SUBMISSION ON PRESS FREEDOM

No one comes with clean hands to the press freedom debate .

1. I write as a former Chairman of the Australian Press Council and of the Australian Broadcasting Authority. I was recently invited to write on this question by The Australian. My piece was published on 24 July 2019 with the above heading chosen by the sub-editor. It can be seen at https://www.theaustralian.com.au/commentary/no-one-comes-with-clean-hands-to-the-press-freedom-debate/news-story/aa14db7ae115d2851ab9826cc24f142d
2. This short submission is essentially from that piece; my views have not changed. The solution I believe is in some targeted changes to law and practice. It does not lie in vast exemptions, in treating journalists and whistleblowers equally or in changing the process for obtaining a search warrant. It does involve ministers 'owning ' complaints to the Federal Police and assuming that the general principle in a democracy still applies, that is that the police only act on complaints. I suggest that in this area only ministers have standing to complain.
3. I note that it will be for the Committee to decide whether to accept my submission.
4. The piece began with a citation from a Labor peer in the House of Lords. I think this realistically describes ideal government/ press relations in a democracy.
5. "Relations between the government and the press have deteriorated and they are deteriorating further. And on no account whatsoever must they be allowed to improve."
6. These wise words are as applicable to Australia today as they were when they were uttered by former editor Sydney Jacobsen to the House of Lords.
7. In the debate on press freedom, the underlying principle should be that in protecting state secrets, the government must not unreasonably hinder the media in its legitimate attempts to inform the people.
8. It's being argued the solution is simple: just adopt a US-style constitutional guarantee of press freedom. Some say this demonstrates the need for a bill of rights.
9. The danger in this can be illustrated by the fact referendums these days are rare. Once common, most were to give more powers to Canberra. Almost always rejected, some questions were put again, even five times.

None succeeded. There'd be little point in repeating most of them again; the High Court has effectively handed those powers over to Canberra.

10. A constitutional guarantee or a bill of rights would be a blank cheque to be signed at our peril.
11. Nor would the media be better off. The US Supreme Court has not hindered rigorous media control when an administration has demanded this; for example, the truly draconian sedition laws under presidents John Adams, Abraham Lincoln and Woodrow Wilson.
12. Nor did it stop Franklin D. Roosevelt from employing former KKK member Hugo Black to set up the central surveillance of telegrams between the media and New Deal opponents, as well as allowing access to their tax returns.
13. Roosevelt subsequently put Black on the US Supreme Court where, in the Pentagon Papers case, he delivered a resounding judgment in favour of press freedom.
14. To control the electronic media, FDR even cut broadcasters' licence renewals from three years to six months.
15. The Obama administration, according to the Associated Press, prosecuted more people for leaking sensitive information than all previous modern administrations.
16. Rather than a sweeping guarantee, what is needed are some carefully targeted measures.
17. On this we should be wary of inevitable demands for uniformity. Not all apparent solutions turn out to be right and the great advantage of a federation, however much the politicians and the judges try to strangle it, is that it allows competition and trial and error until the best model becomes obvious.
18. As to reform, neither the media nor the politicians come with clean hands. It would seem that some of the politicians who complain the most are the first to leak.
19. And those in the media outraged by the recent raids include many who were silent, or even supportive, of the Gillard government's attempt to regulate the media to a degree inconsistent with democracy. Some were also silent over that extraordinary judgment against Andrew Bolt, the law on which it was based, and furious attempts to restrain free speech by the Australian Human Rights Commission.
20. Freedom of speech and of the press are unalienable rights, neither the gift of government nor the preserve of one political group. But as neither freedom can be absolute, calls for reform of the present laws must be realistic.
21. The suggestion that an opportunity should be given to oppose the granting of a search warrant would destroy the point of the process: to surprise those suspected of committing a crime, including terrorists.

22. Nor could journalists and whistleblowers possibly enjoy equal protection. Public service whistleblowers have contractual obligations to the state, journalists do not. Whistleblowers must obviously go through internal processes before they take the risk and go public. What should always be in place is a facility for independent but still internal assessments of their claims. In any prosecution the test to justify their action must obviously be significantly higher than that for journalists.
23. As to journalists and commentators, the law should always recognise their duty to protect their sources unless there is a strong overriding public interest in their disclosure; for example, where a terrorist attack is being planned.
24. Requiring that the source always be known both to the journalist/commentator and the editor would demonstrate that the editor believes the source is genuine. It also would make it unlikely that the shield law would benefit those engaged in nothing more than online harassment.
25. Complaints to the police about official secrets should be limited to those certified by the attorney-general and the relevant minister. While only the police should decide how to act, including whether to seek a search warrant, the complaint would then be "owned" by those ministers who would have to justify this in any subsequent debate. This should significantly reduce the number of complaints to the truly serious.
26. The other great restriction on press freedom that must be addressed is defamation law. The US public figure defence goes too far, with justice William Brennan doubting if private persons still existed in defamation law.
27. A better Australian alternative would be for a political figure defence. Under this, where a broadly defined political figure (a politician or a person engaging in political debate or the political process) claims to be defamed, the political figure would have to prove the media knew what it published was untrue or it had been reckless and indifferent as to whether it was true or false.
28. The measures suggested would at significant points help to ensure that in the never-ending battle between media and government, the public interest would prevail.