Law Council
OF AUSTRALIA

Media freedoms - striking a balance

Speech delivered by Arthur Moses SC, President, Law Council of Australia at the Media and Communications Seminar 2019, Sydney.

15 November 2019

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Distinguished guests, ladies and gentlemen.

I would like to thank the Business Law Section for organising this event on this very important and pressing issue.

I am honoured to be here today to talk to you about an issue that has become a key area of advocacy for the Law Council of Australia in 2019 – the issue of press freedom. The attendance today is an indication of the interest in this significant legal challenge in the communications sector.

Before I begin, I would like to acknowledge the Gadigal people of the Eora Nation, the traditional custodians of this land. I pay my respects to the Elders past, present and emerging.

Let me start by quoting the legendary US broadcaster Walter Cronkite. He once said:

“Freedom of the press is not just important to democracy, it is democracy.”

This year, the Law Council has strongly advocated for greater protections for Australia's independent press. Not because it is for the benefit of our journalists, but because the vital work that our journalists undertake protects Australians from abuse of and misinformation by government.

A free press, that can function without fear or favour, lies at the very heart of our democracy.

It is vital to all Australians, not just politicians, lawyers and journalists.

Australia's media is critical to holding government and its agencies accountable for their actions and scrutinising the exercise of power. This leads to better decision-making and a stronger democracy that respects rights and freedoms and upholds the rule of law.

Protecting our community and the safety of Australians must be the government’s priority. But our parliament is also the guardian of the rights and freedoms of Australian citizens.

In this it is aided by the media, which plays a key role in defending the public interest.

These responsibilities of the government, parliament and media should not be taken lightly.

Unfortunately, after 9/11, in efforts to preserve our rights and freedoms, governments here and around the world found themselves increasingly encroaching upon them. This has been accompanied by a growing culture of secrecy.

Over centuries, the notion developed that human rights are inherent to who we are as humans.

This concept of inherent, universal and inalienable rights is found in the first article of the UN Declaration of Human Rights: “All human beings are born free and equal in dignity and rights”.

The common law too has placed a premium on rights and freedoms and been reluctant to limit them. This is known as the principle of legality.

The principle presumes that parliament does not intend to abrogate rights and freedoms unless there is a clear intention to do so.

But with a proliferation of statutes with a clear intention by parliament to abrogate rights and freedoms we can no longer rely on this principle to protect them.

Since September 11, about 75 pieces of federal national security legislation have been passed.

And there has been a slow erosion of our freedoms.

This year's media raids shone a powerful light on the limits of freedoms – of people and of the press – in Australia.

The Law Council believes all national security and secrecy legislation should be reviewed and reconsidered to ensure it is appropriately calibrated. While protecting our community must always be a priority for the government, this must be considered in conjunction with potential impacts on human rights and freedoms.

A free, independent press is a critical safeguard of human rights.

The United Nations Human Rights Committee has said that: "A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other…rights. It constitutes one of the cornerstones of a democracy".

Until the raids Australians for the most part believed press freedom was protected by law. They were wrong.

Since 9/11, Australia's national security provisions have developed inconsistently, in an environment of increasing powers to intercept and access data.

This has exposed the media because of its role as the fourth estate.

Public interest journalism must be protected.

Disclosure of classified information by the media should only be criminalised if it can be proven to have posed real harm to national security.

For this reason, the concept of 'harm' must be clearly defined in section 122.4A of the Criminal Code. And it must be more than just embarrassment to government.

Such a legislative change would not only make clear muddy waters but would also help protect against overuse and arbitrary use of executive power.

Currently, the notion of 'harm' in section 121.1 relates to information that is 'inherently harmful' or information if communicated is likely to cause harm to Australia's interests, which means to harm or prejudice Australian security, defence Australia's international relations or the health or safety of Australians or interfere or prejudice a criminal investigation or AFP investigation.

These categories are too broad, poorly defined and as a result, have the potential to be applied arbitrarily.

They also extend considerably beyond the essential public interests the Australian Law Reform Commission (ALRC) identified for new general secrecy offences.

In its 2010 report, *Secrecy Laws and Open Government in Australia*, the ALRC recommended secrecy offences should be "reserved for behaviour that harms, is reasonably likely to harm or intended to harm essential public interests".

The ALRC noted general secrecy offence should be limited to 'unauthorised disclosures' likely to: damage the security, defence or international relations of the Commonwealth; prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences; endanger the life or physical safety of any person; or prejudice the protection of public safety.

In contrast, the secrecy offences in division 122 relate to communications of, or dealings with, information relating to one of the many listed categories in proposed section 121.1 relating to the definitions of 'cause harm to Australia's interests' and 'inherently harmful information'.

The categories of 'inherently harmful information' may not, depending on the circumstances of the case, amount to a matter that would, or would be reasonably likely to, cause harm to a public interest of the Commonwealth.

Though a public interest defence currently exists for journalists in section 122.5 subsection 6 of the Criminal Code, it is poorly defined.

The Law Council believes the question of whether the disclosure is not in the public interest should be a key element of the offence.

The prosecution should lead evidence on this – it should not be the journalist's responsibility to show why it was in the public interest. For example, the government should have to prove in open court why it was not in the public interest for a journalist to expose the fact that an agency was seeking more power to access citizens' personal details without consent.

Presently, if charged with a secrecy offence under division 122 of the Criminal Code, a journalist must discharge an evidential burden of proof.

A journalist must provide evidence, possibly in the witness box, that they reasonably believed their story was in the public interest.

It is no answer to say that the standard of proof a journalist must meet is lower than the standard of proof the prosecution must meet – to prove guilt beyond reasonable doubt. It is nonetheless a burden of proof a journalist should not bear at all for what appears to be a key component of criminal liability.

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In terms of formal investigation of a journalist suspected of breaching secrecy provisions, the Law Council believes law reform is needed at every step of the process – from the moment a matter is referred to the Australian Federal Police for investigation, not at the end of the process when the Commonwealth Director of Public Prosecutions (CDPP) proposes to launch a prosecution.

Regarding search warrants that relate to journalists, the Law Council proposed three key reforms to the Parliamentary Joint Committee on Security and Intelligence (PJCIS) inquiry into the impact of law enforcement and intelligence powers on press freedom.

First, the issuing officer of the search warrant must be a judge of a superior court of record, not a registrar.

Second, when considering whether to issue a search warrant, the judge should apply a statutory public interest test, similar to the test that already exists in section 180T of the Telecommunications (Interception and Access) Act 1979 (Cth) when seeking a journalist information warrant for access to a journalist's metadata.

Third, adopting a Public Interest Advocate or Monitor model would provide greater transparency and accountability to search warrants relating to journalists.

The Law Council does not support a ministerial direction requiring the CDPP to have the consent of Attorney-General Christian Porter in relation to charging journalists.

This direction puts the Attorney-General – a politician – in the position of authorising prosecutions of journalists who may have written stories critical of his or her government.

This will not improve press freedom. It is not an "important extra safeguard", as stated by the Attorney-General.

Conversely, it could act as yet another deterrent to public interest reporting.

Though there is no doubt the intention of the ministerial direction is not to stifle journalistic discourse, it could in effect create an environment in which journalists are afraid to report on particular matters, lest they get offside with the government.

Without further reform, a scenario could still arise where journalists face criminal investigation, even if they are not ultimately prosecuted. This would still have a chilling effect, even with the new direction.

Another area that deserves our attention in this context is how the complex and rapidly evolving nature of the digital platform marketplace has altered power and knowledge relations between consumers, digital platform providers, digital intermediaries, media organisations and advertisers.

Many digital platforms have achieved an extraordinary level of integration into the daily lives of Australian citizens. With this success should come a corresponding responsibility to operate the platforms in a way that protects people's privacy unless an individual has actively expressed a wish to surrender such rights.

This is an important emerging area for privacy regulation in Australia.

Data about activities, preferences and interests of individuals has become a new currency which consumers knowingly or otherwise trade for services offered over digital platforms. These changes have significant implications for data regulation of transparency, choice, unambiguous consent, reciprocity of benefits, and data handling practices of many entities.

In July 2019, the Australian Competition and Consumer Commission (ACCC) released the Final Report on the Digital Platforms Inquiry. I understand that this report has been the focus of this morning's sessions.

This is an important report, and while the Law Council does not agree completely with all 23 recommendations, we strongly agree with the ACCC's position that Australia's data and privacy laws, as well as our consumer protection laws, have a role to play in increasing the privacy and safety of Australians online and potentially enhancing competition between digital platforms.

The business practices of a range of business entities impact the depth, range and value of data about activities, preferences and interests of individuals that are the currency of digital platforms.

Those business practices need to be scrutinised from a number of perspectives: competition policy, consumer protection, privacy regulation, advertising and marketing regulation – particularly rules protecting children and other vulnerable persons, and protection of human rights. We believe regulation to date has not been entirely satisfactory in addressing some of the issues that the rise of digital platforms either creates or exacerbates.

This is why the recommendations by the ACCC in respect of strengthening and streamlining Australia's privacy regime and regulatory frameworks dealing with media, communications and advertising are so important. To support this, the Office of the Australian Information Commissioner, as Australia's main privacy regulator, must be properly resourced.

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Ours is a way of life the envy of others the world over. It is worth protecting.

Lawyers and politicians often refer to the rule of law as though that was the start and end of the argument.

We forget the term is not well understood, even amongst ourselves.

When words like the rule of law or freedom or security are thrown around carelessly, they become white noise.

We fail to stop and reflect on what the words mean – and why they are important.

The rule of law means no one is above the law, including the government.

It means government decisions are made according to known rules, are not made capriciously.

It is embodied by fairness and transparency. Illustrated through accountability.

All people, no matter where they are from or what they do, are equal before the law.

Can this be said of modern Australia?

We are the only western democracy without a Charter of Rights or Human Rights Act.

The Law Council believes a Charter of Rights would offer a coherent legal framework to express and protect rights and freedoms.

To promote the universal, indivisible nature of human rights, inherent in the Australian psyche but strangely not its law.

And provide a vehicle to balance tensions between freedom of speech, freedom of the press, public safety, national security, and other fundamental human rights.

Our Constitution provides minimal protections. We do not have a First Amendment such as that which exists in the US Constitution that:

“Congress shall make no law prohibiting…or abridging the freedom of speech, or of the press.”

A Charter of Rights would set out a clear list of fundamental rights, values and freedoms that deserve legal protection.

Last month, in a bid to highlight the increasing environment of secrecy journalists are operating under, media companies from across Australia redacted the front pages of their newspapers.

The Right to Know Coalition includes more than a dozen of the nation’s top media companies, which have banded together in response to the media raids.

They are seeking six key legislative reforms:

- the right to contest any kind of search warrant on journalists or news organisations before the warrant is issued;
- law change to ensure public sector whistle-blowers are adequately protected;
- a new regime that limits which documents can be marked ‘secret’;
- review of Freedom of Information laws;
- that journalists be exempt from national security laws enacted over the past seven years that currently can put them in jail for doing their job; and
- reform to defamation laws.

A survey conducted by Right to Know found that while 87 per cent of respondents said it was important Australia was a free, open and transparent democracy, only 37 per cent felt that described the current environment.

Of the respondents, 88 per cent agreed whistle-blowers were critical to holding the government to account and should be protected. Furthermore, 80 per cent said whistle-blowers should not be treated like criminals even if the law was broken for them to disclose the truth.

Seventy-six per cent said journalists should be protected from prosecution and imprisonment when reporting on matters in the public interest.

Only 35 per cent said the government was keeping them as informed as possible regarding such information.

Finally, respondents felt the government was less transparent on many matters of public interest than it was a decade ago. Key issues included political campaign funding, climate change and immigration.

It is an important time to be having this discussion about press freedoms.

This week, the High Court heard oral submissions in the case of Annika Smethurst & Nationwide News v Commissioner of Police. Those oral submissions were confined to the validity of warrant executed against Ms Smethurst and any relief flowing from that question.

But the plaintiffs also raised in their written submission the question of whether s.79(3) of the Crimes Act effectively burdens the implied freedom of political communication. That question may be ventilated at a later time.

Should this question be considered, I note the important observations of US Supreme Court Justice Black in the case *New York Times v United States* 403 U.S. 713 (1971) – the Pentagon Papers Case.

This case arose from an attempt by the Nixon Administration to seek an injunction to stop the New York Times from continuing to publish extracts from a report that had been commissioned by Secretary of Defence McNamara as to determine how the United States had become involved in the Vietnam war.

The case grappled with the circumstances when the media comes into possession of information concerning a matter of significant public interest. The critical issue was whether national security took precedence over the First Amendment right of free speech and a free press.

As I have already noted Australia does not have the equivalent of a First Amendment. But the comments of Justice Black are no less relevant:

"The press was to serve the governed, not the governors. The government's power to censor the press was abolished so that the press would remain forever free to censure the government…in revealing the workings of government that lead to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do."

In the last month, the government has falsely responded to the Right to Know campaign by stating that "no one is above the law".

The implication that journalists are seeking to place themselves above the law is wrong and fundamentally misunderstands why freedom of the press is important to secure democracy, as the comments by Justice Black elucidate.

This is not about journalists seeking exemptions from the criminal law.

It is about citizens being able to hold government to account for what they do in their name, not whether journalists are above the law. Citizens have the right to know the basis of governments decisions and what information they hold, so that when they cast their vote at the ballot box, they can make a fully informed decision.

For this to occur, it is critical that journalists can shine a light on these decisions and information.

No better example of the creeping culture of secrecy in Australia this is the recent example of a Freedom of Information request by the ABC about waiting times on the NDIS. A large amount of that document was redacted on the basis that it was "irrelevant material". But a critical document providing advice to the Minister from the NDIS about how it would tackle wait times for young children was blacked out on the basis it was deliberative material.

There are few issues as important to the Australians than how the government is going to reduce wait times for young children under the NDIS.

They deserve better than large slabs of black.

The government should not conflate the critical issue of the operation of a free press, with a concern about public servants leaking to the press.

That is a different question altogether. The way to address this concern is to have a robust whistleblower regime that allows individuals to have their concerns about corruption or maladministration properly dealt with, without needing to go to the press.

The answer to this concern, is not to criminalise the work of journalists and shut down a free press.

It is now incumbent on the government to swiftly and in good faith address the issues.

Misleading talking points will not suffice.

We should always remember that a free press exists for the benefit of all Australians – it is a guarantee against misconduct and misinformation by government.

In 1939, Sir Robert Menzies said: “The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process”.

Thank you.

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