Arthur Moses & Dr Matt Collins
Wed 4 September

Facilitator: Good afternoon ladies and gentlemen and welcome to the National Press Club of Australia and today's Westpac address.

My name is Sabra Lane. I am the Club's President. Today's guests, the President of the Law Council of Australia, Arthur Moses SC, and Matt Collins QC, President of the Victorian Bar.

The topic, 'The Slippery Slope: How eroding freedoms impacts people and the press'.

If you are following the conversation online you can find us on Twitter. Our user handle is @PressClubAust and the hashtag NPC.

Everybody please join me in welcoming Arthur Moses.

Arthur Moses: Thank you Sabra. 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.

The United States 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, of course, 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 this Nation. If we do not agree on what we mean, then how can our policymakers 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 by the Attorney General. 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 do 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 priority of our government 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 by government.

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 Jon Locke, the notion 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 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 in this country has also placed a premium on rights and freedoms and being reluctant to limit them. This is known as the Principal of Legality.

The principal presumes that parliament does not intend to abrogate rights

and freedoms unless there is a clear intention to do so. As former Chief Justice of the High Court, Murray Gleeson, explained it, "Courts do not impute the legislature and intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language". What courts will look for is a clear indication that the legislature has directed its intentions 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 common law principal 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 secrets legislation should be reviewed and reconsidered to ensure it is appropriately calibrated, not reviewed in a piecemeal manner.

While protecting our community must always be a priority for government, this must be considered in conjunction with potential impacts on human rights and freedoms. Proportionality is the key. Speaking in 2015 on this challenge of balancing security and individual liberty, then Prime Minister Malcolm Turnbull said, "While we are, and always will be, facing new and evolving threats to our national security, our forebears have faced far greater ones".

This is not a new challenge by any means, although some of our politicians would have you think so, 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, because they don't want to be accused of being un-Australian or endangering national security. So they have waived legislation through parliament without properly 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, in my view, should be denounced for what it is, a cheap way of avoiding of having to explain and justify why laws are needed which take away the rights and freedoms of Australians. Enough is enough.

The AFP June raids on Australian journalists was a stark example of how far the pendulum has swung. The raids were not the fault of the Australian Federal Police 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 and the federal parliamentarians. 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 and regrettably,

again, some of our politicians have forgotten this.

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. And it said, 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 giving 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 and was not in the public interest. For this reason, the concept of harm must be clearly defined in Section 122, sub-Section 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. That is not harm to national security. This would help protect against overuse and arbitrary use of executive power. Though a public interest offence currently exists in Section 122, sub-Section 5 of the Criminal Code, it is poorly defined and the Law Council believes a public interest offence 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 the personal details of citizens without their consent. The absurdity of the government taking such a position would soon become clear and be met, no doubt, with the 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 freedom. But, for the most part, there has not been the same response to the chipping away of other rights and freedoms we often take for granted. These incursions have gone largely unreported. National security must 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, they are complementary. Regrettably, some of our leaders 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 your 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 on each of you and they depend on each of you.

The Australian Law Reform Commission highlighted in 2015 that many rights with a long and distinguished heritage have been chipped away in this country 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 it be in the form of 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 where they are facing significant punishment. Laws that impose strict or absolute liability on one or more elements of an offence despite the traditional presumption that intent or knowledge of an act is wrongful is necessary to found criminal liability. Coercive information gathering and investigation powers of agencies that abrogate the privilege against health 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.

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 and 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 between tensions,

between freedom of speech, freedom of the press, public safety, national security and other fundamental rights without a government having to run to plug holes when an issue hits the front page of the newspaper.

Our constitution provides minimal implied 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 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 that others envy. It is worth protecting and we must do so together because there is no them and us in this endeavour, we are all Australians. Thank you.

Facilitator: Ladies and gentleman, Matt Collins.

Matt Collins: Could I too acknowledge the traditional owners of the land on which we meet, the peoples of the Ngunnawal and Ngambri peoples and pay my respects to their elders past, present and emerging. And thank you Sabra and to the National Press Club for the invitation to address you today on an important topic which should be, and as Arthur has said, of vital interest not just to those in this room but to all Australians.

Arthur has identified some of the ways in which our freedoms have been eroded and some of the reasons why we have suffered the erosion of those freedoms. And I'm going to speak about the particular intrusion on press freedom that most affects the media on a daily basis, our defamation laws.

Australia's defamation laws bear the indelible stamp of their lowly origins. Liable, written defamation, was derived from Roman law. It was originally a crime mostly prosecuted in the Star Chamber in the early middle ages. Not a promising start for a cause of action that is supposed to balance two fundamental rights when they come into conflict in the internet age. The private right to protect one's reputation and the public interest in freedom of expression.

It used to be said that London was the liable capital of the world. Let me give you a statistic to ponder. I recently asked a researcher, [Hanna Douglas] to identify for me every decision by a superior court in the United Kingdom and Australia considering a defamation law issue over the five year period from 2014 to 2018. We found 268 references in the United Kingdom with its national population of about 66 million. In Australia, with our population of about 25 million, we found 577 references, more than double the number in the UK. Even more stunningly, 312 of the Australian references came from New South Wales with its population of about seven and a half million people. On a per capita basis it means that defamation

law issues were considered by superior courts in Sydney more than 10 times more frequently than they were in London over the period we analysed and we didn't even look at proceedings in lower courts, such as the District Court of New South Wales and the County Court of Victoria, which are themselves very active.

In Australia we inherited the English common law and then proceeded to make it worse. Until 2005 when uniform national defamation laws were passed, there were differences between the defamation laws of the six Australian states and two territories with the consequence that there were things you could say on Collins Street in Melbourne that you could not say on Pitt Street in Sydney. Those problems were overcome when we achieved national uniform laws in 2005 but the laws we passed were a pragmatic compromise and not a very coherent one. Because our laws are uniform national laws, they have proved all but impossible to change. Despite myriad acknowledged problems with them, they've not been amended since 2005. That is no small matter.

At the end of 2004 as our parliaments were passing our current laws, Facebook had approximately one million, with an M, users globally. Today it has 2.41 billion users per month. Twitter was founded in March 2006, about three months after our current laws commenced operation. In 2005 only 28% of the Australian population had broadband internet access. The first iPhone was not released until June of 2007. In short, our current defamation laws predate the modern communications era. Not only are they out of date, but they are flawed in a number of other respects. There are many problems and I'll just identify a few in order to give you a sense of the scale of the problems.

The limitation period for defamation actions was reduced to one year but the period starts to run afresh every time the same material is accessed no matter how much time has passed since it was first written. So in most online cases the Statute of Limitations never actually expires. There is a drafting problem with the defence of contextual truth, which is supposed to stop plaintiffs from cherry picking minor parts of a publication that are wrong while ignoring all of the true parts that have really caused them damage, as a result of which the defence is, in practice, a dead letter. The honest opinion defence, which was supposed to liberalise the common law defence of fair comment, has been interpreted by courts as importing some of the requirements of the common law that are not expressly stated in the legislation so the new defence has not actually had any practical impact.

There is a defence of particular interest to the media of qualified privilege, which is supposed to protect publishers who have acted reasonably but got their facts wrong. It's been interpreted so conservatively that it's never actually succeeded in a case involving the media in its entire history since 2005. There's a statutory cap on damages, which can be set aside in any case involving conduct that warrants an award of aggravated damages and the statutory cap can also be circumvented by people bringing multiple proceedings in relation to the same material, in any case where there are

different publishing entities. So, a plaintive routinely brings separate proceedings, for example, in relation to the same article in The Age, the Sydney Morning Herald and the Canberra Times in order to triple the potential available damages.

And, finally, the legislation focuses on the imputations conveyed by a publication. It's a lawyer's word for the meaning formulated by the small number of ingenious lawyers in this country who have mastered the arcane art of defamation pleadings rather than focusing on what an action should really be about, which is the meaning of what a publisher actually wrote or said.

But last year the New South Wales Attorney General released a discussion paper for the reform of defamation law which addresses some of these and other issues with the legislation and I support the current debate, but it is timid. The debate assumes that we are stuck with our current laws and that the best we can do is tinker at the edges. That might prove to be right but I believe we should aim higher.

There are two critical ways in which our defamation laws are failing us. The first is that our laws have proven singularly unable to provide an effective remedy to persons whose reputations are destroyed, often in a heartbeat, by the publication of damaging and demonstrably false material via the internet and in particular, social media. This is a growing problem. In the vast majority of cases, in my experience, defamation plaintives are not motivated by money, at least initially. They are looking to have damaging material removed or corrected or to have a court declare that what has been said about them is false so that they can mitigate the damage by pointing to a finding by a responsible authority.

But our courts measure defamatory impact by an award of damages and then only after protracted and costly litigation in which mud is thrown, some of which inevitably sticks. In some cases, plaintives have been awarded eye-watering sums of damages vastly in excess of what would be awarded for a workplace injury resulting in, say, the loss of an arm or a leg.

The second failure with our laws is that they do not adequately protect freedom of speech and particularly freedom of the press in cases of serious journalism in relation to matters that its targets do not want exposed. Often, these cases involve stories that journalists profoundly believe in, subject matter of high public importance, plaintives who are motivated by a desire to shutdown public debate and information which has been supplied by whistle blowers or confidential sources who are useless in a legal sense because they cannot be called to give evidence at a trial.

There is a common element to both of the failings that I have identified. It resides in the fact that our defamation laws presume that all defamatory publications are false, just think about that for a moment, and place a burden on defenders to displace that presumption. That, it seems to me, has it exactly the wrong way around.

Although we don't talk in civil law about the presumption of innocence, there are analogies. In all other fields of civil law defendants are not presumed to be liable, the plaintives have to prove some wrongdoing on the part of the defendant and that they have suffered some damage before they are entitled to compensation. In defamation law the law presumes that every defamatory publication is false and that every defamatory publication has caused damage to the plaintive's reputation and that last presumption in Australia is not capable as being rebutted as a matter of law.

Surely, it would be better for the law to enable plaintives to demonstrate quickly and cost-effectively that false material has been published about them. And, surely, it would be better to impose upon plaintives the burden of establishing the falsity of what has been published and that their reputations have in fact been damaged so that we can be sure that plaintives are not compensated for the publication of the truth or of matters that have not caused any actual harm. For these reasons, I favour making falsity an element of the cause of action for defamation and introducing a threshold of seriousness as a precondition for commencing a defamation action.

More fundamentally, however, like Arthur and the Law Council of Australia, I am convinced that the time has come for Australia to have a mature debate about how to balance fundamental rights when they come into conflict. This is obviously not a problem which is confined to defamation laws, as Arthur has explained. It rears its head in national security laws, in restrictions on court reporting, in the expression of religious belief and so on. But defamation laws are a good case study.

The fundamental rights which are at play in defamation law are reputation and freedom of expression. Damage to reputation, however, is not even necessary in order to found a right to compensation in defamation law. It's enough that a person has been exposed to hatred, contempt or ridicule or that a statement may tend to lower the person in the estimation of others. As a consequence, defamation law has all too often become a cause of action to compensate for hurt feelings in circumstances where the plaintive has suffered little or no reputational damage.

But freedom of speech is also dealt with in our laws only indirectly. Our laws are silent as to why freedom of speech and freedom of the press matter. Nowhere do we find, for example, reference to Jon Stuart Mill's 1859 insight that there is a peculiar evil in silencing the expression of an opinion because it robs us of the clearer perception and livelier impression of truth produced by its collision with error.

If we were drafting defamation laws from scratch, I think we would start by asking of the plaintive, has the defendant published something that is false and that has damaged your reputation and in what way? And if a plaintive's reputation has been damaged by a false publication beyond a threshold of seriousness, I think we would ask of the publisher, why should your right to freedom of speech prevail given the damage you have caused? And for the

purpose of that enquiry, we would look at why freedom of speech matters. Was it in the public interest for the matter to be published? Was the publication fair in that it competently researched and not motivated by malice? Did it occur on an occasion deserving special protection under the law for some reason, for example, because it was said in court or in parliament, at a public meeting, at a National Press Club address, in a board room or club house or in the course of a work performance review?

In other words, if we were starting from scratch we would subject the competing interests of reputation and freedom of expression to a balancing exercise taking into account the justifications for interfering with, or restricting, each right, we would enquire into the extent to which it is necessary to qualify one right in order to protect the underlying value which is protected by the other. In short, we would do what happens where the law must conform to a charter of rights and freedoms.

The absence of a charter has been used by Australian courts as a justification for not following the liberalising trends in defamation and other laws that have emerged in countries like the United States, the United Kingdom, Canada and New Zealand. It is no coincidence that our defamation laws are among the most restrictive of any western democracy and that we are, at the same time, the only western democracy without a charter. Thank you.

Facilitator: Just a comment from each of you. I'll mention too that we are aware that the Australian Federal Police are raiding the home of a Commonwealth official today in Canberra. We're not quite sure over what it is about but if we do have more information we'll ask you about that today.

Just quickly, those people who say press freedom is a niche issue, what would you say to them, Matt?

Matt Collins: It's not a niche issue Sabra. Imagine what our community, our society would be like without serious public interest journalism. Watergate, the obvious example from the United States. The Moonlight State Chris Masters in exposing corruption in Queensland. Lawyer X in Victoria. All of these matters, by their exposure, have enriched public discourse in Australia. We would be the poorer without it.

Facilitator: Arthur, do you want to say anything about this?

Arthur Moses: I agree [unintelligible 00:40:04] it's essential to a democracy, as the United Nations has said, and it is not an issue [unintelligible 00:40:10] central to our democracy.

Facilitator: David Crowe.

David Crowe: Thanks very much Sabra. David Crowe from the Sydney Morning Herald and The Age. Thank you both for your speeches. As Sabra said, there's a raid going on today so the timing is very interesting to say the least.

I wanted to take you to something that Arthur Moses said in his speech, which I thought was especially relevant given the raid and it's about the concept of harm. Harm must be more than embarrassment. 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 and that's exactly the situation with Annika Smethurst's reporting which was the subject of an AFP raid because there was unease in the government at the disclosure of a government proposal.

Can I ask you both to elaborate on this key point? If there must be a law that guards against harm to the national interest, how should the concept of harm be defined? Is there a better way to actually word what it is and how it should be acted upon?

Arthur Moses: I think in relation to this concept of harm, I think it needs to be narrowly defined within the legislation so that there is a risk to the safety of the public or the Commonwealth in relation to the publication of material. At the moment it is broadly defined and we saw at the Senate Estimates Committee the secretary of the department attempting to defend that particular issue and what became apparent, if I may say so respectfully, was a very emotive response by that individual in relation to this in effect being part of a Canberra game where one agency was potentially leaking information against another agency. That is not relevant to national security. That is a game between two departments. That should never be the trigger for there to be a raid on the home of a journalist in respect of gathering information and certainly trying to find the source of the journalist's story. That is not what the legislation should be designed to do and that comment was regrettable but it demonstrates the real issue at play here and I think, again, we need to be careful about legislation to ensure that we narrowly define these concepts when you are providing broad powers to law enforcement agencies to investigate these matters and then have people prosecute it.

Matt Collins: I agree and the state has a legitimate and vital interest in protecting narrowly defined the national security, the safety of the public and so on. One other point I would add to what Arthur has said is that whatever definition we alight upon not to be applied by national security agencies. The proper interpretation of the definition ought be left to an independent judiciary.

Facilitator: Rosie Lewis.

Rosie Lewis: Rosie Lewis from the Australian. Thank you both for your speeches. I think those stats on defamation are pretty extraordinary.

If I could ask you, Arthur, on the Religious Discrimination Bill, the Draft Exposure Bill we saw come out last week. We've heard competing views from various parties on whether it actually overrides State Law. Have you managed to get across the Bill to the extent that you can give us a definitive answer on that? And, could it prevent Archbishop Porteous being taken to the Anti-Discrimination Commission and Israel Folau being sacked by Rugby Australia? And if I could ask you, on balance, do you think national

security laws, the criminal code, laws that impinge on press freedom or defamation laws are actually more of a threat to journalism?

Arthur Moses: So, Rosie, I might answer your question about the Religious Freedom Bill. There are aspects of the legislation or the Draft Bill that we have reviewed that could give rise to it impacting upon State based legislation such as abortion legislation where it may expressly in effect permit a medical practitioner not to undertake a procedure based on their conscience. So there are aspects of it that could impact upon State based legislation. An interesting concept of this legislation is, of course, that it doesn't carry the same type of protection that Section 18C of the Racial Discrimination Act does in relation to offensive behaviour. The, if I can call it, the Exclusion Provision, in terms of being able to say what you want based on religious belief is narrower in relation to what will fall foul of the legislation and not be protected by the provisions of the Act. So we are troubled that there's a shifting sands approach when it comes to religions as opposed to race and I don't think the government has thought through consistency in legislation because it is a bad idea when you adopt a shifting sand approach to these types of matters and it adds to confusion.

In relation to the Israel Folau matter, that's an interesting question because Section 8, Subsection 3 says, in effect, an employer can have a rule that prevents or restricts an employee from saying certain things unless compliance with it is necessary to avoid unjustifiable financial hardship to the employer. Not that's an interesting concept. So you want to say that there's a mirage of freedom of speech but it's confined to whether it's going to hit the bottom line of the employer. I think that's silly, with all due respect. That will depend then on who complains the most about a person's comment and what is the evidence of impact on the bottom line in relation to the employer. I mean you're either protecting freedom of speech when it comes to these issues or you're not. And, what does religion mean and what does religious beliefs mean, they having defined it in the Bill?

So, again, this is an example of legislation being done on the run by government to get the latest headline off the front page because there is concern about Israel Folau being treated in a particular manner. And he may or may not have been treated unfairly, that's a matter for a court to determine, but I don't think it's appropriate for a government to make legislation on the run to plug holes in the wall. That's not how we operate, I think, as a mature western democracy. I think we're better than that.

Facilitator: Matt.

Matt Collins: And it was asked about whether national security laws or defamation laws pose the greater threat to press freedom. They both pose threats but in different ways. Defamation law is a daily risk for every journalist in this country. Nothing can be published without … Nothing controversial at least can be published without running it past a lawyer. But the consequences of liability for defamation law hit the pocket book and ultimately media organisations will happily indemnify their journalists.

National security laws threaten press freedom less regularly but the consequences can be graver, of course, with journalists potentially facing prison time.

Facilitator: Andrew Tillett.

Andrew Tillett: Andrew Tillett from the Financial Review newspaper. Thanks to both of you for your speeches today.

You both make a call for a Charter of Rights, which whenever we have that debate in this country it's always very quickly shutdown because it gets argued that it will be turned into a lawyer's picnic or activist judges will do all sorts of crazy things. Given Australians historically have been very conservative when it comes to things like Constitutional change, what are the sort of limits around the Bill of Rights should cover? Should it be all encompassing? I mean, obviously, we're both pretty clear that it should include freedom of expression. I think it's safe to say it's not going to include the right to bear arms, so what else should it do if we are to go down this path?

Matt Collins: Well you're right to say that the debate is too often shutdown and that one of the arguments which is put against it is the lawyer's picnic argument but, frankly, we already have a lawyer's picnic in relation to the hotchpotch of protections under our current law. Arthur has identified some of the inconsistences on the face between the Religious Discrimination Bill and other areas of the law. Surely it would be better for us to tackle this matter in a mature and concerted way and seek to identify as a nation what is our moral compass? What are the things that we value as Australians? Freedom of expression is obviously one of them, freedom of belief is another. The right to bear arms, probably not. A good reason not to constitutionally entrench a Bill of Rights one might think.

But in terms of what the universally acknowledged human rights are in 2019, there's not much doubt about those. They have been repeatedly quantified in the Universal Declaration in the European Convention on Human Rights, in the Canadian Charter of Rights and Freedoms, in the New Zealand Bill of Rights, in the Victorian Charter of Human Rights and Fundamental Freedoms. I don't think it's beyond the ingenuity of our Nation to get this right.

Arthur Moses: The only thing I would add to what Matt has said, and I agree with what he has said is, to basically embed such things as the right to silence. These are matters which we have seen creep into laws that has that principle being in terms of the abrogation of that principle. So these are matters that I think we can have a mature discussion about and you've correctly pointed out that in the past we have failed because we have allowed the argument to turn on activist judges and as being a lawyer's picnic.

But I agree with Matt, it's actually a lawyer's picnic when we don't have a Charter of Rights in this country because we are, in effect, playing with

words in legislation that actually has no basis of protection by way of a Charter of Rights. There's no compass for it. I mean what do we mean by freedom, what do we mean by liberty, what are these concepts? We talk about it but there's nothing underpinning it. We need the skeleton for that, I would have thought, directed in order to have the framework for legislation, otherwise our parliamentarians, and some of them are here who I respect immensely, are at sea because they have nothing there helping them understand what should be the baseline for legislation and they get pushed and wedged further and further into passing legislation that they know deep down is contrary to what they should be doing, but they are pushed into it for political purposes. And sometimes, of course, they regret it after the event but that's not good enough when those laws are then used as a blunt instrument against citizens who are then subject to them.

I think, again, that's really why I think we need a Charter of Rights in this country to help our politicians be able to say, well, we can't do this because of these Charter of Rights that Australia have agreed ought to be there as the minimum baseline so it will stop political attacks, which are regrettable in the leadup to elections when they all try to out-bid each other with cheap rhetoric.

Facilitator: Paul Karp.

Paul Karp: Paul Karp from The Guardian Australia. Thank you both for your speeches.

I wanted to ask about various parliamentary enquiries which try and balance the right to security with other rights, including freedom of speech. A few times recently, particularly in the Exclusion Orders Bill, the government has pushed ahead with legislation without implementing bipartisan recommendations of the Parliamentary Joint Commission on Intelligence and Security. So I wanted to ask Mr Moses, is that accountability mechanism broken and, if so, who broke it?

And for both of you, in the context of how the enquiry on freedom of the press, what is the minimum the government would have to do to show that it's committed to press freedom coming out of that enquiry?

Arthur Moses: I'll go to the first part of your question. There is no doubt that these committees exist for the purposes of accountability and testing legislation and all of the committees, I think, within the Federal Parliament, try to do their best to scrutinise legislation and to carefully review it and they do test it. And it is disappointing when there is a bipartisan report that is published by a committee which has raised serious concerns about the exclusion order provisions that it is then ignored. So you asked the question and deserve the correct answer to the question.

Yes, the accountability is broken. It's self-evident who broke it, it's the government, because it ignored what the committee said and that committee has on it, the one that you're referring to I think chaired by Andrew Hastie, some very experienced and senior members of parliament who well

understand this area and I would be taking very close notice and attention to what they're saying in respect to this legislation rather than ignoring it. There's no point having committee hearings and inviting people to come to Canberra and put in significant submissions that my staff at the Law Council, all very experienced in this area, spend endless amount of time putting together in consultation with the leading lawyers around the country, only then to have, in effect, the government snap its fingers at the recommendations of a bipartisan report. That's not accountability.

Matt Collins: You asked about the baseline for a press freedom review. It seems to me it should include at the very least a comprehensive review of all Australian laws which have the potential to affect journalists for doing their jobs. We need better whistle blower protection. We need uniform and clearly expressed laws in relation to the protection of journalists' confidential sources and we need a public interest exemption for all laws which potentially impinge upon journalists for doing their jobs.

Facilitator: Nic Stuart.

Nic Stuart: Thank you both very much for your speeches.

I'd like to take up the point that Matt made in particular about the fact that our regulations and laws date from before the internet age effectively, before the social media age. Has this transformed the way …? It's certainly transformed the dynamics and the pay and the monetary capacity of the medial industry to cope with these sort of things. Do we need particular protections for the press because of that? Is there a need to distinguish now between the publication of an item on the media and a publication of a social item that's more a comment or something like that? Is there a need to, in other words, find some way of making those platforms accountable as well as the media publishers?

Matt Collins: These are really difficult questions. The fact that our defamation laws predate the internet age is only part of the problem. The internet age itself is another part of the problem. Once upon a time, not so long ago, the media presented a curated view of the world to read as listeners and viewers. There was the daily edition of the newspaper and the seven o'clock news. Today, news is iterative, it evolves through the day, something can be corrected immediately or very quickly. Comments on social media can have an immediate impact and then be diluted moments afterwards. Our laws have caught up with none of those phenomena.

In relation to the position of internet intermediaries, Australia Facebook, Google, Instagram and so on, again our laws have fallen behind developments elsewhere. All of the countries we most like to compare ourselves with have worked out the circumstances in which those intermediate read platforms ought to be liable for material which they have facilitated the publication of but for which they were not directly responsible. In Australia our courts are still grappling with those questions as if it were still 1995.

Facilitator: Jon Millard.

Jon Millard: Thank you Sabra. Jon Millard, freelance. Thank you gentlemen both for your incisive addresses.

Some people have suggested that there are several factors adding to Australia's appalling reputation in this area internationally. One is successive conservative governments, particularly the Abbott and initially the Howard ones. Secondly, compliance by oppositions unwilling to say anything against something that might affect national security. And the third thing is, the lack of a Human Rights Charter. Some people have suggested that these things are not only additive are cumulative. One multiplying on the other. How much do you think that's true?

Arthur Moses: I think, certainly, Jon in relation to there being the absence of a Charter of Rights and there being … And I don't want to, as it were, blame the opposition, but there being parliamentarians on both sides who are unwilling to raise issues concerning National Security Legislation lest they be tagged with the line of being un-Australian or potentially putting our nation at risk, that that has fed into legislation being passed by parliament that has undermined the rights and freedoms of Australians in this country. And whether it's been conservative governments or not that have done it, that of course is a matter of record, but it really is those last two issues that you raised Jon that feed into each other.

Matt Collins: I wouldn't lay the blame at either side of politics particularly. I do think an advantage of a Charter of Rights would be that it would require our parliamentarians before any law was passed to pause, draw breath and ask whether the law is compatible with a National Statement of Values. It's not to say that a parliament couldn't override a fundamental value in a particular case, of course, and I don't think anyone is arguing against that. But the mere fact of pausing and reflecting on the question I think would dramatically improve public discourse.

Arthur Moses: I agree with that.

David Speers: David Speers from Sky News. Thank you both for your address today.

Arthur can I just come back to something you said in an earlier answer about the shifting sands and inconsistency between the Race Discrimination Act and the proposed draft Religious Discrimination Act. Can you just flesh out for us what that inconsistency would mean in practice, what would be the effect of having this difference?

Arthur Moses: Well I think under the current terms of the Religious Freedom Bill if you look to the provision that in effect carves out the actions of an individual in making comments, it basically says that in effect the protections do not apply in relation to a statement of belief that is malicious or that would, or is likely to harass, vilify or insight hatred or violence against another person

or group of persons. The concepts of offend and insult that is presently in the Racial Discrimination Act in Section 18C is not to be found in this legislation. So the test is much more difficult to establish in relation to the provisions of the Religious Freedom Bill than what is currently contained in the Racial Discrimination Act and this is an area that we have said you need to be very careful about because some comments that are made do have a detrimental impact on the most vulnerable members of our community and we just need to be careful about what it is that we're unleashing here in terms of this type of legislation.

Facilitator: Mark Kenny.

Mark Kenny: Mark Kenny from the Australian National University and the Press Club Board.

Mr Moses, Mike Pezzullo, Head of the Home Affairs Department, recently gave evidence to one of these committees and he noted, or he said, that he'd, over the length of his career, seen some 20 to 30,000 documents that had been variously stamped secret or top secret or given some such classification and that at no time could he remember any of those classifications or any of those stamps having been put on documents inappropriately or blithely. Now that does seem to run against the idea that, for example, documents are stamped that way so as to keep them from the public view because they might be embarrassing rather than a threat to national security if they were made public. I wonder if I could get you to comment on that.

And just quickly Dr Collins, you started off talking about defamation cases and the incidences of them in other nations. I wonder, is there a model internationally that we should be trying to copy?

Arthur Moses: Just in relation to the first part of the question. I do recall that evidence. I think the critical issue here for us is, what is the process pursuant to which there is a document that is classified as secret and it's not just a matter of putting a stamp on it. There must be a legislative base upon which one classifies information as falling within a particular category. And, again, 20,000 documents I think he said he may have seen over his time within the department. That may or may not be accurate. I think the critical issue is, I think we've got to look at the legislative scheme to see what is the process for classifying material and who determines that material is classified in a particular manner so that it obtains the protection and is then operating as a shield against being able to be reported in the public domain.

So I think that is something that we have asked government to look at again because you can't just stamp a document classified or secret without any proper underpinning for it and then thereby create an offence if it's published. So I think that's something that we need proper oversight in relation to these matters.

Matt Collins: Thanks Mark. In relation to defamation laws, all common law countries, Commonwealth countries broadly, have defamation laws suffering from

many of the flaws that best ours because, as I said in my primary address, they derive from laws from the early middle ages. That said, there have been recent reforms in the United Kingdom in 2013, which I think merit close study in many aspects in which I think would very much improve the position of the media under our current laws.

Facilitator: Tim Shaw.

Tim Shaw: Thanks Sabra. Tim Shaw, National Press Club Board. Gentlemen, thank you very much.

We've talked today about the public's right to know. Can we talk about the public's right to better understand the law? We've seen a lot more judgements being broadcast live on television. We're seeing more engagement, if you like, with the public to understand what is going on in their legal systems. Do we need the federal parliamentarians to be more engaged in that? What's your recommendation? We have three of them here today. What's your message to those elected representatives to make it clearer to the community about the kind of laws that are now protecting them against truth and honesty?

Matt Collins: In relation to the televising of court decisions and the ability of the public to understand decisions, I agree with you Tim that recent televising of verdicts, for example, the Geoffrey Rush case, for example, the George Pell sentence and so on, serve to educate the public about the important work which is done in our courts. It saves the criticism of tabloid journalism dumbing down or not adequately explaining what goes on in those very important settings.

Arthur Moses: I think, certainly in terms of court proceedings being broadcast, that does have an education effect for the members of the public, but in terms of, I think your question Tim also focused on how we can better educate the public about what our federal parliament is doing. I think that is the role of the profession, the legal profession, and the media to be talking more about this.

I think, and I heartedly agree with the fact that we focus on press freedom laws but there have been other freedoms that have been eroded in the past and we haven't focused on them. It's all come to a head with the police raids and I think what we've got to do is look to those freedoms that are being eroded, not only those freedoms that affect us, but affect our fellow Australians, members of the community, those who are marginalised, those who are vulnerable. When we see laws being enacted that impact upon the most vulnerable within our community, that's when we need to stand up and ask, why is this being done? Why are the laws that presently exist not fit for purpose? Why do you need more laws and what impact is this going to have on our most vulnerable within our community? And I think we bear that responsibility.

Some of us have been asleep at the wheel for a while but I think we've got

to get out there and educate the public and bring them with us and talk to the public and the profession has got to engage with the public and through the media talk with the public rather than sitting behind closed doors and reading books. We need to be out there, because that's part of our role, to defend the rights of the community.

Facilitator: Tony Melville.

Tony Melville: Tony Melville, Director of the National Press Club. Just a comment. I remember on classified documents I think there was a story, I think it was Queensland where they used to wheel trolley loads full of documents into cabinet meetings and then out again and call them cabinet in confidence.

But the question is, where do you draw the line in press freedom with what's a journalist and what's not? And I'm thinking, is Julian Assange a journalist? Is a blogger with 100,000 followers a journalist? Is someone, again on Twitter, with that sort of number, what is a journalist that deserves freedom and protection for that?

Arthur Moses: I'll defer to Matt on that because I might answer it in a comical way so I'll defer to the subject matter expert.

Matt Collins: I'm looking forward to the comical answer. I think first and foremost we do need to tackle the question about traditional media defenders. Business models of the traditional media have been undermined very dramatically in the last 20, 25 years broadly coinciding with the advent of the internet. A consequence of that has been a degradation in the amount and quality of serious public interest and investigative journalism. I think that is where we should be focusing our efforts. But you're right to say that the definition of a journalist has broadened very dramatically.

To me, anyone who is exposing information that the public ought to know, having regard to concepts of the public interest, ought to be protected.

Facilitator: Just before we close. Indulge me Arthur. We've had a lot of focus on the refugee and immigration debate in Australia and I know that your parents came out to Australia quite some time ago. If they'd come out here today in these times, would they be allowed to stay?

Arthur Moses: I'm not sure whether my parents would have qualified in 2019 to have come here. They migrated from Lebanon in the 1950s both illiterate, unskilled young adults with a young child and I don't think under the current provisions they would have necessarily had a safe and quick passage into this country. So it is something that I do think about when I do hear cases of refugees and asylum seekers who try to come to this country, which is built on migration, that somehow in the last 20 to 25 years we seem to have turned immigration into a dirty word and we have attempted to create fortress Australia in terms of the drawbridges go up and nobody else should come here and that's saddens me because I think that's not our country. Our country is a welcoming country and the people that I grew up with in the

Western Suburbs of Sydney were very generous Australians who welcomed my family and they still live out there and that is real Australia, not the rhetoric I think that we see from time to time.

Facilitator: Thank you for that. Everybody, please join me in thanking Arthur Moses and Matt Collins. And please, both of you, to show our appreciation for you both coming here today, we have the gift of membership and a copy of our history here at the Press Club. Thank you.