Interview with David Rolph

David Rolph is a Professor at the University of Sydney Law School, specialising in media law. He is the author of several books, including the 13th edition of *Gatley on Libel and Slander* and the 1st edition of *Defamation Law*. He has also published many book chapters and journal articles on all aspects of media law. He has also been the editor of the Sydney Law Review for several years and is often asked for comment on and cited in the most newsworthy media law cases in Australia and abroad. Professor Rolph has recently published Contempt, which examines the fundamental principles of the law of contempt of court and serves as the sole Australian textbook on this issue.

Communications Law Bulletin editorial assistants **Alana Callus** and **Lewis Graham** interviewed Professor Rolph to discuss the history, content and public policy considerations of contempt as well as the latest developments in privacy and defamation law.

ALANA CALLUS AND LEWIS GRAHAM: Professor Rolph, you are a leading expert in all aspects of media law and have recently published the seminal text on the law of contempt. What interests you in contempt as an area of law?

DAVID ROLPH: Contempt of court is a fundamental means by which courts can protect the administration of justice. It is central to the administration of justice and it can touch every aspect of the administration of justice. Notwithstanding its fundamental importance, contempt of court is poorly understood and is complex and confusing. Legal practitioners and judges tend only to engage with aspects of contempt when necessary, and that usually arises on an urgent basis. I wanted to get a better sense of the whole of this area of law, which I have taught and researched in for two decades, and in doing so, fill a glaring gap in the Australian legal literature.

ALANA & LEWIS: The overriding theme of the law of contempt is the tension between public interests, such as the proper administration of justice, and private interests, such as freedom of speech. Do you think the law of contempt in Australia currently strikes the right balance between these competing interests?

DAVID: Contempt of court does seek to strike a balance between competing public interests: between the protection of the administration of justice, on the one hand, and freedom of speech and freedom of expression, on the other hand. It is difficult to say globally whether contempt of court gets the balance right, given that there are so many different types of contempt (and not all of them implicate concerns about freedom of speech and freedom of expression). One aspect of contempt of court which I have always had reservations about is scandalising the court, which is really, in the end, a form of institutional defamation. I am not sure that scandalising the court always properly balances the competing interests.

ALANA & LEWIS: Contempt spans both civil and criminal jurisdictions, with penalties ranging from injunctions to imprisonment. Given the potential for contempt to stifle criticism, particularly criticism directed against the judicial system, do you think the punishment fits the crime?

DAVID: Scandalising the court is the form of contempt most directed towards repressing unwarranted criticism of courts and judges. It is still fitfully, not frequently, punished in Australia. Most contemnors found guilty of this form of contempt are private individuals, rather than media outlets. Even taking that into account, I am not convinced that this is form of contempt is essential. Judges really have to engender public confidence by their open conduct of proceedings. The deployment of criminal sanctions to secure the good opinion of the community seems to be a rather ineffective of inspiring public confidence in the administration of justice. Whether scandalising the court as a form of contempt is essential is open to doubt. It has been abolished in England and Wales, for example.

ALANA & LEWIS: One of the difficulties of contempt in a practical sense is that potentially prejudicial material published online in advance of a trial can easily be republished, shared and disseminated on social media or discovered at a later date through a quick online search. How does the law of contempt apply differently to journalists and individuals using social media?

DAVID: The principles of sub judice contempt are the same for all publications but whether a prosecutor would elect to pursue a single social media user is open to doubt. There have been instances where sub judice contempt has been established against a

social media user but the user in question has had a high public profile established in the mainstream media (*R v Hinch*). The real challenge posed by social media to sub judice contempt is this: the principles of sub judice contempt are adapted to apply to a single publication which has the tendency to pose a substantial risk of serious interference with the administration of justice in relation to a particular proceeding. This works well for a mass media publication. It works less well for social media publications. It may be quite difficult to prove that a single social media publication, taken in isolation, gives rise to a substantial risk of serious interference with the administration of justice. The real problem of social media publications is the cumulative, prejudicial effect of those publications, not the prejudicial effect of a single publication. The principles of sub judice contempt have not yet grappled with how the cumulative prejudice to the administration of justice posed by social media from time to time should be addressed.

ALANA & LEWIS: Pivoting to defamation law, the first instance decision in Ben Robert-Smiths' defamation trial, in which Justice Besanko accepted the Nine/Fairfax newspapers' truth and contextual truth defences to a number of defamatory implications was reported by many commentators as a win for investigative journalism in Australia. Do you agree with that assessment or does the decision set an unrealistically high bar which, outside of long form investigative journalism, most journalists are likely to be unable to meet in their reporting and research?

DAVID: I think both of those things can be true. I think Besanko J's judgment was a vindication of the investigative journalism which uncovered this story. I think setting out to prove the substantial truth of such allegations is a very high bar to surmount. The stakes were high and the risks were great. Having an effective public interest defence is important for investigative journalism because there may be a range of reasons why media outlets are unable at trial to establish the substantial truth of allegations they publish in every trial.

ALANA & LEWIS: Similarly, what is your view on the recently introduced public interest defence in light of the decision in *Russell v ABC?* Is it likely to provide much comfort to media organisations or do you think it requires amendment?

DAVID: Although the public interest defence did not succeed in *Russell v ABC,* Lee J's judgment about the proper approach to the public interest defence gave some encouraging signs to defendants about its use in future cases. *Russell v ABC* was perhaps not the best vehicle for the public interest defence.

ALANA & LEWIS: Another emerging issue in defamation law has been the rise to prominence of generative artificial intelligence solutions which have the capacity to cheaply and easily generate realistic, but also, potentially defamatory, content. Do you think Australian defamation is adequate to deal with this externality from these technologies?

DAVID: I think it is too early to say what impact AI may have on liability for defamation. Given the rapid rate of development of AI technologies, it is going to take some time before we can make a proper assessment of that.

ALANA & LEWIS: Returning to the subject of your book, sub judice contempt seeks to protect the integrity of criminal trials and jury deliberations. Various comments made by the parties to the proceedings, as well as third party political and media figures, have at multiple points skated close to jeopardising the criminal and civil proceedings concerning Bruce Lehrmann. Do you think these cases highlight any virtues and/or weaknesses in Australian contempt law?

DAVID: I think the fact that no contempt proceedings have arisen from the criminal and civil proceedings involving Lehrmann is an indication that courts, prosecutors and other people with standing to complain about contempt properly recognise that contempt is a jurisdiction of last resort, which is as it should be. I do not want to comment further, understandably, because there are still matters before the courts.

ALANA & LEWIS: Turning to another hot button issue within your impressive array of expertise, privacy law. What is your view on the Government's recent response to the Privacy Act Review Report? Do you think it represents a positive development in Australia's laws concerning protection of personal information? Do you think now is an appropriate time for a statutory tort for serious invasions of privacy to be introduced?

DAVID: The *Privacy Act* review was very wide-ranging. My major interest is in the introduction of a cause of action for invasion of privacy. I support the introduction of such a cause of action because I think it is an obvious gap in Australian law. Courts in the United Kingdom, New Zealand and Canada have been developing such causes of action over the last few decades but Australian courts have not followed this path. (I would note here that a similar approach occurred in relation to public interest defences to defamation - courts in the United Kingdom, New Zealand and Canada developed these but Australian courts did not.) I think that Professor McDonald's design of a statutory cause of action for serious invasions of privacy is an excellent model. I should disclose that I was on the advisory committee for that ALRC reference and, of course, Professor McDonald is a longtime friend and colleague of mine.

One issue which I think needs to be addressed when a cause of action for invasion of privacy is introduced is the interaction between defamation and privacy. This has been a longtime interest of mine, and it is an issue which is causing some difficulty in the United Kingdom currently.

For instance, recognising a right to privacy may require rethinking the approach to injunctive relief for defamation. The current approach to injunctive relief in defamation claims is famously restrictive, because a view was taken by the Courts that the plaintiff's interest in her or his reputation must be balanced against the defendant's freedom of speech. If a plaintiff can more readily obtain an interlocutory injunction for invasion of privacy, this may have a distorting effect on defamation law, in that it may incentivise plaintiffs to bring a claim in privacy instead of, or at least in addition to, their claim in defamation for the same publication. This would subvert the restrictive approach to injunctive relief in defamation and so needs to be considered carefully.

ALANA & LEWIS: Contempt cases often involve the most scandalous, strangest and silliest behaviour in the courtroom. Is there a particularly memorable case which has stood out to you?

DAVID: It is a contempt to make a process server eat the subpoena he or she had to serve (*Williams v Johns* (1773) Dick 477; 21 ER 355).

ALANA & LEWIS: Thank you so much for your time and for sharing your expertise with us. On behalf of CAMLA and all the readers of the *Communications Law Bulletin,* congratulations again on the publication of *Contempt* and thank you for that invaluable contribution to our understanding of this important area of law.