

OPINION

Freedom of speech risks being silenced

Should journalists be free to write articles critical of government agencies and keep confidential their sources? The highly secretive NSW Crime Commission thinks not. It is fighting an investigation by the Police Integrity Commission into its operations.

Two journalists at *The Sydney Morning Herald*, Linton Besser and Dylan Welch, wrote articles critical of the Crime Commission and its dealing with criminals, which the paper published. The commission wants to seize the reporters' mobile phones and SIM cards, presumably to discover their sources and to deter further disclosure. If they fail to cooperate, the reporters face being in contempt of court and run the risk of going to prison.

Freedom of speech has no meaning if governments and their agencies are above public criticism and being accountable. To be credible, criticisms must be soundly based. This involves journalists investigating the matter, speaking to a range of people, collecting information, cross-checking the information, drawing reasonable inferences and forming an experienced view, often within a short space of time. No self-respecting journalist or media organisation wants to publish anything that is not soundly based.



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published in part or whole by the media. The article is in the public domain and everyone is able to examine every sentence, every word and every comma. Then, under our freedom of speech, everyone is free to state publicly whether the article is inaccurate, misleading or unfair.

It is no mean feat to criticise publicly government agencies, such as the NSW Crime Commission which probably, as a result, has a secret dossier on the journalists concerned. The commission is immensely powerful with extraordinary powers, including phone-tapping, collecting information and searching your home without you ever knowing. It wants to know everything about anyone it selects, including their family and friends.

While the commission wants to investigate and know everything about everyone else, it wants the public to know little or nothing about it. Justifying its secretive position and extraordinary powers as necessary to

In the real world, few can afford to be disclosed as whistleblowers. For most the toll on their lives, careers and family is too great. But off-the-record conversations with journalists, which are not in breach of the law, may lead to a line of inquiry that reveals or confirms the truth. Such sources need to be kept confidential, otherwise they will dry up.

The recently enacted Federal Evidence Amendment (Journalists Privilege) Act provides for disclosure of a source if a court is satisfied that having regard to the issues to be determined in the proceedings before it, the public interest in the disclosure of the identity of the source outweighs:

- (a) any likely adverse effect on the source and anyone else; and
- (b) the public interest in the communication of facts and opinion to the public by the media and the ability of the media to access the sources of facts.

The act is totally unsatisfactory. The disclosure exception is too broadly based and lacks any certainty. A source gets no comfort from knowing that disclosure depends upon a court ultimately deciding whether disclosure is in the public interest. The source is not even a party to the court proceedings – how can he or she be effectively represented (and who pays for that)?

The act should be amended immediately to provide that disclosure should only be ordered where national security is at stake.

At the end of the day journalists write an article which may be

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protect us from “them”, it takes only a short time before there is an apprehension that we need protection from *it*.

In addressing accountability of such government agencies, the first question is whether its extraordinary powers are necessary, and to the extent any is, what conditions should be met before being exercised (unless this is addressed first, any form of accountability is frequently too limited and too late). Having first contained any problems in this way, it is necessary to address the culture of the agency and to get that right on an ongoing basis. Once those two things are done, you can address the most meaningful form of accountability for the agency concerned.

The media is and will remain a most effective means of accountability. Journalists play an essential role in the freedom of speech. If you silence them by silencing their sources, you silence freedom of speech, and thereby seriously jeopardise the rule of law in Australia.

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