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Press freedom under attack

In December, News Limited CEO, John Hartigan, delivered the Press Council's 2003 Annual Address at the NSW State Library.

I am an unabashed admirer of the work done by the Australian Press Council, and particularly congratulate the chairman, Professor Ken McKinnon, who has for the past two years made significant contributions to the debates which constantly swirl around the media on questions such as press freedoms.

I think the activities of the Press Council, the way it goes about its business of being a watchful guardian and advocate of freedom, as well as addressing public complaints, demonstrates that a self-regulatory regime is both workable and preferable to any other alternative.

The Press Council was established in 1976, which means it was formed six years after I joined News Limited as a reporter. I've now been a journalist for almost 40 years - and I can say that in that period of tumultuous change, for society as well as the media, there has been just one constant: freedom of the press has been under attack from one quarter or another.

Tonight I want to cast the net widely to look at some of the threats and challenges facing the media in the twenty-first century, and I want to do it from a starting point of what I believe is fundamental and non-negotiable.

We can find it in the *Charter for a Free Press*, adopted by the Australian Press Council, which states:

- Freedom of opinion and expression is an inalienable right of a free people.
- A free press is a symbol of a free people.
- In a truly democratic society open debate, discussion, criticism and dissent are central to the process of generating informed and considered choices.
- It is the responsibility of the press to protect the people's right to know and to contest encroachments upon that right by governments, groups or individuals.

There is more to the *Charter*, and I commend it to those of you who haven't read it. The words may sound a bit like a statement in favour of motherhood - but who can argue against mums? And who can argue against a free press?

Not even the legislators or tort-making judges who constantly seek to erode press freedoms by the erection of ever-growing barriers to reporting and the free flow of information come out and say up-front that they want to hobble the media. But that is, or would be, the effect of their demands.

These potential roadblocks to freedom come from multiple sources, notably the judiciary which, from time to time, becomes very testy about the reporting of its work. In my view, the judiciary has no right to expect that it should escape scrutiny or comment. Nor does it have any right to expect that its work should be carried out in secret.

Lawmakers, and the bureaucrats who work for them, need to be reminded that they are public servants - and if I may be literal about this, that translates as being there to serve the public which pays them, and is therefore perfectly entitled to demand they work for the public, not against them.

The media's role is to observe what goes on around us, inform the public about what we see, and if necessary expose to a healthy dose of the disinfectant called 'sunlight' what they are doing, and what they are not doing. When it comes to running governments, at any level, nothing beats transparency.

Tonight I want to focus on two specific areas, which really require widespread reform. They are defamation and freedom of information (FoI).

Defamation

There is an urgent need to reform defamation laws.

This has been accepted by many politicians over the years, and there has been some tinkering around the edges in some of the states.

But there has been no outcome which provides the media with a workable framework, and which provides a uniformity of defamation law.

It is ridiculous to think, more than a decade after the Internet made meaningless the borders which divide our states and nations, that we still have eight different defamation jurisdictions in Australia.

And this is a quarter of a century after network television gave a national voice to news-makers. And 40 years after *The Australian* was established to report the nation to itself - with the need for many intricate and costly changes to state editions to live within the complexities of differing defamation codes and court rulings as to what can and cannot be reported.

I believe this represents a great failure on the part of politicians of all colours, who have paid lip service to the notion of uniform, and reformed, defamation law, but have done next to nothing about it.

Why? Well, there may be many reasons, including the kind of rivalry in state thinking that gave us our higgledy-piggledy system of railway gauges ... There is often a blind belief in the "our system is best" principle.

But it's not too cynical to suggest another powerful reason for inaction is that too many politicians have had too many windfalls over the years to want to give up a potential source of, say, a new swimming pool, a new boat, or a tennis court. There is a kind of human logic to it, I guess: the press has been known to give a politician or two a bit of stick over the years, and they just have to cop it because it goes with the territory they choose to occupy - but when they get an opportunity to see the people who give them that stick getting a lashing - and a huge financial payout - from a judge, they savour it as a quaint form of justice.

Whatever those reasons, it's time to get serious about national, uniform defamation reform, and I note the new Attorney-General, Mr Ruddock, has signalled that he's serious about it.

This is good news, and most welcome. Mr Ruddock has asked the Standing Committee of Attorneys-General to put their heads together and see what they can come up with at their next meeting.

Normally, we might think, "Here we go again," because we've been down that path many times without effect. But Mr Ruddock has also said that if SCAG can't get its act together, then the Commonwealth will go it alone and use its powers to legislate for new uniform defamation laws.

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This is also good news. ***But there is an important proviso here - it must be good law, too. A new, bad uniform defamation act is potentially worse than the mishmash of laws we now have.***

The purpose of reform must be to modernise the law, make it reflect today's values and principles, and make it workable for all parties.

That includes the media. Too often, in too many judgments, we see that the people who administer the law have not the foggiest notion about how the media work; they know nothing of, and therefore pay no heed to, practical limitations like space availabilities or deadlines, let alone more abstract concepts like news values. Nor do they move with the times. When most of our defamation laws were introduced, free speech was what you heard from a soapbox in the Domain. Today we communicate and converse across borders in Internet chat rooms, in letters to the editor of *The Australian*, on Radio National, and in many more ways. I wonder who will bring the first SMS defamation action?

This is the era of globalisation. The media operate in an expansive environment; readers tend to source their information more widely than ever and, if we have a chance to modernise our laws, they should reflect our modern way of life. The media must have a seat at the table as any new, uniform act is drafted. We must be free to argue for a law which sets out to redress any wrongs caused by defamation, not to make people suddenly rich.

Public figures

It is time to rethink the very definition of defamation, and to very carefully remove from the scope of the law, those people who choose professions which invite public comment and criticism - people like politicians and film stars.

This is the way it is in the USA: people who choose to be public figures cannot be defamed by criticism of their public roles, unless it is shown the defamation was malicious.

That seems to me to more adequately fit the definition of a truly democratic society where debate, discussion, criticism and dissent are central to the process of generating informed and considered choices, than the rules here which so bluntly constrain comment.

In this day and age it is hard to believe that people can be held up to hatred, ridicule and contempt by a light-hearted gossip paragraph. When did we last see someone drummed out of polite society because of something written about them? People go to jail these days and, when they come out, they blithely resume their place in society. People are awarded huge sums for what I think most folk would describe as a mere personal slight.

News Limited, through our *Herald Sun* newspaper in Victoria, was recently found to have defamed the Victorian deputy chief magistrate, Jelena Popovic, who was awarded almost a quarter of a million dollars when one of our columnists questioned whether or not she was upholding

the law.

During the first hearing on this matter, a jury found that although she had been defamed publication of the comment was reasonable in the circumstances. But the judge overruled the jury verdict.

On appeal, three judges decided the original judge had got a few things wrong, too, but they found other reasons to maintain the verdict, albeit after they knocked off $25,000 in exemplary damages originally imposed because the columnist involved had had the temerity to thank the jury for upholding his right to free speech. In fact, this case means newspaper columnists are not entitled to simply give their opinions, as you or I may be free to do. The law emerging from this case says, in effect: if you're going to engage in comment, it must be based on facts which can be proved. As a columnist, you must do more than state an opinion.

We're still deciding whether or not to appeal this case to the High Court. But in the meantime the deputy chief magistrate continues in her job. If she suffered any hatred, ridicule or contempt, it certainly would not seem to have affected her employment prospects or her standing in the community.

While we go back to basics to rethink the way defamation is defined and dealt with, there is one glaringly obvious starting point: the NSW 7A system of hearings has to go.

The 7A system was introduced in 1996 and it allows juries to decide whether or not imputations contained in published material are defamatory, with judges deciding on damages in a second hearing, if the jury decides a defamation did occur.

The new system was aimed at making the process faster, cheaper and more reliable. It has had the opposite effect. Not only have our costs more than doubled under the 7A system, but it has created a wholesale rush of perverse verdicts.

In the previous twenty years of traditional trials, two or three jury verdicts were overturned as 'perverse'. Since 7A split trials began in 2000, the number has more than doubled - seven in three years.

Under the 7A system, defamation actions are being decided not on what was written or said, but on imputations, or meanings, distilled by clever barristers who convince jurors that what the author wrote was not what he or she actually meant or believed. This was the case in the famous Mt Druitt *The Class We Failed* action. The words in the story pointed to deep-seated problems within the education system, but a barrister convinced the jury that, regardless of the words before him, what we really meant to say was that the entire class was too stupid to pass the HSC.

How can you defend, through qualified privilege or comment defences, something you didn't mean to say, didn't say, and don't believe? How do you defend something which is not there? After damages and costs of about $2.5 million in that case alone, we'd still like to know.

One of the strongest advocates of the 7A system in its early days was Justice David Levine. Recently he stated the Act is a failure and should be repealed. We agree with that.

But in its place, what? It is difficult to see in any of the existing state acts a template for uniform law, and most certainly we don't want the 7A system reversed, as some in the legal fraternity suggest. That would have judges deciding imputations and juries deciding damages, which I suggest would be ten times worse than the present. In my view the harsh financial penalties attached to defamation law should take a back seat to the principle of righting the wrong. And that means removing the disincentives currently inherent in the system.

In my view the first obligation of the nation's attorneys is to sit down and hold extensive consultation with publishers, and to listen to the practicalities facing the industry. Then they must put aside their traditional self-interests and avoid the temptation of yet again, shooting down viable reforms because they think "my system is best".

And above all, they must remember that the right of free speech exists across frontiers, and to subject the public and the press of this nation to eight different defamation regimes is patently absurd.

Freedom of Information

When the Commonwealth *Freedom of Information Act* came into force twenty-one years ago this week, it was defined as a law which would "extend as far as possible the right of the Australian community to access information in the possession of the government". It was to open government activities to scrutiny, discussion, review and criticism, and to enhance the accountability of the executive.

Great idea. Pity about the result. Sadly, today, ***the FoI Act is in desperate need of reform.***

The laws are not working effectively, to the detriment of all sides. Not only do media companies face exorbitant costs, endless delays, and spurious claims of exemption, but governments themselves are failing to take value from the investment in good governance that FoI can provide through early warnings of the waste of public funds, fraud, and failures in policy and service.

The Australian Press Council has made FoI reform one of its top priorities, and the Australian Law Reform Commission, the Australian Administrative Review Council and the Commonwealth Ombudsman have all joined the call for reform.

News Limited supports these calls because we are committed to the use of FoI and we see the deficiencies in the act right at the front line.

We appointed the first, dedicated, FoI editor in the nation when Michael McKinnon took on that role at *The Australian* a year ago.

I should make the point here that this was hardly an example of us being quick out of the blocks. While I would argue that we try hard to give our journalists all the tools they need, it is true that most newsrooms around the country are lacking in the kind of specialists required in this

modern era to deal with matters such as the law, FoI, higher education, corporate governance and many other specialties.

This is an area we are addressing, and we're backing people like Michael McKinnon to gain more of the specialised knowledge they need to do their jobs better than ever before. McKinnon might be the first FoI specialist - but he won't be the last.

McKinnon is an investigative journalist, not a lawyer, but he represents himself in the often legalistic procedures he has to go through to break down the walls within the bureaucracies who openly flout the intentions of the *FoI Act*.

He currently has eight appeals before the Administrative Appeals Tribunal. If he wins a goodly percentage of them, stand by for some powerful stories about matters the government wants hidden.

McKinnon has had much success in the past year, breaking stories such as former ATSIC chairman Geoff Clark's $31,000 publicly funded trip to a two-day human rights seminar, the alarming decline in bulk billing, and the $128 million spend by the Indigenous Land Corporation to benefit 1014 people - well short of the 60,000 it set out to compensate.

Yet McKinnon tells me he fails more often than he succeeds, frustrated by ridiculous costs, excessive delays, the often wilful obstruction of public servants, political interference and the artful use of commercial-in-confidence and Cabinet exemptions. On costs, McKinnon has on foot an application to find out whether a Commonwealth minister improperly used his office for private business purposes. The initial quote to process the request was $605,284.72. That cost was eventually negotiated down to $284.

Next week, at an Administrative Appeals Tribunal hearing, McKinnon was due to face an army of taxpayer funded lawyers as he appeals three FoI applications to the Treasury.

He has sought information on tax bracket creep, the misuse of the First Home Owners Grant including fraud and its use by millionaires buying multi-million dollar properties in the name of their kids, and documents relating to the impact on government revenue and spending of falling fertility rates and an ageing population. Yet in each case Treasury has refused, saying it is not in the public interest to release the information because it can "create or fan ill-informed criticism," or "confuse and mislead the public." In the case of the home grants, access was denied because release could "create confusion and unnecessary debate," and "encourage ill-informed speculation."

These arguments are an insult to all Australians, yet the Treasurer has in the past couple of days defied common sense, logic, and the spirit of FoI law, to issue what are known as conclusive certificates.

This effectively means any documentation, which may or may not reflect on the Treasurer's competence, is hidden from the public forever. And the Treasurer has done so because he says these documents, paid for by the taxpayer, are not in the public interest.

In our view, this is an act of profound contempt. Mr Costello deserves to be questioned at every press conference between now and the next election on why he has hidden this material from the public gaze, and whether if affects the government's continued claim to superior economic management.

No matter what the outcome of individual FoI requests, there is a need to update and reform FoI laws.

We could adopt the US system where media and scientific institutions have a preferred status in processing FoI and pay less; there should be better training of FoI officers; and the government should consider appointing a Commonwealth FoI Commissioner with powers similar to the Ombudsman, to ensure current failings in FoI administration are eradicated.

We should also adopt the New Zealand system where there is a public interest test which can over-ride claims to withhold information for commercial-in-confidence reasons.

In recent years in Australia there has been a massive growth in the use of consultancies to provide advice to governments, yet the commercial-in-confidence clauses have stopped journalists finding out if we are getting value for money. A public interest test in this area is urgently needed.

Conclusion

We have today looked at two of the vital issues in need of reform - defamation and FoI. But this by no means is the limit of our concerns. At just about every turn, there is a new attack, or potential attack on our freedoms.

We are under attack, and we must resist.

The continuance of a free and unfettered press is of critical importance to a free and democratic society.

There will always be times where the interests of the media and the interests of others in government or the judiciary will clash. But this is an essential part of the process by which the public is informed and able to decide on matters before it.

We cannot allow a situation where decisions which affect us all are made in secret, using secret inputs from sources whose motivations are both secret and suspect. We cannot allow justice to be conducted in secret, because that's not justice at all. In our constant struggle against the forces which seek to impede the press and its freedoms, we are wise to adopt the motto of the RSL - a saying which loses no truth by being possibly classified as another motherhood statement - ***The price of freedom is eternal vigilance.***

Ladies and gentlemen, I know that the Australian Press Council is eternally vigilant in these matters. Long may it continue, and I wish you well in your deliberations in the year ahead.

John Hartigan