps a growing notion' (Paper presented at the Regional Consultation on Asian Media and Freedom of Information, Thailand, 8 May 2000), 11.

<sup>1003</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013), No 2 (Hochiminh, 25 March 2013), No 4 (Cantho 28 March 2013).

<sup>1004</sup>See followings sections in this chapter for detailed discussion about the shortcomings of regulations covering matters mentioned.

<sup>1005</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013).

<sup>1006</sup>Chapter 4, subsection 3.1. *Protection of private information*.

<sup>1007</sup>'Những "kẽ hở" của Luật Báo chí', *Bao Phap luat tp. HCM* (online) 30 November 2013 <<http://phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>.

<sup>1008</sup>See eg, 'Thế nào là bí mật đời tư?', *Bao Xa luan* (online) 04 December 2013 <<http://www.xaluan.com/modules.php?name=News&file=article&sid=187590>>; 'Rắc rối chuyện bí mật đời tư của cá nhân', *Bao Phap luat tp. HCM* (online) 04 December 2013 <<http://phapluattp.vn/20100611121321510p0c1021/rac-roi-chuyen-bi-mat-doi-tu-cua-ca-nhan.htm>>.

scope of the category is narrow and it is understood as a private secret. Another interpretation states that ‘private information is information belonging to individuals’.<sup>1009</sup> One of my interviewees stated that ‘the media take a risk when they publish information relating to individuals because they do not know whether their publication is personal information’.<sup>1010</sup>

The existence of different interpretations mentioned above puts the media at risk of being sued.<sup>1011</sup> Two examples involve Vietnamese singers: in 2014, Ho Ngoc Ha sued the *Phap luat & Cuoc song* newspaper because it published information about her having been married when she was 16 years old;<sup>1012</sup> and in 2010 the *Dat viet* newspaper was sued by Elly Tran, because it published information about her breastfeeding her daughter after having plastic surgery.<sup>1013</sup> According to both singers, the information published belonged to their personal life, so the newspapers had broken laws on protection of private information. In contrast, both newspapers argued that information published was publicly available so they had not broken any law.

Moreover, as three of my interviewees pointed out, the rules on the protection of private information are disjointed.<sup>1014</sup> While the *Vietnamese Constitution* and the *Vietnamese Civil Code 2005* provide that private information is protected and no one can use private information without permission of the individual concerned, neither the *Vietnamese Press Law 1989* nor Decree No. 51/2002/NĐ-CP stipulates clearly that the media are restricted from publishing personal information without permission.<sup>1015</sup> For this reason, there are different views on publishing personal information. Some people cite the *Vietnamese Civil Code 2005* and argue that the media must have permission whether or not the publication will have a negative effect on the individual. By contrast, some others, citing Decree No.51, argue that the permission of an individual is needed only when the media publish information which will negatively affect the individual. Some others state that the rights to personal secrets are guaranteed only when they are not related to any offences and do not violate social ethics.<sup>1016</sup> These different stances make it difficult for the media to know exactly whether or not publication of information they hold is restricted. This also causes difficulties for media regulatory bodies and courts when they are required to rule on disputes about information published. One of my interviewees stated that ‘publishing information relating to personal life is playing a lottery. If the media regulatory body or court applies Decree No.51 to handle the against the publication, the media outlet is lucky because based on this legal document,

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<sup>1009</sup> ‘Thế nào là bí mật đời tư?’ *Bao Xa luan* (online) 04 December 2013 <<http://www.xaluan.com/modules.php?name=News&file=article&sid=187590>>; ‘Rắc rối chuyện bí mật đời tư của cá nhân’, *Bao Phap luat tp.HCM* (online) 04 December 2013 <<http://phapluattp.vn/20100611121321510p0c1021/rac-roi-chuyen-bi-mat-doi-tu-cua-ca-nhan.htm>>.

<sup>1010</sup> participants No 1 (Lam Dong, 03 March 2013).

<sup>1011</sup> ‘Những “kẽ hở” của Luật Báo chí’, *Bao Phap luat tp. HCM* (online) 30 November 2013 <<http://phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>.

<sup>1012</sup> *Hồ Ngọc Hà chính thức khởi kiện vì bị xâm hại đời tư* (14 August 2015) Megafun <<http://megafun.vn/nghe-thuat/hau-truong/201006/ho-ngoc-ha-chinh-thuc-khoi-kiem-vi-bi-xam-hai-doi-tu-80457/?mode=mobile>>.

<sup>1013</sup> Elly Trần kiến nghị một báo điện tử vì bài viết “Elly Trần và chuyện khó nói khi sinh con”, *Dan viet* (online) 14 August 2015 <<http://danviet.vn/hau-truong-giai-tri/elly-tran-kien-nghi-mot-bao-dien-tu-vi-bai-viet-elly-tran-va-chuyen-kho-noi-khi-sinh-con-498019.html>>.

<sup>1014</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 8 (Hochiminh, 22 March 2013), No 17 (Hochiminh, 23 March 2013).

<sup>1015</sup> Chapter 4, subsection 3.1. *Protection of private information*.

<sup>1016</sup> Cam Van, *Sửa đổi, bổ sung Bộ luật Dân sự năm 2005: Xâm phạm bí mật đời tư phải bị xử lý nghiêm* (29 June 2014) Bộ Tư Pháp <<http://www.moj.gov.vn/ct/tintuc/Pages/nguyen-cuu-trao-doi.aspx?ItemID=5926>>.

the media can publish private information without the permission of the individual concerned if the publication does not negatively affect the person's privacy. If the agencies mentioned above apply the *Vietnamese Civil Code 2005*, the media outlet is unlucky and faces disadvantages which may include compensation and administrative punishment'.<sup>1017</sup>

The media also hesitate to publish private information under the exemption provided in the *Civil Code 2005*.<sup>1018</sup> Under the *Civil Code 2005*, the media are exempted from liability for publishing private images if publication was done for 'the benefit of the State' and 'public interest'.<sup>1019</sup> The *Civil Code 2005*, however, does not give provisions which detail what is 'the benefit of the State' and 'public interest'. It is therefore difficult to determine exactly whether or not a publication is in breach of that Code. There is also some doubt as to whether the exemptions listed in the Decree No.51<sup>1020</sup> extend to private images or only to public ones. Therefore, when the media publish individual images they do not know whether they will be subjected to litigation.<sup>1021</sup>

### 3. Defamation

As highlighted in chapter 3, private reputation is protected in a variety of legal documents.<sup>1022</sup> These provisions, however, are not well developed.<sup>1023</sup>

Firstly, both the *Vietnamese Civil Code 2005* and *Vietnamese Press Law 1989* do not provide the definition of defamation and how or what a person must do to prove that the publication complained about is defamation. Needless to say, this makes it difficult to confirm whether or not an action is defamation. Therefore, the application of s 9 of the *Vietnamese Press Law 1989* to resolve complaints that the media has offended a person's honour or dignity is also problematic. For example, in 2011, a newspaper published a story about a dispute between A and B about the right to use a house. In the article, the newspaper stated that the law will be against A in the dispute. According to A, the article breaks the protection of reputation. A therefore asked the newspaper to publish a correction and apology to A. However, the newspaper refused to do this. According to the newspaper, the article did not harm the honour or dignity of A. This case was sent to a state authority agency in early 2012 but has not been resolved.<sup>1024</sup> One of my interviewees said: 'there has been much debate on the issue of defamation. Such debate will continue in future until the Vietnamese government adopts provisions which says what defamation is'.<sup>1025</sup>

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<sup>1017</sup> Interview with participants No 17 (Hochiminh, 23 March 2013).

<sup>1018</sup> Chapter 4, subsection 3.1. *Protection of private information*.

<sup>1019</sup> Chapter 4, subsection 3.1. *Protection of private information*.

<sup>1020</sup> Chapter 4, subsection 3.1. *Protection of private information*.

<sup>1021</sup> Thanh, Nam, 'Chưa quy định việc đăng ảnh cá nhân', *Bao Phap luat tp.HCM* (online) 01 December 2013 <<http://phapluattp.vn/221679p0c1013/chua-quy-dinh-viec-dang-anh-ca-nhan.htm>>.

<sup>1022</sup> Chapter 4, section 3.2. *Defamation*.

<sup>1023</sup> Yên, Hoàng, 'Xúc phạm danh dự đến đâu thì phải bồi thường', *Bao Phap luat tp.HCM* (online) 05 December 2013 <<http://phapluattp.vn/20120706120026219p0c1063/xuc-pham-danh-du-den-dau-thi-phai-boi-thuong.htm>>.

<sup>1024</sup> Report on inspection in 2013, the Department of Information and Communication of Lamdong province.

<sup>1025</sup> Interview with participant No 2 (Hochiminh, 25 March 2013).



Secondly, Vietnamese laws do not provide any ground for compensation for mental damage or for the quantification of damages to be paid.<sup>1026</sup> Therefore, defining whether or not the person or organization who committed defamation has to be responsible for compensation and the amount of compensation is left to the authorities' subjective values and impressions.<sup>1027</sup> This deficiency leads to different solutions to the same problem in different jurisdictions. This has adverse consequences for the finality of proceedings, because when defendants or plaintiffs do not agree with the decisions of complaint handling bodies they can appeal against the outcome.<sup>1028</sup> Vietnamese law does not set out the criteria to be met for compensation or the level of compensation. The court therefore is free to force a newspaper to pay compensation and the amount of money the media organization has to pay is at large.

#### 4. Opposition and dissent

Similar to the problem of the media under the model of the Soviet Communist Theory described by Schramm,<sup>1029</sup> the Vietnamese government now use the media to communicate the policies and laws of the VCP and the state to their citizens, to encourage their citizens to support and implement those policies rather than forming a forum where citizens can discuss or express their opinions about political or government matters. In many cases, people who have something to say will not actually say it. For this reason, the facts are published only when they do not harm the interests of the state; the release of information depends upon regulatory bodies, and the media outlet's owners (which are also state instrumentalities). Freedom of expression in Vietnam is freedom within the state rather than freedom from the state. The media publish information that the government approves, rather than information that the government does not prohibit.

George and Schramm have described the media in modern Singapore and the Soviet Union, respectively, as advancing the objectives and policies of the state rather than acting as a forum where people present evidence and arguments on the basis of which they can act as a check on the government and make up their minds and policies.<sup>1030</sup> One of my interviewees identified a similar situation in Vietnam, arguing that 'the media in Vietnam are considered more as an essential means of communication for the Vietnamese Communist Party and government than as the people's forum'.<sup>1031</sup> Uncertainty about the scope and application of the law on opposition<sup>1032</sup> contribute to this phenomenon, causing media hesitation about publishing opinions on matters of public significance. Therefore the media have an even stronger incentive and tendency than they would otherwise have, to avoid

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<sup>1026</sup>Yến, Hoàng, *Bồi thường xúc phạm danh dự* (05 June 2015) *Hang luat Giai phong* < <http://luatgiaiphong.com/tin-tuc-phap-luat/7302-boi-thuong-xuc-pham-danh-du>>.

<sup>1027</sup> Yến, Hoàng, 'Xúc phạm danh dự đến đâu thì phải bồi thường', *Bao Phap luat tp.HCM* (online) 05 December 2013 <<http://phapluattp.vn/20120706120026219p0c1063/xuc-pham-danh-du-den-dau-thi-phai-boi-thuong.htm>>.

<sup>1028</sup>Yến, Hoàng, *Bồi thường xúc phạm danh dự* (05 June 2015) *Hang luat Giai phong* < <http://luatgiaiphong.com/tin-tuc-phap-luat/7302-boi-thuong-xuc-pham-danh-du>>.

<sup>1029</sup>Chapter 1, subsection 6.1. Fred S Siebert, Theodore Peterson, and Wilbur Schramm.

<sup>1030</sup> See chapter 1, section 6. The existing research.

<sup>1031</sup>Interview with participants No 9 (Hochiminh, 21 March 2013).

<sup>1032</sup> See chapter 4, subsection 3.3.

publishing dissenting opinions against the government or which are contrary to policies, guidelines, laws, plans or opinions of the government or the VCP. It is no wonder that Palmos has stated that freedom of expression in Vietnam means that ‘the press is free to play a positive role in the building of socialism’.<sup>1033</sup>

As discussed in chapter 4, the dividing line between opposition and dissent is unclear.<sup>1034</sup> It is therefore difficult to determine whether or not a publication breaks the law on opposition. The media have no grounds for defining whether or not information incites opposition to the government, damages national unity or incites the use of violence as provided under the *Vietnamese Criminal Code 1999* and *Vietnamese Press Law 1989*. To avoid prosecution, the media withhold information when they worry that the publication may break the law on opposition. Five of my 20 Vietnamese interviewees stressed that the rights to freedom of expression or access to information therefore are limited.<sup>1035</sup>

For this reason, the media cannot determine exactly whether or not the publication of opinions which disagree strongly with the plans and policies of the VCP, or government, amounts to opposition. Editors in chief therefore cannot confirm exactly what types of sources of information are legal and can be published. Hence, they feel less confident about publishing dissenting opinions, so they choose not to publish these opinions. Such opinions have been published on other platforms, such as internet blogs and interviews conducted by foreign media. However, any foreign media which published such opinions would not be permitted to import their products into Vietnam. This is similar to Singapore where the government could declare any foreign newspaper to be engaging in the domestic politics of Singapore and impose a cap on the total number of copies imported.<sup>1036</sup> It would be preferable for such opinions to be published in the main Vietnamese media as the population may be more reliably informed in this way. As one of my interviewees pointed out, ‘in order to avoid being prosecuted for opposition, the media do not publish opinions or views which disagree strongly with the policies, activities or process of the VCP or the government’.<sup>1037</sup> This point of view was also disclosed by other interviewees when they said that to avoid being subject to any obligation or getting in trouble with the government, editors in chief often refrain from publishing information that is at odds with the policies of the VCP or the government.<sup>1038</sup> Members of the public therefore do not have the benefit of diverse opinions or views on the decisions of their representatives.

One example is the publication of opinion about the need for a multi-party system in Vietnam. Frank Palmos stated in 1995 that ‘[n]o media outlet has dared to raise the issue of the need for a multi-party system, which is by far the most common subject of day-to-day

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<sup>1033</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 2.

<sup>1034</sup> Chapter 4, subsection 3.3.

<sup>1035</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 10 (Hanoi, 22 April 2013), No 17 (Hochiminh, 23 March 2013).

<sup>1036</sup> Chapter 1, section 6 Cherian George.

<sup>1037</sup> Interview with participant No 20 (Hochiminh, 23 March 2013).

<sup>1038</sup> See chapter 6, subsection 1.2. Freedom of expression.

political discussions'<sup>1039</sup>. This statement of Palmos is still correct now, as opinions about the need for a multi-party system have been explored in many platforms such as facebook, blogs, Instagram while they are not published in Vietnamese traditional media. Articles have been published online with names such as, 'Having multiple political parties in Vietnam is needed for democracy',<sup>1040</sup> 'Disagreement with the VCP's self-serving argument about having only one political party in Vietnam',<sup>1041</sup> and 'Whether having multiple political parties is dangerous?'<sup>1042</sup> We cannot find these articles or others which have similar content in printed media published in Vietnam such as Tuoitre, Thanhnien, Laodong, Nhandan or their online versions. Another example is the publication of opinions opposed to mining bauxite in some highland areas. In this case, media is limited in publishing strong negative opinions about mining bauxite because it is considered a sensitive issue. The lack of detail in the aforementioned provisions is also the cause of complaints by persons who are accused of opposing by publication.<sup>1043</sup>

## 5. Ownership

Schramm has said that according to the Soviet Communist theory, the working class would not be able to get the media as an instrument of revelation if they did not own the media. The media under the Soviet Union system therefore were state-owned.<sup>1044</sup> Again this coincides with the Vietnamese situation for, as highlighted in chapter 1,<sup>1045</sup> there is no private media there. The *Vietnamese Press Law 1989* states that three kinds of institutions have the right to establish media agencies: VCP organizations, government bodies and social organizations.<sup>1046</sup> Nguyen Tan Dung, the Prime Minister of Vietnam, confirmed this in 2006 when he stated that private ownership of media is strictly forbidden.<sup>1047</sup> The Minister for Information and Communication has confirmed more recently that there is no plan to authorize private media because media is the mouthpiece of the VCP and Vietnamese government social organizations, and a forum for the public.<sup>1048</sup>

Nevertheless, as I have described, private companies have been participating in some stages of media activities, such as by placing advertisements in government media

<sup>1039</sup> Palmos, Frank, *The Vietnam Press: The Unrealised Ambition* (Faculty of Arts, Edith Cowan University Western Australia, 1995) 5.

<sup>1040</sup> *Dânchủđảng ở Việt Nam làcảnhiết* (21 November 2016) British Broadcasting Corporation <[http://www.bbc.com/vietnamese/vietnam/2015/09/150918\\_nguyenvandai\\_nhu-cau-da-dang](http://www.bbc.com/vietnamese/vietnam/2015/09/150918_nguyenvandai_nhu-cau-da-dang)>.

<sup>1041</sup> 'Bác bỏ lý luận sai trái của ĐCSVN', <http://danlambaovn.blogspot.com/2014/11/bac-bo-ly-luan-sai-trai-cua-csvn.html>; <https://vi-vn.facebook.com/danlambaovn/posts/771066519615335>.

<sup>1042</sup> 'Đảng có thật sự đáng sợ không', <https://vi-vn.facebook.com/thong.luan.1/posts/1329650683711703:0>.

<sup>1043</sup> For example, Pham Viet Dao (*Vietnam: Drop Prosecution of Blogger*) (06 June 2015) Human Rights Watch <<https://www.hrw.org/news/2014/03/17/vietnam-drop-prosecution-blogger>>, Nguyen Van Hai, Ta ThiPhong Tan, Phan Thanh Hai ('Xét xử 3 blogger tuyền truyền chống nhà nước', *Thanh Nien* (online) 06 June 2015 <<http://www.thanhnien.com.vn/phap-luat/xet-xu-3-blogger-tuyen-truyen-chong-nha-nuoc-54436.html>>), Truong DuyNhat (*Vietnam: Relentless Prosecutions to Squelch Dissent*) (06 June 2015) Human Rights Watch <<https://www.hrw.org/news/2014/03/03/vietnam-relentless-prosecutions-squelch-dissent>>).

<sup>1044</sup> Fred S. Siebert, Theodore B Peterson, Wilbur Schramm, *Four theories of the press: the authoritarian, libertarian, social responsibility and Soviet communist concepts of what the press should be and do* (Urbana, Ill.: University of Illinois Press, 1963) 123, 140.

<sup>1045</sup> Chapter 1, section 6. The existing research.

<sup>1046</sup> *Vietnamese Press Law 1989* s 1; the draft of new Press Law, s 16. See Chapter 4, section 5. Media ownership regulation.

<sup>1047</sup> Direction No 37/2006/CT-TTg enacted 29 November 2006

Về việc thực hiện kết luận của Bộ Chính trị về một số biện pháp tăng cường lãnh đạo và quản lý báo chí, section 2.d.

<sup>1048</sup> *Việt Nam không định hình công tunhân hóa báo chí* (22 November 2013) Dai Tieng noi Hoa Ky <[http://www.voatiengviet.com/content/vietnam-khang-dinh-khong-tu-nhan-hoa-bao-chi/1210448.html](http://www.voatiengviet.com/content/vietnam-khang-dinh-khong-tunh-an-hoa-bao-chi/1210448.html)>.

and by issuing media releases.<sup>1049</sup> The Vietnamese Ministry of Information and Communication also agrees that individuals and private organizations can take part in some types of media activities but the media supervisor and the editor in chief must take responsibility for the content of media products.<sup>1050</sup>

Holding the media accountable for its activities is difficult because Vietnamese legislation on media ownership has not met the needs of the current situation. The prohibition against private ownership of media is misleading and creates confusion when many private organizations have run media activities under the media licence of other organizations. This is reflected in the following issues.

Firstly, when the private role in media activities becomes more and more obvious, it is difficult to precisely confirm media ownership. Private companies and individuals may have a dominant role in the media organizations with which they engage. Take *VnExpress.net*, the online newspaper that has the largest number of daily visitors (42 million page views per day), as an example.<sup>1051</sup> According to its licence, the Ministry of Science and Technology is the owner of *VnExpress.net* but in fact it is set up and run by FPT, an information technology company listed on the Ho Chi Minh City Stock Exchange and that has provided all the capital for the website.<sup>1052</sup> FPT has a similar relationship with many other online newspapers, for example *Ngoisao.net*, *Dandung.net*, *Sohoa.net*, even though it does not have the right to establish a media organization.<sup>1053</sup> *Forbes Vietnam*, launched June 2013, is the latest example of such practice.<sup>1054</sup> *Forbes* introduced its new venture as a licensing agreement between *Forbes Media LLC* and *Interactive Media*, an *IDG Ventures Vietnam* portfolio company, and in cooperation with Government-owned *Van Hoa* newspaper which holds the licence because of its connection with the Vietnamese Ministry of Culture, Sports and Tourism. It therefore has three usual partners: *Forbes* as the masthead owner, *Interactive Media* as the local company that runs *Forbes Vietnam* operations and *Van Hoa* newspaper as the official licensee.

Secondly, according to article 11 of the *Vietnamese Press Law*, ‘Media organization means an organization performing activities in relation to any one of the types of media referred to in article 3 of this Law’. This means each media organization is authorized to carry out activities with only one of the following types of media: ‘printed (newspapers, magazines, current affairs news, news bulletins from news agencies); audio (radio programs);

<sup>1049</sup> *Khôngchophépbáo chí tunhân* (24 November 2013) British Broadcasting Corporation <[http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717\\_press\\_law.shtml](http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717_press_law.shtml)>.

<sup>1050</sup> *Khôngchophépbáo chí tunhân* (24 November 2013) British Broadcasting Corporation <[http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717\\_press\\_law.shtml](http://www.bbc.co.uk/vietnamese/vietnam/story/2008/07/080717_press_law.shtml)>.

<sup>1051</sup> ‘*VnExpress* tròn 13 tuổi’, *Vnexpress* (online) 07 June 2015 <<http://vnexpress.net/tin-tuc/thoi-su/vnexpress-tron-13-tuoi-2956185.html>>.

<sup>1052</sup> *FPT Annual report 2012(07 June 2015) FPT* <[http://www.fpt.com.vn/en/investor\\_relations/annual\\_shareholders\\_s\\_meeting/2013/2012\\_annual\\_report/](http://www.fpt.com.vn/en/investor_relations/annual_shareholders_s_meeting/2013/2012_annual_report/)>, 19.

<sup>1053</sup> *FPT Annual report 2012(07 June 2015) FPT* <[http://www.fpt.com.vn/en/investor\\_relations/annual\\_shareholders\\_s\\_meeting/2013/2012\\_annual\\_report/](http://www.fpt.com.vn/en/investor_relations/annual_shareholders_s_meeting/2013/2012_annual_report/)>, 19.

<sup>1054</sup> See, eg, N. Trần Tâm, T. Châu, ‘Ra mắt tạp chí *Forbes Việt Nam*’, *Báo mới* (online) 07 June 2015 <<http://www.baomoi.com/Ra-mat-tap-chi-Forbes-Viet-Nam/76/11317840.epi>>; *Con rết hút rốn già đầu tư vào otruyền thông* (07 June 2015) BBC Tiếng Việt <[http://www.bbc.co.uk/vietnamese/vietnam/2013/06/130626\\_nguyenbaohong\\_forbes\\_vietnam](http://www.bbc.co.uk/vietnamese/vietnam/2013/06/130626_nguyenbaohong_forbes_vietnam)>.

visual (television programs, audio and visual programs on current events made by various technical means); electronic (by way of the computer information network)'.<sup>1055</sup> But, in fact, many organizations do not comply with this requirement and the majority of media combine printed and electronic forms. For example, PhapluatTp.HCM has printed media (Phapluatthanh pho Hochiminh newspaper) and electronic media (Phapluatthanh pho Hochiminh online), Tuoitre has Tuoitre newspaper and Tuoitre online. Particularly, VOV has four types of media including radio broadcasting service, television broadcasting service, print media and electronic media.<sup>1056</sup> The fact that the law is honoured more in the breach than in the observance indicates that the law has not kept up with the development of the media. As one of my interviewees stated: 'it is inappropriate in the age of media convergence to limit the media on running only one type of media'.<sup>1057</sup> A media organization is authorized to run no more than one type of media outlet even though it might be well placed to run all three types of media including printed, audio and electronic, in the sense that it has enough editors, reporters, journalists and financial capability and equipment. This interviewee described the restriction as 'similar to limiting your children to one dish while there is a lot of food on the table'.<sup>1058</sup>

A third issue arises from the existence of *trang tin dientu tong hop*, websites that are licensed to collect and publish information from other newspapers, official news sources or the VCP's and government's websites<sup>1059</sup> but have no right to publish information created by the owners themselves.<sup>1060</sup> There are around 1,174 of these 'synthetic' websites.<sup>1061</sup> Because there is no regulation forbidding their staff from producing news for other newspapers, these websites give their articles to other newspapers to publish and then immediately republish the articles on their own websites. In this way, they can bypass the regulations and still manage to run a fully-fledged newspaper. This trend is becoming common and can account for some popular websites such as *Vietstock.vn*, *CafeF.vn*, *Gafin.vn*, *Vinacorp.vn*, etc. Therefore, real editors and reporters have to hide behind bogus state news organs. This situation does not bode well for investigative reporting and real journalism because official news outlets are not taking responsibility for the gathering and preparation of the information. Even so, some synthetic websites have published their own independently written articles.

Lastly, government media funding has been reduced and will be stopped by 2020.<sup>1062</sup> As highlighted before,<sup>1063</sup> since 1986, media organizations have been allowed to

<sup>1055</sup> *Vietnamese Press Law 1989* s 3.

<sup>1056</sup> 'Đài Tiếng nói Việt Nam kỷ niệm 70 năm Ngày thành lập', *Báo Quân đội nhân dân* (online) 07 October 2015 <<http://www.qdnd.vn/qdndsite/vi-vn/61/43/trong-nuoc/dai-tieng-noi-viet-nam-ky-niem-70-nam-ngay-thanh-lap/377005.html>>.

<sup>1057</sup> Interview with participants No 1 (Lam Dong, 03 March 2013).

<sup>1058</sup> Interview with participants No 1 (Lam Dong, 03 March 2013).

<sup>1059</sup> Decree No 97/2008/NĐ-CP enacted 28 August 2008 regulating on control, provision and use of Internet services and information on the Internet, art 2.13. I call these websites are 'Synthetic' websites.

<sup>1060</sup> Decree No 72/2013/NĐ-CP enacted 15 July 2013 regulating on control, provision and use of Internet services and information on the Internet, art 20(2).

<sup>1061</sup> 'Kinh tế khó khăn ảnh hưởng mạnh đến báo chí', *Bao Lao động* (online) 27 November 2013 <<http://www.laodongmt.vn/tren-duong-phat-trien/doc?vinahelp=SRL11LrEbL7UWHIeWD2U0Q%3D%3D>>.

<sup>1062</sup> Giang, Dang, 'Quy hoạch báo chí thế hệ đương đại, tặc chủ', *Bao Nhân Dân* (online) 27 November 2013 <<http://www.nhandan.com.vn/chinhtri/tin-tuc-su-kien/item/21706002-quy-hoach-bao-chi-theo-huong-hien-dai-tu-chu.html>>.

expand into other businesses to earn extra income from selling their products in the free market when government funding was reduced. Therefore, media organizations must finance themselves and it is not surprising that many media outlets subscribe to sensationalism such as celebrity gossip, sexual affairs, or other scandalous events, in a bid to attract viewers and advertisers. It is highly doubtful that the VCP and the Vietnamese government would care to provide the Vietnamese people with sexual, untruthful, distorted, or slanderous and harmful information such as why men cheat or how the movie stars spend their money, why a famous model filed for divorce, the financial success of a famous business. Yet that is the natural result of the withdrawal of funding. One of my interviewees commented that ‘it is funny to say that the government owns the media while they are funded by their own economic activities and by other organizations rather than by the government’.<sup>1064</sup>

## 6. The handling of complaints and grievances

A number of my Vietnamese interviewees pointed out that the provisions covering complaints handling are unfeasible and lacking in detail.<sup>1065</sup> For example, the time limit for publishing an individual’s or an organization’s statement following the conclusion of the regulatory body’s deliberations is too short. By contrast, in most cases, investigations have taken years to uncover all the facts and finally vindicate the press.<sup>1066</sup>

Moreover, s 9 of the *Vietnamese Press Law 1989* does not disclose clearly whether or not the complainant must discuss the issue with the owner of the media organization before lodging the complaint to institute legal proceedings; nor does it detail whether the complainant has to bear the burden of proving that the reported information was untruthful, distorted, or slanderous and harmful to the reputation and dignity of the complainant. The majority of my interviewees emphasised that the deficiencies of s 9 highlighted above cause difficulties for complainants, media organizations and media regulators or courts when they deal with the section.<sup>1067</sup> Complainants do not know whether or not they must discuss the issue with the owner of the media organization prior to lodging their complaint with the authorities. Media regulators and courts do not know whether or not they have the jurisdiction to resolve the issue lodged directly without discussion with the owner of the media. They also cannot confirm exactly who bears the burden of proving that the information published is accurate or inaccurate.<sup>1068</sup>

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<sup>1063</sup> Chapter 1, Section 6. Existing research.

<sup>1064</sup> Interview with participant No 8 (Hochiminh, 22 March 2013).

<sup>1065</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 3 (Hochiminh, 21 March 2013), No 5 (Hanoi, 28 April 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 16 (Hochiminh, 21 March 2013), No 18 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).

<sup>1066</sup> Heng, Russell Hiang-Khng, *Media Negotiating the State: In the Name of the Law in Anticipation* (13 May 2012) Institute of Southeast Asian Studies

<<http://www.jstor.org/discover/10.2307/41057063?uid=24241&uid=3737536&uid=2129&uid=2&uid=70&uid=3&uid=24240&uid=67&uid=62&uid=5909656&sid=21101161470947>>.

<sup>1067</sup> Interview with participants No 1 (Lam Dong, 03 March 2013), No 3 (Hochiminh, 21 March 2013), No 5 (Hanoi, 28 April 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 16 (Hochiminh, 21 March 2013), No 18 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013); ‘Những “kêhở” của Luật Báo chí’, *BaoPhapluattp.HCM* (online) 26 September 2007 <<http://www.phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>.

<sup>1068</sup> ‘Những “kêhở” của Luật Báo chí’, *BaoPhapluattp.HCM* (online) 29 June 2014 <<http://plo.vn/chinh-tri/nhung-ke-ho-cua-luat-bao-chi-274551.html>>.

In addition, the complainant has the right to make a complaint to the owner of the media organization or the media regulatory body, or to file a suit against the media organization, if the media organization refuses to publish a correction, an apology or a statement by the complainant, either at all or properly in accordance with the provisions of the *Vietnamese Press Law*.<sup>1069</sup> However, there is no instruction for the media owner and the media regulatory body to follow when they resolve the complaint, so these organizations do not know which process they have to follow. In fact, media owners have relied on their own processes to resolve complaints.<sup>1070</sup> However, not all media organizations have an internal process for the handling of complaints and grievances. The survey of 37 media organizations conducted by the MIC Press Bureau shows that only 5 have an internal process for the handling of complaints and grievances and only 4 organizations have departments for handling of complaints and grievances.<sup>1071</sup>

Moreover, Decree No. 51 provides specifically that media regulators have the right to resolve complaints against the media. By contrast, Circular No 05/2011/BTTTT<sup>1072</sup> discloses that media regulators including the MIC and the provincial Departments of Information and Communication are responsible (only) for ‘guiding the settlement’ of disputes between the media and organizations or individuals.<sup>1073</sup> Therefore, media regulators do not know what power they have to rule on disputes or what procedures to apply in resolving disputes between media organizations and complainants.<sup>1074</sup> Your complaint is not handled or the media organization will not implement the decision from the complaint handling or you will have an unhappy result. As mentioned above, it is difficult for complainants to get a decision from media regulators on their complaints. Media organizations do not necessarily implement any decision that emerges from complaint handling by the media owner or the media regulator. They do not necessarily publish a correction and an apology or the publication may not comply with the content of the decision. Getting a public apology or correction of the media is very rare for complainants. Even when it happens, the correction or apology may be published in a very limited way.

Further, according to one of my interview participants, resolving complaints about media is more rhetorical than substantial and complaining against the media is considered to be a worthless action.<sup>1075</sup> In fact, only around 30% of complaints are resolved every year.<sup>1076</sup>

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<sup>1069</sup> Chapter 4, Section 6. Complaints handling regulation.

<sup>1070</sup> The report of the Vietnamese Ministry of Information and Communication (MIC) at the conference on complaints against the media held by the MIC and the British Embassy in 2011.

<sup>1071</sup> The report of the Vietnamese Ministry of Information and Communication (MIC) at the conference on complaints against the media held by the MIC and the British Embassy in 2011.

<sup>1072</sup> Circular No 05/2011/BTTTT enacted on 28 January 2011 regulating complaints handling in the field of information and communication.

<sup>1073</sup> Chapter 4, Section 6. Complaints handling regulation.

<sup>1074</sup> See eg, ‘Những “kêhở” của Luật Báo chí’, *BaoPhapluattp.HCM* (online) 26 September 2007 <<http://www.phapluattp.vn/206652p0c1013/nhung-ke-ho-cua-luat-bao-chi.htm>>; statement of 9 Vietnamese interview participants (1 lawyer, 3 journalists, 3 officers of VN MIC, 2 officers of state media control agency).

<sup>1075</sup> Interview with participant No 14 (Lamdong, 7 March 2013).

<sup>1076</sup> See eg, Titian, T.T, Nam, Hải, ‘Không trã löi báo chí là vi phạm luật’, *Thanh Nien* (online) 21 November 2013 <<http://www.thanhvien.com.vn/pages/20131018/khong-tra-loi-bao-chi-la-vi-pham-luat.aspx>>; ‘Luật Báo chí: Cõnhiều bất cập’, *Viet bao* (online) 10 December 2013 <<http://vietbao.vn/Chinh-Tri/Luat-Bao-chi-Con-nhiieu-bat-cap/20780189/96/>>.

Some of my interviewees who have been working for media regulatory bodies also pointed out that the rate of complaints handled is low.<sup>1077</sup> My interviewees also pointed out that there is no provision to ensure that the media organization will implement the decision of the media owner or the media regulator. There is also no sanction provided for not responding to a complaint.<sup>1078</sup> As a result, many media organizations do not obey the press law, and refuse to publish corrections to mistakes they have published.<sup>1079</sup> The media have not been concerned about complaints handling and this is reflected in the fact that most media organizations do not have a department responsible for receiving and handling complaints and grievances. As one of my interviewees stated, ‘making complaints against the media is worthless. It is a waste of time. You only end up unhappy’.<sup>1080</sup>

E-newspapers have developed significantly and in the future, are likely to become more popular than print editions.<sup>1081</sup> However, there is no provision for publishing corrections, apologies or complainants’ statements in e-newspapers. Therefore, the media do not know what they are required to do in such situations, especially the time limit for publishing a correction, apology or complainant’s statement and the form of publishing correction. The media do not know if it is sufficient to change the initial information on the webpage, or if they have to publish additional information as a correction.<sup>1082</sup>

## Conclusion

As discussion above shows, and as all of my interviewees stated, Vietnamese media legislation is not well develop and has not met the needs of the current situation,<sup>1083</sup> especially when the media industry has developed significantly.<sup>1084</sup> As mentioned above, stipulations in quite a few media law documents are very general or vague, especially in the field of government secrets, private information, obligation of government agencies to

<sup>1077</sup>Interview with participants No 5 (Hanoi, 28 April 2013), No 7 (Hochiminh, 25 March 2013), No 16 (Hochiminh, 21 March 2013).

<sup>1078</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 3 (Hochiminh, 21 March 2013), No 5 (Hanoi, 28 April 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 16 (Hochiminh, 21 March 2013), No 18 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).

<sup>1079</sup>Hong, Hoang Thi Minh, ‘Media and civil society in support of good governance and democracy in Vietnam’ (2002) 29(1) *The Asia Journal Media* 24, 27.

<sup>1080</sup>Interview with participants No 18 (Hochiminh, 21 March 2013).

<sup>1081</sup>Huong, Thu, ‘Báođiệntừsẽlàoạihìnhtruyềnthôngchủlực’, *Tin nhanh Viet Nam* (online) 27 November 2013 <<http://vnexpress.net/tin-tuc/thoi-su/bao-dien-tu-se-la-loai-hinh-truyen-thong-chu-luc-2913145.html>>.

<sup>1082</sup> See eg, Phuong, M and Linh, N, ‘SửaLuậtBáo chí: Cầnquyđịnhquyềnmiễntrừchonhà báo’, *BaoPhapluat tp. HCM* (online) 24 November 2013<<http://phapluattp.vn/20091212113022551p0c1013/sua-luat-bao-chi-can-quy-dinh-quyen-mien-tru-cho-nha-bao.htm>>; ‘Thi hànhLuậtBáo chí: nhiềuvướngmắcliênquandếnphátngôn’, *BaoDat Viet* (online) 24 November 2013 <<http://baodatviet.vn/phap-luat/thi-hanh-luat-bao-chi-nhieu-vuong-mac-lien-quan-den-phat-ngon-thi-hanh-luat-bao-chi-nhieu-vuong-mac-lien-quan-den-phat-ngon-2292557/>>.

<sup>1083</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 3 (Hochiminh, 21 March 2013), No 4 (Cantho, 28 March 2013), No 5 (Hanoi, 28 April 2013), No 6 (Lamdong, 12 March 2013), No 7 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 10 (Hanoi, 22 April 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 14 (Lamdong, 7 March 2013), No 15 (Hochiminh, 23 March 2013), No 16 (Hochiminh, 21 March 2013), No 17 (Hochiminh, 23 March 2013), No 18 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).

<sup>1084</sup>See eg, Hoa, Lê, *Sửa đổi luật Báo chí theo hướng quy định rõ điều kiện cấp phép, tăng chế tài xử phạt* (10 December 2013) Chinhphu<<http://xaydungphapluat.chinhphu.vn/portal/page/portal/xaydungphapluat/tinchitiet?title=S%E1%BB%B1+c%E1%BA%A7n+thi+%E1%BA%BFt+ban+h%C3%A0nh+&perspectiveId=641&viewMode=detail&articleId=10001975>>; *Đánh giá toàn diện về báo chí Việt Nam* (30 March 2012) An ninh Thủ do <<http://www.anninhthudo.vn/Thoi-su/Danh-gia-toan-dien-ve-bao-chi-Viet-Nam/441781.antd>>; Interview with participants No 1 (Lam Dong, 03 March 2013), No 2 (Hochiminh, 25 March 2013), No 3 (Hochiminh, 21 March 2013), No 4 (Cantho, 28 March 2013), No 5 (Hanoi, 28 April 2013), No 6 (Lamdong, 12 March 2013), No 7 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 10 (Hanoi, 22 April 2013), No 11 (Dongnai, 26 March 2013), No 12 (Cantho 28 March 2013), No 13 (Lamdong, 12 March 2013), No 14 (Lamdong, 7 March 2013), No 15 (Hochiminh, 23 March 2013), No 16 (Hochiminh, 21 March 2013), No 17 (Hochiminh, 23 March 2013), No 18 (Hochiminh, 21 March 2013), No 19 (Hanoi, 28 April 2013), No 20 (Hochiminh, 23 March 2013).



provide information, opposition and dissent, defamation, ownership and the handling of complaints and grievances. These shortcomings cause difficulties in the understanding and application of these regulations. Clearer and more detailed provision for media activities is therefore needed and will be useful for implementing Vietnamese media law. Therefore, as one of my interviewees stated, Vietnamese media law has not only failed to keep up with the development of the media industry in Vietnam, it has also limited that development.<sup>1085</sup>

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<sup>1085</sup>Interview with participant No 17 (Hochiminh, 23 March 2013).

## Chapter 7

# Review of Australian models and applicability to Vietnamese problems

### Introduction

This chapter provides general discussion about whether concepts from Australian media law described in chapter 4, such as constitutional protection of political communication, freedom of information legislation, and defamation, represent models that could address the shortcomings of Vietnamese media legislation identified in chapter 5. This chapter does not discuss how Vietnam can avoid or improve on the shortcomings of Australian models. These matters will be discussed in the following chapter where I give suggestions for reforming Vietnamese media law. The content of this chapter is used to inform the recommendations in that chapter. Based on the shortcomings of Vietnamese media legislation identified in chapter 6, here I review Australian models and their applicability to remedy Vietnamese deficiencies in the seven priority areas: 1. freedom of expression and freedom of information, 2. personal information, 3. defamation, 4. Opposition and dissent, 5. ownership, 6. national broadcaster model, and 7. the handling of complaints and grievances.

### 1. Freedom of expression and freedom of information

#### 1.1. Laws on freedom of expression

As discussed in chapter 5,<sup>1086</sup> ‘the *Australian Constitution* does not explicitly protect freedom of expression’.<sup>1087</sup> However, Australian law protects the right to freedom of expression in balance against other interests, except on political and government matters where there is a constitutional guarantee based on the needs of the system of government and especially the requirement of free elections.<sup>1088</sup>

The right to freedom of expression relating to political or government matters are considered as demands of the system of open and accountable government.<sup>1089</sup> Butler and Rodrick have described how ‘[a]ccess to information enables citizens to access the workings and outcomes of the democratic processes and, accordingly, the quality of democracy will be improved’.<sup>1090</sup> The *Australian Constitution* establishes a representative democracy,<sup>1091</sup> so

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<sup>1086</sup> Chapter 5, subsection 4.1. *Freedom of information and official secrets*.

<sup>1087</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law: Cases, Materials and Commentary* (Oxford University press, first published 2010, 2011 ed) 21.

<sup>1088</sup> See Chapter 5, subsection 4.1. *Freedom of information and official secrets* to know how these rights are guaranteed in Australia.

<sup>1089</sup> Rolph, David, Vitins, Matt and Bannister, Judith, *Media law: Cases, Materials and Commentary* (Oxford University press, first published 2010, 2011 ed) 21.

<sup>1090</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 10.

<sup>1091</sup> *Australian Constitution* ss 7, 24.

freedom of political expression could be implied.<sup>1092</sup> This freedom ‘enables the people of the Commonwealth to exercise a free and informed choice as electors’.<sup>1093</sup>

In a representative democracy, freedom of political communication is an essential element. Only by exercising freedom of political or government communication can people fully discuss government matters and analyse government policies.<sup>1094</sup> An election requires that electors shall have access to certain important information connected to their choices such as who are the candidates, what are the ideologies of political parties, what they have done, what they will do. As Mason explained in *Australian Capital Television v Commonwealth*:<sup>1095</sup> the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and actions in government and to inform the people so that they may make informed judgments on relevant matters. Without such a freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives. Government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.<sup>1096</sup> It was held further in *Lange v ABC* that freedom of political communication ‘is not limited to communication between the electors and members of the Parliament. It extends to communication between the electors’.<sup>1097</sup>

The *Vietnamese Constitution*, too, establishes a democratic society and representative government.<sup>1098</sup> However, as explained in chapter 6, the right to freedom of expression which is mentioned in the *Constitution* is not adequately supported in practice because of a lack of detail in Vietnamese legislation more generally.<sup>1099</sup> The Australian model for protecting freedom of political expression discussed above could be quite helpful for Vietnam to provide the support that is currently lacking.

In Vietnam, as in Australia, there are elections where citizens have to choose between different candidates to represent them in government. Election rights are provided in the *Vietnamese Constitution* and *Election Law 2015*.<sup>1100</sup> Therefore a freedom of political communication could be justified on precisely the same basis as in Australia. Such a freedom would enable people to freely discuss political matters, and express their opinions about government policies or decisions. In addition, the law could also support the imposition of obligations on government bodies to provide information and explain their decisions or actions to members of the public when requested to do so, albeit subject to exemptions to serve other important public interests. In this way, Vietnam could develop laws on freedom of information to provide a right to access to government-held information, an obligation on government agencies to provide information, and a process for accessing and providing

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<sup>1092</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 14.

<sup>1093</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

<sup>1094</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139.

<sup>1095</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139.

<sup>1096</sup> *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 139.

<sup>1097</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560. See also *Roberts v Bass* (2002) 212 CLR 1.

<sup>1098</sup> *Vietnamese Constitution* s 2.

<sup>1099</sup> Chapter 6, section 1. Freedom of information.

<sup>1100</sup> *Vietnamese Constitution* ss 27, 117; *Election Law 2015* (Luật bầu cử đại biểu quốc hội và đại biểu hội đồng nhân dân 2015).

information. Other interests could be treated as exceptions to freedom of expression, as they are under the Australian implied freedom. Vietnam therefore could also develop provisions covering other interests which support or balance against the rights to freedom of expression. These interests include the right to privacy, personal reputation, national security, public order and the national interest. Either these interests could be considered as exceptions to the freedoms of expression and information, or they could be independently protected with exemptions or defences to allow freedom of expression. Australian law contains examples of both approaches. Either approach would help protect the right to discuss and express views or opinions about political or government processes including election processes or processes of making important decisions or policies of the government. These provisions also enable members of the public to influence the actions of their representatives and to exercise their choices as electors. Based on these regulations, the media could develop their role in a democratic society of publishing the views or opinions of members of the relating to political or government matters.

In addition, Vietnam should develop a constitutional court based on the model of the Australian High Court.<sup>1101</sup> The court should have power effectively to limit the legislative power of the Assembly. Based on this power, the court could strike down laws which unreasonably or inappropriately limit the right to freedom of expression provided in the *Constitution*.<sup>1102</sup> This model could help Vietnam protect and support right to freedom of expression in practice.

## 1.2. Laws on freedom of information

Vietnam could develop a law based on the Australian model of the FOI acts, which establishes a right of access to information in the possession of government agencies, and an obligation on the part of government agencies to provide information on application by a member of the public or (especially) a media organization. It would also detail the process by which applicants can access unpublished government-held information. Based on this law, providing information to the public would be defined as an obligation of government agencies.<sup>1103</sup> The imposition of such an obligation would help resolve the problems associated with the *Vietnamese Spokesman Regulation*. The obligations of spokesmen to provide information would be specified according to the obligations of the government agencies because these are people who represent government agencies in providing information. They therefore would have to carry out their duties according to the process provided by law and they could not refuse to provide information as they have done in the past. This model would help the media implement its role in providing a range of information to members of the public.

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<sup>1101</sup> See chapter 5, subsection 2.1 (*Overview of the Australian government system*) to know about organization and power of the Australian High Court.

<sup>1102</sup> Chapter 8 will detail how the court examine and strike down laws.

<sup>1103</sup> Chapter 5, section 4.1. *Freedom of information and official secrets*.

Vietnamese law, by contrast, has not provided any exemptions from the requirement to provide certain information on grounds such national security, enforcement of law and protection of public safety, and personal privacy or personal affairs. In this sense it fails to balance the right to freedom of information and those other legitimate interests. The Australian exemptions provided in the freedom of information area could form a model for achieving that balance.

Vietnam would also benefit from the adoption of a scheme similar to the Information Publication Scheme (IPS) established under the Commonwealth *FOI Act*. As discussed in chapter 4, the *Vietnamese Law on Information Technology 2006* lays a foundation for establishing an IPS but it does not establish such a scheme.<sup>1104</sup> The *Vietnamese Law on Information Technology 2006* does not require government agencies to establish websites but provides that if they do so, they must make certain information available for the public to access without any application requirement or payment.<sup>1105</sup> However, this law does not detail which agencies are covered by the law. There is also lack of enforcement power such as who is authorized to review the operation of agencies and how people can complain against the implementation of the IPS. These contents are provided in provisions covering the Australian IPS. Under the Australian IPS, certain information is available for the public to access online without any application requirement or payment.<sup>1106</sup> The IPS would greatly support a right of access to government information. The media would benefit from such a scheme when collecting material held by government agencies to inform their publications. This scheme therefore would support the development of the media industry, serving the public interest.

### 1.3. Laws on protection of whistleblowers and journalists' sources

Vietnam and Australia have similar provisions covering the protection of whistleblowers and journalists' sources. However, the implementation of the protection of whistleblowers in Vietnam is in trouble due to a lack of detail about the obligations of relevant institutions and the process of coordination among institutions as described in chapter 6. My research findings indicate that the Australian model can help to solve these shortcomings of Vietnamese law.

Based on the *PID Act*, Vietnam could place on courts an obligation to protect whistleblowers. Whistleblowers would apply to courts for protection, and the courts would give decisions to apply protection methods.<sup>1107</sup> In this way, there would be certainty about the institution with the obligation to deal with the situation, and no need for the courts to cooperate with other agencies when making decisions about protection. People would be confident of making a public interest disclosure as they know that they would be well protected. The media therefore would benefit from having more, and more engaging,

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<sup>1104</sup> Chapter 4, section 4.1. *Freedom of information*.

<sup>1105</sup> See Chapter 5, subsection 4.1. (*Freedom of information and official secrets*) to know how IPS regime works.

<sup>1106</sup> See Chapter 5, subsection 4.1. (*Freedom of information and official secrets*) to know how IPS regime works.

<sup>1107</sup> See Chapter 5, subsection 4.2. (*Whistle-blower protection*) to know about protection methods.

information to publish. Members of the public would also benefit from being better informed through the media.

## 2. Personal information

As discussed in chapter 5, the *Privacy Act 1988* (Cth) provides broad principles to regulate government agencies and private organizations in collecting, using, and other handling of personal information. The Office of the Australian Information Commissioner acknowledged in its submission to the Australian Law Reform Commission that ‘[t]he right to privacy is not absolute and weighing privacy rights against other public interests is critical to any privacy invasion redress mechanism’.<sup>1108</sup> The *Privacy Act 1988* (Cth) therefore both defines personal information and specifies exemptions in order to balance the right to privacy against other competing rights, including the right to freedom of expression.

Unlike Australian law, as discussed in chapter 5, Vietnamese law does not have a definition of personal information. Vietnam therefore could learn from the definition of personal information provided in s 6(1) of the *Privacy Act 1988* (Cth). Based on this definition, the media can determine whether information they have belongs to an individual’s private life, so they will know what they should do if they want to publish it. The media therefore would have increased confidence when publishing information.

Vietnam also could build principles of collection and storage of personal information which have not been provided in Vietnamese law, using the thirteen Australian Privacy Principles (APPs) provided in schedule 1 of the *Privacy Act 1988* (Cth) as a model. Such principles would help Vietnam reform the currently disjointed rules on the publication of personal information. In particular, they could help specify the following: the conditions in which the collection of personal information is authorized; a prohibition on collecting or using personal information unless those conditions are met; the process of collection; the liability of collecting bodies; the process of accessing information and of requiring corrections to collected information; and the right to make complaints against collecting bodies.

The exemptions under the *Privacy Act 1988* (Cth) could provide a useful model for Vietnam in developing the details of privacy protection to be provided in Vietnamese law so as to balance the right to privacy with other legitimate interests including freedom of expression and information.

## 3. Defamation

Australia’s law of defamation has been developed to ‘strike a balance between the protection of reputation and the promotion of freedom of speech’.<sup>1109</sup> Australian law, including the common law and the *Uniform Acts*, provides the definition of defamation,

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<sup>1108</sup> The Office of the Australian Information Commissioner, Submission to the Australian Law Reform Commission, *Serious invasions of privacy in the digital era*, December 2013, 2.

<sup>1109</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 2012, 4<sup>th</sup> edition) 27.

details the requirements for a successful defamation action, and provides defences to support freedom of expression. These matters are not provided in Vietnamese law and these deficiencies cause limitations on both the protection of reputation and freedom of expression.

Australian defamation law therefore could help Vietnam in reforming defamation provisions. Vietnamese media law could benefit from the definition of defamation, and the requirements of successful defamation action provided in the common law. In particular, Vietnam could develop exemptions along the lines of the Australian defences based on the *Uniform Acts* and the *BSA* to balance the protection of personal reputation with other interests including free expression. The details of these provisions will be discussed further in Chapter 8.

#### 4. Regulation of opposition and dissent

Vietnamese law prohibits opposition, but does not specify which actions are considered as opposition, nor does it detail defences to allow freedom of expression. The *Criminal Code Act 1995* (Cth), by contrast, does provide all these things. Vietnam therefore could adopt a law on opposition based on the Australian model, and specifically based upon s 80.2 of the *Criminal Code Act 1995* (Cth). Such a definition, by focussing on the urging of violence, would help Vietnam to distinguish between opposition, which is a criminal offence, and other actions, such as dissent, which are close to, but not the same as, opposition. Having a clear definition would also help the media be confident in making publication decisions because they could determine whether the publication would be an offence against the law on opposition. The media therefore would publish information relating to dissent which they have not done before because of worry about breach of law. This would benefit the public.

Vietnam could also benefit from a provision similar to s 80.3 of the *Criminal Code Act 1995* (Cth), which provides exemptions from liability for the crime of opposition. Such exemptions could form the bases for defences to the crime that would allow a balance to be struck between freedom of expression on the one hand, and national safety, public order and the right to live in peace on the other.

#### 5. Ownership

Ian McGill has said that ‘the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) is a very skillful attempt to balance the interests of private parties and transactions with the public good implicit in media diversity, albeit permitting consolidation of media operations in licence areas subject to the new media diversity prohibitions’.<sup>1110</sup>

The *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) removes the previous limitation on cross-media ownership, permitting media organizations to own more than one type of media in one market. This model can help Vietnam where the *Vietnamese Press Law 1989* also places a restriction on cross-media ownership. As discussed

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<sup>1110</sup>Ian McGill, ‘Cross media mergers under the 2006 amendments to the *Broadcasting Services Act 1992*’ (2007) 30 *University of New South Wales Law Journal* 280, 294.

in Chapter 6, media organizations frequently contravene this restriction, illegally running more than one type of media. Operating outside the law like this limits industry confidence, which in turn limits the development of the industry. In addition, the cross-media restrictions in Vietnam have led to the proliferation of small media organizations<sup>1111</sup> in the market, many of which are inefficient, and rely upon republishing information or publishing information about trivial or unimportant matters.<sup>1112</sup> A relaxation of the cross-media ownership limitation could enable media organizations to reorganize and produce higher-quality material. The media therefore would develop and serve the public interest better than it has done. The Australian model for relaxing cross-media ownership restrictions could usefully support a Vietnamese process for addressing these problems.

The Productivity Commission has noted the limitation of Australian cross-media rules to traditional media, which remain the main providers despite the digital revolution in Australia.<sup>1113</sup> As print media, radio and television remain the main providers in Vietnam as well, these restriction rules are therefore also suitable there.

However, cross-media ownership can lead to a high concentration in the market. The Australian Senate states that cross-media ownership has led to a massive concentration in the ownership of some of the most powerful media companies.<sup>1114</sup> In fact, three companies (News Limited, Fairfax Media and APN News and Media) own the majority of Australian media outlets.<sup>1115</sup> This leads Australia to have one of the highest levels of concentration in ownership of media holdings in the world.<sup>1116</sup> To avoid massive concentration in the media market, Vietnam could use the Australian model to develop limitations on control and restrictions on transactions,<sup>1117</sup> which are designed to guarantee minimum levels of diversity in ownership. These rules 'will promote a beneficial diversity of views across regulated platforms'.<sup>1118</sup>

Cross-media ownership can be introduced without any necessary loss of diversity in content. The connection between plurality in media ownership and diversity of content is still a matter of debate.<sup>1119</sup> Des Freedman notes that a variety of voices cannot be guaranteed by

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<sup>1111</sup>Chapter 3, section 1. Overview of the media in Vietnam; Dũng Nguyễn, 'Bộ trưởng TT&TT: "Ít có nước nào nhiều cơ quan báo chí như VN"', *Báo Giao Thông* (online), 02 September 2015 <<http://www.baogiaothong.vn/bo-truong-tttt-it-co-nuoc-nao-nhieu-co-quan-bao-chi-nhu-vn-d103608.html>>.

<sup>1112</sup>Trương Sơn, 'Sẽ sắp xếp, tổ chức lại những cơ quan báo chí hoạt động không hiệu quả', *Báo Thanh Niên* (online), 02 September 2015 <<http://www.thanhnien.com.vn/chinh-tri-xa-hoi/se-sap-xep-to-chuc-lai-nhung-co-quan-bao-chi-hoat-dong-khong-hieu-qua-530728.html>>.

<sup>1113</sup>Productivity Commission, *Broadcasting*, Report No 11, 03 March 2000, 312.

<sup>1114</sup>The Senate, *Standing Committee on Environment, Communications, Information Technology and the Arts* (10 Oct 2014) Parliament of Australia <[http://www.aph.gov.au/~media/wopapub/senate/committee/ecita\\_ctte/completed\\_inquiries/2004-07/cross\\_media/report/report.ashx](http://www.aph.gov.au/~media/wopapub/senate/committee/ecita_ctte/completed_inquiries/2004-07/cross_media/report/report.ashx)>, 91.

<sup>1115</sup>*About us* (06 August 2015) News corporation <<http://newscorp.com/about/>>; *Fairfax Media Annual Report 2014* (06 August 2015) Fairfax Media <<http://www.fairfaxmedia.com.au/ArticleDocuments/191/2014%20FAIRFAX%20Annual%20Report.pdf.aspx?Embed=Y>>, 117-120; *APN News & Media has a diverse portfolio of vibrant media assets* (06 August 2015) APN News & Media <<http://www.apn.com.au/>>; Douglas, Jane, 'News media in Australia : a transforming landscape' (2013) 27(1) *Online currents* 9, 11-12.

<sup>1116</sup>Douglas, Jane, 'News media in Australia: A transforming landscape' (2013) 27 (1) *Online currents* 9, 11; Dodd A, *The Week Media Diversity was Mortally Wounded* (08 August 2015) Australian Broadcasting Corporation <<http://www.abc.net.au/news/2012-06-21/dodd-media-diversity/4083152>>.

<sup>1117</sup> See Chapter 5, section 5. Media ownership regulation.

<sup>1118</sup> Dean, Barry, 'The deregulation agenda for Australian media ownership : can competition do the heavy lifting?' (2014) 33(2) *Communications Law Bulletin* 20, 22.

<sup>1119</sup> Butler, Des and Rodrick, Sharon, *Australian Media Law* (Lawbook Co, 4<sup>th</sup> ed, 2012) 866; Rolph, David, Vitins, Matt and Bannister, Judith, *Media law, cases, materials and commentary* (Oxford University Press, first published 2010, 2011 ed) 118.



diverse media ownership only,<sup>1120</sup> and according to the Australian Productivity Commission, ‘a highly concentrated media may still provide diversity of opinion’.<sup>1121</sup> Further, the launch of new delivery platforms, including subscription television, digital broadcasting, and the internet, can add to the flow of information. Vietnam therefore could follow Australia to allow cross media ownership without sacrificing diversity.

## 6. National broadcaster model

As discussed in chapter 6, another problem of the Vietnamese media is that all media organizations belong to the Vietnamese government. This restricts free expression, especially when they are tightly controlled by the government and the VCP. The Australian national broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) could be a model for Vietnam to address this problem, as these broadcasters are Australian government owned but they are independent from the government. For the purposes of comparison and analysis I will focus on the ABC, the major and most widespread national broadcaster.

To ensure public confidence in the ABC’s independence, the Australian parliament does not manage the ABC day-to-day. The ABC’s status as a statutory authority ‘enables parliament to monitor [its] activities ... and intervene if necessary, while providing the distance from government necessary to ensure public credibility for the independence of the service’.<sup>1122</sup> The ABC is in large part regulated under its own Act of the Commonwealth Parliament,<sup>1123</sup> which establishes the form, structure, personnel and financial arrangements of the corporation. The control Parliament exerts is limited to requiring the ABC to submit an annual report and directing its officials to give evidence to its committees or to independent inquiries.<sup>1124</sup>

Following this model, Vietnamese law on national broadcasters should provide that the national broadcasters would have to report their actions to the Assembly annually. The Assembly could also exercise its regulatory powers by directing officers of these broadcasters to give evidence to Assembly committees. The government would still finance the VOV and VTV but it would be excluded from their programming decisions and other decisions relating to their day-to-day running. VOV and VTV would be able to decide the programs which they want to broadcast without government intervention. For this reason, information published by these broadcasters could meet the public’s needs. This could address the limitations on free expression for the Vietnamese media that flow from intervention by the VCP and government as highlighted in chapter 6 (section 1).

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<sup>1120</sup> Des Freedman, *The Politics of Media Policy* (Polity Press, 2008), 73.

<sup>1121</sup> Productivity Commission, *Broadcasting*, Report No 11, 03 March 2000, 312.

<sup>1122</sup> Glyn Davis, *Breaking up the ABC* (Allen & Unwin Australia Pty Ltd, first published 1988) 38.

<sup>1123</sup> The Australian Broadcasting Corporation, submission in response to the Convergence Review Interim Report (January 2012), 2; Mark Armstrong, Mark Polden, *The Journalist’s Guide to Media Law* (Crows Nest, NSW Allen & Unwin, 2015) 80; *Broadcasting rules & s* (21 September 2015) The Australian Communication and Media Authority < <http://www.acma.gov.au/theACMA/ACMAi/s/Broadcast-s/faqs-broadcasting-rules-and-s-acma-1>>.

<sup>1124</sup> Glyn Davis, *Breaking up the ABC* (Allen & Unwin Australia Pty Ltd, first published 1988) 43.

On the other hand, the Commonwealth government still has a measure of influence over the ABC. Although the government is excluded from programming decisions, the broadcaster's annual funding is determined each year by the highly political Cabinet process<sup>1125</sup> where Ministers discuss and decide on high-level policy matters. The Government of the day also exerts strong influence in the appointment of the Chairperson and governors of the ABC Board<sup>1126</sup> as its recommendations to the Governor-General are, by convention, always accepted. As Davis argues, 'no legislation could guarantee the ABC immunity from informal pressure',<sup>1127</sup> and these are just two mechanisms whereby that pressure could be felt. However, the ABC model is preferable to Vietnam where the government still maintains direct editorial control over media organizations while free expression requires that the media should be independent from political influence as much as possible. In spite of the subtle influence just mentioned, the ABC is more independent of government than the VOV and VTV. Its example therefore would help Vietnam reduce the political influence on the VOV and VTV. Particularly, ABC model could help Vietnamese national broadcasters avoid the intervention from the VCP and the government in program decisions. For this reason, freedom of expression would be supported.

Looking back to the systems of government described in chapters 4 and 5, Vietnam has a similar system to Australia in that government is formed from the legislature (although unicameral) and must maintain the confidence of the legislature. Based on this similarity, a similar model could be applied in Vietnam: the national broadcasters including the VOV and VTV would still be owned by the government but their rights and obligations would come from Acts developed by the legislature (that is, in Vietnam, the Assembly). This would contrast with the current situation where those rights and obligations come from licences granted by the MIC, which is responsible to the government. Similarly, the government would still finance the broadcasters but their funding would be based upon annual funding determined by the Assembly. The broadcasters would be independent bodies answerable to the Vietnamese Assembly rather than the MIC. The editors in chief would be in the same relationship to the government that the ABC Board currently is in Australia. This means that the editors in chief would be appointed and dismissed by the government (the MIC) as they currently are. Following the duties of the Board which are provided in s 8 of the *Australian Broadcasting Corporation Act 1983* (Cth), the editors in chief would be obligated to operate the VOV and VTV. The editors in chief would also be responsible for maintaining the independence and integrity of the national broadcaster, and for ensuring that they implement their functions efficiently. Moreover, the editors in chief would have the duty to ensure that the national broadcasters collect and broadcast information according to the *Vietnamese Press Law 1989* and relevant legal documents.

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<sup>1125</sup>Glyn Davis, *Breaking up the ABC* (Allen & Unwin Australia Pty Ltd, first published 1988) 41.

<sup>1126</sup>*Australian Broadcasting Corporation Act 1983* (Cth) s 12; *The ABC Board* (21 September 2015) The Australian Broadcasting Corporation <<http://about.abc.net.au/who-we-are/the-abc-board/>>.

<sup>1127</sup>Glyn Davis, *Breaking up the ABC* (Allen & Unwin Australia Pty Ltd, first published 1988) 41.

Based on the functions and duties provided in their respective charters,<sup>1128</sup> the ABC and SBS develop codes of practice covering issues such as classification and complaints handling.<sup>1129</sup> Although the ABC and SBS have to notify the government regulator, the ACMA, of these codes, the ACMA does not play a role in developing or registering these codes.<sup>1130</sup> The ABC develops its own editorial policies based on the experience of its content makers and in accordance with the requirements of current regulations.<sup>1131</sup> The ABC's website states that '[t]he Editorial Policies offer a frame of reference as well as, on occasions, a check list of considerations aimed at helping content makers to make difficult judgements for themselves and to explain their reasons for those judgements'.<sup>1132</sup>

Based on the Australian model for regulating national broadcasters, Vietnam should allow the VTV and VOV to develop their own editorial policies, and their own codes of practice covering certain issues such as complaints handling and selecting their own editors in chief. This is precisely the kind of structure and process that could assist Vietnamese media personnel to feel confident in publishing information, thereby supporting freedom of expression.

To introduce such a structure would reduce the influence of the Vietnamese government and the VCP on the media which is a significant problem of the existing Vietnamese media regulatory system. Under such a model, the VCP could not exert such a strong influence upon media activities through the heads of government bodies and editors in chief who are its members. Based on independence from the government and from VCP influence, these broadcasters could broadcast diverse information including information which the government and the VCP do not want to publish, or opinions which dissent from the government's views or those of the VCP. This model therefore would support freedom of expression and plurality in media content even without diverse ownership. The media therefore would develop and provide members of the public with as much information as they can.

Moreover, Vietnam could also apply the Australian national broadcaster model for other media organizations which have high total annual circulation and which publish at the national level - such as Youth (Bao Tuoi tre), Thanh nien newspapers (Bao Thanh nien), Pioneers' newspapers (Bao Tien phong), and Labor newspapers (Bao Lao dong). These media organizations are not directly owned by the central government but they are owned by government bodies. They should be independent from their owners to reduce the influence of the government and the VCP which can be brought to bear based on their owners' VCP membership.

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<sup>1128</sup> *Australian Broadcasting Corporation Act 1983* (Cth) ss 6, 8; *Special Broadcasting Service Act 1991* (Cth) ss 6, 10.

<sup>1129</sup> ABC Code of Practice 2014; SBS Code of Practice 2014.

<sup>1130</sup> *Australian Broadcasting Corporation Act 1983* (Cth) s 8(1)(e); *Special Broadcasting Service Act 1991* (Cth) s 10(1)(j).

<sup>1131</sup> *ABC Editorial Policies 2011*.

<sup>1132</sup> *About the ABC* (31 August 2015) Australian Broadcasting Corporation <<http://about.abc.net.au/how-the-abc-is-run/what-guides-us/our-editorial-policies/>>.

## 7. The handling of complaints and grievances

As discussed in chapter 5, complaints against the media are handled by different processes in Australia based upon the area of law involved, one such process being the combination of non-litigious dispute resolution and civil court proceedings used for defamation cases.<sup>1133</sup> As the primary shortcomings of Vietnamese law on the handling of complaints and grievances arise from s 9 of the *Vietnamese Press Law 1989*, which focusses on complaints and grievances relating to defamatory publications,<sup>1134</sup> discussion in this section will focus on method of dealing with complaints laid down by the Australian *Defamation Acts*.

However, first I would like to exclude one particular method of complaints handling that is used in Australia, namely allowing the media to handle complaints based on their own standards. As highlighted in chapter 5, Australian media legislation does not regulate print and online news media specifically, so they self-regulate based upon both internal and external standards.<sup>1135</sup> However, as two of my interviewees pointed, media organizations are not required to set and publish their own internal standards of good practice.<sup>1136</sup> They are also not obligated to follow any self-regulation in relation to the design and operation of their internal processes for handling complaints.<sup>1137</sup> There would be similar problems if Vietnam replicated this model. There is evidence that a few media organizations are developing their own process for complaints handling as discussed in chapter 6.

The Australian defamation model could be a good choice for Vietnam. Both the Australian *Defamation Acts* and s 9 of the *Vietnamese Press Law 1989* provide non-litigious process and civil court process for complaints handling. However, while s 9 is not well developed, in that it does not specify whether non-litigious process is compulsory for complaints handling and whether media regulatory bodies have power over complaints handling, the *Defamation Acts* do detail these matters. That is, they make it clear that the non-litigious process is not compulsory, and that no regulatory body has any role but rather the proceedings are a private matter between the complainant and the media outlet. Therefore the adoption of the Australian scheme as a model could improve Vietnamese law on the handling of complaints and grievances. Both the media and complainants would benefit from this reform. Based on the process suggested above, both the media and complainants would know exactly what they have to do and how to do it when they want to make a complaint or grievance or when they are responding to a complaint or grievance. The complaint and grievance therefore could be handled as expeditiously as possible.

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<sup>1133</sup> Chapter 5, section 6. Complaints handling regulation.

<sup>1134</sup> Chapter 4, Section 6. Complaints handling regulation.

<sup>1135</sup> Department of Broadband, Communications and the Digital Economy, *Report of the Independent Inquiry into the media and media regulation on 28 February 2012* (27 Oct 2014) Australian Broadcasting Corporation <[http://www.abc.net.au/mediawatch/transcripts/1205\\_finkelstein.pdf](http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf)>, 188.

<sup>1136</sup> Interview via phone with participants No 1A (Adelaide, 22 September 2014), No 4A (Adelaide, 12 January 2015); Australian Press Council, Submission to the Convergence review, October 2011, 9.

<sup>1137</sup> Australian Press Council, Submission to the Convergence review, October 2011, 9.

Based on the Australian model, complaints against the media could be resolved outside of the courts first. Under the *Defamation Acts* this non-litigious process is not compulsory but it is encouraged. Applying a non-litigious process will help publishers and complainants have a chance to ‘resolve a defamation dispute at an early stage, without resorting to litigation’ thereby saving considerable time and expense.<sup>1138</sup> Complaints would be resolved based on agreement between media organizations and complainants. Media regulatory bodies would have no power over this process. Adopting this provision therefore would help remove the shortcomings of the *Vietnamese Press Law 1989* described above. Where the complainant and the publisher do not reach agreement through non-litigious process, the would be left for civil courts to resolve based on civil court processes provided under the *Civil Procedure Law 2004* (Bộ Luật Tố tụng dân sự 2004), but again there would be no role for any government regulator.

For the reasons discussed above, the Australian model of using civil court proceedings to back up non-litigious complaints handling is suitable to be taken as a model for reforming provisions covering the handling of defamation cases against the media in Vietnam.

### **In conclusion**

As argued by the scholars and observers I discussed in Chapter 5, Australian media law is not perfect. Australian models therefore cannot address all shortcomings of Vietnamese media legislation. There are some provisions which should not replicated or should be modified before adopting in Vietnam which will be discussed in chapter 8. However, Vietnam could benefit from Australian strategies covering the areas I discussed above. Vietnam could use similar approaches to reform many deficiencies, thereby improving media regulation. The improvement would help support the development of the media to serve the public interest through the protection of right to express views or opinions and the right to have information, balanced with other interests highlighted above. The following chapter discusses in more detail the reforms that Vietnam could adopt to its media legislation based upon Australian models, and in particular the changes and adaptations that would be in order.

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<sup>1138</sup> Ryan, Inez, 'New defamation laws : a guide' (2006) 18(1) *Australian Press Council News* 1, 1.

## **Chapter 8**

### **Specific recommendations for reforming Vietnamese media legislation**

#### **Introduction**

The previous chapter discussed, in broad terms, the aspects of Australian legal and regulatory models that could be adopted to resolve the issues with Vietnamese law which I had earlier identified as of significance. This chapter looks more closely at the detail of the Australian provisions, recommending which of these Vietnam should replicate, which particular provisions should be modified before adoption, how they can be modified to be applicable to Vietnam, and which provisions should not be adopted and why. As in chapter 7, this chapter is organized in 7 sections. Section 1 specifies how to better support freedom of expression and freedom of information in practice. Section 2 recommends how to develop the definition of personal information, and rules on its collection, storage and use, and how to balance the protection of the right to privacy and the public's right to know. Section 3 suggests how to develop the definition of defamation and how to balance between the rights to reputation and to free expression. Section 4 proposes modifications to the definition of opposition and exemptions to balance between the protection of national security and free expression. Section 5 gives suggestions for ways of reorganizing media ownership to protect diverse content on the one hand and relax cross ownership restriction on the other. Section 6 proposes how to complete the process of the handling of complaints and grievances provided in s 9 of the *Vietnamese Press Law 1989*.

#### **1. Law on freedom of expression and freedom of information**

As discussed in chapter 4 and chapter 6, Vietnam has a constitutional guarantee for the right to freedom of expression and freedom of information, although these rights are not adequately supported in practice. The Australian models in these areas are capable of application to Vietnam as I analysed in chapter 7. Vietnam therefore should use these models to develop law to support the implementation of those rights.

##### **1.1. Laws on freedom of expression**

Chapter 6 has established that freedom of expression is not supported well in practice in Vietnam; and, as discussed in chapter 7, the *Vietnamese Constitution's* statements about the establishment of democratic society and representative government makes this right an essential part of government in the nation. For this reason it is particularly important to guarantee a freedom of *political* expression to make sure that people are free to discuss and express opinions about the decisions of their representatives. In this area, as reviewed in chapter 7, freedom of political expression in Australia can help Vietnam. Freedom of political communication should be constitutionally guaranteed as it has been in Vietnam. This right

should be legally recognised as an essential part of Vietnamese representative government to develop a democratic society. As one of my interviewees stated that ‘right to freely discuss and express opinions or views about political or government matter should be an essential part of representative government and democratic society which are provided in the *Constitution* rather than given by the government’.<sup>1139</sup> To support this right, the Vietnamese government should develop provisions which specify that people are free to discuss political matters and express their opinions on government issues including the policies and decisions of the VCP and the government, and the laws and by laws of the government. Freedom of political communication should include freedom of communication between representatives and electors, and between electors. Vietnamese law should also place obligations on the bodies of the VCP and government to provide information and explain their policies, decisions, or actions to the public on request.

To better support this right in practice, the *Vietnamese Constitution* should be reformed to place a limitation upon legislative powers to ensure that restrictions on freedom of political communication are reasonably and appropriately adapted to the essentially democratic requirements of representative government. In order to prevent the government limiting the right to free political expression, Vietnam should take the case of *Lange* as a model. Under the *Lange* decision, the parliament may make a law restricting political communication if the law is ‘reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.<sup>1140</sup> A law which does not satisfy such conditions should be considered a breach of the constitutional protection of freedom of political expression and therefore an excess of power. The law would be struck down by the constitutional court which would be formed based on the Australian High Court model as recommended in chapter 7.<sup>1141</sup> Based on this model, the limitation on legislative power would be enforceable by the court. In the alternative, even if the constitutional court model were not adopted in Vietnam, the Assembly could pass a law protecting freedom of expression that would be binding on all government agencies which are authorized to make laws and by-laws including the Assembly, the government, the Prime Minister, the ministries, and the PPCs. This model could allow exemptions from the protection of free expression. Based on this model, Vietnam could balance the right to freedom of expression with other legitimate interests (or ‘ends’) such as national security, public order, the national interest and personal interests. This model would help protect the media from unreasonable and inappropriate limitations on the expression of the public’s views or opinions on political or government processes or decisions. As a result, the media would be supported in its development, serving the public interest.

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<sup>1139</sup> Interview with participant No 17 (Hochiminh, 23 March 2013).

<sup>1140</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-562.

<sup>1141</sup> Chapter 7, subsection 1.1. (*Laws on freedom of expression*).

## 1.2. Laws on freedom of information

I propose that Vietnam should develop a law on freedom of information to support the implementation of this right in practice. This law should state clearly that people have the right to access government-held information. Under this law, providing information to members of the public, including media organizations, should be specified as an obligation of government bodies. The law also should establish a process of accessing and providing information. This process would detail how members of the public could access unpublished government-held information, what government agencies would have to do when they refused to allow access to information, and how members of the public could make complaints when their requirements were rejected. Having a clear process would support the media in collecting relevant and appropriate information. As a result, the media would have engaging information to publish and members of the public would benefit because they would have information in which they were interested. A number of my interviewees stated that the *Vietnamese Press Law 1989* should be reformed to specify that members of the public including the media have right to ask government agencies to provide information, and providing information should be an obligation of the agencies.<sup>1142</sup> These interviewees also suggested that the law should provide a process which details how members of the public can apply for access to documents held by government agencies, how they can complain if their applications are denied, and how government agencies provide their information.<sup>1143</sup>

To define the public right to access government-held information, the Vietnamese law on freedom of information should provide that: ‘every person has a legally enforceable right to obtain access to: a document of an agency, other than an exempt document; or an official document of a Minister, other than an exempt document. A person’s right of access is not affected by: any reasons the person gives for seeking access; or the agency’s or Minister’s belief as to what are his or her reasons for seeking access’.<sup>1144</sup>

To balance the right to freedom of information with other competing interests including national security, public order, personal reputation, right to privacy, national interests and personal interests, the law on freedom of information should include exemptions. These would exempt certain agencies and information (detailed below) from the operation of the freedom of information to protect the legitimate interests mentioned above from the potential harmful effects.

However, the exemptions developed under the Australian *FOI Act* are not all applicable to Vietnam. If Vietnam were to adopt exemptions based on the Australian model, it would need to carefully evaluate which exemptions are inapplicable there, which are

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<sup>1142</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 4 (Cantho, 28 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 14 (Lamdong, 7 March 2013), No 15 (Hochiminh, 23 March 2013), No 17 (Hochiminh, 23 March 2013), No 20 (Hochiminh, 23 March 2013).

<sup>1143</sup>Interview with participants No 1 (Lam Dong, 03 March 2013), No 4 (Cantho, 28 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 14 (Lamdong, 7 March 2013), No 15 (Hochiminh, 23 March 2013), No 17 (Hochiminh, 23 March 2013), No 20 (Hochiminh, 23 March 2013).

<sup>1144</sup>*Freedom of Information Act 1982* (Cth) s 11.



directed to Australian problems that have no counterpart in Vietnam, and which are appropriate in Australia but would cause problems in Vietnam.

Following the *Freedom of Information Act 1982* (Cth) (s 7, sch 2 pt 1), Vietnam should name precisely which institutions are exempt from the obligation to provide any information requested under the right to freedom of information. Exemptions should be applied to institutions where the blocking of access to information can provide protection from potential harmful effects on national security, namely:

- Assembly Budget Office;
- Vietnamese Defence Intelligence Organization;
- Vietnamese Security Intelligence Organization; and
- Vietnamese Secret Intelligence Service.

Agencies which are not counted in the list of absolute exemptions suggested above should be exempt from the obligation to provide access to certain documents. In this area, Vietnam should follow ss 33- 47J of the *Freedom of Information Act 1982* (Cth) to exempt government agencies from the obligation to provide access to information on some grounds absolutely without any condition and on other grounds only if they establish that the publication of such information would be harmful to public interest.

When adopting any exemption relating to documents affecting national security, Vietnam should avoid the *FOI Act's* use of the undefined term of 'damage to the security of the Commonwealth'. As one of my interviewees stated, this term has caused difficulty in Australia because there is no clear way for people to recognize whether or not a matter has an impact upon national security.<sup>1145</sup> My interviewees also pointed out that this causes difficulty in providing, collecting and publishing information.<sup>1146</sup> However, there is a definition of 'national security' in the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).<sup>1147</sup> Therefore Vietnam should consider adopting this definition as part of its FOI legislation.

We have seen that there is no definition of national security in Vietnam. It would be necessary to adopt one because it would help define exactly whether information should or should not be kept secret. A number of my interviewees suggested that Vietnamese law should provide a definition of national security.<sup>1148</sup> Such a definition would help reduce government agencies' refusal to provide the media information.<sup>1149</sup> The definition of national security in the Australian *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) could serve this purpose because it would support the implementation of the

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<sup>1145</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1146</sup> Interview via phone with participants No 1A (Adelaide, 22 September 2014), No 2A (Adelaide, 29 September 2014).

<sup>1147</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)s 8.

<sup>1148</sup> Interview with participants No 4 (Cantho, 28 March 2013), No 6 (Lamdong, 12 March 2013), No 7 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 18 (Hochiminh, 21 March 2013).

<sup>1149</sup> Interview with participants No 4 (Cantho, 28 March 2013), No 6 (Lamdong, 12 March 2013), No 7 (Hochiminh, 25 March 2013), No 8 (Hochiminh, 22 March 2013), No 9 (Hochiminh, 21 March 2013), No 18 (Hochiminh, 21 March 2013).

right to access to information in practice. Vietnamese government agencies therefore would have more limited discretion to refuse the media to access information based on the reason that the information falls into the scope of protection of national security. Having a clear definition supports freedom of expression because it helps to build confidence amongst media practitioners when making publication decisions. The media would have more chance of accessing and publishing government-held information. Members of the public would also benefit when information of interest to them were published as much as possible through the media.

If adopted, the Australian definition would mean that national security extended to Vietnam's 'defence, security, international relations or law enforcement interests'.<sup>1150</sup> In this definition, security would mean:

(a) the protection of, and of the people of, the [government] from:

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;
- (v) attacks on [Vietnam's] defence system; or
- (vi) acts of foreign interference;

whether directed from, or committed within, [Vietnam] or not; and

(aa) the protection of [Vietnam's] territorial and border integrity from serious threats; and

(b) the carrying out of [Vietnam's] responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).<sup>1151</sup>

International relations would mean 'political, military and economic relations with foreign governments and international organizations'.<sup>1152</sup>

Law enforcement interests would include interests in the following:

- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
- (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

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<sup>1150</sup>*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)s 8.

<sup>1151</sup>*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)s 9; *Australian Security Intelligence Organization Act 1979*(Cth)s 4.

<sup>1152</sup>*National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)s 10.

- (c) the protection and safety of informants and of persons associated with informants;
- (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.<sup>1153</sup>

In addition, there is a need to harmonise FOI exemptions with any provisions covering official secrets. Both Australian and Vietnamese law have such provisions, and in both cases these are complicated and broad.<sup>1154</sup> As one of my interviewees pointed out, in Australia this creates confusion as to the reach of the FOI legislation,<sup>1155</sup> leaving the Australian media with greatly limited access to information, and creating undesirable complications for those would seek access. Therefore, when adopting any exemption for documents to which secrecy provisions of enactments apply, Vietnam should ensure that the exemption was carefully drafted to provide clarity for all parties about the extent of the government agency's obligations. This would help to maintain a balance between state interests and freedom of information.

Further, there is range of exemptions applied for agencies provided under the *FOI Act* which are inapplicable in Vietnam because Vietnam has no organizations which are equivalent to them. These organizations include: Aboriginal Land Councils and Land Trusts; Auditor-General; Inspector-General of Intelligence and Security; National Workplace Relations Consultative Council; Office of National Assessments; Parliamentary Budget Officer; Australian Geospatial-Intelligence Organization; Australian Signals Directorate; and Defence Intelligence Organization. In addition, the Cabinet exemption provided in s 34 of the *FOI Act* could have no application in Vietnam because Vietnam has no organization which is equivalent to the Cabinet. Nor is Vietnam a federal state, so the exemption for documents affecting the relationship between central government (Commonwealth) and state government provided in s 47 would have no relevance in Vietnamese law.

Moreover, Vietnam would not be justified in excluding completely the Assembly departments from the operation of the FOI acts, as Australia has with parliamentary departments since the passage of the *Parliamentary Service Amendment (Freedom of Information) Bill 2013*. Similar arguments to those which have been raised in Australia would also apply in Vietnam:<sup>1156</sup> if encouragement of 'effective oversight of public expenditure' is one of the public interest factors favouring disclosure under the *FOI Act*,<sup>1157</sup> then as Adams argues, '[t]he Australian community clearly has an interest in access to information about the integrity of their political representatives, not just the government of the day, in order to be able to exercise real choice at the ballot box'.<sup>1158</sup> As the Vietnamese community has similar interests, Vietnam should exempt Assembly departments from disclosure of specific

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<sup>1153</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 11.

<sup>1154</sup> On Australian law, see Australian Law Reform Commission, *Review of Secrecy Laws*, Discussion Paper No 74 (2009), 33.

<sup>1155</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014); Australian Law Reform Commission, *Review of Secrecy Laws*, Discussion Paper No 74 (2009), 33.

<sup>1156</sup> Review of the *Freedom of Information Act 1982* and *Australian Information Commissioner Act 2010*, 52.

<sup>1157</sup> *Freedom of Information Act 1982* (Cth) s 11B(3)(c).

<sup>1158</sup> Adams, Carolyn, 'Freedom of information and parliamentary departments' (2014) 73(1) *Australian Journal of Public Administration* 67, 73.

documents only. This recommendation has been raised in Australia as an alternative to the full exemption applied for the parliamentary departments.<sup>1159</sup>

As pointed out in chapter 6, in Vietnam the right to access to information is not supported in practice. To support members of the public in accessing government information, Vietnam should extend the *Vietnamese Law on Information Technology 2006* to develop an Information Publication Scheme. As we saw in chapter 7, the model of the Information Publication Scheme developed under the *FOI Act* could be applied in Vietnam. In order to formulate this scheme, Vietnam should learn from the *FOI Act*, ss 7A- 9, to create an obligation on government agencies to publish information online and enforcement powers relating to that same obligation, such as have not been provided in the *Vietnamese Law on Information Technology 2006*. Such a scheme would publish certain information of government agencies so that members of the public could access it online without any application or payment. Establishing websites to publish information under the *Vietnamese Law on Information Technology 2006* should be specified as a compulsory obligation of government agencies. The Vietnamese government also should establish a new agency, or authorize defined agencies such as the MIC, to review the operation of the scheme. This agency would have an enforcement power over the implementation of the scheme. It should be authorized to publish guidelines about the scheme and determine which types of information should not be published under the scheme. In addition, members of the public should be authorized to complain about the implementation of the scheme. Vietnam should adopt all the details about the information required to be published in the scheme in the Australian law. However, to make the provision applicable, Vietnam should substitute: the Assembly for the Parliament, MIC for the Information Commissioner, and remove: ‘other than APS employees within the meaning of the *Public Service Act 1999*;<sup>1160</sup> and ‘appointments of officers of the agency that are made under Norfolk Island enactments (other than officers appointed or employed under the *Public Service Act 2014* of Norfolk Island)’.<sup>1161</sup>

### 1.3. Laws on protection of whistleblowers and journalists’ sources

As discussed in chapter 7, Vietnam should adopt the model of the *PID Act* to place on courts an obligation to protect whistleblowers. This means that Vietnam should amend ss 5 and 6 of the Vietnamese *Denunciation Law 2011* and s 14 of the Decree No 76/2012/NĐ-CP to provide that whistleblowers have the right to apply for protection from the courts (district courts) when they are harmed or threatened with harm because of making a public interest disclosure. The courts should have the power and the obligation to deal with the situation, and no need to coordinate with any other institutions. Improving the implementation of

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<sup>1159</sup>Review of the *Freedom of Information Act 1982* (Cth) and *Australian Information Commissioner Act 2010*, 56.

<sup>1160</sup>*Freedom of Information Act 1982* (Cth) s 8 (2)(d)(i).

<sup>1161</sup>*Freedom of Information Act 1982* (Cth) s 8 (2)(d)(ii).

whistleblower protection would encourage people to expose wrongdoing. The media therefore would have more engaging information to publish and it would serve the public interest.

Courts would be the best choice because in Vietnam, protecting people against damage is the courts' obligation.<sup>1162</sup> Unlike other institutions, courts have the right to make decisions about whether or not whistleblowers are harmed or threatened with harm. They therefore could apply protection for whistleblowers against such damage in short order. In addition, courts have the right to enforce their decisions, and other institutions including government agencies and private bodies must respect courts' decisions.<sup>1163</sup> Moreover, courts have the power to decide on compensation for loss and injury. By contrast, other institutions have no right to make these decisions.

## 2. Law on protection of personal information

To balance individuals' right to privacy with the public right to know, Vietnam could expand the provisions on the right to personal information in the *Vietnamese Civil Code 2005*. To improve the law on the protection of personal information, Vietnam should develop the following provisions.

Firstly, a definition of personal information is needed to resolve the uncertainty faced by organizations including the media, media regulatory bodies and courts, which cannot define exactly which information is personal information. One of my interviewees pointed out that 'it is important to have a definition of personal information because such definition will give editors in chief confidence in making publication decisions'.<sup>1164</sup> As reviewed in chapter 7, the definition of personal information provided in the *Privacy Act 1988* (Cth) could help Vietnam to overcome this lack of clarity. Having a clear definition would enable the media to be confident in collecting and publishing information because they would know which kinds of information they were allowed to have and to use. It would also help other institutions, including media regulatory bodies and courts, to give decisions without hesitation in complaints resolution relating to personal information. Under a definition based on that in s 6(1) of the *Privacy Act 1988* (Cth), personal information would be 'information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not'.<sup>1165</sup>

Secondly, Vietnam should develop rules to regulate individuals and organizations in the collection, storage and use personal information. These rules should be applied for all individuals and organizations regardless of who they are, what their objects are, or how large they are. In this area, Vietnam should use thirteen rules provided in the *Privacy Act 1988* (Cth), schedule 1, as a model. These rules would provide conditions of

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<sup>1162</sup>*Vietnamese Constitution* s 102

<sup>1163</sup>*Luật Tổ chức Tòa án nhân dân 2002* ss12, 13.

<sup>1164</sup>Interview with participant No 8 (Hochiminh, 22 March 2013).

<sup>1165</sup>*Privacy Act 1988* (Cth) s 6(1).

collection; prohibitions on collecting and using personal information (such as collecting it by unlawful or unfair means, or using it once collected for direct marketing); the process of collection; liability for collecting organizations; the process of accessing and requiring corrections to collected information; and the right to complain against collecting organizations when they break rules applied for collecting, storing and using personal information. Having these rules would benefit both the organizations collecting information and individuals. The organizations (including the media) would know what personal information they can collect, store and publish, and how to go about doing so. Individuals would know whether or not their information had been collected, stored and published legally, and how to go about protecting their information.

Thirdly, Vietnam should develop exemptions based upon Australian models to balance the right to privacy with other interests including free information. Having these exemptions would allow the media to publish personal information in certain circumstances to serve the needs of the public. It would help balance between the right to personal information and the public right to know. Exemptions that could be adopted are provided in the *Privacy Act 1988* (Cth), ss 7, 7B(1), 16E, 7B(4).<sup>1166</sup>

As Peter Leonard has observed, the *Privacy Act 1988* (Cth) 'is still incomplete and requires further development'.<sup>1167</sup> In particular, there are numbers of exemptions whose removal the ALRC recommends such as those applied for small business, employee records, national broadcasters, and registered political parties.<sup>1168</sup> These features should not be replicated in Vietnam when developing a law on the protection of privacy. There should be no exemption in Vietnam for: any commercial organizations regardless of their size, the VCP (as the only registered political party), the VOV or VTV (or national broadcasters), or a record held by an organization relating to its employees.

One aspect of Australian privacy law that should not be replicated in Vietnam is the exemption for small business. The same arguments that have been levelled against the exemption in Australia apply in Vietnam. One of my interviewees stated that he questions what the reason is for providing small business exemption from the operation of the law on the protection of right to personal information'.<sup>1169</sup> Another interviewee suggested that 'personal information should be treated in the same way in different organizations. People always expect that their personal information is treated with respect regardless of who is collecting or using it'.<sup>1170</sup> According to the ALRC, all businesses should be treated in the same way when dealing with personal information. People's personal information 'should be protected regardless of whether they were dealing with a small business'.<sup>1171</sup> Individuals

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<sup>1166</sup> See chapter 5, sub-section 3.1. (*Protection of private information*) to know about the exceptions.

<sup>1167</sup> Leonard, Peter, 'Living with Australia's new privacy laws' (2014) 98 *Intellectual Property Society of Australia and New Zealand* 33, 33.

<sup>1168</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1316[39.1], 1429 [41.61], 1261 [36.78], Vol 1, 115.

<sup>1169</sup> Interview via phone with participant No 3A (Adelaide, 15 August 2014).

<sup>1170</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1171</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1320[39.15].

would be concerned to know that whether or not their personal information will be protected adequately will depend on the size of the business accessing that information.<sup>1172</sup> In addition, ‘there is no compelling justification for a blanket exemption for small businesses, as consumers have the right to expect that their personal information will be treated in accordance with the privacy principles’.<sup>1173</sup> The ALRC also notes that, ‘[N]o other comparable jurisdiction in the world exempts small businesses from the general privacy law’.<sup>1174</sup> It is no fairer in Vietnam to have people’s protection vary depending on whether they are dealing with a larger or a smaller business.

Vietnam should also hesitate before adopting an exemption for registered political parties. Based on this exemption, ‘political parties can collect information about constituents from third parties that could be inaccurate; individuals do not know what information has been collected by the parties; and have no right of access to, or correction of, personal information in electoral databases’.<sup>1175</sup> One of my interviewees stated that ‘there is no sense in treating registered political parties different from other organizations in collecting and using personal information’.<sup>1176</sup> Although Vietnam has only one political party, the VCP, there are elections where the members of the VCP have to choose between different candidates to represent them in the head office of the VCP. Vietnam therefore has the same need for ‘trust in the political process’ that the ALRC identified as being undermined by the exemption in Australia.<sup>1177</sup> The Vietnamese people would doubt the result of the VCP’s elections if the VCP were exempt from privacy protection. It would be equally problematic if Vietnam were to exempt the VCP from the operation of the protection of privacy.

Nor should Vietnam follow the Australian model by exempting national broadcasters including the Voice of Vietnam (VOV) and the Vietnamese Television (VTV) from the privacy protection obligations. Although the Australian national broadcasters are exempt from the coverage of the *Privacy Act 1988* (Cth) based on their exempt status under the *FOI Act*; the ALRC states that this is unjustified,<sup>1178</sup> arguing that the purposes of the *FOI Act* and the *Privacy Act 1988* (Cth) are different.<sup>1179</sup> The *FOI Act* aims to encourage democratic society by providing a right of access to government-held information. In contrast, the *Privacy Act 1988* (Cth) primarily concerns the protection of a right to privacy. According to the ALRC, the national broadcasters should be treated in the same way as other media organizations in the private sector.<sup>1180</sup> One of my interviewees stated that ‘it is funny to

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<sup>1172</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1151[33.29].

<sup>1173</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 1, 114.

<sup>1174</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 1, 113.

<sup>1175</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 1, 115-116.

<sup>1176</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1177</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 1, 115-116.

<sup>1178</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1257[36.64].

<sup>1179</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1259[36.72].

<sup>1180</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1257[36.64].

explain that the national broadcasters are exempt from the operation of the *Privacy Act* because they are exempt under the *FOI Act*.<sup>1181</sup> All the same arguments apply in Vietnam.

Further, the exemption for private organizations relating to information held on current and past employees also should not be replicated in Vietnam. There would be a similar argument in Vietnam to that which has been levelled against the exemption in Australia: it is inconsistent to treat private organizations and government agencies differently in this regard.<sup>1182</sup> In addition, the ALRC also states that ‘treating employees’ personal information differently from other personal information also cannot be justified’.<sup>1183</sup> The ALRC then proposes that ‘the employee records exemption should be removed’.<sup>1184</sup> This exemption therefore should not be developed in Vietnamese law. The exemption for the Office of National Assessments (ONA), which should not be adopted in Vietnamese law because Vietnam has no organization which is equivalent to this body.

### 3. Law on protection of reputation

Vietnam should develop provisions covering defamation to balance the protection of reputation and the promotion of free expression. As one of my interviewees put it: ‘having a clear definition of defamation would help stop argument over this issue’.<sup>1185</sup> Vietnam should use Australian common law and the *Uniform Acts* as a basis to formulate a definition of defamation. However, this definition should be modified to accord with recent Vietnamese defamation provisions which allow organizations to sue for defamation. For this reason, defamation in Vietnam should be defined as the publication of defamatory matter which affects or tends to damage the reputation of an other person or organization. Having a definition as suggested would enable the media to be confident in making publication decisions. This would assist the media’s development in that they would have more engaging information to publish and it would satisfy the needs of the public.

In addition, Vietnamese law should specify the requirements of successful defamation actions based on Australian common law and the *Uniform Acts* as mentioned in chapter 7. These requirements would include three elements: firstly, the information has been published; secondly, the publication is about the person complaining of the defamation (the plaintiff); and thirdly, the publication is defamatory, or carries defamatory imputations.

Further, to allow free expression, Vietnam should develop defences to protect people who have published certain kinds of defamatory material from liability for any damage caused by the publication. These defences would allow the free flow of information to be balanced against the protection of reputation. As reviewed in chapter 7, the *Uniform Acts* and the *BSA* should be models for Vietnam in this area. However, the Australian law on

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<sup>1181</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1182</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 1, 115.

<sup>1183</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1372[40.32].

<sup>1184</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008), Vol 2, 1372[40.32].

<sup>1185</sup> Interview with participant No 16 (Hochiminh, 21 March 2013).



defamation has certain shortcomings of its own, so while certain provisions are applicable, some others need to be modified before applying. Also, some are not applicable to Vietnam.

Defences which should be adopted in Vietnamese law on defamation are provided in the *Defamation Act 2005* (NSW), ss 25- 33. However, the qualified privilege defence provided under s 30 of the *Uniform Acts* would need to be modified when applied to Vietnam to avoid the difficult potential impacts on freedom of expression and investigative journalism of its 'reasonableness' requirement.<sup>1186</sup> According to both Mark Pearson and Kim Gould, reasonableness is very difficult for media defendants to prove.<sup>1187</sup> As one of my interviewees pointed out, 'the requirement to prove reasonableness could be considered a major drawback to the media because this defence is very difficult to rely on for the media'.<sup>1188</sup> In addition, based on s 30(3)(g), courts can examine the 'integrity' of a journalist's sources to investigate a reasonableness aspect of the defence.<sup>1189</sup> In Pearson's view '[t]his represents a very real hurdle to investigative reporters who have relied upon confidential sources for their information'.<sup>1190</sup> One of my interviewees pointed out that it is a hardship for the media to prove 'reasonableness' without disclosing their sources of information. Journalists who rely on confidential sources therefore do not have the benefit of the protection of the qualified privilege defence.<sup>1191</sup> To avoid this sticking point for Vietnamese publishers, Vietnamese law on protection of reputation should follow Kim Gould's recommendation that a statement should be inserted in the qualified privilege defence section: 'in order to establish reasonableness of conduct in publishing for the purposes of s 30(1)(c), a publisher does not have to hold an honest belief in the matter published'.<sup>1192</sup>

Also Vietnam should not adopt unmodified the Australian exemption for internet intermediaries under s 91 of Schedule 5 of the *BSA*. If it did so there would be the same problem in Vietnam as in Australia: failure to provide the conditions which an internet intermediary has to satisfy to have the section's protection leads to uncertainty as to when an online intermediary should be treated as a publisher.<sup>1193</sup> One of my interviewees informed me that the lack of clarity in the Australian law on the question slows down the resolution of disputes about online defamatory publications.<sup>1194</sup> This interviewee stated that 'the position of internet intermediaries with respect to liability for defamatory publication under the Australian law is unclear. It is difficult to identify when an internet intermediary is treated as a publisher. As a result, the question of when an internet intermediary is found to have

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<sup>1186</sup> Mark Pearson, 'A review of Australia's defamation reforms after a year of operation' (2007) 29(1) *Australian Journalism Review* 41, 49.

<sup>1187</sup> Mark Pearson, 'A review of Australia's defamation reforms after a year of operation' (2007) 29(1) *Australian Journalism Review* 41, 45; Gould, Kim, 'Statutory qualified privilege succeeds, but too early for the media to go 'dancing in the streets'' (2011) 16 (3) *Media and Arts Law Review* 241, 249.

<sup>1188</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1189</sup> Section 30(3)(g) of the *Defamation Act 2005* (NSW) provides that to determine 'reasonableness', 'a court may take into account the sources of the information in the matter published and the integrity of those sources'.

<sup>1190</sup> Mark Pearson, 'A review of Australia's defamation reforms after a year of operation' (2007) 29(1) *Australian Journalism Review* 41, 48.

<sup>1191</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1192</sup> Gould, Kim, 'Statutory qualified privilege succeeds, but too early for the media to go 'dancing in the streets'' (2011) 16 (3) *Media and Arts Law Review* 241, 286.

<sup>1193</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 4.

<sup>1194</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014); Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 4.

satisfied the requirements of the *BSA* defence [s 91 of Schedule 5 of the *BSA*] is unsettled. That uncertainty is a bar to speedy the handling of disputes about the defamatory material published online'.<sup>1195</sup> This uncertainty also causes 'uneven implementations of legal requirements, ranging from the removal of legitimate speech to harmful monitoring and surveillance of users, which invade privacy and unduly restrict speech'.<sup>1196</sup> The defence as currently drafted under the *Uniform Acts* requires that to have immunity against the liability for defamation, internet intermediaries must prove that they were 'not aware of the nature of the internet content'.<sup>1197</sup> However, it is not clear whether or not the defences provided apply to an intermediary who is 'aware that particular content is being hosted or transmitted, but not aware of the facts and circumstances that result in that content being defamatory'.<sup>1198</sup> and s 91 does not provide clarity on this. These deficiencies lead to 'intermediaries removing or blocking access to content that is unlikely ever to be found by a court to be defamatory'.<sup>1199</sup> Further, s 91 does not specify the time limit for an intermediary to block or remove access to defamatory material since it is 'aware of the nature of internet content'.<sup>1200</sup>

When adopting exemption for online intermediaries based on s 91 of Schedule 5 of the *BSA*, to avoid concerns which have arisen in Australia, Vietnam should specify the conditions which an internet intermediary has to satisfy to be protected by the defence. The new Vietnamese provisions on defamation should also make it clear whether the innocent dissemination defence can apply to search engine operators when they are sued for defamatory information which is the result of searching (google search is an example).<sup>1201</sup> The new Vietnamese provisions on defamation should provide that 'an online intermediary that does no more than facilitate the dissemination of defamatory matter should be deemed not to be a publisher of that matter, whether or not the intermediary is on notice of the allegedly defamatory matter'.<sup>1202</sup> Based on this exemption, the operator of a search engine would be immune from liability for defamatory matter which is disseminated automatically by a search engine. ISPs and other communication conduits should be exempt from liability for defamation when defamatory matter is transmitted via their services.

#### 4. Regulation of opposition and dissent

Vietnam should adopt provisions to specify actions which are considered as opposition based upon s 80.2 of the *Criminal Code Act 1995* (Cth). These provisions would help distinguish between opposition offences and other actions, including legitimate dissent. The media would benefit from these provisions in that they could determine exactly whether publishing information would break the law on opposition. They therefore would be confident of publishing dissenting opinions or views, which would benefit the public and

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<sup>1195</sup> Interview via phone with participant No 2A (Adelaide, 29 September 2014).

<sup>1196</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 4.

<sup>1197</sup> Chapter 4, Subsection 2.2. Defamation; *Broadcasting Services Act*, S 91 (1) (a), (c).

<sup>1198</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 8.

<sup>1199</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 8.

<sup>1200</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 8.

<sup>1201</sup> Communications Alliance, Submission to the Attorney General's review of the Defamation Act, 5 May 2011, 8.

<sup>1202</sup> Communication Alliance, Submission to the Attorney-General's review of the Defamation act, 4 may 201, 8.

develop the role of the media in a democratic society. As one of my interviewees commented, ‘having a clear definition of opposition would help editors in chief be confident of making publication decisions, especially publications of opinions or views which are different from the policies of the government’.<sup>1203</sup>

Vietnamese law on opposition should not include protection for groups against vilification on racial and religious grounds, as well as on grounds of nationality and political opinion, as provided in ss 80.2A, and 80.2B of the *Criminal Code Act 1995* (Cth). The ALRC’s view that, providing protection for groups against vilification on racial and religious grounds, as well as on grounds of nationality and political opinion, is better done in anti-discrimination legislation and not the Criminal Code is compelling and also applies in Vietnam.<sup>1204</sup> The idea of opposition focuses on rebellion against, or subversion of, political authority. In contrast, the purpose of protecting of one group against violence is to guarantee the dignity of members of groups in a pluralist society.<sup>1205</sup> One of my interviewees stated that it is difficult to understand why the Australian Commonwealth includes urging violence against groups in sedition offences; and suggested that the urging of inter-group violence should be framed as an anti-discrimination provision.<sup>1206</sup> Further, the opposition offence has a narrow application.<sup>1207</sup> It includes the notion that ‘the force or violence urged must be between two groups rather than between an individual and a group, or between individuals’.<sup>1208</sup> It is also applied only to ‘the urging of force or violence, not a more general offence of urging hatred or vilification’.<sup>1209</sup> Vietnam therefore should separate the protection of groups from the protection of the state; and develop provisions appropriate to each in its own context.

In addition, Vietnamese law on opposition should not have the intention to urge the commission of a specific offence a compulsory element of opposition offences. It would be redundant if Vietnam followed the *Criminal Code Act 1995* (Cth) to require that to be guilty of an opposition offence, a person must intentionally urge the commission of a specific offence. There is an argument coming from the ALRC which would apply equally in Vietnam, namely that the limitation is inconsistent with the primary reason for the opposition offences, being the need to avoid serious risk to public safety and political bodies.<sup>1210</sup> This argument is obviously correct in Vietnam where the Vietnamese government and the VCP stress that protecting the safety of the VCP, the government system and public order, is of high importance. Indeed, the urging of force or violence against the Constitution, the VCP, the government and political process has increased in recent years.<sup>1211</sup> Further, it is very hard

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<sup>1203</sup> Interview with participant No 2 (Hochiminh, 25 March 2013).

<sup>1204</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 199 [9.86-9.87].

<sup>1205</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 190 [9.50]; B Saul, ‘Preventing Communal Violence: Blurring Sedition, Vilification and Terrorism’ [2005] (special issue) *Human Rights Defender* 15, 16.

<sup>1206</sup> Interview via phone with participant No 1A (Adelaide, 22 September 2014).

<sup>1207</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 199 [9.87].

<sup>1208</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 199 [9.87].

<sup>1209</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 199 [9.87].

<sup>1210</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 144-145 [8.30].

<sup>1211</sup> ‘Nhiệm vụ bảo vệ an ninh quốc gia, giữ gìn trật tự an toàn xã hội trong tình hình hiện nay’, *Báo điện tử Đảng Cộng sản Việt Nam* (online) 27 September 2015 <[http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co\\_id=30552&cn\\_id=8207](http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30552&cn_id=8207)>.

for the prosecution to prove that the defendant intended to urge that a particular offence be committed by another person.<sup>1212</sup> As Ruddock states it is hard to prove 'what is in a person's mind'.<sup>1213</sup> Therefore a Vietnamese law on opposition should define the offence in such a way that it covers the urging of violence generally, and not the commission of particular offence.

To balance the right to free expression and the protection of national security, Vietnam should develop exemptions which immunize publishers from responsibility for opposition offences in certain circumstances. In this area, Vietnam should develop exemptions from liability for opposition along the lines of s 18D of the *Racial Discrimination Act 1975* (Cth) in preference to s 80.3 of the *Criminal Code Act 1995* (Cth) to allow the free flow of information. The defence provided in s 80.3 is very limited, particularly in that it does not provide protection for academic, educational, scientific, religious, artistic, journalistic or other public interest purposes. The defence to racial vilification in s 18D of the *Racial Discrimination Act 1975* (Cth), by contrast, covers such matters, including anything said or done reasonably and in good faith 'in the performance, exhibition or distribution of an artistic work' or in the course of any publication, statement, discussion or debate made or held for any 'genuine artistic purpose'.<sup>1214</sup> It therefore provides 'a better model, by extending the defences to cover a broader range of activity'.<sup>1215</sup> Free expression would be better protected if Vietnam adopted a defence along the lines of s 18D in preference to s 80.3.

Also there are certain exemptions provided under the Australian *Criminal Code* which should not be replicated in Vietnam. Firstly, Vietnam should avoid exempting actions done 'in good faith' from the liability for opposition, for the reason explained by the ALRC: it is illogical to require proof that a person committed an opposition offence 'in good faith'.<sup>1216</sup> The ALRC pointed out that a good faith requirement makes sense only when intention is not an element of opposition.<sup>1217</sup> If intention is an element, and the prosecution has proved its case, it has proved that the defendant intended to urge force or violence. This means that logically it should be impossible for a defendant to prove that he/she acted in good faith because this implies there was no intent to urge force or violence.<sup>1218</sup> One of my interviewees explained that it is impossible to prove that a person intends to commit sedition in good faith; he good faith defences do not made sense because intention is an essential element in sedition offence. It therefore would make sense for the law to provide either intention or a 'good faith' defence.<sup>1219</sup> In addition, as the Fairfax group Article 19 pointed out in its submission to the ALRC review, it is difficult for a defendant to prove that he/she intended to urge another person to use force or violence to interfere with electoral processes (for example) 'in good

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<sup>1212</sup>Ruddock, Philip, 'An unfinished canvas' (2009) 81 (5) *AQ, the Australian Quarterly* 4, 7.

<sup>1213</sup>Ruddock, Philip, 'An unfinished canvas' (2009) 81 (5) *AQ, the Australian Quarterly* 4, 7.

<sup>1214</sup>*Racial Discrimination Act 1975* (Cth), s 18D.

<sup>1215</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 219.

<sup>1216</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 220; Connors, Kate, 'Review of federal sedition laws' (2006) 88 *Reform* 60, 62.

<sup>1217</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 220 [10.67].

<sup>1218</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 220 [10.68].

<sup>1219</sup> Interview via phone with participant No 3A (Adelaide, 15 August 2014).

faith’, ‘especially in the context of media reports, and particularly in relation to the republication of third-party statements’.<sup>1220</sup>

In any case, the ALRC said that ‘the meaning of good faith in sedition law is unclear’.<sup>1221</sup> To prove that the action has been done ‘in good faith’, the publisher/journalist has to prove that the publication was based upon ‘proper material’. Similar to defamation litigation where a media organization wants to succeed with the qualified privilege defence provided under s 30 of the *Uniform Acts* as discussed above, courts can examine the ‘integrity’ of a journalist’s sources to investigate ‘good faith’. For this reason, to win this defence, media organizations or journalists may need to reveal their sources of information. This would ‘chill media reporting of certain views and affect the willingness of individuals to provide their views to the media’.<sup>1222</sup> As one of my interviewees stated, ‘to have the protection of good faith defence, the journalist has to reveal the identity of a source which the journalist does not want to do, he therefore will go to jail rather than breach his promise to keep confidential information’.<sup>1223</sup>

As the ALRC has pointed out, ‘generally, the good faith requirement is not needed because the elements of the offence are not made out in the first place’.<sup>1224</sup> Vietnam therefore should remove the words ‘in good faith’ from the defences. This is also recommended by the ALRC in relation to Australian law on opposition.<sup>1225</sup> Vietnam should follow the recommendation of the ALRC to focus on proving the intention element<sup>1226</sup> and the ALRC’s recommendation to complete the provision covering the intention element by providing that:

‘in considering whether a person intends that the urged force or violence will occur, the trier of fact must take into account whether the conduct was done (i) in the performance, exhibition or distribution of an artistic work; or (ii) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or (iii) in connection with an industrial dispute or an industrial matter; or (iv) in publishing a report or commentary about a matter of public interest; and may have regard to any relevant matter ...’<sup>1227</sup>

This would be a good idea in Vietnam where proving the intention element is also a big challenge and there is no guidance on how to prove that a person intended to conduct opposition. This also would help courts to provide persuasive reasons for their decisions.

Secondly, as Article 19 pointed out, there is a danger associated with the fact that s 80.3(f) of the *Criminal Code Act 1995* (Cth) relies ‘on the Attorney’s discretion’ ... ‘as the

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<sup>1220</sup> Article 19, Submission to the Australian Law Reform Commission’s Review of Sedition Laws, April 2006, 9.

<sup>1221</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 212 [10.34].

<sup>1222</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 212 [10.35].

<sup>1223</sup> Interview via phone with participant No 1A (Adelaide, 22 September 2014).

<sup>1224</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 220 [10.68].

<sup>1225</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 221-222 [proposal 10-1].

<sup>1226</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 220 [10.70].

<sup>1227</sup> Australian Law Reform Commission, *Review of Sedition Laws*, Discussion Paper No 71 (2006), 222 [proposal 10-2].

ultimate arbiter of initiating proceedings in respect of violations by the press'.<sup>1228</sup> This section permits publication in good faith of a 'report or commentary about a matter of public interest'. However, the Attorney-General is a member of the government. He or she therefore 'will obviously be influenced by the outlook of the political party of which he [sic] is a member' in determining 'public policy'.<sup>1229</sup> In addition, because Australia has no definition of the public interest, the decision to publish often depends completely on an interpretation of what the Attorney-General's would consider to be the 'public interest'.<sup>1230</sup> One of my interviewees stated that to make sure that the media outlet will be immune from liability for publishing seditious information based upon the defence that the publication is a report on a matter of public interest, the media outlet should consult the Attorney-General before publishing to determine whether the information should be published.<sup>1231</sup> As discussed in chapter 6, Vietnam does not have a definition of the public interest either. Therefore if Vietnam replicated s 80.3(f) of the *Criminal Code Act 1995* (Cth) it would create similar difficulties for media organizations. They would have to wait before publishing for an answer from the MIC as to whether the publication is in the public interest but, like the Australian Attorney-General, the MIC as a government agency would be subject to heavy political influence. Therefore the MIC may not be inclined to answer that the publication of political material would be in the public interest.

To avoid the influence of the government and the VCP on the decisions of the MIC which may limit publishing political matters on behalf of public interest, Vietnamese law on opposition should include an express requirement for the MIC 'to take into account the public interest in protecting the independence of the press and the content of the right to freedom of expression as protected under international law'.<sup>1232</sup> These could be included in the Prosecution Guidelines of the Supreme Court. As stated in relation to such a proposed change to Australian law, '[t]his would then bring the provision more closely in line with the requirements of the necessity test for a restriction on the right to freedom of expression'.<sup>1233</sup>

## 5. Law on ownership

Vietnam should remove the restriction on operating more than one type of media outlet provided under s 11 of the *Vietnamese Press Law 1989*. This means that a media organization would be allowed to run more than one type of media except traditional media (newspaper, television and radio). In addition to relaxing the restriction on cross-media ownership, Vietnam should develop limitations on control and restrictions on transactions to avoid massive concentration in the media market. Vietnam should take rules provided under the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth), ss 53- 61(AB), as a model to develop these restrictions. However, unlike the Australian media, the Vietnamese

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<sup>1228</sup> Article 19, Submission to the Australian Law Reform Commission's Review of Seditious Laws, April 2006, 9.

<sup>1229</sup> Geoffrey Robertson QC, Andrew Nicol QC, *Media Law* (Sweet & Maxwell, 2007, 5<sup>th</sup>ed), 31-32.

<sup>1230</sup> Article 19, Submission to the Australian Law Reform Commission's Review of Seditious Laws, April 2006, 9.

<sup>1231</sup> Interview via phone with participant No 1A (Adelaide, 22 September 2014).

<sup>1232</sup> Article 19, Submission to the Australian Law Reform Commission's Review of Seditious Laws, April 2006, 10.

<sup>1233</sup> Article 19, Submission to the Australian Law Reform Commission's Review of Seditious Laws, April 2006, 10.

media are not divided into public, commercial, and community services. Restrictions on transaction and limitations on control therefore should be applied to all media organizations regardless their objectives. This means that Vietnam should adopt all the restriction and limitation rules in the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth), substituting: television for commercial television, radio for commercial radio, and newspapers for associated newspapers. These relaxations and restrictions would allow the media to improve the quality of their publications and maintain diverse information. They therefore would support the development of media industry, serving the public interest.

However, one of my interviewees emphasised that Australian media ownership regulation is not well designed to cope with the vast change in the media industry which is the result of Internet development and trends of media convergence.<sup>1234</sup> All four of my Australian interviewees stated that while Australian media ownership regulation is weighted towards the three traditional media forms (commercial television, commercial radio and high-circulation newspapers), it does not consider online media.<sup>1235</sup> One of my interviewees argued that there are few regulatory barriers to entry of online media outlets into the market, and the majority of popular online news outlets and portals are either directly or jointly owned by traditional media platforms.<sup>1236</sup> This unequal regulatory treatment - which also extends to community newspapers and national broadcasters - is becoming more pronounced given the prominence and use of online media in the community, including online versions of offline news services, news aggregators, stand-alone news sites, independent news content providers, and search engines.<sup>1237</sup> Therefore Australian regulation does not provide a model for Vietnam as to how one might address ownership of online media. Yet, as discussed in chapter 3, online content should be subject to certain regulations covering ownership because it has been developing day by day in Vietnam and has become one of the most popular sources of information. This suggestion has been raised by the APC to improve Australian media ownership regulations.<sup>1238</sup>

## 6. The handling of complaints and grievances

Vietnam should reform the provisions covering the handling of complaints and grievances to adopt the use of civil court proceedings, as Australia does in defamation cases. Based on this model, s 9 of the *Vietnamese Press Law 1989* should specify that complainants and media organizations are encouraged to initially resolve complaints by discussion between

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<sup>1234</sup> Interview via phone with participant No 3A (Adelaide, 15 August 2014).

<sup>1235</sup> Interview via phone with participants No 1A (Adelaide, 22 September 2014), No 2A (Adelaide, 29 September 2014), No 3A (Adelaide, 15 August 2014), No 4A (Adelaide, 12 January 2015); Australian Department of Communication, *Media control and ownership* (15 Oct 2014) Press Council <[http://www.presscouncil.org.au/uploads/52321/ufiles/Control\\_Background\\_Paper\\_Australian\\_Government\\_Department\\_of\\_Communications.pdf](http://www.presscouncil.org.au/uploads/52321/ufiles/Control_Background_Paper_Australian_Government_Department_of_Communications.pdf)>, 7.

<sup>1236</sup> Interview via phone with participant No 1A (Adelaide, 22 September 2014).

<sup>1237</sup> Australian Department of Communication, *Media control and ownership* (15 Oct 2014) Press Council <[http://www.presscouncil.org.au/uploads/52321/ufiles/Control\\_Background\\_Paper\\_Australian\\_Government\\_Department\\_of\\_Communications.pdf](http://www.presscouncil.org.au/uploads/52321/ufiles/Control_Background_Paper_Australian_Government_Department_of_Communications.pdf)>, 7.

<sup>1238</sup> Australian Department of Communication, *Media control and ownership* (15 Oct 2014) Press Council <[http://www.presscouncil.org.au/uploads/52321/ufiles/Control\\_Background\\_Paper\\_Australian\\_Government\\_Department\\_of\\_Communications.pdf](http://www.presscouncil.org.au/uploads/52321/ufiles/Control_Background_Paper_Australian_Government_Department_of_Communications.pdf)>, 42, 43.

themselves outside of the courts. In this early stage, the defendant should be encouraged to offer to make amends within a certain time (it could be 28 days as it is in the *Uniform Acts 2005*) to suggest to the plaintiff solutions to the dispute between them. Vietnamese provisions on complaints handling procedure should provide that the matter is resolved when the plaintiff accepts the offer and the defendant implements the offer. In this case, the dispute would not be processed by any organizations. Moreover, to promote the handling of complaints through a non-litigious process, Vietnamese law should provide that an offer to make amends would be a defence for the publisher to any court action if the offer satisfies requirements provided by the law, but the plaintiff does not accept it and he/she continues the proceedings.

When complainants and publishers do not reach agreement through non-litigious process, or they do not want to use non-litigious processes to handle disputes, civil courts would handle complaints. This process should be applied to all types of media including print, broadcast, and online. Based on this process, media outlets do not have to develop their internal processes for complaints handling. In the non-litigious process, complaints would be handled based on the legislative provisions governing offers to make amends. Vietnamese media law should provide certain contents which must be included in the offer as they are provided in s 15 of the *Defamation Act 2005* (NSW), except an offer to publish a reasonable correction. Having a clear process of the handling of complaints and grievances would benefit complainants, media organizations and courts. The complainants would know how to protect their rights via a complaint against the media. The media organizations and courts would know how to handle the complaint and grievance. Complaints and grievances against the media therefore would be handled as expeditiously as possible. As a result, the media would be supported in its development.

### **In conclusion**

Many of the shortcomings of Vietnamese media law can be addressed based upon Australian models. In reforming media law, some Australian provisions should be replicated, some provisions should be modified before applying, and some provisions should not be applied. The recommendations suggested above do not help reform all shortcomings of Vietnamese media law because they are based upon Australian models only. However, those recommendations would help Vietnam improve many provisions covering certain issues. Freedom of expression and freedom of information would be adequately supported in practice. Other competing interests including the right to privacy, national interests, personal interests, public order, personal reputation, and national safety would be protected in balance against the right to know and free expression. Vietnam would have a better process of the handling of complaints and grievances than it currently has. Media ownership would be regulated appropriately. Applying these recommendations would help Vietnamese media law become more appropriate to modern social, political, and economic needs, and help it support the development of a more relevant media industry.





## CONCLUSION

In this conclusion, I aim to summarise the key findings of my research, and to provide recommendations for further research.

### 1. The main achievements of the research

As disclosed in the introduction chapter, this study aims to provide recommendations for reforming Vietnamese media law based upon Australian models. It explores various potential reforms to current Vietnamese media regulations in order to help Vietnamese media law catch up with the requirements of the fast development of the media industry, and make it support the development of the media in a way that serves the public interest. The research produced a number of achievements and results, as outlined below:

Firstly, from the research, I have recognized that most of the shortcomings of Vietnamese media law lie in the provisions covering freedom of information, freedom of expression, personal information, personal reputation, opposition and dissent, ownership and the handling of complaints and grievances.

The second achievement was to provide a deep critique of Vietnamese media law, identifying numerous shortcomings. As pointed out in the introduction chapter (section 6, Existing research), previous studies have pointed to certain shortcomings of Vietnamese media law but those studies are general and they do not analyse or detail those shortcomings. By contrast, for example, my thesis does not stop at providing a general statement that the right to freedom of information is not well protected in Vietnam, it goes on to explain the underlying reasons for the situation by pointing out that the law does not specify the right of members of the public to access to government-held information, or any obligation on government agencies to provide such information. In the thesis, I then analyse the deficiencies to point out how they affect the development of the media industry in a way that serve the public interest. I then described how the deficiencies limit the implementation of the right to freedom of information in practice. My research has identified the deficiencies, the sections that are not well developed, and the negative influences of the deficiencies in relation to freedom of information, freedom of expression, media ownership and the handling of complaints and grievances. The protection of the freedoms of information and expression has been analysed from the perspective of balancing against other interests such as the right to personal information, the right to reputation, national security and public order. The deep critique of Vietnamese media law is provided in chapter 6.

Thirdly, based upon this study, I have proposed that the Vietnamese government should reform the media law as soon as possible. The reform should focus on aforementioned areas where a lot of shortcomings are found. Addressing the shortcomings in those areas should support the implementation in practice of the rights to freedom of information and freedom of expression, to balance these freedoms with other interests and ends including personal information, reputation, national security, public order, confidentiality and the

national interest. I have suggested that the reforming should improve the regulations governing media ownership to allow diverse content to be published, to keep government ownership on the one hand and reduce the influence of the government upon the publication decisions on the other hand. The reform should also to improve the process of handling of complaints and grievances.

Moreover, this study found how Australian law deals with the problems which Vietnamese media legislation leaves unresolved. This is a significant result because as discussed in chapter 1 (section 6, Existing research, and section 3, The significance of the research), no previous studies of Vietnamese law make comparisons with the law of other countries to evaluate how they regulate the media.

Further, the thesis reviewed Australian models to determine whether they are applicable to Vietnam, and if so why. The thesis then suggested which models Vietnam should follow to develop law on the media in specific areas. For example, after pointing out that Vietnamese law does not provide a clear process of the handling of complaints and grievances, my research reviewed Australian complaints handling processes and concluded that civil proceedings, as used in Australian defamation law, represent the most suitable model for developing Vietnamese law on the handling of complaints and grievances. The study has found that Australian models, broadly speaking, are applicable to Vietnamese media law. They could help Vietnam to reform its provisions covering the areas mentioned above. This result is disclosed in chapter 7 where I review Australian law and give general recommendations for reforming Vietnamese media law.

Lastly, the research makes specific recommendations for the reform of Vietnamese media regulations. After providing general suggestions as mentioned above, the research reviews Australian law in detail to determine which sections should be replicated in Vietnam and why; which sections should be modified before adoption and why; and which sections should not be adopted and why. These specific recommendations form a proposal to reform Vietnamese media regulations. This result is explored in chapter 8 of the thesis.

As mentioned in chapters 2 and 4, although the draft of new Press Law has been published to collect opinions and views of the public, this research is still applicable. Recommendations provided in this research are useful for current laws and for the draft also.

## **2. Limitations and recommendations for future research**

Although my research has achieved its objectives and has satisfactorily answered the research questions, it is still subject to a number of limitations. These limitations need to be addressed, with further research being required in order to develop an understanding of the shortcomings of Vietnamese media law, the ways Australian media law avoids the deficiencies found in Vietnamese law, and the applicability of Australian models in redressing Vietnamese media law. These limitations are as follows

Firstly, the research focuses on specific areas of Vietnamese media law. It therefore analyses the shortcomings of Vietnamese media and reviews Australian models only relating to those areas. I hope that future studies can develop this research by expanding to other areas of media law such as provisions relating to organization of media regulatory bodies, advertising in the media, and the making of plans to develop the media industry.

Secondly, the research seeks to shed light on the way that the identified deficiencies of Vietnamese media law are avoided in Australia only – to maintain a manageable project, my analysis could not extend to other nations. For this reason, the solutions I suggest for addressing the shortcomings of Vietnamese media regulations are not the only possible ones, and there may be other, stronger models available in other jurisdictions. In particular, the fact that Australian law does not provide general protection for freedom of expression invites consideration of other jurisdictions which do have such a protection. It is hoped, therefore, that future studies may be able to examine the media law of other countries such as the United Kingdom, Switzerland, or the United States to determine whether even better solutions for the shortcomings can be found there. Looking for solutions from different countries could provide a variety of recommendations for the development of Vietnamese media regulations, and would provide greater choice when adopting relevant strategies for improvement.

APPENDIX 1



**February 2013**

**LETTER OF INTRODUCTION**

**Flinders Law School**

**Flinders University**

GPO Box 2100

Adelaide SA 5001

Dear Sir/ Madam

This letter is to introduce Miss Nguyen Thuy Hang, who is a PhD student at Flinders Law School, Flinders University. She will produce her student card, which carries her photograph, as proof of identity.

She is undertaking research leading to the production of a thesis on the subject of “Reforming Vietnamese legislation on the media- with special reference to Australia’s experience”.

She would be most grateful if you would volunteer to assist in this project, by granting an interview which covers certain aspects of this topic. No more than 45 minutes on two occasions would be required.

Be assured that any information provided will be treated in the strictest confidence and none of the participants will be individually identifiable in the resulting thesis, report or other publication. You are, of course, entirely free to discontinue your participation at any time or to decline to answer particular questions.

Since she intends to make a tape recording of the interview, she will seek your consent, on the attached form, to record the interview, to use the recording or a transcription in preparing the thesis, report or other publications, on condition that your name or identity is not revealed, and to make the recording available to other researchers on the same conditions. It may be necessary to make the recording available to secretarial assistants for transcription, in which case you may be assured that such persons will be advised of the requirement that your name or identity not be revealed and that the confidentiality of the material is respected and maintained.

You also are sent a summary of the result upon your request by Miss Nguyen Thuy Hang.

Any enquiries you may have concerning this project should be directed to me at the address given above.

Thank for your attention and assistance.

Yours sincerely,

Prof. Elizabeth Handsley

*This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5914). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email [human.researchethics@flinders.edu.au](mailto:human.researchethics@flinders.edu.au)*

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## QUESTIONS OF INTERVIEW IN VIETNAM

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### **Reforming Vietnamese legislation on the media- with special reference to Australia's experience**

#### **Investigators:**

Ms Nguyen Thuy Hang  
Flinders Law School  
Flinders University  
Ph: +61 8 8201 5975

1. How do you think about Vietnamese legislation on the media? The media in this question is referred to as the “press” in *Vietnamese Press Law 1989* which includes print media (newspapers, journals, news bulletins, editions of news agencies), electronic media (radio and television programmes and audio-visual news programmes transmitted by various means), and website news (presented through the Internet network) in a variety of languages.

2. How do you think about: freedom of expression, complaint resolution about media activities, media ownership and media regulation in Vietnam (structure and right of media management agencies)?

3. Do you think that right to resolve complaints about media in Vietnam should be authorized some other institutions, such as: complaints related to post content for Vietnamese Journalists Association, resolve complaints relating to advertising in the media for The Protection of Consumer's right?

4. How do you think about media legislation in Australia?

5. Do you think that Australian legislation on the media is preferable to Vietnam's, especially in freedom of expression, complaint resolution about media activities, media ownership and media control? Why?

**Thank you for taking the time to attend the interview.**

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## CÂU HỎI PHÒNG VẤN

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### **Hoàn thiện pháp luật về truyền thông của Việt Nam, đề xuất từ việc nghiên cứu pháp luật về truyền thông của Úc như một tham khảo điển hình.**

#### **Người thực hiện:**

Nguyễn Thúy Hằng  
Flinders Law School  
Flinders University  
Ph: +61 8 8201 5975

1. Ông/Bà hãy vui lòng cho biết quan điểm của mình về hệ thống pháp luật về truyền thông của Việt Nam hiện nay (các quy định của pháp luật về báo chí: báo in, báo hình, báo nói, báo điện tử).

2. Ông/Bà hãy cho biết quan điểm về các quy định của pháp luật Việt Nam về vấn đề tự do báo chí, tự do ngôn luận, khiếu nại và giải quyết khiếu nại về báo chí, sở hữu báo chí và quản lý báo chí (cơ cấu tổ chức và thẩm quyền của cơ quan quản lý về báo chí).

3. Ông/Bà hãy cho biết theo quan điểm của mình, Việt Nam có nên trao quyền giải quyết khiếu nại về báo chí trong một số trường hợp nhất định cho một hoặc vài tổ chức khác không phải là cơ quan quản lý nhà nước về báo chí (Giải quyết khiếu nại liên quan đến nội dung bài viết cho Hội Nhà báo, giải quyết khiếu nại liên quan đến quảng cáo trên báo chí cho Hội Bảo vệ quyền lợi người tiêu dùng)?

4. Ông/Bà cho biết quan điểm của mình về hệ thống pháp luật truyền thông của Úc.

5. Ông/Bà có nghĩ rằng một số quy định pháp luật về truyền thông của Úc có thể thích hợp để được nghiên cứu, xem xét để áp dụng cho việc hoàn thiện hệ thống pháp luật truyền thông của Việt Nam, đặc biệt là các quy định liên quan đến vấn đề tự do ngôn luận, khiếu nại về báo chí, sở hữu, quản lý? Tại sao?

**Cảm ơn ông/bà đã tham gia vào buổi phỏng vấn!**

*This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5914). For more information regarding ethical approval*

*of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email [human.researchethics@flinders.edu.au](mailto:human.researchethics@flinders.edu.au)*



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## QUESTIONS OF INTERVIEW

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### **Reforming Vietnamese legislation on the media- with special reference to Australia's experience**

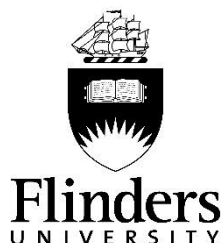
#### **Investigators:**

Ms Nguyen Thuy Hang  
Flinders Law School  
Flinders University  
Ph: +61 8 8201 5975

1. How do you think about the current Australian media law in: freedom of expression, ownership, regulation and complaint handling?
2. How do you think about the balancing of freedom of communication against other recognised interests in Australia, such as: Defamation, Sedition, Whistle-blower protection, Protection of sources, Political advertising, Misleading or deceptive communication?
3. How do you think about media law and legislation in Vietnam?
4. Do you think that Australian legislation on the media is preferable to Vietnam's? Why?

**Thank you for taking the time to attend the interview.**

*This research project has been approved by the Flinders University Social and Behavioural Research Ethics Committee (Project number 5914). For more information regarding ethical approval of the project the Executive Officer of the Committee can be contacted by telephone on 8201 3116, by fax on 8201 2035 or by email [human.researchethics@flinders.edu.au](mailto:human.researchethics@flinders.edu.au)*



**CONSENT FORM FOR PARTICIPATION IN RESEARCH  
BY INTERVIEW**

**Reforming Vietnamese legislation on the media- with special  
reference to Australia's experience**

I .....

being over the age of 18 years hereby consent to participate as requested in the Letter of Introduction for the research project on 'Reforming Vietnamese legislation on the media-with special reference to Australia's experience'.

1. I have read the information provided.
2. Details of procedures and any risks have been explained to my satisfaction.
3. I agree to audio recording of my information and participation.
4. I am aware that I should retain a copy of the Consent Form for future reference.
5. I understand that:
  - I may not directly benefit from taking part in this research.
  - I am free to withdraw from the project at any time and am free to decline to answer particular questions.
  - While the information gained in this study will be published as explained, I will not be identified, and individual information will remain confidential.
  - Whether I participate or not, or withdraw after participating, will have no effect on any treatment or service that is being provided to me.

- Whether I participate or not, or withdraw after participating, will have no effect on my progress in my course of study, or results gained.
  - I may ask that the recording/observation be stopped at any time, and that I may withdraw at any time from the session or the research without disadvantage.
6. I agree/do not agree\* to the tape/transcript\* being made available to other researchers who are not members of this research team, but who are judged by the research team to be doing related research, on condition that my identity is not revealed. \*
- delete as appropriate*
7. I have had the opportunity to discuss taking part in this research with a family member or friend.

**Participant's signature.....Date.....**

I certify that I have explained the study to the volunteer and consider that she/he understands what is involved and freely consents to participation.

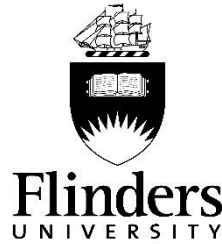
**Researcher's name.....*Nguyen Thuy Hang*.....**

**Researcher's signature.....Date.....**

*NB: Two signed copies should be obtained. The copy retained by the researcher may then be used for authorisation of Items 8 and 9, as appropriate.*

8. I, the participant whose signature appears below, have read the researcher's report and agree to the publication of my information as reported.

**Participant's signature.....Date.....**



## MẪU ĐỒNG Ý THAM GIA PHÒNG VẤN

**Hoàn thiện pháp luật về truyền thông của Việt Nam, đề xuất từ việc nghiên cứu pháp luật về truyền thông của Úc như một tham khảo điển hình.**

Tôi .....

trên 18 tuổi để có thể tham gia vào cuộc phỏng vấn như yêu cầu của thư giới thiệu cho đề án '**Hoàn thiện pháp luật về truyền thông của Việt Nam, đề xuất từ việc nghiên cứu pháp luật về truyền thông của Úc như một tham khảo điển hình**'.

1. Tôi đã đọc các thông tin được cung cấp.
2. Tôi đã được giải thích thỏa đáng về chi tiết tiến trình và các rủi ro có thể gặp phải từ việc tham gia phỏng vấn.
3. Tôi đồng ý cho sử dụng máy ghi âm để ghi lại thông tin mà tôi cung cấp trong quá trình tham gia phỏng vấn
4. Tôi đã được lưu ý là nên giữ lại một bản copy mẫu đồng ý này cho việc tham khảo trong tương lai.
5. Tôi hiểu rằng:
  - Tôi có thể không được hưởng lợi ích trực tiếp từ việc tham gia đề án này.
  - Tôi được tự do bỏ qua việc tham gia đề án này ở bất kỳ thời điểm nào và được tự do lựa chọn các câu hỏi để trả lời.
  - Tôi sẽ không bị xác định danh tính khi các thông tin thu thập được công bố.
  - Việc tham gia hay không hay từ bỏ tham gia đề án tại bất kỳ thời điểm nào không gây ảnh hưởng đến cách cư xử hay dịch vụ đang được cung cấp cho tôi.
  - Việc tham gia hay không hay từ bỏ tham gia đề án không ảnh hưởng đến tiến trình học tập hay công việc của tôi.
  - Tôi có thể yêu cầu ngừng việc ghi âm tại bất kỳ thời điểm nào và có thể rút không tham gia tại bất kỳ thời điểm nào của đề án mà không bị ảnh hưởng bất lợi nào.

6. Tôi đồng ý/ không đồng ý cho bản ghi âm/ bản viết nội dung phỏng vấn được sử dụng cho những người nghiên cứu khác không thuộc đề án này nhưng được người làm đề án cho phép tiến hành các nghiên cứu về sau trong điều kiện danh tính của tôi không được thể hiện. *(ghạch bỏ để chọn một trong hai)*
7. Tôi có thể trao đổi về việc tham gia đề án này với gia đình, bạn bè của tôi.

**Chữ ký của người tham gia.....ngày.....**

Tôi xác nhận đã giải thích việc tham gia vào nghiên cứu cho người tham gia tự nguyện và người tham gia đã hiểu những gì liên quan đến việc tham gia vào việc nghiên cứu.

**Người thực hiện nghiên cứu: Nguyen Thuy Hang.....**

**Chữ ký người thực hiện nghiên cứu .....**

**Ngày.....**

*Lưu ý: Hai chữ ký ở mục 8 và 9 phải được xuất hiện như một sự đồng ý về quyền tác giả cho phép người làm nghiên cứu sử dụng thông tin mà họ được cung cấp bởi người tham gia nghiên cứu.*

8. Tôi, người tham gia vào nghiên cứu ký tên dưới đây đã đọc lại bản tường thuật của người làm nghiên cứu và đồng ý cho phát hành thông tin mà tôi cung cấp như trong bản tường thuật.

**Người tham gia ký tên.....ngày.....**

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