Law Council
OF AUSTRALIA

Address to the National Press Club

Speech delivered by Arthur Moses SC, Law Council of Australia President at the National Press Club, Canberra.

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Welcome ladies, gentlemen, esteemed guests and members of the National Press Gallery.

I acknowledge the traditional custodians of the land on which we meet, the Ngunnawal and Ngambri people, and pay my respects to their elders past, present and emerging.

I acknowledge and extend those respects to Aboriginal and Torres Strait Islander Peoples who join us today.

Thank you to the National Press Club for this opportunity. It is an honour to speak with you today about a matter of critical importance to Australia.

A matter that is important to all Australian citizens.

Not just to politicians or lawyers or journalists.

But all who call our nation home, and contribute to building and upholding the way of life we cherish.

We have – all of us – a responsibility to contribute to its protection.

Australia is a great nation where respect for human rights and liberty underpins our way of life and opportunities in life.

These rights have been hard-won but are easily eroded. Complacency – and good intentions – can be as dangerous as ill-intent.

US President Abraham Lincoln once said “The world has never had a good definition of liberty, and the … people, just now, are much in need of one”.

“We all declare for liberty,” he continued. “But in using the same word we do not all mean the same thing”.

Liberty is not a word we use very often in Australia. Our national anthem speaks instead of being “free”.

But Lincoln’s words should resonate with us and challenge each of us. Because we too could use a better definition of what we understand freedom and liberty to mean in Australia.

If we do not agree on what we mean, then how can our policy-makers and parliaments protect it?

Australia is in dire need of a national discussion about the importance of human rights and freedoms in our country.

How as lawyers or journalists, politicians or citizens can we best protect them.

Last week the Law Council welcomed the release of the draft Religious Freedoms Bill for public consultation. Not because we necessarily agree with the government’s approach or with every provision. But because this provides an opportunity for a discussion that is long overdue about what type of nation we want to be. An inclusive, tolerant and harmonious nation? A nation where people are vilified because of their sexuality in the name of religion? We need to get the balance right to ensure that there are no unintended consequences.

Reasonable minds may differ about how we balance competing rights.

As a starting point, we need to have a clear definition of what we understand freedom and liberty to mean. We also need to be very clear what we understand by the word “security”.

Because when we baulk from these discussions, as our nation has done in recent times, I fear we are heading down a slippery slope.

After 9/11, in efforts to preserve our rights and freedoms, governments here and around the world found themselves increasingly encroaching upon them.

This was done in good faith, not with ill intent. Protecting our community and the safety of our people 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 and scrutinising the exercise of power. The media is not the enemy of our nation, nor should the actions of journalists in scrutinising government be criminalised.

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

Over centuries, through the work of great philosophers such as John Locke, the notion developed that human rights are inherent to who we are as humans. They are not rights given by the State but rather to be protected from the State.

This concept of inherent 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 freedom unless there is a clear intention to do so.

As former Chief Justice of the High Court, Murray Gleeson explained it:[1]

> *Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.*

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.

The impact has been creeping.

In isolation, barely noticeable.

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 has said that 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.

Proportionality is key. Speaking in 2015 on this challenge of balancing security and individual liberty, then Prime Minister Malcolm Turnbull said "while we are –

[1] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476, 492 (Gleeson CJ), citing *Coco v The Queen* (1993) 197 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

and always will be – facing new and evolving threats to our national security, our forebears have faced far greater ones".[2]

This is not a new challenge by any means. But it is a challenge we have stopped talking about as a nation. Many politicians on both sides of politics have informed me that they do not want to question laws purportedly made in the name of national security even though they have concerns about overreach. They don't want to be accused as being un-Australian or endangering national security so they have waved legislation through the Parliament without testing it.

The rhetoric of calling those who disagree with your views about national security as un-Australian or not being concerned about national security is a way of avoiding having to explain and justify why laws are needed which take away the rights and freedoms of Australians.

The AFP's June raids on Australian journalists were a stark example of how far the pendulum has swung. The raids were not the fault of the AFP, or the agents whose images were televised. They were investigating offences which had been created by the Federal Parliament. It is their job to do what they were doing – the problem is the law.

The raids remind us why we must never stop talking about human rights in the context of national security.

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".[3]

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

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[2] https://www.malcolmturnbull.com.au/media/speech-to-the-sydney-institute-magna-carta-and-the-rule-of-law-in-the-digit
[3] 'General Comment No. 34', Human Rights Committee, 102nd session, Geneva 11-29 July 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

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 subsection 4A of the Criminal Code.

It must be more than just embarrassment to government or some bureaucrat being humiliated because of a grand plan to acquire more power has been exposed.

This would help protect against overuse and arbitrary use of executive power.

Though a public interest defence currently exists in section 122 subsection 5 of the Criminal Code, it is poorly defined.

And the Law Council believes a public interest defence is not sufficient to safeguard press freedom.

The onus should be on the prosecution – not the journalist – to establish that the disclosure was not in the public interest in relation to the publication of the journalist. If this offence is to remain, then for example the government should be forced 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 powers to access personal details of citizens without their consent. The absurdity of the government taking such position would soon become clear and be met with a response by the community at the ballot box.

Journalists and supporters of a free press are rightly alarmed and have been vocal about this creeping erosion of media freedoms.

But for the most part there has not been the same awareness or response to the chipping away of other rights and freedoms we often take for granted.

These incursions have gone largely unreported.

National security must always be paramount but the moment we undermine our own rights and freedoms is the moment our enemies win.

We must not be afraid to have these discussions. A culture of silence on some of the most critical issues does the nation a great disservice. It is possible to defend the rights of citizens and prosecute the interests of our nation. These two concepts are not contradictory but complimentary. Regrettably, some have forgotten this in the rhetoric associated with national security legislation.

So let me throw down this challenge today.

To journalists, to policy-makers, to government, to lawyers.

Question threats to all rights and freedoms, not just those that are threats to your freedoms.

Do not be afraid to have these discussions – and challenge those who would seek to shut them down.

Enacting laws in the name of national security without testing them can result in overreach and the erosion of basic freedoms.

Do not be Quiet Australians.

That is not your job.

And do not assume because there are many other Quiet Australians that they are not concerned about these matters.

They are, and they rely and they depend on you.

The Australian Law Reform Commission highlighted in 2015 that many rights with a long and distinguished heritage have been chipped away.

Through laws that reverse the legal burden of proof and interfere with the presumption of innocence until proven guilty.

Laws that interfere with freedom of association or assembly, whether counter-terrorism, criminal or migration laws.

Laws that impinge on the right to a fair trial by protecting certain confidential communications, even from a defendant seeking those to help prove their innocence in a criminal trial.

Laws that impose strict or absolute liability on one or more elements of an offence despite the traditional presumption that intent or knowledge an act is wrongful is necessary to found criminal liability.

Coercive information-gathering and investigation powers of agencies that abrogate the privilege against self-incrimination.

Laws that retrospectively change rights and obligations.

That remove the common law duty to afford procedural fairness to people affected by power exercised by a government official.

Restricting access to the courts and tribunals to challenge administrative decisions which may be unlawful or unfair.

Expanding broad Executive decision-making powers, which can determine people's outcomes but do not lend themselves to judicial review.

This is but a small list.

Many may seem technicalities. But taken together, a concerning picture emerges.

There has been a trend in recent years of parliamentarians tripping over themselves to enact laws in the name of national security without understanding the effect of these laws on our media or the rights of innocent citizens.

The result is an erosion of rights and freedoms taken for granted over centuries.

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 like confetti, 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.

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.

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

Australia has a proud history in the development of human rights.

Our leadership on the world stage remains fundamental as we face an uncertain global future for human rights. We cannot lead with credibility or integrity unless we put our own house in order.

It would be alarmist to say our democracy is under threat. But we must always be vigilant.

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”.

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

It is worth protecting. And we must do so together because there is no them and us in this endeavour. We are all Australians.

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